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WHITE HOUSE TRANSPARENCY, VISITOR LOGS, AND LOBBYISTS

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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WHITE HOUSE TRANSPARENCY, VISITOR LOGS, AND LOBBYISTS

TUESDAY, MAY 3, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2123, Rayburn House Office Building, Hon. Cliff Stearns (chairman of the subcommittee) presiding.

Present: Representatives Stearns, Terry, Burgess, Blackburn, Gingrey, Scalise, Gardner, Griffith, Barton, DeGette, Weiner, Markey, Green, and Waxman (ex officio).

Staff Present: Todd Harrison, Chief Counsel; Stacy Cline, Counsel; Sean Hayes, Counsel; Alan Slobodin, Deputy Chief Counsel; John Stone, Associate Counsel; Alex Yergin, Legislative Clerk; Carl Anderson, Counsel; Sam Spector, Counsel; Aaron Cutler, Deputy Policy Director; Kristin Amerling, Minority Chief Counsel and Oversight Staff Director; Stacia Cardille, Minority Counsel; Brian Cohen, Minority Investigations Staff Director and Senior Policy Advisor; Karen Lightfoot, Minority Communications Director and Senior Policy Advisor; Ali Neubauer, Minority Investigator; and Anne Tindall, Minority Counsel.

Mr. STEARNS. Good morning, everybody. The Subcommittee on Oversight and Investigation of the Energy and Commerce Committee will come to order. And I shall start with my opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Ladies and gentlemen, we convene this hearing of the Subcommittee on Oversight and Investigations today to gather information concerning the Obama administration's commitment to transparency. While he was a candidate, he repeatedly promised that his administration would be the most open and transparent in American history. He said he would make contacts between the administration and lobbyists more open, and that he would televise health care negotiations on C–SPAN so that people can see who is making arguments on behalf of their constituents, and who are making arguments on behalf of the drug companies or the insurance companies. Those were his words.

The American people were made a lot of promises that, quite frankly, do not seem to have been kept. We are here today to examine the administration's policy on transparency and see what else

can be done to ensure that the White House follow through on their own commitments.

Take the White House visitor logs as an example. In September 2009, the President announced a new policy of releasing White House visitor logs to the public. He did this because as he stated, "Americans have a right to know whose voices are being heard in the policymaking process." What the President has failed to mention is that, according to an April 18th report by the Center for Public Integrity, the new policy was forced upon the administration in relation to a settlement of four protracted lawsuits against the Government seeking such records. A Federal judge ruled that those records are subject to release under the FOIA law. Only 1 percent of the 500,000 meetings from President Obama's first 8 months in office have been released. Only 1 percent. Many of the entries do not reflect who actually even took part in the meetings. Two-thirds of the 1 million names released are people on guided group tours and thousands of known visitors to the White House, including numerous lobbyists, are simply missing from the logs.

Since he announced his policy, new reports have uncovered that the administration officials go to great length to avoid disclosing their meetings with lobbyists. White House staff apparently purposely schedule meetings at the Caribou Coffee around the corner from the White House so that those meetings won't show up on the White House logs. And one executive branch agency even went so far as to require lobbyists to sign confidentiality agreements about their discussions with the administration.

This is not the only area we've seen the administration give lip service to the idea of transparency. We've seen a lack of transparency in the administration's response to FOIA's request. Their secrecy about the work done by some of their key czars, such as the climate change czar and health reform czar, and more recently they've tried to require selective disclosure of the public political contributions of Government contractors but not unions. And our investigation into the secret health care negotiation has been delayed by the administration for more than 1 year.

I understand that my Democrat colleagues may want to relitigate the past and compare this administration with previous ones but, simply, the bottom line is that the American people were promised, were simply promised a new era of openness and accountability and they have not got it.

To learn more about White House policies, we had hoped to hear from the White House themselves and their witnesses. Unfortunately, the White House did not accept our invitation to send a witness. This failure to send any witness to a hearing about White House transparency, while depriving the public of the administration's perspective, is revealing in its own way about the administration's true attitudes.

Even without a witness from the White House, this hearing will be of great value in simply pulling together facts and reports from nonpartisan, independent sources like the ones that are represented by our witnesses, and legitimate concerns arising out of lawsuits brought by groups of different ideologies. From large gaps in the White House logs, to secret meetings with lobbyists, to waivers for lobbyists to serve in the administration, to broken promises

to broadcast all of the health care negotiations on C–SPAN, to the appointment of numerous unaccountable czars, to confidentiality agreements, to a political litmus test for a Government contractor, for the first time a coherent picture of the administration's pattern and record on transparency issues will begin to emerge. And that is what this hearing is all about.

[The prepared statement of Mr. Stearns follows:]

Opening Statement of the Honorable Cliff Stearns

Chairman, Subcommittee on Oversight and Investigations

"White House Transparency, Visitor Logs, and Lobbyists"

May 3, 2011

We convene this hearing of the Subcommittee on Oversight and Investigations today to gather information concerning the Obama Administration's commitment to transparency. While candidate for President, Obama repeatedly promised that his Administration would be the most open and transparent in history. He said he would make contacts between the Administration and lobbyists more open and that he would televise health care negotiations on C-SPAN "so that people can see who is making arguments on behalf of their constituents and who are making arguments on behalf of the drug companies or the insurance companies." The American people were made a lot of promises that quite frankly do not seem to have been kept. We are here today to examine the Administration's policies on transparency and see what else can be done to ensure the White House follows through on these commitments.

Take the White House visitor logs as an example. In September 2009, President Obama announced a new policy of releasing White House visitor logs to the public. He did this because, as he stated, "Americans have a right to know whose voices are being heard in the policymaking process." What the President has failed to mention is that according to an April 18th report by the Center for Public Integrity:

- the new policy was forced upon the Administration in relation to a settlement of four protracted lawsuits against the government seeking such records;
- a federal judge ruled that those records are subject to release under the FOIA law;
- only 1% of the 500,000 meetings from President Obama's first eight months in office have been released;
- many of the entries do not reflect who actually took part in the meetings;
- two-thirds of the one million names released are people on guided group tours; and
- thousands of known visitors to the White House, including numerous lobbyists, are missing from the logs.

Since he announced this policy, news reports have uncovered that administration officials go to great lengths to avoid disclosing their meetings with lobbyists. White House staff apparently purposely schedule meetings at the Caribou Coffee around the corner from the White House so that those meetings won't show up on the White House logs. And one executive branch agency even went so far as to require lobbyists to sign confidentiality agreements about their discussions with the administration.

This is not the only area we've seen the Administration give lip service to transparency. We've seen a lack of transparency in the Administration's response to FOIA requests; their

secrecy about the work done by key czars, such as the Climate Change Czar and the Health Reform Czar; and, more recently, they've tried to require selective disclosure of the political contributions of government contractors, but not unions. And our own investigation into the secret health care negotiations has been delayed by the Administration for more than a year.

I understand that my Democratic colleagues may want to relitigate the past and compare this administration with previous ones but the bottom line is that the American people were promised a new era of openness and accountability and they haven't gotten it.

To learn more about White House policies, we had hoped to hear testimony from a White House witness. Unfortunately, the White House did not accept our invitation to send a witness. This failure to send any witness to a hearing about White House transparency, while depriving the public of the Administration's perspective, is revealing in its own way about the Administration's true attitudes. Even without a witness from the White House, this hearing will be of great value in pulling together facts and reports from non-partisan, independent sources like the ones represented by our witnesses and legitimate concerns arising out of lawsuits brought by groups of different ideologies. From large gaps in the White House logs, to secret meetings with lobbyists, to waivers for lobbyists to serve in the Administration, to broken promises to broadcast all of the health care negotiations on C-Span, to the appointment of numerous unaccountable czars, to confidentiality agreements, to a political litmus test for government contractors - for the first time, a coherent picture of the Administration's pattern and record on transparency issues will begin to emerge.

Mr. STEARNS. With that I yield to the ranking member, the gentlelady from Colorado, Ms. DeGette.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you very much, Mr. Chairman. Concern about open government and transparency is not new to this committee, this Congress, or this administration. That's why I want to start by quoting a set of minority views to a committee report concerning Bush administration open government practices that I signed in 2004. "These principles are important elements of a democracy. They represent basic principles of good government that transcend administrations, partisan politics, and the politics and issues of the moment."

Open government practices are integral to ensuring public confidence and respect for Government institutions, and Congress has a duty to conduct vigilant oversight to ensure sunshine in the executive branch, regardless of which political party controls the Presidency.

I am pleased that President Obama has prioritized transparency and has acted to back up these promises. On his first full day in office, the President announced the administration's commitment to creating an unprecedented level of openness in the Government. In January 2009, the President reversed the Bush administration's policy regarding the Freedom of Information Act, instructing agencies to adopt a presumption in favor of disclosure.

Under President Obama, every administration agency has accomplished an open government plan. The administration has created new ethics rules that prevent lobbyists from working in Government or sitting on Government advisory boards. They've launched data.gov, a Web site that makes economic, health care, environmental, and other information available online. They've created a new online access to White House staff financial reports and salaries, and taken numerous other steps to provide the public with information about their government.

In September 2009, the President ordered a new policy of posting secret security records that track visitor entries to the White House. This is an unprecedented and voluntary step that is not required by any open-government law. The Obama administration has a strong transparency record and, frankly, it is perfectly appropriate that Congress conduct oversight of these policies and look into whether these policies are in fact being followed. But the manner in which this particular hearing has been called gives me, frankly, pause.

If the committee wants to fully understand White House policies and practices it makes little sense to have a hearing without a White House representative present, as the chairman said. But in this case, the committee announced the hearing only 1 week in advance and gave the White House only 6 days' notice to produce a witness. The White House had already committed to providing a witness at a hearing simultaneously, occurring at this moment before the Oversight and Government Reform Committee on the

same topic, and so was unable to provide a witness today for this committee under the short notice provided by the majority.

Nonetheless the majority decided to go ahead and have a hearing. Without a White House witness and with no tangible allegations of misconduct, it appears that we're not holding a hearing to gather facts but, rather, to provide a forum for Members to air allegations about the White House.

Now, unfortunately, this would be an unnecessarily partisan use of the oversight process. It would tragically not be the first time, though, that members of this committee engaged in partisan politics with regard to the White House transparency issues. In 2004, a date that Mr. Waxman and I remember well, Republicans on the committee took extraordinary measures to prevent us from obtaining basic information about interaction between the Bush White House and outside parties in developing energy policy, the same kind of information this committee has requested and already received from the Obama administration. Early in 2001, Vice President Cheney chaired a task force forum to develop energy policy.

In April 2001, Representatives Dingell and Waxman asked the Vice President to disclose who was meeting with the task force, and at their request the nonpartisan GAO asked the White House for the same information. The Bush administration took the position that the formulation of energy policy by the task force was beyond any oversight. Republican leaders of this and other committees refused to have hearings or support inquiries into the transparency of the task force. After years of White House intransigence, Representative Dingell in 2004 introduced a resolution of inquiry. And that came to this—the full committee, the full Energy and Commerce Committee. Every Republican on this committee, including the chairman, voted to block access to the information.

During consideration of the resolution, the then-committee chair denied Democrat members the right to speak or debate the resolution. Mr. Waxman and I each offered separate unanimous consent motions to provide for debate time on the motion, and they were both voted down. And so, really, we don't need this kind of partisanship. Either we have disclosure or we don't. Either we have rules or we don't. So if we want to look at disclosure, let's get serious, let's look at disclosure and let's not spend time just being partisan. I don't think that's a good use of this subcommittee's time, Mr. Chairman.

Mr. STEARNS. Thank you, gentlelady.

[The prepared statement of Ms. DeGette follows:]

Statement of Rep. Diana DeGette
Subcommittee on Oversight and Investigations
Hearing on "White House Transparency, Visitor Logs, and Lobbyists"
May 3, 2011

Mr. Chairman, concern about open government and transparency is not new to this Committee, this Congress, or this Administration. That's why I want to start by quoting a section of minority views to a Committee report concerning Bush Administration open government practices that I signed in 2004:

> These principles are important elements of a democracy. They represent basic principles of "good government" that transcend administrations, partisan politics, and the issues of the moment.

Open government practices are integral to ensuring public confidence and respect for government institutions. And Congress has a duty to conduct vigilant oversight to ensure sunshine in the executive branch regardless of which political party controls the presidency.

I am pleased that the President Obama prioritized transparency and has acted to back up those promises. On his first full day in office, the President announced the Administration's commitment to creating "an unprecedented level of openness in the government."

In January 2009, the President reversed the Bush Administration's policy regarding the Freedom of Information Act, instructing agencies to adopt a presumption in favor of disclosure.

Under President Obama, every Administration agency has published an open government plan.

The Administration has created new ethics rules that prevent lobbyists from working in government or sitting on governmental advisory boards.

They have launched Data.gov, a website that makes economic, health care, environmental, and other information available online.

They have created new online access to White House staff financial reports and salaries, and taken numerous other steps to provide the public with information about their government.

In September 2009, the President ordered a new policy of posting Secret Security records that track visitor entries to the White House. This is an unprecedented and voluntary step that is not required by any open government law.

The Obama administration has a strong transparency record, and it is perfectly appropriate that Congress conduct oversight of these policies. But the manner in which this particular hearing has been called gives me pause.

If the Committee wants to fully understand White House policies and practices, it makes little sense to have a hearing without a White House representative present. Yet in this case, the Committee announced the hearing only one week in advance, and gave the White House only six days notice to produce their witness.

The White House had already committed to providing a witness at a hearing simultaneously occurring this morning before the Oversight and Government Reform Committee, and was unable to provide a witness today for this Committee under the short notice provided by the majority. Nevertheless, the majority decided to go ahead and hold a hearing.

Without a White House witness, and with no meaningful allegations of misconduct, it appears that the Subcommittee is not holding a hearing to gather facts but simply to provide a forum for members to air allegations about the White House.

This would be an unnecessarily partisan use of the oversight process. Unfortunately, it would not be the first time members of this Committee engaged in this kind of partisan politics with regard to White House transparency issues. In 2004, Republicans on the Committee took extraordinary measures to prevent us from obtaining basic information about interaction between the Bush White House and outside parties in developing energy policy – the same kind of information this Committee has requested and already received from the Obama Administration.

Early in 2001, Vice President chaired a task force formed to develop energy policy. In April 2001, Reps. Dingell and Waxman asked the Vice President to disclose

who was meeting with the task force, and at their request the nonpartisan GAO asked the White House for similar information.

The Bush Administration took the position that the formulation of energy policy by the task force was beyond any oversight. Republican leaders of this and other Committees refused to hold hearings or support inquiries into the transparency of the Task Force.

After years of White House intransigence, Rep. Dingell in 2004 introduced a resolution of inquiry requesting that the Bush Administration provide Congress with the names of individuals who served on Vice President Cheney's energy policy Task Force, the names of the people with whom the group met, and the costs of the Task Force.

Every Republican on this Committee – including Chairman Stearns -- voted to block access to this information. During consideration of the resolution, the then-Committee chair denied Democratic members the right to speak on or debate the resolution, in violation of Committee and House rules. And Republicans rejected unanimous consent motions that were offered by me and Mr. Waxman simply to provide for debate time on the subject.

Such partisanship reflected poorly on the Committee then, and it has no place today in Congress' important work overseeing executive branch transparency. Just as they did in 2004, my Republican colleagues have a choice today....they can focus on the facts at hand, and the witnesses before us, or they can fling unfounded allegations and rumors and engage in partisanship. I hope that they will make the right choice.

Mr. STEARNS. I would point out as you know, Cass Sunstein came here with 1 week's notice from the administration. And I would also point out to the gentlelady that the rules of the committee are that 1 week is all we have to give.

Ms. DEGETTE. Right, except for there is another hearing going on in another committee on this same topic. That's the problem.

Mr. STEARNS. I respect your opinion. Towards that end, I ask unanimous consent to move this supplemental memo into the record, which I think your staff has seen. Is there any objection?

Ms. DEGETTE. Mr. Chairman, if we can have just a few more minutes to review it, we only received it 5 minutes before the hearing.

Mr. STEARNS. Absolutely, absolutely. And we have 5 minutes on our side; and to use 2 minutes, Dr. Burgess is recognized for 2 minutes.

OPENING STATEMENT OF HON. MICHAEL C. BURGESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BURGESS. I thank the chairman for the recognition. In 2009 I became concerned and attempted to obtain the names of health care industry officials who met with the administration in the lead-up to the passage of the new health care law. This information has been withheld by the White House, despite statements that they would be the most transparent administration in history. The information would simply disclose with whom the administration was meeting. We did not ask for sensitive national security information. This stalling forced me to file a resolution of inquiry in the last Congress and we are still waiting for those facts.

We were told by the White House counsel there was nothing written down at these meetings. But you'll recall a photo op after those meetings occurred where the President came out and said that there was broad agreement to save $2 trillion to pay for health care reform; $2 trillion, and no one even jotted down a note on the back of an envelope? I find that strains credulity.

This hearing today, seeking to promote transparency in government, the White House did decline to send a representative. So what's more pressing for the director of the White House Office of Management Administration when one of its chief duties should be to foster transparency? Perhaps they will disclose who they were meeting with instead of meeting with this committee.

In March, the response by the White House to our committee request for visitor information, we were told that our request would be a vast and expensive undertaking. I don't think it is too vast to disclose what should be public information. Further, the fact that this information is described by the White House as "vast" means that the administration met with more people than was originally thought.

Withholding of information is in direct contradiction to the transparency. And the measures that were taken to limit information on the logs is actually quite ironic, given the fact that when campaigning for the Presidency, candidate Obama did promise the most transparent administration in history.

There have been reports that the administration routinely conducts meetings at coffee shops to evade visitor logs. Look, it's really

hard to bug the White House, but it's probably not hard to bug Caribou Coffee. This should worry every person who is connected with the administration that this is the way—this is the way they have chosen to conduct business in order to avoid any scrutiny or oversight by the United States Congress.

Thank you, Mr. Chairman, I'll yield back.

Mr. STEARNS. The gentleman's time is expired.

The gentlelady from Tennessee, Ms. Blackburn, is recognized for 2 minutes.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Mr. Chairman, and thank you for holding the hearing today on these issues of transparency at the White House. I was truly disappointed to learn that Mr. Brad Kiley, from the White House Office of Management Administration, was unable to join us today to allow for this committee to fully extend its constitutional obligation to provide checks and balances through reasonable oversight.

In talking about lobbyists and general access to the most powerful office in the world, it is important to discuss the responsibilities that key decision makers in the executive branch have.

An issue some of my constituents raised with me is the proliferation of czars, specifically those who function with political power and level of responsibility traditionally only designated for Senate-confirmed Cabinet Secretaries. Since these czars aren't subject to congressional oversight, we have little information on their background and how their background influences policy.

My concurrent resolution H.C.R. 3 would allow for greater oversight of these powerful bureaucrats. My colleague, Mr. Scalise, shares my concerns in light of the President's signing statement last month nullifying section 2262 of the budget compromise that prohibited using appropriations for salaries and expenses of certain White House czars.

While the President promised that he would not use signing statements, he is legally permitted to do so. The implication of this action is that it fundamentally undermines the transparency the American taxpayer is entitled to, and they make certain that we should follow up on this.

I look forward to today's testimony and to working closely with you to promote openness and transparency, and I yield the balance of my time.

Mr. STEARNS. The gentlelady yields the balance of her time.

And the gentleman from Georgia, Mr. Gingrey, is recognized for 1 minute.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. GINGREY. Mr. Chairman, thank you. The hearing today really is all about asking the question, if this President truly has fulfilled his campaign pledge—that being to have the most open and transparent administration in history but certainly much more open and transparent than the previous administration—that's

what it is all about. That's why you on this side of the aisle, you will hear a lot of Members say, you know, I agree with 85 percent of what the President says, I disagree with 85 percent of what the President does. He's not following through.

We can name specifics, and some of my colleagues have done that, but the bottom line is that we are having these witnesses here today and, unfortunately, not one from the administration. I don't know why Mr. Kiley couldn't copy the notes of the administration designee going to Government Oversight and Reform. That would have been particularly easy; he could have shared that with us. Maybe he was involved in capturing and killing Osama bin Laden, but I doubt it. And he had plenty of time to be here. It's disappointing that he's not here. But these witnesses will help us understand exactly what has been done and what has not been done. This business, like Dr. Burgess says, of having meetings, trying to avoid documentation and recordkeeping of visitors at the White House, across the street at Caribou or Burger King or whatever, is a real security issue. So this is a very important meeting. I thank the chairman and I yield back.

Mr. STEARNS. I thank the gentleman.

And I yield 5 minutes to Ms. DeGette.

Ms. DEGETTE. Mr. Chairman, we have no objection to the revised——

Mr. STEARNS. By unanimous consent, the memo will be made part of the record.

Ms. DEGETTE. And I would yield our additional 5 minutes to Mr. Waxman.

Mr. STEARNS. The gentleman, the distinguished ranking member, is recognized for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Mr. Chairman, today's hearing addresses an important subject. I've long been a proponent of transparency in the executive branch. Transparency improves decision making, it makes government more accountable, it produces better results.

But I must say it's hard to take this hearing seriously. You want to find out the facts, and yet you wouldn't give the administration more than 6 days' notice to come in and present their case—they said they didn't have enough time and they had a conflict in the schedule—rather than give them the courtesy of holding this hearing a little later? The hearing is being held, it seems to me, more to give Members on the Republican side of the aisle an opportunity to say, "They didn't come, they wouldn't come."

Oh, please, give me a break. What we see here is a pattern by this committee. We should have an administration witness here to testify, but this wasn't the fault of the White House. The chairman even said we gave them 6 days' notice; that's all we need to give them. What kind of thinking is that? If you want them here, you try to accommodate people's schedules. Instead of rescheduling the hearing so we could hear from an appropriate White House official, the majority decided to proceed today without a White House witness.

This is not the first time this happened on a committee this year. In April, other Energy and Commerce Subcommittees held three hearings on EPA actions. In these cases the committee also gave short notice to the administration, and this resulted in EPA being unable to testify at some of the hearings.

The committee should not be holding hearings without essential witnesses. It's not a good use of the committee's time. But I don't think this committee's time is being devoted to the important issue of transparency. This committee is devoting time to politics.

Now, let's look at the previous administration. The Bush administration—and I was very highly critical of their policies on transparency, because Vice President Cheney met secretly with energy lobbyists and we couldn't even get the list of lobbyists with whom he had meetings. The administration used pseudo classifications like "for official use only" or "sensitive," but unclassified, to keep embarrassing information from the public.

And we exposed the use of RNC, that's the Republican National Committee, e-mail accounts, by senior Bush administration officials that circumvented the Presidential Records Act.

Our ranking member, Ms. DeGette, went through some of these things; how Cheney tried to keep us from getting the information and how this committee and every Republican tried to keep us from getting information about the assessment of the administration on the Part D Medicare costs. We tried to get that information and we were frustrated.

To his credit, President Obama has taken important steps to increase transparency in the White House. They reversed the number of decisions by former President Bush and made it harder to get information about executive branch officials.

In September of 2009, the President announced the voluntary disclosure of White House visitor records. This is a voluntary disclosure. He established new policies to make it easier for citizens to get information through the Freedom of Information Act. And his open government initiative made an unprecedented volume of information available to the public. They established new ethics rules to prevent special interests from having undue influence.

Well, I think they have a good record on transparency. No record is without challenge; we can always get better. But I don't think the proponents of open government should rest. We should use this hearing to examine additional steps that can be taken to increase transparency.

I just heard from Dr. Burgess that he wanted to hear about the discussions at the White House with the different health groups. Well, we knew those meetings were taking place. It was reported in the press. The White House has their logs; we know who came. It wasn't for open government, it was for national security, but we got the information from those logs.

The committee not only is unsatisfied with being able to accommodate the White House to allow them to give testimony, they are now trying to get all these private groups with the White House to disclose all the e-mails that they have, all the conversations they had internally, to try it find out exactly what everybody said to whom.

Now, I find that quite troubling when people have a right to go to their government, whether it is the White House or the Congress, and talk about their concerns, their legislative concerns. They shouldn't be intimidated by trying to get information that may have nothing to do with that. It goes to a broad fishing expedition when you ask for such extensive information.

But nevertheless, I can't take this hearing seriously. I don't think the Republicans want open government. They just want another chance to use their power to whack this administration and the Democrats. And if that's their idea of oversight, we are seeing a good example of it today.

[The prepared statement of Mr. Waxman follows:]

Opening Statement of Rep. Henry A. Waxman
Ranking Member, Committee on Energy and Commerce
"White House Transparency, Visitor Logs, and Lobbyists"
Subcommittee on Oversight and Investigations
May 3, 2011

Mr. Chairman, today's hearing addresses an important subject. I have long been a proponent of transparency in the executive branch. Transparency improves decision-making, makes government more accountable, and produces better results.

During the Bush Administration, I was highly critical of policies that made it more difficult for citizens to get information about the White House. I led the fight in Congress to uncover the secret meetings of Vice President Cheney's energy task force. Our oversight revealed how the Bush Administration used pseudo classifications like "for official use only" or "sensitive but unclassified" to keep embarrassing information from the public. And we exposed the use of RNC e-mail accounts by senior Bush Administration officials that circumvented the Presidential Records Act.

In the case of the energy task force, President Bush and Vice President Cheney tried for years to keep this information out of the public eye. I thought this was wrong because it denied the American people important information about their government.

Ranking Member DeGette described what happened on this Committee when Democrats tried to pass a resolution of inquiry seeking information on Vice Cheney's energy task force. The Republican members of the Committee – several of whom sit on this Subcommittee today – went to extraordinary lengths to deny us access to information about the executive branch.

My view is that regardless of whether we are Republicans or Democrats, and regardless of whether the occupant of the White House is a Democrat or a Republican, we should be working to make government more transparent and accountable.

To his credit, President Obama has taken important steps to increase transparency in the White House. These steps reversed a number of decisions by former President Bush that made it harder to get information about executive branch officials. President Obama in September 2009 announced the voluntary disclosure of White House visitor records. He established new policies to make it easier for citizens to obtain information through the Freedom of Information Act. His open government initiative has made an unprecedented volume of information available to the

public. And the President established new ethics rules to prevent special interests from having undue influence.

The Obama Administration has a good record on government transparency. But that does not mean that proponents of open government should rest. We should use this hearing to examine additional steps that Congress and the Administration can take to increase transparency, and I am looking forward to hearing the recommendations of our witnesses.

I do want to raise one concern about this hearing, particularly because it appears as if it might be part of a pattern: we should have an Administration witness here to testify.

This is not the fault of the White House. The majority gave the White House only six days notice to provide a witness, which is simply not enough time. By the time our Committee contacted the White House, the White House had committed to providing a witness at a hearing this morning before the House Committee on Oversight and Government Reform. Instead of rescheduling the hearing so the members could hear from an appropriate White House official, the majority decided to proceed today without a White House witness.

This is not the first time this has happened on the Committee this year. In April, other Energy and Commerce subcommittees held three hearings on EPA actions. In these cases, the Committee also gave short notice to the Administration and this resulted in EPA being unable to testify at some of the hearings.

The Committee should not be holding hearings without essential witnesses. It is not a good use of the Committee's time, and it results in an incomplete record. I hope the majority will make greater efforts in the future to notify the Administration of upcoming hearings and then work with the Administration to accommodate reasonable scheduling requests.

Today's hearing is about an important subject: open government. It should not be a partisan one, and I hope we can join together to work responsibly to improve government transparency in a bipartisan way.

Mr. STEARNS. The gentleman yields back.

Just a point of information for the gentleman. The Government Oversight had a hearing this morning, starting at 9:30. They asked for Brad Kiley, the same person we asked for, who is the Director of Management Administration. He sent a designee to that committee, the Government Oversight, but he did not send one to us, which disappointed us. So I just would point out that he obviously wants to be transparent, he could have sent a designee.

With that, let us take care and have the first panel start. We have three witnesses. We appreciate your coming here. We have Mr. Tom Fitton, he's President of Judicial Watch, the public interest group that investigates and prosecutes government corruption. It was founded in 1994. Judicial Watch is a foundation that promotes transparency, accountability, and integrity in government, politics and the law.

We have Mr. John Wonderlich. He is the policy director of the Sunlight Foundation, one of the Nation's foremost advocates for open government. John spearheads Sunlight's goal of changing the Government by opening up key data sources and information to make Government more accountable to its citizens.

And Ms. Anne Weismann serves as CREW's chief counsel. CREW's stated mission is to use high-impact legal action to target government officials who sacrifice the common good for special interests.

I welcome our three witnesses today. As customary, I want to thank them for coming. The committee rules provide that members have 10 days to submit additional questions for the record.

Let me address the three of you today. You're aware the committee is holding an investigative hearing and when doing so has had the practice of taking testimony under oath. Do you have any objection to taking testimony under oath?

The Chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today?

In that case, if you'd please rise and raise your right hand, I will swear you in.

[Witnesses sworn.]

Mr. STEARNS. You're now under oath and subject to penalties set forth in Title 18, section 1001, of the United States Code.

STATEMENTS OF TOM FITTON, PRESIDENT, JUDICIAL WATCH; JOHN WONDERLICH, POLICY DIRECTOR, SUNLIGHT FOUNDATION; AND ANNE WEISMANN, CHIEF COUNSEL, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (CREW)

Mr. STEARNS. You may now give a 5-minute summary of your written statement. Mr. Fitton.

TESTIMONY OF TOM FITTON

Mr. FITTON. Thank you, Chairman Stearns and Congressman DeGette, for hosting this hearing and allowing me to testify on this important topic. Judicial Watch is without a doubt the most active Freedom of Information Act requester and litigator operating today. And we've been pursuing this during the Clinton adminis-

tration, during the Bush administration, and obviously during the Obama administration.

The American people were promised a new era of transparency by the Obama administration and, unfortunately, this promise is not being kept. To be clear, the Obama administration is less transparent than the Bush administration. We filed over 325 FOIA requests with the Obama administration and have been forced to sue over 45 times to gain access to documents. And obviously lawsuits don't necessarily guarantee access to documents, but they put you a little bit further along than you otherwise would be if you relied on their good graces to turn documents over.

I would like to talk a little bit about the visitor logs. In fact, the Obama administration is refusing to release, contrary to the Freedom of Information Act, tens of thousands, now according to this recent report, hundreds of thousands of visitor logs and insist citing a Bush administration legal position that the visitor logs are not subject to the FOIA act.

So while the Obama administration attempts to take the high ground by releasing a select number of visitor logs, it shields hundreds of thousands of others in defiance of FOIA law. In the fall of 2009, specifically Norm Eisen, invited us to visit with them to talk about the White House visitor logs.

The White House encouraged us to publicly praise the Obama administration's commitment to transparency, saying it would be good for them and good for us. However, they refused to disclose these records as required to under the Freedom of Information Act, and we were forced to sue to enforce the law.

To date, every court that has reached this issue has concluded that the White House Secret Service visitor logs are agency records and must be processed in response to properly submitted FOIA requests. In fact, we have received FOIA Secret Service logs from the Bush White House until they decided to stop doing that with my colleague from CREW.

Now we know, as the committee has noted, that in order to avoid further disclosure of meetings with lobbyists, there are meetings across the street at Caribou Coffee shop and in the White House conference center. We are investigating to see whether we can get records from that conference center. And other investigators at the Center for Public Integrity have further confirmed what Judicial Watch has long known; that the visitor logs voluntarily disclosed by the White House are little more than a data dump, full of holes that shield rather than shed light on visitors and their business at the White House.

On major issue after major issue, FOIA is ignored by this administration. And specifically of interest to this committee perhaps, we have yet to get one document, despite asking months ago and suing in Federal court over their issuance of the waivers to ObamaCare. To me—that to me is a very cogent instance of their disregard for the Freedom of Information Act.

And with regard to the lobbyists, the difference between this administration's rhetoric and its practices is that they promised no lobbyists in the White House, the Washington Examiner examined at least—and found at least 40 lobbyists hired by the Obama White House. And they promised they would end the revolving door in

terms of lobbyists going into the White House and out by inserting into their ethics pledge a promise not to work on issues that your former clients or others had worked on prior to your working in the White House if you're an agency appointee or White House appointee. Yet they have waivers of these ethics requirements.

Only in Washington can you get away with the phrase "ethics waivers," can you waive ethics. This is the Obama White House's approach to transparency. They have 32 ethics waivers which allow lobbyists who were hired as White House or administration officials to work on work that they had worked on when they were lobbyists just shortly before they had been hired. We now note that the New York Times has reported that the White House has asked lobbyists looking to work there to deregister as lobbyists to avoid this issue.

How does that comport with transparency, accountability, and integrity? This ethics gamesmanship undermines the rule of law and makes one think that this administration has something to hide. You know, this ought to cut across partisan and ideological lines. Judicial Watch, to be clear, pursued the Bush administration without fail on these transparency issues. We took the administration all the way up to the Supreme Court over this energy task force issue. We fought with them over releasing contracting information about Halliburton that was tied to the Vice President. Many of the documents we uncovered were used by opponents of the Bush administration to attack them.

So we approach this from a nonpartisan fashion. We're conservative; but I don't think conservatives or liberals, there should be any daylight between them on transparency and open government. Thank you.

[The prepared statement of Mr. Fitton follows:]

Opening Statement
Tom Fitton, President
Judicial Watch

Hearing of the House Energy and Commerce Subcommittee on Oversight and Investigations entitled "White House Transparency, Visitor Logs and Lobbyists"

May 3, 2011

10:30 a.m., in 2322 Rayburn House Office Building

Good morning, I'm Tom Fitton, president of Judicial Watch. Judicial Watch is a conservative, non-partisan educational foundation dedicated to promoting transparency, accountability and integrity in government, politics and the law. We are the nation's largest and most effective government watchdog group. Judicial Watch is, without a doubt, the most active Freedom of Information Act (FOIA) requestor and litigator operating today. Thank you, Chairman Sterns and Congresswoman DeGette for allowing me to testify on this important topic.

Judicial Watch used the open records laws to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper secrecy. Founded in 1994, Judicial Watch has nearly 17 years' experience in using FOIA to advance the public interest.

The American people were promised a new era of transparency with the Obama administration. Unfortunately, this promise has not been kept.

To be clear: the Obama administration is less transparent than the Bush administration. We have filed over 325 FOIA requests with the Obama administration. And we have filed well over 45 FOIA lawsuits in federal court against this administration.

I would like to shed light on the truth behind the Obama White House's repeated trumpeting of the release of Secret Service White House visitor logs.

In fact, the Obama administration is refusing to release tens of thousands of visitor logs and insists, repeating a Bush administration last-ditch legal position that the visitor logs are not subject to the Freedom of Information Act.

So while the Obama administration attempts to take the "high ground" in the debate by releasing a select number of visitor logs, it shields tens of thousands of other records that continue to be withheld in defiance of FOIA law. Why release some and not all?

In the fall of 2009, Judicial Watch staff was invited to meet with senior White House official Norm Eisen, then-Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the White House visitor logs. The White House encouraged us to publicly praise the Obama administration's commitment to transparency, saying it would be good

for them and good for us. However, the Obama team refused to abandon their legally indefensible contention that Secret Service White House visitor logs are not subject to disclosure under FOIA law.

So we filed a lawsuit to ask the court to enforce the law.

The Obama administration continues to advance its ridiculous and bogus claim that the visitor logs "are not agency records subject to the FOIA," but the Obama administration doesn't have a legal leg to stand on. As we noted in our original complaint (*Judicial Watch, Inc. v. United States Secret Service*, USDC Case No. 9-2312; http://www.judicialwatch.org/files /documents/2009/jw-v-usss-complaint-12072009.pdf), filed on December 7, 2009, the administration's claim "has been litigated and rejected repeatedly" by the courts.

To date, every court that has reached this issue has concluded that the White House Secret Service visitor logs are agency records and must be processed in response to a properly submitted FOIA request.

In fact, the Secret Service had released White House visitor logs in response to previous FOIA requests) from Judicial Watch and other parties (http://www.judicialwatch.org/judicial-watch-v-u-s-secret-service).

Now we know from published reports that White House officials have been meeting with lobbyists and interests at a nearby Caribou Coffee shop or across the street in an anonymous conference center to specifically prevent disclosure of visitors who might otherwise have their names disclosed as a result of visiting the White House complex itself.

And other investigators at the Center for Public Integrity have further confirmed what Judicial Watch has long known: that the visitor logs "voluntarily" disclosed by the White House are little more than a data dump full of holes that shield rather than shed light on visitors and their business at the White House (http://www.iwatchnews.org/2011 /04/13/4115/white-house-visitor-logs-riddled-holes).

On major issue after major issue, FOIA is ignored by this administration.

For instance, I am sure this committee is aware about the astonishing 1,000 + Obamacare waivers issued by the Department of Health and Human Services. Judicial Watch first began asking for documents about this issue last October. We sued in January (*Judicial Watch, Inc. v. Department of Health & Human Services*, USDC Case No. 10-2328; http://www.judicialwatch .org/files/documents/2010/jw-v-hhs-complaint-12302010.pdf). Months after our initial request, we do not have one document about these highly controversial waivers. Given the obvious public interest in this matter, this stonewall seems to us nothing more than arrogant lawlessness.

The difference between this administration's rhetoric and its practice is vast. This White House, we were promised, would not hire lobbyists. But now we know that actually meant that

the Obama administration wouldn't hire lobbyists unless it wanted to. *The Washington Examiner*'s Timothy Carney tracked at least 40 lobbyists hired by the Obama White House (http://washingtonexaminer.com/politics/obama-makes-mockery-his-own-lobbyist-ban).

And the American people were also promised the highest standards of ethics. The so-called "revolving-door ban" is part of an ethics pledge that appointees supposedly sign upon entering the administration. Administration appointees promise not to work, for two years, on matters related to former employers or lobbying clients. In many ways, the lobbyist ban and ethics pledge are silly. But rather than admit that the anti-lobbyist rhetoric might lead to the absurd result of fine Americans with high levels of expertise unable to work for government, the Obama administration started issuing "ethics waivers" of the president's anti-lobbying and ethics rules (http://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel).

So an administration that promised transparency and the rule of law would be the touchstones of this presidency, now regularly "waives ethics" for top appointees. Only in Washington could you "waive ethics" with a straight face. By our count, there have been at least 32 ethics waivers by the Obama administration (http://www.judicialwatch.org /ethics-waivers). Even worse, we have a report in the *New York Times* that the Obama White House actually advised some to de-register as lobbyists to get around the anti-lobbyist rules issued by President Obama on the very first day of his presidency (http://www.nytimes.com/2010/06/25/us/politics /25caribou.html?pagewanted=2).

This ethics gamesmanship undermines the rule of law and makes one think that this administration has something to hide.

Let me end by noting that a commitment to transparency should cut across partisan and ideological lines. The Founding Fathers understood the importance of knowing what our government is up to. John Adams wrote:

> Liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge; I mean, of the characters and conduct of their rulers.

Thank you.

Mr. STEARNS. Thank you.
Mr. Wonderlich.

TESTIMONY OF JOHN WONDERLICH

Mr. WONDERLICH. Thank you, Chairman Stearns, Ranking Member DeGette, and members of the subcommittee for the opportunity to testify here today.

My organization, the Sunlight Foundation, was as enthusiastic as anyone when in September 2009 the White House announced that they'd begin releasing data from the visitor log system on line. And in the 18 months or so since that policy was first announced, the disclosure of the visitor logs has become a symbol for White House openness through both media accounts and frequent commentary from administration officials. Releasing information about who visits the White House has been described as both historic and disappointing, and the truth lies somewhere in between.

The White House frequently points to the logs as evidence of their commitment to transparency, causing even greater scrutiny of their effectiveness. But ultimately the system that the White House is describing as a disclosure system was designed as a security system. Nevertheless, the visitor logs data have proven to be a valuable source for some journalism. Perhaps most notably, my colleague Paul Blumenthal of the Sunlight Foundation wrote a broadly acclaimed piece on the health care negotiations between health care lobbyists and the White House which used the visitor logs data extensively.

Now, some of the limitations of the visitor logs, though, are simply artifacts of how this was designed to function as a security system and not as a disclosure system. From the time the visitor logs were first released on line, the White House was explicit about how the records release would work. The stated policy lays out broadly defined exceptions to what kind of visitors records are withheld. By and large, these exceptions are reasonable. The White House doesn't release personal information like birth dates or particularly sensitive meetings like those of the Supreme Court nominees. Of course, these exceptions could all be abused or ignored, since this was a self-imposed policy. So to ensure continuity with true future administrations and to strengthen the disclosure, Congress should require disclosure of the White House visitor logs and codify these requirements into law.

But ultimately, the most significant limitation of disclosing the visitor logs comes because they only record information for people who access the White House through the WAVE system. As everyone has noted, there have been numerous reports of meetings scheduled in the White House conference center or in coffee shops near the White House. In effect, these meetings circumvent disclosure enabled through the visitor logs policy.

This shouldn't be a surprise, however. Information creates political power and administration officials who regularly avoid lengthy e-mail exchanges are, of course, going to default towards venues that have no accompanying political liability. Visitor logs records will never encompass offsite meetings, telephone calls, or e-mails.

For comprehensive disclosure of who's influencing the White House, the visitor logs are ultimately not the best tool for the job.

The policy of releasing the visitor logs is still a good one and Congress should be involved in strengthening it and making it permanent. But that policy ultimately cannot live up to our expectations, because we are treating it as though it's a replacements for lobbying disclosure.

Congress should examine and craft new disclosure laws that are strong enough to move at the pace of influence that they are intended to expose. Lobbying disclosure laws should require realtime online disclosure of paid lobbying efforts and apply to both Congress and the executive branch. Most urgently, the threshold for who should register as the lobbyist must be dramatically expanded, and reporting of lobbying activities should be reported on line in real time.

Despite their shortcomings, the visitor logs released by the administration have provided a meaningful view of influence within the White House, and perhaps just as importantly, have shown us how far we have to go to create meaningful disclosure of influence in Washington. Thank you.

[The prepared statement of Mr. Wonderlich follows:]

Testimony of John Wonderlich, Policy Director, Sunlight Foundation
May 3, 2011
House Energy and Commerce Committee
Subcommittee on Oversight and Investigations
"White House Transparency, Visitor Logs, and Lobbyists"

One Page Summary

This disclosure loophole should be fixed, but the visitor logs only capture visitors to the White House complex. Visitor log records will probably never encompass off-site meetings, phone calls, or emails. The most serious limitation of the visitor logs is that they *only cover visitors*. For comprehensive disclosure of who is influencing the White House, the visitor logs are not the best tool for the job, even if they are the primary tool at our disposal.

In the 18 or so months since the policy was first announced, the disclosure of the visitor logs has become a symbol for White House openness, through both media accounts and commentary from administration officials. Releasing information about who visits the White House has been described as both historic and disappointing, and the truth lies somewhere in between. The visitor logs, important as their release is, fall far short of the standards by which they are often judged.

Following the disclosure policy first announced in 2009, the White House releases its visitor logs are released each month, after a four month delay, with some redactions. Approximately 100,000 new entries are released each month; this data contains fields defining, among others, the visitors' first and last name, the time and place of entry and exit, the White House visitee, and descriptions of the event attended.

There have been numerous reports of Administration officials scheduling meetings in the White House Conference Center (a space apparently not covered by the WAVES system), or holding meetings with lobbyists in coffee shops and restaurants near the White House. In effect, these meetings circumvent disclosure through the visitor logs policy.

The visitor logs disclosure rules should be tightened, but real reform must also include updating lobbying disclosure laws.

Congress should examine and craft new lobbying disclosure laws that are strong enough to move at the pace of the influence they are intended to expose. The White House visitor logs have often been evaluated in these terms, but they are ultimately an insufficient tool for this job. Lobbying disclosure laws should require real-time, online disclosure for paid lobbying efforts, and apply to both Congress and the Executive Branch.

We urge that a more disclosure-friendly version of the visitor logs be codified into law and ask Congress to tackle the thorny but important underlying issue of lobbying disclosure.

Testimony of John Wonderlich, Policy Director, Sunlight Foundation
May 3, 2011
House Energy and Commerce Committee
Subcommittee on Oversight and Investigations
"White House Transparency, Visitor Logs, and Lobbyists"

Chairman Stearns, Ranking Member DeGette, and Members of the Subcommittee, thank you for the opportunity to testify here today.

My name is John Wonderlich, and I am the Policy Director of the Sunlight Foundation, a non-partisan non-profit dedicated to using the power of the Internet to catalyze greater government openness and transparency. We take inspiration from Justice Brandeis's famous adage "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman."

Our work, since our founding in 2006, has helped to illuminate the connection between influence and political power, bringing sunlight to money in politics, lobbying, and the substance of Washington's work, in both Congress and the Executive Branch.

Given our focus, Sunlight was as enthusiastic as anyone when, in September 2009, the White House announced they would begin releasing data from their visitor log system online. Special Counsel Norm Eisen announced the move on the White House blog, laying out an explicit policy for the release of the visitor data, and announcing the settlement of a lawsuit relating to the records.

In the 18 or so months since the policy was first announced, the disclosure of the visitor logs has become a symbol for White House openness, through both media accounts and commentary from administration officials. Releasing information about who visits the White House has been described as both historic and disappointing, and the truth lies somewhere in between. The visitor logs, important as their release is, fall far

short of the standards by which they are often judged. In my testimony today, I would like to illuminate the strengths and limitations of visitor log disclosure, and talk about the kind of disclosure requirements that can make up for their shortcomings – revised lobbying disclosure laws.

A Security System Introduced as a Disclosure System

The system that the White House often describes as a disclosure system was designed as a security system.

Visitors entering the White House compound go through a process designed to vet and track their entry and exit from the grounds. This system generates records managed by the U.S. Secret Service.

For years, those records have been pursued in high-profile FOIA requests by leading journalists and non-profits (including the *Washington Post*, Citizens for Responsibility and Ethics in Washington, Judicial Watch, and MSNBC) seeking to understand who is meeting with top administration officials.

It is those same records that are now released each month, after a four month delay, and with some redactions by the White House. Approximately 100,000 new entries are released each month; this data contains fields defining, among others, the visitors' first and last name, the time and place of entry and exit, the White House visitee, and descriptions of the event attended.

The visitor logs data have proven to be a valuable source for some journalism. Perhaps most notably, my colleague Paul Blumenthal of the Sunlight Foundation wrote a broadly acclaimed piece on the health care negotiations between health care lobbyists and

the White House, which used the visitor logs data to craft a detailed timeline of the dealmaking that would eventually shape the new law.[1]

As much as they've been used to create stories about political influence, though, the visitor logs have also been criticized as falling short of President Obama's pledge to lead the most open administration in history. *Politico*, the *New York Times*, and the Center for Public Integrity have all published stories detailing the limited transparency afforded by the records' release, and comparing the visitor logs against the Obama Administration's transparency rhetoric.

This coverage has pointed out missing information from the visitor logs data. Some visitors are clearly missing from the data, despite their being at the White House. The visitee field often identifies an assistant, rather than the principal holding the meetings. Some of these limitations are artifacts of how the system is designed to function – these fields were not designed to create meaningful disclosure, but security.

Significant Exceptions, Shortfalls

From the time the visitor logs were first released online, the White House was explicit about how the records' release would work. The stated policy lays out broadly defined exceptions to what kind of visitor records are withheld. By and large these exceptions are reasonable; the White House doesn't release personal information like birth dates, social visitors to the first family, or particularly sensitive meetings (like those with Supreme Court nominees).

Of course, these exceptions could all be abused, and the standards the White

1 Many of these articles are available at http://www.opencongress.org/wiki/White_House_WAVES_Visitor_Logs.

House set for itself are already very broad and could be ignored, selectively applied, or discontinued at will. These are the limitations of any self-imposed policy. To ensure continuity through future administrations, and to ensure effective disclosure, Congress should help design well-crafted requirements for disclosing White House visitors, and codify those requirements into law.

Most significantly, the visitor logs only record information for people who access the White House through the WAVES system.[2]

Because the White House often describes visitor logs as an accountability mechanism, their usefulness is evaluated on those terms. And on those terms, they often fail.

There have been numerous reports of Administration officials scheduling meetings in the White House Conference Center (a space apparently not covered by the WAVES system), or holding meetings with lobbyists in coffee shops and restaurants near the White House. In effect, these meetings circumvent disclosure enabled through the visitor logs policy.

This shouldn't be a surprise, however. Information creates political power, and administration officials who regularly avoid lengthy email exchanges will probably also default towards venues that have no accompanying political liability.

Disclosure loopholes should be fixed, but the visitor logs only capture visitors to the White House complex. Visitor log records will probably never encompass off-site meetings, phone calls, or emails. The most serious limitation of the visitor logs is that they *only cover visitors*. For comprehensive disclosure of who is influencing the White

2 There is a lot of detail that I am omitting about how and where these records are captured that I would be pleased to elaborate upon.

House, the visitor logs are not the best tool for the job, even if they are the primary tool at our disposal.

Nevertheless, the White House has good reason to release these records. They provide an unparalleled view of who is visiting the White House, despite their shortcomings. And there's also a good reason that the media is interpreting their value in different terms – how well they capture influence – as our lobbying disclosure laws, which are intended to capture real influence as it occurs, have fallen well short of their purported function – to bring real public scrutiny to lobbying. The media and the public interpret the visitor logs as a failed lobbying disclosure policy, and not as a valuable affirmative release of public records.

Towards Lobbying Disclosure

The policy of releasing the visitor logs is a good one – and Congress should be involved in strengthening and making it permanent. But that policy ultimately cannot live up to our expectations because we treat it as though it is a replacement for lobbying disclosure.

Congress should examine and craft new lobbying disclosure laws that are strong enough to move at the pace of the influence they are intended to expose.[3] The White House visitor logs have been evaluated on these terms, but they are ultimately an insufficient tool for this job. Lobbying disclosure laws should require real-time, online

3 See the *Real Time Online Lobbying Transparency Act (Revised)*, which was the result of a collaborate effort led by Sunlight to draft model legislation for Congress on reforming lobbying disclosure rules, available at http://publicmarkup.org/bill/real-time-online-lobbying-transparency-act-revised/. Also see the recommendations of the American Bar Association Section on Administrative Law and Regulatory Practice task force report *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, available at http://bit.ly/jU6lpz. More information on lobbying reform is available at http://sunlightfoundation.com/policy/lobbying/.

disclosure for paid lobbying efforts, and apply to both Congress and the Executive Branch.

While applying disclosure requirements to the Presidency does pose some complex questions, the responsibility will fall to Congress to craft new lobbying disclosure laws. Most urgently, the threshold for who must register as a lobbyist must be dramatically expanded (with the 20 percent loophole removed), and reporting of lobbying activities should be reported online, and in real-time.

Despite their shortcomings, the visitor logs released by the administration have provided a meaningful view of influence within the White House, and perhaps just as importantly, have shown how far we have to go to create meaningful disclosure of influence in Washington. Ultimately, only an engaged Congress can make lobbying disclosure policies that will create a more accountable government, and a more engaged public.

We urge that a more disclosure-friendly version of the visitor logs be codified into law and ask Congress to tackle the thorny but important underlying issue of lobbying disclosure.

Thanks for you the opportunity to testify today.

Mr. STEARNS. I thank the gentleman.

Ms. Weismann, if you don't mind, just pull the mic down a little bit and speak into it. That's good.

TESTIMONY OF ANNE WEISMANN

Ms. WEISMANN. Mr. Chairman, Ranking Member DeGette, members of the Committee, thank you for the opportunity to testify today about White House visitor logs and lobbyists.

As mentioned, I am chief counsel for Citizens for Responsibility and Ethics in Washington, or CREW, the plaintiff in the litigation that led to the White House decision to voluntarily post White House visitor logs online.

And by way of background, prior to joining CREW I worked at the Justice Department for about 20 years, including defending government information litigation. No one has a greater or more vested interest than CREW in ensuring that the White House follows through on its commitment to make the White House visitor records publicly available. Although recent new accounts have suggested otherwise, the White House has lived up to that commitment.

Some complain the logs lack critical information such as whom the visitor is meeting with and that requests for clearance were made by low-level staff in order to conceal the true nature of the visit. These criticisms reflect the fundamental misunderstanding of the nature of these logs and the purpose they serve. They are not the equivalent of calendars or date books. And as every court to address this issue has found, they are the records of the Secret Service, not the President.

The Secret Service creates these records to further its statutory mission to protect the President, Vice President and their families, which necessarily extends to protecting the White House complex. Because they are created for that purpose, they contain only that information the Secret Service needs to ensure no visitor to the White House poses a risk to the safety or security of any of its occupants. That information includes identifying information about the prospective visitor, name, date of birth, Social Security number, as well as the dates, time, and location of the planned visit and the name of the White House passholder requesting clearance.

Simply stated, in performing its protective function, the Secret Service does not need the identity of the individual or individuals the prospective visitor is seeing from a security standpoint. It is therefore not surprising that many of the posted visitor logs do not identify the White House's individual with whom the visitor had an appointment. Nor is it surprising or should it be troubling that top White House officials, such as the Chief of Staff, did not personally perform the ministerial task of requesting clearance for their visitors.

The Secret Service requires only that the person requesting clearance be a passholder, able to provide the required information. Moreover, the nature of the information in the Obama White House visitor logs mirrors that of previous administrations, including the frequent omission of such details as the identity of the person with whom the visitor has an appointment, which reinforces the central point, that these are Secret Service records that the Se-

cret Service uses and creates to perform its protective function. They are not an analog to appointment calendars and date books that individual White House officials might keep.

To be clear, CREW very much disagrees with the legal position of the White House that these records are Presidential and therefore not publicly accessible under the FOIA.

Nevertheless, we settled our litigation, which began under the Bush administration and continued through the Obama administration, when the White House offered to not only provide CREW with its requested records, but to post on the White House's Web site on an ongoing basis nearly all visitor records, subject to very limited and reasonable expectations.

Again, the disappointment many feel stems in part from the inherent limitations of these records, what they do and do not do. I think it's important to note, however, as my colleague Mr. Wonderlich did, that they are still of value. They reveal, for example, the kind or level of influence an individual visitor might have.

Beyond making White House visitor logs accessible, the administration has launched some other directives that we have discussed in my testimony. I do want to stress that while we support these efforts, such as the open government directive and the FOIA memoranda that the President issued in his first full day in office, followed up by Attorney General Eric Holder's memo on FOIA 3 months later, these are only a first step. And we remain disappointed that the Government as a whole has yet to achieve the goals of transparency and accountability that the President has set.

There remain very real challenges and the commitment has yet to trickle down to the agency staff charged with implementing open government directives such as the FOIA. I defer to the committee for the rest of my testimony. I'm happy to answer any of your questions, thank you.

Mr. STEARNS. I thank you, Ms. Weismann.

Just for the edification of the members here, CREW stands for the Citizens for Responsibility and Ethics in Washington.

[The prepared statement of Ms. Weismann follows:]

Statement of Anne L. Weismann
Citizens for Responsibility and Ethics in Washington

Before the Oversight and Investigations Subcommittee
of the Committee on Energy and Commerce

"White House Transparency, Visitor Logs and Lobbyists"

May 3, 2011

Mr. Chairman, Ranking Member DeGette, and Members of the Subcommittee, thank you for the opportunity to testify today about White House transparency, visitor logs and lobbyists. I am Chief Counsel for Citizens for Responsibility and Ethics in Washington (CREW), the plaintiff in the litigation that led to the White House decision to voluntarily post White House visitor logs online. Prior to joining CREW, I worked at the Department of Justice for 20 years supervising, among other areas, government information litigation, including the Freedom of Information Act, Presidential Records Act, and Federal Records Act. No one has a greater or more vested interest than CREW in ensuring the White House follows through on its commitment to make the visitor records publicly available. Although recent news accounts have suggested otherwise, the White House has lived up to that commitment

Some complain the visitor logs lack critical information, such as who the visitor is meeting with, and that requests for clearance were made by low-level staff in order to conceal the true nature of the visit. These criticisms reflect a fundamental misunderstanding of the nature of these logs and the purpose they serve. The White House visitor logs are not the equivalent of calendars or date books and, as every court to address this issue has found, are the records of the Secret Service, not the president. The Secret Service creates these records in furtherance of its statutory mission to protect the president, vice president, and their families, which necessarily extends to protecting the White House complex.

Because these records are created to serve the protective function of the Secret Service, they contain only that information the Secret Service needs to ensure no visitor to the White House poses a risk to the safety or security of any of its occupants. That information includes identifying information about the prospective visitor – name, social security number, and date of

birth – as well as the date, time, and location of the planned visit, and the name of the White House pass holder requesting clearance for the visitor. In performing its protective function the Secret Service does not need the identity of the individual or individuals the prospective visitor will see, nor does the Secret Service need or require the name of the individual with whom the visitor has an appointment. Simply stated, this additional information is neither relevant nor necessary to clear visitors for access to the White House from a security standpoint.

It is therefore not surprising that many of the posted visitor logs do not identify the White House individual with whom the visitor had an appointment. Nor is it surprising or troubling that top White House officials such as the chief of staff did not personally perform the ministerial task of requesting clearance for their visitors. The Secret Service requires only that the person requesting clearance be a pass holder able to provide the required information, and there is no suggestion this White House has not complied with that requirement.

Moreover, the nature of the information in the Obama White House visitor logs mirrors that of previous administrations, including the frequent omission of such details as the identity of the person with whom the visitor has an appointment. This reinforces the fundamental purpose of these Secret Service records – enabling the Secret Service to fulfill its statutory mission of ensuring no visitor to the White House presents a threat to the president, vice president or their families. They are not, nor were they ever, intended to provide details about who White House officials meet with.

To be clear, CREW disagrees with the legal position of the White House that these records are presidential and therefore not publicly accessible under the Freedom of Information Act. Nevertheless, we settled our litigation, which began under the Bush administration and

continued under the Obama administration, over access to these records when the Obama White House offered to not only provide CREW with its requested records, but to post on the White House's website on an ongoing basis nearly all visitor records, subject to very limited and reasonable exceptions. Through this bold initiative, President Obama fulfilled his campaign promise that "the White House is the people's house and the people have a right to know who visits," and reversed the policy of secrecy practiced by his predecessor.

The disappointment many may still feel stems in part from the inherent limitations of the visitor logs. As I have explained, they are agency records of the Secret Service that serve that agency's needs, but are not an analog to the appointment books or calendars White House officials otherwise maintain. Nevertheless, these records may reveal valuable information, such as the level of influence an outside individual has on a particular administration. For example, as part of our settlement of the Secret Service litigation, CREW received visitor logs of nine leading conservative Christian leaders during the Bush presidency. Those records revealed an astonishing number of White House visits by some individuals; Andrea Lafferty, executive director of the Traditional Values Coalition, alone made 50 visits to the White House during a seven-year period, including six to President Bush. While the records say nothing about what was discussed in any of those visits, one can reasonably infer this particular visitor had a level of access and influence not enjoyed by many others. Others have reached similar conclusions regarding the Obama records. In October 2009, the *Wall Street Journal* found then-President of the Service Employees International Union Andy Stern had made 22 visits to the White House.

Beyond making White House visitor logs publicly accessible, this administration has launched a government-wide effort – the Open Government Directive – to implement President

Obama's day-one promise to bring more transparency and accountability to government. Intended to institutionalize a culture of open government, the directive promises unprecedented public access to a wealth of information on how our government functions. In implementation of this directive, agencies have posted a wide range of data sets on a wide range of topics and have established processes intended to promote public participation and collaboration.

But the Open Government Directive is not without flaws. Lacking particular requirements and relying instead on laudable goals, the directive contains no concrete metrics by which to measure agencies' success. It ignores the request of groups like CREW and others in the access community that the administration implement a data floor requiring all agencies to post certain frequently requested data sets common across all agency lines, such as calendars for top agency officials and correspondence with Congress. So while the Open Government Directive's heavy emphasis on posting data sets has led to a proliferation of publicly available data, this data often is of questionable utility and does not necessarily include information the public is most interested in receiving.

With this directive the White House also declined an opportunity to link these efforts to the responsibilities each agency bears under the Freedom of Information Act. President Obama launched a new era in executive branch transparency through two memoranda he issued on his first full day in office addressing the FOIA and transparency and open government. The president's January 21 FOIA memorandum imposed a new presumption of disclosure and recognized the profound importance of the FOIA to government accountability. This was followed in March by a memorandum from Attorney General Eric Holder urging agencies to make discretionary releases under the FOIA, to approach all decisions under the FOIA with a

presumption of disclosure, and to refrain from invoking exemptions to cover up information that might embarrass an agency or agency official.

Even with these memoranda in place, however, transforming the dominant agency culture from one of secrecy to one of transparency remains a significant challenge. The president's commitment to transparency has yet to trickle down to agency staff charged with implementing open government mandates such as the FOIA. The huge gap between the administration's aspirations and actual agency practices is evidenced by the near-daily decisions agencies make under the FOIA to deprive the public of key information, ranging from why the Department of Justice refused to let certain members of the media interview convicted lobbyist Jack Abramoff while in prison, to evidence of pressure brought to bear on health care providers working for the Veterans Administration to under-diagnose post traumatic stress disorder as a cost-saving measure. Further, the Department of Justice has supported this agency recalcitrance, continuing its practice under the prior administration of reflexively defending virtually all agency withholding decisions challenged in court. Today under the Obama administration CREW is forced to litigate as many agency refusals to produce records as it litigated under the Bush administration.

Transparency in those who lobby the federal government also is a laudable goal that is far from a reality. The answer here lies primarily with Congress, which to date has opted to impose fairly minimal disclosure requirements on lobbying firms and organizations through the Lobbying Disclosure Act. Although that Act requires registered lobbyists to disclose lobbying contacts, the level of disclosure may be as minimal as identifying contacts with "the Senate" or "the White House Office," with no detail as to which particular office or member was contacted.

A task force of the American Bar Association has released a report to which CREW is a signator that includes a series of recommendations to increase transparency, such as amending the Lobbying Disclosure Act to require disclosure of money spent on grassroots lobbying and expanding who has to register and what has to be disclosed. We urge Congress to consider these recommendations with a view toward enhancing the accountability that comes from fuller disclosure.

Finally, any consideration of transparency and the White House must include a recognition of the protections the Constitution affords the president, including the right to consult in private with individuals both inside and outside of the government. Not simply a matter of constitutional prerogative, this protection provides a president the flexibility needed to privately explore a range of options that have the potential to substantially affect the public. Of course, the White House should be encouraged to be as fully transparent as possible, but we must also recognize the constitutional limits to forcing the White House to reveal certain communications.

Through his policy initiatives, President Obama has put in place many of the critical components for government transparency. But they are only a first step, not an end in themselves. Without question, further work remains and we hope and trust Congress will join with the administration to help achieve a truly open and accountable government. CREW welcomes the opportunity to work with this Committee to make that happen.

Summary of Testimony of Anne L. Weismann
Before the Subcommittee on Oversight of the
Committee on Energy and Commerce, May 3, 2011

- The White House has fulfilled its commitment to make virtually all visitor logs publicly available.

- The visitor logs are created by the Secret Service in furtherance of its protective function and therefore contain only that information the Secret Service needs to clear visitors for access to the White House.

- Necessary information for clearance includes personal identifying information about the prospective visitor – name, social security number, and date of birth – as well as the date, time, and location of the planned visit and the name of the White House pass holder requesting clearance for the visitor.

- The Secret Service does not need to know who the visitor is meeting with in order to clear visitors, and therefore, it is neither surprising nor troubling this information is missing from visitor logs.

- The Secret Service requires only that the person requesting clearance for a visitor be a pass holder able to provide the required information. Therefore, it is neither surprising nor troubling that top White House officials do not personally perform the ministerial task of requesting clearance for their visitors.

- The White House visitor logs were never intended to function as calendars or appointment books of White House officials.

- Beyond posting the visitor logs online, the Obama administration has launched a government-wide effort – the Open Government Directive – to bring more transparency and accountability to government.

- This directive has led agencies to publicly post a wide range of data sets on a wide range of topics, but this data does not necessarily include information the public is most interested in receiving.

- Transforming the dominant agency culture from one of secrecy to one of transparency remains a significant challenge. Through his policy initiatives, President Obama has put in place many of the critical components for government openness. But the president's commitment to transparency has yet to trickle down to agency staff charged with implementing open government mandates, such as the Freedom of Information Act (FOIA). Further, the Department of Justice has supported this agency recalcitrance, especially in its reflexive defense of virtually all FOIA agency withholding decisions challenged in court.

Mr. STEARNS. Before we start, I ask the ranking member unanimous consent that the contents of the document binder be introduced into the record and authorize staff to make any appropriate redactions.

Ms. DEGETTE. No objection.

Mr. STEARNS. Without objection, so ordered.

[The information follows:]

Committee on Energy and Commerce

Subcommittee on Oversight and Investigations

The U.S. Government Response to the Nuclear Power Plant Incident in Japan

April 6, 2011

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14	Viveca Novak & Fred Schulte, "White House Visitor Logs Leave Out Many," *Politico*	4/15/2011

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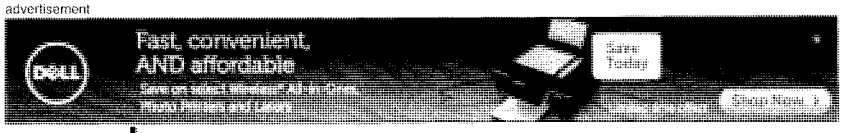

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Obama blocks list of visitors to White House

Taking Bush's position, administration denies msnbc.com request for logs

By Bill Dedman Investigative reporter

msnbc.com

updated 6/16/2009 4:54:16 PM ET

The Obama administration is fighting to block access to names of visitors to the White House, taking up the Bush administration argument that a president doesn't have to reveal who comes calling to influence policy decisions.

Despite President Barack Obama's pledge to introduce a new era of transparency to Washington, and despite two rulings by a federal judge that the records are public, the Secret Service has denied msnbc.com's request for the names of all White House visitors from Jan. 20 to the present. It also denied a narrower request by the nonpartisan watchdog group Citizens for Responsibility and Ethics in Washington, which sought logs of visits by executives of coal companies.

Updated: CREW says it filed suit Tuesday against the Department of Homeland Security, which oversees the Secret Service. Here's a copy of CREW's complaint.

"We are deeply disappointed," said CREW attorney Anne L. Weismann, "that the Obama administration is following the same anti-transparency policy as the Bush administration when it comes to White House visitor records. Refusing to let the public know who visits the White House is not the action of a pro-transparency, pro-accountability administration."

Updated: The White House reiterated that the policy is under review. See transcript below.

Groups that advocate open government have argued that it's vital to know the names of White House visitors, who may have an outsized influence on policy matters.

The visitor logs have been released in only a few isolated cases, most notably records of visits by lobbyist Jack Abramoff to the Bush

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White House, and in the "filegate" investigation of the Clinton White House. Only the Bush and Obama administrations are known to have made an argument in court that the visitor logs should be private.

The Obama administration is arguing that the White House visitor logs are presidential records — not Secret Service agency records, which would be subject to the Freedom of Information Act.The administration ought to be able to hold secret meetings in the White House, "such as an elected official interviewing for an administration position or an ambassador coming for a discussion on issues that would affect international negotiations," said Obama spokesman Ben LaBolt.

These same arguments, made by the Bush administration, were rejected twice by a federal judge. The visitor logs are created by the Secret Service and maintained by the Secret Service, U.S. District Judge Royce Lamberth ruled in 2007 and again this January. CREW had requested records of visits to the Bush White House, as well as the residence of Vice President Dick Cheney, by leaders of Religious Right organizations.

The Bush administration appealed Lamberth's decision, and the Obama administration has continued to press that appeal.

"It is the government's position," the Secret Service wrote last week to msnbc.com in denying access to the visitor logs, "that the vast majority, if not all, of the records ... are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act" and "remain under the exclusive legal custody and control of the White Office and the Office of the Vice President. After the resolution of this litigation, we will respond further to your request if necessary."

The visitor records are kept in two databases:

- Worker and Visitor Entry System (WAVES). This Secret Service database includes information submitted to the Secret Service about individuals who have a planned visit to the White House. This information includes the name of the pass holder submitting the request, the date of the request, the time and location of the planned visit and the nature of the visit or the person to be

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visited. This information may be updated with the actual date and time of entry and exit. Msnbc.com also requested lists submitted to the Secret Service of groups or delegations of visitors with planned visits to the White House.

- Access Control Records System (ACES). This Secret Service database includes information generated when a pass holder, worker or visitor swipes a permanent or temporary pass over an electronic reader at entrances or exits. This information includes the name of the visitor, the badge number, the post or location, and the date and time of entry or exit.

No private information requested

Msnbc.com excluded from its request any private information on the White House visitors. It asked that the Secret Service delete from the logs any dates of birth, Social Security numbers, and home addresses (other than city and state).

In addition, msnbc.com asked the Secret Service to exclude information on security precautions and the results of background checks on prospective visitors.

The Bush White House had taken several steps to close off access to the visitor logs, steps repeatedly rejected by the federal judge.

In May 2006, the Bush White House signed a memorandum of understanding with the Secret Service, declaring that the logs are agency records, under White House control.

In October 2006, CREW sought records of visits by nine religious leaders: James Dobson, Gary L. Bauer, Wendy Wright, Louis P. Sheldon, Andrea Lafferty, Paul Weyrich, Tony Perkins, Donald Wildmon and Jerry Falwell.

The Bush position was rejected in December 2007 by Judge Lamberth, a former federal prosecutor who was appointed to the bench by President Ronald Reagan. Lamberth gave the White House 20 days to hand over the public records. But CREW did not get the visitor logs.

Inside the White House

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In September 2008, Homeland Security said that it did not plan to release the visitor logs, claiming that the visitor logs were protected by the presidential communication privilege in the law.

Judge Lamberth ruled again, denying that claim on Jan. 9. The judge wrote that a simple list of visitors is not a communication at all, because it includes no details on the topics discussed during a meeting, and therefore is not protected by a presidential communication privilege.

The Bush administration appealed on Jan. 14, a week before the end of President Bush's term of office.

In late January and again in May, the Obama administration had opportunities to change course, when it filed papers in the appeals court, but stuck with the Bush position.

In February, the White House spokesman, LaBolt, told msnbc.com that the policy was under review. "We are reviewing our policy on access to visitor logs and related litigation involving the previous administration to determine how we can ensure that policymaking in this administration happens in an open and transparent way, and that we take appropriate measures to ensure that we are operating in a secure environment."

But last week, in denial letters to msnbc.com and CREW, the Secret Service continued to cite the Bush position.

Asked Monday whether the White House plans to continue to oppose release of the records, White House spokesman LaBot said the policy is still under review. He also cited a list of "the unprecedented steps the administration has taken to promote openness and transparency." These include instructing all agencies to adopt a presumption in favor of disclosure in Freedom of Information Act decisions, and overturning the practice of allowing other executives, aside from the president, to assert executive privilege to block access to an administration's records.

Unpersuaded was the attorney for the watchdog group CREW, which was formed in 2003 during the Bush administration to increase open government.

"It's great that President Obama made this commitment to transparency," attorney Weismann said. "But now you need to make good on it."

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Here's an official transcript of White House spokesman Robert Gibbs discussing the issue at Tuesday's press briefing:

Q What's the policy going to be on release of the names of White House visitors?

MR. GIBBS: The policy -- as you know, I think many of you know, this has involved -- visitor logs have been involved in some litigation dating back to some time in 2006. The White House is reviewing that policy based on some of that litigation.

Q So it's just you're not going either way on it now, and you're not refusing to --

MR. GIBBS: We're reviewing what has been the policy of -- the previous policy.

Q Who is doing that review?

MR. GIBBS: The White House Counsel's Office and other people in the administration.

Q What's the length of the review?

MR. GIBBS: I don't know the exact timeline.

Q Is there a mandate to be more transparent than the previous administration?

MR. GIBBS: I think we ran on that --

Q In this specific regard?

MR. GIBBS: That's what's under review.

Q Is that the goal?

MR. GIBBS: What's the goal?

Q Isn't that the goal, to be more transparent on these visitor logs than the previous administration?

MR. GIBBS: The goal is -- and I think the President, who underscored his commitment to transparency on his first full day in office -- this is not a contest between this administration or that administration, or any administration; it's to uphold the principle of open government.

Q Why would the President have any objection to the public knowing who is coming in here to visit?

MR. GIBBS: I think we've taken actions to let

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people know who are. I think again, Peter, this dates back to litigation long before we ever showed up.

Q Do you think you might have to uphold precedent here, possibly?

MR. GIBBS: That's part of what's being reviewed by the Counsel's Office.

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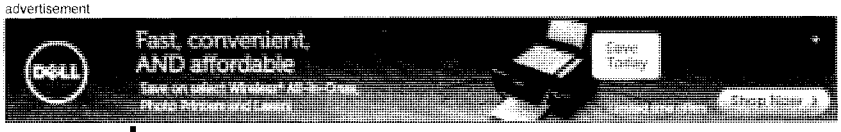

msnbc.com

After lawsuit, Obama opens a bit of info on meetings with health care executives

White House still contends it can keep visitor logs secret

Brooks Kraft / Corbis Images
Echoing the Bush administration, the White Houseargues thatvisitor logsare not covered by the Freedom of Information Act and might reveal presidential communications. A federal judge has rejected both arguments.

By Bill Dedman Investigative reporter

msnbc.com

updated 7/22/2009 11:50:42 PM ET

Despite his campaign promise to "make White House communications public," the Obama administration again is blocking the public from seeing White House visitor logs, this time refusing to disclose meetings with health care executives. Tonight, less than an hour before his news conference on health care, he released some of the information only after a nonprofit group filed a federal lawsuit.

The nonprofit group, Citizens for Responsibility and Ethics in Washington, said it was filing suit Wednesday afternoon against the Department of Homeland Security, which oversees the Secret Service, after a request for the visitor logs was denied.

Within hours after the group announced it was filing suit, the White House relented, in part, saying it would voluntarily release the names and dates of visits. That is less information than is contained in the White House visitor logs, which would also show which White House employee requested the meeting, how long the person was at the White House, and other details. Despite the voluntary release, the Obama White House is still taking the same legal position as the Bush White House, arguing that release of the information is not required. A federal judge has twice rejected those arguments.

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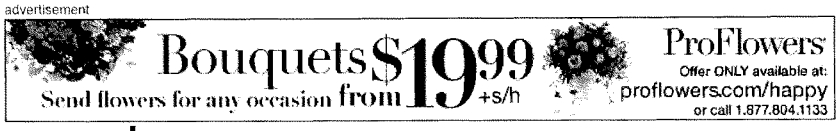

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The nonprofit group had sought logs of visits to the White House and the vice president's residence by 18 people, including the heads of the nation's largest medical, insurance and pharmaceutical companies.

"Right now the White House and Congress are debating colossal changes to the American health care system, and taxpayers have a right to know who is sitting at the table influencing decision-makers," Melanie Sloan, CREW's executive director, said in a statement. The group, widely considered to be a band of liberal activists after many battles over public records with the Bush administration, has continued to press Obama for public records.

The White House position mirrors the stand taken by the Bush administration, although twice a federal judge has ruled that White House visitor logs must be released under the Freedom of Information Act. The Obama administration says the policy is under review, but it also has continued to fight release of the records by continuing the Bush administration's efforts in a federal appellate court. The Secret Service said in its July 7 reply to CREW that the White House might make "discretionary releases," but again took the position that White House visitor logs are not covered by FOIA and also would reveal presidential communications. The Bush administration lost both arguments in federal court, and appealed.

Last month the Secret Service denied msnbc.com's request for logs of all White House visitors from Inauguration Day on Jan. 20.

Msnbc.com filed an administrative appeal. A narrower request by CREW, for logs of visits by coal industry executives, also was rejected, and CREW sued on June 16.

A campaign promise

During the presidential campaign, Obama promised several times to open up records of lobbying, including a promise to "Make White House Communications Public: Obama will amend executive orders to ensure that communications about regulatory policymaking between persons outside the government and all White House staff are disclosed to the public."

White House spokesman Ben LaBolt said Wednesday that the policy on visitor logs remains under review.

Anticipating the limited release of records Wednesday evening, CREW attorney Anne L. Weismann said, "It's our view this is merely

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spin and not a real effort at transparency."

An hour before the president's news conference on health care, the White House sent CREW the following list of visits by health care executives:

- Bill Tauzin visited the White House on March 5, May 19, June 2, and June 24. He is president and CEO, Pharmaceutical Research and Manufacturers of America.
- Karen Ignagni visited the White House on March 5, 6, and 11 and June 30. She is president and CEO, America's Health Insurance Plans.
- Richard Umbdenstock visited the White House on February 4, February 23; March 5, March 25, March 30; April 6, and May 22. He is president and CEO, American Hospital Association.
- J. James Rohack visited the White House on March 25, June 22, and June 24. The cardiologist from Texas is president of the American Medical Association.
- William C. Weldon visited the White House on May 12. He is chairman and CEO, Johnson & Johnson.
- Jeffrey B. Kindler visited the White House on March 5, May 6, and June 2. He is chairman and CEO, Pfizer.
- Stephen J. Hemsley visited the White House on May 15 and 22. He is president and CEO, UnitedHealth Group.
- Angela F. Braly visited the White House on February 13. She is president and CEO, WellPoint.
- George Halvorson visited the White House on March 27 and June 5. He is president and CEO, Kaiser Foundation Health Plan.
- Jay Gellert visited the White House on February 10, March 11, and March 20. He is president and CEO, Health Net.
- Thomas Priselac visited the White House on April 3. He is president and CEO,

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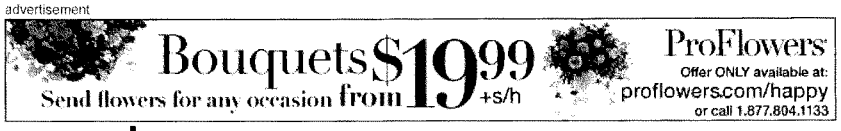

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Cedars-Sinai Health System.

- Richard Clark visited the White House on March 24. He is chairman, president and CEO, Merck.
- Wayne T. Smith visited the White House on June 4. He is chairman, president and CEO, Community Health Systems.
- Rick Smith visited the White House on May 19 and June 2. He is senior vice president, Pharmaceutical Research and Manufacturers of America.
- "In addition to the above information, the White House visitor records reflect that Mr. Tauzin, Ms. Ignagni, Mr. Umbdenstock, Mr. Rohack, Mr. Kindler, Mr. Halvorson, Mr. Gellert, Mr. Priselac, David Nexon, and Rick Smith were scheduled to attend a May 11 meeting at the White House. We understand that all the individuals attended the meeting except Mr. Kindler, and that Mr. Clark attended as well."

'Transparency is not situational'

CREW responded in a statement:

"While Citizens for Responsibility and Ethics in Washington is pleased the White House has taken a step towards delivering the transparency promised in the first days of the administration, the letter sent by White House Counsel Greg Craig in no way satisfies CREW's June 22nd Freedom of Information Act (FOIA) request for the Secret Service visitor records of 18 health care executives. First, the FOIA requires the administration to release the records themselves, not merely a summary of some information included in the records. The actual visitor records likely wonld indicate with whom each official met, the administration official who requested clearance for the visitor, the time of the meeting, the duration of the meeting and, in some cases, the purpose of the meeting. In addition, no information was provided regarding any visits to the vice president's residence. Mr. Craig's summary is not an adequate substitution for the records themselves.

"Second, this letter states the President has used his discretionary authority to release

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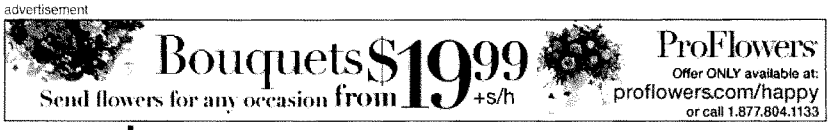

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information regarding the visits. There is no indication, however, that this information is complete; there may well be records of other visits not included in this discretionary release. Further, as required by the FOIA, no information was provided to demonstrate the adequacy of the search.

"Finally, transparency is not situational. It is not sufficient for the White House to release certain visitor records shortly before a press conference to avoid distraction. In a separate case, CREW recently sued the administration for failing to provide records related to White House visits by coal company executives. In addition, CREW has two other cases for visitor records outstanding: one for visits by Christian conservative leaders to the Bush White House, and another for records related to visits to the Bush White House by lobbyist Stephen Payne. These cases are now before the Court of Appeals, but so far, the Obama administration has echoed the Bush administration's position that these records are presidential, not federal, despite district court rulings clearly rejecting that legal analysis.

"Releasing some records because it is politically expedient to do so is not transparency."

Several hours before the news conference, the White House press office started telling Washington reporters that it would release the list of names and dates — without letting reporters know that it was not actually releasing the records requested by CREW. This was an apparent attempt to discourage interest in the story about CREW's lawsuit.

'I don't think there are a lot of secrets'

Nevertheless, in his news conference, the president was asked by a Chicago Tribune reporter about the blocking of visitor logs. Obama didn't answer directly about visitor logs, but pointed out that the list had been released. And he said, "On the list of health care executives who visited us, most of the time you guys have been in there taking pictures, so it hasn't been a secret."

"With respect to most of the negotiations not being on C-SPAN," the president said, "you'll recall that our kickoff event was here on C-S PAN." He said many other meetings have been with Congress, which controls its own publicity. "I don't think there are a lot of secrets going on in there."

Stepping up the pressure with this request,

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CREW has asked a federal court for emergency relief in the form of a preliminary injunction compelling the Secret Service to hand over its agency records.

Wednesday's lawsuit by CREW was first reported by The Los Angeles Times. "As a candidate, President Obama vowed that in devising a healthcare bill he would invite in TV cameras — specifically C-SPAN — so that Americans could have a window into negotiations that normally play out behind closed doors," the newspaper reported.

More background on the White House visitor logs, and efforts by the Bush and Obama administrations to keep them secret, is detailed in our previous story, "Obama blocks access to White House visitor logs."

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Posted by **Norm Eisen** on September 04, 2009 at 09:05 AM EDT

Today, the President took another important step toward a more open and transparent government by announcing a historic new policy to voluntarily disclose White House visitor access records. Each month, records of visitors from the previous 90-120 days will be made available online.
In his statement released earlier today, the President sums up this historic step:

> For the first time in history, records of White House visitors will be made available to the public on an ongoing basis. We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it. Americans have a right to know whose voices are being heard in the policymaking process.

Aside from a small group of appointments that cannot be disclosed because of national security imperatives or their necessarily confidential nature (such as a visit by a possible Supreme Court nominee), the record of every visitor who comes to the White House for an appointment, a tour, or to conduct business will be released. Read the full policy here.

The Administration has also agreed with Citizens for Responsibility and Ethics (CREW) to settle four pending cases requesting specific White House visitor access records, including those dating from the Bush administration (read the transmittal letter here). We have provided CREW with the records relating to their requests, which are here:

Bush Administration

- WHO: [PDF part 1, PDF part 2]
- OVP: [PDF]

Obama Administration

WHO: [csv]

The Administration also thanks CREW for their participation in the development of the new voluntary disclosure policy.

Norm Eisen is Special Counsel to the President for Ethics and Government Reform

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White Hquse Voluntary Disclosure Policy Visitor Access Records

The President has decided to increase governmental transparency by implementing a voluntary disclosure policy governing White House visitor access records. The White House will release, on a monthly basis, all previously unreleased WAVES and ACR access records that are 90 to 120 days old. For example, records created in January 2010 will be released at the end of April 2010. The short time lag will allow the White House to continue to conduct business, while still providing the American people with an unprecedented amount of information about their government. No previous White House has ever adopted such a policy.

The voluntary disclosure policy will apply to records created after September 15, 2009, and the first release of records (covering the month of September) will occur at the end of the year, on or about December 31, 2009. We expect that each monthly release will include tens of thousands of electronic records. Since the White House considers these records to be subject to the Presidential Records Act, it will continue to preserve them accordingly.

The White House voluntary disclosure policy will be subject to the following exceptions:

1. The White House will not release fields within the access records that implicate personal privacy or law enforcement concerns (e.g., dates of birth, social security numbers, and contact phone numbers); records that implicate the personal safety of EOP staff (their daily arrival and departure); or records whose release would threaten national security interests.
2. The White House will not release access records related to purely personal guests of the first and second families (i.e., visits that do not involve any official or political business).
3. The White House will not release access records related to a small group of particularly sensitive meetings (e.g., visits of potential Supreme Court nominees). The White House will disclose each month the number of records withheld on this basis, and it will release such records once they are no longer sensitive.
4. Visitor information for the Vice President and his staff at the White House Complex will be disclosed pursuant to the policy outlined above. It is not possible, however, to release visitor information for the Vice President's Residence in an identical format to the White House Complex at this time because the Residence is not equipped with the WAVES and ACR systems that are in place at the White House Complex. The Office of the Vice President will, instead, release the guest lists for official events at the Residence and will also review the Vice President's and Dr. Biden's daily schedules and release the names and dates of visitors to the Residence who appear on those schedules. The Vice President's staff is working with the Secret Service to upgrade the visitor records system at the Residence. When the electronic update is complete, visitor information for the White House Complex and the Residence will be released in a common format.

WAVES and ACR records created between January 20 and September 15, 2009 will not be subject to the voluntary disclosure policy. Instead, the White House will respond voluntarily to individual requests submitted to the Counsel's Office that seek records during that time period, but only if the requests are reasonable, narrow, and specific (e.g., requests that list specific possible visitors). Responses to reasonable requests will be subject to the four exceptions described above.

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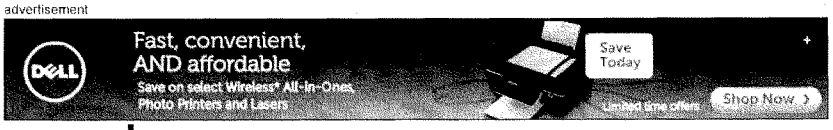

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Obama yields on most White House visitor logs

Names of many visitors will go online — but not for first 8 months of term

By Bill Dedman Investigative reporter

msnbc.com

updated 9/4/2009 2:48:37 PM ET

The Obama administration says it will release names of most visitors to the White House, starting at the end of this year. Information on visitors in the first eight months of his administration will remain secret — though officials say they will consider narrow and specific requests.

The White House called the release of information "voluntary," continuing to argue the Bush administration's position that full disclosure is not required by the Freedom of Information Act.

After being sued twice by a nonprofit organization seeking the records, the Obama administration said Friday it will post the visitor logs online.

The release will be time delayed, with 90 to 120 days passing before the records are posted on the White House Web site. And only visits after Sept. 15, 2009, will be revealed. The first wave of records is expected to be posted around Dec. 31.

The White House also said that certain "sensitive" visits, such as those by potential Supreme Court nominees, will not be revealed. Also hidden will be personal visits to the Obama and Biden families, and security information such as the arrival times of White House staff.

"We will achieve our goal of making this administration the most open and transparent administration in history," President Barack Obama said on Friday.

"Americans have a right to know whose voices are being heard in the policymaking process," he added.

The nonprofit, Citizens for Responsibility and Ethics in Washington, said it was dropping its

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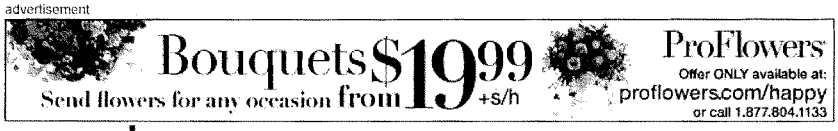

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two lawsuits against Obama, and two previous lawsuits filed during the presidency of George W. Bush.

In addition to the CREW requests, msnbc.com had sought records on all White House visitors. That request, for all visitors since Inauguration Day, still stands, and msnbc.com has filed an administrative appeal with the Department of Homeland Security, which oversees the Secret Service.

The new White House policy says it will consider requests for visitor information for the period from Jan. 20 to Sept. 15, but only if the requests are narrow and include specific names to be checked. In other words, if you don't know who visited, or can't guess who might have visited during this period, the White House won't tell you.

A federal district court has ruled twice that all visitor records belong to the United States Secret Service, and therefore should be open under the Freedom of Information Act.

CREW said it was satisfied with the White House response. CREW Executive Director M elanie Sloan said in a prepared statement, "The Obama administration has proven its pledge to usher in a new era of government transparency was more than just a campaign promise. The Bush administration fought tooth and nail to keep secret the identities of those who visited the White House. In contrast, the Obama administration — by putting visitor records on the White House web site — will have the most open White House in history."

Below is a timeline of the issue. A box on this page contains the original documents. More background on the White House visitor logs is detailed in two previous articles, "Obama blocks access to White House visitor logs," and "After lawsuit, Obama opens a bit of info on meetings with health care executives."

Timeline of events

In May 2006, the Bush White House signed a memorandum of understanding with the Secret Service, declaring that the visitor logs were White House records, not agency records, and therefore not subject to disclosure.

On Oct. 4, 2006, CREW requested information on visits by nine leaders of the religious right to the Bush White House and to the residence of Vice President Dick Cheney.

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On Dec. 17, 2007, U.S. District Judge Royce Lamberth ruled that the records must be released. He rejected the Bush argument that the records belonged to the White House, not the Secret Service. The Freedom of Information Act does not cover the White House. The court ordered the Department of Homeland Security to release the records.

On Jan. 9, 2009, Lamberth rejected a second Bush claim, that the records were protected as presidential communications. Lamberth said the mere listing of the date and time of a meeting was unlikely to reveal the content of any White House communication. The court ordered the Department of Homeland Security to release the records. The court also ruled that the government violated the Federal Records Act by deleting some of the Bush and Cheney visitor logs.

On Jan. 14, 2009, with one week remaining in his administration, Bush appealed.

On Feb. 3, 2009, in response to a request by msnbc.com, the Obama White House said it was reviewing its policy. It said it was trying to balance transparency with security.

On May 14, 2009, the Department of Justice continued to argue against release of the records, restating the Bush position that Lamberth had ruled in error.

On June 8, 2009, the United States Secret Service denied requests by msnbc.com and the nonprofit Citizens for Responsibility and Ethics in Washington. The news organization sought logs of all visitors to the Obama White House beginning on Inauguration Day. CREW's narrower request sought information on visits by coal industry executives. The Secret Service restated the Bush position.

On June 16, 2009, CREW sued the Department of Homeland Security, which oversees the Secret Service, for the coal industry records.

On July 7, 2009, the Secret Service denied a CREW request for logs of visits by 18 health care executives, including the heads of the largest medical, insurance and pharmaceutical companies and trade groups. Again the Service restated the Bush position.

On July 22, 2009, hours before the president's televised news conference on health care reform, CREW sued for the health industry visitor logs. The White House, an hour before the news conference, released the dates of visits by the 18 executives. This wasn't all the

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information that the logs contain, but it allowed the Justice Department to contend to the judge that the CREW case was moot. In conversations with reporters, the White House emphasized that the policy was under review, without mentioning that it had been under review for more than five months. And it emphasized that it was disclosing the information, without mentioning that the visitor logs also would show which White House employee requested the meeting, how long the person was at the White House, and other details.

That same night, in his news conference, the president said that the White House had already made public information on the health industry visitors to the White House. Obama said, ""On the list of health care executives who visited us, most of time you guys have been in there taking pictures, so it hasn't been a secret. And my understanding is we just sent a letter out providing a full list of all the executives. But, frankly, these have mostly been at least photo sprays where you could see who was participating."

On July 25, 2009, an article by Sharon Theimer of the Associated Press documented that the president's statement was a stretch: "Despite President Barack Obama's promise of transparency on his health care overhaul, few White House meetings with medical industry representatives on a list recently released by his administration were made public at the time, an Associated Press review found. ... An AP review of White House activities on those dates found that the majority of the visits occurred without an announcement that the executives were there."

During the presidential campaign, Obama promised several times to open up records of lobbying, including a promise to "Make White House Communications Public: Obama will amend executive orders to ensure that communications about regulatory policymaking between persons outside the government and all White House staff are disclosed to the public."

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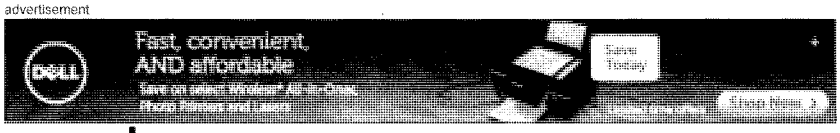

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Obama names 110 White House visitors

Most guests still hidden; list shows Bill Gates, Oprah, bank CEOs, Soros

By Bill Dedman Investigative reporter

msnbc.com

updated 11/4/2009 9:19:54 PM ET

The White House on Friday released a small list of visitors to the White House since President Barack Obama took office in January, including lobbyists, business executives, activists and celebrities.

No previous administration has released such a list, though the information out so far is incomplete. Only about 110 names —and 481 visits —out of the hundreds of thousands who have visited the Obama White House were made public. Like the Bush administration before it, Obama is arguing that any release is voluntary, not required by law, despite two federal court rulings to the contrary.

Under the Obama White House's policy, most names of visitors from Inauguration Day in January through the end of September will never be released. The White House says it plans to release most of the names of visitors from October on, and that release is due near the end of the year. There are limitations there as well, including potential Supreme Court nominees, personal guests of the First Family, and certain security officials.

The names released Friday include business leaders and lobbyists with a lot to gain or lose from Obama policies. They include Microsoft co-founder Bill Gates (whose foundation is pushing for changes in teacher pay), former AIG chairman Maurice Greenberg, Exxon Mobil C EO Rex Tillerson, Chevron CEO David O'Reilly, Citigroup's Vikram Pandit, Goldman Sachs CEO Lloyd Blankfein, JP Morgan's James Dimon, Bank of America CEO Kenneth Lewis, John Stumpf of Wells Fargo, Morgan Stanley's John Mack, State Street bank's Ron Logue, BNY Mellon's Robert Kelly, labor leader Andrew Stern of the Service Employees International Union (22 visits), American Bankers Association CEO Ed Yingling, community bankers president Camden Fine, and lobbyists Heather and Anthony Podesta, whose brother John Podesta led Obama's transition team.

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Besides Gates, Microsoft CEO Steve Ballmer and General Electric CEO Jeffrey Immelt are also on the list. (Msnbc.com is a joint venture of Microsoft and NBC. One of NBC's parents is GE.)

Advocates and nonprofit leaders include National Organization for Women President Kim Gandy, and Risa Lavizzo-Mourey, president of the Robert Wood Johnson Foundation, which is interested in health policy.

Democratic donor and businessman George Soros visited with White House aides twice.

Political figures include former Sen. Thomas Daschle, former House Speaker Newt Gingrich, Chicago Mayor Richard Daley, former Gov. Howard Dean, Sen. Al Franken, former Vice President Al Gore, former Federal Reserve Chairman Alan Greenspan, the late Sen. Edward Kennedy, and Democratic strategist Steve Elmendorf.

Celebrities at the White House include Oprah Winfrey, actors Brad Pitt, George Clooney and Denzel Washington, and tennis star Serena Williams. Journalists include Paul Krugman, the New York Times columnist and Nobel Prize winner in economics.

Religious and civil rights figures Al Sharpton and Jesse Jackson also visited. (**Correction**: An earlier version of this article listed conservative religious leader Gary Bauer among the visitors, but the middle initials d on't match. The famous Bauer's middle initial is L., but the visitor's initial is W.)

Msnbc.com has put the full list in a handy PDF file, and also in an Excel file for those who like to sort.

Not that Bill Ayers

The White House warns that many names that may appear familiar — and controversial — do not in fact refer to the most famous people to carry those names. Jeremiah Wright is on the list, but it's not the president's former pastor. This Michael Jordan is not the basketball player. This Michael Moore is not a filmmaker. The William Ayers who took a group tour of the White House isn't the former radical from Chicago who figured so prominently in the 2008 campaign. And the Angela Davis on the list has a different middle initial than the activist and former fugitive.

The White House could have avoided some of that sort of confusion by providing more

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information on the visitors, such as an employer name and the city they hail from. For example, is the Shawn Carter who attended a poetry reading the same one who goes by Jay-Z and had campaigned for Obama?

"This unprecedented level of transparency can sometimes be confusing rather than providing clear information," a White House special counsel, Norm Eisen, wrote on the White House blog.

If you spot a name on the list that bears investigating, please drop us a note.

Limited release

Despite the accompanying White House claim of "transparency like you've never seen before," the Obama White House continues to take the same legal position as the Bush White House, arguing that the records are not public records subject to the Freedom of Information Act. Only limited "voluntary releases" are being made to settle a lawsuit filed by an advocacy group, though a federal judge has twice ruled that all the visitor logs are public.

Yet there are severe limitations to the transparency:

Most of the visitors from Inauguration Day to September will never be released by the White House under this voluntary disclosure — unless the public can guess their names. The White House policy doesn't allow members of the public or press to ask for "everyone who visited health czar Nancy-Ann DeParle," or everyone who visited on May 4, or everyone from the American Medical Association. Only individual names can be checked.

The list released at 4:30 p.m. Friday includes just about 110 names with 481 visits. Those names were among those requested by members of the public so far, for visits during the period from Inauguration Day through July. (That's why we know of visits by the wrong Bill Ayers, the wrong Angela Davis, etc., but we don't know of visits by countless unnamed lobbyists.) Members of the public who used the White House online form to check names did not receive a personal reply indicating whether or not the request was received, or whether the name appeared on the list, so the system provides no feedback. Does the absence of Bill Clinton's name on the list mean that he has not been to the White House, or that the request wasn't received by the White House online system?

A request for the complete records of all

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visitors from the first months of the administration , filed by msnbc.com, was rejected by the White House, and an appeal is pending. The news organization requested the names of all visitors to the Obama White House beginning with Inauguration Day. Msnbc.com has filed an administrative appeal with the Department of Homeland Security, which oversees the Secret Service.

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Published on *Judicial Watch* (http://www.judicialwatch.org)

Judicial Watch Files Lawsuit against Obama Administration to Obtain White House Visitor Logs

By *gstasiewicz*
Created *8 Dec 2009 - 12:26pm*
Subhead:
During October 27 White House Meeting Obama Administration Officials Sought to Make Deal with Judicial Watch on Records But Refuse to Abandon Erroneous Claim that Visitor Logs are not Subject to FOIA Law
Location:
Washington, DC -- December 8, 2009

Judicial Watch, the public interest group that investigates and prosecutes government corruption, announced today that it filed a lawsuit [1] against the U.S. Secret Service for denying Judicial Watch's Freedom of Information Act (FOIA) request for access to Obama White House visitor logs from January 20 to August 10, 2009. The Obama administration continues to advance the erroneous claim that the visitor logs are not agency records and are therefore not subject to FOIA. As Judicial Watch noted in its complaint, this claim "has been litigated and rejected repeatedly" by federal courts.

The Obama White House did voluntarily release a select number of White House visitor logs to the public. However, other records continue to be withheld in defiance of FOIA law. According to Judicial Watch's complaint [1] filed in the U.S. District Court for the District of Columbia on December 7:

> Since [Judicial Watch] sent its...FOIA request to the Secret Service, the White House has released certain visitor records voluntarily, pursuant to its discretionary release policy. The White House's voluntary production of a portion of the requested records, however, does not satisfy the Secret Service's statutory obligation to produce any and all nonexempt records responsive to Judicial Watch's request. Nor does it remedy the Secret Service's claim, contrary to well established case law, that the requested records are not agency records subject to FOIA.

Judicial Watch criticized the Obama administration over this issue [2] in a press release on October 16. The following week, a White House lawyer called Judicial Watch to set up a meeting with "senior White House officials." On October 27, Judicial Watch staff visited with White House officials led by Norm Eisen, Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the White House visitor logs, as well as other transparency and ethics issues. During the meeting, the Obama White House officials asked Judicial Watch to scale back its request and expressed hope that Judicial Watch would publicly praise the Obama administration's commitment to transparency. However, the White House refused to abandon its legally indefensible line of reasoning that White House visitor logs are not subject to

FOIA law. In a November 30 follow up letter, Mr. Eisen reiterated the Obama administration's legal position and, citing national security concerns, requested that Judicial Watch "focus and narrow (its) request."

"The courts have affirmed that these White House visitor records are subject to release under FOIA law. If the Obama administration is serious about transparency, they will agree to the release of these records under the Freedom of Information Act," said Judicial Watch President Tom Fitton. "The recent 'party crasher' scandal at the White House put the spotlight on the need for transparency under law when it comes to who visits the White House."

FOIA lawsuit Secret Service transparency visitor logs white house

(c) Judicial Watch

Source URL (retrieved on *2 May 2011 - 12:43pm*): http://www.judicialwatch.org/news/2009/dec/judicial-watch-files-lawsuit-against-obama-administration-obtain-white-house-visitor-l

Links:
[1] http://www.judicialwatch.org/files/documents/2009/jw-v-usss-complaint-12072009.pdf
[2] http://www.judicialwatch.org/news/2009/oct/obama-administration-denies-judicial-watch-foia-request-white-house-visitor-logs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., 501 School Street, S.W., Suite 700 Washington, DC 20024, Plaintiff, v. UNITED STATES SECRET SERVICE, 245 Murray Drive, Building 410 Washington, DC 20223, Defendant.	)	Case: 1:09-cv-02312 Assigned To : Kennedy, Henry H. Assign. Date : 12/7/2009 Description: FOIA/Privacy Act

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

Plaintiff Judicial Watch, Inc. brings this action against Defendant United States Secret Service to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). As grounds therefor, Judicial Watch, Inc. alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff is a non-profit, educational foundation organized under the laws of the District of Columbia and has its principal place of business at 501 School Street, S.W., Suite 700, Washington, DC 20024. Plaintiff seeks to promote integrity, transparency, and

accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Plaintiff regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

4. Defendant United States Secret Service ("the Secret Service") is an agency of the United States Government. Defendant has its principal place of business at 245 Murray Drive, Building 410, Washington, DC 20223. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. On August 10, 2009, Plaintiff sent a FOIA request to the Secret Service, by certified U.S. mail, return receipt requested, seeking access to the following records:

> All official visitor logs and/or other records concerning visits made to the White House from January 20, 2009 to the present.

6. According to U.S. Postal Service records, the Secret Service received Plaintiff's FOIA request on August 14, 2009. Pursuant to 5 U.S.C. § 552 (a)(6)(A)(i), the Secret Service was required to respond to Plaintiff's request within twenty (20) working days of receipt, or by September 14, 2009.

7. On October 8, 2009, Craig W. Ulmer, Special Agent in Charge, Freedom of Information and Privacy Acts Officer, sent Plaintiff a letter informing Plaintiff that the Secret Service interpreted the request to encompass "Access Control Records System (ACR) records and/or Workers and Visitors Entry System (WAVES) records" and asserting that the Secret Service determined the requested records "are not agency records subject to the FOIA."

8. On November 3, 2009, Plaintiff sent a timely administrative appeal letter to the U.S. Secret Service specifically appealing the Secret Service's denial of Plaintiff's request. In its appeal letter, Plaintiff demonstrated that the Secret Service's assertion that the requested records are not agency records subject to FOIA has been litigated and rejected repeatedly. *Washington Post v. U.S. Dep't of Homeland Security*, 459 F. Supp 2d 61, 72 (D.D.C. 2006) ("the WAVES records are subject to FOIA processing"); *see also, Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 592 F. Supp. 2d 111, 124 (D.D.C. 2009); *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 527 F. Supp. 2d 76, 89 (D.D.C. 2007); and *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 459 F. Supp. 2d 61, 71-72 (D.D.C. 2006).

9. Contrary to well-established case law, on December 3, 2009, Kevin L. Prewitt, Deputy Director of the Secret Service, denied Plaintiff's administrative appeal, asserting that the Secret Service "maintains its position as stated in the October 8, 2009 response" that the requested records are not agency records subject to FOIA.

10. Because the Secret Service has denied Plaintiff's administrative appeal, Plaintiff has exhausted all administrative remedies with respect to its August 14, 2009 FOIA request, pursuant to 5 U.S.C. § 552(a)(6)(A)(ii).

11. Since Plaintiff sent its August 14, 2009 FOIA request to the Secret Service, the White House has released certain visitor records voluntarily, pursuant to its discretionary release policy. The White House's voluntary production of a portion of the requested records, however, does not satisfy the Secret Service's statutory obligation to produce any and all nonexempt

records responsive to Plaintiff's request. Nor does it remedy the Secret Service's claim, contrary to well-established case law, that the requested records are not agency records subject to FOIA.

COUNT 1
(Violation of FOIA)

12. Plaintiff realleges paragraphs 1 through 11 as if fully stated herein.

13. Defendant has violated FOIA by failing to produce the requested records.

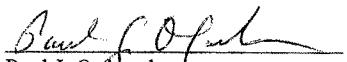
14. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with the requirements of FOIA.

WHEREFORE, Plaintiff respectfully requests that the Court: (1) declare White House visitor logs are Secret Service records and are subject to FOIA; (2) declare Defendant's failure to comply with FOIA to be unlawful; (3) order Defendant to search for and produce any and all non-exempt records responsive to Plaintiff's August 10, 2009 request and a *Vaughn* index of allegedly exempt records responsive to the request by a date certain; (4) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to the request; (5) grant Plaintiff an award of attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (6) grant Plaintiff such other relief as the Court deems just and proper.

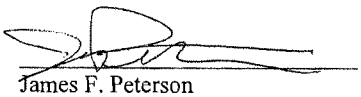
Dated: December 7, 2009

Respectfully submitted,

JUDICIAL WATCH, INC.



Paul J. Orfanedes
D.C. Bar No. 429716



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501 School Street, S.W., Suite 700
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Counsel for Plaintiff

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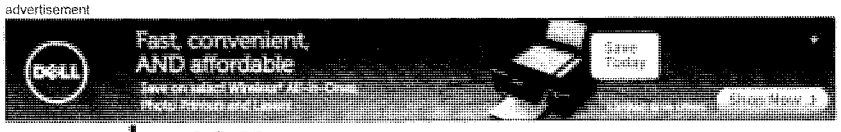

msnbc.com

Group sues for Obama White House visitor list

Secret Service has denied requests from Judicial Watch, msnbc.com

By Bill Dedman Investigative reporter

msnbc.com

updated 12/9/2009 3:02:26 PM ET

The nonprofit conservative group Judicial Watch has sued the U.S. Secret Service after the Obama administration again denied a request for copies of the list of visitors to the White House.

The records are being sought by journalists and public interest groups to help determine who is influencing White House policy on health care, the economy and a host of other issues.

Under the Obama policy, most of the names of visitors from Inauguration Day in January through the end of September will never be released. After the Secret Service and the White House denied a request for those records, Judicial Watch filed suit on Monday in federal court in Washington.

Like the Bush administration before it, the Obama White House argues that the visitor records belong to the White House, not the Secret Service. White House records are not subject to the Freedom of Information Act, as agency records would be. Federal Judge Royce C. Lamberth ruled twice during the Bush administration that White House visitor logs belong to the Secret Service, which creates and maintains them, and must be released.

To settle lawsuits against the Bush and Obama administrations, filed by the liberal group Citizens for Responsibility and Ethics in Washington, or CREW, the Obama administration has released the names of hundreds of visitors, out of the hundreds of thousands who have been to the White House for meetings, events or tours. The administration has promised to release more of the names of visitors for the period from October onward. The first wave of records is due near the end of this year.

Even for the names it has released, the White

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House has not provided a city or affiliation, such as a company name or organization represented, making it difficult or impossible to tell whether a person named on the list is a well-known person with that name. And some names are not being released at all, including potential Supreme Court nominees, personal guests of the first family and certain security officials.

The White House has set up a Web page where members of the public can request the release of names of visitors, but that system gives results only for the names of visitors that the public can guess . If the public can't guess who may have visited the White House between January and September, it can't find out the names.

In addition, although the White House system requires requesters to submit their e-mail address, requests are not acknowledged by the White House, and no reply is sent to the requesters. The names sought, if they correspond to actual visitors, just show up in the next batch of names released by the White House. So far, each release of names by the White House has happened on the evening before a holiday, the classic Washington tactic for burying uncomfortable news.

Negotiations with White House

Judicial Watch, in a press release, described being invited to the White House to discuss its request. It met on Oct. 27 with Norman L. Eisen, special counsel to the president, who happens to be a founder of CREW, which had dropped its own lawsuits on this issue.

"During the meeting, the Obama White House officials asked Judicial Watch to scale back its request and expressed hope that Judicial Watch would publicly praise the Obama administration's commitment to transparency," Judicial Watch said. "However, the White House refused to abandon its legally indefensible line of reasoning that White House visitor logs are not subject to FOIA law.

"If the Obama administration is serious about transparency, they will agree to the release of these records under the Freedom of Information Act," said Judicial Watch President Tom Fitton.

White House officials did not reply Wednesday to a request for comment on the Judicial Watch lawsuit.

Request by msnbc.com also denied

A similar request by msnbc.com was rejected by the Secret Service, which referred us to the

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White House, which also denied the request. The Secret Service denied an administrative appeal of msnbc.com's request on Monday.

The White House now says that national security is a reason not to release the records for January through September, an issue not raised by the Bush or Obama administrations in their previous legal filings on this issue.

"The inherited visitor entrance system was not structured to identify sensitive records," Eisen wrote to msnbc.com. "As a result, we cannot make a broad retroactive release of White House visitor records without raising profound national security concerns. For example, the release of certain sensitive national security records encompassed in your request could assist foreign intelligence agencies to identify and target U.S. government officials working on sensitive national security issues."

Background on this issue is in our previous stories, at the links below. Documents related to the cases are in the box accompanying this article.

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AP review: Use of FOIA exemptions rose in 2009

By The Associated Press
03.16.10

WASHINGTON — Federal agencies haven't lived up to President Barack Obama's promise of a more open government, increasing their use of legal exemptions to keep records secret during his first year in office.

An Associated Press review of Freedom of Information Act reports filed by 17 major agencies found that the use of nearly every one of the law's nine exemptions to withhold information from the public rose in fiscal year 2009, which ended last October.

Among the most frequently used exemptions: one that lets the government hide records that detail its internal decision-making. Obama specifically directed agencies to stop using that exemption so frequently, but that directive appears to have been widely ignored.

Major agencies cited that exemption at least 70,779 times during the 2009 budget year, up from 47,395 times during President George W. Bush's final full budget year, according to annual FOIA reports filed by federal agencies. Obama was president for nine months in the 2009 period.

Departments used the exemption more even though Obama's Justice Department told agencies that disclosing such records was "fully consistent with the purpose of the FOIA," a law intended to keep government accountable to the public.

For example, the Federal Aviation Administration cited the exemption in refusing the AP's FOIA request for internal memos on its decisions about a database showing incidents in which airplanes and birds collided. The FAA initially tried to withhold the bird-strike database from the public, but later released it under pressure.

The FAA claimed the same exemption to hold back nearly all records on its approval of an Air Force One flyover of New York City for publicity shots — a flight that prompted fears in the city of a Sept. 11-style attack. It also withheld internal communications during the aftermath of the public relations gaffe.

In all, major agencies cited that or other FOIA exemptions to refuse information at least 466,872 times in budget year 2009, compared with 312,683 times the previous year, the review found. Agencies often cite more than one exemption when withholding part or all of the material sought in an open-records request.

All told, the 17 agencies reviewed by AP reported getting 444,924 FOIA requests in fiscal 2009, compared with 493,610 in fiscal 2008.

The AP examined the 2008 and 2009 budget year FOIA reports from the departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury and Veterans Affairs; the Environmental Protection Agency; and the Federal Reserve Board.

Other FOIA exemptions cover information on national defense and foreign relations, internal agency rules and practices, trade secrets, personal privacy, law enforcement proceedings, supervision of financial institutions and geological information on wells.

One, known as Exemption 3, covers dozens of types of information that Congress shielded from disclosure when passing other laws.

In sentences that are often vaguely worded and buried deep in legislation, Congress has granted a wide array of information special protection over the years. Information related to grand jury investigations, the additives in cigarettes, juvenile arrest records, the identities of people applying restricted-use pesticides to their crops, and the locations of historically significant caves are a sampling of the broad range of information the public cannot get under FOIA.

The chairman of the Senate Judiciary Committee, Sen. Patrick Leahy, D-Vt., was so concerned about what he called "exemption creep" that last year he successfully pressed for a new law that requires FOIA exemptions to be "clear and unambiguous."

The federal government cited Exemption 3 protections to withhold information at least 14,442 times in the last budget year, compared with at least 13,599 in the previous one, agency FOIA reports show.

The prolific use of FOIA exemptions is one measure of how far the federal government has yet to go to carry out Obama's promise of openness. His first full day in office, Obama told agencies the Freedom of Information Act, "which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open government."

Obama told agencies they shouldn't hide information merely because it might make them look bad. "The presumption of disclosure should be applied to all decisions involving FOIA," Obama wrote.

Following up on Obama's words, the Justice Department advised agencies against withholding records sought under FOIA "merely because an exemption legally applies." Most recently, the White House encouraged agency officials to hold contests, complete with prizes, to encourage employees to promote open government.

White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer called on agency heads today to improve their handling of FOIA requests and assess whether they are devoting the resources needed to respond to requests "promptly and cooperatively."

Describing the Justice Department's actions on FOIA yesterday at the start of Sunshine Week, when news and other organizations promote open government and freedom of information, Attorney General Eric Holder said his agency is making progress.

In the past year, "we've seen something truly promising: an obvious and encouraging change in our

government's attitude toward information," Holder told Justice Department employees in a speech. "We must keep up this work."

Holder noted that Justice provided everything sought in a FOIA request in more than 1,000 more cases than it had the previous year.

"Put simply, I asked that we make openness the default, not the exception. Today, I'm pleased to report that the disturbing 2008 trend — a reduction in this department's rate of disclosures — has been completely reversed," he said. "While we aren't where we need to be just yet, we're certainly on the right path."

Holder was joined yesterday at the Justice Department's Great Hall by information specialists from the Homeland Security, Defense and Treasury Departments as well as the U.S. Trade Representative's office and the Environmental Protection Agency. All said they have made substantial progress in opening up records, while agreeing more needs to be done.

Much of the Obama administration's early effort on FOIA seems to have been aimed at clearing out a backlog of old cases: The number of requests still sitting around past the time limits spelled out in the open-records law fell from 124,019 in budget year 2008 to 67,764 at the end of the most recent budget year over the 17 agencies, the AP's review found. There is no way to tell whether those whose old cases that were closed ultimately received the information they sought.

Published on *Judicial Watch* (http://www.judicialwatch.org)

Obama Justice Department Tells Court to Shield White House Visitor Logs from Full Disclosure and FOIA Law

By *JudicialWatchWeb*
Created *29 Apr 2010 - 11:16am*
Subhead:
Court Precedent Contradicts Obama Administration Position Justice Department Lawyers Claim Previous Court Cases "Incorrectly Decided"
Location:
Washington, DC -- April 29, 2010

Judicial Watch, the public interest group that investigates and prosecutes government corruption, announced today that the Obama Justice Department advanced the erroneous claim in an April 21, 2010, court filing [1] that Secret Service's logs of White House visitors are not subject to the Freedom of Information Act (FOIA). As Judicial Watch noted in its original complaint filed on December 7, 2009, this claim "has been litigated and rejected repeatedly" by the courts.

The Justice Department filing comes in Judicial Watch's FOIA lawsuit seeking records for all visitors to the White House from January 20, 2009, to the present. On February 22, 2010, Judicial Watch filed a "Motion for Partial Summary Judgment" in its lawsuit, noting that the rule of law and court precedent do not support the position of the Obama administration:

> "At issue here is whether Secret Service visitor logs are agency records subject to the Freedom of Information Act ('FOIA'), 5 U.S.C. § 552. To date, every court that has reached this issue has concluded that the requested documents are agency records and must be processed in response to a properly submitted FOIA request. As no disputes of material fact exist as to the nature of the records, summary judgment as to this straightforward legal issue should be entered now."

Noting court precedent, Judicial Watch argued in its motion that the visitor logs were "created by" the U.S. Secret Service and that they remain "under agency control." Judicial Watch also noted that the U.S. Secret Service had released the visitor logs in response to previous FOIA requests from Judicial Watch and other parties, further demonstrating that these records are under the control of the U.S. Secret Service and subject to FOIA.

However, Obama Justice Department lawyers countered in their court filing that "the district court cases on which [Judicial Watch] relies for a contrary conclusion were incorrectly decided," and stuck by their argument that the visitor logs "are not agency (Secret Service) records subject to FOIA." Justice Department lawyers also repeated the blanket argument that to release these records could compromise national security and praised the Obama administration's efforts to "voluntarily" release some White House visitor logs to the public. (In 2009, the Obama White

House began to release, in order to settle related litigation, a select number of Secret Service visitor logs to the public. However, tens of thousands of other records continue to be withheld in defiance of FOIA law.)

The Obama White House admits in the new court filing that it is taking records from the Secret Service in order to ensure that they are not disclosed under FOIA. The Obama administration speculates that there would be "dire national security consequences" if certain White House visitors are disclosed. The Obama White House wants to be able to withhold visitor logs until as long as 12 years after President Obama leaves office.

On October 27, at the request of the White House, Judicial Watch staff visited with senior White House officials led by Norm Eisen, Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the visitor logs. During the meeting, White House officials offered to make some accommodations to Judicial Watch on the visitor logs and encouraged Judicial Watch to publicly praise the Obama administration's commitment to transparency. However, the White House refused to abandon its legally indefensible contention that the visitor logs are not subject to FOIA law, prompting Judicial Watch's lawsuit.

"The Obama administration would undermine a key transparency law in order to keep White House visitor logs secret," said Judicial Watch President Tom Fitton. "Only the Obama administration could offer to release pre-scrubbed White House visitor logs while withholding tens of thousands of other records and call it transparency. President Obama has violated his campaign promises of openness and transparency. We hope the court will do what it has done on previous occasions and uphold FOIA law."

Dept of Justice FOIA Government Transparency Secret Service visitor logs white house

(c) Judicial Watch

Source URL (retrieved on *2 May 2011 - 12:45pm*): http://www.judicialwatch.org/news/2010/apr/obama-justice-department-tells-court-shield-white-house-visitor-logs-full-disclosure-a

Links:
[1] http://www.judicialwatch.org/files/documents/2010/jw-v-usss-def-cm4sjopp2sj-04212010.pdf

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:09-cv-02312
UNITED STATES SECRET SERVICE,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Assistant Attorney General

JOHN R. TYLER (DC Bar 297713)
Assistant Branch Director

BRAD P. ROSENBERG (DC Bar 467513)
Trial Attorney

COUNSEL FOR DEFENDANT
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INTRODUCTION

Plaintiff Judicial Watch, Inc. ("Judicial Watch") has filed an unprecedented Freedom of Information Act ("FOIA") request, seeking White House visitor records known as "WAVES" and "ACR" records for all visitors to the White House "from January 20, 2009 to present." Rather than seek WAVES and ACR records reflecting visits to the White House by a specific individual or individuals, Judicial Watch asks the United States Secret Service ("USSS" or "Secret Service")—or in reality the White House—to produce *all* of the Obama Administration's WAVES and ACR visitor records. The relief that plaintiff requests is all the more striking in light of the White House's recent announcement of an historic voluntary disclosure policy for White House visitor records. Pursuant to that policy (which was announced on September 4, 2009, prior to Judicial Watch's filing of this lawsuit), the White House has been releasing WAVES visitor records (which include relevant parts of ACR visitor records), subject to a few narrow exceptions explained below, since September 2009. As for records created between January 20, 2009 and September 15, 2009, which includes the period of time covered by Judicial Watch's FOIA request, the White House has created a website where the public can make requests for specific visitor records. Pursuant to requests made via that website, the White House has already released thousands of visitor records for the pre-September 15 time period.

Judicial Watch, like any member of the public, is welcome to request specific pre-September 15 visitor records through the White House's website. It has explicitly been invited by the White House to do so, and the White House remains willing to process a request by Judicial Watch for visitor records relating to a list of names that Judicial Watch may choose to provide. As a matter of law, however, Judicial Watch is not entitled under FOIA to *compel*

production of White House visitor records for several reasons.

First, WAVES and ACR records are not agency (Secret Service) records subject to FOIA. White House officials and staff provide information on anticipated visitors to the White House Complex to the Secret Service only on a temporary and confidential basis and only for the purpose of allowing the Secret Service to perform its statutory function to protect the President and the place where he lives and works. This accommodation of the Secret Service's statutory protective function does not divest the President and Vice President of control over White House visitor records, which remain Presidential records under the Presidential Records Act rather than agency records under FOIA. The district court cases on which plaintiff relies for a contrary conclusion were incorrectly decided for the reasons established below, including the fact that subjecting White House visitor records to FOIA would give rise to significant separation of powers concerns contrary to Congress' intent when enacting FOIA. The Court should therefore avoid a constitutional issue by holding that visitor records are Presidential records, particularly given the fact that the White House is voluntarily disclosing the records to the public.

Second, even if WAVES and ACR records were subject to FOIA, the records should be exempted from release due to national security concerns. The unprecedented breadth of Judicial Watch's FOIA request renders the request virtually impossible to process without creating the unacceptable risk that sensitive records implicating national security concerns would be inappropriately released. Literally hundreds of thousands of records are implicated by Judicial Watch's request, a certain number of which reflect visits that, if disclosed, could have dire national security consequences for the reasons set forth below and in the classified declaration accompanying defendant's motion. Prior to September 15, 2009, the WAVES system was not

designed to flag the sensitive nature of meetings. As a result, to determine now whether a particular pre-September 15, 2009 visit implicates national security, all visitor records created by the White House National Security Staff ("NSS") would have to be reviewed by the particular White House visitee or the individual who entered the visitor information into the WAVES database. It would be virtually impossible to conduct such a review with the necessary degree of accuracy, in part, because the NSS is primarily staffed with detailees from other executive agencies who return to those agencies or sometimes leave government entirely at the conclusion of their details. Furthermore, to assure accuracy, pre-September 15, 2009 NSS appointments would also have to be reviewed by the President's senior national security advisors, which would compromise the ability of NSS leadership to conduct national security business and give rise to significant separation of powers concerns. Finally, because several non-NSS offices within the White House also participate in and schedule national security meetings, a national security review would necessarily require a high-level review of non-NSS visitor records by senior White House officials outside the NSS, which would require significant time and attention and inhibit their ability to perform their functions.

For the foregoing reasons, and as set forth in greater detail below, this Court should deny plaintiff's motion for partial summary judgment and grant defendant's cross-motion for summary judgment.

BACKGROUND

FACTUAL BACKGROUND

1. Records Regarding Visitors To The White House Complex

Because the safety of the President and Vice President implicates national security and other governmental interests of the highest order, Congress has directed that both of these constitutional officers receive protection from the United States Secret Service. See 18 U.S.C. §§ 3056(a), 3056A(a). No other official (except the President-elect and Vice President-elect) is required by law to accept such protection. The Secret Service's protection extends not only to the physical persons of the President and Vice President, but also to the places where they live and work, including the White House Complex,[1] which contains the offices of the President and his staff and offices for the Vice President and his staff. See id. § 3056A(a)(1), (2), (4), (6). See Declaration of Donald E. White ("White Decl.") ¶ 2.

As part of its statutorily mandated function to provide security for the White House Complex, the Secret Service clears proposed visitors for entry, and controls the entry and exit of visitors. To enable the Secret Service to perform this protective function, authorized personnel, including, but not limited to, Presidential and/or Vice Presidential staff, provide identifying information regarding proposed visitors to the Secret Service. Declaration of Philip C. Droege ("Droege Decl.") ¶ 5; White Decl. ¶ 7. This information is provided by the White House to the Secret Service confidentially and on a temporary basis, solely for the purpose of allowing the

[1] The "White House Complex," for purposes of access as secured by the Secret Service, includes the White House itself along with the Eisenhower Executive Office Building, the New Executive Office Building, and the grounds encompassing the White House and the Eisenhower Executive Office Building. See Declaration of Donald E. White ("White Decl.") ¶ 4.

Secret Service to conduct background checks to determine whether, and/or under what conditions, a visitor should be admitted, and to allow the Secret Service to verify the visitor's admissibility at the time of the visit. Droege Decl. ¶ 5; White Decl. ¶ 7.

Authorized pass holders at the White House Complex usually provide the Secret Service with information on anticipated visitors to the White House Complex by entering the information into a computer, which automatically transmits it to the Secret Service. See Droege Decl. ¶ 6. A Secret Service employee then verifies that the requestor is authorized to make appointments for the location requested, adds or changes any other information that may be necessary, and conducts background checks; the information is ultimately transmitted to the White House Access Control System ("WHACS"), which includes the Worker and Visitor Entrance System ("WAVES"). See White Decl. ¶¶ 6, 7. The information provided to the Secret Service by the authorized White House pass holder includes information such as the proposed visitor's name, date of birth, Social Security number, the date, time and location of the planned visit, the name of the official or employee submitting the request, the name of the person to be visited, and the date of the request. Droege Decl. ¶ 5. The Secret Service uses the information it is provided to determine whether there is any protective concern with admitting the proposed visitor to the White House Complex, as well as to verify the visitor's admissibility at the time of the visit. Id.; White Decl. ¶ 7. Moreover, some WAVES records are annotated by Secret Service personnel, in note and description fields, with limited information as a result of background checks or instructions, including coded instructions to Secret Service officers. White Decl. ¶ 8.

Once an individual is cleared into the White House Complex, the visitor usually receives a pass, which is swiped over one of the pass readers at entrances to and exits from the Complex.

Swiping a pass automatically creates a record in the Access Control Records System ("ACR"). Droege Decl. ¶ 7; White Decl. ¶ 9. An ACR record includes information such as the visitor's name and badge number, the time and date of the swipe, and the post at which the swipe was recorded. Droege Decl. ¶ 7; White Decl. ¶ 9. Once a visit takes place, WAVES records are typically updated electronically with information showing the time and place of the visitor's entry into and exit from the White House Complex. Droege Decl. ¶ 8; White Decl. ¶ 10.

2. The White House Retains Custody And Control Over White House Visitor Information

Both the Secret Service and the White House recognize that the President and Vice President exercise exclusive legal control over WAVES and ACR records. Droege Decl. ¶¶ 12-14; White Decl. ¶ 11. After a visit is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records. White Decl. ¶ 11. The President and Vice President, by contrast, have a continuing interest in such records for their operational and historical value. Droege Decl. ¶¶ 9, 13.

It has been the practice of the Secret Service, since at least 2001, to transfer newly-generated WAVES records on CD-ROM to the White House Office of Records Management ("WHORM"), generally every 30 to 60 days. See Droege Decl. ¶ 10; White Decl. ¶ 11.[2] The intent of the Secret Service is to delete WAVES records from its computer system once they are transferred to the WHORM. White Decl. ¶ 11. Similarly with respect to ACR records, the Secret Service and the White House, at least as early as 2001, and upon revisiting the issue in 2004, recognized and agreed that they should be treated in a manner generally consistent

[2] The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006. Droege Decl. ¶ 10; White Decl. ¶ 11.

with the treatment of WAVES records. Droege Decl. ¶ 11; White Decl. ¶ 13. Thus, the Secret Service and the White House determined that ACR records should be transferred to the WHORM and deleted from the Secret Service's computers, like WAVES records. White Decl. ¶ 13. In May 2006, the Secret Service transferred ACR records covering the period from January 2001 to April 2006 to the WHORM. Droege Decl. ¶ 11; White Decl. ¶ 13. Since that time, the Secret Service has continued to transfer ACR records to the WHORM. See Droege Decl. ¶ 11; White Decl. ¶ 13.[3]

In May 2006 (more than three years before the plaintiff submitted its FOIA request), the Secret Service Records Management Program and the WHORM entered into a Memorandum of Understanding ("MOU"), which both documents past practice and interests as understood at the time regarding WAVES and ACR records, and "confirm[s] the legal status of [these] records" and WHORM's management and custody of them. See Droege Decl. ¶ 12 & Attachment thereto; White Decl. ¶ 12 & Attachment thereto. The MOU provides, among other things, that the White House has a continuing interest in WAVES and ACR records, and that the White House continues to use the information contained in such records for various historical and informational purposes. Droege Decl. ¶ 13 & Attachment thereto (MOU ¶ 20). The MOU reflects that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records." Attachment to Droege and White Declarations (MOU ¶ 24). The Secret Service acknowledges in the MOU that its temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an

[3] Although the Secret Service has retained copies of WAVES and ACR data due to, among other things, then-pending litigation, it is in the process of determining the appropriate disposition of those data. Droege Decl. ¶¶ 10, 11; White Decl. ¶¶ 11, 13.

orderly and efficient transfer of the records to the WHORM. Droege Decl. ¶ 14 & Attachment thereto (MOU ¶ 22).

3. The White House Voluntary Disclosure Policy

On September 4, 2009, the White House announced its new policy to voluntarily disclose White House records reflecting visitor appointments as "another important step toward a more open and transparent government." Ex. A (Opening the people's house). Pursuant to that policy, effective for visitor records created after September 15, 2009, the White House makes available online WAVES visitor records (including those parts of ACR records that are incorporated into WAVES records after a visit) from 90 - 120 days prior. See Ex. B (White House Voluntary Disclosure Policy Visitor Access Records). However, there are a few narrow, but important, exceptions to that policy. Specifically, the White House will not release portions of records that contain particularly sensitive and private information (*e.g.*, dates of birth, social security numbers, and contact phone numbers, or the USSS-entered instructions in the description field); records that implicate the personal safety of White House Complex pass holders (their daily arrival and departure); records whose release would threaten national security interests; records relating to purely personal guests of the First Family and the Vice President and his family (*i.e.*, visits that do not involve official or political business); or records related to a small group of particularly sensitive meetings (*e.g.*, visits of potential Supreme Court nominees). See Ex. B. As for pre-September 15 records, anyone can request—subject to the exceptions outlined above—the release of visitor records relating to specific individuals through the White House's website. See Ex. B; Ex. C (Request White House Visitor Access Records). To date, more than 2,500 pre-September 15 and more than 250,000 post-September 15 WAVES visitor records have

been released pursuant to this policy. See Droege Decl. ¶¶ 17, 18.

In order to account properly for the exceptions to the voluntary disclosure policy, the ability to designate sensitive records was added to the WAVES system. For all post-September 15 appointments, White House Complex staff submitting an access request can designate whether the public release of the visitor record would implicate national security concerns. See Declaration of Nathan D. Tibbits ("Tibbits Decl.") ¶¶ 14-15.[4] The ability of the National Security Staff ("NSS") to flag sensitive visits in real time allows the White House to disclose non-exempt post-September 15 WAVES visitor records, given the very large number of individuals who visit the White House each month.[5] But even with this ability, the NSS double checks all NSS visitor records that were not initially designated for withholding in order to ensure that no national security sensitive records are released. See Tibbits Decl. ¶¶ 23-26.[6] Even

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[4] To demonstrate the importance of this enhancement, the capacity to submit WAVES requests was discontinued for White House staff until training occurred regarding the new functionality of the WAVES system. See Tibbits Decl. ¶ 15.

[5] NSS is the primary office through which the most sensitive national security information is transmitted from the Intelligence Community to the President and through which national security policy is made. Tibbits Decl. ¶ 2. Owing to this fact, the majority of work conducted by NSS is classified or impacts highly sensitive national security matters. Id.

[6] To accomplish this task each month, the NSS sorts NSS visitor records by visitee name and sends to each visitee a list of their visitors, along with the date and time of arrival and other information that may aid the visitee in making the exemption determination. Tibbits Decl. ¶ 23. The list is also sent to the individual who entered the appointment, if different from the visitee. Id. The visitee must review and validate that the visit need not be exempted for national security reasons. Id. If the visitee is no longer on staff, then the person who entered the request must review it. Id. If a determination is still uncertain, senior leadership will look at the information that is available and cross check, to the extent possible, against other meetings on that day to determine if the visitor was part of an exempted meeting or visit. Id. Ultimately, in the interest of national security, if the nature of the visit cannot be determined, the default position is to exempt the record. Id.

after this review, records that are designated for public disclosure are reviewed for a third time by the Director for Counterintelligence and the Senior Director for Administration before they are released. Tibbits Decl. ¶ 24.

Other units within the Executive Office of the President ("EOP")—which all designate sensitive records at the time of creation—also audit their own records prior to release. See Tibbits Decl. ¶ 22. That is because other EOP components, such as the President's Intelligence Advisory Board and the Office of the Vice President (including the Vice President's national security staff) regularly schedule national security meetings. See Tibbits Decl. ¶ 36. In addition, senior White House officials regularly attend meetings on national security, and will often schedule national security meetings that may involve participants from various components within the White House. See Tibbits Decl. ¶ 36. An authorized White House pass holder may also designate for withholding visitor records that, if released, would expose sensitive, high-level Executive Branch deliberations (such as the afore-mentioned visits of potential Supreme Court nominees). Tibbits Decl. ¶¶ 14-16.[7]

4. Judicial Watch's FOIA Request.

Judicial Watch sent a FOIA request dated August 10, 2009 to the Secret Service. That request sought "[a]ll official visitor logs and/or other records concerning visits made to the White House from January 20, 2009 to present." Ex. D (Judicial Watch FOIA Request). The Secret Service responded by letter dated October 8, 2009 by stating that it interpreted Judicial Watch's FOIA request "to encompass Access Control Records System (ACR) records, and/or Workers

[7] To date, no such "non-national security highly sensitive" records have been withheld pursuant to the voluntary disclosure policy. See Tibbits Decl. ¶ 16.

and Visitors Entry System (WAVES) records." Ex. E (USSS Response to FOIA Request). The Secret Service then stated that the records "are not agency records subject to the FOIA," but instead "are records governed by the Presidential Records Act . . . and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President." Id. (internal citation omitted). On that basis, the Secret Service referred Judicial Watch's FOIA request to the White House for consideration pursuant to the White House's recently-announced voluntary disclosure policy. Id.

Judicial Watch filed an administrative appeal by letter dated November 3, 2009. In its letter, Judicial Watch asserted that the Secret Service's claim that the requested records are not agency records subject to the FOIA has previously been litigated and rejected. Ex. F (Judicial Watch Appeal).[8] The Secret Service denied that appeal by letter dated December 3, 2009, Ex. G (USSS Response to Appeal), and Judicial Watch filed this lawsuit on December 7, 2009.

STATUTORY BACKGROUND

Both the FOIA, which applies to federal agency records, and the Presidential Records Act ("PRA"), which applies to Presidential and Vice Presidential records, provide for the disclosure of Executive Branch records, but the timing and circumstances of disclosure differ under the two statutes. The FOIA provides for the disclosure, subject to certain exemptions, of records of an

[8] Judicial Watch did not appeal the Secret Service's interpretation of Judicial Watch's FOIA request as one for WAVES and ACR records. *See* Exs. E, F. Moreover, Judicial Watch has framed its summary judgment motion as one seeking the release of "visitor logs," which it characterizes as WAVES and ACR records. See Pl. Br. at 1 (referring to "Secret Service visitor logs"); id. at 3 (same); id. at 4 ("[t]he requested records are generated by two electronic systems the Secret Service uses to monitor visitors to the White House – the Worker and Visitor Entrance System ("WAVES") and the Access Control Records System ("ACR")."); id. at 6 (referring to WAVES and ACR records). Accordingly, the parties are in agreement that plaintiff's FOIA request, as well as this litigation, involve only WAVES and ACR records.

"agency." 5 U.S.C. § 552(a). Generally, an agency must respond to a request for records under FOIA within twenty working days, and must "make a determination with respect to any appeal within twenty [working] days," id. § 552(a)(6)(A)(ii), although these time limitations may, in "unusual circumstances," be extended. Id. § 552(a)(6)(B)(I).

The Supreme Court has made clear, however, that the term "agency" under the FOIA does not encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)) (records of telephone calls made by Assistant to the President for Natural Security Affairs are not subject to FOIA); see Armstrong v. Executive Office of the President, 90 F.3d 553, 558 (D.C. Cir. 1996) (records of National Security Council ("NSC") are not subject to FOIA, because NSC is "more . . . like the White House Staff, which solely advises and assists the President" than "an agency to which substantial independent authority has been delegated"). Owing in part to the Vice President's role as a close presidential advisor, the Vice President and his staff also are not subject to FOIA. See Armstrong v. Bush, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (distinguishing Office of the Vice President from agencies that create "federal records"); Schwarz v. U.S. Dep't of the Treasury, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000) (Office of the Vice President not subject to the FOIA), aff'd, 2001 WL 674636 (D.C. Cir. 2001).

While FOIA governs the disclosure of agency records, the Presidential Records Act sets forth a different scheme for the preservation, disclosure, and disposal of Presidential and Vice Presidential records. Under the PRA, records reflecting "the activities, deliberations, decisions, and policies" of the Presidency or Vice Presidency are "maintained as Presidential [or Vice

Presidential] records." 44 U.S.C. § 2203(a); see id. § 2207 ("Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records."). As the D.C. Circuit has recognized, records subject to the PRA do not include "agency records" as that term is used in the FOIA. See Armstrong v. Executive Office of the President, 90 F.3d at 556.

Under the terms of the PRA, while in office, a President or Vice President may not dispose of even "Presidential [or Vice Presidential] records that no longer have administrative, historical, informational, or evidentiary value," without obtaining the written views of the Archivist of the United States, which includes giving the Archivist an opportunity to consult with Congress on the proposed disposition. 44 U.S.C. § 2203(c), (d), (e).[9] When a President or Vice President leaves office, the Archivist "assume[s] responsibility for the custody, control, and preservation of, and access to" the Presidential or Vice Presidential records of the departing administration. Id. § 2203(f)(1).

The PRA imposes upon the Archivist "an affirmative duty to make [Presidential and Vice Presidential] records available to the public as rapidly and completely as possible," subject to the conditions set forth in the statute. Id. Absent specific action by the President or Vice President, the Archivist must generally make records covered by the PRA available under the FOIA five years after the President or Vice President leaves office. Id. § 2204(b)(2), (c)(1). However, the President or Vice President may, before leaving office, "specify durations, not to exceed 12 years, for which access shall be restricted with respect to information" in specified categories of PRA records, such as "confidential communications requesting or submitting advice, between

[9] If the Archivist reports the proposed disposal to Congress, the President must then submit a schedule for the disposal to Congress at least sixty days before the "proposed disposal date." 44 U.S.C. § 2203(d).

the President and his advisers, or between such advisers." Id. § 2204(a); see Armstrong v. Executive Office of the President, 90 F.3d at 556 (PRA records "are to be made publicly available five years after [the President or Vice President] leaves office, except that national defense and certain other information is to be made available no later than 12 years after the end of a [P]resident's [or Vice President's] term."). Thus, all Presidential and Vice Presidential records become subject to potential disclosure no later than twelve years after the officeholder leaves office.

The legislative history of the PRA explains the rationale behind the delayed disclosure of Presidential and Vice Presidential records as opposed to agency records under the FOIA. In passing the bill that became the PRA, Congress recognized that "premature disclosure" of Presidential or Vice Presidential records could have a "chilling effect on presidents and the frankness of advice they could expect from their staffs." See H.R. Rep. No. 95-1487, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5739. Indeed, Congress recognized that seeking to require premature disclosure "might eventually diminish the completeness of the written record created and left by chief executives." Id. And Congress acknowledged the need to consider "the expectation of confidentiality of executive communications to avoid the prospect of a constitutional infirmity." Id. The PRA thus reflects an attempt to balance these important considerations against the desire for "ready availability" of Presidential and Vice Presidential records. Id.; see id. at 15, reprinted in 1978 U.S.C.C.A.N. at 5746 (noting that Congress sought to balance "the objectives of assuring early availability with the concern that the premature disclosure of sensitive presidential records will eventually result in less candid advice being placed on paper and a depleted historical record").

As set forth in detail below, WAVES and ACR records fit the definition of Presidential records. They are historically significant and document the activities of the President and Vice President. Treating these records as Presidential records ensures their long-term preservation; at the same time, the White House's voluntary disclosure policy permits their near-immediate disclosure, thus furthering the goal of transparency in government.

ARGUMENT

I. WAVES AND ACR RECORDS ARE PRESIDENTIAL RECORDS, NOT AGENCY RECORDS SUBJECT TO FOIA.

The plaintiff seeks records of visitors to the White House Complex that are derived from information obtained from the President's and Vice President's advisers and staff. The Secret Service uses such records, for a brief time, in fulfillment of its statutory duties to protect the President and the place where he lives and works. Accommodating the Secret Service's statutory protective function does not divest the President of control over these records—neither as a matter of fact nor as a matter of law under the FOIA—and the records remain Presidential records under the Presidential Records Act rather than agency records under FOIA.

The Supreme Court has held that documents constitute "agency records" subject to FOIA if they (1) are created or obtained by an agency, and (2) in the agency's control. See U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989). Ordinarily, the requisite "control" exists when the records "have come into the agency's possession in the legitimate conduct of its official duties." Id. at 145. As the D.C. Circuit has stressed, however, where a non-FOIA entity such as the President exerts control over documents in an agency's hands, the inquiry "is not so simple." United We Stand, Am., Inc. v. IRS, 359 F.3d 595, 598-99 (D.C. Cir. 2004).

In such cases, the Court's inquiry focuses on the non-FOIA entity's "intent to control" and on "the agency's ability to control" the records at issue. Id. at 600. In this regard, the D.C. Circuit uses a four-factor analysis to determine whether an agency exercises "sufficient control" over a record to render it an "agency record" under the FOIA:

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

Tax Analysts v. U.S. Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (quoting Lindsey v. U.S. Bureau of Prisons, 736 F.2d 1462, 1465 (11th Cir. 1984), vacated, 469 U.S. 1082 (1984)), aff'd on other grounds, 492 U.S. 136 (1989). Applying these factors reveals that WAVES and ACR records are Presidential records and not Secret Service records.

A. The Secret Service's Intent And Actions Indicate It Does Not Control WAVES And ACR Records.

The most important factor is the first—that is, what entity exercises "control" over a particular record. For example, when a document is transferred from a non-agency (such as Congress, the President, or the Vice President) to an agency, it becomes an agency record only if "under all the facts of the case the document has passed from the control of [the non-agency] and become property subject to the free disposition of the agency with which the document resides." Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978), vacated in part on other grounds, 607 F.2d 367 (D.C. Cir. 1979) (per curiam). A similar analysis applies with respect to records originally created by an agency, but over which a non-FOIA entity (that is, Congress, the President, or Vice President) asserts control. See Paisley v. CIA, 712 F.2d 686, 695-96 (D.C. Cir. 1983) (applying

the legal standard set out in Goland to records created by an agency in connection with a congressional investigation), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1984) (per curiam).

In United We Stand America, Inc. v. IRS, the D.C. Circuit explained that the non-FOIA entity's "intent to control" and "the agency's ability to control 'fit together in standing for the general proposition that the agency to whom the FOIA request is directed must have *exclusive* control of the disputed documents . . .'" in order for the records to be considered agency records subject to FOIA. 359 F.3d 595, 600 (D.C. Cir. 2004) (quoting Paisley, 712 F.2d at 693). In that case, the court was required to determine whether documents prepared by the IRS in response to a congressional inquiry were agency records or congressional records. The court stressed that "resolution of this dispute turns on whether the IRS has control of the documents," 359 F.3d at 598, concluding that if "'Congress has manifested its own intent to retain control, then the agency – by definition – cannot lawfully 'control' the documents.'" Id. at 600 (quoting Paisley, 712 F.2d at 693). Accordingly, the court barred the plaintiff from recovering under the FOIA any part of the records at issue over which the Court found "sufficient indicia of congressional intent to control." Id.

The D.C. Circuit's reasoning in United We Stand applies with at least equal force here. The President could hardly have provided more "sufficient indicia" of his "intent to control," as well as his actual control over, the records at issue. As the Director of the White House Office of Records Management explains: "Throughout the presidency of Barack Obama, it has been the policy and practice of the White House Office . . . to retain and maintain legal control over Presidential Records . . . . This includes, but is not limited to, [WAVES and ACR records]."

Droege Decl. ¶ 3. Nor is there any doubt that the Secret Service itself "recognizes that such records are under the exclusive legal control of the President and Vice President." White Decl. ¶ 11. This mutual understanding between the White House and the Secret Service was memorialized in a formal Memorandum of Understanding, which provides the clearest possible evidence that it is the White House, and not the Secret Service, that has "'exclusive control of the disputed documents.'" United We Stand, 359 F.3d at 600 (quoting Paisley, 712 F.2d at 693).

The White House's control over WAVES and ACR records is reflected not only in the MOU, but in the nature of the records themselves. Visitor information submitted by Presidential and Vice Presidential staff is provided on a confidential basis, and only to permit the Secret Service to protect the President and Vice President and the places where they live and work. Droege Decl. ¶ 5; White Decl. ¶¶ 2, 4, 7. And it is of course the White House, and not the Secret Service, that has implemented a voluntary disclosure policy for these WAVES records reflecting visitor appointments to the White House Complex, thus further evidencing the White House's control over them.[10] This case, then, presents the antithesis of the "exclusive control" by the "agency" that the D.C. Circuit has held is necessary to find that a document is an "agency record" subject to FOIA. See United We Stand Am., Inc., 359 F.3d at 600; see also Katz v. NARA, 68 F.3d 1438 (D.C. Cir. 1995) (holding that autopsy records in Archivist's possession were not agency records as they were controlled by President Kennedy's estate); Goland, 607 F.2d at 347

[10] Plaintiff argues that the fact that the Secret Service has previously produced WAVES and ACR records evidences the agency's control over those records. See Pl. Br. at 6-7. However, in the two FOIA lawsuits that plaintiff cites, authorization was obtained from the White House prior to the release of WAVES and ACR records. See White Decl. ¶ 14; see also Ex. H (cover letters for production of WAVES and ACR records to Judicial Watch noting that the government, in producing the records, does not concede that the records constitute agency records subject to FOIA).

(noting that CIA held a congressional document as a "trustee" for Congress and therefore the document was exempt from disclosure under FOIA).

Finally, and even assuming the Secret Service could be considered the "creator" of the WAVES and ACR records—a dubious assumption since the information they contain is provided primarily by authorized White House Complex pass holders—the Secret Service's obvious "intent" is to "relinquish" to the President any "control" over the records that it ever has had. See Tax Analysts, 845 F.2d at 1069. Droege Decl. ¶¶ 9-14; White Decl. ¶¶ 11-13.

B. The Secret Service Lacks Disposal Authority Over WAVES And ACR Records.

Pursuant to the second factor of Tax Analysts, the Secret Service's conduct reflects the agency's intent to relinquish whatever control it might have temporarily had over these records, as well as its inability to "dispose of the record[s] as it sees fit." See Tax Analysts, 845 F.2d at 1069. Since at least 2001, the Secret Service's practice has been to transfer newly-generated WAVES records to the White House Office of Records Management, generally every 30 to 60 days. The intent of the Secret Service is to erase WAVES records from its computer system after transfer; the servers purge and overwrite active WAVES data after they are older than 60 days. See Droege Decl. ¶ 10; White Decl. ¶ 11.[11] ACR records, reflecting entry into and exit from the White House Complex, are treated in a similar manner. See Droege Decl. ¶ 11; White Decl. ¶ 13. The legal status of WAVES and ACR records and WHORM's management and custody of them under the PRA was confirmed in the May 2006 MOU between WHORM and USSS. See Droege Decl. ¶¶ 12-14; White Decl. ¶ 12. Thus, because the President and Vice President retain

[11] The Secret Service has, however, retained copies of some data. See n.3, supra.

control of WAVES and ACR records (as set forth in the MOU), the Secret Service lacks disposal authority over those records.

C. The Secret Service's Use Of WAVES And ACR Records Is Limited.

The limited extent to which—and the limited purpose for which—the Secret Service relies on WAVES and ACR records also demonstrates their Presidential status. See Tax Analysts, 845 F.2d at 1069. The mere fact that an agency has used a record "is not dispositive," see Bureau of National Affairs, Inc. v. U.S. Dep't of Justice, 742 F.2d 1484, 1492 (D.C. Cir. 1984), and the Supreme Court has held that a record's temporary physical location within a federal agency does not itself render it an "agency record" subject to FOIA. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 157 (1980) ("We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.' The papers were not in the control of the State Department at any time.").

The information in question is quintessentially Presidential. The President and his advisors and staff necessarily carry out much of the President's constitutional responsibilities by meeting and consulting with visitors. Congress did not and could not require the President to make his appointment calendars available for immediate public inspection under the FOIA. Presidential and Vice Presidential staff only share this information with the Secret Service so that the Secret Service can perform this protective function. See Droege Decl. ¶ 5; White Decl. ¶ 7. After a visitor leaves the White House, the Secret Service has no continuing interest in the WAVES and ACR records sufficient to justify its own preservation of them. See generally Droege Decl. ¶¶ 9-14; White Decl. ¶¶ 11-13. The Secret Service recognizes, by contrast, that the President has a continuing interest, both operationally and historically, in records reflecting who

has visited the White House Complex. See Attachment to Droege and White Declarations (MOU ¶ 20) (agreement that White House has continuing interest in WHACS records). Thus, "the extent to which agency personnel have read or relied upon" the subject visit records is highly limited both in time and in purpose. See Tax Analysts, 845 F.2d at 1069; see also United We Stand Am., Inc., 359 F.3d at 600 (evaluating the "indicia of . . . intent to control" based upon "the circumstances surrounding the [agency]'s creation and possession of the documents"); Goland, 607 F.2d at 347 (concluding that the requested document was not an agency record based "both on the circumstances attending the documents' generation and the conditions attached to its possession by the [agency]"). The Secret Service's limited use of WAVES and ACR records does not convert this quintessentially Presidential information into an agency record.

D. WAVES And ACR Records Are Not Integrated Into The Secret Service's Record Systems.

Finally, under the fourth Tax Analysts factor, the D.C. Circuit considers "the degree to which the document was integrated into the agency's record system or files." Tax Analysts, 845 F.2d at 1069. WAVES and ACR records do reside on the Secret Service's servers as part of the WHACS data system. However, those data fields reflecting WAVES and ACR records are downloaded from the WHACS data set and burned onto CDs for transfer to the WHORM generally every 30 to 60 days. See White Decl. ¶ 11. Moreover, it is the intent of the Secret Service to delete WAVES and ACR records after they are transferred to the White House; indeed, the Memorandum of Understanding requires the Secret Service to do so. See Droege Decl. ¶ 10; White Decl. ¶¶ 11, 13; Attachment to Droege and White Declarations (MOU ¶ 22).

And while the Secret Service has retained copies of WAVES and ACR data, as well as WHACS data, due to, among other things, then-pending litigation, it is now in the process of determining the appropriate disposition of those data. See Droege Decl. ¶¶ 10, 11; White Decl. ¶¶ 11, 13. The key point is that the WAVES and ACR data fields can be, and are regularly, downloaded from the Secret Service's servers for delivery to the WHORM.

E. Prior District Court Decisions Regarding WAVES And ACR Records Were Incorrectly Decided.

Judicial Watch asserts that "every court that has considered the issue has concluded that Secret Service visitor logs are agency records under FOIA." Pl. Br. at 3. The two "CREW" cases that plaintiff cites for this proposition were decided by the same District Court judge, and the other decision that plaintiff refers to with an accord citation—Washington Post v. U.S. Dep't of Homeland Sec., 459 F. Supp. 2d 61, 72 (D.D.C. 2006) (Urbina, J.)—was subsequently vacated on appeal. See Ex. I (vacatur of opinion).

In any event, it is respectfully submitted that each of those cases was incorrectly decided. As an initial matter, even Judge Urbina in Washington Post held that three of the four Tax Analyst factors supported a determination that the records were not "agency records." See Washington Post, 459 F. Supp. 2d at 70-71. As for the court's singular reliance on the Secret Service's (very limited) use of White House visit records to reach the opposite conclusion, see id., the court's analysis misapplied the D.C. Circuit's precedents. The court of appeals has stressed that the determinative inquiry is whether a non-FOIA entity—such as the President, the Vice President, or Congress—has clearly manifested its intent to control the records and has circumscribed their use by the agency. The court has never suggested that records should be

deemed agency records merely because they are used by the agency in some limited respect. Rather, as noted above, the court has expressly held that "[u]se alone . . . is not dispositive." Bureau of Nat'l Affairs, Inc., 742 F.2d at 1492.

The Court in Washington Post also erred in concluding that the "use" factor was determinative because "the very purpose of the WAVES records is limited." 459 F. Supp. 2d at 70-71. In other words, the court believed that the Secret Service's use of the records was determinative because the records are "generated solely for their use by the Secret Service in protecting the [White House Complex]." Id. at 71. But that holding ignored precisely what prompts the creation of these records: the scheduling of meetings with the President, the Vice President, and their staffs, the record of which has important historical value. The Secret Service transfers White House visit records to the WHORM after the visits to which they pertain because the President has a continuing interest in the records, both operationally and historically. See Attachment to Droege and White Declarations (MOU ¶ 20). Thus, it is incorrect to conclude that the records cannot be used for any other purpose than that for which the Secret Service briefly uses them. (Again, the White House's voluntary disclosure of these visitor records belies that assertion.)

As for Judge Lamberth's decisions in the CREW cases, even he found that the "intent" factor weighed in the government's favor. See CREW v. U.S. Dep't of Homeland Sec., 527 F. Supp. 2d 76, 93 (D.D.C. 2007). The second and third factors—the agency's ability to "use or dispose of the document as it sees fit," and the extent to which the agency relied on the document—are resolved by the shared intent of the White House and the Secret Service. The Secret Service uses the records as contemplated by the MOU, and it is obligated to dispose of

them as contemplated in that agreement. Indeed, the MOU merely memorializes what was then understood to be past practice. The Secret Service uses the information submitted to provide the security that is mandated by statute so that the President and Vice President may safely discharge their constitutional responsibilities. And finally, "the degree to which the document was integrated into the agency's record system or files" similarly negates the implication of Secret Service control. The MOU provides for the systematic transfer of WAVES and ACR records back to the WHORM for preservation pursuant to the Presidential Records Act. For all of these reasons, WAVES and ACR records are Presidential records subject to the Presidential Records Act and are not agency records subject to FOIA.

F. Alternatively, FOIA Must Be Construed As Not Reaching Visitor Records In Order To Avoid Serious Questions As To Its Constitutionality.

If there is any doubt regarding the proper status of WAVES and ACR records, the doctrine of constitutional avoidance would require a construction of the FOIA term "agency records" that avoided a substantial intrusion on the confidentiality necessary for the President and Vice President to discharge their constitutional duties. See, e.g., INS v. St. Cyr, 533 U.S. 289, 299-300 (2001); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). A court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers" of other officers of the government. Public Citizen v. Dep't of Justice, 491 U.S. 440, 466 (1989).

Congress's exclusion of the President and Vice President from the FOIA's definition of "agency" was compelled by appropriate respect for the separation of powers. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1292 (D.C. Cir. 1993). Reviewing the

interrelationship of the FOIA and the Presidential Records Act, the D.C. Circuit observed in Armstrong that Congress was "keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations," and thus sought "'to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term of office.'" 1 F.3d at 1292 (citation omitted).

A court cannot properly engage in a mechanistic application of the FOIA that loses sight of the congressional purpose reflected in FOIA and, in particular, Congress's concern to avoid intrusions inconsistent with the separation of powers. "[S]pecial considerations control" when a ruling implicates the interests of the Presidency or Vice Presidency "in maintaining the autonomy of its office and safeguarding the confidentiality of its communications, are implicated." Cheney v. U.S. District Court, 542 U.S. 367, 385 (2004); see also Judicial Watch v. Dep't of Energy, 412 F.3d 125, 132 (D.C. Cir. 2005) (holding that routine White House practice of detailing employees from agencies does not transform those detailees' documents into agency records, observing that "it is not for a court to burden that practice when not under statutory compulsion"). The requested records provide no insight into the workings of the Secret Service, and do not provide the public with knowledge of what the agency is "up to." Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989). The Court is, instead, confronted with an overt effort to use the FOIA to investigate what the President and Vice President are "up to." Plaintiff's request, moreover, intrudes into the privacy of the President and his family in his home. For these reasons, coercing disclosure of WAVES records would infringe upon Presidential activities, which could potentially have a cooling effect on the advice

the President receives. The Court should therefore avoid construing FOIA to reach these records.[12]

While this Administration has chosen to voluntarily make post-visit WAVES records available, it has done so in the exercise of its own discretion in furtherance of government transparency. Whether or not this Administration voluntarily discloses visitor records says nothing about whether Congress intended to compel disclosures of these records under the FOIA. In addition, for the reasons set forth in Part II immediately below, requiring the White House to disclose pre-September 15 visitor records will impose an enormous burden on senior White House officials, only amplifying the separation of powers concerns raised by Judicial Watch's FOIA request.[13]

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[12] The courts in both Washington Post and CREW rejected defendant's constitutional avoidance argument on the ground the FOIA statute is unambiguous. Washington Post, 459 F. Supp. 2d at 72; CREW, 527 F. Supp. 2d at 98-99. But Congress did not define the term "agency records." Although FOIA defines the separate terms "agency" and "record," the statute does not specify when "records" are properly deemed to belong to a FOIA "agency." See 5 U.S.C. § 552(f)(1), (2). As explained above, Congress excluded the President and Vice President from FOIA precisely because it was concerned that the statute would otherwise violate the constitutional separation of powers. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1292 (D.C. Cir. 1993). Thus, to the extent there is any ambiguity as to whether the records at issue are "agency records" under the Tax Analysts factors, those factors should be applied in a manner consistent with Congress's intent to avoid separation of powers concerns. Defendant has submitted a detailed declaration describing how the broad-based disclosure of White House visitor records will raise national security concerns and place significant burdens on senior White House officials.

[13] The White House's disclosure of WAVES records is premised on its control of those records under the PRA. That allows the White House to provide for the near-immediate disclosure of the vast majority of WAVES records reflecting visits to the White House Complex. By contrast, FOIA would impose numerous requirements prior to the Secret Service's disclosure of WAVES records. For example, DHS regulations require the submission of written authorizations prior to the release of third-party records, such as the WAVES records sought here. See 6 C.F.R. § 5.3. These regulatory requirements are incorporated by the FOIA statute, which requires that an agency process a FOIA request only if such request "is made in

II. EVEN IF WAVES AND ACR RECORDS WERE SUBJECT TO FOIA, IT IS VIRTUALLY IMPOSSIBLE TO PROCESS PLAINTIFF'S RECORD REQUEST WITHOUT POTENTIALLY COMPROMISING NATIONAL SECURITY INTERESTS AND IMPLICATING SEPARATION OF POWERS CONCERNS.

Even if White House visitor records were in fact agency records subject to FOIA, a subset of these records would unquestionably be exempt from release pursuant to various FOIA exemptions, including Exemption 5. That exemption protects against the disclosure of information that is "normally privileged in the civil discovery context," NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975), including information that is subject to the President's executive privilege as it applies to national security and foreign policy information. E.g., United States v. Nixon, 418 U.S. 683, 710 (1974) (utmost deference is owing to the President's need to protect national security, military, or diplomatic secrets); United States v. Reynolds, 345 U.S. 1 (1953) (privilege exists to protect against the disclosure of national security and military information).

WAVES and ACR records include information relating to highly sensitive meetings with national security implications. Tibbits Decl. ¶ 14. As demonstrated in the declaration submitted in support of defendant's motion by the Executive Secretary of the President's National Security

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accordance with published rules stating the . . . procedures to be followed." 5 U.S.C. § 552(a)(3)(A). If not, it is a failure to exhaust administrative remedies. See also Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 3, 1999) (holding that plaintiff who failed to submit third party's privacy waiver "has failed to exhaust administrative remedies under the FOIA by failing to comply with the agency's published procedures for obtaining third-party information") (attached hereto as Ex. J). Moreover, the disclosure of WAVES records may be subject to FOIA privacy exemptions such as Exemption (b)(6). See 5 U.S.C. § 552(b)(6) (protecting from disclosure information contained in "personnel and medical files and similar files"); United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection).

Staff, although WAVES and ACR records are not classified, a broad-based disclosure of WAVES records could have serious consequences for United States national security interests. See Tibbits Decl. ¶ 29.[14] Cf. CIA v. Sims, 471 U.S. 159, 178 (1985) ("[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context") (citation omitted); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (when combined with other information, "the five government-withheld documents could prove useful for identifying information gathering methods and activities . . . though each piece existing in its discrete informational orbit would lack valence"); ACLU v. DOJ, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (affirming that "this Circuit has embraced the government's 'mosaic' argument in the context of FOIA requests that implicate national security concerns" in context of FOIA request regarding DOJ's use of the Patriot Act).

While there is undeniably a critical need to withhold national security information contained in the WAVES database, it would be virtually impossible for the White House, in response to plaintiff's unprecedentedly broad FOIA request for White House visitor records dating back to the beginning of the current Administration, to identify and segregate such information from other visitor information that can be publicly released pursuant to the President's voluntary disclosure policy. That was precisely the situation presented in Los Angeles Times v. U.S. Department of Labor, in which the Department of Labor was unable to determine which records in two databases would be exempt from disclosure under FOIA, because those databases "do not contain any information" necessary to make that determination.

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[14] The classified version of that declaration describes the national security implications of WAVES records, including the harms that may occur if sensitive WAVES records are disclosed.

483 F. Supp. 2d 975, 986 (C.D. Cal. 2007) (citation omitted); compare Tibbits Decl. ¶ 27 ("Prior to September 15, 2009, the WAVES system was not designed to include data regarding the sensitive nature or classification of meetings or to indicate the sensitivity of a visitor's affiliation."). On that basis, the court held that, "[b]ecause there is no way for the Department of Labor to segregate out [exempt information in the database], the DOL properly withheld all the information requested." Id. at 987. See generally Juarez v. Dep't of Justice, 518 F.3d 54, 61 (D.C. Cir. 2008) (a court may rely on government declarations that show with reasonable specificity why documents withheld pursuant to valid exemptions cannot reasonably be segregated from non-exempt information); Swope v. Dep't of Justice, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (the DEA justifiably withheld from release non-exempt portions of the records at issue upon its showing that exempt and non-exempt information could not reasonably be segregated); 5 U.S.C. § 552(b).

Here, the only way to determine whether a NSS appointment entered prior to September 15, 2009 implicates national security concerns is to have each NSS appointment be reviewed by the visitee or staff member who entered the visit information into the WAVES database. See Tibbits Decl. ¶ 27. This is because, as a general matter, the visitee or staff member who entered the visitor information is in the best position to determine whether a particular appointment implicates national security concerns. Id. However, even setting aside the fact that the passage of time results in the fading of memories, the NSS is primarily staffed with detailees from other executive agencies and departments who return to their home agencies—or sometimes leave government service entirely—after their White House detail has ended. Tibbits Decl. ¶ 31. Indeed, 106 employees—who are in the best position to determine whether an appointment they

entered or attended raises national security concerns—departed the National Security Staff between January and September of 2009. Tibbits Decl. ¶ 33. Departed staff members who have returned to their agencies or departments, or who no longer may be employed by the government, may no longer have security clearances and would be unable to access classified White House records to review and determine whether specific appointments implicate national security concerns. Tibbits Decl. ¶ 31. Due to the high turnover among the National Security Staff and the difficulty—if not impossibility—of contacting all prior National Security Staff members, it is not feasible to re-accumulate the necessary information to determine which appointments between January 20, 2009 and September 15, 2009 could harm our Nation's national security interests if publicly disclosed. Tibbits Decl. ¶ 33.

As a result, to ensure that pre-September 15 visits that come within the national security exemption to the President's voluntary disclosure policy are not disclosed, senior national security advisors would have to review NSS-generated WAVES records, of which there are tens-of-thousands. Tibbits Decl. ¶¶ 27, 35. This, too, would be a virtually impossible task which could not, in any event, guarantee that all national security records would be identified because NSS senior leadership may not have the necessary information on which to determine the sensitivity of any particular WAVES record. Tibbits Decl. ¶ 35.

Further, the review of WAVES records would not end with those generated by the NSS. Although the NSS generates the majority of appointments related to national security, other EOP components regularly schedule national security meetings. See Tibbits Decl. ¶ 36. Each of those components would need to try to piece together, after-the-fact, their records in order to determine whether they raise national security concerns. See Tibbits Decl. ¶ 37. And just as with the NSS,

any such effort would not guarantee that all sensitive records are identified and exempted. Tibbits Decl. ¶ 37. What is certain is that such a review would require a substantial amount of time and attention from the most senior White House officials, severely impacting their ability to conduct government business. Tibbits Decl. ¶ 37. And equally certain is that the inadvertent release of even a few WAVES records that contain highly sensitive information could have significant negative consequences for our national security interests. Tibbits Decl. ¶ 29. For all these reasons, WAVES and ACR records are exempt from disclosure under FOIA.

Moreover, the imposition of such a burden on the President's top national security advisors and other senior White House officials would unquestionably give rise to significant separation of powers concerns. See Part I.F., supra. In CREW v. U.S. Department of Homeland Security, 532 F.3d 860 (D.C. Cir. 2008), the appellate court determined whether an interlocutory district court order, requiring the Secret Service to process a very limited FOIA request for visitor records relating to nine specifically identified individuals, constituted an appealable interlocutory injunction. The D.C. Circuit concluded that it did not, and concluded further that interlocutory appeal was also not available under the collateral order doctrine based on the argument that it was unacceptable to impose a burden on the White House to review WAVES records in relation to nine individuals in response to a FOIA request. In rejecting that separation of powers argument with respect to the specific case before it, the D.C. Circuit made observations that weigh very much the other way in regard to this case:

> CREW has not made a massive, wide-ranging, "overly broad . . . [FOIA] request[ ]" that would require the President, Vice President, or their staffs to sort through mountains of files for responsive documents while "critiquing the unacceptable . . . [FOIA] requests line by line." Rather, CREW's request "'precisely identified' and 'specific[ally] . . . enumerated' the relevant materials,"

> focusing on very specific records, all containing the same basic information: names, dates, and other visitor data. *Critically for our purposes*, moreover, *this particular FOIA request is narrowly drawn, targeting nine specific individuals.* Accordingly, the burden on the White House or Office of the Vice President to decide whether to claim Exemption 5 over any responsive records should prove minimal . . . .

532 F.3d at 867 (emphasis added) (internal citations omitted). Here, by contrast, Judicial Watch has made a massively expansive FOIA request, seeking all visitor WAVES and ACR records from January 20, 2009 forward.[15] That request would require NSS staff and senior advisors to the President to review hundreds-of-thousands of visitor records, entry-by-entry, to determine whether it is necessary to exclude specific records of particular visits from disclosure. See, e.g., Tibbits Decl. ¶¶ 27, 35, 37; Droege Decl. ¶ 16 (noting that nearly 500,000 WAVES visitor records were created between January and September of 2009). Such a request very much gives rise to significant separation of powers concerns. For this reason and the additional reasons discussed above, the White House cannot be required to process plaintiff's FOIA request, even assuming *arguendo* that WAVES and ACR records are subject to FOIA, which they are not.

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[15] As plaintiff notes in its own press release, representatives from the White House met with representatives from Judicial Watch to discuss Judicial Watch's FOIA request. See Ex. K (Judicial Watch Files Lawsuit against Obama Administration to Obtain White House Visitor Logs); Ex. L (Nov. 30, 2009 letter from Norman L. Eisen, Special Counsel to the President, to Tegan Millspaw, Judicial Watch). During that meeting, the White House explained that it "cannot make a broad retroactive release of White House visitor records without raising profound national security concerns," and instead asked Judicial Watch "to focus and narrow" its request so as to "allow [the White House] to identify relevant records and release them to the public without endangering national security interests." Ex. L. Judicial Watch rejected these overtures, choosing instead to file this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment to defendant and deny summary judgment to plaintiff.

Dated: April 21, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:09-cv-02312
UNITED STATES SECRET SERVICE,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO
PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND
DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to LCvR 7(h), defendant United States Secret Service ("Secret Service" or "USSS") hereby responds to plaintiff's statement of material facts not in dispute and provides defendant's statement of material facts not in dispute.

Defendant's Response to Plaintiff's Statement of Material Facts Not In Dispute

1. No dispute.

2. No dispute subject to the clarification that plaintiff's Freedom of Information Act request, dated August 10, 2009, was received by the Secret Service on August 20, 2009, and sought "[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present." See Ex. D.

3. No dispute subject to the clarification that the Secret Service responded to Judicial Watch's FOIA request by letter dated October 8, 2009, stating that it interpreted that request "to encompass Access Control Records System (ACR) records, and/or Workers and Visitors Entry

System (WAVES) records" and that it is not just the Secret Service's position, but the government's position, that the requested records are not agency records subject to the FOIA but instead are records governed by the Presidential Records Act and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President. Defendant refers to Exhibit E for its full and complete contents. See Ex. E.

4. Dispute. Judicial Watch's administrative appeal only identified the Secret Service's assertion that White House visitor records are not agency records subject to FOIA as a basis for its appeal. See Ex. F. Moreover, while defendant does not dispute that Judicial Watch's administrative appeal identified prior litigation regarding WAVES and ACR records, defendant disputes that those matters have been fully litigated and that those decisions provide precedential value. No dispute that the Secret Service subsequently denied Judicial Watch's administrative appeal, or that this lawsuit was filed on December 7, 2009.

5. No dispute subject to the clarification that WAVES and ACR data/records were provided to Judicial Watch in response to its January 20, 2006 FOIA request only after obtaining express authorization from the White House. See Declaration of Donald E. White ("White Decl.") ¶ 14.

6. Disputed as plaintiff's assertion is not a material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material."). The production of documents pursuant to a subpoena issued twelve years ago has no relevance to the question of whether the Obama Administration maintains control over WAVES and ACR records such that they are subject to the Presidential Records Act and not the Freedom of Information Act.

Defendant's Statement of Material Facts Not In Dispute

1. The United States Secret Service provides security for the White House Complex, and monitors and controls access to the Complex. See Declaration of Donald E. White ("White Decl.") ¶¶ 2, 5.

2. There are two interrelated electronic systems — collectively termed the White House Access Control System ("WHACS") — for controlling and monitoring access to the White House Complex: the Worker and Visitor Entrance System ("WAVES") and the Access Control Records System ("ACR"). Declaration of Philip C. Droege ("Droege Decl.") ¶ 4; White Decl. ¶ 6.

3. Throughout the presidency of Barack Obama, it has been the policy and practice of the White House, in accordance with the Presidential Records Act, to retain and maintain legal control over Presidential Records as defined in that Act, including, but not limited to, WAVES records and ACR records. Droege Decl. ¶ 3.

4. The process for entry of a proposed visitor into the White House Complex begins when an authorized White House Complex pass holder (such as a member of the President's or Vice President's staff) provides visit information to the Secret Service. Droege Decl. ¶ 5; White Decl. ¶ 7.

5. Authorized White House Complex pass holders provide visitor information to the Secret Service electronically by providing information such as the proposed visitor's identifying information (name, date of birth, and Social Security number), the date, time and location of the planned visit, the name of the staff member submitting the request, the name of the person to be visited, and the date of the request. Droege Decl. ¶ 5. An authorized White House Complex

pass holder enters this information into a computer that automatically forwards it to the Secret Service for processing. Droege Decl. ¶ 6.

6. WAVES records consist primarily of information that an authorized White House Complex pass holder has provided to the Secret Service. Droege Decl. ¶ 5; White Decl. ¶ 8.

7. The information identified in paragraph 5 is provided by authorized White House Complex pass holders on a confidential and temporary basis to the Secret Service for two limited purposes: (1) to enable the Secret Service to perform background checks to determine the existence of any protective concern; and (2) to enable the Secret Service to verify the visitor's admissibility at the time of visit. Droege Decl. ¶ 5; see also White Decl. ¶ 7.

8. When an authorized White House Complex pass holder provides visit information to the Secret Service, a Secret Service employee at the WAVES Center verifies that the requestor is authorized to make appointments for the specific location requested and fills in any additional information (or makes any changes, generally with the consent of the requestor) that may be necessary, conducts background checks, and then transmits the information electronically to the WHACS server. White Decl. ¶ 7.

9. Once an individual is cleared into the White House Complex, the visitor is generally issued a badge. An ACR record is generated whenever a pass is swiped over one of the electronic pass readers located at entrances to and exits from the White House Complex. Droege Decl. ¶ 7; White Decl. ¶ 9.

10. ACR records include information such as the visitor's name and badge number, the date and time of the swipe, and the post at which the swipe was recorded. Droege Decl. ¶ 7; White Decl. ¶ 9.

11. Once a visit takes place, WAVES records are typically updated electronically with information showing the time and place of entry into and exit from the White House Complex. The information is ACR information, although the time of arrival may differ slightly between the WAVES and ACR records. White Decl. ¶ 10.

12. The White House and the Secret Service have operated with the understanding that WAVES and ACR records are subject to the Presidential Records Act, and are not agency records. Droege Decl. ¶ 9.

13. Once a visit to the White House Complex is complete, the Secret Service has no continuing interest sufficient to justify its own preservation of WAVES or ACR records. White Decl. ¶ 11.

14. The Secret Service recognizes that WAVES and ACR records are under the exclusive legal control of the President and Vice President. White Decl. ¶ 11.

15. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records on CD-ROM to the White House Office of Records Management ("WHORM") generally every 30 to 60 days. Droege Decl. ¶ 10; White Decl. ¶ 11.

16. At least as early as 2001 (at the end of the Clinton administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that ACR records should be treated in a manner generally consistent with WAVES records. Droege Decl. ¶ 11; White Decl. ¶ 13.

17. In May 2006, the Secret Service transferred to the WHORM ACR records covering the period from January 20, 2001 to April 30, 2006. Droege Decl. ¶ 11; White Decl. ¶ 13.

18. Since at least 2006, the Secret Service's typical practice has been to transfer ACR records to the WHORM every 30 to 60 days. Droege Decl. ¶ 11; White Decl. ¶ 13.

19. In May 2006, the WHORM entered into a Memorandum of Understanding ("MOU") with the Secret Service Records Management Program that both documented what was then understood to be past practice and interests regarding WAVES and ACR records, and confirmed the legal status of those records and the WHORM's management and custody of them under the Presidential Records Act. Droege Decl. ¶ 12; White Decl. ¶ 12.

20. The MOU provides, among other things, that the White House has a continuing interest in WAVES and ACR records, and that the White House continues to use the information contained in such records for various historical and informational purposes. Droege Decl. ¶ 13 & Attachment thereto (MOU ¶ 20).

21. The MOU reflects that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records." Droege Decl. Attachment (MOU ¶ 24).

22. The Secret Service acknowledges in the MOU that its temporary retention of WAVES and ACR records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM. Droege Decl. Attachment (MOU ¶ 22).

23. WAVES and ACR records are maintained as records subject to the Presidential Records Act. Droege Decl. ¶ 13.

24. On September 4, 2009, the White House announced a new policy to voluntarily disclose White House visitor records as "another important step toward a more open and

transparent government." Ex. A.

25. The White House's voluntary disclosure policy was made effective for WAVES visitor records (including those parts of ACR records that are incorporated after a visit) created after September 15, 2009. Ex. B.

26. The White House's voluntary disclosure policy excludes WAVES records (including those parts of ACR records that are incorporated after a visit) that would threaten national security interests. Ex. B.

27. Anyone can request White House WAVES records (including those parts of ACR records that are incorporated after a visit) from this Administration to the extent those records were created on or prior to September 15, 2009. Ex. B; Ex. C.

28. Between January 20, 2009 and September 15, 2009, nearly 500,000 WAVES visitor records were created. Droege Decl. ¶ 16.

29. Since the announcement of the voluntary disclosure policy, the White House has made publicly available more than 2,500 WAVES visitor records created between January 20, 2009 and September 15, 2009, in response to individual requests from members of the public. Droege Decl. ¶ 17.

30. The White House has made publicly available more than 250,000 WAVES visitor records created after September 15, 2009, since the announcement of the voluntary disclosure policy. Droege Decl. ¶ 18.

31. The National Security Staff ("NSS") is the primary office through which our Nation's most sensitive national security information is transmitted from the Intelligence Community to the President and through which national security policy is made. Declaration of

Nathan D. Tibbits ("Tibbits Decl.") ¶ 2.

32. The bulk of work conducted by the NSS is classified or impacts highly sensitive national security matters. Tibbits Decl. ¶ 2.

33. The WAVES system was enhanced in September 2009 to allow authorized WAVES users to designate an appointment scheduled after September 15, 2009, as highly sensitive due to either national security or non-national security concerns. Tibbits Decl. ¶ 15.

34. WAVES authorization was discontinued until training regarding the new functionality of the WAVES system was conducted. Tibbits Decl. ¶ 15.

35. A WAVES record would qualify for the non-national security highly sensitive designation and for exemption under the White House's voluntary disclosure policy if the meeting does not relate to national security but its release would expose sensitive, high-level Executive branch deliberations. Tibbits Decl. ¶ 16.

36. Each month the USSS transfers WAVES records (including those parts of ACR records that are incorporated after a visit) to the WHORM. On a monthly basis, offices and units within the Executive Office of the President ("EOP") receive the WAVES data for the appointments entered by that office or unit for auditing prior to disclosure. The purpose of the audit is to ensure that records scheduled for public disclosure are, in fact, appropriate for release. Tibbits Decl. ¶ 22.

37. NSS double checks all WAVES visitor records entered by NSS personnel ("NSS visitor records") that were not initially designated as national security sensitive in order to ensure that no sensitive information will be inadvertently released. Tibbits Decl. ¶ 23.

38. Each month, the NSS sorts the NSS visitor records by visitee name and sends to

each visitee a list of their visitors, along with date and time of arrival and other pertinent information that may aide the visitee in making an exemption determination. The list is also sent to the individual who entered the appointment, if different from the visitee. The visitee must review and validate that the visit need not be exempted for national security reasons. Tibbits Decl. ¶ 23.

39. If the visitee referenced in paragraph 38 is no longer on staff, then the person who entered the request must review it. Tibbits Decl. ¶ 23.

40. If a visitee or person who entered a WAVES request is unable to confirm that a WAVES record need not be excluded from disclosure, then senior NSS leadership will look at the information available and cross-check that information, to the extent possible, against other meetings on that day, at that time, and in that location to determine if the visitor was part of an exempted meeting or visit. Tibbits Decl. ¶ 23.

41. After review by the visitee, or pertinent person, WAVES records are color coded, and records designated for public disclosure are reviewed for a third time by the Director for Counterintelligence and the Senior Director for Administration, before they are released. Tibbits Decl. ¶ 24.

42. As a general matter, the visitee and the WAVES user who enters an appointment are in the best position to determine whether a particular appointment implicates national security concerns. Tibbits Decl. ¶ 27.

43. Prior to September 15, 2009, the WAVES system did not include data regarding the sensitive nature of meetings. Tibbits Decl. ¶ 27.

44. The only way to now determine whether an NSS WAVES appointment entered

prior to September 15, 2009 implicates national security concerns is to have each NSS WAVES appointment be reviewed by the visitee and/or the individual who entered the information in the system. Tibbits Decl. ¶ 27.

45. Tens-of-thousands of NSS WAVES visitor records would need to be reviewed in order to comply with Judicial Watch's FOIA request. Tibbits Decl. ¶ 27.

46. The inadvertent release of even a few WAVES records that contain highly sensitive information could have significant negative consequences for our national security interests. Tibbits Decl. ¶ 29.

47. The NSS is primarily staffed with detailees from other executive agencies and departments who return to their home agencies or sometimes leave government service after their detail has ended. Tibbits Decl. ¶ 31.

48. Of the 310 current NSS members, 240 are detailees. Tibbits Decl. ¶ 31.

49. Departed staff members who have returned to their agencies or departments or obtained positions in the private sector may no longer have security clearances and would be unable to access classified White House records to review and determine whether the visitors were here for classified meetings. Tibbits Decl. ¶ 31.

50. Approximately 106 NSS employees departed the NSS between January and September of 2009. Tibbits Decl. ¶ 33.

51. Due to personnel turnover, there is no way for the NSS to re-accumulate the necessary information to determine which appointments between January 20, 2009 and September 15, 2009 could harm our Nation's national security interests if publicly disclosed. Tibbits Decl. ¶ 33.

52. To attempt to determine if visits from January to September 2009 need to be withheld due to national security concerns, high-ranking officials of the NSS would have to review WAVES records. Tibbits Decl. ¶ 35.

53. The review described in paragraph 52 would not guarantee that all records with national security implications are identified and exempted from public disclosure, because the NSS senior leadership may not have the necessary information to make an appropriate determination on the sensitivity of any particular WAVES record. Tibbits Decl. ¶ 35.

54. Review of historical WAVES records as described in paragraph 52 would create an inordinate burden on the time of NSS senior leadership and compromise their ability to conduct national security business. Tibbits Decl. ¶ 35.

55. EOP components other than the NSS regularly schedule national security-related meetings. Tibbits Decl. ¶ 36.

56. Senior White House officials regularly attend meetings on national security. Tibbits Decl. ¶ 36.

57. EOP components, including the President's Intelligence Advisory Board and the Office of the Vice President (including the Vice President's national security staff), regularly schedule national security-related meetings. Tibbits Decl. ¶ 36.

58. Hundreds of thousands of WAVES visitor records created prior to September 15, 2009 would need to be reviewed to determine the national security sensitivity of meetings reflected in those records. Tibbits Decl. ¶ 37.

59. A review of records as described in paragraph 58 would not guarantee that all sensitive records are identified and exempted. Tibbits Decl. ¶ 37.

60. A review of records as described in paragraph 58 would require a substantial amount of time and attention from the most senior White House officials and would severely impact their ability to conduct government business. Tibbits Decl. ¶ 37.

Dated: April 21, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

JOHN R. TYLER
Assistant Branch Director

/s/ Brad P. Rosenberg
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COUNSEL FOR DEFENDANT
UNITED STATES SECRET SERVICE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:09-cv-02312
UNITED STATES SECRET SERVICE,	)	
Defendant.	)	

DECLARATION OF PHILIP C. DROEGE

I, Philip C. Droege, hereby declare as follows:

1. I am the Director of the White House Office of Records Management ("WHORM"). In this capacity, I am responsible for managing, preserving, and forwarding to the National Archives and Records Administration ("NARA") at the appropriate time records reflecting the business of the Presidency and Vice Presidency in accordance with the Presidential Records Act. I have held this position since July 2004, and have been an employee of the White House Office since July 1990. The statements made herein are based on my personal knowledge and on information made available to me in my official capacity.

I. The White House and Presidential Records

2. The United States Secret Service provides security for and monitors and controls access to the White House Complex, which includes the White House, the Eisenhower Executive Office Building ("EEOB"), the grounds encompassing the EEOB and the White House, and the New Executive Office Building. The White House Complex includes office space for the

President and his closest advisors and staff in the White House Office, as well as office space for the Vice President and his closest advisors and staff in the Office of the Vice President.

3. Throughout the presidency of Barack Obama, it has been the policy and practice of the White House Office, in accordance with the Presidential Records Act, 44 U.S.C. §§ 2201, *et seq.*, to retain and maintain legal control over Presidential Records as defined in that Act. This includes, but is not limited to, records generated by the Worker and Visitor Entrance System ("WAVES") and the Access Control Records System ("ACR").

II. Records Regarding the White House Complex

4. The Secret Service utilizes two interrelated computer systems — collectively termed the White House Access Control System ("WHACS") — for controlling and monitoring access to the White House Complex: the WAVES and the ACR.

a. WAVES Records

5. Authorized White House Complex pass holders arrange entry for a visit to the White House Complex by providing the Secret Service with information, including the proposed entrant's identifying information (name, date of birth, and Social Security number); the date, time and location of the planned visit; the name of the staff member submitting the request; the name of the person to be visited; and the date of the request. This identifying information regarding proposed visitors is provided by authorized White House Complex pass holders to the Secret Service on a confidential and temporary basis for two limited purposes: (1) to enable the Secret Service to perform background checks to determine the existence of any protective concern, that is, whether, and/or under what conditions, a visitor may be temporarily admitted to the Complex, and (2) to enable the Secret Service to verify the admissibility at the time of visit. WAVES

records therefore consist primarily of information that an authorized White House Complex pass holder has provided to the Secret Service.

6. Ordinarily, this identifying information is provided to the Secret Service electronically. An authorized White House Complex pass holder enters the information into a computer that automatically forwards it to the Secret Service for processing. The information may also be provided to the Secret Service in other ways. These other ways are by e-mail, facsimile, telephone or physical delivery of a list. In these instances, Secret Service personnel may enter the information into the WAVES system.

b. ACR Records

7. Once an individual is cleared into the White House Complex, s/he is generally issued an appropriate badge (although passes are often not issued for public tours or large group events). Barring technical difficulties, an ACR record is generated whenever a badge is swiped over one of the electronic pass readers located at entrances to and exits from the White House Complex. ACR records include information such as the entrant's name and badge number, the date and time of the swipe, and the post at which the swipe was recorded.

8. Once a visit takes place, WAVES records are typically updated electronically with ACR information showing the time and place of the entry into and exit from the White House Complex. Secret Service officers may also manually update WAVES records, such as by entering a time of arrival for large groups.

III. Treatment of WAVES/ACR Records

9. The White House and the Secret Service have operated with the understanding that the WAVES and ACR records, which contain information relating to visitors entering the

White House Complex to conduct Presidential and Vice Presidential business, are subject to the Presidential Records Act, and are not agency records.

10. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records to the WHORM on CD-ROM, generally every 30 to 60 days. (The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006.) The WHORM understands that the Secret Service's regular procedure is to electronically delete the active WAVES data from Secret Service servers after transfer to the WHORM. The Secret Service has, however, retained copies of WAVES data, as well as various other WHACS data, due to, among other things, then-pending litigation. I understand the Secret Service is in the process of determining the appropriate disposition of those data.

11. At least as early as 2001 (at the end of the Clinton Administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that ACR records should be treated in a manner generally consistent with WAVES records. Since at least 2006, the Secret Service has been transferring ACR records to the WHORM generally every 30 to 60 days, similar to the transfer of WAVES records. (ACR records from 2001 to 2006 were transferred from the Secret Service to the WHORM in 2006.) The Secret Service has, however, retained copies of ACR data, as well as various other WHACS data, due to, among other things, then-pending litigation. I understand the Secret Service is in the process of determining the appropriate disposition of those data.

12. In May 2006, the WHORM entered into a Memorandum of Understanding ("MOU") (attached hereto) with the Secret Service Records Management Program that

documented what was then understood to be past practice and interests regarding WAVES and ACR records. The MOU also confirmed the legal status of those records and WHORM's management and custody of them under the Presidential Records Act.

13. The MOU expressly acknowledges the "White House . . . has a continuing interest in [the WAVES and ACR] Records" in connection with visitors to the White House Complex. Attachment at ¶ 20. This is true because such records reflect the activities and official functions of the Presidency and Vice Presidency and the White House continues to use the information contained in such records for various historical and informational purposes. Accordingly, WAVES and ACR records, like other records that reflect the activities of the Presidency and Vice Presidency, are maintained as records subject to the Presidential Records Act.

14. By contrast, the USSS has expressly disclaimed "all legal control over any and all WHACS Records subject to [the MOU]." Attachment at ¶ 24. Indeed, the MOU acknowledges that the Secret Service's temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM.

15. At the conclusion of a Presidential Administration, it is the practice of the WHORM to transfer to NARA all WAVES and ACR records the WHORM has received during the course of that Administration.

IV. White House Voluntary Disclosure Policy

16. Between January 20, 2009 and September 15, 2009, nearly 500,000 WAVES visitor records were created.

17. Since the announcement of the voluntary disclosure policy, the White House has made publicly available more than 2,500 WAVES visitor records created between January 20, 2009 and September 15, 2009, in response to individual requests from members of the public.

18. In addition, the White House has also made publicly available more than 250,000 WAVES visitor records created after September 15, 2009, since the announcement of the voluntary disclosure policy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 21, 2010.

PHILIP C. DROEGE, DIRECTOR
WHITE HOUSE OFFICE OF RECORDS MANAGEMENT

MEMORANDUM OF UNDERSTANDING
Between the White House Office of Records Management and the United States Secret Service Records Management Program Governing Records Generated By the White House Access Control System

INTRODUCTION

1. This MEMORANDUM OF UNDERSTANDING between the White House Office of Records Management ("White House") and the United States Secret Service Records Management Program ("the Secret Service") (collectively, "The Parties") memorializes and confirms the agreement governing the status and handling of records generated through the White House Access Control System.

DEFINITIONS

2. The White House Access Control System ("WHACS") includes two interrelated systems used by the Secret Service for controlling and monitoring access to the White House Complex:

   a. The Worker and Visitor Entrance System ("WAVES");

   b. The Access Control Records System ("ACR").

3. "WHACS Records" include "WAVES Records" and "ACR Records."

4. "WAVES Records" consist of records generated when an authorized White House pass holder submits to the Secret Service information about visitors (and workers) whose business requires their presence at the White House Complex.

   a. WAVES Records include the following information submitted by the pass holder: the visitor's name; the visitor's date of birth; the visitor's Social Security Number; the time and location of the planned visit; the name of the pass holder submitting the request; the date of the request.

   b. Once a visit takes place, WAVES Records are typically updated electronically with information showing the actual time and place of the visitor's entry into and exit from the White House Complex.

5. "ACR Records" consist of records generated when a White House pass holder, worker, or visitor swipes his or her permanent or temporary pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.

a. ACR Records include the following information: the pass holder's name and badge number; the time and date of the swipe; and the post at which the swipe was recorded.

6. "Federal Records" mean documentary materials subject to the Federal Records Act (44 U.S.C. § 3301 et seq.).

7. "Presidential Records" mean documentary materials subject to the Presidential Records Act (44 U.S.C. § 2201 et seq.).

8. "The White House Complex" means the White House and the Eisenhower Executive Office Building, and the secured grounds encompassing them, and the New Executive Office Building.

9. The "White House Office of Records Management" ("WHORM") means the office in the White House responsible for preserving Presidential Records.

BACKGROUND

10. WHACS is operated by the Secret Service in order to control and monitor the entry and exit of persons into and out of the White House Complex.

11. The information contained in WHACS Records originates with White House pass holders, visitors, and workers as a result of White House business.

    a. Such information reflects the conduct of the President's business by providing details about the comings and goings of staff, workers, and visitors to the White House.

12. The authorized White House pass holders provide information contained in WAVES Records to the Secret Service temporarily for two limited purposes:

    a. To allow the Secret Service to perform background checks to determine whether, and under what conditions, to authorize the visitor's temporary admittance to the White House Complex;

    b. To allow the Secret Service to verify the visitor's admissibility at the time of the visit.

13. Once the visit ends, the information contained in WAVES Records and ACR Records has no continuing usefulness to the Secret Service.

14. It has been the longstanding practice of the Secret Service to transfer WAVES Records on CD-ROM to WHORM every 30 to 60 days. Except as noted in paragraph 16 below, once the Secret Service transferred the WAVES Records, the Secret Service ensured that those records were erased from its computer system.

a. Under this practice, the Secret Service has retained WAVES Records for completed visits for only a brief period, and solely for the purpose of facilitating an orderly and efficient transfer of those records to WHORM.

15. The Secret Service historically has retained ACR Records in its computer system without transferring those records to WHORM. In 2004, however, the Secret Service and the White House recognized and agreed that ACR Records should be treated in a manner consistent with the treatment of WAVES Records, and concluded that ACR Records should be transferred to WHORM and eliminated from the Secret Service's files. The Secret Service has continued to maintain ACR Records pending a legal determination of their status as Presidential Records.

16. In October 2004, at the request of the National Archives and Records Administration ("NARA"), the Secret Service began retaining its own copy of the WAVES Records that it transferred to the White House.

a. The Secret Service agreed to NARA's request on the understanding that it would be a temporary practice maintained until a legal determination was made confirming the propriety of handling WHACS Records as Presidential Records.

UNDERSTANDING AND AGREEMENT

17. The purpose of this Memorandum of Understanding is to express and embody The Parties' understanding and agreement that WHACS Records whenever created:

a. are at all times Presidential Records;

b. are not Federal Records; and

c. are not the records of an "agency" subject to the Freedom of Information Act (5 U.S.C. § 552).

18. The Parties understand and agree that all WHACS Records are at all times under the exclusive legal custody and control of the White House.

a. Although the Secret Service may at times have physical possession of WHACS Records, such temporary physical possession does not alter the legal status of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.

19. The Parties understand and agree that any information provided to the Secret Service for the creation, or in the form, of WHACS Records is provided under an express reservation of White House control.

20. The Parties understand and agree that the White House, but not the Secret Service, has a continuing interest in WHACS Records and that the White House continues to use the information contained in such records for various purposes. Specifically:

    a. WAVES Records have historical and other informational value to the White House as evidence of who has been invited and/or granted admission to the White House to meet with the President or members of his staff.

    b. ACR Records have historical or other informational value to the White House, as evidence of the comings and goings of staff, visitors, and workers at the White House Complex in the conduct of White House business.

21. The Parties understand and agree that, once a visitor's visit to the White House Complex is complete, the Secret Service has no continuing interest in preserving or retaining WAVES Records. The Parties also understand and agree that the Secret Service has no interest whatsoever in preserving or retaining ACR Records.

    a. WHACS Records are therefore not appropriate for preservation by the Secret Service either as evidence of the Secret Service's activities or for their informational value.

22. The Secret Service understands and agrees that it will regularly transfer all WHACS Records in its possession to WHORM, and that it will not retain its own copies of any WHACS Records except as is necessary to facilitate the transfer of those records to WHORM.

    a. Any temporary retention of WHACS Records by the Secret Service after the visit, entrance, or exit memorialized by those records is solely for the purpose of facilitating an orderly and efficient transfer of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.

23. The understandings and agreements expressed herein apply to:

    a. Any and all WHACS Records currently in the possession or custody of the Secret Service;

    b. Any and all WHACS Records that may be generated at any time subsequent to the execution of this Memorandum of Understanding.

24. It is specifically intended by The Parties that the understandings and agreements set forth herein serve as evidence that the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all WHACS Records subject to this Memorandum of Understanding.

a. The foregoing is not intended, and should not be construed, to suggest that WHACS Records in the possession or custody of the Secret Service before the execution of this Memorandum of Understanding were under the legal control of the Secret Service.

Director, White House Office
of Records Management

Chief Records Officer,
United States Secret Service

Dated: 5-17, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:09-cv-02312
UNITED STATES SECRET SERVICE,	)	
Defendant.	)	

DECLARATION OF DONALD E. WHITE
DEPUTY ASSISTANT DIRECTOR
UNITED STATES SECRET SERVICE

I, Donald E. White, hereby declare as follows:

1. I am a Deputy Assistant Director of the Office of Protective Operations for the United States Secret Service ("Secret Service"), which is a component of the Department of Homeland Security ("DHS"). I have held this position since February 2009. The statements made herein are based on my personal knowledge or on information made available to me in my official capacity.

Functions of the Secret Service

2. The Secret Service is a protective and law enforcement agency operating under the provisions of Title 18 of the United States Code, Sections 3056 and 3056A. Pursuant to Section 3056, the Secret Service is charged with the protection of the President and Vice President of the United States and their immediate families; major candidates for President and Vice President of the United States and their spouses; the President-elect and Vice President-elect and their immediate families; former Presidents and Vice Presidents of the United States,

their spouses, and minor children; visiting foreign heads of state and heads of government; and certain other individuals as directed by the President of the United States. By statute, the Secret Service's protection of the President and Vice President (as well as the President-elect and Vice President-elect) is mandatory. Additionally, the Secret Service is authorized to provide security for the White House Complex and the Vice President's official residence; foreign diplomatic missions in the Washington, D.C., area, and certain other locations within the United States; designated events of national significance; as well as other locations.

3. The Office of Protective Operations ("OPO") is one of eight directorates in the Secret Service that manage various operational and support functions. The OPO is responsible for establishing policies related to the Secret Service's protective mission and for overseeing the operational divisions that protect the persons, places, and events that the Secret Service is authorized to protect. In my capacity as a Deputy Assistant Director of the OPO, the representations made in this declaration are made on behalf of the Secret Service as an agency and not solely on behalf of the OPO.

4. The "White House Complex" (also "Complex"), for purposes of access as secured by the Secret Service, includes the White House; the Eisenhower Executive Office Building ("EEOB"), which is also known as the "Old Executive Office Building"; the grounds encompassing the EEOB and the White House; and the New Executive Office Building ("NEOB"). Housed in the White House, the EEOB, and the NEOB are the offices of various staff of the Executive Office of the President and Vice President.

5. As part of its function to provide security for the White House Complex, the Secret Service monitors and controls access to the Complex.

Records Regarding the White House Complex

A. Record Types

6. There are two interrelated electronic systems – collectively termed the White House Access Control System ("WHACS") – for controlling and monitoring access to the White House Complex: the Worker and Visitor Entrance System ("WAVES") and the Access Control Records System ("ACR").

7. When an authorized White House Complex pass holder[1] (including, but not limited to, members of the President's and Vice President's staffs) provides visit information to the Secret Service, a Secret Service employee at the WAVES Center verifies that the requestor is authorized to make appointments for the specific location requested, fills in any additional necessary information (or makes any changes, generally with the consent of the requestor), conducts background checks, and transmits the information electronically to the WHACS server. The Secret Service uses the information provided to perform background checks to determine whether, and/or under what conditions, a visitor may be temporarily admitted to the Complex, and to allow the Secret Service to verify the visitor's admissibility at the time of the visit.

8. WAVES records contain various fields, the majority of which contain information an authorized White House Complex pass holder has provided to the Secret Service. Among those fields is a description field, which may contain comments provided by the authorized White House Complex pass holder. The note field and the description field may be annotated by Secret Service personnel with limited information as a result of background checks performed by the Secret Service and/or with instructions, including coded instructions, to Secret Service

[1]Not all White House Complex pass holders are authorized to submit WAVES requests.

officers (such as security information, the name and/or initials of Secret Service personnel, or notes reflecting the circumstances pursuant to which an individual is to be admitted).

9. Once an individual is cleared into the White House Complex, s/he is generally issued an appropriate badge (although passes are often not issued for large groups). Barring technical difficulties, an ACR record is generated whenever a badge is swiped over one of the electronic pass readers located at entrances to and exits from the White House Complex. ACR records include information such as the entrant's name and badge number, the date and time of the swipe, and the post at which the swipe was recorded.

10. Once a visit takes place, WAVES records are typically updated electronically[2] with ACR information showing the time and place of the entry into and exit from the White House Complex. (The time of arrival may differ slightly, however, between the WAVES and ACR records.) The after-visit records that combine WAVES and parts of ACR information are still commonly referred to as WAVES records, though they may also occasionally be referred to as WHACS records.

B. White House and Office of the Vice President Control over White House Access Records and the Maintenance of these Records

11. Once a visit to the White House Complex is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records, and the Secret Service recognizes that such records are under the exclusive legal control of the President and Vice President. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records on CD-ROM to the White House Office of

[2]Secret Service officers may also manually update WAVES records, such as by entering a time of arrival for large groups.

Records Management ("WHORM"), generally every 30 to 60 days. (The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006.) It is the intent of the Secret Service that, once transferred, the WAVES records are to be erased from its computer system. I have been informed that active WAVES data on the servers older than 60 days are purged daily and overwritten on the servers. The Secret Service has, however, retained copies of WAVES and ACR data, as well as various other WHACS data, due to, among other things, then-pending litigation. The Secret Service is in the process of determining the appropriate disposition of those data.

12. In May 2006, the Secret Service Records Management Program entered into a Memorandum of Understanding ("MOU") with the WHORM that documented what was then understood to be past practice and interests regarding WAVES and ACR records. The MOU also confirmed the legal status of those records and WHORM's management and custody of them under the Presidential Records Act. A true and correct copy of the MOU is attached hereto.

13. At least as early as 2001 (at the end of the Clinton Administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that ACR records should be treated in a manner generally consistent with the treatment of WAVES records. The White House and the Secret Service have determined that ACR records should be transferred to the WHORM and deleted from the Secret Service's computers like WAVES records. In May 2006, the Secret Service transferred to the WHORM ACR records covering the period from 12:00 p.m. on January 20, 2001, to April 30, 2006. (The Secret Service has also transferred, to the National Archives and Records Administration, ACR records covering the

period from 12:00 p.m. on January 20, 1993, to 12:00 p.m. on January 20, 2001.) The ACR records in these transfers are believed to be those from the known or primary database of ACR records. Since then, the Secret Service's typical practice has been to transfer ACR records to the WHORM, similar to the transfer of WAVES records. The Secret Service has, however, retained copies of WAVES and ACR data, as well as various other WHACS data, due to, among other things, then-pending litigation. The Secret Service is in the process of determining the appropriate disposition of those data.

14. I have been advised that WAVES and ACR data/records were released in Judicial Watch v. United States Secret Service, No. 06-310 (D.D.C.) and Citizens for Responsibility and Ethics in Washington v. United States Department of Homeland Security, No. 06-883 (D.D.C.), only after the White House expressly authorized these releases.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 20, 2010.

Donald E. White
Deputy Assistant Director
United States Secret Service

MEMORANDUM OF UNDERSTANDING
Between the White House Office of Records Management and the United States Secret Service Records Management Program Governing Records Generated By the White House Access Control System

INTRODUCTION

1. This MEMORANDUM OF UNDERSTANDING between the White House Office of Records Management ("White House") and the United States Secret Service Records Management Program ("the Secret Service") (collectively, "The Parties") memorializes and confirms the agreement governing the status and handling of records generated through the White House Access Control System.

DEFINITIONS

2. The White House Access Control System ("WHACS") includes two interrelated systems used by the Secret Service for controlling and monitoring access to the White House Complex:

   a. The Worker and Visitor Entrance System ("WAVES");

   b. The Access Control Records System ("ACR").

3. "WHACS Records" include "WAVES Records" and "ACR Records."

4. "WAVES Records" consist of records generated when an authorized White House pass holder submits to the Secret Service information about visitors (and workers) whose business requires their presence at the White House Complex.

   a. WAVES Records include the following information submitted by the pass holder: the visitor's name; the visitor's date of birth; the visitor's Social Security Number; the time and location of the planned visit; the name of the pass holder submitting the request; the date of the request.

   b. Once a visit takes place, WAVES Records are typically updated electronically with information showing the actual time and place of the visitor's entry into and exit from the White House Complex.

5. "ACR Records" consist of records generated when a White House pass holder, worker, or visitor swipes his or her permanent or temporary pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.

a. ACR Records include the following information: the pass holder's name and badge number; the time and date of the swipe; and the post at which the swipe was recorded.

6. "Federal Records" mean documentary materials subject to the Federal Records Act (44 U.S.C. § 3301 et seq.).

7. "Presidential Records" mean documentary materials subject to the Presidential Records Act (44 U.S.C. § 2201 et seq.).

8. "The White House Complex" means the White House and the Eisenhower Executive Office Building, and the secured grounds encompassing them, and the New Executive Office Building.

9. The "White House Office of Records Management" ("WHORM") means the office in the White House responsible for preserving Presidential Records.

BACKGROUND

10. WHACS is operated by the Secret Service in order to control and monitor the entry and exit of persons into and out of the White House Complex.

11. The information contained in WHACS Records originates with White House pass holders, visitors, and workers as a result of White House business.

    a. Such information reflects the conduct of the President's business by providing details about the comings and goings of staff, workers, and visitors to the White House.

12. The authorized White House pass holders provide information contained in WAVES Records to the Secret Service temporarily for two limited purposes:

    a. To allow the Secret Service to perform background checks to determine whether, and under what conditions, to authorize the visitor's temporary admittance to the White House Complex;

    b. To allow the Secret Service to verify the visitor's admissibility at the time of the visit.

13. Once the visit ends, the information contained in WAVES Records and ACR Records has no continuing usefulness to the Secret Service.

14. It has been the longstanding practice of the Secret Service to transfer WAVES Records on CD-ROM to WHORM every 30 to 60 days. Except as noted in paragraph 16 below, once the Secret Service transferred the WAVES Records, the Secret Service ensured that those records were erased from its computer system.

a. Under this practice, the Secret Service has retained WAVES Records for completed visits for only a brief period, and solely for the purpose of facilitating an orderly and efficient transfer of those records to WHORM.

15. The Secret Service historically has retained ACR Records in its computer system without transferring those records to WHORM. In 2004, however, the Secret Service and the White House recognized and agreed that ACR Records should be treated in a manner consistent with the treatment of WAVES Records, and concluded that ACR Records should be transferred to WHORM and eliminated from the Secret Service's files. The Secret Service has continued to maintain ACR Records pending a legal determination of their status as Presidential Records.

16. In October 2004, at the request of the National Archives and Records Administration ("NARA"), the Secret Service began retaining its own copy of the WAVES Records that it transferred to the White House.

a. The Secret Service agreed to NARA's request on the understanding that it would be a temporary practice maintained until a legal determination was made confirming the propriety of handling WHACS Records as Presidential Records.

UNDERSTANDING AND AGREEMENT

17. The purpose of this Memorandum of Understanding is to express and embody The Parties' understanding and agreement that WHACS Records whenever created:

a. are at all times Presidential Records;

b. are not Federal Records; and

c. are not the records of an "agency" subject to the Freedom of Information Act (5 U.S.C. § 552).

18. The Parties understand and agree that all WHACS Records are at all times under the exclusive legal custody and control of the White House.

a. Although the Secret Service may at times have physical possession of WHACS Records, such temporary physical possession does not alter the legal status of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.

19. The Parties understand and agree that any information provided to the Secret Service for the creation, or in the form, of WHACS Records is provided under an express reservation of White House control.

20. The Parties understand and agree that the White House, but not the Secret Service, has a continuing interest in WHACS Records and that the White House continues to use the information contained in such records for various purposes. Specifically:

    a. WAVES Records have historical and other informational value to the White House as evidence of who has been invited and/or granted admission to the White House to meet with the President or members of his staff.

    b. ACR Records have historical or other informational value to the White House, as evidence of the comings and goings of staff, visitors, and workers at the White House Complex in the conduct of White House business.

21. The Parties understand and agree that, once a visitor's visit to the White House Complex is complete, the Secret Service has no continuing interest in preserving or retaining WAVES Records. The Parties also understand and agree that the Secret Service has no interest whatsoever in preserving or retaining ACR Records.

    a. WHACS Records are therefore not appropriate for preservation by the Secret Service either as evidence of the Secret Service's activities or for their informational value.

22. The Secret Service understands and agrees that it will regularly transfer all WHACS Records in its possession to WHORM, and that it will not retain its own copies of any WHACS Records except as is necessary to facilitate the transfer of those records to WHORM.

    a. Any temporary retention of WHACS Records by the Secret Service after the visit, entrance, or exit memorialized by those records is solely for the purpose of facilitating an orderly and efficient transfer of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.

23. The understandings and agreements expressed herein apply to:

    a. Any and all WHACS Records currently in the possession or custody of the Secret Service;

    b. Any and all WHACS Records that may be generated at any time subsequent to the execution of this Memorandum of Understanding.

24. It is specifically intended by The Parties that the understandings and agreements set forth herein serve as evidence that the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all WHACS Records subject to this Memorandum of Understanding.

a. The foregoing is not intended, and should not be construed, to suggest that WHACS Records in the possession or custody of the Secret Service before the execution of this Memorandum of Understanding were under the legal control of the Secret Service.

Director, White House Office
of Records Management

Chief Records Officer,
United States Secret Service

Dated: 5-17, 2006

REDACTED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:09-cv-02312
UNITED STATES SECRET SERVICE,	)	
Defendant.	)	

DECLARATION OF NATHAN D. TIBBITS

I, Nathan D. Tibbits, hereby declare as follows:

1. (U) I am the Executive Secretary of the National Security Staff ("NSS"). In this capacity, I serve as the chief operating officer for the National Security Council and the Homeland Security Council[1] and a principal point of contact between the NSS and other units within the Executive Office of the President, as well as other government agencies. As part of these responsibilities, I assist in directing the activities of the NSS on a broad range of defense, intelligence and foreign policy matters impacting national security. I have been the Executive Secretary of the NSS since October 2009. The statements made herein are based on my personal knowledge and on information made available to me in my official capacity.

[1] (U) For the purposes of the declaration, the National Security Council (NSC); the Homeland Security Council (HSC), and the National Security Staff (NSS) which supports them, are referred to collectively as the NSS.

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Counterintelligence Overview

2. (U) The NSS is the primary office through which our most sensitive national security information is transmitted from the Intelligence Community to the President and through which national security policy is made. Necessarily, the bulk of the work conducted by the NSS is classified or impacts highly sensitive national security matters. National Security work, by its very nature, must be secretive.[2]

3. [redacted]

4. [redacted]

[2] (U) Portions of this declaration are marked SECRET/NOFORN because they reveal counterintelligence methods that could harm national security. While some information in this declaration may appear innocuous on its face, read as a whole, it would provide a road map to some foreign intelligence services on how to mine publicly disclosed WAVES data for sensitive information relating to United States national security activities.

REDACTED

5.

6.

7.

REDACTED

8.

9.

REDACTED

10.

11.

12.

REDACTED

[redacted]

13. [redacted]

14. (U) As demonstrated above, the WAVES system contains very sensitive information. It is not classified, however, in part because, prior to September 2009, it was an internal system not intended for public disclosure. In order to protect this sensitive information from inadvertent public disclosure after the voluntary disclosure policy was announced in September 2009, the White House enhanced the WAVES system, as described below, to allow highly sensitive meetings, including those with national security implications, to be flagged at the outset. In addition, NSS instituted an extensive auditing procedure which relies heavily on the expertise of the NSS staff to determine the sensitivity of the record at the time of entry, making segregation of these records feasible prior to disclosure.

Enhancement of the WAVES System

15. (U) In September 2009, the WAVES system was enhanced to allow authorized WAVES users to designate an appointment as highly sensitive (and therefore not appropriate for

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public disclosure). If a WAVES user designates an appointment as highly sensitive, s/he is also required to select whether the particular sensitivity of a meeting is derived from national security or non-national security matters. This function became operable for appointments scheduled after September 15, 2009. To ensure that WAVES users understood the new requirements, WAVES authorization was discontinued until training regarding the new functionality of the WAVES system was conducted.

Non-National Security

16. (U) As noted above, a WAVES user can designate a meeting as highly sensitive and therefore exempt the WAVES record from public disclosure for non-national security reasons. A record would qualify for this non-national security highly sensitive exemption under the voluntary disclosure program if the meeting does not relate to national security but its release would expose sensitive, high-level Executive branch deliberations, such as the possible selection of a Supreme Court nominee. When announcing the voluntary disclosure program, the White House stated it would also disclose the number of non-national security highly sensitive meetings withheld each month. Since the voluntary disclosure policy took effect in mid-September to date, no visitor records have been withheld due to non-national security sensitivity.

National Security

17. [redacted]

REDACTED

18. [redacted]

19. [redacted]

20. [redacted]

21. [redacted]

REDACTED

22. (U) Each month the United States Secret Service transfers WAVES records to the White House Office of Records Management. On a monthly basis, all offices and units within the Executive Office of the President (such as the Office of the Vice President and NSS, among others) receive the WAVES data for appointments entered by that office or unit for auditing prior to disclosure. The purpose of the audit is to ensure that records scheduled for public disclosure (i.e., records that were not initially designated as highly sensitive) are, in fact, appropriate for release. This "double check" process is described immediately below.

NSS WAVES Review Process Under the Voluntary Disclosure Policy

23. (U) Given the sensitive nature of WAVES information and the potential for damage to our national security interests, NSS double checks all of the visitor records entered by NSS personnel ("NSS visitor records") that were not initially designated as national security sensitive to ensure that no sensitive information will be inadvertently released. To accomplish this task, each month, the NSS sorts the NSS visitor records by visitee name and sends to each visitee a list of their visitors, along with date and time of arrival and other pertinent information that may aide the visitee in making the exemption determination. The list is also sent to the individual who entered the appointment, if different from the visitee. The visitee must review and validate that the visit need not be exempted for national security reasons. If the visitee is no longer on staff, then the person who entered the request must review it. If a determination is still uncertain, senior leadership will look at the information available and cross check, to the extent possible, against other meetings on that day, at that time, and in that location to determine if the visitor was a part of an exempted meeting or visit. In the interest of national security and

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given the nature of the NSS work, and barring a reasonable explanation, the default position for national security-related appointments is to exempt the record from disclosure.

24. (U) After review by the visitee, or pertinent person, the records are color coded, and records designated for public disclosure are reviewed for a third time by the Director for Counterintelligence and the Senior Director for Administration, before they are released.

25. (U) To further assist employees with the review process and ensure that employees focus on visits that potentially require the exemption designation, the NSS has also developed an automated process that pre-sorts a select number of NSS visits that are appropriate for public disclosure, including tours and Marine One arrivals and departures.

26. (U) Although a majority of NSS visitor records have been correctly designated in the first instance by the WAVES user since the voluntary disclosure policy went into effect, during the first 3 months of the program, from October 2009 through the end of the year, approximately 39% of the NSS visitor records initially designated for public disclosure were ultimately withheld for national security reasons as a result of this auditing process. As individuals become more comfortable with the process and as additional enhancements are made to the WAVES system that require the requester to consider national security sensitivities, we expect that more appointments will be correctly designated in the first instance and this error rate will decline.

Ramifications of Releasing WAVES Records Created Prior to September 15, 2009

27. (U) As a general matter, the visitee and the WAVES user who entered the appointment are in the best position to determine whether a particular appointment implicates national security concerns. Prior to September 15, 2009, the WAVES system was not designed to

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include data regarding the sensitive nature or classification of meetings or to indicate the sensitivity of a visitor's affiliation. As a result, the only way to now determine whether an NSS appointment entered prior to September 15, 2009 implicates national security concerns is to have each NSS appointment reviewed by the visitee and/or the individual who entered the information in the system. Tens-of-thousands of WAVES records generated by NSS would need to be reviewed.

28. [redacted]

29. (U) The inadvertent release of even a few WAVES records that contain highly sensitive information could have significant negative consequences for our national security interests.

30. [redacted]

31. (U) NSS is primarily staffed with detailees from other executive agencies and departments who return to their home agencies or sometimes leave government service after their detail has ended. Specifically, of the 310 NSS members, 240, or 75% are detailees. Departed staff members who have returned to their Agencies or Departments

REDACTED

or obtained positions in the private sector may no longer have security clearances and would be unable to access classified White House records to review and determine whether the visitors were here for classified meetings.

32. [redacted]

33. (U) Due to this high rate of personnel turnover (approximately 106 employees departed between January and September 2009), there is no way to re-accumulate the necessary information to determine which appointments between January 20, 2009 and September 15, 2009 could harm our national security interests if publicly disclosed.

34. [redacted]

35. (U) As a result, to accurately determine if previous visits fall under the national security exemption, high-ranking officials of the NSS would have to review records as well. Even this high-level review would not guarantee that all records with national security implications are identified and exempted from public disclosure, because the NSS senior leadership may not have the necessary information to make an appropriate determination on the sensitivity of any particular WAVES record. Review of historical WAVES

REDACTED

records for the period prior to September 15, 2009 would also create an inordinate burden on the time of NSS senior leadership and compromise their ability to conduct national security business.

36. (U) Although the NSS generates the majority of appointments related to national security, additional EOP components, including for example, the President's Intelligence Advisory Board and the Office of the Vice President (including the Vice President's national security staff), also regularly schedule national security-related meetings. In addition, senior White House officials regularly attend meetings on national security. Where expediency or convenience dictates their respective offices do so, they will schedule national security meetings that can involve participants from different components of the White House.

37. (U) As a result, these offices currently conduct an audit of WAVES records prior to disclosure similar to the NSS. For the same reasons, a review of WAVES records created prior to September 15, 2009 to identify appointments with national security implications could not be limited to records created just by NSS. Instead, because each of the offices and components discussed above regularly participates, schedules and attends national security meetings, the vast majority of all WAVES records created prior to September 15, 2009 – hundreds of thousands of records – would need to be reviewed to determine the sensitivity of meetings. Again, such a review would not guarantee that all sensitive records were identified and exempted. It would also require a substantial amount of time and attention from the most senior White House officials and would severely impact their ability to conduct government business.

REDACTED

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 19, 2010.

NATHAN D. TIBBITS
EXECUTIVE SECRETARY
NATIONAL SECURITY STAFF

Opening up the people's house

Subscribe

Posted by **Norm Eisen** on September 04, 2009 at 09:05 AM EDT

Today, the President took another important step toward a more open and transparent government by announcing a historic new policy to voluntarily disclose White House visitor access records. Each month, records of visitors from the previous 90-120 days will be made available online.
In his statement released earlier today, the President sums up this historic step:

> For the first time in history, records of White House visitors will be made available to the public on an ongoing basis. We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it. Americans have a right to know whose voices are being heard in the policymaking process.

Aside from a small group of appointments that cannot be disclosed because of national security imperatives or their necessarily confidential nature (such as a visit by a possible Supreme Court nominee), the record of every visitor who comes to the White House for an appointment, a tour, or to conduct business will be released. Read the full policy here.

The Administration has also agreed with Citizens for Responsibility and Ethics (CREW) to settle four pending cases requesting specific White House visitor access records, including those dating from the Bush administration (read the transmittal letter here). We have provided CREW with the records relating to their requests, which are here:

Bush Administration

- WHO: [PDF part 1, PDF part 2]
- OVP: [PDF]

Obama Administration

WHO: [.csv]

The Administration also thanks CREW for their participation in the development of the new voluntary disclosure policy.

Norm Eisen is Special Counsel to the President for Ethics and Government Reform

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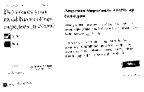

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White House Voluntary Disclosure Policy Visitor Access Records

The President has decided to increase governmental transparency by implementing a voluntary disclosure policy governing White House visitor access records. The White House will release, on a monthly basis, all previously unreleased WAVES and ACR access records that are 90 to 120 days old. For example, records created in January 2010 will be released at the end of April 2010. The short time lag will allow the White House to continue to conduct business, while still providing the American people with an unprecedented amount of information about their government. No previous White House has ever adopted such a policy.

The voluntary disclosure policy will apply to records created after September 15, 2009, and the first release of records (covering the month of September) will occur at the end of the year, on or about December 31, 2009. We expect that each monthly release will include tens of thousands of electronic records. Since the White House considers these records to be subject to the Presidential Records Act, it will continue to preserve them accordingly.

The White House voluntary disclosure policy will be subject to the following exceptions:

1. The White House will not release fields within the access records that implicate personal privacy or law enforcement concerns (e.g., dates of birth, social security numbers, and contact phone numbers); records that implicate the personal safety of EOP staff (their daily arrival and departure); or records whose release would threaten national security interests.
2. The White House will not release access records related to purely personal guests of the first and second families (i.e., visits that do not involve any official or political business).
3. The White House will not release access records related to a small group of particularly sensitive meetings (e.g., visits of potential Supreme Court nominees). The White House will disclose each month the number of records withheld on this basis, and it will release such records once they are no longer sensitive.
4. Visitor information for the Vice President and his staff at the White House Complex will be disclosed pursuant to the policy outlined above. It is not possible, however, to release visitor information for the Vice President's Residence in an identical format to the White House Complex at this time because the Residence is not equipped with the WAVES and ACR systems that are in place at the White House Complex. The Office of the Vice President will, instead, release the guest lists for official events at the Residence and will also review the Vice President's and Dr. Biden's daily schedules and release the names and dates of visitors to the Residence who appear on those schedules. The Vice President's staff is working with the Secret Service to upgrade the visitor records system at the Residence. When the electronic update is complete, visitor information for the White House Complex and the Residence will be released in a common format.

WAVES and ACR records created between January 20 and September 15, 2009 will not be subject to the voluntary disclosure policy. Instead, the White House will respond voluntarily to individual requests submitted to the Counsel's Office that seek records during that time period, but only if the requests are reasonable, narrow, and specific (e.g., requests that list specific possible visitors). Responses to reasonable requests will be subject to the four exceptions described above.

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Annual Report to Congress on White House Staff
Visitors Access Records
Ethics Pledge Waivers

Request White House Visitor Access Records

Per the 'White House Voluntary Disclosure Policy, Visitor Access Records,' President Barack Obama has "decided to increase governmental transparency by implementing a voluntary disclosure policy governing White House visitor access records." As outlined in the policy, for records between January 20 and September 15, 2009, White House Counsel will respond voluntarily to individual requests submitted to the Counsel's Office that are reasonable, narrow, and specific (e.g., requests that list specific possible visitors). To request such visitor access records, please complete the form below.

Your Information

Your Email:

An email will be sent to this address informing you when your request has been processed.

Your First Name:

Your Last Name:

For all record requests, please include the first and last name of the visitor, as well as the date range of their visit.

Visitor 1 Information

Visitor Access Record Request - Last Name, First Name, Middle Initial:

From: Year Month Day

To: Year Month Day

Visitor 2 Information

Visitor 3 Information

Visitor 4 Information

Visitor 5 Information

Visitor 6 Information

Visitor 7 Information

Visitor 8 Information

Visitor 9 Information

Visitor 10 Information

This question is for testing whether you are a human visitor and to prevent automated spam submissions.

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RECEIVED
U.S. SECRET SERVICE
2009 AUG 20 P 3: 36
FREEDOM OF INFORMATION
PRIVACY ACTS LAW

August 10, 2009

VIA CERTIFIED MAIL

United States Secret Service
Communications Center (FOI/PA)
245 Murray Lane
Building T-5
Washington, D.C. 20223

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the United States Secret Service produce any and all agency records concerning the following subjects within twenty (20) business days:

1) All official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present.

For purposes of this request, the term "White House" includes any office or space on White House grounds.

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA…The presumption of disclosure should be applied to all decisions involving FOIA.[1]

President Obama adds that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails." Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under

[1] President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," January 21, 2009; <http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.>

501 School Street, SW • 5th Floor • Washington, DC 20024 • Tel: (202) 646-5172 • (888) JW-ETHIC
Fax: (202) 646-5199 • email: info@judicialwatch.org • Internet Site: http://www.JudicialWatch.org

FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purpose of this request, the term "record" shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, telegrams, teletypes, facsimiles, papers, forms, records, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail, meaning any electronically transmitted text or graphic communication created upon and transmitted or received by any computer or other electronic device, and all materials stored on compact disk, computer disk, diskette, hard drive, server, or tape; (3) any audio, aural, visual, or video records, recordings, or representations of any kind, including without limitation all cassette tapes, compact disks, digital video disks, microfiche, microfilm, motion pictures, pictures, photographs, or videotapes; (4) any graphic materials and data compilations from which information can be obtained; (5) any materials using other means of preserving thought or expression; and (6) any tangible things from which data or information can be obtained, processed, recorded, or transcribed. The term "record" also shall mean any drafts, alterations, amendments, changes, or modifications of or to any of the foregoing.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. See *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). In fact, Judicial Watch has been recognized as a member of the news media in other FOIA litigation. See *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch, Inc. regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

U.S. Secret Service
August 10, 2009
Page 3 of 4

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

> shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under the OPEN Government Act of 2007, Section 6(b).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts, including radio and television programs, website, newsletter, periodic published reports, public appearances, and other educational undertakings.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to $350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

U.S. Secret Service
August 10, 2009
Page 4 of 4

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or tmillspaw@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,

Tegan Millspaw
Judicial Watch

501 School Street, SW • Suite 500 • Washington, DC 20024 • Tel: (202) 646-5172 • (888) JW-ETHIC
Fax: (202) 646-5199 • email: info@judicialwatch.org • Web Site: www.JudicialWatch.org

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

Freedom of Information and Privacy Acts Branch
Communications Center
245 Murray Lane, S.W.
Building T-5
Washington, D.C. 20223

OCT 8 2009

Tegan Millspaw
Judicial Watch
501 School Street, S.W.
5th Floor
Washington, D.C. 20024

File Number: 20090685

Dear Ms. Millspaw:

Reference is made to your Freedom of Information Act (FOIA) request, dated August 10, 2009, received by the United States Secret Service (Secret Service) on August 20, 2009, for "any and all agency records concerning. . .[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present."

Please note that we are interpreting your request to encompass Access Control Records System (ACR) records, and/or Workers and Visitors Entry System (WAVES) records.

It is the government's position that the categories of records that you requested are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President.

The White House and the Office of the Vice President retain authority to direct the discretionary release of the White House visitor records, and have announced a policy for discretionary releases. Therefore, your request is being referred to White House Counsel's office for consideration pursuant to this policy.

Sincerely,

Craig W. Ulmer
Special Agent in Charge
Freedom of Information and
Privacy Acts Officer

Judicial Watch

Because no one is above the law!

VIA CERTIFIED U.S. MAIL and E-MAIL

November 3, 2009

United States Secret Service (MNO)
ATTN: Information Quality Officer
245 Murray Drive, Bldg. 410
Washington, DC 20223
E-mail: IQO@secretservice.gov
(Art. No.: 70083230000326080725)

Re: FREEDOM OF INFORMATION ACT APPEAL,
FOIA Request #20090685

Dear Sir/Madam:

On August 10, 2009, Judicial Watch, Inc. sent a Freedom of Information Act (FOIA) request to the U.S. Secret Service seeking access to the following public records:

1) All official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present.

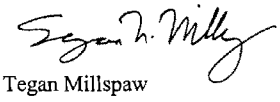
In a response dated October 8, 2009, Craig W. Ulmer, Special Agent in Charge, advised Judicial Watch, Inc. that had determined the requested records were not subject to FOIA and that the request would not be processed as a result. *See* October 8, 2009 Letter, attached.

This letter appeals the determination of Mr. Ulmer. The assertion that White House visitor logs are not agency records subject to FOIA has been litigated and rejected repeatedly. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 527 F. Supp.2d 76, 89 (D.D.C. 2007) ("To the contrary, the Court concludes that these visitor records at the White House Complex and Vice-President's Residence are created (or obtained) and controlled by the Secret Service and are therefore 'agency records' under our circuit's case law"); *see also Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 592 F. Supp.2d 111, 124 (D.D.C. 2009); *Washington Post v. U.S. Dep't of Homeland Security*, 459 F. Supp.2d 61, 71-12 (D.D.C. 2006).

Judicial Watch, Inc. thus respectfully appeals Mr. Ulmer's denial of the request and asks that the requested records be processed and produced pursuant to FOIA without further delay.

Sincerely,

JUDICIAL WATCH, INC.



Tegan Millspaw

Enclosure

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

Freedom of Information and Privacy Acts Branch
Communications Center
245 Murray Lane, S.W.
Building T-5
Washington, D.C. 20223

OCT -8 2009

Tegan Millspaw
Judicial Watch
501 School Street, S.W.
5th Floor
Washington, D.C. 20024

File Number: 20090685

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Reference is made to your Freedom of Information Act (FOIA) request, dated August 10, 2009, received by the United States Secret Service (Secret Service) on August 20, 2009, for "any and all agency records concerning. . .[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present."

Please note that we are interpreting your request to encompass Access Control Records System (ACR) records, and/or Workers and Visitors Entry System (WAVES) records.

It is the government's position that the categories of records that you requested are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President.

The White House and the Office of the Vice President retain authority to direct the discretionary release of the White House visitor records, and have announced a policy for discretionary releases. Therefore, your request is being referred to White House Counsel's office for consideration pursuant to this policy.

Sincerely,

Craig W. Ulmer
Special Agent in Charge
Freedom of Information and
Privacy Acts Officer

U.S. Department of Homeland Security
UNITED STATES SECRET SERVICE
DEC - 3 2009

Tegan Millspaw
Judicial Watch
501 School Street, S.W.
Suite 725
Washington, D.C. 20024

File Number: 20090685

Dear Ms. Millspaw:

Reference is made to your appeal dated November 3, 2009, through which you appeal the United States Secret Service's response to your August 10, 2009 Freedom of Information Act (FOIA) request for "any and all agency records concerning. . .[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present."

The Secret Service maintains its position as stated in the October 8, 2009 response to your request. In that letter, we stated that "[i]t is the government's position that the categories of records that you requested are not agency records subject to the FOIA. Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and the Office of the Vice President." You were also notified that the request was being referred to White House Counsel's office for consideration pursuant to the discretionary release policy.

Please be advised that any decision on appeal, including a finding of no record, is subject to judicial review in the District Court of the district where the complainant resides, has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Sincerely,

Keith L. Prewitt
Deputy Director

U.S. Department of Justice
Civil Division, Federal Programs Branch

Via First-Class Mail
P.O. Box 883
Ben Franklin Station
Washington, D.C. 20044

Via Overnight Delivery
20 Massachusetts Ave., N.W.
Rm. 7224
Washington, D.C. 20001

Justin M. Sandberg
Trial Attorney

Tel: (202) 514-3489
Fax: (202) 616-8202
email: *justin.sandberg@usdoj.gov*

May 10, 2006

BY HAND DELIVERY

Judicial Watch, Inc.
Christopher J. Farrell
501 School St., S.W.
Suite 500
Washington, D.C. 20024

Dear Judicial Watch:

On January 20, 2006, you submitted to the United States Secret Service a Freedom of Information Act (FOIA) request for records "concerning, relating to, or reflecting . . . [a]ll White House visitor logs from January 1, 2001 to present that reflect the entries and exits of lobbyist Jack Abramoff from the White House."

Pursuant to the stipulation to which we voluntarily agreed, and without conceding that the documents constitute "agency records" under FOIA, we are providing you with the enclosed documents that are responsive to your FOIA request. No exemptions have been claimed, and no responsive documents or portions thereof have been withheld. In addition, please be advised that the enclosed documents were found as the result of a computer-generated query of electronic entry and exit logs for the White House Complex, and that the system does not differentiate between individuals with the same name.

Sincerely,

Justin M. Sandberg
Trial Attorney
U.S. Department of Justice, Civil Division

Enclosures

TOTAL P.02

U.S. Department of Justice
Civil Division, Federal Programs Branch

Via First-Class Mail
P.O. Box 883
Ben Franklin Station
Washington, D.C. 20044

Via Overnight Delivery
20 Massachusetts Ave., N.W.
Rm. 7224
Washington, D.C. 20001

Justin M. Sandberg
Trial Attorney

Tel: (202) 514-3489
Fax: (202) 616-8202
email: *justin.sandberg@usdoj.gov*

July 7, 2006

BY FACSIMILE

Judicial Watch, Inc.
Christopher J. Farrell
501 School St., S.W.
Suite 500
Washington, D.C. 20024

Dear Judicial Watch:

On January 20, 2006, you submitted to the United States Secret Service a Freedom of Information Act (FOIA) request for records "concerning, relating to, or reflecting . . . [a]ll White House visitor logs from January 1, 2001 to present that reflect the entries and exits of lobbyist Jack Abramoff from the White House." On May 10, 2006, we released to you two Access Control Records System (ACR) documents that related to the subject matter of your FOIA request.

After that release, and only recently, the Secret Service unexpectedly discovered computer files containing Worker and Visitor Entrance System (WAVES) data relating to six appointments involving Jack Abramoff. The Secret Service also retrieved ACR data matching the data included in the previously-released ACR records. The WAVES data reflect appointments involving Jack Abramoff, but do not necessarily reflect actual visits to the White House Complex.

Pursuant to the stipulation to which we voluntarily agreed, and without conceding that the documents constitute "agency records" or would otherwise be required to be produced under FOIA, we are providing you with the enclosed document sets containing the recently-discovered WAVES data and the ACR data. The different document sets reflect different methods of displaying the data stored in the computer files, and some of the sets are more comprehensive than others. Entries are repeated throughout the documents because the data were found in multiple computer files. No exemptions have been claimed, and only information protected by the Privacy Act has been redacted. In addition, please be advised that one cannot differentiate between individuals with the same name with the ACR data provided.

Sincerely,

Justin M. Sandberg
Trial Attorney
United States Department of Justice

Enclosures

APR-21-2010 13:23 US SECRET SERVICE 202 406 9685 P.02

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5337 **September Term, 2006**

06cv001737

Filed On: February 27, 2007

[1025209]
The Washington Post,
Appellee

v.

Department of Homeland Security,
Appellant

BEFORE: Ginsburg, Chief Judge, and Sentelle and Garland, Circuit Judges

ORDER

Upon consideration of the consent motion to vacate preliminary injunction as moot and dismiss appeal, it is

ORDERED that the motion to dismiss the appeal as moot be granted in light of the "Notice of Voluntary Dismissal Pursuant to Rule 41(a)," filed January 8, 2007. It is

FURTHER ORDERED that the district court's order filed October 18, 2006 and memorandum opinion filed October 19, 2006, granting plaintiff-appellee's motion for a preliminary injunction and directing the United States Secret Service to process plaintiff-appellee's June 12, 2006 Freedom of Information Act request within ten days, be vacated.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

ENTERED
CLERK, U.S. DISTRICT COURT
AUG - 5 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
AUG - 3 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ABRAHAM JOHN PUSA Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION Defendants.	CASE NO. CV99-04603 NM (CWx) ORDER RE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE, MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE.
DATED: AUG 05 1999
DEPUTY CLERK

I

INTRODUCTION

On April 28, 1999, Abraham John Pusa ("Plaintiff") filed this action pro se against the Federal Bureau of Investigation ("Federal Defendant" and/or "FBI") for claims arising under the Freedom of Information Act, 5 U.S.C. § 552(a)(3). In requesting relief, Plaintiff seeks an order from this Court directing Federal Defendant to produce records of all communications between the FBI and individuals: Edward Adams; Gene E. Adem; Robert Adem; Fehmi Tasci; and Greg Lucett (collectively the "Third Parties"). In the complaint, Plaintiff alleges that the FBI violated the Freedom of Information Act ("FOIA") by denying his request for information concerning the Third Parties and their alleged misstatements to Federal Defendant regarding his character and activities.

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On June 1, 1999, Federal Defendant filed the instant motion to dismiss the complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and Plaintiff's failure to state a claim under Fed. R. Civ. P. 12(b)(6). Without receiving any opposition to its motion to dismiss, Federal Defendant filed its Reply and Notice of Non-Receipt of Plaintiff's Opposition on July 7, 1999.[1] However, two days after Federal Defendant filed its notice (and more than five weeks after it filed its motion to dismiss), Plaintiff filed his opposition on July 9, 1999.

In the instant motion, Federal Defendant seeks to dismiss this action on the ground that Plaintiff has failed to exhaust his administrative remedies before filing suit under the FOIA. Specifically, Federal Defendant claims that this Court lacks jurisdiction over Plaintiff's claim as he has neither provided specific documentation with respect to his request for third-party information, nor had his request improperly denied by the FBI before seeking judicial review.

Upon full consideration of the moving, opposition and reply papers, the parties arguments and authorities, and the entire record herein, this Court grants Federal Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

II

RELEVANT FACTUAL BACKGROUND

On February 18, 1999, Plaintiff sent a letter to Federal Defendant's Los Angeles field office requesting information on the Third Parties. Complaint, ¶ 5, Exh. 1. On February 26, 1999, Luis G. Flores ("Mr. Flores"), Chief Division Counsel of the FBI, responded to Plaintiff's letter by informing him that he was required to submit either proof of death or a privacy waiver for the individuals named in his request. Id., ¶ 6, Exh. 2. The letter further stated that without such proof, "disclosure of law enforcement records or information regarding another person is considered an unwarranted invasion of personal privacy." Id. Enclosed with Mr. Flores' letter was a Privacy Waiver and Certification of Identity Form. Id. Plaintiff was informed that once

[1] On July 6, 1999, in light of Plaintiff's failure to file any opposition to Federal Defendant's motion to dismiss, the motion was taken off calendar.

he completed and returned these documents, the FBI would conduct a search of its records and advise him of the results. Id.

On March 19, 1999, Plaintiff sent a letter described as a FOIA Appeal to the U.S. Department of Justice, asserting that the February 26, 1999 letter from Mr. Flores was a denial of his request for information. Id., ¶ 7, Exh. 3. On April 1, 1999, Derma A. Henshaw ("Ms. Henshaw") of the Office of Information and Privacy, U.S. Department of Justice, sent a letter to Plaintiff acknowledging receipt of his administrative appeal. Id., ¶ 8, Exh. 4. Ms. Henshaw also informed Plaintiff that the Office of Information, which has responsibility of adjudicating such cases, had a substantial backlog of pending appeals and that Plaintiff would be notified of a decision as soon as possible. Id.

On April 5, 1999, Plaintiff sent a letter to Timothy McNally ("Mr. McNally"), Assistant Director in Charge of the FBI's Los Angeles field office. Id., ¶ 9, Exh. 5. In his letter, Plaintiff informed Mr. McNally that a few of his agents, along with the Third Parties, had been violating Plaintiff's civil and constitutional rights. Id. Alleging that these individuals were operating outside FBI guidelines, Plaintiff requested that Mr. McNally end their illegal activities so that he would not have to litigate the matter in court.[2] Id.

On April 28, 1999, less than a month after he received acknowledgment of his administrative appeal from the Office of Information, Plaintiff brought this action against Federal Defendant for Injunctive Relief. On June 4, 1999, Plaintiff requested a court appointed attorney, as Federal Defendant was allegedly threatening attorneys who agreed to represent him. Plaintiff's Request for Attorney ("Plf. Req. Atty."), ¶ 1. On July 2, 1999, Plaintiff also requested to change the hearing date, as he had allegedly been poisoned in connection with the

[2] In his April 5, 1999 letter to Mr. McNally, Plaintiff claimed that a few FBI agents "have formed a criminal syndicate" with the Third Parties, and together had placed him under "surveillance" and on the FBI's "black list" "to cover up their own criminal activities." Complaint, § 9, Exh. 5. In his untimely opposition to Federal Defendant's motion to dismiss, Plaintiff claimed that the "syndicate" had: 1) placed a chip in his body to prevent him from working and to cause him emotional distress; 2) portrayed him as a Chinese spy and prevented him from becoming an Arabic translator with the FBI; 3) illegally searched his house to gain the names of diamond dealers; 4) falsely associated him with the Y2K problem; and 5) exposed him to poisonous deadly viruses in an attempt to murder him. Plf. Opp., ¶¶ 5, 12, 13-14, 16, 18.

case and needed time to recover. Plaintiff's Request To Change The Hearing Date ("Plf. Req. Hearing"), p. 1.

III

DISCUSSION

A

Applicable Standard

1. Lack Of Subject Matter Jurisdiction Under FOIA

Under the FOIA, a district court of the United States has jurisdiction to order the production of any agency records improperly withheld from a complainant. 5 U.S.C. § 552(a)(4)(B). However, before the district court can exercise its jurisdiction over FOIA claims, sound judicial policy dictates that the complainant exhaust all of his/her administrative remedies before filing a complaint. In re Steele, 799 F.2d 461, 465 (9th Cir. 1986). As the Ninth Circuit clearly explained in In re Steele:

> Exhaustion of a parties' [sic] administrative remedies is required under the FOIA before that party can seek judicial review. The complaint must [also] request specific information in accordance with published administrative procedures, and have the request improperly refused before that party can bring a court action under the FOIA. Where no attempt to comply fully with agency procedures has been made, the [district] courts will assert their lack of jurisdiction under the exhaustion doctrine.

Id., at 465-66 (emphasis added) (citations omitted). The underlying purpose of the exhaustion doctrine is to give agencies an opportunity to exercise their discretion and expertise in correcting their own procedural errors before initiating any unnecessary judicial intervention into the administrative process. United Farm Workers, AFL-CIO v. Ariz. Agric. Employment Relations Bd., 669 F.2d 1249, 1253 (9th Cir. 1982).

2. Failure To State A Claim Under FOIA

In addition to dismissing the action for lack of subject matter jurisdiction, the exhaustion doctrine also warrants dismissal for a complainant's failure to state a claim upon which relief can be granted. Scherer v. Balkema, 840 F.2d 437 (7th Cir. 1988), *cert denied* 486 U.S. 1043

(1988). Thus, if the complainant has failed to allege that he/she has exhausted all administrative remedies under the FOIA, the complaint must also be dismissed for failure to state a claim. Id.

B

Application

Federal Defendant contends that this action should be dismissed for Plaintiff's failure to exhaust his administrative remedies. Defendant's Motion to Dismiss ("Def. Mot."), p. 4. Specifically, Federal Defendant asserts that this Court lacks jurisdiction to hear Plaintiff's claims on the ground that he has neither complied with the FBI's procedures concerning FOIA requests, nor had his request improperly denied by the agency. Id., at 3-5.

In light of the FOIA requirements established by In re Steele, it is clear that Plaintiff failed to exhaust his administrative remedies before bring this suit. Under the procedures delineated in the Code of Federal Regulations, the FBI has set forth specific instructions to be followed in permitting access to its records under the FOIA. Def. Mot., p. 5. In pertinent part, the FBI's procedures state:

> If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) will help the processing of your complaint.

28 C.F.R. § 16.3(a). Plaintiff was notified of these procedures when Mr. Flores responded to his February 18, 1999 request for information regarding the Third Parties. In his letter dated February 26, 1999, Mr. Flores carefully explained to Plaintiff that he was required to submit "either proof of death or a privacy waiver" before his request for third-party information could be processed. See Complaint, Exh. 2. As a courtesy, a Privacy Waiver and Certification of Identity Form were enclosed with Mr. Flores' letter. Id. However, Plaintiff did not provide this information to the FBI. Def. Mot., p. 5. As such, he has failed to exhaust his administrative remedies under the FOIA by failing to comply with the agency's published procedures for obtaining third-party information.

Moreover, Plaintiff currently has an administrative appeal pending with the Office of Information and Privacy ("OIP") regarding his request for FBI records. Complaint, § 7, Exh. 3.

"Courts have consistently confirmed that the FOIA requires exhaustion of this [administrative] appeal process before an individual may seek relief in the courts." Oglesby v. United States Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990). Thus, Plaintiff is precluded from bringing suit regarding his request for FBI records, as he has not yet exhausted his administrative appeal with the OIP.[3]

Plaintiff contends that he has a right to the information he requested, and that Federal Defendant has no legal basis for denying his FOIA request. Complaint, § 10. Plaintiff further alleges that his request for information on the Third Parties should not be denied by the FBI because both are "engaged in a conspiracy campaign against [him]." Id., at § 9, Exh. 5; and Plaintiff's Opposition ("Plf. Opp."), p. 1.

Regardless of the sincerity of Plaintiff's beliefs, he does not have a right under the FOIA to gain access to third-party information. The FOIA provides for the mandatory disclosure of information held by federal agencies, unless the requested material falls within one of the Act's exemption provisions. See St. Michael's Convalescent Hospital v. State of California, 643 F.2d 1369, 1372 (9th Cir. 1981); Also Lee Pharm. v. Kreps, 577 F.2d 610, 614 (9th Cir. 1978). In his February 26, 1999 letter, Mr. Flores explained to Plaintiffs that his request for FBI records was exempt "without proof of death or a privacy waiver, [and that] the disclosure of law enforcement records or information about another person is considered an unwarranted invasion of personal privacy" under the FOIA. Complaint, Exh. 2. This language is taken from the statute itself, which states that a request under the FOIA "does not apply to...personnel...files... [and] information complied for law enforcement purposes...[due to the fact that] the production of such...records...could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §§ 552(b)(6) and (7)(C). Thus, Plaintiff was not entitled, on the information submitted, to receive any information on the Third Parties under the FOIA.

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[3] The FBI advised Plaintiff of the option to file an administrative appeal with the OIP in its February 26, 1999 letter. Complaint, Exh. 2.

IV

CONCLUSION

Plaintiff has neither provided the required information to the FBI, nor exhausted his administrative appeal. Accordingly, this court lacks jurisdiction over his claim under the FOIA, and the complaint must be dismissed.

IT IS SO ORDERED

DATED: ~~July 29,~~ August 2, 1999

Nora M. Manella
United States District Judge

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Promoting Integrity, Transparency and Accountability in Government, Politics and the Law

Judicial Watch Files Lawsuit against Obama Administration to Obtain White House Visitor Logs

View Discussion

During October 27 White House Meeting Obama Administration Officials Sought to Make Deal with Judicial Watch on Records But Refuse to Abandon Erroneous Claim that Visitor Logs are not Subject to FOIA Law

Contact Information:
Press Office 202-646-5172, ext 305

Washington, DC -- December 8, 2009

Judicial Watch, the public interest group that investigates and prosecutes government corruption, announced today that it filed a lawsuit against the U.S. Secret Service for denying Judicial Watch's Freedom of Information Act (FOIA) request for access to Obama White House visitor logs from January 20 to August 10, 2009. The Obama administration continues to advance the erroneous claim that the visitor logs are not agency records and are therefore not subject to FOIA. As Judicial Watch noted in its complaint, this claim "has been litigated and rejected repeatedly" by federal courts.

The Obama White House did voluntarily release a select number of White House visitor logs to the public. However, other records continue to be withheld in defiance of FOIA law. According to Judicial Watch's complaint filed in the U.S. District Court for the District of Columbia on December 7:

> Since [Judicial Watch] sent its...FOIA request to the Secret Service, the White House has released certain visitor records voluntarily, pursuant to its discretionary release policy. The White House's voluntary production of a portion of the requested records, however, does not satisfy the Secret Service's statutory obligation to produce any and all nonexempt records responsive to Judicial Watch's request. Nor does it remedy the Secret Service's claim, contrary to well established case law, that the requested records are not agency records subject to FOIA.

Judicial Watch criticized the Obama administration over this issue in a press release on October 16. The following week, a White House lawyer called Judicial Watch to set up a meeting with "senior White House officials." On October 27, Judicial Watch staff visited with White House officials led by Norm Eisen, Special Counsel to the President for Ethics and Government, to discuss Judicial Watch's pursuit of the White House visitor logs, as well as other transparency and ethics issues. During the meeting, the Obama White House officials asked Judicial Watch to scale back its request and expressed hope that Judicial Watch would publicly praise the Obama administration's commitment to transparency. However, the White House refused to abandon its legally indefensible line of reasoning that White House visitor logs are not subject to FOIA law. In a November 30 follow up letter, Mr. Eisen reiterated the Obama administration's legal position and, citing national security concerns, requested that Judicial Watch "focus and narrow (its) request."

"The courts have affirmed that these White House visitor records are subject to release under FOIA law. If the Obama administration is serious about transparency, they will agree to the release of these records under the Freedom of Information Act," said Judicial Watch President Tom Fitton. "The recent 'party crasher' scandal at the White House put the spotlight on the need for transparency under law when it comes to who visits the White House."

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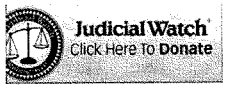

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THE WHITE HOUSE

WASHINGTON

November 30, 2009

Ms. Tegan Millspaw
Judicial Watch, Inc.
501 School Street, SW (Suite 700)
Washington, DC 20024

Dear Ms. Millspaw,

I write in response to your November 3, 2009 letter to the Information Quality Officer of the United States Secret Service ("USSS"). Therein you appeal the denial of your August 10, 2009 Freedom of Information Act request for "any and all agency records concerning all official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to present." The USSS forwarded your letter to the White House Counsel's Office.

As you know, on October 27, 2009, I and other members of the Counsel's Office met with you and your colleagues to discuss your request. In that meeting, we reiterated the Administration's firm commitment to increased transparency in government, as evidenced by the President's decision to voluntarily disclose White House visitor logs created after September 15, 2009. This is the first Administration in history to adopt such a policy.

At our meeting we also explained that the system we inherited was not structured to identify sensitive records. As a result, we cannot make a broad retroactive release of White House visitor records without raising profound national security concerns. For example, the release of certain sensitive national security records encompassed in your request could assist foreign intelligence agencies to identify and target U.S. government officials.

For these reasons and others, we asked you to focus and narrow your request. This would allow us to identify relevant records and release them to the public without endangering national security interests. In fact, on October 30, 2009 and on November 25, 2009 the White House released, in response to numerous specific requests, large collections of visitor records from the time period you identified.

We remain happy to work with you to narrow your current request, so that we can release additional records to the public and further increase government transparency. Please contact me if you are interested in further discussions.

Sincerely,

Norman L. Eisen
Special Counsel to the President

cc: United States Secret Service

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 1:09-cv-02312
UNITED STATES SECRET SERVICE,	)	
Defendant.	)	

[PROPOSED] ORDER

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment. Upon consideration of Plaintiff's and Defendant's motions and of all materials submitted in relation thereto, it is hereby ORDERED that:

Plaintiff's motion shall be, and hereby is, DENIED; and

Defendant's motion shall be, and hereby is, GRANTED; and

Summary Judgment shall be, and hereby is, entered for the Defendant.

Accordingly, this action shall be, and hereby is, DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Date:_____

_____
Henry H. Kennedy, Jr.
United States District Judge

The New York Times

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June 24, 2010

Across From White House, Coffee With Lobbyists

By ERIC LICHTBLAU

WASHINGTON — There are no Secret Service agents posted next to the barista and no presidential seal on the ceiling, but the Caribou Coffee across the street from the White House has become a favorite meeting spot to conduct Obama administration business.

Here at the Caribou on Pennsylvania Avenue, and a few other nearby coffee shops, White House officials have met hundreds of times over the last 18 months with prominent K Street lobbyists — members of the same industry that President Obama has derided for what he calls its "outsized influence" in the capital.

On the agenda over espressos and lattes, according to more than a dozen lobbyists and political operatives who have taken part in the sessions, have been front-burner issues like Wall Street regulation, health care rules, federal stimulus money, energy policy and climate control — and their impact on the lobbyists' corporate clients.

But because the discussions are not taking place at 1600 Pennsylvania Avenue, they are not subject to disclosure on the visitors' log that the White House releases as part of its pledge to be the "most transparent presidential administration in history."

The off-site meetings, lobbyists say, reveal a disconnect between the Obama administration's public rhetoric — with Mr. Obama himself frequently thrashing big industries' "battalions" of lobbyists as enemies of reform — and the administration's continuing, private dealings with them.

Rich Gold, a prominent Democratic lobbyist who has taken part in a number of meetings at Caribou Coffee, said that White House staff members "want to follow the president's guidance of reducing the influence of special interests, and yet they have to do their job and have the best information available to them to make decisions."

Mr. Gold added that the administration's policy of posting all White House visits, combined with pressure to not be seen as meeting too frequently with lobbyists, leave staff members "betwixt and between."

White House officials said there was nothing improper about the off-site meetings.

"The Obama administration has taken unprecedented steps to increase the openness and transparency of the White House," said Dan Pfeiffer, director of communications. "We expect that all White House employees adhere to their obligations under our very stringent ethics rules regardless of who they are meeting with or where they meet."

Attempts to put distance between the White House and lobbyists are not limited to meetings. Some lobbyists say that they routinely get e-mail messages from White House staff members' personal accounts rather than from their official White House accounts, which can become subject to public review. Administration officials said there were some permissible exceptions to a federal law requiring staff members to use their official accounts and retain the correspondence.

And while Mr. Obama has imposed restrictions on hiring lobbyists for government posts, the administration has used waivers and recusals more than two dozen times to appoint lobbyists to political positions. Two lobbyists also cited instances in which the White House had suggested that a job candidate be "deregistered" as a lobbyist in Senate records to avoid violating the administration's hiring restrictions.

A senior White House official, speaking on the condition of anonymity, said that in "a small number of cases," people might have been "wrongly" registered as lobbyists, based on federal standards. The official said that while the White House might have discussed such instances of possible "over-registration," he was "quite confident that no lobbying shop has been instructed to deregister anyone."

Many lobbyists still get in the front door at the White House — nearly 1,000 times, according to a New York Times examination of public White House visitors' logs and lobbying registration records.

Those logs, though, present an incomplete picture. For instance, many of the entries do not reflect who actually took part in a meeting. The "visitee" often shows up not as the White House official who was the host, but as the administrative assistant who arranged the meeting.

David Wenhold, president of the American League of Lobbyists, based in Washington, said the current "cold war" relationship between the White House and K Street lobbyists was one of mutual necessity, with the White House relying on lobbyists' expertise and connections to help shape federal policies.

"You can't close the door all the way because you still need to have these communications," Mr. Wenhold said. "It makes a great sound bite for the White House to demonize us lobbyists, but at the end of the day, they're still going to call us."

Lobbyists say some White House officials will agree to an initial meeting with a lobbyist and his client at the White House, but then plan follow-up sessions at a site not subject to the visitors' log.

One lobbyist reeounted meeting with White House officials on a side lawn outside the building to introduce them to the chief executive of a major foreign corporation.

"I'll call and say, 'I want to talk to you about X,' and they'll say, 'Sure, let's talk at Starbucks,' " said another lobbyist who counted six or seven off-site meetings with White House officials on financial issues.

Rahm Emanuel, the president's chief of staff, has shown up several times at a closed gathering of liberal political activists and lobbyists that is held weekly at the Capital Hilton. Other Obama aides — like Jim Messina, the deputy chief of staff, and Norm Eisen, the special assistant for ethics — and senior aides in the Office of Management and Budget, the energy czar's office and elsewhere have also taken part in off-campus meetings, lobbyists said.

Employees at Caribou Coffee — which many lobbyists said appeared to be the favorite spot for off-site meetings, in part because of its proximity to the White House — welcome the increased traffic.

"They're here all the time — all day," Andre Williams, a manager at Caribou Coffee, said of his White House customers. (He can spot White House officials by the security badges around their necks, or the Secret Service agents lurking nearby.)

"A lot of them like lattes — that or a 'depth charge,' a coffee with a shot of espresso," Mr. Williams said. "The caffeine rush — they need it."

Some administration officials and lobbyists say that meeting away from the White House allows officials to get some air without making visitors go through the cumbersome White House security process. Others, however, acknowledge that one motivation is the desire to avoid lobbyists' names showing up too often on the White House logs.

A senior White House official said, "We don't believe there's anything untoward about these meetings, and we don't think that represents any special access for lobbyists."

The official added that "folks are allowed to get a cup of coffee, and we're not going to bar patronage at any of the area's fine coffeehouses."

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POLITICO

HUD: Sign agreement, stay quiet

By: Chris Frates
February 16, 2011 08:27 PM EDT

Obama administration officials told a group of housing proponents this month that they must sign a confidentiality agreement to continue participating in talks — a highly unusual request that has drawn criticism from a top Republican lawmaker who is investigating the matter.

The agreement, obtained by POLITICO, bars participants from disclosing details discussed at meetings of a rental policy working group, but it has angered some lobbyists and drawn congressional scrutiny.

"How can they go around and pat themselves on the back as the most transparent administration in history and then turn around and ask lobbyists to sign nondisclosure agreements to keep their meetings secret," said a lobbyist whose organization was at the Feb. 4 meeting. "It's like extortion. We're not going to be able to do our jobs unless we have secret meetings with them."

Republican Rep. Judy Biggert, the chairwoman of the House Financial Services subcommittee that oversees HUD, received a copy of the nondisclosure agreement from a source who did not attend the meeting, said spokesman Zachary Cikanek.

"If it's true that the administration is requiring nondisclosure agreements, then HUD has some very serious explaining to do," he said. "This type of gag order represents a compete reversal of the administration's own well-publicized transparency standards and I'm confident the congresswoman will seek immediate answers from HUD as to why industry participants are being told to keep quiet if they want a seat at the table."

An administration official defended the practice saying, "The Obama administration makes it a point to seek input from stakeholders and key constituencies as we develop our policy positions. We will continue to engage a broad range of stakeholders, and will do so in a way that maintains the integrity of our decision-making process."

The nondisclosure agreement covered participants in the "White House's rental policy working group," which includes officials from the departments of Agriculture, Treasury and Housing and Urban Development. The group is tasked with streamlining the administrative requirements of the departments' various rental programs.

"I will maintain the confidentially of information disclosed to me or otherwise learned during the course of my collaborative relationship with the federal government parties," according to a copy of the nondisclosure agreement obtained by POLITICO.

"I will not, without the written permission of HUD, reveal, divulge or publicize any information covered under this agreement or disseminate any oral, written, or electronic information obtained under this collaboration," according to the agreement.

Administration officials first brought up the nondisclosure agreement during a Feb. 4 meeting of the working group, according to a lobbyist familiar with the meetings. At a Feb. 11 meeting, the officials distributed an addendum to the agreement, which slightly loosened the strict prohibitions

strict prohibitions.

The addendum allowed information to be shared with a third party if several criteria are met, including a requirement that written documents aren't shared, the third party is a "working relation" with discretion who agrees to keep the information confidential.

Stakeholders were asked to sign the nondisclosure agreement before draft documents began circulating.

"As the process continued and working documents were going to be circulated, the agencies requested that participating individuals sign a nondisclosure agreement, which protects pre-decisional discussions and helps maintain the open discourse between agency officials and stakeholder organizations," an administration official said.

It was not immediately clear how many lobbyists and other stakeholders signed on to the agreement. A number of organizations that reportedly attended the meeting did not return calls or declined to comment.

Judy Kennedy, president of the National Association of Affordable Housing Lenders, said in her three decades of Washington experience she has only seen a nondisclosure agreement used during negotiations over writing new regulations.

"I can't believe that (HUD) Secretary (Shaun) Donovan would think it's a smart move to say that you can't stay unless you sign this agreement," she said, adding that she was not part of the working group. "I can't believe that he would authorize a gag order."

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POLITICO

W.H. meets lobbyists off campus

By: Chris Frates
February 24, 2011 04:41 AM EDT

Caught between their boss' anti-lobbyist rhetoric and the reality of governing, President Barack Obama[1]'s aides often steer meetings with lobbyists to a complex just off the White House[2] grounds — and several of the lobbyists involved say they believe the choice of venue is no accident.

It allows the Obama administration to keep these lobbyist[3] meetings shielded from public view — and out of Secret Service [4]logs kept on visitors to the White House and later released to the public.

"They're doing it on the side. It's better than nothing," said immigration[5] reform lobbyist Tamar Jacoby, who has attended meetings at the nearby Jackson Place complex and believes the undisclosed gatherings are better than none.

The White House scoffs at the notion of an ulterior motive for scheduling meetings in what are, after all, meeting rooms. But at least four lobbyists who've been to the conference rooms just off Lafayette Square tell POLITICO they had the distinct impression they were being shunted off to Jackson Place — and off the books — so their visits wouldn't later be made public.

[6]Obama's administration

has touted its release of White House visitors logs as a breakthrough in transparency, as the first White House team to reveal the comings and goings around the West Wing and the Old Executive Office Building.

The Jackson Place townhouses are a different story.

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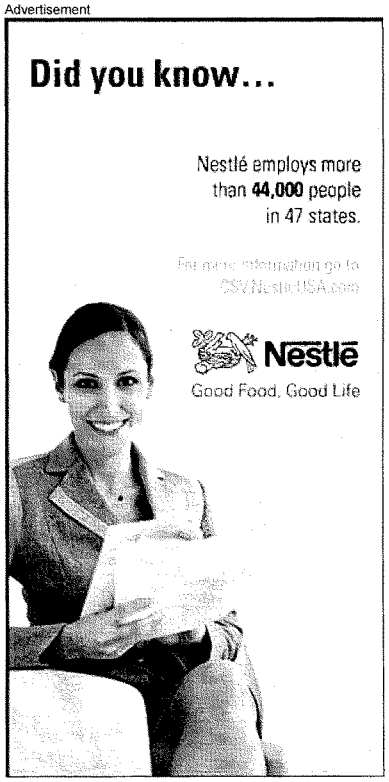

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There are no records of meetings at the row houses just off Lafayette Square that house the White House Conference Center and the Council on Environmental Quality, home to two of the busiest meeting spaces. The White House can't say who attended meetings there, or how often. The Secret Service doesn't log in visitors or require a background check the way it does at the main gates of the White House.

The White House says the additional meeting space is used when the White House is filled or when there's no time to clear participants through the security screening. And to be sure, a few lobbyists contacted by POLITICO said they didn't see any hidden motive for the White House staff's decision to hold a meeting there.

"The White House conference facilities are just that: facilities for large meetings. They are also an option when rooms inside the complex don't have the capacity for a given meeting or are booked," said White House spokesman Reid Cherlin.

But that's not how it feels to some of the lobbyists who've been there.

They say the White House is generally happy to meet with them and their clients once or twice but get leery when an issue requires multiple visits. These lobbyists say it is then that phone calls or meetings seem to be pushed outside the White House gates.

"Without question, I think that there's a lot of concern about being seen meeting with the same lobbyists or particular lobbyists over and over again," said one business lobbyist, who has been to Jackson Place meetings.

It's not only Jackson Place. Another favorite off-campus meeting spot is a nearby Caribou Coffee, which, according to The New York Times[7], has hosted hundreds of meetings among lobbyists and White House

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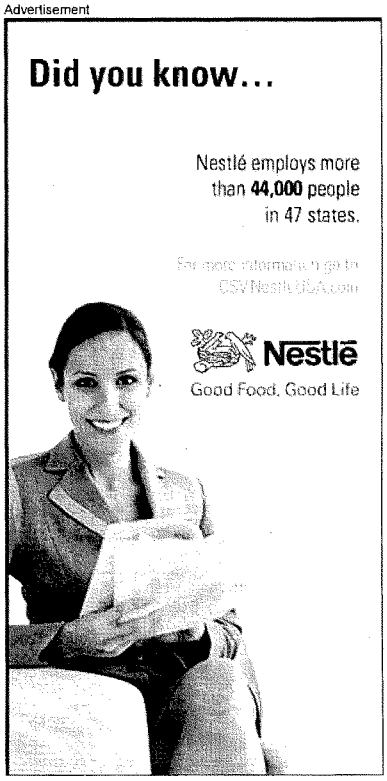

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staffers since Obama took office.

And administration officials recently asked some lobbyists and others who met with them to sign confidentiality agreements barring them from disclosing what was discussed at meetings with administration officials, in that case a rental policy working group.

The administration has defended the practice as a way to "maintain the integrity of our decision-making process." But it has come under fire from lobbyists and a top House Republican, who have criticized the demand that participants sign a "gag order" before being allowed into meetings. The White House has not responded to repeated requests for comment on its nondisclosure agreement policy.

The process of disclosing the meetings can cut both ways.

During the health care reform debate, Democratic House and Senate leadership pushed for high-level negotiations to be held in the White House — specifically to create a record when the visitor logs were released, so administration officials couldn't later distance themselves if the talks had failed, said a source familiar with the situation.

And in fact, a number of lobbyist contacts have been recorded in the visitor logs released by the White House.

Cherlin said the administration never claimed the visitor logs capture every meeting held with White House officials.

"Our driving principal here is that lobbyists should have the same access to the White House as non-lobbyists. We deal with important policy issues, and we want to get those policy issues right," Cherlin said. "We've taken unprecedented steps to limit the influence of lobbyists inside the White House; we've closed the revolving door. But we just felt that access should be equal,

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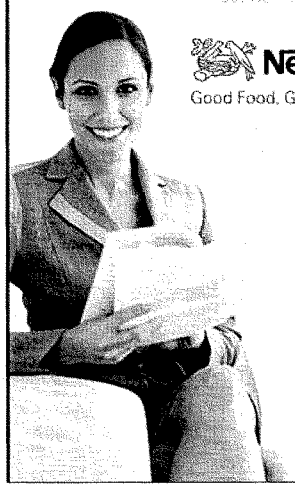

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which you know in the past it has not been. Lobbyists have had more."

But lobbyists are particularly stung by what they see as a double standard, with Obama bashing their profession as part of what's wrong with Washington while his staff routinely sits down with lobbyists to discuss key issues.

"When they need us, they call us. When they don't, we're evil," said another lobbyist who has been to Jackson Place meetings.

Indeed, during the State of the Union address[8] Obama derided the "parade of lobbyists [that] has rigged the tax code to benefit particular companies and industries." And, because the public deserves to know when its elected officials are talking to lobbyists, he called on "Congress to do what the White House has already done — put that information online."

Randy Johnson, a U.S. Chamber of Commerce[9] executive who has been to White House and Jackson Place meetings, said the gatherings aren't closely guarded secrets and insiders generally know who administration staffers are talking to. But, he said, there's no way to know for certain without a record of all the meetings at Jackson Place.

"You can't make the claim you're holier than thou because sometimes a car looks shiny, but when you look below the hood, things may look a lot different," he said. "You can't measure the claim of transparency unless you have those numbers."

Some lobbyists gripe about the hypocrisy of publicly bashing lobbyists while privately holding off-the-books meetings with them, but Jacoby, president of ImmigrationWorks USA, an organization representing small businesses, supports the outreach, no matter the form.

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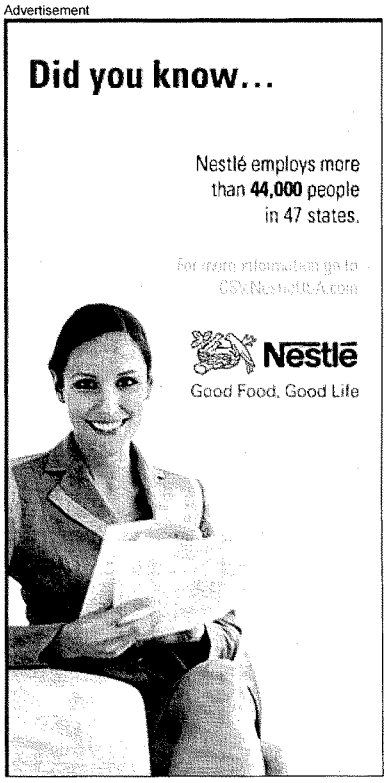

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"The most important thing, for all the prohibitions, is that they're realizing that y ou can't govern in America without a.), getting the input of experts and b.), getting in touch with the business community. No matter how they do that, whether it's on the up-and-up or off-the-charts, so to speak, the important thing is that they know that they have to do it," she said.

The administration really "boxed themselves in" with their anti-lobbyist policies, she said. But rather than emphasizing hypocrisy and playing gotcha, i t's important to recognize that "they're on a better track and they see that they need to get out of the box," said Jacoby, who has been to Jackson Place meetings.
Of course, meeting outside the limelight and limiting written correspondence is not unique to the Obama administration. For years, countless government staffers have been admonished not to write down s omething they wouldn't want to read on the front page of The Washington Post. But the Obama administration, some lobbyists say, has taken that approach to new levels.

"I've not seen The Washington Post test enforced so ritualistically as this White House," said one lobbyist, who regularly does business with the administration.

The veteran lobbyist said no other administration he's worked with has so often responded to routine e-mail queries with the same three-word response, "Gimme a ring."

White House officials are traditionally wary of disclosing their meetings. Vice President Dick Cheney, for instance, refused to name the energy company officials and lobbyists he met with while heading a task force that made pro-industry recommendations — a decision a federal appeals court ultimately upheld.
But unlike Obama, Bush and previous presidents didn't pledge to make their administrations "the most open and

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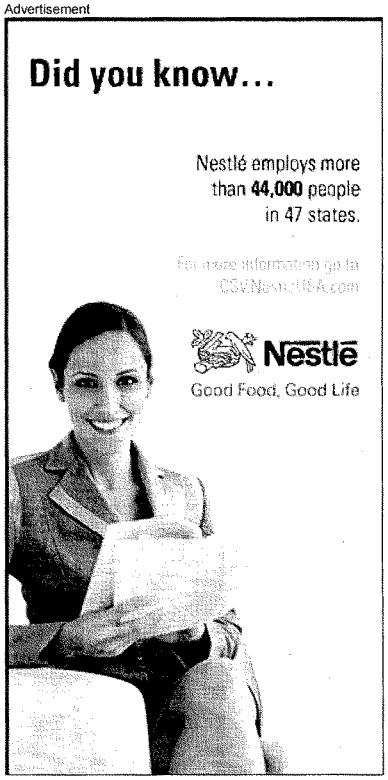

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transparent in history" — a fact not lost on Washington's lobbying class.

During last year's push to move comprehensive immigration reform (CIR) legislation on Capitol Hill, the White House invited business lobbyists and executives from the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Association of Home Builders, the National Restaurant Association and others to a Jackson Place meeting with senior policy staffers.

"We would like to convene a small meeting with White House staff on Friday at 12 noon (736 Jackson Place — see attached map), to discuss the current progress of CIR legislation," a White House invitation obtained by POLITICO said.

The email was sent on a Wednesday, two days before the meeting, which left time for background checks had staffers wanted to hold the meeting at the White House. Some lobbyists suspected they were being kept outside the gates for political, rather than logistical, reasons.

"My understanding was they were holding the meeting there because it included several high-level business and trade association lobbyists," said a senior business lobbyist who attended the meeting. "This was an effort to not have to go through the security protocols at the White House which could lead to the visitor logs at some point being released to the public and embarrass the president."

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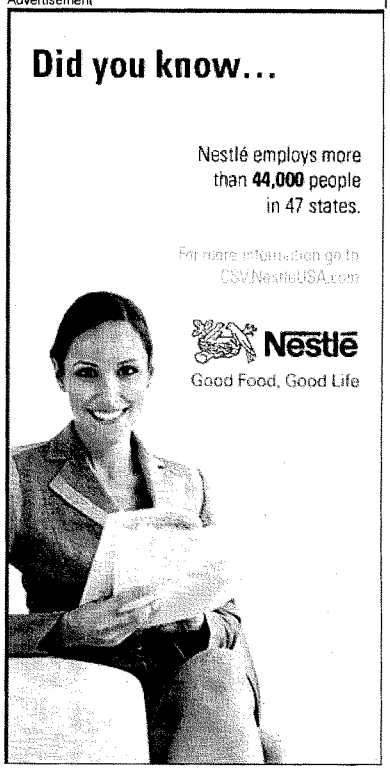

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PROMISES, PROMISES: Little transparency progress

AP Associated Press

WASHINGTON – Two years into its pledge to improve government transparency, the Obama administration took action on fewer requests for federal records from citizens, journalists, companies and others last year even as significantly more people asked for information. The administration disclosed at least some of what people wanted at about the same rate as the previous year.

People requested information 544,360 times last year under the U.S. Freedom of Information Act from the 35 largest agencies, up nearly 41,000 more than the previous year, according to an analysis by The Associated Press of new federal data. But the government responded to nearly 12,400 fewer requests.

The administration refused to release any sought-after materials in more than 1-in-3 information requests, including cases when it couldn't find records, a person refused to pay for copies or the request was determined to be improper under the law. It refused more often to quickly consider information requests about subjects described as urgent or especially newsworthy. And nearly half the agencies that AP examined took longer — weeks more, in some cases — to give out records last year than during the previous year.

The government's responsiveness under the Freedom of Information Act is widely considered a barometer of how transparent federal offices are. The AP's analysis comes a day before a Senate Judiciary Committee hearing examining the Obama administration's progress.

There were some improvements. The administration less frequently invoked the "deliberative process" exemption under the law to withhold records describing decision-making behind the scenes. President Barack Obama had directed agencies to use it less often, but the number of such cases had surged after his first year in office to more than 71,000. It fell last year to 53,360. The exemption was still commonly invoked last year at the Homeland Security Department, which accounted for nearly 80 percent of cases across the whole government.

Overall, the decidedly mixed performance shows the federal government struggling to match the promises Obama made early in his term to improve transparency and disclose more information rapidly. "Transparency promotes accountability and provides information for citizens about what their government is doing," Obama said when he took office."

The White House said it was voluntarily disclosing more information, forestalling a need to formally make requests under the law, and said that agencies released information in nearly 93 percent of cases, excluding instances when it couldn't find records, a person refused to pay for copies or the request was determined to be improper.

"A lot of the statistics need to be taken with a grain of salt, but they may understate our successes," said Steven Croley, a special assistant to the president for justice and regulatory policy.

At an event on Monday celebrating Sunshine Week, when news organizations promote open government and freedom of information, Associate Attorney General Tom Perrelli announced the unveiling of a website, foia.gov, to provide the public with a centralized resource that details how to file requests for government records.

The Obama administration censored 194 pages of internal e-mails about its Open Government Directive that the AP requested more than one year ago. The December 2009 directive requires every agency to take immediate, specific steps to open their operations up to the public. But the White House Office of Management and Budget blacked-out entire pages of some e-mails between federal employees discussing how to apply the new openness rules, and it blacked-out one e-mail discussing how to respond to AP's request for information about the transparency directive.

The OMB invoked the "deliberative process" exemption — the one that Obama said to use more sparingly — at least 192 separate times in turning over the censored e-mails to the AP. Some blacked-out sections involved officials discussing changes the White House wanted and sections of the openness rules that were never made official.

This year, after Republicans won control in the House and with the presidential election looming, the fight over transparency could turn political. The new Republican chairman of the House Oversight and Government Reform Committee, Rep. Darrell Issa, R-Calif., is conducting a broad inquiry into Obama's openness promises. The investigation was at least partly prompted by reports from the AP last year that the Homeland Security Department had sidetracked hundreds of requests for federal records to top political advisers, who wanted information about those requesting the materials.

Organizations that routinely ask for government records are fighting many of the same battles for information waged during the Bush administration. Federal offices lack enough employees and money to respond to requests quickly and thoroughly, said Anne Weismann, chief counsel at Citizens for Responsibility and Ethics in Washington, a watchdog group. With federal spending expected to tighten, the problem will likely get worse.

"They're going to be asked to do more with less," Weismann said.

AP's analysis showed that the odds a government agency would search its filing cabinets and turn over copies of documents, e-mails, videos or other requested materials depended mostly on which

agency produced them — and on a person's patience. Willingness to wait — and then wait some more — was a virtue. Agencies refused more routinely last year to quickly consider information requests deemed especially urgent or newsworthy, agreeing to conduct a speedy review about 1-in-5 times they were asked. The State Department granted only 1 out of 98 such reviews; the Homeland Security Department granted 27 out of 1,476. The previous year the government overall granted more than 1-in-4 such speedy reviews.

The parts of the government that deal with sensitive matters like espionage or stock market swindles, including the CIA or Securities and Exchange Commission, entirely rejected information requests more than half the time during fiscal 2010. And they took their time to decide: The SEC averaged 553 days to reply to each request it considered complicated, and the CIA took more than three months.

Less-sensitive agencies, such as the Social Security Administration or Department of Agriculture, turned over at least some records nearly every time someone asked for them, often in just weeks.

Some federal agencies showed marked improvements, but sometimes it came at a cost elsewhere in the government. The Homeland Security Department cut its number of backlogged information requests by 40 percent last year, thanks mostly to work under a $7.6 million federal contract with TDB Communications of Lenexa, Kan., which was approved during the Bush administration. The company accomplished its work partly by forwarding to the State Department tens of thousands of requests for immigration records from Homeland Security's Citizenship and Immigration Services because the State Department makes visa determinations in immigration cases. At one point, as the Homeland Security Department was reducing its backlog, it was sending as many as 3,800 cases each month to the State Department, said Janice DeGarmo, a State Department spokeswoman.

The State Department received and handled three times as many requests in 2010 than the previous year. It ended up with a backlog of more than 20,500 overdue cases, more than twice as many as the previous year.

Also, the Veterans Affairs Department said it received 40,000 fewer information requests last year. Spokeswoman Jo Schuda said the department incorrectly labeled some requests in 2009 as being filed under the Freedom of Information Act but actually were made under the U.S. Privacy Act, a different law.

The 35 agencies that AP examined were: Agency for International Development, CIA, Consumer Product Safety Commission, Council on Environmental Quality, Agriculture Department, Commerce Department, Defense Department, Education Department, Energy Department, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Interior Department, Justice Department, Labor Department, State Department, Transportation Department, Treasury Department, Department of Veterans Affairs, Environmental Protection Agency, Federal Communications Commission, Federal Deposit Insurance Corporation,

Federal Trade Commission, NASA, National Science Foundation, National Transportation Safety Board, Nuclear Regulatory Commission, Office of Management and Budget, Office of National Drug Control Policy, Office of Personnel Management, Office of Science and Technology Policy, Office of the Director of National Intelligence, Securities and Exchange Commission, Small Business Administration and the Social Security Administration.

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POLITICO

W.H. visitor logs leave out many

By: Viveca Novak and Fred Schulte - Center for Public Integrity
April 13, 2011 04:39 AM EDT

A foot of snow couldn't keep Bob Dylan, Joan Baez, Jennifer Hudson and other celebrities away from a star-studded celebration of civil-rights-era music, hosted by President Barack Obama[1] and first lady Michelle Obama[2] at the White House in February 2010.

Dylan's haunting rendition of "The Times They Are a-Changin'" was a highlight of the dazzling evening. The digitally friendly White House even posted the video of his performance on its website.

But you won't find Dylan (or Robert Zimmerman, his birth name) listed in the White House visitor logs — the official record of who comes to call at 1600 Pennsylvania Ave., which is maintained by the Secret Service.

Ditto Joan Baez.

Similarly, the logs are missing the names of thousands of other visitors to the White House[3], including lobbyists, government employees, campaign donors, policy experts and friends of the first family, according to an investigation by the Center for Public Integrity.

The White House website proudly boasts of making available "over 1,000,000 records of everyone who's come through the doors of the White House" via a searchable database.

Yet the Center's analysis shows that the logs routinely omit or cloud key details about the identity of visitors, whom they met with and the nature of their visits. The logs even include the names of people who never showed up. These are critical gaps that raise doubts about the records' historical accuracy and utility in helping the public understand White House operations,

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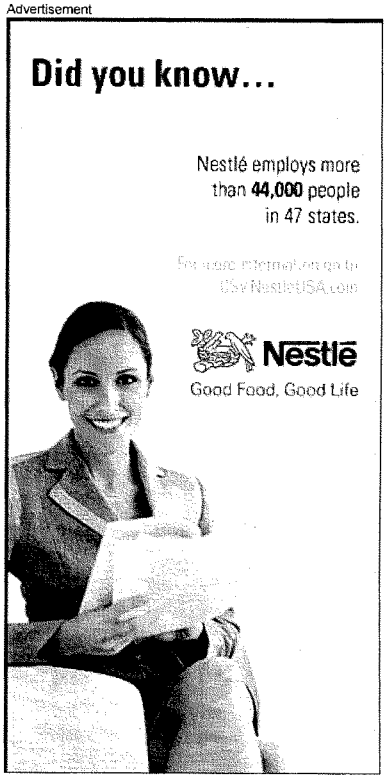

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from social events to meetings on key policy debates.

Among the many weaknesses found by the Center's review of the database:

• The "event" description in the logs is blank for more than 205,000 visits, including many that involved small meetings with the president and his key aides.

• Five junior staff aides together received more than 4,440 visits. By contrast, then-chief of staff Rahm Emanuel[4], famed for his workaholic schedule, is listed as having fewer than 500 visits.

• Less than 1 percent of the estimated 500,000 visits to the White House in Obama's first eight months — a time when the new administration was bustling with activity — have been disclosed, according to the Center's analysis.

• The logs include names of people cleared by the Secret Service for White House entry who apparently never showed up. The Center analysis found more than 200,000 visits with no time of arrival, an indication that the person didn't enter the White House, though there is no way to be certain. For instance, actor Ryan Gosling is listed at a West Wing event with members of his band, Dead Man's Bones, in October 2009. But Gosling's representative, Carolyn Govers, said the actor did not go.

• Two-thirds of the more than 1 million names listed are people who passed through parts of the White House on guided group tours.

The Center's analysis is based on visitor logs through February; additional names released in late March are not included in this analysis. "If this is transparency, who needs it?" said Steven Aftergood, director of the project on government secrecy at the Federation of American Scientists. He called

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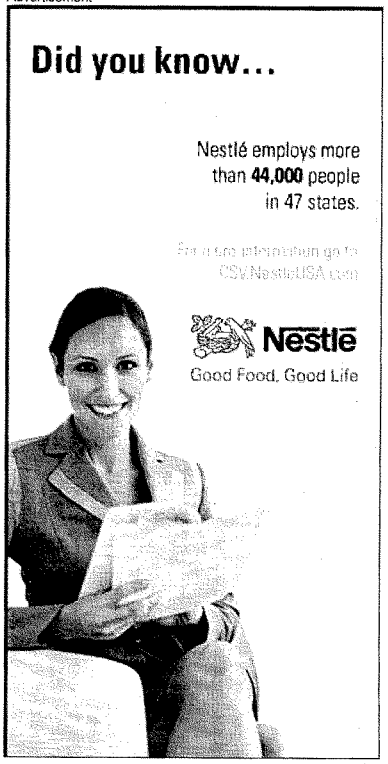

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the White House visitor logs "very thin gruel."

A White House official conceded the system has limitations, asserting it was designed not as an archive but "first and foremost to protect the first family, second family and White House staff while imposing the smallest administrative burden possible."

"The Obama administration has taken unprecedented steps to increase transparency by releasing visitor records from the system each month to provide the American people with more information about their government," White House spokeswoman Kate Bedingfield said.

"No previous White House has ever adopted such a policy," she said.

However, the White House agreed to release the data only as a result of settling a lawsuit. And the Obama administration has taken the same legal position as its Republican predecessor on the subject of whether the data are covered by the Freedom of Information Act. (They say no.)

Moreover, the settlement doesn't cover visitor records generated from Jan. 20 to Sept. 15, 2009. According to the White House, the recordkeeping system was revamped when the settlement was reached, and going back into the old system would be extremely time consuming. The administration said it will respond to "reasonable, narrow and specific" requests for visitor information f rom Obama's early months in office, but there will be no wholesale release of material.

It's a sizable gap that provides the public and historians little insight into how key policy decisions were made and who

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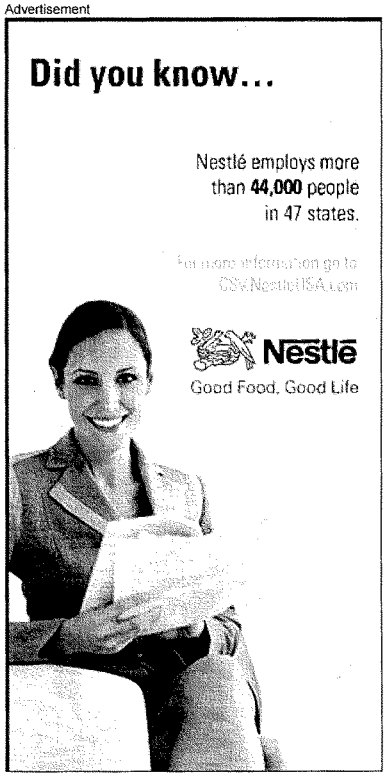

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played a role in them in the energetic early months of the new administration.

And it means it's difficult to assess whether a major Obama campaign pledge to limit the influence of lobbyists in his administration has been kept, or if big donors have been given ready access to the White House, which Obama said during his campaign would not happen once he took office.

"It pains me to think that there are competent people processing this vast series of records for posting on the Web," A ftergood said. "The overwhelming majority is of no consequence whatsoever."

The records posted on the White House website, though voluminous, cover mostly mundane matters, such as tours and social events. In all, more than 50,000 names are listed for people who visited the president, P OTUS in Secret Service parlance. Most were for 600 ceremonial or social gatherings, such as the July Fourth celebration in 2010, attended by more than 3,600 people.

But the logs reveal far less about the purpose of nearly half of the 300-plus private meetings listed with Obama, including those with politicians and even sports figures.

Case in point: Jeffrey Kindler, former chief executive of Pfizer, the world's biggest drug company, is listed as visiting the White House complex eight times. Only three entries describe an event he attended; the rest are blank. Last month, Obama appointed Kindler to a presidential board with the duty to help the federal government improve its operations. Kindler did not return calls for comment.

AFL-CIO head Richard Trumka

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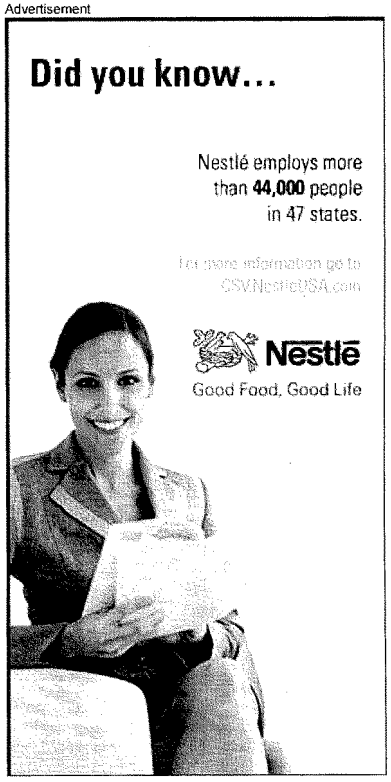

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has been logged in at least four dozen times, often with other labor bigwigs, but the records tell why he was there in only 12 of those cases, and those are mostly ceremonial events or social functions. Twice last year, Trumka met privately with Obama and once with Vice President Joe Biden[5], the records show, but no details are given. The AFL-CIO declined to comment.

Chicago billionaire Penny Pritzker, the Obama's campaign finance chairman, met with the president on Feb. 16, 2009, in the Oval Office, according to the logs. Several other "bundlers," each of whom raised $200,000 or more for the Obama campaign, also met with the president, the visitors' logs show.

Asked why no details are available, the White House said the Secret Service doesn't eed a description for security purposes, and it would be an unnecessary burden to provide it.

In other words, it's up to the White House staffer being visited, who provides the other information the Secret Service needs for doing background checks on visitors, to decide whether to complete the log's description field.

Another practice calling into question the veracity of the logs: Junior White House staff members routinely list themselves as the "visitee," or person being visited, when in fact the visitor has arrived to see someone higher up the chain of command.

The practice appears to apply to the commander in chief in some instances.

is recorded as receiving nearly 300 visits in the West Wing of the White House. Love is Obama's personal assistant, the young aide who is constantly at the president's side. Celebrities like NBA star Kobe Bryant and some Obama friends are listed as visitors to Love.

In addition, nearly two dozen campaign

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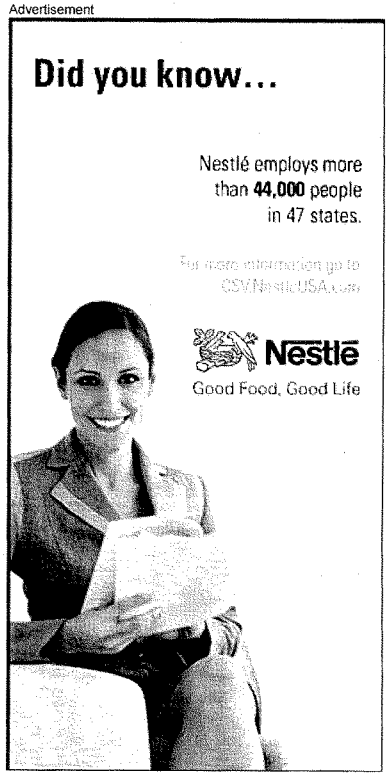

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fundraisers and their family members are listed as visiting Love. The records give no hint as to who else they saw once they entered the White House or the purpose of their meetings. Among them was Hildy Kuryk, a New York fundraiser for Obama who now is deputy national finance director of the Democratic National Committee[6].

While Emanuel is listed as having fewer than 500 visitors, the logs show health care czar Nancy Ann DeParle had three times as many visitors. But three young aides who scheduled meetings for Emanuel — Katherine Kochman, Amanda Anderson and Benjamin Milakofsky — collectively had more than 2,600 visits in their names. Emanuel did not respond to a request for comment.

Asked why junior staffers appear so often with top-flight visitors, the White House said administrative staff are often the point of contact for visitors to senior staff, and they receive guests as they arrive.

On the other hand, at times there is an absurd amount of detail for seemingly trivial visits. An example: Jackie Walker, a professional makeup artist, is listed for more than a dozen one-person meetings w ith Obama. She also made more than two dozen other trips to the White House, visiting various aides or press office staff. Walker, who runs Trackchicks in Chantilly, Va., told the Center that Obama is a client. She declined further comment.

Another lapse in the White House logs is due to Obama staff who met with people off-site. POLITICO has reported that some visitors believe Obama aides avoid listing such visitors in the logs by steering them to buildings just outside the White House complex. An Obama spokesman denied to POLITICO there was any such motive for holding the meetings off-site.

Despite the gaps, some analysts with an eye toward history think the Obama

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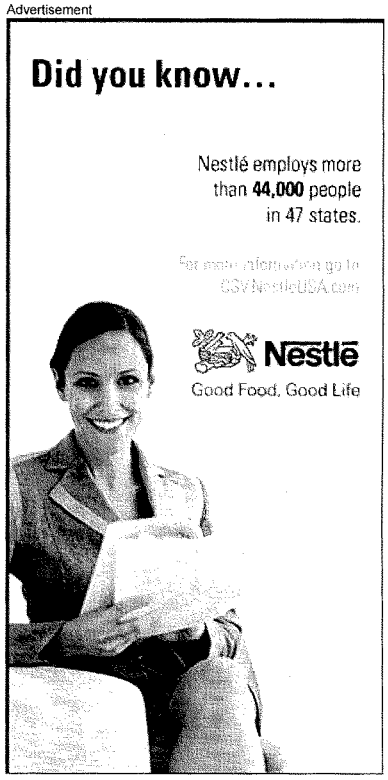

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administration has made a good first move.

"I think we're lucky to get what we're getting," said Martha Kumar, a political science professor at Towson University who writes about White House transitions.

"Would I like more? Yes."

Viveca Novak and Fred Schulte are writers with the *Center for Public Integrity*[7], a Washington-based nonprofit group focused on investigative journalism. A fuller version of this report is at *www.iwatchnews.org*[8].

Shortcuts To Links In Article

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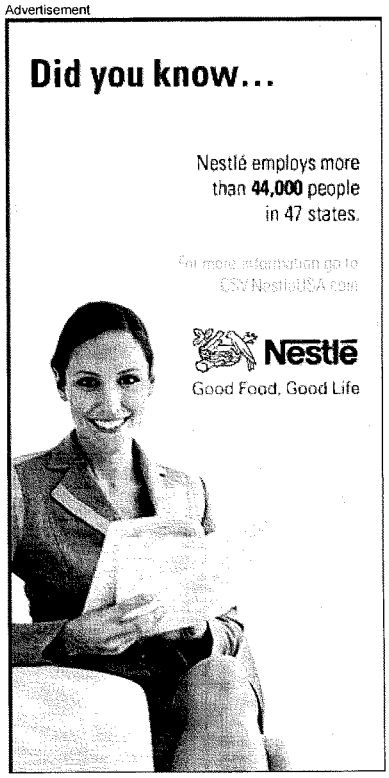

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Mr. STEARNS. I also want to thank the witnesses, and the committee rules provide that members have 10 days to submit additional questions for the record and also provide their opening statements.

Before I start. I would say to the witnesses I just urge all of you to be as direct as you possibly can in your answers. Some members will ask a question that requires a yes or no, and ask that you limit your yes or no to those questions. And I appreciate your understanding so we have a limited time for each of us.

Before we begin, I would like to show a video. It is a collection of the President's promises about conducting the negotiations over health care reform in public. So if you can please watch this video.

[Video shown.]

Mr. STEARNS. So you can see from this video that he was making a promise to the American people to have open, public, televised government. He went out of his way during the campaign to criticize the process that was taking place here in Washington, and I think our focus here today is to show really what he talked about did not come about. We can't even get the exact records of who went to the White House.

Before I start, Mr. Fitton, he mentioned that there were 32 waivers. You mentioned that. Were they issued by the White House, including the President? Is that true?

Mr. FITTON. Yes, it is true.

Mr. STEARNS. And who makes ultimately the decision to give these waivers to the czars and lobbyists that come into the administration?

Mr. FITTON. I think the decision is made by a variety of individuals. If it's in the White House, I think it is granted by then the ethics czar Norm Eisen or White House counsel.

Mr. STEARNS. Does the President of the United States have to approve his ethics violation waivers?

Mr. FITTON. I don't know whether he approves it personally or not.

Mr. STEARNS. So the President gets involved at all, do you think?

Mr. FITTON. You know I—for instance the lawyer, the White House counsel, had a waiver approved for his dealings with the DNC. He used to be DNC chair. I would assume the President had some knowledge of that, but I don't know.

Mr. STEARNS. I think directly the President would make that decision. So the President himself is issuing a waiver for his counsel in dealing with a political organization; is that correct?

Mr. FITTON. I don't know that to be true. I would assume he would have approved it, though.

Mr. STEARNS. And there is nowhere, is there, constitutionally that allows him to make this waiver on his own?

Mr. FITTON. Well, he had issued an executive order detailing this pledge related to not working on work that affected your former clients. Within that ethics pledge is an ethics waiver that is repeatedly invoked, as I mentioned.

Mr. STEARNS. Which would be in direct contradiction to what he said, by what his actions indicate; would that be true?

Mr. FITTON. Yes.

Mr. STEARNS. Both you and Mr. Wonderlich are familiar with the visitor logs that have been released by the White House and you're familiar with the Center for Public Integrity reports that evaluated these logs; is that correct?

Mr. FITTON. Yes.

Mr. STEARNS. This report says, "The logs are incomplete for thousands of other visitors to the White House, including lobbyists, government employees, campaign donors and public policy experts." That's your quote.

Why do you think the White House would withhold so many meetings with lobbyists, particularly in light of what we see the President say during the campaign trail? Either one of you.

Mr. WONDERLICH. Well, when they describe them as incomplete——

Mr. STEARNS. Just take the mic and move it a little closer to you, if you can. That would be helpful.

Mr. WONDERLICH. When they say that they are incomplete, I'm not sure that that means that the White House is withholding them. The CPI——

Mr. STEARNS. OK, good point. So it is yet to be determined whether withholding—just the fact that we can't get them, we can't conclude that they are withholding them. But isn't that contrary to the stated purpose of the White House, which is basically they are withholding information meetings related to national security or, shall we say, extremely sensitive, confidential matters? Wouldn't this be contrary to what they indicated they would do with their transparency policy?

Mr. WONDERLICH. I think it is in line with how they said it would work, but we would like to see oversight to make sure that those standards are applied appropriately.

Mr. STEARNS. Do any of you know about the Center for Public Integrity reports that they have not put out any information that deals with this? Do any of you know about that, either one of you?

Mr. FITTON. In terms of the records being withheld? We don't know. They said they are going report them. There are no reports on the Internet Web site. The key point here is that these records, they say, are not subject to FOIA, so all we can do is take their word for it; which is not appropriate, given the fact we know they are subject to FOIA.

So it is really a lawless process, the release and disclosure of these records.

Mr. STEARNS. Let's also point out that their report also said that logs routinely omit or sort of cloud key details about who these visitors were, who they met with, what was the nature and the subject of their visits, and even includes the names of people who never showed up. Now, how could that possibly be if they are being transparent and they want to abide by their own rules?

Mr. WONDERLICH. Sorry. To me it is an artifact of the design of the system that's intended to provide security for the White House rather than well-defined disclosure.

Mr. FITTON. White House officials quickly understand, in my view, what these records disclose, and they set up the meetings accordingly, to make sure that certain information is not disclosed.

Mr. STEARNS. Would either one of you conclude the fact that they have routinely omitted, sort of clouded the details about the identity, and actually gave false information; would this be construed as they are obstructing in any way the requests of the outside groups or their own rules? Is this sort of a form of an obstruction to provide a behavior which is not conducive to providing transparency? Could it be construed that way?

Mr. WONDERLICH. I don't have any evidence that they are intentionally obstructing it. I would note Jay Carney was asked in one of his first press briefings whether or not the White House had issued any guidance for when it's appropriate to hold meetings off site, and he didn't answer that question and basically said, look at our record. I think that is an interesting question, but I have no evidence that they are intentionally obstructing the view.

Mr. STEARNS. Ms. Weismann, I didn't talk to you. Is there anything you'd like to add?

Ms. WEISMANN. I think some of your questions get to what my testimony got to as well, which is that it misunderstands the nature of these particular records. I don't think there's anything that the White House has disclosed or not disclosed with respect to the White House visitor logs that is not in line with their commitment. And again, I would note that the nature of the information in these records is no different—and I know this from personal experience—from the nature of the White House visitor logs that the Bush White House maintained and previous administrations maintained. As Mr. Wonderlich said, it is an artifact of the nature of the records.

Mr. STEARNS. My time's expired. The ranking member from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman.

I kind of want to follow up on that question, Ms. Weismann, because as I understand it, the litigation that your organization was involved in, starting with the Bush administration and then settled by the Obama administration, was exactly about these visitor logs. And as I understand it, there's some dispute whether FOIA requires the disclosure of the visitor logs. A lot of the watchdog groups say, yes, they think it does, and the White House has traditionally said no. So part of the purpose of the settlement was to figure out a way to have disclosure of what they call these WAVES records; is that right?

Ms. WEISMANN. That is correct.

Ms. DEGETTE. And what is the purpose, again, of these WAVES records?

Ms. WEISMANN. It's for the Secret Service to be able to, from a security standpoint, clear visitors for access to the White House.

Ms. DEGETTE. Frankly, I would like to see ways to disclose on the video people who come to the White House and so on. But that's not what these records that we're talking about here, that's not the purpose of them; it is to get people security clearance.

Ms. WEISMANN. That's correct.

Ms. DEGETTE. In September 2009, President Obama announced a new policy to voluntarily disclose White House visitor records, and visitors records created after September 15th, 2009, are routinely posted on line; is that correct?

Ms. WEISMANN. Yes.

Ms. DEGETTE. To date, there are over 1.25 million White House visitor records posted on the White House Web site in a searchable format; is that right?

Ms. WEISMANN. I don't—I can't confirm that, but that sounds about right. And there is a large volume and they are in a searchable format.

Ms. DEGETTE. Now, has any administration, Democrat or Republican, before the Obama administration, routinely posted these WAVES records on line?

Ms. WEISMANN. No, they have not.

Ms. DEGETTE. OK. Now under the Obama administration policy, visitor records created after September 15th, 2009, are disclosed on line; but records created during the Obama administration prior to that date are treated differently. For the ones before September 15th, 2009, the White House responds voluntarily to individual requests as long as they are reasonable, narrow, and specific. And then there is a form. Is that right?

Ms. WEISMANN. That is correct, yes.

Ms. DEGETTE. And do you think it is reasonable to treat the WAVES records before September 15th, 2009, differently?

Ms. WEISMANN. Yes, I do. If you want, I can explain.

Ms. DEGETTE. I would briefly, yes.

Ms. WEISMANN. Yes. You know these records continue to raise, in specific instances, national security concerns. The White House was going to going forward, put a system in place where they could tag those kinds of visits as they occurred, which would make it easy when they went back to post the records on line to know which ones needed to be segregated for national security purposes. That was not done for all of the visits that predated September 2009, which would have been an enormous undertaking. And that was the compromise we reached.

Ms. DEGETTE. I see. A lot of people have been criticizing this voluntary disclosure of visitor records. As Mr. Fitton said today, it is a data dump full of holes that shield rather than shed light on visitors and their business at the White House.

The recent report by the Center for Public Integrity noted the event description is left blank for more than 20 percent of the visits. And I guess, you know, I think those are valid criticisms in some ways. I'm wondering if you can talk to me about the criticisms that the visitor logs disclosures are not sufficient and can more be done?

Ms. WEISMANN. Well, certainly, more can be done. Again, it goes back to for purposes of the Secret Service, they are sufficient. This is the minimum——

Ms. DEGETTE. Right. It goes back to the nature of the records.

Ms. WEISMANN. Right, right. I think perhaps part of the problem is that the White House itself may have oversold what the visitor logs do and do not do.

Ms. DEGETTE. OK, thanks.

Mr. Chairman, I just want to conclude my questioning by talking about the supplemental memo that we just got this morning, because I'm kind of concerned about some of the allegations and some of the members talked about this and even one or two of our wit-

nesses. They talk about multiple news outlets reporting that White House staff has been holding meetings at coffee shops in order to have those meetings appear on a disclose list. But these allegations are all from an unsourced article in the New York Times, which quotes a Caribou Coffee barista, but not a single named administration official. We don't know of any work that's been done to investigate the truth or falsehood of these allegations.

And the same thing, there was a newspaper report that one executive branch agency requires people to sign confidentiality agreements, and this is referring to a Politico article; but some basic work shows that HUD did nothing wrong.

In fact, our friend, our colleague Judy Biggert had asked for some evidence to that and the HUD inspector general investigated and said nothing was wrong.

So, Mr. Chairman, I would like to enter the results of that IG investigation and report to the Financial Services Committee into the record.

Mr. STEARNS. Without objection, so ordered.

Ms. DEGETTE. Thank you.

[The information follows:]

JUDY BIGGERT
13TH DISTRICT, ILLINOIS

COMMITTEES:
EDUCATION AND LABOR
FINANCIAL SERVICES
SCIENCE AND TECHNOLOGY

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February 17, 2011

Michael P. Stephens
Acting Inspector General
Office of Inspector General
U.S. Department of Housing and Urban Development
451 Seventh St., SW, #8260
Washington, DC 20410-4500

Dear Acting Inspector General Stephens:

Attached is a copy of a "Non-Disclosure Agreement," which was delivered to my office by an individual who reported that a coworker had been asked to sign it upon arriving at a meeting hosted this month by officials at the U.S. Department of Housing and Urban Development (HUD). This individual also said that her coworker, along with others attending the meeting, initially refused to sign the agreement and left the meeting.

Subsequently, the coworker received an addendum to the original agreement, which also is included in the attached document. Upon receiving the addendum, the coworker signed the agreement with addendum so that the coworker would not be excluded from discussions with HUD officials regarding issues that are of great importance to the coworker's organization and members.

This document and reported behavior by HUD officials seems to fly in the face of President Obama's "Memorandum for the Heads of Executive Departments and Agencies," which states that to create:

> "...an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."

I am writing to request that you review this document and determine if the document, its use, or the practice of requiring non-government or government officials to sign it prior to participating in a HUD meeting represents a violation of federal law, regulation, Administration policy, an Executive Order, or the aforementioned memorandum. In addition, I request that you provide a list of all government officials and non-government individuals, including titles and affiliations,

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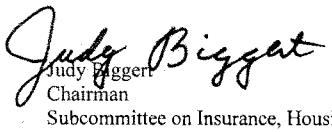
who were asked to sign or did sign a similar document. Finally, please provide an explanation of the circumstances under which these documents were utilized. Who requested that they be signed? Why were they deemed necessary? And, under what typical conditions are government officials or non-government individuals required to sign these documents?

I would appreciate receiving a response from you by March 3, 2011. In advance, thank you for your consideration of my request.

Sincerely,



Judy Biggert
Chairman
Subcommittee on Insurance, Housing, and Community Opportunity
Committee on Financial Services

Cc: Shaun Donovan, Secretary, U.S. Department of Housing and Urban Development

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, DC 20410

NON-DISCLOSURE AGREEMENT

RENTAL POLICY WORKING GROUP – ALIGNMENT EFFORT

1. I, _____, agree to abide by the safeguards described below regarding information to which I may gain access in conferring with HUD, USDA, Treasury or other federal officials (collectively, "the federal government parties"). The word "information" in this Agreement refers to: (1) any information and derivatives therefrom, furnished by the federal government parties, whether or not such information has been reduced to writing; and (2) any details of the federal government parties policy or policy deliberations that have not been made available to the public.
2. I will maintain the confidentiality of information disclosed to me or otherwise learned during the course of my collaborative relationship with the federal government parties.
3. Except as necessary in the performance of my collaboration, I will not, without the written permission of HUD,
   a. Reveal, divulge, or publicize any information covered under this Agreement; or
   b. Disseminate any oral, written, or electronic information obtained under this collaboration.
4. I will not use any information improperly obtained during the course of my collaboration with the federal government parties in or as an aid in preparing future proposals to the federal government.
5. I further acknowledge that I understand the provisions of paragraph 3 & 4 above will continue to apply even after the end of the collaboration.
6. I agree not to release data regarding performance of work under this collaboration to any party, including clients or potential clients, without the express permission of HUD
7. My obligations of confidentiality shall not apply to the following circumstances:
   a. Information which is now or hereafter becomes part of the public domain;
   b. Information known to me before disclosure to me by the federal government parties;

c. Information given to me by a third party having a right to disclose the same; or

d. Information I am compelled to disclose by judicial or administrative process, or by other mandatory requirements of law.

8. The disclosure of information by the federal government parties shall not constitute a grant to the receiving party of any species of right, title, interest, or property in or to confidential information. No license or other right under any U.S. or foreign patent, copyright, or know-how is granted or implied by this Agreement.

9. The above constitutes the full and complete Agreement in this matter by and between the parties hereto.

Signed	
Typed Name	
Organization	
Date Signed	

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, DC 20410

RENTAL POLICYWORKING GROUP – ALIGNMENT EFFORT

Pursuant to Section 3 of the document entitled "**NON-DISCLOSURE AGREEMENT: RENTAL POLICY WORKING GROUP – ALIGNMENT EFFORT**" (the Agreement), permission is granted to the Signatory of the Agreement to make disclosure that possesses all of the following attributes:

- The disclosure is made for the purpose of obtaining knowledgeable comments and suggestions regarding the material and information shared with the Signatory by the federal government parties;
- The disclosure is made to a limited number of individuals with whom the Signatory has an active working relation and in whose discretion the Signatory has a high level of confidence;
- The disclosure does not involve sharing any written documents;
- The person to whom the disclosure is made is informed that all of the policy proposals under consideration are the product of staff-level "brainstorming," and none has yet been approved by, or even presented to, higher-level personnel; and
- The person to whom the disclosure is made is requested to keep the contents of the disclosure confidential.

This permission does not exclude the possibility of additional written permissions, if needed, pursuant to Section 3 of the Agreement.

U.S. Department of Housing and Urban Development
Office of Inspector General
451 7th St., S.W
Washington, D.C. 20410

March 3, 2011

The Honorable Judy Biggert
Chairman
Subcommittee on Insurance, Housing and Community Opportunity
Committee on Financial Services
House of Representatives
1034 Longworth House Office Building
Washington, DC 20410

Dear Chairman Biggert:

We are in receipt of your letter dated February 17, 2011. We have met with HUD officials and contacted Department of Treasury officials involved with organizing the events that required the referenced non-disclosure agreement. We also reviewed relevant supporting information and assessed relevant legal and administrative requirements. Below is a description of the circumstances surrounding the use of the non-disclosure agreement followed by detailed responses to your request for information.

The White House's Domestic Policy Council established an interagency Rental Policy Working Group (working group) in early 2010 to respond to a purported need for better coordination of Federal rental policy. The working group consists of the White House's Domestic Policy Council, the National Economic Council, the Office of Management and Budget, the Department of Housing and Urban Development (HUD), the Department of Agriculture, and the Department of Treasury. The working group hosted two initial meetings in July 2010 to solicit suggestions for improved rental policy coordination from affordable housing developers and managers, and from State and local officials. Stakeholders identified many areas where administrative changes could increase overall programmatic efficiencies and reduce burdens on the public. See Attachment 1 for a copy of the White House Blog discussing the working group.

The working group assembled interagency teams to consider the issues discussed at the July meetings. Around December 2010, having developed several conclusions and possible working concepts, the working group decided more input from the external stakeholders was necessary to ensure conclusions were workable. It was at this point that the Department of Treasury officials stated that, with regard to its low-income housing tax credit program, it could not allow information to be disseminated to non-Federal stakeholders without their signing a non-disclosure agreement. Treasury officials advised that this was because of a Treasury policy that any document that could possibly influence a taxpayer's behavior needed to be protected from disclosure. In order to not delay the first meeting, HUD drafted the non-disclosure agreement on its letterhead because the Department of Treasury could not prepare and approve one quickly enough. All of the Federal participant agencies including the Department of

Treasury agreed on the contents of the non-disclosure agreement. At one of the meetings, some participants refused to sign the non-disclosure agreement as initially prepared. The addendum was added and the remaining participants signed. In summary, although HUD agreed to its use, it was not the agency behind the requirement for the non-disclosure agreement. The following relates to the specific matters you asked us to review.

Determine whether the non-disclosure agreement, its use, or the practice of requiring non-government or government officials to sign it prior to participating in a HUD meeting represents a violation of federal law, regulation, Administration policy, an Executive Order, or President Obama's memorandum regarding transparency.

We examined applicable Federal law, regulations, administration policies, Executive Orders and other guidance to determine if requiring participants to sign a non-disclosure agreement violated any prohibition against the same. We did not find any such violation.

We considered whether provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2) were applicable to the working group and whether requiring the non-disclosure agreements would violate one or more of its provisions. However, upon careful review it was determined that the working group did not fall under this provision of law. HUD officials told us that HUD and its White House liaison had also looked at this initially and had determined that the Federal Advisory Committee Act did not apply to the working group. If the agencies are seeking input as opposed to formal consensus or guidance, generally this Act will not apply. However, the Federal Advisory Committee Act could become an issue if the functions of the group changes over time and the agencies start to use the group as a source of consensus advice or recommendations. For the matter at hand, the agencies asked a varying group of people to provide input on a varying number of topics, and the groups were different for each topic. We also assessed the Federal Sunshine Act (5 U.S.C. 552b) and determined that this law did not apply to the working group.

We also examined President Obama's January 21, 2009 Memorandum on Transparency and Open Government along with OMB's December 8, 2009 implementing guidance. The policy established therein relates primarily to the publication and availability of government information. The policies appear to be much more technology related and driven than geared towards the conduct of meetings and other government functions. We could find no provision of the Memorandum or OMB implementing guidance that the working group may have violated by requiring the use of the non-disclosure agreements. The OMB implementing guidance does state that circumstances would exist that would preclude the presumption of openness, when release would "...threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests."

Provide a list of all government officials and non-government individuals, including titles and affiliations, who were asked or did sign a similar document.

See Attachment 2 for a HUD-provided list of stakeholders that attended the meetings and signed the non-disclosure agreement. Titles were not included and were not available in order to meet our commitment to respond quickly. We examined a sample of the actual signed agreements that were in HUD's possession and determined that information on the list agreed

with the documents in that sample. In some cases, a non-disclosure agreement could not be located and, therefore, the date is missing.

Provide an explanation of the circumstances under which these documents were utilized; who requested they be signed; why they were deemed necessary; and under what typical conditions government or non-government individuals are required to sign these documents.

HUD officials told us that HUD typically does not use a non-disclosure agreement except for rulemaking procedures and other sensitive matters. Usually, as in this case, stakeholders are brought in before the rulemaking process begins. This was considered to be a series of concept meetings that had not reached the point of rulemaking so HUD would typically not require such an agreement under these circumstances.

The documents were used in conjunction with five focus group meetings that were held during January and February 2011. They were also used in conjunction with additional smaller group sessions or "one on one" conversations. The focus group meetings involved the following categories of stakeholders:

January 11, 2011 – State agency representatives

January 19, 2011 – Local government representatives, specifically those involved with administering the HOME and Community Development Block Grant programs.

February 4, 2011 – owners and operators of affordable housing, along with related industry organizations.

February 10, 2011 – private sector investors.

February 16, 2011 – follow-up of February 4, 2011 meeting.

According to Department of Treasury and HUD officials, the Department of Treasury has a policy that any document that could possibly influence a taxpayer's behavior requires them to obtain a non-disclosure agreement from non-Federal employees who are not subject to ethics statutes and regulations. Consequently, all non-Federal stakeholders, both governmental and non-governmental were asked to sign the non-disclosure agreement.

If you have any questions, please have your staff contact James Heist, Assistant Inspector General for Audit at 202-402-8112.

Sincerely,

Michael P. Stephens

Michael P. Stephens
Acting Inspector General

Attachment 1

The White House Blog

Urban Update: Aligning Federal Rental Housing Policy

February 01, 2011 at 05:00 PM EST

The White House's Domestic Policy Council (DPC) established an interagency Rental Policy Working Group in early 2010 to respond to the need for better coordination of Federal rental policy. The White House hosted two gatherings in July 2010 to solicit suggestions for improved rental policy coordination from affordable rental housing developers and managers and from State and local officials. These stakeholders identified many issue areas where administrative changes could increase overall programmatic efficiency and reduce the burdens on the public. The objective was to seek better alignment of rental policy among three agencies that have significant affordable housing programs (Department of Housing and Urban Development, Department of Agriculture and Department of the Treasury) in order to reduce costs and paperwork obligations for property owners, developers, managers, and State and local governments. The meetings explored a broad range of issues and ideas. The notes from those meetings are available here.*

The Rental Policy Working Group and alignment leaders assembled interagency teams to consider the recommendations provided by participants in the July gatherings. They tasked the teams to survey current policy and, in consultation with State and local agencies and stakeholder groups, to find opportunities for greater Federal alignment. The areas that were identified as in particular need of Federal coordination included physical inspections, operating budgets and financial reporting, and appraisals and market studies. The teams are also working on capital needs assessment, energy efficiency, compliance, subsidy layering, and tenant income definition.

Many of the issues raised at the July gatherings reflect the simple fact that much Federal funding to support affordable rental housing flows through programs administered separately by the three Federal Departments. Each Department receives funds based on its Department's appropriations and each Department administers programs authorized by their respective legislative committees. This decentralized administration of rental housing policy has generally been good for the rental housing field, as different programs respond to different needs and draw on the different strengths of the agencies that administer them. It is also true; however, that separate programs and budget streams have created, over time, some inconsistencies and needless overlaps in administrative requirements. As developers and owners of affordable housing become more sophisticated, they increasingly rely on multi-layered finance and subsidy structures, which are supported by multiple Federal programs. These multiple sources of support bring with them overlapping certifications, reporting, and other duplications that can cause unnecessary complexity and cost. In keeping with the Administration's efforts to identify and use less burdensome tools for achieving policy ends, the interagency Rental Policy Working Group will be seeking ways to align the various rental housing programs with each other and within their own Departments.

Derek Douglas is the Special Assistant to the President for Urban Policy in the Domestic Policy Council.

*The link above connects to: http://www.whitehouse.gov/sites/default/files/uploads/Aligning%20Federal%20Rental%20Policy.pdf

Name	Organization	2-9-11 Focus Group at PNC Building		2-10-11 Focus Group at Citizens Building		2-16-11 Focus Group at Little Building		1-11-11 Focus Group at Washington Court House		1-11-11 Focus Group at Lucas Building		Total Group Size
		Planned Size	Actual Size	Planned Size	Actual Size	Planned Size	Actual Size	Planned Size	Actual Size	Planned Size	Actual Size	Actual Size
William Flaherty	Bank of America			[illegible]	[illegible]							
David Longstreet	Bank of America			[illegible]								
Tiffany Parker	Berkshire Capital			[illegible]								
David Clapham	Boston Capital			[illegible]	[illegible]							
Bob Clarke	Boston Properties Investment Management											[illegible]
Lisbetha Allen	Building Owner Assistance Project											[illegible]
Bill Pender	California Tax Credit Allocation Committee									[illegible]	[illegible]	
Thomas Scott Powell	Capital Impact Unlimited											[illegible]
Michael Shelton	Centerline			[illegible]								
Leila Mangelsdorf	CH Community Capital			[illegible]								
Donna Hicken	City of Amarillo, TX							[illegible]				
Elizabeth Spencer	City of Austin, TX							[illegible]				
John Beach	City of Bakersfield, CA							[illegible]				
[illegible]	City of Bedford, MA							[illegible]				
Laura Leonard	City of Boston, MA							[illegible]				
Richard Clement	City of Boston, MA							[illegible]				
[illegible]	City of Champaign, IL							[illegible]				
Dave Fiesta	City of Chicago, IL							[illegible]				
Barbara Sims	City of Cincinnati, OH							[illegible]				
Caroline Hughey	City of Fort Smith, AR							[illegible]				
David Smith	City of Fort Smith, AR							[illegible]				
Sandy Anderson	City of Greenville, NC							[illegible]				
Francis Leslie	City of Jackson, MS							[illegible]				
Patricia Williams	City of Jackson, MS							[illegible]				
Susan Hall	City of Lawrence, KS							[illegible]				
Rhonda Ewan	City of Lexington-Fayette, KY							[illegible]				
Phyllis Nelson	City of Lithonia, TN							[illegible]				
Felicia Fisher	City of Memphis							[illegible]				
George Blevins	City of Miami, FL							[illegible]				
Lisa Allen	City of Orlando, FL							[illegible]				
Fernando Rivera	City of Plano, TX							[illegible]				
Sara Dickerson	City of Quincy, MA							[illegible]				
Bonnie Moore	City of Springfield, IL							[illegible]				
Adolphus Chambers	City of Springfield, IL							[illegible]				[illegible]
[illegible]	City of Springfield, IL							[illegible]				
Christopher Forrester	City of Summit, NJ							[illegible]				
Nancy Robbins	City of Tulsa, OK							[illegible]				
Mary Hamilton	Collier County, FL							[illegible]				
Mary Beth Beauregard	Community Development Agency of the Underserved							[illegible]				

Name	Organization	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]
		Provided date	Expected date	Provided date	Expected date	Provided date	Expected date	Provided date	Expected date	Provided date	Expected date	Expected date
[illegible]	Community Housing Partnership	[illegible]	[illegible]									
[illegible]	Council for Affordable and Rural Housing	[illegible]	[illegible]									
[illegible]	[illegible]			[illegible]	[illegible]							
[illegible]	[illegible]	[illegible]		[illegible]								
[illegible]	[illegible]	[illegible]	[illegible]				[illegible]					
[illegible]	Housing Opportunity Commission of Montgomery County	[illegible]	[illegible]									
[illegible]	Housing Opportunity Commission of Montgomery County	[illegible]	[illegible]									
[illegible]	Independent Consultant											[illegible]
[illegible]	Indiana Housing and Community Development Authority									[illegible]		
[illegible]	Iowa Finance Authority									[illegible]		
[illegible]	Iowa Finance Authority									[illegible]		
[illegible]	JP Morgan Chase			[illegible]	[illegible]							
[illegible]	Local Initiatives Support Coalition	[illegible]	[illegible]									
[illegible]	Maiden Redevelopment Authority							[illegible]	[illegible]			
[illegible]	Maryland Department of Housing and Community Development									[illegible]	[illegible]	
[illegible]	Maryland Department of Housing and Community Development									[illegible]	[illegible]	
[illegible]	Maryland Department of Housing and Community Development									[illegible]		
[illegible]	Mass Housing									[illegible]		
[illegible]	Massachusetts Department of Housing and Community Development									[illegible]		
[illegible]	Mercy Housing	[illegible]	[illegible]									
[illegible]	Michigan State Housing Development Authority									[illegible]	[illegible]	
[illegible]	Minnesota Housing Finance Agency									[illegible]		
[illegible]	Minnesota Housing Finance Agency									[illegible]		
[illegible]	Minnesota Housing Finance Agency									[illegible]	[illegible]	
[illegible]	Mixed Research Center, Inc.											[illegible]
[illegible]	National Affordable Housing Management Association	[illegible]	[illegible]				[illegible]					
[illegible]	National Association of Home Builders	[illegible]	[illegible]				[illegible]					
[illegible]	National Association of Home Builders	[illegible]	[illegible]				[illegible]					
[illegible]	National Association of Home Builders Research Center											[illegible]

Name	Organization	1-24-11 Focus Group of Multi-family		1-25-11 Focus Group of Urban Building		1-26-11 Focus Group of Urban Building		1-27-11 Focus Group of Washington Court Hotel		1-28-11 Focus Group of Urban Building		Small Group Meeting on the Law
		Invited Date	Attended Date	Invited Date	Attended Date	Invited Date	Attended Date	Invited Date	Attended Date	Invited Date	Attended Date	Attended Date
Jeffie Jones	National Church Residences	1-7-2011	1-7-2011									
Carl Freeman	National Community Development Agency							1-10-2011	1-10-2011			
Ellen Lane Huffman	National Council of State Housing Agencies									Forwarded	1-11-2011	
Carla Harman	National Council of State Housing Agencies									Forwarded	1-11-2011	
Eric Blom	National Council of State Housing Agencies									Forwarded	1-11-2011	
Janet Thom	National Council of State Housing Agencies									1-11-2011	1-11-2011	
Lory Malone	National Council of State Housing Agencies									1-11-2011	1-11-2011	
Joe Hagan	National Equity Fund											
Thom Amato	National Housing & Rehabilitation Association	1-5-2011	1-5-2011									1-7-2011
Tom Deaton	National Housing Conference	1-5-2011	1-5-2011				1-7-2011					
Derek Hulley	National Leased Housing Association	1-5-2011	1-5-2011									1-7-2011
Jim Rutland	National Multi Housing Council	1-5-2011	1-5-2011				1-7-2011					
Jon Pratch	Network for Oregon Affordable Housing	1-5-2011	1-5-2011	1-6-2011	1-7-2011							
Debra Gruber	New Jersey Housing and Mortgage Finance Agency									1-7-2011		
Don Murphy	New York State Homes and Community Renewal											1-7-2011
Linda Gaborek	New York State Homes and Community Renewal											1-7-2011
Roberta Smith	New York State Homes and Community Renewal											1-7-2011
Margaret A. Hunt	New York State Homes and Community Renewal											1-7-2011
David Mertz	New York State Homes and Community Renewal											1-7-2011
Susan Cauffman	New York State Homes and Community Renewal											1-7-2011
Robert Fox	Ohio Housing	1-5-2011	1-5-2011									
Paul Kimball	North Carolina Housing Finance Agency											1-7-2011
Keith Gulbourne	North Carolina Housing Finance Agency									1-7-2011	1-7-2011	
Brian Gerstner	Ohio Housing Finance Agency									1-7-2011	1-7-2011	
Dale Thomas	Ohio Housing Finance Agency									1-7-2011		
Kevin Clark	Ohio Housing Finance Agency									1-7-2011		

Name	Organization	2-8-11 Focus Group at HUD Building		2-10-11 Focus Group at USDA Building		2-15-11 Focus Group at USDA Building		2-16-11 Focus Group at Washington Court Place		2-17-11 Focus Group at USDA Building		Total Group of Invitees
		Provided NOA	Executed NOA	Provided NOA	Executed NOA	Provided NOA	Executed NOA	Provided NOA	Executed NOA	Provided NOA	Executed NOA	Executed NOA
Arthur Ecker	Ohio Housing Finance Agency											[illegible]
Polly Blessing-Abel	Pennsylvania Housing Finance Agency									[illegible]	[illegible]	
Todd Lyons	PNC Mortgage			[illegible]	[illegible]							
Andrew Sandford	Partnership of Affordable Housing	[illegible]	[illegible]									
David Smith	Bellco Advisors											[illegible]
Steve Baldor	Bernart											[illegible]
Joan Peterson	Berwick Group			[illegible]	[illegible]							
Bill Lipfa	Coalitions for an Affordable Housing Future	[illegible]	[illegible]									
Paul Hesch	Coalitions for an Affordable Housing Housing Counsling Organization Network			[illegible]	[illegible]							
Francis Murphy	Iowa Department of Housing and Community Affairs									[illegible]		
Charles Durso	The Michael Organization											[illegible]
Lester Sievers	The Sievers Management											[illegible]
Susan Brown	Virginia Housing Development Agency									[illegible]		
Angela Hawkins	Virginia Housing Development Agency									[illegible]	[illegible]	
Patricia Sheridan	Volunteers of America											[illegible]
Tim Sewell	Washington State Housing Finance Commission									[illegible]		
Tim Hammond	Washington State Housing Finance Commission									[illegible]		
Bill Hulsman	Washington State Housing Finance Commission									[illegible]	[illegible]	
Steve Walker	Washington State Housing Finance Commission									Forwarded	[illegible]	
Martha Johnson	Wells Fargo			[illegible]	[illegible]							
Maureen Fitzgerald	Wells Fargo											[illegible]
Sarah Bauscomb	Zillow Residential											[illegible]
Totals:		20	19	15	10	0	7	31	31	32	16	26
Total Provided:		124										
Total Executed		109										

Note: "Forwarded" means NOAs were forwarded to the individual from an invitee and not from a federal representative.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-1000

ASSISTANT SECRETARY FOR CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

March 22, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515-6143

Re: Response to your letter of March 8, 2011

Dear Chairman Issa:

I am writing in response to your letter to Housing and Urban Development (HUD) Secretary Shaun Donovan of March 8, 2011, concerning the non-disclosure agreement utilized by the interagency rental policy working group in which HUD is participating. During the week prior to your letter, the HUD Inspector General completed a review of the same subject, and concluded that the use of the non-disclosure agreement was consistent with federal law, regulation, Administration policy, Executive Order, and President Obama's memorandum regarding transparency. A copy of the IG review, which was prepared at the request of Chairman Judy Biggert of the Subcommittee on Insurance, Housing and Community Opportunity of the House Committee on Financial Services, is enclosed with this letter, along with a subsequent clarifying letter we received from the Department of the Treasury.

Rather than attempting to limit outside participation, the agreement was used as part of an effort to share confidential, pre-decisional government working group information with non-governmental parties to get their input at an early stage, providing more access to internal government documents than usual. The agreement accommodated government interests raised by a staff representative from a non-HUD working group member in preserving the confidentiality of the pre-decisional government information.

With respect to the specific questions and requests in your letter, enclosed is a copy of the non-disclosure agreement, both as originally drafted and as amended by addendum. Also enclosed are signed copies of the agreements in the possession of HUD as well as a spreadsheet, enclosed with the IG review, with names of signers and related information. Although some individuals who received copies of the agreement were unable to attend subsequent meetings, and some requested that the addendum be added to the agreement, no one refused to sign it in its final form. Signing the agreement had no effect on the ability of anyone to express views to the rental policy working group, but was required only to obtain the pre-decisional information discussed above. There was and is no HUD policy concerning non-disclosure agreements; instead, as the IG explained, the agreement was used in this particular case. Of course, like other agencies, HUD retains the ability to utilize non-disclosure agreements when appropriate under particular circumstances.

I trust that this letter and the enclosed IG review will answer your inquiry. We at HUD very much share your commitment to accessibility and transparency. If you or your staff would like any further information, please let me know. Thank you again for your inquiry and your continuing interest in the Department's programs and activities.

Sincerely,

Peter A. Kovar
Assistant Secretary for Congressional
and Intergovernmental Relations

Cc: Rep. Elijah E. Cummings, Ranking Member

U.S. Department of Housing and Urban Development
Office of Inspector General
451 7th St., S.W.
Washington, D.C. 20410

April 18, 2011

The Honorable Judy Biggert
Chairman
Subcommittee on Insurance, Housing and Community Opportunity
Committee on Financial Services
House of Representatives
1034 Longworth House Office Building
Washington, DC 20410

Dear Chairman Biggert:

This is to follow up on my letter dated March 3, 2011, regarding the use of non-disclosure agreements in connection with the administration's Rental Policy Working Group. Subsequent to my response, I received the enclosed letter dated March 21, 2011 from George W. Madison, General Counsel for the Department of the Treasury. Mr. Madison advised that, contrary to what the Treasury representative on the working group told us, he was not aware of any policy that would require non-federal officials to complete a non-disclosure agreement in order to receive pre-decisional information relating to tax policy matters. At the time of our inquiry, we had asked the Treasury representative to provide us with a copy of any relevant regulation or policy document that was the basis for requiring the external participants to sign the non-disclosure agreements. He was unable to provide us with such documentation. Nevertheless, it was clear from our discussions with HUD officials that they were relying on representations from Treasury about the policy and that it was Treasury and not HUD that was asking that the participants sign the non-disclosure agreements.

To clarify my March 3, 2011 response, I did not intend to imply that such a policy did indeed exist, only that we were told that there was a policy. Moreover, I would like to restate my previous conclusion that we did not find any violation of federal law, regulation, administration policy or Executive Order with regard to having participants sign the nondisclosure agreements. If you have any questions, please have your staff contact James Heist, Assistant Inspector General for Audit at 202-402-8112.

Sincerely,

Michael P. Stephens
Acting Inspector General

cc: The Honorable Darrell Issa
George W. Madison

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

GENERAL COUNSEL

March 21, 2011

Mr. Michael P. Stephens
Acting Inspector General
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, D.C. 20410

RE: Rental Policy Working Group

Dear Mr. Stephens:

I am writing in reference to your letter, dated March 3, 2011, to Representative Judy Biggert regarding your office's review of the use of a non-disclosure agreement by the interagency Rental Policy Working Group, which first came to my attention on March 16. I believe that there may be a factual error in the letter related to the Department of the Treasury's policies, and I wanted to alert you to it. This letter constitutes a follow-up to my phone call to you today about this matter.

Your letter describes circumstances in which the Rental Policy Working Group asked non-federal government stakeholders to sign a non-disclosure agreement in order to receive certain deliberative materials regarding ongoing policy matters. The letter implies that this was done in connection with a Department of the Treasury policy that requires non-disclosure agreements to be completed before providing any non-Federal employee with "any document that could possibly influence a taxpayer's behavior." I am writing because to my knowledge Treasury does not have such a policy.

In this particular instance, we understand that a career employee of Treasury's Office of Tax Policy serving in the interagency working group expressed concerns about the distribution of pre-decisional information. Treasury treats deliberative and other pre-decisional policy materials with care, but I am not aware of any policy that requires non-federal-government individuals or entities to complete a non-disclosure agreement in order to receive pre-decisional information relating to tax policy matters.

Thank you for your attention to this matter. Please let me know if we can be of further assistance to you or if you require any additional information.

Sincerely,

George W. Madison
General Counsel

Ms. DEGETTE. And I just want to finally say that there's nothing wrong with somebody going out for a cup of coffee. There is something to me that looks bad if somebody is holding a meeting at a coffee shop to avoid disclosure. So I think we need to be really careful what we're talking about here.

I'm sure all of us want to be that way, and I yield back.

Mr. STEARNS. Just a point of information for the gentlelady. The administration has yet do deny these allegations. And in fact you said there's no names. Rich Gold, a prominent Democratic lobbyist, has taken part in numerous meetings at the Caribou Coffee Shop, said that the White House staff members—and so we have a record contrary to what you just indicated.

So with that, the gentleman from Texas is recognized, Mr. Barton.

Mr. BARTON. Thank you, Mr. Chairman. Before I ask my questions, I just want to make a comment on some of the things that Ranking Member Waxman said.

I guess—I guess it is a surprise to the Obama administration that there's a Republican majority in the House, and we actually show up for work most weeks, Monday through Friday, and are holding hearings. And some of those hearings require the presence of the Obama officials. The American people understands it. Three witnesses that are here today understand it. But apparently this President and his Cabinet don't. I don't think we should apologize that we ask the administration to have witnesses. Ostensibly they work for the people, too, and they are supposed to be at work in Washington, Monday through Friday, most weeks, and apparently they are not.

So I would hope that we could get with Mr. Waxman and Chairman Upton and figure out a way to let the Obamas know that Monday through Friday, most weeks, we're going to be in session and this committee and this subcommittee are going to be holding hearings and we are going to request the presence of senior Obama officials from the various agencies under the jurisdiction of the Energy and Commerce Committee. That should not be a news flash, but apparently it is.

In terms of this hearing today, as I understand it, the general defense of the Obama administration for being nontransparent is all the other Presidents were nontransparent, too. And that is a defense; but as the chairman just pointed out, it's not in and of itself defensible since this administration promised to be transparent. Chairman Stearns showed the clip of the President as a candidate saying that the negotiations on health care would be on C–SPAN. As we all know, that didn't happen.

The purpose of transparency is so that people in the democracy know what those that are in power are doing, who they are talking to, what they are talking about. Now, I personally do not want to know all the meetings that the President and his National Security Advisors had about capturing and killing Osama bin Laden; I don't need to know that. That is a national security issue. Don't tell me until you can—as the President did Sunday night—go on TV and say, "We got him."

However, if the President wants to meet with Al Gore about global warming, that is not a national security issue. I think we have

a right to know that. And this President apparently has gone out of his way to be nontransparent in spite of the fact that he said he would be transparent.

Now, we don't have an administration witness, but we do have a Democrat-recommended witness, the young lady, Ms. Weismann.

I am going to read you a quote, and you tell me who the author or authoress of this quote is: "At best, this administration is marginally more transparent than the previous administration." Who said that?

Ms. WEISMANN. I would like to hazard a guess that it could have been something I or another colleague of mine at CREW said.

Mr. BARTON. You would hazard a guess?

Ms. WEISMANN. We say a lot of things publicly.

Mr. BARTON. OK. Well, my staff says that you said that. It says "Anne Weismann, chief counsel for the Citizens for Responsibility and Ethics in Washington." Do you stand by that statement?

Ms. WEISMANN. Yes, I do.

Mr. BARTON. OK. Do you agree that—and, again, I am only asking you because we don't have the administration, and you were somewhat supportive of their policies. Do you think that President Obama has tried to implement his campaign promise of being more transparent in the White House?

Ms. WEISMANN. I do. I think he has put some of the key components in place. The problem, in our view, is not what the White House is or is not doing; it is what is happening at the agency level. And that is where we see the disconnect between the promises of transparency and accountability the President has made and what agencies are actually doing.

And, like Mr. Fitton, we do a lot under the Freedom of Information Act, and that really informs our experience in this area.

Mr. BARTON. Well, the two witnesses to your right—and I am not going to have time to ask them questions, but both of them, in their written testimony, point out that less than half of the Freedom of Information Act requests have been honored by the Obama administration. And, as you pointed out, these visitor logs, which are really more for clearing people into the White House, don't have a lot of information about who is meeting and what the purpose is.

And, again, if it is national security, I don't want to know. But if it is energy policy, if it is health policy, if it is environmental policy, if it is budget policy, the Congress and the people of the United States, in my opinion, have a right to know. And this President is stiffing us. He is not sharing that. And it is one thing if you don't promise to do it, but if you promise to do it and don't do it, then you should be held accountable.

With that, Mr. Chairman, I yield back.

Mr. STEARNS. The gentleman's time has expired.

The gentleman from California, Mr. Waxman, is recognized for 5 minutes.

Mr. WAXMAN. Mr. Chairman, I was impressed by the statement of Mr. Barton. We are here at work Monday through Friday; the administration should be ready to show up when we want them to. Well, I would have thought that this hearing could have been held next week. We could have discussed another date. To say, "You

have to be here 6 days from now," which is the minimum notice requirement, is awfully harsh. And if somebody can't accommodate you, then you try to get a hearing that is a fair hearing. Well, this doesn't appear to be what we are talking about today.

Mr. BARTON. Will the gentleman yield?

Mr. WAXMAN. Yes.

Mr. BARTON. You are here. Is it harsh that you are here?

Mr. WAXMAN. Well, I have known about this hearing, and I am here. But that doesn't mean the person at the White House has to be here if they have a conflict. If I have a conflict, I won't be here.

Mr. BARTON. There is nobody in the White House——

Mr. WAXMAN. I would take back my own time here. The President said on C–SPAN he wanted to have the negotiations televised. Well, I thought that was interesting. But he had also hoped when he invited Republicans to the White House to talk about healthcare reform that they would do something constructive to be involved in that issue. They weren't helpful at all. And now we stand with a Republican proposal to pass the House to repeal the healthcare bill—repeal and replace. We don't even know what their replacement is.

The third point I want to make is, if we have a right to know what lobbyists or citizens have to say to the White House, why don't we have a law saying that Members of Congress have to make that disclosure? I would like to know whether Chairman Barton, when he was chairman, met with oil company lobbyists, who they were, public interest lobbyists. If we have a right to know about people in the executive branch, why don't we have a right to know about the people here in the legislative branch?

Now, I would like to know how much transparency would satisfy those who think we ought to have open government. Because, as I understand it, some of the requests to the administration for more information would produce around a million or half a million pages. That is a lot of records.

Mr. Fitton, you have a lawsuit, Judicial Watch, against the Obama administration. It is my understanding you have sought release of all visitor records from the first day of the Obama administration through the date of your FOIA request of August of 2009.Isn't that correct?

Mr. FITTON. Yes.

Mr. WAXMAN. OK. From a review of the papers filed in that litigation, it appears that the number of records you are seeking is around half a million. That is quite a lot of records.

Would you agree that public release of at least some of those records—for instance, records of visits from officials on covert security missions—could raise national security concerns?

Mr. FITTON. Maybe, but FOIA allows for withholding of documents, citing those very concerns.

Mr. WAXMAN. And, Ms. Weismann, do you agree that at least some of the visitor log information collected by the Secret Service presents national security concerns?

Ms. WEISMANN. Yes, I do.

Mr. WAXMAN. Mr. Wonderlich, do you agree that sometimes we have national security concerns involved?

Mr. WONDERLICH. Yes.

Mr. WAXMAN. I think that openness in government is important, but I don't think this hearing is really about openness in government. We are hearing complaints from Republicans that they didn't get the administration to show up when they wanted them to. Well, it is a two-way street. The President hoped the Republicans would have worked for the national interest in trying to work out a health-care bill. The Republicans just said no. The administration wanted the Republicans to work on a boost for jobs and the first legislation to make investments; Republicans said no. The administration said to the Congress, let's work together on a bipartisan basis to reform the Wall Street issues that caused our economy to practically topple over the edge. Republicans said, no, we are against it.

And now that they are in power in the House, they can call a hearing and explore issues. And that is right, they can. But this is not a responsible hearing, when we just have a hearing complaining that people didn't show up when you didn't give them enough notice and when they requested that they have another time to come in.

Mr. Fitton, are you a lawyer?

Mr. FITTON. No.

Mr. WAXMAN. You are not.

Mr. Wonderlich, are you a lawyer?

Mr. WONDERLICH. No.

Mr. WAXMAN. Ms. Weismann, are you a lawyer?

Ms. WEISMANN. Yes.

Mr. WAXMAN. Now, as a lawyer, have you ever had a situation where the opposing side requested that they have a week or 2 weeks or a month to get their information together? Is that unreasonable to accommodate them?

Ms. WEISMANN. Depending on the circumstances, but it certainly happens all the time in the legal arena.

Mr. WAXMAN. Well, it happens all the time in the legal arena, and it only fails to happen in Congress when the party in power wants to make a big to-do about it. And they don't have anything else except to try to embarrass an administration that asks that they have another chance to come in and testify at a time when they would be available and not required to be at another hearing testifying.

So, again, this hearing is what it is, and I think it is pretty clear it is not about open government, it is about politics.

Mr. STEARNS. I thank the gentleman.

Obviously, the White House, if they want to be completely transparent, can show up in 24 hours.

Mr. WAXMAN. Point of order, Mr. Chairman.

Mr. STEARNS. Sure.

Mr. WAXMAN. Why is it that you get to make a comment after we ask our questions?

Mr. STEARNS. I will recognize——

Mr. WAXMAN. We each get 5 minutes.

Mr. STEARNS. Yes.

Mr. WAXMAN. And I think that the regular order should be Member says what they have to say in 5 minutes, then you go to the other side of the aisle; not one Member and then the chairman gets

to make a comment, you go to another Member, chairman makes a comment.

Mr. STEARNS. And I recognize your point of order. Thank you.

We recognize the gentlelady from Tennessee, Ms. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

And I want to thank our witnesses for being here today.

I think a lot of what we are talking about centers around the President's statement that he made on day one: that democracy requires accountability, and accountability requires transparency.

So as I mentioned in my opening statement, I have spent some time on this issue with the czars that are out there. And we all know that the agencies have inspectors general and the GAO and FOIA to provide accountability for their work.

And I would just like a confirmation from you all, and I think, Mr. Fitton, I will come to you on this. Isn't it true that the Senate-confirmed agency heads are subject to greater transparency and accountability than their nonconfirmed czars that are shielded by the White House?

Mr. FITTON. Yes.

Mrs. BLACKBURN. Let's talk about a couple of them. Czars like climate czar Carol Browner and health-care czar Nancy-Ann DeParle don't have inspector generals to hold them accountable, do they?

Mr. FITTON. No, nor are they subject to the Freedom of Information Act because they are in the White House office.

Mrs. BLACKBURN. But yet they have had a tremendous impact on legislation that has come before this committee.

Mr. FITTON. Yes, that is my understanding.

Mrs. BLACKBURN. And they don't have the GAO audits of their effectiveness, do they?

Mr. FITTON. I don't know about whether the GAO has purview over White House officials. Certainly, the GAO can get at them indirectly through examining HHS's and other relevant agencies' contacts acts with them.

Mrs. BLACKBURN. OK. Thank you for that.

Let's talk about Ms. Browner, because last fall it was reported that Ms. Browner's staff was discovered to have doctored a Department of Interior report to make it look like a moratorium on offshore drilling was peer-reviewed and recommended by a panel of experts. And I have some of the articles, Politico's article specifically, about that late-night work that took place.

Manipulating science to achieve political goals needs to be reined in, and so how can Congress get a better handle on that type of behavior? What would be your response to this action that took place by Ms. Browner's staff?

Mr. FITTON. I think a reaction ought to be severe. This is unconstitutional activity, I believe, by the President's advisors. The President can get advisors in his White House to advise him. If they start lording over agency heads and directing agency activity the way Ms. Browner did with this report and what I understand the health-care czar did with HHS and the other agencies, it is unconstitutional for them to be doing that. And the reaction by Congress to protect its prerogatives ought to be severe.

I point to Senator Byrd, who warned President Obama about this. The late Senator warned the President about this, that the White House was aggregating to itself powers that were in violation of the Constitution.

Mrs. BLACKBURN. I thank you for that. And I think that this shows why we are all so concerned about this issue and why we feel it is important to bring this issue before the committee. We have worked on legislation that has required a tremendous amount of our time, and the reports and information, when we find out they have been doctored or they have been changed or maybe it was not as represented to be, it does cause us concern.

Now, you have asked for information, or Judicial Watch has asked for information, on these two czars that I have mentioned.Is that correct?

Mr. FITTON. Yes. We asked for information on every czar that we could find, actually, but, specifically, these two czars as well.

Mrs. BLACKBURN. OK. And what information did you ask for on those two?

Mr. FITTON. Their duties and responsibilities, their budget and staffing.

Mrs. BLACKBURN. And I would assume, just like the requests that went in from the committee, that you were not able to get information on their budget, their staff, their salaries?

Mr. FITTON. No.

Mrs. BLACKBURN. OK. I appreciate that.

All right. Did you ask for these through FOIA?

Mr. FITTON. The White House is not subject to FOIA, so we were relying on their good graces to turn the documents over.

Mrs. BLACKBURN. All right. Thank you.

I yield back.

Mr. STEARNS. The gentleman from Texas is recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. And I would hope our Oversight and Investigation Committee, with all of the problems we have in the Federal Government, would spend time on a lot of other issues other than this. But since this is the hearing, then I think I will participate.

Mr. Fitton, I want to talk a bit about the lawsuit your organization, Judicial Watch, has filed against the Obama administration. You talked about some of the legal questions in your testimony, and I want to focus on the practical implications of that lawsuit.

It is my understanding you have sought release of all visitor records from the first day of the Obama administration through the date of your FOIA request, which you just said was not—FOIA did not cover the administration, through August of 2009. Is that correct?

Mr. FITTON. Yes.

Mr. GREEN. From a review of the papers filed in that litigation, it appears that the number of records you are seeking is around a half a million. That is quite a lot of records.

Mr. Fitton, would you agree that the public release of at least some of these records—for instance, records of visits from officials on covert security missions—could raise national security concerns?

Mr. FITTON. Yes.

The White House, to be clear, does not want to give us one document, one visitor log under the Freedom of Information Act. That is the law that protects and preserves these documents and requires their disclosure. Not one document of those 500,000, as released, they don't think should be released under this law.

The Freedom of Information Act allows government agencies to withhold records if their disclosure could harm national security. And that is something that would be appropriate. Most of the records, the 500,000, are of White House visitors who are there for tours. Two-thirds of the records that have been released, according to this report of the Center for Public Integrity, are of White House visitors. Those numbers can be whittled down in the course of negotiations.

Mr. GREEN. OK. So you agree that some of the visitor log information collected by the Secret Service presents national security concerns?

Mr. FITTON. Yes. And those can be withheld under FOIA——

Mr. GREEN. I only have 5 minutes.

Mr. FITTON. Sure, I understand.

Mr. GREEN. And I also appreciate you—are you a constitutional lawyer?

Mr. FITTON. I am not a lawyer.

Mr. GREEN. Oh, oK.

I love it, Mr. Chairman, and I am a lawyer, and I submit Constitution law is not my specialty. You and I have a right to have an opinion as American citizens on what is constitutional, but the folks who actually make that decision under the Constitution are the Supreme Court.

Mr. FITTON. Right.

Mr. GREEN. And so, as long as we recognize that my opinion doesn't matter any more than yours or even a constitutional lawyer—maybe a constitutional lawyer is a little higher up than we are.

Mr. FITTON. It is for the courts to decide.

Mr. GREEN. It is for the nine Supreme Court justicies to make that decision.

Mr. Wonderlich, do you agree with what Mr. Fitton said?

Mr. WONDERLICH. Which part?

Mr. GREEN. Well, that there are some records that shouldn't be, the visitor logs by the Secret Service, shouldn't be released under FOIA?

Mr. WONDERLICH. Yes.

Mr. GREEN. I know that, in September of 2009, President Obama announced a policy of posting White House visitor logs online for meetings that occurred after September 15th of 2009. To implement that policy efficiently, the White House created a process by which logs which raised national security concerns to be flagged for review when they were created and, where necessary, be withheld from disclosure.

For the records that predate September 2009, there is no way to know whether release of the information could present national security concerns unless a single record is reviewed individually.

Mr. Fitton, all of the records for which you are seeking request predate September 2009, is that correct?

Mr. FITTON. In this lawsuit, yes. I have asked for records after that and have not gotten any pursuant to FOIA, as the law requires, either. We haven't sued on that yet.

Mr. GREEN. OK. So granting your FOIA request will require national security officials to review all of the approximately 500,000 records to make sure their release would not endanger the public or otherwise compromise national security interests.

Mr. FITTON. That is what the White House says.

Mr. GREEN. Uh-huh. Now, it is my understanding that the White House has made many of its pre-September 2009 records public. In fact, while these records were not released en masse on the White House Web site, there is a form that anyone can use to request release of records, visitor records for particular individuals or groups, and many people make use of this feature. The White House told the committee staff about 3,000 pre-September-2009 visitor records were released using this process.

Mr. Fitton, yes or no, has your organization used this online tool to request any of the pre-September-2009 records that are subject to your litigation?

Mr. FITTON. We only can request these records under FOIA. This database is not relevant to the Freedom of Information Act.

Mr. GREEN. OK, so I assume your answer is "no." I find that interesting——

Mr. FITTON. Congressman, you can't request records through that system.

Mr. GREEN. Well, but you can view the records, you can view them.

Mr. FITTON. Excuse me?

Mr. GREEN. You can view them. That should satisfy the need for a request for a FOIA.

Mr. FITTON. The records are required to be released under the Freedom of Information Act. Releasing 1 percent of the records in that time period is not complying with the Freedom of Information Act. If they have questions about whether they should be exempt from the law, they have to go to Congress to get exempt from the law, not decide that the law does not apply to records on its own. That undermines the rule of law and transparency.

Mr. GREEN. I am out of time, but can you just briefly tell us how this administration's—and maybe all our witnesses—opinion on Freedom of Information requests differ from what President Bush's administration did?

Mr. Chairman, I think that would be helpful for our whole committee, if there is a difference between the Obama administration and the Bush administration.

Mr. FITTON. Administratively, this administration is more difficult than the Bush administration was. Legally, they are as bad or worse than the Bush administration. So they are less transparent as a result.

Ms. WEISMANN. I would just add——

Mr. STEARNS. The gentleman's time has expired.

Mr. GREEN. Mr. Chairman, may the other witnesses answer?

Mr. STEARNS. Oh, sure. All right.

Go ahead, Ms. Weismann.

Ms. WEISMANN. As an organization that litigated extensively under the FOIA under the Bush administration and now under the Obama administration, their legal position is identical—that is, that they are not subject to FOIA.

However, the practice of the Obama administration differs radically because they are making the vast majority of these records available online as a voluntary policy.

Mr. STEARNS. The gentleman's time—oh, yes, Mr. Wonderlich?

Mr. WONDERLICH. I would defer to my colleague on that question.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. STEARNS. The gentleman from Texas, Mr. Burgess, is recognized for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman.

Well, in light of those last responses to Mr. Green's question, I am going to read a statement that was said by—and I will be inclusive here—one of the four of us. OK? So the three witnesses or me. So let's see who said this.

Quoting here, "We have an administration that is claiming a lot of credit for its transparency policies. But on the other hand, those policies haven't left us with a truly more transparent government," close quote.

Who said that?

Mr. FITTON. I agree with it, but I didn't say it. I don't know who said that.

Mr. BURGESS. I agree with it, but I didn't say it. OK, we are down to two.

Well, Ms. Weismann, you said that on Fox News not too terribly long ago, March 16 of 2011.

Ms. WEISMANN. And I stand by that statement.

Mr. BURGESS. Well, look, we played the clips of the President. I don't recall President Bush, when he was running in 2000—and I was just a regular guy back then. I don't know that I was paying strict attention. But I don't recall him ever standing up at one of the debates with Al Gore and saying, "I am going to run the most open and transparent administration ever. In fact, I will invite all of the energy heads in with me and we will have it on C–SPAN so you will be able to see it on television."

But I do remember President Obama saying that very thing, and we saw those clips this morning. So it doesn't look like he has kept his promise in that regard, does it? They may be legally identical to the Bush administration, but the optic is it doesn't look like he has kept that promise. Is that an accurate statement?

Mr. FITTON. In the least.

Mr. BURGESS. Ms. Weismann, am I out of line to feel that way?

Ms. WEISMANN. I think if you are comparing the openness in records of the Obama and Bush administrations, there is simply no comparison. I think that the Bush administration—and many scholars and other legal experts would agree with this—was the most secretive administration we have ever experienced. I think the Obama administration——

Mr. BURGESS. Look, every administration——

Ms. WEISMANN [continuing]. Has taken a lot of steps.

Mr. BURGESS [continuing]. Needs to keep secrets, and we saw that this weekend. And aren't we all grateful that the Obama ad-

ministration and leaders in the House and Senate who were involved in the discussions surrounding the extinction of Osama bin Laden, aren't we all glad that they were able to keep a secret? In fact, it is astounding to me that all of the above were gathered in the basement of the Hilton hotel on Saturday night and not a word of this leaked. So that is a true testament to the ability to keep a secret when one is necessary.

But, look, you have said yourself, there is no difference from a legal standpoint between the Bush administration and the Obama administration. In my opinion, the difference is that President Obama, when he was a candidate running for President, campaigned on this as a campaign promise, a pact that he made with the American people—not with the Congress, not with the Senate, not with the House, not with the Supreme Court. He made it with the American people, and he has violated it repeatedly.

You all are familiar with my efforts to try to get some of the information surrounding those secret health-care meetings. I mean, it is ironic, here we are almost exactly 2 years to the day with the President coming up with all of the—who did he have? The American Medical Association, the Hospital Association, AdvaMed, PhRMA, AHIP, health insurance, and the Service Employees International Union. He came out and said, "We have saved $2 trillion."

Does anyone else remember that? I was startled that there was $2 trillion in savings that AHIP had been holding back, that the SEIU had been holding back. Was anyone else struck by that figure of $2 trillion? Or is Washington just so inured to figures that that didn't seem like any big deal to anyone else?

Ms. WEISMANN. Just a point of clarification. My testimony was that the legal position of the status of the White House visitor records is the same between the two administrations. I did not mean to suggest beyond that that they shared the same legal opinions on other issues.

Mr. BURGESS. OK, fair enough.

But does anyone else recall that statement of $2 trillion being saved out of the health-care industry in this country secondary to agreements that were struck at the White House? Does that seem like a big deal to anyone else, or am I just misplaced on this?

Mr. FITTON. It is a big deal. We have been investigating those meetings, as well.

Mr. BURGESS. And, you know, I had to push this—and, Mr. Chairman, I will submit for the record a timeline of the activities that have gone on in this committee in both the last Congress and this Congress on just trying to get the scantest amount of information on that.

[The information follows:]

Timeline of Transparency of White House Negotiations over Health Reform:

- On September 30, 2009, Dr. Burgess sent a letter to President Obama requesting detailed information on the negotiations hosted by the White House and six major interest groups in the health care reform debate.
- October-December 2009, Dr. Burgess, Ranking Member Barton, and Committee staff engages in offline negotiations with Chairman Waxman to encourage him to persuade the White House to respond. Chairman Waxman reportedly does ask them to respond without an outcome. Burgess staff encourage White House to respond to September 30th letter without an outcome.
- On December 16, 2009 Dr. Burgess introduces H.Res. 983, A Resolution of Inquiry mirroring many of the requests of the September 30th letter. The Energy & Commerce Committee has 14 legislative days to take up the resolution.
- In January 2010 Chairman Waxman writes White House Counsel Bauer asking for him to formally respond to Dr. Burgess as the Committee is scheduled to markup H.Res. 983 on January 27, 2010.
- On January 26th 2010 The White House responds to Dr. Burgess with 81 pages of publically available information.
- On January 27, 2010 the Energy & Commerce Committee meets to consider H.Res. 983. The Committee, after an agreement between Dr. Burgess and Chairman Waxman, agrees to report the resolution without recommendation.
- On February 17, 2010 Chairman Waxman, Ranking Member Barton and Dr. Burgess sent a letter to Robert Bauer, Counsel to the President, requesting further information regarding meetings held at the White House on health care reform legislation that the three agreed to during consideration of H. Res. 983.
- On February 17, 2010, Dr. Burgess, along with Chairman Waxman and Ranking Member Joe Barton, sent a letter to the Honorable Kathleen Sebelius, Secretary of the Department of Health and Human Services, requesting any paper or electronic documents exchanged between the Department of Health and Human Services and the healthcare industry regarding agreements between the White House and any private party relating to certain bills.
- On March 15, 2010 Robert Bauer responds to Chairman Waxman and Ranking Member Joe Barton & Dr. Burgess that he feels his response to Dr. Burgess of January 26, 2010 sufficiently meets the criteria of the follow-up letter from the three of February 27, 2010.

- On March 15 2010 David Cade, Counsel to HHS writes Waxman, Barton & Burgess that HHS has no relevant documents in addition to the January communication from Bauer that would further respond to the February 17, 2010 follow-up from Waxman, Barton, & Burgess to the Secretary.

- On February 18, 2011 Congressman Burgess sent a letter along with Chairman Fred Upton, Rep. Cliff Stearns, and Rep. Joseph Pitts sent to the newly appointed Deputy Chief of Staff, Nancy – Ann DeParle. The letter was in regards to her work as the Director of the White House Office of Health Reform (WHOHR). The Committee requested that information regarding her work at WHOHR and that office's activities relating to health care reform in regard to the promise of "transparency". The documents are requested to be provided by Friday the 4th of March, 2011.

- On March 10, 2011 Robert Bauer, Counsel to the President responded to the February 18, 2011 letter from Chairman Upton, Stearns, Burgess and Pitts. The letter dismisses the severity of the request and deems that fulfilling the request would "constitute a vast and broad undertaking." Included in his response is reference to materials previously provided to Waxman, Burgess and Barton regarding the underlying issue of transparency in negations during the health care reform debate.

- On March 10, 2011 Congressman Burgess along with Representatives Cliff Stearns, Fred Upton, and Joseph Pitts signed a letter to Robert Bauer, Counsel to the President, as a follow-up to his March 4th response. This letter describes the disappointment in the lack of information provided regarding an original correspondence beginning on February 18th, 2011. A repeated request for further response by March 18, 2011 was made or the Committee would consider it a refusal to respond.

- On April 18, 2011 Congressman Burgess along with Representatives Cliff Stearns, Fred Upton, and Joseph Pitts sent letters to 12 stakeholder groups in response to the failure of the White House to adequately respond to Congressional requests regarding the negations between stakeholder groups and the administration. The intent of this letter was to gain any information on the conversations and correspondence between the groups and the Administration.

Mr. BURGESS. I mean, here is the ironic—March 15th of 2010, David Cade, counsel, writes to then-Chairman Waxman and Ranking Member Barton and Congressman Burgess that HHS has no relevant documents in addition to those that were provided in January of 2010. And then, on March 10th of this year, Robert Bauer, counsel to the President, responded to a letter from Chairman Upton, Stearns, Burgess, and Pitts that says the request is—that fulfilling the request constitutes a vast and broad undertaking. Well, a year before, they said there wasn't anything there, there is nothing to give you. And now it is vast and broad?

I mean, what are we to believe, when we are told that we are going to have a transparent administration where all of these things will be up on C–SPAN, you will be able to see who is standing with the insurance companies and who is standing with the people, and nothing—nothing—close to that is what has happened?

And then, as a consequence, all through this town in 2009, you heard people say over and over again, look, you are either at the table or you are on the menu. People were legitimately afraid of crossing this administration during the run-up to that health-care bill. I think, especially in light of some of the things we know about the terrible drafting problems with that bill, I think it is important that we have that information.

Thank you, Mr. Chairman, for your indulgence. I will yield back.

Mr. STEARNS. I thank the gentleman.

And the gentleman from Massachusetts, Mr. Markey, is recognized for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

In September of 2009, President Obama announced a new policy to voluntarily disclose White House visitor records. These records are routinely posted online, and there are now more than 1.25 million records posted on the White House Web site in a searchable format. We have heard today that no such database existed prior to the Obama administration.

Ms. Weismann, would you agree that this administration's White House visitor database provides more information about who is visiting the White House than the Bush administration, which did not have any database?

Ms. WEISMANN. Yes, absolutely.

Mr. MARKEY. Now, on his first day in office, Mr. Obama announced that Federal agencies would take a new attitude toward requests for information. When asked for information, all agencies should adopt a presumption in favor of disclosure. No longer could information be withheld because, as his memo said, quote, "public officials might be embarrassed by disclosure because errors and failures might be revealed or because of speculative or abstract fears." In other words, when in doubt, disclose. The Bush administration adhered to a different motto, which was, "When in question, conceal."

So the presumption for information requests was not to disclose information, and the Department of Justice was there to rubber-stamp the agency's denials of information requests. Under the Bush administration, agencies were instructed to keep a lid on all records unless there was no legal basis for doing so or such action

would hurt the ability of other agencies to protect their important records.

I will certainly acknowledge that Federal agencies have, in some cases, been slower than I would have hoped they would be to adopt this new culture of transparency. But even with some Federal agencies being slower to change than others, Ms. Weismann, would you agree that the Obama administration's directive, that the default on information requests should be disclosure, not concealment, is an improvement?

Ms. WEISMANN. Absolutely. The policy is very much of an improvement.

Mr. MARKEY. OK, thank you.

I thank the chairman very much.

Mr. STEARNS. I thank the gentleman, and——

Ms. DEGETTE. Will the gentleman yield?

Mr. MARKEY. I would be glad to yield.

Ms. DEGETTE. I just want to follow up on that question, Ms. Weismann.

Mr. STEARNS. I think, in all deference, the gentleman yielded back.

Ms. DEGETTE. Oh.

Mr. STEARNS. So we are going to go to Mr. Gingrey from Georgia.

Mr. GINGREY. Well, Mr. Chairman, thank you. Thank you for holding the hearing today on transparency at the White House.

My time is limited, of course, and I would like to ask a series of serious questions about the litigation that resulted in the release of the visitors log from the administration.

And I will start with you, Ms. Weismann. Yes or no, is it correct that CREW sought the release of Obama administration records regarding meetings with health-care and coal executives in May of 2009?

Ms. WEISMANN. Yes.

Mr. GINGREY. And this is yes or no, as well. Didn't CREW have to file additional lawsuits in June and July of 2009 because the administration refused to release those records?

Ms. WEISMANN. Yes.

Mr. GINGREY. And once again yes or no, wasn't MSNBC.com's request for logs denied, as well?

Ms. WEISMANN. That is my recollection, that it was, yes.

Mr. GINGREY. Thank you.

Isn't it true that, in the Washington Post article—that is item No. 2 in your document binder—you are quoted as saying—and you have said part of the quote several times in this hearing, but the whole quote is this: "The Obama administration has now taken exactly the same position as the Bush administration." You further state, "I don't see how you can keep people from knowing who visits the White House and adhere to the policy of openness and transparency."

Isn't that the full quote?

Ms. WEISMANN. Yes, it is.

Mr. GINGREY. You know, again, why we are here, we are talking about a pledge that the President made during his campaign, a pledge to have a policy that he would adhere to during his administration to more openness and transparency, not really unlike the

pledge that he made that, 1 year from my inauguration, we will close Guantanamo Bay; not unlike a pledge that he made, again, during his campaign that there would be no legal action initiated against our intelligence agents for the methods that they used in obtaining actionable intelligence, which led, incidentally, to the finding and finally destruction of that monster, Osama bin Laden—these kind of pledges that the President made.

So when you make a statement that this is no different than the previous administration, you may be indeed correct, but the President pledged to make things different and more transparent and more open, a better way. And this hearing really, as we hear from the other witnesses, is pretty much proof positive that he has failed miserably in that campaign pledge.

Let me ask you one more. What was the Bush administration policy regarding the status of these same logs that you were referring to? What was their policy?

Ms. WEISMANN. Their policy was that these are Presidential records, not records of the Secret Service, and, therefore, not subject to the Freedom of Information Act.

Mr. GINGREY. Didn't the Obama administration continue for 8 months to appeal the district court decision that the logs were subject to Freedom of Information?

Ms. WEISMANN. Yes, it did.

Mr. GINGREY. Thank you.

Mr. Fitton, my next line of questions is for you, and this is yes or no, as well.

Hasn't Judicial Watch had to sue the Obama administration again because they are still not releasing the visitor log records you had previously requested?

Mr. FITTON. We have not sued again, although they have responded negatively to subsequent visitor log requests.

Mr. GINGREY. Are they making the same arguments the Bush administration did?

Mr. FITTON. The Bush administration changed its argument. We had gotten FOIA records—we had used Freedom of Information to obtain visitor logs pursuant to FOIA. Then CREW started asking for, I guess, too many documents, and the Bush administration didn't like that, so they decided they weren't subject to FOIA anymore.

Mr. GINGREY. Is it correct that the White House discloses visitor logs 90 to 120 days after they have been processed?

Mr. FITTON. That is what they say.

Mr. GINGREY. If someone requested the logs through FOIA, how long would the administration have to respond to the FOIA request by law?

Mr. FITTON. Twenty days.

Mr. GINGREY. Do you think that the President has unfairly taken credit, President Obama, for releasing these visitor logs, when, in fact, greater and faster disclosure is required by law?

Mr. FITTON. Yes. His policy is contrary to Federal law.

Mr. GINGREY. Mr. Wonderlich, my last question is for you and, again, yes or no. Do you agree with Mr. Fitton and think the administration is taking too much credit for release of the visitor logs?

Mr. WONDERLICH. Yes.

Mr. GINGREY. Thank you.

Mr. Chairman, I yield back.

Mr. STEARNS. The gentleman's time expired.

And the gentleman from Louisiana, Mr. Scalise, is recognized for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate you having this hearing.

I wish we would have the opportunity to question someone from the White House. They could have sent anybody to answer I think what are very important questions about openness and transparency, which, again, as has been pointed out by many Members, was a hallmark of President Obama's campaign for presidency. And, you know, it is kind of ironic, in a hearing about openness and transparency, the administration refused to be open and transparent enough to even come and answer what are many important questions that still have not been answered.

And maybe, Mr. Chairman, next time, instead of holding the hearing here, we can go to the Caribou coffee shop next-door to the White House where it seems like you can find more administration officials holding hearings or meetings about who knows what because we can't get those logs.

I want to start off on the question that my colleague from Tennessee brought up regarding czars. This has been an issue that I have had real serious concerns about since the President seemed to have a proliferation of czars appointed to carry out duties that have the same functions and, in many cases, even more powers than Cabinet secretaries.

And, again, as I have stated many times, I completely support the President's ability, any President's ability, to organize their administration, but the Constitution lays out a process that requires Senate confirmation for people of that level of power. And there are reasons for that because of the scrutiny that goes along with it, because of the transparency that goes along with it.

Ms. Weismann, I want to ask you, last year CREW had sent a letter to Attorney General Eric Holder asking him to initiate an investigation into pay-to-play allegations involving the then-czar for urban affairs, Adolfo Carrion. Can you explain to me what it was your organization requested to have an investigation into?

Ms. WEISMANN. I am not the best person from my office to speak to that. I was not involved in that particular matter.

Mr. SCALISE. Are you aware that CREW did send that letter to Attorney General Holder to ask for an investigation into that czar?

Ms. WEISMANN. Yes, I am. But I am not the only person on our staff that is involved in those kinds of matters.

Mr. SCALISE. Sure. It is my understanding that the basis of the letter that your organization sent was to look into allegations that, while serving as a Bronx borough president, Mr. Carrion received a number of campaign contributions from developers in close proximity to when he approved zoning changes or committed money to projects sponsored by those very developers.

Now, the question I will ask you, since you might not be as familiar with the request for that investigation, which I think would have been healthy to produce, but do you think that that sort of

allegation would have come up in the transparentness of a Senate confirmation process?

Ms. WEISMANN. I can't speculate as to that.

Mr. SCALISE. I will ask the other panelists, then. I will first go to Mr. Wonderlich.

Mr. WONDERLICH. I am not sure whether that would have come up in a Senate confirmation hearing.

Mr. SCALISE. Mr. Fitton?

Mr. FITTON. Whether it would have come up is an open question. But the confirmation process is the method by which you uncover information like that about high-level government officials.

Mr. SCALISE. And, clearly, you know, I think when you look at—and these are allegations that have been floating around. It is not something that just one person alleged. These were very serious allegations, enough to where organizations like CREW asked the Attorney General to hold an investigation. You wouldn't have needed to even make that request if we had that transparent process of Senate confirmation.

And yet, you look—and, you know, when we talked about the health-care bill, one of the—I passed legislation that ultimately got included in the continuing resolution to eliminate four of these czars, including the urban affairs position, including the health-care czar, including the climate czar and the car czar.

Now, I found it shocking that the President, when he signed that CR that he, himself, negotiated, in his signing statement that he said he wouldn't do, he said he wasn't going to comply with that section of the law, that he was going to still reserve the right to appoint czars, even though he actually negotiated that agreement. He agreed to eliminate those four czars; he signed the law. This is a law. This isn't an Executive order; this is an actual law that Congress passed. He signed the law, and then he said, "Oh, and, by the way, I am not going to comply with this part of the law."

Now, the day he tries to circumvent the law and maybe appoint somebody into those positions that we eliminated by law, that he signed that law into, then clearly we will have a constitutional challenge because the President absolutely has to comply with the laws that he signs. He is not exempt from these laws.

I want to ask you, Mr. Fitton—you had talked about the visitor logs that you have been trying to get from the White House. Can you tell me how many visitor logs the White House has refused to disclose?

Mr. FITTON. Oh, it is approximately—I think it would be a half a million, most of which would be White House visitors, tourists.

Mr. SCALISE. Half a million logs that they have refused to disclose. And then you said that they granted 30 to the President or whoever else. Again, we can't ask anyone from the White House because they have refused to come here. But they have granted themselves 32 different waivers to their own ethics rules. Now, this isn't a law that we passed; this is an Executive order the President signed.

Mr. FITTON. Right.

Mr. SCALISE. But even with that Executive order the President signed, he has, in essence, allowed 32 different waivers to those ethics laws. Kind of an odd concept, that you would brag about an

ethics law and then quietly go and exempt yourself from it 32 times and who knows how many more times to come. Is that correct?

Mr. FITTON. That is correct. The rules he put out on his first day of his administration have an escape clause or a backdoor way of avoiding it you could drive a truck through.

Mr. SCALISE. Well, thank you.

I see my time has expired. You know, Mr. Chairman, again, I wish we would have the opportunity to ask the White House these questions. These are not trivial questions. These are importance issues that we still don't know the answer to. Many organizations that are respected, transparency organizations, have had to go to court and still haven't even been able to get a resolution to this. So I appreciate you having this hearing.

And I yield back.

Mr. STEARNS. The gentleman's time has expired.

The gentleman from Colorado, Mr. Gardner, is recognized for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman.

And, Mr. Fitton, I wanted to follow up with you on a couple of questions. You have answered some of these. I just want to clarify a little bit more of the information.

What types of information is your organization, Judicial Watch, currently trying to obtain from this administration, the type of information?

Mr. FITTON. Any issue of public interest, we probably have a Freedom of Information Act request on. We have been very interested in the bailouts; obviously, the Obamacare; you know, EPA, climategate; the czars; immigration enforcement or the lack thereof.

We ask about anything of note to try to get more information, because you can't rely on what you read in the press. You have to get the documents for yourselves, in our view.

Mr. GARDNER. Thank you. And you are all of these subject to FOIA?

Mr. FITTON. Yes. We normally ask for these documents under the Freedom of Information Act.

Mr. GARDNER. OK. And in a memo to agency heads, President Obama said, and I quote, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure or because errors and failures might be revealed." Do you think the agencies have lived up to the President's goal?

Mr. FITTON. Absolutely not.

Mr. GARDNER. In that same memo to agency heads, the President said, "All agencies should adopt a presumption in favor of disclosure." Have the agencies that you have worked with adopted this presumption?

Mr. FITTON. No.

Mr. GARDNER. Did the President put any teeth behind his instruction that all agencies should adopt a presumption in favor of disclosure?

Mr. FITTON. No. In fact, he appointed an Attorney General that will defend all those unnecessary, improper disclosures to the Hilton court, just like the Bush administration did.

Mr. GARDNER. Is there any mechanism in place to measure agency performance and to make sure that they are complying or applying the presumption?

Mr. FITTON. There are metrics that are used by the Obama administration and outside evaluators, but they really don't go to the issues we are talking about. It is one thing to put a lot of documents on the Internet, as we have been talking about. It is another thing to refuse to disclose information about matters of public controversy that would be politically inconvenient or scandalous for an administration. On those types of requests, they are as bad, if not worse, than the Bush administration.

Mr. GARDNER. And then just in some of the background for this hearing, it talks about studies by George Washington University and the Knight Foundation showing that barely half of the 90 agencies reviewed have taken any steps at all to fulfill FOIA policies set by President Obama. It talks a little bit about Associated Press studies. It talks about the 35 largest agencies have seen an increase of nearly 41,000 FOIA requests from the previous year, but the government responded to nearly 12,400 fewer requests, despite the promise to be the most transparent and open government in——

Mr. FITTON. I mean, this is an issue of crisis proportions. The government is doing a trillion—what is it?—a trillion extra dollars' worth of work a year, and the disclosure and the public accountability has not kept up with that.

The bailouts, the disclosures are terrible. Fannie and Freddie, $450 billion in moneys going toward them, potentially. The administration has taken a legal position on its own, not following a Bush administration policy but on its own, that not one document would be subject to FOIA in Freddie and Fannie, despite all the money we are spending there.

Obamacare, they are terrible. Department of Justice, they are terrible. They are doing so much more and giving us so much less.

Mr. GARDNER. The other two witnesses would like a chance to speak, perhaps, to this question. Do you believe that the administration is keeping up with the requests for FOIA at an adequate level?

Ms. WEISMANN. No, I do not. And, as some of you have quoted back to me some of my statements in the past, that is exactly what I am referring to. We see a large disconnect, unfortunately, between the policies the President put in place and the actual agency practices.

And, like Mr. Fitton and his organization, I am sad to say that we have also experienced the same aggressive nondisclosure approach by the Department of Justice as we did in prior administrations. It is clear that reversing a culture of secrecy is very, very difficult, and we are by far not there yet.

Mr. GARDNER. So you would characterize this administration's approach as aggressive nondisclosure?

Ms. WEISMANN. I don't know if those are the words I would use. I would say the policies of disclosure are in place but the actual practices do not comply with those policies.

Mr. WONDERLICH. My organization doesn't do nearly the FOIA requesting that my colleagues do, but we do have a pending FOIA request that we submitted after doing an extensive analysis of the data quality on USAspending.gov, where we found over $1.3 trillion of missing or broken spending reporting from that Web site.

We submitted a FOIA request to the Office of Management and Budget to see how each agency is tracking the spending of contracts and the data quality, and that has been more than 6 months that they have basically stonewalled and not gotten back to us. And it is still a standing FOIA request from us.

Mr. GARDNER. Just if I could follow up real quickly. I am out of time here. The $1.3 trillion in missing spending that they have said that they would disclose but they have not?

Mr. WONDERLICH. So, the Web site USAspending.gov that is supposed to disclose grants and contracts information has fundamental problems with the data quality. And we did an extensive analysis, which you can see on clearspending.org's Web site we set up to share it, to follow up and apply that analysis to contract information. We submitted a FOIA request that we are still waiting for a response from.

Mr. GARDNER. Based on the lack of FOIA response, do you believe that omission, the $1.3 trillion omission, is that intentional?

Mr. WONDERLICH. No. That is a systemic problem.

Mr. BURGESS. [Presiding.] The gentleman's time has expired.

The gentleman from Virginia, Mr. Griffith.

Mr. GRIFFITH. Thank you, Mr. Chairman.

Let me make a couple of comments first in regard to some of the things that were said here previously. My concern—Mr. Waxman is right that sometimes you get a continuance. But in this type of a setting, with as many executive-branch people and employees and so forth who are out there, I am beginning to see a pattern in my short period of time here, and it is very concerning, that has the administration not sending people to hearings to answer questions of Congress.

And it is of great concern, particularly when some of the testimony we have heard indicates that, without legal authority, the various agencies of this administration are creating laws out of whole cloth, creating new rules because they think the old rules are absurd, et cetera. And so I am very concerned about that.

And Mr. Green and Mr. Fitton had a conversation where they talked about the opinions that various people have, but only the Supreme Court can interpret the Constitution and make rulings on that. In the end, I do find it very interesting that, however, the administration, in regard to the Defense of Marriage Act, made a decision on its own. And so, not only is the administration taking on legislative authority, it is also taking on the authority that Mr. Green quite rightly pointed out belongs to the Supreme Court.

And while we may have our opinions, you know, the President has now given an order not to enforce the law. So the executive branch is, by its own admissions—and Mr. Green pointed that out

indirectly earlier—is not enforcing the law and, therefore, not doing its job.

And on top of that then, it comes to my attention through staff and so forth that, about 3 weeks ago, the White House secretly circulated an Executive order on political spending disclosure, and the only way the American people heard about it was from a leak.

Mr. Fitton, are you familiar with this Executive order which would require Government contractors to disclose political contributions and expenditures made in the 2 years prior to their bids?

Mr. FITTON. Yes. I reviewed the purported draft.

Mr. GRIFFITH. And isn't it true that one of the substantial reasons, maybe, for having such a requirement is to create a political litmus test or an enemies and friends list for people who wish to do business with the Federal Government?

Mr. FITTON. Or a fundraising list.

Mr. GRIFFITH. And wouldn't it also be of concern—or, it is of concern to me; I want to know if it is of concern to you—that, based on the President's prior statements in regard to another context, that Republicans would have to take a back seat in the bus, that if you were a contractor doing business with the Federal Government who might have a political leaning toward the Republican side, that they would want to use that as an attempt to say that, if you are going to play ball with us, you either have to give us or give our friends money or you have to stop giving money to the people you philosophically agree with?

Mr. FITTON. Yes. I think the memorandum, if implemented, would codify corruption into the Federal contracting process.

Mr. GRIFFITH. And if the President wants to issue an Executive order taking an action which previously was considered and rejected by Congress—and, frankly, I think would be terrible policy—doesn't that call for a higher level of openness and public feedback than a regular Executive order and that this should be out there in full disclosure and everybody who has advised him on it ought to be known, and, in fact, there ought to be a great deal of hearing on this, should there not?

Mr. FITTON. I think this needs to be thoroughly debated and vetted by our elected officials, both, obviously, the present administration and here in Congress. It not only impacts the Federal contracting process, but I also think it impacts the First Amendment rights of third-party, innocent groups.

Mr. GRIFFITH. And so you think it could lead, even if unintended, it could lead to retaliation or harassment of companies or third-party groups or other political groups?

Mr. FITTON. Well, frankly, I think that is the intent of the disclosure requirement.

Mr. GRIFFITH. Uh-huh. I mean, I can't disagree with you. I don't think there is any other way you can interpret it. And so you believe it would chill political speech amongst all of the contractors?

Mr. FITTON. Or guarantee a certain political speech, as far as contributions to the party in power or the party running the administration making the contracting decision.

Mr. GRIFFITH. Right.

Mr. FITTON. It wouldn't surprise me if a Republican administration left this in if President Obama—because the Republican Party

would benefit because they would be doling out the contracts. It is just a terrible precedent.

Mr. GRIFFITH. It is bad precedent and bad government. And did you find it curious that unions were left out of the Executive order?

Mr. FITTON. I found it not surprising.

Mr. GRIFFITH. Did you find it not surprising but troubling?

Mr. FITTON. Of course it is troubling. Unions are well-known to be supportive of the President's political campaigns. And if they are not subject to the same types of disclosures as those perceived to be opposed to his political campaigns, it is troubling.

Mr. GRIFFITH. Yes. I would have to agree with that and appreciate your testimony.

Ms. Weismann, I have to tell you, I think you did a nice job today and that you were very fair in your comments. I might not have completely agreed with you on some of the things philosophically, but I thought that you did a very nice job.

And I appreciate all three of you being here today.

Thank you very much. I yield back my time, Mr. Chairman.

Mr. STEARNS. [Presiding.] The gentleman yields back his time.

I think we will do a second round here, if the witnesses will be patient with us for a little longer.

Mr. FITTON. Sure.

Mr. STEARNS. Mr. Fitton, I would like to explore that, in your opening statement, you talked about the idea of—I think you indicated there were 32 waivers that were given by the administration. In fact, these waivers were basically a decision that was either made by the counsel for the administration or the President himself.

In light of the fact that the administration, the President said, quote, "Lobbyists will not work in my White House," is what his statement was. And on one of his first days in office, he signed an Executive order banning lobbyists from serving in his administration.

Based upon this Executive order, did the President violate his Executive order, Mr. Fitton, in your opinion?

Mr. FITTON. Well, you know, the President's position is, "I will not hire lobbyists unless I want to hire lobbyists. I will not allow these lobbyists to work on work that they previously worked on in their private capacity unless I want them to do that."

Sothe President wants to have his cake and eat it, too, on these issues. He holds two positions at once. It is incredible.

Mr. STEARNS. Yes. The Washington Examiner actually, last year, did a story on this, in which they said, "More than 40 ex-lobbyists now populate top jobs in the Obama administration, including three Cabinet secretaries, director of central intelligence, and many senior White House officials."

When you go through this list, these are people working in the White House: Patton Boggs we all know is a lobbyist firm in town. Covington & Burling is a law firm, but it is also a lobbyist. Cassidy & Associates is clearly a lobbyist. Akin Gump; Center for American Progress. So I have this list here—Hogan & Hartson. I have the names of the individuals who are from those lobbying firms.

Mr. FITTON. Right.

Mr. STEARNS. So what does a so-called lobbyist ban do? And how hard is it to get a waiver from these policies? I think the question we are asking—the President had an Executive order, and then he issued waivers, over 40 waivers. I mean, he had waivers on health care. He is up to almost 1,200 waivers on health care so people don't have to comply to. So now the President is issuing waivers in his administration against his signed Executive order banning.

So, do you have any understanding how you get a waiver? How hard is it to get a waiver?

Mr. FITTON. Well, the ethics pledge allows for a waiver—has a waiver escape clause.

Mr. STEARNS. So there is a component in the Executive order?

Mr. FITTON. Right.

Mr. STEARNS. And do you know the wording of that?

Mr. FITTON. It is available on the White House Web site. I don't have it in front of me.

Mr. STEARNS. Ms. Weismann, do you know what the wording is for this waiver? Is it easy to get a waiver, in your opinion?

Ms. WEISMANN. I don't know what the exact wording is. I don't have it in front of me either.

I think that there still have been relatively limited number of waivers. But let me be clear, I think it is probably——

Mr. STEARNS. I think 40 is a pretty significant number if the President makes a pledge, "No one will work in my White House who is a lobbyist."

Ms. WEISMANN. Well, CREW's policy has been all along we didn't necessarily support the ban on lobbying. We are all about disclosure and don't feel that lobbying, itself, should be banned, but, rather, there should be disclosure for everyone, whether it is Congress or the White House.

Mr. STEARNS. Well, in all deference to you, the President found it was pretty important for him to make that strong statement, that no lobbyist will be working in my administration.

Mr. Wonderlich, do you have any idea how you get a waiver? Or is there is a standard policy or process that you would follow to get a waiver?

Mr. WONDERLICH. I don't know exactly how it works, but I would assume it previously would have gone through the ethics czar, the special counsel for ethics and government reform, who—that position no longer exists. But up until when he left, I would assume it would have gone through him.

Mr. STEARNS. So the administrative position that would make this jurisdiction decision is no longer there?

Mr. WONDERLICH. Presumably. It has probably now fallen under the White House counsel, Bob Bauer.

Mr. STEARNS. So the White House counsel, at this point, is making the waivers based upon some policy which we don't really know.

You know, not to reiterate the point again, but I remember in the State of the Union the President said, quote, "We have excluded lobbyists from policymaking jobs," end quote. Yet, as I have pointed out, all these lobbyists are now working in the administration. So it is difficult to understand how the President can actually say lobbyists will not be working in my administration when it ap-

pears there are over 40 that are doing that. And more than a dozen of those hired have required the White House to issue a waiver from the ethics pledge he asked senior officials to sign.

Is that correct, Mr. Fitton?

Mr. FITTON. It looks like there are many of these ethics waivers. To be clear, these waivers are available via our Web site. You can't find them readily on the White House's since they take them down, I believe, as employees may leave. But the records are available through our Web site, and the link is referenced in my written testimony.

Mr. STEARNS. Well, I would just say that the President's statements are pretty bold and they are pretty dramatic and they are pretty clear. Yet he is using this counsel at the White House to give waivers for precisely the people he said would not be in his administration. And you can parse words by saying, "We are giving waivers under certain situations," but a lobbyist is a lobbyist.

So I think the President has to be held accountable for his statement and the fact that he has a large number of lobbyists, over 40, that are working.

Yes?

Mr. FITTON. Well, I told Norm Eisen at that meeting about the White House visitor logs that, you know, like Ms. Weismann, I thought the lobbyist ban was overblown and silly. But he promised, and he needs to keep his promises.

And if he didn't want to keep his promises and he thought maybe the idea was not good and that the campaign promise ought to be rescinded in the interest of good government and getting the best people in, he should say that. But don't say you are not hiring lobbyists and then do it contemporaneously.

Mr. STEARNS. Well, and he goes so far in the State of the Union to say, quote, "We have excluded lobbyists from policymaking jobs." I mean, that is rhetoric, but it is also not true.

Mr. FITTON. Not true.

Mr. STEARNS. My time has expired.

The gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman.

Now that we have had a big session trashing the President and things he said and allegedly did, let's really talk about what this hearing is about and some of the evidence.

Now, Mr. Fitton, are there 40 waivers or 32 waivers right now? Because we had seen in your testimony that you had said there are 32 waivers.

Mr. FITTON. There are 32 ethics waivers, as best as we can tell. I would——

Ms. DEGETTE. OK. So, hang on. So there are 32 ethics waivers. Are all of those waivers to lobbyists, yes or no?

Mr. FITTON. I do not know whether they are all to lobbyists.

Ms. DEGETTE. OK. Well, I actually have the list. And I am sure it is on your Web site, so you could get it, too.

Mr. FITTON. I have it here, so I can refer to it.

Ms. DEGETTE. What Norm Eisen said—he is the White House ethics advisor—"Few of the waivers were to registered lobbyists." Is that correct?

Mr. FITTON. I don't dispute that.

Ms. DEGETTE. OK. So your answer would be "yes," right?

Mr. FITTON. I don't——

Ms. DEGETTE. Yes or no?

Mr. FITTON. I don't have any information to dispute that.

Ms. DEGETTE. OK, Mr. Wonderlich, do you know how many of the waivers are to registered lobbyists?

Mr. WONDERLICH. No.

Ms. DEGETTE. Do you know, Ms. Weismann?

Ms. WEISMANN. No, I do not.

Ms. DEGETTE. OK. Now, look, I am not saying that you should have registered lobbyists, but every so often it might be appropriate, if disclosed. For example, William Lynn, who is the Deputy Secretary of Defense, once worked at a defense contractor, and he got a waiver. Naomi Walker, who is the Associate Deputy Secretary of Labor, worked at the AFL–CIO. Now, they both did get waivers, but they were specifically not allowed to work on issues that would be of conflict. For example, Naomi Walker was not allowed to work on matters relating to regulation or contracts with unions.

Now, Ms. Weismann, I want to ask you a question. I think the President was saying he doesn't, in general, want to have lobbyists working there, but if you are going to have some lobbyists working there, what you want is, A, disclosure and, B, people not working if they have the conflicts of interest, in other words, being taken out of those conflicts. Is that correct?

Ms. WEISMANN. Yes, it is.

Ms. DEGETTE. And in your oversight experience, I wonder if you know how many former lobbyists are working in the Obama administration versus, say, in the Bush administration? Do you know that information?

Ms. WEISMANN. No, I don't.

Ms. DEGETTE. OK.

Ms. WEISMANN. I know that it is very common in Washington for people to cross both lines.

Ms. DEGETTE. Sure. Sure.

Now, the only other question I wanted to ask you, following up on what Mr. Markey was asking and also what Mr. Gardener, my colleague from Colorado, was asking you, because this is something that disturbs me, is you had said that the good news is that the Obama administration has put together these aggressive FOIA rules, much more aggressive than previous administrations. Right?

Ms. WEISMANN. Yes.

Ms. DEGETTE. But then you said that we are having difficulty getting them implemented in the agencies.Is that correct?

Ms. WEISMANN. Yes, it is.

Ms. DEGETTE. I am wondering if you have some sense of why that is?

Ms. WEISMANN. We do, actually. CREW conducted a survey of hundreds of FOIA professionals last year, and the results were, I think, very enlightening. They don't have the resources they need. They don't have the training they need. And I do think that we are talking about truly a culture change, and that just takes time.

Ms. DEGETTE. And a lot of the information officers at these agencies are career people who have been there for a long time and are used to doing things a different way, right?

Ms. WEISMANN. That is certainly true.

Ms. DEGETTE. So one thing I think we could—on this committee, we might disagree on both sides of the aisle about, you know, is President Obama pure or not pure or is he keeping his promises or whatever. But when you cut through all of that partisan bickering, all of us would agree that we want to have open disclosure.

And so I am wondering, for all three of you, if you have an idea for this committee about how we can help the agencies comply much more directly and clearly with these Obama administration FOIA guidelines.

Ms. WEISMANN. Well, I think there is certainly legislation that could enhance the transparency. Our larger concern as an oversight or ethics watchdog kind of group is with the continued reliance on exemption 5 which allows the agencies to protect deliberative process material. We think there should be built into the FOIA statute a balancing test so that we get to argue that the public interest outweighs that, and that is just an example. But definitely there is room for legislation that I think would enhance transparency and just as importantly would ensure that it is not the political football that it has become over the last I don't know how many administrations.

Ms. DEGETTE. Mr. Wonderlich, would you have anything to add to that?

Mr. WONDERLICH. Yes, I would say I would love to see a far more engaged Congress working on individual information policy questions, that are just punted to the agencies and then ignored. And then I would also like to see individual committees thinking about the laws that form their jurisdiction and whether or not their disclosure requirements within those laws that have atrophied over time and have disclosures that have been important.

Ms. DEGETTE. And Mr. Fitton?

Mr. FITTON. I don't disagree with anything my colleague said. One shortcut may be to ask the Department of Justice why it defends what we believe to be improper disclosures the way they do as aggressively as they do. If the lawyers for the Justice Department were to tell the agencies that they represent in the FOIA litigation that we are not defending this anymore, you need to start disclosing that, that might be one way of getting the politicals at these agencies to start paying attention to what they are withholding and why.

Ms. DEGETTE. Thank you. Thank all of you for coming. I thought this was informative, and I was tempted to call both of you young man. But Ms. Weismann, as I have noted in my many years of Congress, the more often people call me young woman, the happier I get, the older I get.

Ms. WEISMANN. You can call me young woman.

Ms. DEGETTE. Yes.

Mr. STEARNS. Let me ask the ranking member, we are now in a second round of questioning, do you want to go on the protocol that Mr. Weiner would be recognized for his first round or would you like to have the opportunity he would contribute as his second round?

Ms. DEGETTE. He can contribute in any way he——

Mr. STEARNS. Mr. Weiner, would you like to contribute as just a second round of negotiation?

Mr. WEINER. I feel ill-equipped. I only have one round in me. So whatever you want to call it.

Mr. STEARNS. Under the procedure if you don't mind we are going to go to a Republican and come back to you as your second round.

Mr. WEINER. Certainly.

Mr. STEARNS. Mr. Griffith from Virginia is recognized for 5 minutes.

Mr. GRIFFITH. Mr. Chairman, I am going to yield back my time. I am learning lots listening here. I am of course very concerned about some of the things I heard, but I yield back.

Mr. STEARNS. The gentleman from New York, Mr. Weiner, is recognized for 5 minutes.

Mr. WEINER. Well, thank you very much, Mr. Chairman. Forgive me, I was watching the hearing with great interest. I just want to say at the outset I agree with you, Mr. Chairman. It is irresponsible, wrong and a dereliction for the administration not to send a witness. I think that whether we agree with what they are going to say, whether it is a fair hearing, whether the questions are fair or not, I think that the administration has to send—particularly since the administration is being invited to answer these questions in front of one legitimate committee, ours, and one that just investigates stuff. So I think this would have been a constructive thing for them to come.

I have to say that the President was right in that video that was played saying that it is going to be negotiated in public. We held, what, I think 2,000 hours of hearings and markup in this committee in front of cameras rolling the entire time. We were on television all of us stating our positions back and forth, hundreds of times in public forums, town hall meetings left and right. This was probably the most open process, I mean it was gut wrenchingly open. Sixteen months it was like—I don't know what childbirth is like it was pretty darn close. We gave birth to a 2,000-page bill so much so my Republican colleagues were complaining they have to read the bloody thing. There are like, my God, there are so many words here. What are we going to do with them all? Now the complaint is how you should have let us in on a little bit more. Well, I have to tell you something that I for one believe that we want to have sunlight, we want to have transparency, and there was an enormous amount of it in this process, so much so that more of the complaints nationally and in this body were how long the process was going, not that there was insufficient information.

And let's remember something here. The real conversations that are protected from the public are the conversations between the health insurance lobbyists and their wholly owned subsidiary, the Republican Party. Like how come we are not asking for any of those conversations? When we on the Democrat Party in this bill force health insurance companies to hold down the amount that they take for profits and overhead and pass along more in health care, and the Republicans were raising money from those health insurance companies and voted unilaterally against it, I want to see some of those conversations. Where are those fund-raisers and

those steak dinners and those cigar bars? I want to be there and have some transparency about that.

I mean look, the fact of the matter is I want to see when it was that my Republican friends got together in a room and said, you know what, we don't want to add 10 years to Medicare, we don't want to do that. We are going to go out and vote as a group to make sure that they don't get a single vote for that. Where did that conversation happen? I want to see some sunlight on that conversation.

And where was it that the conversation happened that the Republicans got together and said, we don't want to close the donut hole for seniors so they have to continue to pay money out-of-pocket for drugs. Where was that meeting held? I want some investigation to find out where that decision was made that seniors would have to pay more money. I want to find out where it was written that my Republican friends would come up with this idea about lying what was in the bill, like death panels and everything else. Those conversations I would like to see because those we had no sunlight at all on those things.

We had hours and hours and hours. This room was full, was full of people coming here and not explaining that, you know what, I happen to be here to fight for the insurance industry as some of my Republican friends seem to be doing. Those are the conversations I care about.

We had town hall meetings, we had hearings, we had markups. Look, I will stipulate to the idea that we want to have as much transparency as possible. But I will not stipulate to the idea that the President didn't live up to his responsibility by having the process out in the open. It was so out in the open, it was like—I mean I was exhausted. When I started this process I was 6' 4" and 290 pounds. This is all that is left of me.

So I think we have to remember this is an important debate to be having, how you have transparency and make sure that the American people know what is going on. But the American people saw what was going on. They saw basically the Democratic Party, the leadership of the President trying to solve a national crisis that we are spending billions and billions and billions of dollars, because we have people going to hospital emergency rooms with no insurance and passing along the bill to the rest of us. That is what this debate was about.

And by the way, it was also expressed in many, many forms during the campaign. When people voted, they said we want you to solve health care. And when we lose jobs, when localities are struggling, when people can't afford their health care, when all of us are paying for those that are not and we have hundreds of hours on a 2,000-page bill and then long debates on these things clearly into the night. I don't think the American people are saying, ooh, tell me more. They are saying, you know what, that was a long, healthy process. And what they do know is that on one side were people who were fighting every day to improve health care and make it more affordable and the other side was a wholly owned subsidiary of the health insurance industry called the Grand Old Party.

And I yield back my time.

Mr. STEARNS. I thank the gentleman. I remember when you used to say you were 6' 6" and 300 pounds, so it is now 6' 4", 290. Just as a chairman's prerogative, he is welcome to answer my question, what would you say, and I heard what you said about Republicans and wanting to read the bill, what would you say to former Speaker Pelosi who said we will have to pass the bill so that you can see what is in it.

Mr. WEINER. Will the gentleman yield?

Mr. STEARNS. I will yield.

Mr. WEINER. That is actually not what she said. You know, what she said was that when he she was asked a question why do the American people not support the bill that she was saying was so great. And she said very often the bills have to become passed and to become part of the law for people to be able to separate the wheat from the chaff. Do you have any idea how many lies we were told about this bill during the process, Mr. Chairman? And what she said turned out not to be entirely true because—not you personally—people kept lying about it even after it was law. So now you are taking an urban myth that she said people have to read the bill to learn what is in the bill as if the idea that she didn't know. We knew what was in the bill but the American people had to hack through stuff that was being made up about the bill every single day. And she had confidence that sooner or later when the bill was passed and became law, people saw they are getting help with prescription drugs, with preventive care without a co-payment, that people once they saw that all the lies would fade, unfortunately she turned out to be wrong.

Mr. STEARNS. Thank you. The gentleman from Texas is recognized for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman. I appreciate the recognition. You know, we did have a lot of hearings in the spring of 2009. We had hearings that were sort of single focused. We were always having hearings about how to expand Medicaid to more people in this country. We never really had any hearings about how expensive that would or would not be, but we missed the big story.

One of the things we were tasked with by the American people in the summer of 2009, we had those very big town halls, two things they asked us for. Number one, don't mess up the system, it is working arguably well for 65 percent of us. And number two, if you are going to do it at all, could you please help us with cost?

What did we do? We created a system now that it requires 1,200 waivers in which to work. So I don't think you can argue that we didn't mess up what was already working. And what did we do about cost? Well, costs are going up. But was there any place in the country where we could have looked and perhaps asked a few questions about how costs in some environments are not just being held level but in fact coming down?

What about Governor Daniels in Indiana? What about his Healthy Indiana Plan? What about a plan that for his State employees has saved 11 percent over 2 years' time? Why did we not bring Governor Daniels to the very witness table, chain him to the chair until he spilled the beans about how he was able to hold down costs. And how did he hold down costs? He put people in charge of their own money. Something magic happens when people

spend their own money for health care as it turns out, even if it wasn't their own money in the first place.

I could go on and on about the number of amendments offered in this committee. I had my own table for amendments. I got five accepted by the committee before the bill H.R. 3200 left this committee room and went over to the floor of the House. But what happened on the way to the floor of the House? It got tied up in the Speaker's Office. Was that on C–SPAN? Did anyone get to participate in that besides the White House, Rahm Emanuel, Speaker Pelosi? I would submit that probably even our good friend Anthony Weiner was not called into those discussions.

What happened then? We got a 2,000-page bill, people were mad about a 1,000-page bill, they were really mad about a 2,000-page bill. And no one had any earthly idea it was written in secret in the Speaker's Office with heavy input from the White House.

But that wasn't the end of the story. We passed that thing in middle of the night on the floor of the House early in November, dead on arrival. You can't find that legislation no matter if you look high or low, you cannot find it because Harry Reid had a secret bill in his desk drawer. I suspect his left desk drawer. And this was H.R. 3590. Now 3590 had already been passed by the House, but it wasn't a health care bill, it was a housing bill. Harry Reid took a bill that we had passed, a housing bill, stripped all the health care language out of it, stripped all the housing language out of it and began to put health care language in. Is this an open transparent process the way this occurred? Harry Reid went to every Senator on his side of the aisle in the Senate and said, what will it take to get your vote? When he got that he put it in 359O, they passed it on Christmas Eve right before a snowstorm so they could all go home. And in truth they thought they would come back to a conference committee and get to smooth out some of the rough edges that were in that bill.

But a funny thing happened on the way to the conference committee. The State of Massachusetts had an election for a Senator. Senator Brown was elected in Senator Kennedy's old seat. No longer did Harry Reid have 60 votes. And he came back and said, Nancy, this is the best I can do. You have to take this thing and pass it on the floor of the House. I remember what Congressman Weiner's colleagues said then, oh, no, you don't, we are not voting for that thing, it has got an independent payment advisory board in it.

Talk about sunlight. Did we ever have a hearing on the independent payment advisory board in this committee? Did we ever have a chance to mark that up, and vote on it, and amend it? I don't think so. That was a product of the Senate. The public option that Mr. Weiner liked so much was completely excluded by the Senate bill, except the fact that it probably still is in there, in the national exchanges.

This is the problem. When you do things in secret, when you do things behind closed doors and don't have them vetted by the appropriate committees of jurisdiction, you could go on and on about the drafting errors in this bill, but that is the reason it has happened because regular order was completely subverted and there was no transparency.

Now, Mr. Fitton, let me just ask you because you and I have dealt with aspects of health care law with regard to the transparency issue. I have had trouble getting information out of the White House. You have too, haven't you?

Mr. FITTON. That is right. We have asked specifically—the White House isn't subject to FOIA. So no administration is going to happily comply with requests for information from a party like Judicial Watch, but HHS is. As I said in my testimony, they have yet to produce one document to us under the Freedom of Information Act about these health care waivers.

Now if you are a proponent of the ObamaCare law, you might have an interest in knowing why it is being waived all over the place. And obviously as an opponent there would be an interest as well. But the administration does not want to disclose pursuant to the law anything about this thus far and it is ongoing and people are confused about whether the law is being enforced arbitrarily and capriciously, yet the administration is completely silent for practical purposes in terms of disclosing it to the American people, to which they are accountable under the law.

Mr. BURGESS. Well, let me just point out, too, that the American Health Insurance was in those secret meetings at the White House. I never had any meetings with the AHIP, but the White House did. Why weren't those disclosed, why weren't those on the record meetings?

We have heard Anthony Weiner talk about—Congressman Weiner talk about why that was important to have those meetings on the record. Why not have those very meetings down at the White House on the record as well?

Mr. FITTON. Well, the President promised those types of meetings would be on C–SPAN. And to the Congressman's earlier point, I think the Freedom of Information Act should be modified to apply to Congress in a way that protects your constitutional prerogatives but provides more disclosure about some of the activities that you are engaged in. The President made the decision to have these decisions made behind closed doors contrary to campaign promises. There is no doubt about it.

Mr. BURGESS. Thank you, I yield back.

Mr. STEARNS. The gentleman yields back, time has expired. I appreciate the witnesses' forbearance here as we moved a little bit off center here on talking about things. I say to my good friend, Mr. Weiner, former Speaker Pelosi's statement being urban myth, that actually if he wants to I can show him the video of it after the hearing. I would be glad to call it up, I think we have it right in the back here, if he would like to look at it.

But I would like to close by just asking unanimous consent of the ranking member to put this article which he alluded to or talked about from the Washington Examiner in the record. Without objection, so ordered.

[The information follows:]

Obama makes a mockery of his own lobbyist ban

By: **Timothy P. Carney** | 02/03/10 5:00 AM

Columnist

More than 40 former lobbyists work in senior positions in the Obama administration, including three Cabinet secretaries and the CIA director. Yet in his State of the Union address, Obama claimed, "We've excluded lobbyists from policymaking jobs."

Did Obama speak falsely?

Well, it depends on what the definition of "excluded lobbyists" is.

I asked the White House if he chose his words poorly, but the media affairs office defended the president's statement: "As the President said," a spokeswoman wrote in an e-mail, "we have turned away lobbyists for many, many positions."

So, the country may have heard, "we haven't hired lobbyists to policymaking jobs," but the White House tells us Obama meant, "we only hired some of the lobbyists who applied for policymaking jobs." In other words, they've excluded some lobbyists.

And this was in the context of reducing the "deficit of trust."

So Obama has, indeed, taken a Clintonian turn, but not toward the center. Instead, he has adopted our 42nd president's use of clearly misleading statements that can be parsed so as to be factually correct, at least in a general sort of way.

Using Obama's grammar, we can say George W. Bush avoided wars in the Mideast (he didn't invade Iran), and Bush's father refused to raise taxes (repeatedly, for months).

On the day after the State of the Union, when Rep. Jason Chaffetz, R-Utah, asked Obama about his campaign pledge on lobbyists ("They will not work in my White House"), Obama explained that he had made some worthy exceptions: "For example, a doctor who ran Tobacco-Free Kids technically is a registered lobbyist, on the other hand, has more expertise than anybody in figuring out how kids don't get hooked on cigarettes. So there have been a couple of instances like that. ..."

Sure, some of Obama's 40 ex-lobbyists are like that anti-smoking activist, but many are of a different stripe, such as William J. Wilkins, the general counsel of Obama's IRS, a former lobbyist for the Swiss Bankers Association.

Or Monsanto's former VP for public policy, Michael Taylor, who Obama tapped as deputy commissioner for foods at the Food and Drug Administration.

William J. Lynn became Obama's deputy defense secretary within 10 months of being a lobbyist for Raytheon, a giant of the military-industrial complex. By the way, Raytheon's fourth -quarter profits were up 20 percent from a year ago.

Joe Biden's chief of staff, Ron Klain, was a K Street lobbyist who represented Fannie Mae during the housing boom, opposing regulation of the now-bailed-out mortgage giant. And Biden's deputy chief of staff is Alan Hoffman, a K Street veteran who helped oil giant Unocal avoid U.S. sanctions against its natural-gas partnership with the military dictatorship of Burma.

Obama touts the ethics executive order he signed his first day, and none of the above lobbyist appointments violate it (which should suggest how toothless Obama's lobbyist regulations are). Wilkins, for instance, stopped registering as a lobbyist for Swiss bankers and the like in 2003, while Obama's restrictions reach back only two years. Agriculture Secretary Tom Vilsack avoids issues dealing with his former employer, the National Education Association.

William Lynn at DOD? He got a waiver from the president, and so he's exempt from the new rules.

But then there's Mark Patterson, a Goldman Sachs lobbyist until April 2008 (apparently, back then, Wall Street lobbyists weren't all evil in Obama's eyes) who now serves as chief of staff at the Treasury Department. He's one of those lobbyists whom Obama neither "excluded" nor granted a waiver.

But whether or not Obama is living up to his executive order, he's not living up to his rhetoric.

That candidate Obama would pledge lobbyists "will not work in my White House," but President Obama would hire many of them, reflects what we already knew during the campaign: Obama was inexperienced and naive about the realities of governing.

That President Obama would say, "we've excluded lobbyists," when he really meant, "we've included them, too," tells us something more surprising: That he's willing to mislead us, as long as he's left himself a semantic back door to escape through if he gets called out.

Now we're forced to parse all of Obama's claims and promises. Now we always have to try to guess what the president actually means. Obama might soon learn, as Bill Clinton did, that a "deficit of trust" carries a steep price.

Timothy P. Carney, The Examiner's lobbying editor, can be reached at tcarney@washingtonexaminer.com. He writes an op-ed column that appears on Friday.

Former Lobbyists in Senior-Level Obama Administration Positions : Spreadsheet

Appointee	Agency	Administration position	Former employer	Selected former lobbying clients
Barnes, Melody	Domestic Policy Council	Director	Raben Group	ACLU; Center for Reproductive Rights
Barrien, Jacquelin	Equal Employment Opportunity Commission	Commissioner	NAACP Legal Defense Fund	NAACP Legal Defense Fund
Beliveau, Emmett	White House	Deputy Assistant for Advance	Patton Boggs	PriceWaterhouseCo Worldwide Medical Technologies; Shaw Group
Butts, Cassandra	White House	Deputy Counsel	Center for American Progress	Center for American Progress
Corr, William	Health and Human Services	Deputy Secretary	Campaign for Tobacco-Free Kids	Campaign for Tobacco-Free Kids
Coven, Martha	White House	Special Assistant	Center on Budget & Policy Priorities	Center on Budget & Policy Priorities
Crowley, Phillip J.	State Department	Assistant Secretary for Public Affairs	Center for American Progress	Center for American Progress
Donilon, Thomas	National Security Agency	Deputy National Security Advisor	Fannie Mae	Fannie Mae
Douglas, Derek	White House	Special Assistant for Urban Affairs	O'Melveny & Myers; Center for American Progress	Public Transportation Safety Int'l Corp.; Center for American Progress
Frye, Jocelyn	Office of the First Lady	Director of Policy and Projects	Nat'l Partnership for Women & Families	Nat'l Partnership for Women & Families
Gaspard, Patrick	White House	Political Affairs Director	SEIU	SEIU
Gomez, Gabriella	Department of Education	Assistant Secretary	American Federation of Teachers	American Federation of Teachers
Harden, Krysta	Department of Agriculture	Assistant Secretary	Gordley Associates	National Barley Growers Association; National Sunflower Association; American Soybean Association; U.S. Canola Association
Harris, Scott	Department of Energy	General Counsel	Harris, Wilshire & Grannis	Microsoft; Cisco; Dell; Sprint
Hayes, David	Interior Department	Deputy Secretary	Latham & Watkins	Sempra Energy; San Diego Gas & Electric; General Cigar Holdings
Hirschhorn, Eric L.	Department of Commerce	Under Secretary for Export Administration	Winston & Strawn	Lockheed Martin; Sun Chemicals
Hoffman, Alan	Office of the Vice President	Deputy Chief of Staff	Timmons & Co.; RAND Corporation	RAND Corporation, Unocal
				Global Crossing;

Spreadsheet

URL: http://washingtonexaminer.com/politics/obama-makes-mockery-his-own-lobbyist-ban

Mr. STEARNS. And again I want to thanks the witnesses for their participation, and the subcommittee is adjourned.

[Whereupon, at 12:54 p.m., the subcommittee was adjourned.]

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