ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5369

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Plaintiff-Appellant,

v.

NATIONAL SECURITY AGENCY
Defendant-Appellee.

On Appeal from the
United States District Court
for the District of Columbia

BRIEF FOR PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES
CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A), Appellant certifies as follows:

A. Parties and Amici

Appellant is the Electronic Privacy Information Center ("EPIC"). EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, nor affiliate. EPIC has never issued shares or debt securities to the public. EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

The Appellee in case No. 13-5369 is the National Security Agency ("NSA"). The NSA is a federal agency subject to the Freedom of Information Act ("FOIA").

No *amici* appeared before the district court. Public Citizen, Inc., a non-profit advocacy organization that promotes accountability in government by requesting public records and using them to provide the public with information about the government's activities and operations, intends to file a brief as *amicus curiae* in this case.

B. **Ruling Under Review**

Appellant seeks review of the Memorandum Opinion of Judge Beryl A. Howell of the United States District Court for the District of Columbia in case number 1:10-cv-00196. The Opinion, issued on October 21, 2013, granted in part and denied in part the NSA's motion for summary judgment and EPIC's cross-motion for summary judgment. Judge Howell held *sua sponte* that the presidential directive at issue in that case was not an "agency record" subject to the disclosure requirements under FOIA. The Opinion is reproduced in the Joint Appendix at JA 001.

C. **Related Cases**

A recent decision involved the release of a presidential directive issued to the State Department sought under the Freedom of Information Act. *Ctr. for Effective Gov't v. U.S. Dep't of State*, ___ F. Supp. 2d ___, 2013 U.S. Dist. LEXIS 176638, 2013 WL 6641262 (D.D.C. Dec. 17, 2013). In that case, the District Court granted the plaintiff's cross-motion for summary judgment and ordered the State Department to produce the presidential directive. The court in *Center for Effective Government* noted that as the government did not argue that a presidential record is not an agency record it need not decide whether to follow Judge Howell's "rationale." *Id.* at n. 6.

D. **Corporate Disclosure Statement**

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values. EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

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Dated: March 31, 2014

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TABLE OF AUTHORITIES[1]

[1] Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

GLOSSARY

ACR	Access Control and Record System
CNCI	Comprehensive National Cybersecurity Initiative
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
HSC	Homeland Security Council
JA	Joint Appendix
NSA	National Security Agency
NSC	National Security Council
NSS	National Security Staff
NSPD	National Security Presidential Directive
WAVES	Worker and Visitor Entrance System
WHACS	White House Access Control System

JURISDICTIONAL STATEMENT

The district court had jurisdiction to review the Defendants' refusal to disclose records in its possession in response to EPIC's Freedom of Information Act ("FOIA") Requests pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The lower court held *sua sponte* that the document at issue was not an "agency record" under the FOIA and that, as a result, it lacked subject-matter jurisdiction to resolve the claim. (JA 008.) EPIC argues, *infra* at 13-15, that the lower court had subject-matter jurisdiction to consider its claim and that the "agency record" determination is not a jurisdictional limitation in the FOIA.

This Court has jurisdiction to review this appeal pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment entered by a District Court within the District of Columbia Circuit on October 21, 2013 disposing of all parties' claims. EPIC's filed a timely notice of appeal on December 17, 2013.

STATEMENT OF ISSUE FOR REVIEW

Whether the district court erred in holding that a Presidential Directive in the possession of a federal agency is not an agency record subject to the FOIA.

PERTINENT STATUTORY PROVISIONS

The Freedom of Information Act

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:
***

(3)(A) *** each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.
***

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)
***

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;
***

(3) specifically exempted from disclosure by statute (other than section 552b of this title) ***
***

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

STATEMENT OF THE CASE

This case arises from a Freedom of Information Act request for the text of National Security Policy Directive 54 ("NSPD-54"). At issue is the agency's withholding of this record in its possession and under its control. The NSA argued below that the text of NSPD-54 was properly withheld as a privileged presidential communication, exempt from disclosure under Exemption 5, and that one paragraph of the directive was properly withheld under Exemption 1. EPIC argued that NSPD-54 could not be withheld under Exemption 5 because the presidential communications privilege was not properly invoked. EPIC also argued that NSPD-54 was not subject to the privilege and that the public's interest in disclosure outweighs the agency's interest in secrecy. (Pl.'s Cross Mot. Summ. J., 2, ECF No. 13-1.) After both parties completed briefing and moved for summary judgment, the district court ruled *sua sponte* that NSPD-54 is not an "agency record" under the FOIA and "need not be disclosed in response to a FOIA request." (Mem. Op. at 24) (JA 024.) EPIC appeals that ruling of the lower court.

I. Factual Background

A. Presidential Policy Directive

Presidential Directives are "'formal notification[s] to the head of a department or other government agency informing [them] of a presidential decision in the field of national security affairs," generally requiring that such department or agency take some follow-up action." *Ctr. for Effective Gov't v. U.S.*

Dep't of State, ___ F. Supp. 2d ___, 2013 WL 6641262 at *1 n.3 (D.D.C. Dec. 17, 2013) (citing John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 Vt. L. Rev. 333, 357 (2010)). Presidents issue directives when they "seek to implement and coordinate military policy, foreign policy, and other policy deemed to fall within the bounds of national security." *Id.*

According to the Department of Justice Office of Legal Counsel, "there is no substantive difference between an executive order and a presidential directive that is not styled as an executive order." *Id.* (citing Legal Effectiveness of A Presidential Directive, as Compared to an Executive Order, 2000 WL 33155723, *1 (Op. Att'y Gen. Jan. 29, 2000)). It is the "substance" of a presidential action that is determinative of its legal effect, "not the form of the document conveying that action." *Id.* The government has embraced this interpretation that presidential directives "have the force of law." *Id*.

B. NSPD-54

The Cybersecurity Policy Presidential Directive, NSPD-54 (also known as "HSPD-23"), the document at issue in this case, is a presidential order concerning the implementation of federal cybersecurity policy that carries the force of law. The President issued NSPD-54 to "to a number of high ranking Presidential advisers, Cabinet officials, and agency heads, including (*inter alia*) the Director of

NSA." (Decl. of Mary Ronan, Director of Access Management Office, National Security Staff ("Ronan Decl.") ¶ 13, ECF No. 12-10) (JA 114); (*see also* Def.'s Mem. Supp. Mot. for Summ. J. ("Def.'s Mem.") at 3, ECF No. 12-1) (JA 069.) NSPD-54 also "implemented the CNCI." (Decl. of Diane M. Janosek, Deputy Associate Director of Policy and Records, National Security Agency ("Janosek Decl.") ¶ 8, ECF No. 12-2) (JA 97)

II. Procedural History

A. EPIC FOIA Request

On June 25, 2009, EPIC submitted a FOIA request to the NSA, seeking the text of NSPD-54, executing protocols, and related privacy policies. (Def.'s Mot. Summ. J., Tab A at 2, ECF No. 12-3) (JA 117.) EPIC also requested expedited processing. On July 1, 2009, the NSA acknowledged receipt of EPIC's FOIA request but denied expedited processing and made no determination as to the substance of EPIC's request. (Def.'s Mot. Summ. J., Tab B at 2, ECF No. 12-4) (JA 123.) On July 30, 2009, EPIC filed an administrative appeal, challenging the NSA's denial of expedited processing as well as its failure to make a timely substantive determination under 5 U.S.C. §552(a)(6). (Def.'s Mot. Summ. J., Tab C at 2, ECF No. 12-5) (JA 126.) In response to EPIC's administrative appeal, the NSA granted EPIC's request for expedited processing, but did not make a

substantive determination on EPIC's FOIA request. (Def.'s Mot. Summ. J., Tab D at 2, ECF No. 12-6) (JA 141.)

On October 26, 2009, the NSA sent EPIC a letter identifying three documents responsive to EPIC's request. (Def.'s Mot. Summ. J., Tab F at 2, ECF No. 12-8) (JA 147.) The last document identified, which included the full text of NSPD-54, was "referred to the National Security Council (NSC) for review and direct response" to EPIC. *Id*. The NSA stated that the two other responsive documents, relating to privacy policies, were exempt from disclosure. *Id.* On November 24, 2009, EPIC appealed the NSA's determination. (Def.'s Mot. Summ. J., Tab G at 2, ECF No. 12-9) (JA 150.) The NSA acknowledged receipt of this appeal on December 18, 2009, but failed to respond further to EPIC's appeal or its request. (Compl. at 7, ECF No. 1) (JA 037.) The NSC never contacted EPIC regarding the request for the text of NSPD-54 held by the NSA. (Compl. at 8) (JA 038.)

B. EPIC v. NSA, No. 10-cv-00196

On February 4, 2010, EPIC filed a lawsuit against the NSA and the NSC under the Freedom of Information Act and the Administrative Procedure Act. (Compl. at 1) (JA 031.) In its Complaint, EPIC alleged that the NSA had failed to comply with the FOIA's statutory deadlines, that the NSA and NSC had unlawfully withheld responsive records under the FOIA, and that the NSA had

violated the Administrative Procedures Act by referring EPIC's FOIA request to the NSC, which is not an agency subject to the FOIA. (Compl. at 38-9) (JA 038-9.)

In March 2010, the NSA and NSC filed a partial motion to dismiss the entire Complaint as to the defendant NSC and the alleged APA violation as to the defendant NSA. (Mem. Op. Granting Def.'s Partial Mot. to Dismiss at 1, ECF No. 4) (JA 055.) On July 7, 2011, the lower court ordered that the lawsuit would proceed against the NSA, but dismissed the NSC from the case. *Id.* at JA 066. The lower court agreed with EPIC that "a referral of a FOIA request could be considered a 'withholding' if 'its net effect is to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them,'" but held that "an entity that is not subject to FOIA cannot unilaterally be made subject to the statute by any action of an agency, including referral of a FOIA request." *Id.*

In the interim, the White House published a summary of federal cybersecurity policy. (Pl. Opp'n at 18, ECF No. 14) However, the text of NSPD-54 remained a secret. On August 14, 2009, the NSA released a heavily redacted version of two documents it had identified as responsive to EPIC's request. (Janosek Decl. ¶ 13) (JA 105). The remaining document NSPD 54 was not released in any form. *Id.*

On October 11, 2011, the NSA filed a Motion for Summary Judgment, arguing that it had properly fulfilled its duties under the statute. In its Motion, the NSA invoked the presidential communications privilege of FOIA Exemption 5 as the basis for withholding the text of NSPD 54. (JA XXX) The NSA also argued that one paragraph of NSPD-54 was properly classified and thus subject to Exemption 1. (Def.'s Mem. at 7) (JA 073.) The NSA provided two declarations: one from its Deputy Associate Director of Policy and Records, Diane M. Janosek, (Janosek Decl. ¶ 1) (JA 093), and another from the Director of the National Security Staff ("NSS") Access Management Office, which is a "component of the Executive Office of the President (EOP)." (Ronan Decl. ¶ 1) (JA 109.) Both declarations contended that NSPD-54 could be withheld under the presidential communications privilege.

On November 11, 2011, EPIC filed its Memorandum in Opposition and Cross Motion for Summary Judgment, arguing that NSPD-54 could not be withheld under Exemption 5 because the presidential communications privilege was not properly invoked. In its Cross Motion, EPIC also argued that NSPD-54 was not subject to the privilege, and that the public's interest in disclosure outweighs the agency's interest in secrecy. (Pl.'s Cross Mot. Summ. J. at 2.)

On September 9, 2013, nearly two years after briefing had concluded, Judge Howell issued a Minute Order alerting the parties to the decision of this Court in

Judicial Watch v. U.S. Secret Serv., 2013 U.S. App. LEXIS 18119 (D.C. Cir. Aug. 30, 2013). (JA 196.) Judge Howell wrote, "If the parties would like the opportunity to address the relevance, if any, of the D.C. Circuit's recent decision in *Judicial Watch* to the issues raised by the withholding of the requested documents in the instant case, the parties are directed to submit jointly, by September 16, 2013, a schedule for supplemental briefing." The parties consulted, agreed that there was no need to brief *Judicial Watch* in the matter pending before the court, and so notified the court. In the Joint Status Report, EPIC and NSA stated that "The parties have conferred and agreed that no supplemental briefing is necessary." (Joint Status Report at 1, ECF No. 26) (JA 197.)

The District Court issued a Memorandum Opinion and Order on October 21, 2013. (Mem. Op. at 1) (JA 001.)

C. The District Court Decision and Docketing of the Appeal

In the Memorandum Opinion, the District Court held that NSPD-54 was not an "agency record" subject to the FOIA. (Mem. Op. at 8) (JA 008.) As a result, the court found that it did not "have the power under the FOIA" to order the disclosure of the document that EPIC sought. *Id*. According to the lower court, "[T]he parties gloss over the question of whether NSPD 54 is an 'agency record' at all, which is a threshold question the Court must resolve before turning to the applicability of any exemptions . . . . Under this Circuit's recent opinion in *Judicial Watch*, the answer

to this critical question as to NSPD 54 is no, rendering all other arguments about the applicability of Exemption 5 moot." *Id.* at JA 007.

The court ruled that documents originating in the President's National Security Staff are not in the "control" of the agencies to which they are issued. The court also concluded that NSPD-54 was not sufficiently in the "control" of the NSA for it to qualify as an "agency record."

This appeal followed. It was docketed on December 20, 2013, and the appellant EPIC filed a Statement of Issues to Be Raised on January 22, 2014. EPIC identified the issue on appeal as "Whether the district court erred in holding that a Presidential Directive in the possession of a federal agency is not an agency record subject to the FOIA."

SUMMARY OF THE ARGUMENT

Under the FOIA an agency must produce all non-exempt, responsive records that are in its possession. An agency that possesses documents it believes are not "agency records," and therefore not subject to disclosure, bears the burden of justifying its withholding. Nonetheless, the lower court ruled in this case that NSPD-54, an executive order in the possession of a federal agency, was not an agency record. Neither the agency nor the President's staff asserted that NSPD-54 was not an agency record during the administrative proceeding or the litigation below. The lower court also failed to apply the four-factor test established by this Court to determine whether a document that has "come into the agency's possession in the legitimate conduct of its official duties" is an agency record. Because the court below ruled that NSPD-54 was not an agency record even though the agency failed to raise that argument or to meet its burden, and because the court did not apply this Court's four-factor "control" test, it erred when it held that NSPD-54 was not an agency record under the FOIA.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment in a FOIA case *de novo*. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013). In FOIA matters, *de novo* review requires the court to "ascertain whether the agency has sustained its burden of demonstrating that the documents

requested are not 'agency records' or are exempt from disclosure under the FOIA." *Assassination Archives & Rsch. Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003) (citing *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994)).

ARGUMENT

The FOIA requires that agencies make requested records available "to any person," unless one of nine exemptions applies. 5 U.S.C. § 552(a)(3)(A). The FOIA provides district courts authority to issue injunctive relief "to order the production of any *agency records* improperly withheld from the complainant." *Id.* § 552(a)(4)(B) (emphasis added). Congress "did not provide any definition of 'agency records.'" *Forsham v. Harris*, 445 U.S. 169, 178 (1980). Nonetheless, courts have determined that agency records are those that are (1) created or obtained and (2) controlled by the agency at the time the request was made. *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). The "burden is on the agency to demonstrate, not the requestor to disprove, that materials sought are not 'agency records.'" *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 220 (D.C. Cir. 2013) (citing *Tax Analysts*, 492 U.S. at 142 n.3). This means that the "agency record" determination is not a necessary element of the court's subject-matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) ("the party invoking federal jurisdiction bears the burden of establishing its existence.").

I. THE DISTRICT COURT ERRED IN HOLDING THAT NSPD-54 WAS NOT AN AGENCY RECORD WHERE THE AGENCY NEVER MADE THAT ARGUMENT BELOW

The lower court erred when it ruled that NSPD-54 was not an "agency record." The NSA never claimed that the document was not an agency record subject to the FOIA. The agency did not raise this argument during its processing of EPIC's FOIA request, its Answer to EPIC's FOIA Complaint, or its Motion for Summary Judgment. The lower court decided, *sua sponte* and without any briefing from the parties, that an executive order in the possession of a federal agency was not an "agency record." The court erred when it ruled in favor of the NSA, where the NSA had not met its burden to demonstrate that the presidential directive in its possession was not an agency record. Both the Supreme Court and this Court have held that the agency, not the requestor, bears the burden of demonstrating "that the materials sought are not 'agency records.'" *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). *See also Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 287 (D.C. Cir. 2006).

District courts have subject-matter jurisdiction over all claims "arising under" the FOIA. *See Sweetland v. Walters*, 50 F.3d 852, 855 (D.C. Cir. 1995) (citing *Haddon v. Walters*, 43 F.3d 1448, 1490 (D.C. Cir. 1995)) (affirming the lower court's dismissal on alternative grounds while noting that the court "cannot agree that the district court lacked subject-matter jurisdiction"). Thus, the "agency

record" requirement is a nonjurisdictional element of a FOIA claim, not a limitation of the court's subject-matter jurisdiction.[2] Congress did not intend for the "agency records" determination to be a necessary element of the court's jurisdiction. If it had, then the plaintiff, not the agency, would bear the burden of establishing that element.[3] This Court has only held that subject-matter jurisdiction is lacking in a FOIA case where plaintiff's complaint did not allege that a covered agency has improperly withheld agency records. *See*, *e.g.*, *Glick v. Dep't of Army*, 971 F.2d 766 (D.C. Cir. 1992) (per curiam). *C.f. Williams v. Reno*, 93 F.3d 986 (D.C. Cir. 1996) (per curiam) (finding that the district court abused its discretion when it refused to reconsider its ruling that it lacked subject matter jurisdiction over a FOIA claim).

If the "agency records" issue were a jurisdictional limitation, both the lower court and this Court would be required to address it. But courts do not routinely

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[2] The Supreme Court has "endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional'" and has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). As the Court explained, "When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented." *Id*. "But if 'Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.'" *Id*. (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)).

[3] "It is the burden of the party claiming subject-matter jurisdiction to demonstrate that it exists." *Georgiades v. Martin-Trigona*, 729 F.3d 831, 833 n.4 (D.C. Cir. 1984). *See also Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007).

consider this issue, which shows that it is merely a nonjurisdictional element of a FOIA claim that can be waived or abandoned by the defendant agency. *See*, *e.g.*, *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1119 (D.C. Cir. 2004) ("rather than focusing on whether the internal Department documents are 'agency records,' as in *Ryan*, we proceed on the basis that the Office of Pardon Attorney . . . is an agency subject to FOIA."). *See also Judicial Watch, Inc. v. DOJ*, 259 F. Supp. 2d 86 (D.D.C. 2003) (ruling on Exemption 5 grounds without addressing the "agency records" issue).

Because the "agency record" requirement is nonjurisdictional, the NSA abandoned its claim that the document was not an "agency record" when it failed to raise the issue during briefing or in response to the lower court's request for additional briefing. This Court has adopted an "abandonment" rule governing the failure to raise such issues. "As a general rule . . . the failure to raise an affirmative defense in opposition to a motion for summary judgment constitutes an abandonment of the defense." *United Mine Workers of Am. 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 478 (D.C. Cir. 1993) ("Since disposition on summary judgment would resolve the case as a matter of law, [defendant] naturally should have briefed dispositive legal defenses like the running of the limitations period"). *See also Barnes v. District of Columbia,* 270 F.R.D. 21, 23 (D.D.C. 2010) (Lamberth, C.J.) ("[A] party can waive an affirmative defense if it has never raised

the defense and does not raise it in the summary judgment stage"); *Att'y Gen. of U.S. v. Irish People, Inc.*, 595 F. Supp. 114, 120 n. 9 (D.D.C. 1984), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C. Cir. 1986) (holding that affirmative defenses were abandoned when not raised at summary judgment stage).

The abandonment rule is consistent with this Court's prior rulings that certain documents obtained by federal agencies are not agency records subject to the FOIA. For example, in *United We Stand America v. IRS*, the "Defendant declined to produce an additional thirty-four pages of documents, claiming that these documents are not 'agency records'" and subsequently moved for summary judgment on those grounds. *United We Stand Am. v. IRS*, 219 F. Supp. 2d 14, 16 (D.D.C. 2002). Similarly, in *Tax Analysts* and *Kissinger*, the agencies denied that the documents at issue were agency records and argued as much in their dispositive motions. *See Tax Analysts v. DOJ*, 643 F. Supp. 740 (D.D.C. 1986), *rev'd,* 845 F.2d 1060 (D.C. Cir. 1988), *aff'd,* 492 U.S. 136 (1989) ("On August 2, 1979, the Tax Division denied that request on the grounds that the documents were not agency records"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 143 (1980). ("The Department denied Safire's FOIA request by letter of February 11, 1976. The Department letter reasoned that the requested notes had been made while Kissinger was National Security Adviser and therefore were not agency records subject to FOIA disclosure").

Under the abandonment doctrine, the NSA "naturally should have briefed" this otherwise "dispositive legal defense." *Pittston*, 984 F.2d at 478. This Court has never ruled that documents in possession of a federal agency were not agency records when the agency failed to raise that issue on summary judgment.[4] As such,

[4] *See*, *e.g.*, *Goland v. CIA*, 607 F.2d 339, 344 (D.C. Cir. 1978) ("The Agency contended that the Hearing Transcript was not an 'agency record' but rather a congressional document not subject to FOIA"); *Forsham v. Harris*, 445 U.S. 169, 176 (1980) ("[…]HEW properly denied the request on the ground that the patient data did not constitute "agency records" under the FOIA"); *McGehee v. CIA,* 697 F.2d 1095, 1105 (D.C. Cir. 1983) ("Records that are in the possession of the agency to which a FOIA request is submitted but that were originally compiled by another agency, the CIA insists, are not 'agency records' within the meaning of the Act"); *Paisley v. CIA*, 712 F.2d 686, 689 (D.C. Cir. 1983) opinion vacated in part, 724 F.2d 201 (D.C. Cir. 1984) ("On September 25, 1980 the FBI filed affidavits by Special Agents Richard A. McCauley and Thomas L. Wiseman, releasing certain requested documents but withholding parts thereof or other entire documents pursuant to numerous FOIA exemptions and because some were not 'agency records'"); *Lykins v. DOJ*, 725 F.2d 1455, 1457 (D.C. Cir. 1984) ("The Commission withheld the entire report on the ground that it was a court document rather than an agency record, and that it therefore was not subject to FOIA"); *Bureau of Nat'l Affairs, Inc. v. DOJ*, 742 F.2d 1484, 1487 (D.C. Cir. 1984) ("DOJ denied BNA's request on the ground that the materials were not 'agency records' subject to disclosure under FOIA"); *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) ("To qualify as an 'agency record' subject to FOIA disclosure rules, 'the agency must "either create or obtain" the requested materials,' and 'the agency must be in control of [them] at the time the FOIA request is made.' […] HHS suggests that the COMMIT data tapes do not satisfy these requirements because they were neither created by agency employees, nor are they currently located on agency property"); *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 598 (D.C. Cir. 2004) ("Although the IRS eventually produced over five hundred pages of documents, the agency refused to disclose the response sent to the Joint Committee, claiming that it qualified as a congressional document not subject to FOIA"); *Consumer Fed'n of Am. v. USDA*, 383 F. Supp. 2d 1, 2 (D.D.C. 2005) ("After examining the 'totality of the circumstances surrounding the creation, maintenance, and use of the electronic calendars,' defendant informed

a district court has never made such a determination *sua sponte*, negating the agency's burden of proof and the complainant's opportunity to contest the agency's assertion. The lower court in this case erred when it did so.

II. UNDER THE FOUR-FACTOR CONTROL TEST, NPSD-54 IS AN "AGENCY RECORD" AND NO SPECIAL POLICY CONSIDERATIONS WARRANT MODIFYING THAT TEST HERE

An "agency record" is a document that the agency (1) "create[s] or obtain[s]" and (2) "controls" at "the time of the FOIA request." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 217 (D.C. Cir. 2013) (citing *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989)) (emphasis in original). The Supreme Court established this rule in *Tax Analysts* because it found that "To restrict the term 'agency records' to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes." *Tax Analysts*, 492 U.S. at 144. The "legislative history of the FOIA abounds with" references to "records *acquired* by an agency." *Id*. at 144-45 (citing *Forsham v. Harris*, 445 U.S. 169, 184 (1980)) (emphasis in original).

In cases where an agency obtains documents that it did not create, the test focuses on whether the agency "controlled" the records at the time the FOIA

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plaintiff that it had 'determined that these calendars are personal records-not agency records subject to disclosure under the FOIA'"); *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 231 (D.D.C. 2010) *aff'd,* 646 F.3d 924 (D.C. Cir. 2011) ("The FHFA further replied that because Fannie Mae is a private company and the FOIA does not apply to documents for which an agency has not exercised its right of access, the documents are not agency records").

request was made. *Judicial Watch*, 726 F.3d at 217. In this context, "control" means "that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id*. at 218 n.11 (citing *Tax Analysts*, 492 U.S. at 145). This Circuit looks to four factors to determine whether an agency satisfies this requirement. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 926-927 (D.C. Cir. 2011) (citing *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996)).

The control inquiry "focuses on an agency's possession of the requested materials, not on its power to alter the content of the materials it receives." *Tax Analysts*, 492 U.S. at 147. The Supreme Court emphasized that although "Nonpersonal materials in an agency's possession may be subject to certain disclosure restrictions," that "does not bear on whether the materials are in the agency's control. . ." *Id*. at 147 n.8.

A. Under the Four-Factor Burka *Test, the NSA Was in Control of NSPD-54 At the Time EPIC Filed Its FOIA Request and Therefore NSPD-54 Is An Agency Record Subject to FOIA*

Courts in this circuit look to "four factors to determine whether an agency has sufficient control over a document to make it agency record." *Judicial Watch*, 726 F.3d at 218 (citations omitted). They are:

> [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.

Burka v. U.S. Dep't of Health and Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (citing *Tax Analysts v. DOJ*, 845 F.2d 1060, 1069 (D.C. Cir. 1988).

The four-factor test can produce indeterminate results, where some factors indicate that a document is an "agency record" and others indicate that it is not. However, "in light of the Supreme Court's instruction that the 'burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records,'" any uncertainty favors the requestor and a finding that documents in possession of the agency are agency records. *Judicial Watch*, 726 F.3d at 220. *See also Tax Analysts*, 492 U.S. at 142 n.3 (citing S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)).

(1) The Intent of the Document's Creator to Retain or Relinquish Control

NSPD-54 was distributed to the NSA Director and a "select and limited group of senior foreign policy advisors, cabinet officials and agency heads, including (*inter alia*) the Directors of the NSA and the Office of Management and Budget, and the Secretaries of State, Defense, Homeland Security, and Treasury." (Ronan Decl. ¶ 13) (JA 114.) Included with NSPD-54 was a "transmittal memo," issued by "a Special Assistant to the President who was the HSC's Executive Secretary, which was distributed to all recipients." *Id* at ¶ 7 (JA 111.)

The transmittal memo "emphasized NSPD-54's close-hold nature and need to safeguard its content" because it "communicates presidential decisions and orders." *Id*. The transmittal memo "prohibited dissemination of the document beyond its authorized recipients without White House approval" but allowed agency officials to distribute it within their own agencies on a "need to know" basis. *Id*. at JA 112.

While the transmittal memo indicates a clear intent to "safeguard" NSPD-54's "content," (Ronan Decl. ¶ 7) (JA 111), the record in this case bears little resemblance to those considered previously by this Court where it found an express intent to control specific documents. For example, in *Holy Spirit* the court found that Congress intended to control "three sealed cartons" of documents it sent to the CIA, along with a letter from the House Committee on International Relations "indicating that the Committee retained jurisdiction over the documents" and that "access to the files was limited to those with authorization from the Clerk of the House." *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842 (D.C. Cir. 1980). The court noted that, as a result of Congress' instructions, "the Agency has not opened the sealed cartons, does not know their contents, and maintains them for the express purpose of safekeeping." *Id*.

In contrast, NSPD-54 was not sent to the NSA for "safekeeping" but rather was sent so that the agency could implement executive-branch policy. NSPD-54

was not sent to the NSA, the Department of Defense, the Department of State, or the Department of the Treasury, other agency heads, and senior foreign policy advisors for custodial reasons—rather it was sent to facilitate the implementation of "a variety of actions designed to increase the security of federal cyber assets and improve the federal government's capacity to deter and respond to various threats to federal systems and information." (Ronan Decl. ¶ 13) (JA 114.)

In *Judicial Watch* this Court found that the Memorandum of Understanding between the White House and the Secret Service was "unequivocal in asserting that the control over WAVES and ACR records is at all times maintained by the White House and not the Secret Service." *Judicial Watch*, 726 F.3d at 218. The White House further emphasized that "'any information provided to the Secret Service' for the creation of such records 'is provided under an express reservation of White House control.'" *Id.* (internal citations omitted). Here, there is no assertion of ownership by the HSC, and no express reservation of control over NSPD-54, merely a desire to "safeguard" its contents.

In *Judicial Watch*, the White House and the Secret Service had also signed an agreement that the "WHACS records are 'Presidential Records,' and 'are not the records of an 'agency' subjection to the Freedom of Information Act.'" *Id.* at 213. No such legal disclaimer is present in this case. At best, the transmittal memo indicates a desire to limit the distribution of the contents of NSPD-54 and to

protect the information contained therein. The transmittal memorandum in this case does not include the same explicit assertions of ownership and control present in *Judicial Watch* and, importantly, the transmittal memorandum does not include any claim by the agency that the document is not an agency record.

(2) Agency Possession and Ability to Control the Document

The Supreme Court in *Tax Analysts* emphasized the importance of agency "possession" of records when analyzing their ability to control those records. *See Tax Analysts, 492 U.S. at* 147. This Court has also found it instructive to "examine how the agency would treat the records in its normal course of operations, in the absence of pending FOIA-related litigation." *Judicial Watch*, 726 F.3d at 219.

NSPD-54 is designed to implement important federal cybersecurity priorities, "solicits follow-up information from the same Departments and Agencies to the President," (Ronan Decl. ¶ 13) (JA 114) and "implement[s] the CNCI [Comprehensive National Security Cybersecurity Initiative]" (Janosek Decl. ¶ 8) (JA 097), which "directly relates to one of the Agency's core functions and activities of its Information Assurance Mission." (Janosek Decl. ¶ 28) (JA 105), The transmittal memo made clear that the NSA Director retained discretion to use and distribute copies of NSPD-54 within the agency "on a need to know basis," (Ronan ¶ 7) (JA 112), in order to implement the directive.

Presidential directives provide "'formal notification[s] to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs,' generally requiring that such department or agency take some follow-up action." *Ctr. for Effective Gov't v. U.S. Dep't of State*, ___ F. Supp. 2d ___, 2013 WL 6641262 at *1 n.3 (D.D.C. 2013) (citing John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 Vt. L. Rev. 333, 357 (2010)). The agency must necessarily have the ability to possess and control these types of executive directives in order to implement them. While the instruction to disseminate the directive only on a "need to know basis," functions as a restriction on the use of NSPD-54, it still vests discretion with the agency on how to distribute the document. Within the intelligence community, the "need to know" standard is not an unusual or heightened safeguard. "The basic approach taken by the U.S. Government has been focused on establishing 'need-to-know'" with regards to intelligence information. Richard Best, Cong. Research Serv., RL 41848, *Intelligence Information: Need-to-Know vs. Need-to-Share* 13 (2011). The phrase "Need-to-know" specifically entails that "the individual must have a work-related requirement for access to the information not just generalized curiosity." *Id.* at 3. "Need-to-know" restricts access to the information throughout the agency in order to better safeguard it, but still allows the information to be disseminated as

necessary in order to utilize the information. "Information must always be shared with those with a genuine need to know even if this potential universe is a large one." *Id.* at 13.

In this case, the NSA has legitimately obtained NSPD-54 in the course of its official duties and is able to "use and dispose of the record as it sees fit," by distributing it throughout the agency in accordance with the typical standard for sensitive information. The discretion to decide who falls within the "need-to-know" category is vested entirely within the control of the agency and can be as many or as few individuals as the agency believes necessary to implement the requirements of NSPD-54.

(3) Agency Use of and Reliance Upon the Document

Where an agency "reads and relies upon" a document for any purpose, the document is likely to be an agency record. *Judicial Watch*, 726 F.3d at 219. This factor limits from disclosure records that "the agency neither created nor consulted" because "requiring disclosure under [those] circumstances would do nothing to further FOIA's purpose of 'open[ing] agency action to the light of public scrutiny.'" *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d at 927 (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)). The "use" factor is particularly helpful in ensuring that documents "subject to disclosure under FOIA" are agency records "and not an employee's record that happens to be located

physically within an agency." *Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 292 (D.C. Cir. 2006) (citing *Bureau of Nat'l Affairs, Inc. v. DOJ*, 724 F.3d 1484, 1493 (D.C. Cir. 1984)).

Both declarations in this case support the conclusion that the NSA "reads and relies upon," and thus "uses," NSPD-54 under this Court's analysis in *Judicial Watch*:

> It is true, as the Secret Service argues, that its personnel read and rely upon the documents only for the limited purposes the records serve: to enable the Service to perform background checks and verify admissibility at the time of a visitor's entrance. But the agency reads and relies upon the documents for those purposes without restriction, and the third factor requires no more.

726 F.3d at 219.

The entire purpose of a presidential directive is to be read and used by heads of agencies in order to implement policy across the federal government. It would not be possible for the NSA to have "a role in the CNCI," (Janosek Decl. ¶ 9) (JA 097), if the agency was not able to "read and rely upon" NSPD-54. The very nature of a National Security Policy Directive means that it must be read and followed to accomplish the President's intentions—a failure to read and rely upon the directive would defeat the purpose of the directive.

The "use" factor only weighs against a finding that the documents at issue are agency records when the agency has not "used the requested records in any way." *Judicial Watch v. Fed. Hous. Fin. Agency*, 646 F.3d at 927. Courts

previously found that "telephone message slips" and certain personal appointment calendars, kept by agency officials in their offices, were not agency records because they were used by those officials for personal convenience and not made available or used broadly throughout the agency. *See, e.g., Bureau of Nat'l Affairs*, 742 F.2d at 1495-96. In contrast, more modern electronic calendars were held to be agency records because they were used throughout the agency to communicate the officials' availability and were used in "facilitating the scheduling of agency business." *Consumer Fed'n of Am.*, 455 F.3d at 291. In contrast with these narrow examples of personal employee files, it is clear that NSPD-54 was "used" by the NSA for official, rather than personal, reasons.

(4) Integration of the Document Into Agency Records

Courts also consider "the degree to which the document[s] w[ere] integrated into" the agency's "record system or files" as a factor that weighs in the agency control analysis. *Judicial Watch*, 726 F.3d at 219 (citing *Tax Analysts*, 845 F.2d at 1069). There is no question in this case that NSPD-54 was "integrated" into the NSA's records. It was identified as a responsive document by the NSA staff (Janosek Decl. ¶ 30) (JA 105) and was no doubt stored on the agency's computer system. *See Consumer Fed'n of Am.*, 455 F.3d at 290 (finding that employee calendars stored "on the FSIS computer system" were integrated into agency records). In contrast, the telephone notes at issue in *Kissenger* were stored in his

personal office and thus "they never entered the State Department's files." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980).

In this case, all of the *Burka* factors weigh in favor of EPIC. The Homeland Security Council did not seek to retain control over the presidential directive as the White House did the records provided to the Secret Service in *Judicial Watch*. The document came "into the agency's possession in the legitimate conduct of its official duties." *See Tax Analysts*, 492 U.S. at 145. The agency used and relied upon the document at issue, NSPD-54, to accomplish tasks critical to its mission. The document was integrated into its records.

Where the agency has legitimate possession of a document, and there are no "special policy considerations," the document should be considered an agency record. As the Supreme Court has instructed, the "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records,'" *Tax Analysts,* 492 U.S. at 142 n.3 (cited in *Judicial Watch*, 726 F.3d at 221-22). The lower court erred when it held otherwise.

B. No "Special Policy Considerations" Warrant Modifying the Agency Record Test Established by this Circuit

The document at issue in this case is an executive order that was distributed to the heads of multiple agencies in order to facilitate the implementation of federal cybersecurity policy. Its disclosure would not implicate the same "special policy

considerations" at stake in prior FOIA cases that deviated from the *Burka* test. Because the constitutional prerogatives of the President are not at issue in this case, the standard test should apply.

In *Judicial Watch*, this Court determined that "separation of powers" concerns would be implicated if the President's White House visitor logs, temporarily stored by the U.S. Secret Service, were subject to the FOIA. *See Judicial Watch*, 726 F.3d at 224-26. To do so, the Court warned, "could render FOIA a potentially serious congressional intrusion into the conduct of the President's daily operations." *Id*. at 226. This Court noted that "There is good reason to doubt that Congress intended to require the effective disclosure of the President's calendars in this roundabout way." *Id*. at 225. Because "Congress requires the President to accept the protection of the Secret Service," *id.*, it would present the President with an "unacceptable choice" between "surrendering his confidentiality and jeopardizing his safety." *Id*. at 231.

Those special considerations are not implicated in this case because Congress already accounted for the confidentiality of certain Presidential communications and the protection of national security information in the FOIA. There are at least two FOIA exemptions that allow the executive to protect records subject to disclosure under the FOIA.

Exemption 5 allows government agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This provision has been construed "to incorporate the presidential communications privilege." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear").

FOIA Exemption 1 protects from disclosure information that has been deemed classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Exemption 1 was established to give the President and his agencies the ability to protect sensitive national security information. *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (Finding that the legislative history of the FOIA indicates that courts must "recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (sic) might occur as a result of public disclosure of a particular classified record.").

The President's authority to classify information is firmly established in legislation. "The President shall, by Executive order or regulation, establish

procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices of the executive branch of Government." 50 U.S.C. § 3161. President Obama implemented this authority in Executive Order 13526, which details the procedures and guidance for classification, expressly identifying the President as one of the sources of original classification. Executive Order 13526, Classified National Security Information, 75 FR 707 (2009) ("(a) The authority to classify information originally may be exercised only by: (1) the President and the Vice President").

Classification decisions by the President and his executive agencies receive great deference from the courts. *See Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (finding that the court should "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record"). *See also James Madison Project v. CIA*, 605 F. Supp. 2d 99, 109 (D.D.C. 2009).

These FOIA Exemptions prevent the type of "separation of powers" concerns that were at issue in *Judicial Watch*. *See* 726 F.3d at 224-33 (discussing separation of powers concerns). Finding that a presidential directive obtained and used by a federal agency is an "agency record" would not improperly intrude upon the President's prerogatives, as vital confidentiality and national security interests are already protected by Exemptions 1 and 5.

The disclosure of an executive order issued to the heads of federal agencies also would not implicate the type of separation of powers concerns that this Court found triggered the constitutional avoidance doctrine in *Judicial Watch*. The order in this case was obtained and used by agencies that are not part of the "President's staff," a small group whose "sole function [is] to advise and assist the President." *Judicial Watch*, 726 F.3d at 227 (citing *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)). Unlike the WHACS records at issue in *Judicial Watch*, NSPD-54 would not clearly fit within the definition of the Presidential Records Act, 44 U.S.C. § 2201(2), because it was intended to be used and relied upon by federal agency directors, including the Director of the NSA. The HSC did not instruct the agencies to return the document "within 30 to 60 days," but rather instructed agency directors to use the order to implement a unified federal policy. Congress also accounted for the sensitivity of certain executive branch records in Exemption 3, which provides that FOIA does not implicate information that is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). *See Tax Analysts*, 492 U.S. at 147 n.8 ("Nonpersonal materials in an agency's possession may be subject to certain disclosure restrictions. This fact, however, does not bear on whether the materials are in the agency's control, but rather on the subsequent question whether they are exempted from disclosure under § 552(b)(3)").

Furthermore, this Court in *Judicial Watch* stressed that its holding was based on the unique circumstances of that case, and should not be read broadly to hold that White House communications can never be "agency records." *Judicial Watch*, 726 F.3d at 231. The mere presence of a transmittal memorandum, issued by a staff member of the HSC, does not implicate the sort of fundamental separation of powers concern that has justified modifying the *Burka* test in the past. As this Court explained in *Judicial Watch*, if a cover memorandum "were all that were necessary – or if *any* record touching on White House communications were necessarily exempt from FOIA – there would indeed be cause for serious concern. But that is not our holding." *Id*.

This Court identified three unique circumstances that indicated a lack of agency control in *Judicial Watch*: (1) the historical practice of the parties in following the restrictions on the visitor logs' use and dissemination; (2) the rare circumstances that would "put the President on the horns of a dilemma between surrendering his confidentiality and jeopardizing his safety;" and (3) that the kind of information at issue was *sui generis*. *Id*. at 231-32. None of those circumstances are present here. *See Judicial Watch*, 726 F.3d at 218 n.11. The disclosure of the document sought does not pose a "dilemma;" it is the result that the Act seeks to achieve.

III. EVEN UNDER THE MODIFIED CONTROL TEST APPLIED BY THIS CIRCUIT IN *JUDICIAL WATCH*, NSPD-54 IS AN AGENCY RECORD

This Court concluded in *Judicial Watch* that, in the unique circumstance of a FOIA requester seeking the release of White House visitor logs held by the Secret Service, "special policy considerations" required applying a "somewhat different control test" akin to the test applied in *United We Stand* and other congressional records cases. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 221 (D.C. Cir. 2013) (citing *Paisley v. CIA*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201, 233 (D.C. Cir. 1984)). But even under the "modified" control test applied in the congressional records cases, the document at issue in this case is an "agency record."

The court in *United We Stand* found that when the IRS retained the "ability to use and dispose of" portions of its responses to a request by the Joint Committee on Taxation, that ability was sufficient to establish the IRS responses to Congressional requests were agency records. *United We Stand,* 359 F.3d at 602.

The Director of the NSA in this case similarly retains the ability to use and dispose of NSPD-54 in order to carry out the instructions of the President. The NSA "has a role in the CNCI," which NSPD-54 "implemented." (Janosek Decl. ¶ 8-9) (JA 097.) NSPD-54 was thus "issued" to the NSA and "included Presidential

direction on specific actions to be undertaken by the federal government to safeguard cybersecurity." (Janosek Decl. ¶ 31) (JA 105.)

NSPD-54 is not subject to a strict executive control agreement similar to the one present in *Judicial Watch*. The Secret Service established a Memorandum of Understanding (MOU) with the White House. This agreement "memorialized" the historical practice of the Secret Service in declining to treat WHACS records as "agency records" in response to prior FOIA requests, and included a "joint 'agreement' that WHACS records are 'Presidential Records,' and 'are not the records of an 'agency' subject to the Freedom of Information Act." *Judicial Watch*, 726 F.3d at 213. The MOU was "unequivocal in asserting that the control over the WAVEs and ACR records is at all times maintained by the [White House] and not the Secret Service," and maintained an "express reservation of White House control" when providing the records. *Id.* at 218. Finally, the MOU provided that "the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all WHACS records." *Id.* (internal citations omitted)

This Court was careful to note in *Judicial Watch* that it granted "no deference" to the text of the MOU. *Judicial Watch*, 726 F.3d at 231. Rather, the Court noted that neither party at the district level contested the factual and historical descriptions in the MOU and that "because the case was decided against

the Service on summary judgment, we are bound by" the parties' understanding of the MOU's terms and historical application. *Id.* at 215.

In this case there is no evidence concerning an agreement between the NSA and the HSC regarding presidential directives. Because the NSA did not raise the claim that NSPD-54 is not an agency record below, there was no factual development of this issue in the lower court record. The record does not even contain the precise text of the transmittal memorandum. Even the agency's description of the transmittal memorandum includes no assertions of exclusive presidential control or any disclaimer of control by the NSA.

As for the second factor, the Court in *Judicial Watch* viewed the factor as indeterminate and noted that "the Service may use the records for only 'two limited purposes': 'to perform background checks . . .' and 'to verify the visitor's admissibility at the time of the visit.' *Judicial Watch*, 726 F.3d at 218-19. In addition, the Court emphasized that the Service was required to transfer the records to the White House every sixty days and then purge them from its files. *Id.* at 219.

These factors are not present in this case. First, NSPD-54 is transmitted to multiple agencies instead of a single agency. Second, there is no provision for returning NSPD-54 to the HSC and then purging the document from the relevant files. Thirdly, there is no restriction on the purposes for which NSPD-54 can be

used, only a restriction on disseminating the contents of NSPD-54 to other agencies. The NSA can use NSPD-54 as necessary to implement relevant policies.

Furthermore, the transfer to the agency head permitted internal dissemination, consistent with standard intelligence community protocol, and vested discretion with the agency director, not the President. As this Court emphasized, "In deciding whether a document is an agency record under FOIA, we examine how the agency would treat the records in its normal course of operations." *Judicial Watch*, 726 F.3d at 219. There is no basis for viewing the second factor as indeterminate, as it was in *Judicial Watch*, when there are no requirements for NSPD-54 to be purged and returned to the HSC and no restrictions on the use of NSPD-54 by the agency, that would not occur "in its normal course of operations."

Given that even the first two factors in the control test – intent of the document originator and ability to use of the recipient agency – weigh in favor of finding that NSPD-54 is an agency record, the records sought should be subject to the FOIA. This Court has repeatedly made clear that the underlying purpose of the FOIA is disclosure. And on the question of what constitutes an agency record, this Court explained:

> Although FOIA "limited access to 'agency records,' [it] did not provide any definition" of the term. *Forsham v. Harris,* 445 U.S. 169, 178, (1980) (internal citation omitted). We must nonetheless be careful to ensure that "[t]he term 'agency records' . . . not be

> manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice,* 742 F.2d 1484, 1494 (D.C. Cir. 1984). As the Supreme Court has repeatedly reminded us, in enacting FOIA, "Congress sought to open agency action to the light of public scrutiny." *Tax Analysts,* 492 U.S. at 142 (internal quotation marks omitted); see *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772 (1989); *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Consumer Fed'n of Am. v. Dep't of Agric., 455 F.3d 283, 287 (D.C. Cir. 2006).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the District Court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Rule 32(a)(7)(B)(iii).

/s/ Marc Rotenberg
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 31st day of March 2014, he caused the foregoing brief to be served by ECF and two hard copies by first-class mail, postage prepaid, on the following:

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