ORAL ARGUMENT NOT YET SCHEDULED

NO. 13-5369

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

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

NATIONAL SECURITY AGENCY,
Defendant-Appellee.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Beryl A. Howell)

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., CENTER FOR EFFECTIVE GOVERNMENT, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, OPENTHEGOVERNMENT.ORG, PROJECT ON GOVERNMENT OVERSIGHT, AND SUNLIGHT FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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

(1) Parties and Amici. All parties and amici appearing in this Court are listed in the Brief for Appellant with the exception of the following amici in support of appellant: the Center for Effective Government, Citizens for Responsibility and Ethics in Washington, OpenTheGovernment.org, the Project on Government Oversight, and the Sunlight Foundation.

(2) Rulings Under Review. The rulings under review appear in the Brief for Appellant.

(3) Related Cases. This case has not previously come before this Court or any other court. Counsel is aware of no related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).

(4) Corporate Disclosure Statement. Amici are non-profit organizations that have not issued shares or debt securities to the public and that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purpose of the organizations is to advocate for the public interest on a range of issues, including openness in government.

/s/ Julie A. Murray
Julie A. Murray

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT..............i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

GLOSSARY...ix

INTERESTS OF AMICI CURIAE...1

STATUTES AND REGULATIONS 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The District Court Erred in Reaching the "Agency Record" Issue Because the Issue Is Not Jurisdictional. 6

A. The Federal-Question Jurisdictional Statute Provides Jurisdiction over FOIA Claims and Is Not Displaced by 5 U.S.C. § 552(a)(4)(B)..7

B. The District Court's Jurisdictional Holding Misreads Decisions of the Supreme Court and This Court. 12

C. This Court Should Reverse the District Court's Jurisdictional Error and Deem the "Agency Record" Issue Waived.........................15

II. On the Merits, the District Court Wrongly Held That the Directive Is Not an Agency Record. 16

A. *Judicial Watch* Does Not Require Application of the Modified Control Test to All Records Originating with the President..............17

B. The District Court Misapplied *Judicial Watch*'s Express Limitations...20

C. The District Court's Decision Incorporates Concerns Best Left for Consideration of the Application of FOIA Exemptions Raised by the NSA. 26

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 30

ADDENDUM A1

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006)....8, 10, 11, 12, 15

Burka v. HHS,
87 F.3d 508 (D.C. Cir. 1996)....17

**Center for Effective Government v. Department of State*,
_ F. Supp. 2d __, No. 13-414, 2013 WL 6641262 (D.D.C. Dec. 17, 2013)....1, 23, 24

Center for National Security Studies v. INS,
No. 87-2068, 1990 WL 236133 (D.D.C. Dec. 19, 1990)....23

Consumer Federation of America v. USDA
455 F.3d 283 (D.C. Cir. 2006)....17, 27

DOJ v. Tax Analysts,
492 U.S. 136 (1989)....16

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (1985)....8

Forsham v. Harris,
445 U.S. 169 (1980)....12, 13, 14, 15

Glick v. Department of Army,
971 F.2d 766 (D.C. Cir. 1992) (unpublished)....12, 14

Gonzalez v. Thaler,
132 S. Ct. 641 (2012)....8

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,
545 U.S. 308 (2005)....7

** Authorities upon which we chiefly rely are marked with asterisks.*

Halperin v. NSC,
452 F. Supp. 47 (D.D.C. 1978)....................23

Judicial Watch, Inc. v. Federal Housing Finance Agency,
646 F.3d 924 (D.C. Cir. 2011)....................12, 14

**Judicial Watch v. Secret Service*,
726 F.3d 208 (D.C. Cir. 2013).................. 1, 4, 5, 6, 16, 17, 18, 19, 20, 24, 25

Kissinger v. Reporters Committee for Freedom of the Press,
445 U.S. 136 (1980)....................12, 13, 14

Mace v. EEOC,
37 F. Supp. 2d 1144 (D. Mo. 1999)....................12

Maydak v. DOJ,
218 F.3d 760 (D.C. Cir. 2000)....................12

Milner v. Department of Navy,
131 S. Ct. 1259 (2011)....................28

Paisley v. CIA,
712 F.2d 686 (D.C. Cir. 1983), *vacated in part on other grounds*,
724 F.2d 201 (D.C. Cir. 1984) (per curiam)....................17

Rockwell International Corp. v. United States,
549 U.S. 457 (2007)....................8, 9

**Steel Co. v. Citizens for a Better Environment*,
523 U.S. 83 (1998).................... 5, 7, 9, 10, 11, 12

Sweetland v. Walters,
60 F.3d 852 (D.C. Cir. 1995)....................8

United States v. Olano,
507 U.S. 725 (1993)....................15

United We Stand America, Inc. v. IRS,
359 F.3d 595 (D.C. Cir. 2004)....................17

Williams v. Reno,
93 F.3d 986 (D.C. Cir. 1996) (per curiam) (unpublished) 8

STATUTES

Freedom of Information Act,
5 U.S.C. § 552...7
5 U.S.C. § 552(a)(3)(D)...27
5 U.S.C. § 552(a)(4)(B) 6, 8, 9, 10, 11, 13, 14
5 U.S.C. § 552(b)..28
5 U.S.C. § 552(b)(1) 4, 23
5 U.S.C. § 552(b)(5) 4

7 U.S.C. § 13a-1(d) 10

28 U.S.C. § 1331 ....7, 8, 10

42 U.S.C. § 2000e(b) 11

42 U.S.C. § 5000e-5(f)(3)...11

42 U.S.C. § 11046(c) 9

44 U.S.C. § 1505(a) 22

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Letter from the Department of State to the Center for Effective Government (Feb. 24, 2014) (with enclosures), *available at* http://www.foreffectivegov.org/files/info/global-develop ment-policy-directive-deptofstate-release.pdf..24

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OMB, Fiscal Year 2013 Budget of the U.S. Government, *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/budget.pdf 3

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The White House, The Comprehensive National Cybersecurity Initiative, http://www.whitehouse.gov/issues/foreign-policy/cybersecurity/national-initiative 2, 3

GLOSSARY

CNCI	Comprehensive National Cybersecurity Initiative
EPCRA	Emergency Planning and Community Right-to-Know Act
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
NSA	National Security Agency

INTERESTS OF AMICI CURIAE[1]

Amici curiae are organizations that support government transparency, rely on FOIA to receive records necessary for their work, and have significant expertise in how FOIA works in practice. Some amici also routinely litigate FOIA cases on behalf of themselves or other requesters. Two of the amici were involved in *Center for Effective Government v. Department of State*, _ F. Supp. 2d __, No. 13-414, 2013 WL 6641262 (D.D.C. Dec. 17, 2013), which held that the presidential communications privilege did not apply to a presidential directive on global development and ordered the directive's release under FOIA. More detailed information about each organization is set forth in the addendum. All parties consent to the filing of this brief.

Amici submit this brief to augment the appellant's discussion of two issues. First, this brief explains why the "agency record" issue addressed by the district court is not jurisdictional, and it draws on recent, key Supreme Court precedent that this Court should consider. Second, the brief adds to appellant's discussion of the merits of the "agency record" issue by discussing in detail three limitations of *Judicial Watch v. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), that distinguish

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

the instant case. This brief also describes why the district court's decision would have a harmful and unsettling impact on FOIA practice.

STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the Brief of Appellant.

INTRODUCTION AND SUMMARY OF ARGUMENT

National Security Policy Directive 54, the document at issue in this Freedom of Information Act (FOIA) case, established a Comprehensive National Cybersecurity Initiative (CNCI) for executive agencies to safeguard federal cybersecurity. This Directive, issued by President George W. Bush in 2008, set a federal policy with broad application, much like an executive order. The Directive was disseminated to various Cabinet officials, agency heads, and presidential advisors, and all but a single paragraph of the document is unclassified, although not public. And the Directive continues to have a significant effect on agency operations and budgets. White House and executive agencies routinely refer to the Directive and the policy it created in publicly-available documents as the foundation for the government's cybersecurity efforts.[2] The Government

[2] *See*, *e.g.*, The White House, The Comprehensive National Cybersecurity Initiative, http://www.whitehouse.gov/issues/foreign-policy/cybersecurity/national-initiative (last visited Apr. 7, 2014) (stating that "President Obama determined that the CNCI and its associated activities should evolve to become key elements of a broader, updated national U.S. cybersecurity strategy"); DHS, Agency Information Collection Activities: DHS Cybersecurity Education Office National Initiative for

(continued)

Accountability Office undertook a study to assess agencies' implementation of the Directive's CNCI.[3] Moreover, the Obama Administration has in turn sought millions of dollars to support the CNCI.[4]

Despite the public's strong interest in learning about a federal policy with broad import and significant financial consequences, the Directive remains unavailable to the public more than six years after its issuance. The government

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Cybersecurity Careers and Studies Cybersecurity Training and Education Catalog Collection, Notice and Request for Comment, 78 Fed. Reg. 57,643, 57,643 (Sept. 19, 2013) (identifying the Directive as an "authorit[y]" that "permits [the agency] to collect information of the type contemplated"); DHS, Computer Network Security and Privacy Protection 2 (Feb. 19, 2010), *available at* https://www.dhs.gov/xlibrary/assets/privacy/privacy_cybersecurity_white_paper .pdf (stating that the Directive "authorize[d]" and "empower[ed]" the agency to take certain actions and "specifically enumerate[d] that CNCI program initiatives" would "be implemented in a manner that ensures that the privacy rights and other legal rights of Americans are protected"); DOD Directive 5111.13, at 4 (Jan. 16, 2009), *available at* http://www.dtic.mil/whs/directives/corres/pdf/511113p.pdf (establishing an assistant secretary position whose responsibilities include serving as the Defense Department's "policy lead to develop, coordinate, and oversee implementation of" the Directive).

[3] *See generally* GAO, Cybersecurity: Progress Made but Challenges Remain in Defining and Coordinating the Comprehensive National Initiative (2010), *available at* http://www.gao.gov/new.items/d10338.pdf.

[4] *See* OMB, Fiscal Year 2013 Budget of the U.S. Government 118, *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/budget. pdf (seeking $769 million to support a Department of Homeland Security division responsible "for protecting Federal computer systems and sustain[ing] efforts under the [CNCI]"); *see also* The White House, The Comprehensive National Cybersecurity Initiative, http://www.whitehouse.gov/issues/foreign-policy/ cybersecurity/national-initiative (noting that the "CNCI includes funding within the federal law enforcement, intelligence, and defense communities").

has refused to disclose the record, contending that it is exempt from disclosure in full under FOIA Exemption 5, specifically the presidential communications privilege, and—with respect to the single, classified paragraph—Exemption 1. *See* 5 U.S.C. § 552(b)(1), (b)(5).

The district court in this case never assessed these contentions. Instead, the court dismissed the case on a ground that threatens to make FOIA a withholding statute for any records originating with the President and that would result in upheaval in FOIA practice if affirmed by this Court. The district court held *sua sponte* that the Directive is not an "agency record" under FOIA, believing itself obligated to address this issue because its subject-matter jurisdiction hinged on it. The court determined that under this Court's decision in *Judicial Watch v. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), the President may "keep records secret without resorting to a FOIA exemption" simply by "exert[ing] efforts to retain control and limit dissemination" of the records, JA 15 n.8, even where, as here, a record issued by the President sets broad federal policy for agency operations. Although the district court recognized that *Judicial Watch* "pointed to three circumstances that limited the application of its holding," JA 19, it concluded that none of those circumstances sufficed to distinguish the Directive in this case. Accordingly, the district court held that it lacked subject-matter jurisdiction over

the Electronic Privacy Information Center's (EPIC) claim for the Directive because the document is not an "agency record."

The district court's decision is erroneous and should be reversed. First, whether the Directive is an "agency record" is an issue reached by the district court only as a result of legal error. The "agency record" issue is not jurisdictional, so the district court had no obligation to consider it. The district court's jurisdictional holding ignores a long line of Supreme Court cases, in particular *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), whose rationale makes clear that the "agency record" issue does not implicate a district court's subject-matter jurisdiction. The district court's holding would also turn elements of a FOIA cause of action into jurisdictional prerequisites, wreaking havoc on established FOIA practice. This Court should reverse the district court's legal error and refuse to reach the merits of the "agency record" issue because the National Security Agency (NSA) intentionally relinquished any argument on this ground in the district court.

Second, if this Court reaches the merits of the "agency record" issue, it should hold that the Directive is an agency record because it was obtained by the NSA and was in the agency's control. Contrary to the district court's decision, *Judicial Watch* does not stand for the proposition that this Circuit applies a "modified control test" to all records originating with the President. In any event,

under either the traditional, four-factor control test or the modified control test, the Directive is within the NSA's control. The district court reached the opposite and erroneous conclusion based in part on its failure to apply appropriately three express limitations that this Court placed on its decision in *Judicial Watch*. Moreover, the district court's decision manipulates the term "agency records" in a way that harms FOIA's basic structure as a statute requiring disclosure of records so long as none of FOIA's nine exclusive exemptions applies.

ARGUMENT

I. The District Court Erred in Reaching the "Agency Record" Issue Because the Issue Is Not Jurisdictional.

FOIA, 5 U.S.C. § 552(a)(4)(B), provides in relevant part:

> 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.

Relying on this provision, the district court determined that its subject-matter jurisdiction depended on whether the Directive was, in fact, an "agency record." JA 7-8 n.5. Accordingly, although the district court recognized that neither party had raised or briefed the issue, it held *sua sponte* that the Directive was not an "agency record[]," as 5 U.S.C. § 552(a)(4)(B) uses that term, and dismissed EPIC's claim. JA 8, 15.

The district court's holding in this regard should be reversed because the district court reached the "agency record" issue only by way of legal error. The court ignored the federal-question jurisdictional statute, 28 U.S.C. § 1331, which provided the district court with subject-matter jurisdiction to decide EPIC's claim. FOIA does not displace federal-question jurisdiction. Indeed, under the Supreme Court's rationale in *Steel Co.*, 523 U.S. 83, 5 U.S.C. § 552(a)(4)(B) is not a jurisdiction-conferring provision at all. Because the "agency record" issue is not jurisdictional, the district court erred in believing itself bound to consider it where the NSA intentionally waived the issue during district court proceedings.

A. The Federal-Question Jurisdictional Statute Provides Jurisdiction over FOIA Claims and Is Not Displaced by 5 U.S.C. § 552(a)(4)(B).

The federal-question jurisdictional statute, 28 U.S.C. § 1331, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." In a FOIA case, federal law—5 U.S.C. § 552—creates the cause of action and supplies the rules of decision that govern the merits of the claim. Such characteristics bring FOIA claims within the core of those "arising under" federal law. *See*, *e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Accordingly, a district court has federal-question jurisdiction to adjudicate a FOIA claim. This Court has, in fact, held as much, although without discussing the

interplay between federal-question jurisdiction and § 552(a)(4)(B). *See Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995); *Williams v. Reno*, 93 F.3d 986, 986 (D.C. Cir. 1996) (per curiam) (unpublished).

The district court's jurisdictional holding could survive only if this Court determined that 5 U.S.C. § 552(a)(4)(B) displaced general federal-question jurisdiction under 28 U.S.C. § 1331, which EPIC invoked in its complaint. *See* Compl. ¶ 2, JA 31. Although Congress can make exceptions to or place limitations on § 1331's general grant of jurisdiction, *see*, *e.g.*, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-68 (2007); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985), it cannot do so by mere implication. Rather, to determine whether a limitation on a statute's scope is jurisdictional, the Supreme Court has in recent years applied a "clear-statement principle." *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012). If Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (footnote omitted). "But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516.

FOIA lacks the clear statement necessary to displace federal-question jurisdiction. As an initial matter, § 552(a)(4)(B) does not govern subject-matter

jurisdiction at all. Rather, the sentence on which the district court's analysis rests identifies the appropriate venue ("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") and a court's remedial authority in FOIA cases ("jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant").

That § 552(a)(4)(B) uses the word "jurisdiction"—as in, jurisdiction "to enjoin" and "to order"—does not connote that the section confers subject-matter jurisdiction. Jurisdiction "is a word of many, too many, meanings." *Steel Co.*, 523 U.S. at 90 (internal quotation marks omitted). And it "does not in every context connote subject-matter jurisdiction." *Rockwell*, 549 U.S. at 467. In fact, in *Steel Co*., the Supreme Court held that a statutory provision remarkably similar in structure to § 552(a)(4)(B) was not a jurisdictional provision. There, the Supreme Court considered an Emergency Planning and Community Right-to-Know Act (EPCRA) provision providing that a "'district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.'" 523 U.S. at 90 (quoting 42 U.S.C. § 11046(c)). The Court held that it would be "unreasonable to read this [provision]

as making all the elements of the cause of action under subsection (a) [of that section] jurisdictional, rather than as merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties." *Id.*

Steel Co. also emphasized that it was "commonplace" for statutes to use the term "jurisdiction"—as EPCRA does—to refer to courts' remedial powers. *Id.* The Court cited, for example, 7 U.S.C. § 13a-1(d), which provides that "[i]n any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose . . . a civil penalty in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation." 523 U.S. at 90. Under *Steel Co.*, § 552(a)(4)(B) is decidedly non-jurisdictional.

Moreover, even if § 552(a)(4)(B)'s reference to "jurisdiction" were held to confer subject-matter jurisdiction over FOIA claims on the district courts, and thus confirm alongside 28 U.S.C. § 1331 that a federal forum is available for FOIA claims, § 552(a)(4)(B) does not contain a clear statement that Congress intended to make jurisdictional the entire phrase "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." For example, in *Arbaugh*, 546 U.S. 500, the Supreme Court considered Title VII's "jurisdiction-conferring provision," *id.* at 505, which states that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have

jurisdiction of actions brought under this subchapter." 42 U.S.C. § 5000e-5(f)(3). Title VII actions may be brought only against employers, which the statute—in a separate provision under the same subchapter—defines as persons with fifteen or more employees. *Id.* § 2000e(b). The Supreme Court held that Title VII's employee-numerosity requirement was "an element of a plaintiff's claim for relief, not a jurisdictional issue," *Arbaugh*, 546 U.S. at 516, even though the requirement must be met to bring an "action[] . . . under this chapter," as Title VII's jurisdiction-conferring provision states. "Given the unfairness and waste of judicial resources entailed in tying the employee-numerosity requirement to subject-matter jurisdiction," the Supreme Court held "it the sounder course to refrain from constricting § 1331 or Title VII's jurisdictional provision" to those instances in which a company met the employee-numerosity requirement. *Id.* at 515 (internal quotation marks, citation, and alteration omitted). In line with *Arbaugh*, § 552(a)(4)(B), to the extent it confers jurisdiction at all, does not make the term "agency records improperly withheld" jurisdictional.

That the question whether an "agency record[] [is] improperly withheld," 5 U.S.C. § 552(a)(4)(B), mirrors the elements of a run-of-the-mill FOIA claim further counsels against regarding this portion of the provision as jurisdictional. Although Congress could make these requirements jurisdictional if it chose to, *see Arbaugh*, 546 U.S. at 514-15, it would certainly be a "strange scheme," *Steel Co.*,

523 U.S. at 93. FOIA claims decided in favor of the government because, for example, a document was not "improperly withheld" "would be dismissed for lack of jurisdiction rather than on the merits." *Id.* That outcome "'clearly has not been the case in practice.'" *Mace v. EEOC*, 37 F. Supp. 2d 1144, 1146 (D. Mo. 1999) (quoting DOJ Office of Information and Privacy, Freedom of Information Act Guide & Privacy Act Overview 482 (Sept. 1998 ed.)). Moreover, because subject-matter jurisdiction "involves a court's power to hear a case," it "can never be forfeited or waived." *Arbaugh*, 546 U.S. at 514 (internal quotation marks omitted). As a result, courts would have an obligation to raise merits-related inquiries *sua sponte* in every FOIA case, as the district court did here with the "agency record" issue, or with respect to whether a document has been "improperly" withheld. Again, that outcome is at odds with the case law. *See*, *e.g.*, *Maydak v. DOJ*, 218 F.3d 760, 764 (D.C. Cir. 2000) ("[T]he government . . . as a general rule . . . must assert all [FOIA] exemptions at the same time, in the original district court proceedings.").

B. The District Court's Jurisdictional Holding Misreads Decisions of the Supreme Court and This Court.

The district court relied for its jurisdictional holding on *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), *Judicial Watch, Inc. v. Federal Housing Finance Agency*, 646 F.3d 924 (D.C. Cir. 2011), and *Glick v. Department of Army*, 971 F.2d 766 (D.C. Cir. 1992) (per curiam)

(unpublished). JA 7 n.5. None of those cases, however, held that § 552(a)(4)(B) affects a district court's subject-matter jurisdiction.

Kissinger held that if requested records are wrongfully possessed by a non-agency party, "the agency which received the request does not 'improperly withhold' those materials by its refusal to institute a retrieval action" from the non-agency party. 445 U.S. at 139. Although *Kissinger* stated that "[u]nder 5 U.S.C. § 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records,'" *id.* at 150, the Court elsewhere made clear that its reference to "jurisdiction" described the scope of a court's remedial authority, not its subject-matter jurisdiction. *See*, *e.g.*, *id.* at 147 (describing the question presented as "whether Congress has conferred jurisdiction on the federal courts to impose [a] remedy"); *id.* at 150 (stating that "[j]udicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has" improperly withheld an agency record). Moreover, *Kissinger* described the question whether an "agency record[]" is "improperly withheld" as a merits-related inquiry. *Id.* at 155 (holding that the agency did not "withhold" certain records, "an indispensable prerequisite to *liability* in a suit under the FOIA" (emphasis added)).

The district court's view that § 552(a)(4)(B) is jurisdictional under *Kissinger* is further undercut by the Supreme Court's decision in *Forsham v. Harris*, 445

U.S. 169 (1980), issued the same day as *Kissinger*. *Forsham* also held that certain documents were not "agency records" under FOIA, *id.* at 171, but it notably did not state that the district court lacked subject-matter jurisdiction to hear the FOIA claim, nor did it mention the word "jurisdiction." It simply determined that, "[h]aving failed to establish th[e] threshold requirement [of showing that certain data were agency records], petitioners' FOIA claim [had to] fail." *Id.* at 186-87. *Forsham* described the companion holding in *Kissinger* as requiring only "that an 'agency' . . . 'improperly withh[o]ld agency records' for an individual *to obtain access* to documents through a FOIA action," *id.* at 177 (emphasis added), further indication that *Kissinger*, to the extent it used the word "jurisdiction," referred to remedies available under FOIA, not subject-matter jurisdiction.

This Court's decisions in *Judicial Watch* and *Glick* likewise do not hold that § 552(a)(4)(B) addresses subject-matter jurisdiction. In *Judicial Watch*, although this Court stated that "FOIA gives federal courts jurisdiction to order the production of any agency records improperly withheld from the complainant," it held only that certain records of Fannie Mae and Freddie Mac were not "agency records" subject to FOIA because no one at the Federal Housing Finance Agency had ever read or relied on the documents. 646 F.3d at 926, 927 (internal quotation marks omitted)). The Court did not expressly state that it was dismissing the claim for lack of subject-matter jurisdiction. Likewise, in *Glick*, which is not

precedential, this Court held only that a plaintiff did "not allege that any agency records ha[d] been improperly withheld, which is a jurisdictional prerequisite to suit under the FOIA." 971 F.2d at 766. This Court used the term "jurisdiction" loosely in a way that, in context, refers not to subject-matter jurisdiction but to a plaintiff's failure to state a claim. The Supreme Court has indicated that courts' "less than meticulous" distinctions between subject-matter jurisdiction and the ingredients for a claim for relief are not precedential. *Arbaugh*, 546 U.S. at 511.

C. This Court Should Reverse the District Court's Jurisdictional Error and Deem the "Agency Record" Issue Waived.

The district court committed a legal error by determining that it was bound to consider whether the document at issue is an "agency record" because the question went to the court's subject-matter jurisdiction. Because the "agency record" issue does not go to jurisdiction and the NSA intentionally waived it, the merits of that issue were not before the district court and need not be addressed by this Court.

This case is not one where the NSA simply forfeited an "agency record" argument by failing to raise it in a timely manner. Rather, the NSA intentionally relinquished the argument. *Cf. United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (internal

quotation marks omitted)). Specifically, after this Court's 2013 decision in *Judicial Watch v. Secret Service*, the district court "invited the parties to supplement their briefing as to whether [the directive] was an 'agency record[,]'" but both parties, including the NSA, "declined to do so." Dist. Ct. Op., JA 5 (citing Dist. Ct. Doc. 26, Joint Status Report at 1). Under these circumstances, it would be prejudicial to EPIC to permit the NSA a second bite at the apple with respect to the "agency record" issue, when the agency purposely declined to argue this issue in the first round of district court proceedings.

II. On the Merits, the District Court Wrongly Held That the Directive Is Not an Agency Record.

Should this Court nevertheless reach the merits of the "agency record" issue, it should hold that the Directive is an agency record. A document constitutes an "agency record" under FOIA if the agency either "create[s] or obtain[s]" the record and is "in control of" it at the time of a FOIA request. *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (internal quotations marks omitted). As the district court recognized and the NSA concedes, the NSA obtained a copy of the Directive. JA 9. Thus, the only merits-related question is whether the NSA controlled the Directive, where "control" means that the record "c[a]me into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145.

A. *Judicial Watch* Does Not Require Application of the Modified Control Test to All Records Originating with the President.

This Court has traditionally applied a four-factor test to assess the extent of agency control. It considers—as part of a "totality of the circumstances test"—

> "(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."

Consumer Fed'n of Am. v. USDA, 455 F.3d 283, 288 & n.7 (D.C. Cir. 2006) (quoting *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996)). However, in a series of cases invoked by the district court here and involving records obtained from or prepared in response to a request from Congress, this Court has indicated that "'special policy considerations counsel in favor of according due deference to Congress's affirmatively expressed intent to control its own documents.'" *Judicial Watch*, 726 F.3d at 221 (quoting *Paisley v. CIA*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (per curiam)) (internal alteration omitted). Accordingly, in cases where these special policy considerations are present, this Court has modified its four-factor control test to focus "'on whether Congress manifested a clear intent to control the document.'" *Id.* (quoting *Paisley*, 712 F.2d at 693); *see also United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 600 (D.C. Cir. 2004). This narrower test—often called the modified control test or the *United We Stand* test—"renders the first two

factors of the standard [four-factor] test" (whether the document's creator intends to retain control and whether the agency can use and dispose of the document) "effectively dispositive." *Judicial Watch*, 726 F.3d at 221.

In *Judicial Watch v. Secret Service*, this Court for the first and only time applied its modified control test to assess in part an agency's control of records involving the White House, instead of Congress. *Judicial Watch* held that White House visitor logs that were maintained by the Secret Service and used to perform backgrounds checks on visitors and to verify visitors' admissibility to the White House were not "agency records" under FOIA. *Id.* at 212. To reach that conclusion, this Court engaged in a fact-intensive inquiry regarding the relationship between the Secret Service and the White House and the nature of the information contained in the records. It emphasized that, by law, the President is required to accept Secret Service protection. *Id.* at 211. It also stressed that the Secret Service transfers visitor log records to the White House, generally within sixty days of a visit, and purges its own version of these records. *Id.* at 212. In fact, at the time of the case, the Secret Service and the White House maintained a memorandum of understanding in which both parties agreed that information provided to the Secret Service was subject to "an express reservation of White House control." *Id.* at 218, 223 (internal quotation marks omitted). Under these circumstances, this Court concluded that the Secret Service did not sufficiently

control the visitor logs to warrant coverage of the documents as "agency records" under FOIA.

The district court erred in reading *Judicial Watch* to compel the application of the modified control test to all "records originating with the President." JA 9. *Judicial Watch* first applied this Circuit's traditional, four-factor test to determine whether the Secret Service controlled the visitor logs. It determined that the standard test left it "with an uncertain result," and that the four-factor test was "not the only test relevant to the FOIA request at issue" because "special policy considerations" analogous to those in the congressional-records cases were at stake. *Judicial Watch*, 726 F.3d at 220, 221 (internal quotation marks omitted). Only then did this Court apply the modified control test, ultimately concluding that the White House had expressed a clear intent to control the records and that the Secret Service was not free to use and dispose of them. *Id.* at 224.

Thus, before applying the modified control test, this Court would first have to find that special policy considerations warrant such treatment. Amici agree with EPIC that no such policy considerations apply here to warrant application of the modified control test. *See* EPIC Opening Brief 28-32. They further agree that under this Court's traditional, four-factor control test or the modified control test the Directive constitutes an agency record. *See id.* at 18-28, 34-38.

B. The District Court Misapplied *Judicial Watch*'s Express Limitations.

Even assuming the modified control test applies to the Directive, the district court misapplied several express limitations that this Court placed on its holding in *Judicial Watch*, each of which makes clear that the Directive is an agency record. Recognizing that there would be "cause for serious concern" if the White House could circumvent FOIA by "assigning legal custody [for records] away from [an] agency" or if "*any* record touching on White House communications were necessarily exempt from FOIA," *Judicial Watch*, 726 F.3d at 231 (internal quotation marks omitted), this Court circumscribed its holding in three key ways.

1. "[M]ost important[ly]," this Court stressed that "the kind of *information* at issue . . . [was] in many ways sui generis" because the requested records "would not even arguably be subject to [FOIA], but for the President's need for Secret Service protection." *Id.* at 232. Here, the district court believed that the Directive was analogous to the White House visitor logs because the President needs to "communicat[e] to a limited group of high-ranking Executive branch officials any instructions and guidance contained in" the Directive to carry out his "constitutional, statutory, or other official or ceremonial duties." JA 20. The district court's conclusion in this regard built on its earlier assertion that courts have not ordered agencies to release presidential directives or related documents under FOIA. JA 17-18.

The district court's opinion effectively reads the "most important" limitation in *Judicial Watch* out of the opinion. Nearly any official correspondence involving the President could be portrayed as carrying out his "constitutional, statutory, or other official or ceremonial duties," including correspondence—such as the Directive—that sets broad federal policy for executive agencies. The district court's rationale would presumably cover all presidential directives, even though the Department of Justice's Office of Legal Counsel has made clear that a "presidential directive has the same substantive legal effect as an executive order," and is thus likely to have an important effect on agency operations and the public. Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 2000 WL 33155723 (Jan. 29, 2000), *also available at* http://www.justice.gov/olc/predirective.htm. The district court's rationale would reach directives that concern diverse topical areas, including economic sanctions, international negotiations, human rights, science policy, and space policy.[5] It would also cover directives that

[5] *See*, *e.g.*, National Security Decision Directive 41, December 30, 1981 Sanctions on Oil and Gas Equipment Exports to the Soviet Union (June 22, 1982), *available at* www.fas.org/irp/offdocs/nsdd/nsdd-41.pdf (economic sanctions); National Security Decision Memorandum 117, Instructions for Strategic Arms Limitation Talks at Helsinki (SALT V) (July 2, 1971), *available at* http://nixon.archives.gov/virtuallibrary/documents/nsdm/nsdm_117.pdf (international negotiations); Presidential Directive 30, Human Rights (Feb. 17, 1978), *available at* www.fas.org/irp/offdocs/pd/pd30.pdf (human rights); National Security Action (continued)

have far-reaching effects on the nation, similar to those announcing the imposition of sanctions on Libya, authorizing American military action after Iraq's invasion of Kuwait, and implementing the National Defense Authorization Act.[6] The district court's rationale would also call into question the "agency record" status of various other forms of unilateral presidential action that appear in agency files, such as executive orders, proclamations, and letters to agencies, even though some of these documents are actually required to be published in the Federal Register as a matter of course. *See* Federal Register Act, 44 U.S.C. § 1505(a). These are typical records on which agencies routinely rely, not the type of sui generis information at issue in *Judicial Watch*.

In addition, the district court was wrong to conclude by way of analogy that the Directive was not even arguably the type of document subject to FOIA. The district court highlighted two cases that permitted withholding under FOIA

Memorandum 357, The Technological Gap (Nov. 25, 1966), *available at* www.fas.org/irp/offdocs/nsam-lbj/nsam-357.htm (science policy); National Security Action Memorandum 183, Space Program for the United States (Aug. 27, 1962), *available at* www.marshall.org/pdf/materials/817.pdf (space policy) (signed by National Security Advisor expressing President's wishes).

[6] *See* National Security Decision Directive 205, Acting Against Libyan Support of International Terrorism (Jan. 8, 1986), *available at* www.fas.org/irp/offdocs/nsdd/nsdd-205.pdf; National Security Directive 54, Responding to Iraqi Aggression in the Gulf (Jan. 15, 1991), *available at* www.fas.org/irp/offdocs/nsd/nsd54.pdf; Presidential Policy Directive 14, Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012 (Feb. 28, 2012), *available at* www.justice.gov/opa/documents/ppd-14.pdf.

Exemption 1 of a presidential directive or lists of national security memoranda that were classified in full. *See* JA 17-18 (discussing *Center for Nat'l Security Studies v. INS*, No. 87-2068, 1990 WL 236133 (D.D.C. Dec. 19, 1990), and *Halperin v. NSC*, 452 F. Supp. 47 (D.D.C. 1978)). But neither of those cases addressed the question whether presidential directives are "agency records." Moreover, the information in those cases was not withheld because it was contained in a presidential directive but because classified information is exempt from disclosure under FOIA. *See* 5 U.S.C. § 552(b)(1).

Far more analogous to this case is *Center for Effective Government v. Department of State*, _ F. Supp. 2d __, No. 13-0414, 2013 WL 6641262 (D.D.C. Dec. 17, 2013), a recent decision that ordered two agencies to disclose under FOIA the Presidential Policy Directive on Global Development. The directive at issue in that case—like the majority of the Directive withheld here—was unclassified. *Id.* at *1. The Obama Administration sought $27 billion to support that directive, *see* OMB, Executive Office of the President, Fiscal Year 2012 Budget of the U.S. Government 116, *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/budget.pdf, and enlisted nearly two dozen federal agencies to implement it, *Center for Effective Government*, 2013 WL 6641262, at *4. The district court rejected the government's assertion that the presidential communications privilege applied to permit withholding of the directive under

Exemption 5, and it admonished the government for its "cavalier attitude that the President should be permitted to convey orders throughout the Executive Branch without public oversight—to engage in what is in effect governance by 'secret law.'" *Id.* at *9 (internal citation omitted). The government did not appeal that decision and has released the directive and its transmittal memorandum in full. *See* Letter from the Department of State to the Center for Effective Government (Feb. 24, 2014) (with enclosures), *available at* http://www.foreffectivegov.org/files/info/global-development-policy-directive-deptofstate-release.pdf. In contrast to the court's decision in *Center for Effective Government*, the district court's decision in this case would permit federal agencies to withhold from the public "secret law" that originates with the President, even where the policy at issue broadly affects federal operations and is unclassified.

2. This Court also limited *Judicial Watch* by stressing that it gave no deference to the memorandum of understanding between the Secret Service and the White House but instead simply accepted the memorandum's "representations as to the way in which both parties ha[d] historically regarded and treated the documents." 726 F.3d at 231. That is, the Secret Service had regularly transferred the visitor logs to the White House, purged its own version of those documents upon transfer, and understood the documents to be subject to presidential control. *See id.* at 212-13.

The district court here concluded that this limitation did not distinguish the instant case because the White House gave "explicit instructions regarding the limited use and dissemination of [the Directive] only with the White House's approval," and that those instructions sufficed to show "that the White House took clearly articulated steps to retain control over the document." JA 19. The court erred, however, by giving short shrift to the fact that the transmittal memorandum for the Directive generally permitted recipient agencies and departments to redistribute the Directive to individuals within those agencies or departments on an undefined, "need to know" basis. Janosek Decl. ¶¶ 8, 32, JA 93, 103. Even assuming the transmittal memorandum reflects actual practice, the White House did not retain exclusive control over the Directive. Instead, it gave recipients substantial discretion to share the Directive within their agencies and departments.

3. Finally, this Court in *Judicial Watch* stressed that the circumstances that led it "to give effect to" the memorandum of understanding between the Secret Service and the White House were "rare" since "[t]here are very few instances in which a construction of FOIA would put the President on the horns of a dilemma between surrendering his confidentiality and jeopardizing his safety." 726 F.3d at 231. It was "the presence of this unacceptable choice . . . that [was] central to [this Court's] understanding that the President exercise[d] control over the[] visitor logs." *Id.* at 231-32.

Here, the district court believed the circumstances analogous to those in *Judicial Watch* because the President must be able to communicate his decisions privately, and that without such confidentiality, his ability to "oversee[] executive agencies" would be hampered. JA 20. As a matter of logic, however, there is no reason why effective control over the executive branch requires secrecy of directives, as candid deliberations or discussions between the President and his closest advisors do. Nor is there any basis for the notion that the President should have the power to exercise secret control over broad-based federal policy. "Secret law" is no less abhorrent, nor does it have any less effect on the public, when made by the President than when made by executive agencies. Accordingly, interpreting the term "agency record" to include broad-based federal policy like the Directive here surely would not present the President with an "unacceptable choice" comparable to the one at issue in *Judicial Watch*. It is the outcome of the district court's rationale here that would in fact be unacceptable: reinstatement of the reign of "secret law" so long as it is set by the President instead of executive agencies.

C. The District Court's Decision Incorporates Concerns Best Left for Consideration of the Application of FOIA Exemptions Raised by the NSA.

This Court has stressed that the term "agency records" should "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." *Consumer Fed'n of Am.*, 455 F.3d at 287 (internal quotations marks omitted). Many of the concerns that the district court expressed in considering *Judicial Watch*'s limitations are appropriately considered with respect to the applicability of FOIA Exemptions 1 (for classified information) and 5 (for information subject to the presidential communications privilege). Considering these factors in the "agency record" context, however, perverts the meaning of the term "agency record," creating a threshold barrier for FOIA requesters that avoids FOIA's basic structure, which focuses on the applicability of the statute's nine exclusive exemptions.

Turning exemption-related factors into threshold considerations at the "agency records" stage—as the district court did here—would have a grave practical impact on FOIA requesters and transparency. For example, it is not clear that an agency would need to conduct a search for "non-agency records" in response to a FOIA request, as it would have to do for exempt agency records. *See* 5 U.S.C. § 552(a)(3)(D) ("[T]he term 'search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."). Nor is it clear that an agency would need to disclose to a requester the fact that it is withholding such "non-agency records" when they are located. Thus, the district court's rationale—which dramatically expands the definition of non-agency records—would create powerful incentives for agencies

to consider broad swathes of records outside FOIA's scope altogether, incentives that are very likely to lead to abuse. Moreover, although in the usual course of FOIA litigation a court must determine whether non-exempt information in an otherwise responsive agency record is releasable under FOIA, *see* 5 U.S.C. § 552(b), a "non-agency record" need not be segregated for release and might not even need to be listed in a *Vaughn* index.

In sum, incorporating exemption-related concerns into the "agency record" analysis—as the district court did here—poses "the risk that FOIA . . . become[s] less a disclosure than a withholding statute," an untenable outcome. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1270 (2011) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court and remand for further proceedings on the applicability of any FOIA exemptions raised by the NSA as grounds for withholding.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 6,709.

/s/ Julie A. Murray
Julie A. Murray

ADDENDUM

The foregoing brief is submitted on behalf of the following organizations:

Public Citizen, Inc., is a non-profit advocacy organization founded in 1971 with members and supporters nationwide. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues, including openness and integrity in government and access to the courts. Public Citizen has long advocated a robust FOIA, and it promotes accountability in government by requesting public records and using them to provide the public with information about the government's activities and operations. In addition, Public Citizen has expertise involving the type of document at issue in this case. Its attorneys successfully represented the plaintiff in *Center for Effective Government v. Department of State*, _ F. Supp. 2d __, No. 13-414, 2013 WL 6641262 (D.D.C. Dec. 17, 2013), which held that the presidential communications privilege did not apply to a presidential directive on global development and ordered the directive's release under FOIA.

The **Center for Effective Government** is a non-profit research and advocacy organization based in Washington, DC. Formed as OMB Watch in 1983, the organization became the Center for Effective Government in January 2013. The Center for Effective Government's mission is to build an open, accountable government that invests in the common good, protects people and the environment, and advances the national priorities defined by an active, informed citizenry. The

Center for Effective Government conducts policy research and develops policy proposals, creates and disseminates tools and communications materials to encourage citizen participation and government accountability, and builds broad-based coalitions to ensure that government is effective and responsive to the priorities of the American people. The Center for Effective Government was the plaintiff in *Center for Effective Government v. Department of State*, _ F. Supp. 2d __, No. 13-414, 2013 WL 6641262 (D.D.C. Dec. 17, 2013).

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Toward that end, CREW frequently files FOIA requests to access and make publicly available government documents that reflect on, or relate to, the integrity of government officials and their actions. CREW frequently litigates to seek access to records that agencies have withheld under Exemption 5 of FOIA, and participates as an amicus in these cases to ensure Exemption 5 is not expanded beyond the parameters Congress and the courts have established.

OpenTheGovernment.org is a non-partisan coalition of journalists, consumers, good- and limited-government groups, environmentalists, librarians,

unions, and others whose mission is to increase government transparency to ensure that policies affecting our health, safety, security, and freedoms place the public good above the influence of special interests.

The **Project On Government Oversight (POGO)**, founded in 1981, is a non-partisan, independent watchdog that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in the federal government, and in doing so it relies on FOIA. POGO has found that in many cases, the nondisclosure of government records has to do with hiding corruption, intentional wrongdoing, or gross mismanagement by the government or its contractors. POGO strongly believes that sunshine is the best disinfectant, and that we must empower citizens with information and tools to hold a local, state, or federal government accountable.

The **Sunlight Foundation** is a non-partisan and non-profit organization founded in 2006 that uses technology to help make government—and the public sphere—more open, responsive, transparent, accountable, and engaging. Sunlight accomplishes these goals at municipal, federal, and international levels by building tools that empower democratic participation and by working with policymakers and civil society organizations to employ a technology-centric and transparency-oriented approach to their work. This mission is focused and reliant on transparency in government, which Sunlight frequently secures through FOIA

requests and, recently, through litigation. Among other examples, in December of 2013, Sunlight successfully retrieved and released fourteen years of contract-related data after initiating a lawsuit against the General Services Administration, which had failed to fulfill a FOIA request for six months.

CERTIFICATE OF SERVICE

I certify that on April 7, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray