

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND  
ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S. DOGE SERVICE, *et al.*,

Defendants.

Case No. 1:25-cv-00511-CRC

**PLAINTIFF'S OPPOSITION TO**  
**DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S**  
**MARCH 10, 2025 OPINION AND ORDER, FOR AN ORDER SETTING AN**  
**EXPEDITED BRIEFING SCHEDULE, AND FOR A STAY OR EXTENSION OF THIS**  
**COURT'S MARCH 10, 2025 OPINION AND ORDER**

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## INTRODUCTION

The U.S. DOGE Service wants a do-over.<sup>1</sup> It made a strategic decision to withhold certain arguments and evidence in opposing CREW’s motion for a preliminary injunction because it assumed the motion would fail on other grounds. That assumption proved incorrect. So DOGE now seeks another bite at the apple. Unfortunately for DOGE, a “motion for reconsideration [is not] an avenue to ‘present theories or arguments that could have been advanced earlier.’” *Banks v. Booth*, 518 F. Supp. 3d 57, 63 (D.D.C. 2021) (quoting *Shvartser v. Lekser*, 330 F. Supp. 3d 356, 360 (D.D.C. 2018)). Nor may it “be used to rescue a litigant from strategic choices that later turn out to be improvident.” *Owen-Williams v. BB & T Inv. Servs., Inc.*, 797 F. Supp. 2d 118, 128 (D.D.C. 2011).

DOGE’s blunderbuss motion—which seeks three discrete forms of relief—should be denied in full. DOGE’s request for reconsideration on irreparable harm merely accuses the Court of clear error for not addressing arguments DOGE chose not to make. Its demand for reconsideration on the “important threshold legal issue” of DOGE’s substantial independent authority tries to excuse its odd (but purposeful) choice not to dispute the issue by offering largely irrelevant evidence that DOGE chose to withhold until now. And its plea of manifest injustice would require the Court to close its eyes to its own equitable powers, DOGE’s conduct, and the record. Finally, DOGE’s cursory request for a stay does not attempt to satisfy its heavy burden for one, offering only forfeited arguments that exaggerate DOGE’s burden if it complies with the Court’s narrow March 10 Order.

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<sup>1</sup> CREW refers here to the U.S. DOGE Service as “DOGE,” rather than “USDS,” per the Court’s stated preference during the March 7, 2025 preliminary injunction hearing. The term “DOGE” is coterminous with the term “USDS” in CREW’s prior briefing and includes the U.S. DOGE Service, its temporary organization, its detailees, and others who work on its behalf.

If the Court nonetheless grants reconsideration, it should permit CREW to conduct limited discovery before the parties proceed to summary judgment briefing on whether DOGE wields substantial independent authority. Recognizing that this is a fact-intensive inquiry, judges in this District have allowed such discovery to aid the analysis of whether components of the Executive Office of the President (“EOP”) are subject to FOIA. If the Court is inclined to grant DOGE another bite at the apple (and it should not), then it should at least afford CREW the opportunity to fully develop the factual record on this threshold question.

### **BACKGROUND**

On January 24, 2025, CREW submitted an expedited Freedom of Information Act (“FOIA”) request to DOGE seeking various records that would shed public light on its secretive structure and operations. PI Mem. Op. at 10, ECF No. 18. CREW submitted the request through the Office of Management and Budget (“OMB”), per OMB’s instructions. *Id.* OMB granted expedited processing of the DOGE request on January 29. *Id.* at 10-11.

On February 7, CREW sent a letter to DOGE requesting expedited production of the requested documents by March 1, because members of Congress had begun to signal that DOGE’s rapid and unprecedented takeover of federal operations would play a central role in the upcoming negotiations to fund the government beyond March 14. Compl. Ex. J, ECF No. 2-12. By February 20, the situation had become desperate. Given DOGE’s escalating control over federal functions and employees, members of Congress made clear that they required basic information about DOGE’s ongoing and planned activities to responsibly determine how to fund the government. CREW PI Mem. at 1-10, ECF No. 2-1.

On February 19, CREW emailed Defendants’ counsel to inform them of CREW’s intent to file this suit under FOIA and the Federal Records Act (“FRA”), and a motion for preliminary

injunction compelling DOGE to produce documents on an expedited basis. CREW PI Reply Supp. Ex. C, ECF No. 13-4. CREW attached its FOIA request to DOGE, the letter it received granting expedition, and its February 7 letter, and asked DOGE’s counsel for its position. *Id.* CREW received an acknowledgment email and nothing else. *Id.*

On February 20, CREW filed its complaint and motion. The motion laid out the extensive public record of DOGE’s unprecedented operations and the Congressional and public outcry about it. CREW PI Mem. at 1-12, 17-38. The motion also argued at length that the executive orders establishing and empowering DOGE and the public record of its conduct made clear that DOGE wields “substantial independent authority” from the President, making it a de facto “agency” subject to FOIA and the FRA under longstanding precedent. *Id.* at 18-25.

The Court ordered DOGE to respond by February 27 and set a hearing for March 7. Min. Order (Feb. 22, 2025). In its February 27 opposition to CREW’s preliminary injunction motion, DOGE did not object to CREW’s submission of its FOIA request through OMB or OMB’s grant of expedition, did not dispute its substantial independent authority for purposes of FOIA and the FRA, and made no argument regarding any burdens it would face in complying with CREW’s request. *See generally* Defs.’ PI Opp., ECF No. 10. DOGE chose to make only cursory assertions—buried in footnotes—that it was exempt from FOIA as a component of the Executive Office of the President (“EOP”), and insisted that whether FOIA applied to it was “a question for the merits . . . once Defendants have had an opportunity to answer the complaint in the ordinary course” that “should not be decided in the context of a preliminary-injunction motion.” *Id.* at 8 n.2, 20 n.4. DOGE further argued that CREW would not suffer irreparable harm absent a preliminary injunction because the requested records would retain their value even after Congress determined how to fund the government. *Id.* at 13-16. CREW filed its reply on March



4, providing more evidence from the public record on the public debate about DOGE and narrowing the requests for which it sought relief. CREW PI Reply at 6-20, ECF No. 13.

On March 6, DOGE reversed course and denied CREW’s FOIA request by email to counsel. Ex. A; *see also* Hr’g Tr. 3:23-4:4, Ex. B. During the Court’s March 7 hearing on CREW’s motion, DOGE offered no new arguments and explained that it did not dispute its substantial independent authority because it assumed its other arguments would carry the day. *See* Ex. B at 86:5-87:6. DOGE’s gamble was wrong. On March 10, the Court partially granted CREW’s motion, ordered DOGE to begin expedited processing of CREW’s narrowed requests and the parties to meet and confer on a proposed production schedule, set a deadline of March 20 for DOGE to provide an estimate of the total number of responsive documents, and ordered the parties to report back on March 27. PI Order, ECF No. 17.

DOGE now seeks partial reconsideration and a stay of the Court’s March 10 Order, and expedited summary judgment briefing solely on the question of whether it is subject to FOIA. DOGE’s motion advances arguments and evidence that it chose to withhold in opposing CREW’s motion. Defs.’ Mem. at 10-21, ECF No. 20-1. It claims the Court’s ruling on irreparable harm was clearly erroneous because, in its estimation, CREW’s FOIA claim could be fully litigated (inclusive of appeals) before any irreparable harm from nondisclosure materializes. *Id.* at 11-13. DOGE argues it did not previously know that it needed to dispute the “important threshold legal issue” of its substantial independent authority, even though “CREW briefed” the issue “at length in its preliminary injunction motion.” *Id.* at 12-17. It further claims that a declaration of DOGE’s purported Acting Administrator—which it easily could have submitted in opposition to CREW’s preliminary injunction motion—constitutes newly available evidence. *Id.*

And it insists the Court worked a manifest injustice by granting equitable relief within the scope of (though not precisely the same as) that sought by CREW. *Id.* at 17-20.

DOGE's motion should be denied in full and this Court's March 10 Order should remain in effect, including DOGE's imminent March 20 deadline to "provide an estimate of the volume of responsive records to CREW's FOIA requests." PI Order.

## ARGUMENT

### I. DOGE's motion for reconsideration should be denied.

#### A. Legal standard

"Rule 59(e) is the appropriate standard by which to assess a motion to reconsider a preliminary injunction." *N.S. v. Hughes*, No. 20-cv-101-RCL, 2020 WL 4260739, at \*1 (D.D.C. July 24, 2020). "Rule 59(e) [motions] are 'disfavored' and 'the moving party bears the burden of establishing "extraordinary circumstances" warranting relief.'" *Banks*, 518 F. Supp. 3d at 62-63 (quoting *United States v. Burwell*, 253 F. Supp. 3d 283, 285 (D.D.C. 2017)). Such "extraordinary circumstances" are limited to (1) an "intervening change of controlling law," (2) "the availability of new evidence," or (3) "the need to correct a . . . manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996).<sup>2</sup>

Whether brought "under either Rule 54(b) or Rule 59(e)," a motion for reconsideration "is not 'simply an opportunity to reargue facts and theories upon which a court has already ruled.'" *Banks*, 518 F. Supp. 3d at 63 (quoting *New York v. United States*, 880 F. Supp. 37, 38

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<sup>2</sup> DOGE appears to agree Rule 59(e) governs its reconsideration request. Although its motion fails to identify the rule on which it is based, it cites cases applying Rule 59(e). *See* Defs.' Mem. at 10-11 (first citing *AARP v. EEOC*, 292 F. Supp. 3d 238, 241 (D.D.C. 2017); and then citing *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057-58 (D.C. Cir. 1998)). DOGE is foreclosed from arguing that a different rule, such as Rule 54(b), should apply. *See Steele v. United States*, 657 F. Supp. 3d 23, 44 (D.D.C. 2023) (quoting *Nippon Shinyaku Co., Ltd. v. Iancu*, 369 F. Supp. 3d 226, 239 n.8 (D.D.C. 2019)) ("Arguments raised for the first time in a reply brief are waived.").

(D.D.C. 1995)). “Nor is a motion for reconsideration an avenue to ‘present[] theories or arguments that could have been advanced earlier.’” *Id.*; *see also Oceana, Inc. v. Evans*, 389 F. Supp. 2d 4, 8 (D.D.C. 2005) (“Rule 59 was not intended to allow a second bite at the apple.”). Indeed, “once the parties have ‘battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.’” *Banks*, 518 F. Supp. 3d at 63 (quoting *Hisp. Affs. Project v. Perez*, 319 F.R.D. 3, 6 (D.D.C. 2016)).

Here, DOGE fails to identify any intervening change of controlling law, new evidence, or need to correct a manifest injustice. It simply wants a do-over. Specifically, it seeks another chance to offer arguments and evidence it had ample notice and opportunity to submit the first go-round, before the Court ruled on CREW’s motion. DOGE thus falls far short of its heavy burden to show that “extraordinary circumstances” warrant reconsideration. Its motion should be summarily denied.

#### **B. The Court’s irreparable harm ruling was not clearly erroneous.**

DOGE asserts that the Court’s irreparable harm ruling rested on a flawed premise—which the Court stated explicitly at the March 7 hearing without objection from DOGE’s counsel, *see* Ex. B at 7:15-21—that resolving DOGE’s “FOIA status before ordering processing and production would take years, resulting in indefinite delay.” Defs.’ Mem. at 11. Not so, DOGE now asserts, because the question of DOGE’s FOIA status can be fully litigated (inclusive of appeals) with only “modest delay” to any processing and release of records, and because CREW could have sought expedited consideration of the question by filing a procedurally irregular summary judgment motion at the outset of the case. Defs.’ Mem. at 12-13. Neither argument withstands scrutiny.

The Court and all parties are well aware of how litigation and FOIA processing works. It defies experience and logic to expect that piecemeal litigation of DOGE’s FOIA status could be

fully resolved—by this Court, the Court of Appeals, and potentially the Supreme Court—with only “modest delay” to the potential release of DOGE’s records. The Court’s finding that irreparable harm would befall CREW and the public without expedited processing of CREW’s FOIA request was plainly correct—and certainly comes nowhere close to “clear error” or “manifest injustice.” The Court’s order was fully consistent with case law holding that the public must receive timely information pertaining to debates about issues of vital national importance to which it is entitled, particularly given the rapid pace, nature, and impact of DOGE’s work and the overwhelming public interest in it. *See* PI Mem. Op. at 31-34. The Court rightly determined that DOGE must expedite processing and production for a small number of documents now so that their production is not delayed until they become stale. *Id.*

All DOGE musters to avoid that obvious conclusion is bald speculation that its agency status could be fully litigated with only “modest delay.” Defs.’ Mem. at 11. Full stop. DOGE offers no facts, no commitments, and no case law on which the Court could conceivably rely to evaluate DOGE’s position. And it conspicuously avoids committing any resources to ensure timely processing and production if CREW were to prevail in establishing FOIA’s applicability to DOGE after fully litigating the issue.<sup>3</sup>

Instead, DOGE attempts a bait-and-switch in which it chides *CREW* for failing to take the unusual step of filing a pre-answer summary judgment motion on DOGE’s agency status. *See*

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<sup>3</sup> That DOGE may be acting with dilatory motives is a genuine concern. CREW noted in its briefing the furtiveness and at times outright hostility with which DOGE and the wider Administration has approached routine questions about how DOGE operates, CREW PI Reply at 10, and the Court likewise noted DOGE’s “unusual secrecy,” PI Mem. Op. at 35-36. Now, rather than cooperating with CREW as envisioned in the Court’s order, DOGE is wasting time and resources by belatedly raising arguments that it easily could have raised earlier, all in an attempt to avoid an initial disclosure. As described below, it is doing so based in part on a declaration that appears to drastically overstate the burden to DOGE in complying with what, in the end, was a narrow order. *See infra* Part II.

Defs.’ Mem. at 12. This argument gets things backwards. Moving for a preliminary injunction—and specifically *not* filing a pre-answer motion for summary judgment—is the proper procedure in this District for preventing irreparable harm caused by delayed release of FOIA records. *See* CREW PI Mem. at 15 n.45 (citing ten cases from this District granting such motions); Minute Order, *United States v. Navarro*, No. 22-cv-2292-CKK (D.D.C. Sept. 27, 2022) (summarily denying a pre-answer summary judgment motion and explaining that “the longstanding practice of this jurisdiction” is to “defer consideration of any motion for summary judgment until after the filing of Defendant’s answer,” but indicating that a preliminary injunction motion would have been permitted) (citing *First Am. Bank, N.A. v. United Equity, Corp.*, 89 F.R.D. 81, 87 (D.D.C. 1981); Wright & Miller, 10A Fed. Prac. & Proc. Civ. § 2717 (West 2022)). DOGE itself claimed in earlier briefing that its agency status was “a question for the merits . . . *once Defendants have had an opportunity to answer the complaint in the ordinary course.*” Defs.’ PI Opp. at 20 n.4 (emphasis added). Now, by contrast, DOGE insists that a pre-answer summary judgment motion would have been the “ordinary course.” But that is not the rule in this District.

Nor is it apparent why DOGE believes that the Court could not address its agency status in the context of a preliminary injunction motion. Likelihood of success *on the merits* is, of course, the first step in the preliminary injunction analysis, *id.* at 10, and DOGE recognized that CREW “devote[d] significant space to arguing that [DOGE] is an agency subject to FOIA,” *id.* at 20 n.4. Courts routinely address merits questions of first impression when ruling on preliminary injunction motions. A party opposing such a motion is not excused from addressing the likelihood of success on the merits of a claim simply because it is novel or complex.

Moreover, if DOGE genuinely thought that expedited summary judgment briefing was the proper mechanism for resolving its agency status, it could have filed a motion requesting

such a briefing schedule prior to the March 10 Order. It did not. Instead, it waited until after it lost the motion to raise the proposal. This is the very definition of using “reconsideration [as] an avenue to ‘present[] theories or arguments that could have been advanced earlier.’” *Banks*, 518 F. Supp. 3d at 63 (quoting *Shvartser*, 330 F. Supp. 3d at 360).

**C. DOGE waived its new arguments and its “new” evidence is neither new nor timely.**

DOGE seeks to relitigate whether FOIA applies to it on the ground that it lacked sufficient notice and opportunity to litigate that issue. *See* Defs.’ Mem. at 13-20. That argument does not pass the laugh test, let alone approach “manifest injustice.” *Firestone*, 76 F.3d at 1208 (quoting *Nat’l Trust v. U.S. Dep’t of State*, 834 F. Supp. 453, 455 (D.D.C. 1993)).

As the Court explained, DOGE was faced with a fully briefed threshold legal issue that it chose not address because it assumed CREW’s motion would fail on other grounds. *See* PI Mem. Op. at 27-28. That assumption proved incorrect. DOGE cannot now “escape the consequences of refusing its opportunity to refute any of CREW’s allegations suggesting that USDS is acting with substantial independent authority,” especially where this “decision” appears to have been “strategic.” *Id.* at 28 & n.3. DOGE’s willful refusal to respond to CREW’s arguments on this threshold merits question resulted in waiver (or at least forfeiture) of the issue for purposes of CREW’s preliminary injunction motion. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (waiver); *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (forfeiture).

A “motion for reconsideration [is not] an avenue to ‘present theories or arguments that could have been advanced earlier.’” *Banks*, 518 F. Supp. 3d at 63 (quoting *Shvartser*, 330 F. Supp. 3d at 360). Nor may it “be used to rescue a litigant from strategic choices that later turn out to be improvident.” *Owen-Williams*, 797 F. Supp. 2d at 128. And yet, DOGE is now seeking to do just that on what it now admits is an “important threshold legal issue” that “CREW briefed

. . . at length in its preliminary injunction motion.” Defs.’ Mem. at 3, 12. In fact, DOGE now asserts that whether DOGE is covered by FOIA is so important, and DOGE’s opposition to it so predictable, that CREW should have taken the unusual step of immediately moving for summary judgment on that issue. *See supra* Part I.B.

Three additional considerations confirm that DOGE’s decision not to address DOGE’s substantial independent authority was purely strategic. First, CREW’s motion sought the first preliminary ruling that DOGE, a newly-created EOP component, is subject to FOIA. *Of course* the Court was likely to consider FOIA’s applicability to DOGE and, under longstanding Circuit precedent, that necessarily requires an inquiry into whether DOGE wields substantial independent authority. *See, e.g., Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). As DOGE itself notes, the issue had already been raised peripherally in other litigation. *See* Defs.’ Mem. at 12.

Second, DOGE argued that it was not subject to FOIA to the extent it found it strategically useful, asserting that (1) DOGE is not subject to FOIA because it is a standalone component of the EOP, and (2) the question of FOIA’s applicability to DOGE was a question for the merits (again proving that DOGE knew the importance of the issue at the time). Defs.’ PI Opp. at 8 n.2, 20 n.4. DOGE’s problem is not that it was not aware of or failed to appreciate that FOIA’s applicability to it was in dispute; its problem is that it recognized and raised the issue but chose not to make an essential argument “After expressing its clear and accurate understanding of the . . . issue,” DOGE “deliberately steered the District Court away from the question” of its status as an agency, thus waiving arguments it belatedly seeks to litigate now, *Wood*, 566 U.S. at 474.

Third, DOGE also needed to dispute its substantial independent authority to oppose CREW's FRA claim and chose not to do so. *See* CREW PI Mem. at 18 (citing *Armstrong v. Exec. Off. of the President*, 90 F.3d 553, 556 (D.C. Cir. 1996) (“[T]he coverage of the FRA is coextensive with the definition of ‘agency’ in the FOIA.”)). CREW's FRA claim was based on a separate irreparable harm theory and was untethered to the particulars of CREW's FOIA requests. DOGE may (wrongly) claim that the nature of its dispute over the FOIA claim excuses its failure to brief that threshold issue, but nothing but a strategic choice could explain its failure to brief the issue on CREW's FRA claim.

For the same reasons, the Court should also disregard DOGE's new argument, discussed further below, that complying with the Court's order to produce a limited number of documents is so burdensome to DOGE that it should outweigh the public interests established by FOIA and in understanding how DOGE operates. Defs.' Mem. at 20-21. DOGE chose silence on this point in its opposition to CREW's motion, apparently on the mistaken belief that the Court would not reach it, leaving the Court to issue its order on the record before it. Again, DOGE's strategic miscalculation results in a waiver, and falls far short of the high bar for reconsideration under either Rule 59(e) or Rule 54(b). *See Banks*, 518 F. Supp. 3d at 62-63; *Firestone*, 76 F.3d at 1208.

Nor does the belated declaration of DOGE's purported Acting Administrator, Amy Gleason, provide grounds for reconsideration. Recall that reconsideration requires the movant to establish “extraordinary circumstances.” *Banks*, 518 F. Supp. 3d at 63. New evidence can only meet that high bar where it is both new and previously unavailable to the movant. *Firestone*, 76 F.3d at 1208; *see also Johnson v. District of Columbia*, 266 F. Supp. 3d 206, 211 (D.D.C. 2017) (“Rule 59(e) motions on the basis of new evidence are restricted to evidence that is ‘newly discovered or previously unavailable despite the exercise of due diligence.’”) (quoting



*Niedermeier v. Off. of Baucus*, 153 F. Supp. 2d 23, 29 (D.D.C. 2001)). Ms. Gleason’s declaration fails on both counts.

Nothing in Ms. Gleason’s declaration is new in any sense. “Courts routinely deny Rule 59(e) motions where all relevant facts were known by the party prior to the entry of judgment and the party failed to present those facts.” *Niedermeier*, 153 F. Supp. 2d at 29. Ms. Gleason’s declaration provides nothing more than spin on the plain text of multiple executive orders pertaining to DOGE’s work, legal conclusions, and conclusory factual assertions that (if true) should have been known to DOGE well before the Court’s March 10 Order. Gleason Decl. at 1-5, ECF No. 20-2. DOGE’s “complete omission” of facts that were “solely in the government’s possession” “is indicative of just how far-fetched this request for reconsideration really is.” *N.S.*, 2020 WL 4260739, at \*2.

DOGE also does not and cannot attempt to claim that Ms. Gleason’s declaration and its contents were previously unavailable. DOGE instead admits it chose not to submit the declaration because it thought it had “good reasons for not offering [it] earlier.” Defs.’ Mem. at 13. As noted, those “good reasons” were a strategic miscalculation. *See supra* at 9-11.<sup>4</sup>

Even if the Court forgives DOGE’s choice to withhold this information until this late date and considers Ms. Gleason’s declaration, it would not move the needle on reconsideration. As described below, Ms. Gleason’s declaration raises more questions than it answers. Most significantly for purposes of reconsideration, her declaration does not purport to dispute the accuracy of any of the dozens of public reports cited in CREW’s FOIA requests and briefing of

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<sup>4</sup> Although Ms. Gleason’s declaration conspicuously omits the date on which she became Acting DOGE Administrator, she reportedly held that position before DOGE opposed CREW’s motion on February 27. *See* CREW PI Reply at 10. And while DOGE has refused to tell other judges of this Court who, if anyone, the DOGE Administrator was before Ms. Gleason, that person was previously available to DOGE to submit a declaration as well. *See id.*

DOGE exercising substantial independent authority. It provides only Ms. Gleason's conclusory characterizations of DOGE's purported operations, some of which (most notably, Ms. Gleason's conclusory statement that DOGE merely advises the President) are inconsistent with DOGE's charter documents. Gleason Decl. at 1-4. Ms. Gleason's declaration offers far too little, far too late.

**D. The Court's order was well within its equitable discretion and CREW's requested relief.**

DOGE's various arguments suggesting that the Court's March 10 Order was clearly erroneous or worked a manifest injustice do not withstand the slightest scrutiny. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assist. Proj.*, 582 U.S. 571, 579 (2017) (citing *Winter v. Nat. Res. Def. Couns., Inc.*, 555 U.S. 7, 20, 24 (2008)). "The purpose of such interim equitable relief is . . . to balance the equities as the litigation moves forward." *Id.* at 580. "In the course of doing so, a court 'need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.'" *Id.* (quoting Wright et al., 11A Federal Practice and Procedure § 2947, at 115 (2013)). "This Court's discretion in granting preliminary injunctive relief is therefore not constrained by the relief Plaintiff[] explicitly seek[s]." *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 133 (D.D.C. 2018).

Further, "[i]n our adversary system . . . we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). As described above, the Court's decision was correct and DOGE's new arguments should and would have been brought far earlier but for DOGE's own strategic choices. The relief granted by the

Court was well within its equitable powers and addressed issues that were before the Court but that DOGE chose to handle to its detriment.

The expedited processing ordered by the Court was a necessary element of the relief sought by CREW, made so by both FOIA itself and DOGE's own conduct. The Court in *Brennan Center for Justice at NYU School of Law v. U.S. Department of Commerce*, 498 F. Supp. 3d 87, 99-100 (D.D.C. 2020) (citing 5 U.S.C. § 552(a)(6)(E)(iii)), on which DOGE relied extensively in its opposition to CREW's motion, Defs.' PI Opp. at 12-14, explained that production by date certain is itself premised on the statutory language that, *after a grant of expedited processing*, production must be "as soon as practicable." Here, CREW filed its complaint and preliminary injunction based on a FOIA request to DOGE *for which expedited processing was granted* on January 29, 2025, legally obligating DOGE to respond as soon as practicable. *See* 5 U.S.C. § 552(a)(6)(e); PI Mem. Op. at 10-11. CREW notified DOGE's counsel of its intent to file and of the relief sought, before it brought this action, attaching both CREW's FOIA request to DOGE and the letter it received granting expedition, and requested its position on the motion. CREW PI Mem. Supp. Ex. B. DOGE's counsel merely acknowledged receipt and chose not to raise an issue with the grant of expedited processing. *Id.* CREW's preliminary injunction motion thus did not explicitly seek an order requiring expedited processing by DOGE because, at that point, expedited processing had already been granted.

DOGE, meanwhile, stayed silent. It chose not to dispute the grant of expedited processing that preceded CREW's motion in its opposition on February 27. Defs.' PI Opp. at 8 n.2.<sup>5</sup> Not until March 6—one day before it needed to address its handling of CREW's FOIA request at the

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<sup>5</sup> DOGE's decision not to do so was intentional, as its Motion seeks credit for its choice not to raise the issue. Defs.' Mem. at 20 n.5.

Court’s March 7 hearing—did DOGE change course and for the first time deny CREW’s FOIA request in full, Ex. A, compelling the Court to address whether CREW was entitled to expedited processing as a predicate to determining whether DOGE should be compelled to produce documents. During the hearing on CREW’s Motion, DOGE’s counsel likewise did not object that a grant of expedited processing to compel the production of documents after March 10—a clear possibility given the progress of the hearing—would be beyond the scope of CREW’s requested relief. Ex. B at 4:14-5:23. Only now does DOGE finally make that claim. That DOGE’s strategy failed is a function of its own choices, not a clear error by the Court.

The Court’s judgment also pertained to the central issue in the case. CREW’s FOIA request to DOGE, its request for expedited treatment (as granted by OMB), its February 7 letter asking for production by a date certain, its preliminary injunction motion and its reply in support were all based on an ever-growing public record of DOGE’s outsized influence on the federal government. The Court noted on March 10 that the parties cited “at least fifty” news articles about DOGE in their briefing alone. PI Mem. Op. at 29. Further, CREW’s request for production by March 10 was premised on the need for both Congress and the public to have information about DOGE *specifically* because of its continued impact on the operations of the federal government, which CREW and the members of Congress it cited in its briefing believe is integral to the determination of how the government should be funded. CREW Pl. Mot. at 1-3, 8-12, 27-29, 32-38; CREW Pl. Rep. at 1-2, 6-12, 15-18.

Further, this Court’s approach accords with several other cases that denied production by a date certain, but still ordered processing and production on an expedited basis—including cases cited by DOGE. For example, in *Protect Democracy Project, Inc. v. U.S. Department of Justice*, 498 F. Supp. 3d 132, 142 (D.D.C. 2020), cited in DOGE’s opposition (*see* Defs.’ PI Opp. at 16),

the court denied the plaintiff's request for documents regarding the Department of Justice's voter fraud task force but ordered them processed by an indeterminate date to ensure that they were available while any inquiries about voter fraud were ongoing. *See also Brennan*, 498 F. Supp. 3d at 99-100 (denying production of documents regarding census apportionment by November 2, 2020 but ordering production completed by January 25, 2021). DOGE should have anticipated a similar outcome here given its own argument that the requested records would retain their value to the public *after* March 10. *See* Defs.' PI Opp. at 12-15.

In sum, the Court acted well within its "discretion and judgment" in issuing a preliminary injunction tailored to "meet the exigencies of [this] particular case." *Trump*, 582 U.S. at 579.

## **II. DOGE has failed to demonstrate that a stay is warranted.**

DOGE falls woefully short of its burden to obtain a stay of this Court's March 10 preliminary injunction.<sup>6</sup> "The party seeking a stay bears the 'burden of showing that exercise of the court's extraordinary injunctive powers is warranted.'" *Comm. on the Judiciary v. McGahn*, 407 F. Supp. 3d 35, 38 (D.D.C. 2019) (quoting *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). "There are four 'traditional' factors that govern a request for a stay: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)).<sup>7</sup> DOGE's

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<sup>6</sup> DOGE labels its request as one for a stay or an extension of time, but no matter the terminology used, the requested relief would function as a stay of the Court's March 10 Order.

<sup>7</sup> DOGE again fails to identify any standard by which the Court should evaluate its request for a stay, thereby waiving any argument that another standard should apply. *See Steele*, 657 F. Supp. 3d at 44.

cursory, two-paragraph argument for a stay fails to meaningfully address any of these factors. *See* Defs.’ Mem. at 20-21.

Although DOGE seeks a stay pending resolution of its motion for reconsideration and its forthcoming motion for summary judgment, it offers only dubious arguments for the former and no argument for why it is likely to succeed on the merits of the latter. *See Comm. on the Judiciary*, 407 F. Supp. 3d at 38-39. And despite recognizing that the “basis for injunctive relief in the federal courts has always been irreparable harm,” Defs.’ Mem. at 11, DOGE is entirely silent on what irreparable harm it would suffer if a stay is not issued. It is likewise silent on the substantial injury to CREW and the public if they continue to be kept in the dark about DOGE’s operations, *see* PI Mem. Op. at 31-34, as well as the established public interests in the disclosure of the requested documents about DOGE specifically, *id.* at 35, fulfilling FOIA’s purpose of informing the public generally, CREW PI Mem. at 42, and in ensuring that the government does not continue to act unlawfully through DOGE’s evasion of its legal obligations, *id.* at 41. DOGE advances only conclusory assertions about the purported burden to DOGE, supported only by conclusory statements in Ms. Gleason’s untimely declaration which, as described *supra* Part I.C, should be ignored.

DOGE’s only argument—which it chose not to make when opposing CREW’s motion—is that complying with the Court’s order would unduly burden it because it would need to “create a FOIA operation from scratch” including “adopt[ing] FOIA regulations” and hiring “document processors or reviewers,” without a dedicated budget to do so. Defs.’ Mem. at 21. That is simply untrue and the latest example of DOGE’s obstinance. As DOGE acknowledges immediately after listing these unnecessary costs to DOGE, the Court has not yet held that DOGE is subject to FOIA forever and all time. *Id.* It only ordered DOGE to produce a discrete set of organizational

charts, ethics documents, financial disclosures, directives, and communications regarding a specific set of topics as soon as practicable. PI Mem. Op. at 1. There is no reason such a limited production will require DOGE—which is led by purported technology and efficiency experts—to stand up a fully operational FOIA apparatus.<sup>8</sup>

Additional context underscores the argument’s absurdity. First, the Court has given DOGE the opportunity to manage its burden by working with CREW to establish a schedule for the processing and rolling production of documents. PI Order. Yet DOGE’s counsel has not acted on two requests from CREW’s counsel to actually schedule that meet-and-confer, opting instead to circle the wagons and work to avoid its obligations under the March 10 Order. Second, two days after the Court’s March 10 Order and two days before DOGE filed its motion, DOGE was ordered in *New Mexico v. Musk*, No. 25-cv-429-TSC, 2025 WL 783192 (D.D.C. Mar. 12, 2025), to produce documents and respond to interrogatories regarding its structure and operations. Surely whatever resources DOGE is utilizing to respond to that and other court orders should be available to respond to this one, which was issued first.

Third, DOGE does not dispute it was apportioned at least \$39 million in funding in its first two months of existence. *See* CREW PI Mem. at 2. Yet based on Ms. Gleason’s untimely declaration, DOGE apparently claims that that significant sum is going exclusively toward advising the President. *See* Defs.’ Mem. at 21. While the record thoroughly refutes that characterization of DOGE’s work, even if Ms. Gleason’s declaration is credited, she offers no

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<sup>8</sup> DOGE also suggests that the burden would be particularly pronounced given DOGE’s role, according to more conclusory statements in Ms. Gleason’s untimely declaration, of advising the President. Defs.’ Mem. at 20-21. As explained *infra*, the accuracy of Ms. Gleason’s characterizations of DOGE’s work is doubtful and she also provides no detail that would allow the Court to evaluate how DOGE’s substantial resources are actually allocated.

explanation why DOGE cannot spend a portion of that \$39 million in taxpayer funds on compliance with its statutory obligations and this Court's Order.

Fourth, DOGE's entire premise is undercut by its continuous use of its resources to collect and publish public information from across the federal government on its website, DOGE.gov. At this point, DOGE is only increasing its costs by resisting its own promise to be transparent and increasing the number of communications that it will eventually need to produce.

**III. If the Court grants reconsideration, CREW is entitled to expedited discovery prior to any summary judgment briefing on whether DOGE wields substantial independent authority.**

If the Court grants reconsideration (and it should not), it should deny as premature Defendants' request to proceed immediately to summary judgment briefing on whether DOGE wields substantial independent authority. *See* Defs.' Mem. at 1. CREW has had no opportunity for discovery on this issue. Any summary judgment briefing would thus be based on Defendants' one-sided evidentiary presentation. *See, e.g.,* Gleason Decl. That would be improper because the D.C. Circuit has made clear that whether an EOP component wields substantial independent authority raises questions of fact. Specifically, the Circuit requires a functional analysis of activities the EOP component actually "performs *or* is authorized to perform." *CREW v. Office of Admin.* ("OA"), 566 F.3d 219, 224 (D.C. Cir. 2009) (emphasis added). An understanding of both the EOP component's "authority *and* operations" are "critical for determining whether [it] is subject to FOIA." *Id.* at 225 (emphasis added); *see also Armstrong*, 90 F.3d at 560 (court must evaluate whether the EOP component "*could* exercise substantial independent authority" and whether it "*does in fact* exercise such authority") (emphasis added).

For these reasons, judges in this District have granted discovery into EOP components' authority and operations to determine whether they are subject to FOIA. In *CREW v. OA*, "the district court allowed CREW to obtain more than 1300 pages of documents that shed light on



[the EOP’s Office of Administration’s (“OA’s”)] authority and operations,” and CREW deposed OA’s director—who submitted a sworn declaration in the case—“about OA’s history of compliance with FOIA, *its interactions with federal agencies*, and the duties OA performs.” 566 F.3d at 225-26 (emphasis added); *see also id.* at 221 (noting the district court allowed discovery “to explore ‘the authority delegated to [OA] in its charter documents *and any functions that OA in fact carries out*’” in order to determine “whether ‘OA acts with the type of substantial independent authority that has been found sufficient to make’ other EOP units ‘subject to FOIA.’”) (emphasis added).

Similarly, in *EPIC v. Office of Homeland Security*, the district court granted limited discovery on whether an EOP component—the Office of Homeland Security—wielded substantial independent authority. *See* No. 02-cv-00620-CKK, ECF No. 11 (D.D.C. Dec. 26, 2002), (attached as Ex. C). The court rejected the government’s attempt to confine the analysis to “statutes, executive orders and presidential directives,” reasoning that “courts have looked beyond public documents in efforts to determine whether or not an entity was an agency for FOIA purposes.” *Id.* at 12. The court added that “[s]uch evidence would be helpful especially in this case” because “the language” of the executive order “establishing the entity’s power [was] broad and lacking in firm parameters.” *Id.*

The *EPIC* court relied on *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), where the Circuit considered testimony of National Security Council (“NSC”) staff members in deciding whether the NSC was a FOIA-covered agency. *See id.* at 561 (citing NSC staffer’s deposition testimony that he did not “have the ability to issue instructions or directions to agencies” but “would merely convey a decision made by the President” or others on his behalf); *id.* at 559-60 (citing a different staffer’s declaration in concluding that the “NSC has

a structure sufficiently self-contained that the entity could exercise substantial independent authority”). The *EPIC* court likewise cited the district court’s decision in *Meyer v. Bush*, No. 88-cv-3112-JHG, 1991 WL 212215 (D.D.C. Sept. 30, 1991), *rev’d on other grounds*, 981 F.2d 1288 (D.C. Cir. 1993), which looked beyond executive orders and relied on letters, memoranda, and the Vice President’s public statements in considering whether the Presidential Task Force on Regulatory Relief was an agency subject to FOIA. *See id.* at \*4-\*7.

These cases directly support CREW’s entitlement to limited discovery on not only DOGE’s “authority,” but also its “operations”—*i.e.*, “any functions that [DOGE] *in fact* carries out.” *CREW v. OA*, 566 F.3d at 225, 221 (emphasis added); *see Armstrong*, 90 F.3d at 560. As in *EPIC*, “[s]uch evidence would be helpful especially in this case” because “the language” of the executive orders establishing and empowering DOGE are “broad and lacking in firm parameters.” *EPIC*, No. 02-cv-00620-CKK, ECF No. 11, at 12; *see* PI Mem. Op. at 23-24 (noting that executive orders broadly authorize DOGE “to implement the President’s DOGE Agenda” and give it “the power to keep vacant career positions open unless an agency overrides their decision”).<sup>9</sup>

Public statements of President Trump and Mr. Musk, as well as public reporting of DOGE’s actions to date, further demonstrate that DOGE is in fact wielding “substantial authority

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<sup>9</sup> Defendants wrongly seek to minimize the DOGE Team Leads’ sweeping authority to hold open career vacancies at every executive branch agency, *see* Defs.’ Mem. at 17—a power made all the more significant by the Trump administration’s ongoing blitz of firings across the government. Defendants claim this power is insubstantial because agency heads can “freely veto” DOGE’s decisions. *Id.* But in the analogous context of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, the Supreme Court has made clear that the mere “capacity” to have the “last[.]word” on agency decisions—even if subject to override by agency heads—constitutes “significant” federal authority. *See Lucia v. SEC*, 585 U.S. 237, 247-49 & n.4 (2018) (holding that SEC administrative law judges’ authority to render decisions that “bec[a]me final” unless overridden by the SEC was “significant” and noting that “final decisionmaking authority is [not] a *sine qua non* of officer status”).

over vast swathes of the federal government” and that Mr. Musk is DOGE’s de facto leader. PI Mem. Op. at 24-27; *see* CREW PI Mem. at 20-25. These public statements and reports conflict with the untimely declaration of DOGE’s purported Acting Administrator. *See* Gleason Decl. ¶¶ 6, 17-23 (stating “Elon Musk does not work at” DOGE and characterizing DOGE’s functions as “limited”). Because Ms. Gleason’s representations are cast into doubt by an extensive public record, including Defendant Musk’s own admissible statements, *see* Fed. R. Evid. 801(d)(2), they should be tested through discovery. *See Cause of Action Inst. v. Off. of Mgmt. & Budget*, 10 F.4th 849, 858 n.4 (D.C. Cir. 2021) (recognizing that discovery may be granted in FOIA cases where agency affidavits are “called into question by contradictory evidence in the record”).

Accordingly, if the Court grants reconsideration (and it should not), it should allow CREW to conduct limited written and oral discovery prior to summary judgment briefing, including depositions of Ms. Gleason and individuals publicly identified as wielding authority on behalf of DOGE. The requested discovery will be carefully tailored *not* to seek communications with the President or his immediate staff, which would not answer whether DOGE wields authority *independent* of the President. *E.g., New Mexico v. Musk*, 2025 WL 783192, at \*5 (granting such targeted discovery from DOGE).

To be sure, CREW will oppose in due course any summary judgment motion as premature under Fed. R. Civ. P. 56(d) (a “court may ... allow time ... to take discovery” where the “nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition”). But since the Court “has broad discretion in its handling of discovery,” *CREW v. OA*, 566 F.3d at 225 (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 737 (D.C. Cir. 2007)), it may enter a discovery order now as a precursor to any summary judgment briefing.

## CONCLUSION

The Court should deny Defendants' motion for partial reconsideration, for an order setting an expedited briefing schedule, and for a stay of the Court's March 10, 2025

Memorandum Opinion and Order.

Dated: March 18, 2025

Respectfully submitted,

/s/ Nikhel S. Sus

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Jonathan E. Maier (D.C. Bar No. 1013857)  
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90031810)

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*Counsel for Plaintiff*

# Exhibit A



Jon Maier <jmaier@citizensforethics.org>

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## Re: CREW FOIA Request

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admin <admin@doge.eop.gov>

Thu, Mar 6, 2025 at 8:34 PM

To: "jmaier@citizensforethics.org" <jmaier@citizensforethics.org>

Dear Mr. Maier:

We are writing in reference to the Freedom of Information Act (FOIA) request that you submitted on behalf of the Center for Responsibility and Ethics in Washington (CREW) to the Office of Management and Budget (OMB) on January 24, 2025. That FOIA request sought information from the United States DOGE Service (USDS).

As set forth in Executive Order 14158, Establishing and Implementing the President's "Department of Government Efficiency," USDS sits within the Executive Office of the President, and the USDS Administrator reports to the President's Chief of Staff. Accordingly, OMB forwarded your request to USDS on February 26, 2025. We write now to inform you that USDS is subject to the Presidential Records Act, 44 U.S.C.S. § 2201 *et seq.*, and is not subject to FOIA. We therefore decline your request.

# Exhibit B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CITIZENS FOR RESPONSIBILITY )  
AND ETHICS IN WASHINGTON, )  
 )  
 ) CIVIL NO. 25-511  
Plaintiff, )  
 )  
v. ) Friday, March 7, 2025  
 )  
U.S. DOGE SERVICE, et al., ) 2:08 p.m. - 3:50 p.m.  
 )  
 )  
Defendant. )  
\_\_\_\_\_ )

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE CHRISTOPHER R. COOPER  
UNITED STATES DISTRICT JUDGE

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APPEARANCES: CITIZENS FOR RESPONSIBILITY AND ETHICS  
IN WASHINGTON  
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Washington, DC 20004  
202-408-5565  
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For the Plaintiff  
  
DOJ-Enrd  
Civil Division, Federal Programs  
Branch  
1100 L Street NW  
Washington, DC 20005  
202-353-7203  
Email: Andrew.m.bernie@usdoj.gov

For the Government

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COURT REPORTER: CHANDRA R. KEAN, RMR  
Official Court Reporter  
333 Constitution Avenue, NW  
Washington, DC 20001



1 think before we start with you, I think it would make  
2 more sense for me to get a bit more information from the  
3 government about the DOGE request.

4 I know we flagged a couple of issues in our minute  
5 order, just to put you on notice that we were interested  
6 in that, and that might affect the scope of the issues  
7 being discussed.

8 MR. BERNIE: Certainly, Your Honor, and thanks  
9 for -- thanks for giving us notice of those -- of those  
10 questions the Court had in advance.

11 THE COURT: Sure. And I will refer to it as  
12 DOGE as opposed to the other acronym, which sounds --  
13 sounds a lot more like other agencies.

14 MR. BERNIE: I'm used to saying USDS but  
15 I'll --

16 THE COURT: You call it what you will.

17 MR. BERNIE: But just to address the Court's  
18 question as to --

19 (Reporter request for clarification.)

20 MR. BERNIE: Can you hear me better now?

21 So just to address the USDS or DOGE request, I  
22 mean, there has been a relevant development.

23 Last night the Court -- the DOGE made a  
24 determination on that request. DOGE sent an email to  
25 plaintiff saying that the request was denied on the

1 grounds that USDS is not an agency subject to FOIA.

2 So from our perspective, USDS will not be  
3 processing that request on an expedited basis or  
4 otherwise.

5 Those are the facts. I mean, I'm happy to get into  
6 the implications.

7 I mean, we still think the PI should be denied on  
8 other grounds, as we said in our motion -- our  
9 opposition, independent of that, and that that legal  
10 issue should be briefed and decided before any potential  
11 processing of documents on USDS' behalf.

12 THE COURT: Okay. Well, thank you for that  
13 clarification.

14 I mean, so I guess that raises the question as to  
15 procedurally speaking how do we -- or how should we tee  
16 up that issue.

17 I take it that if I don't grant the PI and we were  
18 just to proceed on an expedited processing basis and I  
19 ordered DOGE to, you know, process -- you know, based on  
20 a conclusion that DOGE was in fact an agency and subject  
21 to FOIA, I ordered DOGE to process, you know, X-hundred  
22 of records a week or a month as I would in any FOIA  
23 request, I take it your response would be that DOGE  
24 would not -- would not do that absent some sort of court  
25 order on the merits.

1 MR. BERNIE: Right. I mean, we would -- we  
2 would ask the Court to decide the legal issue first. I  
3 mean, obviously if the Court were to issue a processing  
4 order without deciding the legal issue, we obviously  
5 recognize that we have to comply with court orders of  
6 course. But we would urge that issue to be decided  
7 first.

8 As to the vehicle as to which it decided, I mean,  
9 our answer, our response to the complaint, is due  
10 March 26th. Courts have -- courts in this district have  
11 sometimes resolved such issues on Rule 12 motions. We  
12 haven't decided yet whether we would make that argument  
13 as a basis for a partial motion to dismiss, but it could  
14 be teed up in that context. Depending on how the Court  
15 resolves any such motion, it could also be teed up in a  
16 motion -- you know, in a motion for summary judgment.

17 I guess our top line --

18 THE COURT: I guess -- so there are three  
19 options, right? I could, I suppose, grant a PI with a  
20 declaration contained in it saying that the Court finds  
21 that DOGE is an agency subject to FOIA.

22 That would be appealable.

23 MR. BERNIE: Correct.

24 THE COURT: Or we could do it on a 12(b) motion  
25 on an expedited basis or a motion for summary judgment

1 other grounds.

2 But the other thing I would say about that is  
3 before CREW filed their -- before CREW filed their  
4 reply, the -- and purported to narrow the FOIA request,  
5 their FOIA request, I mean, we would say were just  
6 plainly overbroad given the deadlines they sought.

7 I mean, they sought essentially every communication  
8 among USDS employees over a three-month period. All  
9 communications --

10 THE COURT: Okay. We'll get there later.

11 I mean, what I'm hearing from you is if from your  
12 perspective the DOGE request is off the table because  
13 there's been a determination that DOGE is not subject to  
14 FOIA, that leaves the other two OMB requests.

15 Prior to narrowing, you told me that it would take  
16 you at minimum three years to process that request, even  
17 on an expedited basis. Now that the request has been  
18 narrowed, has there been any undertaking by DOGE to  
19 estimate when it would be practicable or as soon as  
20 practicable under the expedited standard to process  
21 those two requests?

22 MR. BERNIE: Right. So just to wrap up my  
23 answer to the first part of your question first.

24 THE COURT: Okay.

25 MR. BERNIE: So I think as Your Honor's

1 for a preliminary injunction based in part on lack of --  
2 unlikelihood of success on the merits --

3 MR. BERNIE: Right.

4 THE COURT: -- right?

5 And if it were the case that you knew when you  
6 filed that opposition that DOGE was taking the position  
7 that it was not subject to FOIA, wasn't it your  
8 obligation to tell me that that's why they're not going  
9 to succeed on the merits and brief it?

10 MR. BERNIE: No -- well, we cited in the  
11 opposition, and that remains -- and it remains our  
12 position today, which is that we think that the Court  
13 can deny the motion without even addressing that because  
14 they just haven't shown the type of irreparable harm,  
15 and none of the other requirements are met.

16 My point, though, in just -- my point, though, in  
17 just explaining why I think that the different state of  
18 the request was relevant to our decision when we were  
19 briefing the case, is back when they were requesting  
20 literally every document involving the U.S. DOGE Service  
21 with any agency outside the Executive Office of the  
22 President, every document from the U.S. Digital Service  
23 for a two-and-a-half month period, other extremely broad  
24 categories of documents, it was extremely reasonable, I  
25 think, for us to conclude based on those requests that

1       it was so clear that they were not entitled to  
2       preliminary injunction as to those requests that we  
3       did -- that there was no need to separately address that  
4       legal issue which we had never addressed before.

5               So they have now, through their reply, set forth  
6       basically a completely different set of requests.

7               THE COURT: Okay.

8               MR. BERNIE: But just on the merits of it, our  
9       position would be when the case is briefed that the  
10      functions performed by the U.S. DOGE Service are  
11      advisory; that they have no -- that they have no  
12      authority independent of the President. I don't think  
13      there's anything in the Executive Order referenced to  
14      Executive Order 14158 that formed the U.S. DOGE Service  
15      that contradicts that.

16              But in any event, we don't think the Court needs to  
17      address that issue to deny the motion.

18              THE COURT: Okay. The Court will take the  
19      matter under advisement, and we will get something out  
20      as soon as we can.

21              I will say that it is likely that the order will  
22      include a preservation order, and so we can assume that  
23      that order should run from now. So if you could advise  
24      your clients of that as soon as possible, I think that  
25      would be helpful. Okay.

# Exhibit C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC PRIVACY INFORMATION  
CENTER

Plaintiff,

Civil Action No. 02-620 (CKK)

v.

OFFICE OF HOMELAND SECURITY and  
TOM RIDGE, in his official capacity as  
Director of Homeland Security

Defendants.

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**FILED** ✓

**DEC 26 2002**

**NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT**

**MEMORANDUM OPINION**

(December 26, 2002)

Plaintiff Electronic Privacy Information Center ("EPIC") brought a four-count complaint against the Office of Homeland Security ("OHS") and its Director Tom Ridge ("Ridge") (collectively "Defendants") for injunctive and other appropriate relief, seeking the expedited processing and release of agency records requested from OHS. Pending before this Court is Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Def. Mot."). Plaintiff has filed a Motion to Stay Proceedings Pending Discovery ("Pl. Mot."). Upon review of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, Plaintiff's Motion to Stay Proceedings, Defendants' Opposition ("Def. Opp."), and Plaintiff's Reply ("Pl. Reply"), the Court shall deny Defendants' Motion without prejudice, and shall grant Plaintiff's Motion with respect to its request for discovery.

**I. BACKGROUND**

On March 20, 2002, Plaintiff made a request pursuant to the Freedom of Information Act

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(“FOIA”), 5 U.S.C. 552, to OHS for “all records relating to efforts to standardize driver's licenses across the country in the possession of [OHS], including but not limited to memos, talking points, reports and draft legislation.” Plaintiff’s Complaint ¶ 7. Plaintiff also requested “all records associated with [the trusted-flier program] and other proposals being considered by [OHS] that rely on biometric technology to identify citizens and visitors to America.” *Id.*

As a basis for their Motion, Defendants maintain that neither OHS nor the Homeland Security Council (“HSC”) are “agencies” for the purposes of FOIA, and thus cannot be subjected to FOIA information requests. *See* Def. Mot. at 3. Defendants argue that OHS’s status as a non-agency means that this Court lacks jurisdiction to hear this case and therefore it should dismiss Plaintiff’s complaint. *Id.* In response, Plaintiff filed its Motion, claiming that it is entitled to discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure<sup>1</sup> before the Court rules on Defendants’ Motion. Plaintiff asserts that it is “currently unable to present certain material facts essential to [its] opposition to defendants’ motion.” Pl. Opp. Exhibit 1, Declaration of David L. Sobel (Sobel Decl.) ¶ 2. The current record provided by Defendants consists— with one exception— of public record documents.<sup>2</sup> Plaintiff claims that in order to be able to oppose

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<sup>1</sup> “Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” Fed. R. Civ. P. 56(f).

<sup>2</sup> Defendant filed in support of its Motion the following exhibits: Executive Order 13228 (“Establishing the Office of Homeland Security and the Homeland Security Council”), Exhibit 1; a six-page printout from the White House website (“President Establishes Office of Homeland Security”), Exhibit 2; President George W. Bush’s remarks at the swearing-in of then-Governor Tom Ridge as Director of the Office of Homeland Security, Exhibit 3; Homeland Security Presidential Directive - 1, Exhibit 4; Homeland Security Presidential Directive - 2; Exhibit 5; Joint Statement by the Deputy Prime Minister of Canada and Director Ridge on Progress Made

Defendants' Motion it requires facts "within the exclusive knowledge and control of the government," and that prior adjudications of an entity's status for FOIA purposes have "not rested solely upon publicly available documents and directives." Sobel Decl. ¶ 4. Plaintiff has confined its request for discovery to include only material information that will establish OHS's entity status. *Id.* ¶ 6. Specifically, Plaintiff seeks to discover material facts concerning the following information to justify its opposition to Defendants' Motion:

- (a) the staffing and organizational structure of the Office;<sup>3</sup>
- (b) the manner in which the Office has fulfilled the responsibilities assigned to it in Executive Order 13228;
- (c) the nature of the Office's communications and other interactions with federal agencies and officials, including whether OHS has issued guidelines, instructions, or directives to such agencies and officials;
- (d) whether federal agencies and officials have been directed to obtain OHS approval before pursuing policies or activities relating to homeland security; and
- (e) whether the President has expressly approved OHS decisions, findings or other initiatives.

*Id.* ¶ 5.

In response to Plaintiff's discovery request, OHS maintains that its status is plainly

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in the Smart Border Action Plan, Exhibit 6; Homeland Security Presidential Directive - 3, Exhibit 7; Notice seeking comments on the Homeland Security Advisory System, 67 Fed. Reg. 12047 (Mar. 18, 2002), Exhibit 8; President George W. Bush's "Securing the Homeland, Strengthening the Nation" Report, Exhibit 9; Testimony of Director of Office of Management and Budget, Mitchell E. Daniels, Jr., Before Senate Committee on Governmental Affairs, April 11, 2002, Exhibit 10; Letter from Director Ridge to Senator Joseph Lieberman, April 10, 2002, Exhibit 11; President George W. Bush's Proposal for The Department of Homeland Security, June 2002, Exhibit 12; Organizational Charts for the Office of Homeland Security, Exhibit 13; Executive Order Establishing a Transition Planning Office for the Department of Homeland Security Within the Office of Management and Budget, June 20, 2002, Exhibit 14; President George W. Bush's Message to the Congress of the United States transmitting proposed legislation to create a new Cabinet Department of Homeland Security, June 18, 2002, Exhibit 15.

<sup>3</sup> Defendant's Exhibit 13, containing organizational flowcharts of OHS was submitted with its Opposition to Plaintiff's Motion.

sufficient under law, as evidenced by the record. Def. Opp. at 1. Defendants have proffered various public documents such as OHS's "charter" executive order, all three existing Homeland Security Presidential Directives, and additional congressional materials, which they claim "demonstrate that operational authority for homeland security resides in executive branch agencies," and not in OHS. *Id.* Defendants maintain that more information is not required to determine whether or not OHS is an agency for FOIA purposes.

## II. DISCUSSION

### A. *Legal Standards*

#### 1. Motion to Dismiss

Defendants bring their Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). In reviewing motions to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), district courts employ a standard virtually identical to that used for 12(b)(6) motions. *See, e.g., Vanover v Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999) (*citing Pitney Bowes Inc. v U.S. Postal Serv.*, 27 F. Supp.2d 15, 19 (D.D.C. 1998)). In reviewing a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, a court will not grant the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Accordingly, at this early stage in the proceedings, the Court assumes the veracity of all factual allegations set forth in Plaintiff's Complaint. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Moreover, "[t]he complaint must be 'liberally construed in favor of the plaintiff,' who must be granted the benefit of all inferences that can be derived from the facts alleged." *Schuler*

*v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). Nonetheless, the Court is not bound to accept the legal conclusions of the non-moving party. *See Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997). In the 12(b)(1) context, however, the plaintiff bears the burden of proving jurisdiction. *See Vanover*, 77 F. Supp.2d at 98. In its consideration of a motion under 12(b)(1), a district court may look beyond the pleadings to inquire into facts pertinent to its jurisdiction. *See Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947). “[R]uling on a Rule 12(b)(1) motion may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction.” *Herbert v. Nat’l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992) (citing *Collins v. New York Cent. Sys.*, 327 F.2d 880 (D.C. Cir. 1963); *see also Wilderness Soc’y v. Griles*, 824 F.2d 4, 16 n.10 (D.C. Cir. 1987) (“What is clear is that under . . . Rule 12(b)(1) . . . a district court must give the plaintiff the opportunity to discover evidence relevant to his jurisdictional claim.”). “Even under Rule 12(b)(1), procedural safeguards equivalent to those in Rule 56 are required, with Rule 56 used selectively as a guide for ensuring fairness.” *Gordon v. Nat’l Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).

## 2. Motion for Summary Judgment

Defendants, in the alternative, bring a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants, as the moving parties, bear the “initial responsibility of informing the district court of the basis for [their] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [they] believe[] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c). Plaintiff, in response to Defendants’ motion, must “go beyond the pleadings and by [its] own affidavits, or by

depositions, answers to interrogatories, and admissions on file, ‘designate’ specific facts showing that there is a genuine issue for trial.” *Id.* at 324 (internal citations omitted). The Court is to draw all inferences from the supporting records submitted in favor of the party opposing the summary judgment motion. However, mere allegations or denials in the non-moving party’s pleadings are insufficient to defeat an otherwise proper motion for summary judgment.

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Furthermore, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); the court must determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251. Rule 56 also provides “essential safeguards” aimed at “ensuring fairness.” *Gordon*, 675 F.2d at 360.

One of these “safeguards” is Rule 56(f), which states: “Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” Fed. R. Civ. P. 56(f). To succeed on a Rule 56(f) Motion, the Plaintiff must establish how the specific discovery it seeks would create a genuine issue of material fact. *See Carpenter v. Federal Nat’l Mortgage Ass’n*, 174 F.3d 231, 237 (D.C. Cir. 1999). The Court may also deny a motion for summary judgment, or postpone its ruling by granting a stay pending discovery “if the party opposing the motion adequately explains why, at what timepoint, it cannot present by affidavit facts needed to defeat the motion.” *Strang v. United States Arms Control and Disarmament Agency*, 864 F.2d 859, 861

(D.C. Cir. 1989). “A Rule 56(f) affidavit or other supporting material must provide reasons why the non-moving party cannot present facts in opposition and how additional discovery will provide those facts, not simply assert that ‘certain information’ and ‘other evidence’ may exist and may be obtained through discovery.” *Richardson v. Nat’l Rifle Ass’n*, 871 F. Supp. 499, 501-502 (D.D.C. 1994). Furthermore, discovery will not be granted under Rule 56(f) where the non-movant seeks speculative, vague, or irrelevant discovery. *See Strang*, 864 F.2d at 861.

**B. “Agency” Under FOIA**

FOIA requires “agenc[ies]” to “make available to the public” various types of information. 5 U.S.C. § 552(a). The Act defines “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” *Id.* at § 552(f)(1). This definition “was not, however, meant to cover ‘the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.’” *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (*quoting* H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)). From FOIA’s text and congressional intent, this Circuit has identified

“three interrelated factors” relevant to determining whether those who both advise the President and supervise others in the Executive Branch exercise “substantial independent authority” and hence should be deemed an agency subject to the FOIA. These factors are: (1) “how close operationally the group is to the President,” (2) “whether it has a self-contained structure,” and (3) “the nature of its delegated authority.” These three factors are not necessarily to be weighed equally; rather each factor warrants consideration insofar as it is illuminating in the particular case.

*Id.* (*citing Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993)). “The question is not only

whether the President sets the [assigned] goal, but the generality of that goal; the more general the goal the greater the likelihood that the responsible entity is vested with some element of discretion and is not just advising or assisting the President.” *Id.* at 565.

Defendants maintain that based upon the public documents they have submitted with their briefs, this Court can conclude that OHS is not an agency for the purposes of FOIA. *See* Def. Mot. at 23-35. Defendants point to excerpts from congressional testimony, a letter to a United States Senator, an Executive Order, and Presidential Directives to make their point. *Id.* Defendants also claim that the size of the record reflects only the short length of time OHS has been in existence and not any effort by Defendants to withhold relevant information. Def. Opp. at 2. Defendants also warn the Court that failure to find OHS a non-agency would place it in the position of having to answer a “significant constitutional question.” Def. Mot. at 35.

Plaintiff responds that courts, in determining an entity’s agency status, have relied on “facts concerning the actual manner in which the authority of the subject entity has been exercised, which . . . were within the exclusive knowledge and control of the government. Those cases have not rested solely upon publicly available documents and directives.” Sobel Decl. ¶ 4. Plaintiff claims that the lack of information provided in this case stands in contrast to the record established in *Armstrong*, and therefore posits that “there is simply no clear indication here that the authority of the OHS cannot ‘be exercised without the consent of the president.’” Pl. Mot. at 8 (*quoting Armstrong*, 90 F. 3d at 563). Plaintiff also points to the public documents submitted by Defendants arguing that the evidence does not foreclose the possibility that OHS may exercise some independent authority. Plaintiff maintains that many of Defendants’ arguments pertain to HSC and not to OHS. Pl. Mot. at 9-10. Furthermore, while the Executive Order establishing

HSC and OHS states that HSC “shall be responsible for advising and assisting the President with respect to all aspects of homeland security,” similar language is not applied to the description of the OHS. Pl. Mot at 11; Def. Mot. Exhibit 1 (Executive Order 13228) §§ 1-3, 5. Lastly, Plaintiff notes that the Executive Order establishing OHS uses vague terms, such as “develop,” “coordinate,” and “review,” which Plaintiff argues “mitigates in favor of a conclusion that OHS exercises the requisite ‘independent authority.’” Pl. Mot. at 13-14.

**C. The Court Cannot Grant Defendants’ Motion**

**1. Motion to Dismiss**

Plaintiff has the burden of showing that this Court has jurisdiction to hear its case. *Vanover*, 77 F. Supp. 2d at 98. However, Plaintiff claims that if it were allowed discovery it would be able to obtain “information that is within the exclusive knowledge and control of defendants [that] is likely material to the jurisdictional issue defendants raise.” Pl. Mot. at 7. While Plaintiff has not shown that this Court has jurisdiction to hear this case, it is clear that the information Plaintiff would need to make such a showing rests solely with Defendants who object to Plaintiff’s request for discovery.

The Court agrees with Plaintiff that Defendants’ briefs and exhibits filed in support do not foreclose the possibility that OHS is an agency. First, the Court notes that Defendants have presented no affidavits in support of their position. The Court observes that given the strong presumption given government affidavits in FOIA cases, *see Safecard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (“Agency affidavits are accorded a presumption of good faith. . . .”), an affidavit addressing the scope of OHS’s independent authority would be strong evidence in favor of the Defendants’ position, *see Public*



*Citizen Health Research Group v. Food and Drug Administration*, 997 F. Supp 56, 72-73 (D.D.C. 1998) (“If a court is satisfied that the affidavits supplied by the agency meet the established standards for summary judgment in a FOIA case and that plaintiff has not adequately called these submissions into question, no factual dispute remains, and discovery is inappropriate.”) (citations omitted). Instead, Defendants have provided the Court with various public documents, and pages of explanation of their contents, in an effort to show how OHS functions. However, none of these documents foreclose the possibility that OHS has acted with independent authority in other, undocumented instances. The Court notes with interest that OHS’s “mission” is “to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks,” and that OHS is instructed to “*perform the functions necessary to carry out this mission, including the functions specified in section 3 of this order.*” Executive Order 13228 § 2 (emphasis added). Therefore, OHS’s charter document provides the Office, at least on paper, with the authority to do whatever is “necessary” to meet its mission. The fact that Defendants can point to instances where OHS has acted “solely to advise and assist the President,” Def. Mot. at 25, does not mean that OHS acts only in that capacity. Furthermore, it cannot be said that “each one of the [OHS’s] enumerated . . . duties is directed at providing . . . advice and assistance to the president,” as was the case when the D.C. Circuit examined the Council of Economic Advisers’ status. *Rushford v. Council of Economic Advisers*, 762 F.2d 1038, 1042 (D.C. Cir. 1985) (determining that the Council “should not be considered an agency for the purposes of FOIA”); *see also* Executive Order 13228 §§ 2-3.

Given that Defendants have failed to provide evidence that is definitive on the issue of the OHS’s agency status and the fact the relevant evidence on this issue rests solely with

Defendants, if this Court is to rule on Defendants' Motion to Dismiss it "must give the plaintiff the opportunity to discover evidence relevant to [its] jurisdictional claim." *Wilderness Soc'y*, 824 F.2d at 16 n.10. The Court will therefore allow Plaintiff the opportunity to conduct limited discovery on this narrow threshold question, as discussed later in this Opinion.

## 2. Defendants' Motion for Summary Judgment

The Court similarly finds that it cannot grant Defendants' Motion for Summary Judgment. As detailed above, Plaintiff lacks access to information to challenge Defendants' position, and Defendants have not been able to establish to the Court's satisfaction, that OHS is not an agency. Given this determination, the Court cannot grant Defendants' Motion for Summary Judgment.

In addition to the analysis in the preceding section, the Court finds noteworthy the fact that the *Armstrong* court was aided in its analysis of the National Security Council's ("NSC") agency status by a deposition by the NSC's Senior Director for Intelligence Programs, who stated "I don't have the ability to issue instructions or directions to agencies. I would merely convey a decision made by the President or by the National Security Adviser or Deputy National Security Adviser on behalf of the President." *Armstrong*, 90 F.3d at 561. This deposition, in part, led the *Armstrong* court to "conclude that the NSC staff does not 'direct' the CIA in the conduct of its business, nor tell the DCI what to do except insofar as it may relay the decisions of the President and his senior advisers on the statutory Council." *Id.* A deposition by National Security Adviser Anthony Lake was also considered by the *Armstrong* court in reaching its conclusion that the NSC "has a structure sufficiently self-contained that the entity could exercise substantial independent authority." *Id.* At 559-60. Although the *Armstrong* court said nothing about the

need for such evidence in making such a determination, the fact that it had such evidence at its disposal and quoted from two depositions suggests that the consideration of such evidence is, at the very least, helpful, if not required, in determining the status of an entity positioned within the Executive Office of the President.

Much of the Court's concerns would be addressed by such additional evidence. Defendants argue that additional evidence is not required because courts deciding whether or not an entity meets FOIA have relied on statutes, executive orders and presidential directives. Def. Opp. at 4-5. Defendants also maintain that Plaintiff has not shown additional evidence is warranted in this case and that its discovery requests are vague, speculative or irrelevant. *Id.* at 6. The Court disagrees. First, as shown above, courts have looked beyond public documents in efforts to determine whether or not an entity was an agency for FOIA purposes. Such evidence would be helpful especially in this case where the language establishing the entity's power is broad and lacking in firm parameters. Indeed, in *Armstrong*, an affidavit, in addition to analysis of the relevant statute, assisted the Court of Appeals in determining the nature of the authority delegated to the NSC.<sup>4</sup> Defendants' citation to Executive Order 13228 and the Homeland Security Presidential Directives clearly suggest that OHS operates only to assist and advise the President; it does not, however, provide definitive proof that OHS is not an agency. Furthermore, Plaintiff has shown that its request for discovery is necessary and relevant.

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<sup>4</sup> The district court in *Meyer v. Bush*, also looked beyond executive orders in determining whether or not the Presidential Task Force on Regulatory Relief was an agency subject to FOIA. No. 88-3112, 1991 U.S. Dist. LEXIS 13626 (D.D.C. Sept. 30, 1991), *rev'd and remanded*, 981 F.2d 1288 (D.C. Cir. 1993). The district court relied on letters, memoranda and statements in making its determination. *Id.* at \* 20-22.


3. Discovery

The Court shall permit Plaintiff sixty (60) days in which to complete discovery related solely to whether or not OHS is an agency. Discovery may not extend into the merits of this case, and should be narrowly tailored to achieve the goal of this grant. Plaintiff's suggested areas of discovery should be narrowed further. Specifically, Plaintiff may inquire into the nature of the authority delegated to OHS to determine whether or not it possesses independent authority, or operates exclusively, for example, as the staff of the HSC. After completion of this sixty (60) day period, Defendants shall have 30 days in which to refile their Motion if they so choose.

**III. CONCLUSION**

For the foregoing reasons, the Court shall deny Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment without prejudice. The Court shall grant Plaintiff's Motion with respect to its request for discovery. An order accompanies this memorandum opinion.

December 26, 2002

  
COLLEEN KOLLAR-KOTELLY  
United States District Judge