UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KATE DOYLE, NATIONAL SECURITY ARCHIVE, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs,

17 Civ. 2542 (KPF)

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, EXECUTIVE OFFICE OF THE PRESIDENT,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' FOIA CLAIMS AND DISMISSAL OF PLAINTIFFS' REMAINING CLAIMS

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Preliminary Statement

Plaintiffs submitted a Freedom of Information Act ("FOIA") request to the U.S. Secret Service ("Secret Service"), seeking to obtain records of Presidential visitors that they indisputably could not obtain directly from the President. Specifically, plaintiffs seek certain data fields contained in Worker and Visitor Entry System ("WAVES") and Access Control Record ("ACR") records of visits to the White House Complex, as well as records of Presidential visitors at Mar-a-Lago containing the same data fields, for the period January 20 through March 8, 2017.

The D.C. Circuit previously considered the status of WAVES and ACR records in *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013). Given the clear Congressional intent "to place documents like the President's appointment calendar beyond the reach of FOIA," and construing the statutory text "in light of both that intent and the canon of avoiding constitutional separation-of-powers concerns," the D.C. Circuit held that WAVES and ACR records that "disclose the kind of information contained in such documents are not agency records within the meaning of FOIA." *Id*. at 233. That rationale applies with equal force in this case, with regard to both WAVES and ACR records and Presidential schedules and related information reflecting Presidential visitors at Mar-a-Lago.

Apart from Presidential schedules and related information, which are not subject to FOIA, the Secret Service's broad search for records of Presidential visitors at Mar-a-Lago revealed only one responsive record—an email originating from the State Department containing the names of individuals who would be accompanying the Japanese Prime Minister and his spouse during their visit to Mar-a-Lago on February 10 and 11, 2017. Although it is unclear whether each of these individuals was a Presidential visitor, the Secret Service released the email to plaintiffs with limited redactions to protect the personal privacy of non-visitor third parties and an employee of the Executive Office of the President ("EOP"). The Secret Service's production was limited to

one document because the agency maintains no system for tracking Presidential visitors at Mar-a-Lago, as it does at the White House Complex. The Secret Service's search was more than adequate, and the personally identifying information it withheld from the one responsive record is exempt from disclosure under FOIA exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) & (7)(C). To the extent the Secret Service located additional operational records simply repeating the fact that the Japanese Prime Minister and his spouse visited the President at Mar-a-Lago, the agency was not required to expend resources processing those records in order to release information that has already been disclosed by the White House and is also duplicative of the record the Secret Service produced. Defendant Department of Homeland Security ("DHS") is therefore entitled to summary judgment on plaintiffs' FOIA claims.

Plaintiffs' remaining claims under the Federal Records Act ("FRA"), Administrative Procedure Act ("APA"), Presidential Records Act ("PRA"), and Declaratory Judgment Act ("DJA") should be dismissed for lack of subject matter jurisdiction and/or failure to state a claim. Plaintiffs seek to challenge defendants' practices regarding the disposition of records of visits to "agency components" of EOP—the very types of claims that courts have held are not subject to judicial review. Without an underlying substantive claim, plaintiffs are not entitled to declaratory relief, nor can they obtain such relief on their FOIA claims.

BACKGROUND

I. Records of Visitors to the White House Complex

As the safety of the President and Vice President implicates national security and other governmental interests of the highest order, Congress has directed that both of these constitutional officers receive protection from the Secret Service. *See* 18 U.S.C. §§ 3056(a), 3056A(a). No other official (except the President-elect and Vice President-elect) is required by law to accept such protection. *Judicial Watch*, 726 F.3d at 211 n.2. The Secret Service's protection extends to the

physical persons of the President and Vice President, as well as the White House Complex, which contains the offices of the President, the Vice President, and their respective staff. *See* 18 U.S.C. § 3056A(a)(1), (2), (4), (6); *see also* Declaration of James M. Murray ("Murray Decl.") ¶ 3; Declaration of Philip C. Droege ("Droege Decl.") ¶ 2.

A. The EFACS and WAVES Systems

To fulfill its statutorily mandated function to protect the White House Complex, the Secret Service clears proposed visitors for entry and controls the entry and exit of visitors. Murray Decl. ¶¶ 3-6. The Secret Service utilizes two interrelated electronic systems: the Executive Facilities Access Control System ("EFACS"), for controlling and monitoring access to the White House Complex, and WAVES, for vetting visitor information and granting access to the White House Complex. Murray Decl. ¶ 7. The Secret Service operates EFACS and WAVES on behalf of the President, and pursuant to a 2015 Memorandum of Understanding, the President is the business owner of those systems. Murray Decl. ¶ 16; Declaration of Charles Christopher Herndon ("Herndon Decl.") ¶ 5 & Exh. B ("2015 MOU").

The 2015 MOU was the result of a Presidential Memorandum issued by President Obama creating the Presidential Information Technology Community. Herndon Decl. ¶¶ 3-4 & Exh. A ("Memorandum"). The purposes of the Memorandum were to "ensure that information resources and information systems provided to the President, Vice President, and EOP are efficient, secure, and resilient; establish a model for Government information technology management efforts; reduce operating costs through the elimination of duplication and overlapping services; and accomplish the goal of converging disparate information resources and information systems for the EOP." Memorandum § 1. Pursuant to the MOU, the President, and the Director of White House Information Technology ("DWHIT") on his behalf, control the EFACS and WAVES systems, and the Secret Service operates those systems as a service provider. *Id.* ¶ 8. As a service

provider, the Secret Service cannot make changes to the systems, or make purchases related to the systems, without consent of the DWHIT or his designee. *Id.* ¶ 8-9, Murray Decl. ¶ 19-20. And if the Secret Service wants to view a WAVES or ACR record once a visit is completed, the White House must grant that permission. Murray Decl. ¶ 19.

To make an appointment, authorized White House pass holders, including, but not limited to, Presidential and Vice Presidential staff, provide the Secret Service with information on anticipated visitors to the White House Complex. *See id.* ¶ 8 (describing how information is entered and transmitted to Secret Service). This information includes, *inter alia*, the proposed visitor's name and other personal information, including date of birth and Social Security number; the date, time and location of the planned visit; the name and email address of the official or employee submitting the request; the name of the person to be visited; and the date of the request. *Id.*; Declaration of William Willson ("Willson Decl.") ¶ 7. The Secret Service uses that information solely to determine whether there is any protective concern with admitting the proposed visitor to the White House Complex, as well as to verify the visitor's admissibility at the time of the visit. Murray Decl. ¶ 8. The majority of the information contained in WAVES records consists of information that the authorized White House pass holder has provided to the Secret Service, *id.*, although some WAVES records may be annotated by Secret Service personnel, in note and description fields, with limited information resulting from background checks and/or with instructions, including coded instructions to Secret Service officers, *id.* ¶ 9.

Once a visitor is cleared into the White House Complex, he or she usually receives a badge, which is swiped over one of the badge readers at entrances to and exits from the Complex. Swiping a badge automatically creates an ACR within EFACS. *Id.* ¶ 10. An ACR includes information such as the visitor's name and badge number, the time and date of the swipe, and the post at which the swipe was recorded. *Id.* ¶ 11. After the visit, WAVES records are typically updated

electronically with information showing the time and place of the visitor's entry into and exit from the White House Complex. *Id.*

B. The Secret Service's Transfer and Deletion of WAVES and ACR Records

After a visit is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records. *Id.* ¶ 13; Droege Decl. ¶ 9. The President, by contrast, has a continuing interest in such records for their operational and historical value. Murray Decl. ¶ 14; Droege Decl. ¶ 7. Accordingly, it has been the practice of the Secret Service, since at least 2001, to transfer newly-generated WAVES records to the White House Office of Records Management ("WHORM"), generally every 30 to 60 days. *See* Murray Decl. ¶ 13.[1] The Secret Service then deletes WAVES records from its computer system once they are transferred to the WHORM. *Id.* Similarly with respect to ACR records, the Secret Service and the White House, at least as early as 2001, and upon revisiting the issue in 2004, recognized and agreed that they should be treated in a manner generally consistent with the treatment of WAVES records, and thus should be transferred to the WHORM and deleted from the Secret Service's computers. *Id.* ¶ 15. In May 2006, the Secret Service transferred ACR records covering the period from January 2001 to April 2006 to the WHORM. *Id.* Currently, the after-visit records that are transferred to the WHORM constitute a combination of WAVES and ACR information. *Id.*

In May 2006, the Secret Service Records Management Program and the WHORM entered into a Memorandum of Understanding, which both documented past practice and interests as understood at the time regarding WAVES and ACR records, and confirmed WHORM's management and custody of them. *See* Murray Decl. ¶ 14 & Exh. 1 ("2006 MOU"); Droege Decl. ¶ 6. The 2006 MOU continues to reflect the current practices and interests of the White House

[1] The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006. Murray Decl. ¶ 13.

and Secret Service regarding WAVES and ACR records. Droege Decl. ¶ 8. The 2006 MOU provides, among other things, that the President has a continuing interest in WAVES and ACR records, and continues to use the information contained in such records for various historical and informational purposes. Murray Decl. ¶ 14; 2006 MOU ¶ 20. The 2006 MOU reflects that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records." 2006 MOU ¶ 24. The Secret Service acknowledges in the 2006 MOU that its temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM. 2006 MOU ¶ 22.

C. The Former Voluntary Disclosure Policy

Although not required by law, in 2009, the White House adopted a policy of voluntarily disclosing certain fields of data contained in a subset of WAVES and ACR records. Droege Decl. ¶ 12; *see also Judicial Watch*, 726 F.3d at 214 & n.6. That policy did not apply to records and information implicating national security, particularly sensitive meetings, the personal safety of EOP staff, and visits from purely personal guests of the first and second families. Droege Decl. ¶ 13. The policy was rescinded on April 14, 2017, and is no longer in effect. *Id.* ¶ 14.

II. The President's Schedule

To fulfill its protective mission, the Secret Service also relies on information regarding the President's schedule provided by the White House Office. Murray Decl. ¶ 22. Each evening, staff in the White House Office (which includes the Office of Presidential Scheduling) provide the President's schedule to a limited number of Secret Service personnel with an operational need to know the President's schedule. *See id.* (describing mechanisms by which schedule is transmitted). A Secret Service employee who needs access to the President's schedule must first request and receive approval from the White House Office. *Id.* ¶ 23. Presidential schedules belong to the

White House Office and not the Secret Service. *Id.* ¶ 24. They are provided to and used by the Secret Service solely for the purpose of allowing the Secret Service to perform its mandatory duty to protect the President, other protectees, and the White House Complex. *Id.*

III. The March 10, 2017 FOIA Request and the Secret Service's Response

On March 10, 2017, plaintiffs submitted a FOIA request to the Secret Service seeking (1) WAVES and ACR records from January 20 through March 8, 2017, and (2) records of "presidential visitors" at Trump Tower and Mar-a-Lago for the same period. Second Declaration of Kimberly E. Campbell ("Campbell Decl.") ¶ 6 & Exh. A ("March 10 FOIA request"). From these two categories of records, the request "specifically seeks the same 28 fields of data that previously were posted on the White House Visitor Records Requests website." *Id.*; *see* ECF No. 32 ("Am. Complt.") ¶ 39.[2]

The Secret Service did not search for or process the requested WAVES or ACR records because those records are Presidential records, not Secret Service records. Campbell Decl. ¶ 7. Nor did the agency search for records of Presidential visitors at Trump Tower, as the President did not visit Trump Tower during the relevant time period. *Id.* ¶ 8. The Secret Service did, however, conduct a broad search for records of Presidential visitors at Mar-a-Lago. *Id.* ¶¶ 10-30.

A. The Secret Service's Search

At the time of plaintiffs' request, the Secret Service's protective efforts and the particular protective situation at Mar-a-Lago were newly developed, and it was unclear what, if any, record

[2] Plaintiff Kate Doyle alleges she submitted another FOIA request, dated January 23, 2017, seeking WAVES and ACR records for January 20 through 22, 2017, and then filed an administrative appeal on February 24, 2017. Am. Complt. ¶¶ 34-35. The Secret Service has no record of receiving or being notified of this FOIA request or administrative appeal, although Doyle has presented documents purporting to indicate that facsimiles were sent on the identified dates. Campbell Decl. ¶¶ 4-5. Regardless, any dispute as to receipt of the January 23 FOIA request is immaterial, as the WAVES and ACR records (for January 20 to 22) sought by that request are encompassed within the WAVES and ACR records (for January 20 to March 8) sought by the March 10 FOIA request.

systems or record groupings might exist in regard to who visited the President at Mar-a-Lago, or where such record systems or record groupings might be located. Campbell Decl. ¶ 9. Therefore, the Secret Service determined to conduct a broad set of searches to determine what, if any, record systems or record groupings existed that might contain information potentially responsive to plaintiffs' request, in particular the request for the 28 fields of data found in the previously posted WAVES records. *Id.* ¶ 10.

The Secret Service identified four offices or divisions that could potentially have responsive documents: (1) the Protective Intelligence Division ("PID"), which conducts background checks; (2) the Miami Field Office ("Miami FO") and (3) the West Palm Beach Resident Office ("West Palm Beach RO"), which would most likely have involvement in President Trump's visits because they are geographically located near Mar-a-Lago; and (4) the Presidential Protective Division ("PPD"), which has direct operational responsibility for the protection of the President, including when he is at Mar-a-Lago. *Id.* ¶ 16. The PID searched for records of background checks for Presidential visitors to Mar-a-Lago during the relevant period, and found no records. *Id.* ¶ 17. The Miami FO, West Palm Beach RO, and PPD searched for paper and electronic records reflecting that an individual visited with the President at Mar-a-Lago during the relevant period, and forwarded potentially responsive records for review. *Id.* ¶¶ 18-19.

The Secret Service also conducted a broad key-word search of the email accounts of employees within the PPD, West Palm Beach RO, and Miami FO, as well as the Dignitary Protective Division (DPD),[3] for the time period January 20 to March 8, 2017. *See id.* ¶ 20 (identifying search terms). The email search was conducted within the Secret Service's Enterprise Vault, which contains e-mails sent, received, or deleted by all Secret Service employees. *Id.* This

[3] E-mail accounts of DPD employees were searched, as it appeared that the Prime Minister of Japan had visited President Trump at Mar-a-Lago during the relevant period. Campbell Decl. ¶ 20 n.1.

search captured a large volume of e-mails, some with attachments. *Id.*

After de-duplication, there were over 4000 e-mails and attachments, which the Secret Service then reviewed for responsiveness. *Id.* ¶¶ 21-22. Many of the e-mails and attachments consisted of copies of media reports concerning Presidential visits to Mar-a-Lago; these were removed as non-responsive. *Id.* ¶ 23. Pursuant to agreement with plaintiffs, the Secret Service also treated as non-responsive records regarding family members, cabinet members, and White House staff who were present at Mar-a-Lago, *id.* ¶ 24, as well as records reflecting the names of local law enforcement and support personnel scheduled to have their photographs taken with the President, *id.* ¶ 25. *See also* ECF Nos. 33-4, 33-5, 33-6.

B. The Records Identified by the Search

Upon review of the remaining records, the Secret Service determined that it had no records directly responsive to the request for records of Presidential visitors at Mar-a-Lago. Campbell Decl. ¶ 13. There is no system for keeping track of visitors to Mar-a-Lago, as there is at the White House Complex. *Id.* ¶ 11. Consistent with the fact that the Secret Service is not charged with protection of Mar-a-Lago, as it is with the White House Complex, *see* Murray Decl. ¶ 3, there is no Secret Service system that controls access to Mar-a-Lago, and the search confirmed there is no grouping, listing, or set of records that reflect Presidential visitors at Mar-a-Lago, in particular the data fields specifically requested by plaintiffs. Campbell Decl. ¶¶ 10-13.

In fact, the Secret Service's broad search for responsive records ultimately located just a few scattered and repetitive pieces of Mar-a-Lago Presidential visitor information. *Id.* ¶ 15. The records that were identified indicate the possibility of a "presidential visit," such as a document indicating that a person is scheduled to meet with the President in the future, but they do not reveal whether a visit actually took place. *Id.* ¶ 30. The Secret Service located the following documents:

i. three White House documents, received from the White House Office, titled "Official Travel Schedule, the Visit of the President to Palm Beach, Fl," for the dates

of February 10, 2017, February 11, 2017, and February 12, 2017, respectively;

ii. a White House document, received from the White House Office, titled "Schedule of the President, Sunday, February 12, 2017;"

iii. an e-mail from the White House Office containing the President's schedule for February 10, 2017;

iv. an e-mail from the White House Office containing the White House Chief of Staff's Schedule, which includes an entry referring to the President's dinner with the Prime Minister of Japan at Mar-a-Lago on February 10, 2017;

v. two Secret Service emails containing the President's schedules for February 10, 2017, and February 11, 2017, respectively, obtained from the White House Office;

vi. three e-mails from the White House Office to PPD, each providing specific information concerning the arrival of an individual who was scheduled to meet with the President on February 12 or February 19, 2017, respectively, and the person(s) accompanying the individual;

vii. a Secret Service intelligence report titled "Final Intelligence Situation Report for the visit of President Donald J. Trump . . . to Palm Beach, FL from February 10-12, 2017," containing the statement that the President and First Lady are traveling to Palm Beach, FL to host the Prime Minister of Japan;

viii. a Secret Service intelligence assessment titled "Foreign Dignitary Assessment," prepared by the Secret Service's PID for the visit of Prime Minister Abe, containing the statement that the Prime Minister will meet with the President at Mar-a-Lago;

ix. a letter from the Secret Service to the FBI, advising that the President and First Lady would be visiting in the FBI's West Palm Beach Resident Office district on February 10-12, 2017, and noting that the Prime Minister of Japan and Spouse will stay as guests of President Trump at the Mar-a-Lago Club;

x. a Secret Service document titled "Special Operations Division (SOD) Joint Tactical Survey" for the visit of President Donald Trump and family to Palm Beach, Florida, February 10-12, 2017, containing two references to the fact that the President will be hosting and meeting with the Prime Minister of Japan and Spouse at Mar-a-Lago;

xi. seven internal Secret Service e-mails containing or forwarding Secret Service operational, scheduling, reporting, or Presidential or other event information, including Presidential scheduling information obtained from the White House Office, and each containing a notation that the Prime Minister of Japan would be meeting or dining with the President at Mar-a-Lago; and

xii. an e-mail from the Dept. of State, Office of the Chief of Protocol, that was sent to the White House Office and forwarded to the Secret Service, providing a listing of individuals (including names, titles or job responsibilities) accompanying the Prime

Minister of Japan and his wife during their visit to Mar-a-Lago.

Campbell Decl. ¶ 28.

The first six categories of records (i-vi), and discrete portions of some of the operational emails in category xi, consist of Presidential schedules or information directly relating to Presidential schedules (collectively, the "Presidential schedule documents") that originated from the White House Office. *Id*. ¶ 30. These materials were forwarded, through the Department of Justice, to the White House Office for consultation. *Id.* ¶ 31. As a result of that consultation, it was determined that all of the Presidential schedule documents contain, reflect, or directly relate to Presidential schedules that were transmitted by the White House Office to the Secret Service for the limited purpose of providing information necessary for the Secret Service to perform its statutory duty to protect the President. *Id.*; Murray Decl. ¶ 24. As such, these materials are not agency records subject to FOIA, and they were not further processed. Campbell Decl. ¶ 31.

The email originating from the State Department (category xii) was deemed responsive to plaintiffs' FOIA request because it evidenced potential visitors to Mar-a-Lago, some of whom were scheduled to attend a dinner with the President. *Id*. ¶ 33. The e-mail was referred to the Department of State for review and returned to the Secret Service. *Id.* The remaining records (categories vii-xi) were deemed non-responsive because they are not records of Presidential visitors at Mar-a-Lago, but rather operational materials that merely contain a repeated statement that the Prime Minister of Japan and his spouse would be meeting, dining, or present with the President and First Lady at Mar-a-Lago, which had already been publicly released by the White House.[4] *Id*. ¶ 32. This information is also duplicative of the information contained in the State

[4] *See* https://www.whitehouse.gov/the-press-office/2017/02/09/background-press-call-prime-minister-abes-visit-white-house ("the Prime Minister and his wife will be guests of President Trump for the weekend," where they will be spending "time together eating and just relaxing really down at Mar-a-Lago"); https://www.whitehouse.gov/the-press-office/2017/02/11/readout-presidents-day-japanese-prime-minister-shinz%C5%8D-abe ("the President looks forward to further discussions with the Prime Minister

Department email. *Id*.

C. The Secret Service's Production

On September 15, 2017, the government produced the State Department email to plaintiffs, with the names, certain email addresses, and a cell phone number of non-visitor third parties and one EOP employee redacted pursuant to FOIA exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) & (7)(C). Campbell Decl. ¶ 33; ECF No. 33-8. The government explained that the remaining records processed by the Secret Service contain, reflect, or otherwise relate to the President's schedule, and therefore are not agency records subject to FOIA. ECF No. 33-8 (citing *Judicial Watch*, 726 F.3d at 224-32).

IV. Plaintiffs' Lawsuit

Plaintiffs commenced this lawsuit against DHS on April 10, 2017, initially asserting claims only under FOIA and the DJA. ECF No. 1. Plaintiffs later amended the complaint, adding EOP as a defendant and asserting additional claims under the FRA, PRA, and APA regarding the treatment of records of visits to "agency components" of EOP. *See* Am. Complt. ¶¶ 61-68.

ARGUMENT

I. DHS Is Entitled to Summary Judgment on Plaintiffs' FOIA Claims

"FOIA actions are typically and appropriately resolved on summary judgment." *NDLON v. U.S. ICE*, 236 F. Supp. 3d 810, 816 (S.D.N.Y. 2017); *see Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The defendant agency bears the burden to demonstrate that it conducted an adequate search for agency records in response to a FOIA request, and that any such records withheld are exempt from disclosure. *See*

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at dinner this evening") (both last visited on October 23, 2017).

5 U.S.C. § 552(a)(4)(B).[5] "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812 (footnote omitted). Declarations also suffice to demonstrate that requested records are not agency records subject to FOIA. *See Judicial Watch*, 726 F.3d at 215. The government's declarations are "accorded a presumption of good faith." *Carney*, 19 F.3d at 812, 814. For the reasons below, DHS is entitled to summary judgment with regard to plaintiffs' FOIA claims.

A. The Requested WAVES and ACR Records and Presidential Schedule Documents Are Not Agency Records Subject to FOIA

Although FOIA requires disclosure of "agency records," 5 U.S.C. § 552(a)(4)(B), that term is not defined in FOIA. *U.S. DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989). However, as the Supreme Court held in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the legislative history makes clear that "Congress did not intend for 'the President's immediate personal staff or units in the Executive Office of the President whose sole function is to advise and assist the President' to be included within the term 'agency' under the FOIA." *Main Street Legal Servs., Inc. v. NSC*, 811 F.3d 542, 546 (2d Cir. 2016) (quoting *Kissinger*, 445 U.S. at 156, and H.R. Conf. Rep. No. 93-1380 (1974) (quotation marks and alterations omitted)).

Moreover, "not all documents in the possession of a FOIA-covered agency are 'agency records' for the purpose of that Act." *Judicial Watch*, 726 F.3d at 216 (citations omitted). "As the Supreme Court instructed in *Tax Analysts*, the term 'agency records' extends only to those documents that an agency both (1) 'creates or obtains,' *and* (2) 'controls at the time the FOIA request was made.'" *Id.* (quoting 492 U.S. at 144-45 (alterations omitted)). While the Secret

[5] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, 89 Civ. 5071(RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996).

Service may have "obtained" the WAVES and ACR records requested by plaintiffs, it did not "control" those records at the time of the FOIA request.

1. The Secret Service Does Not Control WAVES and ACR Records Under the *Tax Analysts* Test

Neither the Supreme Court nor the Second Circuit has had occasion to determine what constitutes sufficient "control" to render a record an "agency record" under FOIA. However, the D.C. Circuit looks to four factors:

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

Tax Analysts v. U.S. DOJ, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989); *see also McErlean v. U.S. DOJ*, No. 97 Civ. 7831(BSJ), 1999 WL 791680, at *11 (S.D.N.Y. Sept. 30, 1999) (applying *Tax Analysts* test).

In *Judicial Watch*, the D.C. Circuit applied the *Tax Analysts* factors to WAVES and ACR records, then collectively known as White House Access Control ("WHACS") records, and concluded that the result was "indeterminate." 726 F.3d at 218. Since the D.C. Circuit's decision, however, the White House's information technology infrastructure has been reorganized and centralized pursuant to the 2015 Presidential Memorandum and MOU, further demonstrating the Secret Service's lack of control over WAVES and ACR records.

The first *Tax Analysts* factor—intent—clearly favors a finding that the White House controls the records, as the D.C. Circuit found in *Judicial Watch*. *Id.* That intent is reflected in the 2006 MOU, which is "unequivocal" in asserting that control over WAVES and ACR records is at all times maintained by the White House, not the Secret Service. *See* 2006 MOU ¶ 24 ("the White House at all times asserts, and the Secret Service disclaims, all legal control over any and

all [WAVES and ACR] records subject to this [MOU]"); *id.* ¶ 19 ("any information provided to the Secret Service for the creation, or in the form, of [WAVES and ACR] records is provided under an express reservation of White House control"); Murray Decl. ¶ 13; Droege Decl. ¶ 3; *Judicial Watch*, 726 F.3d at 218. The 2015 MOU reinforces that "[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component." 2015 MOU § 3.01; Murray Decl. ¶ 17; Herndon Decl. ¶ 9.

The second *Tax Analysts* factor—the ability of the Secret Service to use and dispose of the records as it sees fit—also weighs in favor of White House control. *See Judicial Watch*, 726 F.3d at 218-19. Simply put, the Secret Service may not use the records "as it sees fit." Rather, pursuant to the 2006 MOU, the agency's use of the records is strictly limited to two purposes: (1) to perform background checks to determine whether, and under what conditions, to authorize a visitor's temporary admittance to the White House Complex, and (2) to verify the visitor's admissibility at the time of the visit. 2006 MOU ¶ 12; Murray Decl. ¶ 7. "Once the visit ends, the information contained in WAVES and ACR records has no continuing usefulness to the Secret Service." 2006 MOU ¶ 13; Murray Decl. ¶ 13; Droege Decl. ¶ 9.

Moreover, the Secret Service has a longstanding practice, reflected in the 2006 MOU, of transferring WAVES and ACR records to the White House (specifically, to the WHORM) within 30 to 60 days of the visit,[6] and automatically deleting those records from the Secret Service's systems every 60 days. 2006 MOU ¶ 14; Murray Decl. ¶¶ 13, 15; Droege Decl. ¶¶ 4-5. Once WAVES and ACR records are transferred to the WHORM and deleted from the Secret Service's

[6] WAVES records have been transferred to the WHORM since at least 2001; the Secret Service began transferring ACR records to the WHORM in 2006. Murray Decl. ¶¶ 13, 15; Droege Decl. ¶¶ 4-5.

systems, the agency has no further access to them; it must make a request to the WHORM and obtain White House approval to access the records. Murray Decl. ¶¶ 19-20; Herndon Decl. ¶ 9. Even before the records are transferred and deleted, the Secret Service must obtain White House approval to look at them after a visit is concluded. Murray Decl. ¶ 19; Herndon Decl. ¶ 9.

These stringent "restrictions on use and disposal imposed by a governmental entity not covered under FOIA have a substantial bearing on the second *Tax Analysts* factor." *Judicial Watch*, 726 F.3d at 219. Although the D.C. Circuit characterized this factor as "relatively uncertain," the court's analysis suggested that it weighed in favor of White House control, even if not "unambiguously." *Id*. at 220; *see also id.* at 218-19. The restrictions on the Secret Service's ability to use and dispose of WAVES and ACR records are even greater today than they were in *Judicial Watch*; this factor now clearly favors White House control.

The *Judicial Watch* court found that the third factor—the extent to which the Secret Service reads and relies upon the documents—favors a finding of Secret Service control. 726 F.3d at 219. Even though the Secret Service may read and rely upon WAVES and ACR records only for the limited purposes of enabling the Service to perform background checks and verify a visitor's admissibility, the court found that "the agency reads and relies upon the documents for those purposes without restriction, and the third factor requires no more." *Id.*

However, the fourth and final factor—the degree to which the documents were integrated into the Secret Service's record system or files—clearly demonstrates White House control. The D.C. Circuit noted that WAVES and ACR records resided on the Secret Service's servers, and thus "were in the agency's files at least at one time," but the court nevertheless had "reservations about the *degree* to which they were or are *integrated into* the Secret Service's overall record system," particularly because the servers were located in the White House Complex, they contained only WAVES- and ACR-related data, and the records were removed from the Secret Service's servers

within 60 days. 726 F.3d at 220. The court thus ultimately found this factor uncertain. *Id.*

The reorganization of EOP information systems and resources pursuant to the 2015 Presidential Memorandum and MOU, however, further diminished the degree to which WAVES and ACR records are integrated into the Secret Service's system, if at all. The Memorandum and MOU consolidated disparate information systems and resources into a single information technology community under the auspices of the DWHIT. Herndon Decl. ¶ 4; Memorandum § 1. Pursuant to that framework, the President is the business owner of the EFACS and WAVES systems, and the Secret Service operates those systems on behalf of the President, acting as a service provider. Murray Decl. ¶¶ 16, 20; Herndon Decl. ¶¶ 7-8. The Secret Service cannot make any changes to the system, or make purchases related to the systems, without the consent of the DWHIT. Indeed, once a visit is concluded, the Secret Service must obtain White House approval to view WAVES or ACR records. Murray Decl. ¶ 19; Herndon Decl. ¶ 9.

Under the framework of the 2015 Memorandum and MOU, therefore, it is no longer the case that WAVES and ACR records are "in the agency's files" simply because they "reside on the Secret Service's servers." *Judicial Watch*, 726 F.3d at 219-20. While the Secret Service operates the machinery, it does so on behalf of the President, and the mere fact that WAVES and ACR records reside on the Secret Service's servers for a short period does not mean that they are "*integrated into* the Secret Service's overall record system." *Id.* at 220.

As a result, the second and fourth factors are no longer uncertain, but now "unambiguously favor" White House control, and tip the balance toward the conclusion that WAVES and ACR records are not controlled by the Secret Service. With three factors favoring White House control and only one suggesting Secret Service control, the totality of the circumstances demonstrates that WAVES and ACR records are not agency records under the *Tax Analysts* test. *Judicial Watch*, 726 F.3d at 220.

2. WAVES and ACR Records Are Not Agency Records Because They Are Like Presidential Appointment Calendars, Which Congress Excluded from FOIA

As the *Judicial Watch* court determined, the *Tax Analysts* test "does not fully capture the 'control' issue" for WAVES and ACR records because special policy considerations counsel in favor of according deference to the White House's clearly manifested intent to control those records, and because subjecting the records to FOIA would raise serious separation-of-powers concerns. *See Judicial Watch*, 726 F.3d at 221-32. This Court should reach the same conclusion.

Drawing on a line of D.C. Circuit cases involving congressional records in the hands of federal agencies, *see, e.g.*, *United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), the *Judicial Watch* court found that WAVES and ACR records similarly raise special policy considerations. 726 F.3d at 221-24. The Secret Service creates the records in response to requests from, and information provided by, a government entity not covered by FOIA, namely, the Office of the President. *Id.* at 222. That non-covered entity has manifested a clear intent to control the documents, as reflected in the 2006 MOU, and the Secret Service is not free to use or dispose of them as it sees fit. *Id*. at 223. And "disclosing the records would reveal the specific requests made by the non-covered entity," *i.e.*, "the Office of the President's requests for visitor clearance." *Id.* Subjecting WAVES and ACR records to FOIA would also "confront the President with a dilemma" by "forcing him either to 'surrender his constitutional prerogative of maintaining secrecy' regarding his choice of visitors (and therefore of outside advisors), or to decline to cooperate with the executive branch agency entrusted with (and necessary for) his personal protection." *Id.* at 224 (quoting *United We Stand*, 359 F.3d at 599; alterations omitted). Indeed, given that the President is barred by statute from declining Secret Service protection for himself, *see* 18 U.S.C. § 3056(a), and does not have the ability to do so on the behalf of the White House Complex, "it is not even clear he would have the latter choice." *Judicial Watch*, 726 F.3d at 224.

The *Judicial Watch* court further concluded that "separation-of-powers concerns . . . provide an additional—and more fundamental—reason to find that the logs of visits to the Office of the President are not 'agency records' within the meaning of FOIA." *Id.* Although it is clear that a FOIA requestor may not obtain Presidential appointment calendars (or visitor logs) from the White House, "the President and his staff cannot retain effective physical control over their calendars," given that they must provide visitor information to the Secret Service to allow that agency to perform its protective duties. *Id.* at 225. If the Secret Service must disclose WAVES and ACR records under FOIA, requestors will effectively obtain copies of those calendars. The D.C. Circuit found "good reason to doubt that Congress intended to require the effective disclosure of the President's calendars in this roundabout way." *Id.* To the contrary, the court found Congress's exclusion of Presidential papers "quite intentional," and observed that "where Congress has intentionally excluded a governmental entity from the Act," courts have been "unwilling to conclude that documents or information of that entity can be obtained indirectly, by filing a FOIA request with an entity that *is* covered under that statute." *Id.*

Allowing such an "end run" in the case of WAVES and ACR records would present serious separation-of-powers concerns. *Id.* at 225-26. "Construing the term 'agency records' to extend to White House visitor logs—regardless of whether they are in the possession of the White House or the Secret Service—could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public." *Id.* at 226. Applying the canon of constitutional avoidance, the D.C. Circuit declined to interpret the statute to raise such concerns. *Id.* at 226-27. The court noted that Congress itself, by making clear that FOIA does not apply to the President's staff and those units that advise and assist him, "wished to avoid the serious separation-of-powers questions that too expansive a reading of FOIA would engender." *Id.* at 227. Congress also created a separate statutory regime in the PRA "to avoid the very 'separation of

powers concerns' and 'outside interference with the day-to-day operations of the President and his closest advisors'" that would be presented if those records were subject to FOIA. *Id*. at 227-28.

While plaintiffs have suggested that the separation-of-powers analysis in *Judicial Watch* is somehow undermined by the voluntary disclosure policy that was adopted in 2009 (and rescinded in April 2017), *see* ECF No. 33-3 at 7-9, that makes little sense. The D.C. Circuit was well aware of the existence of that policy, which had been in force for nearly four years when the court issued its decision. *See* 726 F.3d at 214 & n.6. At any rate, the voluntary disclosure policy has no bearing whatsoever on the separation-of-powers analysis. The fact that the White House implemented (and later rescinded) a policy of *voluntary* disclosure, subject to several significant exceptions, *see id.* at 214 n.6; Droege Decl. ¶ 13, does nothing to alleviate the serious concerns that would be presented if Congress were to *compel* disclosure. *See Judicial Watch*, 726 F.3d at 226 (noting "potentially serious congressional intrusion into the conduct of the President's daily operations"). Nor does a voluntary disclosure policy adopted by the White House in 2009 shed any light on Congress's intent in enacting or amending the relevant statutory provisions decades earlier. *Id.* at 443 (noting Congress's "clear" intent in the 1974 FOIA Amendments and 1978 PRA to exclude from FOIA "the appointment calendars of the President and his close advisors").

3. The Presidential Schedule Documents Are Not Agency Records Because They Similarly Would Reveal the President's Appointment Calendars

In response to plaintiffs' request for records of "presidential visitors" at Mar-a-Lago during the relevant time period, the Secret Service located a number of documents that contain, reflect or directly relate to the President's schedule. Campbell Decl. ¶¶ 28(i)-(vi), 30. Several of these documents are denominated as "Schedules," and were created by the White House Office and provided to the Secret Service. *See id.* ¶ 28(i) (three "Official Travel Schedules"), ¶ 28(ii) (one "Schedule of the President"). Others are emails containing the President's schedule or that of his senior staff—some were sent by the White House Office to the Secret Service, *see id.* ¶ 28(iii)-

(iv), and others were prepared by the Secret Service based on schedules provided to the Secret Service by the White House Office, *see id.* ¶ 28(v); Murray Decl. ¶¶ 22-23. The documents themselves and/or the Presidential schedules contained within the documents thus originated from the White House Office, a PRA component not subject to FOIA. Campbell Decl. ¶ 30; *see* Herndon Decl. ¶ 2 (explaining that White House Office, also referred to as the Office of the President, serves the President in the performance of the many detailed activities incident to his immediate office); Murray Decl. ¶ 22; *Wilson v. Libby*, 535 F.3d 697, 708 (D.C. Cir. 2008).

The Presidential schedule documents located by the Secret Service also include three emails that, while not denominated as schedules or containing schedules, nevertheless relate directly to the President's schedule because they contain specific information concerning individuals who were scheduled to meet with the President at Mar-a-Lago. Campbell Decl. ¶¶ 28(vi), 30. These emails, and the information contained within them related to the President's schedule, similarly originated from the White House Office. *Id.* ¶ 30. Some of the operational emails located by the Secret Service also contain Presidential schedule information originating from the White House Office. *Id.* ¶ 28(xi).

In *Judicial Watch*, the D.C. Circuit held that, given the clear Congressional intent "to place documents like the President's appointment calendar beyond the reach of FOIA," and construing the statutory text "in light of both that intent and the canon of avoiding constitutional separation-of-powers concerns," WAVES and ACR records that "disclose the kind of information contained in such documents are not agency records within the meaning of FOIA." 726 F.3d at 234. That rationale compels the same conclusion with respect to the Presidential schedule documents.

The Presidential schedule documents satisfy the definition of PRA records: they were created by the President's "immediate staff, or a unit or individual of the Executive Office of the President"—namely, the White House Office—"in the course of conducting activities which relate

to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." Campbell Decl. ¶¶ 30-31; Murray Decl. ¶¶ 22-24; *see* 44 U.S.C. § 2201. As with WAVES and ACR records, the White House has "manifested a clear intent to control" Presidential schedules and related information, and the Secret Service is not "free to use and dispose of [them] as it sees fit." *Judicial Watch*, 726 F.3d at 223. The White House Office disseminates the President's schedule only to limited personnel within the Secret Service who have an operational need to know the scheduling information in order to perform their protective duties. Murray Decl. ¶ 22. Only Secret Service personnel who are approved by the White House may access the President's schedule. *Id.* The Presidential schedules and related information identified during the Secret Service's search were transmitted by the White House Office to the Secret Service for the narrow and limited purpose of providing the information necessary for the Secret Service to perform its mandatory statutory duty to protect the President. Campbell Decl. ¶ 31; Murray Decl. ¶¶ 3, 24; 18 U.S.C. § 3056(a). Secret Service, in turn, uses the Presidential schedule documents for the limited purpose of fulfilling its operational needs in relation to the performance of its protective functions. Murray Decl. ¶ 24. In short, the Presidential schedule documents belong to the White House, not the Secret Service. *Id.*

The Presidential schedule documents also raise the very same policy considerations and separation-of-powers concerns as WAVES and ACR records. Like those records, the Presidential schedule documents "replicate in key particulars the content of the President's appointment calendars and those of his staff, including the name, time, and appointment of visitors" who were scheduled to meet with the President at Mar-a-Lago. *Id.* at 225. This is the same "kind of *information*" that the D.C. Circuit held was beyond the scope of FOIA because it "effectively reproduces a set of records"—Presidential appointment calendars—"that Congress expressly excluded from FOIA's coverage." *Id.* at 232. The Presidential schedule documents indisputably

could not be obtained directly from the White House under FOIA, and yet the President "has little choice" but to provide his schedule to the Secret Service so that it can perform its protective functions. *See id.* at 225. As the *Judicial Watch* court held, "Congress did not intend to authorize FOIA requesters to obtain indirectly from the Secret Service [Presidential schedule] information that it had expressly barred requesters from obtaining directly from the President." *Id.* at 231. To hold otherwise would "put the President on the horns of a dilemma between surrendering his confidentiality and jeopardizing his safety." *Id.* The Presidential schedule documents accordingly are not agency records subject to FOIA.

4. The Secret Service Is Unable to Segregate Visits to Agency Components of EOP

In *Judicial Watch*, the D.C. Circuit concluded that records documenting visits to offices within the White House Complex "that are themselves 'agencies' covered by FOIA" and "reveal[] nothing about visits to the Office of the President [also known as the White House Office]" "*are* 'agency records' subject to FOIA." 726 F.3d at 217. For the reasons discussed above, the reorganization of the White House technology infrastructure pursuant to the 2015 Presidential Memorandum and MOU calls this conclusion into question, because the Secret Service does not control WAVES and ACR records under the *Tax Analysts* test. In any event, the Secret Service is unable to segregate WAVES records reflecting visits to agency components of EOP.[7]

While WAVES records contain a series of fields, none identifies whether a record relates to a visit to a "PRA Component" or a "FOIA Component" of EOP. *See* Willson Decl. ¶ 7 (listing visitor record fields). WAVES records reveal the name of the person being visited, but they do not identify whether that individual is employed by a PRA Component or FOIA Component, as

[7] On remand, the Secret Service asserted a similar argument to that it presents here. *See* Def.'s Second Mot. for Summ. J. at 4-10, *Judicial Watch, Inc. v. United States Secret Service*, No. 1:09-cv-2312-BAH, ECF No. 37 (D.D.C. filed Mar. 24, 2014). The plaintiff in that case, however, dismissed the suit before the issues raised on remand were resolved.

there is "no field in the WAVES system that indicates what office the visitee is employed by." *Id.* ¶ 9. The "meeting location" field is also unilluminating because "both the PRA Components and the FOIA Components utilize both the Eisenhower Executive Office Building (EEOB) and the New Executive Office Building (NEOB)." *Id.* ¶ 11. The "description" field contained within WAVES "is a 'free form' field" that allows users to make remarks regarding security arrangements or other general information about a visitor; it too does not identify whether a particular event is PRA Component-sponsored or FOIA Component-sponsored. *Id.* ¶ 12.

WAVES records do contain the name and email address of the person making the appointment (the "caller name" and "caller email"). *Id.* ¶ 7. In most cases, the email address will provide an indication of whether the person making the appointment is employed by a PRA Component or a FOIA Component. *Id.* ¶ 9. But identifying the person requesting the visit does not necessarily reveal whether the visit is to a PRA or FOIA Component. For example, a visitor may be invited to a meeting by an OMB employee, but the meeting may be with members of both OMB and White House Counsel's Office. *Id.* ¶ 10. Additionally, the person making the appointment may not be the visitee. Not all employees have authorization to make appointment requests; if a particular visitee does not have such authorization, he or she may request that an authorized person from another component submit an appointment request. *Id.* ¶ 9.

Simply put, the limitations of the WAVES system do not permit the Secret Service to definitively identify records reflecting visits to FOIA Components. This implicates a fundamental FOIA principle—agencies are not required to conduct research to respond to a FOIA request. *See, e.g.*, *Blakey v. DOJ*, 549 F. Supp. 362, 366-67 (D.D.C. 1982) ("The FOIA was not intended to compel agencies to become ad hoc investigators for requesters whose requests are not compatible with their own information retrieval systems."), *aff'd*, 720 F.2d 215 (D.C. Cir. 1983); *Greenberg v. U.S. Dep't of Treas.*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998) (FOIA does not require "extensive

research cross-indexing particular bits of information to specific events, incidents or activities").

Nor does FOIA require the Secret Service to seek the assistance of other agencies or components in order to identify which records may be responsive to plaintiff's request. *See Jones-Edwards v. Appeal Bd. of NSA*, 196 F. App'x 36, 38 (2d Cir. 2006) ("An agency is not obliged to conduct a search of records outside its possession or control."); *NDLON v. U.S. ICE*, No. 16 Civ. 387, 2017 WL 1494513(KBF), at *10 (S.D.N.Y. Apr. 19, 2017) (EOIR and USCIS not required to obtain A-numbers from ICE in order to search their own databases). It may be that other agencies or components (such as the White House) retain calendars or other information that could shed light on whether particular visit requests requested by persons employed by FOIA Components were associated with meetings attended by persons employed by PRA Components. However, nothing in FOIA requires the Secret Service to investigate and obtain this information from third parties, be it the White House or another agency. *See, e.g.*, *Blakey*, 549 F. Supp. at 366-67. Nor does the Court have authority to order the Secret Service to obtain third-party records in order to attempt to process a FOIA request. *See* 5 U.S.C. § 552(a)(4)(B) (limiting court's jurisdiction to ordering "production of any agency records improperly withheld").

Moreover, any attempt to involve PRA Components in processing plaintiffs' FOIA request would potentially raise separation-of-powers concerns. In *Judicial Watch*, the D.C. Circuit expressed concern that subjecting all WAVES and ACR records to FOIA would impose a burden on the White House to review such records for possible FOIA exemptions, which would give rise to separation-of-powers concerns. *See* 726 F.3d at 230. Requiring PRA Components to attempt to segregate those WAVES records that are subject to FOIA from those that are not could impose like burdens and, hence, the same separation-of-powers concerns. If plaintiffs are interested in records of visits to agency components of EOP, they can always seek visitor information from those entities within the White House Complex that are subject to FOIA. Although those

components would not have WAVES and ACR records, they might have other records reflecting visits to their offices.

B. The Secret Service Conducted a Reasonable Search and Properly Produced One Agency Record with Redactions Pursuant to FOIA Exemptions 6 and 7(C)

1. The Secret Service's Search Was More Than Adequate

The government does not have a heavy burden in defending its search; it need only show "'that its search was adequate.'" *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812); *see also Radcliffe v. IRS*, 328 F. App'x 699, 700 (2d Cir. 2009) (requiring "a good faith effort to search for the requested documents using search methods that were reasonably calculated to uncover all relevant documents under the circumstances" (citations and internal quotation marks omitted)). The agency is not required to search every record system, but only those systems in which it believes responsive records are likely to be located. *See Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010).

The Secret Service's "broad set of searches" easily meets these standards. Campbell Decl. ¶ 10. The Secret Service searched the offices and divisions reasonably likely to have responsive records: (1) the PID, which conducts background checks; (2) the two local offices located near Mar-a-Lago, the Miami FO and the West Palm Beach RO, and (3) the PPD, which has direct operational responsibility for protection of the President, including when he is at Mar-a-Lago. *Id.* ¶ 16. While the PID located no responsive records, the Miami FO, West Palm Beach RO, and PPD searched their electronic and paper files and forwarded potentially responsive records for responsiveness review. *Id.* ¶ 17-19. The Secret Service also conducted a broad key-word search of relevant employee email accounts within the Enterprise Vault, which captured a large volume of emails and attachments. *Id.* ¶ 20. Even after de-duplication, the searches identified over 4000 emails and documents, which then had to be manually reviewed for responsiveness. *Id.* ¶ 22.

Upon review of these documents and removal of media reports and records the parties had

agreed were not responsive, *see id.* ¶¶ 23-25, the Secret Service determined that it possessed only a "few scattered and repetitive pieces of Mar-a-Lago Presidential visitor information," *id.* ¶ 15, and only one agency record that was responsive because it evidenced potential visitors to Mar-a-Lago, some of whom were scheduled to attend a dinner with the President and the Prime Minister of Japan, *id.* ¶¶ 14, 33.[8] But that does not suggest any defect in the Secret Service's search. Rather, it is because the Secret Service does not maintain any system for keeping track of visitors at Mar-a-Lago, as it does at the White House Complex. *Id.* ¶ 11. Nor does Secret Service maintain any data system, grouping of records, listing, or document containing the data fields specifically requested by plaintiffs, as its search confirmed. *Id.* ¶¶ 10, 12-13.

2. The Secret Service Properly Withheld the Personally Identifying Information of an EOP Employee and Third Parties from the State Department Email

Exemption 6 protects information from "personnel, medical, or other similar files" the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) protects "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In determining whether personal information is exempt under Exemption 6 or 7(C), the Court balances the public's need for the information against the individual's privacy interest. *Associated Press v. DOD*, 554 F.3d 274, 291 (2d Cir. 2009); *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005). The "only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contributing *significantly* to public understanding of the operations or activities of the government." *DOD v. FLRA*, 510 U.S. 487, 495 (1994) (internal quotation marks

[8] As discussed *infra*, the Secret Service also located a handful of operational records that merely referred to the fact that the Japanese Prime Minister was scheduled to visit with the President at Mar-a-Lago, but these were deemed non-responsive because that information had previously been released by the White House and was duplicative of the information in the State Department email.

and alteration omitted). A lesser showing is required for Exemption 7(C) than for Exemption 6. *NARA v. Favish*, 541 U.S. 157, 166 (2004).

The Secret Service properly withheld from the State Department email the names, certain email addresses and a cell phone number of an EOP employee and non-visitor third parties, pursuant to Exemptions 6 and 7(C). Campbell Decl. ¶¶ 37-38. The "similar files" language in Exemption 6 encompasses any "information which applies to a particular individual . . . sought from Government records." *Cook v. NARA*, 758 F.3d 168, 174 (2d Cir. 2014). The names, addresses and cell phone number easily meet this threshold. This information was also "compiled for law enforcement purposes" within the meaning of Exemption 7(C). The Secret Service is a criminal law enforcement agency created under 18 U.S.C. § 3056, and the information in the email was compiled and provided to the Secret Service in connection with the Secret Service's protective and/or investigative functions. Campbell Decl. ¶¶ 37-38.

The Secret Service correctly determined that the employee's and third parties' interest in the privacy of their names and contact information outweighed any public interest in disclosure. Campbell Decl. ¶ 38. Government employees and private individuals "have privacy interests in the dissemination of their names," *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993), as well as their email addresses or cell phone numbers, *see, e.g., Gov't Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 106 (D.D.C. 2010). On the other side of the scale, this information reveals nothing about how the Secret Service conducts its activities, Campbell Decl. ¶ 39; *see Associated Press*, 554 F.3d at 288-89; *Wood*, 432 F.3d at 88-89. Thus, the balancing test clearly weighs in favor of withholding.

3. The Secret Service Properly Excluded Operational Records That Merely Contained References to the Publicly Known Fact That the Japanese Prime Minister Visited the President at Mar-a-Lago

In addition to the State Department email, the Secret Service's search yielded a small number of operational records related to the Japanese Prime Minister's visit that also referred to the fact that the Prime Minister and his spouse were scheduled to meet or dine with the President and First Lady at Mar-a-Lago. Campbell Decl. ¶¶ 28(vii)-(xi), 32. The Secret Service properly determined that these documents were not responsive to the request for Presidential visitors at Mar-a-Lago. *Id.* ¶ 32. The only arguably responsive information in these documents is the statement, repeated in each document, that the Prime Minister of Japan and his spouse would be meeting, dining, or present with the President at Mar-a-Lago. *Id.* That same information has already been publicly released by the White House. *See supra* note 4.

The Secret Service was not required to expend resources processing these records—which consist of intelligence reports and other operational records wholly unrelated to the subject of plaintiffs' FOIA request—only to release a minute amount of already public information. *See Triestman v. U.S. DOJ*, 878 F. Supp. 667, 671 (S.D.N.Y. 1995); *Mueller v. U.S. Dep't of Air Force*, 63 F. Supp. 2d 738, 744 n.3 (E.D. Va. 1999); *see also Crooker v. U.S. State Dep't*, 628 F.2d 9, 11 (D.C. Cir. 1980) (FOIA request seeking documents readily available in the public record was "abusive and a dissipation of agency and court resources"). Any arguably responsive information in these records is also duplicative of the information contained in the State Department email released to plaintiffs, which documents the fact that the Prime Minister and his wife visited Mar-a-Lago on February 10 and 11, 2017, including dinner on both evenings. Campbell Decl. ¶ 32; *see* ECF No. 38-8 at 4-5. That further supports the Secret Service's determination to exclude these records. *See, e.g.*, *Conti v. U.S. DHS*, No. 12 CIV. 5827(AT), 2014 WL 1274517, at *26–27 (S.D.N.Y. Mar. 24, 2014).

II. Plaintiffs' Non-FOIA Claims Should Be Dismissed

The Court should dismiss plaintiffs' remaining claims under Federal Rule 12(b)(1) for lack of subject matter jurisdiction, because judicial review of plaintiffs' FRA- and PRA-based claims is precluded by the FRA and PRA, and/or under Federal Rule 12(b)(6) for failure to state a claim.

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* Although a court "must accept as true all material factual allegations in the complaint," it may not "draw inferences from the complaint favorable to plaintiffs" in determining jurisdiction. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004).

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). While a court must accept all factual allegations in the complaint as true and draw reasonable inferences in plaintiffs' favor, *Ahlers v. Rabinowitz*, 684 F.3d 53, 60 (2d Cir. 2012), it has no obligation to "credit conclusory allegations or legal conclusions couched as factual allegations," *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (quotation marks omitted).

A. Plaintiffs' FRA and APA Claims Are Not Subject to Judicial Review, and Plaintiffs Fail to State a Plausible FRA Claim

The FRA "governs the creation, management, and disposal of federal records." *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991) [hereinafter "*Armstrong I*"]. The FRA "prescribes the exclusive mechanism for disposal of federal records." *Armstrong v. EOP*, 1 F.3d 1274, 1278 (D.C. Cir. 1993) [hereinafter "*Armstrong II*"]. In other words, "[n]o records may be 'alienated or destroyed' except pursuant to the disposal provisions of the FRA." *Armstrong I*, 924 F.2d at 285

(quoting 44 U.S.C. § 3314). Records of executive branch agencies subject to the FRA are generally subject to FOIA. *See* 5 U.S.C. § 552(a)(3).

However, the FRA does not provide a private right of action—express or implied—to enforce the FRA's requirements. *Kissinger*, 445 U.S. at 148. To the contrary, the FRA "precludes direct private actions to require that agency staff comply with the agency's recordkeeping guidelines." *Armstrong I*, 924 F.2d at 297. As a result, a court cannot "prohibit [an agency] from improperly discarding agency records," or "require [an agency] to retrieve records that have already been transferred to the White House." *CREW v. U.S. DHS*, 527 F. Supp. 2d 101, 111 (D.D.C. 2007). The only means available to a plaintiff to enforce the FRA is an APA action challenging (1) the adequacy of an agency's "recordkeeping guidelines" under the FRA, *Armstrong I*, 924 F.2d at 292-94, or (2) "an agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General," as required by the FRA, to "prevent an agency official from destroying records in contravention of the agency's recordkeeping guidelines or to recover records unlawfully removed from an agency," *id.* at 295, 297.

While plaintiffs have invoked the FRA and, in passing, the APA,[9] their claim does not fall within either of these narrow categories. Although their allegations are sparse, plaintiffs appear to

[9] Because plaintiffs cannot bring an APA claim to enforce the PRA, *see Armstrong I*, 924 F.2d at 297 ("The APA does not authorize judicial review of the President's compliance with the PRA because the President is not an 'agency' within the meaning of the APA. . . ."), the government assumes this claim is asserted only in conjunction with plaintiffs' FRA claims and only against DHS. To the extent plaintiffs assert an FRA-based APA claim against EOP, *see* Am. Complt. ¶ 63, such a claim must fail. "[I]t has never been thought that the whole Executive Office of the President could be considered a discrete agency under" FOIA's definition of "agency," *United States v. Espy*, 145 F.3d 1369, 1373 (D.C. Cir. 1998), which uses the same definition as the APA, *compare* 5 U.S.C. § 551(1) *with* 5 U.S.C. § 01(b)(1). Rather, a court must examine each EOP component to determine whether that particular component is an "agency." *See Main St. Legal Servs.*, 811 F.3d at 546-49. Here, Plaintiffs assert a claim against EOP as a whole, see Am. Complt. ¶¶ 61-64, and not against any agency component of EOP. Nor could they; the DWHIT is part of the White House Office, which is not an agency. Herndon Decl. ¶ 1; *see Wilson*, 535 F.3d at 708.

challenge the Secret Service's practice of transferring to the WHORM, and deleting from the Secret Service's system, WAVES and ACR records of visits to "agency components" of EOP. *See* Am. Complt. ¶¶ 48-49 (alleging that Secret Service has not maintained records of visits to four agencies of EOP—OMB, OSTP, ONDCP, and CEQ—but instead has transferred them, and continues to transfer them, to the WHORM, a non-agency unit of EOP); *id.* ¶¶ 2, 62, 66. But plaintiffs do not identify, let alone challenge the adequacy of, any "recordkeeping guideline" of DHS. The only document cited in relation to their FRA claim is section 3.01 of the 2015 MOU, which simply states that records created, stored, used, or transmitted through the unclassified information systems and resources provided to the President, Vice President, and EOP "shall remain under the exclusive ownership, control, or custody of the President, Vice President, or originating EOP component." Am. Complt. ¶¶ 50, 63, 67. That provision by its plain language says nothing about whether WAVES or ACR records—or any other category of records for that matter—belong to an agency or non-agency component of EOP. Nor do plaintiffs challenge any refusal to seek initiation of an enforcement action by the Attorney General. Instead, plaintiffs' challenge is to DHS's records disposal practices—the very type of claim that is unreviewable under the FRA. *See Armstrong I*, 924 F.2d at 294 (sole "remedy for the improper removal of a 'record' from the agency" is FRA's administrative enforcement mechanism, not judicial review"); *CREW*, 527 F. Supp. 2d at 111 (court cannot "prohibit [an agency] from improperly discarding agency records"); *see also Competitive Enter. Inst. v. U.S. EPA*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (no FRA claim where "the form of [the] claim sounds in a cognizable APA claim," but "the substance of its allegations" challenge "records disposal decisions").

But even if section 3.02 of the 2015 MOU could somehow be considered a "recordkeeping guideline"—which it is not—plaintiffs could not state a plausible claim for relief under the FRA. While federal records "may not be alienated or destroyed except under" the FRA, 44 U.S.C.

§ 3314, section 3.02 of the 2015 MOU does neither. The provision does not envision or permit the destruction of any records, much less records of visits to agency components of EOP. Plaintiffs themselves allege that WAVES and ACR records of visits to agency components of EOP are being treated as "presidential and governed by the PRA." Am. Complt. ¶ 49. Those records accordingly would be preserved under the PRA. *See* 44 U.S.C. § 2203(c)-(e), (g)(1).

Nor does section 3.02 of the 2015 MOU call for any records to be "alienated." "When interpreting a statute, courts should accord a statutory enactment its plain meaning." *Sprint Spectrum LP v. Conn. Siting Council*, 274 F.3d 674, 677 (2d Cir. 2001). "The definition of 'alienate' in Black's Law Dictionary and other dictionaries limits alienation to acts resulting in a *change* in title." *In re Jones*, 206 B.R. 614, 619 (Bankr. D.D.C. 1997) (emphasis added). Section 3.02 of the MOU provides for the very opposite of a change in title: the provision states that records "*shall remain* under the exclusive ownership . . . of the President, Vice President, or originating EOP component." Am. Complt. ¶ 50 (emphasis added). The provision thus offers no plausible basis to assert a claim under the FRA.

In reality, underlying plaintiffs' FRA and APA challenge is their dissatisfaction with the determination that WAVES and ACR records reflecting visits to agency components of EOP are not segregable "agency records." *See, e.g.*, Am. Complt. ¶¶ 63, 67 (alleging that Defendants were required to treat records as "agency records"); *id.* at 16 ¶¶ 5, 7 (seeking order that defendants treat records as "agency records"). But that determination is already part of plaintiffs' FOIA claim, *see supra* Points I.A.1 (explaining why WAVES and ACR records not under Secret Service control), I.A.4 (explaining why Secret Service unable to segregate records of visits to agency components of EOP); *Judicial Watch*, 726 F.3d at 214-215 (analyzing whether WAVES and ACR records "are 'agency records'" under FOIA). As explained above, it is not a permissible FRA or APA claim.

B. Plaintiffs' PRA Claims Are Not Subject to Judicial Review, and Plaintiffs Fail to State a Plausible PRA Claim

The PRA "directs the President to 'take all steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records.'" *Armstrong I*, 924 F.2d at 285 (quoting 44 U.S.C. § 2203). By design, Presidential records are not subject to FOIA while the President is in office. The PRA's definition of "Presidential records" "exclude[s] specifically 'any documentary materials that are . . . official records of an agency,' as the term 'agency' is defined in the FOIA." *Armstrong II*, 1 F.3d at 1290 (quoting 44 U.S.C. § 2201(2)(B)(i)).

The PRA "precludes judicial review of the President's recordkeeping practices and decisions." *Armstrong I*, 924 F.2d at 291. Instead, "the PRA accords the President virtually complete control over his records during his term of office," *id.* at 290, "and the courts may not restrict that control by reviewing the President's recordkeeping practices and decisions," *Armstrong II*, 1 F.3d at 1290. Consequently, "courts may not review any decisions regarding whether to create a documentary presidential record," any "[m]anagement decisions" concerning "the day-to-day process by which presidential records are maintained," or any "disposal decisions" under the disposal provisions set forth in the PRA. *Id.* at 1294 (emphasis omitted). A court may only "review guidelines outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records." *Id.*

For the reasons discussed above with regard to their FRA-based claim, plaintiffs essentially challenge "the President's recordkeeping practices and decisions"; such claims have been squarely held to be unreviewable under the PRA as well. *See Armstrong I*, 924 F.2d at 291. And again, plaintiffs' allegations regarding section 3.01 of the 2015 MOU cannot reasonably be construed as a challenge to a "guideline" for determining whether a record is "presidential." The plain language

of that provision makes no distinction between agency and non-agency components of EOP, and thus plaintiffs have not plausibly alleged that the provision sweeps into the PRA "materials properly subject to the FOIA." *Armstrong II*, 1 F.3d at 1290.

Rather, as with plaintiffs' FRA-based claim, this too is a FOIA claim with a PRA veneer. Plaintiffs do not challenge a written guideline, but rather the determination that the records at issue are not "agency records" subject to FOIA. *See, e.g.*, Am. Complt. ¶¶ 2, 63, 67. That decision is already a subject of Plaintiffs' FOIA claim, *see* Points I.A.1 & 4; *Judicial Watch*, 726 F.3d at 214-15, and is not to be rehearsed under the PRA, which precludes such a claim. Plaintiffs therefore fail to state a plausible claim under the PRA.

C. Plaintiffs Fail to State a Claim Under the Declaratory Judgment Act

"The Declaratory Judgment Act does not expand jurisdiction," "[n]or . . . provide an independent cause of action." *In re Joint E. & So. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993). "Its operation is procedural only—to provide a form of relief previously unavailable." *Id.*; *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). In other words, plaintiffs "cannot maintain an action for a declaratory judgment without an underlying federal cause of action." *Springfield Hosp. v. Hofmann*, 488 F. App'x 534, 535 (2d Cir. 2012). Here, as explained above, plaintiffs have not stated a cognizable claim under either the FRA and APA or the PRA, and thus any claim for declaratory relief also fails. Nor can Plaintiffs seek relief under the Declaratory Judgment Act through their FOIA claim. *See Isiwele v. U.S. HHS*, 85 F. Supp. 3d 337, 352 (D.D.C. 2015) ("the comprehensiveness of FOIA forecloses any claims purportedly brought also under . . . the DJA" (internal quotation marks omitted)).

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to DHS with regard to plaintiffs' FOIA claims, and plaintiffs' remaining claims should be dismissed.

Respectfully submitted,

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