IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF THE TREASURY, Defendant.	)	Civil No. 17-1855 (RCL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Months after filing this lawsuit, plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") received the bulk of the documents it had requested under the Freedom of Information Act ("FOIA") concerning Treasury Secretary Steven Mnuchin's use of non-commercial aircraft for government travel, at great cost to the American taxpayers. The Treasury Department, however, continues to withhold portions of a handful of documents it has described variously as "non-agency records" or White House records. This label does not withstand scrutiny. The context of these withheld portions makes clear that the redacted information formed a key part of the process the Treasury Department used to secure travel authorization for Secretary Mnuchin. As such, the redacted documents constitute agency records subject to disclosure under the FOIA. Any other conclusion to treat them as non-agency or presidential records would contravene D.C. Circuit precedent that the Presidential Records Act not be used "to functionally render the FOIA a nullity." *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993).

FACTUAL BACKGROUND AND CREW FOIA REQUEST

This case arises from an expedited FOIA request CREW sent to the Treasury Department on August 23, 2017 (attached as Exhibit A), for two categories of records: (1) copies of all records concerning authorization for and the costs of Secretary Mnuchin's use of a government plane for an August 21 trip he took with his wife, Louise Linton, to Lexington, Kentucky; and (2) copies of all records concerning authorization for and the costs of the Secretary's use of a government plane for any purpose since his appointment as Treasury secretary. That trip set off a firestorm when Secretary Mnuchin's wife posted on Instagram a photo of herself deplaning from the government aircraft dressed from head to toe in luxury brands, which she identified by designer name and tagged on her Instagram image.[1] In response to a comment on the post, Ms. Linton snapped back in a post that was highly critical of the commenter and defended her lavish lifestyle and the government-paid trip.[2]

CREW's FOIA request along with the events that prompted it received extensive media coverage.[3] Shortly thereafter, on August 31, 2017, the Treasury Department's Office of Inspector

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[1] *See, e.g.*, Maggie Haberman and Mikayla Bouchard, Mnuchin's Wife Mocks Oregon Woman Over Lifestyle and Wealth, *New York Times*, Aug. 22, 2017, *available at* https://www.nytimes.com/2017/08/22/us/politics/mnuchin-louise-linton-treasury-instagram.html.

[2] *Id.*

[3] *See, e.g.*, Emily Tillett, Ethics Watchdog Asks for Records of Mnuchin and Wife's Travel to Kentucky, *CBS News*, Aug. 25, 2017, *available at* https://www.cbsnews.com/news/steve-mnuchin-louise-linton-travel-kentucky-ethics-watchdog-crew/; Abigail Abrams, Watchdog: Steven Mnuchin and Wife May Have Used Government Plane to Watch the Eclipse, *Time*, Aug. 24, 2017, *available at* http://time.com/4915080/watchdog-steven-mnuchin-louise-linton-trip-eclipse/; Josh Delk, Watchdog Requests Document About Mnuchin and Wife's Ky. Trip Timed with Eclipse, *The Hill*, Aug. 23, 2017, *available at* http://thehill.comhomenews/administration/3477713-watchdog-requests-documents-about-mnuchin-and-wifes-trip-to-ky-theres; Marina Fang, Ethics Group Wants to Know If Steve Mnuchin and Louise Linton Used Government Plane to See the Eclipse, *Huffington Post*, Aug. 24, 2017, *available at* https://www.huffingtonpost.com/entry/mnuchin-linton-watchdog-foia_us_599f1b15e4b05710aa5ac6c8; Melissa Quinn, Watchdog Group Wants to Know if Steven Mnuchin Used Government Plane to Get a Better View of the Eclipse, *Washington Examiner*, Aug. 23, 2017, *available at* http://www.washington

General announced it was "reviewing the circumstances of the Secretary's August 21 flight . . . to determine whether all applicable travel, ethics, and appropriations laws and policies were observed[.]"[4] Additional revelations followed, including that Secretary Mnuchin had requested a military jet to take him and his wife on their honeymoon to Scotland, France, and Italy, a request that was "deemed unnecessary[.]"[5]

On October 4, 2017, Inspector General Counsel Rich Delmar issued a memorandum to Inspector General Eric Thorson about the Secretary's use of government aircraft.[6] The IG Memo describes nine requests for use of government aircraft made on behalf of Secretary Mnuchin. Mr. Delmar noted his view that none of the requests and uses violated the law, but also expressed a concern with "a disconnect between the standard of proof called for [by White House guidance] and the actual amount of proof provided by Treasury and accepted by the White House in justifying these trip requests." The memo closed with the recommendation that "future requests be ready to justify government air in greater detail[.]"

After receiving no response to its August 23, 2017 FOIA request, CREW filed the complaint in this action on September 11, 2017. Following several status conferences and consultations between the parties, the Court ordered the Treasury Department to make an initial

examiner.com/watchdog-group-wants-to-know-if-steven-mnuchin-used-government-plane-to-get-a-better-view-of-the-eclipse/article/2632393.

[4] Drew Harwell, Treasury Inspector General to Review Mnuchin's Flight to Fort Knox, *Washington Post*, Aug. 31, 2017, *available at* https://www.washingtonpost.com/business/economy/treasury-inspector-general-to-review-mnuchin-flight-to-ft-knox/2017/08/31/d9e122d4-8eb2-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.5598ca0e18a5.

[5] Henry C. Jackson and Josh Dawsey, Treasury Secretary Asked for Government Jet for Honeymoon, *Politico*, Sept. 13, 2017, *available at* http://www.politico.com/story/2017/09/13/mnuchin-government-jet-honeymoon-2422222696.

[6] That report ("IG Memo") is available on *Politico*'s website at http://www.politico.com/f/?id=0000015e-ee60-dfe3-abfe-ffe93fab0000 and a copy is attached as Exhibit B.

production by November 30, 2017;[7] a second production by December 18, 2017; a third production by January 18, 2018; and a final production by February 15, 2018.[8] On November 30, 2017, the Treasury Department produced three pages of responsive documents.[9] It produced 32 pages of records on December 21, 2017,[10] and made a final production of 125 pages on February 15, 2018.[11] In each production the agency withheld materials pursuant to FOIA exemptions, which plaintiff does not challenge. In the third and final production, however, the Treasury Department withheld portions of eight pages and an attached 2009 White House memorandum that it claimed are "non-agency records."[12] Plaintiff challenges those withholdings as contrary to law.

The documents in dispute comprise email exchanges between the Treasury Department, in some instances the Defense Department, and White House officials as part of the approval process spelled out in the guidance discussed above for Secretary Mnuchin's travel on military aircraft. The first set of documents (UST 000054-57) consists of emails between Joey Smith, the Director of Operations at the Treasury Department, and White House Cabinet Secretary William McGinley sent on May 31 and June 1, 2017, seeking approval for Secretary Mnuchin to use military aircraft to travel to Ottawa, Canada in June 2017. The Treasury Department has redacted a portion of Mr. McGinley's email that follows the words: "See below and resubmit to me. Thanks," UST 000055, claiming it is a White House record.

[7] Order, Nov. 20, 2017 (Dkt. 13).
[8] Order, Dec. 18, 2017 (Dkt. 15).
[9] Joint Status Report ¶ 1, Dec. 15, 2017 (Dkt. 14).
[10] Letter from Ryan Law, U.S. Department of the Treasury, to Anne L. Weismann, CREW, Dec. 21, 2017 (attached as Exhibit C).
[11] Letter from Ryan Law to Anne L. Weismann, Feb. 15, 2018 (Exhibit D).
[12] *Id.* The documents redacted as White House or non-agency records are attached as Exhibit E.

The second set of documents (UST 000090-92) also consists of email exchanges between Mr. Smith and Mr. McGinley sent on July 19 and 20, 2017, concerning approval for Secretary Mnuchin to use military aircraft to travel to Jerusalem, Riyadh, Abu Dhabi, and Doha in September 2017. The Treasury Department has redacted a portion of Mr. McGinley's July 20 email that follows the words: "Please see below re aircraft request. Please advise," again claiming it is a White House record.

The Treasury Department also has redacted a portion of a subsequent email exchange between Mr. Smith and an individual serving as the presidential airlift coordinator in the White House Military Office whose name is redacted, that was sent on October 24, 2017, and that also concerns Secretary Mnuchin's October Mideast trip (UST 000134-35). The blacked-out portion that the Treasury Department asserts is a non-agency record follows a request made of Mr. Smith: "Please submit a new memo so we can get this travel re-approved and we have the correct paperwork." UST 000134.

The fourth set of redactions the Treasury Department has made based on a claim of non-agency or White House records (UST 000140-42) consists of part of an email exchange between individuals whose names are redacted, except for that of Mr. Smith, and at least some individuals associated with the U.S. Air Force, and contains the subject line: "DCoS approval: Sec Treasury (24-30 Oct 17)." UST 000140.[13] In this set, the Treasury Department has redacted two pages in full as non-agency or White House records (UST 000141-42) that follow an email with the text: "Please see attached OSD/ES approval." UST 000140. While the meaning of the abbreviated "OSD/ES" is not explained, it appears from other language in the email that it references the Office of the Secretary of Defense, Executive Secretary.

[13] From the context, the abbreviation "DCoS" appears to reference the deputy chief of staff.

Finally, the Treasury Department has withheld what it describes as "a March 13, 2009 White House memorandum attached to the email on UST 000106-07[.]" *See* Exhibit C. The referenced email, dated August 1, 2017, concerns "Use of MilAir" and was sent to three Treasury officials. The Treasury Department has redacted the name and other identifying information of the sender pursuant to FOIA Exemption 6, and those redactions are not at issue.

GOVERNING TRAVEL REGULATIONS AND POLICIES

OMB Circular A-126, issued on May 22, 1992, governs Secretary Mnuchin's official travel, like that of all government officials (except the president and vice president. Intended to "restrict the operation of government aircraft to defined official purposes,"[14] the circular applies "to all government-owned, leased, chartered and rental aircraft and related services operated by Executive Agencies" except aircraft the president and vice-president use.[15] The guidance defines "official travel" as travel that falls into one of three categories: "(i) travel to meet mission requirements, (ii) required use travel, and (iii) other travel for the conduct of agency business."[16] The Federal Travel Regulation ("FTR") echoes these requirements for when government aircraft may be used. 41 C.F.R. §§ 301-10.260-301-10.266. The FTR, however, does not apply to the use of military aircraft for "White House Support Missions," which instead is governed by the "longstanding approval process in place since at least 2005." IG Memo.

A memorandum from then-White House Chief of Staff William Daley dated April 4, 2011, spells out this "long-standing approval process" ("Daley Memo").[17] The Daley Memo

[14] OMB Circular A-126 ¶ 3, *available at* https://www.gsa.gov/cdnstatic/OMB_Circular_A-126.pdf.
[15] *Id.* ¶ 4.
[16] *Id.* ¶ 5(c).
[17] The Daley Memo does not appear to be publicly available. References herein are to the IG Memo, which quotes from and describes the Daley Memo in detail.

defines White House support missions as those for which the president has "specifically directed that the travel occur[.]" IG Memo. Moreover, "[t]he President must have specifically directed the government employee to undertake the assignment that requires the travel," although the authorization for a particular mode of travel may come from the White House deputy chief of staff for operations. *Id.* Under a process the White House had implemented at that time, the White House deputy chief of staff was empowered to approve such requests. *Id.*

More recently, in the wake of revelations about the extensive use of non-commercial aircraft by Secretary Mnuchin and other cabinet secretaries, OMB Director Mick Mulvaney issued a memorandum on the topic of travel on government-owned, rented, leased, or chartered aircraft.[18] The Mulvaney Memo notes that such travel, except for "space-available travel and travel to meet mission requirements . . . shall require prior approval from the White House Chief of Staff." *Id.*

ARGUMENT

I. The Treasure Department Has Improperly Withheld Documents As Non-Agency or White House Records.

As the context of the documents from which the redactions were made reveals, all the information the Treasury Department characterizes as non-agency records pertains directly to the process of seeking approval for Secretary Mnuchin's use of military aircraft for government travel. This use places the withheld records squarely within the category of agency records subject to the FOIA, as that term has been construed by the Supreme Court.

[18] Memorandum for the Heads of Executive Departments and Agencies from Mick Mulvaney, Director, OMB re Travel on Government-Owned, Rented, Leased, or Chartered Aircraft, Sept. 29, 2017 ("Mulvaney Memo") (attached as Exhibit F).

In *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989) ("*Tax Analysts II*"), the Supreme Court established a two-part definition of "agency records" as including records that an agency (1) creates or obtains, and (2) controls. *Id.* at 144-46. The first factor emphasizes records that an agency actually acquires, as opposed to records that "merely *could have been* obtained[.]" 492 U.S. at 145 (quoting *Forsham v. Harris*, 445 U.S. 169, 186 (1980)) (emphasis in original). In this way the first factor focuses the definition of agency records on the most important factor – actual possession – consistent with the FOIA's legislative history. *See Tax Analysts II*, 492 U.S. at 144-45 ("The legislative history of the FOIA abounds . . . with references to records *acquired* by an agency.") (omission and emphasis in original). Given that actual possession forms the core of the control inquiry, the Supreme Court anticipated that "disputes over control should be infrequent" because "requested materials ordinarily will be in the agency's possession at the time the FOIA request is made." *Id.* at 146 n.6.

That is certainly the case here, where the Treasury Department has actually acquired the contested documents. Throughout this litigation, the agency has represented to the Court that documents within its possession that are responsive to CREW's FOIA request include documents it had located and subsequently circulated to the Executive Office of the President ("EOP") for "consultation[.]"[19] In response, the Court ordered the Treasury Department to "complete its production of non-exempt portions of responsive records that required consultation with the Executive Office of the President ("EOP") no later than February 15, 2018."[20] When the Treasury Department made the required production on February 15, it stated in its cover letter: "Pursuant to the Court's December 18, 2017 Order, this production consists of non-exempt

[19] *See, e.g.*, Joint Status Report, Dec. 15, 2017 (Dkt. 14).
[20] Order, Dec. 18, 2017 (Dkt. 15).

portions of responsive records that required consultation with the [EOP].” Exhibit D. The agency went on to note it was not producing other documents it described as “internal EOP email exchanges” and a White House memorandum attached to another email it was producing. *Id.* The portions of documents the Treasury Department withheld as non-agency records are contained within and a part of email exchanges it produced and that presumably were extracted from servers located within the Treasury Department. Of note, at no point in this litigation did the Treasury Department represent it had to go outside of the agency to locate responsive records. These facts clearly establish that the Treasury Department obtained and has possession of the disputed records.

The second factor focuses on control, which *Tax Analysts II* defined to mean “that the materials have come into the agency’s possession in the legitimate conduct of its official duties.” 445 U.S. at 145. In defining “control” broadly to encompass materials possessed by an agency “in the legitimate conduct of its official duties,” the Supreme Court drew upon the definition of agency records in the Records Disposal Act, which is part of the Federal Records Act and includes a range of materials “made or received by an agency of the United States Government *under Federal law or in connection with the transaction of public business*.” *Id.* (quoting 44 U.S.C. § 3301) (emphasis in original).

The control factor also is satisfied here. The emails in question came into the Treasury Department’s possession in the ordinary course of business as part of the agency’s process of securing approval for Secretary Mnuchin to use military aircraft (referred to as “milair” in the documents) for official travel. Without question this constitutes “the legitimate conduct of [the Treasury Department’s] official business.”

Even looking more broadly to the four-factor control test the D.C. Circuit has adopted, first in *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989) ("*Tax Analysts*"), and more recently in *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), yields the same conclusion that the withheld records constitute agency records under the FOIA. Under that test the Court would consider:

> (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 the 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 of files.

Tax Analysts, 845 F.2d at 1069 (D.C. Cir. 1988).[21]

The second, third, and fourth factors point unmistakably to agency control here. There is no indication the agency was limited in any way in its use and disposal of this information (factor two). The texts of the relevant emails from Treasury Department officials indicate they clearly relied on the withheld material in perfecting the requested military aircraft authorization (factor three). The redacted material was incorporated into Treasury Department records as part of email exchanges involving agency personal that apparently the Treasury Department located on its email servers while conducting a search for records responsive to CREW's FOIA request (factor four).

As to the first element – the creator's intent – while the D.C. Circuit has directed courts to look at this factor, the Supreme Court has ruled otherwise. In *Tax Analysts II*, the Supreme Court expressly rejected a definition of "agency records" that turns on the creator's intent, reasoning "[s]uch a *mens rea* requirement is nowhere to be found in the Act. Moreover,

[21] Although the Supreme Court affirmed this decision in *Tax Analysts II*, it explicitly announced a two-factor test, ignoring the four-factor test announced below. *Tax Analysts* II, 492 U.S. at 147-48.

discerning the intent of the drafters of a document may often prove an elusive endeavor . . .” *Tax Analysts* II, 492 U.S. at 147-48. But while a serious question remains as to whether a court, consistent with Supreme Court precedent,[22] can consider the creator’s intent, here that factor is fully satisfied.

The context of the documents at issue provides sufficient evidence of the creator’s intent to relinquish control. Most of the disputed records appear to have originated within the EOP and were provided freely to Treasury Department officials to educate them on and assist them in securing authorization for Secretary Mnuchin’s travel on military aircraft, with no limitations on their use or distribution. The redacted portions found at UST 000055-57 were sent from Mr. McGinley to Mr. Smith in response to Mr. Smith’s request for a status update on a pending “milair memo request” for Secretary Mnuchin’s upcoming trip to Ottawa, Canada. UST 000057. Mr. McGinley responded: “See below and resubmit to me.” UST 000055. From this context, it is clear Mr. McGinley submitted additional information and/or guidance on how the Treasury Department should perfect its travel authorization request. Far from reflecting a retention of control by EOP, the context demonstrates the redacted information was freely provided subject to no conditions or restrictions on its use.

Similarly, Mr. McGinley sent to Mr. Smith the redacted portions found at UST 000091-92 in response to the Treasury Department’s submission of its “milair request memo for the Secretary’s travel currently scheduled for September 14-19” to three Mideast countries. UST

[22] At least one member of the D.C. Circuit has recognized the apparent conflict between the Supreme Court’s definition of “agency records” and the D.C. Circuit’s four-factor test, which “relie[s] heavily on the authors’ purpose in creating the documents.” *Consumer Fed’n of Am. v. Dep’t of Agriculture*, 455 F.3d 283, 294 (D.C. Cir. 2006) (Henderson, J., concurring). Judge Henderson expressly acknowledged that after the D.C. Circuit articulated its test (in *Tax Analysts*), “the Supreme Court [in *Tax Analysts II*] determined that the author’s intent is irrelevant to whether a document is an ‘agency record.’” *Id.*

000092. The redactions follow the words "Please see below re aircraft request. Please advise." UST 000090. This context makes clear Mr. McGinley was providing the Treasury Department with information it should consider with respect to the request for authorization to use military aircraft. In this way, the redacted documents became part of the agency's authorization process, with no indication the Treasury Department was restricted in any way with respect to the redacted information.

The redacted information found in UST 000134 appears to have played a similar role in the authorization process. In response to an email from Mr. Smith advising of a change in Secretary Mnuchin's upcoming Mideast trip and a question of whether the Treasury Department needed to submit a new milair authorization (UST 000135), the White House Military Office advised "Please submit a new memo[.]" UST 000134. The claimed non-agency information follows this statement, and there is no indication it pertains to anything other than the requested milair authorization. In response, the Treasury Department submitted an updated request "reflecting the below changes." UST 000134. The reference to "below changes" appears to pertain to changes directed by or recommended in the withheld material. Here, as in the other instances, the larger context is an ongoing travel authorization process in which information is freely exchanged to aid the Treasury Department in securing military aircraft for Secretary Mnuchin's use. The Treasury Department not only received the redacted information, but incorporated it into updates to the request. All this evidences that EOP did not retain control over the information.

Likewise, the redacted material found in UST 000141-43 contains approval by the Office of the Secretary of Defense Executive Secretary for an air mission to be taken by Secretary Mnuchin in October 2017. UST 000140. The redacted material, sent by the Pentagon, is

described as "OSD/ES approval." *Id.* Given that the withheld material did not originate with the EOP, the claim that it constitutes non-agency or White House records makes no sense. In any event, the redacted material forms a crucial part of the authorized travel by Secretary Mnuchin and this pivotal role defeats any claim that the White House ever had – much less retained – a level of control that would render the documents non-agency records.

Finally, the Treasury Department has claimed that a March 13, 2009 White House memorandum attached to an email at UST 000106-107 is a White House record not subject to the FOIA. The document in question is attached to an email dated August 1, 2017, sent to Treasury Department officials with the subject line "Use of MilAir." UST 000106. The email also includes a copy of guidance on the use of government aircraft for travel titled "When may I use a Government aircraft for travel?", *id.*, and closes with the following: "Let me know if you need any additional information or need additional clarification." UST 000107. This context demonstrates that the redacted portions contain additional guidance on the use of government travel for aircraft that pertains directly to Secretary Mnuchin's use of military aircraft for travel. Even if, as the Treasury Department contends, this memo originated at the White House, it was shared freely with the Treasury Department to advise the agency and facilitate Secretary Mnuchin's requested use of military aircraft that was controlled by another agency, the Defense Department. As an apparently freely shared document pertaining directly to agency business, the withheld memorandum cannot plausibly be considered a non-agency record once it is in the hands of the Treasury Department for the conduct of Treasury Department business.

Any other conclusion would "functionally render the FOIA a nullity." *Armstrong v. Executive Office of the President*, 1 F.3d at 1293. In *Armstrong*, the court considered the interplay between the Presidential Records Act ("PRA") and the Federal Records Act ("FRA") to

conclude that the PRA's explicit exemption of records subject to the FOIA from its reach was "absolutely essential to preventing the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of the FOIA." *Id.* at 1292. As the *Armstrong* court explained, the class of materials that constitutes federal records subject to the FOIA and the class of materials that constitutes presidential records not subject to the FOIA are "mutually exclusive[.]" *Id.* at 1293. Thus, placing a record in the PRA category necessarily would remove it from the FOIA's reach.

That is precisely what the White House attempts to do here by labelling records in the possession and control of the Treasury Department as "White House" or non-agency records to eliminate public access under the FOIA. Allowing the White House to coopt records that plainly formed part of an agency process would violate the principles recognized in *Armstrong* and embodied in the PRA's directive that presidential records "do not include 'any documentary materials that are . . . official records of an agency,' as the term 'agency' is defined in the FOIA[.]" *Armstrong*, 1 F.3d at 1292 (quoting 44 U.S.C. § 2201(2)(B)(i)).

Finally, concluding here that the challenged records are agency records subject to disclosure under the FOIA would not deprive the White House of the ability to protect any legitimate interest it may have in keeping portions of the withheld documents secret. The FOIA's nine exemptions more than adequately protect information in the possession of agencies that may have originated from the president and his staff. For example, the government routinely invokes FOIA Exemption 5 to withhold information that may reveal presidential decision-making. *See, e.g., Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004). Further, any time the president issues a directive to federal agencies to implement policy, authorizes an agency to carry out a course of action, or communicates or visits with agency officials, the president leaves

a trail of agency records subject to the FOIA. *See, e.g., Center for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 18 (D.D.C. 2013) (granting summary judgment to plaintiff, which had requested under the FOIA a Presidential Policy Directive on Global Development); *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 124 (2d Cir. 2014) (ordering disclosure of a redacted OLC memorandum on the legality of targeted drone strikes), *op. amended on denial of reh'g*, 758 F.3d 436 (2014), *supplemented*, 762 F.3d 233 (2014). While the courts have held that some of those records are exempt from production under the FOIA, none have suggested they are not "agency records." Here, too, the fact that the Treasury Department must consult with and secure authorization from the White House to secure authorization for Secretary Mnuchin's use of military aircraft does not demonstrate a degree of White House control that places the documents created from that consultation beyond the reach of the FOIA.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's motion for summary judgment and order the Treasury Department to produce all non-exempt records withheld as non-agency or White House records.

Respectfully submitted,

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