

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY AND :  
ETHICS IN WASHINGTON, :

Plaintiff, :

v. :

Civil Action No. 07-0964 (CKK)

OFFICE OF ADMINISTRATION, :

Defendant. :

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**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
FOR JUDGMENT ON THE PLEADINGS**

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**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION  
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**STATEMENT**

As this Court has recognized in the past, in determining whether an entity of the Executive Office of the President (“EOP”) is an agency for purposes of the Freedom of Information Act (“FOIA”) it is “at the very least, helpful, if not required” to have deposition testimony and other evidence on issues such as the degree of independent authority that an entity in fact exercises. Electronic Privacy Information Center v. Office of Homeland Security, Civil Action No. 02-620 (CKK), Memorandum Opinion, December 26, 2002, p. 12 (attached as Exhibit 1). Public documents such as executive orders simply do not provide “definitive proof” of an EOP entity’s status as a non-agency. Id. at 12.

Notwithstanding the approach that this Court and the D.C. Circuit have sanctioned as necessary for resolving the agency issue, the Office of Administration (“OA”) asks the Court here to rule solely on the basis of the pleadings that OA is not an agency. To be sure, OA attaches public documents to its motion that it suggests the Court can consider beyond the pleadings -- precisely the kind of documents this Court has eschewed as definitive proof of

agency status – but asks the Court to confine its review to the facts presented in the pleadings.

Not only is OA’s approach analytically unsound, but the publicly available facts strongly suggest, if not prove conclusively, that OA is an agency subject to the FOIA. Completely missing from OA’s brief -- whether by intention or design -- is any mention of the language in the executive order establishing OA that makes clear OA is to provide administrative support and services “to all units within the Executive Office of the President, *except for such services provided primarily in direct support of the President.*”<sup>1</sup> A subsequent provision of that executive order states unequivocally that the effect of the order is to transfer to OA primary responsibility for “performing all administrative support and service functions of units” within EOP “*except to the extent those functions are performed by the White House Office primarily in direct support of the President.*”<sup>2</sup> The clear and repeated language of the executive order limiting OA’s responsibilities makes the government’s failure to even mention, much less explain, this language all the more inexcusable.

OA’s litigating position here also cannot be reconciled with its consistent prior practice of holding itself out as subject to the FOIA. Like other EOP entities that the D.C. Circuit has deemed to be agencies, OA has published FOIA regulations, has responded consistently to FOIA requests, and in all other respects has acted as an agency under the FOIA. OA’s attempt here to adopt an “on-again off-again definition” of itself as an agency<sup>3</sup> must therefore fail.

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<sup>1</sup> Executive Order No. 120028, § 3, 42 Fed. Reg. 62785 (Dec. 12, 1977) (emphasis added).

<sup>2</sup> *Id.*, § 5 (emphasis added).

<sup>3</sup> See, e.g., Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1041 (D.C. Cir. 1985).

At an absolute minimum, this Court cannot on the basis of the pleadings -- even as amplified by public documents such as executive orders and budget submissions -- “foreclose the possibility that [OA] is an agency.”<sup>4</sup> Instead, the issue of OA’s agency status can be resolved only after appropriate discovery, including depositions, that elicits facts concerning the actual nature of the authority OA enjoys, its operational proximity to and relationship with the president, and its organizational structure.

## **BACKGROUND**

### **A. The Office Of Administration**

The Reorganization Plan No. 1 of 1977 established the Office of Administration within the EOP and directed that it “shall provide components of [EOP] with such administrative services as the President shall from time to time direct.” Reorganization Plan No. 1 of 1977, § 2, 42 Fed. Reg. 56101, 91 Stat. 1633. Subsequently, through Executive Order 12028 President Jimmy Carter clarified more specifically OA’s duties and responsibilities. In particular, that executive order provides:

The Office of Administration shall provide common administrative support and services to all units within the Executive Office of the President, except for such services provided primarily in direct support of the President.

Executive Order No. 12028, § 3(a), 42 Fed. Reg. 62895 (Dec. 12, 1977) (“EO 12028”). The exclusion of the president from OA’s primary responsibilities is also echoed in section 5 of EO 12028:

The primary responsibility for performing all administrative support

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<sup>4</sup> Electronic Privacy Information Center v. Office of Homeland Security, Civil Action No. 02-620 (CKK), Memorandum Opinion, December 26, 2002 at 9 (“EPIC Op.”).

and service functions of units within the Executive Office of the President shall be transferred and reassigned to the Office of Administration; except to the extent those functions are vested by law in the head of such a unit, other than the President; and except to the extent those functions are performed by the White House Office primarily in direct support of the President.

EO 12028, § 5.

President Carter subsequently amended EO 12028 through Executive Order No. 12122, which provides in pertinent part as follows:

Subject to such direction or approval as the President may provide or require, the Director shall organize the Office of Administration, contract for supplies and services, and do all other things that the President, as head of the Office of Administration, might do.

Executive Order No. 12122, § 4(a), 44 Fed. Reg. 11197 (Feb. 26, 1979) (“EO 12122”).

In 1980, OA published its first FOIA regulations establishing procedures to obtain records from OA. 5 C.F.R. Part 2502, 42 Fed. Reg. 47112 (July 14, 1980) (attached as Exhibit 2).<sup>5</sup> Among other things, OA’s initial FOIA regulations provided that “all records by the Office of Administration are available to the public, *as required by the Freedom of Information Act.*” *Id.* at Part 2502.16 (emphasis added). OA’s current FOIA regulations, also found at 5 C.F.R. Part 2502, contain this same provision. See 5 C.F.R. § 2502.16.

In addition to providing access to OA’s FOIA regulations, the official White House website – [www.whitehouse.gov](http://www.whitehouse.gov) -- provides a wealth of other information concerning OA’s compliance with the FOIA. For example, the website posts OA’s annual FOIA reports dating

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<sup>5</sup> Although these regulations, together with documents available from the White House’s own website discussed below, are not part of the pleadings, this Court can take judicial notice of them as publicly-available documents to the same extent the government has requested that the Court take judicial notice of OA’s budget submissions.

back to 1996. See [www.whitehouse.gov/oa/foia/readroom.html](http://www.whitehouse.gov/oa/foia/readroom.html). Among other things, those reports reveal the number of FOIA requests OA receives and processes each fiscal year and the basis for any withholdings the agency has made. For example, in Fiscal Year 2006, OA received 67 FOIA requests. See [www.whitehouse.gov/oa/foia/foia2006.pdf](http://www.whitehouse.gov/oa/foia/foia2006.pdf).

Until this past weekend, the White House's official website also explained in two separate places how FOIA works within the EOP. As provided therein, "The President's immediate personal staff and units within the EOP whose sole function is to advise and assist the President are not subject to FOIA." [www.whitehouse.gov/oa/foia/eop-foia.html](http://www.whitehouse.gov/oa/foia/eop-foia.html); [www.whitehouse.gov/oa/foia/handbook.html](http://www.whitehouse.gov/oa/foia/handbook.html).<sup>6</sup> The site went on to list the specific EOP entities that are subject to the FOIA:

- Council on Environmental Quality
- Office of Administration
- Office of Management and Budget
- Office of National Drug Control Policy
- Office of Science and Technology Policy
- Office of the United States Trade Representative.

Id. Also listed were the six entities considered exempt from FOIA's provisions. Id. In addition, the Department of Justice's website listing of principal FOIA contacts at federal agencies includes OA. See [www.usdoj.gov/oip/foiacontacts.html](http://www.usdoj.gov/oip/foiacontacts.html).<sup>7</sup>

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<sup>6</sup> Copies of these postings as they existed as of August 31, 2007, are attached as Exhibit 3. The White House's eleventh-hour changes made during the pendency of litigation over OA's status cannot erase its prior consistent treatment of the OA as an agency subject to the FOIA.

<sup>7</sup> DOJ's listing also includes under the heading Executive Office of the President the five other EOP components that the White House's website denotes as agencies subject to the FOIA (Council on Environmental Quality, Office of Management and Budget, Office of National Drug Control Policy, Office of Science and Technology Policy and Office of the United States Trade Representative) in addition to the Privacy and Civil Liberties Oversight Board. Id.

## **B. CREW's<sup>8</sup> FOIA Request, OA's Response And This Litigation**

Based on information CREW received that a massive amount of email -- at least five million -- during a two and one-half year period mysteriously went missing from White House servers CREW sent a FOIA request to OA on April 16, 2007, seeking documents OA had assembled and prepared related to the loss of EOP email records. See Exhibit A to Complaint. On April 18, 2007, CREW sent a second clarifying request that delineated four categories of records CREW is seeking, all related to the loss of email and proposals developed to restore the deleted email as well as implement a new electronic record-keeping system that would ensure proper preservation of records under both the Federal Records Act and the Presidential Records Act. See Exhibit B to Complaint. CREW's requests also sought a waiver of fees as well as expedition for the express purpose of disseminating any responsive documents to the public based on the widespread and exceptional media interest in the White House emails, the revelations about the use by high-ranking EOP officials of outside email accounts and the fact that the White House has known since the fall of 2005 that at least five million emails are missing from its records management system, but has done nothing to address or fix the problem. Exhibits A and B to Complaint.

By letter dated April 27, 2007, OA acknowledged receipt of CREW's requests and granted the requests for a fee waiver and expedited processing. Exhibit C to Complaint. OA also stated, however, that due to "unusual circumstances" it could neither process the requests within FOIA's mandatory time-frames nor could it provide an anticipated date for completing

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<sup>8</sup> CREW is the acronym for plaintiff Citizens for Responsibility and Ethics in Washington.

processing. Id.

On April 30, 2007, CREW sent a follow-up letter to OA explaining that OA's assessment that CREW was seeking an "extensive list of records" was inaccurate. Exhibit D to Complaint. When OA failed to respond to this letter or provide CREW with an anticipated date for completing processing, CREW filed the complaint in this matter on May 23, 2007, along with a motion for a preliminary injunction.

At the direction and assistance of the Court, the parties negotiated a time-table for OA to process CREW's prioritized categories of documents that resolved the pending motion for emergency relief. See Order of June 4, 2007, as modified by Order of June 7, 2007.<sup>9</sup> At no time during those discussions did OA suggest it was not subject to the FOIA.

Pursuant to the Court's Orders, OA made its first response on June 21, 2007. There, for the first time, OA stated that it was processing CREW's requests "as a matter of administrative discretion" based on its claim that "on occasion" OA provides direct administrative support to the president. Letter from Carol Ehrlich, FOIA Officer, to Anne L. Weismann, June 21, 2007 (Exhibit 1 to Plaintiff's Motion to Modify Order -- Document 12).<sup>10</sup> OA also claimed it had located 504 pages that "may be responsive," which it described as including "emails, spreadsheets, procurement-related documents, and internal guidance." Id. Of those documents,

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<sup>9</sup> It was revealed recently, in a letter from Chairman Henry A. Waxman to Fred F. Fielding, Counsel to the President, that at the same time OA was telling this Court it would need months to process CREW's request it was meeting with House Oversight Committee staff specifically to brief them on the White House email system and the missing email. See Letter from Chairman Henry A. Waxman to Fred F. Fielding, August 30, 2007 (attached as Exhibit 4).

<sup>10</sup> References to pleadings and other motions filed in this case include reference to the document number assigned to each filing.

OA claimed approximately 454 pages were exempt under Exemptions 2, 5 and 6. Finally, OA released 50 pages, including nine pages of a document dated November 12, 2002, 26 pages of a document dated June 24, 2003, with a July 2005 amendment and interagency agreement dated September 24, 2005, and 15 pages of a document dated September 21, 2004. Id. None of these documents included information related directly to the deleted emails.

Given the total absence of any meaningful information to enable an assessment of the completeness of OA's production, on July 2, 2007, CREW requested that the Court modify its orders (Document 12). Specifically, CREW requested that the Court require OA to provide additional information, including a description of the withheld documents and an identification of the exemption claimed for each withheld document. Id. OA has opposed the motion and briefing is now complete.

Thereafter, on July 27, 2007, the parties filed a Joint Proposed Schedule (Document 17) as ordered by the Court. Defendant, for its part, stated "OA will move to dismiss this action on the ground that OA is not an 'agency' subject to FOIA." Joint Proposed Schedule, ¶ 6. By Order dated August 7, 2007, the Court ordered OA to file its brief in support of its motion to dismiss on or before August 21, 2007, with CREW's opposition due on or before September 4, 2007, and OA's reply due by September 11, 2007. Order of August 7, 2007 (Document 18). OA was also directed to comply with the Court's prior orders regarding its processing of CREW's requests. Id. Finally, the Court noted it was holding in abeyance CREW's motion to modify pending resolution of OA's motion to dismiss. Id.

Contrary to its representations to the Court, OA did not file a motion to dismiss. Instead, on August 21, 2007, OA filed a motion for judgment on the pleadings pursuant to Rule 12(c) of

the Federal Rules of Civil Procedure (Document 20). As exhibits to its motion OA included three of OA's budgets for Fiscal Years 2006, 2007 and 2008, that it claims are evidence of its mission. See Defendant's Motion for Judgment on the Pleadings and Memorandum in Support at 13 ("D's Mem.").

In addition, on August 24, 2007, OA sent its second response to CREW's FOIA requests. OA's one-page letter (attached as Exhibit 5) states in summary form that OA has located "approximately 3,470 pages that may be responsive," that "[s]uch documents include spreadsheets and related documents," and that all 3,470 pages are exempt in their entirety (or do not contain reasonably segregable portions) pursuant to exemptions 5 (attorney work product, attorney client and/or deliberative process privileges) and 6 (personal privacy matters).

## **ARGUMENT**

### **I. THE ISSUE OF WHETHER OA IS AN AGENCY FOR PURPOSES OF THE FOIA CANNOT BE DECIDED ON THE BASIS OF THE PLEADINGS.**

#### **A. Standard For Judgment On The Pleadings**

In ruling on a motion for judgment on the pleadings, the court's review is confined to the pleadings and the facts they contain. See, e.g., Fay v. Perles, 484 F.Supp. 2d 12, 14 (D.D.C. 2007). Any facts must be construed most favorably to the non-moving party, Schuchart v. La Taberna Del Alabardero, Inc., 365 F.3d 33,3 5 (D.C. Cir. 2004), and such motion must be denied where the complaint, at a minimum, alleges a "plausible entitlement to relief." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007).

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, if the moving party presents matters outside the pleadings, a motion for judgment on the pleadings "shall be treated

as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” While courts are permitted to take judicial notice of certain public documents in deciding such motions, a court generally exercises its discretion to do so to avoid unnecessary proceedings. So, for example, in Covad Communcations Co. v. Bell Atlantic Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005), cited by OA in its brief,<sup>11</sup> the court looked to the public record in another related judicial proceeding precisely to avoid an unnecessary proceeding in the case before it. Indeed, virtually all of the cases cited by OA in support of its claim that including OA budget submissions does not transfer its motion to one for summary judgment involved a court’s consideration of publicly filed documents or documents pertaining to judicial or quasi judicial proceedings.<sup>12</sup> Notably, OA cites no case -- and CREW is aware of none -- sanctioning a party’s use of a motion for judgment on the pleadings to avoid discovery and prevent the court from considering a full and complete record.

**B. The Pleadings Here Do Not Establish As A Factual Matter That OA Is Not An Agency Under The FOIA.**

Under the FOIA, “[e]ach agency” “shall make records promptly available” upon request, subject to certain exceptions. 5 U.S.C. § 552(a)(3)(A). The Act, as amended in 1974, defines “agency” to include:

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<sup>11</sup>D’s Mem. at 7 n.1.

<sup>12</sup> For example, in EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997), the documents in question were referenced in the complaint and consisted of publicly filed notices of recordation. Similarly, in Wise v. Glickman, 257 F.Supp. 2d 123, 130 n. 5 (D.D.C. 2003), the documents in question were rulings of arbitrators that were in the public record.

any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . .

Id. at § 552(f)(1).

The legislative history of this provision makes clear that by including the EOP in the definition of “agency,” Congress did not intend to include “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 14 (1974). In this regard, the drafters intended to codify the approach of the D.C. Circuit in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). Id. See also S. Conf. Rep. No. 1200, 93d Cong. 2d Sess. 15 (1974).

Specifically, in Soucie, the D.C. Circuit applied a “sole function” test in considering whether the Office of Science and Technology Policy (“OST” or “OSTP”), an entity within the EOP, is an agency. As the Soucie court reasoned, “[i]f the OST’s sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President’s staff and not a separate agency.” 448 F.2d at 1075. The court found the OST to be an agency “[b]y virtue of its independent function of evaluating federal programs,” which went beyond solely advising and assisting the president. Id.

It is therefore clear from the text of the FOIA, as amplified by congressional intent, that the determination of whether a particular entity within the EOP is an agency is fact-dependent. This Court came to this same conclusion in EPIC, noting that the D.C. Circuit “ has identified

‘three interrelated factors’ relevant to determining whether those who both advise the President and supervise others in the Executive Branch exercise ‘substantial independent authority’ and hence should be deemed an agency subject to the FOIA. These factors are: (1) ‘how

close operationally the group is to the President,’ (2) ‘whether it has a self-contained structure,’ and (3) ‘the nature of its delegated authority.’ These three factors are not necessarily to be weighed equally; rather each factor warrants consideration insofar as it is illuminating in the particular case.

EPIC Op. at 7, *quoting* Armstrong v. Executive Office of the President, 90 F.3d 553, 558 (D.C. Cir. 1996) (“Armstrong”) (*citing* Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993)).

Despite this clear authority, the government takes issue with the three-factor test endorsed by the D.C. Circuit in both Meyer and Armstrong, arguing instead that the test applies only in “certain contexts” not present here. D’s Mem., p. 15. According to the government, the only relevant factor here is whether OA has substantial independent authority. Id. at 15-16.

What the government overlooks is that the three-factor test employed by the Meyer court is simply a way to determine whether a particular entity within the EOP is not an agency because it has “characteristics and functions . . . similar to those of the President’s immediate personal staff.” Meyer, 981 F.2d at 1293. Whether viewed exclusively through the lens of the actual authority that an EOP entity wields, or informed by the structure of the entity and its operational closeness to the president, the touchstone for any analysis of the agency question is the same: the language and intent of the FOIA to exclude from the definition of agency those entities of the EOP whose sole function is to advise and assist the President. See Armstrong, 90 F.3d at 558-59 (explaining that the three-part test of Meyer “is designed succinctly to capture the court’s prior learning on the subject whether a unit within the [EOP] is an agency covered by the FOIA. As reflected in those cases, the specific evidence bearing upon that question varies with the entity in

question.”).<sup>13</sup>

Moreover, even if the Court were to adopt the single-factor agency test that OA advances here, it would still be required to consider factual evidence not contained in any of the pleadings or the three OA budget documents included with OA’s brief. In determining whether OA is an agency, the Court must be guided by facts that reveal the actual authority that OA has exercised and its operational proximity to the president as well as facts that would reveal whether OA has “characteristics and functions” like those of the president’s immediate personal staff. None of these facts is contained in the pleadings on which the government asks the Court exclusively to rely. Indeed, those pleadings are silent on the critical questions of what the actual role that OA plays is and whether it exercises independent authority. Simply stated, the pleadings “do not foreclose the possibility that [OA] is an agency.” EPIC Op. at 9.<sup>14</sup>

Missing from the record, for example, are the agency declarations and deposition testimony that were so critical to the court in deciding the agency question in Armstrong. See, e.g., Armstrong, 90 F.3d at 559-60 (discussing declaration of National Security Advisor Anthony Lake), 561 (discussing deposition testimony of the Senior Director for Intelligence Programs). As a review of the district court opinion in Armstrong reveals,<sup>15</sup> the record in that case was

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<sup>13</sup> OA’s argument also cannot be reconciled with the court’s observation in Meyer that “the structure of the group is important in determining its relative independence from the President. Function is crucial, but, like the architect Louis Sullivan, we believe that form follows function.” 981 F.2d at 1296-97.

<sup>14</sup> Notably, in EPIC the government filed with its motion to dismiss considerably more exhibits (15) than OA has proffered here. See EPIC Op. at 2-3 n.2. The Court nevertheless found the record insufficient from which to conclude that the Office of Homeland Security was not an agency.

<sup>15</sup> See 877 F.Supp. 690 (D.D.C. 1995).

replete with not only deposition testimony from multiple deponents, but also a joint statement of facts, responses to admissions and other discovery requests, internal memoranda and letters and other documents such as National Security Division directives. This evidence, “at the very least,” was “helpful, if not required, in determining the status of an entity positioned within the Executive Office of the President.” EPIC Op. at 12.

Here, by contrast, there is no testimony from OA officials -- whether by deposition or declaration -- elucidating its status. Instead, the government cites only to certain budget submissions by OA that are far from dispositive on the issue of OA’s status as an agency and the executive orders that established OA in the first place. These executive orders not only fail to provide “definite proof” that OA is not an agency,<sup>16</sup> but make clear that OA’s sole purpose is not to advise and assist the president.

First and foremost, EO 12028 directs OA to provide administrative support and services to all units within the EOP “*except for such services provided primarily in direct support of the President.*” EO 12028, § 3(a) (emphasis added). That same executive order directs that responsibility for providing administrative support to the President remains with the White House Office. Id. at § 5. Thus, by its plain terms, the executive order establishing OA is proof positive that OA is not an entity that solely advises and assists the President. To the contrary, OA’s primary mission is to advise and assist all other components of the EOP, save the President.

OA has no response or differing explanation of this language; indeed, OA’s brief does not even mention these two provisions of the executive order. Yet this executive order is, in the

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<sup>16</sup> EPIC Op. at 12.

words of the Meyer court, “the most important indication of [OA’s] role.” 981 F.2d at 1294. OA’s silence on this most probative evidence speaks volumes about the lack of merit in OA’s position.

The governing executive orders also evidence the independent authority OA has been given. Pursuant to EO 12122, the director of OA is empowered to “organize the Office of Administration, contract for supplies and services, and do all other things that the President, as head of the Office of Administration, might do.” EO 12122, § 4(a). And while the director is “[s]ubject to such direction or approval as the President *may* provide or require,” id. (emphasis added), the use of the word “may” indicates that, in the absence of such direction or approval, the director is free to act. In other words, OA’s director is authorized to act as the president might, and need not wait for direction, guidance, or orders from the president.

OA suggests otherwise, claiming that this language makes OA akin to the staff of the Executive Residence found to be outside the scope of the FOIA in Sweetland v. Walters, 60 F.3d 852 (D.C. Cir. 1995). D’s Mem. at 13-14. The comparison is inapt; unlike OA, the staff of the Executive Residence was found to be “exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties.” Sweetland, 60 F.3d at 854. OA, by contrast, was created to provide administrative support to all entities of the EOP except for the president, including entities such as the Office of Management and Budget (“OMB”), OST, and the Council on Environmental Quality (“CEQ”), all EOP components found to be agencies for purposes of the FOIA.<sup>17</sup>

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<sup>17</sup> In determining that the Executive Residence is not an agency, the court in Sweetland was also guided by the “unseemly” result of submitting the Executive Residence to the FOIA, namely the resulting revelation of “the intimate details of the management of [the president’s]

Moreover, the government’s litigating position here, including its claim that OA is headed by the president,<sup>18</sup> is directly contrary to the interpretation of the governing executive order that the government advanced before the Supreme Court in Armstrong. The government’s brief in opposition to certiorari addresses the specific suggestion that the National Security Council is not unique in having the president as its head, as the OA also is headed by the president, as follows:

Petitioners suggest . . . that the Office of Administration, a component of the EOP, is also headed by the President. That suggestion is incorrect. *By Executive Order No. 12,122, 44 Fed. Reg. 11,197 (1979), the President has effected a broad delegation of authority over the OA to its Director.* That Executive Order states that, ‘[s]ubject to such direction or approval as the President may provide or require, [the] Director shall organize the Office of Administration, contract for supplies and services, and do all other things that the President, as head of the Office of Administration, might do.’ *Ibid.* The OA’s governing regulations state that the OA ‘consists of specified offices, which do not include the President.

Armstrong v. Executive Office of the President, No. 96-1242 (S. Ct. 1996), Brief for the Respondent in Opposition, p. 18 n.5 (emphasis added) (“Armstrong Brief”).<sup>19</sup>

The budget documents OA has offered here in support of its claim that it is not an agency also provide proof for the opposite conclusion.<sup>20</sup> For example, OA’s Fiscal Year 2008 Budget

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home, particularly when those details will often be closely connected to his duties as head of State as well as head of Government.” 60 F.3d at 855. A determination that OA is an agency and subject to the FOIA will have no such result, particularly as OA lacks proximity to the president.

<sup>18</sup> D’s Mem. at 17-18.

<sup>19</sup> Available at <http://www.usdoj.gov/osg/briefs/1996/w961242w.txt>.

<sup>20</sup> OA’s brief cites to the budget submissions only as evidence of OA’s “organizational lines,” D’s Mem. at 4, 16, and its mission. See D’s Mem. at 13. These documents, standing

(Exhibit 1 to D's Mem.), describes the responsibilities of the Office of the Chief Financial Officer ("OCFO") as follows: "The OCFO directs, manages, and provides policy guidance and oversight of financial management activities and operations, including procurement and travel support." Executive Office of the President, Office of Administration, Fiscal Year 2008 Budget at OA-3. Similarly, the responsibilities of the Office of the Chief Information Officer include providing "leadership to the components that OA supports." Id. Moreover, OA's salaries and expenses are paid from funds that came from other EOP components, including OMB, OSTP, the United States Trade Representative and CEQ, all EOP components found to be agencies for purposes of the FOIA. See id. at OA 4-5. The degree of responsibility afforded offices within OA as well as the sources of at least some of its funding evidence OA's independence from the President and its corresponding status as an agency.<sup>21</sup>

It necessarily follows that the Court cannot resolve the issue of OA's status as an agency simply on the basis of the pleadings. OA's brief and exhibits do not foreclose the possibility, indeed likelihood, that OA has acted with independent authority and is an agency. See EPIC Op. at 9-10. Nor can it be said that "each one of the [OA's] enumerated . . . duties is directed at providing . . . advice and assistance to the president." Id. at 10, *quoting* Rushford v. Council of

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alone, are hardly conclusive on either of these issues.

<sup>21</sup> In addition, while not part of the pleadings, representations by Keith Roberts on behalf of OA also document OA's independent authority. For example, during the June 1, 2007 conference call before the Court, Mr. Roberts stated: "the Office of Administration, our mission is to provide a common administration throughout the deputy office of the president complex so part of that involves *we own all the information technology system* and we do -- we maintain all electronic databases, all the e-mails, and we also do all the searches from the complex." Transcript at 9 (Exhibit A to Plaintiff's Reply in Support of Plaintiff's Motion to Modify (Document 16-2) (emphasis added)).

Economic Advisers, 762 F.2d at 1042. OA's motion for judgment on the pleadings must therefore be denied.

**II. PLAINTIFF MUST BE AFFORDED DISCOVERY ON THE AGENCY ISSUE GIVEN THAT THE RELEVANT EVIDENCE RESTS SOLELY WITH THE GOVERNMENT.**

As a necessary corollary to denying OA's motion for judgment on the pleadings, the Court must also afford CREW an opportunity to conduct appropriate discovery. The Court has already noted that "whether OA is an agency subject to the FOIA is . . . a dispositive issue," that should be resolved in advance of deciding how to proceed on the merits of CREW's claims. Order of August 7, 2007 (Document 18). OA's failure to proffer definitive evidence on the issue of OA's agency status,<sup>22</sup> coupled with the fact that "the relevant evidence on this issue rests solely with Defendant[]," means that CREW must be given "the opportunity to discover evidence relevant to [its] jurisdiction claim." EPIC Op. at 10-11, *quoting Wilderness Soc'y v. Griles*, 824 F.2d 4, 16 n.10 (D.C. Cir. 1987).

In determining the scope of appropriate discovery, the Court should be guided by the three areas of relevant inquiry identified in Meyer and endorsed in Armstrong: (1) OA's operational closeness to the president; (2) whether OA has a self-contained structure; and (3) the nature of OA's delegated authority. Armstrong, 90 F.3d at 558, *citing Meyer*, 981 F.2d at 1293.

To address the first issue, plaintiff will need discovery on the nature of OA's communications and interactions with the president and his advisors and the extent to which the

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<sup>22</sup> OA's blanket and unsupported statements about the nature of OA's authority (e.g., "[i]t wields no authority independent of the President (D's Mem. at 15)) and its bald statements about OA's proximity to the president (e.g., "on a day-to-day basis, OA's Director reports to senior White House Officials concerning OA activities" (D's Mem. at 18)) are no substitute for the factual evidence the D.C. Circuit has demanded.

president has expressly approved OA decisions, findings, or other initiatives. Plaintiff is particularly entitled to this information given the tension between OA's assertion here that it is not an agency and the language of the executive order creating OA that excludes from OA's responsibilities providing services in direct support of the president.

Second, plaintiff will need discovery on the staffing and organizational structure of OA. Although the government appears to concede here that OA has a self-contained structure (see D's Mem. at 16-17), its failure to provide adequate factual evidence on this critical factual issue requires supplementation of the record through discovery.

Third, plaintiff will need discovery on the manner in which OA has actually fulfilled the responsibilities assigned to it in EO 12028 and EO 12122. This includes consideration of OA's interactions with other EOP components and the degree to which those components must seek OA approval or action on administrative functions.

This discovery can be accomplished in part through the use of interrogatories, admissions and requests for production of documents. In the final analysis, however, plaintiff will need to conduct targeted depositions of individuals who can speak to the actual authority and independence that OA has wielded. Documents, while certainly probative, do not address sufficiently how the OA has actually acted. Indeed, it was the deposition testimony of senior officials with the National Security Council that led the court in Armstrong to conclude that the NSC was not an agency. Armstrong, 90 F.3d at 561, 555-560. As Armstrong illustrates, it is necessary to consider not only the nature of the authority delegated to OA, but how it has actually exercised that authority.

The government will undoubtedly argue that discovery is unnecessary and that it should

first be given an opportunity to supplement the record further. Such a request should not be granted. OA represented to the Court that it would be filing a motion to dismiss, and the Court so ordered. Instead, however, OA filed a motion for judgment on the pleadings -- a transparent attempt to foreclose any factual inquiry beyond what the government chose to put before the Court.<sup>23</sup> Under these circumstances, OA is not entitled to another try before discovery is commenced.

Moreover, plaintiff bears the burden of establishing this Court's jurisdiction and cannot do that here without access to facts that are in the exclusive knowledge and control of the government. See EPIC Op. at 8. In short, discovery is both necessary and appropriate and should proceed at the earliest opportunity given the great public interest in and importance of the substantive issues that this case presents.

### **III. ALTERNATIVELY THE COURT SHOULD RULE THAT OA IS AN AGENCY SUBJECT TO THE FOIA.**

Alternatively the Court can conclude, based on the language of OA's governing executive orders and the consistent position that OA has taken in the past, that it is an agency subject to the FOIA.<sup>24</sup> As discussed supra, OA does not solely advise and assist the president as evidenced in the executive order establishing the OA, which directs that OA provide

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<sup>23</sup> In deciding a motion to dismiss based on a claim that the court lacks jurisdiction, a reviewing court may look beyond the pleadings to consider facts relevant to the jurisdictional issue. Land v. Dollar, 330 U.S. 731, 735 n.4 (1947). Courts have also recognized that in responding to a motion to dismiss a plaintiff must be given "the opportunity to discover evidence relevant to his jurisdictional claim." Wilderness Soc'y, 824 F.2d at 16 n.10.

<sup>24</sup> Such a finding is a predicate to the Court's jurisdiction, given that the FOIA vests jurisdiction in district courts to enjoin an "agency" from withholding agency records. 5 U.S.C. § 552(a)(4)(B); see also Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 139 (1980).

administrative support to all EOP entities except for the president. See EO 12028, §§ 3(a), 5. Just as importantly, as the government has recognized in the past, through EO 12122, “the President has effected a broad delegation of authority over the OA to its Director.” Armstrong Brief at 18 n.5.

These executive orders -- the “most important indication” of OA’s role<sup>25</sup>-- place OA on the same footing as other EOP entities found to be agencies for FOIA purposes. For example, in Soucie, the D.C. Circuit concluded that OST was an agency “[b]y virtue of its independent function of evaluating federal programs.” 448 F.2d at 1075. Similarly, the director of OA functions independently of the president in organizing OA, contracting for supplies and services, and doing all other things that the president might do. EO 12122 at § 4(a).

Likewise, in Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C. Cir. 1980), the court placed great weight on executive orders that expanded CEQ’s functions to include oversight of the activities of federal agencies and regulatory authority. Id. at 1262. There, as here, the executive orders granted the EOP entity independent authority that went beyond solely advising and assisting the president.<sup>26</sup> Based on this precedent and the language of the executive order, the Court can properly conclude that OA is an agency under the FOIA.

Moreover, while no court has ruled explicitly that OA is an agency, the D.C. Circuit at

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<sup>25</sup> Meyer, 981 F.2d as 1294.

<sup>26</sup> OA suggests that because OA “is entirely a Presidential creation” it necessarily cannot be an agency. D’s Mem. at 15. Meyer makes clear, however, that this is not relevant. See 981 F.2d at 1296 (“We do not think much should turn on whether the President delegates authority to a White House group by memorandum or by Executive Order.”).

least implicitly so found in National Security Archive v. Archivist, 909 F.2d 541 (D.C. Cir. 1990). At issue there were four FOIA requests of OA for documents related to the Tower Commission's investigation. The executive order establishing the Tower Commission also directed OA to provide the Commission with administrative and support services, including funding. After OA denied the requests on the ground that it did not "maintain" any of the documents in question, NSA redirected its FOIA requests to the White House Counsel's Office. The White House Counsel's Office denied the requests on the ground that it was not an agency subject to the FOIA. See generally, 909 F.2d at 543.

The D.C. Circuit agreed with the district court that the claims against OA were properly dismissed given that the Tower Commission, and not OA, had "sole possession and control of the requested documents" and there was therefore "no basis for upsetting its conclusion that the Office of Administration did not withhold the documents." Id. at 545. By sharp contrast, the claims against the White House Counsel's Office were found properly dismissed for the very different reason that "the Office of the President," in which the White House Counsel's Office is found, "is not an 'agency' for purposes of the FOIA." Id. Critical here is the fact that the D.C. Circuit treated OA as subject to the FOIA -- dismissing the FOIA claims against it only because OA had not improperly withheld documents -- while at the same time it found the claims against the White House Counsel's Office properly dismissed because the office was not an agency. Stated differently, a necessary predicate to the D.C. Circuit's ruling as to OA was that OA was an agency subject to the FOIA in the first instance.

The conclusion that OA is an agency is reinforced by OA's past practices. Since 1980, OA has published regulations governing access to its records under the FOIA. Those regulations

provide unambiguously that “all records by the Office of Administration are available to the public, *as required by the Freedom of Information Act.*” 5 C.F.R. § 2502.16 (emphasis added). Pursuant to the FOIA regime that it has adopted, OA has processed hundreds of FOIA requests over the years and submitted yearly reports as the FOIA requires (5 U.S.C. § 552(e)(1)). See [www.whitehouse.gov/oa/foia/readroom.html](http://www.whitehouse.gov/oa/foia/readroom.html). Moreover, the White House’s own website (until this past weekend) delineated the OA as an EOP entity that is subject to the FOIA because its sole function is not to advise and assist the president. See [www.whitehouse.gov/oa/foia/eop-foia.html](http://www.whitehouse.gov/oa/foia/eop-foia.html).

OA’s past conduct also includes the litigating positions it has adopted throughout the years. As discussed *supra*, the government’s brief filed before the Supreme Court in Armstrong adopts the same expansive interpretation of OA’s independent authority pursuant to EO 12122 as that plaintiff is advancing here -- an interpretation that cannot be reconciled with OA’s newly minted argument that it is not an agency. Further, there is no suggestion in the National Security Archives case that OA ever questioned the court’s jurisdiction over it or its status as an agency under the FOIA.

This is equally true in the only other reported FOIA decision involving OA that plaintiff has located, Goldgar v. Office of Administration, 26 F.3d 32 (5th Cir. 1994). Goldgar involved a FOIA request of OA to which the agency responded that it had no responsive records. *Id.* at 34. On appeal, in response to the plaintiff’s argument that he was seeking “information,” not agency records, the Fifth Circuit ruled that such a request is an “abuse[] and misus[e] [of] the FOIA.” 26 F.3d at 35. The court held alternatively that if the plaintiff were seeking a record, “we hold that no such record exists and that Goldgar has failed to state a claim under the FOIA . . .” *Id.*

Importantly, there is no suggestion that OA ever argued it was not an agency subject to the FOIA, nor did the appellate court reach that issue. Instead, its opinion presupposes the general applicability of the FOIA to OA.

OA's treatment of CREW's FOIA requests also reinforces the notion that it is an agency subject to the FOIA. Upon receipt of CREW's request, OA sent a letter granting expedition and the fee waiver request. At no time did OA ever represent, or even suggest, that it was not subject to the FOIA or was processing the request only as a matter of administrative discretion. See Exhibit C to Complaint. Once in litigation, OA participated in court-supervised discussions over a schedule for processing the six prioritized categories of documents CREW was seeking in its request for emergency relief. At no time during those discussions did OA represent, or even suggest, that it was not subject to the FOIA. In its answer, OA denied the allegations pertaining to the court's jurisdiction and venue, Answer at ¶ 3 (Document 10), but amplified this denial in its first affirmative defense wherein it stated: "The Court lacks jurisdiction over the subject matter of this complaint because no records have been improperly withheld." Id., First Defense. Completely missing from OA's answer was any suggestion that OA is not subject to the FOIA in the first place because it is not an agency. That OA has raised this defense now -- in an apparent effort to avoid having to account for or produce any documents that would document the degree of the White House's prior knowledge about the deleted email and its failure to address the problem -- cannot excuse or erase its consistent prior practices.

Nevertheless, OA argues that its prior conduct is not probative on the issue of whether it is an agency subject to the FOIA, citing Armstrong. D's Mem. at 19-20. This reliance is misplaced. First, the Armstrong court characterized the NSC's past practice as "*voluntarily*

subject[ing] certain of its records to the FOIA” “in the interest of permitting public access to *some* NSC records . . .” 90 F.3d at 566 (emphasis added). As even the Armstrong plaintiff conceded, “even as the NSC was treating some of its institutional records as though they were subject to the FOIA and the FRA [Federal Records Act], it was declining to treat other records in that way.” Id. The D.C. Circuit accordingly found that the NSC’s prior references to itself as an agency were not probative on the agency issue because “quite simply, the Government’s position on that question has changed over the years.” 90 F.3d at 566. Indeed, precisely because “the NSC’s past behavior has been inconsistent -- both logically and factually” the court found that it did not “illuminate the legal question” of whether the NSC was an agency subject to the FOIA. Id.

By contrast, as outlined above, there is nothing inconsistent about OA’s past practices. Unlike the NSC, there is nothing to suggest OA has “voluntarily subjected certain of its records to the FOIA.” Quite the opposite is true. Since at least 1980, when it published its first FOIA regulations, OA has represented that it is required under the FOIA to make its records available upon request. In the 30 years of its existence there has been no suggestion until now -- when faced with a potentially very embarrassing, if not outright damaging, FOIA request -- that it is not an agency subject to the FOIA. OA’s sudden about-face on the agency question has been rejected repeatedly and explicitly by the D.C. Circuit in favor of exactly the kind of indicia of agency status present here. See Soucie, 448 F.2d at 1075 (OST’s publication of FOIA regulations “lends additional support to the conclusion that it is a separate administrative entity”); Rushforth, 762 F.2d at 1041 (discussing Pacific Legal Foundation in which the D.C. Circuit “rejected the CEQ’s proffered on again-off again definition” after CEQ had admitted in

the past that it was an agency).

In sum, the available evidence points unmistakably to one conclusion: OA is, as it has consistently represented itself to be, an agency for purposes of the FOIA.

### **CONCLUSION**

For the foregoing reasons, the Court should deny defendant's motion for judgment on the pleadings and grant plaintiff an opportunity to conduct discovery. Alternatively, the Court should rule that OA is an agency and must respond fully and promptly to CREW's FOIA requests. Pursuant to LCvR 7(f) plaintiff hereby respectfully requests that the Court hold an oral hearing on defendant's motion.

Respectfully submitted,

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