

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

CITIZENS FOR RESPONSIBILITY	)	
AND ETHICS IN WASHINGTON,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 07-0964 (CKK)
	)	
	)	
OFFICE OF ADMINISTRATION,	)	
	)	
Defendant.	)	
_____	)	

**AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC.  
IN SUPPORT OF PLAINTIFF**

Judicial Watch, Inc. (“Judicial Watch”), by counsel, respectfully submits this *amicus curie* brief, in support of Plaintiff, Citizens For Responsibility and Ethics in Washington (“CREW”). As grounds therefor, Judicial Watch states as follows:

**INTEREST OF THE PROPOSED AMICUS CURIAE**

As set forth in Judicial Watch’s motion seeking leave to file this proposed *amicus curiae* brief, Judicial Watch is a not-for-profit organization that seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. In furtherance of this public interest mission, Judicial Watch regularly seeks access to government records under the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), pursues public interest litigation, and files *amicus curiae* briefs, among other activities. Judicial Watch seeks to participate as an *amicus curiae* in this matter because Defendant in the instant case seeks to restrict the scope of FOIA in an unprecedented manner. Specifically, Defendant seeks a ruling from this Court declaring that the Office of Administration (“OA”), an entity within the

Executive Office of the President (“EOP”), is not an agency subject to the FOIA. Such a ruling would preclude CREW, Judicial Watch, and any other FOIA requester from seeking records from OA, which, to Judicial Watch’s knowledge, has always been considered an agency for purposes of FOIA and has held itself out as such for years.

### **SUMMARY OF THE ARGUMENT**

First, contrary to OA’s motion, application of the three-part test in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) demonstrates that OA is indeed a FOIA agency.

Second, the behavior and regulations of OA and other parts of EOP prove conclusively that OA has always considered itself a FOIA agency until litigation over CREW’s present FOIA request began. CREW’s request seeks documents from OA analyzing potential technical difficulties in OA’s e-mail records management system, as well as the failure of OA’s e-mail records management system to preserve such records. Defendant’s goal in this case is obvious. Such documents do not fall under any FOIA exemption and would have to be released to CREW in the ordinary course. To avoid that outcome, Defendant seeks to shield itself from public scrutiny by claiming the FOIA does not apply to OA at all. Judicial Watch respectfully submits that OA’s attempt to avoid legitimate public inquiry into its record keeping practices should not be countenanced by this Court.

### **ARGUMENT**

#### **I. THE OFFICE OF ADMINISTRATION IS AN AGENCY.**

In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the U.S. Supreme Court held that, while EOP is an agency subject to the FOIA, the Office of the President is not. The Court held that the determining factor in this outcome was an express

statement made by Congress in amending FOIA in 1974 that “the President’s *immediate* personal staff or units in the Executive Office whose sole function is to advise and assist the President’ are not included in the term ‘agency’ under the FOIA.” *Id.* (quoting H.R. Conf Rep. No 93-1380, at 15) (emphasis added). In *Meyer*, the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) set forth its own, three-prong test for determining whether or not a federal entity is an agency for purposes of FOIA. Specifically, the D.C. Circuit declared:

[W]hen we apply *Soucie* to those who help the President supervise others in the executive branch, we think it necessary to focus on three interrelated factors. We must ask how close operationally the group is to the President, what the nature of its delegation from the President is, and whether it has a self-contained structure.

*Meyer*, 981 F.2d at 1293.

Applying these principles, it is clear that OA is an agency for purposes of FOIA. First, Defendant all but concedes that OA does indeed have a self-contained structure. *See* Defendant’s Motion (“Def. Mot.”) at 16. For example, Defendant states that “OA maintains a staff of some 200 employees and is organized along the lines of five offices,” each with its own functions.” *Id.* The only question then is whether OA in fact exercises substantial independent authority. That it does is made clear from Defendant’s own Exhibits. For example, Defendant’s Exhibit 1 consists of OA’s FY 2008 Budget, in which OA provides a Mission Statement and Background. This section of the budget states that OA’s Office of Security and Emergency Preparedness is responsible for, among other things, oversight of EOP security and emergency preparedness. *Id.* at OA-3. It also serves as a liaison with the Secret Service, a separate agency, something OA clearly could not do unless it possessed some independent authority of its own. *Id.* The office of the Director of OA also contains an Equal Employment Opportunity Office,

which operates pursuant to regulations promulgated by the Equal Employment Opportunity Commission, an entirely separate agency. 29 C.F.R. § 1614.102. Clearly, OA possesses at least some independent authority.

Second, while OA may operate close to the President, the D.C. Circuit has warned against gratuitous expansion of the category of persons who qualify as members of the President's immediate personal staff. In *Judicial Watch, v. Department of Justice*, 365 F. 3d 1108, 1117 (D.C. Cir. 2004), the Court declined to expand the presidential communications privilege to cover the Office of the Pardon Attorney, an entity within the U.S. Department of Justice, merely because it was in close proximity to the President and existed solely to advise and assist the President on pardons. Rather, the Court found that the relevant inquiry is whether documents are solicited and received by the President's immediate advisors. *Id.* For Defendant to claim that the records produced by 200 employees from no fewer than five separate offices were solicited and received by the President and/or his immediate advisers strains credulity to say the least.

Third, and finally, even if OA's only delegated authority is to provide such administrative assistance as directed by the President, as shown above, such assistance is not enough to remove the office from the purview of FOIA. Defendant has not and cannot show that all documents produced by OA were solicited and received by either the President or his immediate advisors, nor can it be said that each and every office and employee within OA, or any office or employee within OA for that matter, falls legitimately within the President's *immediate* personal staff or units within EOP whose sole function is to advise and assist the President.

## **II. THE OFFICE OF ADMINISTRATION HAS LONG HELD ITSELF OUT AS AN AGENCY FOR PURPOSES OF FOIA.**

FOIA requires agencies to promulgate rules by which their records shall be made available for public inspection. 5 U.S.C. § 552(a)(2). EOP is divided into no fewer than nine separate sub-agencies or offices,<sup>1</sup> six of which have published such regulations,<sup>2</sup> and three others, the CEA, the PFIAB, and the WHO, which have not because they are not agencies subject to FOIA. OA's FOIA regulations are published at 5 C.F.R. § 2502. In addition, OA has published a series of annual reports for at least the past 11 years detailing the number and disposition of FOIA requests that it has received and processed. See <http://www.whitehouse.gov/oa/foia/readroom.html>. For example, in Fiscal Year 2006, OA states that it received 67 FOIA requests and completed processing of 65 of them. See Exhibit 1 at 3. All told, Judicial Watch estimates that OA has received and fully responded to no fewer than 744 FOIA requests over the past 11 years alone. Yet, incredibly, OA now claims that it has suddenly and mysteriously transformed itself from an entity that dutifully responded to hundreds of FOIA requests over many years, and even enacted its own FOIA regulations, into one that is not subject to FOIA at all. Such an attempted sleight of hand not only would change the rules for FOIA requesters like Judicial

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<sup>1</sup> EOP includes the Council of Economic Advisors ("CEA"), the Council on Environmental Quality ("CEQ"), the Office of Administration ("OA"), the Office of Management and Budget ("OMB"), the Office of National Drug Control Policy ("ONDCP"), the Office of Science and Technology Policy ("OSTP"), the President's Foreign Intelligence Advisory Board ("PFIAB"), the United States Trade Representative ("USTR"), and the White House Office ("WHO"). See <http://www.whitehouse.gov/government/eop.html>.

<sup>2</sup> FOIA regulations for CEQ may be found at 40 C.F.R. § 1515.5, OMB's at 5 C.F.R. § 1303, ONDCP's at 21 C.F.R. § 1401 *et. seq.*, OSTP's at 32 C.F.R. § 2400.22, and USTR's at 15 C.F.R. § 2004.

Watch and CREW, but it also would undermine the basic principles of transparency and accountability in government that lie at the heart of FOIA. Defendant's arguments have no merit and should be rejected by this Court.

**CONCLUSION**

For the foregoing reasons, Judicial Watch respectfully requests that the Court reject Defendant's arguments that OA is no longer subject to the provisions of FOIA.

Dated: September 4, 2007

Respectfully submitted,

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