[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 11-5282

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL WATCH, INC., Plaintiff-Appellee,

v.

UNITED STATES SECRET SERVICE, Defendant-Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* BLOOMBERG L.P., CBS BROADCASTING INC., DOW JONES & COMPANY, INC., GANNETT CO., INC., THE MCCLATCHY COMPANY, THE NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL FREEDOM OF INFORMATION COALITION, NATIONAL PUBLIC RADIO, THE NEWSPAPER GUILD, THE RADIO TELEVISION DIGITAL NEWS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE WASHINGTON POST IN SUPPORT OF APPELLEE JUDICIAL WATCH

David Murray (DC Bar No. 401158)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1112

Thomas H. Golden (of counsel)
Deirdre N. Hykal (of counsel)
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

Dated: May 8, 2012

Counsel for Media Amici

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, counsel for *amici curiae* Bloomberg L.P., CBS Broadcasting, Inc., Dow Jones & Company, Inc., Gannett, Co. Inc., The McClatchy Company, The National Association of Broadcasters, National Freedom of Information Coalition, National Public Radio, The Newspaper Guild, The Radio Television Digital News Association, The Reporters Committee for Freedom of the Press, and The Washington Post (collectively, "Media Amici") certifies as follows:

(A) **Parties and Amici.** Except for the following, all parties, intervenors and amici appearing before the district court and in this court are listed in the Brief for Plaintiff-Appellee Judicial Watch: *Amici curiae* briefs in support of Appellee have been submitted by the Media Amici, and by Citizens for Responsibility and Ethics in Washington ("CREW") and similarly situated not-for profit organizations.

(B) **Rulings Under Review**. Reference to the ruling at issue appears in the Brief for Appellee.

(C) **Related Cases**. This case has not previously come before this Court. Counsel for the Media Amici is aware of no other related cases.

CORPORATE DISCLOSURE STATEMENTS OF MEDIA AMICI

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1 and 29(b) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, the Media Amici respectfully submit corporate disclosure statements as follows:

1. Bloomberg L.P.

Bloomberg L.P. ("Bloomberg") is a limited partnership organized under the laws of the State of Delaware. Bloomberg has no parent corporation and no publicly held corporation owns 10% or more of Bloomberg's limited partnership interests.

Bloomberg supplies real-time business, financial, and legal news and information to more than 250,000 subscribers worldwide. Bloomberg operates Bloomberg News, a 24-hour global news service with more than 2,200 employees in 145 news bureaus around the world. As a wire service, Bloomberg provides news to more than 400 newspapers globally. Bloomberg also provides television and radio programming throughout the world through its 24-hour television and radio affiliates. It publishes Bloomberg Businessweek and Bloomberg Markets magazines and more than 50 books each year, and its websites receive approximately 3.5 million visits each month. In total, Bloomberg distributes news, information and commentary to millions of readers and listeners each day.

2. CBS Broadcasting Inc.

CBS Broadcasting Inc. ("CBS Broadcasting") is an indirect, wholly-owned subsidiary of CBS Corporation, whose shares are publicly-traded. CBS Broadcasting is not a publicly-traded company.

CBS Broadcasting produces and broadcasts news, public affairs and entertainment programming. Its CBS News Division produces morning, evening, and weekend news programming, as well as news and public affairs newsmagazine shows such as 60 MINUTES and 48 HOURS INVESTIGATES. CBS Broadcasting also directly owns and operates television stations across the country.

3. Dow Jones & Company, Inc.

News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones & Company, Inc. ("Dow Jones"), and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more of Dow Jones's stock.

Dow Jones is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides

realtime financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

4. Gannett Co., Inc.

Gannett Co., Inc. ("Gannett") has no corporate parent, nor is there a publicly held company that holds more than 10% of its stock.

Gannett is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

5. The McClatchy Company

The McClatchy Company does not have a parent corporation. It is publicly traded on the New York Stock Exchange under ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the stock of The McClatchy Company.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the Sacramento Bee, the

Miami Herald, the Kansas City Star, and the Charlotte Observer. The newspapers have a combined average circulation of approximately 2,200,000 daily and 2,800,000 Sunday.

6. National Association of Broadcasters

National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Federal Communications Commission, and the courts on behalf of its members. NAB has not issued any shares or debt securities to the public, and NAB has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

7. National Freedom of Information Coalition

National Freedom of Information Coalition ("NFOIC") is a nonpartisan alliance of citizen-driven nonprofit freedom of information organizations, academic and First Amendment centers, journalistic societies, and attorneys. NFOIC awards grants to strengthen state coalitions and member organizations, foster their growth, and support a broad range of open government endeavors in individual states. NFOIC also administers the Knight FOI Fund, which offers financial support to defray costs and expenses in open government lawsuits throughout the year. NFOIC has not issued any shares or debt securities

to the public, and NFOIC has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

8. National Public Radio

National Public Radio ("NPR") is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 268 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR is a privately supported, not-for-profit membership organization that has no parent company and issues no stock.

9. The Newspaper Guild - CWA

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors,

CWA issues no stock and has no parent corporations. The Newspaper Guild - CWA promotes and represents the interests of various employees within newspapers, newsmagazines, news services and other media.

10. The Radio Television Digital News Association

The Radio Television Digital News Association ("RTDNA") is a non-profit incorporated association and the world's largest professional organization exclusively serving the electronic news profession, consisting of more than 3,000 news directors, news associates, educators and students. Founded as a grassroots organization in 1946, the association is dedicated to setting standards for newsgathering and reporting. RTDNA has not issued any shares or debt securities to the public, and RTDNA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

11. The Reporters Committee for Freedom of the Press

The Reporters Committee for Freedom of the Press ("RCFP") is an unincorporated association that has no parent and issues no stock. RCFP is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. RCFP has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

12. The Washington Post

The Washington Post ("WP Company LLC") is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company. The Washington Post publishes one of the nation's most prominent daily newspapers, as well as a website (www.washingtonpost.com) that attracts an average of more than 17 million unique visitors per month.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS AND REGULATORY MATERIALS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Media Amici[1] include private, public, and not-for-profit organizations that produce, or support access to, news in all forms of media, including daily, weekly and monthly print and online publications; and through broadcasts on television, cable, satellite, and radio. Together, the Media Amici and their members distribute news, information, and commentary to millions of readers and listeners each day.

The Media Amici respectfully submit this brief, as *amici curiae*, to assist the Court in its consideration of the policy consideration underlying the Freedom of Information Act ("FOIA"), and to present the Court the media's perspective on the critical role that FOIA plays in their ability properly to discharge their role as the eyes and ears of the public. The Media Amici are particularly concerned that reversal of the decision below may encourage federal agencies to seek to place millions of documents outside of FOIA's ambit based on no more than their say-so, even in the face of express statutes and judicial orders directly to the contrary. Permitting such an end-run around FOIA would

[1] Bloomberg L.P., CBS Broadcasting, Inc., Dow Jones & Company, Inc., Gannett, Co. Inc., The McClatchy Company, The National Association of Broadcasters, National Freedom of Information Coalition, National Public Radio, The Newspaper Guild, The Radio Television Digital News Association, The Reporters Committee for Freedom of the Press, and The Washington Post.

significantly reduce the quantity and quality of information available to the media and, consequently, to the public at large, severely undermining the goal of an informed public that sits at the core of our democracy.

The Media Amici file this brief on consent of all parties.

CERTIFICATION OF COUNSEL

Counsel hereby certifies pursuant to Rule 29(d) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit that the separate *amici curiae* brief of the Media Amici is necessary to assist the Court in its consideration of issues not raised in the brief of the Appellee or the brief submitted by *amici curiae* Citizens for Responsibility and Ethics in Washington ("CREW"), Electronic Frontier Foundation, OpenTheGovernment.org. Specifically, the brief of the Media Amici addresses the importance of FOIA to a free press and informed citizenry, and demonstrates that the Secret Service's invocation of the Presidential Records Act, national security concerns, and purported burden do not relieve it of its obligations under FOIA.[1]

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for the Media Amici confirms that no party's counsel authorized this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than Media Amici, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE CASE

This case involves efforts by the United States Secret Service (the "Secret Service") to circumvent the Freedom of Information Act (the "FOIA"), a decades-old statute enacted by Congress to ensure public confidence in government through openness and transparency. In response to a FOIA request submitted by Judicial Watch for all records concerning visitors to the White House Complex over a specified period, the Secret Service insists that the White House visitor logs it creates and maintains to carry out its core statutory function are not "agency records" subject to FOIA. Instead, the Secret Service claims that, by the mere fact of a transfer of location, its "agency records" are transformed into "presidential records" beyond FOIA's reach. This same position has been rejected in three federal district court decisions,[3] including the ruling below, and is contrary to the purposes of both FOIA and the Presidential Records Act (the "PRA").

The Secret Service also seeks to justify its non-compliance with FOIA by invoking supposed concerns regarding national security, confidentiality, and burden. In fact, the FOIA provides ample protections for all of those concerns. But FOIA also requires agencies who seek to invoke them to adhere to particular procedures designed to ensure their applicability to the specific records in question.

---

[3] *Judicial Watch, Inc. v. U.S. Secret Service*, No. 09-cv-02312 (D.D.C. Aug. 17, 2011) (JA95-113); *CREW v. U.S. Dep't of Homeland Security*, 592 F. Supp. 2d 127 (D.D.C. 2009); *CREW v. U.S. Dep't of Homeland Security*, 527 F. Supp. 2d 76, 89 (D.D.C. 2007).

Here, the Secret Service ignored those requirements, and purported to substitute its judgment for Congress's with respect to its obligations under FOIA..

Media Amici respectfully urge this Court to affirm the District Court's ruling below and reject the Secret Service's repeated efforts to evade the congressional mandate of FOIA. Any other decision risks inviting a degradation of the rights of the media and the public to access government information, ultimately reducing confidence in governmental institutions.

ARGUMENT

I. The Secret Service's Circumvention Of FOIA Is Contrary To The History And Purpose Of The Act.

The Supreme Court repeatedly has recognized the central importance of FOIA to our democracy, explaining that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA is "a means for citizens to know 'what their Government is up to.'" *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). According to the Court, "[t]his phrase should not be dismissed as a convenient formalism"; rather, "[i]t defines a structural necessity in a real democracy." *Id*. at 172.

FOIA's command that the press and the public be allowed to serve as a "check" on government affairs reflects our nation's core values. As explained in the legislative history:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government . . . For without an informed and free press, there cannot be an enlightened people.

112 Cong. Rec. H13641-42 (daily ed. June 20, 1966) ("The right to speak and the right to print, without the right to know, are pretty empty.").

Ultimately, "A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operations. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty." S. Rep. No. 89-813, at 45 (1965). In short, by allowing the public to know "what their Government is up to," FOIA leads to a better informed citizenry with greater confidence in its public institutions. *Reporters Comm.*, 489 U.S. at 750.

The Secret Service argues that the visitor logs it creates, uses, and maintains in performance of its agency function are not agency records. This position, if allowed, would encourage cynical efforts by agencies to shift their records beyond FOIA's reach, degrading the public's ability to assess governmental conduct. Such a result would run counter to the Congressional intent that FOIA would be a powerful tool to break down barriers to information. 112

Cong. Rec. H13641-42 (daily ed. June 20, 1966) (statements of Rep. John Moss) ("We must remove every barrier to information about – and understanding of – Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.").

Our country was founded, and has prospered, on the recognition of the importance of transparency in government. In 1822, James Madison cautioned that, "a popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both." Letter from James Madison to W.T. Barry, Aug. 4, 1822, quoted in *The Complete Madison*, edited by Saul Padover, 1953, p. 337. In 1861, Abraham Lincoln pronounced: "Let the people know the facts, and the country will be safe." And in 2009, President Obama declared that "[a] democracy requires accountability," which FOIA encourages "through transparency." Presidential Memorandum for Heads of Executive Departments and Agencies Considering the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

The Secret Service's assertion that it should not be required even to process Judicial Watch's FOIA request or disclose *any* of the White House visitor logs – regardless of whether any one of the nine FOIA exemptions applies to permit non-disclosure – would effect a complete end-run around FOIA, and flatly

contradicts FOIA's history and purpose of promoting transparency in government. *See N.Y. Times Co. v. U.S.*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

II. The District Court Was Correct To Order The Secret Service To Process Judicial Watch's FOIA Request The White House Visitor Logs.

Under FOIA, an agency is required to conduct a reasonable search and either produce responsive documents or explain why such documents are exempt from disclosure under one of nine enumerated exemptions. 5 U.S.C. §§ 552(a)(3)(A), 552(a)(6)(A)(i), 552(b) (2006). In the proceedings below, the District Court properly upheld those clear statutory requirements and ordered the Secret Service to "process the plaintiff's FOIA request, disclose all segregable, non-exempt records, and assert specific FOIA exemptions for any records it seeks to withhold or otherwise demonstrate that it would be unreasonably burdensome to search for such withheld records." JA93. In other words, the District Court simply ordered the Secret Service to follow the well-established framework for responding to FOIA requests. That framework is essential to the success of FOIA. Once courts permit agencies to chip away at the legislative protections, FOIA will shrink from its status as an invaluable guarantor of transparency and turn into a toothless statute that agencies can side-step with unilateral, blanket decisions about what should, and should not, be subject to FOIA.

Here, the Secret Service's primary basis for evading its FOIA obligations is its position that the White House visitor logs are not "agency

records" covered by FOIA, but rather "presidential records" covered by the PRA. The Secret Service also invokes "national security," Presidential "autonomy" and "confidentiality," and "burden" as justifications for its failure to comply with FOIA. Appellant Br. 28-31; JA64-77 (Tibbits Decl.); Defendant's Cross-Motion for Summary Judgment 27-32. None of those arguments are valid justifications for avoiding FOIA's statutory obligations and pro-disclosure mandate. And they certainly do not support the wholesale refusal to even assess whether particular documents are exempt from disclosure under FOIA. The decision of the District Court should be affirmed.

A. The District Court Was Correct In Finding That The Presidential Records Act Does Not Shield The Visitor Logs From Immediate Disclosure.

1. The PRA Does Not Limit The Scope Of FOIA.

The PRA, like FOIA, is a pro-disclosure statute intended to increase government transparency. In the PRA, Congress explicitly provided that "presidential records" do not include "any documentary materials that are . . . official records of an agency," or "agency records" within the purview of FOIA. 44 U.S.C. § 2201(2)(B). In enacting the PRA, Congress made clear that documents that would have otherwise been subject to FOIA would remain so:

> "[t]he term 'presidential records' is intended ... to encompass all White House and [Executive Office of the President] records ... which ... fall outside the scope of the FOIA because they are not agency records. In other

> words, that which is now subject to FOIA would remain so and that which is [not] now subject to FOIA would be subject to the [PRA] . . .”

H.R. Rep. No. 1487, 95th Cong., 2d Sess. 11 (1978).

Since the enactment of the PRA, the courts have interpreted the Act narrowly to avoid any conflict with FOIA’s overarching goal of government transparency. As this Court concluded in *Armstrong v. Executive Office of the President*, “Congress preserved the critical role of judicial review under the FOIA, and avoided a conflict between the PRA and the FOIA, by explicitly exempting records subject to the FOIA from the scope of the PRA and allowing judicial review of guidelines defining presidential records under the rubric of substantive FOIA law . . .” 1 F.3d 1274, 1292 (D.C. Cir. 1993). The Secret Service’s suggestion that agency records can be kept secret by re-characterizing them as presidential records flies in the face of this command.

2. The Presidential Records Act Does Not Provide The White House – Or Any Other Agency – With Sweeping Authority To Remove Records From The Purview Of FOIA.

The PRA does not allow the Executive Branch to seal agency records from public scrutiny by simply redesignating them as “presidential records.” As the District Court has explicitly cautioned, “[the PRA] does not bestow on the President the power to assert sweeping authority over whatever materials he chooses to designate as presidential records without any possibility of judicial review.” *Citizens for Responsibility and Ethics in Washington v. Executive Office*

of President, 587 F.Supp.2d 48, 55 (D.D.C. 2008) (citing *Armstrong*, 1 F.3d at 1290).

Further, as this Court warned in *Armstrong*, a "limitation on the scope of the PRA is absolutely essential to preventing the PRA from becoming a potential *carte blanche* to shield materials from the reach of the FOIA." 1 F.3d at 1292. Accordingly, "agency records" are subject to FOIA, regardless of their connection to the White House or to the Executive Office of the President. The Secret Service may not redesignate records that clearly fall within FOIA's definition of "agency records" as "presidential records" due to their connection to the White House, and thereby avoid its disclosure obligations. *See, e.g.*, *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 155 n.9 (1980) (warning against permitting an agency to "circumvent a FOIA request" by "purposefully rout[ing] a document out of agency possession."); *see also Consumer Federation of America v. Dep't of Agriculture*, 455 F.3d 283, 289 (D.C. Cir. 2006) (". . . how federal agencies . . . create, dispose of, and otherwise manage documents and other material . . . cannot be used as the divining rod for the meaning of 'agency records' under FOIA.").

The Secret Service's sweeping declaration that *all* of the requested visitor logs created for the entire White House Complex are "presidential records" also is implausible on its face. The Secret Service acknowledges that the White

House Complex includes "agencies, such as the Office of Management and Budget, the Office of Science and Technology Policy, the Council on Environmental Quality, and the Office of National Drug Control Policy." Appellant Br. at 6. The Secret Service, however, does not explain how the requested information regarding visitors to those agencies could possibly be "presidential records." Similarly, the Secret Service has made no attempt to segregate records that may be exempt from those that are not, instead shrouding *all* records in secrecy to avoid the administrative hassle of adhering to the FOIA procedures. But, as Justice Stewart cautioned in the Pentagon Papers case:

> [W]hen everything is classified, nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion . . . [T]he hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

N.Y. Times Co. v. U.S., 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

3. The Secret Service's Dilatory Tactics Are Contrary To The Fundamental Purpose Of FOIA.

The Secret Service's refusal to respond to Judicial Watch's FOIA request on the basis that the requested records are "presidential records" and therefore not subject to FOIA is in direct contravention of two prior rulings in the District of Columbia. *CREW v. U.S. Dep't of Homeland Security*, 527 F. Supp. 2d 76, 89 (D.D.C. 2007); *CREW v. U.S. Dep't of Homeland Security*, 592 F. Supp. 2d

127 (D.D.C. 2009). Rather than acknowledge judicial findings that are directly on point, the Secret Service chose a path of non-disclosure that led to this litigation, the third case in five years to address the specific question of whether the White House visitor logs are agency records of the Secret Service.

"[U]nreasonable delays in disclosing nonexempt documents violate the intent and purpose of the FOIA, and courts have a duty to prevent these abuses." *Long v. IRS*, 693 F.3d 907, 910 (9th Cir. 1982). Congress has echoed this when it amended the FOIA in 2007 to try to stem agency unresponsiveness: "Federal agencies have become less and less responsive to requests for information … [t]axpayers should have the opportunity to obtain information from the Federal Government quickly and easily." 153 Cong. Rec. S15701-04 (Dec. 14, 2007) (statement of Rep. Smith) (cited by *Judicial Watch, Inc. v. Bureau of Land Mgmt.*, 562 F. Supp. 2d 159, 175 (D.D.C. 2009)).

The Secret Service's refusal to comply with Judicial Watch's request for the White House visitor logs reflects an agency position that is contrary to the instruction and guidance of both Congress and the courts. Instead of responding to Judicial Watch's request for the visitor logs in accordance with both FOIA and prior judicial rulings that the logs are "agency records," the Secret Service has continued to withhold disclosure of those records. The Secret Service has failed in even the most basic FOIA requirement to make a reasonable search for the

documents and produce segregable, non-exempt, responsive documents. Media Amici respectfully urge the Court to admonish agencies to respond in good faith to FOIA requests, rather than engage in dilatory tactics.

B. The Court Should Be Skeptical Of Alarmist Agency Arguments Regarding Supposed Harm That Will Flow From Disclosure.

The Secret Service's argument that disclosure will threaten national security or otherwise result in public harm is the type of alarmist refrain often invoked by agencies to avoid their FOIA obligations, but belied by practical experience.

For example, in response to a Bloomberg News request for documents pertaining to loans made by Federal Reserve Banks to private banks pursuant to emergency lending programs during the financial crisis, the Federal Reserve refused to disclose the documents and resisted disclosure in an action before the Second Circuit. *See Bloomberg v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010). Among the various arguments it made to support that position, the Federal Reserve asserted that disclosure would "impair its mission to furnish critical infusions to distressed banks" and predicted a "loss of confidence, bank runs, fluctuations of bank stock, and rippling harm to the banking system." *Id*. at 150. The Second Circuit properly rejected those arguments and ordered the Federal Reserve to disclose the requested information. *Id*. at 151. After years of litigation ending at the Supreme Court, the Federal Reserve

ultimately did so. *See Bloomberg v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 1674 (2011). The sky did not fall, depositors did not panic, and the banking system was not shaken. The disclosures did, however, lead to a series of important news articles that informed the public about the Federal Reserve's actions during the financial crisis.[4]

In short, there is no place in the FOIA rubric for fear mongering. Any legitimate concerns that the Secret Service may have about the disclosure of specific records should be raised in the context of the enumerated exemptions, whose applicability the agency bears the burden of establishing. *See* 5 U.S.C. § 552(a)(6)(A)(i) (2006). The Secret Service's blanket and conclusory invocations of "national security" and "confidentiality" as a means to side-step the FOIA framework find no support in the law, and should not be countenanced.

C. The Secret Service May Not Rely On "Burden" As A Basis To Avoid Even Processing Any Of The Requested Visitor Records.

1. The Burden Imposed By Judicial Watch's Request Is Not Unreasonable.

The Secret Service also may not rely on stray suggestions in its briefing of "burden" as a basis to avoid processing Judicial Watch's request for the White House visitor logs. An agency seeking to avoid its obligations under FOIA must demonstrate with specificity why processing the request would be unduly

[4] *See, e.g.*, B. Keoun and C. Torres, *Foreign Banks Tapped Fed's Secret Lifeline Most at Crisis Peak*, Bloomberg (April 11, 2011).

burdensome. *See Public Citizen v. Dep't of Education*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003). While FOIA does not require agencies to conduct "unreasonably burdensome" searches for records, the burden must be extreme in order to relieve an agency of its FOIA obligations. *See, e.g.*, *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (search that would require review of 23 years of unindexed files would be unreasonably burdensome); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (burden exists where segregating non-exempt documents would take eight work-years); *see also Schladetsch v. HUD*, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) (creation and use of program to perform electronic search for responsive information would not require "unreasonable efforts"); *Dayton Newspapers, Inc. v. Dep't of the Air Force*, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (an estimated fifty-one hours required to compile responsive information "is a small price to pay" in light of FOIA's presumption favoring disclosure).

The Secret Service has not demonstrated that Judicial Watch's request for White House visitor logs poses an "unreasonable" burden. Rather, it conclusively asserts that it "has no basis to determine whether executive privilege or other privileges should be asserted with respect to any record" and that "[t]he burden of processing the nearly 500,000 records . . . would fall squarely on the President, Vice President, and their senior staff." Appellant Br. 31. The Secret

Service fails, however, to distinguish between visitor entries for the President and Vice President and visitor entries for agencies such as the Council on Environmental Quality, or explain why plainly non-exempt records could not reasonably be segregated from those that may be exempt. The Secret Service has failed to credibly assert that (let alone meet its burden to explain why) it cannot reasonably search for, process, and disclose the requested information. The District Court properly rejected the Secret Service's casual reliance on notions of burden and ordered the Secret Service to conduct the segregability analysis required under FOIA. *See* 5 U.S.C. § 552(b) (2006). This Court should do the same.

2. The Secret Service Cannot Avoid Its FOIA Obligations Due To A Burden Of Its Own Making.

The Secret Service's invocation of burden fails for the additional reason that the supposed burden is of its own making. An agency should not be permitted to avoid its FOIA obligations on this basis. *See Rosenfeld v. DOJ*, 2010 WL 3448517 (N.D. Cal. 2010). In *Rosenfeld*, the FBI argued that it should not be required to search for and produce certain records, because the records "were not indexed under the relevant subject matter" in its records system, and a search for them would be "unduly burdensome." *Id*. at *4-5. The District Court for the Northern District of California rejected the FBI's argument, stating that the agency "cannot use the make-up of its own internal database" and an "FBI agent's

decision to index or not to index" as a "shield to avoid FOIA mandates." *Id*. at *4. According to the court, the FBI was required to search for those records that were "specifically identified" in the request. *Id*. at *5.

Similarly, the Secret Service cannot rely on "burden" to avoid even processing the request, given that the "burden" is one that the Secret Service admits is caused by the "make-up" of its own records system. The Secret Service states that "[p]rior to September 15, 2009, the WAVES system was not designed to include data regarding the sensitive nature or classification of meetings" and that, as a result, disclosure of visitor entries prior to that date would require individual review by Executive Department officials or even the visitors themselves. JA73-74. In September 2009, the Secret Service enhanced its WAVES system to allow visitors to designate a meeting as sensitive, allowing for faster review and disclosure of visitor records created since the enhancement. Although the lack of this feature in the WAVES system prior to September 2009 may increase the efforts required to respond to Judicial Watch's request, it cannot and should not be used by the Secret Service to abdicate its FOIA responsibilities.

CONCLUSION

For the reasons stated above, the Media Amici respectfully urge the Court to affirm the District Court's ruling in its entirety.

Dated: May 8, 2012

WILLKIE FARR & GALLAGHER LLP

/s/ David P. Murray
David P. Murray (DC Bar No. 401158)
1875 K Street, N.W.
Washington, D.C. 20006
Tel: (202) 303-1112
Fax: (202) 303-2000
dmurray@willkie.com

Of Counsel:
Thomas H. Golden
Deirdre N. Hykal
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
tgolden@willkie.com
dhykal@willkie.com

Counsel for Media Amici

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 3,578 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ David P. Murray

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2012, I filed via the CM/ECF system the foregoing **AMICI CURIAE BRIEF** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ David P. Murray