IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:17-1669 (CRC)
UNITED STATES Secret Service,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION

Plaintiff, Public Citizen, Inc., has submitted to Defendant the United States Secret Service ("Secret Service") several requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a), seeking records documenting visitors to certain agencies within the White House Complex. In denying the plaintiff's administrative appeal of the first of plaintiff's such requests, the Secret Service explained that it has no way to identify records responsive to plaintiff's request, or to distinguish such records from records that are not subject to FOIA because they concern visitors to offices within the White House Complex to which the FOIA does not apply. Plaintiff nowhere disputes that, as a result, the Secret Service lacks the ability to process plaintiff's FOIA requests, and offers no authority for the proposition that the Secret Service is in violation of FOIA for denying plaintiff's request on that basis.

Nevertheless, plaintiff now seeks an extraordinary remedy: emergency injunctive relief. In plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Pl.'s Mot.), ECF No. 2, plaintiff moves the Court for a preliminary order requiring the Secret Service to "maintain a copy of all visitor logs and other records documenting visitors to the Office of Management and Budget (OMB), Office of Science and Technology Policy (OSTP), Office of National Drug Control Policy (ONDCP), and Council on Environmental Quality (CEQ), from January 20, 2017 going forward." Pl.'s Mot. However, plaintiff wholly fails to satisfy the requirements for obtaining preliminary relief. First, because there is no danger of records not being preserved, plaintiff is not suffering any harm, let alone irreparable harm. The requested visitor records are already preserved under the Presidential Records Act, and the White House Office of Records Management ("WHORM") has committed to ensuring the satisfaction of any final judgment should plaintiff prevail in this litigation. Moreover, the Secret Service has

committed to retaining copies of all White House Complex visitor records during the pendency of this litigation. Accordingly, plaintiff cannot demonstrate the irreparable harm necessary for the issuance of emergency injunctive relief, and on that basis alone the current motion should be denied.

Second, plaintiff cannot demonstrate a likelihood of success on the merits because the Secret Service's recordkeeping system prevents it from processing plaintiff's FOIA requests and the FOIA does not require the Secret Service either to engage in a futile search or to enlist outside assistance in order to respond to a FOIA request.

Finally, the balance of equities weighs against an injunction. Plaintiff cannot demonstrate any irreparable harm and, indeed, the preservation efforts that Secret Service has already undertaken render plaintiff's motion unnecessary. And because the Secret Service has the stronger argument on the merits, the public interest also weighs against awarding the requested relief.

For all of these reasons, and as explained more fully herein, this Court should deny plaintiff's extraordinary request for preliminary injunctive relief.

BACKGROUND

I. Records Regarding Visitors to the White House

Because the safety of the President and Vice President implicates national security and other governmental interests of the highest order, Congress has directed that both of these constitutional officers receive protection from the United States Secret Service. *See* 18 U.S.C. §§ 3056(a), 3056A(a). No other official (except the President-elect and Vice President-elect) is required by law to accept such protection. *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 211 n.2 (D.C. Cir. 2013). The Secret Service's protection extends not only to the physical

persons of the President and Vice President, but also to the places where they live and work, including the White House Complex,[1] which contains the offices of the President and his staff and offices for the Vice President and his staff. *See* 18 U.S.C. § 3056A(a)(1), (2), (4), (6); *see also Judicial Watch*, 726 F.3d at 212; Buster Decl. ¶ 3.

As part of its statutorily mandated function to provide security for the White House Complex, the Secret Service clears proposed visitors for entry, and controls the entry and exit of visitors. *Judicial Watch*, 726 F.3d at 212. To enable the Secret Service to perform this protective function, authorized personnel, including, but not limited to, Presidential and/or Vice Presidential staff, provide to the Secret Service identifying information regarding proposed visitors. *Id.*; Buster Decl. ¶ 8.[2] This information is provided by the White House to the Secret Service solely for the purpose of allowing the Secret Service to conduct background checks to determine whether, and/or under what conditions, a visitor should be admitted, and to allow the Secret Service to verify the visitor's admissibility at the time of the visit. *Judicial Watch*, 726 F.3d at 218-19; Buster Decl. ¶ 8.

The Secret Service utilizes two interrelated electronic systems, collectively termed the Executive Facilities Access Control System ("EFACS"), for controlling and monitoring access to the White House Complex, and the Worker and Visitor Entrance System ("WAVES") for vetting visitor information and granting access to the White House Complex. Buster Decl. ¶ 8; *id.* at

[1] The "White House Complex," for purposes of access as secured by the Secret Service, includes the White House itself along with the Eisenhower Executive Office Building, the New Executive Office Building, and the grounds encompassing the White House and the Eisenhower Executive Office Building. See Declaration of Robert P. Buster ("Buster Decl.") ¶ 5.

[2] Additional information about the historical practices of WHORM and its interactions with the Secret Service as related to the issues in this case can be found in the Declaration of Philip C. Droege, *Judicial Watch, Inc. v. United States Secret Service*, No. 1:09-cv-2312-BAH, ECF No. 13-1.

¶ 16 & Exhibit 2 thereto. The Secret Service manages and operates EFACS and WAVES on behalf of the Executive Office of the President ("EOP"), but pursuant to a 2015 Memorandum of Understanding, the EOP is the business owner of the systems. Buster Decl. ¶ 16 & Exhibit 2 thereto. Authorized pass holders at the White House Complex provide the Secret Service with information on anticipated visitors to the White House Complex by entering the information into one of two web-based applications, the WAVES Request System ("WRS") or the EOP Appointment Center. *Id.* When an authorized pass holder requests an appointment through the WRS, the appointment data is directly saved into WAVES. *Id.* With respect to appointment requests made through the EOP Appointment Center, after the information is input into the EOP Appointment Center, the Secret Service then utilizes two WAVES modules to pull EOP Appointment Center data into WAVES which automatically transmits it to the Secret Service. *Id.* A Secret Service employee then verifies that the requestor is authorized to make appointments for the location requested, adds or changes any other information that may be necessary, and conducts background checks; the information is ultimately transmitted to the EFACS server. *Id.*

The information provided to the Secret Service by the authorized White House pass holder includes information such as the proposed visitor's name, date of birth, Social Security number, the date, time and location of the planned visit, the name of the official or employee submitting the request, the name of the person to be visited, and the date of the request. *Judicial Watch,* 726 F.3d at 212; Declaration of William Willson ("Willson Decl.") ¶ 7. The Secret Service uses the information provided to determine whether there is any protective concern with admitting the proposed visitor to the White House Complex, as well as to verify the visitor's admissibility at the time of the visit. *Judicial Watch*, 726 F.3d at 212; Buster Decl. ¶ 8.

Moreover, some WAVES records are annotated by Secret Service personnel, in note and description fields, with limited information as a result of background checks or instructions, including coded instructions to Secret Service officers. *Id.* at ¶ 9.

Once an individual is cleared into the White House Complex, the visitor usually receives a pass, which is swiped over one of the pass readers at entrances to and exits from the Complex. Swiping a pass automatically creates a record in the Access Control Records System ("ACR"). *Judicial Watch*, 726 F.3d at 212; Buster Decl. ¶ 11. An ACR record includes information such as the visitor's name and badge number, the time and date of the swipe, and the post at which the swipe was recorded. *Judicial Watch*, 726 F.3d at 212; Buster Decl. ¶ 11. Once a visit takes place, WAVES records are typically updated electronically with information showing the time and place of the visitor's entry into and exit from the White House Complex. *Id.*

After a visit is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records. Buster Decl. ¶ 13. The President and Vice President, by contrast, have a continuing interest in such records for their operational and historical value. Buster Decl. ¶ 14 & Ex. 1 thereto. Accordingly, it has been the practice of the Secret Service, since at least 2001, to transfer newly-generated WAVES records to the WHORM, generally every 30 to 60 days. *See* Buster Decl. ¶ 13.[3] The practice of the Secret Service is to delete WAVES records from its computer system once they are transferred to the WHORM. *Id.* Similarly with respect to ACR records, the Secret Service and the White House, at least as early as 2001, and upon revisiting the issue in 2004, recognized and agreed that they should be treated in a manner generally consistent with the treatment of WAVES records. *Id.* at

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

¶ 15. Thus, the Secret Service and the White House determined that ACR records should be transferred to the WHORM and deleted from the Secret Service's computers, like WAVES records. *Id.* In May 2006, the Secret Service transferred ACR records covering the period from January 2001 to April 2006 to the WHORM. *Id.* Currently, the after-visit records that are transferred to the WHORM constitute a combination of WAVES and ACR information. *Id.*

In May 2006, the Secret Service Records Management Program and the WHORM entered into a Memorandum of Understanding ("2006 MOU"), which both documents past practice and interests as understood at the time regarding WAVES and ACR records, and "confirm[s] the legal status of [these] records" and WHORM's management and custody of them. *See* Buster Decl. ¶ 14 & Exhibit 1 thereto. The 2006 MOU provides, among other things, that the White House has a continuing interest in WAVES and ACR records, and that the White House continues to use the information contained in such records for various historical and informational purposes. Buster Decl. ¶ 14 & Exhibit 1 thereto (2006 MOU ¶ 20). The 2006 MOU reflects that the White House "at all times asserts, and the Secret Service disclaims, all legal control over any and all [WAVES and ACR] Records." Buster Decl., Ex. 1 (2006 MOU ¶ 24). The Secret Service acknowledges in the 2006 MOU that its temporary retention of such records after an individual's visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer of the records to the WHORM. Buster Decl., Ex. 1 (2006 MOU ¶ 22). Although not required by law, starting on September 15, 2009, the White House adopted a policy of voluntarily disclosing some WAVES and ACR records, subject to redaction. *Judicial Watch*, 726 F.3d at 214 & n.6. That policy of voluntary disclosure was rescinded on April 14, 2017.

II. Legal Background

Both FOIA, which applies to federal agency records, and the Presidential Records Act ("PRA"), which applies to Presidential and Vice Presidential records, provide for the disclosure of Executive Branch records, but the timing and circumstances of disclosure differ under the two statutes. FOIA provides for disclosure, subject to certain exemptions, of "agency" records. 5 U.S.C. § 552(a). Generally, an agency must respond to a request for records under FOIA within twenty working days, and must "make a determination with respect to any appeal within twenty [working] days," *id.* § 552(a)(6)(A)(ii), although these time limitations may, in "unusual circumstances," be extended. *Id.* § 552(a)(6)(B)(I).

The Supreme Court has made clear that the term "agency" under FOIA does not encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)) (records of telephone calls made by Assistant to the President for Natural Security Affairs are not subject to FOIA); *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (records of National Security Council ("NSC") are not subject to FOIA, because NSC is "more . . . like the White House Staff, which solely advises and assists the President" than "an agency to which substantial independent authority has been delegated"). As a close presidential advisor and constitutional officer, the Vice President and his staff also are not subject to FOIA. *See Armstrong v. Bush*, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (distinguishing Office of the Vice President from agencies that create "federal records"); *Schwarz v. U.S. Dep't of the Treasury*, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000) (Office of the Vice President not subject to FOIA), *aff'd*, 2001 WL 674636 (D.C. Cir. 2001).

These entities, however, have affirmative duties to preserve Presidential and Vice Presidential records, as required by the PRA. Under the PRA, records reflecting "the activities, deliberations, decisions, and policies" of the Presidency or Vice Presidency are "maintained as Presidential [or Vice Presidential] records." 44 U.S.C. § 2203(a); *see id.* § 2207 ("Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records."). Under the terms of the PRA, while in office, a President or Vice President must preserve Presidential or Vice Presidential records and may not even dispose of those "that no longer have administrative, historical, informational, or evidentiary value," without obtaining the written views of the Archivist of the United States, which includes giving the Archivist an opportunity to consult with Congress on the proposed disposition. 44 U.S.C. § 2203(c), (d), (e).[4] When a President or Vice President leaves office, the Archivist "assume[s] responsibility for the custody, control, and preservation of, and access to" the Presidential or Vice Presidential records of the departing administration. *Id.* § 2203(f)(1).

Certain offices located within the White House Complex, however, are "'agencies' under FOIA, and their records are 'agency records' subject to disclosure." *Judicial Watch*, 726 F.3d at 232 (citing cases). These offices include the Office of Management and Budget ("OMB"), the Office of Science and Technology Policy ("OSTP"), the Office of National Drug Control Policy ("ONDCP"), and the Council on Environmental Quality ("CEQ"). *Id.* at 232 n.28. In *Judicial Watch*, the D.C. Circuit distinguished the offices located on the grounds of the White House Complex that historically have been subject to FOIA ("FOIA Components"), from the Office of the President, consisting of the President's immediate personal staff, units in the Executive

[4] If the Archivist reports the proposed disposal to Congress, the President must then submit a schedule for the disposal to Congress at least sixty days before the "proposed disposal date." 44 U.S.C. § 2203(d).

Office whose sole function is to advise and assist the President, and the Vice President and his staff, which are not subject to FOIA ("PRA Components"). The D.C. Circuit concluded that White House Complex visitor records, then known as White House Access Control System ("WHACS") records, that "are generated by visits to [FOIA Components]" and "reveal[] nothing about visits to the Office of the President" "*are* 'agency records' subject to FOIA." *Id.* at 217.

III. Procedural Background

On April 19, 2017, plaintiff submitted a FOIA request to the Secret Service for "a copy of all visitor logs and other records documenting visitors to [OMB, OSTP, ONDCP, and CEQ] from January 20, 2017, through April 15, 2017." Pl.'s Br., Ex. A at 1. The request, to which the Secret Service assigned file numbers 20171430, 20171431, 20171432, and 20171433, specified that it "includes records from the [WAVES and ACR], as well as any other system used to track visitors to the White House Complex and/or above-listed agencies." *Id.* By letter dated May 24, 2017, the Secret Service denied plaintiff's request, explaining that the requested records "are not Secret Service agency records subject to the FOIA" but are "records governed by the Presidential Records Act, 44 U.S.C. 2201 et seq., and remain under the exclusive legal custody and control of the White House." Pl.'s Br., Ex. B at 2. On June 5, 2017, plaintiff submitted an appeal of the Secret Service's denial of FOIA request numbers 20171430 through 20171433. As grounds for its appeal, plaintiff cited the D.C. Circuit's decision in *Judicial Watch* in which, plaintiff argued, the appellate court held that "'the Secret Service may not withhold [visitor logs] that reveal visitors to [OMB, OSTP, ONDCP, and CEQ],'" because "records of visits 'to components of the White House Complex that are not part of [the Office of the President], and that are themselves 'agencies' covered by FOIA . . . *are* 'agency records' subject to FOIA." Pl.'s Br., Ex. C at 1-2 (quoting *Judicial Watch*, 726 F.3d at 217, 233-34). By letter dated July 10, 2017, the Secret

Service denied plaintiff's appeal. Pl.'s Br., Ex. D at 1-3. As the Secret Service explained, the Secret Service "does not maintain WAVES post-visit records (which combine WAVES and ACR data) for the time period of [plaintiff's] request, as such records are transferred to the [WHORM] on a regular and continuing basis." *Id.* at 1. Moreover, the Secret Service explained, even if it had the requested records in its possession, the Secret Service "has no ability to discern from WAVES records whether a visitor is making a visit to an individual employed by a PRA component or an individual employed by a FOIA component." *Id.*

On June 5, 2017, plaintiff submitted a second FOIA request to the Secret Service, similar to the first, but seeking "a copy of all visitor logs and other records documenting visitors to [OMB, OSTP, ONDCP, and CEQ] from April 16, 2017, through May 31, 2017." Pl.'s Br., Ex. E at 1. On July 17, 2017, plaintiff submitted a third FOIA request to the Secret Service, for "a copy of all visitor logs and other records documenting visitors to [OMB, OSTP, ONDCP, and CEQ] from June 1, 2017, through July 15, 2017." Pl.'s Br., Ex. F at 1. By letter dated August 14, 2017, the Secret Service acknowledged receipt of plaintiff's July 17, 2017 FOIA request, to which the Secret Service assigned file numbers 20171972, 20171973, 20171974, and 20171975. *See* Exhibit.

On August 17, 2017, plaintiff filed a Complaint for Declaratory and Injunctive Relief, ECF No. 1, asserting three claims: (1) a claim under FOIA for release of the requested records, Compl. ¶¶ 14-15; (2) a claim under FOIA that the Secret Service has a "policy or practice of withholding visitor logs and other records documenting visitors to OMB, OSTP, ONDCP, and CEQ [which] results in repeated violations of FOIA and constitutes an ongoing failure to abide by the statute," *id.* ¶ 20; and (3) a claim under the Administrative Procedure Act that the Secret Service's "policy or practice of withholding visitor logs and other records documenting visitors

to OMB, OSTP, ONDCP, and CEQ [which] constitutes agency action that is arbitrary and capricious and not in accordance with law," *id.* ¶ 22. That same day, plaintiff filed the instant motion for a temporary restraining order and preliminary injunction. ECF No. 2.

ARGUMENT

"The standard for issuance of the extraordinary and drastic remedy of a temporary restraining order or a preliminary injunction is very high." *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 933 F. Supp. 2d 58, 75 (D.D.C. 2013) (citation omitted). An interim injunction is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion," *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A party moving for a temporary restraining order or a preliminary injunction "must demonstrate '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'" *Jack's Canoes*, 933 F. Supp. 2d at 75-76 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)); *see also League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) ("A party seeking a preliminary injunction must make a 'clear showing that [the] four factors, taken together, warrant relief.'" (quoting *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016)).

I. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE INJURY

Plaintiff's motion should be denied because it has not established that it has or will suffer irreparable injury absent a temporary restraining order or a preliminary injunction. The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756,

766 (D.C. Cir. 2008) (citation omitted). To demonstrate irreparable injury, the party seeking emergency relief must make two showings. *League of Women Voters*, 838 F.3d at 7. "First, the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm.' Second, the harm 'must be beyond remediation.'" *Id.* (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

It is a "well known and indisputable principle[]" that a "unsubstantiated and speculative" harm cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Plaintiff's assertion of irreparable harm, that it "will not be able to access the [requested] records if it prevails" on its claims, *see* Pl.'s Br. 6, is unsubstantiated and speculative and thus does not support its request for preliminary relief.

Fundamentally, plaintiff is suffering no harm, let alone irreparable harm, because the records that plaintiff has requested are being preserved, as are all White House visitor records. First, the records are preserved under the express terms of the PRA.[5] As discussed *supra*, while in office, a President or Vice President may not dispose of even "Presidential [or Vice Presidential] records that no longer have administrative, historical, informational, or evidentiary value," without obtaining the written views of the Archivist of the United States, which includes giving the Archivist an opportunity to consult with Congress on the proposed disposition. 44 U.S.C. § 2203(c), (d), (e). Once transferred to the Archivist at the end of the administration, absent specific action by the President or Vice President, the Archivist must generally make

[5] The WHORM is located within the White House Office, an "advise and assist" component of the EOP. *Judicial Watch*, 726 F.3d at 216. Accordingly, the WHORM is subject to the PRA and is a PRA Component.

records covered by the PRA available under FOIA five years after the President or Vice President leaves office. *Id.* § 2204(b)(2), (c)(1). The President or Vice President may, however, before leaving office, "specify durations, not to exceed 12 years, for which access shall be restricted with respect to information" in specified categories of PRA records, such as "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers." *Id.* § 2204(a); *see Armstrong v. Executive Office of the President*, 90 F.3d at 556 (PRA records "are to be made publicly available five years after [the President or Vice President] leaves office, except that national defense and certain other information is to be made available no later than 12 years after the end of a [P]resident's [or Vice President's] term."). Thus, all Presidential and Vice Presidential records become subject to potential disclosure no later than twelve years after the officeholder leaves office. Pursuant to the PRA, therefore, all WAVES records are being preserved and will continue to be preserved for the duration of the administration, and thereafter will be preserved by the National Archives and Records Administration ("NARA").[6]

Further, although the records are already being preserved, the WHORM has also assured the Secret Service that if plaintiff prevails on its claims, and a court issues a final order compelling the Secret Service to process and release to plaintiff records responsive to plaintiff's FOIA requests, the WHORM will provide the Secret Service with the records necessary to satisfy that final order. *See* Buster Decl. ¶ 22. Additionally, although not necessary to preserve the requested records, the Secret Service has stated that it will retain copies of all WAVES and ACR data during the pendency of this litigation, and Secret Service has suspended auto-delete

[6] The WHORM treats all WAVES and ACR records as if they were subject to the PRA, thus ensuring the preservation of all records regardless of the originating component.

functions. *See id.* at ¶ 21.

These measures ensure that, should there be a final ruling in plaintiff's favor on its FOIA claims, plaintiff will be able to "obtain the [requested] records through FOIA." Pl.'s Br. 8. Accordingly, plaintiff has failed to demonstrate that absent the emergency relief it requests—an order by this Court that the Secret Service "maintain a copy of all visitor logs and other records documenting visitors to OMB, OSTP, ONDCP, and CEQ from January 20, 2017, forward until this lawsuit is resolved," Pl.'s Br. 10—plaintiff will suffer harm that is "beyond remediation." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (finding no irreparable harm where defendant had in place "measures [that would] ensure that . . . 'adequate compensatory or other corrective relief' is available to [plaintiff]'"). Nor has plaintiff demonstrated that absent the requested relief, it will suffer harm that is "certain and great,' 'actual and not theoretical,'" or at all "imminent." *League of Women Voters*, 838 F.3d at 7.

Because plaintiff has failed to establish irreparable harm, the Court should on this basis alone deny plaintiff's request for emergency injunction relief.

II. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS

In *Judicial Watch*, the D.C. Circuit concluded that records documenting visitors to the White House Complex that represent visits to offices "that are themselves 'agencies' covered by FOIA" and "reveal[] nothing about visits to the Office of the President" "*are* 'agency records' subject to FOIA." *Judicial Watch*, 726 F.3d at 217. However, the status of a record as an agency record subject to FOIA does not end the matter, as the proceedings on remand in that case demonstrated.[7]

[7] On remand, the Secret Service asserted the identical argument that it presents here. Plaintiff in that case, however, dismissed the suit before the issues raised on remand were resolved. *See* Def.'s Second Mot. for Summ. J. at 4-10, *Judicial Watch, Inc. v. United States Secret Service*,

In fact, the Secret Service is not itself able to process plaintiff's FOIA requests. While WAVES records contain a series of fields, none identifies whether a record relates to a visit to a PRA Component or a FOIA Component. *See* Willson Decl. ¶ 7 (identifying visitor record fields). These records reveal the name of the person being visited or the person making the appointment (the "caller name"), but do not reveal whether those individuals are employed by PRA Components or FOIA Components, as there is no "field in the WAVES that indicates what office the [person being visited] is employed by or what office the person making the appointment is employed by." *Id.* ¶ 9. The field "meeting location" is similarly unilluminating because "both the PRA Components and the FOIA Components utilize both the Eisenhower Executive Office Building (EEOB) and the New Executive Office Building (NEOB)." *Id.* ¶ 11. As for the "description" field contained within WAVES, that "is a 'free form' field" that allows users to make various remarks regarding security arrangements or other general information about a visitor; it does not, for example, identify whether a particular event is PRA Component-sponsored or FOIA Component-sponsored. *Id.* ¶ 12.

Simply put, the limitations of the recordkeeping system at issue here—WAVES—does not permit the Secret Service to identify records reflecting visits to FOIA Components. This implicates a fundamental FOIA principle. It is well-settled that FOIA "was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Assassination Archives & Research Ctr. v. CIA* ("*AARC*"), 720 F. Supp. 217, 219 (D.D.C. 1989); *see also Blakey v. DOJ*, 549 F. Supp. 362, 366-67 (D.D.C. 1982) ("The FOIA was not intended to compel agencies to become ad hoc investigators for requesters whose requests are not compatible with their own information retrieval systems."), *aff'd*, 720 F.2d 215 (D.C. Cir. 1983). Instead, a FOIA

No. 1:09-cv-2312-BAH, ECF No. 37 (filed Mar. 24, 2014).

request must allow an agency employee to locate a record with a reasonable amount of effort, which depends both on the nature of the request and the type of records system an agency has. *See, e.g., Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 275-76 (D.D.C. 2012) (noting that it is "unreasonable to require agencies to throw practical considerations to the wind in deciding whether they can process FOIA requests"). Thus, "an agency is presumably unable 'to determine' precisely what records [are] being requested when it cannot perform a reasonable search for the requested records within the limitations of how its records systems are configured." *Id.* Finally, "agencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems." *AARC*, 720 F. Supp. at 219.

To that end, when it is impossible to conduct a search due to the limitations of an agency's recordkeeping system, an agency need not engage in an exercise in futility in order to try to respond to a FOIA request. Directly on point is *Moore v. National DNA Index System*, 662 F. Supp. 2d 136 (D.D.C. 2009), in which plaintiff, who had been convicted of a state criminal offense, sought DNA records about himself from the Federal Bureau of Investigation's National DNA Index System ("NDIS"). *See id.* at 137. That database contains DNA records uploaded by federal, state, and local criminal justice agencies. *See id.* at 138. The database, however, "does not contain individuals' names or any other personal identifier that would allow the records in the NDIS to be identified with a specific person." *Id.* Accordingly, the court held that a search of the database would be futile and was not required by FOIA:

> The FBI cannot determine which records in the NDIS relate to a particular state convict. In other words, it is not possible for the defendants to identify records in the NDIS that are responsive to Moore's request for DNA records about himself. Therefore, both a futile search and not searching are methods equally reasonably calculated to uncover responsive documents. The defendants have not searched the record systems they control for which it is impossible to identify records

> related to Moore. Under these circumstances—where a search for records related to Moore is, by design, literally impossible for the defendants to conduct—not searching satisfies the FOIA requirement of conducting a search that is reasonably calculated to uncover responsive documents.

Id. at 139 (internal citation and footnote omitted). Here, as in *Moore*, the Secret Service cannot identify the records in its database (reflecting visits to FOIA Components) that are responsive to plaintiff's FOIA request. Here, as in *Moore*, attempting to search the WAVES database is literally impossible because the WAVES database does not contain the field necessary to identify the category of records that plaintiff seeks. Accordingly, here, as in *Moore*, denying the FOIA request without searching the WAVES database satisfies FOIA.

Importantly, a court's jurisdiction in FOIA cases is limited to enjoining an agency from improperly withholding agency records. 5 U.S.C. § 552(a)(4)(B) (providing that district court "has jurisdiction to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld"); *see also Tax Analysts v. DOJ*, 913 F. Supp. 599, 601-02 (D.D.C. 1996). Here, only the Secret Service is a defendant in this lawsuit. It cannot be required under FOIA to seek the assistance of other agencies or components in order to identify which records may be responsive to plaintiff's request. For example, it might be that third parties (such as the White House) retain employment information that could shed light on whether individuals making visit requests at the White House Complex were employed by FOIA Components (thus presumably making WAVES records associated with those visits theoretically subject to FOIA).[8] However, nothing in FOIA requires the Secret Service to obtain this information from third parties, be it the White House, another agency, or a public library.

[8] Even identifying the person requesting the visit, however, would not necessarily resolve the question of whether the visitor record is subject to FOIA. A visitor may be admitted to visit by an employee of OMB, for example, but the meeting may be with members of both OMB and White House Counsel's Office.

(Otherwise, it would improperly turn the Secret Service into a research service. *See, e.g.*, *Blakey*, 549 F. Supp. at 366-67.) Nor does this Court have the authority to order the Secret Service to obtain these types of third-party records in order to attempt to process a FOIA request. *See* 5 U.S.C. § 552(a)(4)(B) (limiting court's jurisdiction to ordering "production of any agency records improperly withheld"); *cf. Skurow v. DHS*, 892 F. Supp. 2d 319, 328 (D.D.C. 2012) (holding that FBI is not a component of DHS and, thus, TSA was under no obligation to search FBI records); *Bonaparte v. DOJ*, No. 07-0749, 2008 WL 2569379, at *1 (D.D.C. June 27, 2008) (finding search adequate when it revealed that records had been transferred to NARA, and stating that requester could seek records from NARA).

Moreover, any attempt to involve PRA Components in the further processing of this FOIA request (beyond WHORM's voluntary agreement as provided in Buster Decl. ¶ 22, *see supra* Section I) would potentially raise separation-of-powers concerns. In *Judicial Watch*, the D.C. Circuit expressed concern that, if all WHACS records were held to be subject to FOIA, this would impose a burden on the White House to review all such records for possible FOIA exemptions, which would give rise to separation-of-powers concerns. *See Judicial Watch*, 726 F.3d at 230. Purporting to require PRA Components to segregate those WAVES records that are subject to FOIA from those that are not could impose like burdens and, hence, the same separation-of-powers concerns. Plaintiff, of course, can always seek visitor information from those entities within the White House Complex that are subject to FOIA. Although those components would not have WAVES and ACR records, they might have other records reflecting visits to their offices.

At bottom, the Secret Service lacks the information necessary to further process plaintiff's FOIA requests. Plaintiff make no assertion in their complaint or brief alleging

otherwise. Accordingly, plaintiff cannot show that it is likely to succeed on the merits of its claims.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH AGAINST INJUNCTIVE RELIEF

A party seeking a temporary restraining order or preliminary injunction must also demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiff argues that the balance of equities weighs in favor of an emergency injunction here because plaintiff "will suffer irreparable harm in the absence of an injunction" and "any burden that the requested injunction would place on the Secret Service would be quite small." Pl.'s Br. 9. However, for the reasons explained *supra*, Section I., plaintiff has not demonstrated that it will suffer irreparable harm. Accordingly, this factor weighs against an emergency injunction. *See Hispanic Affairs Project v. Perez*, 141 F. Supp. 3d 60, 74 (D.D.C. 2015) (finding balance of equities weighed against issuing requested injunction where, *inter alia*, "the requested injunctive relief would do little to redress plaintiffs' alleged harms, and no irreparable harm is likely to inure to plaintiffs in the absence of immediate injunctive relief"). In addition, the requested relief would impose an unnecessary and unwarranted burden on the White House, because it would be required to identify the responsive records at a time when it is entirely unclear that plaintiff will ever prevail in its suit. Burdening the White House with such requests is precisely what the D.C. Circuit admonished should not occur. *Judicial Watch*, 726 F.3d at 229-30 (rejecting notion that "any separation-of-powers concerns arising from extending FOIA to WHACS records could be mitigated by the Executive's 'ready recourse' to FOIA Exemption 5" because "the burden [on the White House] of identifying those records [not subject to

disclosure under FOIA] on a document-by-document basis is substantial enough to make that an ineffective way of mitigating the kind of separation-of-powers concerns at issue here").

Additionally, where—as here—a plaintiff cannot establish a likelihood of success on the merits, the public interest by definition weighs against issuing an emergency injunction. *See e.g., Serono Laboratories, Inc. v. Shalala,* 158 F.3d 1313, 1326 (D.C. Cir. 1998) ("The final preliminary injunction factor, the public interest, also offers [plaintiff] no support because it is inextricably linked with the merits of the case. If, as we have held, [plaintiff] is not likely to establish [a likelihood of success in the merits], then public interest considerations weigh against an injunction."); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 83 (D.D.C. 2013) (holding that where "the parties' public interest arguments are essentially derivative of the parties' arguments on the merits of the case . . . the public interest factor of the preliminary injunction test should weigh in favor of whoever has the stronger arguments on the merits"); *Hubbard v. United States*, 496 F. Supp. 2d 194, 203 (D.D.C. 2007) ("Because it concludes that the plaintiff has not demonstrated a likelihood of success on the merits, the court need not linger long to discuss . . . public interest considerations [as] . . . [i]t is in the public interest to deny injunctive relief when the relief is not likely deserved under law." (internal quotations marks and citations omitted) (second alteration in original)).

Accordingly, plaintiff has failed to establish that either the balance of harms or the public interest favors an injunction, and there is no basis for the Court to invoke its emergency powers at this early stage in the litigation.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion for a temporary restraining order and/or preliminary injunction.

Dated: August 22, 2017

Respectfully submitted,

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