UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	)	
Plaintiffs,	)	Civil Action No. 1:13-cv-1870 (JEB)
v.	)	
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DEFENDANT'S REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

In Plaintiffs' Opposition to Defendant's Motion to Dismiss ("Pls.' Opp."), plaintiffs narrowly interpret the test set forth by the D.C. Circuit to determine whether a document is an "agency record" for purposes of FOIA. As set forth in the opening brief of the Central Intelligence Agency ("CIA"), the intent of the Senate Select Committee on Intelligence ("SSCI" or "Committee") from the creation of the Report was clear – it expected to retain control over the work product that would become the Report.[1] Plaintiffs ignore the clear, contemporaneous expressions of intent to retain control on the part of SSCI, focusing instead on the conditions under which SSCI transferred the Report to the CIA, and even then, they inexplicably overlook Senator Feinstein's December 14, 2012 letter transmitting the Report, a letter that, again, expresses SSCI's intent to maintain control over any public release. These expressions of congressional intent to retain control should weigh heavily in the Court's determination of whether SSCI Report is an "agency record" under FOIA.

[1] Throughout this brief, the CIA will refer to the version of the SSCI Report – approved by the Committee and transmitted to the CIA by Senator Feinstein in December 2012 (the version of the Report at issue in this case) as the "Report."

To date, SSCI has not submitted any version of the Report to the CIA (or the Executive Branch) for classification review, a necessary precursor to public release. There is no reason to interfere with this process, or with SSCI's process for finalizing the Report, which, as Senator Feinstein set forth in her letter, was SSCI's intention. Nor do any actions by the CIA in formulating its response to the Report transform the document into an agency record. The CIA has limited the individuals who were permitted access to the Report, and the drafting of the CIA's response and any reforms were well within the "use" contemplated by the Committee when it transmitted the Report to the CIA. And although the D.C. Circuit has noted that with respect to a document that originated in Congress, the extent to which the agency read and relied on the document and the degree of integration of the document into the agency's records are irrelevant, those two factors favor the CIA as well. Moreover, because the record is clear, and, in any event, plaintiffs' proposed discovery would not change the analysis, discovery is unnecessary. This Court should grant the CIA's motion to dismiss.

ARGUMENT

I. SSCI INTENDED TO RETAIN CONTROL OVER THE REPORT.

Plaintiffs argue that SSCI provided no "clear, contemporaneous, and specific" assertions of its intent to control the Report, and thus that the first factor, "the intent of the document's creator to retain or relinquish control over the records" favors the plaintiffs.[2] Pls.' Opp. at 7;

[2] Plaintiffs contend that the D.C. Circuit's four-part test for whether a document constitutes an "agency record" "is in some tension" with Supreme Court precedent in *Tax Analysts v. Dep't of Justice*, 492 U.S. 136 (1989). Pls.' Opp. at 6. While the *Tax Analysts* Court did state that, "By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties," it had the four-factor test before it at the time in the case that was being appealed, and, in affirming the decision in that case, did not reject it. *See Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (*aff'd*, 492 U.S. 136 (1989)). Subsequent D.C. Circuit cases have relied on that four-factor test as an amplification of the "control" requirement set forth in the Supreme Court decision in *Tax Analysts*. *See, e.g., Burka*, 87 F.3d at

Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996). In doing so, however, plaintiffs inexplicably ignore the December 14, 2012 letter from Senator Dianne Feinstein, SSCI's Chairman, which transmitted the Report to the President and appropriate Executive Branch agencies.[3] That letter makes clear that the Report was being provided for the specific and limited purpose of soliciting edits and comments for SSCI to consider in making changes to the Report before finalizing it. *See* Feinstein Letter (Ex. C to Higgins Decl.). As the

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515; *accord United We Stand America, Inc. v. IRS*, 359 F.3d 359 F.3d 595, 599 (D.C. Cir. 2004). Moreover, to the extent that plaintiff contends that D.C. Circuit's test conflicts with the Supreme Court's *Tax Analysts* decision because the *Tax Analysts* Court stated that the agency record inquiry should not "turn on the intent of the creator of a document relied upon by an agency," Pls.' Opp. at 6 n. 4, in making that statement, the *Tax Analysts* Court was responding to a Department of Justice argument that would have limited "agency records" "to those documents 'prepared substantially to be relied upon in agency decisionmaking.'" *Tax Analysts*, 492 U.S. at 147-48. It was discerning that intent that the Court determined to be an "elusive endeavor," and not the outward manifestations of non-agency control relied upon in the four-part test used by the D.C. Circuit. *Id.* at 148.

[3] While plaintiffs argue that this motion should not be brought under Rule 12(b)(1) because the CIA has answered the Complaint, Pls.' Opp. at 5 n. 2, courts in this Circuit have noted that motions to dismiss for lack of subject matter jurisdiction may be brought under Rule 12(b)(1) even after entry of a final judgment. *See, e.g., U.S. v. Philip Morris USA, Inc.*, 787 F.Supp.2d 68, 73 (D.D.C. 2011) (treating challenge to court's subject matter jurisdiction in "Suggestion of Mootness and Motion for Partial Vacatur" of award of injunctive relief brought under Rule 12(h)(3) as challenge to subject matter jurisdiction under Rule 12(b)(1), stating that challenge to subject matter jurisdiction under Rule 12(b)(1) "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.") (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006)). To the extent the Court may determine that this motion should have been brought either under Rule 12(h)(3) or 12(c), rather than Rule 12(b)(1), Rule 12(b)(1) continues to provide the proper standard of review. *See id.* ("When faced with what a party characterizes as a Rule 12(h)(3) motion, a court should treat the motion as a traditional Rule 12(b)(1) motion for lack of subject matter jurisdiction.") (quoting *Harbury v. Hayden*, 444 F.Supp.2d 19, 26 (D.D.C.2006)). A Rule 12(c) motion to dismiss for lack of subject matter jurisdiction should also be decided under the 12(b)(1) standard. *See Newbrough v. Piedmont Reg'l Jail Auth.*, No. 3:10CV867–HEH, 2012 WL 169988, at *2 (E.D. Va. 19 Jan. 19, 2012) (quoting 5A Wright & A. Miller, Fed. Practice and Procedure § 1367 (1990)) ("'[I]f a party raises an issue of subject matter jurisdiction on his motion for judgment on the pleadings, the court will treat the motion as if it had been brought under Rule l2(b)(1).'")

CIA argued in its opening brief, that SSCI intended to review the CIA's (and any other) responses and use them to perhaps amend the Report makes clear that, while SSCI viewed this as a process of the Executive Branch providing input for a congressional decision, it did not intend to relinquish control over the Report or the final version of the Report that would emerge after review and comment by the Executive Branch. Plaintiffs fail entirely to rebut this essential point.

Senator Feinstein's December 14, 2012 letter also underscores the fact that the version of the SSCI Report that was circulated to the President and Executive Branch agencies (and which is at issue in this case) was not a final document; rather, it was preliminary, with SSCI wholly in control of the final, and as yet undecided, content of the Report. *See* Ex. C to Higgins Decl. ("After consideration of these views, I intend to present this report with any accepted changes again to the Committee to consider how to handle any public release of the report, in full or otherwise."). Moreover, to the extent that Senator Feinstein's letter itself is not clear enough, a statement that she made the day before transmitting the Report also expresses SSCI's intent to maintain control over the Report: "Following the committee's vote today, I will provide the report to President Obama and key executive branch officials for their review and comment. The report will remain classified and is not being released in whole or in part at this time. The committee will make those decisions after receiving the executive branch comments." Feinstein Statement on CIA Detention, Interrogation Report (Dec. 13, 2012), http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635. Senator Feinstein's statements, made contemporaneously with the transmittal of the Report to the Executive Branch provide clear indicia of congressional intent to retain control over the disposition of the SSCI Report.

Even if Senator Feinstein's statements at the time of the transmittal of the Report were not sufficiently clear, there is additional evidence of SSCI's intent to control the Report. Plaintiffs acknowledge that SSCI manifested its intent to control the initial drafts of its Report. Pls.' Opp. at 8. Plaintiffs, however, then argue that because SSCI did not reiterate the control with respect to later drafts of the Report, the version of the Report transmitted to the CIA should be considered an "agency record." This argument too narrowly reads the requirement of congressional intent to control. Plaintiffs cite to *Paisley v. CIA*, 712 F.2d 686 at 695 (D.C. Cir. 1984), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984), and *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842 and n. 5 (D.C.Cir. 1981) to argue that the June 2009 letter from the SSCI Chairman and Vice Chairman to the CIA Director provides insufficient evidence of control because 1) it was not contemporaneous with the *transmission* of the Report, and 2) it is too general in its prohibitions. Pls' Opp. at 10. But plaintiffs ignore additional language in those cases that supports the CIA's position.

In *Holy Spirit Ass'n*, the D.C. Circuit noted that an objection by Congress to the disclosure of documents created by Congress but in possession of the CIA came "as a result of the . . . FOIA request and this litigation long after the actual transfer to the CIA." *Holy Spirit Ass'n*, 636 F.2d at 842. Importantly (and contrary to plaintiffs' argument here), the court in that case specifically noted: "[W]e do not adopt appellant's position that Congress must give contemporaneous instructions when forwarding congressional records to an agency. Nor do we direct Congress to act in a particular way in order to preserve its FOIA exemption for transferred documents. . . . Nothing here either in the circumstances of the documents' *creation* or in the conditions under which they were sent to the CIA indicates Congress' intent to retain control over the records or to preserve their secrecy." *Id.* at 842 (emphasis added). The court in *Holy*

Spirit, therefore, determined that an assertion of congressional control at the time of the transmittal of a document from Congress to an agency was not necessary, and acknowledged that Congress could, in fact, manifest intention to control a document "in the circumstances of the documents' creation." "Contemporaneous," therefore, does not mean only at the time of transfer, as plaintiffs contend. Rather, to the extent that Congress provided contemporaneous and specific instructions with respect to its control at the creation of the Report, such instructions may also suffice to show congressional intent to maintain control over the Report. *See, e.g.*, *Holy Spirit Ass'n*, 636 F.2d at 842; *accord Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1979) (citing, as evidence of congressional intent to maintain control over transcript of congressional hearing, facts that stenographer and typist were sworn to secrecy prior to hearing, and that "Secret" markings were placed on transcript at time of its creation).

Thus, far from being "utterly irrelevant," Pls.' Opp. at 8, the June 2009 letter from the SSCI Chairman and Vice Chairman to the CIA Director shows congressional content to control the disposition of SSCI's work product from the outset of the drafting of the Report, or at the time of the Report's creation. While plaintiffs attempt to argue that this letter affects only work product created at CIA facilities and stored on a CIA computer system, *id.*, this distinction is an artificial one. This is particularly apparent in light of Senator Feinstein's December 14, 2012 letter (and her statement of the previous day), which expressly reserve control over any public release of the SSCI Report.[4] *See* Ex. C to Higgins Decl. All of these communications demonstrate that SSCI's intent to retain control over disposition of these records has remained consistent and unequivocal.

[4] That SSCI has not "expressed . . . concerns over the CIA's review and reliance upon the approved version of the Report," Pls.' Opp. at 9, indicates that the limited use to which the CIA has put the Report is within the scope of what SSCI anticipated when it transferred that version of the Report to the CIA for review and comment.

Plaintiffs also argue that any congressional assertion of control was too general in its prohibitions; that is, because the June 2009 SSCI letter to the CIA refers only to "draft and final recommendations, reports, or other materials generated by Committee staff or Members," it is too "general and sweeping" to provide sufficient proof of congressional intent to control the Report. Pls.' Opp. at 10. Once again, however, plaintiffs fail to address Senator Feinstein's December 14, 2012, letter, which discusses a single document: the version of SSCI's Report that had been approved for submission to the Executive Branch for review, and expresses SSCI's intent to control any public release of that Report. Ex. C to Higgins Decl. Certainly, the discussion in that letter should be specific enough to satisfy plaintiffs' concerns.

Moreover, the June 2009 letter from SSCI to the CIA, standing alone, is sufficiently specific to support a finding that the SSCI Report is not an agency record. Neither *Paisley v. CIA*, 712 F.2d at 695, nor *Holy Spirit*, 636 F.2d at 842 and n. 5, cited by plaintiffs, is to the contrary. Pls.' Opp. at 10. In *Paisley*, the letter that was deemed insufficient by the court "indicate[d] the Committee's desire to prevent release without its approval of *any* documents generated by the Committee or by an intelligence agency in response to a Committee inquiry." *Paisley*, 712 F.2d at 695 (emphasis added). Certainly, that is not the situation here, where the June 2009 letter specifically discussed drafts of the SSCI Report. *See* Higgins Decl. ¶¶ 6, 8 (discussing restrictions imposed after "SSCI advised the CIA in March 2009 that it planned to conduct a review of the CIA's former detention and interrogation program"). Similarly, in *Holy Spirit*, while the court held that a transmittal memorandum from Congress applied to one set of documents but not a second set about the same investigation, the documents in this case are drafts of the SSCI Report and the version of *the same document* approved by the Committee for transmittal to the Executive Branch for review. Thus, contrary to plaintiffs' contention, because

of the context in which the restrictions came about, *i.e.*, restrictions imposed in order to protect SSCI's drafting of the SSCI Report from public disclosure, *Paisley* and *Holy Spirit* are inapposite.

Plaintiffs next contend that "the CIA has not shown that the SSCI sought the list of names [of those who would review the Report] for its own purposes, rather than at the CIA's behest." Pls.' Opp. at 11. This is pure speculation on plaintiffs' part; the record is devoid of evidence that the restrictions SSCI imposed on the Report were imposed at the CIA's request. If it was the CIA, rather than SSCI, that was controlling such access, there would have been no reason for SSCI to require the *CIA* to provide the names of the *CIA* individuals who would review the Report. Moreover, even if the CIA had imposed classification-related restrictions on access to the Report, this does not mean that SSCI did not intend to retain control over the Report's ultimate dissemination and disposition, as evidenced by the June 2009 letter, the December 2012 letter, and Senator Feinstein's public statements.

Finally, plaintiffs downplay the fact that SSCI has reserved the right to make changes to the Report, and that it is therefore not final. Pls.' Opp. at 11-12. But as Senator Feinstein's letter indicates, the Committee considered the version of the Report that was circulated to the Executive Branch to be subject to revision, circulating it for the specific and limited purpose of soliciting edits and comments for SSCI to consider in making changes to the Report before finalizing it, with SSCI remaining wholly in control of the final, and as yet undecided content of the Report. *See* Ex. C to Higgins Decl. ("After consideration of these views, I intend to present this report with any accepted changes again to the Committee to consider how to handle any public release of the report, in full or otherwise."). Certainly, it should not be surprising that SSCI might intend to retain control of its 6,000 page Report and the Executive Summary until

the Committee considered the Report to be final; to the extent that comments or concerns expressed by one or more agencies might change the Report or its conclusions, the Committee would be reluctant to allow use of the Report for other than internal review and comment at the time.

Even more recently, in July 2013, Senator Feinstein again indicated that the Report remains subject to revision, stating that she "planned to ask the White House and C.I.A. to declassify its 300-page executive summary after 'making any factual changes to our report that are warranted after the C.I.A.'s response." Mark Mazzetti and Scott Shane, "Senate and C.I.A. Spar Over Secret Report on Interrogation Program" N.Y. Times (Jul. 19, 2013), available at http://www.nytimes.com/2013/07/20/us/politics/senate-and-cia-spar-over-secret-report-on-interrogation-program.html?_r=0. Moreover, even though individual members of SSCI may have requested that the Report be declassified, a formal request for declassification *from the Committee* has not yet occurred.[5] *See, e.g.*, Transcript, Statement of Dianne Feinstein (Mar. 11, 2014) ("I also want to reiterate to my colleagues my desire to have all updates to the committee report completed this month and approved for declassification. We're not going to stop. I intend to move to have the findings, conclusions and the executive summary of the report sent to the president for declassification as release to the American people."), http://www.washingtonpost.com/world/national-security/transcript-sen-dianne-feinstein-says-

[5] SSCI is expected to vote shortly on whether to submit portions of the revised Report for declassification review. *See* David Lightman and Jonathan S. Landay, "Senate panel vote on releasing CIA study delayed," McClatchyDC (Mar. 27, 2014) (quoting Senator Feinstein as stating the vote on declassifying portions of the Report "now likely will be April 3."), http://www.mcclatchydc.com/2014/03/27/222669/senate-panel-vote-on-releasing.html. To the extent that SSCI plans to vote to submit an updated version of the Report for declassification – and did not do the same for the version currently in possession of the CIA – it strongly supports the CIA's argument that SSCI intended to maintain control of any public release of the version of the Report that was transmitted to the CIA in December 2012.

cia-searched-intelligence-committee-computers/2014/03/11/200dc9ac-a928-11e3-8599-ce7295b6851c_story.html; Transcript, Council on Foreign Relations, Remarks by CIA Director John Brennan (Mar. 11, 2014) ("[I]f the Senate committee, you know, submits this report they have to CIA for classification review, which they haven't done yet – I mean, it's not as though we're holding it back. . . . It's up to them to decide whether or not they want to put it out publicly or not"), available at http://www.cfr.org/intelligence/cia-director-brennan-denies-hacking-allegations/p32563; Shane Harris, "Obama Calls for Releasing Controversial Senate Torture Report," at 1 (Mar. 12, 2014) ("I would urge [SSCI] to go ahead and complete the report and send it to us . . . ."), available at http://thecable.foreignpolicy.com/posts/2014/03/12/obama_calls_for_releasing_controversial_senate_torture_report. Thus, because SSCI has expressed clear, contemporaneous, and specific indicia of intent to control the disposition of the SSCI Report, this factor favors the CIA.

II. THE CIA CANNOT USE AND DISPOSE OF THE REPORT AS IT SEES FIT.

Plaintiffs argue that because the CIA "conducted a thorough review of the Report," "drafted a lengthy response," and apparently instituted certain reforms in response to the Report's findings, it was free to use the Report as it saw fit, and thus, under the second factor of the *Burka* analysis, converted the Report to an "agency record." Pls.' Opp. at 13. The analysis should be simpler than that, however: to the extent that Congress expressed its own intent to retain control, the Agency cannot be free to use and dispose of the document as it sees fit. Indeed, as the court in *United We Stand* stated, "In this circuit, whether the [document] is subject to FOIA turns on whether Congress manifested a clear intent to control [it]." *United We Stand*, 359 F.3d at 597; *accord Paisley*, 712 F.2d at 693 (if "Congress has manifested its own intent to retain control, then the agency – by definition – cannot lawfully 'control' the documents"). The

court in *Judicial Watch, Inc. v. United States Secret Service*, 726 F.3d 208, 223 (D.C. Cir. 2013), analyzed the issue similarly, determining that where "the non-covered entity . . . has 'manifested a clear intent to control' the documents[,] . . . . the agency is not free to use and dispose of the documents as it sees fit." Here, where, as discussed above, Congress manifested its own intent to retain control, the CIA cannot use and dispose of the Report as it sees fit.

In addition, contrary to plaintiffs' arguments, the use that the Agency put to the Report was within the scope of that contemplated by Congress, and was limited. In her December 14, 2012, letter, Senator Feinstein made clear that SSCI was providing the Report to the President and Executive Branch agencies for their "review," as well as for them to provide "edits and comments." Ex. C to Higgins Decl. In the letter, Senator Feinstein also sought response by the agencies to the Report itself, stating, "I ask that the White House coordinate any response from these agencies." *Id.* Thus, to the extent that the CIA not only reviewed the Report, but drafted a response to provide to the Committee, the drafting of the response was entirely consistent with the limited use of the Report expressly allowed by the Committee when it provided the Report to the CIA, and such use would not have converted the Report to an "agency record" in the CIA's possession.

Plaintiffs' other arguments do not change this analysis. Plaintiffs contend that the CIA's apparent institution of "certain reforms in response to the Report's findings," would convert the document to an "agency record." However, such reforms were part of the response to the Report contemplated by the Committee. As plaintiffs themselves point out, SSCI produced this Report in order to ensure reforms by the CIA. Pls.' Opp. at 13. Former CIA Director Leon Panetta recognized this as well, in a March 16, 2009 statement to CIA employees: "Earlier this month, the Senate Select Committee on Intelligence announced a major review of CIA's past practices

in terrorist detention and interrogation. As I told you then, the Chairman and Vice Chairman of the Committee have assured me that *their goal is to draw lessons for future policy decisions*," https://www.cia.gov/news-information/press-releases-statements/new-review-group-on-rendition-detention-and-interrogation.html (emphasis added). Indeed, one of the primary purposes of congressional oversight generally, and the SSCI's review of the CIA's former detention and interrogation program in particular, is to prompt the Executive to enact reforms. If this was not the case, the SSCI Report would be nothing more than a historical accounting of the program. That the CIA may have developed and set forth certain reforms in its response to the Committee was thus within the scope of the CIA use of the Report that SSCI intended.

Plaintiffs also point to the discussion of the Report at the confirmation of John Brennan to be CIA Director to contend that because Director Brennan stated that he would make portions of the Report required reading for senior Agency personnel, the CIA was free to use the Report as it wished. Pls.' Opp. at 13-14. Even if such additional individuals reviewed the Report within the CIA, however, plaintiffs overlook the fact that Director Brennan's statement came as a response to a request by Senator Rockefeller, a SSCI member. U.S. Senate Select Committee on Intelligence, Transcript, *Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency* (Feb. 7, 2013), 44:1-6 ("I would hope very much that you would, if you are confirmed, which I hope you will be, that you will make parts of this at your discretion, required reading for your senior personnel so they can go through the same experience that you went through. Are you willing to do that?"), http://1.usa.gov/Ph7rCk. A request by a Committee member that additional personnel review the Report is entirely consistent with SSCI's expressed intent to retain control over the Report, and with Agency use of the Report itself remaining limited.

Finally, plaintiffs challenge the CIA's "conclusory assertion" that it cannot disclose the Report without SSCI's approval. Pls.' Opp. at 14. This assertion, however, is based on not only the past history of SSCI's assertions of control over drafts of the document – even to the point of specifying that those drafts would not become agency records subject to FOIA – but also upon the assertions of control over any public release of the Report set forth in Senator Feinstein's December 14, 2012 letter. Moreover, this assertion comes from the senior CIA official who is responsible for managing the Agency's interactions with the SSCI, and therefore it should not be discounted. SSCI has done nothing to contradict or withdraw these indicia of congressional control, and the CIA has appropriately circumscribed its use and dissemination of the Report accordingly.

III. TO THE EXTENT THEY ARE RELEVANT, THE THIRD AND FOURTH FACTORS FAVOR THE CIA.

As the CIA noted in its opening brief, and plaintiffs do not dispute, in *Judicial Watch, Inc. v. United States Secret Service*, 726 F.3d 208, 221 (D.C. Cir. 2013), the D.C. Circuit noted that "the standard, four-factor control test does not apply to documents that an agency has . . . obtained from . . . a governmental entity not covered by FOIA: the United States Congress." In such a case, the court stated, "the first two factors of the standard test [are] effectively dispositive."[6] *Id.* Thus, the Court should end its analysis without considering the additional two factors.

[6] Plaintiffs cite to *United We Stand*, 359 F.3d at 597, 602, in an attempt to broaden the Court's considerations beyond the first two factors. Pls.' Opp. at 7. But in *United We Stand*, the document at issue was a document created by the IRS at the request of Congress, to which the discussion in *Judicial Watch* would not apply. To the extent that *United We Stand* suggests that the consideration of additional factors were appropriate under the circumstances of that case, such consideration is inapplicable here, where there is no dispute that the record at issue is a congressionally-created document in the possession of the CIA.

To the extent that the Court determines to consider the additional two factors, however, they, too, favor the Agency. With respect to the third factor: "the extent to which agency personnel have read or relied upon the document," plaintiffs contend only that because additional personnel reviewed the Report in preparation for the drafting of the response, and that – at the request of a member of SSCI – Director Brennan agreed to have senior staff review the Report, the Agency read and relied upon the Report. But as set forth in the Higgins Declaration, access to the Report within the CIA has "remained confined to authorized CIA personnel with the requisite security clearances and a need-to-know, and for the limited purpose of assisting the Agency in its interactions with the Committee with respect to the Report and the Agency's response." Higgins Decl. ¶ 12. Such limited review within the Agency should not be enough to convert the SSCI Report to an agency record. Because of the limited nature of the access, the circumstances of this case differ from *Judicial Watch*, cited by plaintiffs, where there was apparently no limit placed on who within the agency would be reading or relying upon the documents in question. *See Judicial Watch*, 726 F.3d at 219; Pls.' Opp. at 16. Nor would the institution of any policy reforms require further review or dissemination of the Report itself.

Finally, with respect to the fourth factor: "the degree to which the document was integrated into the agency's record system or files," plaintiffs offer nothing but speculation, arguing that the CIA's review and response to the Report "imply some degree of integration into the Agency's computer systems," and because the CIA has "taken steps to address shortcomings identified by the Report" the Report's content must have been integrated into the Agency's files. Pls.' Opp. at 16. To be clear, the CIA's position is not that the Report does not exist within its files (obviously it does), but that the Report has not been integrated into the CIA's records systems; in other words, the Report has been segregated from and treated differently than normal

agency records that are under the CIA's control. The CIA declarant's assertion to this fact, which is entitled to a presumption of good faith, is entirely consistent with the limited distribution of the Report within the Agency. See Higgins Decl. ¶ 8. ("[A]ccess to the document has remained confined to authorized CIA personnel with the requisite security clearances and a need-to-know, and for the limited purpose of assisting the Agency in its interactions with the Committee with respect to the Report and the Agency's response."). Notwithstanding plaintiffs' speculation, there is no reason that the Agency's review of and response to the Report would require integration into either the Agency's computer or other records systems, particularly if it was distributed to those who reviewed it in hard copy rather than via email. Indeed, the limited dissemination of the Report would mean that integration into Agency files should not have occurred.

IV. POLICY CONSIDERATIONS PROVIDE ADDITIONAL INDEPENDENT REASONS TO CONCLUDE THAT THE REPORT IS NOT AN "AGENCY RECORD."

Plaintiffs downplay the CIA's argument that policy considerations unique to a congressionally-created document in the possession of an agency warrant a finding that the Report is not an agency record. Pls.' Opp. at 7 n. 5. But these policy considerations should not be taken so lightly. As noted by Senator Feinstein, Director Brennan, and President Obama, SSCI has not yet submitted a final version of the Report for classification review, which would necessarily come prior to any decision to publicly release it. SSCI should be afforded the opportunity to decide when the Report is sufficiently final to allow for such classification review, and should also be afforded the opportunity to decide when and under what circumstances the Report should be publicly released. The plaintiffs themselves have characterized this document

as "critically important." Pls.' Opp. at 15. It is entirely appropriate to allow Congress to decide for itself when the appropriate time would be to publicly release such an important document.

Moreover, were the Court to require that the SSCI Report be treated as an "agency record," to be processed for release of any non-exempt information by the Agency, it would likely have broad consequences implicating separation of powers and congressional oversight concerns that resound beyond this case. As the D.C. Circuit concluded in *Judicial Watch*, 726 F.3d at 224, constitutional separation of powers concerns provided an important reason to find that the logs of visitors to the Office of the President were not "agency records" within the meaning of FOIA. In finding that the visitor logs were not "agency records," the *Judicial Watch* court – in language equally applicable here – cautioned against allowing a plaintiff to use FOIA to require the disclosure of documents otherwise not subject to FOIA: "And where Congress has intentionally excluded a governmental entity from the Act, we have been unwilling to conclude that documents or information of that entity can be obtained indirectly, by filing a FOIA request with an entity that *is* covered under that statute." *Id.* at 225 (emphasis in original). In addition, requiring processing under FOIA of a document generated by Congress in its oversight capacity could further impair communications between the Committee and the Agency, and could render SSCI and other committees unwilling to again entrust copies of their sensitive analyses to the Executive Branch for review for fear that they would be required to be disclosed under FOIA by an Executive Branch agency. The free-flow of communication between congressional oversight committees and their corresponding Executive agencies is critical to effective congressional oversight, and a finding that the SSCI Report is an "agency record" in this case could significantly chill the exchange of such communications in the future.

V. DISCOVERY IS UNWARRANTED.

Finally, plaintiffs argue in favor of discovery in this case. However, discovery is generally not appropriate in FOIA actions. *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) ("[D]iscovery in a FOIA action is generally inappropriate."); *Pub. Citizen Health Research Group v. FDA*, 997 F. Supp. 56, 72 (D.D.C. 1998) ("Discovery is to be sparingly granted in FOIA actions. Typically, it is limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like."), *aff'd in part, rev'd in part & remanded*, 185 F.3d 898 (D.C. Cir. 1999). A court may deny a request for discovery made "in the bare hope of falling upon something that might impugn the affidavits." *Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 n. 101 (D.C. Cir. 1979).

Here, the record is clear, and plaintiffs have not raised any arguments that would overcome the presumption against discovery in a FOIA case.[7] Moreover, no matter what the CIA's response to the plaintiffs' proposed interrogatories might be, it would not change the outcome of the agency record issue where the restrictions that SSCI imposed on the various draft versions of the SSCI Report clearly indicate its intent to retain control.

For example, plaintiffs first suggested interrogatory, which seeks information with respect to whether SSCI expressly stated that it intended the Report to remain a "congressional record" within the meaning of FOIA when it sent the Report to the CIA for review and comment, is unnecessary in light of the clear indications of SSCI's intent to maintain control over

[7] While the CIA believes the record is sufficient, to the extent the Court does not agree, the CIA would respectfully request that the Court allow the Agency to provide an additional declaration to expand as necessary upon the information already provided.

dissemination and distribution of the Report evidenced both in Senator Feinstein's letter of December 14, 2012, and the June 2009 letter from SSCI to the CIA Director. For the same reasons, and in light of the undisputed manifestations of SSCI's intent to retain control over the disposition of the various versions of the Report, whether the CIA's classification of information within the Report somehow restricted SSCI's ability to disseminate the Report is irrelevant as well (proposed interrogatory #4 and subpart, seeking information about limits placed by the CIA's classification of information in the Report).

Plaintiffs' additional suggested interrogatories fare no better. As discussed in sections II. and III., supra, even if the CIA used the Report to institute reforms, any use of the Report for that purpose was limited, and was well within the scope of use contemplated by Congress (proposed interrogatory #2, seeking information on reliance and reforms). Furthermore, to the extent that the Report may have been further shared within the Agency, it was for the purpose of responding to the Report as requested by Congress, or for the purpose of informing senior Agency officials of the Report's contents, as requested by SSCI member Senator Rockefeller (proposed interrogatory #3 and subparts, seeking information on how Report was shared within CIA). Finally, plaintiffs' final proposed interrogatory, seeking information on "how the Agency could thoroughly review and respond to the Report without integrating the Report into its files" was also addressed in section III., supra: any reforms that were instituted would not require integration of the Report into Agency record systems.

CONCLUSION

For the foregoing reasons, and those set forth in the CIA's opening brief, the SSCI Report is not an "agency record" subject to FOIA, and plaintiffs' claims concerning this document should be dismissed.

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Respectfully submitted,

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