IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRACY FORWARD FOUNDATION, *et al.*, *Plaintiffs*, vs. THE WHITE HOUSE OFFICE OF AMERICAN INNOVATION, *Defendant*.	Case No. 18-cv-349 (CKK)

OPPOSITION TO MOTION TO DISMISS

Javier M. Guzman, Bar No. 462679
Karianne Jones, Bar No. 187783
Nitin Shah, Bar No. 156035
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090
jguzman@democracyforward.org
kjones@democracyforward.org
nshah@democracyforward.org

Counsel for Plaintiffs Democracy Forward Foundation and Food & Water Watch, Inc.

Zachary B. Corrigan, D.C. Bar No. 497557
Food & Water Watch, Inc.
1616 P Street NW, Suite 300
Washington, D.C. 20036
(202) 683-2451
zcorrigan@fwwatch.org

Counsel for Plaintiff Food & Water Watch, Inc.

STATEMENT REGARDING ORAL ARGUMENT

This case requires the Court to consider whether the Office of American Innovation is functioning as an "agency," *i.e.* is exercising substantial independent authority, for the purposes of determining whether the Office is subject to the requirements of the Freedom of Information Act. Plaintiffs respectfully submit that oral argument in this case may aid the Court's resolution of this matter.

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INTRODUCTION

The Office of American Innovation ("OAI" or "Office") was established with broad, sweeping objectives, and with expansive authority to launch initiatives and coordinate implementation of plans to accomplish those objectives. Despite that broad authority, the government now claims that OAI was not required to respond to the plaintiffs' Freedom of Information Act ("FOIA" or "Act") requests because it is not an entity subject to FOIA. It contends that, even though the Office has been launching initiatives, evaluating and implementing government programs, and imposing mandatory duties on federal agencies, its sole purpose in fact is to advise the President, and thus qualifies for a narrow exception from the ordinary rule—codified in FOIA's plain language—that all Executive Branch offices are subject to FOIA, including those housed within the Executive Office of the President.

The government's claims cannot be reconciled with the statute, the cases, or with Plaintiffs' well-pleaded factual allegations, which plausibly establish that OAI exercises substantial authority independent from the President and therefore is subject to FOIA. The government's motion to dismiss therefore should be denied.

BACKGROUND

A. The Office of American Innovation.

President Trump issued a formal Presidential Memorandum establishing OAI in March 2017 for the expansive purpose of "implementing policies and scaling proven private-sector models to spur job creation and innovation" and "ensur[ing] that America is ready to solve today's most intractable problems, and is positioned to meet tomorrow's challenges and opportunities." Compl. ¶ 12 (quoting Mem. from President Trump to the Senior Advisor to the President, et al. (Mar. 27, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-white-house-office-american-innovation/ ("the Presidential Memorandum")). OAI

operates as a distinct entity within the White House Office. *Id.* ¶ 16. Even by the terms of its founding document, its duties far exceed a mere advisory function. *Id.* ¶ 13. Rather, it is charged with, among other things, "launch[ing] initiatives with a focus on innovation," and "coordinat[ing] implementation of any resulting plans." *Id.* ¶ 14. OAI is further mandated to create "task forces to focus on initiatives such as modernizing Government services and information technology, improving services to veterans, creating transformational infrastructure projects, implementing regulatory and process reforms, creating manufacturing jobs, addressing the drug and opioid epidemic, and developing 'workforce of the future' programs." *Id.* ¶ 15. In carrying out these activities, "OAI shall gather information, ideas, and experiences from other parts of Government, from the private sector, and from other thought leaders and experts outside of the Federal Government." *Id.* ¶ 14.

The Presidential Memorandum establishes Jared Kushner as the head of OAI, and lists a number of staff positions, including a communications officer, a head of federal IT modernization, a head of infrastructure and workforce modernization issues, and a research and events planning team. *Id.* ¶ 17. OAI staff meet daily with other government entities and conduct weekly team meetings to discuss ongoing projects. *Id.* ¶ 19. The Presidential Memorandum does not require Presidential approval of OAI initiatives or projects, nor does it contemplate regular meetings between OAI and the President. *Id.* ¶ 22.

Since its inception, OAI has performed an extensive array of substantive functions, many of which are the functional equivalent of the functions that the Office of Science and Technology Policy ("OSTP") has performed in prior administrations, including (1) evaluating and directing the modernization of federal IT systems across agencies, (2) developing and implementing federal infrastructure policy, (3) establishing "Centers of Excellence" to implement technology changes within agencies, and (4) negotiating deals between public and private sector entities. *Id.* ¶ 24. Each is discussed in further detail below.

Evaluating and directing the modernization of federal IT systems. OAI's substantial authority and efforts in the federal IT space have largely displaced those of the Office of Science and Technology Policy ("OSTP") (*see id.* ¶ 37)—an office that is subject to FOIA, and which, at the time this action was filed, had shrunk substantially from a staff of 135 people under the Obama Administration to a staff of 45 under the Trump Administration. *Id.* ¶ 36. According to published reports, OSTP's staff decline is because "other power centers in the administration," including OAI, "have emerged to lessen [OSTP's] role, especially on the technology side." *Id.* Indeed, OSTP has been without an appointed Chief Technology Officer—a position imbued with the power to "ensure an open, digital, and data-driven government"—since President Trump took office. *Id.* ¶¶ 38-40.

In June 2017, OAI "launched" (in the White House's words) the American Technology Council ("ATC"), and through that Council has taken the lead on developing and implementing technology policy across the federal government, including by evaluating and reporting on existing federal technology programs. *Id.* ¶¶ 25-27 (quoting The White House, *The American Technology Council Summit to Modernize Government Services* (June 21, 2017), https://www.whitehouse.gov/articles/american-technology-council-summit-modernize-government-services/).[1] OAI, through ATC, has directed agencies to achieve certain objectives for federal IT systems, including by moving towards "a risk-based approach" to security and a "shift towards a consolidated IT model." *Id.* ¶ 28 (quoting The White House, *Report to the President on Federal IT Modernization* (Aug. 30, 2017), https://itmodernization.cio.gov/assets/report/Report%20to%20the%20President%20on%20IT%20Modernization%20-%20Final.pdf). OAI, through ATC, also has set the following binding deadlines:

[1] Jared Kushner, the head of OAI, was officially named a member of the ATC. *See* Exec. Order No. 13,794, 82 Fed. Reg. 20,811 (Apr. 28, 2017).

- "Within 30 days of the date of issuance of this final report … OMB will submit a data call to agencies requesting submission of both in-progress and pending projects for cloud migration."

- "Within 90 days of the issuance of this final report … For Category 1 of projects above, agencies will be given approval to begin cloud migration by following their proposed migration plans. GSA, DHS, OMB, and NSC will require collection of metrics which will be used to ensure that the proposed changes to policy do not introduce an unacceptable level of cybersecurity risk."

- "Within 90 days of the issuance of this final report … For Category 2 projects above, GSA, DHS, OMB, NSC, USDS, and other relevant parties will kick off a 90-day spring to validate particular case studies. The exact number of engagements will be driven by staffing considerations from these organizations, but will consist of at a minimum three test cases."

Compl. ¶¶ 29-30.

OAI has also worked to implement mandatory computer system interoperability standards at the Department of Veterans Affairs ("VA"). *Id.* ¶ 33. As part of this effort, Jared Kushner, the head of OAI, facilitated the deployment of personnel by Defense Secretary Jim Mattis from the Department of Defense to the VA to assist in the OAI project. *Id.* ¶ 35.

Developing and implementing federal infrastructure policy. OAI coordinated with the Department of Transportation, the Department of Commerce, the Environmental Protection Agency, and the Administration's Infrastructure Council to develop the government's infrastructure plan. *Id.* ¶ 42. OAI conducted daily meetings regarding the development of the infrastructure plan and regularly consulted with constituents, mayors, governors, and congressional leadership in developing that plan. *Id.* ¶¶ 43-44. In November 2017, Reed Cordish—the head of OAI's infrastructure initiatives—explained that OAI had developed a detailed, 70-page memo of infrastructure principles that would be submitted to Congress to serve as a building block for lawmakers to draft an actual legislative package. *Id.* ¶ 45.

Establishing "Centers of Excellence." OAI directed the General Services Administration ("GSA") to create an office to manage a variety of so-called "Centers of Excellence." *Id.* ¶ 47. These centers, focused on IT issues, are intended to be a top-down means

to spread best practices to federal agencies to provide both greater quality and consistency. *Id.* ¶ 48. GSA has also, at OAI's apparent direction, undertaken an internal reorganization in order (in GSA's words) to be "better able to leverage its expertise and assets in support of the White House and its Office of American Innovation." *Id.* ¶¶ 49-50.

Negotiating deals with private entities. OAI has also engaged in negotiations with private entities for contracts. For example, in the summer of 2017, Mr. Kushner and Mr. Cordish met with Foxconn executives about building a facility in the United States. *Id.* ¶ 54. Mr. Kushner also participated in the VA's award of a major electronic health records system contract with IT contractor Cerner. *Id.* ¶ 55.

B. Plaintiffs' FOIA Requests.

Plaintiff Food & Water Watch, Inc. ("FWW") is a non-profit organization dedicated to championing healthy food and clean water for all. It has long worked on federal infrastructure policy, with a particular focus on the problems associated with privatization of water and wastewater utilities. On May 23, 2017, in an effort to better understand the role OAI is playing in creating, implementing, and promoting the Administration's infrastructure agenda, FWW sent a FOIA request to OAI seeking "all records including minutes, agendas, memoranda, documents, correspondence of, to, and from the OAI related to its authority to 'launch initiatives' under the President's Memorandum dated March 27, 2017, and that reference water systems, sewer, wastewater, stormwater, water infrastructure, privatization, or public-private partnerships." *Id.* ¶ 56. FWW received confirmation via certified mail that its FOIA request had been delivered on May 30, 2017. *Id.* ¶ 57.

Plaintiff Democracy Forward Foundation ("DFF") is a non-profit organization that works to promote transparency and accountability in government, in part by educating the public on government actions and policies. On November 22, 2017, DFF sent a FOIA request to OAI seeking: (1) OAI meeting agendas and minutes, (2) calendars or calendar entries for Jared

Kushner, Reed Cordish, or Christopher Liddell, or anyone acting on their behalf, reflecting their work related to OAI, and (3) communications related to infrastructure policy sent to or from the following people: (1) Reed Cordish, (2) Jared Kushner, (3) Richard Lefrak, (4) Steven Roth, or (5) Christopher Liddell. *Id.* ¶ 59. Democracy Forward Foundation received confirmation via certified mail that its request had been delivered on November 27, 2017.

To date, neither FWW nor DFF has received any acknowledgement from OAI of these FOIA requests, nor has OAI produced any responsive documents. Both thus brought suit challenging OAI's failure to comply with its FOIA obligations.

STANDARD OF REVIEW

Defendants move to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, the factual allegations stated in a complaint must be enough "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing the plausibility of a complaint, it"must be construed in the light most favorable to the plaintiff and 'the court must assume the truth of all well-pleaded allegations.'" *Afram v. United Food & Commercial Workers Unions & Participating Emp'rs Health & Welfare Fund*, 958 F. Supp. 2d 275, 278 (D.D.C. 2013) (quoting *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004)).

Defendants alternatively move to dismiss for lack of subject-matter jurisdiction (Def.'s Mem. at 3 n.3), acknowledging that "[u]nder 5 U.S.C. § 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) '*agency* records.'" (emphasis added) (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980)); *see also Wang v. Exec. Office of the President*, 2008 WL 180189, at *1 (D.D.C. Jan. 18, 2008) (dismissing a FOIA case for lack of jurisdiction because the defendant

was not an agency subject to FOIA). The standard for evaluating a facial challenge to subject-matter jurisdiction is "substantially the same standard of review" that is used to evaluate a 12(b)(6) motion. *See Bowyer v. District of Columbia*, 2009 WL 3299815, at *1 n.1 (D.D.C. Oct. 14, 2009). However, when, as here, a defendant "challenges the factual basis of the court's subject-matter jurisdiction" (*Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1, 2 (D.D.C. 2004)), it is appropriate to allow a plaintiff to "supplement its jurisdictional allegations through discovery" (*Judicial Watch, Inc. v. Tillerson*, 293 F. Supp. 3d 33, 47 (D.D.C.), *appeal filed* No. 17-5275 (D.C. Cir. 2017)).

ARGUMENT

I. THE OFFICE OF AMERICAN INNOVATION IS SUBJECT TO THE FREEDOM OF INFORMATION ACT.

The government's contention that OAI is not subject to FOIA finds no support in the Act, the cases, or in plaintiffs' well-pleaded allegations, all of which point to the conclusion that OAI exercises substantial independent authority that brings it within FOIA's broad jurisdictional scope. The government's effort to shoehorn OAI into the narrow exception for offices that solely advise the President should be rejected.

A. Offices, such as OAI, which exercise substantial authority independent from the President, are subject to FOIA.

The Supreme Court has explained that the "core purpose" of FOIA is to "contribut[e] significantly to public understanding of the operations or activities of the government." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (emphasis omitted) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). To this end, the Act broadly defines an "agency," subject to its requirements, as the following:

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

5 U.S.C. § 552(f)(1) (emphases added). Thus, by the statute's plain terms, offices within the Executive Office of the President (including OAI) are presumptively subject to FOIA.

From this sweeping definition, courts have inferred a narrow exception for "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Kissinger*, 445 U.S. at 156 (1980) (quoting H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.)). Thus, in *Kissinger*, the Supreme Court concluded that records of Henry Kissinger, the National Security Adviser, prepared solely in connection with his role as assistant to the President, were not agency records subject to FOIA.

Applying *Kissinger*, the D.C. Circuit carefully considers the functions of an office housed within the Executive Office of the President in determining whether it is subject to FOIA. *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1043 n.7 ("[I]t is, at bottom, its function that determines an entity's status for FOIA purposes."). In so doing, the court evaluates "whether the entity exercises substantial independent authority," "whether the entity's sole function is to advise and assist the President," "how close operationally the group is to the President," "whether it has a self-contained structure," and "the nature of its delegated authority." *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.* ("*CREW*"), 566 F.3d 219, 222 (D.C. Cir. 2009) (alterations adopted). Of this list, however, "[t]he most important consideration appears to be whether the entity in question wielded substantial authority independently of the President." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm. on Election Integrity*, 266 F. Supp. 3d 297, 315 (D.D.C. 2017). And, although an entity is excluded from the definition of an "agency" if its "*sole* function is to advise and assist the President" (*see CREW*, 556 F.3d at 222, 223-24), the D.C. Circuit has on several occasions found "[e]valuation plus advice" sufficient to bestow agency status. *See Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581,

584 (D.C. Cir. 1990). On this basis, the D.C. Circuit found that the Office of Science and Technology ("OST") (now the Office of Science and Technology Policy) is subject to FOIA, as, in addition to advising and assisting the President, the Office also performs "the function of evaluating federal programs." *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). The same is true for the Council on Environmental Quality (*see Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1263 (D.C. Cir. 1980)), and the Defense Nuclear Facilities Safety Board (*Energy Research Found.*, 917 F.2d at 585).

In short, the government bears the burden to show that plaintiffs have not plausibly alleged factual allegations that establish that OAI exercises substantial authority independent of the President. As discussed below, it has not done so.

B. Plaintiffs have adequately alleged that OAI exercises substantial independent authority and is therefore subject to FOIA.

Plaintiffs have pleaded factual allegations that plausibly establish that OAI is exercising substantial authority independent from the President and therefore is subject to FOIA. Plaintiffs alleged that OAI is intended to be a permanent entity within the White House Office, and that it has several staff members who play specific roles. Compl. ¶¶ 17-18. OAI's staff regularly meet and work on OAI-specific projects and activities. *Id.* ¶¶ 19-20. Taken on its own terms, the March 2017 Presidential Memorandum grants OAI sweeping authority to "implement[] policies and scal[e] proven private-sector models to spur job creation and innovation." *Id.* ¶ 12. In pursuit of such goals, the OAI is empowered and, in fact, mandated, to "launch initiatives with a focus on innovation" and "coordinate implementation of any resulting plans." *Id.* ¶ 14. The Presidential Memorandum further establishes the office as a distinct entity, led by Jared Kushner. *Id.* ¶¶ 16-17. In addition, the White House's press announcement of the OAI, referred to in the Complaint, indicates that the agency has the broad authority to create "task forces to focus on initiatives such as modernizing Government services and information technology, improving

services to veterans, creating transformational infrastructure projects, implementing regulatory and process reforms, creating manufacturing jobs, addressing the drug and opioid epidemic, and developing 'workforce of the future' programs." *Id.* ¶ 15. Finally, there is absolutely nothing within the Presidential Memorandum or the White House press announcement suggesting that the President needs to approve of OAI's policies or initiatives or that the President is to regularly consult with or interact with OAI. *Id.* ¶ 22.

As plaintiffs alleged in their Complaint, OAI's undertakings thus far have been substantial:

- OAI has taken over many of the functions of OSTP—an "agency" subject to FOIA—including evaluation of federal government IT infrastructure, and other duties previously performed by OSTP's Chief Technology Officer—a position that remains unfilled in the Trump Administration. *Id.* ¶¶ 36-41.

- OAI has directed the VA's efforts to update its IT systems to improve private sector interoperability. *Id.* ¶ 33-35.

- Through the American Technology Council, which it launched, OAI has performed an evaluation of federal technology programs, and, as a result of that evaluation, directed agencies to implement updates and changes to their IT programs by dates certain. *Id.* ¶¶ 25-30.

- OAI has coordinated with various other agencies to develop the government's infrastructure policy. *Id.* ¶¶ 42-46.

- At OAI's apparent direction, GSA has reorganized its offices to focus on best practices for federal agencies in the areas of IT issues. *Id.* ¶¶ 47-52.

- And OAI has negotiated contracts involving private entities. *Id.* ¶¶ 53-55.

Thus, much like the Office of Science and Technology, OAI has been tasked with evaluating federal policies or programs—indeed, many of the functions that by statute belong to OSTP in the first instance. *See Soucie*, 448 F.2d at 1075 (emphasizing "independent function of evaluating federal programs" in concluding that OST was subject to FOIA); Compl. ¶¶ 36-41. OAI has (in the White House's own terms) "launched" a major initiative to develop and implement IT policy across the federal government, including imposing binding deadlines and

requirements on federal agencies. *See Pac. Legal Found.*, 636 F.2d at 1262 (concluding that the Council on Environmental Quality ("CEQ") was subject to FOIA because, among other things, it "issue[s] guidelines to federal agencies"). OAI coordinates with other federal agencies on various policies and programs, including the Administration's infrastructure plan, GSA's "Centers for Excellence" and other programs, and VA's modernization program. *See id.* (noting that CEQ "coordinate[s] federal programs"). And OAI has engaged in contract negotiations, the sort of power "commonly held by other agencies of government." *Energy Research Found.*, 917 F.2d at 584 (discussing Nuclear Safety Board's investigatory functions).

Moreover, the self-contained structure of the OAI and its lack of proximity to the President further rebut the government's claim that it is excluded from FOIA. *See Meyer v. Bush*, 981 F.2d 1288, 1296 (D.C. Cir. 1993) ("[B]y declaring that only 'establishments in the executive branch' are covered, [FOIA] requires a definite structure for agency status."); *id.* at 1293 ("[T]he other [FOIA-exempt Executive Office] units . . . would be those whose characteristics are similar to the White House staff—one of which is proximity to the President.") Here, plaintiffs have specifically alleged that OAI has a self-contained structure, alleging not only a hierarchy, but also that there are various staff positions filled by staff members who play specific roles. Compl. ¶¶ 16-20. That some of these positions are occupied by individuals who wear a different hat to serve as advisors to the president is of little consequence. *See Armstrong v. Exec. Office of the President*, 90 F.3d 553, 560 (D.C. Cir. 1996) (the fact that "several individuals occupy positions on the organization charts of both the White House and the NSC" would not, without more, render NSC not an agency under FOIA); *Meyer*, 981 F.2d at 1297 (other roles of office staff should not have conclusive effect).[2] Nor does the government point to anything in the

[2] The government inaccurately suggests that the *Meyer* decision indicates that OAI's composition of White House staff and advisors would "alone strongly indicate[] that an entity within the Executive Office of the President lacks substantial independent authority." Def.'s Mem. at 6. In fact, *Meyer* focuses almost exclusively on the functions and structure of the task force at issue there, discussing the roles of White House staff only in rebutting the dissent's

Presidential Memorandum or elsewhere that indicates that the President is directly involved in OAI's performance of its sweeping responsibilities[3]—a fact that further demonstrates OAI's substantial independent authority. *See Meyer*, 981 F.2d at 1293 ("Proximity to the President, in the sense of *continuing interaction*, is surely in part what Congress had in mind when it exempted the President's 'immediate personal staff.'" (emphasis added) (citing H.R. Rep. No. 1380 (1974)).

Taking these allegations together, as supported by public documents and reports, OAI exhibits the hallmarks of substantial independent authority. It is therefore subject to FOIA.

C. The government's arguments to the contrary are unavailing.

Defendant makes several arguments that seek to elevate form over function and disregard plaintiffs' well-pleaded factual allegations. None of them is persuasive.

1. The Court should examine OAI's functions, not merely its form.

The government asks that the Court ignore these well-pleaded facts and instead find—based solely on the Presidential Memorandum—that OAI is not subject to FOIA for three reasons: (1) because OAI does its business out of the White House Office (Def.'s Mem. at 6); (2) because the Presidential Memorandum uses advisory terms in a few select places, such as its description of its mission as "mak[ing] recommendations" to the President (*id.*); and (3) because the Presidential Memorandum indicates the OAI is staffed by at least a few White House staff who are listed as presidential advisors (*id.*). Each argument fails.

First, the government insists that OAI's placement within the White House Office necessarily excludes it from agency status. The D.C. Circuit has endorsed no such bright-line

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argument that the inclusion of cabinet offers should be dispositive. 981 F.2d at 1297. Thus, if anything, *Meyer* cuts against the government's argument here that the titles of the OAI staff should bear nearly conclusive weight in the analysis.

[3] Indeed, public media reports indicate that Mr. Kushner felt it unnecessary to report on OAI's activities to even the then-White House Chief of Staff. Compl. ¶ 23.

test, and instead focuses on the office's functions, rather than its form or location. *See Rushforth*, 762 F.2d at 1043 n.7 ("[I]t is, at bottom, its function that determines an entity's status for FOIA purposes."); *Soucie*, 448 F.2d at 1075. Thus, the location of OAI in the White House Office cannot alone preclude its status as an "agency" for FOIA purposes given its far-reaching authority.

Second, and likewise, the Presidential Memorandum's use of the subject heading of "Mission" along with the description of "mak[ing] recommendations to the President"—which the government is quick to claim is OAI's "sole mission"—wrongly elevates the importance of this subject heading and description, to the exclusion of far more expansive language elsewhere in the very same memorandum, and it overlooks plaintiffs' allegations that OAI has in fact wielded far greater authority. *See Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 559 F. Supp. 2d 9, 24 (D.D.C. 2008) (stating that an entity's "function may be discerned from its charter documents as well as the responsibilities [it] actually undertakes, if they in fact extend beyond the responsibilities delineated in [its] charter documents"), *aff'd*, 566 F.3d 219 (D.C. Cir. 2009).

Third, the government's argument that OAI cannot exercise substantial independent authority simply because some of its staff are also advisors to the President misunderstands the functional analysis the D.C. Circuit used to determine whether an office is an "agency" under FOIA. Rather than putting weight on the title or rank of the head of the entity, the D.C. Circuit has instead looked to the structure and functions of the office in question. *See Meyer*, 981 F.2d at 1293 (performing "substantial independent authority" analysis with respect to task force headed by Vice President).

With respect to all three of these main points, the government urges the Court to ignore plaintiffs' well-pleaded allegations and engage in an exceedingly formalistic analysis that cannot

be reconciled with the D.C. Circuit's functional approach to the "agency" analysis. The government's arguments are therefore unpersuasive.

2. The government's emphasis on the source of OAI's formal authority is misplaced.

The government also devotes a substantial portion of its brief to its argument that OAI's FOIA status turns on an entirely different question from the D.C. Circuit's "substantial independent authority" test: the *source* of its authority. *See* Def.'s Mem. at 7-10. This attempt to shift the inquiry away from the functional role of OAI and toward its origin fares no better. Indeed, the D.C. Circuit has expressly stated that delegations of authority from the President can render an office subject to FOIA. *See Rushforth*, 762 F.2d at 1041-42 & n.5 (noting that "[i]f the President adds duties to an entity," it could become subject to FOIA); *see also Meyer*, 981 F.2d at 1293, 1296-97 (observing that "the nature of . . . delegation from the President" is a critical factor in assessing agency status, while also stating that it is of less importance whether the relevant delegation came via Presidential Memorandum or Executive Order). Nor is the out-of-circuit case on which the government relies to the contrary. *Compare* Def.'s Mem. at 7 (discussing *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542 (2d Cir. 2016)) *with Main St. Legal Servs.*, 811 F.3d at 557-58 (declining to address when and whether presidential grant of authority can establish an entity subject to FOIA, and instead performing "sole function" and "substantial independent authority" analysis).

The government next attempts to work backwards to invent a new test from whole cloth, claiming that all entities subject to FOIA within the Executive Office of the President are "Congressionally-created entities." Def.'s Mem. at 8. They advance this claim even though the D.C. Circuit has never considered the origin of an office to be a dispositive (or even particularly important) factor. In reality, this supposed distinction is both inaccurate and inapposite.

The government first points to *Soucie*, in which the D.C. Circuit declared the Office of Science and Technology which is now the Office of Science and Technology Policy, to be an agency for FOIA purposes. *See* Def.'s Mem. at 8-9. The government claims that "the D.C. Circuit relied on the fact that Congress had created OSTP as part of a reorganization plan . . . ." *Id.* at 8. This is incorrect. In fact, it was the *President*, not Congress, who created the OST through the reorganization plan. *Soucie*, 448 F.2d at 1073-74; Reorganization Plan No. 2 of 1962, pt. I, § 1. The plan went into effect without congressional action (*Soucie*, 448 F.2d at 1074), and Congress did not formally authorize the Office of Science and Technology Policy until 1976, after *Soucie* was decided. *See* National Science and Technology Policy, Organization, and Priorities Act of 1976, Pub. L. No. 94-282, § 202, 90 Stat. 459, 463 (1976). Despite OST lacking explicit congressional authorization, the D.C. Circuit concluded that it was subject to FOIA "[b]y virtue of its independent function of evaluating federal programs." *Soucie*, 448 F.2d at 1075. In other words, the government's argument that the *Soucie* test imposes a requirement of congressional authorization is belied by *Soucie* itself.

The government next points to *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d at 1262, 1263, which likewise demonstrates that authority assigned by the President can confer FOIA agency status. *See* Def.'s Mem. at 9. While the government correctly notes that the Council on Environmental Quality possessed authority both from Congress and the President, it ignores subsequent case law clarifying that the presidentially authorized functions were what rendered CEQ a FOIA agency. After *Pacific Legal Foundation*, the D.C. Circuit later evaluated the status of the Council of Economic Advisors ("CEA"), an entity with statutory authorization that "for all practical purposes" was "identical" to CEQ's. *Rushforth*, 762 F.2d at 1041. Despite this, CEA—unlike CEQ—was deemed to not be an agency, because "the functions

performed by the two entities differ[ed] markedly" after "CEQ's functions had been expanded by several executive orders." *Id.*; *see also Meyer*, 981 F.2d at 1292 ("CEQ differed, however, because several executive orders had given it the power to coordinate federal environmental programs and to issue guidelines to federal agencies."). Because it lacked additional authority from the President, the statutory functions of CEA were merely "directed at providing such advice and assistance to the President" and were insufficient for agency status. *Rushforth*, 762 F.2d at 1042. In reaching its conclusion, the D.C. Circuit effectively rejected the suggestion that "the President should not be allowed to . . . place an entity in[] FOIA agency status," concluding that "Congress would want the entity to be covered." *Id.* at 1042 n.5.[4]

Even in cases where the D.C. Circuit has determined that an entity is not an agency, it has treated presidential authorizations as relevant to the FOIA inquiry. In *Armstrong*, the D.C. Circuit concluded that the National Security Council (NSC) was not subject to FOIA. *Armstrong*, 90 F.3d at 555-56. But after quickly dismissing the possibility that the NSC was an agency on the basis of statutory authority alone, the Circuit took seriously the parties' "larger battle . . . over various presidential delegations to the NSC." *Id.* at 561. Instead of discounting the relevance of such delegations, as Defendant urges, the court there conducted a fact-intensive inquiry, analyzing each of the various functions asserted by the plaintiff individually. *Id.* at 561-65. Only then did the Court conclude that "under none of [the asserted delegations] does the NSC appear to exercise any significant non-advisory function." *Id.* at 565. Like *Soucie* and *Pacific Legal*

[4] Nor does the government's position find support in *Sierra Club v. Andrus*, where the D.C. Circuit held that the Office of Management and Budget ("OMB") is an "agency" for NEPA purposes. Def.'s Mem. at 9-10 (discussing *Sierra Club v. Andrus*, 581 F.2d 895 (D.C. Cir. 1978). Although the Court in that case certainly did point to OMB's statutorily-granted duties as a reason to find OMB an agency, neither there nor anywhere else has it suggested that statutorily-granted duties is a *prerequisite* to a finding of agency status. *See* 581 F.2d at 902.

Foundation, *Armstrong* recognizes that the President can establish a FOIA agency even when that entity has not been created or authorized to act by Congress.

In the absence of favorable precedent, the government makes broad policy claims about the implications of a supposed need *Soucie* to encompass OAI. Def.'s Mem. at 7-8. As an initial matter, these concerns are irrelevant because *Soucie* need not be here expanded to hold that OAI is an agency under FOIA. But what is more, these concerns are misplaced. The government refers to cases suggesting that some limits to FOIA's applicability are constitutionally required on separation-of-powers grounds. *Id*. But these cases, applied to this context, would at most explain why close presidential advisors may be exempt from FOIA *when serving a purely presidential advisory function*, which *Kissinger* and *Soucie* already recognize.[5] Moreover, when FOIA requests implicate the communications of close presidential advisors on a presidential decision, the government has regularly (and successfully) asserted privilege under FOIA's statutory exemptions to withhold those communications from the public. *See, e.g.*, *Loving v. Dep't of Def.*, 550 F.3d 32, 37-38 (D.C. Cir. 2008). The notion that constitutional concerns justify a wholesale carve out from FOIA of offices that exercise substantial authority independent of the President sweeps far too broadly.

In fact, the policy concerns underlying FOIA—the interest in enhancing the public's understanding of the operations of government, *see Reporters Comm. for Freedom of the Press*, 489 U.S. at 775—support concluding that OAI is subject to FOIA. The government's approach would allow the President to circumvent FOIA's requirements by unilaterally creating entities that wield large amounts of authority without supervision, and then nominally housing them

[5] For example, a request for records prepared by Jared Kushner in his capacity as Senior Advisor to the President, rather than as the head of OAI, would likely be beyond the scope of FOIA.

within the White House Office, and naming a Senior Advisor as its head. For that reason, the D.C. Circuit has sensibly rejected the idea that agency status should depend on how an entity was formed or the job titles of its head. *See Meyer*, 981 F.2d at 1296 ("We do not think much should turn on whether the President delegates authority to a White House group by memorandum or by Executive Order. Otherwise, of course, a future President could avoid creating an agency under FOIA by informally delegating authority to an 'establishment' in the Executive Office."). If an entity is, like OAI, performing functions "commonly held by other agencies of government," the formalities of its establishment cannot divest it of agency status. *Energy Research Found.*, 917 F.2d at 584.

3. The government unsuccessfully attempts to inject factual disputes into the inquiry at the pleading stage.

The government does not show why the allegations in plaintiffs' complaint fail to plausibly establish that OAI exercises substantial independent authority from the President. Instead—before even filing an Answer formally admitting or denying plaintiffs' allegations—OAI points to what it calls "contradictory information" that it contends refute plaintiffs' allegations.[6] The disputes involve OAI's involvement in the ATC and the ATC report; its

[6] The government argues that the court should take judicial notice of information that is contained in Federal Register and on government websites. (Def.'s Mem. at n.6.) Plaintiffs do not object to the Court taking judicial notice of many of the documents, as they are either facts alleged or incorporated by reference in plaintiffs' complaint (*see* 2 Moore's Federal Practice - Civil § 12.34 (2018)), or amount to legislative facts (*see* Fed. R. Evid. 201(a)). The government does, however, cite to sources at footnotes 9, 10, and 12 of its brief that are not referenced within the complaint, including two that did not exist at the time Plaintiffs filed their complaint. Plaintiffs ask that the Court either not consider these websites as they are extraneous, or to the extent it takes judicial notice of them, that it "only take judicial notice of the *existence* of those matters of public record . . . but not of the *veracity* of the arguments and disputed facts contained therein." *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 974 (E.D. Cal. 2004). *Cf. Tex. Border Coal. v. Napolitano,* 614 F. Supp. 2d 54, 57 n.1 (D.D.C. 2009) (finding that a declaration attesting to the authenticity of public records unnecessary, and the Court would not substantively consider the content of the declaration). Moreover, to the extent the Court does

drafting and implementation of legislation and policy; its engagement with the VA; its contractual dealings with private companies; its supplanting of OSTP; and its creation of Centers of Excellence. Def.'s Mem. at 11-15.

At most, the government merely offers denials creating triable issues of fact. *Cf. Jones v. Kirchner*, 835 F.3d 74, 79 (D.C. Cir. 2016) ("The task of resolving the conflicting accounts would fall to the finder of fact—judge or jury—who could decide how much weight to assign" the evidence.) And, regardless, OAI's newly proffered evidence does not even demonstrate what the government contends—that "Plaintiffs' assertions suggest no more than that OAI was formulating advice and recommendations for the President and otherwise acting on his behalf." Def.'s Mem. at 11.

To begin, the government's argument that OAI has not supplanted OSTP (Def.'s Memo. at 13-14) is circular. Plaintiffs have plausibly alleged that OAI has essentially co-opted many of OSTP's functions at the same time that OSTP has, by all appearances, dramatically curtailed its performance of duties—including those mandated by statute. Compl. ¶¶ 36-41. The government cannot rebut those *factual* allegations by pointing to OSTP's and OAI's legal authorities. Nor is the government's argument about OAI's role in the ATC any more convincing. The government attempts to rebut plaintiffs' allegations about OAI's extensive involvement in the ATC and the latter entity's evaluative and directorial powers by characterizing ATC as independent because it was formally established by an Executive Order. Def.'s Mem. at 11-12. But the White House itself stated that OAI "launched" the ATC in a press release cited in the Complaint. Compl. ¶¶ 25-27 (quoting Press Release, The White House, *The American Technology Council Summit*

take judicial notice of the document, plaintiffs also ask the court to take judicial notice of government documents that plaintiffs cite in response. *See* footnotes 8 and 10, *infra*.

to Modernize Government Services (June 21, 2017), https://www.whitehouse.gov/articles/american-technology-council-summit-modernize-government-services/). The Executive Order does not rebut the White House's own admission that the ATC was an OAI-launched initiative.

The government's further contention that ATC's report was merely a recommendation to the President (*see* Def.'s Mem. at 11-12) issued pursuant to Executive Order 13,800, is contrary to both the order and the report. The ATC's report goes far beyond what is required by the Executive Order, which merely calls for a report describing the "legal, policy, and budgetary considerations relevant to—as well as the technical feasibility and cost effectiveness, including timelines and milestones of—transitioning" agencies to coordinated network and shared IT services. Exec. Order No. 13,800 § 1(c)(vi) (May 11, 2017). The report, on the other hand, "direct[s] agencies to achieve certain objectives for federal IT systems, concluding that agencies must 'move further towards a risk-based approach to securing their systems,' and that 'the Federal Government must shift towards a consolidated IT model.'" Compl. ¶ 28 (citing The White House, *Report to the President on Federal IT Modernization* 7, 19 (2017), *available at* https://itmodernization.cio.gov/ ("ATC Report")). It also establishes strict timelines for the implementation plan to accomplish the objectives. *Id.* ¶¶ 28-29.

The government next protests that plaintiffs have not cited separate and additional authority supporting the allegation that the report is binding on agencies (Def.'s Mem. at 12), but the report itself speaks in clearly binding terms. *See* ATC Report at app. F (listing 50 separate

"Action[s] Required" to be addressed by other agencies, who are the "Responsible Party/ies"; and the timeline for such required actions). Nothing more is required.[7]

Notwithstanding the government's citation to a few instances in the report that indicate that the report contained recommendations for the President (Def.'s Mem. at 12 & n.7), the government has not provided any indication that the President (to whom the report was supposedly sent for action and follow-up) has taken any steps to implement the report. Compl. ¶ 31. Rather, the report itself, with its authoritative language, represents the ATC and OAI's marching orders to federal agencies. The government points to no presidential action because none was needed to effectuate it.

The government also misses the mark in contending that plaintiffs have not demonstrated a lack of presidential involvement in its work with both the VA and contractual dealings with private companies (Def.'s Mem. at 13-15). Plaintiffs have alleged that OAI staff are authorized to and have performed distinct projects "solely for OAI" and that by its founding document, presidential involvement is not required. Compl. ¶¶ 20, 22. Indeed, in the very press briefing that OAI cites as supposedly showing OAI was acting on behalf of the President when spearheading the VA's transition to electronic records (Def.'s Mem. at 13 & n.10), the then-VA Secretary indicated that the OAI operated independently from the President. Press Briefing, The White House (June 5, 2017), https://www.whitehouse.gov/briefings-statements/press-briefing-principal-deputy-press-secretary-sarah-sanders-va-secretary-david-shulkin-060517/ ("Of course,

[7] In addition, the Complaint references sections of the ATC Report that have nothing to do with the topics covered by Executive Order 13,800. The specific required actions and timelines pertain to cloud migration, which is not addressed in the Executive Order. *See* Compl. ¶ 29 (citing ATC Report at 12-13).

we've talked with the President's office, but also working closely with the American Office of Innovation [sic].").

OAI's suggestion that the President may have been involved in some of OAI's work is irrelevant. That is true of virtually any federal agency subject to FOIA. The relevant question is whether OAI has substantial independent authority, not whether it exercises *complete and totally independent* authority. OAI's suggestion that the President might have some involvement in these activities simply does not render facially implausible plaintiffs' allegations that OAI exercises substantial independent authority.[8]

Finally, while the government denies that GSA's activities pertaining to the Centers of Excellence were undertaken at the direction of OAI (*see* Def.'s Mem. at 13-14 (contradicting Compl. ¶ 47)), it concedes that the press release announcing GSA's activities specifically indicate that they were being done to support *both* the OAI and the White House—suggesting that they were operating independently of one another with respect to these activities. *Id.* at 14. The government now refers to a newer press release issued by GSA after this lawsuit was filed that omits mention of OAI and instead only references the ATC.[9] The government fails to note,

[8] Further contrary to the government's contentions, plaintiffs do not merely claim that OAI has simply "assisted the President in drafting legislation." Def.'s Mem. at 12. Rather, plaintiffs allege that OAI has had a significant and substantive hand in creating policy. Compl. ¶¶ 32, 42-46. The government's argument that OAI could not have had substantial independent authority to develop infrastructure policy because the President "transmitted" the final policy package to Congress, does not address plaintiffs' allegation that the infrastructure plan was a direct adaptation of OAI staff's own 70-page memorandum. *Id.* ¶¶ 45-46. And the fact that the Office of Management and Budget issued guidance *after passage of* the Modernizing Government Technology Act (Def.'s Mem. at 13), does not somehow undercut OAI's authority to make and create policy by drafting the legislation in the first place. *See* Compl. ¶ 32.

[9] *See* Press Release, GSA, *GSA Issues Initial Awards for IT Modernization Centers of Excellence* (Mar. 14, 2018), https://www.gsa.gov/about-us/newsroom/news-releases/gsa-issues-initial-awards-for-it-modernization-centers-of-excellence.

however, that the same press release contains a link to a Request for Information that expressly indicates that the solicitation was on behalf of OAI.[10] This only underscores the degree to which ATC and OAI are intertwined, and the substantiality and agency-like nature of the authority that OAI exercises.

D. Jurisdictional discovery is appropriate.

At bottom, the agency-status question involves a fact-intensive inquiry, and "the specific evidence bearing upon [the agency] question varies with the entity in question." *Armstrong*, 90 F.3d at 558-59. Thus, it is appropriate to look "beyond public documents" to depositions, document discovery, letters, memoranda, and other statements by government officials, particularly where the "language establishing the entity's power [in the public documents] is broad and lacking in firm parameters." Mem. Op. at 12 & n.4, *Elec. Privacy Info. Ctr. v. Office of Homeland Sec.*, No. 02-cv-00620 (D.D.C. Dec. 26, 2002).

It would therefore be inappropriate for the Court to dismiss based on this record. Indeed, in similar circumstances, courts have authorized jurisdictional discovery to develop additional jurisdictional facts regarding the structure and functions of offices housed within the Executive Office of the President, in order to determine whether they are agencies subject to FOIA. *Id.* at 13 (authorizing jurisdictional discovery in case raising question whether Office of Homeland Security was subject to FOIA); *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 2008 WL 7077787, at *4 (D.D.C. Feb. 11, 2008) (same for Office of Administration). Insofar as the government now questions whether OAI falls within the jurisdiction of FOIA—and whether

[10] GSA, *Key Initiatives Centers of Excellence Operations Support* (Oct. 20, 2017), https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=cca9da77bffbcb0d0a8f1b46d4cfa4ad&_cview=0&utm_source=Eastern+Foundry+Newsletter&utm_campaign=a440dc0b32-Newsletter_9_69_7_2016&utm_medium=email&utm_term=0_b11519f756-a440dc0b32-95440033&goal=0_b11519f756-a440dc0b32-95440033.

this case falls within this Court's jurisdiction, *see* Def.'s Mem. 3 n.3—additional development of the factual record is warranted.

CONCLUSION

This court should deny Defendant's Motion to Dismiss, or, in the alternative, grant jurisdictional discovery on the disputed questions of fact raised by Defendant in disputing jurisdiction.

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Respectfully submitted,

/s/ *Karianne M. Jones*

Javier M. Guzman, Bar No. 462679
Karianne M. Jones, Bar No. 187783
Nitin Shah, Bar No. 156035
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090
jguzman@democracyforward.org
kjones@democracyforward.org
nshah@democracyforward.org

Counsel for Plaintiffs Democracy Forward Foundation and Food & Water Watch, Inc.

Zachary B. Corrigan, D.C. Bar No. 497557
Food & Water Watch, Inc.
1616 P Street NW, Suite 300
Washington, DC 20036
(202) 683-2451
zcorrigan@fww.org

Counsel for Plaintiff Food & Water Watch, Inc.