

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

ALL PARTY PARLIAMENTARY GROUP)
ON EXTRAORDINARY RENDITION, *et al.*,)

Plaintiffs,)

vs.)

U.S. DEPARTMENT OF DEFENSE, *et al.*,)

Defendants.)

Civ. Action No. 09-02375
(RMU)

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
PARTIAL MOTION FOR SUMMARY JUDGMENT
AND IN FURTHER SUPPORT OF DEFENDANTS'
PATRIAL MOTION TO DISMISS**

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**MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ PARTIAL MOTION FOR
SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF DEFENDANTS’
PARTIAL MOTION TO DISMISS**

Defendants submit this memorandum in further support of their partial motion to dismiss (Docket No. 10) (hereinafter “Def.’ Br.”), and in opposition to Plaintiffs’ cross-motion for partial summary judgment (Docket Nos. 16 and 17, hereinafter “Pls.’ Br.”). Although filed as separate motions, the parties’ filings center on the same, relatively narrow legal issue, *viz.*, whether 5 U.S.C. § 552(a)(3)(E), a provision of the Freedom of Information Act (“FOIA”), applies to Plaintiffs and thus prohibits Defendants, elements of the U.S. intelligence community (“IC”), as defined in 50 U.S.C. § 401a(4), from providing them with documents in response to a FOIA request.

PRELIMINARY STATEMENT

Plaintiffs’ cross-motion asks the Court to conclude — contrary to the plain language of 5 U.S.C. § 552(a)(3)(E) and common sense — that the Parliament of the United Kingdom is not “government entity” (or subdivision thereof) and that Members of Parliament are not “representatives” thereof. In support of this proposition, Plaintiffs do not rely upon a close and

contextual analysis of the statutory text or its legislative history, but rather upon the sworn declarations of two British Lords describing the ins-and-outs of the British system of governance. Those declarations are irrelevant to the IC Defendants' partial motion to dismiss. The plain meaning of the statute supports Defendants' motion. *Merriam-Webster's Dictionary* defines a representative as a "member"; Plaintiffs are Members of Parliament; and Parliament is a foreign governmental entity. Section 552(a)(3)(E) therefore bars Plaintiffs' claims against the IC Defendants, regardless of what British law has to say on the subject.

The Court may accept as true, for example, Plaintiffs' allegations that, in the United Kingdom, the term "Government" has the meaning described in Plaintiffs' declarations. The Court may also accept as true the fact that, in the United Kingdom, Plaintiffs are not members of the executive branch of government according to British tradition. Finally, the Court may accept as true that none of the Plaintiffs filed their FOIA requests at the express direction of the Prime Minister or any other member of "the UK Government," as the Lords Norton and Lyell might use that term. The Court may accept all of those facts as true and *still* find, as the IC Defendants respectfully submit it should, that a Member of the Parliament of the United Kingdom is a "representative" of a "government entity" (or subdivision thereof) pursuant to 5 U.S.C. § 552(a)(3)(E) and, as such, is *per se* barred from receiving documents from the intelligence community through FOIA. As described in detail in the IC Defendants' original memorandum, the text of Section 552(a)(3)(E) and the intent of Congress — informed by the plain usage of the terms "government" and "representative" — compel this straightforward result.

Plaintiffs' memorandum and declarations, however, misconstrue the IC Defendants' position and the statute in an effort to focus the Court's inquiry on who does or does not

constitute a member of the “UK Government” in the United Kingdom.¹ But as stated in Defendants’ opening brief, the IC Defendants do not contend that Plaintiffs Tyrie and APPG are representatives of “the UK Government” under English law. Rather, the IC Defendants contend that: (1) the Congress of the United States prohibited the U.S. intelligence community from producing documents to representatives of foreign government entities through FOIA, and (2) that prohibition extends to members of foreign legislative bodies, such as the British Parliament.

The IC Defendants therefore respectfully submit that the Court need only resolve two questions in the context of this motion. First, does Section 552(a)(3)(E) prohibit the U.S. intelligence community from producing documents to Members of the British Parliament through FOIA? Second, are Plaintiffs Members of Parliament? The answer to the second question is not in dispute. The answer to the first question depends upon the plain text of the statute and whether Congress intended the phrase “government entity” to include a foreign legislative body such as the British Parliament (and whether Congress intended the term “representative” to include a member of that body, as *Merriam-Webster’s Dictionary* does). English law is simply not part of this equation.

In an effort to outflank the statute and render the IC Defendants’ Section 552(a)(3)(E) arguments moot, however, Plaintiffs engaged Mr. Cyr to jointly file the FOIA request on their behalf and represent them in this litigation. Here again, the Court may accept as true the fact that

¹ See, e.g., Pls’ Br. at 13 (“The IC Defendants contend that Plaintiffs submitted the FOIA requests as representatives of the *UK Government*.”) (emphasis added); *id.* at 19 (“Contrary to the IC Defendants’ argument, Parliament is not part of the *UK Government*.”) (emphasis added); *id.* at 22 (“Since the IC Defendants contend that the APPG is a representative of the *UK Government*, the Court may look to English law to determine whether this contention has any merit.”) (emphasis added); Lyell Decl. at ¶ 21 (“Addressing the points in the Defendants’ brief, they are entirely mistaken in suggesting that a back bench Member of Parliament or a member of an all party parliamentary group could be a member of the *UK government*.”) (emphasis added).

Mr. Cyr is not an agent of “the UK Government” and that absent his current representation of Plaintiffs Tyrie and APPG, he is otherwise legally eligible to obtain non-exempt documents from the intelligence community through FOIA. Mr. Cyr, however, indisputably represents Plaintiffs Tyrie and APPG as their lawyer in this matter, and filed his FOIA request concurrently with them in a representative capacity. Accordingly, as a matter of both law and common sense, any production of documents to Mr. Cyr would constitute *de facto* production of documents to his clients, and would thereby operate to circumvent both the statutory text and congressional intent. Far from working an injustice against Mr. Cyr, a ruling barring him from receiving documents on behalf of the other prohibited parties would uphold the rule of law and affirm the intent of Congress to limit the scope and applicability of FOIA.

For all of those reasons, and the reasons stated herein, the IC Defendants respectfully ask the Court to grant their partial motion to dismiss and deny Plaintiffs’ cross-motion for partial summary judgment.²

ARGUMENT

I. PLAINTIFFS’ INTERPRETATION OF THE TERM “GOVERNMENT ENTITY” IS UNREASONABLY NARROW

Plaintiffs argue that the term “government entity” in Section 552(a)(3)(E) is limited to “the official executive and administrative departments of foreign governments.” Pls.’ Br. at 34. Plaintiffs’ arguments in support consist largely of unsupported conjecture about the policy goals

² The IC Defendants are defined at page 2 of the government’s opening brief and include the Central Intelligence Agency; the Federal Bureau of Investigation; the Defense Intelligence Agency; the National Security Agency; the intelligence elements of the Army, Navy, Air Force, and Marine Corps; the intelligence collection offices and directorates within the U.S. Unified Combatant Commands; the National Reconnaissance Office; the Office of Intelligence and Analysis within the Department of Homeland Security; the Coast Guard’s Command for Intelligence and Criminal Investigations within the Department of Homeland Security; and the Bureau of Intelligence and Research within the Department of State.

of Section 552(a)(3)(E), without any analysis of the actual text of the statute. Rather than prohibiting IC agencies from providing records to *foreign governments*, as Plaintiffs would have the Court hold, the statute instead refers to “*any government entity . . . or any subdivision thereof*,” not to mention any representative of any such entity. 5 U.S.C. § 552(a)(3)(E). Section 552(a)(3)(E) thus necessarily includes foreign legislative bodies such as Parliament.³

A. The Statutory Text and Legislative History Do Not Support Plaintiffs’ Narrow Construction

Plaintiffs surmise that “it is unlikely that Congress intended the term ‘government entity’ to include the legislative bodies of foreign states.” Pls.’ Br. at 34. They also argue that the term “government entity” includes only the national-level “official executive and administrative departments of foreign governments,” as opposed to regional or local-level government entities. The foundation of this argument is Plaintiffs’ view that the sole purpose for which Section 552(a)(3)(E) was enacted was to route official nation-to-nation information requests through diplomatic channels. *See* Pls.’ Br. at 33-34. The plain meaning of the term “government,”

³ The Court may take judicial notice of the fact that the Parliament of the United Kingdom is a legislative body. *See Black’s Law Dictionary* 1225 (9th ed. 2009) (defining “parliament” as “the supreme legislative body of some nations” and, in the United Kingdom, the “national legislature consisting of the monarch, the House of Lords, and the House of Commons”). The Declarations of Professor the Lord Norton of Louth (hereinafter “Norton Decl.”) and Lord Lyell of Markyate QC (hereinafter “Lyell Decl.”) also provide ample undisputed evidence of that fact. *See* Norton Decl. at ¶ 25 (“Parliament, along with other legislatures, fulfils the core defining function of a legislature. What defines legislatures is that they are constitutionally designated institutions for giving assent to binding measures of public policy, that assent being given on behalf of a political community that extends beyond the government elite responsible for formulating those measures.”) (internal quotations omitted); *id.* at ¶ 31 (“Members of Parliament are elected to represent individual constituencies similar to members of the US House of Representatives”); Lyell Decl. at ¶ 18 (“Unless invited by the Prime Minister of the day to become a member of the government, a Member of Parliament in either house remains simply a member of the legislature, *i.e.*, a Member of Parliament, whose primary duty in the House of Commons is to represent his or her constituents . . .”).

however, supports the IC Defendants' position, as does the legislative history of Section 552(a)(3)(E), *see infra* at n.7.

1. The Text of the Statute Requires a Broad Reading of the Term "Government Entity"

The IC Defendants' textual arguments are straightforward and unchallenged by Plaintiffs. First, the statute refers to "any government entity," as opposed to "*a* government entity" or "*the* Government entity," thereby evidencing the statute's broad application to include the full panoply of governmental bodies and subdivisions and components thereof at all levels of government (including but not limited to legislative bodies). *See* 5 U.S.C. § 552(a)(3)(E)(i). Second, the fact that Congress specifically excluded "a State of the United States" from Section 552(a)(3)(E) means that Congress otherwise would have considered state-level governments to be within the scope of the term "government entity." *Id.* And if that is true, then Congress necessarily must have intended to exclude analogous foreign government entities (*i.e.*, regional or local governments) from FOIA. Third, the statute expressly excludes "a State, territory, commonwealth, or district of the United States, *or any subdivision thereof*" from the term "government entity." *Id.* Given that state governments in the U.S. generally consist of coequal executive, legislative and judicial branches (*i.e.*, the "subdivisions" of the state "government entity"), the term "government entity" (or subdivision thereof) therefore must include non-U.S. legislative and judicial bodies, in addition to executive authorities.

For those reasons, Plaintiffs' sole textual argument regarding the meaning of the term "government entity" is unpersuasive. Specifically, Plaintiffs state that "[h]ad Congress meant to include Parliament within the ambit of 'government entity,' it would have used far more explicit language in [§ 552(a)(3)(E)]." But it does not logically follow that if Congress intended the

statute to apply broadly (*i.e.*, to include foreign legislative bodies), then it would have used narrower, more specific language. Rather, the better inference is that Congress used broad language precisely because it intended the statute to apply broadly. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

2. Plaintiffs’ Congressional Intent Arguments Amount To Conjecture

Plaintiffs’ arguments regarding the underlying purpose of Section 552(a)(3)(E) are similarly unavailing. Specifically, they contend that Section 552(a)(3)(E) was designed exclusively to promote government-to-government exchanges of information through diplomatic channels, not FOIA. *See* Pls.’ Br. at 33-34. It certainly is true that one *consequence* of Section 552(a)(3)(E) is that foreign governments seeking official information from the U.S. intelligence community must route their requests through diplomatic channels. But it does not follow that that was the *sole* purpose of the statute, nor does it necessarily follow that Section 552(a)(3)(E) only applies to representatives of foreign executive-level entities. The legislative history cited by the IC Defendants, moreover, confirms that Congress’s reasons for enacting Section 552(a)(3)(E) extended beyond a theoretical preference for official diplomatic information requests.⁴

Plaintiffs’ arguments regarding the policy underlying Section 552(a)(3)(E) are therefore insufficient to require the narrow statutory construction that Plaintiffs seek.

⁴ *See* Defs. Br. at 12-13; H.R. Rep. No. 107-592, at 27 (2002) (describing purpose of Section 552(a)(3)(E), as “Because elements of the Intelligence Community routinely handle classified national security information, the resources required to perform the painstaking, line-by-line reviews necessary to ensure the proper protection of such classified information are substantial. This section will *prevent the diversion of the Intelligence Community’s limited declassification resources for this purpose.*”) (emphasis added).

B. Plaintiffs' Narrow Construction of the Term "Government Entity" Would Frustrate Congressional Intent

If Plaintiffs' construction of the statute were correct, the vast majority of government entities throughout the world would fall outside the scope of Section 552(a)(3)(E). Plaintiffs' definition of "government entity" is so artificially narrow, for example, that even Her Majesty Queen Elizabeth II would not constitute a representative of a foreign government entity because she is not a member of "the UK Government" as Plaintiffs use that term. *See* Norton Decl. at ¶ 14. The IC Defendants respectfully submit that it would be irrational to conclude that Her Majesty, the Head of State of the United Kingdom,⁵ is not a representative of a "government entity" (*i.e.*, the nation-state of England and the entire United Kingdom) pursuant to the plain language of Section 552(a)(3)(E). That, however, is the conclusion Plaintiffs would have this Court endorse.

Although the possibility of Her Majesty filing a FOIA request is obviously fanciful (and intended merely to illustrate the unreasonableness of Plaintiffs' position), far more worrisome for the U.S. intelligence community is the fact that the following individuals and entities, *inter alia*, would be permitted to obtain records from IC agencies if the Court adopts Plaintiffs' interpretation of the statute: foreign legislatures and members thereof, foreign courts, foreign judges, foreign municipal councils, employees of every foreign legislature or court, foreign mayors and foreign regional governors, throughout the world. This would clearly be contrary to the stated purpose of Section 552(a)(3)(E), which is to alleviate the administrative burden on the U.S. intelligence community. Congress could not have intended to exclude the numerous world leaders, national legislatures and other government entities listed above from the statute. Rather,

⁵ The Queen and the UK, <http://www.royal.gov.uk/MonarchUK/TheMonarchyToday.aspx>.

the more logical interpretation is that Congress intended its statute to be broad enough to have its desired effect.

Plaintiffs argue that “the IC Defendants’ claims of undue burden make absolutely no sense.” Pls.’ Br. at 35. Congress, however, concluded precisely the opposite prior to enacting Section 552(a)(3)(E): “Because elements of the Intelligence Community routinely handle classified national security information, the resources required to perform the painstaking, line-by-line reviews necessary to ensure the proper protection of such classified information are substantial. This section will prevent the diversion of the Intelligence Community’s limited declassification resources for this purpose.” *See* H.R. Rep. No. 107-592, at 27 (2002). The express findings of the U.S. Congress — not the opinions of British Members of Parliament — should therefore guide the Court’s interpretation of U.S. law.⁶

Plaintiffs also argue that the IC Defendants’ textual analysis would lead to a “curious outcome” because the IC Defendants “can refuse to process FOIA requests made as part of the APPG’s inquiry into UK Government involvement in extraordinary rendition, but they would be required to respond if the requests were made by the *London Times*” Pls.’ Br. at 21. This

⁶ Additionally, Plaintiffs argue that their request will not harm national security or cause an undue burden because “Plaintiffs do not seek the disclosure of records that are legitimately exempted from disclosure under the FOIA.” Pls.’ Br. at 2. This is tantamount to a statement that “Plaintiffs do not seek records other than the records they seek,” *i.e.*, it is a circular statement that has no bearing on the Court’s analysis. First, whether or not responsive documents are exempt is irrelevant to the application of Section 552(a)(3)(E), as the statute does not distinguish between exempt and non-exempt records. Second, Congress made the decision to prohibit any disclosures to certain parties to save the IC agencies from the burden of having to search for records; to review them on a line-by-line basis to determine if they could be released; and then to prepare declarations and indices to defend any withholdings in litigation. *See supra* at []. In other words, it is the processing of a FOIA request itself that creates the administrative burden.

outcome is not “curious,” however, if it is the outcome that Congress intended and anticipated.⁷ Congress presumably understood that its legislation bars FOIA requests by some individuals and permits FOIA requests for the same information by others. Such a result is fully consistent with Congress’s intent to alleviate the administrative burden on the U.S. intelligence community agencies by reducing the sheer number of FOIA requests they are required to process. Plaintiffs’ opinions regarding the wisdom or efficacy of that outcome are therefore immaterial. *See Negusie v. Holder*, 129 S. Ct. 1159, 1180 n.2 (2009) (when Congress acts within its authority, “it is not for this Court to question the wisdom of that choice”); *Salazar v. Buono*, No. 08-472, --- S.Ct. ----, 2010 WL 1687118, at *12 (Apr. 28, 2010) (“Congress’s prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations.”).

C. 5 U.S.C. § 552(a)(3)(E) Should Be Construed Broadly

Plaintiffs cite inapposite D.C. Circuit case law for the proposition that “courts should narrowly construe all provisions in the FOIA that limit disclosure.” Pls.’ Br. at 12 (citing *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010)). But *Public Citizen*, like virtually every other reported FOIA case, involved the application of specific FOIA exemptions set forth in a different section of the statute, Section 552(b). *See* 598 F.3d at 869 (“FOIA allows agencies to withhold only those documents that fall under *one of nine specific exemptions*, 5 U.S.C. § 552(b), which are construed narrowly in keeping with FOIA’s presumption in favor of disclosure”) (emphasis added). Section 552(a)(3)(E) is unequivocal

⁷ Plaintiffs include several references in their brief to the fact that Section 552(a)(3)(E) was enacted in the “wake of 9/11,” Pls.’ Br. at 1, and “not long after the terrorist attacks on September 11, 2001” Pls.’ Br. at 12-13. It is unclear why these descriptions were included in Plaintiffs’ brief. Whatever Plaintiffs’ rationale, the timing of the passage of Section 552(a)(3)(E) is irrelevant to the questions before this Court.

in stating that intelligence community agencies “*shall not make any record available*” to representatives of non-U.S. government entities. 5 U.S.C. § 552(a)(3)(E) (emphasis added). The Court is required to give full meaning to these statutory terms, and the principle favoring narrow construction set forth in *Public Citizen* and numerous other FOIA cases is therefore not applicable to Section 552(a)(3)(E).

II. PLAINTIFFS’ INTERPRETATION OF THE TERM “REPRESENTATIVE” IS UNREASONABLY NARROW

If the Court were to agree that the Parliament of the United Kingdom is a “government entity,” then the only remaining question would be whether Plaintiffs Tyrie and APPG — all of whom are indisputably *Members* of Parliament — are “representatives” of Parliament. As the IC Defendants have previously established in support of their partial motion to dismiss, Congress intended Members of Parliament — as members of a foreign legislative body — to be included within the scope of the statute, given the plain meaning of the term “representative” in the English language (*i.e.*, including a member of a legislative body) and given the underlying purpose of the statute. *See* Defs.’ Br. at 8-9 (citing *Merriam-Webster’s Dictionary* definition for “representative” as including, *inter alia*, “one that represents another or others, *e.g.*, one that represents a constituency as a member of a legislative body; a member of the House of Representatives of the United States Congress or a state legislature”).

Plaintiffs, however, advance a narrow definition of the term “representative” grounded in common law agency principles. Mr. Tyrie, for example, states that “I do not and cannot act on behalf of Parliament collectively (either the House of Commons or the House of Lords) in bringing this lawsuit or pursuing responses to the FOIA Requests.” Declaration of Andrew Tyrie MP (hereinafter “Tyrie Decl.”) at ¶ 26. Mr. Tyrie also states that “[t]he UK Government has not

requested, or authorized the APPG or the Requesters to act on its behalf in making the FOIA Requests” Tyrie Decl. at ¶ 21. Plaintiff APPG “did not make Plaintiffs’ Requests with the imprimatur of the UK Government, Parliament, or even the backing of a particular political party.” Pls.’ Br. at 25. Although a common law agency relationship is undoubtedly *one* way in which a FOIA requester could “represent” a government entity, nothing in the text of the statute or the legislative history suggests that Congress intended to define the term “representative” so narrowly.

A. Section 552(a)(3)(E) Uses the Word “Representative,” Not “Agent”

Statutory interpretation begins with the text. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001) (“We begin, as always, with the language of the statute.”). To that end, Section 552(a)(3)(E) prohibits the intelligence community from producing documents to “representatives” of any non-U.S. government entities, not “agents” of those government entities. If Congress had intended to prohibit the production of documents to “agents” of foreign government entities (*i.e.*, parties acting pursuant to express, implied or apparent authority of a foreign government entity), as Plaintiffs argue, then it would have used the word “agent” as it has in other statutes. *See, e.g.,* 18 U.S.C. § 951 (“agents of foreign governments” are prohibited from acting within the United States without authorization from the Attorney General).

In drafting Section 552(a)(3)(E), however, Congress used the phrase “representative” of “any government entity” — thereby reflecting its intent for the provision to apply not only to “agents” of non-U.S. government entities but to all “representatives” as that term is commonly used. Plaintiffs’ arguments that they are not acting as the agents for Parliament as a whole or “the UK Government” (as they define that term) are therefore irrelevant; the Court may accept

those facts as true and still rule in the IC Defendants' favor because Plaintiffs' status as Members of Parliament disqualifies them from receiving documents from the intelligence community through FOIA.

This construction is consistent with Congress's purpose in enacting Section 552(a)(3)(E), *i.e.*, to alleviate the administrative burden on the intelligence community, and with the fact that Section 552(a)(3)(E) is mandatory, not discretionary. Indeed, because the statute *prohibits* the intelligence community from producing documents to representatives of non-U.S. government entities, intelligence community personnel would — if Plaintiffs had their way — be required to investigate the foreign “agent” status of every FOIA requester before processing a FOIA request. This would only increase the administrative workload, contrary to Congress' intent.

Plaintiffs argue that because individual Members of the United States Congress are not the agents of Congress as a whole — and thus are eligible to file FOIA requests in their capacities as individuals — it necessarily follows that Members of Parliament are not agents of Parliament as a whole and are similarly eligible to file FOIA requests. *See* Pls.' Br. at 28-30. This analogy misses the point. Congress is entitled to determine who is and is not eligible to file a FOIA request. Here, Congress has decided that, notwithstanding FOIA's overall goal of open government, the U.S. intelligence community “shall not” produce documents to representatives of non-U.S. government entities. The fact that individual Members of the British Parliament do not have the same rights under FOIA as Members of the U.S. Congress is therefore merely the

result contemplated by Congress, not, as Plaintiffs suggest, evidence of some fatal flaw in the IC Defendants' interpretation of the statute.⁹

B. Plaintiffs' Construction of the Term "Representative" Would Render the Statute Meaningless

Plaintiffs argue that because Mr. Tyrie and APPG — all of whom are current Members of the British Parliament — claim to have filed their FOIA requests in their "individual capacities," Section 552(a)(3)(E) does not apply to them even if Parliament is a "government entity." The text of Section 552(a)(3)(E), however, does not contain an express or implied "individual capacity" exception, and for good reason: If it did, the statute would become meaningless because any prohibited parties — including America's adversaries — could easily circumvent it by claiming "individual capacity" status. Congress cannot have intended for its statute to be vitiated by these means.¹⁰

Nor should the Court credit Plaintiffs' suggestion that they filed these FOIA requests for reasons unrelated to their official duties as Members of Parliament. Plaintiffs' complaint, their

⁹ Moreover, it is entirely appropriate for Congress to treat foreign governmental entities and their representatives differently than themselves. As the Supreme Court has explained, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (emphasis added) (internal citations omitted). Foreign governmental entities and their representatives do not fall into this category. Nor are they part of a co-equal branch of government with oversight responsibilities.

¹⁰ Plaintiffs presumably would not contest, for example, that North Korean dictator Kim Jong Il is a representative of a non-U.S. government entity pursuant to Section 552(a)(3)(E). If Plaintiffs had their way, however, Kim Jong Il's status as the leader of the Democratic People's Republic of Korea (also known as North Korea) would not *per se* bar the intelligence community from producing documents to him through FOIA. Rather, if Kim Jong Il claimed to file a FOIA request in his "individual capacity," the U.S. intelligence community would have no choice but to process his request and produce all responsive, non-exempt documents to him. This would be an absurd result.

FOIA requests, and their own filings show that Mr. Tyrie and APPG submitted these requests in an effort to influence British public policy from their legislative offices.¹¹

C. APPG's "Interest Group" Status is Irrelevant

Plaintiff APPG is a self-described "cross-party group of more than sixty Members of Parliament and Peers from the Parliament of the UK." Tyrie Decl. at ¶ 4. In other words, APPG consists entirely of individuals who are unquestionably representatives of a non-U.S. government entity because they are Members of the British Parliament. Plaintiffs, however, argue that APPG's status as an "interest group" defeats Section 552(a)(3)(E)'s prohibition. But if the Court were to agree that Members of Parliament are representatives of a non-U.S. government entity (or subdivision thereof), then the only question with respect to APPG is whether parties who are *not* eligible to file a FOIA request can transform themselves into parties who *are* eligible to file a FOIA request by banding together as a group and filing their request jointly. If this were the law, then Section 552(a)(3)(E) would be rendered meaningless.

Even under Plaintiffs' construction of the statute, for example, a country's official leader is a representative of a non-U.S. government entity for purposes of Section 552(a)(3)(E), and thus individually ineligible to obtain documents from the U.S. intelligence community through

¹¹ See Compl., Ex. A (FOIA request to DOD) at 2 ("Andrew Tyrie is a Member of the Parliament of the United Kingdom and the Chairman of the APPG."); *id.*, Ex. A at 5 (referring to APPG's work to "clarify and publicize the legal obligations owed by the UK in relation to rendition and to detainees captured by UK forces in Iraq, Afghanistan, and elsewhere"); *id.* at page 14 (providing address for APPG as "c/o Andrew Tyrie MP" and providing Mr. Tyrie's address as "House of Commons, London SW1A 0AA, United Kingdom"). Indeed, Plaintiffs repeatedly refer to the fact that the "release of these records is of critical importance at the present time, as both the US and the UK governments are engaged in profound debates about the legality of their past and present treatment of detainees." Pls.' Br. at 37. In addition, Plaintiffs sought publicity in connection with their FOIA requests, further undermining their claim to an entirely personal interest in the subject matter of their requests. See, e.g., December 15, 2009 letter from Plaintiffs' counsel to the CIA (attached hereto as Exhibit 1) (promising the filing of a lawsuit in federal court and noting "*The Guardian*, a British daily newspaper . . . intends to run a story on the Requester and the Requesters' complaint").

FOIA. But according to Plaintiffs, multiple such leaders could band together to form an “interest group,” and file a FOIA request on behalf of that “interest group,” and thereby evade Section 552(a)(3)(E)’s reach. Congress cannot have intended its prohibition to be so easily defeated given the text of the statute and the legislative history set forth above. *See generally Holy Trinity Church v. U.S.*, 143 U.S. 457, 461 (1892) (encouraging courts to use common sense when interpreting a statute); *accord Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (“In deciding whether a result is absurd, we consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intentions of the statute’s drafters — that is, whether the result is absurd when considered in the particular statutory context.”). APPG’s self-identification as an “interest group” thus has no bearing on the application of Section 552(a)(3)(E).

III. FOREIGN LAW IS NOT RELEVANT TO THE COURT’S INTERPRETATION OF THE U.S. FREEDOM OF INFORMATION ACT

Plaintiffs argue that the Court cannot interpret the meaning of FOIA Section 552(a)(3)(E) without first delving into the nuances and intricacies of the British system of governance. *See* Pls.’ Br. at 13 (“The IC Defendants contend that Plaintiffs submitted the FOIA requests as representatives of the UK Government. The composition of the UK Government is governed by the Constitution of the United Kingdom and English law.”)¹² To that end, Plaintiffs have submitted the declarations of Plaintiff Andrew Tyrie and two British Lords describing the history of the British governmental system, the differences between backbenchers, Ministers, whips,

¹² As described above, this is a mischaracterization of the IC Defendants’ position. The IC Defendants do not contend that the Plaintiffs are members of the “UK Government” as that term is defined under British law. Rather, the IC Defendants contend that Congress has prohibited the intelligence community from producing documents to, *inter alia*, Members of the British Parliament, and that Plaintiffs are indisputably Members of Parliament.

Lords, MPs, shadow secretaries, and all-party groups. Those declarations — although interesting — are beside the point. First, foreign law is presumptively irrelevant to the interpretation of U.S. law. Second, requiring intelligence community agencies to conduct in-depth research regarding the ins-and-outs of a foreign governmental system prior to responding to a FOIA request is inconsistent with the purpose of Section 552(a)(3)(E). As described above, the Court need only determine whether Congress intended to prohibit the intelligence community from producing documents to foreign legislators through FOIA. The answer to that question depends upon the plain text of the statute and the intent of Congress, not the expert testimony of British Lords.

A. Foreign Law is Presumptively Irrelevant

The United States Congress is entitled to determine for itself the scope and applicability of FOIA. For Plaintiffs' position to be correct, however (*i.e.*, if the Court is required to construe British law prior to interpreting FOIA), then Congress necessarily must have intended to imbue Section 552(a)(3)(E) with the laws of all nations and to have entrusted the interpretation of those laws to FOIA requesters themselves. Plaintiffs, for example, argue that they are not “representatives of a government entity” because Professor the Lord Norton of Louth says so. But absent a specific showing that Congress intended foreign law to apply, “laws [not] implemented domestically by Congress . . . are therefore not a source of authority for U.S. courts.” *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010); *see also Small v. United States*, 544 U.S. 385, 385 (2005) (“it is appropriate to assume that Congress had domestic concerns in mind” when enacting a statute); *Smith v. United States*, 507 U.S. 197, 204, n.5 (1993). There is no such specific showing under FOIA that Congress intended foreign law to apply, and Plaintiffs make no attempt to identify one. In this case, the plain language and the

intent of Congress control the Court's interpretation of the statute. English law is irrelevant to either of those considerations.

For the same reason, Plaintiffs' analogy to the Foreign Sovereign Immunities Act ("FSIA") is unavailing. *See* Pls.' Br. at 22-23 (arguing that because courts look to foreign law to interpret the FSIA, this Court should look to foreign law to interpret FOIA). The FSIA governs suits against "agent[s] or instrumentalit[ies] of foreign state[s]." 28 U.S.C. § 1603(b). The applicability of the FSIA therefore depends upon the "agent" status of a particular party. In other words, unlike Section 552(a)(3)(E), the FSIA requires courts to determine whether, as a *factual* matter, a particular entity is an "agent or instrumentality" of a foreign state or a subdivision thereof. *See, e.g., Filler v. Hanvit Bank*, 378 F.3d 213, 217-220 (2d Cir. 2004) (examining whether the facts supported a finding that the Korean Deposit Insurance Corp. was an "agent or instrumentality" of a foreign state). The applicability of Section 552(a)(3)(E), on the other hand, does not depend upon whether the FOIA requester is the "agent" of a foreign nation-state. As described above, Congress intended to prohibit the intelligence community from producing documents to members of foreign governmental entities, regardless of their status as "agents" for the nation-state itself. In any event, even under the FSIA, courts are not required to defer to foreign law in reaching their ultimate conclusion (*i.e.*, whether a particular entity is an agent or instrumentality of a foreign state or subdivision thereof). *See, e.g., Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 306 (D. D.C. 2005) (finding, without any analysis of foreign

law, that “[t]he City of Amsterdam is *clearly* a ‘political subdivision’ of The Kingdom of the Netherlands and is therefore a ‘foreign state’ within the meaning of FSIA”) (emphasis added).¹³

Moreover, the FSIA is intended to “protect the rights of both *foreign states* and litigants in United States courts.” 28 U.S.C. § 1602 (emphasis added). FOIA has an entirely different purpose, *i.e.*, to “ensure an informed *citizenry*, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable *to the governed*.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (emphasis added). Nothing in the legislative history of Section 552(a)(3)(E) suggests that Congress was concerned about protecting the rights of British Members of Parliament to file FOIA requests. Rather, Congress was concerned about protecting the American taxpayer and national security by preserving intelligence community resources. *See supra* at n.7. Plaintiffs’ FSIA analogy is therefore inapposite.

B. Importing Foreign Law Into the Statute Would Defeat the Intent of Congress

Plaintiffs’ reliance upon foreign law also undermines the intent of Congress to alleviate the administrative burden on the intelligence community. *See supra* at n.7. Plaintiffs argue, for example, that the IC Defendants should have processed their FOIA requests because Plaintiffs are not representatives of “The Government” under British law. *See* Pls.’ Br. at 13. But the only way for the IC Defendants to come to that conclusion would be to conduct legal research regarding the British legal system prior to responding to the FOIA request. Yet given the underlying purpose of the statute, Congress cannot have intended Section 552(a)(3)(E) to impose

¹³ This holding also supports the IC Defendants’ contention that the term “subdivision” in Section 552(a)(3)(E) necessarily extends the reach of the statutory prohibition beyond the national-level executive government of a foreign state, as Plaintiffs claim.

a *greater* burden on the intelligence community by requiring it to research the legal systems of foreign countries.

The United Nations, for example, currently has 192 member nations, each with its own legal system, customs and definition of what it means to be a member of “the government.”¹⁴ Construing the relevant laws of those individual countries would be no easy task. *See Eckert Intern., Inc. v. Gov’t of Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 80 (4th Cir. 1994) (“Efforts to determine and apply foreign law often involve reference to secondary sources and to competing testimony of experts concerning the content of the law of a jurisdiction far distant and possibly differently structured.”).¹⁵ This is especially true for countries whose governments, unlike the UK, bear little or no resemblance to the U.S. system, or for nations in various states of political transition (*see, e.g.*, Iraq subsequent to the 2003 coalition invasion). If Plaintiffs were correct, each intelligence community agency would need to conduct extensive research on who is and who is not a member of the “government” pursuant to local custom prior to responding to a FOIA request. This would require the expenditure of scarce resources that Section 552(a)(3)(E) seeks to conserve and thereby undermine the intent of Congress.

Plaintiffs’ own motion illustrates the incongruous results their position would yield. They have submitted 45 pages of detailed declarations, containing 61 exhibits, from Mr. Tyrie, Lord Norton and Lord Lyell. These declarations set forth the history of the British system of governance, present a comparative legal analysis of parliamentary and presidential systems, and

¹⁴ *See* Member States of the United Nation, <http://www.un.org/en/members/>.

¹⁵ *See generally Small*, 544 U.S. at 390-91 (holding that the phrase “convicted in any court” in the Gun Control Act, codified at 18 U.S.C. § 922(g)(1), does not include foreign convictions because such a construction would lead to incongruous results, and because such a construction would require courts and prosecutors to construe foreign law, a feat that is “not easy for those not versed in foreign law to accomplish”).

describe the distinctions between back-benchers, opposition members, ministers, and numerous other players on the British political scene. *See generally* Norton Decl., Tyrie Decl., Lyell Decl. Plaintiffs' declarations rely upon numerous secondary treatises, information from the House of Commons Library, their own prior writings and extensive personal experience studying and practicing British politics. *See, e.g.*, Norton Decl. at ¶¶ 1-5. Congress could not have intended for IC agencies to refer to like sources to determine the "government" status of a FOIA requester.¹⁶

Plaintiffs opine that Congress's concern with the administrative FOIA burden — as set forth in the legislative history — was irrational. *See* Pls.' Br. at 35 ("The IC Defendants' claims of undue burden make absolutely no sense."). Among other things, Plaintiffs argue that "the burden is created not by Plaintiffs' narrow construction," but "by the IC Defendants' overbroad reading." Plaintiffs freely concede that if the IC Defendants were required to research foreign

¹⁶ The results of the recent British national election underscore this point. As the Court is no doubt aware, the election resulted in a "hung Parliament," the first since 1974 (meaning that no single political party will have a majority of seats in the House of Commons). *See* "Britain Wakes Up To A Hung Parliament," <http://www.timesonline.co.uk/tol/news/politics/article7119226.ece>. Although David Cameron has recently been named U.K. Prime Minister, the precise contours of what "the UK Government" will be (even as Plaintiffs define the term) is in flux and far from clear. Mr. Cameron is quoted as saying that "I aim to form a proper and full coalition between the Conservatives and the Liberal Democrats." Cameron Is Great Britain's New Prime Minister, http://news.sky.com/skynews/Home/Politics/David-Cameron-Becomes-Prime-Minister-Tory-Leader-Heads-To-Buckingham-Palace-To-Form-New-Government/Article/201005215630036?lpos=Politics_Carousel_Region_0&lid=ARTICLE_15630036_David_Cameron_Becomes_Prime_Minister%3A_Tory_Leader_Heads_To_Buckingham_Palace_To_Form_New_Government. *See also* The Maybe Ministers, <http://www.guardian.co.uk/politics/gallery/2010/may/11/liberaldemocrats>. Yet Plaintiffs' position would require the U.S. intelligence community to correctly divine the intricacies of British politics prior to responding to a FOIA request (because failing to investigate the "Government" status of an individual requester who appears, for all intents and purposes, to represent a foreign government entity or subdivision thereof would be to risk violating a mandatory statute). This is inconsistent with one of the basic purposes of Section 552(a)(3)(E), *i.e.*, to alleviate the administrative FOIA processing burden.

law prior to processing a FOIA request it would be an “administrative nightmare.” *See id.* at 36; *id.* (“It is true that under [the IC Defendants’] construction members of the intelligence community would have to carefully investigate the identity of each and every FOIA requester and the circumstances of each and every FOIA request.”) But they argue that because Section 552(a)(3)(E) only applies when “a request is actually made by the government of a foreign country,” and because all such requests “should be made through diplomatic channels,” the Court should ignore Congress’s concern with administrative burden. *Id.*

Plaintiffs’ logic is confusing at best. First, as described above, Section 552(a)(3)(E) applies to FOIA requests from “representatives” and “subdivisions” of non-U.S. government entities, not merely requests from nation-state entities as a whole. Thus, even accepting Plaintiffs’ construction of the statute as correct (*i.e.*, that it only applies to members of “the UK Government” as they define that term), the intelligence community would *still* need to conduct legal research to determine whether a particular person is a representative of the “UK Government.” Second, there is no basis in fact to conclude that all requests from non-U.S. government entities (even as Plaintiffs define those terms) will always be routed through diplomatic channels. Finally, the IC Defendants’ broad construction of the term “representative of a government entity” requires comparatively little analysis; it is Plaintiffs’ narrow position that required three declarations — totaling 45 pages and 61 exhibits — to explain.

IV. PLAINTIFF CYR IS PROHIBITED FROM OBTAINING DOCUMENTS ON BEHALF OF HIS CLIENTS

With respect to Mr. Cyr, Plaintiffs’ motion again asks the Court to elevate form over substance. Specifically, Plaintiffs argue that even if APPG and Mr. Tyrie are representatives of a government entity and thus *per se* barred from receiving documents, the statute does not prohibit

the intelligence community from providing the requested documents to their attorney, Mr. Cyr. *See* Pls.’ Br. at 30-32. In support of this argument, Plaintiffs cite the fact that Mr. Cyr claims to have filed his request in his “individual capacity” and the fact that Mr. Cyr does not represent “the UK Government” or Parliament. *See id.* However, were Plaintiffs’ interpretation of the law correct, the law would be pointless, because it could be avoided simply by having an American lawyer join in a FOIA request and serve as counsel in any subsequent litigation. The Court should reject Plaintiffs’ attempts to end-run the statutory text and the intent of the U.S. Congress.

A. Mr. Cyr’s Allegedly “Independent” Basis for Making the FOIA Request is Not Relevant to the Court’s Interpretation of the Statute

Plaintiffs argue, correctly, that “a requester’s reason for making a records request is irrelevant.” Pls.’ Br. at 32 (citations omitted). The Court may therefore ignore the portions of Mr. Cyr’s declaration in which he explains his independent reason for making a records request. Even if the Court is inclined to consider Mr. Cyr’s declaration, however, none of his statements advance Plaintiffs’ position.

As Plaintiffs correctly concede, Mr. Cyr’s stated independent interest in the matter, even if credible, is irrelevant. The undisputed and dispositive facts are that Mr. Cyr represents APPG and Mr. Tyrie in this lawsuit, and that he submitted his underlying FOIA request in a representative capacity. *See* Cyr Decl. at ¶ 12; Compl., Exs. A-E, at 2 (“Lovells LLP and Mr. Cyr have assisted the APPG and Mr. Tyrie on a *pro bono* basis in the drafting and filing of this Request.”). Any production of documents to Mr. Cyr therefore constitutes *de facto* production of documents to Mr. Tyrie and APPG.¹⁹ This is because Mr. Cyr is the agent for Plaintiffs Tyrie

¹⁹ Producing document to Mr. Cyr, for example, would be analogous to the government’s production of criminal discovery to a defense attorney: no court would hold that the government failed to meet its

and APPG in the classic, common law sense, *i.e.*, “one who is authorized to act for or in place of another; a representative.” *Black’s Law Dictionary* 72 (9th ed. 2009); *see also Gov’t of Rwanda v. Rwanda Working Group*, 227 F. Supp. 2d 45, 64 (D. D.C. 2002) (Urbina, J.) (“Like other agents, lawyers owe their clients a duty of loyalty and a duty of care.”). In short, if Congress intended to prohibit Plaintiffs Tyrie and APPG from receiving documents from the intelligence community (as the IC Defendants submit), then that prohibition necessarily must extend to Mr. Cyr.

Plaintiffs, however, mischaracterize the IC Defendants’ position in an effort to portray that position as unreasonable. For example, Plaintiffs assert that, “according to the IC Defendants’ reasoning, members of the intelligence community would be barred from processing FOIA requests filed by lawyers who represent foreign governments or their representatives in any [unrelated] capacity” Pls.’ Br. at 31. Plaintiffs also state that the IC Defendants seek to bar “not only lawyers representing foreign governments, but also lawyers representing foreign sovereign wealth funds, state oil companies, national monopolies . . . or even anyone with a government-related email address” from filing a FOIA request. *Id.* at 32. The IC Defendants have suggested nothing of the sort. Instead, the IC Defendants’ position is that: (1) Section 552(a)(3)(E) prohibits the intelligence community from providing documents to foreign government entities or representatives thereof through FOIA requests, and (2) that prohibition must, as a matter of common sense, extend to the lawyers who represent foreign governmental entities or their representatives, and who assist in the filing of and litigating those FOIA requests.

discovery obligations because it provided the required discovery to the defendant’s lawyer, as opposed to the defendant himself.

Mr. Cyr does not dispute that he filed the FOIA request in a representative capacity, and that he continues to represent Plaintiffs Tyrie and APPG. *See* Cyr Decl. at ¶ 12. Production of documents to Mr. Cyr would therefore constitute *de facto* production of documents to his clients and would, accordingly, violate the statute. Mr. Cyr’s “independent” interest in the FOIA request is completely irrelevant to that calculation, as is his assertion that he does not represent “the UK Government” or Parliament.

B. Allowing Mr. Cyr to Proceed With His Case Would Expose the U.S. Intelligence Community to FOIA Requests from Foreign Governments

The only reasonable interpretation of the text of Section 552(a)(3)(E) and congressional intent is that the intelligence community is barred from doing indirectly through an intermediary that which it is barred from doing directly (*i.e.*, producing documents to representatives of foreign government entities). The Supreme Court and the D.C. Circuit have long recognized the principle that “[l]egislatures are presumed to act reasonably and statutes will be construed to avoid unreasonable and absurd results.” *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) (noting the existence of “legions” of appellate and Supreme Court decisions in agreement); *see also Holy Trinity Church v. U.S.*, 143 U.S. 457, 461 (1892), in which the Supreme Court sanctioned the use of common sense in statutory interpretation:

The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edw. II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, ‘for he is not to be hanged because he would not stay to be burnt.’

In this case, it would contravene the intent of Congress and lead to absurd results if the Court were to allow Mr. Cyr to proceed under FOIA on behalf of his clients, Plaintiffs Tyrie and APPG. This would allow the leader of a hostile foreign nation to hire an American lawyer to file

a FOIA request on his behalf, rather than filing the request directly. Furthermore, the leader's lawyer could then simply claim in litigation to have filed the FOIA request in his "individual capacity" and thereby force IC agencies to process his FOIA request even while knowing, as the agencies do in this case, that production of documents to the lawyer constitutes *de facto* production to a prohibited party. Congress could not have intended for Section 552(a)(3)(E) to be so easily circumvented given the purpose of the statute and the concerns articulated by Congress. See *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("the court must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available") (citing *United States v. American Trucking*, 310 U.S. 534, 543 (1940); *Haggard Co. v. Helvering*, 308 U.S. 389, 394, (1940)); cf. *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000) (Congress "would not bother passing such an easily circumvented law."). Accordingly, because Plaintiffs Tyrie and APPG are representatives of a government entity for purposes of Section 552(a)(3)(E), Mr. Cyr's complaint should be dismissed as well, as he is their representative.

V. DEFENDANTS HAVE PROPERLY INVOKED 552(a)(3)(E)

Plaintiffs suggest, without directly arguing, that some of the IC Defendants are prohibited from invoking Section 552(a)(3)(E) because they only did so "post-litigation." Pls.' Br. at 8-9. But Section 552(a)(3)(E) has no time limit for when it may be invoked. Moreover, the statute sets forth a Congressional prohibition on the distribution of records to persons and entities such as Plaintiffs — which cannot be ignored by a federal agency. More fundamentally, however, long-settled caselaw provides that agencies are free to litigate legal matters under FOIA that they

did not invoke administratively.²² Accordingly, the IC Defendants have appropriately invoked Section 552(a)(3)(E) to dismiss' Plaintiffs' Complaint.

²² See, e.g., *Young- v. CIA*, 972 F.2d 536, 538-39 (4th Cir. 1992) (“ an agency does not waive FOIA exemptions by not raising them during the administrative process . . . [a prior court] reasoned that waiver is inappropriate because FOIA provides for de novo judicial review, 5 U.S.C. § 552(a)(4)(B); agencies do not litigate FOIA requests and therefore do not create a record suitable for review; and plaintiffs may bring suit even before the agency determines whether to grant a request if the agency has not acted within ten days of the request, 5 U.S.C. § 552(a)(6)(A).”); *Sciba v. Board of Gov’r of Fed. Res. Sys.*, No. 04-1011, 2005 WL 758260, at *1, n.3 (D.D.C. Apr. 1, 2005) (“These cases do not specify, as the plaintiff contends, that FOIA Exemptions must be made in the answer to the complaint. In fact, a fair reading of these cases leads to the conclusion that the exemption only need be raised at a point in the district court proceedings that gives the court an adequate opportunity to consider it. And the plaintiff has cited no other case that supports a different proposition.”); *Gula v. Meese*, 699 F. Supp. 956, 959 n. 2 (D.D.C. 1988) (“[T]he defendant in a FOIA case may assert new exemptions at the federal district court level stage not previously asserted at the administrative level, even if the circumstances have not changed in the interim.”) (citing *Jordan v. Dep’t of Justice*, 591 F.2d 753, 779 (D.C. Cir.1978)); *Kay v. FCC*, 867 F. Supp. 11, 21-22 (D.D.C. 1994) (“With respect to the Plaintiffs’ assertion that the FCC’s failure to invoke Exemption 7(A) at the outset evinces bad faith, the Court again finds no authority for their proposition.”).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary Judgment, and should dismiss Plaintiffs' First, Second, and Third Causes of Action as pled in the Complaint, and dismiss all claims against the IC Defendants because Plaintiffs are prohibited from receiving records from these agencies pursuant to 5 U.S.C. § 552(a)(3)(E).

Dated: May 11, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

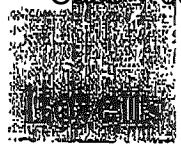
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Your ref F-2009-00176
Our ref NYDJC/163415.1
Matter ref A0020/79059

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Washington, D.C. 20505
Fax: (703) 613-3007

RE: FREEDOM OF INFORMATION ACT REQUEST #2009-00176

Dear Ms. Nelson:

Please be advised that we represent the All Party Parliamentary Group on Extraordinary Rendition (the "APPG"), Andrew Tyrie MP ("Tyrie") and Joe Cyr ("Cyr") (the APPG, Tyrie and Cyr are collectively referred to herein as the "Requesters"). On November 17, 2008, the Requesters submitted a request (the "Request") to the CIA under the Freedom of Information Act, 5 U.S.C. et seq., seeking agency records concerning the United States' extraordinary rendition, secret detention and coercive interrogation of individuals suspected of being terrorists or having ties to terrorists, and the circumstances and extent of participation in these activities by the United Kingdom and other governments. The CIA declined to process the Request.

Please be advised that the Requesters intend to file a complaint tomorrow (December 16, 2009) in the United States District Court for the District of Columbia seeking to compel the CIA to comply with the Request. We would like you to know that the APPG has shared this information with *The Guardian*, a British daily newspaper. *The Guardian* intends to run a story on the Request and the Requesters' complaint, and, given the time difference, that information probably will be released to the public prior to the time your agency has been served with the complaint. We also will be distributing press releases to other media channels.

Very truly yours,

Derek J. Craig

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FROM LOVELLS NY

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

ALL PARTY PARLIAMENTARY GROUP)	
ON EXTRAORDINARY RENDITION, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civ. Action No. 09-02375
)	(RMU)
vs.)	
)	
U.S. DEPARTMENT OF DEFENSE, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS’ STATEMENT IN OPPOSITION TO
PLAINTIFFS’ STATEMENT UNDER LCvR 7(h) AND 56.1**

For the reasons set forth below, Defendants hereby respectfully respond to Plaintiffs’ Statement of Material Facts, submitted in support of their cross-motion for summary judgment.

1. **Plaintiffs’ Statement of Material Fact #1:** There is reason to believe that, since at least September 2001, the United States Government has engaged in the extraordinary rendition, secret detention, and coercive interrogation of individuals in connection with its efforts to prevent terrorist attacks against the United States and its interests (these programs are referred to collectively herein as the “Extraordinary Rendition Program”). Compl. ¶¶ 37-38.

Defendants’ Response: Disputed. Defendants object to this statement of fact because the facts stated herein are not material to the outcome of this litigation. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (“[T]he substantive law will identify what facts are material. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.”). In addition, Plaintiffs’ cited evidence, their unverified Complaint, does not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

2. **Plaintiffs' Statement of Material Fact #2:** Former President George W. Bush and high-ranking members of his administration publicly acknowledged the existence of the US Government's Extraordinary Rendition Program. Compl. ¶¶ 38-39.

Defendants' Response: Disputed. Defendants object to this statement of fact because the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248. In addition, Plaintiffs' cited evidence, their unverified Complaint, does not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

3. **Plaintiffs' Statement of Material Fact #3:** There is reason to believe that the US Government's Extraordinary Rendition Program has involved the worldwide, extra-legal apprehension, transfer, and detention, by the US Government and its allies, of suspected terrorists and individuals suspected of having ties to terrorists. Compl. ¶ 40.

Defendants' Response: Disputed. Defendants object to this statement of fact because the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248. In addition, Plaintiffs' cited evidence, their unverified Complaint, does not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

4. **Plaintiffs' Statement of Material Fact #4:** For several years, the All Party Parliamentary Group on Extraordinary Rendition (the "APPG"), the media, and elements of the Government of the United Kingdom, among others, have investigated whether officials or agents of the UK Government knew about, or were involved in, the US Government's Extraordinary Rendition Program. Compl. ¶ 46.

Defendants' Response: Disputed. Defendants object to this statement of fact because the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248. In addition, Plaintiffs' cited evidence, their unverified Complaint, does not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

5. **Plaintiffs' Statement of Material Fact #5:** Plaintiffs believe that Defendants have been involved in, or are privy to records and information about, instances of extraordinary rendition, secret detention, and coercive interrogation carried out by the US Government and/or its allies, including the UK Government. Compl. ¶ 44.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248. In addition, Plaintiffs' cited evidence, their unverified Complaint, does not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

6. **Plaintiffs' Statement of Material Fact #6:** Plaintiff APPG is a cross-party group of more than sixty Members of the Parliament of the United Kingdom of Great Britain and Northern Ireland ("Parliament"). Tyrie Decl. ¶ 4.

Defendants' Response: Not disputed.

7. **Plaintiffs' Statement of Material Fact #7:** The APPG collects, examines, and publicly disseminates information on the Extraordinary Rendition Program and the circumstances and extent of the UK Government's involvement and/or cooperation in the Extraordinary Rendition Program. Tyrie Decl. ¶¶ 8-10.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248.

8. **Plaintiffs' Statement of Material Fact #8:** The APPG publishes on its publicly available website (<http://www.extraordinaryrendition.org>) most of the information that it obtains. Tyrie Decl. ¶ 9.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248.

9. **Plaintiffs' Statement of Material Fact #9:** The APPG does not receive any funding from the UK Government or from Parliament. Tyrie Decl. ¶¶ 15, 20.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248.

10. **Plaintiffs' Statement of Material Fact #10:** The APPG relies on contributions from private trusts, private foundations, nongovernmental organizations, and private individuals to carry out its activities. Tyrie Decl. ¶ 15.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 at 248.

11. **Plaintiffs' Statement of Material Fact #11:** The Chairman of the APPG is Plaintiff Andrew Tyrie. Tyrie Decl. ¶¶ 2-5.

Defendants' Response: Not disputed.

12. **Plaintiffs' Statement of Material Fact # 12:** The APPG does not represent the UK Government. Tyrie Decl. ¶ 18.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that the APPG and its members are representatives of a foreign government entity or subdivision thereof.

13. **Plaintiffs' Statement of Material Fact # 13:** The APPG did not make the Freedom of Information Act ("FOIA") requests at issue on behalf of the UK Government. Tyrie Decl. ¶ 21.

Defendants' Response: Not disputed however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that the APPG and its members are representatives of a foreign government entity or subdivision thereof.

14. **Plaintiffs' Statement of Material Fact # 14:** The UK Government did not authorize the APPG to make the FOIA requests at issue. Tyrie Decl. ¶ 21.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that the APPG and its members are representatives of a foreign government entity or subdivision thereof.

15. **Plaintiffs' Statement of Material Fact # 15:** Parliament is not a part of the UK Government. Norton Decl. ¶ 18; Lyell Decl. ¶ 20; Tyrie Decl. ¶ 22.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. This statement also constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). Defendants have made clear their position that Parliament is a foreign government entity or subdivision thereof.

16. **Plaintiffs' Statement of Material Fact # 16:** Parliament is not a "government entity" within the meaning of 5 U.S.C. § 552(a)(3)(E) (the "Foreign Government Exception"). Norton Decl. ¶ 47; Lyell Decl. ¶ 20.

Defendants' Response: Disputed. This statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). In addition, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives. Defendants have made clear their position that Parliament is a foreign government entity or subdivision thereof. Finally,

Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

17. **Plaintiffs' Statement of Material Fact # 17:** The APPG does not represent Parliament. Tyrie Decl. ¶¶ 16, 22.

Defendants' Response: Disputed. The APPG is composed entirely of Members (and thus representatives, according to *Merriam-Webster's Dictionary*) of Parliament. In addition, this statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). Defendants have made clear their position that the APPG and its members are representatives of a foreign government entity or subdivision thereof.

18. **Plaintiffs' Statement of Material Fact # 18:** The APPG did not make the FOIA requests at issue on behalf of Parliament. Tyrie Decl. ¶ 22.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248 (1986).

19. **Plaintiffs' Statement of Material Fact # 19:** Parliament did not authorize the APPG to make the FOIA requests at issue. Tyrie Decl. ¶ 22.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248 (1986).

20. **Plaintiffs' Statement of Material Fact # 20:** The APPG is not a "government entity" within the meaning of the Foreign Government Exception. Norton Decl. ¶ 47; Lyell Decl. ¶ 26.

Defendants' Response: Disputed. This statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). In addition, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives. Defendants have made clear their position that the APPG and its members are representatives of a foreign government entity or

subdivision thereof. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

21. **Plaintiffs' Statement of Material Fact # 21:** The APPG is not a "representative" of a "government entity" within the meaning of the Foreign Government Exception. Norton Decl. ¶ 47; Lyell Decl. ¶ 26.

Defendants' Response: Disputed. This statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). The APPG is composed entirely of Members (and thus representatives, according to *Merriam-Webster's Dictionary*) of Parliament. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

22. **Plaintiffs' Statement of Material Fact # 22:** The APPG made the FOIA requests at issue in its capacity as an association. Tyrie Decl. ¶¶ 18-22, 28.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

23. **Plaintiffs' Statement of Material Fact # 23:** Plaintiff Andrew Tyrie, a citizen of the United Kingdom, is a Member of Parliament. Tyrie Decl. ¶ 1.

Defendants' Response: Not disputed.

24. **Plaintiffs' Statement of Material Fact # 24:** Mr. Tyrie does not represent the UK Government. Tyrie Decl. ¶¶ 24-28.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Tyrie is a representative of a foreign government entity or subdivision thereof.

25. **Plaintiffs' Statement of Material Fact # 25:** Mr. Tyrie did not make the FOIA requests at issue on behalf of the UK Government. Tyrie Decl. ¶¶ 27-28.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Tyrie is a representative of a foreign government entity or subdivision thereof.

26. **Plaintiffs' Statement of Material Fact # 26:** The UK Government did not authorize Mr. Tyrie to make the FOIA requests at issue. Tyrie Decl. ¶¶ 21, 27-28.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Tyrie is a representative of a foreign government entity or subdivision thereof.

27. **Plaintiffs' Statement of Material Fact # 27:** Mr. Tyrie does not represent Parliament. Tyrie Decl. ¶ 26.

Defendants' Response: Disputed. Mr. Tyrie is a Member (and thus a representative, according to *Merriam-Webster's Dictionary*) of Parliament. In addition, this statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h).

28. **Plaintiffs' Statement of Material Fact # 28:** Mr. Tyrie did not make the FOIA requests at issue on behalf of Parliament. Tyrie Decl. ¶ 26.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

29. **Plaintiffs' Statement of Material Fact # 29:** Parliament did not authorize Mr. Tyrie to make the FOIA requests at issue. Tyrie Decl. ¶¶ 22, 26.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

30. **Plaintiffs' Statement of Material Fact # 30:** Mr. Tyrie did not make the FOIA requests at issue as a representative of a "government entity" within the meaning of the Foreign Government Exception. Tyrie Decl. ¶¶ 27-28.

Defendants' Response: Disputed. This statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). In addition, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives. Defendants have made clear their position that Mr. Tyrie (as a Member of Parliament) is a representative of a foreign government entity or subdivision thereof. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

31. **Plaintiffs' Statement of Material Fact # 31:** Mr. Tyrie made the FOIA requests at issue in his capacity as an individual. Tyrie Decl. ¶ 28.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Tyrie (as a Member of Parliament) is a representative of a foreign government entity or subdivision thereof.

32. **Plaintiffs' Statement of Material Fact # 32:** Plaintiff Joe Cyr, a United States citizen, is a lawyer who resides and works in New York. Cyr Decl. ¶ 1.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

33. **Plaintiffs' Statement of Material Fact # 33:** Joe Cyr is a Partner at Lovells LLP and heads the firm's litigation and arbitration practice in the United States. Cyr Decl. ¶ 2.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

34. **Plaintiffs' Statement of Material Fact # 34:** Joe Cyr does not represent the UK Government. Cyr Decl. ¶¶ 7-8, 13.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof.

35. **Plaintiffs' Statement of Material Fact # 35:** Joe Cyr did not make the FOIA requests at issue on behalf of the UK Government. Cyr Decl. ¶¶ 8, 10.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof.

36. **Plaintiffs' Statement of Material Fact # 36:** The UK Government did not authorize Joe Cyr to make the FOIA requests at issue. Cyr Decl. ¶ 8.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by

Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof.

37. **Plaintiffs' Statement of Material Fact # 37:** Joe Cyr does not represent Parliament. See Cyr Decl. ¶ 13.

Defendants' Response: Disputed. Joe Cyr has acted as an agent for Mr. Tyrie, a Member of Parliament, and the APPG, which consists entirely of Members (and thus representatives according to *Merriam-Webster's Dictionary*) of Parliament. *See* Defs. Reply Mem. at Section IV; Cyr Decl., ¶¶ 9, 17; Compl., Exs. A-E, at 2. In addition, this statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof.

38. **Plaintiffs' Statement of Material Fact # 38:** Joe Cyr did not make the FOIA requests at issue on behalf of Parliament. See Cyr Decl. ¶¶ 7-8, 13-14.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

39. **Plaintiffs' Statement of Material Fact # 39:** Parliament did not authorize Joe Cyr to make the FOIA requests at issue. See Cyr Decl. ¶¶ 7-8, 13-14.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

40. **Plaintiffs' Statement of Material Fact # 40:** Joe Cyr did not make the FOIA requests at issue as a representative of a "government entity" within the meaning of the Foreign Government Exception. Cyr Decl. ¶¶ 7-8, 13-14.

Defendants' Response: Disputed. Joe Cyr has acted as an agent for Mr. Tyrie, a Member of Parliament, and the APPG, which consists entirely of Members (and thus

representatives according to *Merriam-Webster's Dictionary*) of Parliament. *See* Defs. Reply Mem. at Section IV; Cyr Decl., ¶¶ 9, 17; Compl., Exs. A-E, at 2. In addition, this statement constitutes a legal conclusion, not a statement of material fact and is thus not in accordance with Local Rule 7(h). Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

41. **Plaintiffs' Statement of Material Fact # 41:** Joe Cyr made the FOIA requests at issue in his capacity as an individual. Cyr Decl. ¶¶ 14, 21.

Defendants' Response: Disputed. Joe Cyr's involvement in the FOIA requests at issue in this litigation was as an agent of Mr. Tyrie and the APPG. *See* Defs. Reply Mem. at Section IV; Cyr Decl., ¶¶ 9, 17; Compl., Exs. A-E, at 2. Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof.

42. **Plaintiffs' Statement of Material Fact # 42:** On November 17, 2008, Plaintiffs submitted FOIA requests to the Central Intelligence Agency ("CIA"), the Department of Homeland Security, the Department of State, the Department of Defense, and the Department of Justice, and these agencies' respective components. Tyrie Decl. ¶ 12; Cyr Decl. ¶ 10.

Defendants' Response: Not disputed.

43. **Plaintiffs' Statement of Material Fact # 43:** Plaintiffs sought records and information concerning the US Government's Extraordinary Rendition Program and the circumstances and extent of the UK Government's participation in the Extraordinary Rendition Program. Tyrie Decl. ¶ 12.

Defendants' Response: Not disputed.

44. **Plaintiffs' Statement of Material Fact # 44:** Plaintiff Joe Cyr and other lawyers in the New York office of Lovells LLP assisted the APPG and Mr. Tyrie in drafting Plaintiffs' FOIA requests and in following up with Defendants in an attempt to obtain the release of responsive agency records. Cyr Decl. ¶¶ 9-12.

Defendants' Response: Not disputed.

45. **Plaintiffs' Statement of Material Fact # 45:** Besides assisting the APPG and Mr. Tyrie in drafting and filing Plaintiffs' FOIA requests, Plaintiff Joe Cyr made the FOIA requests in his individual capacity as a US citizen. Cyr Decl. ¶¶ 14, 21.

Defendants' Response: Disputed. Joe Cyr's involvement in the FOIA requests at issue in this litigation was as an agent of Mr. Tyrie and the APPG. *See* Defs. Reply Mem. at Section IV; Cyr Decl., ¶¶ 9, 17; Compl., Exs. A-E, at 2. Defendants have made clear their position that Mr. Cyr is an agent of Mr. Tyrie and the APPG, who are representatives of a foreign government entity or subdivision thereof.

46. **Plaintiffs' Statement of Material Fact # 46:** The APPG's actions are neither supported nor dictated by the UK Government. Tyrie Decl. ¶ 20.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that the APPG and its members are representatives of a foreign government entity or subdivision thereof.

47. **Plaintiffs' Statement of Material Fact # 47:** The UK Government has never requested or authorized Plaintiffs to act on its behalf in making the FOIA requests or in bringing the instant lawsuit. Tyrie Decl. ¶ 21.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because the scope of Section 552(a)(3)(E) of the Freedom of Information Act is not limited to the "UK Government" and its representatives (as defined by

Plaintiffs). *See Liberty Lobby*, 477 U.S. at 248. Defendants have made clear their position that Plaintiffs are representatives of a foreign government entity or subdivision thereof.

48. **Plaintiffs' Statement of Material Fact # 48:** Parliament has never requested or authorized the Plaintiffs to act on its behalf in making the FOIA requests or in bringing this lawsuit. Tyrie Decl. ¶ 22.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

49. **Plaintiffs' Statement of Material Fact # 49:** On December 12, 2008, the CIA refused to process Plaintiffs' FOIA requests on the alleged basis that 5 U.S.C. § 552(a)(3)(E) (the "Foreign Government Exception") prohibits it from "disclosing records in response to any FOIA request that is made by any foreign government or international organization, either directly or through a representative." Letter from Delores M. Nelson to Joe Cyr of Dec. 12, 2008 (Craig Decl, Ex. 7).

Defendants' Response: Not disputed.

50. **Plaintiffs' Statement of Material Fact # 50:** Plaintiffs administratively appealed this determination on February 4, 2009. Letter from Derek J. Craig to Delores M. Nelson of Feb. 4, 2009 (Craig Decl., Ex. 8).

Defendants' Response: Not disputed.

51. **Plaintiffs' Statement of Material Fact # 51:** The CIA rejected Plaintiffs' appeal on April 2, 2009. Letter from Delores M. Nelson to Derek J. Craig of Apr. 2, 2009 (Craig Decl., Ex. 9).

Defendants' Response: Not disputed.

52. **Plaintiffs' Statement of Material Fact # 52:** In a letter dated January 29, 2009, the Office of Intelligence and Analysis within the Department of Homeland Security ("I&A") took the position that the Foreign Government Exception prohibits it from processing Plaintiffs' FOIA requests. Letter from Vania T. Lockett to Joe Cyr of Jan. 29, 2009 (Craig Decl., Ex. 10).

Defendants' Response: Not disputed; however, Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

53. **Plaintiffs' Statement of Material Fact # 53:** Plaintiffs administratively appealed this determination on March 27, 2009. Letter from Derek J. Craig to Associate General Counsel of Mar. 27, 2009 (Craig Decl., Ex. 11).

Defendants' Response: Not disputed.

54. **Plaintiffs' Statement of Material Fact # 54:** I&A never acted on Plaintiffs' appeal. Compl. ¶ 86.

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation. *See Liberty Lobby*, 477 U.S. at 248.

55. **Plaintiffs' Statement of Material Fact # 55:** The FBI, a component of the Department of Justice, disclosed records in response to Plaintiffs' FOIA requests on January 16, 2009 and August 28, 2009. Letter from David M. Hardy to Joe Cyr of Jan. 16, 2009 (Craig Decl., Ex. 13); Letter from David M. Hardy to Joe Cyr of Aug 28, 2009 (Craig Decl., Ex. 14).

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because Section 552(a)(3)(e) cannot be waived; there is no time limit on its invocation; and FOIA matters are subject to *de novo* review by the Court. *See Liberty Lobby*, 477 U.S. at 248.

56. **Plaintiffs' Statement of Material Fact # 56:** The National Security Agency/Central Security Service of the Department of Defense did not assert the Foreign Government Exception; instead, it refused to search for responsive documents on the basis that Plaintiffs' FOIA requests sought classified information or information that does not "fall within the purview of [the National Security Agency]." Letter from Pamela N. Phillips to Joe Cyr of Dec. 12, 2008 (Craig Decl., Ex. 20).

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because Section 552(a)(3)(e) cannot be waived; there is no time limit on its invocation; and FOIA matters are subject to *de novo* review by the Court. *See Liberty Lobby*, 477 U.S. at 248.

57. **Plaintiffs' Statement of Material Fact # 57:** The Chief of the Department of Defense's Office of Freedom of Information restated Plaintiffs' description of the APPG in his letter responding to Plaintiffs' request for a fee waiver, and, as such, was aware of the composition of the APPG, but he did not invoke the Foreign Government Exception. Letter from Will Kramer to Joe Cyr of Nov. 26, 2008 (Craig Decl., Ex. 19).

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because Section 552(a)(3)(e) cannot be waived; there is no time limit on its invocation; and FOIA matters are subject to *de novo* review by the Court. *See Liberty Lobby*, 477 U.S. at 248. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

58. **Plaintiffs' Statement of Material Fact # 58:** On December 16, 2009, Plaintiffs filed the Complaint in this action, seeking injunctive, declaratory, and other appropriate relief under the FOIA. Compl. ¶ 125; Tyrie Decl. ¶ 11.

Defendants' Response: Not disputed.

59. **Plaintiffs' Statement of Material Fact # 59:** In a post-litigation letter dated February 17, 2010, the FBI asserted that the Foreign Government Exception prohibited it from further processing Plaintiffs' FOIA requests. Letter from David M. Hardy to Joe Cyr of Feb. 17, 2010 (Craig Decl., Ex. 15).

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because Section 552(a)(3)(e) cannot be waived; there is no time limit on its invocation; and FOIA matters are subject to *de novo* review by the Court. *See Liberty Lobby*, 477 U.S. at 248. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

60. **Plaintiffs' Statement of Material Fact # 60:** In a post-litigation letter dated February 23, 2010, the Bureau of Intelligence and Research within the Department of State asserted the Foreign Government Exception. Letter from Wilma M. Manning to Andrew Tyrie and Joe Cyr of Feb. 23, 2010 (Craig Decl., Ex. 16).

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because Section 552(a)(3)(e) cannot be waived; there is no time limit on its invocation; and FOIA matters are subject to *de novo* review by the Court. *See Liberty Lobby*, 477 U.S. at 248. Finally, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

61. **Plaintiffs' Statement of Material Fact # 6:** This letter was the Department of State's first communication to Plaintiffs since Plaintiffs filed their FOIA requests in November 2008. See Letter from Wilma M. Manning to Andrew Tyrie and Joe Cyr of Feb. 23, 2010 (Craig Decl., Ex. 16).

Defendants' Response: Not disputed; however, the facts stated herein are not material to the outcome of this litigation because Section 552(a)(3)(e) cannot be waived; there is no time limit on its invocation; and FOIA matters are subject to *de novo* review by the Court. *See Liberty Lobby*, 477 U.S. at 248.

62. **Plaintiffs' Statement of Material Fact # 62:** On March 23, 2010, the Department of Homeland Security informed Plaintiffs that the Coast Guard's Command for Intelligence and Criminal Investigations within the Department of Homeland Security ("CG-2") had located a responsive forty-four page document but stated that the Foreign Government Exception prohibited CG-2 from responding to Plaintiffs' FOIA requests. Letter from Vania T. Lockett to Joe Cyr of Mar. 23, 2010 (Craig Decl., Ex. 18).

Defendants' Response: Not disputed; however, Plaintiffs' abbreviation for Section 552(a)(3)(E) is inaccurate, because the statute's terms are not limited to foreign Governments and their representatives.

Dated: May 11, 2010

Respectfully submitted,

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