UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

- v. -

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

Defendants.

Case No. 1:09-cv-02375 (RMU)

REPLY MEMORANDUM IN FURTHER SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs All Party Parliamentary Group on Extraordinary Rendition (the "APPG"), Andrew Tyrie MP, and Joe Cyr respectfully submit this Reply Memorandum in further support of their Cross-Motion for Partial Summary Judgment. This Reply Memorandum is accompanied and supported by the Supplemental Declaration of Andrew Tyrie MP ("Tyrie Suppl. Decl.").

PRELIMINARY STATEMENT

This is a case of first impression concerning the construction of the Foreign Government Exception, 5 U.S.C. § 552(a)(3)(E), an anomalous exception to the Freedom of Information Act, 5 U.S.C. § 552 (2006). The Foreign Government Exception prohibits agencies and components of agencies that are part of the intelligence community from disclosing records under the FOIA to non-United States government entities or representatives of non-United States government entities.[1]

As explained in the Memorandum in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment and in Opposition to Defendants' Partial Motion to Dismiss ("Pls.' Mem.") and supporting Declarations, Plaintiffs are not "representatives" of a foreign "government entity," and the Foreign Government Exception does not bar the agencies and components of agencies that moved to dismiss Plaintiffs' Complaint (the "IC Defendants") from processing Plaintiffs' FOIA requests. In their Local Rule 7(h) Statement and other papers, the IC Defendants do not dispute that Plaintiffs are not representatives of the UK Government. IC

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[1] The Foreign Government Exception states, in relevant part:

An agency, or part of an agency, that is an element of the intelligence community . . . shall not make any record available under this paragraph to –

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

Defs.' Stmt. in Opp'n to Pls.' Stmt. Under LCvR 7(h) and 56.1 ("IC Defs.' Counterstm't") ¶¶ 12-14, 24-26, 34-36, 46-47. Nevertheless, in construing the Foreign Government Exception, the IC Defendants would have this Court look beyond the provision's plain meaning, put an improper gloss on the legislative history of the provision, and ignore the overarching goals of the FOIA. Specifically, the IC Defendants argue that the Foreign Government Exception prohibits them from processing FOIA requests submitted by Plaintiffs—an American citizen and individual Members of the Parliament of the United Kingdom—because Plaintiffs purportedly represent Parliament and Parliament purportedly is a foreign "government entity." As discussed in detail below, the IC Defendants' argument fails because: (1) Plaintiffs are not "representatives" of Parliament as a whole (or of either House of Parliament, for that matter); (2) Parliament is not a "government entity" within the meaning of the Foreign Government Exception; and (3) Plaintiffs submitted their FOIA requests in their individual capacities.

Contrary to the IC Defendants' suggestions, Plaintiffs have not asked this Court to create a precedent that will change the ways in which FOIA requests are submitted or processed, place undue burdens on intelligence agencies, or put classified and sensitive information at risk of disclosure. Plaintiffs merely ask the Court to adopt a restrained construction of the Foreign Government Exception that gives effect to the provision's statutory language and legislative history, and the overarching purposes of the FOIA. The interpretation of the Foreign Government Exception suggested by Plaintiffs can be applied easily and will not increase the administrative burdens placed on intelligence agencies in responding to FOIA requests.

ARGUMENT

I. THE IC DEFENDANTS CONSTRUE THE FOREIGN GOVERNMENT EXCEPTION TOO BROADLY

The IC Defendants argue that "members" of foreign legislative bodies should automatically be considered to be "representatives" of foreign government entities under the Foreign Government Exception, even if they are not authorized to act or speak on behalf of the legislative body in question. *See* IC Defs.' Mem. in Opp'n to Pls.' Partial Mot. for Summ. J. and in Further Supp. of Defs.' Partial Mot. to Dismiss ("IC Defs.' Reply Mem.") 3, 11. This overbroad interpretation of the Foreign Government Exception is not supported by the provision's text or legislative history and is inconsistent with the policy goals of the FOIA.

The legislative history makes clear that the focus of the Foreign Government Exception was meant to concern "*the requests of foreign governments*." H.R. Rep. No. 107-592, at 11, 27, 2002 WL 1587466, at *11, *27 (2002) (emphasis added). Implicit in this formulation is that such requests are authorized by foreign governments. The scope of the Foreign Government Exception should be limited to bar disclosures only when records are requested on behalf of and under the authority of a foreign government. The provision should not be expanded to apply to FOIA requests submitted by requesters that lack authority to act or speak for a foreign government. Such requests cannot be said to be made by "representatives" of a foreign government entity. *See* Section II, *infra*.

Courts have consistently held that the purpose of the FOIA is to promote and facilitate the disclosure of government records in aid of an open and transparent government and that exceptions to the statute should be construed narrowly so that they do not unnecessarily undermine this important objective. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2167 (2008) ("No reason need be given for a FOIA request, and unless the requested materials fall within one of

the Act's enumerated exemptions, *see* § 552(a)(3)(E), (b), the agency must 'make the records promptly available' to the requester, § 552(a)(3)(A)."); *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010). This approach is particularly appropriate in situations like the present case, where an overbroad construction of the exception could swallow the rule and might potentially be used as a tool to conceal government misconduct or shield the executive branch from potential embarrassment. *See Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4683 (Jan. 21, 2009) ("The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."). The FOIA makes clear that the Foreign Government Exception is a narrow limitation on disclosure: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and *except as provided in subparagraph (E)*, each agency, upon any request for records . . . *shall make the records promptly available to any person.*" § 552(a)(3)(A) (emphasis added).

Although the IC Defendants contend that "the principle favoring narrow construction set forth in *Public Citizen* and numerous other FOIA cases" applies only to the exemptions that are enumerated in § 552(b) (*see* IC Defs.' Reply Mem. 10-11), this contention falls apart under scrutiny. As an exception to the broader rule of disclosure, there is no principled reason why the Foreign Government Exception should be treated any differently from the FOIA exemptions set forth in § 552(b). Although ruling on a different matter under the FOIA, the Supreme Court recently included the Foreign Government Exception in a list of exemptions together with § 552(b), further suggesting that, like the other exemptions, the Foreign Government Exception should be construed narrowly. *Taylor*, 128 S. Ct. at 2167.

II. NEITHER ANDREW TYRIE NOR THE APPG ARE "REPRESENTATIVES" OF PARLIAMENT AS A WHOLE

The IC Defendants ask the Court to find that Members of Parliament who do not hold Government office, such as Andrew Tyrie and the other members of the APPG, are "representatives" of Parliament and, hence, "representatives" of a "government entity." But even if Parliament could be considered to be a "government entity" (and it cannot, *see* Section III, *infra*), individual Members of Parliament cannot, in any way, be considered to be representatives of Parliament as a whole. *See* Pls.' Mem. 24-25, 27-30.

The IC Defendants rely on a single, inapposite aspect of the definition of "representative"—the aspect that includes "one that represents a constituency as a member of a legislative body." IC Defs.' Reply Mem. 11. Plaintiffs have already acknowledged that individual Members of Parliament represent their constituents *in* the Parliamentary process, but this does not mean that they are "representatives" of Parliament as a whole. *See* Pls.' Mem. 27-28. The fact is that neither Andrew Tyrie nor any of the other members of the APPG represents Parliament as a body. *See id.* Nor do they represent the House of Commons or the House of Lords. *See id.* at 24-25, 27-28.

The Foreign Government Exception applies to "representative[s] *of* a government entity," *i.e.*, representatives who represent the government entity itself. *See* § 552(a)(3)(E)(ii) (emphasis added). By its express terms, the Foreign Government Exception does not apply to representatives *in* a government entity, representatives *to* a government entity, representatives that *are part of* a government entity, or representatives that are *members of* a government entity. *See id.* When read in context, it is clear that Congress did not intend the word "representative" in the Foreign Government Exception to refer simply to individual members of a foreign legislative body—especially if that body has not authorized such members to make a FOIA request. Rather,

Congress intended the provision to apply to persons who speak for or act on behalf of a foreign government entity (and have the authority to so act). Congress could have drafted the provision to include the words "member," "part," "officer," or "employee" of a government entity, but it did not do so.

Properly understood, the phrase "representative *of* a government entity" refers to persons or groups that act for or on behalf of the government entity. Indeed, there are specific officials who can speak on behalf of a House of Parliament in certain circumstances, namely the Speaker of the House of Commons and the Lord Speaker of the House of Lords. *See* Tyrie Suppl. Decl. ¶ 10. Nevertheless, Andrew Tyrie does not have such authority, nor do any of the other members of the APPG. *Id.* ¶¶ 9-10; Decl. of Andrew Tyrie MP ("Tyrie Decl.") ¶ 26.

The IC Defendants' failure to look to and use the common understanding of the word "representative"—*i.e.*, one who stands for or acts on behalf of another—is revealing. *Black's Law Dictionary* first defines representative as "[o]ne who stands for or acts on behalf of another," and refers the reader to the definition of "agent"; only later does *Black's* define a representative (after a litany of specialized definitions, including accredited, class, independent personal, lawful, legal-personal, legal, personal, and registered representatives) to be "[a] member of a legislature, esp. of the lower house." *See Black's Law Dictionary* 1328 (8th ed. 2004). Given these multiple meanings, it would have been odd for Congress to use the phrase "representative of a government entity" as a way to refer to individual members of a legislative body. Such usage would be needlessly cumbersome and ambiguous.

The IC Defendants further postulate that Congress would have used the word "agent" if it had meant "representative" to mean "agent." *See* IC Defs.' Reply Mem. 12. Congress, however, did not need to use the word "agent," as the words "representative" and "agent" are synonymous.

The Department of Justice itself, in determining what an "agent of a foreign government" means in the context of 18 U.S.C. § 951 (2006),[2] indicates that "[t]he term *agent* means *all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction or control of that foreign government or official*, and who are not specifically excluded by the terms of the Act or the regulations thereunder." 28 C.F.R. § 73.1(a) (2010) (emphasis added).

As the term is commonly understood, a person cannot be a "representative" without having been granted authorization and legitimacy to stand for or act on behalf of the persons or body that he or she will represent. *See Black's Law Dictionary* 1328 (8th ed. 2004). Here, Plaintiffs do not represent or have any authority to represent Parliament as a whole. The IC Defendants do not dispute that:

- The APPG did not make the FOIA requests at issue on behalf of Parliament, and Parliament did not authorize the APPG to make the FOIA requests (IC Defs.' Counterstm't ¶¶ 18-19);
- Andrew Tyrie did not make the FOIA requests at issue on behalf of Parliament, and Parliament did not authorize Andrew Tyrie to make the FOIA requests (IC Defs.' Counterstm't ¶¶ 28-29);
- Joe Cyr did not make the FOIA requests at issue on behalf of Parliament, and Parliament did not authorize Joe Cyr to make the FOIA requests (IC Defs.' Counterstm't ¶¶ 38-39); and
- Parliament has never requested or authorized the Plaintiffs to act on its behalf in bringing this lawsuit (IC Defs.' Counterstm't ¶¶ 48).

Given these concessions—and the IC Defendants cannot do anything *but* concede these points—the only way the IC Defendants can claim that each Plaintiff is a "representative" of a foreign

[2] 18 U.S.C. § 951 makes it a crime for a person, "other than a diplomatic or consular officer or attaché," to act "in the United States as an agent of a foreign government without prior notification to the Attorney General" if required under rules and regulations promulgated by the Attorney General.

government entity is by arguing for an extremely broad interpretation of the Foreign Government Exception, one that goes well beyond the language of the statute and its legislative history to bar disclosures to any and all members of foreign legislatures. *See* IC Defs.' Reply Mem. 3, 11-14.[3] It makes no sense to suggest that individual Members of Parliament are "representatives" of Parliament as a body. They simply have no such authority. Pls.' Mem. 27-28.

Although the IC Defendants attempt to brush the point aside, it is instructive to consider whether, as a matter of federal law, an individual Member of Congress can be considered to be a representative of the United States Congress as a whole. *Cf.* IC Defs.' Reply Mem. 13-14 & n.9. Since the Foreign Government Exception compares foreign government entities and government entities in the United States, there is in fact no more appropriate analogy than comparing a Member of Congress to a backbench Member of Parliament. The language of the Foreign Government Exception sets forth what sorts of entities are "government entities" by giving examples of government entities in the United States for comparison, such as States, commonwealths, territories, and districts. *See* § 552(a)(3)(E)(i). Accordingly, the Court may look to the standards applied in the United States to Members of Congress for guidance as to whether a backbench member of Parliament can be considered to be a representative of Parliament as a whole.

Federal law holds that a Member of Congress conducting an inquiry alone, or even as part of a group without the official blessing of the house (*i.e.*, outside of a committee or

[3] The legislative intent of Congress in enacting the Foreign Government Exception was to reduce the administrative burden on intelligence agencies. H.R. Rep. No. 107-592, at 27, 2002 WL 1587466, at *27 (2002). It would be contrary to this purpose to construe the provision so broadly that intelligence agencies would have to perform a background check on each and every person who submits a FOIA request to confirm whether he or she is a foreign legislator or affiliated with a foreign legislature.

subcommittee), is *not* a representative of the United States Congress. *See, e.g., Liveright v. United States*, 347 F.2d 473, 474-76 (D.C. Cir. 1965) (noting that a Congressional subpoena was not valid without the full, express authority of a subcommittee); *Exxon Corp. v. Fed. Trade Comm'n*, 589 F.2d 582, 592-94 (D.C. Cir. 1978) (discussing the subpoena power of committees and subcommittees of the House and Senate and noting "disclosure of information can only be compelled by authority of Congress, its committees and subcommittees, not solely by individual members").[4] Indeed, the IC Defendants concede that individual Members of Congress are not agents of (and thus not representatives of) Congress. *See* IC Defs.' Reply Mem. 13-14. The IC Defendants miss the point when they contend that Congress has the power to determine who has rights under FOIA and that, for that reason, the analogy to Congress is inappropriate. *See* IC Defs.' Reply Mem. 11-14 & n.9. The analogy is instructive exactly because Congress suggested what kinds of government entities are covered by the Foreign Government Exception by making a comparison to the US system. *See* § 552(a)(3)(E)(i).

Just as Andrew Tyrie has no authority to represent Parliament as a whole and in fact does not represent Parliament as a whole, the APPG also has no authority to represent Parliament as a whole and in fact does not represent Parliament as a whole. *See* Pls.' Mem. 24-25. The APPG is an informal interest group composed of individual Members of Parliament. It has no official status within Parliament and is not accorded any powers or funding by Parliament. Tyrie Suppl. Decl. ¶ 5 n.1. The IC Defendants mischaracterize Plaintiffs' position on this point—no country's

[4] The Department of Justice itself does not allow the special privileges allowed to Congress and congressional committees and subcommittees under the FOIA to be exercised by individual Members of Congress unless the members are vested with the authority to make requests on behalf of a committee or subcommittee. *See* Office of Info. Policy, U.S. Dep't of Justice, *Congressional Access Under FOIA*, 5 FOIA Update 1 (1985), *available at* http://www.justice.gov/oip/foia_updates/Vol_V_1/page3.htm (last visited May 31, 2010).

official leader can circumvent the Foreign Government Exception by claiming to be part of an "interest group." *See* IC Defs.' Reply Mem. 16. Indeed, neither the Prime Minister nor the Queen are members (or likely to become members) of the APPG.[5]

III. PARLIAMENT IS NOT A "GOVERNMENT ENTITY"

The IC Defendants do not seriously dispute that under English law Parliament is not a "government entity." *See* IC Defs.' Counterstm't ¶ 15; IC Defs.' Reply Mem. 16-17. Instead, they attempt to sidestep this point by contending that it is irrelevant. But English law is highly relevant—the fundamental issue in dispute is whether Plaintiffs are representatives of a British government entity. Although the issue of statutory interpretation is ultimately a question of federal law under the FOIA, in interpreting the statute the Court can look to foreign law for guidance (*see* Fed. R. Civ. P. 44.1) and should start with an actual understanding of the circumstances and the legal system in which a foreign person or body operates. Because Parliament is not a government entity under English law (Pls.' Mem. 15-16, 32), it likewise should not be considered to be a "government entity" for purposes of the Foreign Government Exception.

The IC Defendants cite inapposite case law in an attempt to support their position on the inapplicability of foreign law. Their quotation from *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), for the proposition that "'laws . . . . [not] implemented domestically by

[5] The recently published *Ministerial Code of Conduct* (revised May 2010), which sets out the standards of conduct expected of UK Government Ministers and how they discharge their duties, continues to require Members of the Government to resign from All-Party Groups: "In order to avoid any conflict of interest, Ministers on taking up office should give up membership or chairmanship of a Select Committee or All-Party Parliamentary Group." UK Cabinet Office, *Ministerial Code* ¶ 7.14 (May 2010), *available at* http://www.cabinetoffice.gov.uk/conduct-ethics/minsterial.aspx (last visited May 31, 2010) (a copy is attached as Exhibit 2 to the Tyrie Suppl. Decl.). *See also* Tyrie Suppl. Decl. ¶ 5.

Congress'" cannot serve as authority for the federal courts is incomplete. *See* IC Defs.' Reply Mem. 17. *Al-Bihani* stands for the proposition that customary international law (specifically, the law of war)—rather than the law of a single foreign nation—does not bind federal or state courts if Congress has not implemented the law domestically. *Al-Bihani*, 590 F.3d at 871. The IC Defendants' misreading of the case is further clarified by the *Al-Bihani* court's citation to the Restatement (Third) of Foreign Relations Law of the United States (1987) ("Restatement"). *See Al-Bihani*, 590 F.3d at 871 (citing Restatement § 111(3)-(4) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.")).

Here, Plaintiffs do not ask the Court to look to international law. Plaintiffs merely request the Court to look to English law for guidance in determining whether Plaintiffs can be considered to be representatives of the UK Government. The Court can (and Plaintiffs respectfully submit that the Court should) look to English law to construe the meaning of the words "representative" and "government entity" in the context of this case.

Contrary to the IC Defendants' contentions, the Court's ability to look to foreign law for assistance in construing a statute is not limited to situations in which Congress specifically intends for foreign law to apply. *See* IC Defs.' Reply Mem. 17. The IC Defendants cite *Small v. United States*, 544 U.S. 385 (2005), for the proposition that courts should assume "that Congress had domestic concerns in mind" when enacting a statute. IC Defs.' Reply Mem. 17 (citing *Small*, 544 U.S. at 385). Here, too, as the IC Defendants concede (*see* IC Defs.' Reply Mem. 20 n.15), the legal issues are different; *Small* stands for the proposition that there is a legal presumption against the extraterritorial application of US law (namely, whether a US statute

governing persons "convicted in any court" also contemplates convictions in foreign courts), not whether a Court can look to the law of another country to assist in the determination of whether foreign persons can be considered to be representatives of foreign government entities. *See Small*, 544 U.S. at 388, 390.

The Foreign Sovereign Immunities Act ("FSIA") cases cited in Plaintiffs' opening brief are particularly illuminating. *See* Pls.' Mem. 22-23. It is true that the FSIA uses the words "agent or instrumentality" and the Foreign Government Exception uses the word "representative." But just as the FSIA requires the Court to determine as a factual matter whether some actor is an agent of a foreign state, the Foreign Government Exception requires the Court to determine whether a FOIA requester is a representative of a foreign government. Foreign law is just as instructive for this purpose as it is in the context of the FSIA.

Contrary to the IC Defendants' suggestion, Plaintiffs do not dispute that Parliament is a legislative body. *See* IC Defs.' Reply Mem. 5 n.3. Rather, Plaintiffs make the point that a close, thoughtful examination of the Foreign Government Exception and its legislative history reveal it is likely that Congress intended the term "government entity" to apply only to the official executive and administrative departments of foreign governments and that it is unlikely Congress intended the term to include the legislative bodies. This is because governments take action, gather information, and communicate with other governments through their executive branches and/or administrative agencies or departments. Government-to-government requests for information are best handled through diplomatic channels, by executive agencies or departments on both sides, rather than through the FOIA process. Plaintiffs' analysis is not mere conjecture; it is based on a nuanced reading of the Foreign Government Exception and its legislative history,

and it provides a construction of the provision that accords with the provision's text, its legislative history, and the underlying purposes of the FOIA.

IV. ANDREW TYRIE SUBMITTED HIS FOIA REQUEST IN HIS INDIVIDUAL CAPACITY, AND THE APPG SUBMITTED ITS FOIA REQUEST IN ITS CAPACITY AS AN ASSOCIATION OF MEMBERS OF PARLIAMENT ACTING ON THEIR OWN BEHALF

Consistent with the FOIA's purpose of providing to any person a "broad right of access to official information," the Foreign Government Exception has no application to requests made in a personal capacity. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 772 (1989) (citation and internal quotation marks omitted). If a representative of a foreign government has a personal reason for seeking FOIA disclosure from an agency, he or she should not be precluded from doing so, but the IC Defendants' overly broad reading of the provision would foreclose this possibility. Even if Andrew Tyrie and the APPG were each a representative of a government entity, in a situation such as the present one, where neither act for or on behalf of a foreign government entity, the Foreign Government Exception should not preclude them from receiving FOIA disclosures. In such situations, because they are not acting for a government entity, they should be considered to fall within the "any person" standard under the FOIA. *See* 5 U.S.C. § 552(a)(3); *Stone v. Exp.-Imp. Bank of the U.S.*, 552 F.2d 132, 136 (5th Cir. 1977) (noting the difference between "person" and "citizen" and holding that "person" includes foreign citizens and entities).

The text and legislative history provide that the scope of the Foreign Government Exception is limited only to foreign government entities and persons acting as representatives of foreign government entities. *See* H.R. Rep. No. 107-592, at 27. A careful reading of the legislative history reveals that Congress was cognizant of the fact that FOIA provides for

disclosure to *any* person and that the intelligence agencies were burdened with requests from foreign persons and foreign governments, but Congress chose to limit the application of the Foreign Government Exception to government entities and did not include foreign persons within the ambit of the provision. *See* H.R. Rep. No. 107-592, at 27; 5 U.S.C. § 552(a)(3)(E). Indeed, given the FOIA's purpose of providing a "broad right of access to official information," the Foreign Government Exception contains no provision barring a representative of a foreign government entity from attempting to seek disclosure of documents in his or her individual capacity. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 (citation and internal quotation marks omitted). Further, as set forth in Section I, *supra*, exceptions to the FOIA should be construed narrowly.

Again, the analogy to Congress is instructive. In *Aspin v. Dep't of Defense*, 491 F.2d 24 (D.C. Cir. 1973), a congressman acting in his capacity as a private citizen submitted a FOIA request to the Army for public release of a general's review of the Army's criminal investigation of the My Lai Massacre. Although the court affirmed the Army's refusal to disclose the records based on the law enforcement purposes exemption, nowhere did it suggest any inherent conflict between the congressman's status as a legislator and his status as a person entitled to make FOIA requests in his individual capacity. *See id.* at 26 & n.14. A similar request concerning federal natural gas leases was made by another congressman in his individual capacity, and his request was treated as if it was a personal request. When his request was denied, he sought the information with the imprimatur of a congressional committee subpoena, and he eventually secured the information. *See Ashland Oil, Inc. v. Fed. Trade Comm'n*, 409 F. Supp. 297, 300-01, 308-09 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976). As with a member of Congress, a foreign legislator should be permitted to make a request in his individual capacity.

If the Court were to give effect to the IC Defendants' blanket rejection of Plaintiffs' rights to make FOIA requests in their individual capacities (*see* IC Defs.' Reply Mem. 14), each and every person employed by a foreign government entity would be barred from receiving any FOIA disclosures. This would include not only foreign persons, who have been recognized in the case law and by the legislative history of the Foreign Government Exception to have a right to disclosure under FOIA, but also to Americans whom the IC Defendants might construe to be representatives of a foreign government entity. *See* H.R. Rep. No. 107-592, at 27 (showing that Congress knew that the intelligence agencies were burdened with requests from both foreign persons and foreign governments but that Congress chose to limit the application of the Foreign Government Exception to government entities).

V. JOE CYR IS NOT A "REPRESENTATIVE" OF A "GOVERNMENT ENTITY" BY VIRTUE OF THE FACT THAT HE IS ALSO SERVING AS ANDREW TYRIE'S AND THE APPG'S LAWYER

The IC Defendants advance an attenuated argument with respect to Joe Cyr, contending they cannot process Joe Cyr's FOIA requests on the alleged grounds that Joe Cyr is a representative of a representative of a foreign government entity. The Foreign Government Exception should not be read to stretch so far. Even if the Court somehow concludes that Parliament is a "government entity" and that Andrew Tyrie and the APPG are "representatives" of Parliament as a body, there still would be no basis to conclude that Joe Cyr is a representative of Parliament by virtue of this chain of agency relationships. The fact is that Joe Cyr has no authority whatsoever to act or speak for Parliament, and the IC Defendants do not dispute this. *See* IC Defs.' Counterstm't ¶¶ 38-39.

Just like any other individual, Joe Cyr has a right to request information under the FOIA, and he should not be forced to forfeit that right because his clients include the APPG and

Andrew Tyrie. The IC Defendants should not be allowed to so easily evade the fact that Joe Cyr signed and submitted the FOIA requests at issue as an individual requester and that he is proceeding as a Plaintiff in this lawsuit on his own behalf. *See, e.g.*, Compl. ¶ 31 ("Mr. Cyr joins this request in his individual capacity and not as a representative of the APPG, Mr. Tyrie, or the UK Government."); Nov. 17, 2008 FOIA Request to the CIA 1 (Ex. D to Compl.). As a matter of fact, Joe Cyr could have filed the FOIA requests at issue by himself as a sole requester (or he could have asked another person to file them), and the IC Defendants would have had no cause to invoke the Foreign Government Exception. If and when records were disclosed in response to such a request, Joe Cyr would have been free to disclose them to the media, to the public at large, and to Andrew Tyrie and the APPG. Joe Cyr should not be penalized for having been above-board and for disclosing his relationships with Andrew Tyrie and the APPG at the outset.

In situations like the present case, where there are multiple FOIA requesters and the Foreign Government Exception is inapplicable to at least one of them, the FOIA's underlying presumption in favor of disclosure should prevail, and there should not be any impediment to disclosure. Contrary to the IC Defendants' position, the fact that Joe Cyr will disclose released records to his clients the APPG and Andrew Tyrie is not objectionable. It is well settled that whenever records are released to a FOIA requester, they are deemed to be released to the world at large, and no prohibition can be placed on their dissemination. *See Swan v. Sec. & Exch. Comm'n*, 96 F.3d 498, 500 (D.C. Cir. 1996).

VI. REQUIRING THE IC DEFENDANTS TO PROCESS PLAINTIFFS' FOIA REQUESTS WILL NOT UNDULY BURDEN THE IC DEFENDANTS

Congress's stated purpose in enacting the Foreign Government Exception was to ease the administrative burdens placed on agencies of the intelligence community in having to respond to

FOIA requests (*see* H.R. Rep. No. 107-592, at 27), and not to protect against the disclosure of sensitive records under the FOIA (or to protect members of the government from embarrassment or cover up wrongdoing). *See Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4683; Attorney General Holder's *Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act* (Mar. 19, 2009), *available at* http://www.usdoj.gov/ag/foia-memo-march2009.pdf (last visited May 31, 2010). The FOIA exemptions set out at § 552(b), as well as other provisions of the FOIA, guard against the disclosure of classified and sensitive information. Despite the IC Defendants' suggestion to the contrary, the prevention of disclosure of classified or sensitive information is not at issue on the present motion. *See* IC Defs.' Reply Mem. 25-26. The only issues before the Court are whether the Foreign Government Exception applies to Plaintiffs and whether the IC Defendants should be ordered to process Plaintiffs' FOIA requests.

In enacting the Foreign Government Exception, Congress struck a balance between the competing policies of preserving intelligence agencies' administrative resources and facilitating the disclosure of government records in furtherance of open government. Congress did not prohibit disclosures to all foreign persons. Instead, Congress barred only disclosures to a narrow category of requesters that are foreign government entities and the representatives of foreign government entities. The fact that Congress did not see fit to bar any and all disclosures to foreign persons suggests that Congress did not wish to change the overall purpose or scope of the FOIA, annul well-settled case law under the FOIA, or have the new exception swallow the overall presumption in favor of disclosure.

Ironically, if the IC Defendants' reading of the Foreign Government Exception is adopted, the administrative burdens placed on intelligence agencies will dramatically increase.

Pursuant to the IC Defendants' reading of the provision, intelligence agencies would have to thoroughly investigate the background of every single FOIA requester, in every situation, to determine whether he or she is or could be submitting their request on behalf of a Foreign Government.[6] If adopted, the IC Defendants' interpretation of the Foreign Government Exception would chill FOIA requests from foreign persons, a consideration rejected by Congress when it passed the Foreign Government Exception. *See* H.R. Rep. No. 107-592, at 27. Moreover, a clampdown on FOIA requests by foreign persons may deprive the American public—in addition to the foreign public—of the benefits of FOIA openness. *See Southam News v. U.S. Immigration and Naturalization Serv.*, 674 F. Supp. 881, 892 (D.D.C. 1987) (granting fee waiver and finding that it was "rather presumptuous of the FBI" to suggest that a foreign news story would not be of any benefit to the American public).

Plaintiffs advocate a much more restrained reading of the Foreign Government Exception, a reading that can be easily applied in concrete situations. When an intelligence agency receives a request that on its face appears to come from a person that represents a foreign government, the agency may ask the requester to provide further information to resolve the issue. The agency does not need to undertake a broad research project into the form and structure of the foreign government at issue. If the request is an official request from a foreign government (for example written on official government letterhead), then the intelligence agency may presume—

[6] The IC Defendants suggest that the recent election in the UK supports their argument that figuring out who is and who is not a representative of a foreign government—in this case with reference to UK law—would be prohibitively burdensome. But this is not the case. The matter of who is and who is not part of the new UK Government was resolved and made public within a matter of days. *See* Tyrie Suppl. Decl. ¶ 2.

subject to rebuttal—that the request should not be processed.[7] The requester should be afforded an opportunity to demonstrate that it is not a government entity or a representative of a government entity and be afforded the right to apply to a court for a determination, just as in the case at bar. *See* 5 U.S.C. § 552(a)(4)(B). With respect to who is and who is not a representative, the "agency" approach advanced by Plaintiffs is rational and easy to implement.

Plaintiffs' FOIA requests disclosed everything the IC Defendants needed to know about Plaintiffs in order to determine the applicability of the Foreign Government Exception. Plaintiffs' request to the CIA and subsequent correspondence, for example, demonstrate that the CIA was made aware that Mr. Tyrie is an individual member of Parliament, that the APPG is an informal group of individual Members of Parliament, and that the APPG receives no money from any government and has no official status within Parliament. The requests made clear who Plaintiffs are and explained that they are not foreign governments or representatives of foreign governments. *See* Craig Decl., Exs. 7-8.

Plaintiffs' correspondence with the CIA also shows one of the problems with adopting the IC Defendants' broad approach to understanding what constitutes a foreign government entity or its representative. The correspondence with the CIA showed that the CIA attempted to graft onto the Foreign Government Exception a bar against disclosure to any "international organization." *See* Craig Decl., Ex. 7. As Plaintiffs explained to the CIA, however, the Foreign

[7] The Department of Justice itself advocates a similar process. *See* Office of Info. Policy, U.S. Dep't of Justice, *FOIA Amended by Intelligence Authorization Act, available at* http://www.justice.gov/oip/foiapost/2002foiapost38.htm ("[F]or any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision. This is not unlike the consideration of a FOIA requester's circumstances that an agency must undertake for purposes of determining a requester's proper 'fee status' under the Act or a requester's entitlement to 'expedited processing.'") (last visited May 31, 2010).

Government Exception "makes no reference to international organizations." *See* Craig Decl., Ex. 8. One may ponder whether the IC Defendants will make similar attempts in the future to expand the scope of the Foreign Government Exception where the statute does not so require.

Unlike the IC Defendants' interpretation, Plaintiffs' construction of the statute effectuates the Foreign Government Exception while staying true to the purposes of FOIA.

CONCLUSION

For the foregoing reasons (and for the reasons set forth in Plaintiffs' submissions of April 9, 2010), the Court should deny the IC Defendants' Partial Motion to Dismiss, grant Plaintiffs' Cross-Motion for Partial Summary Judgment, declare that Plaintiffs are not representatives of a foreign government, and order the IC Defendants to process Plaintiffs' Requests immediately.

Plaintiffs respectfully request a hearing on Plaintiffs' and the IC Defendants' motions.

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Respectfully submitted,

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