



decision on that issue was made on August 21, 2007, and that defendant's prior motion for judgment on the pleadings filed in this case on August 21, 2007 reflects that final decision. Defendant further notes that prior to the filing of that motion, the Office of Legal Counsel ("OLC") of the Department of Justice had provided legal advice to the White House Counsel's Office regarding OA's status under FOIA. That legal advice was formalized in a memorandum to the White House Counsel's Office dated August 21, 2007. OLC's advisory memorandum was not the final decision and is therefore not responsive to the Court's instructions during the conference call on March 28, 2008 and under the Court's Order of March 30, 2008.

The determination that OA is subject to the Presidential Records Act ("PRA") and not to the Federal Records Act ("FRA") was not reached separately or independently from the decision that OA is not subject to FOIA. As will be discussed in the declaration to be provided on April 18, 2008, OA recognized that "coverage of the FRA is coextensive with the definition of 'agency' in the FOIA," *Armstrong v. EOP*, 90 F.3d 553, 556 (D.C. Cir. 1996); and that presidential records under the PRA do not include "official records of an agency," as the term "agency" is defined in the FOIA, 5 U.S.C. § 552(f). 44 U.S.C. 2201(2)(B)(I). Thus, the decision that OA is not subject to FOIA is also a decision that OA is not subject to the FRA but is subject to the PRA. OA has a document that reflects the August 21, 2007 decision that OA is subject to the PRA rather than the FRA. That document, which is dated August 31, 2007 and is attached as Exhibit 1, advised personnel working within OA that their records management obligations are governed by the PRA and not the FRA.

Dated: April 7, 2008

Respectfully submitted,  
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