UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE 1899 L Street, N.W., 12th Floor Washington, D.C. 20036 Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460 Defendant.	)	C.A. No. 13-627

COMPLAINT FOR DECLARATORY RELIEF AND RELIEF IN THE FORM OF MANDAMUS

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA" or "the Agency"), alleges as follows:

1) This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel production under one request for certain EPA records reflecting the conduct of or otherwise relating to agency business.

2) In a FOIA request sent electronically on February 26, 2013, CEI sought certain described records, email sent to or from a specifically identified non-official email account that EPA Region 9 Administrator Jared Blumenfeld uses to correspond on EPA-related issues, in addition to his EPA-provided email account on which law and regulation require him to conduct all such correspondence.[1]

[1] This is with limited exception. *See, e.g.*, *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency ("**Can I use a non-EPA account to**

3) Defendant has not responded in any way to Plaintiff's request submitted electronically more than two months ago.

4) In the face of increasing revelations about senior employees throughout the federal government turning to private email accounts to conduct official business and otherwise engage in work-related correspondence, circumventing the requirements of statutory and regulatory record-creating and record-keeping regimes, EPA refuses to comply with its FOIA obligations in the present matter.

PARTIES

5) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.

6) Defendant EPA is a federal agency headquartered in Washington, DC whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

7) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

8) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiffs reside in the District of Columbia, and defendant is federal agency.

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send or receive EPA e-mail? No, do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-EPA e-mail system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping system.") (emphasis in original) (available at www.epa.gov/records/faqs/email.htm).

FACTUAL BACKGROUND

9) Transparency in government is the subject of high-profile promises from the president and attorney general of the United States arguing forcefully against agencies failing to live up to their legal recordkeeping and disclosure obligations.

10) Attorney General Holder states, *inter alia*, "On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA 'should be administered with a clear presumption: In the face of doubt, openness prevails.'" OIP Guidance, *President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government,"* http://www.justice.gov/oip/foiapost/2009foiapost8.htm. This and a related guidance elaborate on President Obama's memorandum.

11) This lawsuit seeks to compel EPA to respond fully and completely to one FOIA request dated February 26, 2013. The request sought specifically described records sent to, from or copied to a specific non-official email address that EPA Region 9 Administrator Jared Blumenfeld used for official or work-related duties.

12) The records at issue in this matter reflect what has been shown to be a widespread practice of government employees using non-official email accounts for work-related correspondence, without copying their official email account as required by law and regulation, avoiding creation of the record required by federal statute and regulation.[2]

[2] *See, e.g.*, Judson Berger, "EPA official scrutinized over emails to resign", FoxNews.com, February 19, 2013, http://www.foxnews.com/politics/2013/02/19/epa-official-scrutinized-over-emails-to-resign/ (addressing EPA Region 8 administrator James Martin's use of a private email account); *see also* August 14, 2012 Letter from U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa and subcommittee Chairmen Jim Jordan and Trey Gowdy to Energy Secretary Steven Chu,

13) Plaintiff learned of Mr. Blumenfeld's use of this account as an alternate to his EPA.gov account by way of another FOIA request, which is also how it has learned of other senior EPA officials similarly using such non-official accounts.

14) Defendant EPA has failed to even acknowledge Plaintiff's request.

15) EPA did respond to Congress about this account's use. *See, e.g.,* April 9, 2013 letter from Associate Administrator Arvin Ganesan responding to the March 18, 2013 letter from Sen. David Vitter, ranking member of the U.S. Senate Committee on Environment and Public Works to Region 9 Administrator Jared Blumenfeld.

Plaintiff's FOIA Request Seeking Certain
Emails to or From Administrator Blumenfeld's Comcast Account

16) On February 26, 2013, by electronic mail Plaintiff sent a request for records to EPA's Region 9 FOIA officer at r9foia@epa.gov, stating in pertinent part:

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http://oversight.house.gov/wp-content/uploads/2012/08/2012-08-14-DEI-Gowdy-Jordan-to-Chu-re-loan-program-emails.pdf ("at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business"). *See also* Jim Snyder, *Brightsource Warned Of Embarrassment To Obama In Loan Delay*, Bloomberg, June 6, 2012, www.bloomberg.com/news/2012-06-06/brightsource-warned-of-embarrassment-to-obama-from-loan-delays.html; Eric Lichtblau, *Across From White House, Coffee With Lobbyists*, New York Times, June 24, 2010, at A18, www.nytimes.com/2010/06/25/us/politics/25caribou.html (lobbyists "routinely get e-mail messages from White House staff members' personal accounts rather than from their official White House accounts, which can become subject to public review"); Nick Bauman, *Starbucksgate: Obama's Lobbyist/Email Scandal*, Mother Jones, June 28, 2010, http://motherjones.com/mojo/2010/06/starbucksgate-crew-calls-investigation-white-house (White House aides "using private email accounts to schedule coffee shop meetings with lobbyists (an apparent attempt to prevent these sessions from appearing in White House visitor logs)"). Similarly, then-White House Deputy Chief of Staff Jim Messina used his AOL account to orchestrate deals with industry involving health care reform. *See Promises Made, Promises Broken: The Obama Administration's Disappointing Transparency Track Record*, report by the U.S. House of Representatives Committee on Energy and Commerce, Vol. 1, Issue 3, July 31, 2012, http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReport.pdf, and supporting documents at http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReportSupportingDocs.pdf.

please provide copies of all emails a) sent to or from (including as cc: and bcc:) Region 9 Administrator Jared Blumenthal at JaredBlumenfeld@Comcast.net (with or without CAPS in any part of the address), b) dated, sent or received from November 1, 2009 to the date EPA conducts its search, inclusive, which c) by their "Subject" field, body, or correspondents indicate they are in connection with his official role at EPA, are in furtherance of agency business, or otherwise which address, relate to or are connected with agency-related policies, activities or other business.

17) As part of its request, Plaintiff also noted (emphasis in original):

> This request applies to a specific, identified non-official email account in the name of Regional Administrator Blumenfeld and which Mr. Blumenfeld uses for Agency purposes, which use is how we learned of this address. The account has been solely under his control. Agency-related emails to and from such accounts are discouraged but, when created, must by law and regulation be copied to EPA either electronically or in paper. Now that EPA is notified of this Agency-related use (see exemplar, attached to this email), its search can be EPA's means to obtain the legally required copies but regardless this search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). *See also Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that Michael Dettmer had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.) That is, Mr. Blumenfeld may not conduct his own search, without supervision. Factors among correspondents indicating a potentially responsive record's status as an Agency record include EPA employees, environmentalist groups or media as correspondents, which correspondence is presumptively related to Mr. Blumenfeld's official duties or capacity or otherwise to EPA business. **We note that this request is sufficiently specific and narrow, requires one search, no forwarding to other offices for processing, and is a 'simple' Request**.

Defendant's Response to Plaintiff's FOIA Request

18) EPA has not responded to this request in any way, whether by an acknowledgement letter and assignment of an identification number, or substantively.

LEGAL ARGUMENTS

Defendant EPA Owed and Has Failed to Provide Plaintiff a Substantive Response to its Request

19) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating "that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request." (5 U.S.C. § 552(a)(6)(C)(i)) Alternately, the agency must cite "exceptional circumstances" and request, and make the case for, an extension that is necessary and proper to the specific request. *See also Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

20) EPA regulations state, *inter alia*, "(a) Unless the Agency and the requester have agreed otherwise, or when unusual circumstances exist as provided in paragraph (e) of this section, EPA offices will respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office. EPA will ordinarily respond to requests in the order in which they were received. If EPA fails to respond to your request within the 20 working day period, or any authorized extension of time, you may seek judicial review to obtain the records without first making an administrative appeal." 40 C.F.R. § 2.104.

21) The courts have deemed a substantive agency response to mean the agency must begin to process the request. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57 (D.C. Cir. 1990). Examples include informing a requester that it assigned the request(s) to the simple, normal or complex processing tracks and giving notice that it

is reviewing some quantity of records with an eye toward production on some estimated schedule. *See generally Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011). Alternately, a complying agency will obtain an appropriate extension in the event of unusual circumstances.

22) A covered agency must provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). *See also Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing "the statutory requirement that [agencies] provide estimated dates of completion").

23) EPA must at least inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013).

24) FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, "and the reasons therefor," as well as CEI's right to appeal; further, FOIA's unusual-circumstances safety valve to extend time to make a determination, and its exceptional-circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *Id.*, *quoting* 5 U.S.C. § 552(a)(6)(A)(i).

25) EPA owed Plaintiff CEI a substantive response to its request by March 26, 2013.

26) No office within Defendant EPA has provided any indication it is in fact processing Plaintiff's request, or sought and made its case for an extension of time to respond to either request as required when "exceptional circumstances" exist, or even provided Plaintiff with an acknowledgement or identification/tracking number of its request.

27) EPA failed to respond to Plaintiff's request. Due to this failure, under well-established precedent Plaintiff need not administratively appeal but may seek relief from this Court.

28) For the foregoing reasons, EPA is now legally required to provide Plaintiff records responsive to its request subject to legitimate withholdings.

Records Reflecting Official Business are Agency Records

29) The Department of Justice notes that "'Records' is not a statutorily defined term in FOIA. In fact it appears that the only definition of this term in the U.S. Code is that in the Federal Records Act. 44 U.S.C. § 3301." *What is an "Agency Record?"*, U.S. Department of Justice FOIA Update Vol. II, No. 1, 1980, http://www.justice.gov/oip/foia_updates/Vol_II_1/page3.htm.

30) That definition of "records" for purposes of proper maintenance and destruction "includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, *regardless of physical form or characteristics, made or received* by an agency of the United States Government under Federal law or *in connection with the transaction of public business and* preserved or *appropriate for preservation by that agency* or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities

of the Government or because of the informational value of data in them" (emphasis added).

31) "The definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act."[3] This Act requires the document to somehow reflect the operations of government at some substantive level while FOIA covers far more, including phone logs, annotations and the most seemingly inconsequential piece of paper or electronic record in an agency's possession. At bottom "the question is whether the employee's creation of the documents can be attributed to the agency for the purposes of FOIA." *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006).

32) An email record's status is not dictated by the account on which it is created or received. Specifically as regards private email accounts, "Agencies are also required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts on commercial systems such as Gmail, Hotmail, .Mac, etc.)", and when used during working hours or for work-related purposes "agencies must ensure that federal records sent or received on such systems are preserved in the appropriate recordkeeping system and that reasonable steps are taken to capture available transmission and receipt data needed by the agency for recordkeeping purposes." Government Accountability Office, *Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management*, GAO-08-742, June 2008, http://www.gao.gov/assets/280/276561.pdf, p. 37.

33) EPA policy on this matter is clear. *See, e.g.,* Footnote 1, *supra*.

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3 *See, e.g.,* Environmental Protection Agency, *What Is a Federal Record?*, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm.

34) After being informed that one of its officials was using non-official email for official business, the head of the White House Office of Science and Technology Policy (OSTP) affirmed the law and policy in equally clear terms, reminding employees in a memo to all staff that work-related email must be copied to the agency, stating in pertinent part:

> In the course of responding to the recent FOIA request, OSTP learned that an employee had, in a number of instances, inadvertently failed to forward to his OSTP email account work-related emails received on his personal account. The employee has since taken corrective action by forwarding these additional emails from his personal account to his OSTP account so that all of the work-related emails are properly preserved in his OSTP account.
>
> If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account. In this way, all correspondence related to government business—both incoming and outgoing—will be captured automatically in compliance with the [Federal Records Act].[4]

35) Agencies interpret extant record-keeping policy and FOIA as allowing for searching an employee's private accounts and equipment. *See, e.g.*, August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher C. Horner, Competitive Enterprise Institute in response to NOAA FOIA#2010-00199, stating in pertinent part, "NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the

[4] May 10, 2010 Memo from OSTP Director John Holdren to all OSTP staff, *Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge*, at 10-11, available at http://www.citizensforethics.org/page/-/PDFs/Legal/Investigation/Request_for_Investigation_into_White_House_20100628.pdf?nocdn=1.

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home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions." (p. 2).

36) Plaintiff has recently confronted this issue an another instance of an EPA Regional Administrator (former Region 8 Administrator James Martin). Defendant ultimately produced Mr. Martin's ME.com emails to and from the environmentalist pressure group Environmental Defense addressing work-related issues. *See, CEI v. EPA*, D.D.C., C.A. No. 12-1497 (ESH), *Stipulation of Settlement and Dismissa*l (Docket Doc. No. 26, filed 4/24/13) at ¶2 ("After the lawsuit was filed, EPA . . .released nineteen (19) email messages that had been collected from a personal, non-Government email account"); *id*. at ¶4 ("the EPA determined that there were additional documents from Mr. Martin's personal, non-Government email account responsive to the FOIA request at issue in this litigation and, accordingly, released these additional documents to Plaintiff on March 7, 2013."). On the same basis that these emails represented the conduct of, or otherwise related to, official duties, Martin subsequently also turned over to congressional investigators numerous other emails from the same account, not responsive to Plaintiff's request but addressing issues relevant to Martin's work at EPA.

Other Jurisdictions Recognize Work-Related Email on Private Accounts as Public or Agency Records, Subject to Freedom of Information Laws

37) States with open records or freedom of information laws obtain and produce work-related email on non-official accounts in response to requests for public records. For example, in response to an 2010 Open Records Act request for correspondence pertaining to the drafting of and lobbying for the state's Clean Air Clean Jobs Act, Colorado produced email from two separate private email addresses for state

employee Martin, during his two stints with two separate departments (the Colorado Department of Public Health and Environment and Department of Natural Resources).

38) The Illinois attorney general issued a binding opinion that communications on a private email account "pertaining to public business" were public records, with that state's FOIA having a definition of "public records" similar to the relevant federal definition (including "all . . . documentary materials pertaining to the transaction of public business, regardless of physical form") and its legislature having similarly intended a bias toward disclosure. *See* Public Access Opinion No. 11-006, November 15, 2011, http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-006.pdf.

39) That opinion rejected the notion that the creation of an account, as opposed to the records in question, dictated a record's status. ("Whether information is a 'public record' is not determined by where, how or on what device that record was created; rather, the question is whether the record was prepared by or used by one or more members of a public body in conducting the affairs of government. The focus is on the creation of the record itself, and how it was used." *Ibid.*) Similarly, "26 states view the use of private emails for government business as public records." Steven Braun, *Mitt Romney Used Private Email Accounts to Conduct State Business While Massachusetts Governor*, Huffington Post, March 9, 2012, available at http://www.huffingtonpost.com/2012/03/09/mitt-romney-emails_n_1335712.html.

40) Other countries with freedom of information acts likewise produce private email as public records when the content indicates the record is work-related. U.S. courts

consider rulings from other countries like the United Kingdom when construing similar laws.[5]

41) The United Kingdom's Freedom of Information Act was modeled after and resembles the U.S. federal law.

42) The UK Information Commissioner (Information Commissioner's Office ("ICO")) notes that "The use of private email accounts instead of departmental accounts for the conduct of official business is a matter of concern to the Commissioner for a number of reasons. Adherence to good records management practice should be encouraged to promote data security, to preserve the integrity of the public record and to ensure effective compliance with access to information obligations." *Ibid*, at p. 8.[6]

43) This is the same policy reflected in U.S. federal statute (Federal Records Act of 1950 44 U.S.C. 3101 et seq., the E-Government Act of 2002 and other legislation) and regulation (36 C.F.R. Subchapter B, Records Management, and all applicable National Archives and Records Administration (NARA) mandated guidance), and reflected in the GAO report cited in paragraph 32, *supra*.

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[5] *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (relying on English Bill of Rights of 1689 to interpret U.S. Constitution's Second Amendment); *Harmelin v. Michigan*, 501 U.S. 957, 983-84 (1991) (citing rulings of "state courts interpreting state constitutional provisions with identical" or similar "wording" to Eighth Amendment to construe Eighth Amendment, even though the rulings were issued well after the Eighth Amendment's adoption, between 1824 and 1900); *Solem v. Helm*, 463 U.S. 277, 285, n. 10 (1983)(citing "English Bill of Rights" to interpret 8th Amendment).

[6] The Information Commissioner addressed the issue because, as one British newspaper put it, "It would seem that as the UK has followed the US in its freedom of information laws, so our politicians seem to have also followed their Washington DC colleagues in their attempts to evade the law." Gavin Clarke, *Beware Freedom of Info law 'privacy folktale'—ICO chief*, Register (U.K.), February 7, 2012, http://www.theregister.co.uk/2012/02/07/foia_review_information_commissioner/.

44) The UK's ICO confirmed that all official correspondence is subject to disclosure laws, specifically rejecting the UK Department of Education claim that work-related emails to and from Secretary Michael Gove on his Gmail account "do not fall within the FOI Act." United Kingdom Office of the Information Commissioner, *ICO Statement: Department for Education Decision Notice*, March 2, 2012, www.ico.gov.uk/news/latest_news/2012/statement-department-for-education-decision-notice-02032012.aspx. *See also* ICO, Decision Notice, March 1, 2012, at 6 (email's status as an agency record is determined by its content) (PDF available by link at www.ico.gov.uk/news/latest_news/2012/statement-department-for-education-decision-notice-02032012.aspx).

45) The UK ICO wrote, "It may be necessary to request relevant individuals to search private email accounts in particular cases" (ICO Decision Notice, at p. 1) because, regardless of with whom the governmental official corresponds, emails are the public's on the basis that "[I]nformation 'amounts to' public authority business, or whether information was 'generated in the course of conducting the business of the public authority'" (*Ibid*, at p. 5), and is thereby "held by" an agency even if on an agency employee's private email account.

46) As the UK ICO notes, "It should not come as a surprise to public authorities to have the clarification that information held in private email accounts can be subject to Freedom of Information law if it relates to official business," because "[t]his has always been the case—the Act covers all recorded information in any form." Quoted in C. Williams, *Civil servants to be forced to publish Gmail emails*, Telegraph (U.K.),

Dec. 15, 2011, http://www.telegraph.co.uk/technology/news/8958198/Civil-servants-to-be-forced-to-publish-Gmail-emails.html.

Defendant EPA Owes a Reasonable Search of All Locations Likely to Hold Potentially Responsive Records

47) FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

48) The term "search" means to "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3). *See also Iturralde*, 315 F.3d at 315; *Steinberg,* 23 F.3d at 551.

49) A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). The search must be "'adequate'" on the "'facts of this case.'" *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir 1986) (internal citations omitted).

50) The reasonableness of the search activity is determined ad hoc but there are rules, including that it cannot be cursory. *See Citizens For Responsibility and Ethics in Washington v. U.S. Department of Justice*, 2006 WL 1518964 *4 (D.D.C. June 1, 2006) ("CREW") ("The Court is troubled by the fact that a mere two hour search that started in August took several months to complete and why the Government waited

[for several months] to advise plaintiff of the results of the search."). Reasonable means that "all files likely to contain responsive materials . . . were searched." *Cuban v. SEC*, 795 F.Supp.2d 43, 48 (D.D.C. 2011).

51) Courts inquire into both the form of the search *and* whether the correct record repositories were searched. "[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *See e.g., Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An unsupervised search allowing for abuses is not reasonable and so does not satisfy FOIA's requirements. See *Kempker-Cloyd v. Department of Justice*, W.D. Mich. (1999). An agency must search "those files which officials expec[t will] contain the information requested." *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 30 n.38 (D.D.C. 1998). Agencies cannot structure their search techniques so as to deliberately overlook even a small and discrete set of data. *See Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked).

52) It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)).

53) The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352

(1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Ibid.*

54) Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n.3; *Consumer Fed'n of America,* 455 F.3d at 287; *Burka*, 87 F.3d at 515.

55) If it is likely that responsive records exist on non-official email accounts (or equipment) it is for the agency to search an employee's private accounts and equipment. *See, e.g*., August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher C. Horner, Competitive Enterprise Institute in response to NOAA FOIA#2010-00199, stating in pertinent part, "NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions." (p. 2).

56) If a requester presents an agency with evidence that it overlooked responsive documents, it must act upon it. *Campbell v. Department of Justice*, 164 F.3d 20, 28-29 (D.C. Cir. 1999). "[A] law-abiding agency" must "admit and correct error" in its searches "when error is revealed." *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986). In *Friends of Blackwater v. Department of the Interior*, this court held it was

"inconceivable" that no drafts or related correspondence existed of documents produced from the agency's office existed, and found the search inadequate on those grounds. 391 F. Supp. 2d 115, 120–21 (D.D.C. 2005).

FIRST CLAIM FOR RELIEF
Release of Certain Records Sent To or From Administrator Blumenfeld's Comcast.net Account -- Declaratory Judgment

57) Plaintiff re-alleges paragraphs 1-56 as if fully set out herein.

58) EPA is required to respond to requests within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i).

59) EPA owed Plaintiff a substantive response by March 26, 2013.

60) Plaintiff provided EPA with evidence of Administrator Blumenfeld's use of a non-official email account for work-related correspondence.

61) EPA is aware of this practice and has had to repeatedly caution staff about its impropriety. *See, e.g.,* April 8, 2013 Memorandum from Bob Perciasepe, Acting Administrator, to the Honorable David Vitter, Ranking Member, Senate Committee on Environment and Public Works, at 1-2 (admitting that "the use of private, non-official email by EPA employees while conducting work-related activities has occurred," despite "guidance to employees . . . not to use personal email for official business, except for emergencies").

62) FOIA requires all doubts to be resolved in favor of the requestor, and of disclosure.

63) Plaintiff is owed an adequate search and production responsive to Plaintiff's request including of Mr. Blumenfeld's Comcast.net email account (given his known work-related use of it).

64) Plaintiff has sought and been denied production of responsive records representing work-related correspondence.

65) Plaintiff has a statutory right to the information it seeks.

66) EPA refused to respond to Plaintiff's request.

67) Plaintiff has constructively exhausted its administrative remedies.

68) Plaintiff asks this Court to enter a judgment declaring that

i. EPA records sent to or from any account used by Administrator Blumenfeld for work-related correspondence as described in Plaintiff's request at issue in this matter are agency records, subject to release under FOIA unless subject to one of that Act's mandatory exclusions;
ii. EPA has failed to provide records responsive to Plaintiff's request;
iii. EPA's denial of Plaintiff's FOIA Request seeking the described records is not reasonable, and does not satisfy EPA's obligations under FOIA;
iv. EPA's refusal to produce the requested records is unlawful; and
v. EPA must release the requested records.

SECOND CLAIM FOR RELIEF
Release of Certain Records Sent To or From Administrator Blumenfeld's Comcast.net Account -- Injunctive Relief

69) Plaintiff re-alleges paragraphs 1- 68 as if fully set out herein.

70) Plaintiff is entitled to injunctive relief compelling EPA to produce all records responsive to its request described, *supra*.

71) Plaintiff asks this Court to enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining EPA from further withholding responsive records and ordering the EPA to produce to Plaintiff within 10 business days of the date of the order the described, requested records relating to EPA operations or activities, or a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

72) Plaintiff re-alleges paragraphs 1-71 as if fully set out herein.

73) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

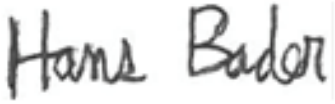
74) This Court should enter an injunction ordering EPA to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

75) Plaintiff has a statutory right to the records that it seeks, EPA has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 2nd day of May, 2013,

Christopher C. Horner
D.C. Bar No. 440107



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