APPEAL UNDER THE FREEDOM OF INFORMATION ACT
AND
NOTICE THAT OSTP MUST INFORM NATIONAL ARCHIVIST OF REMOVAL OR POSSIBLE DESTRUCTION OF RECORDS

February 18, 2014

Office of Science and Technology
General Counsel Rachel Leonard
Old Executive Office Building, Room 431
Washington, DC 20502

BY ELECTRONIC MAIL– ostpfoia@ostp.eop.gov

RE: **Freedom of Information Act Appeal -- FOIA No. 14-02**

Dear Ms. Leonard,

We are in receipt of your letter dated February 4, 2014 representing an initial determination that the above-cited FOIA request was not in fact a request, "Because OSTP understands the records you requested to be beyond the reach of FOIA." Denial Letter, OSTP FOIA No. 14-02, February 4, 2014. In the event it is not an initial determination, then OSTP has failed to provide the required response. 5 U.S.C.A. § 552(a)(6)(A)(i); *see also Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013).

Therefore we appeal this adverse determination, while also reserving our rights to pursue judicial review on the grounds of futility of administrative appeal as evidenced by OSTP's

election to not respond but to ignore the contents of CEI's request, which covered all relevant issues and authorities including how the requested records are covered by FOIA. Further, OSTP's determination failed to notify CEI of its right to appeal which, rather than shielding an agency from judicial review invites it.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552 et seq. Your February 4, 2014 letter is either an adverse determination, in claiming CEI's request failed to sufficiently identify FOIA-covered records despite plainly doing so (as detailed again, *infra*), or a refusal to provide the required response. Either way it relies on a rationale contradicting all relevant authority and precedent on the topic of whether the records CEI sought are subject to FOIA, most egregiously, even OSTP's own "Holdren memo" (see *infra*). Further, all procedural rules have been complied with as this request is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Appeal under the Freedom of Information Act" and includes a copy of the underlying request (Ex. 1), (4) sets forth grounds for reversal, and (5) was filed within 30 days of February 10, 2014, which is the date we received your initial determination dated February 4, 2014 and postmarked February 6, 2014.

II. PROCEEDINGS BELOW

This appeal involves one FOIA Request, sent by electronic mail to OSTP's FOIA officer on October 16, 2013, that sought:

> copies of all **policy/OSTP-related email** sent to or from jholdren@whrc.org (including as cc: or bcc:). We are aware that White House science advisor John Holdren maintained this account after joining the White House, and that **he used this address/account for**

> **OSTP-related correspondence**. We also state on information and belief that Mr. Holdren corresponded on such matters with non-governmental individuals, as well, during his employment at OSTP.

Request at 2 (**emphases** added).

The request then asserted:

> This entails searching jholdren@whrc.org. It makes sense for OSTP to search Mr. Holdren's OSTP account(s) as discussed, *infra*, but this request is for responsive records on the cited account, which was used for correspondence relating to Mr. Holdren's duties at OSTP.[1]

Id.

That discussion referenced in the request set forth OSTP's obligation to obtain all copies of such correspondence that are "on the cited account", as they are presumptively agency records -- in which case, all copies obtained, as required by law, would be responsive to CEI's request -- just as Mr. Holdren was required to copy OSTP (see "Holdren memo", *infra*). Regardless of where they are held, as CEI detailed, the described records are covered by FOIA and potentially responsive barring application of one of FOIA's none exemptions (none of which OSTP cites in its February 4, 2014 letter). In short, as drafted CEI's request ensures that, even in the event Mr. Holdren resists access to this non-official account and/or OSTP resists complying with FOIA, by being placed on notice of these records its is obliged to obtain them, and recognize them as potentially responsive. This proved somewhat prescient, it seems, given OSTP's apparent effort to read the records out of FOIA with a strained interpretation -- for which it took more than two

[1] In addition to the request seeking OSTP-related email, wherever located, the Email transmitting the request was titled "Subject: FOIA Request Seeking certain work-related emails from John Holdren's non-official email account used for policy/OSTP-related correspondence".

extra months of deliberation, and consultation with (a presumably, by this response, reluctant) Mr. Holdren to arrive upon.

That interpretation is apparently that if OSTP and Mr. Holdren have not been complying with the law, and now continue refusing to comply with their legal obligations under FRA, FOIA and other federal law and policy, they can exempt otherwise FOIA-subject records from the Act's coverage. There is no precedent for such an interpretation, which surely is why OSTP cites none.[2]

It seems from OSTP's response that neither it nor Mr. Holdren have complied with their respective requirements to provide and to obtain copies of all such correspondence using a non-OSTP account for work-related email. OSTP chose to instead offer an illusory distinction between the location of the requested records (which were requested in whichever location they are being held, although the key to their responsiveness is their content, not their location, see *infra*), and their status as responsive records in order to avoid processing this request.

Yet it is well-established that an employee who chooses to perform public business on private accounts or equipment thereby makes that account or equipment subject to FOIA. OSTP, subject to National Archives Records Administration (NARA) rules, is fully aware of this.

By OSTP's February 4, 2014 letter, it plainly did not search either email account. As such, OSTP is also implicitly asserting that it has neither requested Mr. Holdren comply with the

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[2] We of course cannot assert with certainty whether this represents a misreading of our request or mere effort to delay. We do know our wording ensured OTSP must produce responsive records given the Federal Records Act and FOIA, and that OSTP has an ongoing obligation to obtain copies of all such correspondence, and that specifically as a result of our request it was obligated to obtain therm. As such, the claim that the records are on a private server have no relevance to a FOIA request for OSTP's copies, and no law provides for such distinction. One reasonable test of the seriousness with which the request was treated is whether OSTP notified the National Archivist as required, if some insight is needed in subsequent proceedings.

law or notified the National Archivist of the possible loss of records, as required under 44 U.S.C. 3105.

Regardless, this seems a rather transparent effort to use FOIA as a withholding statute, as opposed to a disclosure statute, contrary to all judicial precedent on the Act going back to *EPA v. Mink*, 410 U.S. 73 (1973).

As such CEI appeals while reserving all rights to seek judicial review for OSTP's failing to respond as required under FOIA.

OSTP claiming our request was not in fact a FOIA request is a misapplication of the law. We do not feel we are therefore required to administratively appeal, but do so without waiving or ceding any rights to obtain judicial relief in the interim.

Background to this Records Request

As it has with numerous other senior administration officials, CEI has established Mr. Holdren's use of this non-official account jholdren@whrc.org in the conduct of his public business.

All correspondence made or received by federal officials in connection with the transaction of public business is in fact covered by FOIA, which takes the broadest view of "record" of all relevant federal statutes.[3] Under he Federal Records Act (44 U.S.C 3301 et seq.) Mr. Holdren was and remains required to copy OSTP on all such correspondence using a non-OSTP account, whether contemporaneously or, if later discovered as appears to be the case here,

[3] *See e.g.*, EPA acknowledging that "[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." *See*, *e.g.,* Environmental Protection Agency, *What Is a Federal Record?*, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. *See, e.g.*, *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency ("**Can I use a non-EPA account to 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).

at a subsequent date; he must do so at minimum when OSTP exercises its duty to require that act. OSTP has both the right an the obligation to obtain copies of the requested records, under t, and the right and obligation to obtain these copies under FOIA. That duty is not discretionary, on the part of either Mr. Holdren or OSTP.

Under FRA, in part to ensure compliance with FOIA, Mr. Holdren was obligated to copy his OSTP account on any correspondence relevant to his OSTP employment sent or received by the identified WHRC.org account, and has a continuing obligation to provide those records, either electronically or in paper format. for work-related correspondence. OSTP had and has the obligation to obtain and preserve such correspondence as it would were the records properly preserved in or on an OSTP account/system.

We are interested in OSTP's compliance with its legal obligation to maintain and preserve electronic mail correspondence relating to the performance of official business as federal records and agency records, and its obligation to obtain copies of such records when created on non-agency accounts or devices (a practice which its regulations also discourage but which we and congressional investigators have established is nonetheless widespread). This now includes OSTP's willingness to notify the National Archivist as required (see *infra*).

Further, we wish to determine the extent of this emailing practice described, above, that we have discovered.

<u>Note about OSTP's and Mr. Holdren's continuing legal obligations</u>

We and others have established a widespread pattern of federal government employees using private emails and computers that, regardless of intent, evades (but does not, as a legal matter, defeat) federal record-keeping and other transparency laws including the Presidential

Records Act, Federal Records Act and FOIA.[4] We are also aware of an administration claim in response to one such revelation, "A White House spokeswoman said [private] e-mails are not subject to the FOIA."[5] Given that the content reveals this statement meant that emails on a non-official account are not subject to FOIA by virtue of their location, this position is simply untenable. Yet this appears to be the posture assumed by OSTP in its February 4, 2014 letter.

Courts, like the law and Mr. Holdren himself in his "Holdren memo", beg to differ. *Memorandum of Opinion, Competitive Enterprise Institute v. EPA,* 12-cv-1617, January 29, 2014, at 30 (Boasberg, J) (FOIA requesters "can simply ask for work-related emails and agency records *found in the specific employees' personal accounts*; requesters need not spell out the email addresses themselves." (*emphasis* added).

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[4] *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/; 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"). *See* Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; *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, 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, e.g.*, *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.

[5] Jessica Guynn, "Watchdog Group Requests White House Official's E-mail After Google Buzz Mishap," *Los Angeles Times Technology Blog*, Apr. 1, 2010, http://www.consumerwatchdog.org/story/watchdog-group-requests-white-house-officials-e-mail-after-google-buzz-mishap.

See also, e.g., Landmark Legal Foundation v. EPA, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5.[6]

Mr. Holdren properly asserted his (and OSTP's) responsibilities when, after one OSTP employee was exposed to be engaging in this practice, he reaffirmed that forwarding such mail is mandatory. His May 2010 memo to all staff stated in pertinent part:

> **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 FRA**. In order to minimize the need to forward emails from personal accounts, please advise email senders to correspond with you regarding OSTP-related business on your OSTP account only.[7]

(**emphases** added).

The short version of the applicable legal principles is that **using private assets to perform public business while impermissible does not succeed in making that any less the public's business; not forwarding the emails, in further violation of the law, does not exempt records from the law and therefore is not a useful means of evading or exempting records from transparency laws**. They are still subject to FOIA's reach, wherever they are.

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[6] Summary judgment precluded due to inadequate search where "EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts *that were in its possession and control*," despite the existence of "evidence that upper-level EPA officials conducted official business from their personal email accounts." (italics in original); *id.* at *8, noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."

[7] Memo from OSTP Director John Holdren to all OSTP staff, *Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge*, May 10, 2010, available at http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf (herein, "Holdren memo").

If in fact OSTP has not contemporaneously obtained copies of all of Mr. Holdren's such email then similar "corrective action" as OSTP took in the above-referenced instance is again in order regarding Mr. Holdren, and now to satisfy this request under FOIA.

We are confident that OSTP has taken notice of the above-referenced pattern of Obama administration employees -- beyond merely the OSTP employee in the above-referenced incident of which OSTP is inescapably aware and which now so inconveniently dogs the Office in this matter -- have been found to be regularly using private email to conduct public business, and that these are subject to FOIA. Other examples include even the *New York Times* acknowledging the practice of using private email accounts as the preferred means of contacting lobbyists.[8] We also have seen that employees deciding to use unofficial email accounts for public business typically choose, to little surprise, to not forward copies of any such mail to their government email account for proper retention and preservation according to the rules.

Importantly, agencies are therefore increasingly called to search an employee's private accounts and equipment. For example, CEI has recently confronted this issue involving EPA Regional Administrators. EPA produced former Region 8 Administrator James Martin's work-related 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)(FOIA 08-FOI-00203-12).

Similarly, again because these emails represented the conduct of or otherwise related to official duties, Martin subsequently turned over to congressional investigators numerous other

[8] Eric Lichtblau, "Across From White House, Coffee With Lobbyists," *New York Times*, June 24, 2010, http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?_r=1&scp=4&sq=caribou&st=cse.

emails from the same account.[9] EPA produced these records to plaintiff in response to EPA FOIA-R8-2014-000358.

CEI also obtained several hundred work-related emails from Region 9 Administrator Jared Blumenfeld's Comcast.net account in response to FOIA EPA-R9-2013-007631, and Region 2 Administrator Judith Enck's AOL account in response to FOIA EPA-R2-2014-001585.

CEI also confronted this issue involving former National Oceanic and Atmospheric Administration (NOAA) official Susan Solomon, whose non-official account NOAA searched to respond to FOIA#2010-00199 (*see infra* at 27).

This is policy is also reflected in U.S. federal statute (FRA 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 United States Government Accountability Office, "Report to the Ranking Member, Committee on Finance, U.S. Senate: NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. Oversight and Management Improvements Initiated, but More Action Needed," GAO-11-15, October 2010, http://www.gao.gov/assets/320/310933.pdf.

III. OSTP HAS FAILED TO SATISFY ITS OBLIGATIONS UNDER FOIA (AND FRA)

This is an administrative appeal for OSTP's improper denial of a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, or more accurately its refusal to acknowledge a

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[9] *See* Press Release and Letter from Letter from David Vitter, Ranking Member, Senate Committee on Environment and Public Works and U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa (R-Calif.) to Bob Perciasepe, Acting Administrator, Senate Committee on Environment and Public Works (Minority), *In Light of New Information, Vitter, Issa Continue Investigation into Inappropriate Record Keeping Practices at EPA*, May 13, 2013, http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9f04b9b3-9d61-b58f-525b-18ff44d2683f.

properly made request for certain "agency records" reflecting the conduct of or otherwise relating to agency business.

The FOIA request at issue in this appeal submitted on October 16, 2013 sought copies of work-related emails sent to or from a senior federal government appointee using a non-official email account for certain of his work-related correspondence.

OSTP failed to produce one record or otherwise a substantive response to any of these requests. On its face, OSTP's response also indicates it declined to take any step toward processing this request.

OSTP must now produce records responsive to appellant's request.

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.

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.

When federal employees find themselves having corresponded on work-related issues on non-official accounts, they are required to copy their office, because all such correspondence are possibly "agency records" under the Federal Records Act (44 U.S.C. § 3301), and more likely

are covered by FOIA.[10] Similarly, when agencies learn of such correspondence or the use of such accounts for work-related correspondence they must obtain copies.

This practice of creating work-related correspondence, generally unknown to and unaccessible by other employees of the employer agency -- for FOIA, congressional oversight or discovery requests -- and therefore solely under the control of private parties, until they are made known by others, also violates other obligations of federal officials, and potentially other laws.

Until March 19, 2009 Mr. Holdren was Director of the environmentalist pressure group "Woods Hole Research Center", a position he was required to relinquish to occupy his appointed position in the federal government to work on the same issues, with many or all of the same people as in his position with the federal government. WHRC's board of directors is a *Who's Who* of the environmentalist pressure group world. The group and/or its officers and employees stood to benefit from OSTP decisions or information, and had interests potentially in conflict with OSTP's. Regardless, WHRC had no right to control these records.

Maintaining this address constituted a conflict of interest by Mr. Holdren, but regardless all correspondence on that account during her federal employment was possibly a federal record and most or all was covered by FOIA.

When the non-official account being used is not the employee's private account but on the computer system of, and thereby under the control of, a third party such as a former employer (Woods Hole Research Center), these accounts' use is further problematic in that this is the means by which a still-relevant set of individuals knows to correspond, and still does correspond

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[10] *See also e.g.*, 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, at p. 37; *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency (FN 3, *supra*).

with the individual who is now a government employee, making most or all such correspondence now a potential federal record and all subject to FOIA.

Other problems particular to this practice include providing other parties direct access to and control over public records and potentially over sensitive information, in which they might have a unique interest.

Of course allows for destruction of those possible records with no safeguard that federal records are not lost as a result.

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

Not knowing if Mr. Holdren was indeed following the law while also breaking it in his use of this account in its request CEI explained to OSTP why it also made sense to search Mr. Holdren's OSTP account.

OSTP searched neither account, according to its February 4, 2014 letter.

OSTP had and has an obligation to obtain all copies of requested records, just as Mr. Holdren had and has the obligation to provide them to OSTP.

OSTP owed CEI a substantive response to its request FOIA 14-02 by November 14, 2013.

On February 4, 2014, OSTP sent a letter by regular mail stating in pertinent part, "OSTP is unable to search the 'jholdren@whrc.org' account for the records you have requested because that account is under the control of the Woods Hole Research Center, a private organization.

Because OSTP understands the records you requested to be beyond the reach of FOIA, OSTP considers your request unperfected." Denial Letter, OSTP FOIA No. 14-02, February 4, 2014.

By not treating CEI's request as a FOIA request, although that request detailed the requirements of the Federal Records Act, FOIA, OSTP policy, judicial precedent and the Holdren memo, all making plain that employees cannot exempt records from the law by keeping them from the control of others in their agency and that agencies have an obligation to obtain such copies just as the employee has an obligation to copy his employer agency, OSTP has failed to respond.

Work-Related Emails are Subject to and Possible Agency Records Under FOIA

CEI and others have exposed the practice by executive branch employees using non-official email accounts to conduct official duties, without copying the employer office or the employer office otherwise obtaining required copies, or notifying the National Archivist as required, to be rampant. Regardless of intent, this practice violates also results in the frustration of federal record-keeping and disclosure laws. *See Landmark Legal Foundation v. E.P.A*., 2013 WL 4083285, *6 (D.D.C. Aug. 14, 2013).

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.

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).

"The definition [sic] of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." *See e.g.,* Environmental Protection Agency, *What Is a Federal Record?*, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. The Federal Records Act requires a record 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).

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.

Agencies are clear about this in policy.[11] OSTP is even more clear on this issue. After being informed that one of its officials was using non-official email for official business (just as we now know he was), Director Holdren 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].[12]

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[11] *See* FN 3, *supra* (EPA). Also, DOE acknowledges that fulfillment of these requirements, which originate in the Federal Records Act of 1950 44 U.S.C. 3101 *et seq*., the E-Government Act of 2002 and other legislation means that DOE must "Capture and manage records created or received via social media platforms, including websites and portals, or from personal email used for Department business", and "Ensure that departing Federal employees identify and transfer any records in their custody to an appropriate custodian, or the person assuming responsibility for the work." *See* "Your Records Management Responsibilities", U.S. Department of Energy, Office of IT Planning, Architecture, and E-Government, Office of the Chief Information Officer, July 2010, available at http://energy.gov/sites/prod/files/cioprod/documents/Your_Records_Management_Responsiiblities__2_.pdf. *See also*, DOE Order 243.1A, Records Management Program, http://energy.gov/sites/prod/files/o243%201a_Final_11-7-11.pdf, replacing similar requirements found in DOE Order 243.1, Records Management Program, 2-3-06. *See also, e.g.,* September 11, 2012 *Letter* from Morgan Wright, U.S. Department of Energy, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and September 11, 2012 *Letter* from Eric J. Fygi, Deputy General Counsel, U.S. Department of Energy, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, affirming that DoE officials' work-related emails conducted on non-official accounts potential status as agency records and which therefore must be produced by the employee to the employee's agency.

[12] May 10, 2010 "Holdren Memo", FN 6, *supra*, at 1-2.

FOIA asserts the broadest view of "records" among the relevant federal statutes. It covers emails sent or received on an employee's personal email account if their subject relates to official business. *See e.g.*, Senate Committee on Environment and Public Works, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

As noted on pages 7-8, *supra*, the U.S. District Court for the District of Columbia recently has twice addressed on this problem and neither ruling supports OSTP's actions in this matter.

OSTP Owes CEI a Reasonable Search of All Locations Likely to Hold Potentially Responsive Records

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).

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.

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). *See also, e.g., Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5 (summary judgment precluded due to inadequate search where "EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts *that were in its possession and control*," despite the existence of "evidence that upper-level EPA officials conducted official business from their personal email accounts") (italics in original); *id.* at *8 (noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."); Michael D. Pepson & Daniel Z. Epstein, *Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?*, 13 Engage J. 4, 4 (2012) (FOIA covers emails sent using private email accounts); Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 (FOIA "includes emails sent or received on an employee's personal email account" if subject "relates to official business"), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; *accord Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (officials' private email addresses covered under open-records laws); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96 (Pa.Cmwlth 2012) (same).

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).

The search also should be free from conflict. *See e.g*., *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).

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).

OSTP Owed and Has Failed to Provide CEI a Substantive Response to its Request

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).

A substantive agency response means that 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").

Agencies must at least gather, review, and 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 CREW v. FEC*.

FOIA specifically requires agencies to immediately notify requesters 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).

OSTP has not provided any indication it is in fact processing CEI's request, or sought and made its case for an extension of time to respond to either request as required when "exceptional circumstances" exist.

Holdren's Actions, and CEI's Request, Triggered Other OSTP Obligations

For the above-cited reasons, agencies which learn of possible removal or loss of records must inform the National Archivist.

Federal records in the form of work-related emails sent and received on non-official accounts have been removed from defendant federal agencies since the agencies lack access to or control of records which should by law be in their possession.

Specifically, the failure by OSTP to obtain and preserve work-related emails on non-official accounts has caused the removal of those federal records from the appropriate federal agency.

The Director of the White House Office of Science and Technology Policy has actual (and his subordinates have constructive, if not actual) knowledge of the failure to obtain and preserve federal records in the form of work-related emails sent and received on non-official accounts.

The head of any Federal agency has an obligation to notify the Archivist of the United States whenever "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head come[s] to his attention." 44 U.S.C.A. § 3106.

The head of any Federal agency has a further obligation to "initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency." *Id*.

The knowledge on the part of OSTP triggered the obligation under 44 U.S.C.A. § 3106 to notify the Archivist of the United States and the Attorney General, in order to recover those records removed.

OSTP has never notified the Archivist or the Attorney General regarding the failure to obtain and preserve or prevent the removal of the federal records, or recover the federal records described in this complaint.

The failure by OSTP to take remedial action and to notify the Archivist and the Attorney General of the removal of the documents despite clear statutory mandates is directly relevant to CEI's request in that, as explained supra, this appears to be OSTP's excuse for claiming CEI's request is not a request. It also is actionable under the APA.[13]

With the head of a Federal agency (OSTP) having failed to take action in compliance with the obligation of 44 U.S.C.A. § 3106, CEI has a right to seek to compel such compliance.[14]

Further, it is a violation of the U.S. Code to willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy any record, proceeding, paper, document, or other thing, filed or

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[13] *See Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) ("the FRA *requires* the agency head and Archivist to take enforcement action" in response to destruction of records; "On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.").

[14] *See Id.*

deposited with any clerk or officer of any court of the United States, or in any public office, or with any public officer of the United States, or attempt or act with intent to do so.[15]

OSTP Director Holdren has previously admonished OSTP employees for the same practice and instructed them to copy their office on all work-related correspondence from non-official email accounts.

Notwithstanding this, OSTP asserted that CEI's request was not in fact a FOIA request because it sought emails Holdren had placed under his sole control, in contravention of the Federal Records Act, OSTP policy, judicial precedent and the "Holdren memo." ("OSTP is unable to search the 'jholdren@whrc.org' account for the records you have requested because that account is under the control of the Woods Hole Research Center, a private organization. Because OSTP understands the records you requested to be beyond the reach of FOIA, OSTP considers your request unperfected." Denial Letter, OSTP FOIA No. 14-02, February 4, 2014).

CEI is owed an adequate, non-conflicted search and production responsive to its request including of the identified non-official email account given the employee's known work-related use of this account.

On appeal OSTP's general counsel should produce all responsive records within 20 working days, notify the Archivist of the United States, and initiate actions through the Attorney General about the removal of federal records permitted out by the Administrator and to assist the Attorney General in initiating an enforcement action to recover those records.

[15] 18 USC § 2071 - Concealment, removal, or mutilation generally.

OSTP Has an Obligation to Enforce Federal Law and Policy to Stop the Expanding Use of Non-Official Email Accounts

As the House Committee on Oversight and Government Reform has noted, "The technological innovations of the last decade have provided tools that make it too easy for federal employees to circumvent the law and engage in prohibited activities."[16]

It seems that the present case represents an effort to do just that. By fulfilling its obligations to obtain all copies of responsive records OSTP can, if belatedly and despite the most recent resistance in its February 4, 2014 letter, work to minimize the chances for further violation.

Although EPA and Energy are among the agencies that have most thoroughly detailed these obligations, it is OSTP, in particular Director Holdren, that has most directly noted its own obligations, having specifically admonished employees against the practice of using non-official accounts for work-related correspondence when the practice by an OSTP official was exposed.[17]

In addition to having established that use of non-official email accounts for work-related correspondence is widespread within the federal executive branch, CEI also asserts, on information and belief, that work-related correspondence on private accounts are not searched for or produced in response to FOIA or congressional oversight requests for "records" or "electronic records."

The Government Accountability Office (GAO), addressing current electronic record practices, wrote in late 2010 that "almost 80 percent of agencies were at moderate or high risk of

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[16] Statement, House Committee on Oversight and Government Reform, "The Hatch Act: The Challenges of Separating Politics from Policy," June 21, 2011, http://oversight.house.gov/hearing/the-hatch-act-the-challenges-of-separating-politics-from-policy/. This statement was made in the context of a law precluding federal employees from using taxpayer-provided resources, including time, phones, computers, etc., to engage in certain unofficial activity, specifically politicking. It seems nearly everyone in Washington has their own anecdotal stories of observing Hatch Act violations, federal employees using private email accounts to perform political activity on official time.

[17] Holdren Memo.

improper destruction of records; that is, the risk that permanent records will be lost or destroyed before they can be transferred to NARA [National Archives Records Administrator] for archiving or that other records will be lost while they are still needed for government operations or legal obligations." GAO-11-15, at 18.

"The Archivist referred to these results as 'alarming' and 'worrisome'; in a subsequent oversight hearing, the director of NARA's Modern Records Program testified that the findings were 'troubling' and 'unacceptable.'" *Id.*, at p. 19.

Specifically as regards private 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*.). Where agency staff have access to external systems, 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." *Id*., at p. 37.

OSTP must establish safeguards against the removal or loss of records and making requirements and penalties known to agency officials and employees (44 U.S.C. 3105); it also must notify the National Archivist of any actual, impending, or threatened unlawful destruction of records and assist in their recovery (44 U.S.C. 3105). For the moment, however, it must cease its refusal to obtain the described records, and must report the possible loss of agency records to the National Archivist.

OSTP's own response to CEI establishes that it does not in fact ensure against this practice or otherwise satisfy its various obligations under federal law.

All Questions and Doubts Are to be Resolved in Favor of Disclosure

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)).

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." *Id*.

Accordingly, when an agency withholds requested documents or, e.g., claims a submitted request is not a request, 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. OSTP simply ignored CEI's extensively sourced request and declared it not a request.

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*., the above-cited examples of CEI's experience with agencies doing this at pages 9-10, *supra*; *see also* 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). OSTP declined to do this.

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*, the D.C. Circuit 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).

IV. PROCESSING CEI's REQUEST

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

If OSTP claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack**

Obama, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

We remind OSTP that it cannot withhold entire documents rather than producing their "factual content" and redacting the confidential advice and opinions. As the D.C. Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or

provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

That means, do not redact the requesting party and the Department's initial determination, or grounds there-for, in the event that determination was a denial. For example, OSTP must cease its pattern with CEI and others of over-broad claims of b5 "deliberative process" exemptions to withhold information which is not in fact truly antecedent to the adoption of an agency policy (*see Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978)), but merely embarrassing or inconvenient to disclose.

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

This discussion is detailed as a result of our recent experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[18]

1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the

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[18] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

operations or activities of government and is not primarily in the commercial interest of the requester").

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[]"). With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.

867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[19]

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, "insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

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[19] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like CEI, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well.

Indeed, CEI is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. Potentially responsive records reflecting whether or not OSTP has maintained and preserved a certain class of correspondence messages sent and received on a non-official account unquestionably reflect "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

The requested records directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever", and a practice that is increasingly being proved to be widespread within the administration (use of non-official email accounts for work-related correspondence), in that **they beg the question whether OSTP is properly maintaining certain OSTP-related records, created on an account that is not only not an official account but is administered by a senior OSTP official's former employer, plainly in violation of the Anti-Deficiency Act (31 U.S.C. § 1341), the Presidential**

Records Act (44 U.S.C. § § 2201-2207), and Federal Records Act (44 U.S.C. § 3301), yet remarkably maintained by Mr. Holdren after assuming his post despite the obvious impropriety of doing so. OSTP's stance in the face of actual knowledge of this account's use also raises questions about whether OSTP will fulfill its obligations described herein and of which, we must presume, it was previously unaware (other than its Director, whose actual knowledge is imputed to OSTP).

This promised transparency in its serial incarnations demanded and spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency").

Employees are discouraged but not prohibited from on occasion using private email accounts or personal computers, on an honor code, despite the obvious conflict of leaving it to the employee to decide what to turn over and also other sound arguments, for example that this constitutes unlawful use of voluntary or personal services banned by the Anti-Deficiency Act. As one U.S. consultant notes in this context, "If you work for a government agency ... sending official information on your personal account would place it outside of the controls in place to protect and retain email communications. Doing so is not only a compliance violation, but also gives the appearance of a willful and intentional attempt to circumvent the system and covertly hide your communications."[20]

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[20] Tony Bradley, "Mixing Business and Personal Email: Is It a Good Idea?," About.com Network Security, September 19, 2008, http://netsecurity.about.com/od/newsandeditoria2/a/palinemail.htm. *See also* 44 U.S.C. Sections 3105, 3106, which prohibit the actual, pending or threatened, removal, defacing, alteration or destruction of documents, including documents or records of a Federal Agency and set forth procedures in these events. *See also*, 18 USC § 2071 - Concealment, removal, or mutilation generally.

Per NARA and the Government Accountability Office, "[A]gencies are required to establish policies and procedures that provide for appropriate retention and disposition of electronic records. In addition . . . agency procedures must specifically address e-mail records: that is, the creation, maintenance and use, and disposition of federal records created by individuals using electronic mail systems."[21] "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.). Where agency staff have access to external systems, 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."[22]

It is up to the head of the agency learning of possible destruction or removal of records to notify the Archivist and initiate action against the employee; if he does not within a reasonable period of time, the Archivist "shall" ask the attorney general to do so (Criminal penalties, including fines or jail time for the unlawful destruction of records or documents, can be found in 18 USC § 2071 - Concealment, removal, or mutilation generally).

NARA regulations also state, "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system."[23]

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[21] 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. 6.

22 *Id*., at p. 37.

[23] 36 C.F.R. § 1236.22(a), "What are the additional requirements for managing electronic mail records?," http://www.archives.gov/about/regulations/part-1236.html.

It is not just of interest in the U.S. As one British media outlet put it after a Cameron-administration figure was found to have used a private email account to conduct public business, "**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**."[24]

These requirements and OSTP's refusal to comply with them, makes the issue inherently of public interest. Also, thanks to Congressman Henry Waxman we have established that the use of private email to conduct official business is a matter of tremendous public importance for the possible violation of federal record-keeping and preservation requirements (the Presidential Records Act or the Federal Records Act, depending on the office involved), and is a serious matter as is any effort to evade the law.[25]

CEI's request seeks records directly relevant to these requirements and this unfolding controversy.

Particularly after requester's recent discoveries using FOIA, its publicizing certain agency record-management and electronic communication practices, controversial OSTP correspondence (*e.g.*, various requests re: IPCC-related records), and CEI's other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency.

This request, when satisfied, will further inform this ongoing public discussion.

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[24] 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/.

[25] *See*, "Interim Report: Investigation of Possible Presidential Records Act Violations." Prepared for Chairman Henry A. Waxman, United States House of Representatives Committee on Oversight and Government Reform Majority Staff, June 2007, available at http://usspi.org/resources-emailsgone/interim-report.pdf.

We emphasize that **a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003). Regardless, we note for the record the original request and this Appeal establish a prima facie case of wrongdoing.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request. The disclosure of the requested records has an informative value and is "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the administration's transparency, returned in the above-cited search "study obama transparency", and the public records themselves that were released to the groups cited in those news reports contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration's own promises and continuing claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, would be arbitrary and capricious, as would be denial that shedding light on **this increasingly exposed practice** relevant to the issue would further and significantly inform the public. *See e.g.*, *Less Than Thorough: Flaws in Recent EPA OIG Investigation*, Senate Committee on Environment and Public Works, Minority, February 13, 2014.

More specifically, see the widespread media coverage of and public interest in this issue of use of private email accounts for work-related correspondence by senior administration officials, cited in FN 26, *infra*.

Further, CEI is preparing a report on the contents of Mr. Holdren's and other senior administration officials' (at *e.g.*, EPA, Treasury, DoE, OSTP) use of non-official accounts and what this reveals about administration officials' relationships with certain industry players, activist academics and environmentalist pressure groups. As noted, *supra*, congressional investigators are, as well.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that these are emails that can (and must) be obtained and held only by OSTP. Further, however, **this aspect of the important public debate, of the use by senior officials of non-official email accounts and related agency practices, is presently unfolding (*e.g.*, EPA has produced emails of three Regional Administrators whom CEI discovered were using their private email accounts for work-related correspondence, an issue which has become the subject of congressional oversight including a recent hearing**

and calls for inspector general scrutiny.[26] It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Through broad dissemination the disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. *CEI intends to broadly disseminate these records to as wide a segment of the population as it is able; in the recent past, it has show (as cited herein) that it is very able.*

It also intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the litany of exemplars of newsworthy FOIA activity, below, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to light important information about questionable email and record-keeping practices.[27] Like other agencies, OSTP has not exacted fees for these requests for the same reason it cannot now, and

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[26] Recent revelations, in addition to those high-profile examples CEI has found at EPA, include the Treasury Department. *See also* news coverage of discovery of how widespread the problem is, *e.g.*, C.J. Ciaramella, *Darrell Issa: IRS Officials Sent Private Data Over Personal Email Accounts*, Washington Free Beacon, Oct. 8, 2013, http://freebeacon.com/darrel-issa-irs-officials-sent-private-data-over-personal-email-accounts/; John Hayward, *IRS Officials Used Private Email to Handle Confidential Taxpayer Information*, Human Events, Oct. 8, 2013, http://www.humanevents.com/2013/10/08/irs-officials-used-private-email-to-handle-confidential-taxpayer-information/); Stephen Dinan, *EPA's use of secret email addresses was widespread: report*, THE WASHINGTON TIMES, Feb. 13, 2014; Jack Gillum, *Top Obama Appointees Using Secret EMail Accounts*, ASSOCIATED PRESS, June 4, 2013.

[27] *See e.g.,* CEI requests of OSTP 12-38(A), 12-43, 12-45.

also cannot now for all reasons stated herein, specifically in recent years relating to transparency and electronic record management practices.

Requester also broadly publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.[28] For a list of exemplar publications, please see http://cei.org/publications. Those activities are in fulfillment of CEI's mission. We intend to broadly disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique)(*See, e.g., www.openmarket.org,* one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and *www.globalwarming.org* (another CEI blog); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

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[28] Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See* ACLU of Washington v. U.S. Dep't of Justice, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also* Serv. Women's Action Network v. DOD, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012); *Electronic Privacy Information Center v. Department of Defense,* 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request)*; Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

CEI also is regularly cited in newspapers,[29] and law reviews and legal and scholarly publications.[30]

More importantly, with a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the "specialized knowledge" and "ability and intention" to broadly disseminate the information requested in the

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[29] Select print examples, only, to the exclusion of dozens of national electronic media broadcasts, include *e.g*., Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, THE WASHINGTON TIMES, Apr. 30, 2011, at A1. Other outlets covering this dissemination include Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, THE WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, THE NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, THE NEW YORK POST, Jan. 6, 2013, at 23. *See also*, Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, THE WASHINGTON TIMES, Apr. 9, 2013, at A4; Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, THE WASHINGTON TIMES, Apr. 2, 2013, at A1, Stephen Dinan, "Researcher: NASA hiding climate data", *Washington Times*, Dec. 3, 2009, at A1, Dawn Reeves, *EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013. Al Neuharth, "Why Bail Out Bosses Who Messed It Up," *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, "Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan," *Crain's Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, "You Might Suppose That President Obama Has His Hands ...," *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI's OpenMarket blog); Hal Davis, "Earth's Temperature Is Rising and So Is Debate About It," *Dayton Daily News*, Apr. 22, 2006, at A6 (citing CEI's GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, "Think-Tanking" (reprinting relevant commentary from OpenMarket); Mark Landsbaum, "Blogwatch: Biofuel Follies," *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, "Best of the Blogs," Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

[30] *See, e.g., See, e.g.,* Robert Hardaway, "The Great American Housing Bubble," 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program). *See also*, Bruce Yandle, "Bootleggers, Baptists, and the Global Warming Battle," 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI's GlobalWarming.Org); Deepa Badrinarayana, "The Emerging Constitutional Challenge of Climate Change: India in Perspective," 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, "Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources," 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, "The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives," 30 Denver Journal of International Law and Policy 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, "Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac, 6 North Carolina Banking Institute 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

After disclosure of these records, the public's understanding of this emerging and highly controversial practice by executive branch officials, and administration transparency and compliance with relevant laws, will inherently be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

As such, the requester has stated "with reasonable specificity that its request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event OSTP deviates from prior practice on similar requests and refuses to waive our

fees under the "significant public interest" test, we request OSTP proceed with processing on the grounds that we are a media organization, and request a waiver or limitation of processing fees on that basis pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...").

However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI's mission from pages 40-43, *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA,[31] because it satisfies the statutory test as a media outlet[32]: CEI not only serves as a regular source of public information and substantive editorial comment about this information to numerous national media outlets each of which warrant fee waiver, but also applies substantive editorial input in its own publications disseminating public information.

In addition to adding its editorial input to the widespread coverage of its FOIA requests

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[31] *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

[32] Examples of FOIA-derived CEI publications by undersigned include: *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks,* WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled,* WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012;*Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP WITH THAT, Jan. 14, 2013; *EPA Doubles Down on 'Richard Windsor' Stonewall*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013. See CEI's website for further publications reaffirming this "media" status for FOIA purposes.

and document productions in print publications, CEI regularly disseminates on broadcast media, and requesting counsel Horner appears regularly to discuss his work on national television and national and local radio shows, including weekly on the radio shows "Garrison" on WIBC Indianapolis and the Alan Nathan Show, which is nationally syndicated on Salem Radio Network.

The requested information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with OSTP activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

V. CONCLUSION

We expect OSTP to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

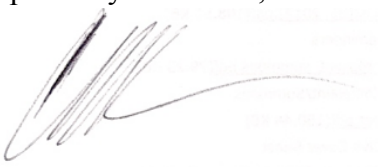
We expect all aspects of this request be processed free from conflict of interest. We request OSTP provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). OSTP must at least inform us 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; FOIA specifically requires OSTP to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal that; 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, both indicate that responsive documents must be collected,

examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform OSTP of our intention to protect our appellate rights on this matter at the earliest date should OSTP not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,



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