UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 14-765-GK
	)	
OFFICE OF SCIENCE AND TECHNOLOGY POLICY	)	
	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL PRESERVATION OF PRIVATE EMAILS

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INTRODUCTION

Defendant argues that no "preservation order is necessary here" because "Dr. Holdren has now submitted a sworn declaration attesting ... that he will continue preserving [the responsive] e-mails during the pendency of this litigation" and "will continue cooperating with OSTP regarding compliance with future court orders entered in this case, even after he leaves government service." Defendant's Memorandum (ECF No. 26) at 1-2. Defendant does not claim that these attestations are judicially enforceable, but only that we can trust in "Dr. Holdren's good faith." *Id.* at 2.

I. A Preservation Order is Necessary to Ensure the Future Availability of the Woods Hole E-mails

But the possibility, or even likelihood, that Dr. Holdren will act in good faith is not a reason to reject taking basic precautions against the risk that the emails will be lost. *See, e.g., Citizens For Responsibility And Ethics In Washington v. Office of Admin.*, 593 F.Supp.2d 156, 162 (D.D.C. 2009) ("Although OA's counsel are indeed officers of the court, *id.*, and the Court presumes that executive officials will act in good faith . . . the Court nevertheless agrees with CREW that, absent a court order punishable by contempt requiring the maintenance and preservation of the records here at issue . . . it would have no recourse if the documents were not so maintained and preserved").

A. Holdren's Voluntary Assurances Will Not Ensure the E-Mails' Preservation

At a bare minimum, the court should order Dr. Holdren to carry out the promises he has made in his Declaration, which otherwise may become unenforceable. Even if Dr. Holdren presently intends to preserve the emails and comply with future court orders, he could change his mind in

the future. He makes no secret of how unpleasant the mere prospect of turning over the emails is to him, how "reluctant" he would be to do it, and what a "significant" burden it would be.[1]

Such an order would merely require Dr. Holdren to keep his promises, and thus would not impose any real burden on him. *See* Defendant's Memorandum (ECF No. 26) at 21-22 n.4 (OSTP concedes that "an order to Dr. Holdren directing him to preserve the thumb drives containing the Woods Hole e-mail archives from his personal computers. . . would accommodate Dr. Holdren's personal privacy interests, while . . . ensuring that the e-mails remain available in the future."); *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433-34 (W.D. Pa. 2004) (creating a three-factor test, weighing the degree of concern about continued preservation of evidence, the irreparable harm likely to result from destruction, and any burdens caused by issuing a preservation order). It would simply preserve the status quo by requiring him to keep doing what he has already "voluntarily undertaken" to do, *see* Defendant's Mem. (ECF No. 26) at 1; *see id.* at 16 (conceding that under *CREW*, the fact that a preservation order simply "preserve[s] the status quo" militates in its favor).

By contrast, the absence of an order could easily lead to broken promises, which might not even be judicially redressable. If he later does not live up to his promises, that will not automatically establish perjury, since it could result from a change in his intentions over time, rather than deceit on his part now. As the First Circuit has explained,

> "A representation of the maker's own intention to do ... a particular thing is fraudulent if he does not have that intention" at the time he makes the representation.. . . Likewise, "a promise made without the intent to perform it is held to be a sufficient basis for an action of deceit.". .

[1] *See* Holdren Decl. ¶¶12-13 ("I am reluctant to offer to deposit a copy of my WHRC emails with the Court" based on their "highly-sensitive nature"; "I think requiring Executive Branch employees to turn over the contents of their personal email accounts . . . would constitute a significant disincentive in the recruitment and retention of federal employees, including in senior positions such as mine").

> *On the other hand, if, at the time he makes a promise, the maker honestly intends to keep it but later changes his mind or fails or refuses to carry his expressed intention into effect, there has been no misrepresentation. . .This is true "even if there is no excuse for the subsequent breach. . .".*

Palmacci v. Umpierrez, 121 F.3d 781, 786-87 (1st Cir. 1997) (italics added) (citations omitted).[2]

To show perjury, plaintiff would later have to show not just a failure to live up to these commitments, but also his fraudulent "intention" at the time "when the agreement was entered into." Restatement (Second) of Torts § 530 cmt. d (1977). There are "obvious proof difficulties involved in trying to establish a defendant's state of mind" at an earlier time in this fashion, *In re Pearsall*, 2016 WL 3976479, *10 (W.D. Pa. July 19, 2016), and it is "unusual to have the present state of a person's mind be the subject of a false pretense or false representation" proceeding. *Id.* at *9. The speculative possibility that plaintiff would somehow be able to prove that elusive state of mind is not much of a deterrent, and certainly no assurance of preservation. Accordingly, it does not obviate the need for a preservation order. Moreover, the loss of documents sought in a FOIA request is irreparable harm,[3] and there will be no compensation if it later occurs.[4]

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[2] *See also In re Pearsall*, 2016 WL 3976479, **8-9 (W.D. Pa. July 19, 2016) (fact that lender "made the loan based on an [explicit] understanding that it would be used only for a new house," did not make borrower's "subsequent failure to restrict the use of the loan for that purpose" a "false statement or false pretense"), *citing* Restatement (Second) of Torts § 530 cmt. d (1977).

[3] *See, e.g., Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir.1988) (delay in producing responsive records that results in "stale information" justifies injunctive relief); *Union Pac. R.R. Co. v. U.S. Envtl. Prot. Agency*, 2010 WL 2560455, *2 (D. Neb. June 24, 2010) (granting temporary restraining order in light of evidence supporting "inference that" the agency has deleted "relevant emails" responsive to FOIA request, which constituted sufficient "threat of irreparable harm" by impeding requester's "ability to gather data pursuant to its FOIA requests"); *Union Pac. R.R. Co. v. EPA*, 2010 WL 3455240, *2 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA to "preserve relevant electronically stored data").

[4] There are no money damages available in FOIA cases, so any such destruction is not compensable. The absence of compensation is an additional reason why the ensuing harm qualifies as irreparable. *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536,

By contrast, if this court issues an order instructing Dr. Holdren to follow through on his assurances, they will become enforceable (through contempt proceedings). That will reduce the risk of non-preservation.

B. There Is a Significant Risk of the Records Being Lost

Given how "reluctant" Dr. Holdren is to turn over the records to the court, and how a "significant" burden doing so would be in his eyes,[5] there remains a significant risk of the records being lost in the future due to Dr. Holdren changing his mind and deciding not to cooperate anymore – unless the court orders him to preserve them. As discussed further below, Dr. Holdren's declaration also contains caveats and limitations that may undermine the efficacy of its assurances.

These representations may themselves not be that reliable to begin with. As OSTP concedes, "Throughout his time at OSTP, Dr. Holdren would sometimes send or receive work-related e-mail using the Woods Hole e-mail account." ECF No. 26 at 6, citing Holdren Decl. ¶7. As Dr. Holdren notes, "people would send emails to my WHRC address that were related to OSTP agency business." Holdren Decl. ¶6.

These admissions are in tension with OSTP's past suggestions that the account contained no work-related emails. *See* ECF No. 10 at 14 ("the e-mails on the WHRC account are not 'agency records' subject to FOIA."); ECF No. 7-8 at 22 ("Generously construed, CEI's Complaint alleges

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1543 (10th Cir. 1994) (because sovereign immunity barred "a legal remedy in damages," the "plaintiffs' injury was irreparable"). That fact distinguishes this case from a typical case involving a preservation order, where irreparable harm is less present. In a typical case, such as one involving civil discovery, the documents are a means to an end (to obtain evidence in support of a verdict on a substantive legal claim), not an end in and of themselves (as in a FOIA case); and monetary discovery sanctions and the ability to obtain jury instructions adverse to the party guilty of spoliation provide an element of compensation and deterrence.

[5] *See* footnote 1, above.

one specific instance of a federal record existing on a non-official e-mail account—namely, an e-mail produced from the EPA that revealed to CEI the existence of the WHRC account.").

The fact that he sent or received "work-related email using the Woods Hole e-mail account" "[t]hroughout his time at OSTP" suggests that there are a large number of responsive emails in the account that need to be preserved, and which can be lost in the absence of measures to preserve them.

Although Dr. Holdren allegedly had a "practice" to "forward [the work-related] e-mail to [his] official e-mail account at OSTP," Defendant's Memorandum (ECF No. 26) at 6, he does not claim that he always did so. His declaration merely claims it was a "customary practice," Holdren Decl. ¶7, to forward them, not that he always did. Customary practices are not always followed. *Perez v. El Tequila, LLC*, No. 12–CV–588–JED–PJC, 2015 WL 4173541, *9 (N.D. Okla. July 10, 2015) ("an agency's 'typical practice" does not mandate the conclusion that "specific actions [followed] from that general practice").

His failure to attest that he always followed this practice suggests that occasionally it was not. *See, e.g., Gray v. Great American Recreation Ass'n,* 970 F.2d 1081, 1082 (2d Cir.1992) (adverse inference drawn when a litigant fails to provide relevant information within its possession); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (adverse inference can be drawn from "the production of weak evidence when strong is available"); Wigmore, *Evidence In Trials At Common Law,* § 285 (Chadbourn rev. 1979) (The nonproduction of available evidence "permits the inference that its *tenor is unfavorable to the party's cause.*") (italics added).

Moreover, it is not clear what Dr. Holdren means by "work-related" (*see* Holdren Decl. ¶7), or how he determined which emails needed to be forwarded to his OSTP account. OSTP itself says that "the segregation of work-related e-mails from personal e-mails cannot be achieved using search terms," which begs the question of what standard was used. *See* Defendant's Memorandum

(ECF No. 26) at 19 (rejecting the approach for capturing all OSTP-related emails that CEI proposed in its motion). Dr. Holdren has not clarified what this means, let alone provided the criteria he used to make this determination (an email can be both related to agency business, and have personal content as well).

C. Any Forwarding of Emails By Dr. Holdren Did Not Preserve Them In Full

Even if Dr. Holdren did forward *all* these emails to his OSTP account, it still would not eliminate the need to preserve them in his WHRC account. Forwarding emails eliminates certain metadata contained in the header of the email, such as the email address of senders or recipients.[6] Forwarding also removes the list of recipients of an email who have been "blind carbon copied."[7] And even when senders and recipients are listed in a forwarded email, their email addresses may be lost due to forwarding: for example, when the name of a familiar sender or recipient appears in the "From," "To", or "cc" field, it may be stripped by the forwarding process of the underlying email address that would otherwise accompany their name, or be revealed by clicking on their name with one's computer mouse (*e.g.,* if the sender or recipient has their email address listed in the forwarding party's email address book).

Such hidden metadata in emails is a public record subject to disclosure under freedom of information laws, and citizens are entitled to the disclosure of the metadata associated with the original email sent to a government official. *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1153

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[6] *See Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 359 (S.D.N.Y. 2008) ("If the officials responded by forwarding their emails to the ICE contact person, the original email metadata was altered in the process," rather than being "preserved.").

[7] *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1151 (Wa. 2010) (forwarded email "did not list any other recipients that [sender] had sent it to," where she had "blind carbon copied all other recipients. As a result," blind-carbon-copy recipients names and email addresses did not show "as recipients" in the forwarded email).

(Wa. 2010) ("the metadata associated with [the] original e-mail … is a 'public record' subject to disclosure" under Washington State's freedom-of-information law, which is modeled on federal FOIA).

The loss of metadata due to forwarding means that CEI will often not be able to tell from forwarded emails whether the government officials listed as senders or recipients used their personal email addresses to conduct government business. But that is one of the key things this FOIA request was intended to shed light on. CEI's FOIA request made clear that its focus was on the "widespread pattern of federal government employees using private emails" to conduct agency business and, as part of that, "to determine the extent of this emailing practice" by Dr. Holdren. *See* ECF No. 7-1, at 3 (Motion to Dismiss, Exhibit 1, pg. 3).

The omission of recipients of blind carbon copies will also make it impossible to see what additional government officials may have been copied on the emails, to either their official or their private email addresses. That is so even though the identity of blind carbon copy recipients could not only be newsworthy in and of itself (such as where it could suggest *ex parte* communications), but also because it is information critical to any privilege claim that OSTP will likely make in withholding any such records.[8] (To withhold a record as privileged, the agency must list all authors and recipients of the record,[9] including all "copyees," to negate the possibility that it was "shared with outside parties and that [any] privilege was thereby waived."[10])

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[8] *Baxter Healthcare Corp. v. Fresenius Medical Care Holding,* 2008 WL 4547190, *1 (N.D. Cal. Oct. 10, 2008) (privilege log should list blind carbon copy recipients); *Castillo v. Government Acquisitions, Inc.,* 2009 WL 10310223, *2 (E.D. Va. July 31, 2009) (same); *Oosharem v. Spec Personnel, LLC,* 2008 WL 4458864, *3 (D.S.C. Sept. 29, 2008) (same).

[9] *See Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 88 (D.D.C.2009);*CREW v. DHS,* 648 F.Supp.2d 152, 163 (D.D.C. 2009).

[10] *NRDC v. Dept. of Defense*, 442 F.Supp.2d 857, 870 (C.D. Cal. 2006).

Even if the difference in metadata did not render the records in the WHRC account legally different from those forwarded to his official account (which it does), plaintiff could still seek them from the WHRC account. That is because FOIA does not "foreclose an individual from seeking the production of records already disclosed to him, particularly in a situation like the instant case where an individual seeks redundant documents in order to obtain a new piece of information." *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 104-05 (D.D.C. 2013). Nor is a FOIA requester precluded from obtaining records merely because they could hypothetically have been obtained from another source. *U.S. Dep't. of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (rejecting argument that records "were not 'improperly' withheld because of their public availability")

OSTP's representations about Dr. Holdren's purported "customary practice" may ultimately provide as little reassurance as its past misleading suggestions that the WHRC account did not contain work-related emails and records relating to agency business. *See* pp. 4-5, above. And the tension between its past and current positions itself warrants greater judicial scrutiny and oversight. *Negley v. FBI*, 658 F.Supp.2d 50, 58 (D.D.C. 2009) (variation in agency statements barred summary judgment, where agency first suggested entire database was searched, then "clarified" that "only one component" had been searched); *Landmark Legal Foundation v. E.P.A.,* 959 F.Supp.2d 175, 183 (D.D.C. 2013) (agency's record of "inconsistent filings, precludes . . . summary judgment" by suggesting possible agency "bad faith").

Given his longstanding use of this account to send and receive work-related email (the fact that "[t]hroughout his time at OSTP," Dr. Holdren sent or received "work-related e-mail using the Woods Hole e-mail account"), it seems unlikely that in each and every case he forwarded such emails to his OSTP account. That is especially true given the ambiguity in what emails he

deemed "work-related" (especially when its content entwines both OSTP-related and personal matters in the same email). Inevitably, one would expect at least occasional misclassifications. *See Competitive Enterprise Institute v. E.P.A.*, 67 F.Supp.3d 23, 34 (D.D.C. 2014) (in lawsuit seeking injunctive relief against agency for violating Federal records Act, "CEI adequately allege[d] that EPA 'failed to take action in compliance with the [FRA]'" in not preserving 5,000 personal text messages, even though the agency claimed that there were *no* uncopied agency records; this is because "it is implausible that EPA's Administrators would not have suspected the destruction of *any* federal records with the removal of over 5,000 Agency text messages").

Dr. Holdren's ambiguity-laden declaration provides little reassurance. It only states that he has taken steps to preserve the "WHRC emails existing on the local hard drives" of "every computer that is still in my possession that I used during the time that I understand to be at issue in this lawsuit." Holdren Decl. ¶8. "I have agreed . . . that I will maintain *those* preserved emails . . .I will continue preserving *those* emails." Holdren Decl. ¶9 (italics added).

He does not indicate whether he has made any effort to preserve the emails on the WHRC account itself (including turning off any auto-delete programs), or from his smart phone or instant-messaging devices. Nor does he make clear whether he has made any effort to recover the emails from computers he used to have and could still gain access to.

People can access usually access their personal email accounts even if the emails have never been downloaded to a particular computer, or are not found on their hard drive at all (this is certainly the case for Yahoo, Gmail, Hotmail, etc.[11]). Yet, Dr. Holdren has only taken steps "to ensure preservation of all WHRC e-mails *existing on the local hard-drives* of [certain] computers."

[11] *See, e.g., In re Stern*, 321 S.W.3d 828, 846 (Tex. App. 2010) (Yahoo "stores the emails of its users on Yahoo!'s servers rather than on the user's hard drive"); *Altisource Solutions, Inc. v. Quick Home Restore*, 2014 WL 308846 (Cal. App. Jan. 29, 2014) (noting that "emails from"

Holdren Decl. ¶9 (emphasis added). *See also* Defendant's Memorandum (ECF No. 26) at 10 ("The Woods Hole e-mail archives *existing on Dr. Holdren's personal computers* are being preserved, *see* Holdren Decl. ¶¶ 8-10, and thus no further action is presently needed") (emphasis added). He says nothing about whether he has taken steps to preserve them on any other devices he possesses other than computer "hard-drives." This is insufficient, because the issue under FOIA is not just what computer is in Holdren's "possession," but also what servers or other electronically-stored information are within his "control."[12]

One would expect Dr. Holdren to preserve not only email archives on a personal computer, but also email boxes on networks and other servers. Yet his declaration contains no such assurances, nor any indication that he sought to collect and preserve such collections of emails. "Emails are often backed up on a network server, so that even when deleted from the user's account," or from the user's individual computer, "it should [still] be recoverable from the Network Email Server." *Thompson v. Workmen's Circle Multicare Center*, 2015 WL 4591907, *17 (S.D.N.Y. June 9, 2015); *see also In re A & M Florida Properties II, LLC*, 2010 WL 1418861, *2 (S.D.N.Y. Apr. 7, 2010) (employer's email "system distinguishes an employee's 'live' email box from his or her 'archive' and 'deleted items' folders"; even "[w]hen an employee deletes an email from his or her mailbox," those "messages, like those moved into archives, remain on [the

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plaintiff's employee "would have survived a hard drive crash, because they would have been on Gmail's servers.")

[12] *See, e.g., Chicago Tribune Co. v. U.S. Dept. of Health & Human Services*, No. 95-C-3917, 1997 WL 1137641, *5 (N.D. Ill. March 28, 1997) (FOIA can reach documents even when they are "in the physical possession of a third party," such as those "produced by an independent contractor"; noting that either "possession or control may suffice for a withholding"), *citing Kissinger v. Reporters Committee*, 445 U.S. 136, 152 (1980) ("possession or control is a prerequisite to FOIA disclosure duties") and *Burka v. Department of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996) (FOIA reached records held away from an agency's offices by an independent contractor, when the agency had the ability to access them).

employer's] system."); *Orillaneda v. French Culinary Institute*, 2011 WL 4375365, *2 (S.D.N.Y. Sept. 19, 2011) ("employer reviewed employees' personal "email boxes" as well as their "present network email boxes" and "email archives."); *Trickey v. Kaman Indus. Technologies Corp.*, 2010 WL 3892228, *7 (E.D. Mo. Sept. 29, 2010) (to show compliance with "discovery obligations," defendant's Declaration should indicate that it "searched [both its] live data server," and any "separate storage archive" that may exist); *Procaps S.A. v. Patheon Inc.*, 2014 WL 11498060, *9 (S.D. Fla. Dec. 1, 2014) (to comply with discovery, employer's counsel and IT Department collected not only "emails located on [employer's] email server and email archives," but also on individual "computer hard drives," "file server directories," "shared server folders." "other external media such as flash drives," and "relevant hard copy files").

II. A Preservation Order Would Not Improperly Intrude on Any Privacy Interests

OSTP does not deny that "the FOIA request in question only seeks OSTP-related records, not records of a purely personal nature." ECF No. 26 at 19, quoting CEI's Mot. at 20. Yet it claims that a "preservation order" would improperly "intrude on Dr. Holdren's significant privacy interests." But no "privacy interest" exists "in a public record." *Nissen v. Pierce County*, 357 P.3d 45, 56 (Wash. 2015) (rejecting argument that requiring public employee to produce text messages on his private cell phone in response to a public records request would violate "various provisions of the state and federal constitutions" such as the Fourth Amendment). OSTP does not dispute this unequivocal holding, or the case law making clear that injunctions in FOIA cases can bind not only agencies, but also their employees, in mandating that they college and preserve potentially responsive records. *See, e.g., Union Pacific R. Co. v. EPA*, Civil Case No. 10-235, 2010 WL 2560455, *2 (D. Neb. June 24, 2010) (enjoining "Defendants and their employees" against

destroying documents, and requiring the identification and collection of potentially responsive records).

CONCLUSION

For the foregoing reasons, this court should grant an order to preserve the Woods Hole emails.

Respectfully submitted this 10th day of November, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, a copy of the foregoing Plaintiff's Reply In Support of Motion to Compel Preservation of Private Emails, was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Counsel for the Defendant automatically receiving this filing through the Court's CM/ECF System includes:

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