

ORAL ARGUMENT NOT YET SCHEDULED
No. 15-5128

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMPETITIVE ENTERPRISE INSTITUTE,
Plaintiff/Appellant,

v.

OFFICE OF SCIENCE AND TECHNOLOGY POLICY,
Defendant/Appellee.

On Appeal from the U.S. District Court for the District of Columbia
No. 1:14-cv-00765-GK, Honorable Gladys Kessler

JOINT APPENDIX

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Filed: 08/10/2015

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APPEAL,CLOSED,TYPE-I

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:14-cv-00765-GK**

COMPETITIVE ENTERPRISE INSTITUTE v. OFFICE OF
SCIENCE AND TECHNOLOGY POLICY

Assigned to: Judge Gladys Kessler

Case in other court: USCA, 15-05128

Cause: 05:552 Freedom of Information Act

Date Filed: 05/05/2014

Date Terminated: 03/10/2015

Jury Demand: None

Nature of Suit: 895 Freedom of
Information Act

Jurisdiction: U.S. Government Defendant

Plaintiff

**COMPETITIVE ENTERPRISE
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V.

Defendant

**OFFICE OF SCIENCE AND
TECHNOLOGY POLICY**

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Date Filed	#	Docket Text
05/05/2014	1	COMPLAINT against All Defendants (Filing fee \$ 400 receipt number 0090-3705420) filed by COMPETITIVE ENTERPRISE INSTITUTE. (Attachments: # 1 Civil Cover Sheet, # 2 Summons for U.S. Attorney, # 3 Summons for the agency, OSTP, # 4 Summons for the Attorney General)(Bader, Hans) (Entered: 05/05/2014)

05/05/2014		Case Assigned to Judge Gladys Kessler. (kb) (Entered: 05/05/2014)
05/05/2014	2	SUMMONS (3) Issued Electronically as to OFFICE OF SCIENCE AND TECHNOLOGY POLICY, U.S. Attorney and U.S. Attorney General. (Attachments: # 1 Consent Form, # 2 Notice of Consent)(kb) (Entered: 05/05/2014)
05/19/2014	3	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 5/12/2014. (Answer due for ALL FEDERAL DEFENDANTS by 6/11/2014.), RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. OFFICE OF SCIENCE AND TECHNOLOGY POLICY served on 5/12/2014, RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 05/12/2014. (Bader, Hans) (Entered: 05/19/2014)
06/05/2014	4	NOTICE of Appearance by Daniel Schwei on behalf of All Defendants (Schwei, Daniel) (Entered: 06/05/2014)
06/05/2014	5	Consent MOTION for Extension of Time to File Answer re 1 Complaint, by OFFICE OF SCIENCE AND TECHNOLOGY POLICY (Attachments: # 1 Text of Proposed Order)(Schwei, Daniel) (Entered: 06/05/2014)
06/06/2014	6	ORDER granting 5 Defendant's Consent Motion for Extension of Time; Defendant shall have up to and including July 11, 2014, in which to answer or otherwise respond to Plaintiff's Complaint. Signed by Judge Gladys Kessler on 6/6/14. (CL,) (Entered: 06/06/2014)
06/06/2014		Set/Reset Deadlines: Answer due by 7/11/2014 (CL,). (Entered: 06/06/2014)
07/11/2014	7	MOTION to Dismiss by OFFICE OF SCIENCE AND TECHNOLOGY POLICY (Attachments: # 1 Exhibit 1 - CEI's FOIA Request, # 2 Exhibit 2 - OSTP's Response to FOIA Request, # 3 Exhibit 3 - CEI's Letter of Feb. 18, 2014, # 4 Exhibit 4 - OSTP's Letter of Mar. 7, 2014, # 5 Exhibit 5 - CEI's Letter of Apr. 18, 2014, # 6 Exhibit 6 - Holdren Memo, # 7 Exhibit 7 - Holdren E-mail from EPA Production, # 8 Memorandum in Support, # 9 Text of Proposed Order)(Schwei, Daniel) (Entered: 07/11/2014)
07/28/2014	8	Memorandum in opposition to re 7 MOTION to Dismiss filed by COMPETITIVE ENTERPRISE INSTITUTE. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Text of Proposed Order)(Bader, Hans) (Entered: 07/28/2014)
07/30/2014	9	Consent MOTION for Extension of Time to File Response/Reply as to 7 MOTION to Dismiss by OFFICE OF SCIENCE AND TECHNOLOGY POLICY (Attachments: # 1 Text of Proposed Order)(Schwei, Daniel) (Entered: 07/30/2014)
07/31/2014		MINUTE ORDER granting 9 Defendant's Consent Motion for Extension of Time; Defendant shall have up to and including August 21, 2014, in which to file its Reply in support of its Motion to Dismiss. Signed by Judge Gladys Kessler on 7/31/14. (CL,) (Entered: 07/31/2014)
07/31/2014		Set/Reset Deadlines: Replies due by 8/21/2014. (CL,) (Entered: 07/31/2014)

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08/21/2014	10	REPLY to opposition to motion re 7 MOTION to Dismiss filed by OFFICE OF SCIENCE AND TECHNOLOGY POLICY. (Attachments: # 1 Exhibit 1 - Declaration of Eric Wachter, # 2 Exhibit 2 - E-Mail from Schwei to Bader & Kazman)(Schwei, Daniel) (Entered: 08/21/2014)
03/03/2015	11	ORDER granting 7 Defendant's Motion to Dismiss; Plaintiff's Complaint is hereby dismissed. This is a final, appealable Order. Signed by Judge Gladys Kessler on 3/3/15. (CL,) (Entered: 03/03/2015)
03/03/2015	12	MEMORANDUM OPINION to the Order granting Defendant's Motion to Dismiss. Signed by Judge Gladys Kessler on 3/3/15. (CL,) (Entered: 03/03/2015)
04/22/2015	13	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 11 Order on Motion to Dismiss by COMPETITIVE ENTERPRISE INSTITUTE. Filing fee \$ 505, receipt number 0090-4065752. Fee Status: Fee Paid. Parties have been notified. (Bader, Hans) (Entered: 04/22/2015)
04/23/2015	14	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 13 Notice of Appeal to DC Circuit Court. (znmw,) (Entered: 04/23/2015)
04/30/2015		USCA Case Number 15-5128 for 13 Notice of Appeal to DC Circuit Court filed by COMPETITIVE ENTERPRISE INSTITUTE. (md,) (Entered: 04/30/2015)

PACER Service Center**Transaction Receipt**

07/30/2015 16:32:17

PACER Login:	cokaz123:2523162:0	Client Code:	ostp765
Description:	Docket Report	Search Criteria:	1:14-cv-00765-GK
Billable Pages:	2	Cost:	0.20

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE)
1899 L Street, N.W., 12th Floor)
Washington, D.C. 20036)
)
Plaintiff,)
)
v.) Civil Action No. 14-765
)
OFFICE OF SCIENCE AND)
TECHNOLOGY POLICY)
Eisenhower Executive Office Building)
1650 Pennsylvania Avenue, N.W.)
Washington, DC 20504)
)
Defendant.)

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND RELIEF IN THE FORM OF MANDAMUS**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE for its complaint against Defendant the

OFFICE OF SCIENCE AND TECHNOLOGY POLICY (“OSTP”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under a request for certain records reflecting the conduct of, or otherwise relating to, agency business.
- 2) The request at issue in this complaint sought a senior federal official’s OSTP-related emails, while he served as OSTP Director, sent to or from a certain non-official email account maintained by his previous employer. Plaintiff learned that Director Holdren maintained this non-official email address and continued to use it to correspond with certain colleagues on work-related issues despite leaving the environmental group’s employment to work with the White House. Plaintiff learned of this by way of a *Vaughn* Index it received under another

FOIA request, which listed some correspondence from this account as work-related by another senior executive branch official.

- 3) In a FOIA request sent in October 2013, CEI sought OSTP-related email sent to or from this specified non-official email account while Holdren was employed at the White House.
- 4) The requested emails and other records are of significant public interest due to the ongoing controversy surrounding widespread use by senior government officials of non-official email accounts for select work-related correspondence. The non-official accounts then are generally not searched in response to FOIA or congressional oversight requests seeking work-related “records” or “electronic records.”¹
- 5) Defendant claimed plaintiff’s request was not in fact a FOIA request because it described records “beyond the reach of FOIA”, ignoring federal law, rules, judicial precedent, and even defendant’s own “Holdren memo” making clear that federal recordkeeping laws reach “work-related emails” in “any personal email account.”²
- 6) By unjustly refusing to acknowledge plaintiff’s request was a FOIA request, for agency records covered under FOIA, defendant failed to provide a substantive response.
- 7) Plaintiff appealed that decision, which appeal defendant inaccurately characterized instead as plaintiff “clarifying” its request so as to only seek emails on the OSTP computers, contrary to

¹ See, e.g., *Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 181 (D.D.C. 2013) (“EPA did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff” despite “evidence that upper-level EPA officials conducted official business from their personal email accounts”).

² May 10, 2010 Memo from OSTP Director John Holdren to all OSTP staff, *Subject: Reminder: Compliance with the Federal Records Act and the President’s Ethics Pledge*, at 1, available as Exhibit B to the letter found at [http://www.citizensforethics.org/page/-/PDFs/Legal/Investigation/Request for Investigation into White House 20100628.pdf?nocdn=1](http://www.citizensforethics.org/page/-/PDFs/Legal/Investigation/Request%20for%20Investigation%20into%20White%20House%2020100628.pdf?nocdn=1). Holdren’s memo, which is found on the 10th and 11th sheets of that letter, is referred to in this Complaint as the “Holdren memo.”

the plain language of plaintiff's request. It did not otherwise address plaintiff's appeal seeking emails from Holdren's personal account, even though FOIA prescribes a 20-working-day deadline for ruling on the merits of an appeal. 5 U.S.C. § 552(a)(6)(A)(ii); 32 CFR 2402.7(c).

- 8) As such, defendant failed to provide the required ruling on the appeal within the statutory deadline, and accordingly plaintiff has exhausted its administrative remedies.
- 8) Alternately, if this did constitute a ruling on plaintiff's administrative appeal, then plaintiff has exhausted its administrative remedies.
- 10) After defendant either denied or mischaracterized (and thus failed to adjudicate) plaintiff's administrative appeal, plaintiff sent another letter informing defendant there is no support for that rewriting of its request, that it sought the described work-related records sent to or from Dr. Holdren's unofficial account still hosted by his former employer. It further noted that defendant had failed to substantively respond to its appeal in the statutorily-mandated period of time. It also explained that plaintiff would exercise its right to judicial review if defendant did not cure its failure by providing a substantive response to the appeal by the beginning of the current month.
- 11) Defendant has continued to fail to respond.
- 12) Defendant's efforts, if successful, would bar future requesters from obtaining records this Court has recently made plain must be produced when they are requested after the email accounts' use is discovered (in *Competitive Enterprise Institute v. EPA*, No. 12-1617, --- F.Supp.2d ---, 2014 WL 308093, at *14 (D.D.C. Jan. 29, 2014)), thereby rewarding actions that frustrate the Freedom of Information Act, Federal Records Act, and other federal laws and regulations.

13) After six months of delay, defendant is now legally obligated to produce records responsive to plaintiff's request, as written.

PARTIES

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

15) Defendant is a FOIA-covered, congressionally established office within the executive branch that "advise[s] the President and others within the Executive Office of the President on the effects of science and technology on domestic and international affairs," located in Washington, D.C. next to the White House.

JURISDICTION AND VENUE

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

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

FACTUAL BACKGROUND

18) 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.

19) Plaintiff and others have exposed the practice by many executive branch employees of using non-official email accounts to conduct official or work-related correspondence, often with their network of contacts of former colleagues who still share an interest in what is now the employee’s official business, without creating the official record required by federal statute and regulation (*e.g.*, Federal Records Act of 1950 44 U.S.C. 3101 *et seq.*, and the E-Government Act of 2002; 36 C.F.R. Subchapter B, Records Management, and all applicable National Archives and Records Administration (NARA) mandated guidance).³ Regardless of

³ For example plaintiff has learned of 18 senior EPA officials engaging in this practice, as well as former or current officials in the Departments of Energy and Treasury, and OSTP. *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>

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).

- 20) Plaintiff learned of this account in the *Vaughn* Index produced in FOIA litigation seeking emails from the false-identity email account created for former EPA administrator Lisa Jackson, in the name of “Richard Windsor” (in *Competitive Enterprise Institute v. EPA*, No. 12-1617, 2014 WL 308093, *1 (D.D.C. Jan. 29, 2014)).
- 21) The defendant’s agency head, OSTP Director John Holdren, is required by law and regulation to conduct all work-related email correspondence on his official account.
- 22) When federal employees correspond 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. Similarly, when agencies learn of such correspondence or the use of such accounts for work-related correspondence they must obtain copies.
- 23) This practice of creating work-related correspondence, which absent the required copying of an employee’s office is solely under the control of private parties and generally unknown to and inaccessible by the federal government, also violates other obligations of federal officials, and potentially other laws. When the non-official account being used is not the employee’s

(“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>.

private account but on the computer system of, and thereby under the control of, a third party such as a former employer (in this case, the Woods Hole Research Center, or WHRC, an environmentalist activist group not to be confused with the Woods Hole Oceanographic Institute), their use is also problematic for other reasons. Specifically, senior employees are typically hired due to their work in a certain field outside of government; their email account in the non-governmental position is how contacts correspond on the issues the now-employee handles for the federal government, making most or all such correspondence now a potential federal record and all subject to FOIA. Other unique problems include providing other parties direct access to and control over public records and potentially over sensitive information.

24) 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.

25) This case involves the OSTP's Director, the very person who wrote the "Holdren memo," which warned employees about the impropriety of the very activity he has engaged in.

Plaintiff's Request

26) Plaintiff's FOIA request to OSTP dated October 15, 2013 sought specifically described records sent to, from or copied to a specific non-official email address that plaintiff learned OSTP Director John Holdren maintained and used for official or work-related correspondence

27) 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 access or control the emails sent or received by Mr. Holdren after he took up a position in the federal government.

28) Maintaining this address constituted a conflict of interest by Mr. Holdren, but regardless all correspondence on that account during his federal employment were possible federal records and most or all were covered by FOIA.

Defendant's Response

29) OSTP owed plaintiff 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.

30) On February 18, 2014, plaintiff administratively appealed this reply, in the event it constitutes an initial determination. Plaintiff specifically challenged defendant's assertion that plaintiff's request was not a FOIA request despite the requirements of the Federal Records Act, OSTP policy, and the "Holdren memo"⁴ all making plain that employees cannot exempt

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

records from the law by keeping them from the control of others in their agency. OSTP has failed to respond to that appeal.

- 31) OSTP owed plaintiff a response to its appeal (FOIA 14-02) by March 20, 2014.⁵
- 32) On March 31, 2014, defendant replied, asserting that plaintiff's appeal was instead a clarification. It mischaracterized the request as being for Holdren's emails between his OSTP and WHRC accounts, which it recognized as constituting a FOIA request. OSTP then began processing the mischaracterized search ("On February 18, 2014, you sent OSTP a letter clarifying that you are requesting a search of Dr. John Holdren's OSTP email account for records to and from jholdren@whrc.org.")).
- 33) On April 18, 2014 plaintiff informed defendant it had either failed to respond to plaintiff's appeal or mischaracterized it as a clarification instead. In this communication, Plaintiff requested that defendant provide by May 1, 2014 a substantive response to the appeal as required, or plaintiff would pursue judicial review.

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

- 34) FOIA provides that a requesting party is entitled to a substantive agency response both to requests and administrative appeals within twenty working days, affirming the agency is processing the request made 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

⁵ See 5 U.S.C. § 552(a)(6)(A)(ii) (deadline for a determination is 20 working days); 32 CFR 2402.7(c) (same).

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).

- 35) 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”). Defendant 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*, 711 F.3d 180, 186 (D.C. Cir. 2013) (“*CREW*”).
- 36) Defendant first improperly responded to plaintiff’s request (by not even treating it as a FOIA request, much less providing a substantive response within the statutory deadline assuring plaintiff that it would comply, as required by *CREW*).
- 37) Then it failed to properly rule on plaintiff’s appeal of that determination by not substantively responding to the appeal, but instead distorting and effectively rewriting plaintiff’s request (moreover, the deadline for responding to the appeal has since passed). As a result, plaintiff has exhausted its administrative remedies.
- 38) Then, it ignored plaintiff’s further plea that defendant respond to the FOIA request plaintiff actually made, and address the substance of plaintiff’s appeal. Thus, any further administrative appeals would clearly be futile, even if they were statutorily-required, which they are not.

39) For the foregoing reasons, defendant is now legally required to provide plaintiff records responsive to its request subject to legitimate withholdings.

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

40) 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.” 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/>.⁶

41) OSTP and OSTP Director Holdren are required by law and regulation to conduct all work-related email correspondence on official accounts.⁷ When employees create or receive work-related correspondence on non-official accounts this correspondence is presumptively an agency record, but regardless must be provided to the employee’s agency.

42) OSTP Director Holdren, has specifically admonished employees about these obligations and against the practice of using non-official accounts for work-related correspondence, when the practice by an OSTP official was revealed (“Holdren memo”).

⁶ This statement was made in the context of the Hatch Act, 5 U.S.C. § 7321 *et seq.*, a law precluding federal employees from using taxpayer-provided resources to engage in certain unofficial activity, specifically politicking, including time, phones, computers, *etc.*

⁷ See, 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 (“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).

- 43) Plaintiff has established that use of non-official email accounts for work-related correspondence is widespread within the federal executive branch, including at the highest level of OSTP.
- 44) Plaintiff understands, 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.”
- 45) 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 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.” 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, www.gao.gov/assets/320/310933.pdf, p. 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.
- 46) 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 tak-

en to capture available transmission and receipt data needed by the agency for recordkeeping purposes.” *Id.*, at p. 37.

47) Plaintiff has established that agencies, specifically including OSTP, do not in fact ensure against the use of these accounts, nor do they obtain copies of such correspondence as required.

48) Regardless of how federal employees are accessing their non-official email accounts for work-related correspondence, *e.g.*, through either an agency-provided or a non-official device, they are doing so, and experience affirms that employees making this decision also do not volunteer such emails in response to FOIA requests or congressional oversight, when these emails exist.

Records Reflecting Official Business are Agency Records

49) 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.

50) 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).

51) 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).

52) FOIA has the broadest definition of “record” among the relevant federal statutes. “The 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>. 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.

53) An email record’s status is not dictated by the account on which it is created or received.

54) OSTP policy is also clear on this issue. After being informed that an OSTP employee was using non-official email for official business, Director Holdren affirmed the law and policy in equally clear terms, reminding OSTP staff in the Holdren memo 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].⁸

55) Notwithstanding that OSTP Director Holdren 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, OSTP asserted that plaintiff'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, 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).

54) Agencies are increasingly called to search an employee's private accounts and equipment. For example, plaintiff has recently confronted this issue in other instances involving EPA Regional Administrators. Defendant ultimately produced former Region 8 Administrator James Martin's work-related ME.com emails to and from the environmentalist pressure group

⁸ May 10, 2010 "Holdren Memo," cited in FN 2, *supra*.

Environmental Defense (previously Environmental Defense Fund) addressing work-related issues. *See CEI v. EPA*, D.D.C., C.A. No. 12-1497 (ESH)(FOIA 08-FOI-00203-12).

55) Similarly, again because these emails represented the conduct of or otherwise related to official duties, Martin subsequently turned over to congressional investigators numerous other emails from the same account.⁹ EPA produced these records to plaintiff in response to EPA FOIA-R8-2014-000358.

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

57) Plaintiff 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*).

58) This is policy is also reflected in U.S. federal statute (Federal Records Act of 1950 44 U.S.C. 3101 *et seq.*, the E-Government Act of 2002 and other legislation) and regulation (36 C.F.R. Subchapter B, Records Management, and all applicable National Archives and Records Administration (NARA) mandated guidance), and reflected in the GAO report cited in paragraph 45, *supra*.

⁹ *See* Press Release and 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.

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

- 59) This Court recently acknowledged that FOIA requesters “can simply ask for work-related emails and agency records found in the specific employees’ personal accounts; requesters” need not even identify the non-official email addresses at issue (which parties may not know). *CEI v. EPA*, No. 12-1617, 2014 WL 308093, at *14 (D.D.C. Jan. 29, 2014))
- 60) Requester did, in this request, specify the non-official account used for work-related correspondence by the official (after having obtained exemplars showing the account’s use).
- 61) Plaintiff is owed an adequate, non-conflicted search and production responsive to its request including of the identified non-official email account, given the OSTP Director’s known work-related use of this account, and his recent admission that he maintains it. *See* John Holdren Answers to Follow-Up Questions for Written Submission by Sen. David Vitter, February 25, 2014 Environment and Public Works Hearing, pp. 3-4.
- 62) FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itruralde 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).
- 63) A search must be “reasonably calculated to uncover all relevant documents.” *Nation Magazine v. U.S. Customs*, 71 F.3d 885, 890 (D.C. Cir. 1995). In deciding whether a search is “reasonable,” courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (“reasonableness” assessed “consistent with congressional intent tilting the scale in favor of disclosure”).
- 64) A cursory search does not suffice. *See CREW v. U.S. Dept. of Justice*, 2006 WL 1518964 *4 (D.D.C. June 1, 2006) (“CREW”). 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).

- 65) 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) (employee cannot simply claim records are personal without agency review; faulting Justice Department 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).
- 66) Agencies cannot overlook record systems or repositories. “[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.” *Oglesby v. Dept. of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An unsupervised search allowing for abuses is not reasonable and does not satisfy FOIA’s requirements. *Kempker-Cloyd v. Dept. of Justice*, No. 97-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999). An agency must search “those files which officials expect will contain the information requested.” *Greenberg v. Dept. 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. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (agency cannot create filing system which makes it likely that discrete classes of data will be overlooked).
- 67) 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. The Act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny,” consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* at 361.

- 68) Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See Tax Analysts*, 492 U.S. at 142 n.3; *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996).
- 69) 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., Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996)(data tapes were "agency records" subject to FOIA, even though they were "neither created by agency employees, nor are they currently located on agency property"); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327-28 (D.C.Cir.1999) (Coast Guard should have searched records located off premises in Atlanta at a non-Coast Guard site that contained federal records)). *See also, e.g.*, August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher 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." (p. 2).
- 70) If a requester presents an agency with evidence that it overlooked responsive documents, it must act upon it. *Campbell v. Department of Justice*, 164 F.3d 20, 28-29 (D.C. Cir. 1999). "[A] law-abiding agency" must "admit and correct error" in its searches "when error is revealed." *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986). In *Friends of Blackwater v. Department of the Interior*, this court held it was "inconceivable" that no drafts or related cor-

respondence existed of documents produced from the agency's office existed, and found the search inadequate on those grounds. 391 F. Supp. 2d 115, 120–21 (D.D.C. 2005).

FIRST CLAIM FOR RELIEF

Release Under FOIA of Certain Records Sent To or From OSTP Director Holdren's Non-Official Account -- Declaratory Judgment

- 71) Plaintiff re-alleges paragraphs 1-70 as if fully set out herein.
- 72) Plaintiff is owed an adequate, non-conflicted search and production responsive to its request including of the identified non-official email account given the OSTP Director's known work-related use of this account and his recent admission that he maintains it.
- 73) Plaintiff has sought and been denied production of responsive records representing work-related correspondence.
- 74) Plaintiff has a statutory right to the information it seeks.
- 75) Defendant has refused to read plaintiff's request as written, but instead rewrote it.
- 76) Plaintiff has exhausted its administrative remedies.
- 77) Plaintiff asks this Court to enter a judgment declaring that:
 - i. Work-related emails sent to or from the account as described in plaintiff's above-described October 2013 request are agency records, subject to release under FOIA unless subject to one of that Act's mandatory exclusions;
 - ii. Defendant OSTP has failed to provide records responsive to plaintiff's request;
 - iii. Defendant OSTP failed to adequately respond plaintiff's request.
 - iv. By describing plaintiff's administrative appeal as merely clarifying its request, and misstating what that appeal argued, defendant OSTP has failed to respond to plaintiff's administrative appeal or otherwise has improperly responded.

- v. Defendant's failure to properly respond to plaintiff's FOIA request seeking the described records is not reasonable, and does not satisfy its obligations under FOIA;
- vi. Defendant's failure to properly respond to plaintiff's administrative appeal is not reasonable, and does not satisfy its obligations under FOIA;
- vii. Defendant's refusal to produce the requested records is unlawful; and
- viii. Defendant must release the requested records.

SECOND CLAIM FOR RELIEF

Release Under FOIA of Certain Records Sent To or From OSTP Director Holdren's Non-Official Accounts -- Injunctive Relief

- 78) Plaintiff re-alleges paragraphs 1-77 as if fully set out herein.
- 79) Plaintiff is entitled to injunctive relief compelling defendant agencies to produce all records responsive to its request described, *supra*.
- 80) Plaintiff asks this Court to enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining defendant from further withholding responsive records and ordering the defendant to produce to plaintiff within 10 business days of the date of the order the requested records, or a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.
- 81) Further, that this Court shall retain jurisdiction to enforce the terms of the order as well as retain jurisdiction to conduct such further proceedings and award relief as may be necessary to resolve any breach of the order and to retain jurisdiction over any plaintiffs' motion seeking judicial review of some or all withheld and/or redacted documents.

THIRD CLAIM FOR RELIEF

Violations of the Administrative Procedure Act-- Declaratory Judgment

- 82) Plaintiff re-alleges paragraphs 1-81 as if fully set out herein.
- 83) Defendant has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA, through its failure and refusal to issue initial

determinations, respond to plaintiff's administrative appeal, or otherwise process plaintiff's information request.

- 84) Defendant has unlawfully withheld agency action by failing to comply with the mandates of FOIA, through its failure and refusal to conduct a proper records search or otherwise process plaintiff's information request.
- 85) Defendant's failure to comply with the mandates of FOIA violates plaintiff's right to access public records. Its refusal to conduct a proper records search or otherwise process plaintiff's information request has injured plaintiff's interests in public oversight of governmental operations and violates defendant's statutory duties under the Administrative Procedure Act (APA).
- 86) Plaintiff has suffered a legal wrong as a result of the defendant's failure to comply with the mandates of FOIA. Defendant's failure and refusal to issue initial determinations or otherwise process plaintiff's information request have injured plaintiff's interests in public oversight of governmental operations and violate Defendant's statutory duties under the APA.
- 87) Defendant's failure and refusal to issue a timely final determination on plaintiff's information request constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).
- 88) Further, defendant's failure and refusal to issue initial determinations or otherwise process plaintiff's information request is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).
- 89) Plaintiff is entitled to judicial review under the APA, 5 U.S.C. §§ 702, 706.
- 90) Plaintiff is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412.

FOURTH CLAIM FOR RELIEF
Duty to Acquire and Preserve Email on Non-Official Accounts
-- Declaratory Judgment

- 91) Plaintiff re-alleges paragraphs 1-90 as if fully set out herein.
- 92) OSTP's pattern, practice, and ongoing policy of failing to acquire, and not preserving, work-related email sent to or from non-official email accounts violates the Federal Records Act (FRA) and illegally denies the public access to records covered by the Freedom of Information Act.¹⁰ It is also arbitrary and capricious agency action that violates the Administrative Procedure Act (APA), 5 U.S.C. § 704, *et seq.*¹¹ OSTP's failure to take remedial action and to notify the Archivist of the loss of the documents despite clear statutory mandates also is actionable under the APA.¹²
- 93) Plaintiff CEI regularly files FOIA requests including with OSTP seeking agency records, as the docket of this District illustrates.¹³ CEI has filed, and will continue to file, such FOIA requests seeking emails including those sent or received on non-official accounts. This is part of CEI's ongoing transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.

¹⁰ *See, e.g., Payne Enters., Inc. v. U.S.*, 837 F.2d 486, 491 (D.C.Cir.1988) (separate from claims seeking relief for specific FOIA requests, requesting parties may also assert a "claim that an agency policy or practice will impair the party's lawful access to information in the future"); *Hajro v. U.S.C.I.S.*, 832 F.Supp.2d 1095 (N.D. Cal. 2012) (attorneys could bring lawsuit challenging pattern or practice of agency delays in responding to FOIA requests for clients).

¹¹ *See e.g., CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (rejecting motion to dismiss claims over agency's allegedly illegal destruction and failure to preserve emails under the APA, 5 U.S.C. §§ 704-06, and the Mandamus Act, 28 U.S.C. § 1361).

¹² *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.").

¹³ *See, e.g., Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil action ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074, 14-582, 14-681.

- 94) This practice has led plaintiff being denied production of responsive records reflecting the conduct of official business.
- 95) Plaintiff has a statutory right to the information it seeks.
- 96) Defendant's response to plaintiff's FOIA request affirms it is not acquiring or preserving emails produced on non-official accounts.
- 97) Moreover, federal regulations mandate that "Records shall not be disposed of while they are the subject of a pending . . . lawsuit under the FOIA". 40 C.F.R. § 2.106.
- 98) 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 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.¹⁴
- 99) As a regular FOIA requester, CEI will continue to experience ongoing harm in the form of emails never searched for or produced, lost information and destruction of the documents it seeks unless this Court declares OSTP's policy of not obtaining and not preserving emails sent or received on non-official accounts illegal and puts an end to it.
- 100) OSTP has not disavowed or repudiated its position justifying the widespread use of such accounts leading to the loss of such agency documents. To the contrary, by its response to plaintiff's request OSTP clearly intends to continue this objectionable position, thereby frustrating future FOIA requests by plaintiff. It is therefore evident that the impermissible practice is a continuing one, that plaintiff will experience a continuing injury due to this practice, and that no relief is forthcoming.¹⁵

¹⁴ 18 USC § 2071 - Concealment, removal, or mutilation generally.

¹⁵ See *Better Gov't Ass'n v. Dept. of State*, 780 F.2d 86, 90-92 (D.C. Cir. 1992).

- 101) “The case is fit for review because it presents a clear-cut legal question,” whether OSTP’s document preservation policy regarding emails sent or received on non-official accounts is “inconsistent” with federal recordkeeping laws such as the Federal Records Act and FOIA.¹⁶
- 102) This Court should issue a declaratory judgment that OSTP has violated its duty to preserve records under the FRA and FOIA; has acted arbitrarily, capriciously, and illegally in violation of the APA; and has a duty to acquire, preserve, and prevent the destruction by OSTP employees, of work-related email sent or received on non-official accounts.

FIFTH CLAIM FOR RELIEF
Duty to Acquire and Preserve Email on Non-Official Accounts
– Injunctive Relief

- 103) Plaintiff re-alleges paragraphs 1-102 as if fully set out herein.
- 104) Defendant will continue its unlawful policy of not preserving work-related emails sent or received on non-official accounts unless it is enjoined from so doing, even though that policy violates the Federal Records Act, destroys documents subject to FOIA, and is arbitrary and capricious agency action violative of the Administrative Procedure Act. “In utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate ... to bar future violations that are likely to occur.”¹⁷ Courts have previously found that injunctive relief is necessary to prevent agencies from deleting or destroying documents subject to FOIA.¹⁸
- 105) Thus, CEI is entitled to injunctive relief forbidding defendant from destroying or failing to preserve such emails.

¹⁶ See *Venetian Casino Resort LLC v. EEOC*, 409 F.3d 359, 365 (D.C. Cir. 2005).

¹⁷ See *Long v. United States Internal Revenue Service*, 693 F.2d 907, 909 (9th Cir.1982).

¹⁸ *Union Pac. R.R. Co. v. U.S. Env'tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA and its employees from deleting or destroying emails in violation of FOIA, and finding “irreparable harm” from EPA’s “pattern of deleting relevant emails”).

- 106) In addition, CEI is entitled to preliminary injunctive relief forbidding such practices, because the practice and resulting failure to preserve documents results in irreparable harm by forever eliminating access to those documents, and because there is a strong public interest in ensuring an agency's compliance with federal recordkeeping laws such as the Federal Records Act and FOIA,¹⁹ and with regulations commanding that records not be disposed of while they are the subject of a pending lawsuit under the FOIA.
- 107) This Court should enter an injunction ordering defendant to preserve, and prevent the destruction by defendant's employees, of emails sent or received on non-official accounts; establish safeguards against their removal and loss; and to notify the head of the National Archives and Records Administration of any destruction, removal, or loss of such records.

SIXTH CLAIM FOR RELIEF
Duty to Acquire and Preserve Email on Non-Official Accounts
– Writ of Mandamus

- 108) Plaintiff re-alleges paragraphs 1-107 as if fully set out herein.
- 109) Plaintiff has a clear right to relief under laws such as the Federal Records Act; the defendant has a clear duty to act; and there is no other adequate remedy available to plaintiff.
- 110) CEI has a clear statutory right to the records that it seeks, defendant has not fulfilled its clear statutory obligations to prohibit the practice of using non-official email accounts for work-related correspondence, to preserve and provide such records, and there is no legal basis for destroying them.

¹⁹ See *EPIC v. Department of Justice*, 416 F.Supp.2d 30, 40-42 (D.D.C. 2006) (granting preliminary injunction to expedite response to FOIA request, because even delay in producing documents is irreparable harm; and noting that there is a strong public interest in enforcing compliance with federal laws such as FOIA) (“there is an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate.”), quoting *Jacksonville Port Authority v. Adams.*, 556 F.2d 52, 59 (D.C.Cir.1977).

111) Thus, this destruction of documents justifies the grant of a writ of mandamus or other extraordinary relief, and gives rise to a remedy under the Mandamus Act, 28 U.S.C. 1361. Accordingly, this court should issue a writ of mandamus.

SEVENTH CLAIM FOR RELIEF

Duty to Notify the Archivist of the United States - Injunctive Relief

- 112) Plaintiff re-alleges paragraphs 1-111 as if fully set out herein.
- 113) Federal records in the form of work-related emails sent and received on non-official accounts have been removed from defendant, and not provided to defendant as required, according to defendant's claim it does not possess records which by law should be in its possession.
- 114) The failure by defendant to obtain and preserve work-related emails on a non-official account has caused the removal of those federal records from the appropriate federal agency.
- 115) The Director of the White House Office of Science and Technology Policy has actual and constructive knowledge of the failure to obtain and preserve federal records in the form of work-related emails sent and received on non-official accounts.
- 116) 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.
- 117) 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.*

- 118) The knowledge on the part of the agency head 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.
- 119) Defendant 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.
- 120) The failure by these federal agency heads to take remedial action and to notify the Archivist and the Attorney General of the removal of the documents despite clear statutory mandates is actionable under the APA.²⁰
- 121) When the head of a Federal agency fails to take action in compliance with the obligation of 44 U.S.C.A. § 3106, plaintiff has a right to seek to compel such compliance.²¹
- 122) Thus this Court should order the Director of the White House Office of Science and Technology Policy to notify the Archivist of the United States, and initiate actions through the Attorney General regarding the removal of federal records permitted by the Administrator and to assist the Attorney General in initiating an enforcement action to recover those records.

EIGHTH CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 123) Plaintiff re-alleges paragraphs 1-122 as if fully set out herein.

²⁰ See *Armstrong v. Bush*, 924 F.2d at 295 (“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.”).

²¹ See *id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-765 (GK)
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY,)	
)	
Defendant.)	
)	

Exhibit 1:
CEI's FOIA REQUEST



REQUEST UNDER THE FREEDOM OF INFORMATION ACT

October 16, 2013

Office of Science and Technology, John Holdren, Director
Old Executive Office Building
Attn: FOIA Officer (Barbara Ann Ferguson)
Old Executive Office Building, Room 431
Washington, DC 20502

RE: FOIA Request – Seeking certain *work-related emails* from John Holdren’s non-official email account used for policy/OSTP-related correspondence

BY ELECTRONIC MAIL– ostpfoia@ostp.eop.gov

Dear OSTP FOIA Staff,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and related activities at various agencies including OSTP, and how policymakers comply with record-keeping and management requirements, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,¹ 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.

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.

Background to this Records Request

Correspondence made or received by federal officials in connection with the transaction of public business is in fact covered by FOIA, which has the broadest definition of "record" of all relevant federal statutes.² Mr. Holdren was obligated to copy his OSTP account on any correspondence relevant to his OSTP employment sent or received by that account, and OSTP had the obligation to preserve all such correspondence.

¹ See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 27-28, *infra*.

² 44 U.S.C 3301. Because EPA has more fulsomely documented its obligations than most agencies, *see also, 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).

As it has with numerous other senior administration officials, CEI has established Mr. Holdren's use of such an account for work-related correspondence, specifically the account cited in this request. OSTP is required to obtain and produce responsive 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).

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

Note about OSTP's and Mr. Holdren's continuing legal obligations

We have obtained documentary evidence establishing that Mr. Holdren did use the non-official email account with the address jholdren@whrc.org in the conduct of his public business.

Mr. Holdren has a continuing obligation to provide those records, , either electronically or in paper format.

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. 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.”³

Given that the content demonstrates that this statement meant that emails on a non-official account are not subject to FOIA, this position is simply untenable. 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.

Ironically, it was Mr. Holdren who, after one OSTP employee was exposed to be engaging in this practice, reaffirmed that forwarding 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.⁴

³ Jessica Guynn, “Watchdog Group Requests White House Official’s E-mail After Google Buzz Mishap,” *Los Angeles Times Technology Blog*, April 1, 2010, <http://www.consumerwatchdog.org/story/watchdog-group-requests-white-house-officials-e-mail-after-google-buzz-mishap>.

⁴ Memo from OSTP Director John Holdren to all OSTP staff, titled “Subject: Reminder: Compliance with the Federal Records Act and the President’s Ethics Pledge,” May 10, 2010, <http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf>. *See also, e.g.*, September 11, 2012 letter from DoE Deputy General Counsel Eric J. Fygi to Chairman Darrell Issa of the House Committee on Oversight and Government Reform, affirming that communications to and from non-official, personal email accounts referring or relating to the Department’s [programs]... or any other official business of the Department ...[that] relate to official business and thus are potential federal agency records.” (*See also* September 11, 2012 letter from the Department of Energy’s Morgan Wright to Chairman Issa, affirming the records’ status and that he has therefore provided all responsive records to the Department for purposes of having them produced, as agency records).

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**, and therefore is not a useful means of evading or exempting records from transparency laws. If in fact OSTP has not obtained copies of all such records 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.

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."⁵

It seems that occurred in the present case. By promptly fulfilling its obligations to obtain all copies of responsive records OSTP can work to minimize the chances for further violation.

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."⁶ "Agencies are also required to address the use of

⁵ 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.

⁶ 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.

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.”⁷

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).

We are confident that OSTP has taken notice that Obama administration employees -- beyond merely the OSTP employee in the above-referenced incident of which OSTP is inescapably aware -- have been found to be regularly using private email to conduct public business. 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.

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**

⁷ *Id.*, at p. 37.

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.

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.”⁹

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.”¹⁰

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).

⁹ 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/.

¹⁰ 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.

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.”¹¹

Thanks to Congressman Henry Waxman we have established that the use of private email to conduct official business violates 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.¹²

OSTP Owes CEI a Reasonable Search, Which Includes a Non-Conflicted Search

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).

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

¹¹ 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>.

¹² *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>.

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.*

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”). *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 the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

For these reasons CEI expects this search of the above-cited account be conducted free from conflict of interest. Mr. Holdren is the most conflicted person imaginable to conduct the search and is therefore the inappropriate person to so search, particularly if not unsupervised. Further, given that Mr. Holdren will have notice of this search prior to it occurring, Mr. Holdren and OSTP must declare as to what emails were or were likely or possibly destroyed, in order to meet its burden of *demonstrating* it has conducted a reasonable search.

It is possible that at some point after leaving WHRC that Mr. Holdren or his (former) organization terminated Holdren's email account on that system, such that Mr. Holdren no longer has access to emails sent or received on that account (it is not accurate to state that closing

the account means he no longer has copies of these records, however); it is also possible that this is done at some point after OSTP receives this request. In this event, OSTP is obligated to obtain responsive records from the organization itself. A simple check on the reasonableness of OSTP's search is also to search Mr. Holdren's OSTP account for copies of responsive records, to cross-check the WHRC.org production as well as to check on OSTP's compliance with the requirement that all such records be copied to OSTP (alternately, Mr. Holdren may have provided the office paper copies).

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 *Vaughn 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. DoJ*, 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.¹³

- 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 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

¹³ 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/acluefffeewvrfoialtr.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>.

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)).¹⁴

¹⁴ This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, 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.*

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.

“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. 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, obviously 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. It also tests whether OSTP will fulfill its obligations once this transgression has been revealed to OSTP which, we must presume, was previously unaware.**

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”).

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 e: 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.

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).

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.

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.

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.

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, to the extent the requested information is available in the public domain; these are forms obtained and held only by the OSTP official or, in the event he and OSTP did in fact comply with the law, by OSTP and this now-former official. 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 or is producing the emails of two former Regional Administrators whom CEI discovered were using their private email accounts for work-related correspondence, and issue which has become the subject of congressional oversight**

including a recent hearing and calls for inspector general scrutiny.¹⁵ 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 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 above litany of exemplars of newsworthy FOIA activity, 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 policies grounded in energy and environmental policy, including OSTP’s,¹⁶ specifically in recent years relating to transparency and electronic record management practices. Like other agencies, OSTP has not exacted fees for these requests for the same reason it cannot now, and also cannot now for all reasons stated herein.

¹⁵ See also news coverage of discovery of how widespread the problem is. Recent revelations, in addition to those high-profile examples CEI has found at EPA, include the Treasury Department, e.g., Ciaramella, C.J., *Darrell Issa: IRS Officials Sent Private Data Over Personal Email Accounts*, Washington Free Beacon, October 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, October 8, 2013, <http://www.humanevents.com/2013/10/08/irs-officials-used-private-email-to-handle-confidential-taxpayer-information/>.

¹⁶ See e.g., CEI requests of OSTP 12-38(A), 12-43, 12-45.

Requester intends to broadly disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows “Garrison” on WIBC Indianapolis and the nationally syndicated “Battle Line with Alan Nathan”).

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.¹⁷ 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.

¹⁷ See *EPIC v. DOD*, 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,¹⁸ law reviews,¹⁹ and legal and scholarly publications.²⁰

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

¹⁸ See, e.g., 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*, April 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).

¹⁹ 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).

²⁰ See, e.g., 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, which we will then appeal while requesting OSTP proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees 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...”) and 40 C.F.R. §2.107(d)(1) (“No search or review fees will be charged for requests by educational institutions...or representatives of the news media.”); *see also* 10 C.F.R 1004.9(b)(3).

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 21-24, *supra*.

The 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 public. *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.

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; 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. *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,



Christopher C. Horner, Esq.

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Washington, DC 20036
202.262.4458 (M)
CHorner@CEI.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-765 (GK)
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY,)	
)	
Defendant.)	
)	

Exhibit 2:
OSTP's Response to FOIA
Request

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

February 4, 2014

Mr. Christopher C. Horner
1899 L Street NW, Suite 1200
Washington, DC 20036

Re: OSTP FOIA No. 14-02

Dear Mr. Horner:

On October 16, 2013, you sent the Office of Science and Technology Policy (OSTP) a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OSTP received your request on October 16, 2013 and assigned it OSTP FOIA No. 14-02. You requested:

Please provide us, within twenty working days, 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.

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.

OSTP understands that your request seeks "copies of all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)," which "entails searching jholdren@whrc.org." Specifically, "this request is for responsive records on the cited [WHRC] account." 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. If OSTP has misinterpreted the scope of your request or if you wish to perfect your request by describing the OSTP agency records you seek, please contact us.

Sincerely,

Jennifer Lee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-765 (GK)
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY,)	
)	
Defendant.)	
)	

Exhibit 3:
CEI's Letter of February
18, 2014



**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

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 OSTP 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 them. 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 the 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 and 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.

Note about OSTP's and Mr. Holdren's continuing legal obligations

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*)).

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.

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

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 inaccessible 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

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

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_Resposiibilities_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.*, *Iturralde 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 expect [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

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

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 *Vaughn 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. DoJ*, 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

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/acluefffeewvrfoialtr.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.

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

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

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.

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

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.

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

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 outlet³²: 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

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 public. *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,



Christopher C. Horner, Esq.

1899 L Street NW, Suite 1200
Washington, DC 20036
202.262.4458 (M)
CHorner@CEI.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)

Plaintiff,)

v.)

OFFICE OF SCIENCE AND)
TECHNOLOGY POLICY,)

Defendant.)

Case No. 1:14-cv-765 (GK)

Exhibit 4:
OSTP's Letter of March 7,
2014

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

March 7, 2014

Mr. Christopher C. Horner
1899 L Street NW, Suite 1200
Washington, DC 20036

Re: OSTP FOIA No. 14-02

Dear Mr. Horner:

On October 16, 2013, you sent the Office of Science and Technology Policy (OSTP) a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking:

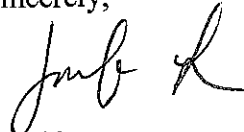
[c]opies of all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:). We are aware that White House science advisor John Holdren maintained this account after joining the White House, and that he used this address/account for OSTP-related correspondence. We also state on information and belief that Mr. Holdren corresponded on such matters with non-governmental individuals, as well, during his employment at OSTP.

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.

OSTP sent you a letter on February 4, 2014, which was not a denial of your request, nor a final agency determination. OSTP understood your request to be one that sought a search of the jholdren@whrc.org account, and not a search of any OSTP email accounts. Accordingly, our February letter explained that your request was unperfected and offered you an opportunity to perfect your request.

On February 18, 2014, you sent OSTP a letter clarifying that you are requesting a search of Dr. John Holdren's OSTP email account for records to and from jholdren@whrc.org. OSTP has conducted a search of Dr. Holdren's OSTP email account and will produce responsive records to you on a rolling basis, that is, as records are processed and become available. In the meantime, please contact me if you have any questions regarding your request.

Sincerely,



Jennifer Lee
202-456-4444

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-765 (GK)
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY,)	
)	
Defendant.)	
)	

Exhibit 5:
CEI's Letter of April 18,
2014



**RESPONSE TO OSTP REPLY TO CEI
APPEAL UNDER THE FREEDOM OF INFORMATION ACT**

April 18, 2014

Office of Science and Technology Policy
Jennifer Lee
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. Lee:

This is in regard to your letter of March 31, 2014, concerning our FOIA request OSTP FOIA No. 14-02. Your letter was in response to our February 18th administrative appeal, and thereby fell outside of OSTP's statutory window to respond. As such, we are entitled to seek judicial review immediately. But we offer OSTP the opportunity to avoid a lawsuit, since our basic interest is in obtaining the documents we seek.

OSTP incorrectly asserts that CEI had clarified it was "requesting a search of Dr. John Holdren's OSTP email account for records to and from jholdren@whrc.org." We plainly sought, and restated that we seek, the following: *all* emails sent to or from jholdren@whrc.org that are OSTP-related. Our request covers OSTP-related documents *regardless of whether they are from an ostp.gov email account, and regardless of whether they are found in Dr. Holdren's ostp.gov email account.* The emails we request are possible federal records under FRA, and are all subject to FOIA.

Your March 31 letter misstates what CEI was actually seeking in both its initial request and its appeal in response to OSTP's February 4th letter, and it unjustifiably narrows the range of documents sought. Thus, OSTP still has not provided a sufficient response under FOIA, or a substantive response regarding the full range of documents we seek (*e.g.*, disclosing the scope of such documents, whether OSTP will produce them, and whether it plans to withhold any as exempt, *see CREW v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013)).

We explained this in our initial request as well as in our administrative appeal.

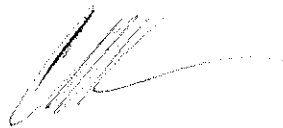
Our February 18th administrative appeal did not seek to “perfect” our request but instead went to some length to further explain how OSTP had misstated our request. As such, CEI’s February 18th appeal plainly constituted an administrative appeal, though it gave OSTP the opportunity to cure its non-response administratively.

Furthermore, as we previously explained, the use of private emails and computers, regardless of intent, does not defeat federal record-keeping and other transparency laws. It is the content, not the location, of such emails that matters, and the agency in question must seek to obtain them. If it cannot, it is required to initiate action through the Attorney General to recover them. Our appeal clearly cited to various statutes, regulations, court decisions, agency actions and ironically the “Holdren memo,” which illustrates what OSTP surely knows inasmuch as it issued this memo.

In short, OSTP misinterpreted our request in a way that essentially denied it (and resulted in most responsive documents not even being searched for; *See House Committee on Government Reform, House Report 109-226, A Citizen’s Guide to Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, at pg. 20 (Sept. 20, 2005) (available at <http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt226/html/CRPT-109hrpt226.htm>) (requester can administratively “appeal because the agency failed to conduct an adequate search for the documents that were requested,” just as it can appeal a “response indicating that no requested records were located.”)). CEI appealed OSTP’s misreading and OSTP failed to respond, leaving this matter ripe for judicial review.

Should OSTP wish to cure this by fully producing the requested records – that is, OSTP-related correspondence sent to or from Mr. Holdren’s identified WHRC email account, subject to legitimate withholdings (regardless of whether those emails are with, or in, Mr. Holdren’s ostp.gov email account)-- please so inform us with a substantive “CREW” response by May 1, 2014.

Respectfully submitted,



Christopher C. Horner, Esq.

CEI
1899 L Street NW, Suite 1200
Washington, DC 20036
202.262.4458 (M)
CHorner@CEI.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)

Plaintiff,)

v.)

OFFICE OF SCIENCE AND)
TECHNOLOGY POLICY,)

Defendant.)

Case No. 1:14-cv-765 (GK)

Exhibit 6:
Holdren Memo

From: [Holdren, John P.](#)
To: [DL-OSTP-ALL](#)
Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge
Date: Monday, May 10, 2010 4:39:38 PM

Dear Colleagues – Please see the important memo below. Thank you. John

JOHN P. HOLDREN
Assistant to the President for Science and Technology
and Director, Office of Science and Technology Policy
Executive Office of the President of the United States
jholdren@ostp.eop.gov
Executive Assistant Karrie Pitzer
kpitzer@ostp.eop.gov, 202-456-6064

MEMORANDUM FOR ALL OSTP EMPLOYEES

FROM: JOHN P. HOLDREN

SUBJECT: Reminder: Compliance with the Federal Records Act and
the President's Ethics Pledge

OSTP has long had an excellent record of complying with legal and ethical standards. We should all be proud of that record, and we all need to be vigilant in maintaining it. This memo describes how one of our employees recently fell short in this regard, inadvertently implicating two important standards that govern our activities as Federal employees: the Federal Records Act and the President's Ethics Pledge. The information below serves as a reminder of what these standards require from all of us and what you must do to ensure compliance.

The Federal Records Act

OSTP is subject to the Federal Records Act (FRA). FRA guidance was provided to you at your in-briefing; more detailed information is available at <http://www.archives.gov/records-mgmt/publications/documenting-your-public-service.html>. In general, the FRA requires that OSTP employees preserve records of government business, including emails. *See* 44 U.S.C. § 3301. Our email system is designed to ensure that all emails sent to or from an OSTP account are automatically and properly preserved. To ensure that we comply with the FRA with respect to emails, all OSTP-related email communications should be conducted using your OSTP email accounts.

In the course of responding to the recent FOIA request, OSTP learned that an employee had, in a number of instances, inadvertently failed 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 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.

-
The President's Ethics Pledge

-
Paragraph Two of the Ethics Pledge that some OSTP employees have signed per Executive Order 13490 prohibits certain communications with former employers and clients on matters relating to the signer's official duties for two years from the date of appointment. See http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09003a.pdf. All Pledge signers received guidance on the requirements of the Pledge when they joined OSTP. Detailed guidance on the Pledge is available at: http://www.usoge.gov/ethics_guidance/daeograms/09_daeograms.aspx.

In connection with the above-mentioned FOIA request, OSTP learned there were several communications between the OSTP employee and his former employer involving matters within the scope of the employee's official duties at the OSTP. Most of these communications did not violate Paragraph Two of the Pledge, either because the OSTP employee did not reply or because the communications were to or from a person who works at the former employer in that person's official capacity as a member of a Federal Advisory Committee. However, there were several emails in which the OSTP employee discussed matters within the sphere of his official duties with representatives of his former employer who were acting in their capacity as employees of his former employer. These communications violated the employee's Ethics Pledge.

Remedial Actions

With regard to the Federal Records Act, the employee has since taken corrective action so that all work-related emails that he received at his personal email address are now properly preserved on his OSTP email account. With regard to the President's Ethics Pledge, the employee recognizes that those communications were inappropriate and violated Paragraph Two of the ethics pledge. The employee has been reprimanded on these issues and received additional individual training on his obligations under the FRA and the ethics pledge.

We will be conducting refresher training on ethics and FRA obligations in the coming weeks. If you have questions on either subject at any time, please contact Rachael Leonard, OSTP's General Counsel and DAEO, x66125. On FRA issues, you may also contact OSTP Records Officer, Miriam Eubanks, x67331.

It is very important that we all follow the rules and standards that govern our conduct as Federal employees, including the FRA and the President's Ethics Pledge. The public has put its trust in us, and it is the responsibility of every OSTP employee to uphold that trust.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)
)
 Plaintiff,)
)
 v.) Case No. 1:14-cv-765 (GK)
)
 OFFICE OF SCIENCE AND)
 TECHNOLOGY POLICY,)
)
 Defendant.)
_____)

Exhibit 7:
Holdren E-mail from EPA
Production

01268-EPA-5574

"Holdren, John P."

<[REDACTED] (b) (6) gov>

02/22/2011 11:07 AM

To "John P. Holdren"

cc

bcc

Subject PowerPoint of my plenary speech to AAAS annual meeting last Friday

Dear Friends – Attached here is a PDF of the PowerPoint from my plenary speech on “Policy for Science, Technology, and Innovation in the Obama Administration – A Mid-Course Update”, which I gave Friday evening to an audience of about 2,000 at the annual meeting of the AAAS here. It summarizes quite a lot of what we’ve been up to in OSTP and PCAST for the past two years – with the remarkable leadership of President Obama -- as well as some of what I hope is coming. A lot is left out (it had to fit in 50 minutes), and I find one of my biggest challenges in this game is squeezing 20 pounds of stuff into a 10-pound bag. Suggestions and other comments including cries of outrage always welcome. My best, John

JOHN P. HOLDREN

Assistant to the President for Science and Technology,
Director, Office of Science and Technology Policy,
Co-Chair, Presidents Council of Advisors on Science and Technology
Executive Office of the President of the United States

email [REDACTED] (b) (6)

assistant Karrie Pitzer [REDACTED] (b) (6), [REDACTED] (b) (6)



2011-02-18_AAAS plenary_JPH_rev5.pdf

Policy for Science, Technology, & Innovation in the Obama Administration: A Mid-Course Update

John P. H. I. r. n

Assistant to the President for Science and Technology
Director, Office of Science and Technology Policy
Co-Chair, President's Council of Advisors on Science and Technology



Plenary Lecture

2011 Annual Meeting of the AAAS

Washington DC • 18 February 2011



“Science is more essential for our prosperity, our security, our health, our environment, and our quality of life than it has ever been before.” - President Barack Obama, April 27, 2009

Challenges linked to ST&I: Domestic

- economic recovery & growth: S&T as drivers (infotech, biotech, nanotech, greentech...?)
- health care: better outcomes for all at lower cost
- energy & climate: cleaner, safer energy supply (incl reduced oil imports & GHG emissions)
- other resources & environment: water, land use, coastal zones, toxics, biodiversity, sustainability
- national & homeland security: IED detection & disarming, cyber- & power-grid security, bio-defense, ensuring safety/reliability of shrinking US nuclear stockpile without nuclear testing

Challenges linked to ST&I: Global

- Health: Defeating preventable and pandemic disease
- Development: Eradicating poverty and providing the possibility of sustainable prosperity for all
- Energy-Climate: Providing for societies everywhere the energy their economies need without wrecking the climate their environments need
- Land-Water: Managing the intensifying competition for the world's land & fresh water among food, fiber, fuel, infrastructure/industry, and ecosystem function
- Oceans: Maintaining their ecological integrity & productivity
- WMD: Avoiding use of nuclear and biological weapons

President Obama's views on the challenges

- They're interdisciplinary and interconnected (I&I)
- S&T are not just germane to success but central.
- Centrality means putting S&T in the center of what the federal government thinks, says, and does about these challenges – "Science in its rightful place."
- Success requires not only applying S&T to specific challenges but also nurturing the cross-cutting foundations of strength in S&T.
- I&I mean solutions require partnerships across: federal agencies; branches & levels of government; public, private, & philanthropic sectors; and nations.

The centrality of S&T: What do we need?

- The Economy: innovation that yields better manufacturing techniques, better products & services, and (thus) high-quality, sustainable jobs...
- Health: new IT tools for medical records, doctor-doctor & doctor-patient interaction; better, cheaper diagnostics; faster vaccine development & production; cancer therapies that target only cancer cells...
- Energy: better batteries, cheaper photovoltaic cells, lower-impact biofuels, CO₂ capture & sequestration, safer nuclear fuel cycles, fusion...

What we need from S&T (continued)

- Agriculture: stress-tolerant crop varieties, livestock resistance to disease, farmer access to knowledge & markets through IT
- Climate Change: better monitoring in-situ & from space; better models on faster computers; regional disaggregation of impacts to support adaptation; better scientific communication for public understanding...
- National & Homeland Security: better detection of conventional & nuclear explosives and of clandestine weapons facilities; faster identification of & response to bio-threats; better defenses against cyber-threats...

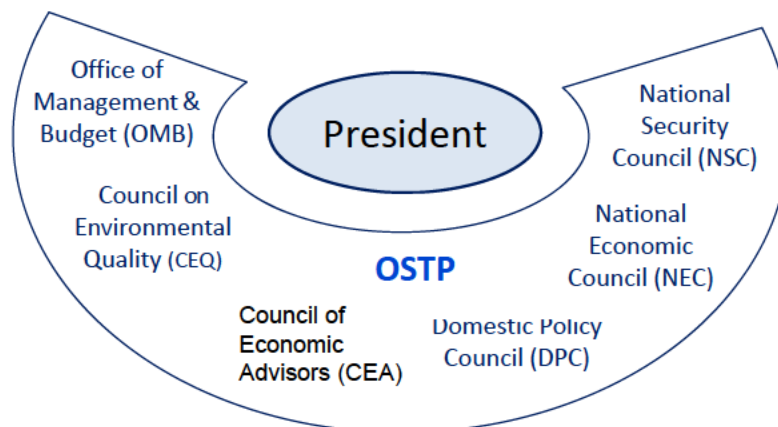
Cross-cutting foundations of strength in S&T

- the institutions that do most basic research
 - research universities, national labs, nonprofits
- other key infrastructure
 - IT/broadband, high-speed computing, energy, transportation, space technology
- science, technology, engineering, & math (STEM) education
- economic & policy conditions conducive to entrepreneurship, innovation, partnerships
 - IPR, financing, tax policy, export policy, immigration policy, transparency & predictability in regulation

The federal support infrastructure for ST&I

- Congress
 - S&T authorizing & appropriations committees
- S&T-rich cabinet departments & their agencies
 - Defense (with DARPA), HHS (w NIH, FDA, CDC), Energy (w ARPA-E), Commerce (w NOAA, NIST), Interior (w USGS), Agriculture (w NIFA), State/OES
- Free-standing S&T-rich agencies
 - NSF, NASA, EPA, FCC, SBA

Federal support infrastructure for ST&I (continued): The Executive Office of the President

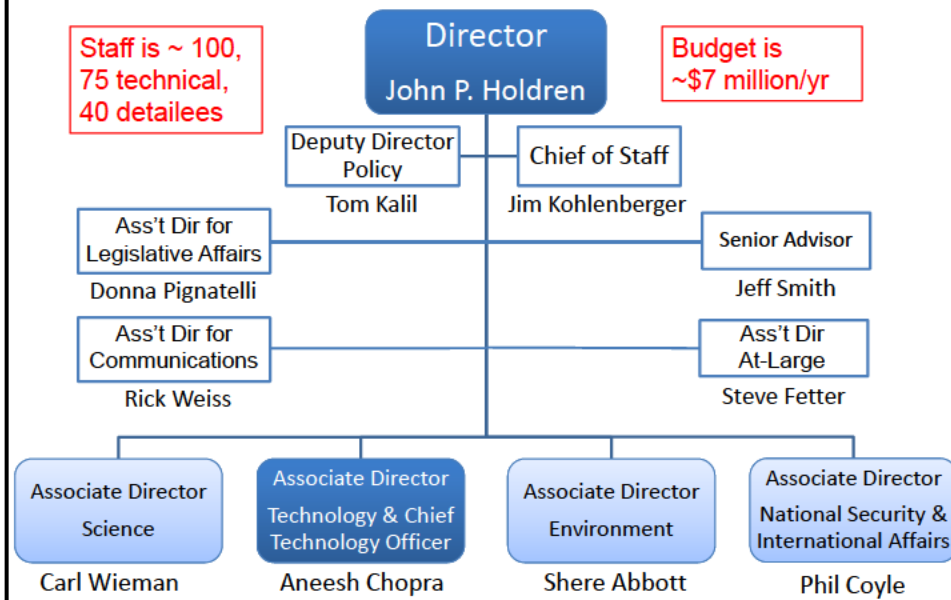


EOP also includes Offices of: Vice President, Chief of Staff, Cabinet Affairs, Communications, Intergovernmental Relations, Public Engagement, Legal Counsel, US Trade Representative, Energy & Climate Change, and more.

Responsibilities of OSTP and the S&T Advisor

- Policy for science and technology
 - Analysis, recommendations, & coordination with other White House offices on R&D budgets & related policies, S&T education and workforce issues, interagency S&T initiatives, broadband, open government, scientific integrity...
- Science and technology for policy
 - Independent advice for the President about S&T germane to all policy issues with which he is concerned

OSTP structure



Under President Obama, both Holdren and Chopra serve as Assistants to the President.

OSTP-managed entities

- National Science & Technology Council (NSTC)
 - Deputy secretaries & undersecretaries of cabinet departments with S&T missions, plus heads of NSF, NIH, NASA, NOAA, NIST, EPA, USGS, CDC
 - Nominally chaired by the President; chaired in practice by the OSTP Director / Science Advisor; administered by OSTP
 - Coordinates S&T activities that cross agency boundaries
- President's Council of Advisors on Science and Technology (PCAST)
 - Co-Chairs J Holdren & E Lander
 - Vice-Chairs W Press & M Savitz
 - 16 other members from academia, industry, NGOs
 - Helps link White House to wider ST&I community

Putting science "in its rightful place": Presidential appointments

- Five Nobel Laureates in science
 - Energy Secretary Chu, OSTP Associate Director for Science Wieman, NCI Director Varmus, PCAST Members Molina and Zewail
- Another 25+ members of the NAS, NAE, IOM, and American Academy of Arts & Sciences
 - Including heads of NIH, NOAA, USGS, FDA, NIFA
- A CTO (Chopra) and a CIO (Kundra) in the White House for the first time
- An engineer running EPA (Lisa Jackson)

ST&I have never been so prominent in leadership positions.



President Obama with his PCAST, NAS Board Room, 4-27-09

“Rightful place”: speeches & events

Highlighting ST&I in...

- Speeches throughout the campaign, then Inaugural Address and speeches at: 2009 annual meeting of the NAS, Cairo Egypt, Albany NY, MIT, State of the Union (2010, 2011), Kennedy Space Center, Marquette MI, Portland OR (today!)
- White House events with nat’l middle-school and high-school science & math winners, National Medal of science and national medals of technology & innovation winners, groups of US astronauts (on 7 occasions), US Nobel Prize winners, math & science teaching & mentoring award winners, PECASE winners.

No president has ever talked as much about ST&I.

With middle-school "Mathletes" in the Oval Office



"Rightful place": PCAST studies undertaken

- PCAST studies requested and completed:
 - The science and technology of 2009-H1N1 Influenza
 - Reengineering the Influenza Vaccine Production Enterprise
 - Assessment of the National Nanotechnology Initiative
 - Prepare and Inspire: K-12 STEM Education
 - Accelerating the Pace of Change in Energy Technologies
 - Realizing the Full Potential of Health IT to Improve Healthcare
 - Designing a Digital Future: Networking and IT R&D
- PCAST studies underway (with more to come):
 - Advanced manufacturing
 - Biodiversity preservation and ecosystem sustainability
 - The science of carbon offsets
 - STEM Higher Education – the first two years

No President has asked PCAST to do so much so soon.

The President and his PCAST



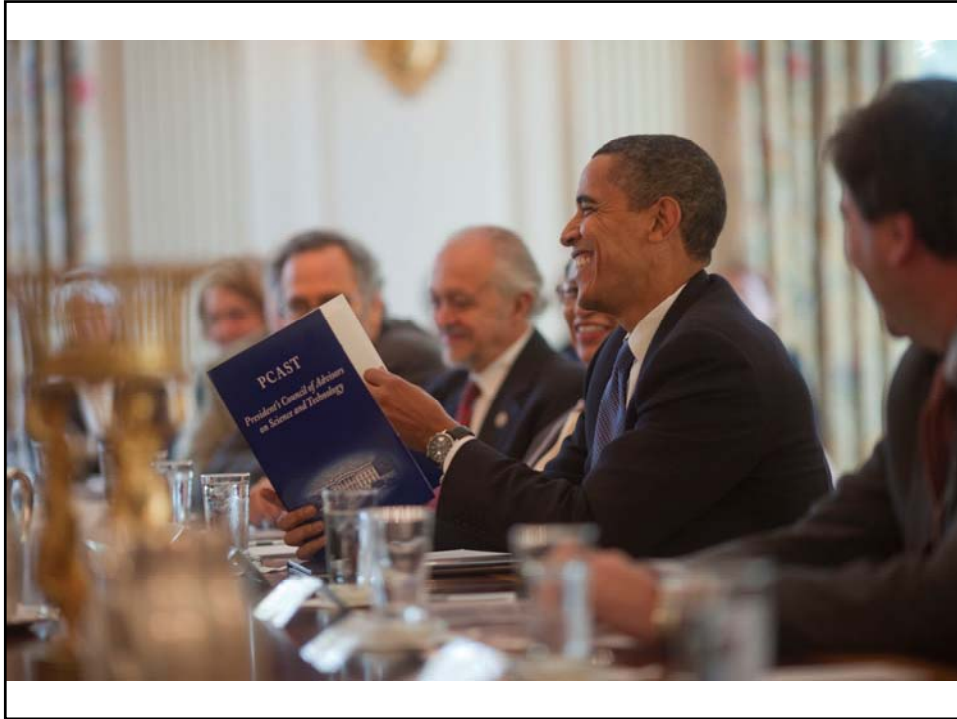
President Obama, VP Biden, and PCAST in the East Wing, 11-04-10

“Rightful place”: PCAST studies implemented

PCAST recommendations that are part of the President’s 2012 strategy:

- Prepare an additional 100,000 K-12 STEM teachers by the end of the decade
- Launch a new Advanced Research Projects Agency Education (ARPA-ED)
- Initiate improvements to influenza vaccine manufacturing to shorten production timeframe
- Accelerate breakthroughs in advanced manufacturing technologies
- Expand funding for Advanced Research Projects Agency – Energy (ARPA-E) and three new Energy Innovation Hubs
- Accelerate adoption of Electronic Health Records, and develop standards for health information exchange over the internet
- Support research to foster the next revolution in IT, to help transform healthcare, energy efficiency, education, and transportation

This PCAST works for a President who is listening!



“Rightful place”: budgets

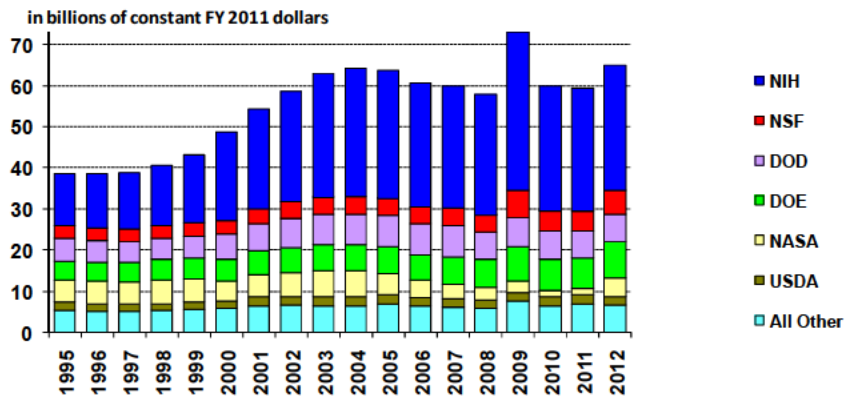
Investments in S&T

- Science got a huge boost in the stimulus/recovery package (American Recovery & Reinvestment Act -- ARRA) and the FY2009 / FY2010 budgets, giving 2009-10 the highest federal research spending ever.
- Total ARRA funds for S&T, including IT & transportation infrastructure, applied energy technology, space exploration, exceeded \$100 billion.
- Investment goals announced in 2009: double budgets of basic science agencies in 10 yr; make Research & Experimentation Tax Credit permanent: lift public + private investment in R&D to $\geq 3\%$ of GDP.

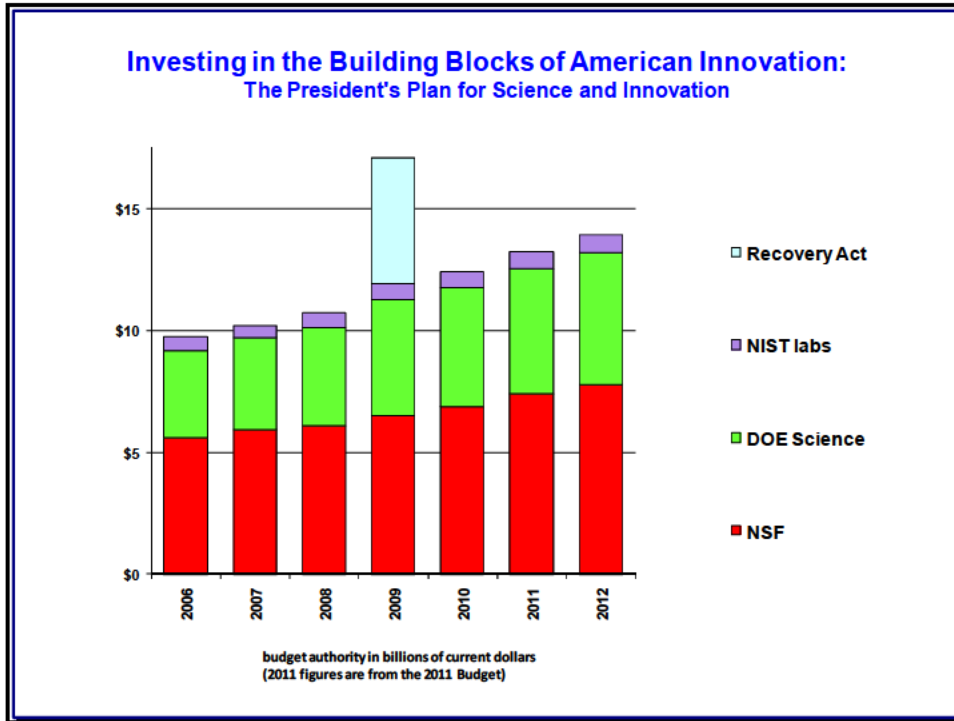
The President's FY2012 R&D Budget

- \$147.9B for Federal R&D—up \$0.8B from FY2010 enacted
- Nondefense R&D = \$66.8B—up \$4.1B (6.5 percent)
- Basic & applied research = \$66.1B—up \$6.9 billion (11 percent)
- NIH—\$31.8B (up 2.7 percent)
- DOE total—\$13.0B (up 20 percent)
 - DOE's Office of Science—\$5.4B (up 10.7 percent)
- NASA—\$9.8B (up 6 percent)
- NOAA—\$5.5B (up 15.8 percent)
- DHS—\$1.05B (up 19 percent)
- National Science Foundation—\$7.8B (up 13 percent)
- NIST—\$764M (up 15.1 percent)
- Defense Department's R&D portfolio—\$76.6B (-4.9 percent)

Winning the Future: Federal Research by Agency, FY 1995-2012

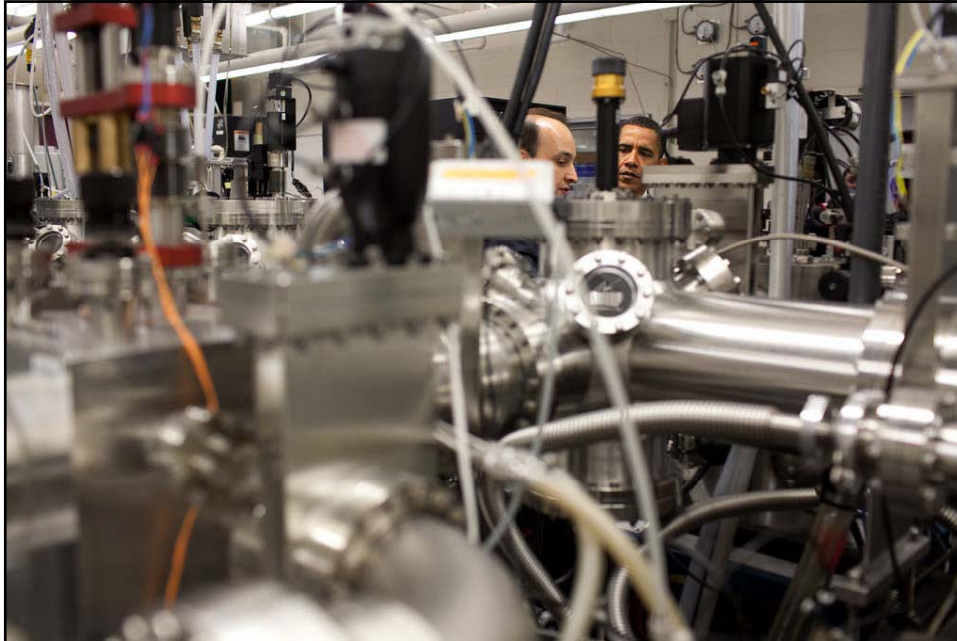


FY 2009 figures include Recovery Act appropriations.
 2011 figures are preliminary estimates.
 Research includes basic research and applied research.
 FEB. '11 OSTP



Initiatives: energy & environment 2009-10

- \$80 billion for clean & efficient energy in ARRA
- creation of ARPA-E (\$400M in 2009-10, \$300M proposed for FY2011), 3 energy-innovation hubs
- first-ever fuel-economy/CO₂ tailpipe standards
- US Global Change Research Program revived, with \$2.56 billion proposed for FY2011 (19.4% real increase).
- Interagency task force led by OSTP, CEQ, NOAA on coordination of government's adaptation activities
- Expanded responsibilities for the renamed NSTC Committee on Environment, Natural Resources, and Sustainability
- New National Oceans Policy & National Oceans Council



The President at the MIT Energy Lab, October 2009

Initiatives: energy & env't 2009-10 (continued)

- OMB/OSTP budget letter to agencies (7-21-10)
 - Calls for priority on understanding, mitigating, & adapting to climate change, and for support for the new National Climate Assessment covering these bases.
- Executive Order on Federal Leadership in Environmental, Energy, & Economic Performance (10-09)
 - “to establish an integrated strategy towards sustainability in the Federal Government and to make reduction of greenhouse gas emissions a priority...”
 - designation of agency senior sustainability officers
 - sustainable buildings & acquisition policies
 - targets for GHG reductions in Federal agencies (28% reduction by 2020)



Sustainability "on the ground": the First Couple planting trees in a DC wetland.

Initiatives: energy & env't 2011

- FY2012 Budget has \$550M for ARPA-E; EERE up 43%; energy hubs doubled 3→6
- Making climate change mitigation & adaptation a priority for initiatives in departments & agencies, employing existing authorities.
- Working with the new Congress on initiatives for accelerating the transition to cleaner & more efficient energy options that bring multiple economic, environmental, & security benefits.
- Working with other major emitting countries to build technology cooperation + individual & joint climate policies for mitigation and adaptation.



President Obama and VP Biden with rooftop PV arrays, Denver

The US Global Change Research Program

- Administered by the USGCRP subcommittee of the NSTC's CENR, w 13 participating dep'ts & agencies
- We are engaged in broadening and strengthening USGCRP's work on:
 - Science: aerosols, precipitation, ice, paleoclimate, regional climate prediction
 - Adaptation: accounting for system effects, economics, behavior, governance issues
 - Integrated Assessment: engaging & meeting the needs of diverse regions, sectors, with the next **National Assessment of Climate Change** underway for 2013 delivery
- 2012 proposed budget = \$2.6B, up 19% real

National Oceans Policy

Executive Order 13547, 19 July 2010

- The EO establishes our Nation's first ever ***National Policy for Stewardship of the Ocean, our Coasts, and the Great Lakes***
- Creates an interagency ***National Ocean Council*** to provide sustained, high-level, and coordinated attention to advance the National Policy
- Prioritizes ***9 categories for action*** that seek to address the most pressing challenges facing the ocean, our coasts, and the Great Lakes
- Establishes ***a flexible framework for effective coastal and marine spatial planning*** to address conservation, economic activity, user conflict, and sustainable use of ecosystem services

33

President Obama signing the National Oceans Policy Executive Order (19 July 2010)



National Oceans Policy: The nine categories of action

- Four priority objectives to improve the way we do business:
 - ✓ Ecosystem-based management
 - ✓ Coastal and marine spatial planning
 - ✓ Inform decisions and improve understanding
 - ✓ Coordinate and support
- Five areas of special focus:
 - ✓ Resiliency/adaptation to climate change and ocean acidification
 - ✓ Regional ecosystem protection and restoration
 - ✓ Water quality and sustainable practices on land
 - ✓ Changing conditions in the Arctic Ocean
 - ✓ Ocean, coastal, and Great Lakes observations and infrastructure

35 35

The President's American Innovation Strategy

- Invest in the building blocks of innovation
 - educate Americans with 21st century skills
 - strengthen leadership in fundamental research
 - Building a leading physical infrastructure
 - develop an advanced IT “ecosystem”
- Promote market-based innovation
 - accelerate business innovation w R&E tax credit
 - encourage innovation-based entrepreneurship
 - grow investments in ingenuity w effective IPR policy
 - promote innovative, open, competitive markets

The American Innovation Strategy (continued)

- Catalyze breakthroughs for national priorities
 - unleash a clean-energy revolution
 - accelerate i_t_h, n_n_t_h, & advanced mfg
 - develop breakthroughs in space applications
 - drive breakthroughs in health-care technology
 - create a leap forward in educational technologies
- These efforts include increased support for...
 - scientists & engineers early in their careers
 - commercializing university research
 - multidisciplinary & high-risk/high-return research

STEM-education initiatives

- Increased collaboration of White House (OSTP, DPC) with Dept of Education & NSF, HHS, DoD, DOE, NASA
- New national goals: moving American kids from middle to top of international rankings on science & math tests, increasing American proportion of college graduates to first in the world by 2020.
- \$4.4 billion “Race to the Top” in the ARRA included preference to states whose proposals emphasize innovation in STEM education.
- “Educate to Innovate” program (11-09) for K-12 STEM education w \$700+ million in private-sector & philanthropic support; “Change the Equation” added 9-10



Initiatives on principles & procedures

- Stem-cell guidelines
 - expanding stem-cell lines that can be used with federal support while respecting ethical boundaries
- Reporting procedures for Federal grants
 - streamlined and made consistent across agencies
- Scientific integrity principles
 - Presidential memo 3-09, add'l guidelines 12-10
 - ensuring openness, transparency, reliance on peer-reviewed science across Federal agencies
- Open government
 - expanded access to databases at every agency

the WHITE HOUSE PRESIDENT BARACK OBAMA

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Open Government Initiative

TRANSPARENCY • PARTICIPATION • COLLABORATION

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My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

— PRESIDENT OBAMA, 04/21/09

LATEST BLOG POSTS

June 18, 2010 at 1:34 PM EDT
Ending Lobbyist Appointments to Agency Boards and Commissions
A new Presidential Memorandum directs agencies in the Executive Branch not to appoint or re-appoint currently-registered federal lobbyists to advisory boards or commissions.

PARTICIPATE NOW

Change the Game in Cybersecurity
Help refine game-changing concepts in cybersecurity research and development.

Apps for Healthy Kids
\$60,000 in prizes to innovative software tools and games that encourage children – directly or through their parents – to be active and eat healthy.

OPEN GOVERNMENT DASHBOARD

More Information

An Official Web Site of the United States Government Sunday, June 27, 2010 Text: [Icons] Share [Icon]

DATA.GOV
EMPOWERING PEOPLE

HOME DATA TOOLS COMMUNITY METRICS DIALOGUE

Data.gov Catalogs

Use the Data.gov catalog below to access U.S. Federal Executive Branch datasets. Click on the name of a dataset to view additional metadata for that dataset. By accessing the data catalogs, you agree to the [Data Policy](#). Data.gov offers data in three ways: through the "raw" data catalog, using tools and through the goodata catalog. The "Raw" Data Catalog provides an instant download of machine readable, platform-independent datasets while the Tools Catalog provides hyperlinks which may lead to agency tools or agency web pages that allow you to mine datasets.

TOOLS

"RAW" DATA CATALOG TOOL CATALOG GOODATA CATALOG

Search "raw" data by keywords

Search "raw" data by file type
XML CSV/Text KML/KMZ Shapefile RDF Other

Search "raw" data by single/multiple category

Search "raw" data by single/multiple agency

Page 1 of 62 (1,547 records) Results per page: 25 | 50 | 100

Name (click for metadata and to rate dataset)	Rating	Agency	XML	CSV/TXT	KML/KMZ	Shapefile	RDF	Other
Formal Enforcement Actions Fiscal Year 2009 The annual data tables contained in this document provide summary statistics on the civil enforcement activities of the United States Trustee Program. These tables summa...	★ ★ ★ ★ (11 votes)	DOJ/USTP						
Informal Enforcement Actions Fiscal Year 2009 The annual data tables contained in this document provide summary statistics on the civil enforcement activities of the United States Trustee Program. These tables summa...	★ ★ ★ ★ (5 votes)	DOJ/USTP						

Initiatives: NASA

- The Obama Administration inherited a space program in disarray after years of mismatch of resources and vision.
- The Augustine Committee deemed the Constellation program for crewed missions beyond low Earth orbit (LEO) “unexecutable”.
- Meanwhile Earth science, space science, & aeronautics had been gutted to feed Constellation; the ISS was going to be scrapped in 2016; and the projected gap in ability to transport US astronauts to LEO on US rockets after Shuttle retirement was lengthening.
- The new Administration developed a plan to rebalance NASA’s programs, with longer use of the ISS, more science, more R&D on advanced systems, more diverse destinations for crewed missions, and increased reliance on commercial transport of crew to LEO.
- The new plan was rolled out with the President’s FY2011 Budget and elaborated in a speech by the President at KSC on 4-15-10.

President Obama visits KSC & SpaceX Falcon 9, 4-15-2010

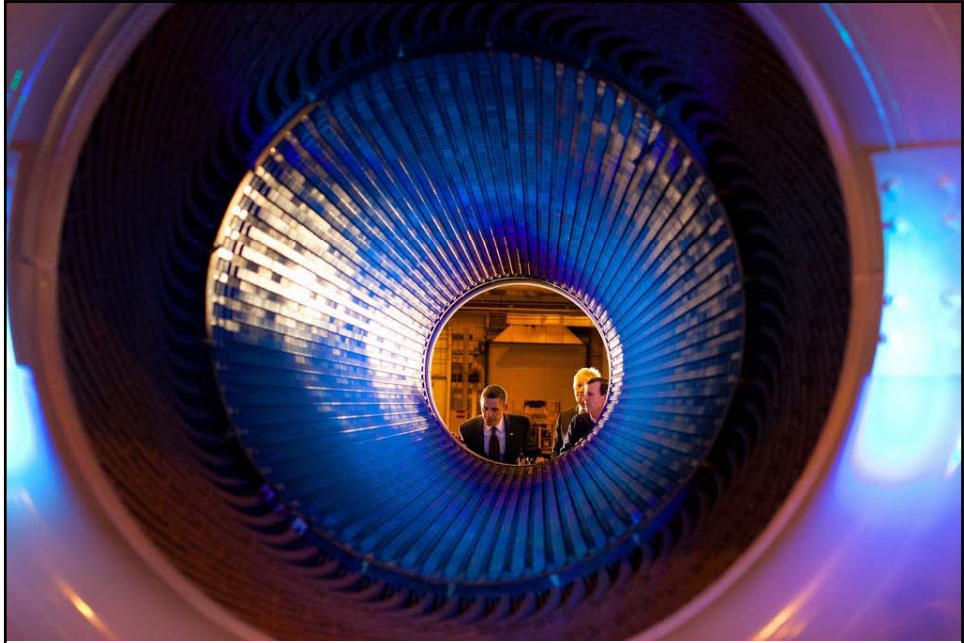


NASA (continued)

- The NASA Authorization Act of 2010 represented a compromise containing much that the President and NASA leadership wanted but reflecting a Congressional preference for using existing technologies and contracts to develop a replacement for Constellation’s “heavy lift” rocket by the end of 2016.
- The FY 2012 budget funds every element of the 2010 Act, but there will be arguments about the numbers proposed, some rooted in challenges arising from the lack of a 2011 budget.
- Omens for success of “commercial crew” have been improving, including 2 recent successful launches of the SpaceX company’s Falcon 9 rocket (the 2nd one with orbit and on-target splashdown of a dummy crew capsule), and the entry of a Constellation prime contractor into the commercial-crew competition.

Partnerships: working w the private sector

- Firms fund 67% of US R&D, perform 72%.
- Pres Obama has proposed to make the Research & Experimentation tax credit permanent.
- Recovery Act has helped start & grow clean-energy businesses across the country.
- Small Business Innovation Research (SBIR) initiative provides funding from diverse agencies for many avenues of innovation.
- Small business lending bill (signed 9-27-10) increases loans & cuts taxes for entrepreneurs.
- DOE’s energy-innovation hubs link national labs, universities, and industry.



President visiting GE Schenectady, 21 January 2011

Partnerships with the private sector (continued)

- Launched Jan. 31, Startup America is facilitating entrepreneurship by increasing the success of high-growth startups that create broad economic growth and quality jobs
 - Aims to accelerate the transfer of new ideas from labs to the market
 - Create new opportunities for small business financing
 - Improve regulatory environment for starting and growing new businesses
- 15 private-sector leaders have committed to Startup America’s goal of catalyzing & developing entrepreneurial ecosystems across the Nation
- Last week the President visited Northern Michigan University to unveil the Wireless Innovation and Infrastructure Initiative (Wi3), an ambitious blueprint to connect 98 percent of the US population with 4G wireless
 - *“To attract the best jobs and newest industries, we’ve got to **out-innovate, out-educate, out-build and out-hustle** the rest of the world.” - President Obama at NMU*

Harnessing private innovation: prizes and challenges

- Prizes & challenges harness the ingenuity that lurks in individuals, schools, firms all across the society.
- Sponsors/organizers set an ambitious goal without prescribing the best means to achieve it, pay only for results.
- The Administration's new challenge.gov website provides 1-stop shopping for innovators looking for opportunities.

Prizes and challenges (continued)

- The recent Progressive Insurance / DOE Automotive X-Prize illustrates the leverage in this approach.
 - \$10M in prizes for super-fuel-efficient passenger vehicles (over 100 miles per gallon of gasoline equivalent) called forth \$100M+ in investments in innovation by competitors.
 - Winning designs achieved up to 200 MPGe.



Partnerships: International ST&I cooperation

- Reviving & strengthening the high-level Joint Commission Meetings on S&T cooperation with China, India, Brazil, Japan, S Korea, Russia
- Nurturing the strong S&T cooperation that has long existed with the EU, Canada, Australia, NZ...
- Convening the Multilateral Economic Forum, US-China S&ED, US-Russia Presidential Commission strong ST&I focus
- Streamlining the visa procedures that apply to visiting scientists & technologists
- S&T as a centerpiece of Cairo speech (Science Envoys, centers of excellence) & USAID strategy

Science Envoys: the 1st two cohorts

2009-10

2011-12

Bruce Alberts
Indonesia,
Pakistan to
come



Rita Colwell
Bangladesh,
Malaysia,
Vietnam

Elias Zerhouni
Morocco, Libya,
Algeria, Tunisia,
Qatar, Kuwait,
Saudi Arabia



Gebisa Ejeta
South Africa,
Tanzania,
Ethiopia or
Kenya

Ahmed Zewail
Egypt, Turkey,
Lebanon,
Jordan



Alice Gast
Azerbaijan,
Kazakhstan,
Uzbekistan
or Georgia

http://www.america.gov/science_envoys.html

Priorities identified in the 1st round of envoy visits

- Global S&T knowledge-sharing initiative
 - Expand broadband access
 - Electronic libraries
 - Global e-Learning resources for students and teachers
 - Tools for mentoring and collaboration
- Enhance USG coordination, awareness
- Promote academic exchange and sustain collaborations
- Promote centers/networks of excellence

OSTP will sponsor a conference at NAS in spring 2011 on ways to enhance international S&T engagement.

Ongoing expansion of global engagement

- Centers of Excellence being developed in water, climate change, energy
- OSTP and NSC leading a "Global Engagement" policy committee
- State Department allocated 12 new science-officer positions in regional embassies
- New NSTC Subcommittee on International S&T

The screenshot shows the official website of the Office of Science and Technology Policy (OSTP) at the White House. The page is titled "Global Science Diplomacy" and features a sub-header "First Anniversary of President Obama's Cairo Speech". A photograph of President Obama speaking at a podium is displayed. To the right of the photo is a list of related blog posts and a "Related Blog Post" section. At the bottom, there is a list of periodic reports from the ESTH (Environment, Science, Technology, and Health) officer stationed at the Embassies in each region.

The linchpin of progress in S&T policy: a committed President



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.)

Exhibit 1:

OSTP's Letter of March 31, 2014
Enclosing Certain Responsive Documents
(excerpts of those documents
are also found beneath)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

March 31, 2014

Mr. Christopher C. Horner
1899 L Street NW, Suite 1200
Washington, DC 20036

Re: OSTP FOIA No. 14-02

Dear Mr. Horner:

On October 16, 2013, you sent the Office of Science and Technology Policy (OSTP) a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking:

[c]opies 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.

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.

OSTP sent you a letter on February 4, 2014, explaining that your request was unperfected and offering you an opportunity to perfect your request. On February 18, 2014, you sent OSTP a letter clarifying that you are requesting a search of Dr. John Holdren's OSTP email account for records to and from jholdren@whrc.org.

On March 7, 2014, OSTP sent you a letter advising that your request was perfected upon its receipt by OSTP on February 18, 2014. In its March 7 letter, OSTP also advised that it had conducted a search of Dr. Holdren's OSTP email account and would produce responsive records to you on a rolling basis, that is, as records are processed and become available.

Agencies are allowed 20 working days to respond to a FOIA request, extending this period for an additional 10 working days under certain circumstances. *See* 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i). OSTP has completed its search for records potentially responsive to your request. Because you did not specify a specific time period for your request, OSTP located a large number of records that may be responsive. Given the large number of potentially responsive records and the likely need to consult with other agencies regarding records containing their equities, your request falls within the "unusual circumstances" described in 5 U.S.C. §§ 552(a)(6)(B)(i)-(iii) and will take more than 30 days to process. OSTP will release responsive records as they are processed and become available.

If you would like to receive particular responsive records more quickly, you may choose to narrow the scope of your request. *See* 5 U.S.C. § 552(a)(6)(B)(ii). If you would like to discuss narrowing the scope of your request to reduce processing time, please contact me at 202-456-4444 or ostpfoia@ostp.eop.gov. You may also contact OSTP's FOIA Public Liaison, Rachael Leonard, at the same number and email address.

Enclosed, please find 110 pages consisting of OSTP's first set of responsive documents in response to your request. OSTP has withheld portions of responsive documents under 5 U.S.C. §§ 552(b)(5) and (b)(6). In addition, OSTP has withheld 73 pages in full under (b)(5). Attachments marked as "(b)(5)" or "Attachment Withheld" have been withheld in full under 5 U.S.C. § 552(b)(5).

In your letter dated February 18, 2014, you also requested a waiver of all FOIA processing fees. OSTP has elected to assess no fees associated with processing OSTP FOIA Request No. 14-02. Accordingly, there is no need to determine the appropriate requester category or to adjudicate the request for a fee waiver, which OSTP neither grants nor denies.

OSTP is continuing to process your request and will release responsive, non-exempt records to you on a rolling basis. In the meantime, please do not hesitate to contact me if you have any questions.

Sincerely,



Jennifer Lee
202-456-4444

From: John Holdren <jholdren@whrc.org>
To: Weiss, Rick </o=eop/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=rickweiss24142627>
Cc: Holdren, John P. </o=eop/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=johnp.holdren67352118>; Siger, Rick </o=eop/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=frederick_c_siger>; Vahey, Moira </o=eop/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=vahey, moira.k.a3a>; Fried, Becky </o=eop/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=fried, rebecca.l.2e7>
Bcc:
Subject: Re: Holdren on WH press call this evening
Date: Thu Feb 13 2014 15:42:33 EST
Attachments:

(b)(5)

Sent from my iPad

On Feb 13, 2014, at 11:40 AM, "Weiss, Rick" (b)(6) wrote:

John,

(b)(5)

The Press call is at 6:30 this evening.

(b)(5)

(b)(5)

Rick Weiss

Director of Communications and Senior Science and Technology Policy Analyst

Office of Science and Technology Policy

Executive Office of the President

(b)(6)

From: John P Holdren <jholdren@whrc.org>
To: Holdren, John P. </o=eop/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=johnp.holdren67352118>
Cc:
Bcc:
Subject: Fwd: CLIMATE: MORE.....
Date: Mon Feb 10 2014 05:34:50 EST
Attachments: adc.png
An-Egyptian-farmer-on-cra-011.jpg
environment.gif
logo_observer.gif
Prince-Charles-visits-Muc-006.jpg
suzanne_goldenberg_140x140.jpg
Women-Maharashtrian-villa-004.jpg

Sent from my iPhone

Begin forwarded message:

From: "Paul R. Ehrlich" (b)(6)
Date: February 9, 2014 at 3:59:50 PM EST
To: List <ehrllich_list@lists.stanford.edu>
Subject: CLIMATE: MORE.....

Groundwater is one of the gigantic question marks in the human future.....P

Hide

Why global water shortages pose threat of terror and war

From California to the Middle East, huge areas of the world are drying up and a billion people have no access to safe drinking water. US intelligence is warning of the dangers of shrinking resources and experts say the world is 'standing on a precipice'

*
*

*
Suzanne Goldenberg
*

*The Observer, Saturday 8 February 2014

An Egyptian farmer shows the dryness of the land due to drought in a farm formerly irrigated by the river Nile. Photograph: Mohamed Abd El Ghany/Corbis

On 17 January, scientists downloaded fresh data from a pair of Nasa satellites and distributed the findings among the small group of researchers who track the world's water reserves. At the University of California, Irvine, hydrologist James Famiglietti looked over the data from the gravity-sensing Grace satellites with a rising sense of dread.

The data, released last week, showed California on the verge of an epic drought, with its backup systems of groundwater reserves so run down that the losses could be picked up by satellites orbiting 400km above the Earth's surface.

"It was definitely an 'oh my gosh moment'," Famiglietti said. "The groundwater is our strategic reserve. It's our backup, and so where do you go when the backup is gone?"

That same day, the state governor, Jerry Brown, declared a drought emergency and appealed to Californians to cut their water use by 20%. "Every day this drought goes on we are going to have to tighten the screws on what people are doing," he said.

Seventeen rural communities are in danger of running out of water within 60 days and that number is expected to rise, after the main municipal water distribution system announced it did not have enough supplies and would have to turn off the taps to local agencies.

There are other shock moments ahead – and not just for California – in a world where water is increasingly in short supply because of growing demands from agriculture, an expanding population, energy production and climate change.

Already a billion people, or one in seven people on the planet, lack access to safe drinking water. Britain, of course, is currently at the other extreme. Great swaths of the country are drowning in misery, after a series of Atlantic storms off the south-western coast. But that too is part of the picture that has been coming into sharper focus over 12 years of the Grace satellite record. Countries at northern latitudes and in the tropics are getting wetter. But those countries at mid-latitude are running increasingly low on water.

"What we see is very much a picture of the wet areas of the Earth getting wetter," Famiglietti said. "Those would be the high latitudes like the Arctic and the lower latitudes like the tropics. The middle latitudes in between, those are already the arid and semi-arid parts of the world and they are getting drier."

On the satellite images the biggest losses were denoted by red hotspots, he said. And those red spots largely matched the locations of groundwater reserves.

"Almost all of those red hotspots correspond to major aquifers of the world. What Grace shows us is that groundwater depletion is happening at a very rapid rate in almost all of the major aquifers in the arid and semi-arid parts of the world."

The Middle East, north Africa and south Asia are all projected to experience water shortages over the coming years because of decades of bad management and overuse.

Watering crops, slaking thirst in expanding cities, cooling power plants, fracking oil and gas wells – all take water from the same diminishing supply. Add to that climate change – which is projected to intensify dry spells in the coming years – and the world is going to be forced to think a lot more about water than it ever did before.

The losses of water reserves are staggering. In seven years, beginning in 2003, parts of Turkey, Syria, Iraq and Iran along the Tigris and Euphrates rivers lost 144 cubic kilometres of stored freshwater – or about the same amount of water in the Dead Sea, according to data compiled by the Grace mission and released last year.

A small portion of the water loss was due to soil drying up because of a 2007 drought and to a poor snowpack. Another share was lost to evaporation from lakes and reservoirs. But the majority of the water lost, 90km³, or about 60%, was due to reductions in groundwater.

Farmers, facing drought, resorted to pumping out groundwater – at times on a massive scale. The Iraqi government drilled about 1,000 wells to weather the 2007 drought, all drawing from the same stressed supply.

In south Asia, the losses of groundwater over the last decade were even higher. About 600 million people live on the 2,000km swath that extends from eastern Pakistan, across the hot dry plains of northern India and into Bangladesh, and the land is the most intensely irrigated in the world. Up to 75% of farmers rely on pumped groundwater to water their crops, and water use is intensifying.

Over the last decade, groundwater was pumped out 70% faster than in the 1990s. Satellite measurements showed a staggering loss of 54km³ of groundwater a year. Indian farmers were pumping their way into a water crisis.

The US security establishment is already warning of potential conflicts – including terror attacks – over water. In a 2012 report, the US director of national intelligence warned that overuse of water – as in India and other countries – was a source of conflict that could potentially compromise US national security.

The report focused on water basins critical to the US security regime – the Nile, Tigris-Euphrates, Mekong, Jordan, Indus, Brahmaputra and Amu Darya. It concluded: "During the next 10 years, many countries important to the United States will experience water problems – shortages, poor water quality, or floods – that will risk instability and state failure, increase regional tensions, and distract them from working with the United States."

Water, on its own, was unlikely to bring down governments. But the report warned that shortages could threaten food production and energy supply and put additional stress on governments struggling with poverty and social tensions.

Some of those tensions are already apparent on the ground. The Pacific Institute, which studies issues of water and global security, found a fourfold increase in violent confrontations over water over the last decade. "I think the risk of conflicts over water is growing – not shrinking – because of increased competition, because of bad management and, ultimately, because of the impacts of climate change," said Peter Gleick, president of the Pacific Institute.

There are dozens of potential flashpoints, spanning the globe. In the Middle East, Iranian officials are making contingency plans for water rationing in the greater Tehran area, home to 22 million people.

Egypt has demanded Ethiopia stop construction of a mega-dam on the Nile, vowing to protect its historical rights to the river at "any cost". The Egyptian authorities have called for a study into whether the project would reduce the river's flow.

Jordan, which has the third lowest reserves in the region, is struggling with an influx of Syrian refugees. The country is undergoing power cuts because of water shortages. Last week, Prince Hassan, the uncle of King Abdullah, warned that a war over water and energy could be even bloodier than the Arab spring.

The United Arab Emirates, faced with a growing population, has invested in desalination projects and is harvesting rainwater. At an international water conference in Abu Dhabi last year, Crown Prince General Sheikh Mohammed bin Zayed al-Nahyan said: "For us, water is [now] more important than oil."

The chances of countries going to war over water were slim – at least over the next decade, the national intelligence report said. But it warned ominously: "As water shortages become more acute beyond the next 10 years, water in shared basins will increasingly be used as leverage; the use of water as a weapon or to further terrorist objectives will become more likely beyond 10 years."

Gleick predicted such conflicts would take other trajectories. He expected water tensions would erupt on a more local scale.

"I think the biggest worry today is sub-national conflicts – conflicts between farmers and cities, between ethnic groups, between pastoralists and farmers in Africa, between upstream users and downstream users on the same river," said Gleick.

"We have more tools at the international level to resolve disputes between nations. We have diplomats. We have treaties. We have international organisations that reduce the risk that India and Pakistan will go to war over water but we have far fewer tools at the sub-national level."

And new fault lines are emerging with energy production. America's oil and gas rush is putting growing demands on a water supply already under pressure from drought and growing populations.

More than half the nearly 40,000 wells drilled since 2011 were in drought-stricken areas, a report from the Ceres green investment network found last week. About 36% of those wells were in areas already experiencing groundwater depletion.

How governments manage those water problems – and protect their groundwater reserves – will be critical. When California emerged from its last prolonged dry spell, in 2010, the Sacramento and San Joaquin river basins were badly depleted. The two river basins lost 10km³ of freshwater each year in 2012 and 2013, dropping the total volume of snow, surface water, soil moisture and groundwater to the lowest levels in nearly a decade.

Without rain, those reservoirs are projected to drop even further during this drought. State officials are already preparing to drill additional wells to draw on groundwater. Famiglietti said that would be a mistake.

"We are standing on a cliff looking over the edge and we have to decide what we are going to do," he said.

"Are we just going to plunge into this next epic drought and tremendous, never-before-seen rates of groundwater depletion, or are we going to buckle down and start thinking of managing critical reserve for the long term? We are standing on a precipice here."

REGIONS AT RISK

1 CALIFORNIA

The state's water resources are at critically low levels and a drought emergency has been declared. The health department says 17 rural areas are dangerously parched.

2 BRAZIL

São Paulo, the country's largest city, is on the verge of water rationing because of a severe drought and

shortages are possible when the country hosts the football World Cup in the summer. January was the hottest month on record in the city and water in its main reservoir has fallen to 20.9% of its capacity, the lowest level in a decade.

3 MIDDLE EAST

Tehran, the capital of Iran, is facing a shortage so serious that officials are making contingency plans for rationing in an area where 22 million live as well as in other big cities. President Hassan Rouhani has identified water as a national security issue. Shortages are so severe in the United Arab Emirates that the country is using non-conventional resources, including desalination, treated wastewater, rainwater harvesting and cloud seeding. At a water conference, Crown Prince General Sheikh Mohammed bin Zayed al-Nahyan said: "For us, water is [now] more important than oil." With the third lowest water reserves in the region, Jordan is struggling to cope with an influx of Syrian refugees. The country is undergoing power cuts because of water shortages. Prince Hassan, uncle of King Abdullah, warned last week that a war over water and energy could be bloodier than the Arab spring.

4 NORTH AFRICA

Egypt has demanded that Ethiopia stop construction of a mega-dam on the Nile, vowing to protect its historical rights to the river at "any cost". The Egyptian authorities have called for a study into whether the project would reduce the river's flow.

5 SOUTH ASIA About 600 million people live on the 2,000km swath that extends from eastern Pakistan, across the hot dry plains of northern India and into Bangladesh and the land is the world's most intensely irrigated. Up to 75% of farmers rely on pumped groundwater.

6 CHINA

There is increasing competition for water. More than half the proposed coal-fired power stations are expected to be built in areas of high water stress, thus threatening water insecurity for farms, other industry and the public. this?

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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.)

Exhibit 2:

Excerpts from index of redacted emails
in *CEI v. EPA*, No. 12-1617 (JEB)

(lists emails to and from OSTP Director
John Holdren's personal email account
citing deliberative process privilege)

Index Number	From	To/cc/bcc	Date
01268-EPA-4606	"Zichal, Heather R."	Richard Windsor/DC/USEPA/US@EPA;"Sutley, Nancy H." <(b) (6) Privacy> Carson, Jonathan K." <(b) (6) Privacy> Browner, Carol M." <(b) (6) Privacy> Heather.Zich Heinzerling/DC/USEPA/US@EPA;David McIntosh/DC/USEPA/US@EPA;Robert Richard Windsor/DC/USEPA/US@EPA;Lisa Heinzerling/DC/USEPA/US@EPA;David McIntosh/DC/USEPA/US@EPA;Eric Wachter/DC/USEPA/US@EPA	02/01/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4607	Robert Goulding	Richard Windsor/DC/USEPA/US@EPA;"Sutley, Nancy H." <(b) (6) Privacy> Sutphen, Mona K." <(b) (6) Privacy> SChu@hq.do	02/02/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4608	"Holdren, John P."	"Browner, Carol M." <(b) (6) Privacy> Richard Windsor/DC/USEPA/US@EPA;"Sutley, Nancy H." <(b) (6) Privacy> Sutphen, Mona K." <(b) (6) Privacy> SChu@hq.do	02/04/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4609	"Holdren, John P."	"Browner, Carol M." <(b) (6) Privacy> Richard Windsor/DC/USEPA/US@EPA;"Sutley, Nancy H." <(b) (6) Privacy> Sutphen, Mona K." <(b) (6) Privacy> SChu@hq.do	02/04/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4610	Richard Windsor	"Holdren, John P." <(b) (6) Privacy> Holdren, John P." <(b) (6) Privacy> Browner, Carol M." <(b) (6) Privacy> Kohlenberger Jim C." <(b) (6) Privacy> Sutphen, Mona K." <(b) (6) Privacy>	02/04/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4611	"Sutley, Nancy H."	Richard Windsor/DC/USEPA/US@EPA;"Holdren, John P." <(b) (6) Privacy> Browner, Carol M." <(b) (6) Privacy> Kohlenberger Jim C." <(b) (6) Privacy> Sutphen,	02/04/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-4831	Richard Windsor	[redacted] "Holdren, John P." <(b) (6) Privacy>; Harold Varmus" <varmus@mskcc.org>; "Eric Lander" <lander@broad.mit.edu>; "Stine, Deborah D." <(b) (6) Privacy>; Katharine Gage" <Gage.Katharine@epamail.epa.gov>; "Diane Thompson" <thompson.diane@epa.gov>; "Carol Browner" <(b) (6) Privacy>	[redacted] 07/22/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-4832	Richard Windsor	[redacted] Richard Windsor/DC/USEPA/US@EPA; Diane Thompson/DC/USEPA/US@EPA; Arvin Ganesan/DC/USEPA/US@EPA	[redacted] 07/23/2009 Ex. 5 - Deliberative Process Privilege -Redact [redacted] 07/25/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-4833	Bob Sussman	[redacted] Richard Windsor/DC/USEPA/US@EPA; Diane Thompson/DC/USEPA/US@EPA; Arvin Ganesan/DC/USEPA/US@EPA	[redacted] 07/25/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-4834	Scott Fulton	[redacted] Eric Wachter/DC/USEPA/US@EPA; windsor.richard@epa.	[redacted] 07/27/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-4835	Michael Moats	[redacted] Eric Wachter/DC/USEPA/US@EPA; goulding.robert@epa.; Fulton/DC/USEPA/US@EPA; windsor.richard@epa.gc Brooks-LaSure/DC/USEPA/US@EPA; Seth Oster/DC/USEPA/US@EPA	[redacted] 07/27/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-4836	"Stine, Deborah D."	[redacted] Richard Windsor/DC/USEPA/US@EPA; Katharine Gage/DC/USEPA/US@EPA; Diane Thompson/DC/USEPA/US@EPA	[redacted] 07/27/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-4903	"Sutley, Nancy H."	Richard Windsor/DC/USEPA/US@EPA;"Sunstein, Cass R." (b) (6) Privacy Ericsson, Sally C." (b) (6) Privacy Holdren, John P." (b) (6) Privacy Summers, Lawrence" (b) (6) Privacy Romer, Christina" Richard Windsor/DC/USEPA/US@EPA;Gina McCarthy/DC/USEPA/US@EPA;Lisa Heinzerling/DC/USEPA/US@EPA;David McIntosh/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert Goulding/DC/USEPA/US@EPA	09/22/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4904	Richard Windsor	Messina, James A." (b) (6) Privacy >; "Sutphen, Mona K." (b) (6) Privacy Rouse, Peter M."	09/22/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4905	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA;Gina McCarthy/DC/USEPA/US@EPA;Lisa Heinzerling/DC/USEPA/US@EPA;David McIntosh/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert Goulding/DC/USEPA/US@EPA	09/22/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4906	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA;Bob Sussman/DC/USEPA/US@EPA;Chuck Fox/CBP/USEPA/US@EPA	09/23/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4907	Richard Windsor	"Lisa At Home" L.Jackson b(6)	09/23/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4908	"Sutley, Nancy H."	Richard Windsor/DC/USEPA/US@EPA	09/24/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-4956	Bob Sussman	Richard Windsor/DC/USEPA/US@EPA;Peter Silva/DC/USEPA/US@EPA;Diane Thompson/DC/USEPA/US@EPA;Seth Oster/DC/USEPA/US@EPA	10/14/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4957	Bob Sussman	Seth Oster/DC/USEPA/US@EPA;Richard Windsor/DC/USEPA/US@EPA	10/14/2009 Ex. 6 - Personal Privacy -Redact
01268-EPA-4958	Adora Andy	"Seth Oster" <oster.seth@epa.gov>; "Richard Windsor" <windsor.richard@epa.gov>; "Betsaida Alcantara" <alcantara.betsaida@epa.gov>; "Brendan Gilfillan" <gilfillan.brendan@epa.gov>; "Michael Moats" <Moats.Michael@epamail.epa.gov>	10/15/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4959	Diane Thompson	"Richard Windsor" <Windsor.Richard@epamail.epa.gov>	10/16/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4961	"Holdren, John P."	"Koonin, Steven" <Steven.Koonin@science.doe.gov>; "Lubchenco, Jane" <lubchenco@oregonstate.edu>; Richard Windsor/DC/USEPA/US@EPA	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4962	"Koonin, Steven"	"Holdren, John P." <(b) (6) Privacy Lubchenco, Jane" <lubchenco@oregonstate.edu>; Richard Windsor/DC/USEPA/US@EPA	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-4963	Richard Windsor	"Diane Thompson" <thompson.diane@epa.gov>	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-4964	Richard Windsor	[redacted] "Holdren, John P." <[redacted]@epa.gov>; [redacted] Koonin, Steven" <[redacted]@epa.gov>; "Lubchenco, Jane" <lubchenco@oregonstate.edu>; "Diane Thompson" <thompson.diane@epa.gov>	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4965	Richard Windsor	"Diane Thompson" <thompson.diane@epa.gov>	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4966	"Lubchenco, Jane"	[redacted] Steven.Koonin [redacted] Windsor/DC/USEPA/US@EPA	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4967	Richard Windsor	"Diane Thompson" <thompson.diane@epa.gov>	10/20/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4968	Lisa Heinzerling	Richard Windsor/DC/USEPA/US@EPA	10/22/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-4969	Richard Windsor	Lisa Heinzerling/DC/USEPA/US@EPA	10/22/2009 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

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Index Number	From	To/cc/bcc	Date
01268-EPA-5020	David McIntosh	windsor.richard@epa.gov;oster.seth@epa.gov;depa	11/25/2009
01268-EPA-5021	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA;Michelle DePass/DC/USEPA/US@EPA;Lisa Heinzerling/DC/USEPA/US@EPA;David McIntosh/DC/USEPA/US@EPA;Gina McCarthy/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Ailyn Brooks-LaSure/DC/USEPA/US@EPA;Seth Oster/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert "Jackson, Lisa P." <windsor.richard@epa.gov>; "Fulton, Scott" <fulton.scott@epa.gov>; "Thompson, Diane" <Thompson.Diane@epamail.epa.gov>; "Sussman, Bob" <sussman.bob@epa.gov>; "Heinzerling, Lisa" <Heinzerling.Lisa@epamail.epa.gov>; "DePass, Michelle" <DePass.Michelle@epamail.epa.gov>; "McCarthy, Gina" <Browner.Carol.M.>; "Sutley, Nancy H." <(b) (6) Privacy>; "Smith, Elizabeth S." <(b) (6) Privacy>; "Richard Windsor/DC/USEPA/US@EPA;"McGrath, Shaun L." <(b) (6) Privacy>	11/25/2009
01268-EPA-5022	Ailyn Brooks-LaSure	Richard Windsor/DC/USEPA/US@EPA	11/25/2009
01268-EPA-5023	"Munoz, Cecilia"	Richard Windsor/DC/USEPA/US@EPA	12/01/2009
01268-EPA-5024	"Rouse, Peter M."	Richard Windsor/DC/USEPA/US@EPA	12/01/2009
01268-EPA-5025	Richard Windsor	"Rouse, Peter M." <(b) (6) Privacy>	12/01/2009
01268-EPA-5026	Diane Thompson	"Richard Windsor" <Windsor.Richard@epamail.epa.gov>; "Aaron Dickerson" <dickerson.aaron@epa.gov>; "Robert Goulding" <goulding.robert@epa.gov>	12/01/2009
01268-EPA-5027	"Holdren, John P."	Richard Windsor/DC/USEPA/US@EPA	12/02/2009

Ex. 6 - Personal Privacy -Redact
Ex. 6 - Personal Privacy -Redact

Ex. 6 - Personal Privacy -Redact

Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact

Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact

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Ex. 6 - Personal Privacy -Redact

Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-5331	Gina McCarthy	Richard Windsor/DC/USEPA/US@EPA;oster.seth@epa.gov;	06/29/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5333	Heidi Ellis	"Lisa" <windsor.richard@epa.gov>; "Bob Perciasepe" <Perciasepe.Bob@epamail.epa.gov>	07/01/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5339	Al Armendariz	"Seth Oster" <oster.seth@epa.gov>; "Janet Woodka" <Woodka.Janet@epamail.epa.gov>; "Adora Andy" <andy.adora@epa.gov>; "Richard Windsor" <Windsor.Richard@epa.gov>; "Stan Meiburg" <Meiburg.Stan@epamail.epa.gov>; "Peter Silva" <silva.peter@epa.gov>; "Mike Shapiro" <shapiro.mike@epa.gov>; "Sam Coleman" <coleman.sam@epa.gov>	07/03/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5352	Janet Woodka	Bob Perciasepe/DC/USEPA/US@EPA; Richard Windsor/DC/USEPA/US@EPA	07/09/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5354	"Holdren, John P."	Richard Windsor/DC/USEPA/US@EPA	07/13/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5356	Diane Thompson	"Richard Windsor" <Windsor.Richard@epamail.epa.gov>; "Bob Perciasepe" <perciasepe.bob@epa.gov>; "Mathy Stanislaus" <stanislaus.mathy@epa.gov>; "Aaron Dickerson" <dickerson.aaron@epa.gov>; "Robert Goulding" <goulding.robert@epa.gov>; "Dan Kanninen" <kanninen.daniel@epa.gov>; "Donald Maddox" <Maddox.Donald@epamail.epa.gov>	07/13/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-5357	David McIntosh	Richard Windsor/DC/USEPA/US@EPA	07/14/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5358	David McIntosh	Richard Windsor/DC/USEPA/US@EPA	07/14/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5359	Richard Windsor	(b) (6) Privacy	07/14/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5360	"Browner, Carol M."	Richard Windsor/DC/USEPA/US@EPA	07/14/2010 Ex. 6 - Personal Privacy -Redact
01268-EPA-5363	Diane Thompson	"Richard Windsor" <Windsor.Richard@epamail.epa.gov>; "Bob Perciasepe" <perciasepe.bob@epa.gov>; "Aaron Dickerson" <dickerson.aaron@epa.gov>; "Robert Goulding" <goulding.robert@epa.gov>; "Dan Kanninen" <kanninen.daniel@epa.gov>	07/15/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5364	Jane Lubchenco	Richard Windsor/DC/USEPA/US@EPA; (b) (6) Privacy >; "John Holdren" <(b) (6) Privacy>; "Abbott, Shere" <(b) (6) Privacy>; "Kathryn_N Perciasepe/DC/USEPA/US@EPA; Paul Anastas/DC/USEPA/US@EPA; (b) (6) Privacy	07/15/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-5365	Dana Tulis	[redacted]; Richard Windsor/DC/USEPA/US@EPA; Bob Perciasepe/DC/USEPA/US@EPA; Mathy Stanislaus/DC/USEPA/US@EPA; Paul Anastas/DC/USEPA/US@EPA	[redacted] 07/15/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5366	Dana Tulis	[redacted] Robert Pavia <Robert.Pavia@noaa.gov>; Steve Murawski <Steve.Murawski@noaa.gov>; Bob Perciasepe/DC/USEPA/US@EPA; Mathy Stanislaus/DC/USEPA/US@EPA; Diane Thompson/DC/USEPA/US@EPA; Gregory Wilson/DC/USEPA/US@EPA; Barry Breen/DC/USEPA/US@EPA; Jane Lubchenco <Jane.Lubchenco@noaa.gov>; Richard Windsor/DC/USEPA/US	[redacted] 07/16/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5367	Heidi Ellis	[redacted] "Diane Thompson" <thompson.diane@epa.gov>; "Lisa" <windzor.richard@epa.gov>; "Bob Perciasepe" <Perciasepe.Bob@epamail.epa.gov>	[redacted] 07/20/2010 Ex. 6 - Personal Privacy -Redact
01268-EPA-5370	Diane Thompson	[redacted] Richard Windsor/DC/USEPA/US@EPA; Bob Perciasepe/DC/USEPA/US@EPA; Aaron Dickerson/DC/USEPA/US@EPA; Robert Goulding/DC/USEPA/US@EPA; Daniel Kanninen/DC/USEPA/US@EPA	[redacted] 07/22/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5371	Adora Andy	[redacted] "Richard Windsor" <windzor.richard@epa.gov>; "Bob Perciasepe" <Perciasepe.Bob@epamail.epa.gov>; "Seth Oster" <oster.seth@epa.gov>; "Allyn Brooks-LaSure" <brooks-lasure.allyn@epa.gov>; "Diane Thompson" <Thompson.Diane@epamail.epa.gov>; "Peter Silva" <Silva.Peter@epamail.epa.gov>; "Bob Sussman" <sussman.bob@epa.gov>	[redacted] 07/23/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5372	Bob Sussman	[redacted] Adora Andy/DC/USEPA/US@EPA; "Allyn Brooks-LaSure" <brooks-lasure.allyn@epa.gov>; "Seth Oster" <oster.seth@epa.gov>; "Bob Perciasepe" <Perciasepe.Bob@epamail.epa.gov>; "Peter Silva" <Silva.Peter@epamail.epa.gov>; "Bob Sussman" <sussman.bob@epa.gov>; "Diane Thompson" <Thompson.Diane@epamail.epa.gov>; "Richard Windsor" <windzor.richard@epa.gov>	[redacted] 07/23/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date	
01268-EPA-5373	Richard Windsor	Adora Andy/DC/USEPA/US@EPA;"Lisa Jackson" <windor.richard@epa.gov>; Bob Perciasepe/DC/USEPA/US@EPA;"Seth Oster" <oster.seth@epa.gov>; Allyn Brooks-Lasure" <Brooks-lasure.allyn@epa.gov>; Diane Thompson/DC/USEPA/US@EPA;Peter Silva/DC/USEPA/US@EPA;"Bob Sussman" <Sussman.bob@epa.gov> "EPA" <Windsor.Richard@epamail.epa.gov>;"Mathy Stanislaus" <stanislaus.mathy@epa.gov>;"Allyn Brooks-LaSure" <brooks-laSure.allyn@epa.gov> Richard Windsor/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert Goulding/DC/USEPA/US@EPA;Daniel Kanninen/DC/USEPA/US@EPA	07/23/2010	Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-5378	Michelle DePass	"EPA" <Windsor.Richard@epamail.epa.gov>;"Mathy Stanislaus" <stanislaus.mathy@epa.gov>;"Allyn Brooks-LaSure" <brooks-laSure.allyn@epa.gov> Richard Windsor/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert Goulding/DC/USEPA/US@EPA;Daniel Kanninen/DC/USEPA/US@EPA	07/26/2010	Ex. 6 - Personal Privacy -Redact
01268-EPA-5379	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert Goulding/DC/USEPA/US@EPA;Daniel Kanninen/DC/USEPA/US@EPA	07/27/2010	Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-5380	"Holdren, John P."	Richard Windsor/DC/USEPA/US@EPA;Dina Kruger/DC/USEPA/US@EPA;Erin Birgfeld/DC/USEPA/US@EPA	07/29/2010	Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-5381	Richard Windsor	"Holdren, John P." <(b) (6) Privacy	07/29/2010	Ex. 6 - Personal Privacy -Redact
01268-EPA-5382	"Boots, Michael J."	"Sutlev, Nancy H." <(b) (6) Privacy <(b) (6) Privacy Windsor/DC/USEPA/US@EPA;" (b) (6) Privacy <(b) (6) Privacy (b) (6) Privacy <(b) (6) Privacy Will_Shafroth@ios.doi.gov" <Will_Shafroth@ios.doi.gov>; "Robert.Bonnie@osec <Robert.Bonnie@osec.usda.gov>; "Joan_Padilla@io <Joan_Padilla@ios.doi.gov>; Daniel Kanninen/DC/USEPA/US@EPA;Heidi Bob Perciasepe/DC/USEPA/US@EPA;Richard Windsor/DC/USEPA/US@EPA;Diane Thompson/DC/USEPA/US@EPA	07/30/2010	Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact
01268-EPA-5383	Janet Woodka	Bob Perciasepe/DC/USEPA/US@EPA;Richard Windsor/DC/USEPA/US@EPA;Diane Thompson/DC/USEPA/US@EPA	07/30/2010	Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-5384	"Holdren, John P."	Richard Windsor/DC/USEPA/US@EPA	08/02/2010	Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-5385	Richard Windsor	"Holdren, John P." <(b) (6) Privacy Holdren, John P.> <(b) (6) Privacy Heidi Ellis/DC/USEPA/US@EPA;Paul Anastas/DC/USEPA/US@EPA Scott Fulton/DC/USEPA/US@EPA;Cynthia Giles-AA/DC/USEPA/US@EPA;Richard Windsor/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Diane Thompson/DC/USEPA/US@EPA	08/02/2010 Ex. 6 - Personal Privacy -Redact
01268-EPA-5388	Janet Woodka	"Sunstein, Cass R." <(b) (6) Privacy Sunstein, Cass R.>	08/05/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5393	"Sutley, Nancy H."	Richard Windsor/DC/USEPA/US@EPA	08/10/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5395	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Aaron Dickerson/DC/USEPA/US@EPA;Robert Goulding/DC/USEPA/US@EPA;Daniel Kanninen/DC/USEPA/US@EPA	08/11/2010 Ex. 6 - Personal Privacy -Redact
01268-EPA-5397	Richard Windsor	"Sunstein, Cass R." <(b) (6) Privacy Sunstein, Cass R.>	08/15/2010 Ex. 5 - Deliberative Process Privilege -Redact
01268-EPA-5398	Richard Windsor	Bob Perciasepe/DC/USEPA/US@EPA;Diane Thompson/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Diane Thompson/DC/USEPA/US@EPA;Daniel Kanninen/DC/USEPA/US@EPA	08/15/2010 Ex. 6 - Personal Privacy -Redact
01268-EPA-5399	"Sunstein, Cass R."	Richard Windsor/DC/USEPA/US@EPA	08/16/2010 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-5750	Cynthia Gaines	✉ Aaron Dickerson/DC/USEPA/US@EPA;Arvin Ganesan/DC/USEPA/US@EPA;Bicky Corman/DC/USEPA/US@EPA;Bob Perciasepe/DC/USEPA/US@EPA;Bob Sussman/DC/USEPA/US@EPA; Diane Thompson/DC/USEPA/US@EPA;Eric Wachter/DC/USEPA/US@EPA;Glady's Stroman/DC/USEPA/US@EPA;Heidi Ellis/DC/USEPA/US@EPA;Jose Richard Windsor/DC/USEPA/US	📅 09/16/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5752	Noah Dubin	✉ Richard Windsor/DC/USEPA/US	📅 09/21/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5753	Noah Dubin	✉ Richard Windsor/DC/USEPA/US	📅 09/22/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5755	Betsaida Alcantara	✉ Richard Windsor/DC/USEPA/US@EPA;Seth Oster/DC/USEPA/US@EPA;Dru Ealons/DC/USEPA/US@EPA;Stephanie Owens/DC/USEPA/US@EPA;Brendan Gilfillan/DC/USEPA/US@EPA;Shira Sternberg/DC/USEPA/US@EPA	📅 09/23/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5756	Noah Dubin	✉ Richard Windsor/DC/USEPA/US	📅 09/23/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5757	Noah Dubin	✉ Richard Windsor/DC/USEPA/US	📅 09/26/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5758	Bob Perciasepe	✉ "Richard Windsor" <Windsor.Richard@epamail.epa.gov>; "Bob Sussman" <Sussman.Bob@epamail.epa.gov>; "Gina (Sheila) McCarthy" <mccarthy.gina@epa.gov>	📅 09/26/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5759	Noah Dubin	✉ Richard Windsor/DC/USEPA/US	📅 09/27/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5760	Elizabeth Ashwell	✉ "Richard Windsor" <Windsor.Richard@epamail.epa.gov>	📅 09/27/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5761	Richard Windsor	✉ Elizabeth Ashwell/DC/USEPA/US@EPA	📅 09/27/2011 Ex. 6 - Personal Privacy -Redact
01268-EPA-5762	"Holdren, John P."	✉ Bob Perciasepe/DC/USEPA/US@EPA;Paul Anastas/DC/USEPA/US@EPA	📅 09/29/2011 Ex. 5 - Deliberative Process Privilege -Redact,Ex. 6 - Personal Privacy -Redact

Index Number	From	To/cc/bcc	Date
01268-EPA-5968	Richard Windsor	"Zichal, Heather R." <(b) (6) Privacy	03/08/2012 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5969	"Carson, Jon"	Richard Windsor/DC/USEPA/US@EPA	03/08/2012 Ex. 6 - Personal Privacy -Redact
01268-EPA-5970	Richard Windsor	"Carson, Jon" <(b) (6) Privacy	03/08/2012 Ex. 6 - Personal Privacy -Redact
01268-EPA-5971	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA; Bob Perciasepe/DC/USEPA/US@EPA; Aaron Dickerson/DC/USEPA/US@EPA; Christopher Busch/DC/USEPA/US@EPA	03/12/2012 Ex. 6 - Personal Privacy -Redact
01268-EPA-5972	Diane Thompson	Richard Windsor/DC/USEPA/US@EPA; Bob Perciasepe/DC/USEPA/US@EPA; Aaron Dickerson/DC/USEPA/US@EPA; Christopher Busch/DC/USEPA/US@EPA	03/12/2012 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5973	Richard Windsor	"John Holdren" <(b) (6) Privacy	03/21/2012 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5974	Gina McCarthy	Richard Windsor/DC/USEPA/US@EPA	03/22/2012 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact
01268-EPA-5975	Richard Windsor	Gina McCarthy/DC/USEPA/US@EPA	03/22/2012 Ex. 5 - Deliberative Process Privilege -Redact, Ex. 6 - Personal Privacy -Redact

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)
)
Plaintiff,)
)
v.)
)
OFFICE OF SCIENCE AND)
TECHNOLOGY POLICY,)
)
Defendant.)
_____)

Case No. 1:14-cv-765 (GK)

Reply Exhibit 1:
Declaration of Eric Wachter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)
)
 Plaintiff,)
)
 v.)
)
 OFFICE OF SCIENCE AND)
 TECHNOLOGY POLICY,)
)
 Defendant.)

Case No. 1:14-cv-765 (GK)

DECLARATION OF ERIC E. WACHTER

1. I, Eric E. Wachter, director of the Office of the Executive Secretariat (“OEX”) within the Office of the Administrator of the U.S. Environmental Protection Agency (“EPA” or “Agency”), declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge and on information obtained by me in performance of my official duties.

2. I have served as the OEX director since June 2009. My office has four business lines: processing Freedom of Information Act (“FOIA”) requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator; managing the Administrator’s and Deputy Administrator’s executive correspondence; and administering the EPA’s electronic correspondence tracking system. During my time as OEX director I served as vice chair of the Council of Federal Executive Secretariats in 2011 and as chair of the Council in 2012.

3. The Office of the Executive Secretariat processes approximately 120 FOIA requests for the Office of the Administrator every year and coordinates many requests for the entire Agency. The requests processed by my office generally are complex, involving large volumes of records, records from multiple geographic areas, cross-cutting programmatic issues and interagency coordination issues, and involve a variety of FOIA exemptions that are reviewed for discretionary release to provide the greatest amount of disclosure possible. My office currently employs two full-time employees to process FOIA requests.

4. I am personally familiar with the litigation related to a FOIA request submitted to EPA by the Competitive Enterprise Institute, seeking certain emails sent from or to (including as “cc:” or “bcc:”) the secondary email account(s) assigned to former EPA Administrator Lisa Jackson that included the words “climate,” “endanger,” (which includes in e.g., “endangerment”) “coal,” or “MACT.” This FOIA request was at issue in the case Competitive Enter. Inst. v. United States EPA, Case No. 12-cv-1617, 2014 WL 308093, 2014 U.S. Dist. LEXIS 10601 (D.D.C. 2014).

5. In that case I filed three declarations in support of the EPA’s Motion for Summary Judgment, EPA’s Reply to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, and EPA’s Motion to Amend or in the Alternative to Stay. In all three declaration I generally address and explain the Agency’s withholding of White House employees’ email addresses under 5 U.S.C. § 552(b)(6), or FOIA’s Exemption 6 for Personal Privacy.

6. EPA withheld the official White House email address of numerous current and former White House employees under Exemption 6, including the official White House email address of Dr. John Holdren, the Director of the Office of Science and Technology Policy.

7. Specifically, EPA withheld the official White House email address of Dr. Holdren in the following document numbers: 01268-EPA-4608; 01268-EPA-4609; 01268-EPA-4610; 01268-EPA-4611; 01268-EPA-4827; 01268-EPA-4831; 01268-EPA-4903; 01268-EPA-4961; 01268-EPA-4962; 01268-EPA-4964; 01268-EPA-5354; 01268-EPA-5364; 01268-EPA-5380; 01268-EPA-5381; 01268-EPA-5385; 01268-EPA-5574; 01268-EPA-5762 and 01268-EPA-5973. No other email address for Dr. Holdren was withheld by EPA in these documents. This is not an exhaustive list of documents in which EPA withheld Dr. Holdren's official White House email address; instead this list was taken from footnote 14 on page 6 of Competitive Enterprise Institute's Opposition to Defendant's Motion to Dismiss in the present case.

8. The sole appearance of the email account jholdren@whrc.org in the above-cited litigation – with respect to all documents, not just those referenced above – was on a draft *Vaughn* index entry for document number 01268-EPA-5574. That document is a one-page email accompanied by a twenty-nine page PowerPoint file attachment, sent from Dr. Holdren's official White House email address to the jholdren@whrc.org account. In that document, EPA withheld Dr. Holdren's official White House email account. Due to the technical conversion process from an email to a PDF file, the jholdren@whrc.org address did not appear on the face of the document when EPA produced that email. EPA subsequently informed Competitive Enterprise Institute through the draft *Vaughn* index referenced above that this document was sent to the jholdren@whrc.org address. Dr. Holdren's White House email address was redacted both on the face of the document and in the draft *Vaughn* index entry for this document.

9. I have personally examined the documents listed above in paragraph 7 again, in light of the statements made by the Competitive Enterprise Institute in footnote 14 on page 6 of their Opposition to Defendant's Motion to Dismiss in the present case. CEI's assertion regarding

the substance of the documents' redactions – i.e., that these documents “all have Holdren’s personal email address redacted for privacy reasons” – is incorrect. All of the redactions in the cited documents were for Dr. Holdren’s official White House email account. The only document involving the jholdren@whrc.org account was document 01268-EPA-5574, as described above.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this 21st day of August, 2014.

A handwritten signature in black ink, appearing to read "E. E. Wachter", written over a horizontal line.

Eric E. Wachter
Director, Office of the Executive Secretariat
Office of the Administrator
U.S. Environmental Protection Agency

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-765 (GK)
)	
OFFICE OF SCIENCE AND)	
TECHNOLOGY POLICY,)	
)	
Defendant.)	
)	

Reply Exhibit 2:
E-Mail from Schwei to Bader
& Kazman (June 13, 2014)

From: Schwei, Daniel S. (CIV)
To: [Hans Bader \(Hans.Bader@cei.org\)](mailto:Hans.Bader@cei.org)
Cc: [Sam Kazman \(Sam.Kazman@cei.org\)](mailto:Sam.Kazman@cei.org)
Subject: CEI v. OSTP
Date: Friday, June 13, 2014 2:12:00 PM
Attachments: [2013-10-16 CEI's FOIA Request.pdf](#)
[2014-02-04 OSTP Letter, Feb. 4.pdf](#)
[2014-02-18 Letter from CEI, Feb. 18.pdf](#)
[2014-03-07 OSTP Letter, Mar. 7.pdf](#)
[2014-04-18 Letter from CEI, Apr. 18.pdf](#)
[2014-05-01 OSTP Letter, May 1.pdf](#)

Mr. Bader,

Regarding *Competitive Enterprise Institute v. Office of Science and Technology Policy*, Case No. 14-cv-765 (D.D.C.), I am writing to inform you that based on the complaint filed in this case and your allegations that OSTP has mischaracterized your FOIA request, OSTP will cease its rolling production of documents from Dr. Holdren's OSTP e-mail account.

As you know, your original FOIA request sought "copies of all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)." FOIA Request at 2. Although your request asserted that "[i]t makes sense for OSTP to search Mr. Holdren's OSTP account(s)," *id.*, the request nonetheless made clear that it was specifically for "responsive records on the cited account"—referring to the WHRC account. *Id.*

On February 4, 2014, OSTP responded to your FOIA request, stating that it was unable to search the jholdren@whrc.org e-mail account. You then sent a letter on February 18, 2014, purporting to appeal OSTP's failure to provide the requested records. OSTP interpreted this February 18th letter as "clarifying that you are requesting a search of Dr. John Holdren's OSTP email account for records to and from jholdren@whrc.org." OSTP Mar. 7 Letter at 1. Based on this interpretation, OSTP provided you with two productions (on March 31, 2014 and May 1, 2014) of responsive records.

In your complaint, however, you assert that OSTP has misinterpreted your FOIA request and your letter of February 18, 2014. *See, e.g.*, Compl. ¶ 32 (alleging that OSTP "mischaracterized the request as being for Holdren's emails between his OSTP and WHRC accounts"); *id.* ¶ 37 (alleging that OSTP "distort[ed] and effectively rewr[ote] plaintiff's request"). Your letter of April 18, 2014 also asserts that OSTP's interpretation of your February 18th letter "misstates what CEI was actually seeking in both its initial request and its appeal[.]" CEI April 18 Letter at 1.

Thus, it appears that you disagree with OSTP's present interpretation of your FOIA request and subsequent correspondence. Because you disagree with this interpretation—*i.e.*, the interpretation that prompted the search and production of records located on Director Holdren's OSTP account—OSTP will cease its rolling production of those documents. Going forward, OSTP will revert back to its initial interpretation of your FOIA request—requesting only records located on the jholdren@whrc.org account—as demanded by your Complaint. *See* Compl. ¶ 75 ("Defendant has refused to read plaintiff's request as written, but instead rewrote it.").

For your convenience, I have attached to this e-mail all of the referenced documents except for the complaint. I have also attached a letter from OSTP dated May 1, 2014, which you should have received but which is not referenced in your complaint.

Please let me know if you have any concerns about any of the above or would like to discuss.

--Daniel

Daniel Schwei

Trial Attorney

United States Department of Justice

Civil Division, Federal Programs Branch

20 Massachusetts Ave. NW, Room 7340

Washington, DC 20530

Tel: 202-305-8693

Fax: 202-616-8470

From: [Sam Kazman](#)
To: [Schwei, Daniel S. \(CIV\)](#)
Subject: Read: CEI v. OSTP
Date: Monday, June 23, 2014 4:32:19 PM

Your message

To:
Subject: CEI v. OSTP
Sent: Friday, June 13, 2014 2:24:04 PM (UTC-05:00) Eastern Time (US & Canada)
was read on Friday, June 13, 2014 2:14:24 PM (UTC-05:00) Eastern Time (US & Canada).

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Competitive Enterprise Institute,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
Office of Science and Technology Policy	:	Civil Action No. 14-765 (GK)
	:	
Defendant.	:	

ORDER

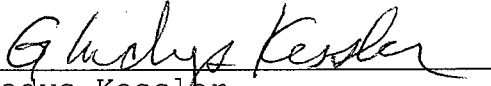
Plaintiff Competitive Enterprise Institute ("Plaintiff" or "CEI") brings this action against the Office of Science and Technology Policy ("Defendant," "OSTP," or "the Government"), a component of the Executive Office of the President of the United States. Plaintiff alleges violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, (Counts I & II), the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, et seq., (Count III), and the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-14, (Counts IV-VII).

This matter is presently before the Court on the Government's Motion to Dismiss, [Dkt. No. 7]. Upon consideration of the Motion, Opposition, [Dkt. No. 8], Reply, [Dkt. No. 10], and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Defendant's Motion to Dismiss [Dkt. No. 7] shall be **granted**, and Plaintiff's Complaint shall be **dismissed**.

This is a final, appealable Order.

March 3, 2015


Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Competitive Enterprise Institute,
Plaintiff,
v.
Office of Science and Technology Policy
Defendant.

Civil Action No. 14-765 (GK)

MEMORANDUM OPINION

Plaintiff Competitive Enterprise Institute ("Plaintiff" or "CEI") brings this action against the Office of Science and Technology Policy ("Defendant," "OSTP," or "the Government"), a component of the Executive Office of the President of the United States. Plaintiff alleges violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, (Counts I & II), the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, et seq., (Count III), and the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-14, (Counts IV-VII).

This matter is presently before the Court on the Government's Motion to Dismiss, [Dkt. No. 7]. Upon consideration of the Motion, Opposition, [Dkt. No. 8], Reply, [Dkt. No. 10], and the entire record herein, and for the reasons stated below,

Defendant's Motion is **granted**, and Plaintiff's Complaint shall be **dismissed**.

I. BACKGROUND

A. Statutory Framework

1. Freedom of Information Act

FOIA, 5 U.S.C. § 552, allows individuals to request the disclosure of records from government agencies. Id. § 552(a)(3). When an agency receives a request that "reasonably describes" the records sought, id. § 552(a)(3)(A), it must "conduct[] a search reasonably calculated to uncover all relevant documents." Morely v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (internal quotation marks omitted). The agency must then disclose any responsive agency records it locates, except to the extent that any such records are protected from disclosure by one of FOIA's nine statutory exemptions. See 5 U.S.C. § 552(b).

If an agency withholds responsive records not covered by one of FOIA's exemptions, after exhausting administrative remedies, the requester may file a lawsuit in district court to challenge the agency's decision to withhold. See id. § 552(a)(4)(B). As the Supreme Court has held, in order to state a claim under FOIA, a requester must allege that the agency has (1) improperly; (2) withheld; (3) agency records. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150

(1980). "Judicial authority to devise remedies and enjoin agencies can only be invoked . . . if the agency has contravened all three components of this obligation." Id.

2. *Federal Records Act*

The FRA is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." Pub. Citizen v. Carlin, 184 F.3d 900, 902 (D.C. Cir. 1999); accord 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-14. Under the FRA, agency heads are required to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]" 44 U.S.C. § 3101. Not all documents in an agency's possession qualify as "records" under the FRA. Instead, "records" includes any "recorded information" "made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value in them." Id. § 3301(a)(1)(A).

Agencies may only dispose of records on terms approved by the Archivist of the United States, who is head of the National

Archives and Records Administration ("NARA"). 44 U.S.C. § 3303; 36 C.F.R. § 1225.10. In order to efficiently manage the disposition process, agencies may create records schedules, which must be approved by the NARA, to govern recurring types of records. 44 U.S.C. § 3303(3); 36 C.F.R. §§ 1225.10-1225.26. Records may be deemed temporary or permanent, the former designation leading to destruction after a set period and the latter, to preservation and eventually, transfer to the NARA. 36 C.F.R. §§ 1225.14, 1225.16.

If an agency head learns of "any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency," he or she must notify the Archivist. 44 U.S.C. § 3106. If the agency head "knows or has reason to believe [that records] have been unlawfully removed from [his or her] agency," then the agency head "with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records[.]" Id. If the agency head "does not initiate an action for such recovery or other redress within a reasonable period of time," then the Archivist "shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made." Id.

B. Factual Background¹

On October 15, 2013, Plaintiff sent OSTP a FOIA request seeking "copies of all policy/OSTP-related emails sent to or from jholdren@whrc.org (including as cc: or bcc:)." CEI FOIA Request at 2. [Dkt. 7-1]; see also compl. ¶¶ 2-3, 26-28. The jholdren@whrc.org email account, provided to OSTP Director John Holdren ("Dr. Holdren" or "Director Holdren") is maintained by his former employer, a private entity called the Woods Hole Research Center. Compl. ¶ 2, 23. The request alleged that "John Holdren maintained this account after joining the White House, and that he used this address/account for OSTP-related correspondence." CEI FOIA Request at 2.

CEI clearly stated that its request would "entail[] searching jholdren@whrc.org." Id. According to CEI's request, while "[i]t [would] make[] sense for OSTP to search Mr. Holdren's OSTP account(s)[,] . . . this request [was] for responsive records on the cited account[,]" id., i.e., jholdren@whrc.org, not his OSTP account(s).

¹ For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed to be true and liberally construed in favor of the plaintiff. Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008); Shear v. Nat'l Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979). Therefore, unless otherwise noted, the facts set forth herein are taken from Plaintiff's Complaint.

On February 4, 2014, Defendant responded to CEI's request stating that "OSTP [would be] unable to search the 'jholdren@whrc.org' account . . . because that account [was] under the control of the Woods Hole Research Center, a private organization." Compl. ¶ 29 (quoting OSTP's Response to FOIA Request [Dkt. 7-2]). OSTP stated that it "underst[ood] the records [CEI] requested to be beyond the reach of FOIA," and therefore, "consider[ed] [the] request unperfected." Id.

On February 18, 2014, CEI replied to OSTP's letter. Plaintiff requested administrative appellate review of the agency's initial determination that the records sought were outside of FOIA's ambit. Compl. ¶ 30.

On March 7, 2014,² OSTP responded to CEI's letter of February 18. Compl. ¶ 32. In OSTP's view, CEI's letter did not serve as an appeal; instead, it merely "clarif[ied] that [CEI was] requesting a search of Dr. Holdren's OSTP email account for records to and from jholdren@whrc.org." Id.

On April 18, 2014, CEI responded, calling OSTP's reading a mischaracterization and reiterating its desire for the agency to

² Plaintiff's Complaint ¶ 32 states that OSTP did not respond to CEI's February letter until March 31, 2014, but that appears to be a mistake. A copy of the letter with the text quoted in the Complaint bears the date March 7, 2014. [Dkt. No. 7-4]. CEI attached to its Opposition another letter from OSTP dated March 31, 2014, [Dkt. No. 8-1], but the March 31 letter also references the March 7 letter.

search for all OSTP-related emails sent to or from jholdren@whrc.org. Compl. ¶ 33; CEI's April Response [Dkt. No. 7-5]. CEI noted that, in its view, the agency had failed to respond to CEI's appeal and that CEI would pursue judicial review unless OSTP provided a substantive response by May 1, 2014. Compl. ¶ 33.

On May 5, 2014, CEI filed its Complaint; on July 11, 2014, OSTP filed its Motion to Dismiss; on July 28, 2014, CEI filed its Opposition; and on August 21, 2014 OSTP filed its Reply.

II. STANDARD OF REVIEW

In order to survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] [his or her] claims across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 563.

Under the Twombly standard, a "court deciding a motion to dismiss must not make any judgment about the probability of the plaintiffs' success . . . [,] must assume all the allegations in the complaint are true (even if doubtful in fact) . . . [, and] must give the plaintiff the benefit of all reasonable inferences

derived from the facts alleged." Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 17 (D.C. Cir. 2008) (internal quotation marks and citations omitted). A complaint will not suffice, however, if it "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557) (alteration in Iqbal).

III. ANALYSIS

A. Counts I & II: FOIA Claims Seeking an Injunction and a Declaratory Judgment

Counts I and II of CEI's Complaint arise under FOIA, which allows private persons to contest an agency's (1) improper (2) withholding of (3) agency records. Kissinger, 445 U.S. at 150.

Plaintiff has been exceedingly clear about what it wanted from OSTP: work-related emails residing on Dr. Holdren's unofficial email account, jholdren@whrc.org, which is maintained by a private entity, the Woods Hole Research Center. See CEI FOIA Request at 2 ("This [request] entails searching jholdren@whrc.org. It makes sense for OSTP to search Mr. Holdren's OSTP account(s) . . . but this request is for responsive records on the cited account."); Compl. ¶ 26 ("Plaintiff's FOIA request to OSTP . . . sought specifically

described records sent to, from or copied to a specific non-official email address[.]").³

Relying on Kissinger, 445 U.S. at 139, the Government contends that it is not "withholding" the requested emails because it neither possesses nor controls them.⁴ In Kissinger, the Supreme Court held that FOIA's "withholding" requirement demonstrates that an agency's "possession or control is a prerequisite to FOIA disclosure duties[.]" Id. at 152. Thus, FOIA did not reach transcriptions of Henry Kissinger's phone calls once the transcriptions had been removed from the State Department's possession and placed under the control of Mr.

³ In its brief, CEI maintains that it also wants copies of emails sent to or from jholdren@whrc.org that reside on Dr. Holdren's official OSTP email account. Pl.'s Opp'n at 18-22. CEI acknowledges, however, that before litigation commenced, OSTP had already begun rolling productions of responsive emails on Dr. Holdren's OSTP account. Id. at 25. CEI claims that there is something "[s]uspicious[]" about the Government's cessation of these rolling productions, id., but the Government only stopped production after CEI filed suit, alleging that OSTP had "mischaracterized[,] "distort[ed,] and effectively rewr[itten]" CEI's FOIA request. Compl. ¶¶ 32, 37. In the face of these allegations and CEI's statement that its "request [was] for responsive records on [jholdren@whrc.org,]" CEI FOIA Request at 2, the Government's decision to stop production was neither suspicious nor surprising. CEI's insinuations lack any merit.

⁴ The Government also contends that the emails are not "agency records" because OSTP did not create or obtain them. Because CEI's FOIA claims fail on the "withholding" prong of the Kissinger analysis, the Court need not reach the question of whether the emails sought are agency records.

Kissinger and the Library of Congress. Kissinger, 445 U.S. at 154-55.

Plaintiff's own allegations, which the Court must accept as true at this stage, belie any argument that OSTP has control over emails located on the jholdren@whrc.org account. Plaintiff itself admits repeatedly that emails on the unofficial account are outside of OSTP's control. Compl. ¶¶ 23, 27, 30, 46. The Complaint specifically alleges that when an agency employee uses an email account "under the control of, a third party . . . in this case, the Woods Hole Research Center," the emails are "solely under the control of private parties and generally unknown to and inaccessible by the federal government[.]" Compl. ¶ 23. Plaintiff cannot now disregard its own allegations.

CEI attempts to resuscitate its claim with the argument that because (1) Dr. Holdren maintains control over jholdren@whrc.org and (2) Dr. Holdren is OSTP's Director, OSTP controls the unofficial email account. Even putting aside this argument's fundamental conflict with CEI's allegations, it has no legal basis.

The law is clear, however, that agencies do not -- merely by way of the employer/employee relationship -- gain "control"

over their employees' personal email accounts.⁵ Competitive Enterprise Institute v. National Aeronautics and Space Admin., 989 F. Supp. 2d 74, 86 (D.D.C. 2013) (holding that NASA employee's emails located on university account were not under the agency's control); see also U.S. Gov't Accountability Office, GAO-08-742, FEDERAL RECORDS: National Archives and Selected Agencies Need to Strengthen E-Mail Management (2008)⁶ ("Agencies are also required to address the use of external email systems that are not controlled by the agency (such as private email accounts on commercial systems such as Gmail, Hotmail, Mac, etc.)").⁷ That is precisely why agencies admonish

⁵ Quoting out of context, CEI argues that "employees are not distinct from their agencies." Pl.'s Opp'n at 4 (quoting Judicial Watch, Inc. v. Dep't of Energy, 310 F. Supp. 2d 271, 300 (D.D.C. 2004)). The cited language, however, had nothing to do with agency control of employees' personal accounts, and instead, dealt only with whether Department of Energy employees detailed to the Office of the Vice President created FOIA-accessible records during the detail. Judicial Watch, Inc., 310 F. Supp. 2d at 300. More importantly, the district court was reversed on this point. See Judicial Watch, Inc. v. Dep't of Energy, 412 F.3d 125, 132 (D.C. Cir. 2005) (holding that "the detailees were as a practical matter employees" of the Office of the Vice President and that therefore their records were not "agency records" within the meaning of FOIA).

⁶ Available at <http://www.gao.gov/assets/280/276561.pdf>.

⁷ CEI relies on Landmark Legal Foundation v. EPA, 959 F. Supp. 2d 175, 182 (D.D.C. 2013) for the proposition that, if so directed by a FOIA request, agencies must search employees' personal email accounts. The factual context of that case was quite different. Because of "EPA's silence" about to whether "personal

their employees to use their official accounts for government business (and discipline employees who repeatedly fail to do so). See id.; Armstrong v. Bush, 924 F.2d 282, 296 n.12 (describing options available to agency officials to prevent and remedy the unlawful removal of agency records by employees); see also Compl. ¶ 42.

Under FOIA, even high ranking agency officials have personal interests distinct from those of the agencies they lead. See e.g., Kissinger, 445 U.S. at 157 (rejecting argument that would render "Kissinger's personal books, speeches, and all other memorabilia stored in his office . . . agency records subject to disclosure under [] FOIA."); Bureau of Nat'l Affairs, Inc. v. Dep't of Justice, 742 F.2d 1484, 1496 (D.C. Cir. 1984) (holding that appointment calendars for DOJ Assistant Attorney General were not subject to FOIA because they "were created for the personal convenience of individual officials so that they could organize both their personal and business appointments."). CEI fails to cite any authority supporting the proposition that simply because Dr. Holdren heads the OSTP, his unofficial email account falls under the agency's control.

accounts were being used to conduct official business[,]” the Court did not have the opportunity to address whether EPA actually had the requisite control of its employees’ accounts.
Id.

Finally, CEI worries that if government employees' personal email accounts are not subject to FOIA, agency officials will escape FOIA coverage altogether by conducting government business with their personal accounts. CEI's reliance on FOIA to solve this anticipated problem is misplaced: "Congress never intended when it enacted [] FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records." Kissinger, 445 U.S. at 154; accord Armstrong, 924 F.2d at 294 (In post-Kissinger amendments to the FRA "Congress again decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants to prevent the destruction or removal of records."). Accordingly, Counts I & II of Plaintiff's Complaint shall be dismissed.

B. Count III: APA Claim Seeking Review of Agency's Failure to Take Action on FOIA Request

Count III of the Complaint seeks relief under the APA for OSTP's failure to take action with respect to CEI's FOIA request. The Government contends that the APA permits judicial review only when "there is no other adequate remedy in a court[.]" Gov't's Mot. at 24 (quoting 5 U.S.C. § 704). Because

FOIA provides its own remedial scheme, "[t]his Court and others have uniformly declined jurisdiction over APA claims that sought remedies made available by FOIA." Feinman v. F.B.I., 713 F. Supp. 2d 70, 76 (D.D.C. 2010). For this reason, and because CEI failed to respond to the Government's arguments in its Opposition, Count III shall be dismissed.

C. Counts IV and V: FRA Claims Seeking a Declaratory Judgment and an Injunction Ordering OSTP to Preserve and Prevent the Destruction of Documents

Count IV seeks a declaratory judgment that, under the RFA, OSTP has a duty to acquire, preserve, and prevent the destruction of work-related email sent or received on non-official accounts, and Count V seeks an injunction to enforce this duty. Under the FRA, however, private parties may challenge only (1) the adequacy of an agency's record-keeping guidelines; or (2) the agency head or Archivist's failure to seek initiation of an enforcement action by the Attorney General. Armstrong, 924 F.2d at 291-93, 295. Private plaintiffs may not challenge an agency's compliance with its guidelines. Id. at 294.

As CEI's Complaint acknowledges, OSTP's records retention policies are facially adequate. Compl. ¶ 54 ("OSTP policy is also clear on this issue. After being informed that an OSTP employee was using non-official email for official business, Director Holdren affirmed the law and policy in equally clear

terms, reminding OSTP staff in the Holdren memo that work-related email must be copied to the agency[.]"); id. ¶ 30 ("[T]he Federal Records Act, OSTP policy and the 'Holdren memo' all mak[e] plain that employees cannot exempt records from the law by keeping them from the control of others in their agency.").

Attempting to evade the FRA's preclusion of compliance claims, CEI argues that its Complaint "describes the Holdren memo to illustrate what OSTP once admitted its policy should be, not as evidence of what its policy (and practice) in fact is." Pl.'s Opp'n at 26-27 (emphasis in original). The allegations in CEI's Complaint, however, fail to show that OSTP has "repudiated the Holdren Memo" as CEI now argues. Id. at 27.

Instead the Complaint provides an example of Director Holdren following what CEI believes to be an acceptable records retention policy, namely issuance of his memo to all employees. Compl. ¶ 54. On the basis of vague allegations, without citing any specifics, CEI bases its argument that OSTP's policy (as practiced) is inadequate and that it has engaged in a "pattern, practice, and ongoing policy of failing to acquire, and not preserving, work-related email sent to or from non-official email accounts[.]" Compl. ¶ 92. However, this allegation is no more than a "legal conclusion couched as a factual

allegation[,]" and is accordingly, "not entitled to the assumption of truth." Ashcroft, 556 U.S. at 678-79. For these reasons Counts IV and V shall be dismissed.

D. Count VI: Writ of Mandamus

Count VI of the Compliant seeks a writ of mandamus ordering the Director of OSTP to "prohibit the practice of using non-official email accounts for work-related correspondence" and "to preserve and provide" the documents Plaintiff seeks. Compl. ¶ 110. The "remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances. Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002) (internal citations and quotation marks omitted).

The Government argues that CEI's request for a writ of mandamus is duplicative of Plaintiff's FRA claims and that the request is faulty because: (1) the FRA precludes judicial review of agency compliance with record-retention guidelines, and therefore Plaintiff has no clear right to relief; (2) OSTP has no clear duty to act because agencies have discretion under the FRA; and (3) to the extent that Plaintiff has any right to relief, the availability of APA review of an agency's failure to

notify the National Archivist of unlawful record removals is enough to preclude mandamus. CEI failed to respond to any of these arguments in its Opposition, and therefore, Count VI shall be dismissed.

E. Count VII: FRA Claim Seeking an Injunction Requiring OSTP's Director to Notify National Archivist of Removal of Federal Records

Count VII seeks an order directing the head of the OSTP to "notify the Archivist of the United States, and initiate actions through the Attorney General regarding the removal of federal records permitted by the Administrator [sic] and to assist the Attorney General in initiating an enforcement action to recover those records." Compl. ¶ 122. Unlike CEI's other FRA claims, Count VII is not barred by the Act itself. Armstrong, 924 F.2d at 296 ("[I]f the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action.").

In order to state a claim, CEI must plausibly allege that records have been unlawfully "removed" from OSTP. Id. The parties do not dispute that although a record may reside on an unofficial email account, it has not been "removed" for purposes

of the FRA as long as a copy also exists on an official account.⁸ Thus, in order to state a claim, CEI must plausibly allege that Dr. Holdren failed to copy his official account with any agency records residing on his unofficial account.

The Complaint never directly alleges that Dr. Holdren failed to place copies of agency records on his official account. Instead -- quite tellingly -- Plaintiff merely states that OSTP's response to the FOIA request shows that `jholdren@whrc.org` contains records not copied to OSTP's files. In Plaintiff's view, "OSTP asserted that plaintiff'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[.]'" Compl. ¶ 55 (emphasis added); see also Compl. ¶ 113. Rather than state a factual basis for its allegation that Dr. Holdren unlawfully removed agency records, CEI simply point's to OSTP's response to CEI's FOIA request.⁹

⁸ Though not relevant here, the Government adds that an email is unlawfully "removed" (even when the agency has a copy) if there is some independent reason why the document should not appear on an unofficial account, such as the presence of classified information. Gov't's Reply at 19.

⁹ CEI attempts to shift the burden of proof to OSTP, arguing that "OSTP has not even alleged that most [records sent to or from unofficial email accounts] were captured on agency systems[.]" Pl.'s Opp'n at 24. CEI contends that "it is simply implausible to suggest that each and every one of the many emails in Holdren's 'personal' email account did not qualify as a federal

However, OSTP's response, which is quoted in the Complaint, does not assert that "Holdren had placed [agency records] under his sole control[.]" Compl. ¶ 55. To the contrary, the agency responded, "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." Compl. ¶ 55 (quoting Denial Letter, OSTP FOIA No. 14-02, February 4, 2014).

CEI would have the Court interpret OSTP's refusal to search Dr. Holdren's unofficial account to be an admission that uncopied agency records reside there. That does not suffice to state a claim. CEI must affirmatively allege facts that make plausible the claim that documents have been "removed" from OSTP. It has failed to do so,¹⁰ and therefore Count VII shall be dismissed.

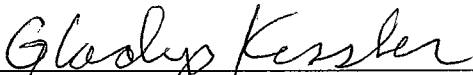
record[.]" Pl.'s Opp'n at 26. However, it is CEI, the Plaintiff in this matter, that bears the burden of alleging sufficient facts to support its claim.

¹⁰ Plaintiff's Opposition states that CEI discovered that "many examples of work-related correspondence between Holdren (using his personal email account) and then-EPA administrator Lisa Jackson turned up in a sample Vaughn index as withheld agency records, in CEI v. EPA, D.D.C. No. 12-1617 (JEB)." Pl.'s Opp'n at 25. Even though the Complaint refers to the cited Vaughn index, it fails to make this particular allegation. See Compl. ¶¶ 2, 20, 80. Plaintiff now asks the Court to take judicial notice of the Vaughn index and of the truth of CEI's newfound allegation. The Court cannot take judicial notice of the facts

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **granted**, and Plaintiff's Complaint shall be **dismissed**. An Order shall accompany this Memorandum Opinion.

March 3, 2015



Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF

CEI attempts to establish because they (1) were not alleged in CEI's Complaint and (2) appear to be without basis in the document cited. The Vaughn index contains numerous redactions of an email address belonging to Dr. Holdren, but contrary to CEI's assertion, the redacted address is apparently the OSTP Director's official White House account. Decl. of Eric Wachter [Dkt. No. 10-1] ¶ 7 ("EPA withheld the official White House email address of Dr. Holdren[.] . . . No other email address was withheld by EPA in these documents.").

CERTIFICATE OF SERVICE

I certify that on this 10th day of August 2015, I filed the foregoing Joint Appendix with the Court. I further certify that on this 10th day of August 2015, I served the foregoing brief on all counsel of record through the Court's CM/ECF system. Defense counsel, who have appeared, will be automatically served by the CM/ECF system, including:

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