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

OPENING BRIEF OF PLAINTIFF/APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici* – This case involves only two parties: the plaintiff/appellant, Competitive Enterprise Institute, and the defendant/appellee, Office of Science and Technology Policy. There were no amici or intervenors below.

Appellant Competitive Enterprise Institute is a non-profit 501(c)(3) corporation organized under the law of the District of Columbia for the purpose of defending free enterprise, limited government, and the rule of law.

Rulings Under Review – This is an appeal of U.S. District Judge Gladys Kessler's Order granting Defendant's Motion to Dismiss on March 3, 2015 (*see* JA 184) in Civil Action No. 14-765, for the reasons given in the accompanying Memorandum Opinion also issued on March 3, 2005 (*see* JA 186). The Court's Memorandum Opinion is being published in the Federal Supplement, and although the F.Supp.3d citation is not yet available, the opinion is currently found in Westlaw at 2015 WL 967549.

Related Cases – There are no related cases, and this case has not been previously before this court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, plaintiff/appellant makes the following disclosures:

Appellant Competitive Enterprise Institute is a non-profit 501(c)(3) corporation. It has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in it, or indeed, any interest in it at all.

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GLOSSARY

APA	Administrative Procedure Act
CEI	Competitive Enterprise Institute
EPA	Environmental Protection Agency
FRA	Federal Records Act
FOIA	Freedom of Information Act
NOAA	National Oceanic and Atmospheric Administration
OSTP	Office of Science and Technology Policy
WHRC	Woods Hole Research Center

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). It dismissed plaintiff's lawsuit on March 3, 2015.[1] Appellant timely filed a notice of appeal on April 22, 2015.[2] This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in ruling that the emails Plaintiff sought in its Freedom of Information Act request are not subject to FOIA because they are located in the agency head's unofficial email account, not the official account provided by the agency, even if they are work-related or otherwise constitute agency records.
2. Whether the district erred in failing to address whether these emails were within the *constructive* control of the agency, in its ruling that the agency neither possessed nor controlled them, and thus could not be liable for improperly withholding them under the Freedom of Information Act (contrary to this court's decision in *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996)).

[1] *See* JA 185.
[2] *See* JA 3.

STATUTES AND REGULATIONS

Applicable provisions are reprinted in the Statutory Addendum, which contains the pertinent sections of the Freedom of Information Act.

STATEMENT OF THE CASE

On October 15, 2013, plaintiff CEI submitted a FOIA request to OSTP that sought "records sent to, from or copied to a specific non-official email address that CEI learned OSTP Director John Holdren maintained and used for official or work-related correspondence,"[3] an email account at Woods Hole Research Center.[4] "Plaintiff learned of this account in the Vaughn Index produced in FOIA litigation seeking emails" from the email account of "former EPA administrator Lisa Jackson."[5] That Vaughn Index "listed some correspondence from this account as work-related."[6]

In a letter dated February 4, 2014, OSTP declined to provide the records from this account, saying that the requested records were "beyond the reach of

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[3] *See* Complaint at ¶27, JA 10-11.

[4] *Id.* at ¶23, JA 9-10.

[5] *Id.* at ¶20, JA 9 *See also* Memorandum In Support of Motion to Dismiss (Docket No. 7-8) at 5 ("CEI apparently discovered this WHRC e-mail address through documents produced to CEI in connection with a separate FOIA request submitted to EPA.").

[6] Complaint at ¶2, JA 4-5.

FOIA" because they were in an "account" that "is under the control of the Woods Hole Research Center, a private organization."[7] OSTP did not indicate that it had made any attempt to search the account or actually been denied access to it.[8]

On February 8, 2014, CEI filed an administrative appeal, taking issue with the refusal to produce documents from Holdren's non-official email account, and noting that agencies have repeatedly shown the ability to search employees' private email accounts and produce emails from them in response to FOIA requests.[9] For example, CEI had obtained "several hundred work-related emails from [EPA] Region 9 Administrator Jared Blumenfeld's Comcast.net account," "EPA produced former Region 8 Administrator James Martin's work-related ME.com emails,"[10] and the Commerce Department produced "responsive records" based on its "searching the home office and personal email account of Dr. Solomon," an employee of the National Oceanic and Atmospheric Administration (NOAA).[11]

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[7] *Id.* at ¶29, JA 11.

[8] *See* JA 62 (OSTP's response to the FOIA request, attached as Exhibit 2 to the Defendant's Motion to Dismiss).

[9] *See* JA 72-73, JA 89-90. The Complaint also notes this. JA 18-19, JA 22.

[10] JA 72-73.

[11] JA 89-90.

When OSTP did not substantively respond to that appeal,[12] CEI filed suit on May 5, 2014 seeking an injunction mandating production of "work-related emails sent to or from the account."[13] As CEI's Complaint noted, contrary to OSTP's claim that this account was beyond its control due to its private nature, other agencies had in fact managed to produce hundreds of emails from their employees' private email accounts in response to FOIA requests, such as in response to CEI's FOIA requests to the EPA and NOAA.[14]

In an opinion and order dated March 3, 2015, the district court granted OSTP's motion to dismiss the lawsuit for failure to state a claim. The court concluded that even if the requested records were "agency records" – a question it explicitly did not decide – OSTP had not violated FOIA in failing to produce them, because it had not "withheld" them within the meaning of FOIA.[15] It reached this conclusion despite "OSTP's refusal to search Dr. Holdren's unofficial account"[16]

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[12] *See* Complaint at ¶¶30-33, 37-38, JA 11-13.

[13] *Id.* at ¶77, JA 23.

[14] Complaint at ¶¶ 54-57, 69, JA 18-19, 22.

[15] Memorandum Opinion at 10-12, JA 195-97.

[16] Memorandum Opinion at 19, JA 204.

and the fact that when an agency receives a FOIA request, "it must 'conduct [] a search reasonably calculated to uncover all relevant documents."[17]

As it noted, federal jurisdiction over a FOIA claim is dependent upon a showing that an agency has improperly "withheld" agency records, and a showing of withholding in turn requires proof that records are in an agency's "possession or control."[18] It concluded that OSTP lacked "control over emails located on the jholdren@whrc.org account."[19]

The court rejected CEI's arguments that since "Dr. Holdren maintains control over jholdren@whrc.org and (2) Dr. Holdren is OSTP' s Director, OSTP controls the unofficial email account." It reasoned that these arguments were inconsistent with CEI's characterization of the account in its complaint, saying that "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[.]'"[20]

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[17] *Id.* at 2, JA 187.

[18] Memorandum Opinion at 10, JA 195, *citing Kissinger v. Reporters Committee*, 445 U.S. 136, 139 (1980); *see* 5 U.S.C. § 552(a)(4)(B) (jurisdiction exists where agency "improperly withheld" records).

[19] Memorandum Opinion at 10, JA 195.

[20] Opinion at 10, JA 195, *citing* Complaint, ¶23.

(In addition to alleging a violation of the Freedom of Information Act, CEI had also alleged that by allowing Director Holdren to conduct official business using an unofficial email account, OSTP had violated the Federal Records Act,[21] by giving outside "parties [like the Woods Hole Research Center] direct access" to "sensitive information" under their "control,"[22] making it difficult for other federal employees to access them,[23] and creating the risk those emails would be lost or overlooked by the agency in responding to records requests.[24] The court below dismissed the Federal Records Act claim,[25] a dismissal that is not being appealed).

The court below concluded that "agencies do not – merely by way of the employer/employee relationship -- gain 'control' over their employees' personal email accounts."[26] It reasoned that "Under FOIA, even high ranking agency officials have personal interests distinct from those of the agencies they

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[21] *Id.* at ¶¶ 91-110, JA 26-29.

[22] *Id.* at ¶23, JA 10.

[23] *Id.* at ¶¶23, 55, JA 9-10, JA 18.

[24] *Id.* at ¶¶44, 48, JA 15-16.

[25] *See* Opinion at 13-19, JA 198-204 (citing, *e.g.,* the fact that the Federal Records Act precludes judicial review of agency compliance with record-retention guidelines).

[26] Opinion at 10-11, JA 195-96.

lead," citing cases in which high-ranking officials' personal materials were deemed not to constitute "agency records."[27]

SUMMARY OF ARGUMENT

At issue in this case is OSTP's refusal to search the personal email account of its Director in response to a FOIA request seeking emails in the account relating to "agency business."[28] The agency refused to do so even though such work-related emails are subject to FOIA—a fact that is demonstrated by federal agency practice and is supported by well-established legal principles. The district court's ruling to the contrary should be overturned.

The court engaged in an unreasonably cramped reading of CEI's complaint. It failed to draw the reasonable inferences in CEI's favor that are required on a motion to dismiss, and it effectively shifted FOIA's burden of proof to the plaintiff.[29] Finally, the court held that documents in a personal email account are not covered by FOIA regardless of their nature.

The court's ruling on FOIA's scope is plainly incorrect. The mere fact that emails are in a personal email account does not exempt them from FOIA, nor does

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[27] Opinion at 12, JA 197.

[28] Complaint, ¶¶1-11, 20, 26, 29, JA 4-6, JA 10-11.

[29] *See Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989) (even on summary judgment, agency has the "burden" to prove that "the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'")

it place them beyond an agency's actual control for purposes of FOIA. Agencies frequently search the personal email accounts of agency employees for work-related records, demonstrating that agencies have actual control over those accounts.[30] It makes little sense to claim that an agency is not "withholding" documents when it refuses to produce documents held by its own chief executive that relate to "agency business."[31]

Even if OSTP had demonstrated that these emails were not within its actual control – which it did not – its failure to search its director's personal account would still violate FOIA because any agency records in that account fall within the agency's "constructive control." *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996); *see also Landmark Legal Foundation v. E.P.A.*, 959 F.Supp.2d 175, 181, 184 (D.D.C. 2013 (denying summary judgment because agency "did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff."); *Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Minute Order dated June 19, 2015 ("In view of revelations that then-Secretary of State Clinton and members of her staff used personal email accounts to conduct State Department business, and that emails from those accounts may not have been covered by State Department

[30] *See, e.g.,* JA 18-19, 22 (Complaint, ¶¶54-57, 69).

[31] *See, e.g.,* JA 4 (Complaint, ¶1).

searches for documents responsive to the FOIA request at issue in this case," court reopened case that had previously been dismissed) (http://goo.gl/mLF5Xj). The court's attempt to distinguish *Landmark* does not withstand scrutiny, and its ruling should be reversed.

Moreover, an agency can be found liable for improperly withholding agency records under FOIA, even when they are located outside an agency and its offices. *See, e.g., Burka*, 87 F.3d at 515 (data tapes held by agency contractor 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). The court below never even acknowledged the existence of these decisions, perhaps because its ruling simply cannot be reconciled with them.

STANDARD OF REVIEW

This Court reviews *de novo* dismissals for failure to state a claim. *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 253 (D.C. Cir. 2008). In reviewing a motion to dismiss, the court "must accept as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and draw "all inferences in favor of the nonmoving party." *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014). The Court "must construe the complaint in favor of the complaining party." *Warth v.*

Seldin, 422 U.S. 490, 501 (1975). General factual allegations in the complaint are presumed to embrace the specific facts necessary to support the claim. *Laroque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011).

The "'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007), *quoting Weisberg v. U.S. Dep't of Justice,* 705 F.2d 1344, 1351 (D.C.Cir.1983). "The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *accord Gallant v. NLRB*, 26 F.3d 168, 171 (D.C.Cir.1994) ("the agency has ... [the] burden of demonstrating that the documents requested are not 'agency records' ") (citing 5 U.S.C. § 552(a)(4)(B)).

"Even when the requester," rather than the government, "files a motion for summary judgment, the Government 'ultimately [has] the onus of proving that the [documents] are exempt from disclosure.'" *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904-05 (D.C. Cir. 1999)¸*quoting NAGE v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978).

To prevail, an agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the [FOIA's] inspection requirements." *Goland v. CIA*,

607 F.2d 339, 352 (D.C.Cir.1978). Thus, "records are presumptively disclosable unless the government can show" otherwise. *Consumer Federation of America v. Department of Agriculture*, 455 F.3d 283, 287-93 (D.C. Cir. 2006).

ARGUMENT

I. The Court Below Wrongly Excused OSTP's Failure to Search Its Director's Unofficial Email Account

As the court below noted, "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."[32] Such emails connected with "agency business"[33] plainly existed in the account, which the Complaint alleges was used for "official" and "work-related correspondence,"[34] such as one enclosing a presentation by Dr. Holdren on "Obama administration" "policy" on "science, technology, and innovation," including the administration's "National Oceans Policy," "the American Innovation Strategy," and federal "STEM Education Initiatives."[35] The

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[32] Memorandum Opinion at 8, JA 193.

[33] *See, e.g., Complaint* at ¶1, JA 4-5 (request encompassed records "reflecting the conduct of, or otherwise relating to, agency business")..

[34] *Complaint* at ¶¶ 2, 27, JA 4-5, 10-11.

[35] *See, e.g.,* JA 119-149 (reproducing this email about official government policy as exhibit 7 to the Motion to Dismiss; this email was produced not in response to the FOIA request at issue in this case, but in response to a FOIA request that plaintiff propounded to the EPA years ago.). Defendant has admitted this email's existence and authenticity, *see Memorandum In Support of Motion to Dismiss*

court below did not deny that this email or others like it constitute an agency record.[36] Many additional examples of agency records were once found in that account, as we discuss in Part VI of this brief, *infra* (pp. 42-46).

Yet OSTP did not even attempt to search the email account, much less produce emails from it, as the Court observed in noting "OSTP's refusal to search Dr. Holdren's unofficial account"[37] This refusal to search for responsive documents in a place where the agency is on notice that they may exist bars dismissal, especially

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(Dkt. No. 7-8) at 22; *compare Purgess v. Sharrock*, 33 F.3d 134, 144 (2D Cir. 1994) (factual "statements in briefs" are "binding judicial admissions"), of which this court can take judicial notice, *see Gomez v. Wilson*, 477 F.2d 411, 416 n.28 (D.C. Cir. 1973) (court can "judicially notice the record [even] in other litigation"); *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("judicial notice" proper on motion to dismiss).

[36] *See* Memorandum Opinion at 9 n. 4, JA 194 (court did not "reach the question of whether the emails sought are agency records"). Although "the agency has ... [the] burden of demonstrating that the documents requested are not 'agency records'," *Gallant*, 26 F.3d at 171, it did not do so; indeed, it has not described the nature or content of other emails in the account, or the context in which they were created.

Even absent the concrete examples of agency records in the form of emails related to government policy cited in this brief, plaintiff's allegations of the existence of other such emails would be sufficient to prevail on a motion to dismiss, where all of the plaintiff's material allegations must be taken as true, *Warth*, 422 U.S. at 501, and general allegations are presumed to embrace the specific facts necessary to support the plaintiff's claims (such as a work-related email having the elements needed to constitute an agency record), *see Laroque*, 650 F.3d at 785.

[37] Memorandum Opinion at 19, JA 204. *See also* Reply Memorandum In Support of Defendant's Motion to Dismiss (Docket No. 10) at pg. 4 (noting OSTP did not "pressur[e]" Holdren "to grant OSTP access to the private account.").

on a motion to dismiss. *See Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327-28 (D.C.Cir.1999) (notice to agency of possibly "overlooked materials" off its premises made summary judgment improper; "It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search" them, even if they are not in the agency's own files; Coast Guard had duty to search "records stored at a federal record center" in Atlanta, even though that was not a Coast Guard facility); *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 698 (9th Cir. 2012) (dismissal on motion to dismiss is inappropriate where "the agency produces what it maintains is all the responsive records, but the plaintiff challenges 'whether the [agency's] search for records was adequate'"); *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents," even on summary judgment); *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (agency has the "burden of showing that its search was adequate").

A. Agencies Routinely Search and Exert Control Over Work-Related Emails in the Personal Accounts of Their Employees

Agencies have repeatedly shown the ability to search employees' private email accounts and produce work-related emails from them in response to FOIA

requests.[38] For example, CEI had obtained "several hundred work-related emails from [EPA] Region 9 Administrator Jared Blumenfeld's Comcast.net account," EPA "produced former Region 8 Administrator James Martin's work-related ME.com emails."[39] And the National Oceanic and Atmospheric Administration (NOAA) produced responsive records based on its "searching the home office and personal email account of Dr. Solomon," an NOAA employee.[40]

Similarly, the State Department produced thousands of pages of emails from the personal email account of former Secretary of State Hillary Clinton. The Department requested that Clinton "provide it with any federal records in her possession, such as an email sent or received on a personal email account while serving as Secretary of State," and Clinton "produced approximately 55,000 pages in response."[41]

Indeed, agencies explicitly exert control over work-related emails in employees' private email accounts in response to FOIA requests. For example,

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[38] *See* Complaint, ¶¶ 54-57, 69, JA 18-19, JA 22.

[39] Complaint, ¶¶ 54-56, JA 18-19.

[40] Complaint, ¶¶ 57, 69, JA 19, 22.

[41] *Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Exhibit B to Defendant's Status Report (August 7, 2015) at pg. 1 (Letter from Undersecretary of State Patrick Kennedy to David E. Kendall); Declaration of John F. Hackett filed March 30, 2015 in the *Judicial Watch* case (ECF No. 14-1), at ¶¶7,9 (same).

"EPA's litigation hold notice [in a recent FOIA case] orders EPA staff not to delete potentially relevant information from personal devices or email accounts."[42] As the judge noted in that case, that was entirely proper, since "[r]equiring EPA employees to both forward *and preserve* business-related information received within or sent from personal email accounts would not impose an undue burden on agency staff."[43] In light of that fact, and FOIA's goal of "transparency," the judge urged EPA to consider adopting a broader "policy instructing employees who conduct any agency business using personal accounts to (1) forward such emails to their EPA accounts *and* (2) preserve the emails in their personal accounts."[44]

That litigation hold, issued on October 23, 2012, directed agency officials to preserve "any materials," including "electronic" ones, that were "potentially relevant to" Landmark Legal Foundation's FOIA Request.[45] It ordered officials to preserve all "Electronically Stored Information ['ESI']," including "emails," *id.* at 2, noting that "it does not matter whether the ESI is stored on . . . your EPA-issued

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[42] *See Landmark Legal Foundation v. E.P.A.,* --- F.Supp.3d ----, 2015 WL 971206, *11 (D.D.C. 2015) (No. 12-1726).

[43] *Id.* at *11.

[44] *Id.*

[45] *See Litigation Hold Notice*, at pg. 2, filed as Dkt No. 46-3 (filed, 7/24/2014) in *Landmark Legal Foundation v. EPA*, D.D.C. Case 1:12-cv-01726-RCL. *Accord Landmark*, at *2 ("The litigation hold obligations applied to both official and personal devices")

desktop and/or laptop computer, *privately owned computers or other devices, or in personal email accounts*." *Id.* at 3 (emphasis added).[46]

"The litigation hold notice states that '[f]orwarding emails from your personal email account to your agency account will not relieve you of the responsibility for preserving the emails in your personal account.'. . . The hold further commanded EPA employees not to 'delete any [potentially relevant information] from your personal email account.'"[47]

Similarly, the State Department requested that employees, such as former Secretary of State Hillary Clinton, provide it with work-related records found in their personal email accounts in response to FOIA requests.[48]

B. Despite This Ability, OSTP Made No Attempt to Search the Account or Even Determine What Work-Related Emails Were In It

Despite agencies' ability to do so, OSTP argued that it need not bother even attempting to search Holdren's account, since that might involve "pressuring its employees" to allow a search, and "OSTP's failure to take this step . . . cannot be

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[46] *Accord Landmark*, 2015 WL 971206, at *2 (quoting this passage).

[47] *Landmark,* 2015 WL 971206, at *10, *quoting* the Litigation Hold.

[48] *See, e.g., Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Exhibit B to Defendant's Status Report (August 7, 2015) (ECF No. 20-1) at 1 (request made to Hillary Clinton to "please produce forthwith" "all responsive documents" in "her possession as a result of her employment at the State Department).

construed as an agency 'withholding' of records."[49] Under this logic, an agency could avoid turning over agency records even if they were located in an employee's office, based on potential employee resistance. That would enable federal employees to flout FOIA with impunity.

Nothing in the record that suggests that OSTP's FOIA staff even asked Holdren to let them search his emails for responsive documents (even though the agency had the burden of detailing how its search was calculated "to uncover all relevant documents"[50]), or even inquired as to whether he used his personal email account to conduct agency business (as other agencies have done in response to FOIA requests[51]), so a discussion of potential insubordination is premature in this case. As we explain *infra* (pp. 18-31), such work-related emails are plainly within the control of their agencies, both in terms of actual control, and under the theory of

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[49] Reply Memorandum In Support of Defendant's Motion to Dismiss (Docket No. 10) at pg. 4.

[50] *See, e.g., Weisberg*, 705 F.2d at 1351.

[51] *See* Declaration of Larry Gottesman (Dkt. No. 55-8) at ¶¶4,7, pp. 2, 4, in *Landmark Legal Foundation v. Environmental Protection Agency*, D.D.C. Case 1:12-cv-01726-RCL (to determine whether there were "documents responsive to [a] FOIA request located in personal email accounts," agency "identified and contacted 17 senior officials" and inquired whether "they used text messaging or personal (non-Agency) email accounts to send or receive information regarding rules or rulemaking"; a "few officials indicated that they would use their personal email account for business purposes if remote access to the Agency's server was not operating or if there was a need to print at another location, such as at home.").

"constructive control." *See Burka*, 87 F.3d at 515. And agencies have explicitly asserted such control.

II. OSTP Has Withheld Work-Related Emails of Its Director Clearly Connected With Agency Business

But in any event, agencies cannot rely on the specter of employee resistance to avoid producing records under FOIA. That would defeat the purpose of the statute, which seeks "'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989), and "pierce the veil of administrative secrecy." *Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976).

An agency cannot disclaim responsibility for the acts of its employees, much less its director and "alter ego"[52], since it is not legally distinct from its employees,[53] but rather can only act through them. "Government has no mouth, it has no hands or feet; it speaks and acts through people. Governmental employees

[52] *Harrison v. Eddy Potash*, 158 F.3d 1371, 1376 (10th Cir. 1998) (sufficiently "high rank" makes official his "employer's alter ego" or proxy," whose conduct is automatically imputed to it as a matter of federal law).

[53] There "is no basis" for viewing an agency's head "as distinct from his department for FOIA purposes." *Ryan v. Department of Justice*, 617 F.2d 781, 787 (D.C. Cir. 1980).

must do what the state cannot do for itself because it lacks corporeal existence; in a real sense, they **are** the state."[54]

In addition to these general precepts of agency liability, FOIA specifically imposes obligations on agency employees – not just the agency itself – to hand over requested records. For example, when a court finds that "agency personnel acted arbitrarily or capriciously" in withholding documents, FOIA provides that the "Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding," and the agency's "administrative authority shall take the corrective action that the Special Counsel recommends." 5 U.S.C. § 552(a)(4)(F)(i); *see also* 5 U.S.C. § 552(a)(4)(G) (employees can be held in contempt). These provisions make clear that agencies cannot disclaim responsibility for withholding of agency records committed by their employees.

III. FOIA Covers Records Stored Outside An Agency's Offices or Official Recordkeeping Systems, Such as OSTP Director Holdren's Emails

Documents do not have to be located on agency property or in official agency record-keeping systems to be subject to FOIA, or for them to be improperly withheld by the agency. This Circuit's precedent has rejected such arguments.

[54] *Arizonans for Official English v. Arizona,* 69 F.3d 920 at 960 (9th Cir. 1995) (J. Kozinski and Kleinfeld, dissenting), *vacated as moot,* 520 U.S. 43 (1977).

A. Agencies Have Both Actual and Constructive Control Over Work-Related Emails In Their Employees' Unofficial Email Accounts

As noted earlier, agencies have repeatedly shown the ability to search employees' private email accounts and produce work-related emails from them in response to FOIA requests.[55] And they have exerted control over such accounts by issuing orders to employees to preserve work-related emails and other electronically stored information on "privately owned computers or other devices, or in personal email accounts."[56]

OSTP has never explained why it, unlike other federal agencies, is somehow unable to produce work-related emails from employees' private email accounts.[57] Although it has asserted in *ipse dixit* fashion that it "is unable to search the 'jholdren@whrc.org' account . . . .because that account is under the control of the Woods Hole Research Center, a private organization,"[58] it has not explained why

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[55] *See also* JA 18-19, JA 22 (discussing past productions to plaintiff of emails from agency officials' personal email accounts).

[56] *See* this brief at pp. 16-17, *citing, e.g.,* the litigation hold notice filed as Dkt No. 46-3 *in Landmark Legal Foundation v. EPA, D.D.C. Case 1:12-cv-01726-RCL.*

[57] The only natural inference is to the contrary, which is more than sufficient to preclude dismissal at this stage. *See, e.g., Autor*, 740 F.3d at 179 (court must draw "all inferences in favor of the" plaintiff); *Laroque*, 650 F.3d at 785 (general factual allegations in the complaint are presumed to embrace the specific facts necessary to support the claim).

[58] Complaint, ¶55, JA 19.

or how this is so. *See Weisberg*, 705 F.2d at 1351 (even at the summary judgment phase, "the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents," based on "reasonably detailed, nonconclusory affidavits").

Thus, it has not met its burden, even under the standards that would apply on summary judgment, much less (as here) on a motion to dismiss. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'"); *Consumer Federation of America*, 455 F.3d at 287-93 ("records are presumptively disclosable unless the government can show" otherwise); *Goland*, 607 F.2d at 352 (even on summary judgment, to prevail, an agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the [FOIA's] inspection requirements."); *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904-05 (D.C. Cir. 1999) ("Even when the requester" rather than the government "files a motion for summary judgment, the Government 'ultimately [has] the onus of proving that the [documents] are exempt from disclosure.'").

Even if OSTP had shown that it lacks actual control over the emails of its director, this would not be dispositive, because FOIA does not require that an

agency have actual control over records, as long as it has "constructive control" over the records. *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996).

B. Documents Can Qualify As Agency Records Under FOIA Even When Located Away from the Agency

Documents can be "agency records" that must be produced in response to a FOIA request, even when they are located away from an agency, not in its offices. *See, e.g., Burka*, 87 F.3d at 515 (data tapes held by agency contractor 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,* 180 F.3d at 327-28 (Coast Guard should have searched records located off premises in Atlanta at a non-Coast Guard site). "The actual physical location of the documents is not dispositive."[59] Thus, Holdren's emails are subject to FOIA even if they are not in an agency computer or email account.

[59] *Judicial Watch, Inc. v. U.S. Dept. of Energy*, 310 F.Supp.2d 271, 297 (D.D.C. 2004), *aff'd in part, rev'd in part*, *Judicial Watch v. Dept. of Energy*, 412 F.3d 125, 133 (D.C. Cir. 2005) (citing *Burka*, 87 F.3d at 515 (HHS had "constructive control" of data tapes in the possession of research firm) and *Ryan v. Dept. of Justice,* 617 F.2d 781, 785 (D.C. Cir. 1980) (FOIA can reach "operations" of "outside contractors").

C. FOIA Can Reach Records in the Unofficial Email Accounts of High-Ranking Agency Officials Like OSTP Director Holdren

As courts have recognized, work-related emails can be subject to FOIA and public-records requirements as "agency records" even when they are in "personal" rather than "official" email accounts. *See, e.g., Landmark Legal Foundation v. E.P.A.*, 959 F.Supp.2d 175, 181, 184 (D.D.C. 2013) (denying EPA summary judgment, because it "did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," despite the "possibility" that such "unsearched personal email accounts may have been used for official business"); *Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Minute Order dated June 19, 2015 ("In view of revelations that then-Secretary of State Clinton and members of her staff used personal email accounts to conduct State Department business, and that emails from those accounts may not have been covered by State Department searches for documents responsive to the FOIA request at issue in this case," court reopened case that had previously been dismissed) (http://goo.gl/mLF5Xj); *CEI v. EPA*, 12 F.Supp.3d 100, 122 (D.D.C. 2014) ("FOIA requestors may seek access to the employees' non-official email account" by "simply ask[ing] for work-related emails and agency records found in

the specific employees' personal accounts").[60] Such records are also covered by state laws modeled on FOIA.[61]

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[60] *See also Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Minute Order dated July 31, 2015 (ordering agency (1) to identify "any and all" email "servers" or "accounts," whether in the agency's possession "or otherwise," that "may contain responsive information," and (2) to "request" that three individuals who worked at the State Department (a) "describe" the "extent to which they used" the former Secretary of State's personal email account "to conduct official government business" and (b) produce all "responsive information" in "their possession") (http://goo.gl/Sk5Wab).

[61] *See also, e.g., Mollick v. Tp. of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (emails stored on government officials' "personal computers or in their personal email accounts" were public records if "created, received, or retained in connection with a transaction, business, or activity" of the government); *Barkeyville v. Stearns*, 35 A.3d 91, 95-96 (Pa.Cmwlth 2012) (emails located in and sent from government officials "personal email accounts" were public records); *Bradford v. Director, Employment Sec. Dept.*, 128 S.W.3d 20, 27-28 (Ark. App. 2003) ("Emails transmitted between Bradford and the governor that involved the public's business are subject to public access under the Freedom of Information Act" even when "transmitted to private email addresses through private internet providers"); *McLeod v. Parnell*, 286 P.3d 509, 510 (Alaska 2012) ("private emails" sent using "private email accounts" can be "public records"); *Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. 2013) (officials' communications on personally-owned electronic devices were subject to disclosure under state FOIA).

"26 states view the use of private emails for government business as public records." Steven Braun, *Mitt Romney Used Private Email Accounts to Conduct State Business While Massachusetts Governor*, Huffington Post, Mar. 9, 2012, www.huffingtonpost.com/2012/03/09/mitt-romney-emails_n_1335712.html. For example, the Pennsylvania courts, which have interpreted their state's open-records law as reaching private email accounts, look to federal FOIA case law for "guidance" (*Bowling v. Office of Open Records*, 990 A.2d 813, 819 (Pa. Cmwlth. 2010)), although Pennsylvania's provisions "establish a narrower framework for public disclosure" in some respects than the federal FOIA (*North Hills News Record v. McCandless,* 722 A.2d 1037, 1040 n.4 (Pa. 1999)).

In short, FOIA covers emails sent or received on an employee's personal email account if they relate to official business. 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://goo.gl/CnGgtR.[62]

D. OSTP Is Responsible for Work-Related Records Controlled By Its Employees, and Certainly Those of Its Director

Here, the requested documents are in the actual possession of OSTP's Director, as OSTP does not dispute, and are within his "control."[63] Thus, they are in the agency's control as well, since there "is no basis" for viewing an agency's head "as distinct from his department for FOIA purposes." *See Ryan v.*

Similarly, the United Kingdom has interpreted its FOIA, which is modeled on our FOIA, as reaching officials' private email accounts. *See* Gavin Clarke, *Beware Freedom of Info law 'privacy folktale'—ICO chief*, The Register (U.K.), Feb. 7, 2012 (also noting that the "UK has followed the US in its freedom of information laws") (http://goo.gl/ylQhs5), *citing* ICO, Decision Notice, March 1, 2012, at 1, 5 (https://goo.gl/i15yBj); Christopher Williams, *Civil servants to be forced to publish Gmail emails*, Telegraph, Dec. 15, 2011, http://goo.gl/9diaTc.

[62] *Accord* Michael Pepson & Daniel 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), *citing DNC v. U.S. DOJ*, 539 F. Supp. 2d 363, 368 (D.D.C. 2008) (in case involving e-mails sent or received by officials using an e-mail account owned and assigned by the Republican National Committee, judge ruled that FOIA exemption 5, the deliberative-process privilege, applied, implicitly recognizing that the emails would have been subject to disclosure under FOIA if an exemption did not apply).

[63] Compl. ¶ 55, JA 18 (arguing that Holdren placed the requested e-mails "under his sole control, in contravention of the Federal Records Act [and] OSTP policy").

Department of Justice, 617 F.2d 781, 787 (D.C. Cir. 1980). In performing their duties, "employees are not distinct from their agencies,"[64] and their documents are "thus [in] the constructive control of" their agency.[65] As this Court has made clear, where records were generated by agency employees in the course of agency business, it is "immaterial that the documents were and are located [outside the agency] and were never integrated into [its] records system."[66]

Even if it were not appropriate to impute the conduct of an ordinary employee to his agency,[67] it would certainly be appropriate to do so for an

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[64] *Judicial Watch*, 310 F.Supp.2d at 300, *citing Ryan,* 617 F.2d at 787.

[65] *Judicial Watch*, 310 F.Supp. at 300, *citing Burka*, 87 F.3d at 515. *See also Judicial Watch,* 425 F.3d at 133 ("As the district court correctly observed, however, possession is not the proper test of whether a record is within an agency's control.").

[66] *See Judicial Watch,* 425 F.3d 125, 131 fn.* (D.C. Cir. 2005) ("If they were [agency] employees, then . . . it would be immaterial that the documents were and are located [outside the agency] at the Office of the Vice President," who is exempt from FOIA, "and were never integrated into the [agency']s records system").

[67] The court below cited this court's decision in *Judicial Watch* (see Opinion at 11 fn. 5, JA 196), but in that case, this court did not take issue with the general principle that employees' actions are imputed to their agency, *see id.*, 425 F.3d at 131 fn. * & 133, but rather involved the special case where the employees had temporarily been assigned to a completely different agency on whose behalf they acted instead. *Judicial Watch*, 412 F.3d 125, 133 (D.C. Cir. 2005) (employees' conduct not imputed to an agency where they have been detailed to another agency, and instead act on behalf of that agency rather than the original agency).

agency's director, who is legally its "alter ego," meaning that what is in his control is thus deemed to be in the control of the agency as a matter of course.[68]

It would not be dispositive even if Holdren created all of these records while away from OSTP's offices: Holdren's non-official account emails produced before OSTP decided to stop producing responsive records (see *infra*, Part VI, pp. 42-46), also indicate he commonly used this account during regular business hours.[69]

In short, "merely because an employee is not physically located at his or her agency of employment does not mean that the employee ceases to be an agency employee capable of creating records on the agency's behalf," and "[t]he physical location in which" agency "employees create, generate, obtain or review records does not determine whether the records are agency records subject to the FOIA." *Judicial Watch*, 310 F.Supp.2d at 300, *citing Ryan,* 617 F.2d at 785. "The D.C. Circuit has made clear that records need not be generated by an agency, or [be] in the actual possession of an agency, for the records to be considered 'owned or

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[68] *See Harrison*, 158 F.3d at 1376 (sufficiently "high rank" makes official his "employer's alter ego" or proxy," whose conduct is automatically imputed to it).

[69] See, for example, the email regarding a White House press call sent by Holdren using his jholdren@whrc.org email address to agency employee Rick Weiss, Director of Communications and Senior Science and Technology Policy Analyst at OSTP, on Feb. 13, 2014 (a Thursday) at 15:42:33 EST. JA 153-59. That email is attached as Exhibit 1 to the memorandum in opposition to the motion to dismiss. *See* JA 150-59. Titled "Re: Holdren on WH press call this evening," that email contains redactions under FOIA Exemption 5 ((b)(5)), which is something that can only be claimed for official agency records.

obtained' by an agency" and thus subject to FOIA. *In Defense of Animals v. NIH,* 543 F.Supp.2d 70, 77 (D.D.C. 2008).

Furthermore, as OSTP's Director, Holdren is not just any agency employee, but the agency's head, and thus the agency's alter ego, and his conduct is attributable to the agency under agency theory even in contexts where low-level employees' acts would not be imputable to the agency.[70] Holdren's high-ranking, policymaking status (formulating "science and technology policy") puts him on a very different level than the lower-level, non-policymaking agency employee whose personal emails were held beyond the reach of FOIA in *Competitive Enterprise Institute v. NASA*, 2013 WL 5825584 at *7, 989 F.Supp.2d 74, 87 (D.D.C. 2013), cited by the trial court. A work-related discussion by a high-ranking agency official sheds much more light on agency policy and the agency's

[70] *See Harrison*, 158 F.3d at 1376 ("[T]he Supreme Court . . . acknowledged an employer can be held vicariously liable . . . if the. . .employee's 'high rank in the company makes him or her the employer's alter ego'" or proxy) (*quoting Burlington Indus. v. Ellerth*, 524 U.S. 742, 758 (1998)); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000) ("*Vicarious liability automatically applies*" against agency "when the . . .supervisor is" very high-ranking). Strict liability for acts of high-ranking officials like agency directors applies even where a statute does not hold agencies liable for acts of non-supervisory employees. *Compare Vance v. Ball State Univ.,* 133 S.Ct. 2434 (2013) (no strict liability for non-supervisory conduct under the law at issue in *Harrison, Ellerth*, and *Johnson*). An entity is presumptively responsible for "statements of the officers, directors, and employees who are in positions of authority or have apparent authority to make policy for" it, including any high-ranking officials in its "inner circle." *U.S. v. Basic Constr. Co.,* 711 F.2d 570, 573 (4th Cir. 1983).

thinking, and thus more readily constitutes a "federal record" under the Federal Records Act, based on its "informational value" about agency "policies" and "decisions."[71]

Moreover, contrary to OSTP's suggestion, that *NASA* district court decision did not adopt a bright-line rule that emails in "personal" email accounts are beyond the reach of FOIA. To the contrary, it recognized that emails in a private email account can indeed be covered by FOIA, and be within an agency's control, requiring the agency to search that account: "Of course, not all of Dr. Schmidt's emails from or to his @columbia.edu email address are personal materials exempt from being searched." *CEI v. NASA*, 989 F.Supp.2d 74, 87 (D.D.C. 2013). And it predicated its ruling on the fact that "there [was] no evidence that agency personnel read or relied upon" the emails it declined to order produced, and "nothing in the record . . . suggests that" the emails in question "were used by agency personnel to carry out agency business." *Id.* at 86. The agency in that case, unlike OSTP, had submitted declarations attesting that "the emails that were

[71] *See* 44 U.S.C. § 3301 (document is federal record if it is "appropriate for preservation . . . 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." "[T]he meaning of 'agency records' for FOIA purposes is [even] broader than that of 'records' under 44 U.S.C. 3301." National Archives, *Disposition of Federal Records: A Records Management Handbook* (2000 Web Edition), http://goo.gl/Dg5ivN.

agency records" in the personal email account had already been "captured by the agency's search of [other] email accounts" and "produced by the agency."[72]

E. FOIA Can Reach Even Documents Held By Third Parties Rather Than the Agency

FOIA can reach documents even when they are "in the physical possession of a third party," such as those "produced by an independent contractor." *Chicago Tribune v. U.S. Dept. of Health & Human Services,* 1997 WL 1137641, *5 (N.D.Ill.1997). FOIA's coverage is triggered not by documents' location, but by the agency's "actual or constructive 'control.'"[73]

F. An Agency Need Not "Possess" Records For Them To Be Subject to FOIA, As Long As It Has Actual or "Constructive Control"

Moreover, this Court has made clear that documents can be agency records under FOIA even absent *possession* by the agency, based on constructive or actual control. *See Judicial Watch v. Dept. of Energy*, 412 F.3d 125, 133 (D.C. Cir. 2005) ("As the district court correctly observed, however, possession is not the proper

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[72] *Id.* at 87.

[73] *Judicial Watch, Inc. v. U.S. Dept. of Energy*, 310 F.Supp.2d 271, 297 (D.D.C. 2004), *aff'd in part, rev'd in part*, 412 F.3d 125, 133 (D.C. Cir. 2005) (citing *Burka*, 87 F.3d at 515 (HHS had "constructive control" of data tapes in research firm's possession) and *Ryan,* 617 F.2d at 785 (FOIA can reach "operations" of "outside contractors").

test of whether a record is within an agency's control")[74]; *In Defense of Animals v. NIH,* 543 F.Supp.2d 70, 77 (D.D.C. 2008) ("the D.C. Circuit has made clear that records need not be . . . in the actual possession of an agency" to be covered by FOIA, *citing Burka*, 87 F.3d at 515 ("constructive control").

IV. The Lower Court's Attempt to Distinguish *Landmark* Does Not Withstand Scrutiny

CEI relied on the *Landmark* decision, which ruled against an agency on the issue of whether FOIA required it to search the personal email accounts of high-ranking agency officials for emails related to agency business. *Landmark Legal Foundation v. E.P.A.*, 959 F.Supp.2d 175, 181, 184 (D.D.C. 2013) (denying summary judgment to EPA because it "did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff" despite the "possibility that unsearched personal email accounts may have been used for official business raises").

The court below unsuccessfully attempted to distinguish that case by claiming that the "factual context of that case was quite different," "[b]ecause of 'EPA's silence' about to whether 'personal accounts were being used to conduct official

[74] *Id.*, *citing Judicial Watch*, 310 F.Supp.2d at 302 (quoting *Ryan v. DOJ,* 617 F.2d 781, 785 (D.C. Cir. 1980) ("A simple possession standard would permit agencies to insulate their activities from FOIA disclosure by farming out operations to outside contractors").

business."[75] But that does not distinguish the case at all. Indeed, this case contains stronger evidence of the use of personal accounts for agency business than the *Landmark* case, since the Complaint specifically alleged that Holdren's personal account *has been used* to transmit records related to agency business, and there is concrete evidence of this in the record below.

Here, as in *Landmark,* OSTP is silent about the *current* content of Holdren's non-official email account, submitting no declaration contesting that he used it for official business (even though it submitted declarations on other topics).

But unlike in the *Landmark* case, which the trial court describes as being "silent" about whether personal accounts were being used for official business, here the account clearly was used for "official" and "work-related correspondence" involving "agency business," as the Complaint specifically alleges.[76] Moreover, one record attached to defendant's motion papers in the court below discusses Administration "policy" on "science, technology, and innovation," including the "the American Innovation Strategy," "STEM Education Initiatives" and "National Oceans Policy."[77] The court below did not deny that this email or others like it

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[75] JA 196-97 fn. 7.

[76] *Complaint* at ¶¶ 2, 27, JA 4-5, 10-11.

[77] *See, e.g.,* JA 119-149 (reproducing this email about official government policy as exhibit 7 to the Motion to Dismiss; this email was produced not in response to

constitute an agency record.[78] Other examples are discussed in Part VI of this brief, *infra* (pp. 42-46).

"Plaintiff learned of this account" through documents (such as a Vaughn Index) produced in response to an earlier FOIA request directed at another agency,[79] which "listed some correspondence from this account as work-related."[80] Moreover, unlike the *Landmark* case, which was decided on summary judgment (where the plaintiff needed to show a genuine issue of material fact to defeat summary judgment, by pointing to specific facts), this case was decided on a motion to dismiss, where the plaintiff's burden is less, since all of its relevant allegations must be taken as true,[81] "all inferences" must be drawn in its favor,[82] and its general allegations are presumed to embrace whatever specific facts are

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the FOIA request at issue in this case, but in response to a FOIA request that plaintiff propounded to the EPA years ago.).

[78] *See* Memorandum Opinion at 9 n. 4, JA 194 (court did not "reach the question of whether the emails sought are agency records").

[79] *Id.* at ¶20, JA 9 *See also* Memorandum In Support of Motion to Dismiss (Docket No. 7-8) at 5 ("CEI apparently discovered this WHRC e-mail address through documents produced to CEI in connection with a separate FOIA request submitted to EPA.").

[80] *Complaint* at ¶2, JA 4-5.

[81] *Warth*, 422 U.S. at 501.

[82] *Autor*, 740 F.3d at 179.

necessary to support its claims.[83] Moreover, the Complaint specifically states that Holdren's personal email account was used for "official" and "work-related correspondence," and that CEI learned this through document productions in response to prior FOIA requests.[84]

V. The Supreme Court's *Kissinger* Decision Does Not Support a Contrary Result

The trial court rejected CEI's argument that OSTP had sufficient control over the email account of its director by pointing to the Supreme Court's decision in *Kissinger v. Reporters Committee*, 445 U.S. 136, 139 (1980), which blocked attempts to use FOIA to force the return of documents donated to a third party by an outgoing Secretary of State. *See* Opinion at 9-10, JA 194-95. But the facts of *Kissinger* were very different from this case.

A. *Kissinger* Involved Records That Were Impossible to Obtain Absent Costly and Time-Consuming Litigation

The Court's rationale was that "[a]n agency's failure to sue a third party to obtain possession is not a withholding under the Act." *Kissinger*, 445 U.S. at 151. As it noted, FOIA "does not suggest that Congress expected an agency to commence lawsuits in order to obtain possession of documents requested,

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[83] *Laroque*, 650 F.3d at 785.

[84] *Complaint* at ¶¶ 2, 20, 27, JA 4-5, 8, 10-11.

particularly when it is seen that where an extension [of time to respond to a FOIA request] is allowable, the period of the extension is only for 10 days. Either Congress was operating under the assumption that lawsuits could be waged and won in 10 days or it was operating under the assumption that agencies would not be obligated to file lawsuits in order to comply with FOIA requests." *Id.* at 153. This rationale has no relevance in this case, where the agency could just ask Holdren to produce the emails (or permit an IT specialist to search through them), and would not need to sue Holdren or anyone else in order to obtain them.

Kissinger had refused to assist in the return of the documents, and in light of Kissinger's imminent departure, the government had no leverage over him to assist in the return of the documents. The only thing it could possibly do was to bring a lawsuit for the return of the documents. *See id.* at 155 ("The Government, through the Archivist, has requested return of the documents from Kissinger. The request has been refused. The facts make it apparent that Kissinger, and the Library of Congress as his donee, are holding the documents under a claim of right.").

B. Here, the Agency Likely Could Obtain the Requested Records Simply By Asking For Them, Which It Has Not Done

Here, no one has argued that the agency would need to sue a third party in order to obtain the records, which could be obtained quite easily. No one claims Holdren has donated his emails to any third party. OSTP does not allege that it ever even requested the documents from him (either to produce them, or review them for

possible production), much less that he refused any such request. Nothing suggests that he would defy such an order, nor is there any reason to think that a lawsuit against him would be necessary. If the agency asked, he would mostly likely simply turn the requested records over to it, as other employees have in fact done in similar FOIA lawsuits brought by CEI in the past.

C. Moreover, unlike Kissinger, OSTP's Director Is Subject to Agency Discipline and a FOIA Court's Equitable Powers

Holdren remains OSTP's Director, and, as a current agency employee, is subject to the agency discipline at the behest of the Special Counsel, and to the contempt powers of the court in any FOIA lawsuit. As noted earlier, he is subject to potential "disciplinary action" mandated by the "Special Counsel," if he arbitrarily ignores his FOIA obligations. 5 U.S.C. § 552(a)(4)(F)(i).

As an OSTP employee, he is also subject to injunctive relief in a FOIA lawsuit commanding him to turn over and not discard the requested records. *See, e.g., Union Pacific R. Co. v. E.P.A.,* 2010 WL 2560455 (D. Neb. June 24, 2010) (temporary injunction barring agency and its "employees" from "transporting, removing, destroying, deleting, modifying, or in any way tampering with records, data, or other information, including electronically stored information, in their possession or control that is, or potentially may be, responsive to the requests submitted . . . under the Freedom of Information Act"). FOIA specifically provides

that "the district court may punish for contempt the responsible employee." 5 U.S.C. § 552(a)(4)(G).

The trial court noted that the Supreme Court had held that "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. Kissinger and the Library of Congress." Opinion at 9-10, JA 194-95.

But Kissinger was no longer in office by the time the courts acquired jurisdiction of that case, since the relevant FOIA requests were filed in the final days of the Ford Administration, after Jimmy Carter had defeated Kissinger's boss, Gerald Ford, in the 1976 election,[85] when Kissinger's departure was imminent, and by the time "the Archivist renewed his request for an inspection on February 11, 1977 . . . Kissinger was no longer Secretary of State."[86]

Here, by contrast, Holdren remains OSTP's Director, and was so at the time the instant lawsuit was filed. He remains subject to potential discipline, such as by

[85] *See Kissinger,* 445 U.S. at 143 (The Reporter's Committee's FOIA request was filed on January 18, 1977, a few days before Kissinger left office, meaning that the time to respond to the request did not elapse until after Kissinger left office; and the Military Audit Project's request was filed on December 28 and 29, 1976.)

[86] *Id.*, 445 U.S. at 144.

his agency,[87] if he refuses to comply with his FOIA obligations. Nothing in the Supreme Court's *Kissinger* decision suggests that FOIA permits sitting agency officials to avoid producing agency records.

D. The Historic Equitable Practice Cited By the *Kissinger* Court Confirms OSTP's Control of and Responsibility for Holdren's Emails

To the contrary, the Supreme Court likened FOIA obligations to those of people in discovery who receive a subpoena, under "historic equitable practice" governing when an individual is responsible for improperly withholding "a document sought pursuant to a subpoena." 445 U.S. at 154, *citing Amey v. Long*, 103 Eng.Rep. 653, 657 (K.B. 1808).

Under that longstanding practice, Holdren's emails would be subject to a subpoena issued to OSTP, and they would be considered to be within its "control" for purposes of Federal Rule of Civil Procedure 34. The records of executives or officers are commonly subject to discovery aimed at their employer, since those records are deemed to be within its "control." *See, e.g., Riddell Sports, Inc. v. Brooks*, 158 F.R.D. 555, 558 (S.D.N.Y. 1994) (corporate officer); *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445–46 (S.D.N.Y.2000) (executive);

[87] *See, e.g.,* 5 U.S.C. § 552(a)(4)(F)(i) (agency "shall take the corrective action that the Special Counsel recommends" as "disciplinary action" when agency employee is found to have "arbitrarily" withheld records).

Miniace v. Pacific Martime Ass'n, 2006 WL 335389, **1-2 * (N.D. Cal. Feb. 13, 2006) (outside directors); *Anz Advanced Technologies v. Bush Hog, LLC*, 2011 WL 814663, *9 (S.D. Ala. Jan 26, 2011) (chief executives).

Similarly, communications of agency employees stored outside the agency can be subject to both a subpoena aimed at the agency, and freedom of information laws governing the agency, since those communications are deemed to be within its "control" even if it does not possess them. *Flagg v. City of Detroit*, 252 F.R.D. 346, 354 (E.D. Mich. 2008) (construing "control" under Fed. R. Civ. P. 34(a)(1) and the Michigan Freedom of Information Act). "This principle extends not just to documents in the actual possession of a non-party officer or employee of a corporate party," but also to "electronic records maintained by a third party on the company's behalf." *Id.* Thus, a city "has 'control' over the text messages preserved by" a third party "pursuant to its contractual relationship with the City," and those "text messages satisfy the statutory definition of 'public records,' insofar as they capture communications among City officials or employees 'in the performance of an official function.'" *Id.* at 355.

These cases reflect the simple fact "the control required for Rule 34 purposes may be established by virtue of a principal agent relationship," *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 78 (D.D.C.1999), and because an employer "acts through its agents, [an officer's] refusal to cooperate [with

discovery] can be imputed to" the employer, *Coastal Mart, Inc. v. Johnson Auto Repair, Inc.*, 196 F.R.D. 30, 33 (E.D. Pa. 2000).

So, too, can the conduct of its "principals" or chief executives, whose "misconduct is imputable" to their corporation or agency, and whose records can be sought "without regard to" their "physical location" or whether they are located on the company's premises. *Anz Advanced Technologies v. Bush Hog*, LLC, 2011 WL 814663, *9 (S.D.Ala. Jan 26, 2011) (plaintiff had an "independent duty to produce the hard drives" of its CEO and an affiliated company's CEO "as required by Fed.R.Civ.P. 34 without regard to [their] physical location."); *Miniace v. Pacific Martime Ass'n*, 2006 WL 335389, **1-2 * (N.D. Cal. Feb. 13, 2006) ("documents in the possession" of defendant's "outside directors").

For example, a court ruled that a company would be required to answer interrogatories with information in possession of its former chief executive officer (CEO), who no longer worked at the company, but still had a contractual relationship with it; the company was in a position to exert pressure on the former CEO to provide the necessary information since his termination agreement provided for payment to the former CEO of $585 million, of which at least $582 million had not yet been paid, and the company's obligation to pay was conditioned upon CEO's performance of his contractual obligation to comply with requests

made of him by party with respect to any matters concerning civil litigation. *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445-46 (S.D.N.Y. 2000). Thus, OSTP has control over Holdren's records, even if they are not located in OSTP's offices. Control is established through his connection with OSTP, as well as the principal agent relationship, and his refusal to cooperate can be imputed to his agency.

The court below attempted to avoid this fact by noting that "under FOIA, even high ranking agency officials have personal interests distinct from those of the agencies they lead." Opinion at 12, JA 197, *citing, 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."). But that passage in *Kissinger* dealt with a different issue -- not with what constitutes "withholding" by an agency, but rather what constitutes an "agency record." If the content of a record is sufficiently personal rather than work-related – like a personal diary – it is not an "agency record" regardless of where it is located, in the office or out of the office, and regardless of whether the agency controls it. The agency still may be withholding such a record, but the withholding would not violate FOIA, because FOIA only requires production of "agency records." But in this case, CEI has specifically alleged that the requested records are agency records, because they were used to conduct agency business, in

an email account that Holdren "maintained" and "continued to use" in order "to correspond with certain colleagues on work-related issues," *Complaint* at ¶2, JA 4.

VI. OSTP Revealed That Agency Records Were in Holdren's Account In Its Response to the FOIA Request

Moreover, the record in this case indicates that the emails in Holdren's non-official email account do in fact include at least some agency records closely connected to agency business and policymaking. The agency already recognized the existence of responsive agency records from that account, by initially producing copies of them found in a different email account (Holdren's official email account) before ceasing production. In processing those documents, it withheld or redacted many of them based on their direct connection to agency policymaking.

In a March 31, 2014 letter to CEI's Christopher Horner, OSTP wrote, "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), and enclosed those documents. (In addition, OSTP has withheld 73 pages in full under (b)(5))," which contains FOIA's deliberative-process privilege for agency policymaking.[88]

[88] JA 152 (exhibit 1 to the Opposition to the Motion to Dismiss); *see* Reply Memorandum In Support of Defendant's Motion to Dismiss (Docket No. 10) (not disputing the authenticity of this exhibit).

These documents further confirm that CEI's allegations about the account containing agency records are "plausible." *Bell Atlantic v. Twombly*, 550 U.S. 514, 570 (2007). (Appellant believes it was not *necessary* to include such specific facts in the complaint, *see Laroque*, 650 F.3d at 785 (general factual allegations in the complaint are presumed to embrace the specific facts necessary to support the claim). But even if it actually were necessary, it would still be improper for the court below to dismiss this lawsuit *without leave to amend the complaint* (as it did in this case), despite the existence of such readily available supporting facts cited by the plaintiff.[89])

A. OSTP Effectively Conceded That The Emails Included Agency Records

For OSTP to claim Exemption 5, which covers "intra-agency" or "inter-agency" communications, as to these emails, is an implicit concession that the emails were in fact "agency" records, since that is a precondition for the applicability of the exemption. "To qualify, a document must thus satisfy two conditions: *its source*

[89] *See Lourenco v. General Maintenance Service Co.*, 1994 WL 114690, *2 n.3 (D.D.C. March 24, 1994) (dismissal of lawsuit without leave to amend the complaint was "inappropriate" where "initial discovery had revealed" supporting facts, such that "a simple amendment of the complaint" could "potentially salvage" claims that were originally too conclusory), *citing District Council 47 v. Bradley*, 795 F.2d 310, 316 (3d Cir. 1986) (granting leave to amend even though counsel never sought it in the court below, since "the district court at the least should have granted the plaintiffs leave to amend their complaint to provide specific factual allegations to demonstrate a causal nexus").

must be a Government agency, and it must fall within the ambit of a privilege against discovery" held by the agency. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (emphasis added); *accord* Michael D. Pepson & Daniel Z. Epstein, *Gmail.Gov: When Politics Gets Person, Does the Public Have a Right to Know?,* 13 Engage J. 4, 4 (2012) (application of FOIA exemption 5 to emails in agency employees' personal email accounts meant that they were agency records for purposes of FOIA), *citing DNC v. U.S. DOJ*, 539 F. Supp. 2d 363, 368 (D.D.C. 2008).

B. OSTP Has Effectively Conceded That The Requested Records Are Connected With Agency Policymaking

The fact that OSTP invoked official deliberative-process privilege as to many of these documents (including "73 pages" withheld "in full") means that they must have been closely connected with agency business, because that is a threshold requirement for asserting the privilege. To qualify for redaction or withholding under (b)(5) (FOIA's Exemption 5), communications must be connected to the "adoption of an agency policy," *Jordan v. U.S. Dept. of Transportation*, 591 F.2d 753, 774 (D.C. Cir. 1978), be a "direct part" of the agency's "deliberative process" in making "recommendations" or expressing "opinions on legal or policy matters," *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1976), and have more than a "peripheral" relationship "to actual policy formulation." *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994).

In short, if OSTP itself is to be believed, the emails in Holdren's "personal" email account included some that were not just work-related, and connected to agency business, but that also played a "direct," non-"peripheral" role in "actual policy formulation" by the federal government, and were part of the agency's own "deliberative process." As such, they were necessarily "agency records" under FOIA.[90]

C. Specific Examples Show The Emails' Connection With Agency Business

An example of what are clearly agency records among those documents is an email about a White House press call, sent by Holdren using his jholdren@whrc.org email address to agency employee Rick Weiss, Director of Communications and Senior Science and Technology Policy Analyst at OSTP, on Feb. 13, 2014 at 15:42:33 EST.[91] Moreover, that email, titled "Re: Holdren on WH press call this evening," contains redactions under FOIA Exemption 5 ((b)(5)),

[90] Had they not been agency records, the agency would not have produced them, merely because they were stored within the agency. *See, e.g., Gallant v. NLRB,* 26 F.3d 168, 172 (D.C. Cir. 1994) (purely personal document was not agency record covered by FOIA even though it was stored in an agency employee's office); *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.").

[91] *See* JA 153-59 (found in Exhibit 1 to the memorandum in opposition to the motion to dismiss).

which is something that can only be claimed for official agency records.[92] This document was forwarded by Holdren between his jholdren@whrc.org account, and his official White House EOP account.

Another document not produced in OSTP's rolling production, but found as an exhibit to OSTP's memorandum, also qualifies as an agency record. It is a Feb. 22, 2011 email Holdren sent to EPA's Administrator describing his speech at the annual meeting of the American Association for the Advance of Science, and attaching his 29-page PowerPoint presentation outlining government "Policy for Science, Technology, and Innovation in the Obama Administration." The presentation discusses the "responsibilities of OSTP" and "OSTP-managed entities" and promotes related federal "initiatives" dealing with "energy," "environmental" programs, the "space program," and "stem-cell" research.[93]

VII. The Trial Court Mischaracterizes the Complaint, Which Shows OSTP's Control Over the Records

Despite the manifest control over the account wielded by Holdren, OSTP's Director, the trial court ruled that control was absent based on CEI's

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[92] JA 153.

[93] JA 119-149. *See also* Docket No. 7-8 at 22 (defendant concedes in its memorandum in support of the motion to dismiss that this was an email that "Holdren sent from his OSTP account to the WHRC account (with the EPA Administrator bcc'd on the email)").

characterization of the email account as being subject to access and control by third parties. JA 195 ("Plaintiff itself admits repeatedly that emails on the unofficial account are outside of OSTP' s control," citing Complaint, ¶¶ 23, 27, 30, 46). But legally speaking, these records *were* within the control of OSTP, since they were "emails Holdren had placed under his . . . control," Compl. ¶ 55 (JA 18), in an account he "maintained" and "continued to use" in order "to correspond with certain colleagues on work-related issues," *id.* at ¶2, JA 4-5. Such control by Holdren, the agency's director, is legally tantamount to control by the agency itself.[94] For that reason, the requested records fall squarely within OSTP's control.

Multiple parties can have "control" over the same materials, so merely because the Woods Hole Research Center has control over the email account does not mean that Holdren (and through him OSTP) lacked control over the account. *See U.S. v. Taylor,* 728 F.2d 864, 868 (7th Cir. 1984) ("possession may be either actual or constructive and it need not be exclusive but may be joint"); *Curl v. State*, 162 N.W.2d 77, 82 (1960) (more than one person may be said to have control over the same property).

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[94] *See, e.g., Judicial Watch*, 310 F.Supp.2d at 300 ("Because employees are not distinct from their agencies," their "documents thus [a]re in . . . the constructive control of" their agency") (citations omitted); *Harrison*, 158 F.3d at 1376 (entity responsible for conduct of high-ranking officials, who are its *alter ego*, even under statute that, unlike FOIA, does not hold it responsible for many acts of ordinary employees).

The fact that CEI happened to characterize the email account at one point as being under the "sole control" of the Woods Hole Research Center does not change this. The account is plainly within the control of OSTP Director Holdren, as his use of the account illustrates. Moreover, *actual* control by the agency is not necessary under FOIA, which reaches documents under an agency's "constructive control." *Burka*, 87 F.3d at 515 (data tapes held by contractor were subject to FOIA due to agency's "constructive control" over them, even though "they were neither created by agency employees, nor are they currently located on agency property").

Moreover, "courts hold that even where a party . . . lacks actual physical possession or custody of requested documents . . . such party may nevertheless be found to have control of the documents." *Gross v. Lunduski*, 304 F.R.D. 136, 142 (W.D.N.Y. 2014) (civil lawsuit). A government or corporate official can have sufficient control over "discovery material" to be obligated to produce it even when it is in the "sole possession" of a third party. *Id.* at 141-42 (subpoena could require defendant to produce documents described as being "within the exclusive possession, custody, and control" of defendant's employer); *U.S. v. Martoma*, 2014 WL 31704, *5 (S.D.N.Y. Jan. 6, 2014) (U.S. Attorney has "obligation to produce" exculpatory "material that is in the sole possession of the SEC" if they "were engaged in a joint investigation" of the accused), *citing U.S. v. Gupta*, 848 F.Supp.2d 491, 493 (S.D.N.Y.2012) (discovery obligation can extend to materials

even if "another agency" is "in actual possession of the documents created or obtained as part of [a] joint investigation"); *U.S. v. Upton*, 856 F.Supp. 727, 750 (E.D.N.Y.1994) ("discovery material" can be subject to disclosure even if U.S. Attorney does not "physically" possess it).

A. CEI Did Not Make Any Admissions Foreclosing Its Claims

In any event, whether records are covered by FOIA is generally a matter of statutory interpretation, and is not controlled by CEI's characterizations, which did not constitute judicial admissions.[95] "Courts generally limit the invocation of 'judicial admissions' to affirmative, unequivocal factual admissions," not "a legal argument" like this; "The judicial admissions doctrine was not meant to facilitate games of 'gotcha' in which parties seek to bind each other to prior arguments."

[95] *See Jones v. Executive Office of President*, 167 F.Supp.2d 10, 17 (D.D.C. 2001) (court does not "consider party admissions in conjunction with its interpretation of a statute."); *New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963)("admissions go to matters of fact which, otherwise, would require evidentiary proof ... the doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case. When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them."); *AstenJohnson, Inc. v. Columbia Cas. Co.,* 562 F.3d 213, 229 (3d Cir. 2009) (interpretation of contract was "legal conclusion" that did not contain "factual admissions"); *Garcia v. Att'y Gen.*, 462 F.3d 287, 290 n. 6 (3d Cir.2006) ("legal classification of prior convictions is not a factual proposition susceptible of admission by a litigant.").

U.S., ex rel. Miller v. Bill Harbert Intern. Const., No. 95-1231, 2007 WL 851871, *1 (D.D.C. Mar. 14, 2007)

B. In Dismissing the Case, The Court Below Took CEI's Allegations Out of Context

Moreover, the allegations on which the court focused were taken completely out of context. They were included in the Complaint not for CEI's FOIA claim, but rather for its separate Federal Records Act/APA claim, which contended that the Federal Records Act's recordkeeping requirements had been breached (*see, e.g.*, Counts Six and Seven, JA 26-28), such as by putting records at risk of being lost or making them hard to access by agency recordkeeping staff.[96]

The distinction is important, because a lack of physical control by agency record-keepers can easily frustrate the goals of the FRA even if it is irrelevant to

[96] *See, e.g., Complaint,* ¶22 (complaining that an official's emails can end up being "unknown to and inaccessible by" agency recordkeeping staff when they are never copied from the official's private email account to his office account, and that using a private entity's account for transacting agency business can give it "direct access to and control over public records and potentially over sensitive information"); *id.* at ¶45 (discussing the "risk of improper destruction of [such] records; that is, the risk that [they] will be lost or destroyed before they can be transferred to" official recordkeeping systems); *Id.* at ¶48 (discussing how "work-related" emails in poorly-monitored "non-official" email accounts are sometimes overlooked in response to "congressional" and other records requests). *Compare CEI v. EPA*, 67 F.Supp.3d 23, 29 (D.D.C. 2014) (Administrative Procedure Act (APA) violated by ongoing agency practice of failing to "notify the Archivist of the potential loss or destruction of federal records" in violation of the Federal Records Act).

FOIA.[97] Storing records haphazardly off site may endanger both their preservation and the public's ability to access them in the future. This can violate the FRA even if it does not exempt those records from FOIA. The FRA's goal is to ensure that documents are not lost and are readily accessible to record an agency's policies, decisions, operations, and activities, and the transaction of public business, *see, e.g.,* 44 U.S.C. § 3301, a goal that is undermined when an agency official stores them in his non-official email account.

For that reason, the court seriously erred in relying on these allegations to dismiss the FOIA claim in the Complaint. *See Bill Harbert*, *1 (courts do not treat as judicial admissions "a legal argument advanced, in the alternative," much less "an argument taken out of context."). With respect to FOIA, and given the liberality with which complaints should be construed, CEI's complaint more than

[97] "The meaning of 'agency records' for FOIA purposes is broader than that of 'records' under" the Federal Records Act. National Archives, *Disposition of Federal Records: A Records Management Handbook* (2000 Web Edition), http://goo.gl/Dg5ivN. *See Ryan*, 617 F.2d at 785 (rejecting a "simple possession standard" because that "would permit agencies to insulate their activities from FOIA disclosure by farming out operations," thus circumventing FOIA). Even if an agency lacks the ability to adequately safeguard and preserve the content of a personal email account, making storage of records there inappropriate under the FRA, it can still have enough control over those records (through Holdren) to render them subject to FOIA.

adequately set forth a valid claim concerning OSTP's failure to adequately search the personal email account of its director despite its ability to do so.[98]

CONCLUSION

For the foregoing reasons, the court below erred in granting defendant's motion to dismiss the complaint, and its judgment should be reversed.

Respectfully submitted this 10th day of August, 2015,

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[98] *See, e.g.,* Complaint at ¶¶ 54-55, JA 18-19, JA 22 (noting that agencies can and do produce such emails from employees' "personal" email accounts and search their personal devices in response to FOIA requests).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, because this brief contain 12,675 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2010 version of Microsoft Word in fourteen-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on this 10th day of August 2015, I filed the foregoing brief 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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STATUTORY ADDENDUM

Freedom of Information Act

5 U.S. Code § 552 - Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

*****

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which

(i) reasonably describes such records and

(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed,

shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, 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.

*****

(4)

*****

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

*****

(F)

(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or

employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

*****

(6)

(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

*****

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

*****

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. 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. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

*****

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or

authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

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(f) For purposes of this section, the term—

(1) “agency” as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) “record” and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.