

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

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

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

In reviewing a motion to dismiss, the court must accept “as true all of the factual allegations contained in the complaint,” and draw “all inferences in favor of the nonmoving party.” *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014).

The burden of demonstrating that the documents are not “agency records” subject to production under FOIA falls on the agency. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (“The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not ‘agency records’ ...”) (citing S.Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)); *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C.Cir.1994) (noting that “[i]n the FOIA context ... the agency has ... [the] burden of demonstrating that the documents requested are not ‘agency records’”) (citing 5 U.S.C. § 552(a)(4)(B)); *CREW v. U.S. Dept. of Homeland Sec.*, 527 F.Supp.2d 76, 88 (D.D.C. 2007). OSTP has not met this burden.

Here, as we explain below, the requested records are indeed “agency records,” because they are work-related records generated and held by the agency head, OSTP Director John Holdren, in an email account he has routinely used for OSTP-related communications.¹ Moreover, some of these emails are also held in his official OSTP email account, yet the agency refuses to produce even those emails. OSTP’s wrongful withholding of these emails states a claim under the Freedom of Information Act. OSTP has also violated the Federal Records Act in a way that warrants relief under the APA, through a judicial order that it notify the National Archives.²

¹ See, e.g., *Landmark Legal Foundation v. E.P.A.*, 959 F.Supp.2d 175, 181 (D.D.C. 2013).

² See *Armstrong v. Bush*, 924 F.2d 282, 292-95 (D.C. Cir. 1991).

I. Contrary to OSTP's Claim, FOIA Covers Records Stored Outside of OSTP's Offices and Official Recordkeeping Systems, Such as OSTP Director Holdren's Emails

Contrary to OSTP's argument,³ documents do not have to be located on agency property or in official agency record-keeping systems to be subject to FOIA. Binding D.C. Circuit precedent has rejected this argument.

A. 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 v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996) (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 actual physical location of the documents is not dispositive."⁴ Thus, Holdren's emails are subject to FOIA even if they are not in an agency computer or email account.

B. Contrary to OSTP's Claim, FOIA Reaches the "Non-Official" Email Accounts of High-Ranking Agency Officials Like OSTP Director Holdren

OSTP claims that because they are in a "non-official account," Holdren's emails cannot be "Agency Records" Under FOIA.⁵ This is at odds with precedent regarding the use of non-

³ ECF No. 7-8 at pp. 10-11.

⁴ *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").

⁵ ECF No. 7-8 at pg. 12.

official email accounts by high-ranking agency officials, and would permit wholesale evasion of FOIA by federal officials, who could conceal all their correspondence from the public simply by using personal email accounts to conduct agency business.

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 (D.D.C. 2013) (faulting EPA because it “did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff.”); *id.* at 184 (“The possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA,” which reinforces the need to deny summary judgment); *Competitive Enterprise Institute v. United States Environmental Protection Agency*, -- F.Supp. ___, 2014 WL 308093, *14 (D.D.C. Jan. 29, 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”). Such records are also covered by state laws modeled on FOIA.⁶

⁶ *See also, e.g., Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (emails sent by government officials using personal email accounts and personal computers were public records; “regardless of whether the Supervisors herein utilized personal computers or personal email accounts, if two or more of the Township Supervisors exchanged emails that document a transaction or activity of the Township and that were created, received, or retained in connection with a transaction, business, or activity of the Township, . . . those emails could be “records” “of the Township” . . . even if they are stored on the Supervisors’ personal computers or in their personal email accounts”); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96 (Pa.Cmwlth 2012) (emails sent by government officials were public records even though the agency was “not in the physical possession of any emails, beyond the emails already produced, that were composed via personal email accounts,” because “a public entity’s lack of possession of an existing writing at the time of the request . . . is not, by itself, determinative of the question of whether the writing is a public record subject to disclosure”; agency “must turn over any remaining emails discussing” agency “business” that were within email accounts held by the “individual” agency employees); *Bradford v. Director, Employment Sec. Dept.*, 128 S.W.3d 20, 27-28 (Ark. App. 2003) (“The creation of a record of communications about the public’s business is no less subject to the public’s access because it was transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium. Emails transmitted between Bradford and the governor that involved the public’s business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or

C. OSTP Is Responsible for 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. The very passage in the Complaint cited by OSTP specifically states that the non-official email account is under the "control" of OSTP's Director.⁷ "Because employees are not distinct from their agencies,"⁸ their "documents thus [a]re in the actual control of the agency employees and the constructive control of" their agency.⁹ Thus, defendant is simply wrong to

whether sent to official government email addresses over means under the control of the State's Division of Information Services."); *McLeod v. Parnell*, 286 P.3d 509, 510 (Alaska 2012) ("private emails" sent using "private email accounts" can be "public records" whose destruction is forbidden); *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. 2013) (city council members' communications for personally-owned electronic devices were subject to disclosure under state FOIA, even though it only covered "public records"); 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) (FOIA covers emails sent using private email accounts), citing *Democratic Nat'l Comm. v. U.S. DOJ*, 539 F. Supp. 2d 363, 368 (D.D.C. 2008) (in case involving e-mails sent or received by White House staff members 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).

"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" (see *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 Freedom of Information Act" (*North Hills News Record v. Town of McCandless*, 722 A.2d 1037, 1040 n.4 (Pa. 1999)).

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 ("UK has followed the US in its freedom of information laws") (www.theregister.co.uk/2012/02/07/foia_review_information_commissioner/), citing ICO, Decision Notice, March 1, 2012, at 1, 5 (www.ico.gov.uk/news/latest_news/2012/statement-department-foreducation-decision-notice-02032012.aspx); Christopher Williams, *Civil servants to be forced to publish Gmail emails*, Telegraph, Dec. 15, 2011, www.telegraph.co.uk/technology/news/8958198/Civil-servants-to-be-forced-to-publish-Gmail-emails.html.⁷ See ECF 7-8 at 15, quoting Compl. ¶ 55 (arguing that Holdren placed the requested e-mails "under his sole control, in contravention of the Federal Records Act, OSTP policy, and the 'Holdren memo'" (emphasis added by OSTP)).

⁸ *Judicial Watch Inc. v. U.S. Dept. of Energy*, 310 F.Supp.2d at 300, *aff'd in part, rev'd in part*, *Judicial Watch v. Dept. of Energy*, 412 F.3d 125, 133 (D.C. Cir. 2005), citing *Ryan v. Department of Justice*, 617 F.2d 781, 787 (D.C. Cir. 1980).

⁹ *Judicial Watch*, 310 F.Supp. at 300, citing *Burka*, 87 F.3d at 515.

claim that “OSTP lacks control over the WHRC account.”¹⁰ Such a pinched notion of “control” would create a gaping loophole in FOIA, enabling agency employees to evade their obligations under FOIA and federal record-keeping laws.

Mystifyingly, OSTP claims that “nowhere does CEI allege that the WHRC records were created by an OSTP representative *acting on behalf of OSTP*.”¹¹ But even if that were a required showing under FOIA, the Complaint does indeed allege that the records were emails used by Holdren specifically “to correspond with certain colleagues on work-related issues,” and thus was done in the scope of his employment. *See* Complaint at ¶2.

It would not be dispositive even if Holdren created all of these records while away from OSTP’s offices (which OSTP has not alleged, and seems unlikely: high-ranking agency officials often use personal email addresses to correspond with colleagues and lobbyists, even when that violates federal recordkeeping laws.¹² Holdren’s non-official account emails produced before

¹⁰ ECF No. 7-8 at p. 16.

¹¹ ECF No. 7-8 at p. 12.

¹² *See, e.g.,* Senate Committee on Environment and Public Works, Minority Report, *A Call for Sunshine: EPA’s FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 4 (“Multiple high ranking officials have used non-EPA email accounts to conduct official agency business” even though “use of non-official, or personal email accounts expressly violates internal EPA policy that forbids the use of non-official e-mail accounts to conduct official agency business”; “the use of *non-official* email accounts was a widespread practice across the Agency.”), available at www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62. *Accord* Eric Lichtblau, *Across From White House, Coffee With Lobbyists*, New York Times, June 25, 2010, at A18 (“lobbyists say that they routinely get e-mail messages from White House staff members’ personal accounts rather than from their official White House accounts, which can become subject to public review.”), available at www.nytimes.com/2010/06/25/us/politics/25caribou.html?_r=1&scp=4&sq=caribou&st=cse; John Fund, *Email Scandal at the EPA*, National Review, Jan. 5, 2013 (“When cutting deals to ensure the health-care industry’s support of Obamacare and provide \$500 million in green-energy loan guarantees to the now-bankrupt Solyndra solar company, senior administration officials used private e-mail accounts . . . The Solyndra loans were coordinated on 14 separate private e-mail accounts”) (www.nationalreview.com/articles/336995/e-mail-scandal-epa-john-fund); Nick Bauman, *Starbucksgate: Obama’s Lobbyist/Email Scandal, Mother Jones*, June 28, 2010, <http://motherjones.com/mojo/2010/06/starbucksgate-crew-calls-investigation-white-house>. (“Obama administration officials use their personal email accounts and hold “off-campus” coffee shop meetings with lobbyists in an apparent attempt to skirt disclosure rules. . . a DC watchdog group, has penned a letter (PDF) to the House Oversight and Government Reform committee . . . pointing to apparent ‘wilful violations’ of federal law. The allegations suggest that the Obama administration may be flouting the same recordkeeping laws that the Bush administration did: the federal and presidential records acts (FRA and PRA). Both laws require that White House staff retain records—

OSTP decided to stop producing responsive records (see *infra*, Part II), also indicate he commonly used this account during regular business hours.¹³ And an index of redacted documents filed in a different FOIA case shows that Holdren used personal email repeatedly to correspond with the head of the EPA and other federal officials about matters of federal policy, resulting in portions of those emails being redacted as privileged.¹⁴

As this court has observed, “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

including emails—related to their daily work. . . emails scheduling meetings with lobbyists would almost certainly be the type of emails that the FRA and PRA require White House officials to preserve”).

¹³ 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. That email is the first email found in Exhibit 1 to this memorandum. The email, titled “Re: Holdren on WH press call this evening,” contains redactions under FOIA Exemption 5 ((b)(5)), which is something that can only be claimed for official agency records.

¹⁴ See, e.g., *CEI v. EPA*, D.D.C. Civil Action No. 12-1617 (JEB), ECF No. 35-2 (filed, 12/27/2013), pg. 404 (documents ## 01268-EPA 4608 through 01268-EPA-4611) (showing emails exchanged with Holdren, redacting portions as covered by FOIA Exemption Five’s deliberative process privilege, and redacting Holdren’s personal, non-official email address for putative privacy reasons); pg. 436 (doc.# 01268-EPA-4827); pg. 437 (doc. ## 01268-EPA-4831); pg. 447 (doc. # 01268-EPA-4903); pg. 455 (docs. ## 4961, 4962); pg. 456 (doc. # 4964); pp. 502-06 (docs. ## 5354, 5364, 5380, 5381, 5385), p. 532 (doc. #5574); p. 556 (doc. # 5762), p. 578 (doc. # 5973). Holdren authored many if not most of these emails. (See, e.g., docs. ## 4608-11, 4961, 5354, 5574, 5762, 5384).

These all have Holdren’s personal email address redacted for privacy reasons under FOIA Exemption 6 (“(b)(6)”). As OSTP does not dispute, the personal email account used was jholdren@whrc.org. See ECF No. 7-8 at pg. 23 fn. 5 (“the EPA produced to CEI a draft sample Vaughn index stating that the e-mail address in the ‘to:’ field was jholdren@whrc.org.”) (discussing one of the documents cited above, # 5574, referred to in full as “01268-EPA-5574”), *citing Compl. ¶¶ 2, 20*. Portions of the index of redacted documents are attached as Exhibit 2.

This court can take judicial notice of this index of redacted documents. See, e.g., *State of Florida Board of Trustees v. Charley Toppino and Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975) (court can “take judicial notice of related proceedings and records in cases before that court.”); *accord U. S. v. American Tel. & Tel. Co.*, 83 F.R.D. 323, 333 (D.D.C. 1979), *citing Gomez v. Wilson*, 477 F.2d 411, 416 n.28 (D.C. Cir. 1973) (affidavits in other cases).

agency, or [be] in the actual possession of an agency, for the records to be considered ‘owned or 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.¹⁵ Holdren’s high-ranking, policymaking status¹⁶ 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 (D.D.C. Oct. 30, 2013), so that case is not controlling here (even assuming a court ruling on such an evolving legal issue could have preclusive effect to begin with, which it could not¹⁷).

¹⁵ See *Harrison v. Eddy Potash*, 158 F.3d 1371, 1376 (10th Cir. 1998) (“[T]he Supreme Court in *Burlington [Industries v. Ellerth]* acknowledged an employer can be held vicariously liable under Title VII 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) (same principles apply to agency; “Vicarious liability automatically applies when the . . .supervisor is” very high-ranking) (citing *Faragher*, 524 U.S. at 789)). Strict liability for acts of high-ranking officials like agency directors applies even where the relevant law (Title VII in those decisions) does not hold agencies liable for acts of non-supervisory employees. See *Vance v. Ball State Univ.*, 133 S.Ct. 2434 (2013) (Title VII does not impose strict liability for the conduct of non-supervisory and non-managerial employees). 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.” *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *Pasantino v. Johnson & Johnson*, 212 F.3d 493, 517 (9th Cir. 2000) (liable for punitive damages “when the corporate officers who engage in illegal conduct are sufficiently senior to be considered proxies for the company.”).

¹⁶ As OSTP’s very name – Office of Science and Technology Policy – illustrates, it shapes government policy.

¹⁷ See *Montana v. United States*, 440 U.S. 147, 162-63 (1979) (discussing “the exception [to issue preclusion] which obtains for ‘unmixed questions of law’”); *Advanced Health Systems, Inc. v. Schweiker*, 510 F.Supp. 965, 969 (D. Colo. 1981)(“collateral estoppel applies only to questions of fact, not to questions of law”).

The rapid growth in the use of electronic communications and devices also would weight against the application of issue preclusion even if it would otherwise be warranted. *Montana*, 440 U.S. at 163 (“Unreflective invocation of collateral estoppel . . . could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.”); *Riley v. California*, 134 S.Ct. 2473 (2014) (rejecting “mechanical application of [past precedent] that might well support the warrantless searches” of cell phones and refusing to apply the “search incident to arrest doctrine” to “modern cell phones,” because they have now become “such a pervasive and insistent part of daily life,” unlike “ten years ago.”)

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. It recognized that such emails could indeed be covered by FOIA,¹⁸ 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 *7. (That ruling was on summary judgment, where FOIA requester has a heavier burden than the plaintiff does here, and must point to record evidence to how genuine issues of material fact). And the agency in that case, unlike OSTP, submitted evidence, in the form of declarations under penalty of perjury attesting that "the emails that were 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."¹⁹ Here, by contrast, OSTP says it "has never obtained the WHRC emails," much less produced them.²⁰

Issue preclusion does not apply if a new determination of the legal issue is warranted "in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1356 (2d Cir. 1992) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28(2), *rev'd on other grounds sub nom. Sale v. Haitian Ctrs. Council*, 113 S.Ct. 2549 (1993); *see also Haitian Ctrs.*, 969 F.2d at 1356 ("Relitigation of an issue of public importance should not be precluded when there has been an intervening change in the applicable legal context.")). Here, it would be inequitable to prevent CEI alone from obtaining records from non-official email accounts based on a single district court decision in one of its many FOIA cases, even as all other requestors remain free to seek such records based on conflicting court rulings by other judges. *See* this memo at pg. 3, *citing, e.g., Landmark Legal Foundation v. E.P.A.*, 959 F.Supp.2d 175, 181 (D.D.C. 2013) (ruling against agency because it "did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff" of the agency); *cf. CEI v. EPA*, 2014 WL 308093, *14 (D.D.C. Jan. 29, 2014) (suggesting, even after the *CEI v. NASA* decision, that requesters like CEI can "simply ask for work-related emails and agency records found in the specific employees' personal accounts").

¹⁸ *Id.* at *8 (noting that "not all of [those] emails from or to his @columbia.edu email address are personal materials exempt from being searched.")

¹⁹ *Id.* at *8, *citing, e.g., Travis Decl. and Dewey Decl.*

²⁰ *See* ECF No. 7-8 at 16; *see Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) ("statements in briefs" can be "binding judicial admissions of fact").

Even if a record produced by a low-ranking employee – like a personal diary -- does not constitute an agency record just because it reflects on an employee’s work, that has little bearing on whether FOIA covers high-ranking agency officials’ policy-related communications. Unlike communications with an ordinary employee, communications with agency heads influence important agency decisions and policies. *See, e.g.*, Complaint at ¶2 (Holdren used his “non-official email address” to “correspond with certain colleagues on work-related issues”). Because of that, his communications readily qualify as a “federal record” under the Federal Records Act, which classifies documents as such based on their “informational value” about agency “policies,” “decisions,” etc.²¹ (FOIA’s reach is similar to, but broader than, the FRA in terms of what is a covered record, although FOIA lacks an explicit definition).²²

OSTP’s contrary argument simply ignores this critical distinction between high-ranking policymakers, and ordinary, 9-to-5 employees. *See* ECF 7-8 at 13. It also ignores the pervasiveness of high-ranking agency officials’ documented use of personal email accounts to evade transparency while conducting agency business.²³

OSTP claims CEI advocates “treating agency employees’ private e-mail accounts the same as the agency’s official records systems.” *Id.* at 1. In reality, CEI recognizes that, by their very nature, private email accounts are less likely to contain agency records than an agency’s official recordkeep-

²¹ *See* 44 U.S.C. § 3301 (whether document qualifies as a record tied to whether it is “appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”).

²² “The definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” EPA, *What Is a Federal Record?*, www.epa.gov/records/tools/toolkits/procedures/part2.htm.

²³ 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 4, 9 (“Multiple high ranking officials have used” personal “email accounts to conduct official agency business”), *id.* at 12-14 (giving specific examples), available at www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

ing systems,²⁴ and that agencies are thus not required to routinely search the personal email accounts of all their employees in response to FOIA requests.²⁵ But here, plaintiff has specifically *identified* a non-official email account that does contain OSTP-related records, and was repeatedly used for work-related communications. Where plaintiff specifically identifies such an account, the agency must search it as part of its duty to “follow through on obvious leads to discover requested documents.” *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C.Cir.1999); *see id.* at 327 (failure to search facility outside the agency “identified as a likely place where the requested documents might be located clearly raises a genuine issue of material fact as to the adequacy of the [agency’s] search”); *Landmark Legal Foundation*, 959 F.Supp.2d at 181 (agency should have searched high-ranking agency officials’ “personal email” accounts, especially where agency “leaders” may have used them to “purposefully attempted to skirt disclosure under the FOIA”).

OSTP itself previously admitted that federal recordkeeping laws reach “work-related emails received” in employees’ “personal” accounts. *See* ECF No. 7-6 at 2 (the 2010 Holdren memo).

D. FOIA Reaches 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*

²⁴ Indeed, for many agency employees, unlike Holdren, use of personal email during work hours is simply impossible, ensuring that their personal email accounts will be largely if not entirely free of agency communications. When undersigned counsel worked for the Department of Education as a staff attorney, he never used a personal email account for agency business, because the web browser used by the agency blocked access to web-based personal email accounts, in order to facilitate compliance with the Federal Records Act. Low-level agency employees also have little motive to evade FOIA by using personal email accounts to discuss agency actions, since they lack policymaking authority to begin with, making their communications of little interest to most FOIA requesters.

²⁵ *See Oglesby v. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (“There is no requirement that an agency search every record system. . . However, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.”); *Judicial Watch v. DHS*, 857 F.Supp.2d 129, 145 (D.D.C. 2012) (“FOIA does not obligate agencies to undertake fishing expeditions” unlikely to lead to “responsive records.”)

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.’”²⁶

E. OSTP Mischaracterizes the Complaint, Which Shows OSTP’s Control Over the Records

OSTP claims that CEI has admitted in its complaint that the requested records were not in the control of the OSTP and thus were not “agency records,” saying that “CEI’s complaint repeatedly alleges that OSTP lacks possession of the records on the WHRC account.” *Id.* at 12, citing Compl. ¶¶ 113-22 (seeking relief for Federal Records Act violation). But legally speaking, these records *were* within the control of OSTP, since they were “emails Holdren had placed under his . . . control,” Compl. ¶ 55, in an account he “maintained” and “continued to use” in order “to correspond with certain colleagues on work-related issues,” *id.* at ¶2. Such control by Holdren, the agency’s director, is legally tantamount to control by the agency itself.²⁷ For that reason, the requested records fall squarely within OSTP’s control.

1. OSTP Need Not “Possess” the Records For Them To Be Subject to FOIA

Moreover, OSTP’s contrary argument completely ignores D.C. Circuit authority finding documents to be agency records under FOIA even absent *possession* by the agency; or based on constructive rather than 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

²⁶ *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”).

²⁷ *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 v. Eddy Potash*, , 158 F.3d 1371, 1376 (10th Cir. 1998) (entity responsible for conduct of high-ranking officials, who are its *alter ego*, even under statute that, unlike FOIA, does not hold entity responsible for acts of ordinary employees).

test of whether a record is within an agency's control")²⁸; *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).

2. 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, not a factual matter to be admitted.²⁹ Moreover, "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."³⁰

3. OSTP Takes CEI's Allegations Out of Context

Moreover, OSTP takes these paragraphs in the complaint completely out of context. They are not from plaintiff's FOIA claim, but rather from its separately pled Federal Records Act/APA claim (Count Seven). *See U.S. ex rel. Miller v. Bill Harbert Intern. Const.*, No. 95-1231 (RCL), 2007 WL 851871, *1 (D.D.C. Mar. 14, 2007) (courts do not treat as judicial admissions "a legal argument advanced, in the alternative," much less "an argument taken out of context."). The

²⁸ *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").

²⁹ *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.").

³⁰ *U.S., ex rel. Miller v. Bill Harbert Intern. Const.*, No. 95-1231, 2007 WL 851871, *1 (D.D.C. Mar. 14, 2007) .

statements OSTP cites from plaintiff's complaint and correspondence were alleging that the Federal Records Act's recordkeeping requirements had been breached, not that the records were outside the reach of FOIA. It is nonsensical to argue that violating the Federal Records Act's recordkeeping requirements can, *ipso facto*, exempt a document from FOIA.

In its FOIA claims, CEI underscored OSTP's ability and duty to produce emails from that account,³¹ noting that it was controlled by OSTP's own director.³² And it specifically argued that "federal recordkeeping laws reach [such] 'work-related emails' in 'any personal email account.'" Complaint, ¶ 5, *citing May 10, 2010 Memo from OSTP Director John Holdren to all OSTP staff, Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge*, at 1.³³ Thus, OSTP is wrong to claim "CEI argues that OSTP failed to produce records from an e-mail account existing *wholly outside OSTP's possession and control*." See ECF No. 7-8 at p. 1.

³¹ See, e.g., Complaint at ¶ 54-55 (noting that agencies can and do produce such emails from employees' "personal" email accounts in response to FOIA requests); *id.* at ¶ 59 ("This Court recently acknowledged that FOIA requesters 'can simply ask for work-related emails and agency records found in the specific employees' personal accounts; requesters' need not even identify the non-official email addresses at issue (which parties may not know)," *quoting CEI v. EPA*, No. 12-1617, 2014 WL 308093, at *14 (D.D.C. Jan. 29, 2014)); *id.* at ¶ 65 (discussing case law holding that agency "employee cannot simply claim records are personal [and withhold them] without agency review; faulting Justice Department for the fact that it 'was aware that Michael Dettmer had withheld records as "personal"' but did not require that 'he submit those records for review' by the Department)." *citing Kempker-Cloyd v. Department of Justice*, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999); *id.* at ¶ 69 ("If it is likely that responsive records exist on non-official email accounts (or equipment) it is for the agency to search an employee's private accounts and equipment. See, e.g., *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996)(data tapes were 'agency records' subject to FOIA, even though they were 'neither created by agency employees, nor are they currently located on agency property'). . . See also, e.g., August 17, 2012 Letter from U.S. Department of Commerce . . . to Christopher Horner . . . stating in pertinent part, 'NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the home office and personal email account of Dr. Solomon.'"); *id.* at ¶ 12, *citing CEI v. EPA*, 2014 WL 308093, at *14 (D.D.C. Jan. 29, 2014) (simply ask for emails in personal accounts).

³² See, e.g., *id.* at ¶ 61 (noting "OSTP Director's known work-related use of this account, and his recent admission that he maintains it."); Complaint, ¶ 2 (OSTP's Director himself "maintained this non-official email address").

³³ Defendant itself has filed this memo as an exhibit. See ECF No. 7-6, at 1. See also Complaint, ¶ 41 ("When employees create or receive work-related correspondence on non-official accounts this correspondence is presumptively an agency record"); *id.* at ¶ 22 ("When federal employees correspond on work-related issues on non-official accounts, they are required to copy their office, because all such correspondence are possibly 'agency records' under the Federal Records Act (44 U.S.C. § 3301), and more likely are covered by FOIA."); *id.* at ¶ 12 (such "records this Court has recently made plain must be produced when they are requested after the email accounts' use is

Furthermore, “The definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” EPA, *What Is a Federal Record?*, www.epa.gov/records/tools/toolkits/procedures/part2.htm. It covers emails sent or received on an employee’s personal email account if their subject relates to official business. 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, www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

So even though OSTP lacks the ability to safeguard and preserve the content of the WHRC email account, making Holdren’s storage of federal records there inappropriate *under the Federal Records Act*, it still had *enough* control over those records (through Holdren) to render them *subject to FOIA*. Storing records haphazardly off site in a way that endangers their preservation and the public’s ability to access them in the future violates the Federal Records Act, but it does not exempt those records from FOIA. If it did, that would reward wrongdoing employees who seek to shield such records from public scrutiny. Moreover, an agency’s FOIA staff will often not even know that non-official email accounts exist, resulting in responsive documents being completely overlooked in responding to FOIA requests. That is the point of the point plaintiff was making in the passages OSTP mischaracterizes as an admission – not that Holdren’s emails are somehow exempt from FOIA requests. *See* ECF No. 7-8 at 16, *citing* Compl. ¶ 23 (alleging that work-related correspondence that is not copied to an agency’s systems is “generally unknown to and inaccessible by the federal government”).

discovered”), *citing* *CEI v. EPA*, No. 12-1617, 2014 WL 308093, at *14 (D.D.C. Jan. 29, 2014)); *id.* at ¶ 61 (discussing “OSTP Director’s known work-related use of this account, and his recent admission that he maintains it.”)

The Federal Records Act's goal is to ensure that documents are not lost and are accessible to record the agency's activities and operations, which is undermined when an agency official stores them in his non-official email account. Such accounts will become completely inaccessible to the agency in the future when the agency official stops working for the agency and is no longer subject to record-keeping regulations that only apply to current agency employees. The use of a non-official email account can, and commonly does, also result in responsive "emails never searched for or produced," in violation of FOIA. Complaint ¶ 99.

Indeed, agencies still are not searching even officials' *agency-supplied* personal devices for cell phone text messages and instant message chats in response to FOIA requests, to say nothing about accounts and devices supplied *by third parties*, like Holdren's WHRC.org account. *See* Stephen Dinan & S.A. Miller, *Lois Lerner emails reveal gaping open-records loophole; IRS, other agencies aren't storing instant messages, texts*, Washington Times, July 20, 2014, <http://m.washingtontimes.com/news/2014/jul/20/lois-lerner-emails-reveal-gaping-open-records-loop/> ("The Lois G. Lerner emails released this month revealed a potentially huge loophole in federal open-records practices when an IRS tech staffer acknowledged that the agency doesn't regularly store — and never checks — instant message chats as official government records. Analysts say there is no question that the Internal Revenue Service and all other federal agencies should be storing chats and even cellphone text messages that may constitute official government documents, but a check by The Washington Times suggests that hardly any agency is doing so.")

F. Binding D.C. Circuit Precedent Establishes That An Agency Can Be Held Liable for Unlawfully 'Withholding' Such Records, Foreclosing OSTP's Argument To the Contrary.

OSTP falsely claims that “OSTP cannot ‘withhold’ the records,” because it “lacks possession of the requested records.”³⁴ This is untrue. As we have previously explained, the requested records qualify as “agency records,” and it has access to them, so its refusal to produce them constitutes the “withholding” of such records, regardless of whether they are in its possession in “physical”³⁵ or “actual”³⁶ terms. Under D.C. Circuit law, even records “neither created by agency employees, nor . . . currently located on agency property” can be an “agency record” that it is “in control of” and thus improperly “be withheld in the FOIA context.”³⁷ Here the request covers records not just “created by agency employees,” but by its Director and alter ego, Dr. Holdren.

II. Defendant Is Withholding Records Plainly Within Its Possession That Actually Exist on Its Official Email Accounts; OSTP’s Failure to Produce Them Bars Dismissal

While OSTP claims that Holdren’s emails include no “agency records” responsive to CEI’s request, this claim is belied by the fact that it has already recognized the existence of responsive agency records. It did so by initiating production of some of them before ceasing its production, and withholding others as being directly related to agency business, due to their alleged role in agency policymaking.

In a March 31, 2014 letter to CEI’s Christopher Horner, OSTP’s Jennifer Lee wrote, “please find 110 pages consisting of OSTP’s first set of responsive documents in response to

³⁴ ECF No. 7-8 at pg. 12.

³⁵ See *Chicago Tribune*, 1997 WL 1137641, at *5 (rejecting argument based on lack of “physical possession”).

³⁶ *Judicial Watch*, 310 F.Supp.2d at 297 (“actual possession” not required); *In Defense of Animals*, 543 F.Supp.2d at 77 (same).

³⁷ *Burka*, 87 F.3d at 514-16 (discussing whether documents “withheld under Exemption 5,” which applies to agency memoranda, qualified for that privilege); *id.* at 515 (“HHS may withhold [such] agency records . . . only if they fall under an applicable exemption”); *id.* at 521 (“Because . . . the agency has not defeated Burka’s claim that the data he seeks is [privileged], it may not withhold the information pursuant to Exemption 5” as it did; “In order to withhold [them], the agency bears the responsibility of demonstrating that” they were privileged. “It has not done so.”).

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.³⁸ *Id.* at 2.)

One such document produced is clearly an agency record, since it is about a White House press call, and was 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.³⁹ Moreover, that email, titled “Re: Holdren on WH press call this evening,” contains redactions under FOIA Exemption 5 ((b)(5)), which is something that can only be claimed for official agency records. 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. *See* ECF No. 7-7. 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 a 29-page PowerPoint presentation. *Id.*; ECF No. 7-8 at 22.⁴⁰ The fact that this email was not produced in OSTP’s

³⁸ 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. *See* Michael D. Pepson & Daniel Z. Epstein, *Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?*, 13 Engage J. 4, 4 (2012) (application of FOIA exemption 5 to White House staff emails was implicit recognition that the emails would have been subject to disclosure under FOIA if an exemption did not apply).

³⁹ *See* Exhibit 1 to this memo, attaching excerpts of the production and the cover letter enclosing them.

⁴⁰ *See* ECF No. 7-8 at 22 (conceding 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”).

rolling production, even though it was sent from Holdren's OSTP account to his WHRC account, is one more sign that OSTP's production was anything but complete.⁴¹

The first document above came from Holdren's official agency email account. It was produced because Plaintiff's FOIA request, by its plain terms, covers emails in Holdren's official email account, not *just* his non-official email accounts, as long as they were OSTP-related, and were "sent to or from jholdren@whrc.org (including as cc: or bcc:)."⁴² That includes (but is not limited) to "copies" of such emails stored in his official email account. The FOIA specifically requested that OSTP "search Mr. Holdren's OSTP account for copies of responsive records."⁴³

Plaintiff reiterated that it was seeking such documents from both accounts – not just his private email account -- in its subsequent correspondence with the agency. For example, on February 18, it emphasized that it had submitted a "request seeking OSTP-related email, *wherever located*,"⁴⁴ complaining that "OSTP searched *neither* account,"⁴⁵ and observing that it "makes

⁴¹ Agencies cannot withhold documents just because they think the requester already has the document, and there is no sign that OSTP withheld that document on that basis. See *National Sec. Counselors v. CIA*, 931 F.Supp.2d 77, 104 (D.D.C. 2013) (Nothing in Freedom of Information Act (FOIA) forecloses individual from seeking production of records already disclosed to him, particularly where individual seeks redundant documents in order to obtain new piece of information).

⁴² See ECF No. 7-1 at pg. 2 (attaching CEI FOIA request, which sought "copies of all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)").

⁴³ Plaintiff specifically requested that OSTP "search Mr. Holdren's OSTP account for copies of responsive records," which would serve "to crosscheck the WHRC.org production as well as to check on OSTP's compliance with the requirement that all such records be copied to OSTP (alternately, Mr. Holdren may have provided the office paper copies)." *Id.* at 11.

Nothing in CEI's FOIA request suggested that copies of such records remaining in Holdren's official email account were outside the scope of this request. The request observes that it "entails searching jholdren@whrc.org," but "entails" means involves or encompasses, not exclusively consists of, and the request also noted that "Mr. Holdren was obligated to copy his OSTP account on any correspondence relevant to his OSTP employment sent or received by that account, and OSTP had the obligation to preserve all such correspondence." *Id.* at 2.

⁴⁴ CEI's Letter of Feb. 18, 2014 (ECF No. 7-3) at pg. 3 fn. 1 (emphasis added).

⁴⁵ *Id.* at 13 (emphasis added).

sense for OSTP to search Mr. Holdren's OSTP account."⁴⁶ On April 18, it reiterated that "Our request covers OSTP-related documents *regardless of whether they are from an ostp.gov email account,*" and "*regardless of*" which account "they are in."⁴⁷

OSTP's March 31 letter also claimed that it "will release responsive, non-exempt records to you on a rolling basis," *see id.* at 2, reiterating what it had said in its March 7 letter, in which it assured plaintiff it "would produce responsive records to you on a rolling basis, that is, as records are processed and become available." *Id.* at 1.⁴⁸ But after CEI reiterated its demand for all responsive emails, not just those cc'd to Holdren's official email account, OSTP terminated its rolling productions, and none has been received since.

Even if it were somehow true that FOIA does not reach work-related emails found solely in Holdren's whrc.org account, FOIA still reaches his official email account, and OSTP inarguably remains obligated to produce emails from that account. *See Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested").

OSTP refuses to produce even those responsive records manifestly in its possession, even as it argues incongruously that it cannot produce emails not in its possession. That alone bars dismissal of this case. Under FOIA, "the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Department of State v. Ray*, 502 U.S. 164, 173 (1991); *Limbright v. Hofmeister*, 2010 WL 3385346, *4 (E.D. Ky. Aug. 25, 2010) ("dismissal for failure to state a claim is not warranted merely be-

⁴⁶ *Id.* at 3; *see id.* at 13 ("CEI explained to OSTP why it also made sense to search Mr. Holdren's OSTP account.")

⁴⁷ ECF No. 7-5 at 2 (the first page of this letter) (emphasis in original)

⁴⁸ OSTP admits as much on page 7 of its memorandum in support of the motion to dismiss. *See* ECF 7-8 at pg. 7 ("Accordingly, OSTP stated that it had 'conducted a search of Dr. Holdren's OSTP email account and will produce responsive records to you on a rolling basis[.]' OSTP Letter of Mar. 7, 2014 (attached hereto as Exh. 4) at 1").

cause one form of requested relief is unavailable.”). OSTP has not explained why it is withholding documents found in Holdren’s official email merely because they are also found in his “personal” email account. 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); *Lasko v. U.S. Dept. of Justice*, 684 F.Supp.2d 120, 129 (D.D.C. 2010).

In light of its unexplained refusal to continue producing documents on a rolling basis, OSTP has certainly not met its burden of proving it has produced “each” responsive document, or even that it has produced a significant fraction of them. The agency bears the “burden of showing that its search was adequate,” rather than the requestor having to prove it was inadequate. *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir.1994) (citing 5 U.S.C. § 552(a)(4)(B)).

The documents previously produced by OSTP, and its invocation of deliberative-process privilege as to portions of those documents (and other documents withheld in full under Exemption 5) also call into question OSTP’s unsupported claim that the emails in Holdren’s non-official email account too tangentially “relate to an employee’s work” to be within the ambit of FOIA. *See* ECF No. 7-8 at pg. 13.

The documents produced were exchanged not just with Holdren’s official email account, but also with his whrc.org account, and judging from their content and OSTP’s own claims, they had *more* than just a peripheral relationship to agency business. They plainly had a substantial connection to agency business, or OSTP would not have produced them, both because it argues that a “record does not become an agency record simply because its contents *relate* to an employee’s work,” *id.* at 13, and because a document with no relation to an agency or employee’s

work is not an “agency record” under D.C. Circuit precedent,⁴⁹ and thus would not have been produced by OSTP unless they were in fact related to the agency’s mission.

Indeed, the documents, which were also present in his non-official email account, were so closely related to agency business that OSTP invoked official deliberative-process privilege as to many of them, writing in the letter accompanying its production that “OSTP has withheld portions of responsive documents under 5 U.S.C. §§ 552(b)(5) and (b)(6). In addition, OSTP has withheld 73 pages in full under (b)(5).” *Id.* at 1.

To qualify for redaction or withholding under (b)(5) (FOIA’s Exemption 5), communications must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1976). The “privilege does not protect a document which is merely peripheral to actual policy formulation.” *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994), or is not “antecedent to the adoption of an agency policy,” *Jordan v. U.S. Dept. of Transportation*, 591 F.2d 753, 774 (D.C. Cir. 1978).⁵⁰

In short, if OSTP itself is to be believed, the emails found 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

⁴⁹ 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).

⁵⁰ Even many agency records that are closely connected to agency business do not qualify for this deliberative-process privilege, because they involve implementation of, rather than the development of, agency policy. See, e.g., *Houser v. Blank*, No. 10-3105, Slip Copy, 2013 WL 873793, *3 (S.D.N.Y. March 11, 2013) (communications that “mostly . . . reflect decisions that had already been made” are not protected); *Badhwar v. U.S. Dept. of Justice*, 622 F.Supp. 1364, 1372 (D.D.C. 1981) (“There is nothing predecisional about a recitation of corrective action already taken”). Similarly, the deliberative process privilege does not apply to factual statements underlying predecisional recommendations, *Bilbrey v. U.S. Dept. of Air Force*, No. 00-0539, Slip Op. at 10-11 (W.D. Mo. June 30, 2011), or other factual materials such as research or surveys. See *Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1976) (survey results cannot be protected where they merely “provide the raw data upon which decisions can be made”); *Rashid v. HHS*, No. 98-098, Slip Op. at 13-14 (D.D.C. March 2, 2000) (“The results of research are factual and not deliberative information”); *Bryce v. OPIC*, No. A-96-CA-595, Slip Op. at 17 (W.D. Tex. Sept. 28, 1998) (photos).

government, and were part of the agency's own "deliberative process." As such, they were necessarily "agency records" under FOIA.

Yet, OSTP has simply stopped producing them (without citing an applicable FOIA exemption to withhold them), even though it admitted in its March 31 letter that more such documents exist in its possession. *See* Exhibit 1 to this memo (enclosing a first set of responsive documents, and saying that OSTP "will release responsive, non-exempt records to you on a rolling basis" in the future.) This plainly does not satisfy OSTP's obligation to prove that "each document that falls within the class requested either has been produced . . . or is wholly [or partially] exempt from the [FOIA's] inspection requirements.'" *Goland*, 607 F.2d at 352; *cf. Tax Analysts*, 492 U.S. at 142 ("The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not 'agency records' ...").

III. D.C. Circuit Precedent Permits the Relief Requested by Plaintiff on Its Federal Record Act Claim, Such as An Order Mandating Notification of NARA

OSTP admits that "the D.C. Circuit has recognized" an "FRA-based claim" "challenging an agency's failure to notify the National Archives about the actual, unlawful removal of federal records," ECF No. 7-8 at pg. 18, and that "a private party's APA lawsuit may challenge . . . an agency's compliance with the FRA," including "the agency head's or the Archivist's failure to seek initiation of an enforcement action by the Attorney General." *See Armstrong v. Bush*, 924 F.2d 282, 292-95 (D.C. Cir. 1991)." ECF 7-8 at pg. 19. Such challengeable failures include a failure by an agency head like Holdren to notify the Archivist of FRA violations: "The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal . . . or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of" such records." 44 U.S.C. § 3106.

CEI's complaint explicitly seeks precisely this, and challenges precisely such failures, in its Seventh Claim for Relief. *See* ECF No. 1 at 27-28. Thus, OSTP is wrong to claim that CEI is only "challenging particular OSTP employees' compliance with [FRA] guidelines" rather than OSTP's "unlawful actions" in failing to notify NARA. ECF No. 7-8 at 19-20. Far from being "precluded" as OSTP claims, ECF No. 7-8 at 23, the remedy CEI seeks is expressly recognized by statute and case law: "the FRA *requires* the agency head and Archivist to take enforcement action" in response to destruction of records; "On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review." *Armstrong v. Bush*, 924 F.2d at 295.

Plaintiff's Seventh Claim for Relief is specifically entitled "Duty to Notify the Archivist of the United States." As it notes, "The head of any Federal agency has an obligation to notify the Archivist of the United States whenever 'any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head come[s] to his attention,' 44 U.S.C.A. § 3106," and "'has a further obligation to 'initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency.'" *Id.* at ¶¶ 116-117. Yet, "Defendant has never notified the Archivist or the Attorney General regarding the failure to obtain and preserve or prevent the removal of the federal records, or recover the federal records described in this complaint," *id.* at ¶ 119, even though "federal records in the form of work-related emails sent and received on non-official accounts have been removed from" the agency's recordkeeping systems, "records which by law should be" present in them, a violation that OSTP's Director "has actual and constructive knowledge" of since he himself is responsible for it. *Id.* at ¶¶ 113-115.

This is sufficient to state a claim under the D.C. Circuit’s decision in *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991), which ruled “that if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify” relevant officials and seek enforcement action. *Id.* Here, the agency head, Holdren, has done precisely that – nothing -- about such violations.

In the 2010 Holdren memo, OSTP had conceded that to “comply with the FRA with respect to emails, all OSTP-related email communications should be conducted using your OSTP email accounts.”⁵¹ Yet now, OSTP argues that Holdren’s use of a non-official email account for agency business did not violate the Federal Records Act, since “an employee’s use of a non-official account does not violate the FRA (or FOIA), provided that the employee ensures that any records on the non-official account are also captured on agency systems,” and “CEI’s Complaint alleges [only] one specific instance of a federal record existing on a non-official e-mail account.” But OSTP has not even alleged that most such records were captured on agency systems,⁵² and instead says that “OSTP. . .has never obtained the WHRC emails.”⁵³

⁵¹ See ECF No. 7-7 at pg. 2 (also noting that that even emails received by – rather than sent from – an employee’s personal email account should be forwarded to OSTP if they are “work-related.”).

⁵² OSTP does cite a single example of an email it says “was already captured on OSTP’s systems,” (ECF No. 7-8 at 22) but it turns out that that email had been produced *not* from OSTP’s systems, but from the email account of EPA’s administrator in a completely different lawsuit brought by the plaintiff. ECF No. 7-7 (email bears markings saying it was produced in response to an EPA FOIA request, HQ-FOI-01268-12, as document 01268-EPA-5574). Even if it was also captured on OSTP’s systems, that isolated example would say little about OSTP’s overall compliance with its record-keeping obligations. An agency’s preservation of a document the requester already knows about says little about whether it is capturing and preserving other documents the requester has never even heard of.

More importantly, OSTP didn’t even produce it in its document production. If this well-known document is indeed “captured on OSTP’s systems,” it is hard to understand why it did not produce the document in response to the FOIA request in this case. (Agencies cannot withhold documents just because the requester already obtained them through a different FOIA request, and in any event, OSTP does not claim it withheld that document on that basis. See *National Sec. Counselors v. CIA*, 931 F.Supp.2d 77, 104 (D.D.C. 2013)) .

⁵³ See ECF No. 7-8 at 16; *Purgess*, 33 F.3d at 144 (“statements in briefs” can be “binding judicial admissions”).

And OSTP has inadvertently confirmed Holdren's regular use of his personal account for work-related correspondence by producing copies of some such emails stored in his official account.⁵⁴ Those documents show that Holdren uses his WHRC account for a climate-change list-serve/discussion forum that relates to the very subjects he addresses in the course of his job, such as the effects of climate change, and its impact on water shortages and drought.⁵⁵

Suspiciously, it stopped producing responsive emails from Holdren's official email account after this lawsuit was filed. Plaintiff first learned of this usage, in fact, when many examples of work-related correspondence between Holdren (using his personal email account) and then-EPA administrator Lisa Jackson turned up in a sample Vaughn index as withheld agency records, in *CEI v. EPA*, D.D.C. No. 12-1617 (JEB).⁵⁶

⁵⁴ See this memo, above, at pp. 16-18.

⁵⁵ See Exhibit 1 to this memo (attaching, *inter alia*, an email, sent on Feb. 10, 2014 at 5:34:50 EST, which shows that Holdren uses his WHRC account for a climate-change list-serve/discussion forum, and in this instance decided to forward *one* of those messages to his WH account, an item about the effect of climate change on domestic and global water shortages. Other such items in his WHRC account should also have been forwarded, since his job perennially involves climate-change issues, the very subject of this forum, and he regularly issues advice and pronouncements about climate change in his capacity as OSTP Director. See Henry Fountain, *Obama Adviser on Front Lines of Climate Fight*, July 4, 2014, at A11. That includes drought and water shortages, this item's subject, which he was publicly addressing at the very time it was transmitted. *Id.* (Holdren testified about alleged "link between climate change and Western droughts" at February 2014 Congressional hearing); see also John Hurdle, *Climate Check: US Produce Prices to Rise on Extreme CA Drought*, Market News Service, April 21, 2014 ("President Obama's science advisor, John Holdren, argued in a February paper that drought was linked to climate change in ways that suggests droughts will be more frequent in future.") (available in Westlaw news database); Neela Banerjee, *White House Unveils Climate Data Website*, Baltimore Sun, March 20, 2014 at 6A (Holdren argues "climate change" is fueling "droughts"); Justin Gillis, *Science Linking Drought to Global Warming Remains Matter of Dispute*, New York Times, Feb. 17, 2014, at A11.

Holdren addresses innumerable aspects of climate change in his capacity as OSTP's Director. See, e.g., Jason Samenow, *Scientists: Don't make "extreme cold" centerpiece of global warming argument*, Washington Post, Feb. 20, 2014 (discussing Holdren's pronouncement that global warming leads to severe winter cold, a claim questioned by scientists), www.washingtonpost.com/blogs/capital-weather-gang/wp/2014/02/20/scientists-dont-make-extreme-cold-centerpiece-of-global-warming-discussions/; Matt Vespa, *WH Scrambles to Blame 'Polar Vortex' on Global Warming*, CNS News, Jan. 8, 2014 (<http://cnsnews.com/mrctv-blog/matt-vespa/wh-scrambles-blame-polar-vortex-global-warming>).

⁵⁶ See this memo, above, at pg. 6 & footnote 14, citing to the Vaughn Index filed with the court in that case.

Moreover, in addition to being belied by correspondence from Holdren's personal email account turning up in other litigation, it is simply implausible to suggest that each and every one of the many emails in Holdren's "personal" email account did not qualify as a federal record, and it violates the FRA to categorically treat them as beyond its reach.⁵⁷ "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an entire set of" electronic or "email documents" generated by high-ranking officials like Holdren over a multi-year period. *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

To the contrary, in construing the analogous term "agency records," the D.C. Circuit has made clear that "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), quoting *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1494 (D.C.Cir.1984); *Cooper Cameron Corp. v. U.S. Dept. of Labor*, 280 F.3d 539, 545 (5th Cir. 2002) ("in judging agencies' attempts to withhold information, courts use a 'strong presumption in favor of disclosure.'"). Under FOIA, "the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Department of State v. Ray*, 502 U.S. 164, 173 (1991).

OSTP claims that "OSTP's actual record-keeping policies are concededly compliant with the FRA. *See* Compl. ¶¶ 30, 42, 54." *Id.* at 20. This is a misreading of the complaint, which describes the Holdren memo to illustrate what OSTP once *admitted* its policy *should* be, *not* as evi-

⁵⁷ Consistent with such a categorical approach, OSTP says it "has never obtained the WHRC emails." ECF No. 7-8 at pg. 16.

dence of what its policy (and practice) in fact *is*. Moreover, in its memorandum,⁵⁸ OSTP has essentially repudiated the Holdren memo, which held employees responsible for “work-related emails” in their non-official email accounts, by disclaiming any responsibility for the emails in his non-official email account. Thus, it has not just approved their being “removed” from public access, but also has thereby given a green light to their “threatened unlawful. . . destruction.”

See 44 U.S.C.A. § 3106.⁵⁹

⁵⁸ Agencies’ positions in their briefs can be binding against them. *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) (“statements in briefs” are “binding judicial admissions of fact”); *Lanfeard v. Home Depot*, 679 F.3d 1267, 1279 n.12 (11th Cir. 2012) (party bound to position in its brief on motion to dismiss under “invited error” doctrine).

⁵⁹ OSTP has not denied that these records have been removed from the agency, contesting only whether they were *unlawfully* removed, so their removal is undisputed. See ECF No. 7-8 at p. 21 (“CEI has not alleged the actual, *unlawful* removal of any federal records.”); *id.* at 23 (“the existence of those documents on the WHRC account does not establish any *unlawful* removal.”); *Corson & Gruman Co. v. N.L.R.B.*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (litigant “waived [an] argument” because it “never raised” it “in its opening brief”; parties must “raise all of their arguments in the opening brief to prevent ‘sandbagging’” and give “opposing counsel the chance to respond.”); *accord Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); Complaint, ¶¶ 113-14 (“Federal records in the form of work-related emails sent and received on non-official accounts have been removed from defendant. . . The failure by defendant to obtain and preserve work-related emails on a non-official account has caused the removal of those federal records from the appropriate federal agency.”).

Indeed, it elsewhere conceded that agencies have “enforcement duties to recover records” in such “private” email “accounts,” under Federal Records Act provisions dealing with the recovery of removed agency records. See ECF No. 7-8 at pp. 23-24 (if “federal employees . . . evade their record-keeping (and disclosure) obligations . . . by conducting work on private equipment or accounts,” “both the agency and NARA have enforcement duties to recover [such] records, see 44 U.S.C. §§ 2905, 3106.”)

Yet, it has abdicated responsibility for these records and their preservation, thus facilitating their loss, and endangering their very existence as well. *Cf. Matter of Chicago, Rock Island & Pacific R. Co.*, 865 F.2d 807, 815 (8th Cir. 1988) (bankrupt railroad’s anticipatory repudiation of control with right-of-way owner under which railroad was to operate rail services and maintain tracks in return for right of way allowed property owner to treat contract as terminated), *citing Lufkin Nursing Homes v. Colonial Inv. Corp.*, 491 S.W.2d 459, 463 (Tex. Civ. App. 1973) (“When one party to an agreement has repudiated it, the other party may then accept the agreement as being terminated”); *Liberty v. Storage Tank Properties*, 600 S.E.2d 841 (Ga. 2004) (“By seeking damages for breach of contract in his complaint, Liberty took action ‘inconsistent with a repudiation of the transaction,’ and lost his right to rescind the contract”); see *Complaint*, ¶ 119 (discussing OSTP’s “policy of not preserving work-related emails sent or received on non-official accounts,” which “destroys documents subject to FOIA”); *id.* at ¶ 114 (“The failure by defendant to . . . preserve work-related emails on a non-official account has caused the removal of those federal records from the appropriate federal agency”); *Complaint*, ¶ 111 (discussing resulting “destruction of documents”).

It has done so both in its memorandum in opposition to the motion to dismiss, and in pre-litigation correspondence, such as that attached to OSTP’s own motion papers. See also, *e.g.*, ECF No. 7-2 (arguing that “OSTP-related email sent to or from jholdren@whrc.org” is “beyond the reach of FOIA”); *Complaint*, ¶100 (“OSTP has not disavowed or repudiated its position justifying the widespread use of such accounts leading to the loss of such agency documents.

An agency's actual policy may not be reflected in its "express statements of policy," and may contradict both its stated policies, and governing legal standards. *See Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988), quoting *Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C.Cir.1986); *Woodward v. Correctional Medical Services*, 368 F.3d 917, 928, 922 (7th Cir. 2004) (finding illegal policy based on defendant's "actual practice (as opposed to its written policy)," even though it was "contrary to written CMS policy and procedures."). For example, an "employer's institution of a written policy against race discrimination" (including an anti-discrimination "seminar" for employees) concealed a "corporate policy of keeping African-Americans in low level positions," used "to mask [intentional] race discrimination." *Lowery v. Circuit City Stores*, 206 F.3d 431, 443, 446 (4th Cir. 2000). Similarly, plaintiffs "met their burden of proving that sex discrimination was the standard operating procedure" by the defendant against women as a class, "with respect to placement, promotion, [and] movement to full-time positions," *Stender v. Lucky Stores*, 803 F.Supp. 259, 336 (N.D. Cal. 1992), sufficient to award "punitive damages," *id.*, even though defendant's employment contract included an explicit "non-discrimination clause," *id.* at 267-68, its affirmative action plan for women "acknowledged that equal employment opportunity is legally required." *id.* at 290, and its lawyer "present[ed] a series of training programs regarding non-discriminatory promotion of females." *Id.* at 270.

"The policy or custom used to anchor liability need not be contained in an explicitly adopted rule or regulation," and may be shown through "persistent and widespread" practices or "custom" even when it "has not received formal approval through the body's official decisionmaking channels." *Sorlucco v. N.Y.C. Police Dept.*, 971 F.2d 864, 870-71 (2d Cir. 1992), quoting *Monnell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978). The existence of a "policy or custom

To the contrary, by its response to plaintiff's request OSTP clearly intends to continue this objectionable position, thereby frustrating future FOIA requests by plaintiff.").

may be established in any of four ways,” including not just “(1) the existence of a formal policy,” but also “(2) actions taken or decisions made by” government “officials with final decision making authority,” “(3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials; or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to ‘deliberate indifference’ to the rights of those who come in contact with” them. *Prince v. County of Nassau*, 837 F.Supp.2d 71, 103 (E.D.N.Y. 2011) (citations omitted); *see Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986) (policy can be established by single decision of chief policymaker under appropriate circumstances); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (“city can be liable” for policy based on “inadequate training of its employees”); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) (lawsuit could be maintained over policy of failing to take action with respect to complaints of sexual misconduct by teachers, even though such conduct violated applicable laws; “appellants’ argument that there was no policy, custom or practice is a merits issue, which we cannot resolve” on a pre-trial motion).

CONCLUSION

For the foregoing reasons, plaintiff’s complaint states a claim for relief, and the motion to dismiss should be denied.

Respectfully submitted this 28th day of July, 2014,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, a copy of the foregoing Plaintiff's Memorandum In Opposition to Defendant's Motion to Dismiss was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/

Hans Bader