IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff Competitive Enterprise Institute (CEI) raises a host of claims against the Office of Science and Technology Policy (OSTP), stemming from OSTP's allegedly inadequate response to a Freedom of Information Act (FOIA) request, as well as OSTP's allegedly inadequate records-management practices. Each of CEI's claims is individually meritless, but when viewed together they reveal the extreme nature of this lawsuit: CEI seeks to drastically expand federal agencies' record-keeping obligations, while also subjecting those obligations to the oversight of private litigants (such as CEI here). Neither FOIA nor the Federal Records Act (or any of the other statutes relied upon by CEI) justifies or provides for such intrusive relief. Accordingly, CEI's Complaint should be dismissed for failure to state a claim.

With respect to CEI's FOIA claims, CEI argues that OSTP failed to produce records from an e-mail account existing *wholly outside OSTP's possession and control*. Pursuant to Supreme Court precedent, however, possession and control are both pre-requisites for a valid FOIA claim. Absent agency possession of a requested record, the agency cannot be said to "withhold" the record. And absent agency control of the record, the record is not an "agency record" subject to FOIA. Here, CEI's requested records—existing solely on a private e-mail account—meet neither criterion, and thus as a matter of law cannot give rise to a valid FOIA claim.

In CEI's view, the records on the private account are indeed "agency records" because the private account allegedly belongs to an OSTP employee. But CEI's interpretation of FOIA—treating agency employees' private e-mail accounts the same as the agency's official records systems—would eliminate any practical limits on the reach of FOIA. Contrary to the implications of CEI's arguments, agencies are not required to search their employees' private homes, computers, and e-mail accounts to respond to a FOIA request. Such a remarkably

expansive interpretation of FOIA is both contrary to precedent and unjustified from a practical standpoint.

Similarly, CEI's claims under the Federal Records Act (FRA) are an intrusive and unwarranted attempt to oversee OSTP's records-management practices. CEI concedes the propriety of OSTP's records *policies*, but nonetheless seeks to obtain judicial oversight of individual employees' *compliance* with those policies. Again, pursuant to binding D.C. Circuit precedent, these types of claims are precluded.

CEI also fails to allege an essential element of its FRA-based claim that OSTP was required to notify the Archivist of the United States (the head of the National Archives and Records Administration (NARA)) about the unlawful removal of federal records from OSTP's custody. Specifically, CEI does not allege—nor can it allege—that anyone *unlawfully* removed federal records from OSTP. Thus, this claim must also be dismissed.

Finally, CEI also alleges claims under the Administrative Procedure Act (APA) and the mandamus statute, both of which must also be dismissed. With respect to the APA claim, courts have uniformly held that the APA cannot be used to pursue FOIA-based claims, because FOIA itself offers an adequate, alternate remedy. And as for mandamus, CEI cannot establish any of the requirements necessary for granting this extraordinary remedy. Accordingly, CEI's Complaint must be dismissed for failure to state a claim upon which relief can be granted.

BACKGROUND

I. STATUTORY FRAMEWORK.

A. The Federal Records Act.

CEI's lawsuit implicates two distinct statutory schemes. The first is the Federal Records Act (FRA), which is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999); *see*

44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24. Under the FRA, agency heads are required to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]" 44 U.S.C. § 3101. Agency heads must also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." *Id.* § 3102.

Not all documents or items, however, qualify as federal records. Instead, the FRA defines "records" as follows:

> As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

Id. § 3301.

Under the FRA, each agency must ensure the proper disposition of all federal records. Specifically, the FRA requires that the disposal of all federal records be approved by the Archivist of the United States, who is the head of the National Archives and Records Administration (NARA). *Id.* § 3303; *see also* 36 C.F.R. § 1225.10. In order to efficiently manage the disposition process, agencies may create records schedules—negotiated with and approved by NARA—that govern recurring types of records. 44 U.S.C. § 3303(3); 36 C.F.R. §§ 1225.10-1225.26. Those records schedules classify records as either permanent, in which case the records are eventually transferred to NARA for preservation, *see* 36 C.F.R. § 1225.14, or temporary, in which case the records may be destroyed after a set period of time. *See id.* § 1225.16.

The FRA also establishes an administrative enforcement scheme to address potential violations of the FRA. Pursuant to that scheme, if an agency head learns of "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency," then the agency head shall notify the Archivist. 44 U.S.C. § 3106. For records that the agency head "knows or has reason to believe have been unlawfully removed from his agency," then the agency head "with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records[.]" *Id.* If the agency head "does not initiate an action for such recovery or other redress within a reasonable period of time," then the Archivist himself "shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made." *Id.*

B. The Freedom of Information Act.

The second statutory scheme relevant to this lawsuit is the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which allows individuals to request the disclosure of records from government agencies. *Id.* § 552(a)(3). Upon receipt of a request that "reasonably describes" the records being sought, *id.* § 552(a)(3)(A), typically an agency must then "conduct[] a search reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (internal quotation marks omitted). The agency is generally required to disclose any responsive records to the requester, except to the extent that such records are protected from disclosure by one of FOIA's nine statutory exemptions. *See* 5 U.S.C. § 552(b).

In the event that an agency withholds responsive records from the requester, the requester may, after exhausting administrative remedies, file a lawsuit in district court challenging the agency's withholdings. *See id.* § 552(a)(4)(B) (stating that the court may "enjoin the agency from withholding agency records and to order the production of any agency records improperly

withheld from the complainant"). As the Supreme Court has stated, this provision requires a FOIA requester to establish three elements before a court may order the production of records:

> [FOIA's] statutory scheme authorizes federal courts to ensure private access to requested materials when three requirements have been met. Under 5 U.S.C. § 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records." Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation.

Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980).

II. FACTUAL AND PROCEDURAL HISTORY.

A. Plaintiff's FOIA Request.

Plaintiff, the Competitive Enterprise Institute (CEI), alleges it is a "public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy." Compl. (ECF No. 1) ¶ 14. Defendant, the Office of Science and Technology Policy (OSTP), is a component of the Executive Office of the President that advises on science and technology issues. *Id.* ¶ 15.

The present lawsuit arises out of a FOIA request that CEI submitted to OSTP, seeking "copies of all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)." CEI's FOIA Request (attached hereto as Exh. 1) at 2; *see also* Compl. ¶¶ 2-3, 26-28. This whrc.org e-mail address allegedly belongs to Dr. John Holdren, the Director of OSTP. *See* Compl. ¶¶ 2-3, 26-27. CEI apparently discovered this WHRC e-mail address through documents produced to CEI in connection with a separate FOIA request submitted to EPA. *See id.* ¶¶ 2, 20.

Here, CEI's FOIA request sought OSTP-related e-mails as they existed on the WHRC account. *See* FOIA Request (Exh. 1) at 1 (the subject line states that CEI is "[s]eeking certain work-related emails *from John Holdren's non-official email account*" (emphasis added)). Although CEI suggested that OSTP also search Dr. Holdren's OSTP account, that was solely for

purposes of "cross-check[ing] the WHRC.org production as well as to check on OSTP's compliance with the requirement that all such records be copied to OSTP[.]" *Id.* at 11. The FOIA request itself made clear that it was seeking only records on the WHRC account. *See id.* at 2 ("This [request] entails searching jholdren@whrc.org. It makes sense for OSTP to search Mr. Holdren's OSTP account(s) as discussed, *infra*, *but this request is for responsive records on the cited account*[.]" (emphasis added)).

OSTP responded to CEI's FOIA request on February 4, 2014, informing CEI that "OSTP is unable to search the 'jholdren@whrc.org' account for the records you have requested because that account is under the control of the Woods Hole Research Center, a private organization." OSTP's Response to FOIA Request (attached hereto as Exh. 2) at 1; *see also* Compl. ¶¶ 5-6, 29, 55. Accordingly, OSTP informed CEI that its FOIA request was considered unperfected—*i.e.*, that the request had failed to reasonably describe the records being sought—because the requested records were "beyond the reach of FOIA." OSTP's Response (Exh. 2) at 1.

On February 18, 2014, CEI responded with a 47-page letter arguing that Dr. Holdren's OSTP-related e-mails were subject to FOIA regardless of where they were located, and that OSTP was required to obtain and produce all copies of such records. *See*, *e.g.*, CEI's Letter of Feb. 18, 2014 (attached hereto as Exh. 3) at 3, 13; *see also* Compl. ¶¶ 7-9, 30. In this letter, CEI also argued that OSTP was violating the FRA by failing to notify the Archivist about the removal or loss of federal records. *See* CEI's Feb. 18th Letter (Exh. 3) at 21-23 (arguing that "agencies which learn of possible removal or loss of records must inform the National Archivist" and that the presence of "work-related emails on non-official accounts has caused the removal of those federal records from the appropriate federal agency").

OSTP responded on March 7, 2014, interpreting CEI's February 18th letter as a clarification of its original FOIA request. Specifically, OSTP viewed the February 18th letter as clarifying that CEI was seeking copies of all documents sent to or from the WHRC account, regardless of where those documents were located. 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; *see also* Compl. ¶¶ 7-9, 32, 37.

On April 18, 2014, CEI responded and argued that OSTP had mis-characterized CEI's FOIA request. In particular, CEI clarified that its February 18th letter was not intended to "perfect" its initial FOIA request, but rather to administratively appeal the denial of that request. *See* CEI Letter of Apr. 18, 2014 (attached hereto as Exh. 5) at 2 ("Our February 18th administrative appeal did not seek to 'perfect' our request but instead went to some length to further explain how OSTP had misstated our request."); *see also* Compl. ¶¶ 10, 33, 38. CEI's letter then requested a response by May 1, 2014 in the event that OSTP wished to cure its denial of the FOIA request. *See* CEI's Apr. 18th Letter (Exh. 5) at 2. CEI alleges that it did not receive any such response. *See* Compl. ¶¶ 11, 38.[1]

B. The Present Lawsuit.

CEI filed the present Complaint on May 5, 2014, alleging eight counts under a variety of statutes but primarily FOIA and the FRA. As support for the FOIA counts, CEI alleges that all OSTP-related e-mails, even if located on the WHRC account, are "agency records" subject to FOIA. *See, e.g.*, Compl. ¶¶ 6, 12, 41, 53, 61. The Complaint also alleges that OSTP's

[1] OSTP did, in fact, respond on May 1, 2014 to CEI's letter. OSTP's response was sent via U.S. mail, however, so it may not have arrived prior to CEI's filing of the Complaint.

correspondence mis-characterized CEI's original FOIA request, and demands that OSTP interpret the request as originally written. *See, e.g.*, Compl. ¶¶ 13, 32, 37, 75.[2]

The specific FOIA-based counts included in CEI's Complaint are as follows. Count I requests a declaratory judgment that OSTP's failure to produce the requested records is unlawful. *See* Compl. ¶ 77. Count II seeks an injunction compelling OSTP to produce the requested records. *Id.* ¶ 80. And Count III of the Complaint arises under the APA but is similarly FOIA-based, alleging that OSTP's "failure and refusal to issue initial determinations or otherwise process plaintiff's information request is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)." Compl. ¶ 88.

With respect to the FRA, CEI's Complaint argues that government employees must conduct work-related business using official e-mail accounts, and that when employees use non-official accounts they must ensure that their e-mails are provided to their employing agency:

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

Compl. ¶ 41; *see also id.* ¶¶ 21-23. CEI alleges that this policy governing the use of non-official accounts is codified in OSTP's own records guidance, in a memorandum issued by Director Holdren in 2010:

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

[2] Based on these allegations—in particular CEI's demand that OSTP interpret CEI's FOIA request as originally written—OSTP ceased its rolling productions of records from Dr. Holdren's OSTP e-mail account.

Holdren memo that work-related email must be copied to the agency, stating in pertinent part:

> In the course of responding to the recent FOIA request, OSTP learned that an employee had, in a number of instances, inadvertently failed to forward to his OSTP email account work-related emails received on his personal account. The employee has since taken corrective action by forwarding these additional emails from his personal account to his OSTP account so that all of the work-related emails are properly preserved in his OSTP account.
>
> If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account. In this way, all correspondence related to government business—both incoming and outgoing—will be captured automatically in compliance with the [Federal Records Act].

Compl. ¶ 54 (quoting John P. Holdren, Memorandum for All OSTP Employees, *Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge* (May 10, 2010) (attached hereto as Exh. 6, hereafter referred to as "Holdren Memo")); *see also* Compl. ¶¶ 5, 25, 30, 42, 55. CEI alleges that, notwithstanding the policy articulated in the Holdren Memo, Dr. Holdren himself improperly conducted work-related business on his non-official WHRC account. *See, e.g.*, Compl. ¶¶ 27-28, 43, 55.

Based on these allegations, CEI alleges four FRA-based counts. Count IV requests a declaratory judgment that OSTP "has a duty to acquire, preserve, and prevent the destruction by OSTP employees, of work-related email sent or received on non-official accounts." Compl. ¶ 102. Count V seeks "an injunction ordering defendant to preserve, and prevent the destruction by defendant's employees, of emails sent or received on non-official accounts[.]" *Id.* ¶ 107. Count VI seeks a writ of mandamus, presumably prohibiting OSTP from destroying any work-related e-mails existing on non-official accounts. *Id.* ¶ 111 ("[T]his destruction of documents justifies the grant of a writ of mandamus or other extraordinary relief[.]"). And finally, Count VII seeks injunctive relief requiring OSTP's Director to notify NARA about the removal

of federal records, and then to initiate an action through the Attorney General to recover those records. *See id.* ¶ 122. (CEI also brings an eighth count, which simply requests attorney's fees and other litigation costs incurred in connection with this case. *See id.* ¶¶ 124-25.)

STANDARD OF REVIEW

Defendant, the Office of Science and Technology Policy, moves to dismiss CEI's Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In evaluating the sufficiency of the complaint, the Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although a court must accept all factual allegations as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation[.]" *Id.* (internal quotation marks omitted).

ARGUMENT

I. PLAINTIFF CANNOT USE FOIA TO COMPEL PRODUCTION OF RECORDS OUTSIDE THE AGENCY'S POSSESSION.

CEI's FOIA claims are based on the premise that FOIA requires federal agencies to search for and produce any and all responsive records—even if those responsive records exist wholly outside the agency's possession and control. To state this premise is to refute it. Under binding Supreme Court precedent, a federal agency must produce only those responsive records that are *already* within its possession and control.

CEI's FOIA request here necessarily seeks records outside OSTP's possession and control, because the request seeks only records existing on the private, non-official WHRC

account. As a matter of law, therefore, CEI cannot establish two of the elements necessary for its FOIA claims. First, CEI cannot establish that OSTP is "withholding" any records, because the requested records, if they exist, exist outside of OSTP's possession. Second, CEI has not requested any "agency records," because the requested records are outside OSTP's custody and control.

A. Binding Supreme Court Precedent Establishes that OSTP Cannot "Withhold" Records That OSTP Does Not Possess.

As discussed above, to establish a valid FOIA claim the plaintiff must allege that an agency is unlawfully withholding requested records. *See* Background, Section I.B. The Supreme Court has made clear that if an agency does not have possession of a particular record, then the agency cannot be said to "withhold" the record:

> Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither the custody or control necessary to enable it to withhold.
>
> In looking for congressional intent, we quite naturally start with the usual meaning of the word "withhold" itself. The requesters would have us read the "hold" out of "withhold." *The act described by this word presupposes the actor's possession or control of the item withheld.* A refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb "withhold."

Kissinger, 445 U.S. 136, 150-51 (1980) (emphasis added); *see also Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990) ("[T]he agency must have 'possession or control' over a document before it may be deemed to be 'withholding' it.").

Here, it is undisputed that OSTP does not possess the requested e-mails, which necessarily exist only on the private, non-official WHRC account. *See* FOIA Request (Exh. 1) at 2 (stating that "this request is for responsive records on the cited [WHRC] account"); OSTP's Response (Exh. 2) at 1 ("OSTP is unable to search the 'jholdren@whrc.org' account for the

records you have requested because that account is under the control of the Woods Hole Research Center, a private organization.").

Indeed, CEI's Complaint repeatedly alleges that OSTP lacks possession of the records on the WHRC account. *See* Section II.B, below; *see also* Compl. ¶¶ 113-22 (requesting an injunction ordering OSTP to seek recovery of the federal records located on the WHRC account); CEI's Feb. 18th Letter (Exh. 3) at 21 ("Federal records in the form of work-related emails sent and received on non-official accounts have been removed from defendant federal agencies since *the agencies lack access to or control of records* which should by law be in their possession." (emphasis added)).

As CEI itself admits, OSTP lacks possession of the requested records. As such, OSTP cannot "withhold" the records, and CEI's FOIA claims fail as a matter of law.

B. The Requested Records on the Non-Official Account Are Not "Agency Records" Under FOIA.

As a separate and independent reason why CEI fails to state a valid FOIA claim, the records CEI requests are not "agency records." There are two requirements for requested materials to constitute agency records: "[f]irst, an agency must 'either create or obtain' the requested materials;" and "[s]econd, the agency must be in control of the requested materials at the time the FOIA request is made." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

Here, it is doubtful that CEI's requested records meet even the first criterion of the *Tax Analysts* test. As discussed above, CEI does not contend that OSTP has ever obtained the requested materials. As for whether OSTP can be said to have "created" the materials, nowhere does CEI allege that the WHRC records were created by an OSTP representative *acting on behalf of OSTP*. Instead, CEI simply alleges that the WHRC account contains OSTP-*related*

correspondence. *See, e.g.*, Compl. ¶ 43 ("Plaintiff has established that use of non-official email accounts for *work-related correspondence* is widespread within the federal executive branch, including at the highest level of OSTP." (emphasis added)). But a private record does not become an agency record simply because its contents *relate* to an employee's work. *See, e.g.*, *Bureau of Nat. Affairs, Inc. v. Dep't of Justice*, 742 F.2d 1484, 1493 (D.C. Cir. 1984) ("[T]he statute cannot be extended to sweep into FOIA's reach personal papers that may 'relate to' an employee's work—such as a personal diary containing an individual's private reflections on his or her work—but which the individual does not rely upon to perform his or her duties."); *Wolfe v. De''t of Health & Human Servs.*, 711 F.2d 1077, 1081 (D.C. Cir. 1983) ("Newhall's possession of the transition team reports is analogous to an individual's possession of a thesis that analyzes the agency and its policies. The fact that the thesis 'relates to' the business of the Department would not render it an 'agency record.'"). Thus, it is doubtful that CEI has alleged sufficient facts here to overcome even this first criterion for defining "agency records."

In any event, the Court need not rest its analysis on the first criterion, because CEI clearly cannot satisfy the second element of the *Tax Analysts* test—that the agency must be in control of the requested materials at the time the FOIA request is made. In a typical case, this "control" inquiry is guided by four factors:

> As to the second prong of the *Tax Analysts* test, this circuit has identified four factors relevant to a determination of whether an agency exercises sufficient control over a document to render it an "agency record": (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

Burka v. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (internal quotation marks omitted). But here, the Court need not resort to these four factors, because CEI itself has repeatedly acknowledged that OSTP lacks control over the requested records. *See, e.g.*, Compl.

¶ 23 (discussing how "the non-official account being used is not the employee's private account but on the computer system of, *and thereby under the control of*, a third party such as a former employer (in this case, the Woods Hole Research Center . . .)" (emphasis added)); *id.* (criticizing the "practice of creating work-related correspondence, which absent the required copying of an employee's office is *solely under the control of private parties* and generally unknown to and *inaccessible by the federal government*" (emphasis added)); CEI's Feb. 18th Letter (Exh. 3) at 12 ("Federal records in the form of work-related emails sent and received on non-official accounts have been removed from defendant federal agencies since *the agencies lack access to or control of records* which should by law be in their possession." (emphasis added)). Because CEI has thus conceded that OSTP lacks control over the requested records, these statements alone are sufficient to conclude that the requested documents are not "agency records" subject to FOIA.

Even were the Court to undertake a more detailed inquiry, moreover, CEI still could not establish that the requested records are within OSTP's control. Indeed, this point is confirmed by a recent decision in a separate FOIA case brought by CEI. In *Competitive Enterprise Institute v. NASA*, the court concluded that e-mails located on an agency employee's private e-mail address with Columbia University were not "agency records" subject to FOIA. *See* Case No. 10-cv-883, 2013 WL 5825584 at *7 (D.D.C. Oct. 30, 2013) ("Applying these four 'control' factors, the court determines that Dr. Schmidt's emails located only on the @columbia.edu domain are not in the agency's control."). This decision correctly concluded that e-mails on non-agency accounts are not subject to FOIA. And because this decision involved CEI itself, CEI is now collaterally estopped from advancing a contrary argument here—that FOIA requires agencies to "search an

employee's private accounts and equipment" whenever "it is likely that responsive records exist on [those] non-official email accounts (or equipment)[.]" Compl. ¶ 69.[3]

The correctness of the *NASA* decision (and the insufficiency of CEI's FOIA claims here) is also supported by the Supreme Court's decision in *Forsham v. Harris*, 445 U.S. 169 (1980). There, the Court concluded that "data generated by a privately controlled organization which has received grant funds from an agency . . . , but which data has not at any time been obtained by the agency, are not 'agency records' accessible under the FOIA." *Id.* at 178. Although the federal agency funded the creation of the data, had a right of access to the data, and even relied on the data, the Court still concluded that the agency's lack of possession was paramount. *See id.* at 185 (discussing FOIA's "possessory emphasis" and noting the "congressional judgment . . . that records which have never passed from private to agency control are *not* agency records"). So too here: OSTP undisputedly lacks control over the WHRC account, and therefore the records within that account are not agency records subject to FOIA.

These precedents are conclusive. Moreover, they illuminate why, even were the Court to examine the four *Burka* factors, the requested records here would not be "agency records" subject to OSTP's control. First, CEI does not allege that Dr. Holdren or anyone else intended to relinquish control of the WHRC account. Indeed, CEI has stated just the opposite. *See* Compl. ¶ 55 (arguing that Dr. 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)). Second, OSTP cannot use and dispose of the WHRC e-mails as OSTP sees fit, because

[3] All three requirements for issue preclusion were met in *CEI v. NASA*. The court resolved the issue presented here (whether an agency must search an employee's private e-mail account); the issue was necessary for the court's judgment; and there is no unfairness in holding CEI accountable for the court's determination. *See generally Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (discussing the three requirements for "establishing the preclusive effect of a prior holding").

OSTP lacks control over the WHRC account. *See* OSTP's Response (Exh. 2) at 1 (stating that OSTP does not control the WHRC account). Again, CEI has acknowledged this very point. *See* 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"). And finally, the third and fourth factors weigh in OSTP's favor for similar reasons. Because OSTP does not possess and has never obtained the WHRC e-mails (as they exist on the WHRC account), agency personnel have not relied on those e-mails, nor have the e-mails been integrated into the agency's systems. The four *Burka* factors, therefore, simply highlight the reason why CEI's FOIA claims fail as a matter of law—the requested records, which necessarily exist only on the WHRC account, are not in OSTP's custody or control, and consequently are not "agency records."

C. Plaintiff Cannot Save Its FOIA Claims By Purporting to Challenge the Adequacy of OSTP's Search for Records.

CEI's Complaint seeks to avoid the above defects by challenging the adequacy of OSTP's search for responsive records. Specifically, within the "Legal Arguments" section of CEI's Complaint, CEI asserts that absent a search of the WHRC account, OSTP will not have conducted a search "reasonably calculated to uncover all relevant documents." Compl. ¶ 63 (internal quotation marks omitted); *see generally id.* ¶¶ 59-70.

CEI cannot overcome the above defects with its FOIA claims, however, simply by casting its FOIA claims as challenging the adequacy of OSTP's search. The defects above demonstrate why, as a matter of law, OSTP does not violate FOIA by not producing records from the WHRC account. If OSTP is under no obligation to *produce* documents from an account existing outside its possession (here, the WHRC account), then *ex ante* OSTP cannot be required to *search* that account existing outside its possession. Any contrary conclusion would wholly undermine *Kissinger*'s holding that agencies are not required to institute retrieval actions for requested

records. *See* 445 U.S. at 139 ("We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an 'agency,' the agency which received the request does not 'improperly withhold' those materials by its refusal to institute a retrieval action.").

Not only is CEI's interpretation of FOIA lacking in precedent, it is also lacking in logic. CEI does not (and cannot) explain how exactly OSTP is to conduct a search of the WHRC account, which exists wholly outside OSTP's possession and control. OSTP has no more ability to search the WHRC account than it does any other private account located outside its servers. In CEI's view, however, FOIA not only permits but actually *compels* agencies to search the privately hosted e-mail accounts of individuals. This view—requiring agencies to search Yahoo! and Gmail accounts in order to be fully responsive—is unrealistic, and threatens to transform FOIA beyond recognition. *See Forsham*, 445 U.S. at 186 ("[T]he FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.").

To be sure, CEI's theory of FOIA is that agencies are required to search employees' private accounts and equipment only when "it is likely that responsive records exist on non-official email accounts (or equipment)[.]" Compl. ¶ 69. But that is no limitation at all, because that is the same standard for when agencies must search their *own* records systems for responsive records. *See Oglesby v. Dep't 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." (internal citations omitted)). In effect, then, CEI believes there is no meaningful difference between agencies' official records systems and employees' private e-mail accounts, even when those accounts exist on outside servers such as Yahoo! or Gmail. Again, this drastic expansion of FOIA—virtually eliminating agency employees' expectations of privacy in their

private accounts, records, and even their physical homes—is without limit, and cannot be correct. *Cf. Kissinger*, 445 U.S. at 154 (expressing "reluctance to construe the FOIA as silently departing from prior longstanding practice").

In short, none of the legal theories presented in the Complaint can save CEI's FOIA claims. Those claims fail as a matter of law because OSTP is not "withholding" any records, and further because the requested records are not "agency records" subject to FOIA. Thus, Counts I-III of the Complaint must be dismissed.

II. PLAINTIFF CANNOT OBTAIN INTRUSIVE OVERSIGHT OF OSTP'S COMPLIANCE WITH THE FEDERAL RECORDS ACT, AND HAS NOT PLAUSIBLY ALLEGED ANY OTHER FEDERAL RECORDS ACT CLAIM.

In addition to CEI's expansive interpretation of FOIA, CEI also advances an intrusive and extreme interpretation of the Federal Records Act (FRA). Specifically, CEI seeks extensive injunctive relief regarding OSTP's record-keeping practices, despite binding precedent from the D.C. Circuit holding that such claims are precluded. As for the narrow FRA-based claim that the D.C. Circuit has recognized—challenging an agency's failure to notify the National Archives about the actual, unlawful removal of federal records—CEI fails to plausibly allege any such unlawful actions. Accordingly, CEI's FRA-based claims (Counts IV, V, and VII) are meritless.

A. The Federal Records Act Precludes Plaintiff's Compliance-Based Claims.

In Counts IV and V of the Complaint, CEI seeks an injunction compelling OSTP "to preserve, and prevent the destruction by defendant's employees, of emails sent or received on non-official accounts[.]" Compl. ¶ 107. These claims, however, are not challenges to any OSTP records *guidelines*, but are instead challenges to OSTP employees' *compliance* with records guidelines. Under binding Supreme Court and D.C. Circuit precedent, this type of compliance-based claim is unavailable under either the FRA or the APA.

It is black-letter law that the FRA does not authorize a private right of action to enforce its provisions. *See Kissinger*, 445 U.S. at 148-50. That conclusion is based on the FRA's administrative enforcement scheme, which provides agency heads, the Archivist, and the Attorney General with responsibility for redressing any unlawful removal, defacing, alteration, or destruction of federal records. *Id.*; *see also* 44 U.S.C. §§ 2905, 3106; Background, Section I.A. Thus, CEI cannot challenge any of OSTP's actions pursuant to the FRA itself.

With respect to the APA, the D.C. Circuit has held that private parties may obtain only very limited judicial review of an agency's compliance with the FRA. Specifically, a private party's APA lawsuit may challenge only two aspects of an agency's compliance with the FRA: (1) the general adequacy of an agency's record-keeping guidelines and directives; or (2) 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) [hereafter *Armstrong I*]. Importantly, however, private parties are precluded from challenging an agency's *compliance* with its record-keeping guidelines. *Id.* at 294 ("Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions."); *see also CREW v. Dep't of Homeland Sec.*, 527 F. Supp. 2d 101, 111 (D.D.C. 2007) ("Given the firm language in *Armstrong I*, CREW is precluded from suing the DHS to enjoin the agency from acting in contravention of its own recordkeeping guidelines or the FRA. The Court may not, in other words, prohibit the DHS from improperly discarding agency records[.]").

Here, Counts IV and V of CEI's Complaint do not challenge any record-keeping guidelines or directives issued by OSTP. Instead, CEI is challenging particular OSTP

employees' *compliance* with those guidelines—the very type of claim that is precluded. This distinction is illustrated throughout CEI's Complaint, for example when CEI expressly concedes that OSTP's records policies (including the Holdren Memo) correctly implement the FRA, but then alleges that Dr. Holdren has failed to comply with those policies. *Compare* Compl. ¶ 30 (noting "the requirements of the Federal Records Act, OSTP policy, and the 'Holdren memo' all making plain that employees cannot exempt records from the law by keeping them from the control of others in their agency"), *with* Compl. ¶ 55 (alleging that Dr. Holdren improperly placed e-mails "under his sole control, *in contravention of the Federal Records Act, OSTP policy, and the 'Holdren memo'*" (emphasis added)). Accordingly, CEI is not challenging any record-keeping guidelines issued by OSTP regarding non-official e-mail accounts, but is instead challenging Dr. Holdren's particular compliance with those guidelines.

To be sure, CEI's Complaint alleges that OSTP has a "pattern, practice, and ongoing policy of failing to acquire, and not preserving, work-related email sent to or from non-official email accounts[.]" Compl. ¶ 92. But this allegation is nothing more than a legal conclusion, attempting to bootstrap a compliance-based claim into a guidelines-based claim. Fundamentally, this purported "policy"—of failing to acquire e-mails from non-official accounts—is not based on any official record-keeping guidelines or directives, but instead on the purported actions of individual OSTP employees. Thus, the claims remain tethered to alleged non-compliance with agency record-keeping guidelines. And because compliance-based claims are the very essence of what is precluded, CEI cannot obtain review over Dr. Holdren's actions simply by alleging that his actions constitute an OSTP "policy"—particularly given that OSTP's actual record-keeping policies are concededly compliant with the FRA. *See* Compl. ¶¶ 30, 42, 54. Thus, Counts IV and V of CEI's Complaint must be dismissed.

B. Plaintiff Has Not Alleged that the Removal of Any Federal Records Was Unlawful.

In Count VII, CEI alleges that OSTP must inform the Archivist that federal records have been unlawfully removed from OSTP. *See* Compl. ¶¶ 113-122. An agency is required to so notify the Archivist if federal records have been unlawfully removed from the agency, and the head of the agency has actual knowledge of such unlawful removal. *See* 44 U.S.C. § 3106; *Armstrong I*, 924 F.2d at 295. Here, however, CEI fails to state such a claim. Specifically, CEI has not alleged the actual, *unlawful* removal of any federal records belonging to OSTP.

In CEI's view, the mere existence of federal records on non-official e-mail accounts constitutes unlawful removal of those records from the agency. *See, e.g.*, Compl. ¶ 114 ("The failure by defendant to obtain and preserve work-related emails on a non-official account has caused the removal of those federal records from the appropriate federal agency."). Importantly, however, federal records on non-official accounts are removed unlawfully only if (1) the agency does not have its own copy of the federal record, or (2) there is some independent reason why the record cannot be publicly disclosed (for example, if the record contains classified information). It is insufficient, therefore, for CEI simply to rely on the existence of federal records outside OSTP's control; CEI must also demonstrate that the removal of those records was *unlawful*.

Here, CEI has not plausibly alleged the actual, unlawful removal of any federal records from OSTP. For one thing, most of CEI's allegations on this issue are highly conclusory and generalized. *See, e.g.*, Compl. ¶ 43 ("Plaintiff has established that use of non-official email accounts for work-related correspondence is widespread within the federal executive branch, including at the highest level of OSTP."); *id.* ¶ 47 ("Plaintiff has established that agencies, specifically including OSTP, do not in fact ensure against the use of these [non-official] accounts, nor do they obtain copies of such correspondence as required."). These conclusory

allegations are a far cry from what is necessary to establish a plausible claim that the head of OSTP is *actually* aware of the *unlawful* removal of federal records.[4]

Furthermore, even these generalized statements do not actually allege any unlawful actions by Dr. Holdren. As CEI itself admits, 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. *See* Compl. ¶ 22. Here, although CEI alleges that Dr. Holdren *used* a non-official account, CEI does not allege that Dr. Holdren failed to copy OSTP systems on any federal records. *See, e.g.*, Compl. ¶¶ 43, 47 (quoted above). Accordingly, even CEI's generalized allegations fail to include a necessary element for establishing the unlawful removal of federal records.

Generously construed, CEI's Complaint alleges one specific instance of a federal record existing on a non-official e-mail account—namely, an e-mail produced from the EPA that revealed to CEI the existence of the WHRC account. Although CEI's Complaint does not specify the exact record, *see* Compl. ¶¶ 2, 20, CEI appears to be referring to an e-mail that Dr. Holdren sent from his OSTP account to the WHRC account (with the EPA Administrator bcc:'d on the e-mail). The e-mail described a speech Dr. Holdren had recently given at the annual meeting of the American Association for the Advance of Science, and attached a twenty-nine page PowerPoint presentation associated with the speech that he publicly presented at the annual

[4] Not all work-related documents meet the definition of a "federal record." *See* 44 U.S.C. § 3301 (defining federal records as only those materials that are "preserved or 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"). Even if some work-related correspondence existed on non-official accounts, therefore, that would not necessarily equate to *federal records* existing on the non-official accounts.

meeting. *See* E-mail from John P. Holdren (the OSTP account) to John P. Holdren (the WHRC account), dated Feb. 22, 2011 (attached hereto as Exh. 7).[5]

Even assuming *arguendo* that this e-mail and PowerPoint presentation constitute federal records, however, the existence of those documents on the WHRC account does not establish any *unlawful* removal of a federal record. Indeed, the e-mail was *sent* from Dr. Holdren's OSTP account, and thus the e-mail was already captured on OSTP's systems. As discussed above, even under CEI's theory of the FRA, OSTP validly complied with its record-keeping obligations by ensuring a copy remained on agency servers. *Cf.* Compl. ¶ 22 (discussing how federal employees are "required to copy their office" when "correspond[ing] on work-related issues on non-official accounts"). Moreover, the e-mail related to a public presentation that Dr. Holdren had given. Dr. Holdren simply further circulated that presentation to others, including himself. There is nothing improper under FOIA or the FRA about Dr. Holdren doing so. And given that CEI obtained complete copies of these records through FOIA, there is obviously no independent restriction on the documents' disclosure. Thus, the existence of these documents on the WHRC account was not improper, and it certainly does not establish the *unlawful* removal of any federal records. And because CEI has not plausibly alleged the actual, unlawful removal of any federal records, Count VII must also be dismissed.

* * * *

In sum, CEI's attempts to obtain private oversight over OSTP's record-keeping practices are precluded. That does not mean, of course, that federal employees may evade their record-

[5] This e-mail was produced to CEI as part of Case No. 1:12-cv-01617 (D.D.C.). In connection with that litigation, the EPA produced to CEI a draft sample *Vaughn* index stating that the e-mail address in the "to:" field was jholdren@whrc.org. *See* Compl. ¶¶ 2, 20. The EPA has posted the full FOIA production online, with the relevant e-mail and PowerPoint attachment located on pages 276-305 of the following PDF: http://www.epa.gov/ epafoia1/docs/Release-4-Part-I.pdf.

keeping (and disclosure) obligations simply by conducting work on private equipment or accounts. In such situations, both the agency and NARA have enforcement duties to recover records, *see* 44 U.S.C. §§ 2905, 3106, and agencies may also undertake internal corrective measures against employees who violate records policies. *See CREW v. Sec. & Exch. Comm'n*, 916 F. Supp. 2d 141, 149 (D.D.C. 2013) (noting that agencies may take "internal remedial steps" and "intra-agency corrective actions" in response to records violations (citing *Armstrong I*, 924 F.2d at 296 n.12)). Here, CEI seeks to inject itself into this administrative process, which is not only precluded but also unwarranted: CEI has entirely failed to allege any improper or unlawful actions by OSTP officials. Accordingly, CEI's FOIA and FRA claims should be dismissed.

III. PLAINTIFF'S REMAINING CLAIMS MUST BE DISMISSED.

A. The APA Cannot Be Used to Bring FOIA Claims.

In Count III of the Complaint, CEI purports to bring an APA claim based on OSTP's failure to comply with its duties under FOIA. *See, e.g.*, Compl. ¶ 84 ("Defendant has unlawfully withheld agency action by failing to comply with the mandates of FOIA, through its failure and refusal to conduct a proper records search or otherwise process plaintiff's information request."). The APA, however, permits judicial review only when "there is no other adequate remedy in a court[.]" 5 U.S.C. § 704; *see generally Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.").

Here, FOIA itself provides an adequate, alternate remedy for CEI to pursue its FOIA claims. Indeed, CEI is adequately pursuing those claims pursuant to Counts I and II of the Complaint. *See* Compl. ¶¶ 72-81. As numerous courts within this Circuit have concluded, therefore, CEI's APA claim is precluded. *See Feinman v. FBI*, 713 F. Supp. 2d 70, 76 (D.D.C. 2010) ("This court and others have uniformly declined jurisdiction over APA claims that sought

remedies made available by FOIA."); *see also Am. Chemistry Council, Inc. v. Dep't of Health & Human Servs.*, 922 F. Supp. 2d 56, 66 (D.D.C. 2013); *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 795 F. Supp. 2d 85, 95 (D.D.C. 2011); *Kenney v. Dep't of Justice*, 603 F. Supp. 2d 184, 190 (D.D.C. 2009); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 308 (D.D.C. 2007); *Physicians Comm. for Responsible Med. v. Dep't of Health & Human Servs.*, 480 F. Supp. 2d 119, 121 n.2 (D.D.C. 2007); *Edmonds Inst. v. Dep't of the Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005); *Sierra Club v. Dep't of the Interior*, 384 F. Supp. 2d 1, 30 (D.D.C. 2004).[6] Accordingly, Count III must be dismissed.

B. The Mandamus Statute Does Not Permit Relief for Plaintiff's Federal Records Act Claims.

Finally, CEI cannot invoke the mandamus statute as a basis for its claims here. *See* Compl. ¶¶ 109-11 (Count VI). The same reasons why relief is precluded directly under the FRA also explain why CEI cannot invoke mandamus as a substitute. *See* Section II.A, *supra*. Furthermore, CEI has not met any of the other requirements necessary for the issuance of a writ of mandamus.

As described by the D.C. Circuit:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances. Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.

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[6] Courts outside this Circuit have reached the same conclusion. *See Rimmer v. Holder*, 700 F.3d 246, 262 (6th Cir. 2012) ("[T]he district court's ability to conduct a *de novo* review of Rimmer's FOIA request and, if it were to rule in Rimmer's favor, to order relief identical to that provided under the APA, *i.e.*, production of the unredacted documents Rimmer seeks, clearly provides an alternate adequate remedy in court and thus triggers § 704's bar on claims brought under the APA."); *see also Cent. Platte Natural Res. Dist. v. Dep't of Agric.*, 643 F.3d 1142, 1149 (8th Cir. 2011); *Walsh v. Dep't of Veterans Affairs*, 400 F.3d 535, 537-38 (7th Cir. 2005); *Columbia Riverkeeper v. Fed. Energy Regulatory Comm'n*, 650 F. Supp. 2d 1121, 1126 (D. Or. 2009); *Lion Raisins, Inc. v. Dep't of Agric.*, 636 F. Supp. 2d 1081, 1115 (E.D. Cal. 2009).

Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002) (internal quotation marks and citations omitted). Even if a plaintiff can carry its burden of satisfying these three elements, "whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc).

Here, CEI has met none of those elements. First, for the reasons discussed above in Section II.A, CEI does not have a clear right to relief. The FRA precludes judicial review over the type of claim brought by CEI here—a challenge to an agency's compliance with record-keeping guidelines—and this preclusion of judicial review applies equally to a potential mandamus claim. *See Columbia Power Trades Council v. Dep't of Energy*, 671 F.2d 325, 328-29 (9th Cir. 1982) (declining to issue the writ of mandamus when another statute precluded review, because "[i]t would frustrate the Congressional scheme . . . if exclusive jurisdiction could be thwarted by a party's characterization of the nature of the lawsuit"); *cf. Dalton v. Specter*, 511 U.S. 462, 474 (1994) (holding that non-APA judicial review "is not available when the statute in question commits the decision to the discretion of the President"). Thus, CEI cannot establish the "clear right to relief" necessary for mandamus.

Second, CEI cannot establish that OSTP has a clear duty to act. As other courts have recognized, although the Federal Records Act contains a mandatory enforcement duty in 44 U.S.C. § 3106, that duty still leaves significant discretion to the agency. *See CREW v. SEC*, 916 F. Supp. 2d at 149 (discussing how § 3106 "give[s] the agency broad discretion regarding what internal remedial steps it may take in response to a loss of records" (citing *Armstrong I*, 924 F.2d at 296 n.12)). This exercise of agency discretion precludes issuance of mandamus. *See Consol. Edison Co. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002) ("Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not

free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." (internal quotation marks and modifications omitted)).

Finally, CEI cannot establish that it has no other available remedy. Indeed, CEI's mandamus claim is entirely duplicative of its other purported FRA-based claims in Counts IV and V. The three counts seek virtually identical relief, and are premised on the same underlying legal theory. Moreover, CEI has other forms of APA review available to address agencies' compliance with the FRA. *See* Section II.A, *supra*. Even if those other types of APA review do not provide the same type of relief requested here, they are still adequate for purposes of precluding mandamus relief. *See Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) ("[H]owever unsatisfactory the CSRA's approach may appear to the plaintiffs, the fact that a remedial scheme chosen by Congress vindicates rights less efficiently than a collective action does not render the CSRA remedies inadequate for purposes of mandamus."); *see also Power*, 292 F.3d at 787 ("[W]here there are alternative means of vindicating a statutory right, a plaintiff's preference for one over another is insufficient to warrant a grant of the extraordinary writ."). Thus, CEI's claim under the mandamus statute (Count VI) must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

Dated: July 11, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, a copy of the foregoing Memorandum in Support of Defendant's Motion to Dismiss was filed electronically. Notice of this filing will be sent by e-mail 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/ Daniel Schwei
Daniel Schwei