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 FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

In an attempt to buy time and delay this court's ruling on the merits, OSTP repeats arguments that the D.C. Circuit has previously rejected in new guises, hoping to forestall any ruling against it until its director, Dr. Holdren, leaves the government (at which point, it will presumably cite his departure to claim that it lacks control over his emails and thus need not produce them, even though the delay is of its own making, and even though D.C. Circuit precedent should foreclose that tactic[1]).

Its claim that the Woods Hole emails are not "readily reproducible" contradicts the fact that they have already been reproduced, quite readily, by being downloaded onto two thumb drives held by Dr. Holdren, that are in a "readily accessible location."[2] That makes it very simple to produce them to plaintiff. Although OSTP now says Holdren has not consented to OSTP accessing his personal email account,[3] in the past, both he and OSTP said he would cooperate with any court order to OSTP compelling production of the Woods Hole emails.[4]

Thus, the Court could simply order production of one of the thumb drives, without even accessing his email account. Thus, OSTP plainly has the technical capacity to produce them to plaintiff, satisfying FOIA's "readily reproducible" language.[5] OSTP's claim that they are not

---

[1] Holdren's future departure should not absolve OSTP of the duty to produce the documents sought by plaintiff, because "the status of a particular document *at the time the FOIA request is submitted* determines whether the unreasonable failure to produce that document is an unlawful withholding." *Judicial Watch v. U.S. Dep't. of Commerce*, 34 F.Supp.2d 28, 44 (D.D.C.1998) (emphasis added); *see Chambers v. Department of Interior*, 568 F.3d 998, 1004 (D.C.Cir.2009) (removal of "document after it has been requested" violates FOIA).

[2] Declaration of Dr. John P. Holdren, ¶ 9 (ECF No. 26-1) (filed Oct. 31, 2016).

[3] See Leonard Decl. ¶ 23.

[4] Declaration of Dr. John P. Holdren (ECF No. 26-1) at ¶ 11; Defendant's Memorandum In Opposition to Plaintiff's Motion to Compel Preservation (ECF No. 26) at 2.

[5] *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C.Cir.2006) (focus is on "technical capability" to reproduce).

"readily reproducible" rests on the very "control" argument the D.C. Circuit has previously rejected in this case, *CEI v. OSTP*, 827 F.3d 145, 147, 150 (D.C. Cir. 2016), and is an attempt to read into this statutory language a limitation at odds with its purpose of expanding FOIA access.

There is every indication that the Woods Hole emails include agency records subject to FOIA that are found nowhere else. While OSTP implies that Dr. Holdren's work-related emails were forwarded to his official account, it has not shown that he consistently did so, even though it bears the burden of proof.[6] Holdren's declaration claims only that he had a "customary practice" of doing so, not that he *always* did so. (Rachel Leonard's declaration about this "custom" is hearsay that merely attests to her "understanding" of Holdren's purported practice). Since the Woods Hole account contained thousands of work-related emails, it was inevitable that he failed to forward at least some of them. Holdren has studiously avoided saying he always forwarded the emails to his official account, even in the face of this very question being repeatedly raised, giving rise to the inevitable inference that the Woods Hole emails have *not* all been forwarded to his official account. Moreover, Holdren's statement that he had a custom of forwarding OSTP-related emails to his official account is meaninglessly general given his failure to explain what he considers "work related," and given his past description of his own official statements at OSTP, in his capacity as the President's science advisor, as being merely his "personal opinions."

Even if Holdren had in fact forwarded all of his work-related emails to his official OSTP account, critically important metadata found in the original emails would have been lost in the forwarding process -- including metadata about recipients and their use of personal email addresses to conduct government business that is the focus of plaintiff's FOIA request. OSTP has not even

[6] The "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989).

denied that such metadata was lost. Courts have recognized that such metadata is an agency record covered by freedom of information laws. Plaintiff thus seeks this original information found nowhere else except in the Woods Hole account and any archives made by downloading rather than forwarding the Woods Hole emails (such as Holdren's thumb drives) – not a series of unnecessary "duplicate copies," as OSTP claims.

OSTP's claim that the Woods Hole emails are not agency records rests on the very theory rejected by the D.C. Circuit: that OSTP lacks control over its own director, and that he is legally distinct from the agency for FOIA purposes even when he sends work-related emails.

I. OSTP's Motion Is Based on Arguments the D.C. Circuit Already Rejected

OSTP's summary judgment motion seeks to relitigate arguments that the D.C. Circuit has already rejected. It claims it "does not control the Woods Hole e-mails," Def's Mem. at 23,[7] even though the D.C. Circuit held that it does control these emails, because they are held by its own director, who is not legally "distinct" from the agency. *See CEI v. OSTP*, 827 F.3d 145, 147, 150 (D.C. Cir. 2016) (rejecting appellee's argument that the emails are "outside the possession and control" of OSTP, since the "agency head controls" them). As the DC Circuit explained, "there is no basis in the FOIA 'to view'" an agency head "'as distinct from his department for FOIA purposes,'" since "an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency… If the agency head controls what would otherwise be an agency record, then it is

[7] *See also* Def's Mem. at 3 (claiming its "inability" to obtain "access to those personal accounts") (ECF No. 32-1).

still an agency record and still must be searched or produced." *Id.* at 150, *quoting Ryan v. Department of Justice*, 617 F.2d 781, 787 (D.C. Cir. 1980). Yet OSTP persists in making the rejected argument that "the account belongs to Dr. Holdren and [thus] he controls access to it" rather than the agency, Mem. 30, and that his use of it does not constitute "use" by the agency for purposes of whether the emails in it are in the agency's control. *Id.* at 25.

While the D.C. Circuit left open the possibility that emails in the Woods Hole account are not agency records based on their *content*,[8] it rejected the idea that they were not agency records due to a lack of agency *control* over them, emphasizing that agency records remain agency records even if "the official who possesses them takes them out the door," and that an agency record "is still an agency record" even if an agency employee holds it outside the agency's offices. *OSTP*, 827 F.3d at 150.

OSTP also reiterates other arguments it unsuccessfully made to the D.C. Circuit, such as its claim that agencies need not produce emails from officials' private email accounts because that would violate their privacy, and that plaintiff pled itself out of court. It cites "personal privacy interests that federal employees possess in their personal e-mail accounts, and the practical inability of agencies to compel employees to provide the agency with access to those personal accounts." Def's Mem. at 3. It unsuccessfully made this same argument to the D.C. Circuit, claiming that FOIA "does not authorize an intrusion into the nongovernmental email accounts of federal employees." *See CEI v. OSTP*, No. 15-5128, Brief for Appellee at pg. 14 (filed, 9/30/2015)

[8] The D.C. Circuit did not foreclose the possibility that Dr. Holdren could withhold emails in the jholder@whrc.org account, based on their content or privileged nature. See id., 827 F.3d at 150 ("we are not ordering the specific disclosure of any document," and OSTP also may have "valid exemption claims").

(goo.gl/JmLJUu).[9] It also argues that plaintiff pled itself out of court based on ¶ 23 of the Complaint, Def's Mem. 23, an argument that it unsuccessfully made to the D.C. Circuit, in which its brief cited the very same paragraphs of the complaint, and the very same *Sparrow* decision from the D.C. Circuit.[10]

Ignoring the fact that Holdren is an agency employee, and not distinct from the agency for FOIA purposes, it likens him to a non-employee, the daughter of an agency employee. Def's Mem. at 28 ("no court would compel the agency to obtain the version from the daughter's house"). Even if this analogy were on point, the DC Circuit specifically rejected the idea that a "department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control," *CEI v. OSTP*, 827 F.3d

[9] *See also id.* at 18-19 (government argued that "Mere employee status, regardless of the employee's rank within the agency, does not give the agency a right to search the employee's non-governmental email account, any more than a federal agency could search an employee's home"); *id.* at 20 (same).

[10] S*ee* Brief for Appellee at pp. 18-19 (arguing that plaintiff pled itself out of court by averring that the Woods Hole email account "was 'solely under the control of private parties and generally unknown to and inaccessible by the federal government,'" quoting Compl. ¶ 23; "The FOIA does not require the government to disclose documents that are "inaccessible by the federal government."), *citing Sparrow v. United Air Lines*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) ("it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible."). This argument ignores the fact that it is quite possible for a document to be both outside an agency's recordkeeping systems and unknown to other agency employees (in violation of the Federal Records Act, as plaintiff argued) and yet within the control of an agency's director (and thus within the reach of FOIA). The FRA and FOIA serve different purposes: the former to preserve and safeguard records, and the latter to make them available to members of the public. Accordingly, words such as "record" and "control" can have different meanings under one statute than under the other. *See* National Archives, Disposition of Federal Records: A Records Management Handbook (2000 Web Edition) ("The meaning of 'agency records' for FOIA purposes is broader than that of 'records' under" the Federal Records Act."), http://goo.gl/Dg5ivN. The fact that a record is stored outside an agency's official record systems in a way that puts it at risk of loss (violating the FRA) is hardly a reason to allow the agency employee responsible to use that as an excuse to withhold it from FOIA requesters.

145, 150 (D.C. Cir. 2016), in response to OSTP's argument that an agency does not have the "right to search [an] employee's nongovernmental email account, any more than a federal agency could search an employee's home," Brief for Appellee at 18-19.[11]

II. The Woods Hole Emails Are "Readily Reproducible"

Defendant claims that "the e-mails on the private account are not readily reproducible because OSTP cannot compel Dr. Holdren to provide the agency with access to his private, personal e-mail account." This is absurd, because the emails have been downloaded to two thumb drives that are in a "readily accessible location," Holdren Decl. at ¶ 9, where OSTP can easily access them, and it should have no difficulty accessing them in response to a court order, since Holdren has made a "pledge to the court" about "cooperating with OSTP regarding compliance with future court orders entered in this case, including after I leave government service." Holdren Decl. ¶ 11.

The DC Circuit has already rejected OSTP's argument that it lacks control over the Woods Hole emails, *CEI v. OSTP*, 827 F.3d 145, 147, 150 (D.C. Cir. 2016). Moreover, Dr. Holdren possesses the emails, and since he is the agency director, his access to them constituted access by the agency, since an agency head is not "distinct from his department for FOIA purposes," *CEI v. OSTP*, 827 F.3d at 149. There is no legal barrier to producing them, since FOIA is enforceable

[11] *See* also Brief for Appellee at 20 ("An agency has no unilateral right to search the nongovernmental email account of an agency employee—including the agency's Director—any more than the agency could unilaterally search an employee's home.") (goo.gl/JmLJUu).

against agency employees, not just the agency itself,[12] and no "privacy interest" exists "in a public record."[13]

OSTP cites a 1977 decision noting that President Nixon had "a legitimate expectation of privacy in his personal communications," Def's Mem. at 29, but Nixon's presidential papers were not subject to FOIA at all, and were purely his private property, not public records. *See Nixon v. United States of America*, 978 F.2d 1269 (D.C. Cir. 1992) (law passed by Congress after Nixon left office restricting his rights to his presidential papers constituted a taking of Nixon's property under the Fifth Amendment); *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996) (FOIA does not cover the President).[14] By contrast, Dr. Holdren was bound at all times by FOIA, a well-known obligation of federal agency heads that curtailed any expectation of privacy he could have had. *Ontario v. Quon*, 560 U.S. 746, 760 (2010) (city did not violate Fourth Amendment by obtaining its employee's text messages from a pager company, Arch Wireless; in determining whether personal communications are private it is necessary to consider compliance with open records laws, because "employers' policies concerning communications . . . shape the reasonable expectations of their employees").

---

[12] *See also, e.g., Union Pacific R. Co. v. EPA*, No. 10-cv-235, 2010 WL 2560455, *2 (D. Neb. June 24, 2010) (enjoining "Defendants and their employees" against destroying documents, and requiring the identification and collection of potentially responsive records).

[13] *Nissen v. Pierce County*, 357 P.3d 45, 56 (Wash. 2015) (rejecting argument that requiring public employee to produce text messages on his private cell phone in response to a public records request would violate "provisions of the state and federal constitutions" such as the Fourth Amendment).

[14] The Presidential Records Act of 1978, which does regulate Presidential papers, was not passed until well after Nixon left office. 44 U.S.C. §§ 2201-2207 (2000).

Producing Holdren's emails is far simpler and less burdensome than what agencies are commonly ordered to do to make records available to a requester. All it requires is that Holdren turn over one of his two thumb drives, each of which contains the Woods Hole emails, such as the one the court has already ordered him to maintain to ensure that such a production is feasible in the future. Not only were these emails "readily reproducible," Holdren has already reproduced them at least twice without any recorded difficulties. And the thumb drives containing them are in a "readily accessible location."[15]

Pursuant to this Court's Order, Dr. Holdren has already put all of his "archived emails" from the Woods Hole account "on a thumb drive to be kept in his possession until such a time that this Court determines that they must be turned over to OSTP for processing or that they may be Deleted." December 12 Memorandum Opinion and Order (ECF No. 31) at 11. And he previously attested that he had preserved "all WHRC e-mails" on his computers "by copying the WHCR e-mail archives to two thumb drives – each thumb drive being duplicate of the other." Declaration of Dr. John P. Holdren (Oct. 31, 2016), ECF No. 26-1, ¶8. Thus, the agency can simply take one of these thumb drives from him, delete any extraneous or privileged matter, and turn it over to the plaintiff or the court.

Unlike many other cases, producing these records will not test the agency's technical capabilities, nor would producing them have imposed a significant burden on OSTP. The D.C. Circuit has held that "[u]nder any reading of the statute…'readily reproducible' simply refers to an agency's technical capability to create the records in a particular format." *Sample v. Bureau of Pris-*

[15] Declaration of Dr. John P. Holdren, ¶ 9 (ECF No. 26-1).

ons, 466 F.3d 1086, 1088 (D.C.Cir.2006). Here, OSTP does not have to create or "duplicate" anything, since Holdren can just turn over one of his existing thumb drives containing the Woods Hole emails.[16]

Even if Holdren had not already put all of his Woods Hole emails on thumb drives for the express purpose of making them available, they could easily be reproduced. Agencies have been producing emails from their employee's private email accounts for years, demonstrating that such emails are "readily" obtainable and "reproducible." *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004) ("this Court assumes that a search of personal email accounts will occur as was done in other departments. . . .If the defendants fail to undertake a search of the personal email accounts of the SOL employees, the plaintiff is welcome to again challenge the sufficiency of the search").[17] Indeed, they have produced thousands of pages

[16] *Cf. Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 63 (D.D.C.2003) (construing "readily reproducible" as the ability to *duplicate*).

[17] *Wilderness Society v. Dept. of Interior*, No. 03-cv-1801 (Defendants' Opposition to Plaintiff's Motion for Summary Judgment [Dkt. #25] at p. 7, filed 3/5/2004) (agency "does commit to confirm that the appropriate employees . . . have produced responsive emails that they may have on their personal email account"). In the *Wilderness Society* case, agency staff used personal email addresses such as bobcomer@yahoo.com and sgriles@aol.com. Plaintiff's Memorandum In Support of Its Motion for Judgment (filed 2/13/2004) at pp. 40-41 (discussing these emails). *See also Judicial Watch v. Dept. of State*, No. 15-363, Minute Orders dated 9/22/2015 & 8/7/2015 (ordering agency to upload electronic records obtained from former employees).

of emails from former employees' personal email accounts,[18] and have done so in response to plaintiff's own FOIA requests for years.[19]

Agencies regularly exert control over work-related emails in response to FOIA requests, showing that they do in fact have control over, and access to, such accounts. For example, "EPA's litigation hold notice [in a recent FOIA case] orders EPA staff not to delete potentially relevant information from personal devices or email accounts."[20]

Despite the D.C. Circuit's statement in *Samples* that reproducibility is a matter of technical capability, trial courts have allowed agencies to avoid producing records in a particular requested format if it doing so imposes a significant and undue burden. *Long v. ICE*, 149 F.Supp.3d 39, 55-56 (D.D.C. 2015). But "requiring" agency "employees to both forward and preserve business-related information received within or sent from personal email accounts" does "not impose an undue burden on agency staff."[21]

Moreover, an agency must provide "compelling" "evidence," not mere **assertions**, that "demonstrate that compliance with a request would impose a *significant* burden or interference with the agency's operation." *Long v. ICE*, 149 F.Supp.3d 39, 55-56 (D.D.C. 2015), *citing Public.Resource.Org v. IRS*, 78 F.Supp.3d 1262, 1266 (N.D.Cal.2015) (citing TPS, Inc. v. DOD, 330

[18] For example, the State Department produced approximately 55,000 pages from former Secretary of State Hillary Clinton's personal email account. *See Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Exhibit B to Defendant's Status Report (August 7, 2015) at pg. 1 (Letter from Undersecretary of State Patrick Kennedy).

[19] *See, e.g.,* Declaration of Christopher C. Horner In Opposition to Defendant's Motion for Summary Judgment, Exhibit 1 (attaching a 2012 letter from an agency assistant general counsel noting that NOAA's search for responsive records "included searching the home office and personal email account" of an agency employee).

[20] *See Landmark Legal Foundation v. E.P.A.,* 82 F.Supp.3d 211, 226 (D.D.C. 2015).

[21] *Id*.

F.3d 1191, 1195 (9th Cir.2003)). The degree of burden that a requester can impose on an agency far exceeds the trivial inconvenience that Dr. Holdren might feel in turning over a thumb drive containing his Woods Hole emails.

For example, records are "readily reproducible" even if the agency "will have to develop new protocols and train staff" to provide records in a particular electronic file format, and "would need to spend $6200 to develop protocols and train staff to be able" to produce the records in the requested "MeF format," even if that involved "a format that the agency has not accommodated before." *Public.Resource.Org v. IRS*, 78 F.Supp.3d 1262, 1265-66 (N.D. Cal. 2015); *see also Scudder v. C.I.A.,* 25 F.Supp.3d 19, 37 (D.D.C. 2004) (rejecting argument that an agency need only produce records in a particular format requested if the agency already keeps or maintains its records in that format); *cf. Pinson v. DOJ*, 80 F.Supp.3d 211, 217 (D.D.C.2015) (holding that DOJ did not carry its burden by merely asserting that the search would require a "burdensome effort" without offering estimates of "the time required to conduct [the] requested search, the cost of such a search, or the number of files that would have to be manually searched").

OSTP does not allege that it needs to develop new agency policies or train staff in order to produce the emails from the Woods Hole account. And merely having to shift records from one database or recordkeeping system to another does not make producing the records not "readily reproducible," even when (as is not the case here) the agency would have to subject the records to "security procedures" or other special screening before doing so. *See National Sec. Counselors v. C.I.A.*, 960 F.Supp.2d 101, 204-06 (D.D.C. 2013).

Even if these emails become more difficult for OSTP to retrieve from Holdren due to his future departure from the government, and OSTP's previous failure to search the Woods Hole ac-

count by then, that will not render them not "readily reproducible" for purposes of the FOIA statute, which focuses on the ability to produce records at the time the FOIA request was made, not at the time of the court's subsequent ruling.

When an agency allows records to become difficult to retrieve after plaintiff submits a FOIA request, it is still liable for withholding those records, if the records were readily retrievable at the earlier time that the FOIA request was submitted. For example, when an agency fails to renew a contract with an information technology vendor and thus does "not currently have access to [a] program" needed to retrieve the requested records at the time of the court's ruling, the agency can be ordered to make efforts "to coordinate with its former vendor to extract the" requested information "and produce it as required" by FOIA, *Southeastern Legal Foundation v. U.S. Environmental Protection Division*, 181 F. Supp. 3d 1063, 1087-88 (N.D. Ga. 2016), since "the status of a particular document at the time the FOIA request is submitted determines whether the unreasonable failure to produce that document is an unlawful withholding." *Judicial Watch, Inc. v. U.S. Dep't. of Commerce*, 34 F.Supp.2d 28, 44 (D.D.C.1998).

Thus, even if Holdren leaves OSTP, the agency can be required "to coordinate with its former" employee to obtain the records. *See Southeastern Legal Foundation*, 181 F.Supp.3d at 1088 ("The Court therefore ORDERS EPA to undertake all reasonable efforts to coordinate with its former vendor to extract the raw statistical data from FOIAXpress and produce it as required under Section 552(e)(3) of FOIA"). *Cf. DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C.Cir.2015) ("agency may not avoid a FOIA request" by "ridding itself of a requested document."); *Chambers v. Department of Interior*, 568 F.3d 998, 1004 (D.C.Cir.2009)(("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA[.]").

OSTP is trying to turn the purpose of FOIA's statutory language upside down. It seeks to take FOIA's "readily reproducible" language, which was added to FOIA in order to *expand* the availability of electronic records under FOIA and enable a requester to select its preferred "electronic format,"[22] and use that language to *shrink* FOIA's reach, contrary to FOIA decisions mandating that agency officials search and produce records from employee's personal files. *See Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

Even if the emails in the Woods Hole account were not in fact "readily reproducible," the proper response would have been for OSTP to explain that fact in response to the FOIA request, and then produce all the copies of the Woods Hole emails found in Holdren's official account. But OSTP did not do so, belatedly raising this "reproducibility" argument for the first time in the current motion for summary judgment. Prior to this lawsuit, OSTP initially produced a few copies of Woods Hole emails from Holdren's official account, but it soon stopped doing so, without ever making this *post hoc* "reproducibility" argument. If the emails were truly unavailable and unreproducible from the Woods Hole account (which they were not, in light of the D.C. Circuit's opinion), then they should have been produced from the official account instead. *See Southeastern Legal Foundation v. U.S. Environmental Protection Div.*, 181 F. Supp. 3d 1063, 1083-84

[22] *See Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C.Cir.2006) (discussing former law under the D.C. Circuit's *Oglesby* decision saying agency could choose to make records available "in *any* format" it chose, which was abrogated by the "readily reproducible" language added to FOIA by the Electronic Freedom of Information Act Amendments, Pub.L. 104-231, 110 Stat. 3048, 3049 (1996); agency had to produce the records in the "electronic format" requested).

(N.D. Ga. 2016) (where agency made "unchallenged" claim about excessive "cost of producing the documents electronically," court ordered it to "produce them in paper format" instead).

III. OSTP Has Not Shown Holdren Forwarded OSTP-Related Emails to His Official Account, Since Holdren Only Claims He Had a "Customary Practice" of Doing So, Not That He Always Did So.

OSTP claims that "Dr. Holdren's customary practice" was to copy or forward "OSTP-related emails" to "his OSTP account." Defendant's Memorandum (ECF No. 32-1) at 12; *see also* Defendant's memorandum in opposition to plaintiff's motion to preserve emails (ECF No. 26) at 6 (10/31/2016) (Holdren allegedly had a "practice" to "forward [the work-related] e-mail to [his] official e-mail account at OSTP"). But customary practices are not always followed. *Perez v. El Tequila, LLC*, No. 12–CV–588–JED–PJC, 2015 WL 4173541, *9 (N.D. Okla. July 10, 2015) ("an agency's 'typical practice'" does not mandate the conclusion that "specific actions [followed] from that general practice"). As this court has noted in its December preservation order, while the "Government claims" that there is "a copy" of the Woods Hole emails "in Dr. Holdren's work email," it is unrealistic to "assume that each and every work related email in the Woods Hole account was duplicated in Dr. Holdren's work email account," since "policies are rarely followed to perfection by anyone." Memorandum Opinion and Order (ECF No. 31) at 8.

Holdren does *not* claim he *always* forwarded work-related emails to his official account. Indeed, he has carefully and deliberately avoiding saying he always did so, despite plaintiff's past attempts to elicit that very information. This is tantamount to an admission that he did *not* always forward work-related emails to his official account. Thus, even under OSTP's pinched interpretation of FOIA (which allows it to avoid producing emails from the Woods Hole account if they

have been forwarded to his official account), there are responsive emails in the account that need to be produced. OSTP has not met its burden of showing it produced all responsive records.[23]

Holdren's declaration merely claimed that it was his "customary practice," Holdren October Decl. (ECF No. 26-1) ¶7, to forward them, not that he always did so. When Plaintiff pointed out last year that this did not mean that Holdren always did so,[24] Holdren did not deny this, or submit any declaration claiming that he always forwarded work-related emails to his official account. Instead, OSTP has submitted only a subsequent declaration from Rachael Leonard, which merely repeats this vague claim about Holdren's purported custom, based on hearsay. She states that "[m]y understanding is that Dr. Holdren had a customary practice that for any OSTP-related emails sent or received on his Woods Hole account, Dr. Holdren ensured that these emails were

[23] The "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989). To prevail, an agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the [FOIA's] inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978). Thus, "records are presumptively disclosable unless the government can show" otherwise. *Consumer Federation v. Department of Agriculture*, 455 F.3d 283, 287-93 (D.C. Cir. 2006); *see also Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327-28 (D.C.Cir.1999) ("It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search" them, even if they are not in the agency's own files; Coast Guard had duty to search "records stored at a federal record center" in Atlanta, even though that was not a Coast Guard facility); *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents").

[24] *See* Plaintiff's Reply In Support of Motion to Compel Preservation of Private Emails at pg. 5 (Nov. 10, 2016), ECF No. 29 ("Although Dr. Holdren allegedly had a 'practice' to 'forward [the work-related] e-mail to [his] official e-mail account at OSTP'… he does not claim that he always did so. His declaration merely claims it was a 'customary practice,'… to forward them, not that he always did. Customary practices are not always followed…His failure to attest that he always followed this practice suggests that occasionally it was not.")

ultimately captured in an OSTP system by copying or forwarding the emails to an official OSTP account." Declaration of Rachael Leonard (ECF No. 32-2), ¶ 15 (filed, Dec. 27, 2016).

Leonard's statement about Dr. Holdren's supposed "customary practice" is pure hearsay, and her "understanding" is not admissible to prove the practice existed, much less that he acted in accordance with it. Moreover, a "customary practice" describes a general norm, not a certainty.

If an agency intended to use "weasel words" to cloak occasional failures to forward records to its director's official account, these words (its "understanding" of Holdren's "customary practice") are precisely the words it would use. Holdren's failure to specifically attest that he always followed this practice – even after we raised the issue at length in earlier briefing[25] -- further suggests that it was not always followed. *See, e.g., Gray v. Great American Recreation Ass'n,* 970 F.2d 1081, 1082 (2d Cir.1992) (adverse inference drawn when a litigant fails to provide relevant information within its possession); Wigmore, *Evidence In Trials At Common Law,* § 285 (Chadbourn rev. 1979) (The nonproduction of available evidence "permits the inference that its *tenor is unfavorable to the party's cause.*") (italics added). So, too, does the agency's decision to subsequently rely on extraordinary weak, inadmissible hearsay evidence (Leonard's second-hand "understanding" of Holdren's purported "customary practice"). *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (adverse inference can be drawn from "the production of weak evidence when strong is available"). OSTP reliance on vague, inadmissible hearsay (Leonard's "understanding" of Holdren's ""practice") no doubt reflects the fact that it lacks stronger evidence. OSTP's evasiveness casts doubt on the credibility of all of its past and future declarations in this case.

[25] *See* Plaintiff's Reply In Support of Motion to Compel Preservation of Private Emails at pg. 5 (Nov. 10, 2016), ECF No. 29.

Presuming that OSTP officials like Dr. Holdren followed all agency policies about handling agency records (such as forwarding emails to his official account) also makes little sense in light of how OSTP has mishandled other FOIA requests submitted by CEI for records held by Dr. Holdren, and failed to keep track of, and turn over, records in his possession. In a May 9 ruling involving another CEI request for records relating to Dr. Holdren, Judge Mehta noted that OSTP's "representations" about its records had "proven to be inaccurate time and again." *CEI v. OSTP*, 185 F.Supp.3d 26, 29 (D.D.C. 2016). The judge also found evidence of OSTP's "bad faith" by OSTP, due to repeated inaccurate claims by OSTP and Rachel Leonard, which were belied by belated disclosures of responsive records that had been sent by Dr. Holdren. *Id.* at 27.

OSTP claims there is "no basis to question compliance," given the presumption of agency good faith, Def's Mem. 14, but that presumption is rebuttable, and any such presumption disappears when the plaintiff submits evidence that the agency's statements are unreliable or inconsistent. *See CEI v. OSTP*, 186 F.Supp.3d 26, 27 (D.D.C. 2016); *Landmark Legal Foundation v. E.P.A.,* 959 F.Supp.2d 175, 183 (D.D.C. 2013) (agency's record of "inconsistent filings, precludes . . . summary judgment" by suggesting possible agency "bad faith"); *Negley v. FBI*, 658 F.Supp.2d 50, 58 (D.D.C. 2009) (inconsistent statements by agency barred summary judgment).

As Judge Mehta noted, "Defendant Office of Science and Technology Policy's (OSTP) representations . . . about the scope and completeness of its searches have been, to say the least, inconsistent. Those inconsistencies have created a real question in the court's mind . . . about Defendant's good faith in processing Plaintiff's FOIA request." *CEI v. OSTP*, 185 F.Supp.3d 26, 27 (D.D.C. 2016). "Defendant's representations that it conducted a reasonable search designed to locate all relevant records has proven to be inaccurate time and again." *Id.* at 29.

OSTP does not explain why this Court should now place faith in its vague representations, when its specific representations to plaintiff and this Court have proven false "time and again." *See id.* OSTP's carelessness in complying with its FOIA obligations, and its difficulty in getting Dr. Holdren to comply with them, became very clear in that case as OSTP belatedly disclosed records held by Dr. Holdren whose existence was previously concealed or overlooked. *See id.* at 29 ("In the course of complying with the court's Order, Defendant found two new drafts" that were previously undisclosed). Similarly, Dr. Holdren could easily have overlooked work-related emails that needed to be copied or forwarded to his official OSTP account.

OSTP also claims that CEI "has not plausibly alleged that [uncopied agency] records exist solely on Dr. Holdren's Woods Hole account," citing this court's 2015 dismissal of plaintiff's Federal Records Act claim. Def's Mem. at 14. But under FOIA, unlike the Federal Records Act,[26] it is OSTP that has the burden of proof on that issue, not CEI. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'"); *Consumer Federation v. Department of Agric.*, 455 F.3d 283, 287-93 (D.C. Cir. 2006) ("records are presumptively disclosable unless the government can show" otherwise).

[26] Generally, where a private right of action exists, the plaintiff bears the burden of proof under a preponderance standard. *Herman & MacLean & Huddleston,* 459 U.S. 375, 390 (1983). A private right of action under the Federal Records Act does not even exist, although injunctive relief for FRA violations is available in narrow circumstances. *CEI v. EPA*, 67 F.Supp.3d 23, 31, 33, 36 (D.D.C. 2014) (The "FRA does not include an express or implied private right of action," so "plaintiffs cannot rely on the APA to challenge . . . an agency's substantive decisions to destroy or retain records"; plaintiff could sue under the APA where it plausibly alleged violation of "clear statutory mandates" to notify the archivist of a widespread FRA violation, and could sue under Mandamus Act where it plausibly alleged a "clear right to relief").

And OSTP plainly has not proven that. To the contrary, as this court has already noted in its recent preservation order, while the "Government claims" that there is "a copy" of the Woods Hole emails "in Dr. Holdren's work email," it is unrealistic to "assume that each and every work related email in the Woods Hole account was duplicated in Dr. Holdren's work email account." Memorandum Opinion and Order (ECF No. 31) at 8. This observation is buttressed by Dr. Holdren's repeated (and subsequent) failure to attest that he *always* copied work-related emails to his official account. His protracted silence about that is as telling as the silence of the proverbial "dog that didn't bark."[27] Thus, OSTP's "law of the case" argument is meritless.

IV. Given the Thousands of OSTP-Related Emails in the Woods Hole Account, It Is Not Credible That Holdren Forwarded All of Them To His Official Account

Moreover, is inherently implausible that Holdren forwarded all of the emails in the Woods Hole account to his official OSTP account, given that there were thousands of them. Holdren himself has not indicated how many work-related emails are in his account (contradicting FOIA, which requires an agency to "determine and communicate the scope of the documents it intends to produce and withhold"[28]). But we recently learned that, contrary to OSTP's suggestions earlier in this litigation,[29] the number of such emails is extremely large, since OSTP's Rachael Leonard

[27] *See* Wikipedia, *Silver Blaze* (in a Sherlock Holmes story, the detective deduces from the fact that a dog didn't bark on the night of its owner's death, that a stranger did not kill him, since the dog would have barked at a stranger; as Holmes explained, "the silence of the dog" was evidence that gave rise to an inevitable "inference").

[28] *CREW v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013); *accord id.* at 186.

[29] Previously, OSTP had implied that this was a rare or occasional event. *See* defendant's memorandum opposing the preservation order (ECF No. 26) at 6 ("Dr. Holdren would sometimes send or receive work-related email using the Woods Hole e-mail account"), citing Holdren October Decl. (ECF No. 26-1) ¶7 ("Sometimes, however, people would send e-mails to my WHRC address that were related to OSTP agency business.")

found "approximately 4,500" records in Holdren's official account using just one search term that would yield copies of such records. Declaration of Rachael Leonard (ECF No. 32-2), ¶ 17 (discussing search results containing the term jholdren@whrc.org). The true number of such emails is likely be much greater, especially given the underinclusive nature of Leonard's search of the official account.

Where the number of work-related emails in an account is large (which is plainly the case here), it is inherently implausible that all such emails will have been forwarded to his official account, since "policies are rarely followed to perfection by anyone,"[30] much less thousands of times in succession. *See Competitive Enterprise Institute v. E.P.A.*, 67 F.Supp.3d 23, 34 (D.D.C. 2014) (in lawsuit seeking injunctive relief against agency for violating Federal records Act, "CEI adequately allege[d] that EPA 'failed to take action in compliance with the [FRA]'" in not preserving 5,000 personal text messages, even though the agency claimed that they included *no* uncopied agency records; this is because "it is implausible that EPA's Administrators would not have suspected the destruction of *any* federal records" in the erasure of "over 5,000 Agency text messages"). Each time a work-related email is sent or received on a personal account, there is a chance that, due to human error, the sender or recipient will forget to forward it, or erroneously classify it as "personal" rather than "work-related."

Dr. Holdren himself echoed this observation about inadvertent errors, in explaining to his subordinates why "all OSTP-related email communications should be conducted using your OSTP email account." In a 2010 memo, he noted that "To ensure that we comply with the FRA with respect to emails, all OSTP-related email communications should be conducted using your OSTP email accounts. In the course of responding to [a] recent FOIA request, OSTP learned that an

[30] Memorandum Opinion and Order (ECF No. 31) at 8.

employee had, in a number of instances, inadvertently failed forward to his OSTP email account work-related emails received on his personal account." *See* Holdren Memo, ECF No.7-6, at p. 2. Yet OSTP now reveals that thousands of times, Holdren violated his own rule that "all OSTP-related email communications should be conducted using your OSTP email account."

V. Holdren's Statement that He Had a Custom of Forwarding OSTP-related Emails to His Official Account Is Meaninglessly Vague Given His Failure to Explain What is "Work Related" and What Criteria He Used.

Moreover, it is not clear what Dr. Holdren means by "work-related" (*see* Holdren Decl. ¶7), or how he determined which emails needed to be forwarded to his OSTP account. OSTP itself has said that "the segregation of work-related e-mails from personal e-mails cannot be achieved using search terms," which begs the question of what standard was used. *See* Defendant's Memorandum in opposition to the motion to preserve (ECF No. 26) at 19. Dr. Holdren has not clarified what this means, let alone provided the criteria he used to make this determination (an email can be related to important agency business, and yet contain deeply personal content as well).

In Congressional testimony, Dr. Holdren has taken a strikingly narrow definition of what constitutes "personal" rather than work-related communication. For example, he was asked by Congressman Weber about when he "filmed a short video for the White House web site entitled 'The Polar Vortex,'" in which he stated that "'the kind of extreme cold being experienced by much of the United States as we speak is a pattern that we can expect to see with increasing frequency as global warming continues.'"[31] Weber asked him if this was "an expression of your personal opinion" and thus not an agency statement covered by the "Federal Information

[31] *See The Administration's Climate Plan: Failure by Design,* Hearing Before the Committee on Science, Space, and Technology, House of Representatives, Serial No. 113-94, 113th Cong., 2nd Sess., Sept. 17, 2014, at 72 (available at https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg92327/pdf/CHRG-113hhrg92327.pdf).

Quality Act."[32] Dr. Holdren replied that this was "accurate," and that it was merely his "personal opinion" even though the video was produced by "White House Digital Services" and posted on the White House web site, and thus was obviously an agency record.[33] He has classified even positions he takes as the President's Science Advisor on scientific matters as being "personal" in nature, telling Congress that "[a]s the President's Science Advisor, I express my personal opinion on the balance of science all the time."[34]

OSTP argues that Holdren must have complied with FOIA because he allegedly complied with the Federal Records Act. *See* Def's Mem. at 1-3, 15, 20. But even if we were to assume Dr. Holdren attempted in good faith to comply with the Federal Records Act's requirement that he forward "federal records" to his official email account, he might nonetheless not have complied with FOIA, for several reasons. FOIA has a broader definition of covered records than the Federal Records Act does (FOIA covers "agency records," a slightly broader category than the "federal records" covered by the FRA). As the National Archives note, "the meaning of 'agency records' for FOIA purposes is broader than that of 'records'" under the FRA.[36]

Moreover, it is simply improper for the agency to just rely on Holdren's say-so as to whether the uncopied emails in his Woods Hole account were "personal" rather than work-related. *See Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for

[32] *Id.*
[33] *Id.*
[34] *Id.*
[36] National Archives, *Disposition of Federal Records: A Records Management Handbook: 2000 Web Edition (of 1997 printed publication)*, Chapter Two, http://www.archives.gov/records-mgmt/publications/disposition-of-federal-records/chapter-2.html.

the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.).

VI. Plaintiff is Not Seeking "Duplicate Records," but Rather the Original Version of the Emails, Which Contained Unique Metadata That Sheds Light on Government Functions and Operations

OSTP argues that "agencies are not compelled to obtain or produce duplicate records existing on non-governmental accounts." Mem. 16 (ECF No. 32-1). This is irrelevant because we are seeking the emails in their *original* form, not "duplicate records," such as the versions that exist in his official account. The "duplicates" are the copies forwarded to his official account, which did not preserve them in full, but rather altered or eliminated their metadata in the forwarding process, as we have explained in the past, *see* ECF No. 29 at 6.

Plaintiff seeks the emails in their original form, with the metadata embedded in the originals – which is how the emails would typically be found if downloaded or copied to a thumb drive (such as the thumb drive Dr. Holdren was ordered to preserve pursuant to this Court's order).

Even if Dr. Holdren did forward *all* these emails to his OSTP account, it still would not eliminate the need to preserve them in his WHRC account. Forwarding emails eliminates certain metadata contained in the header of the email, such as the email address of senders or recipients.[37] Forwarding also removes the list of recipients of an email who have been "blind carbon

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

copied."[38] And even when senders and recipients are listed in a forwarded email, their email addresses may be lost due to forwarding: for example, when the name of a familiar sender or recipient appears in the "From," "To", or "cc" field, it may be stripped by the forwarding process of the underlying email address that would otherwise accompany their name, or be revealed by clicking on their name with one's computer mouse (*e.g.,* if the sender or recipient has their email address listed in the forwarding party's email address book).

Such hidden metadata in emails is a public record subject to disclosure under freedom of information laws. When a public record exists in "in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure." *Lake v. City of Phoenix*, 218 P.3d 1004, 1008 (Ariz. 2009). The "metadata associated with [the] original e-mail … is a 'public record' subject to disclosure." *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1153 (Wa. 2010); *accord ACLU v. Arizona Dept. of Child Safety,* 377 P.3d 339, 344 (Ariz. App. 2016), *citing In re Online DVD Rental Antitrust Litig.,* 779 F.3d 914, 927 (9th Cir.2015) ("The faithful production of electronically stored information may require . . . preservation of metadata.").[39]

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

[39] These cases are instructive, because they involve laws modeled on the federal FOIA. *See Limstrom v. Ladenburg*, 963 P.2d 869, 875 (Wa. 1998) ("Because our state act was modeled after the federal Freedom of Information Act," we "look to judicial constructions of the FOIA in construing our own statute."); *ACLU v. Arizona Dept. of Child Safety,* 377 P.3d 339, 346 (Ariz. App. 2016) ("'When interpreting Arizona's public records statutes, it is appropriate to look to FOIA for guidance.'") (quoting Arizona Supreme Court ruling).

The loss of metadata due to forwarding means that CEI will often not be able to tell from forwarded emails whether the government officials listed as senders or recipients used their personal (rather than official) email addresses to conduct government business. But that is the very thing this FOIA request was designed to shed light on. CEI's FOIA request made clear that its focus was on the "widespread pattern of federal government employees using private emails" to conduct agency business and, as part of that, "to determine the extent of this emailing practice" by Dr. Holdren and other federal officials. *See* ECF No. 7-1, at 3 (Motion to Dismiss, Exhibit 1, pg. 3).[40]

Thus, OSTP is just wrong to argue that the disclosure of this "metadata sheds no light on the Government's functions or operations," Def's Mem. (ECF 32-1) at 19, and that it would "do nothing to further FOIA's fundamental purpose, which is 'to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny.'" *Id.* The use of private email accounts to conduct government business is a classic example of government activity that has long attracted public scrutiny from both the press and Congressional overseers, to whom it sheds important light on government functions and operations.[41]

---

[40] Where a FOIA request did request the records in electronic form, it might be reasonable to produce them in paper form, without the metadata. But here, plaintiff specifically requested production of the documents in electronic form. *See* FOIA request at pg. 13, ECF No. 7-1 (July 11, 2014) (requesting "copies of documents, in electronic format"); *id.* at 26 ("The records requested are available electronically and are requested in electronic format").

[41] *See, e.g.,* Senate Committee on Environment and Public Works, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8-13, http://goo.gl/CnGgtR (discussing and criticizing the use of private email accounts to conduct government business at length); Stephen Dinan*, EPA Officials Lied About Email Use*, Senator Says, Washington Times, March 11, 2013, at A4 (discussing use of private email accounts to conduct government business); Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Washington Times, Aug. 14, 2013, at A1 (same); Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Wash. Times, Apr. 9, 2013, at A4 (same).

Even if it is true, as OSTP argues, "the metadata" has no material "value" to "most" FOIA requesters,[42] that plainly is not true of this particular request, since it is central to its stated purpose.[43] If responsive records cannot be withheld merely because portions of them are non-responsive, they certainly cannot be withheld merely because those portions are deemed to lack "value" by the agency. *See American Immigration Lawyers Ass'n v. EOIR*, 830 F.3d 667, 677 (D.C. Cir. 2016) (redaction of non-responsive material within records disclosed as responsive was improper). In any event, FOIA is not limited "to records that shed light on governmental activity." *Prison Legal News v. EOUSA*, 628 F.3d 1243, 1251 (10th Cir. 2011) (FOIA "has no such limitation"). So OSTP cannot withhold such data based on its subjective belief that the metadata sheds no light on government functions or operations.

The omission of recipients of blind carbon copies will also make it impossible to see what additional government officials may have been copied on the emails, to either their official or their private email addresses. That is so even though the identity of blind carbon copy recipients could not only be newsworthy in and of itself (such as where it could suggest *ex parte* communications), but also because it is information critical to any privilege claim that OSTP will likely make in withholding any such records.[44] (To withhold a record as privileged, the agency must

[42] Def's Mem. (ECF No. 32-1) at 19.
[43] *Cf. Lake v. Phoenix*, 218 P.3d 1004, 1008 (Ariz. 2009) (agencies may avoid providing metadata only "if the nature of the request precludes any need for the electronic version.").
[44] *Baxter Healthcare Corp. v. Fresenius Medical Care Holding,* 2008 WL 4547190, *1 (N.D. Cal. Oct. 10, 2008) (privilege log should list blind carbon copy recipients); *Castillo v. Government Acquisitions, Inc.,* 2009 WL 10310223, *2 (E.D. Va. July 31, 2009) (same); *Oosharem v. Spec Personnel, LLC,* 2008 WL 4458864, *3 (D.S.C. Sept. 29, 2008) (same).

list all authors and recipients of the record,[45] including all "copyees," to negate the possibility that it was "shared with outside parties and that [any] privilege was thereby waived."[46])

OSTP's contention that "just as a paper-based search for documents is free to exclude duplicates, so too is an electronic search" (Def's Mem. at 18, ECF No. 32-1) is irrelevant here, because we are not seeking duplicates (with the different metadata resulting from the duplication process), but rather the original emails. We are not seeking "to compel agencies to search, process, and produce the metadata associated with every potentially responsive" duplicate (as OSTP claims, see *id.* at 18), but rather only the metadata associated with the *originals*.

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

---

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

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

VII. The D.C. Circuit Has Demolished OSTP's "Agency Records" Argument

The D.C. Circuit left open the possibility that specific emails found in the Woods Hole account were not "agency records" because of such records potentially having personal, rather than work-related content. *See id.*, 827 F.3d at 150 ("we are not ordering the specific disclosure of any document"). But it did definitively reject OSTP's "control" argument, along with its related "create or obtain" argument, *see* Def's Mem. at 22, by noting that an agency head is not "distinct from his department for FOIA purposes," *CEI v. OSTP*, 827 F.3d at 149 (agency head is not "distinct from his department for FOIA purposes"). That means that what an agency's director controls is also in the control of the agency, and work-related emails he creates are created or obtained by the agency.

That forecloses the argument reserved in footnote 4 of this Court's 2015 ruling, in which OSTP argued that the Woods Hole emails were categorically not "agency records." *CEI v. OSTP*, 82 F.Supp.3d 228, 232 n.4 (D.D.C. 2015) (not ruling on OSTP's argument that it did not "create or obtain" the records, which thus should not be deemed "agency records."). That argument was based on the premise rejected by the D.C. Circuit, that agency heads are in such respects "distinct from those of the agencies they lead." *CEI v. OSTP*, 82 F.Supp.3d 228, 234 (D.D.C. 2015), *rev'd*, 827 F.3d 145 (D.C. Cir. 2016).

Citing its prior *Burka* decision, the D.C. Circuit indicated that records that Dr. Holdren possesses are within the "constructive control" of the agency. *Id.*, 827 F.3d at 149, *quoting Burka v. U.S. Department of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996). *Burka* was a decision involving what degree of agency control over a record was sufficient to render a record an "agency record." The D.C. Circuit's decision thus indicated that the test for control under

FOIA's "agency records" prong is very similar to the test for control under FOIA's "withholding" prong. And by citing *Burka*, which dealt with "agency records" rather than "withholding," the D.C. Circuit indicated that OSTP had sufficient control over the records both to render them "agency records," and to render it liable for "withholding" of such records.

Despite the D.C. Circuit's ruling, OSTP persists in claiming that it lacks control over the records, because they are held by its director, Dr. Holdren, rather than by the agency. Although the D.C. Circuit ruled that an agency head is not "distinct from his department for FOIA purposes," 827 F.3d at 149, meaning that his control over the records amounts to control by the agency, OSTP contradicts this reasoning at every step of its "agency records" argument. It constantly treats Holdren's control and use of the records as *not* being control or use of the records by the agency – even though Holdren is the agency's head.

This erroneous reasoning (that Holdren is distinct from his agency for purposes of FOIA's control test) is the basis for OSTP's arguments under the four-factor test for control under *Burka*. *See* Def's Mem. (ECF No. 32-1) at 23-25 (citing and purporting to apply the "four factor" test for control in "*Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996)").

That renders its analysis wrong under three of the four factors. *See* Def's Mem. at 24 (claiming the first factor is not met because OSTP supposedly lacks "control over the e-mails existing on the Woods Hole account" because Dr. Holdren has control over them – as if Holdren were distinct from his agency); *id.* at 24 (claiming the second factor is not met OSTP "does not have the ability to use or dispose of the records on the Woods Hole account" because they are in Holdren's control – as if Holdren was not the head of OSTP); *id.* at 25 (claiming that the third factor is not met because "OSTP personnel have not read or relied upon any e-mails *as they exist on the Woods Hole account*"

"Aside from Dr. Holdren"[47] – as if relevant "OSTP personnel" did not include Dr. Holdren, and not denying that other OSTP personnel did in fact rely on them, albeit after they were transmitted to other accounts).

With regard to the fourth factor, its reasoning verges on the tautological, and by its own terms, would not justify withholding copies of the Woods Hole emails found in his official OSTP email account.[48] And OSTP's Rachael Leonard concedes, they were agency records in terms of their content, and "the e-mails forwarded" by Dr. Holdren have thus "been integrated into OSTP's systems and files." Leonard Decl. (ECF No. 32-2), ¶26. Even if this factor, in isolation, did not weigh against OSTP, the remaining factors plainly do, rendering the Woods Hole emails "agency records." *See Washington Post v. DHS,* 459 F.Supp.2d 61, 71 (D.D.C. 2006) (finding records were "agency records" under the control test even though at most two of the factors were satisfied, in that the records were "not integrated into" the agency's "record system or files" and thus did not satisfy the fourth factor, and the agency lacked an "intent" to "control" the records, and thus the first factor was not satisfied, and "'the ability of the agency to use and dispose of the record as it sees

[47] While Rachael Leonard claims that "no OSTP employee aside from Dr. Holdren has read or relied on the versions existing in the Woods Hole Account," Leonard Decl. (ECF No. 32-2), ¶25, she does not explain the basis of this belief, which is conclusory hearsay. Without having access to the email in its original form, and the metadata in that email, it might not be apparent who all recipients of an email – such as bcc recipients – were (much less whether such recipients relied upon them), or whether it was exchanged with a personal email address.

[48] *Id.* at 25 (claiming that the factor does not weigh in favor of control because "only the versions of those e-mails copied or forwarded to an OSTP system have been integrated" into "the agency's record system or files."). Yet OSTP stopped producing the copied emails from Holden's official OSTP account, even though they have concededly been integrated into "the agency's record system," and thus, this fourth factor plainly weighs in favor of producing them.

fit' is quite limited" under the second factor); *Consumer Federation of America v. Dept. of Agriculture*, 455 F.3d 283, 290 ("even if" employee "calendars never entered USDA's files," they were nevertheless "agency records," with one exception).

Since the *Burka* factors, properly viewed in light of the D.C. Circuit's July 2016 ruling, support a finding that the Woods Hole emails are "agency records," OSTP has not met its burden on summary judgment of showing that they are not agency records.[49] *Judicial Watch, Inc. v. U.S. Secret Serv.*, 803 F.Supp.2d 51, 57-60 (D.D.C. 2011) (finding the four-factor test for control satisfied where three of the four factors weighed in favor of control, while the remaining factor weighed against control); *CREW v. DHS*, 527 F.Supp.2d 76, 92-93, 97 (D.D.C. 2007) (same).

Moreover, under its own past admissions, OSTP has sufficient control over the emails to readily produce them. Holdren has previously stated that he will comply with any court order to OSTP to turn over the Woods Hole emails, stating in his October 31 declaration that "I hereby pledge to the Court that I will continue cooperating with OSTP regarding compliance with future court orders entered in this case, including after I leave government service." Declaration of Dr. John P. Holdren (ECF No. 26-1) at ¶ 11. So OSTP should in fact have no difficulty obtaining the emails and turning them over to the plaintiff.

Indeed, OSTP has expressly stated that Holdren "will continue cooperating with OSTP regarding compliance with future court orders entered in this case, even after he leaves government service." *See* Defendant's Memorandum In Opposition to Plaintiff's Motion to Compel Preservation (ECF No. 26) at 2. This is a binding judicial admission. *Purgess v. Sharrock*, 33 F.3d 123, 134 (2d Cir. 1994)

[49] The "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989).

(party's statements in brief in one case could be used against it in another, related case) ("statements in briefs" are "binding judicial admissions of fact").

In her December declaration, OSTP's Rachael Leonard says that Dr. Holdren (who is presumably on the verge of leaving the government), "does not consent to granting OSTP access to the Woods Hole e-mail account." *See* Leonard Decl. ¶ 23. However, she does not say that he would refuse to turn over the emails even if this Court ordered them produced.

If Holdren does intend to refuse to do so, that contradicts his earlier representations to the court, demonstrating his dishonesty. Such dishonesty would render all of his other representations in his declaration (such as his purported "customary practice" of forwarding work-related emails to his official account) unreliable and suspect. Such inconsistent statements by agency officials preclude summary judgment by creating an inference of bad faith. *See CEI v. OSTP*, 185 F.Supp.3d 26, 27 (D.D.C. 2016); *Landmark Legal Foundation v. E.P.A.,* 959 F.Supp.2d 175, 183 (D.D.C. 2013).

Moreover, OSTP should be estopped from contradicting its earlier claim that Holdren will consent to producing the emails if the court so orders. In granting only a narrow protective order rather than the broader one sought by plaintiff (which would have required OSTP to search Holdren's emails and retrieve the responsive records), this court relied on the impression left by OSTP that a narrow order would suffice to ensure production of the emails in light of Holdren's promised cooperation. See ECF No. 31 at 7-8 (granting "a Preservation Order in line with the Government's suggestion on pages 21-22 of its Opposition" under the assumption that this would ensure that Dr. Holdren would "produce the Woods Hole emails if he left his position at OSTP."). OSTP should not be allowed to take advantage of any misimpression it may have created that Holdren will in fact produce the emails if OSTP is ordered to do so. *See Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988) (no litigant will be permitted to make false claims or otherwise invite error, and then take advantage

of the situation created by his own wrong); *U.S. v. Console*, 13 F.3d 641, 660 (3d Cir. 1990) (similar). For Holdren to make an 11th-hour claim that he will not produce the emails, contrary to his past representations, would verge on defiance towards the court. And legally, it would not change matters.

An agency cannot rely on its Director's thumbing his nose at FOIA to avoid liability for withholding a record. If it could, agencies could routinely refuse to turn over sensitive or embarrassing communications to FOIA requesters merely due to employee resistance or insubordination. As Leonard concedes, "OSTP may be able to exercise leverage over its employees" to make them "cooperate with OSTP's request" to turn over their records. Leonard Decl. ¶ 29. She has not described what, if any, "leverage" OSTP has attempted to employ with Dr. Holdren. Nor has Leonard even indicated that OSTP demanded that Holdren turn over the Woods Hole emails, rather than merely asking him for consent and accepting a "no" answer without any further discussion. And while she states that he did not consent to OSTP having "access to the Woods Hole e-mail account" itself, Leonard Decl. ¶ 23, she does not state that OSTP asked him for his thumb drive containing copies of the Woods Hole emails, as opposed to access to the account itself.

Of course, OSTP's "leverage" may be somewhat less than it used to be, now that Dr. Holdren is about to leave office due to the impending change of administration. But that is OSTP's own fault, for its inexcusable delay in waiting so long to ask Holdren to turn over the records – something it declined to do even after it lost in the court of appeals.[50]

When an agency had control over a record at the time it received the FOIA request, but later loses access to it, it remains liable for the resulting withholding of the record. *See Southeastern Legal Foundation v. U.S. Environmental Protection Division*, 181 F. Supp. 3d 1063, 1087-88 (N.D.

[50] As of last fall, OSTP still had not asked Holdren or other OSTP employees whether they used their personal email accounts to send work-related emails responsive to a different CEI FOIA request, much less requested their production. *See CEI v. OSTP,* D.D.C. No. 14-cv-1806, Def's Memo. In Opposition to Plaintiff's Motion to Compel (ECF No. 33) at 10 (Sept. 23, 2016).

Ga. 2016) (when an agency fails to renew a contract with an information technology vendor and thus does "not currently have access to [a] program" needed to retrieve the requested records at the time of the court's ruling, the agency can be ordered to make efforts "to coordinate with its former vendor to extract the" requested information "and produce it as required" by FOIA).

This is because "the status of a particular document at the time the FOIA request is submitted determines whether the unreasonable failure to produce that document is an unlawful withholding." *Judicial Watch, Inc. v. U.S. Dep't. of Commerce*, 34 F.Supp.2d 28, 44 (D.D.C.1998). *Cf. DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C.Cir.2015) ("agency may not avoid a FOIA request" by "ridding itself of a requested document."); *Chambers v. Department of Interior*, 568 F.3d 998, 1004 (D.C.Cir.2009)(("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA[.]").

Of course, even now, OSTP does retain leverage over Holdren. For example, it could seek further enforcement by the Attorney General, and trigger a retrieval action against Holdren, even after he leaves the government.[51] *Cf. Judicial Watch v. Kerry*, 2016 WL 7439010, *2 (D.C. Cir. Dec. 27, 2016) (even after former Secretary of State turned over thousands of emails from private email account, long after leaving office, the State Department could still "shake loose a few more emails" from her by seeking further "enforcement action" by the Attorney General under the Federal Records Act, so the case was "not moot"); *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (agency head can seek the initiation of an enforcement action, and "if the agency head or Archivist does nothing while an agency official destroys or removes records in

[51] The head of an agency is required under 44 U.S.C. § 3106 to notify the Attorney General if he determines or "has reason to believe" that records have been improperly removed from the agency. The GSA Administrator is obligated to assist in such actions. 44 U.S.C. § 2905. At the behest of these administrators, the Attorney General may sue to recover the records.

contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action."); *CEI v. EPA*, 67 F.Supp.3d 23 (D.D.C. 2014).

The fact that this single form of leverage would not, in and of itself, be sufficient to constitute "control" over Holdren under the Supreme Court's *Kissinger* decision does not change the fact that the agency's much *greater* leverage over Holdren at the time the FOIA request was made easily satisfied FOIA's "control" test for withholding and agency records. OSTP plainly had such control at the time of plaintiff's FOIA request. *CEI v. OSTP*, 827 F.3d at 149-50 (rejecting OSTP claim that it lacked sufficient control over Holdren's emails to be liable for withholding them); *Judicial Watch, Inc.*, 34 F.Supp.2d at 44 (whether record was unlawfully withheld turns on conditions existing "at the time the FOIA request is submitted").

CONCLUSION

For the foregoing reasons, this court should deny defendant's motion for summary judgment.

Respectfully submitted this 10th day of January 2017,

___/s/ Hans Bader_____
Hans Bader, D.C. Bar No. 466545
Competitive Enterprise Institute
1310 L St., NW, Floor 7, Washington DC 2005
(202) 331-2278, hans.bader@cei.org
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, a copy of the foregoing Plaintiff's Memorandum In Opposition to Defendant's Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Counsel for the Defendant automatically receiving this filing through the Court's CM/ECF System includes:

Daniel S. Schwei
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
Email: daniel.s.schwei@usdoj.gov
Counsel for Defendant

/s/ *Hans Bader*
Hans Bader