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 MOTION TO COMPEL
PRESERVATION OF PRIVATE EMAILS
AND MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

Plaintiff moves for an order compelling defendant Office of Science and Technology Policy and its Director, John P. Holdren, to preserve "OSTP-related" emails and records currently located in Dr. Holdren's non-official email account jholdren@whrc.org.[1] OSTP's FOIA staff should either obtain a copy of all the emails in the account; or search for, identify, and collect those emails in the account that are OSTP-related. They should then preserve those emails in the agency's official records. Dr. Holdren should be instructed to cooperate with them, preserve all OSTP-related emails, and attest to whether he has deleted responsive records. Since Dr. Holdren is a political appointee who may leave the federal government soon, responsive records in the account need to be turned over to agency FOIA staff soon, since the records may otherwise become beyond the reach of this court.

OSTP's arguments against searching the account seek to evade the plain language of the D.C. Circuit's ruling against it in this case, *CEI v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016).

I. This Court Has The Power to Order Preservation of Records, Prior to Ruling on Whether They Are Covered by FOIA

Judges of this court have granted orders that records be preserved, even prior to any ruling that the records are agency records covered by FOIA. For example, after ruling that records were not subject to FOIA, but finding that it was a "close question" whether they constituted

[1] Plaintiff's FOIA request sought copies of all policy-related or "OSTP-related email sent to or from jholdren@whrc.org." *See* ECF No. 7-1 at pg. 2. Plaintiff believes that potentially responsive records would thus include, *inter alia*, all emails sent or received on the account since March 19, 2009 – the date that Dr. Holdren took office -- that involve (a) discussion of OSTP activity, or discussion or formulation of government policy, or (b) contain the word "OSTP" or "Office of Science" or "policy" or "policies"; or (c) are sent to or from a "**.**gov" email address.

agency records, a judge issued an order that they be preserved pending an appeal to the D.C. Circuit. *See Citizens for Responsibility And Ethics In Washington v. Office of Admin*., 593 F.Supp.2d 156, 162 (D.D.C. 2009) (granting preliminary injunction to preserve records that the appeals court might find to be covered by FOIA, where the records might otherwise become unavailable prior to the appeals court's ruling, even though the trial judge herself had concluded the records were not covered by FOIA, and the agency had assured the court they would be preserved). Moreover, courts can issue injunctions that apply not only to agencies, but also their employees, such as Dr. Holdren, requiring them to identify and collect records that may be responsive to a plaintiff's FOIA request. For example, a court issued an order banning agency "employees" from destroying responsive records, and requiring them to "identify, collect, and preserve" records that "may be responsive," including "electronically stored information."[2]

II. This Account Is Known to Have Contained Agency Records

In this case, it is especially important to order the records preserved, because this email account is known to have contained agency records.

Given that Dr. Holdren is head of OSTP, and that he has been using a private email account long in advance of the Circuit's ruling in this case, there would be a high likelihood that this email account contains agency records even if we knew nothing else whatsoever about it. On this basis alone, the email account should be searched by FOIA.

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[2] *See Union Pacific R. Co. v. U.S. Environmental Protection Agency*, Civil Case No. 10-235, 2010 WL 2560455, *2 (D. Neb. June 24, 2010)("Defendants and their employees are immediately enjoined from transporting, removing, destroying, deleting, modifying, or in any way tampering with records, data, or other information, including electronically stored information, in their possession or control that is, or potentially may be, responsive to the requests submitted by Union Pacific Railroad Company under the Freedom of Information Act; 3. Defendants are ordered to identify, collect, and preserve records . . . that are or may be responsive to Plaintiff's Freedom of Information Act requests").

But in fact we do know more, because OSTP has itself indicated that the account contained agency records. While the agency claims that any such records are merely copies of records found elsewhere, this claim is based on pure speculation, since the agency has conceded that it did not even ask Dr. Holdren if he used this account for certain kinds of agency business. Its suspicious refusal to even ask him gives rise to the adverse inference that the account likely contains uncopied agency records that are subject to FOIA. The "'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007), and it has the burden" to prove that "the materials sought are not 'agency records.'"" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989).

An agency can be ordered ordered to search for and retrieve responsive records when, absent such a search, the agency "has not demonstrated . . . 'that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [the FOIA's] inspection requirements.'" *Kronberg v. U.S. Dept. of Justice*, 875 F.Supp. 861, 866 (D.D.C. 1995) (Kessler, J.) (granting plaintiffs' "Motion to Compel Further Searches"), *quoting National Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973). "If the sufficiency of its search is challenged, the government must demonstrate 'beyond material doubt' that the search was reasonable" and thorough in order to avoid the requested search. *See Kronberg*, 875 F.Supp. at 866, 869, *quoting Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citing *Weisberg v. Dept. of Justice* 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

It is undisputed that work-related emails have been sent to or from the jholdren@whrc.org email account. For example, Dr. Holdren sent to both this account, and to the EPA Administrator, his 29-page PowerPoint presentation outlining government "Policy for Science, Technology,

and Innovation in the Obama Administration."[3] This record was produced by EPA in response to another FOIA request. Using the account, Dr. Holdren also sent an email in 2011 to the EPA Administrator about a White House press call.[4] This email was so obviously work-related, and an agency record, that OSTP redacted portions of this email pursuant to FOIA exemption 5, 5 U.S.C. 552(b)(5).[5] That exemption only covers "agency" records, specifically "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.* For this privilege to attach to any portion of a record, the record's "source must be a government agency." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). (On March 31, 2014, OSTP produced a copy of this record from Holdren's official email account.[6] It then stopped producing copies of such records from Holdren's official account.[7])

In recent correspondence with plaintiff CEI, OSTP has not denied that the account contains work-related emails related to agency business. Instead, it argues that even if such records are

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[3] *See* ECF No. 7-7 (filed 07/11/14) (email sent by Dr. Holdren to EPA administrator attaching his presentation). This document is also available in the Joint Appendix on appeal in this case, at JA 119-49, available at https://cei.org/sites/default/files/CEI%20v.%20OSTP%20-%20No.%2015-5128%20-%20Joint%20Appendix%20-%20FILED_0.pdf.

[4] *See* ECF No. 8-1 (filed 07/28/14) (redacted email about a White House press call, sent by Dr. Holdren); *see also CEI v. OSTP*, D.C. Cir. No. 15-5128, Joint Appendix (8/10/2015), JA 153-59 (same redacted email).

[5] *See* ECF No. 8-1 (filed 07/28/14) (March 31, 2014 letter from OSTP's Jennifer Lee to CEI's Christopher Horner enclosing this record and others, which stated "please find 110 pages consisting of OSTP's first set of responsive documents in response to your request. OSTP has withheld portions of responsive documents under 5 U.S.C. §§ 552(b)(5)).").

[6] *See* ECF No. 8-1.

[7] *See CEI v. OSTP*, 82 F.Supp.2d 228, 232 n.3 (D.D.C. 2015), *rev'd*, 827 F.3d 145 (D.C. Cir. 2016).

work-related and connected to agency business, and would otherwise be deemed agency records, they do not qualify as agency records, because they are in Dr. Holdren's personal account, and supposedly were copied them to his official email account. (As explained further below, there is no evidence that all such records were copied to his official account. But for the moment, let us assume this for the sake of argument).

OSTP appears to concede there are "copies of work-related emails in Dr. Holdren's Woods Hole account." *See* Email from Daniel Schwei, OSTP's counsel, to Hans Bader and Sam Kazman, counsel for plaintiff, on Monday, October 10, 2016 3:37 PM ("OSTP understands Dr. Holdren to have had a practice of copying his OSTP account on work-related e-mails, we believe the duplicate copies of work-related e-mails on Dr. Holdren's Woods Hole account are not even agency records subject to FOIA").

But an agency record does not stop being an agency record merely because it is in a personal account. As the D.C. Circuit explained in its recent ruling in this case, "If the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced," even if it is in a non-official email account. *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016).

Nor do these records cease being agency records even if they are copies. OSTP is confusing its obligations under the Federal Records Act with its obligations under FOIA. If the records were copied to Holdren's official email account, that may satisfy the Federal Records Act, which generally does not require the agency to store multiple copies of the same record. As the court noted in its prior ruling, in order to state a claim" under the Federal Records Act, "CEI must plausibly allege that Dr. Holdren failed to copy his official account with any agency records re-

siding on his unofficial account." *See CEI v. OSTP*, 82 F.Supp.2d 228, 236 (D.D.C. 2015). (Under the Federal Records Act, unlike under FOIA, the plaintiff bears the burden of proof.[8]). But that has nothing to do with whether these records are "agency records" subject to FOIA.

Records can be subject to FOIA even if they are duplicates. A FOIA requester can seek a record even if it could have been obtained elsewhere. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). Indeed, FOIA requesters can even request the very records that they have previously received under different FOIA requests. *National Sec. Counselors v. C.I.A.*, , 931 F.Supp.2d 77, 104 (D.D.C. 2013) ("The Court finds nothing in the FOIA that would 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."). Here, the presence of the emails in Dr. Holdren's account would provide a new piece of information.

In any event, OSTP refuses to produce even the work-related emails that were copied to Holdren's official account. *CEI v. OSTP*, 82 F.Supp.2d 228, 232 n.3 (D.D.C. 2015). OSTP cannot refuse to produce emails from this account because copies exist elsewhere, when it also refuses to produce those very copies. It cannot rely on the availability of records that it then renders unavailable. That is a Catch-22 argument.

III. This Account Likely Contains Agency Records Found Nowhere Else

More importantly, there is every reason to believe that the jholdren@whrc.org account does contain uncopied agency records found nowhere else. In another lawsuit between the parties,

[8] *See CEI v. OSTP,* 82 F.Supp.3d at 236 n.9 (noting that plaintiff CEI had "the burden of proof" under the Federal Records Act, which it could not "shift" to OSTP); *compare Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (under FOIA, the "'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'").

OSTP conceded that it "has not made any determination regarding whether Dr. Holdren used non-official email accounts to send any version of the draft responses" of an agency ruling on a CEI information correction request. *See CEI v. OSTP*, No. 14-1806, ECF No. 32-1, Exhibit 2 (*Defendants' Responses and Objections to Plaintiff's First Set of Interrogatories,* Response to Interrogatory No. 5).[9] Since even OSTP does not know whether the account was used to transact government business, it by definition cannot meet its burden of proving a thorough search without first searching the account. *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (The "'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'"). Yet, "OSTP has not searched Dr. Holdren's non-official email accounts."[10]

OSTP has quite deliberately avoided even asking Holdren whether his email account contains agency records clearly responsive to a different CEI FOIA request.[11] This is true even though

[9] OSTP produced such draft responses from Dr. Holdren's official account, and did not suggest that any were copied to or from his jholdren@whrc.org account. *See CEI v. OSTP*, D.D.C. Civil Action No. 14-1806, Declaration of Rachael Leonard in support of OSTP's response to the Court's Order to Show Cause*,* ECF No. 20-2 (filed, April 6, 2016), ¶ 23.

[10] *CEI v. OSTP*, D.D.C. Civil Action No. 14-1806, ECF No. 32-1, Exhibit 2, *Defendant's Responses and Objections to Plaintiff's First Set of Interrogatories* (June 20, 2016), Response to Interrogatory No. 4. These responses are attached as Exhibit 2 of the Bader Declaration filed in that case, ECF No. 32-1 (filed, Sept. 6, 2016).

[11] *See CEI v. OSTP,* Civil Action No. 14-1806, Defendant's Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Compel Additional Searches (ECF No. 33) at 10 (filed, Sept. 23, 2016) ("OSTP has not asked its employees whether they used non-official email accounts to send drafts of OSTP's response to CEI's information correction request to any person who is not a federal employee."); *CEI v. OSTP*, No. 14-1806, ECF No. 32-1, Exhibit 1, *Defendant's Responses and Objections to Plaintiff's Second Set of Interrogatories*, Response to Interrogatory No. 6 (making the same admission), attached to Declaration of Hans Bader, ECF No. 32-1, filed in that case, *CEI v. OSTP*, No. 14-1806 (filed Sept. 6, 2016).

just a single instance of a personal email account being used for official business can render a refusal to search the account unreasonable under governing caselaw.[12]

From this suspicious refusal to even ask, one can deduce that it is likely that the account contains such files. When an agency fails to provide information that is within its possession, that gives rise to an inference that that information is adverse to its position. *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). "When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to' that party" under "the adverse inference rule." *Radio TV Reports v. Ingersoll*, 742 F.Supp. 19, 22 (D.D.C. 1990), *quoting UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C.Cir.1972*); accord Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Clifton v. U.S.*, 45 U.S. 242, 247 (1846); 2 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.").

OSTP has speculated that no *uncopied* responsive agency records exist in the WHRC account, because under OSTP policy (as required by the Federal Records Act), if "OSTP employees received work-related communications on a personal account, they were required to promptly forward any such emails to their OSTP account." *Defendants' Memo.* at 18-19. But the existence of

[12] *See Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 181-82 (D.D.C. 2013) (finding that agency failed to prove it conducted an adequate search where it "did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," even though the plaintiff pointed to "one disclosed record—an email originating from the personal email account of" a former Deputy Administrator "as evidence that upper-level EPA officials conducted official business from their personal email accounts"; this "one concrete example of a personal email being used for official purposes" was sufficient to preclude "summary judgment as to the adequacy of the EPA's search.").

a sometimes-flouted policy hardly proves it was followed, any more than the existence of laws against speeding proves that motorists do not speed. As OSTP itself notes, an OSTP employee "inadvertently failed [sic] forward to his OSTP email account work related emails received on his personal account." *Id.* at 19. The employee did this, even though that violated the Federal Records Act, which has been law for decades.[13] OSTP cites the agency's own memo, which "describes how one of our employees recently fell short" in complying with, *inter alia*, "the Federal Records Act."[14] As that memo noted,

> "OSTP is subject to the Federal Records Act (FRA). FRA guidance was provided to you at your in-briefing; more detailed information is available at http://www.archives.gov/recordsmgmt/publications/documenting-your-public-service.html. In general, the FRA requires that OSTP employees preserve records of government business, including emails. See 44 U.S.C. § 3301. . . . 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. . .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."[15]

Notwithstanding such longstanding Federal Records Act requirements, agencies have often searched officials' personal email accounts to make sure agency records were not there. The agencies recognized that they could not just assume compliance with the Federal Records Act,

[13] *See* ECF No. 7-6 (filed 7/1/2014). This is also available in the Joint Appendix on appeal at JA 117-18, available at https://cei.org/sites/default/files/CEI%20v.%20OSTP%20-%20No.%2015-5128%20-%20Joint%20Appendix%20-%20FILED_0.pdf

[14] *Id.* at JA 117.

[15] *Id.* at JA 117-18.

but had to actually conduct a search of their employees' personal email accounts, and submit a search declaration attesting to that.[16]

Presuming that OSTP officials like Dr. Holdren followed all agency policies about handling agency records also makes little sense in light of OSTP's demonstrated carelessness in handling other FOIA requests sought by this very plaintiff. In a May 9 ruling involving another CEI request, Judge Mehta found evidence of carelessness and possible "bad faith" at OSTP, due to inaccurate claims by the agency, which were belied by belated disclosures of responsive records sent by Dr. Holdren himself. *See CEI v. OSTP*, No. 14-1806, 2016 WL 2642961, *1 (D.D.C. May 9, 2016) (discussing OSTP's careless handling of CEI's other FOIA request, including repeatedly overlooking responsive records, and making erroneous claims to the court about their existence and who they were shared with, including drafts shared by Dr. Holdren outside the agency).

Where an agency has made inaccurate (or even merely inconsistent statements), it is inappropriate to allow the agency to avoid a comprehensive search of all possible places where responsive records may be found. *See McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983) ("agency should bear the responsibility of convincing the trier of fact that its less than comprehensive search is reasonable under the circumstances"); *Landmark Legal Foundation v. E.P.A.,* 959

[16] *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"; briefs in the case indicate it involved Yahoo and AOL accounts); *Wilderness Society v. Dept. of Interior*, D.D.C. Civil Action 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, and DOI will file a supplemental search declaration" attesting thereto).

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 barred summary judgment, where agency first suggested entire database was searched, then "clarified" that "only one component" had been searched).

Moreover, it is a common and recurring problem for federal officials to conduct agency business using personal email, and then to forget about the need to forward such emails to their official account. That has led to missing records in the case of high-ranking federal officials.[17]

Even if we 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. First, 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 44 U.S.C. 3301 with respect to such agencies."[18]

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[17] *See* United States Senate Environment and Public Works Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) (noting that many high-ranking federal officials used non-official email accounts, and that the former EPA Administrator "no longer has responsive emails" in which she "used personal email," *see id.* at 14), available at http://www.epw.senate.gov/public/_cache/files/513a8b4f-abd7-40ef-a43b-dec0081b5a62/9913epwminoritystaffreporttransparency.pdf); *see also* Stephen Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Washington Times, August 14, 2013, at A1 (high-ranking official failed to turn over work-related emails in private account); *Stephen Dinan, EPA Officials Lied About Email Use, Senator Says,* Washington Times, March 11, 2013, at A4; Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Washington Times, April 2, 2013, at A1

[18] National Archives, *Disposition of Federal Records: A Records Management Handbook: 2000 Web Edition (of 1997 printed publication)*, Chapter Two

Second, Dr. Holdren, a non-lawyer, may not be familiar with the intricacies of what constitutes an "agency record" versus a "personal record" (which is a subject that has generated a long line of D.C. Circuit decisions parsing the difference, and sometimes overturning the decisions of learned trial judges). In Congressional testimony, Dr. Holdren has taken a strikingly narrow definition of what constitutes "personal" rather than "official" agency business. For example, he was asked by Congressman Weber about an instances in which he "filmed a short video for the White House web site entitled 'The Polar Vortex,'" in which he stated that "'a growing body of evidence suggests 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.'"[19] Weber asked him if this was "an expression of your personal opinion" and thus not an agency statement covered by the "Federal Information Quality Act."[20] 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.[21]

Dr. Holdren's pinched view of what constitutes agency business may have resulted in him erroneously failing to forward some covered agency records to his official account, based on the

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http://www.archives.gov/records-mgmt/publications/disposition-of-federal-records/chapter-2.html.

[19] *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).

[20] *Id.*

[21] *Id.*

misapprehension that they were not sufficiently connected with agency business to constitute an agency records. *Cf. Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that Michael Dettmer had withheld records as "personal"" but did not require that "he submit those records for review" by the Department.).

IV. The DC Circuit Rejected the Alternative OSTP Argument Mentioned In This Court's Ruling on the Motion to Dismiss

Previously, OSTP has objected to searching the account, and the issuance of an order to preserve the responsive emails, based on an argument that simply ignores the plain language of the D.C. Circuit's recent ruling in this case. *See CEI v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016). In granting OSTP's motion to dismiss on the ground that the agency did not "withhold" the emails in the jholdren@whrc.org email account, this Court, in footnote 4 of its ruling, reserved OSTP's argument that it did not "create or obtain" the records, which thus should not be deemed "agency records."[22] In light of that, OSTP's counsel says that "we believe the 'agency records' portion of our motion to dismiss remains pending before Judge Kessler."[23]

But the D.C. Circuit's ruling washed away the foundations of this argument. This argument was based on the assumption that records created by Dr. Holdren were not created by the agency, due to the argument that "even high ranking agency officials have personal interests distinct from those of the agencies they lead." *CEI v. OSTP*, 82 F.Supp.3d 228, 234 (D.D.C. 2015), *rev'd*, 827

[22] *CEI v. OSTP*, 82 F.Supp.3d 228, 232 n.4 (D.D.C. 2015), *rev'd*, 827 F.3d 145 (D.C. Cir. 2016).

[23] Email from Daniel Schwei to Hans Bader, sent on October 7, 2016 11:29 AM, quoting Schwei's Sept. 8 email to Bader.

F.3d 145 (D.C. Cir. 2016).[24] But such reasoning was squarely rejected by the D.C. Circuit's decision, which noted that an agency head is not "distinct from his department for FOIA purposes," *see CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016). Thus, any work-related records Dr. Holdren created or obtained were also created or obtained by OSTP.

The D.C. Circuit rejected the distinction that OSTP sought to draw, because it analogized what records are in an agency's "control" (for purposes of "withholding") with what records are within an agency's control for purposes of "agency records," and find that requisite degree of control here. It found sufficient control for "withholding" because there was also sufficient control to make the records "agency records" under pre-existing D.C. Circuit precedent finding that agency records held by contractors or agency employees are within an agency's "constructive control":

> More nearly on point is *Burka v. U.S. Department of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). In *Burka*, a requestor sought disclosure from the Department of Health and Human Services of data tapes and questionnaires regarding smoking habits and attitudes conducted by an agency within the Department. 87 F.3d at 510–13. As relevant here, we held in Burka, that the agency must search and disclose records that were not on its premises but were under its "constructive control." Id. at 515. This comes closer to the question before us.

CEI v. OSTP, 827 F.3d 145, 149 (D.C. Cir. 2016).

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"). But it did definitively reject OSTP's "control" argument, along with its subsidiary "create or obtain" argument, obliterating the argument reserved in footnote 4 of

[24] *See also CEI v. OSTP*, 82 F.Supp.3d 228, 233 n.5 (D.D.C. 2015) ("CEI argues that 'employees are not distinct from their agencies.' Pl.'s Opp'n at 4 (quoting Judicial Watch, Inc. v. Dep't of Energy, 310 F.Supp.2d 271, 300 (D.D.C.2004))" but "the district court was reversed on this point. *See Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 132 (D.C.Cir.2005).")

this Court's 2015 ruling. *CEI v. OSTP*, 827 F.3d at 149 (agency head is not "distinct from his department for FOIA purposes").

V. OSTP's Empty Assurances of Preservation Are No Reason to Avoid Collecting and Preserving the Records, Some of Which May Already Have Been Deleted

OSTP has said that no preservation order is necessary, because it will provide written assurances that the records will be preserved. But courts have issued preservation orders even in the face of such assurances. And such assurances are empty, because OSTP cannot control Dr. Holdren after he leaves government services, and any representations Dr. Holdren makes in any written assurance will only be statements of his present intent, not his future intent, meaning that he may change his mind about preserving the documents in the future, and decide he would rather destroy them.

Moreover, responsive emails may already have been deleted. In an October 10, 2016 3:38 PM email, defense counsel refused to answer whether Dr. Holdren had already deleted responsive records, and made clear that any assurances would be prospective only, suggesting that any compliance by Dr. Holdren with FOIA may be grudging at best. In response to repeated queries from plaintiff's counsel beginning on October 6,[25] defense counsel Daniel Schwei finally wrote:

> Regarding your queries about prior deletion of e-mail, you raised this issue for the first time on Thursday, October 6, only two business days prior to the status conference. The prior two-and-a-half weeks of correspondence focused exclusively on the prospective preservation of records, which is also the only concern you articulated at the status conference. As such, I am not in a position to answer your question about the retrospective retention of e-mails.

[25] *See, e.g.,* October 7, 2016 2:59 PM email from plaintiff's counsel Hans Bader to defense counsel Daniel Schwei ("has Dr. Holdren deleted any responsive emails from the WHRC email account? You haven't answered my queries about this.").

This statement is alarming, because agency counsel or FOIA staff should have been in touch with Dr. Holdren from the very beginning, to ensure that he did not delete any responsive records. *See Chambers v. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2004) ("An agency" is liable under FOIA "if it . . . destroys a document after it has been requested under FOIA."). It also suggests that Holdren may feel free to destroy such records unless a preservation order is issued.

The agency has also ignored multiple requests from plaintiff for a litigation hold to preserve the responsive records, even though other agencies have issued such holds in FOIA litigation that apply to both official and personal email accounts of agency employees.[26]

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[26] *See* email from plaintiff's counsel Hans Bader to defense counsel Daniel Schwei, September 20, 2016 6:59 PM:

> "Again, as in my August 23, September 8, and September 16 emails, I request that OSTP take steps to preserve the responsive emails, including not limited to a litigation hold, and preserving them in agency recordkeeping systems. We requested on August 23 at 6:02 PM that OSTP take "steps to preserve the responsive emails in the WHRC account, including having them stored in official agency accounts or official recordkeeping systems (which would facilitate their review and production by agency FOIA staff). If not, we request that the agency do so now, including issuing a litigation hold protecting them, and retrieving them for preservation in official agency accounts where they will not be at risk of loss. *See Landmark Legal Foundation v. E.P.A.*, --- F.Supp.3d ----, 2015 WL 971206, *11, *2, *10 (D.D.C. 2015) (No. 12-1726) (agency's 'litigation hold notice [in a recent FOIA case] orders [agency] staff not to delete potentially relevant information from personal devices or email accounts.'; That litigation hold, issued on October 23, 2012, directed agency officials to preserve 'any materials,' including 'electronic' ones, that were 'potentially relevant to' Landmark Legal Foundation's FOIA Request. It ordered officials to preserve all 'Electronically Stored Information ['ESI'],' including 'emails,' noting that 'it does not matter whether the ESI is stored on . . . your EPA-issued desktop and/or laptop computer, privately owned computers or other devices, or in personal email accounts.'; 'The litigation hold notice states that '[f]orwarding emails from your personal email account to your agency account will not relieve you of the responsibility for preserving the emails in your personal account.". . . The hold further commanded EPA employees not to 'delete any [potentially relevant information] from your personal email account.')"

Defense counsel replied to the email containing this request, but not this request itself. *See* Email from Daniel Schwei to Hans Bader, 9/26/2016 12:47 PM.

The agency's offer to provide "prospective" written assurances that records will not be destroyed in the future does not change the need for an order. Written assurances do not militate against a court order to preserve records. In *Citizens for Responsibility And Ethics In Washington v. Office of Admin*., 593 F.Supp.2d 156 (D.D.C. 2009), the agency "maintain[ed] that the assurances of its attorneys that NARA [the National Archive, to which the records had been entrusted] will preserve and return the potentially responsive documents, if requested, should be sufficient to satisfy both" the FOIA requester and the court. *Id.* at 160. As it noted, "NARA has further committed to store" the records "under appropriate security . . . NARA has also agreed to 'promptly return these, and all other [responsive] records to" the agency "should it be determined that" the records were "subject to the FOIA." *Id.*

The court was not satisfied with these assurances, because "'a declaration does not have the force of an order. Unlike a court order, a declaration is not punishable by contempt.'" *Id.* at 162, *quoting CREW v. Office of Admin.*, 565 F.Supp.2d 23, 30-31 (D.D.C. 2008). Although the court presumed "that executive officials will act in good faith," this assumption was insufficient to deny relied, since "absent a court order punishable by contempt requiring the maintenance and preservation of the records here at issue, in the event [the FOIA requester] is successful on its appeal, it would have no recourse if the documents were not so maintained and preserved." 593 F.Supp.2d at 163.

VI. OSTP's Representations About Responsive Records Have Proven to Be Unreliable

OSTP's written assurances and representations are in any event too unreliable to rely on. And OSTP and its employees have a tendency to overlook or misplace records. As another judge of this Court noted in a different FOIA case between plaintiff and OSTP, "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—sufficient to warrant limited discovery—about Defendant's good faith in processing Plaintiff's FOIA request." *CEI v. OSTP*, No. 14-1806, 2016 WL 2642961, *1 (D.D.C. May 9, 2016) (Mehta, J.). "Defendant's representations that it conducted a reasonable search designed to locate all relevant records has proven to be inaccurate time and again." *See id.* at *3. OSTP does not explain why this Court should place faith in written assurances from it when its 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, e.g., CEI v. OSTP*, No. 14-1806, 2016 WL 2642961, *2 ("In the course of complying with the court's Order, Defendant found two new drafts substantively similar to the Francis Draft. Dr. Holdren had sent one of them outside the Executive Branch to Dr. Rosina Bierbaum, a professor and former dean at the University of Michigan School of Natural Resources and Environment.").

After these belated disclosures, which show that responsive records were repeatedly overlooked, it is now vital to thoroughly search all of Dr. Holdren's email accounts to ensure that all responsive records are identified and collected.

VII. Collection of the Records Is Needed Now, Rather Than Later, to Preserve Access to the Records and Prevent Irreparable Harm and Protect the Public Interest

Collection of the records by agency FOIA staff is needed now, rather than later, since Dr. Holdren is a political appointee who may leave office after the election (or even before). Historically, OSTP has changed directors with the election of a new President, even when the new president is of the same political party as the old; and most OSTP heads are in office for two years or

less.[27] The D.C. Circuit held that the jholdren@whrc.org account is subject to OSTP's control because he is its head. *CEI v. OSTP*, 827F.3d 145, 149 (D.C. Cir. 2016) ("If the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced."). But that reasoning may no longer apply after Holdren leaves office, at which point, he will no longer be the "agency head," leaving uncertain whether responsive records in that email account will continue to be deemed subject to OSTP's control.

Thus, "absent a court order punishable by contempt requiring the maintenance and preservation of the records here at issue," plaintiff will "have no recourse if the documents were not so maintained and preserved." *See Citizens for Responsibility And Ethics*, 593 F.Supp.2d at 163.

VIII. All Four Requirements For Preliminary Injunctive Relief Are Satisfied

In consider whether to order an agency to preserve documents during the pendency of a FOIA lawsuit, courts consider four factors: whether the plaintiff faces a risk of irreparable harm; whether the plaintiff presents a serious legal question for whether the records are subject to FOIA; whether other parties will be harmed by granting the order; and the public interest. *Citizens for Responsibility And Ethics*, 593 F.Supp.2d at 160-65. All four factors favor an order to identify and preserve the records at issue in this case.

As noted above, plaintiff has no recourse, absent a court order, if the documents are not maintained and preserved. That constitutes "irreparable harm" sufficient to warrant a preservation order or other preliminary injunctive relief (such as an order to search the account and collect and preserve any responsive records found therein. *See id.* at 163.

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[27] *Office of Science and Technology Policy*, Wikipedia, https://en.wikipedia.org/wiki/Office_of_Science_and_Technology_Policy (new OSTP head appointed in 1989 by George H.W. Bush to replace its Reagan-era head; 17 people have headed OSTP since the Carter Administration).

As the Court of Appeals' ruling in favor of plaintiff in this case suggests, plaintiff has presented a "serious legal question" as to whether FOIA applies in this case. *See Citizens for Responsibility And Ethics*, 593 F.Supp.2d at 160-61. Plaintiff need not prove the emails in the account are actually covered by FOIA (as they in fact likely are) to prevent their destruction. *See id.* at 161 (even though judge had ruled that records were not covered because the defendant was not an agency covered by FOIA, the judge ordered the records preserved pending appeal, because the question was "a close one" on which the appeals court could reasonably disagree with the trial judge).

The "public interest strongly favors the granting of a stay" or other relief to preserve these records. *Id.* at 165, *citing CREW*, 565 F.Supp.2d at 31. The "basic purpose of FOIA is to ensure an informed citizenry, vital to the function of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). If non-privileged agency records are found in the account, the result will be that this "information is subject to disclosure, [and] belongs to all." *NARA v. Favish*, 541 U.S. 157, 172 (2004). "As such, the public interest certainly favors ensuring that [the agency's] records are preserved while" so that this Court can rule on whether they are subject to FOIA. *Citizens for Responsibility And Ethics*, 593 F.Supp.2d at 165.

And such an order will not harm the agency or Dr. Holdren, who will not be stripped of any rights to use the records in question. Nor will it violate his rights, since the FOIA request in question only seeks OSTP-related records, not records of a purely personal nature, and since no "privacy interest" exists "in a public record." *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 "various provisions of the state and

federal constitutions" such as the Fourth Amendment). Courts can, and do, issue injunctions in FOIA cases that apply not only to agencies, but also their employees, such as Dr. Holdren, requiring them to collect potentially responsive records. *See, e.g., Union Pacific R. Co. v. EPA*, Civil Case No. 10-235, 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).

IX. Identification of Responsive Records Should Not Be Left Solely to Dr. Holdren

To avoid any possible conflicts of interest, and in light of Dr. Holdren's pinched view as to what constitutes agency business[28], an OSTP staffer other than Dr. Holden – such as Rachael Leonard, who is the Chief Freedom of Information Act officer of OSTP[29] – should conduct the search of Dr. Holdren's non-official email accounts, to identify and collect potentially responsive records. *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 FOIA's purpose is defeated if employees can simply assert that records are personal rather than agency records without agency review; faulting agency for the fact that it "was aware that Michael Dettmer had withheld records as "personal"" but did not require that "he submit those records for review" by the agency.). Since Ms. Leonard typically submits search declarations on behalf of OSTP[30] (she has previously

[28] For example, Dr. Holdren described his statement in an OSTP video on the official White House web site as merely his "personal opinion," even though it was paid for by taxpayers. *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).

[29] *See CEI v. OSTP*, D.D.C. Civil Action No. 14-1806, Declaration of Rachael Leonard in support of OSTP's response to the Court's Order to Show Cause, ECF No. 20-2 (filed, April 6, 2016), ¶ 1.

[30] *Id.*

searched Dr. Holdren's records[31]), she would then be in a position to describe the search terms used for the search, and explain why they were reasonably calculated to collect all responsive records, in any future search declaration submitted by OSTP.

X. Dr. Holdren Should Submit a Declaration About Whether He Deleted Emails

Dr. Holdren should also be instructed not to delete anything in the account, and to disable any auto-deletion programs in his account, including those affecting previously deleted emails.[32] And to facilitate the recovery of any responsive emails that may have been deleted since plaintiff submitted its FOIA request,[33] Dr. Holdren should also be required to submit a declaration indicating whether he has deleted any emails in the account since plaintiff submitted its FOIA request on Oct. 16, 2013; whether his email account contains any auto-deletion program; and whether he has disabled all such auto-deletion programs in his account. If he has deleted any emails from the account, he should indicate whether responsive emails continue to exist in any archive of emails, such as on his home computer.

Respectfully submitted this 17th day of October, 2016,

___/s/ Hans Bader_____
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[31] Ms. Leonard previously searched Dr. Holdren's records in response to a different FOIA request by plaintiff to OSTP. *See CEI v. OSTP*, D.D.C. Civil Action No. 14-1806, ECF No. 32-1, Exhibit 2, *Defendant's Responses and Objections to Plaintiff's First Set of Interrogatories* (June 20, 2016), responses to interrogatories No. 3 & 11. These responses are attached as Exhibit 2 of the Bader Declaration filed in that case, ECF No. 32-1 (filed, Sept. 6, 2016).

[32] *Cf. Landmark Legal Foundation v. EPA*, 2015 WL 971206, *11, *2, *10 (D.D.C. 2015) (No. 12-1726) (agency's "litigation hold notice [in a recent FOIA case] orders [agency] staff not to delete potentially relevant information from personal devices or email accounts.").

[33] *Chambers v. Department of the Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2004) (agencies are required to preserve responsive records after a FOIA request comes in, and may not delete them).

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, a copy of the foregoing Plaintiff's Motion to Compel Preservation of Private Emails and Memorandum of Points and Authorities, 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:

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