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 STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Civil Rule 7(h)(1), Plaintiff hereby submits the following statement of genuine issues of material fact in opposition to Defendant's motion for summary judgment. The following responses are numbered to correspond with the relevant paragraphs of defendant's Statement of Material Facts.

11. Plaintiff denies that Dr. Holdren's consistent "practice was to 'forward'" all OSTP-related e-mail to his "official e-mail account at OSTP or to copy" his official account on the correspondence, and denies that he "ensured" that all "OSTP-related email was preserved on OSTP's official system." Plaintiff has repeatedly questioned whether Dr. Holdren *always* forwarded work-related emails to his official account.[1] But OSTP has never answered this question, even after this Court noted that "policies are rarely followed to perfection by anyone,"[2] and Dr. Holdren has merely asserted it was his "*customary* practice."[3] His failure to address whether he always did so is evidence that this purported custom was not always followed.[4]

20. Plaintiff denies that "OSTP ceased its rolling productions of records from Dr. Holdren's OSTP account" in accord with the wishes expressed "in CEI's complaint." The point of the "statements in CEI's Complaint" was to complain that OSTP was *only* producing records from the official OSTP account, not the private account. It was not to prevent production of the Woods Hole emails from the official OSTP account, especially if the records turned out to only available from that account. Plaintiff made clear that it was seeking such documents from both accounts –

[1] *See, e.g.,* Plaintiff's Reply In Support of Motion to Compel Preservation at 5 (Nov. 10, 2016), ECF No. 29.
[2] Memorandum Opinion and Order (ECF No. 31) at 8.
[3] Holdren Decl. ¶ 7 (emphasis added).
[4] *See, e.g.,* 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."); *Interstate Circuit. v. U.S.*, 306 U.S. 208, 226 (1939) (adverse inference can be drawn from "the production of weak evidence when strong is available").

not just Holdren's private email account – both before and after it filed the complaint. For example, on February 18, it emphasized that it had submitted a "request seeking OSTP-related email, *wherever located*,"[5] complaining that "OSTP searched *neither* account,"[6] and observing that it "makes sense for OSTP to search Mr. Holdren's OSTP account."[7] On April 18, it reiterated that "Our request covers OSTP-related documents *regardless of whether they are from an ostp.gov email account*," and "*regardless* of" which account "they are in."[8] CEI reiterated its desire for records in the OSTP account is its subsequent court filings as well.[9]

22. Plaintiff denies "that Dr. Holdren had a customary practice that, for any OSTP-related e-mails sent or received on his WHRC Account, Dr. Holdren ensured that those e-mails were ultimately captured in an OSTP system by copying or forwarding the e-mails to an official OSTP account." OSTP's "understanding" that this supposed customary practice existed is based on speculation in the form of hearsay contained in the declaration of Rachael Leonard (OSTP cites solely Leonard Decl. ¶ 15). If Dr. Holdren had failed to copy or forward an email from the WHRC account to the official OSTP account, Leonard would have had no way of knowing. This is just conjecture on her part. Plaintiff has repeatedly questioned whether Dr. Holdren *always*

[5] CEI's Letter of Feb. 18, 2014 (ECF No. 7-3) at pg. 3 fn. 1 (emphasis added).
[6] *Id.* at 13 (emphasis added).
[7] *Id.* at 3; *see id.* at 13 ("CEI explained to OSTP why it also made sense to search Mr. Holdren's OSTP account.").
[8] ECF No. 7-5 at 2 (the first page of this letter) (emphasis in original).
[9] See Plaintiff's Memorandum in Opposition to Motion to Dismiss (ECF No. 8) at *id.* at 18 (CEI is seeking "documents from both accounts – not just his private email account"); *id.* at 16 ("Defendant Is Withholding Records Plainly Within Its Possession That Actually Exist on Its Official Email Accounts"); *id.* at 19 ("Even if it were somehow true that FOIA does not reach work-related emails found solely in Holdren's whrc.org account, FOIA still reaches his official email account, and OSTP inarguably remains obligated to produce emails from that account").

forwarded work-related emails to his official account.[10] But Holdren never answered that question, and now OSTP merely asserts Ms. Leonard's vague "understanding" of Dr. Holdren's "customary practice," without showing (or pointing to any evidence) that it was always followed. OSTP's decision to rely on extraordinary weak, inadmissible hearsay evidence (Leonard's second-hand "understanding" of Holdren's purported "customary practice") suggests that the practice did not even exist, much less constitute a practice that was always followed.[11] Similarly, Holdren himself has not stated that he *always* followed such a custom, despite plaintiff raising the issue repeatedly; he has studiously avoided saying he *always* forwarded the emails to his official account, even in the face of this very question being raised. This gives rise to the inevitable inference that the Woods Hole emails have not all been forwarded to his official account.[12]

Plaintiff also denies that "OSTP's understanding is that Dr. Holdren had [this] customary practice." OSTP cites not Dr. Holdren for this proposition – which is very suspicious – but Rachael Leonard. No one would know better than Dr. Holdren whether this practice existed, yet this "statement of fact" cites Leonard, not Holdren. If Holdren does not allege that "any" and all emails were captured in an OSTP system by forwarding them, then OSTP lacks any such understanding, since it is Holdren who has direct knowledge of this subject; he is OSTP's head and "alter ego," not Leonard; an agency head like Holdren is not "distinct from his department for FOIA purposes."[13]

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[10] *See, e.g.,* Plaintiff's Reply In Support of Motion to Compel Preservation of Private Emails at pg. 5 (Nov. 10, 2016), ECF No. 29.
[11] *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").
[12] Wigmore, *Evidence In Trials At Common Law,* § 285 (Chadbourn rev. 1979) (non-production of available evidence "permits the inference that its *tenor is unfavorable to the party's cause.*").
[13] *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016).

23. Plaintiff denies that "Dr. Holdren followed his customary practice any time he sent or received an OSTP-related message on his WHRC Account." OSTP's "understanding" that this supposed customary practice existed is based on speculation in the form of hearsay declaration of Rachael Leonard (this statement cites solely Leonard Decl. ¶ 16). If Dr. Holdren had failed to copy or forward an email from the WHRC account to the official OSTP account, Leonard would have had no way of knowing. This is just conjecture on her part. Plaintiff has repeatedly questioned whether Dr. Holdren *always* forwarded work-related emails to his official account.[14] Ms. Leonard's vague "understanding" of Dr. Holdren's "customary practice" does not show, or provide any evidence, that it was always followed. OSTP's decision to rely on extraordinary weak, inadmissible hearsay evidence (Leonard's second-hand "understanding" of Holdren's purported "customary practice") suggests that the practice did not even exist, much less constitute a practice that was always followed.[15] Similarly, Holdren himself has not stated he *always* followed such a custom, despite CEI raising the issue repeatedly.[16]

Plaintiff denies that "OSTP's understanding is that Dr. Holdren followed his customary practice any time he sent or received an OSTP-related message on his WHRC Account." OSTP cites not Dr. Holdren for this proposition, but Rachael Leonard – which is very suspicious. Holdren has never even claimed that he followed such a custom every "time he sent or received an OSTP-related message on his WHRC Account." No one would know better than Holdren whether this

[14] *See* Plaintiff's Reply In Support of Motion to Compel Preservation at 5 (Nov. 10, 2016), ECF No. 29.
[15] *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").
[16] 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.*").

practice existed, yet OSTP's statement of facts cites Leonard, not Holdren. In the absence of such an understanding by Holdren, OSTP lacks any such understanding, since Holdren is OSTP's head, not Leonard, and an agency head is not "distinct from his department for FOIA purposes."[17]

24. Plaintiff denies that "OSTP is unaware of any basis for doubting Dr. Holdren's compliance with his customary practice," and also denies that there is no "basis for doubting Dr. Holdren's compliance with his customary practice." OSTP is well aware of such a basis: Plaintiff's past argument that Dr. Holdren's evasive declaration suggests that he did not always follow this purported customary practice. *See Plaintiff's Reply In Support of Motion to Compel Preservation of Private Emails* (ECF No. 32) at 5 (noting that Holdren's "failure to attest that he always followed this practice suggests that occasionally it was not," under decisions such as "*Gray v. Great American Recreation Ass'n*, 970 F.2d 1081, 1082 (2d Cir.1992)"). OSTP's subsequent refusals to address this question, and Dr. Holdren's continuing failure to attest that he always followed this purported practice, creates a stronger and stronger adverse inference that he did not.

Dr. Holden has merely attested that this was his "customary practice," not that he complied with it in each and every single case. Customary practices are not always followed.[18] 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.

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

[18] *Perez v. El Tequila, LLC*, 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").

Holdren's work email account," since "policies are rarely followed to perfection by anyone." Memorandum Opinion and Order (ECF No. 31) at 8. Indeed, Holdren 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. 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,[19] Holdren did not deny this, or submit any declaration claiming 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 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.

[19] *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.")

Moreover, OSTP has a history of making inaccurate statements about what records Dr. Holdren possesses, statements that "proven to be inaccurate time and again."[20]

25. Plaintiff denies that "OSTP is unaware of any incident in which Dr. Holdren failed to comply with his customary practice." The most knowledgeable person about whether Dr. Holdren failed to comply with his customary practice is Dr. Holdren himself – not Rachael Leonard. Her lack of awareness is irrelevant. Her purported "knowledge" of this is hearsay and conjecture. The fact that *she* is unaware of any such incident does not mean the he is unaware of any such incident. And he has not attested that he *always* followed this customary practice. OSTP cites not Dr. Holdren for this proposition, but rather Rachael Leonard – which is very suspicious.[21] Dr. Holdren has never even claimed that he followed such a custom every "time he sent or received an OSTP-related message on his WHRC Account." No one would know better than Dr. Holdren whether this practice existed, yet OSTP's statement of facts cites Leonard, not Holdren. This suggests awareness by Holdren that this purported custom was not perfectly followed. Such awareness constitutes OSTP's own awareness, since Holdren is OSTP's head, not Leonard, and an agency head is not "distinct from his department for FOIA purposes."[22]

26. Plaintiff denies that "the number of search results identified by OSTP appears consistent with Dr. Holdren being diligent about complying with his customary practice of copying or forwarding OSTP-related e-mails to his OSTP account." No matter how numerous the search results may

[20] *CEI v. OSTP*, 185 F.Supp.3d 26, 27 (D.D.C. 2016).
[21] *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").
[22] *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016).

have been, if the number of work-related emails in Dr. Holdren's Woods Hole account were substantially more numerous still, it would not show diligence in complying with that purported "customary practice," but rather the opposite. Dr. Holdren has never indicated how many work-related emails are in the WHRC account, which may be many thousands. And OSTP does not cite Dr. Holdren for this claim, which is suspicious, because he is the one OSTP employee who would know best whether this is true.

35. Plaintiff denies that "OSTP reasonably expects that a FOIA search of the WHRC Account would be duplicative of a search of the OSTP system" and denies that "a search of the WHRC account would not be reasonably likely to locate new OSTP-related e-mails not already on OSTP's system." OSTP cites not Dr. Holdren for this proposition, but rather Rachael Leonard – which is very suspicious, since Dr. Holdren would know better than Rachael Leonard, since this is his account, not hers. It is Holdren whose expectations count, since he, not Leonard, is OSTP's head, and an agency head is not "distinct from his department for FOIA purposes."[23] Moreover, as is explained in response to subsequent statements of fact, a search would not be duplicative, because of the unique metadata found in the emails in the WHRC account. Moreover, the search term used for the "search of Dr. Holdren's OSTP e-mail account" was "jholdren@whrc.org." Leonard Decl. ¶ 18. If a forwarded email did not contain that search term – even though it had been stored in that account – it would not show up in the search results, making them underinclusive. The emails in the WHRC account would thus not simply be duplicative of the subset of those emails that were gathered through an underinclusive "search of the OSTP system."

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

36. Plaintiff denies that "Because of Dr. Holdren's practice of copying or forwarding OSTP-related e-mails to his official OSTP account, the versions of those e-mails residing in the WHRC Account are cumulative and functional duplicates of the versions existing on the OSTP system." Forwarding emails eliminates certain metadata contained in the header of the email, such as the email address of senders or recipients.[24] Forwarding also removes the list of recipients of an email who have been "blind carbon copied,"[25] making it impossible to see what additional government officials may have been copied on the emails, to either their official or their private email addresses. 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). Moreover, OSTP cites not Dr. Holdren for this proposition, but rather Rachael Leonard – which is very suspicious, since Dr. Holdren would know better than Rachael Leonard, since this is his account, not hers.[26] That calls this proposition into question, providing additional support for the WHRC account containing emails that were found nowhere else. That means those emails are not "cumulative" or "functional duplicates of the versions existing on the OSTP system."

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[24] *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.").

[25] *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).

[26] *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").

37. Plaintiff denies that "[a]ny difference in metadata between those emails would not shed light on OSTP's substantive operations or undertakings." 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). Such 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.[27]

38. Plaintiff denes that "OSTP" lacks "access to Dr. Holdren's WHRC account." OSTP's General Counsel, Rachael Leonard, admits that "OSTP may be able to exercise leverage over its employees to encourage them to cooperate with OSTP's requests." Leonard Decl. (ECF No. 32-2) at ¶ 29. Indeed, it is the account used by its own director, Dr. John P. Holdren, who recently made thumb drives of the emails in the account. Declaration of Dr. John P. Holdren, at ¶¶ 1, 4, 8. Access by Holdren constitutes access by the agency, since an agency head is not "distinct from his department for FOIA purposes," *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016). Even as-

[27] *See, e.g.,* Senate Committee on Environment and Public Works, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8-13, http://goo.gl/CnGgtR; S. Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Washington Times, Aug. 14, 2013, at A1.

suming *arguendo* that Holdren has recently lost access to the email account itself, that is irrelevant 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."[28] And Holdren certainly had access to the account at the time of plaintiff's FOIA request. Declaration of Dr. John P. Holdren, ¶ 4. The D.C. Circuit rejected OSTP's argument that it lacks access and control, in its July decision, 827 F.3d 145 (D.C. Cir. 2016), and other agencies' practice of turning over personal emails of their employees belies this claim. Agencies have been producing emails from their employees' private email accounts for more than a decade, showing that such emails are accessible by agencies.[29] Indeed, they have produced thousands of pages of emails from former employees' personal email accounts.[30] Agencies have also searched home offices and personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching agency letter noting that its search for "responsive" records included "searching the home office and personal email account" of an agency employee).

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[28] *Judicial Watch, Inc. v. U.S. Dep't. of Commerce*, 34 F.Supp.2d 28, 44 (D.D.C.1998)

[29] *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"); *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, and DOI will file a supplemental search declaration" attesting thereto). In that 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).

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

39. Plaintiff denies that "OSTP does not have the ability to use or dispose of the e-mails existing on Dr. Holdren's WHRC account." OSTP's director, John P. Holdren, recently made thumb drives of the emails in the account. Declaration of Dr. John P. Holdren, at ¶¶ 1, 4, 8. Holdren's ability to use or dispose of the emails shows OSTP's ability to do so, since an agency head is not "distinct from his department for FOIA purposes," *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016). Even assuming *arguendo* that Holdren has recently lost access to the email account itself, that is irrelevant 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."[31] .And Holdren certainly had the ability to use the account (and the emails in it) at the time of plaintiff's FOIA request. *See* Declaration of Dr. John P. Holdren, ¶ 4.

The D.C. Circuit rejected OSTP's that it lacks the ability to access emails in employees' private email accounts, *see CEI v. OSTP*, 827 F.3d 145, 147-50 (D.C. Cir. 2016), and other agencies' practice of turning over personal emails of their employees belies this claim. Agencies have been producing emails from employees' private email accounts for years, showing that such emails are accessible and usable by agencies.[32] They have produced thousands of pages of emails from former employees' personal email accounts.[33] Agencies have also searched home offices and personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching 2012 agency letter noting that its search for "responsive" records included "searching the home office and personal email account" of an agency employee).

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[31] *Judicial Watch, Inc. v. U.S. Dep't. of Commerce*, 34 F.Supp.2d 28, 44 (D.D.C.1998).
[32] *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004).
[33] *See, e.g., Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Exhibit B to Defendant's Status Report (August 7, 2015) at pg. 1 (Letter from Undersecretary of State Patrick Kennedy).

41. Plaintiff denies that "OSTP does not have control of e-mails as they exist on Dr. Holdren's Woods Hole Account." The D.C. Circuit rejected this very argument by OSTP that it lacks access and control, in its July decision, 827 F.3d 145 (D.C. Cir. 2016), and other agencies' practices of turning over personal emails of their employees belies this claim. OSTP admits it has "leverage over its employees to encourage them to cooperate with OSTP's requests." Leonard Decl. (ECF No. 32-2) at ¶29. Moreover, this is the account used by its own director, Dr. John P. Holdren, who recently made thumb drives of the emails in the account. Declaration of Dr. John P. Holdren, at ¶¶ 1, 4, 8. Access by Holdren is access by the agency, since an agency head is not "distinct from his department for FOIA purposes,"[34] Even assuming *arguendo* that Holdren has recently lost access to the email account itself, that is irrelevant 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."[35] And Holdren certainly had access to the account at the time of plaintiff's FOIA request. *See* Declaration of Dr. John P. Holdren, ¶ 4.

Agencies have been producing emails from their employee's private email accounts for years, demonstrating that such emails are "readily" obtainable and "reproducible."[36] Indeed, they have produced thousands of pages of emails from former employees' personal email accounts.[37] Agencies have also searched home offices and personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching 2012 agency letter

[34] *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016).
[35] *Judicial Watch, Inc. v. U.S. Dep't. of Commerce*, 34 F.Supp.2d 28, 44 (D.D.C.1998).
[36] *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004).
[37] *See, e.g., Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Exhibit B to Defendant's Status Report (August 7, 2015) at pg. 1 (Letter from Undersecretary of State Patrick Kennedy).

noting that its search for "responsive" records included "searching the home office and personal email account" of an agency employee).

42. Plaintiff denies that "[a]side from Dr. Holdren, no OSTP personnel have ever read or relied upon the versins of the emails existing within the WHRC account." The Leonard declaration cited does not deny they were relied upon after being transmitted to other employees. Leonard has never looked at "the emails existing within the WHRC account," so she has no idea which of them may have been sent to the personal email addresses of other OSTP employees, or employees of other federal agencies. Moreover, OSTP cites not Dr. Holdren for this proposition, but rather Rachael Leonard – which is very suspicious, since Dr. Holdren would know better than Rachael Leonard, since these are his emails, not hers. That increases the likelihood that the WHRC account contains emails that were found nowhere else, but which OSTP personnel read or relied upon (such as emails sent to or from their personal email accounts).

43. Plaintiff admits that the "emails have been shared with other OSTP employees by forwarding the e-mails to the official OSTP system." Plaintiff denies that "no OSTP employee aside from Dr. Holdren has read or relied on the versions of the e-mails existing on the WHRC account," since this is simply conjecture on Leonard's part, and her declaration contains inadmissible hearsay on this subject. Leonard has never looked at "the emails existing on the WHRC account," so she has no idea which of them may have been sent to the personal email addresses of other OSTP employees, or employees of other federal agencies. OSTP cites not Dr. Holdren for this proposition, but rather Rachael Leonard – which is very suspicious, since Dr. Holdren would know better than Rachael Leonard, since these are his emails, not hers. That adverse inference provides added support for the WHRC account containing emails that were found nowhere else, but which

were sent to OSTP employees at their personal email addresses, and which accordingly they read or relied upon without Ms. Leonard being aware of it.

44. Plaintiff denies that "the versions of the e-mails existing in the WHRC Account have never been integrated into OSTP's systems or files." The cited paragraph of the Leonard declaration does not preclude the transmittal of some of the emails with their original metadata to the official OSTP email account of employees other than Dr. Holdren. Even if the forwarding of an email from Dr. Holdren's account stripped out the original metadata, resulting in the forwarded version being a different version from the original, if the email was sent to, or received from, the official OSTP account of another OSTP employee, the version of the email present in that email address would contain the original metadata, and thus the original version of the email could be integrated into OSTP's official email accounts. Leonard's contrary assertion is simply conjecture, and her declaration contains inadmissible hearsay on this subject.

45. Plaintiff denies that "any OSTP-related emails that exist on the WHRC Account are duplicative and cumulative of the versions that exist on OSTP systems." The OSTP-related emails that exist on the WHRC Account are not duplicative because they contain unique metadata. Forwarding emails eliminates certain metadata contained in the header of the email, such as the email address of senders or recipients.[38] Forwarding also removes the list of recipients of an email who

[38] *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.").

have been "blind carbon copied."[39] 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).

Plaintiff denies the assertion that "OSTP considers the WHRC versions to be non-federal record material" because it cites only Ms. Leonard's declaration, not Dr. Holdren. Dr. Holdren would know better than Rachael Leonard, since this is his account, not hers. He is the head of the agency, not she, and an agency head is not "distinct from his department for FOIA purposes."[40] Dr. Holdren has not attested that each and every email is duplicative. Nor has he even denied that the emails he forwarded lost unique metadata in the process, rendering a great many of the Woods Hole emails non-duplicative by virtue of the metadata they contain, even assuming they were forwarded at all.

46. Plaintiff denies that "OSTP does not have the authority to intrude into its employees' homes" or "demand that its employees turn over the passwords to their personal email accounts for purposes of allowing OSTP to fulfill its obligations under FOIA." Moreover, this "statement of fact" includes assertions of law, to which no response is needed. OSTP's ability to demand such in-

[39] *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 "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).
[40] *CEI v. OSTP*, 827 F.3d 145, 149 (D.C. Cir. 2016).

formation is supported by its admission that OSTP has "leverage over its employees to encourage them to cooperate with OSTP's requests." Leonard Decl. (ECF No. 32-2) at ¶29. OSTP could have used the "leverage" OSTP admits it had over Holdren as an OSTP employee, to "demand" that Holdren turn over his password or permit a search of his home computer, or otherwise facilitate Holdren's compliance in turning over the responsive records. Moreover, no "privacy interest" exists "in a public record."[41] Agencies have been producing emails from their employee's private email accounts for years, demonstrating that such emails are "readily" obtainable and "reproducible."[42] Agencies have also searched home offices and personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching agency letter noting that its search for "responsive" records included "searching the home office and personal email account" of an agency employee).

47. Plaintiff denies that "If an OSTP employee refuses to cooperate, OSTP lacks the authority to intrude into an employee's private home, private e-mail account, or their private property absent the employee's consent." If an employee "refuses to cooperate" when asked to comply with his FOIA obligations, the agency can turn up the heat by threatening to censure, discipline, or fire the employee. As OSTP concedes, it has "leverage over its employees to encourage them to cooperate with OSTP's requests." Leonard Decl. (ECF No. 32-2) at ¶29. When compliance is made a condition of employment, employees will no doubt comply, even though compliance will

[41] *Nissen v. Pierce County*, 357 P.3d 45, 56 (Wash. 2015) (public employee could constitutionally be compelled to produce text messages on his private cell phone in response to a public records request).
[42] *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004).

be, in a sense, non-consensual due to the presence of pressure.[43] This contention includes assertions of law, to which no response is needed. But in any event, no "privacy interest" exists "in a public record."[44] OSTP does have the "authority" to use the employment relationship as leverage to compel employees to produce records even when they are located in a private home, private email account, or private property. Agencies have been producing emails from their employee's private email accounts for years, demonstrating that such emails are "readily" obtainable and "reproducible."[45] Indeed, they have produced thousands of pages of emails from former employees' personal email accounts.[46] Agencies have also searched home offices and personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Decl., Exhibit 1, pg. 2 (attaching agency letter noting that its search for "responsive" records included "searching the home office and personal email account" of an agency employee).

48. Plaintiff denies that OSTP has an "inability to compel an employee to cooperate in permitting access to his or her personal e-mail account." OSTP does have that ability. As OSTP concedes, it has "leverage over its employees to encourage them to cooperate with OSTP's requests." Leonard Decl. (ECF No. 32-2) at ¶29. Moreover, agencies have been producing emails from their employee's private email accounts for years, demonstrating they have the ability to do so.

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[43] Many people perceive consent to be negated by any form of pressure. *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881 (2016) (goo.gl/bPEy8N) (citing many campus discipline policies so stating, and citing an example from the University of Wyoming, *Where Is Your Line: Consent Is Sexy* (defining consent as being negated by "any sort of pressure" or "coercion," such as conduct permitted by a participant who is "reluctant") (goo.gl/sHsQUc).

[44] *Nissen v. Pierce County*, 357 P.3d 45, 56 (Wash. 2015).

[45] *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004).

[46] *See, e..g., Judicial Watch, Inc. v. Dept. of State*, D.D.C. No. 1:13-cv-01363-EGS, Exhibit B to Defendant's Status Report (Aug. 7, 2015) at 1 (Letter from Undersecretary of State Kennedy).

Agencies have also searched employees' private emails n response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching agency letter noting that its search for "responsive" records included "searching the home office and personal email account" of an agency employee); *Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004).

Plaintiff also denies that emails in Holdren's "personal account are not 'readily reproducible' by OSTP." Not only are they readily reproducible, Holdren demonstrated that they are readily reproducible by doing so already, by downloading them "to two thumb drives," Declaration of Dr. John P. Holdren, ¶ 8 (ECF No. 26-1). Moreover, those thumb drives are in a "readily accessible location," *Id.* at ¶ 9, where OSTP can easily access them, especially 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." Declaration of Dr. John P. Holdren, ¶ 11.

49. Plaintiff denies that "allowing a private individual to submit a FOIA request and thereby obtain judicial scrutiny of a federal employee's personal e-mail account would constitute a severe and extraordinary intrusion on that employee's personal privacy interests." It is blackletter law that FOIA is enforceable against agency employees, not just the agency itself, and no "privacy interest" exists "in a public record."[47] Moreover, requiring employees to turn over agency records in personal email accounts is not "extraordinary" at all, much less severe. Agencies have

[47] *Nissen v. Pierce County*, 357 P.3d 45, 56 (Wash. 2015) (public employee could constitutionally be compelled to produce text messages on his private cell phone in response to a public records request).

been producing emails from their employee's private email accounts for years. *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004). Agencies have also searched personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching 2012 agency letter noting that its search for "responsive" records included "searching the home office and personal email account" of its employee).

50. Plaintiff denies that "[a]llowing private individuals to obtain this type of scrutiny of a federal employee's personal e-mail account would be a substantial disincentive in the recruitment and retention of federal employees." OSTP cites no evidence for this, only Ms. Leonard's conclusory assertion that it would be a disincentive (*see* Leonard Decl. ¶ 32). Agencies have been producing emails from their employee's private email accounts for years,[48] without any evident apparent effect on applications for federal employment, and without resulting in employee departures (federal employee turnover is quite low relative to the private sector[49]). Agencies have also searched home offices and personal email accounts in response to plaintiff's past FOIA requests. *See, e.g.,* Horner Declaration, Exhibit 1, pg. 2 (attaching agency letter noting that agency's search for "responsive" records included "searching the home office and personal email account" of an agency employee). Yet, people continue to apply for (and work in) federal jobs.

Respectfully submitted this 10th day of January 2017,

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[48] *See, e.g., Wilderness Society v. Dept. of Interior*, 344 F.Supp.2d 1, 21 n.20 (D.D.C. 2004).
[49] *See, e.g.*, Brian Reed, *Why Government Workers Have Low Turnover,* Wall Street Journal, Dec. 16, 2015 (noting the "phenomenally low turnover rate in federal employment"), http://www.wsj.com/articles/why-government-workers-have-low-turnover-1450306273.

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, a copy of the foregoing Plaintiff's Statement of Genuine Issues of Material Fact 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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