[ORAL ARGUMENT NOT SCHEDULED]

No. 15-5128

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE,

Plaintiff-Appellant,

v.

OFFICE OF SCIENCE AND TECHNOLOGY POLICY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The appellant in this Court, which was plaintiff in the district court, is the Competitive Enterprise Institute. The appellee in this Court, which was defendant in the district court, is the Office of Science and Technology Policy.

There were no amici curiae in the district court. An amicus brief in support of plaintiff was filed in this Court by The Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, Cable News Network, Inc., Courthouse News Service, Cox Media Group, Inc., Dow Jones & Company, Inc., First Amendment Coalition, First Look Media, Inc., Gannett Co., Inc., GateHouse Media, LLC, Investigative Reporting Workshop at American University, MediaNews Group, Inc., MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, National Public

Radio, Inc., The New York Times Company, News Corp, The News Guild - CWA, North Jersey Media Group Inc., Online News Association, TEGNA Inc., Tully Center for Free Speech, and The Washington Post.

B. Rulings Under Review

The ruling under review is the Memorandum Opinion and accompanying Order issued on March 3, 2015, by Judge Gladys Kessler, docket numbers 12 and 13. The opinion is published at 82 F. Supp. 3d 228.

C. Related Cases

This matter has not previously been before this Court or any other court. We are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Daniel Tenny
Daniel Tenny

TABLE OF CONTENTS

Page

GLOSSARY

INTRODUCTION 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE ISSUE 2

PERTINENT STATUTES 2

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. Facts and Prior Proceedings 5

SUMMARY OF ARGUMENT 12

STANDARD OF REVIEW 13

ARGUMENT 14

THE FOIA NEITHER COMPELS NOR AUTHORIZES AN AGENCY TO SEARCH A NONGOVERNMENTAL EMAIL SERVER 14

A. Documents on a nongovernmental email server are outside the possession or control of federal agencies and thus beyond the scope of the FOIA. 14

1. The FOIA reaches only documents that the agency possesses or controls. 14

2. Federal agencies do not possess or control documents on a nongovernmental email server. 18

3. Documents from nongovernmental email accounts are subject to the FOIA only insofar as copies are in the possession or control of the agency. 24

B. Cases that do not address FOIA's limitation to documents that the agency has "withheld" are inapposite. 28

CONCLUSION 34

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page**

Armstrong v. Bush,
924 F.2d 282 (D.C. Cir. 1991) 3, 5

Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice,
742 F.2d 1484 (D.C. Cir. 1984) 20, 30

Burka v. U.S. Dep't of Health & Human Servs.,
87 F.3d 508 (D.C. Cir. 1996) 30, 31

Citizens for Responsibility & Ethics in Wash. v. Office of Admin.,
566 F.3d 219 (D.C. Cir. 2009) 13

Competitive Enter. Inst. v. National Aeronautics & Space Admin.,
989 F. Supp. 2d 74 (D.D.C. 2013) 20

* *Founding Church of Scientology of Wash., D.C., Inc. v. Regan*,
670 F.2d 1158 (D.C. Cir. 1981) 15, 18, 23, 32

In re Auction Houses Antitrust Litig.,
196 F.R.D. 444 (S.D.N.Y. 2000) 32

Judicial Watch, Inc. v. Dep't of Energy,
412 F.3d 125 (D.C. Cir. 2005) 30

Judicial Watch, Inc. v. U.S. Secret Serv.,
726 F.3d 208 (D.C. Cir. 2013) 30

* *Kissinger v. Reporters Comm. for Freedom of the Press*,
445 U.S. 136 (1980) 3, 5, 9, 11, 12, 15, 16, 17, 23, 24, 28, 30, 32, 33

Landmark Legal Found. v. EPA,
959 F. Supp. 2d 175 (D.D.C. 2013) 31

* Authorities upon which we chiefly rely are marked with an asterisk.

* *National Sec. Archive v. Archivist of the U.S.*,
909 F.2d 541 (D.C. Cir. 1990) 17, 18

Ryan v. Dep't of Justice,
617 F.2d 781 (D.C. Cir. 1980) 21

Sparrow v. United Air Lines, Inc.,
216 F.3d 1111 (D.C. Cir. 2000) 19

Tax Analysts v. U.S. Dep't of Justice,
845 F.2d 1060 (D.C. Cir. 1988) 29

Statutes:

Freedom of Information Act, 5 U.S.C. § 552:

5 U.S.C. § 552 2

5 U.S.C. § 552(a)(1) 3

5 U.S.C. § 552(a)(1)-(2) 14

5 U.S.C. § 552(a)(2) 3

5 U.S.C. § 552(a)(3) 3, 15

* 5 U.S.C. § 552(a)(4)(B) 3, 9, 12, 15

5 U.S.C. § 552(a)(4)(F)(i) 22

5 U.S.C. § 552(a)(4)(G) 22

5 U.S.C. § 552(a)(6)(A) 17

5 U.S.C. § 552(a)(6)(B) 17

5 U.S.C. § 552(e) 21

5 U.S.C. § 552(f) 21

Presidential and Federal Records Act Amendments of 2014,
Pub. L. No. 113-187, 128 Stat. 2003 4

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

44 U.S.C. § 2904(a) 4

44 U.S.C. § 2905(a) 5

44 U.S.C. § 2911 ....4, 25

44 U.S.C. § 3101 4

44 U.S.C. § 3106(a) 5

44 U.S.C. § 3106(b) 5

44 U.S.C. § 3301 4

Legislative Material:

S. Rep. No. 93-854 (1974) 17

Rule:

Fed. R. App. P. 4(a)(1)(B) 2

GLOSSARY

FOIA	Freedom of Information Act
OSTP	Office of Science and Technology Policy

INTRODUCTION

This case stems from a request under the Freedom of Information Act that sought records not on a particular topic or subject matter, but on the basis of their location in a nongovernmental email account. Seeking all "email sent to or from jholdren@whrc.org" related to government business, plaintiff instituted this lawsuit in an attempt to force a federal agency to search the nongovernmental email account of its Director for work-related emails.

The adequacy of agency recordkeeping is governed not by the FOIA, but by the Federal Records Act. While plaintiff brought a claim under the Federal Records Act, plaintiff has not appealed the district court's dismissal of that claim. Instead, plaintiff has pursued a claim under the FOIA, arguing that the agency has a duty under the FOIA to search the nongovernmental email account of its employee. As discussed below, however, the FOIA does not require agencies to obtain additional records, but only to disclose the agency's existing records. Because the email account at issue was not under the control of the agency, the FOIA did not require the agency to search that account. The district court thus properly

rejected plaintiff's claim under the FOIA, and its judgment should be affirmed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. On March 3, 2015, the district court granted the government's motion to dismiss. Mem. Op. [JA 186]. Plaintiff timely appealed on April 22, 2015. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the Freedom of Information Act requires an agency to obtain and disclose emails from an email account that is not maintained or controlled by the government.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

The Freedom of Information Act, 5 U.S.C. § 552, requires federal agencies to make certain information available to the public. Some categories of information must be published in the Federal Register, *id.*

§ 552(a)(1), and other categories must be made available for public inspection and copying, *id.* § 552(a)(2). Relevant here is the requirement that agencies make records available, with certain exceptions, upon receiving a request from a member of the public. *Id.* § 552(a)(3).

Persons who are dissatisfied with an agency's response to a FOIA request may file a complaint in federal district court seeking "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). But the FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980).

A separate statutory scheme, the Federal Records Act, "governs the creation, management, and disposal of federal records." *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991). It defines "records" to include "all recorded information . . . made or received by a Federal agency under Federal law or in connection with the transaction of public business" that is "preserved or appropriate for preservation . . . as evidence" of the agency's functions or activities "or because of the informational value of data in

them." 44 U.S.C. § 3301. The statute requires the head of each federal agency to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." *Id.* § 3101. In addition, the Archivist of the United States is to "provide guidance and assistance to Federal agencies . . . to ensur[e] adequate and proper documentation of the policies and transactions of the Federal Government and ensur[e] proper records disposition." *Id.* § 2904(a). In November 2014 (before the district court's decision, but after the underlying events at issue in this case), the Federal Records Act was amended to include a provision requiring federal officers and employees who "create or send a record using a non-official electronic messaging account" to copy their official account or forward a copy of the record to an official account. Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, § 10, 128 Stat. 2003, 2014 (adding 44 U.S.C. § 2911).

If an agency head becomes aware of the unlawful removal or destruction of records, the Federal Records Act authorizes the agency head to initiate legal action through the Attorney General. 44 U.S.C. § 3106(a). If the Archivist becomes aware of the unlawful removal or destruction of records, the Archivist is to notify the agency head and assist the agency head in instituting legal action through the Attorney General. *Id.* § 2905(a). If the agency head fails to initiate legal action, the Archivist can make the request to the Attorney General directly, and must notify Congress that such a request has been made. *Id.* § 3106(b).

The Federal Records Act contains no private right of action. *Kissinger*, 445 U.S. at 148-50. This Court has held that private parties may not challenge an agency's compliance with recordkeeping guidelines in federal court. *Armstrong*, 924 F.2d at 294. If the agency head or the Archivist unreasonably fails to request that the Attorney General initiate legal action, however, this Court has held that a plaintiff may challenge that inaction under the Administrative Procedure Act. *Id.* at 295.

B. Facts and Prior Proceedings

1. This action is premised on a FOIA request sent to the Office of Science and Technology Policy (OSTP) seeking emails sent to or from a

nongovernmental email address belonging to the agency's Director, John Holdren. In particular, plaintiff sought "copies of all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)." FOIA Request 2 [JA 35]. Plaintiff specified that "[t]his entails searching jholdren@whrc.org." *Id.*

The agency responded by stating that it was "unable to search the 'jholdren@whrc.org' account for the records . . . requested because that account is under the control of the Woods Hole Research Center, a private organization." Letter from Jennifer Lee to Christopher C. Horner, Feb. 4, 2014 [JA 62]. The agency thus considered the request "unperfected." *Id.*

Plaintiff sought to appeal the agency's determination, and the agency interpreted the appeal papers as requesting that the agency search Dr. Holdren's government email account for messages that had been sent to or from jholdren@whrc.org. Letter from Jennifer Lee to Christopher C. Horner, Mar. 7, 2014 [JA 112]. The agency located "a large number of records that may be responsive," and commenced production on a rolling basis. Letter from Jennifer Lee to Christopher C. Horner, Mar. 31, 2014 [JA 151].

Plaintiff thereafter objected to the government's new understanding of plaintiff's request and clarified that it sought emails from the nongovernmental account "regardless of whether those emails are with, or in, Mr. Holdren's ostp.gov email account." Letter from Christopher C. Horner to Jennifer Lee, Apr. 18, 2014, at 2 [JA 115]. Plaintiff then filed this lawsuit, again asserting that the agency had misunderstood its request. *See, e.g.*, Compl. ¶¶ 7, 32, 37, 75 [JA 5-6, 12, 13, 23]. Because plaintiff disagreed with the government's understanding of the request, the government stopped the rolling production. *See* Email from Daniel Schwei to Hans Bader, June 13, 2014 [JA 181].

The complaint alleged that plaintiff had learned through other litigation that Dr. Holdren used "a certain non-official email account maintained by his previous employer" to conduct government business. Compl. ¶ 2 [JA 4]. According to the complaint, "[w]hen federal employees correspond on work-related issues on non-official accounts, they are required to copy their office, because all such correspondence are possibly 'agency records' under the Federal Records Act (44 U.S.C. § 3301), and more likely are covered by the FOIA." *Id.* ¶ 22 [JA 9]. The complaint characterized work-related correspondence from nongovernmental

accounts, "absent the required copying of an employee's office," as "solely under the control of private parties and generally unknown to and inaccessible by the federal government." *Id.* ¶ 23 [JA 9].

Plaintiff's complaint sought relief under the FOIA, the Federal Records Act, and the Administrative Procedure Act. *See* Compl. ¶¶ 71-126 [JA 23-32]. For the FOIA claim, which is the only claim at issue here, plaintiff sought both declaratory and injunctive relief. The requested declaratory judgment would have declared that the emails are subject to release, that the agency had failed to produce responsive records and to respond adequately to the request and appeal, and that the emails must be released. *Id.* ¶ 77 [JA 23-24]. The requested injunction would have compelled the production of responsive emails and enjoined the government from further withholding responsive records. *Id.* ¶¶ 78-81 [JA 24]. For the APA claim, plaintiff sought to set aside the agency's actions under the FOIA as unlawful. *Id.* ¶¶ 83-90 [JA 24-25].

Plaintiff also sought declaratory and injunctive relief, and a writ of mandamus, to prevent the government from destroying or failing to preserve the emails in question. Compl. ¶¶ 92-111 [JA 26-30]. Finally, plaintiff sought, under the Federal Records Act, injunctive relief to compel

the agency head to initiate action to recover the emails in question. *Id.* ¶¶ 113-22 [JA 30-31]. Plaintiff also sought costs and fees. *Id.* ¶¶ 124-26 [JA 32].

2. On the government's motion, the district court dismissed the case. As noted above, under the FOIA, a district court may prohibit the government from "withholding agency records." 5 U.S.C. § 552(a)(4)(B). The Supreme Court has "held that FOIA's 'withholding' requirement demonstrates that an agency's 'possession or control is a prerequisite to FOIA disclosure duties.'" Mem. Op. 9 [JA 194] (quoting *Kissinger*, 445 U.S. at 152) (brackets omitted).

The court held that plaintiff's own allegations "belie any argument that OSTP has control over emails located on the jholdren@whrc.org account," noting that plaintiff "admits repeatedly that emails on the [jholdren@whrc.org] account are outside of OSTP's control." Mem. Op. 10 [JA 195]. For instance, the complaint specifically states that "when an agency employee uses an email account 'under the control of, a third party . . . in this case, the Woods Hole Research Center,' the emails are 'solely under the control of private parties and generally unknown to and

inaccessible by the federal government[.]'" *Id.* (quoting Compl. ¶ 23 [JA 10]) (alterations in original).

The district court rejected plaintiff's "attempt[] to resuscitate its claim with the argument that because (1) Dr. Holdren maintains control over jholdren@whrc.org and (2) Dr. Holdren is OSTP's Director, OSTP controls the unofficial email account." Mem. Op. 10 [JA 195]. In addition to "this argument's fundamental conflict with [plaintiff's] allegations," the district court held that "it has no legal basis." *Id.* Agencies do not have "'control' over their employees' personal email accounts," and "[t]hat is precisely why agencies admonish employees to use their official accounts for government business." *Id.* at 10-12 [JA 195-97].

The court likewise rejected plaintiff's policy concern that "agency officials will escape FOIA coverage altogether by conducting government business with their personal accounts." Mem. Op. 13 [JA 198]. This concern is addressed not by the FOIA, but by other statutes. As the Supreme Court has explained, "'Congress never intended when it enacted [] FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records as well

as to retrieve wrongfully removed records." *Id.* (quoting *Kissinger*, 445 U.S. at 154) (brackets in original).

3. The district court also dismissed plaintiff's remaining claims, and plaintiff has not challenged those dismissals on appeal. The court held that plaintiff's claim under the Administrative Procedure Act fails because "FOIA provides its own remedial scheme." Mem. Op. 14 [JA 199]. And the court rejected plaintiff's challenge to the agency's record-retention policies because, as the "Complaint acknowledges, OSTP's records retention policies are facially adequate," and plaintiff's assertion that the agency has engaged in a pattern or practice of noncompliance with its policy had no factual basis in the complaint. *Id.* at 14-16 [JA 199-201].

Finally, the court rejected plaintiff's request that the court order the head of the OSTP to notify the Archivist of improper removal of federal records and to assist the Attorney General in initiating an enforcement action. The parties agreed that the documents at issue here have not been "'removed' for purposes of the FRA as long as a copy also exists on an official account." Mem. Op. 17-18 [JA 202-03]. But "[t]he Complaint never directly alleges that Dr. Holdren failed to place copies of agency records on his official account." *Id.* at 18 [JA 203].

SUMMARY OF ARGUMENT

The Freedom of Information Act authorizes a district court "to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). The Supreme Court has recognized that records are not "withheld," and thus are not subject to the FOIA, if they are not within the agency's "possession or control." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 151 (1980). The FOIA does not require an agency to obtain additional records, but rather only addresses the disclosure of records that the agency has already preserved.

Plaintiff seeks to compel a search of a nongovernmental email account held by the director of a federal agency. Documents on a nongovernmental email server are not in the agency's possession or control. Rather, as the complaint acknowledged, they are inaccessible to the federal government, and under the control of outside parties.

In suggesting otherwise, plaintiff mistakenly seeks to equate a federal employee's control over records with control by the employing agency. The district court properly recognized that a government employee cannot be equated to the employing agency for all purposes. Mere employee status, regardless of the employee's rank within the agency, does not give

the agency a right to search the employee's nongovernmental email account, any more than a federal agency could search an employee's home.

But even if the government had authority to search an employee's email account, the FOIA, which addresses only records already within the government's possession or control, could not compel the government to do so. A different federal statute, the Federal Records Act, governs a federal agency's right and obligation to obtain and preserve documents. The district court dismissed plaintiff's claim under the Federal Records Act, and plaintiff has not appealed the dismissal of that claim. The only claim at issue here is plaintiff's claim under the FOIA, which the district court properly rejected because the FOIA does not apply to documents outside the agency's possession or control.

STANDARD OF REVIEW

This Court reviews de novo the district court's granting of a motion to dismiss. *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 221 (D.C. Cir. 2009).

ARGUMENT

THE FOIA NEITHER COMPELS NOR AUTHORIZES AN AGENCY TO SEARCH A NONGOVERNMENTAL EMAIL SERVER

A. Documents on a nongovernmental email server are outside the possession or control of federal agencies and thus beyond the scope of the FOIA.

This litigation is premised on plaintiff's assertion that, in response to a request under the Freedom of Information Act, the Office of Science and Technology Policy was compelled to search for responsive documents on the nongovernmental email account of its Director, Dr. Holdren. The FOIA imposes no such requirement. The FOIA requires the government to disclose only those documents that are already in the agency's possession or control. It does not authorize an intrusion into the nongovernmental email accounts of federal employees. A federal employee's nongovernmental email account is outside the possession or control of the employing agency, and documents in that account are not properly subject to the FOIA unless they can also be found in the agency's files.

1. The FOIA reaches only documents that the agency possesses or controls.

The Freedom of Information Act compels automatic public disclosure of certain documents, *see* 5 U.S.C. § 552(a)(1)-(2), and requires agencies to

disclose other documents upon receiving a request from the public, *id.* § 552(a)(3). The FOIA also creates a cause of action that allows a federal district court "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." *Id.* § 552(a)(4)(B).

"The Freedom of Information Act empowers federal courts to compel disclosure of agency records improperly withheld, but does not confer authority upon the courts to command agencies to acquire a possession or control of records they do not already have." *Founding Church of Scientology of Wash., D.C., Inc. v. Regan*, 670 F.2d 1158, 1163 (D.C. Cir. 1981). The Supreme Court has therefore recognized that the FOIA does not "furnish congressional intent to permit private actions to recover records" that are not within the agency's "possession or control." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 137-38, 155 (1980). The Court explained that the use of the word "withholding" in the statutory provision creating the private right of action, 5 U.S.C. § 552(a)(4)(B), "presupposes the actor's possession or control of the item withheld." *Kissinger*, 445 U.S. at 151. Reading the statute to compel

agencies to obtain documents in order to disclose them to a FOIA plaintiff, the Court reasoned, would "read the 'hold' out of 'withhold.'" *Id.*

In *Kissinger*, the Supreme Court concluded that the FOIA had no application to documents that former Secretary of State Henry Kissinger had removed from his office at the State Department and transferred to the Library of Congress. The State Department received FOIA requests for some of Secretary Kissinger's papers "while Kissinger was Secretary of State." *Kissinger*, 445 U.S. at 142. But because the papers had been transferred to the Library of Congress before the request was received, the Court held that "the State Department [could not] be said to have had possession or control of the documents at the time the requests were received." *Id.* at 155. The State Department "did not, therefore, *withhold* any agency records, an indispensable prerequisite to liability in a suit under the FOIA." *Id.* (emphasis added).

The Supreme Court explained that "it is apparent that Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records and Records Disposal Acts providing for administrative remedies to safeguard against wrongful removal of agency records as well as to retrieve wrongfully removed records." *Kissinger*, 445

U.S. at 138. Because "the agency is not required to create or to retain records under the FOIA," the Court found it "somewhat difficult to determine why the agency is nevertheless required to retrieve documents which have escaped its possession, but which it has not endeavored to recover." *Id.* at 152.

The Court further noted that the FOIA's procedural provisions granting a ten-day extension where the agency may need to "search for and collect the requested records from field facilities and other establishments that are separate from the office processing the request" demonstrates that the extent of that search does not include retrieving materials from third parties. 5 U.S.C. § 552(a)(6)(A), (B); *Kissinger*, 445 U.S. at 153. And the FOIA's legislative history clarifies that agencies "generally are not obligated to provide extensive services in fulfilling FOIA requests." *Kissinger*, 445 U.S. at 153-54 (citing S. Rep. No. 93-854, at 12 (1974)).

Applying these principles, this Court has held that the FOIA did not require disclosure of documents that had been created by a federal agency but were held by the President's Special Review Board ("Tower Commission"). *National Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 542-43 (D.C. Cir. 1990). Because the "Tower Commission had sole

possession and control of the requested documents until . . . [its] expiration," the agency had neither control over nor a legal right to retrieve the documents. *Id.* at 545. The agency thus "did not withhold the documents" and had no obligation under the FOIA to obtain and disclose them. *Id.*

This Court similarly held that documents that had been possessed by a federal agency, but had been forwarded to Interpol in Paris, were not subject to the FOIA. *Founding Church of Scientology*, 670 F.2d at 1164. Because the documents had left the agency's possession before the request was filed, the agency had no responsibility to "retrieve and index" them. *Id.*

2. Federal agencies do not possess or control documents on a nongovernmental email server.

The principles established and applied in *Kissinger*, *National Security Archive*, and *Founding Church of Scientology* compel dismissal of plaintiff's FOIA claim here. Plaintiff seeks emails that were sent or received by the Director of the Office of Science and Technology Policy, Dr. Holdren, through a nongovernmental email account. As the district court recognized, the premise of plaintiff's complaint is that the Director

impermissibly sent and received emails on a server that was "solely under the control of private parties and generally unknown to and inaccessible by the federal government." Compl. ¶ 23 [JA 9]; *see* Mem. Op. 10 [JA 195]. The FOIA does not require the government to disclose documents that are "inaccessible by the federal government." And although plaintiff insists (Pl. Br. 50-51) that those factual allegations were included in the complaint in support of the claim under the Federal Records Act rather than the FOIA claim, there is no indication in the complaint itself that those allegations were inapplicable to plaintiff's FOIA claims. *See* Compl. ¶¶ 71, 78 (incorporating all prior paragraphs of complaint in connection with FOIA claims). Moreover, plaintiff offers no authority for the startling proposition that factual allegations can be ignored merely because they were made in support of a different claim. *Cf. Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) ("In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.").

Plaintiff does not and cannot dispute the district court's observation that governmental agencies lack the ability or authority to access employees' email accounts held on nongovernment email servers. *See*

Mem. Op. at 11 [JA 196]; *Competitive Enter. Inst. v. National Aeronautics & Space Admin.*, 989 F. Supp. 2d 74, 86 (D.D.C. 2013) (holding that a NASA employee's emails held on a university account were not accessible by the agency). An agency has no unilateral right to search the nongovernmental email account of an agency employee—including the agency's Director—any more than the agency could unilaterally search an employee's home.

Citing principles of vicarious liability and agency law, plaintiff mistakenly suggests that Dr. Holdren's ability to control the email account suffices to place the account under the control of the agency. *See* Pl. Br. 28. The possibility that some of the employee's acts might be imputed to the agency for some purposes does not eliminate the distinction between government and private email accounts.

In the related context of ascertaining whether a document was an agency record, this Court has concluded that "the fact that the head of the Department controls the record does not mean that the record is automatically a departmental record." *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1491 (D.C. Cir. 1984). "If that were the case," this Court reasoned, "the distinction between the personal papers of the Secretary and the agency's papers would be obliterated." *Id.* Although

this case does not turn on whether the email account at issue contains agency records, *see infra* Part B, that common-sense distinction carries over here with full force. The district court properly concluded that "[u]nder FOIA, even high ranking agency officials have personal interests distinct from those of the agencies they lead." Mem. Op. 12 [JA 197].

Plaintiff does not advance its argument by relying on this Court's statement, in another context, that "there 'is no basis' for viewing an agency's head 'as distinct from his department for FOIA purposes.'" Pl. Br. 25 (quoting *Ryan v. Dep't of Justice*, 617 F.2d 781, 787 (D.C. Cir. 1980)). The language on which plaintiff relies came from a decision determining that the Attorney General should be considered a FOIA "agency" when acting as an advisor to the President. Observing that the FOIA defines "agency" to include "any executive department," 5 U.S.C. § 552(f), this Court held that "[t]here is no basis in this definition or its legislative history to view the Attorney General as distinct from his department for FOIA purposes." *Ryan*, 617 F.2d at 787 (citing 5 U.S.C. § 552(e) (1976), which has since been recodified at 5 U.S.C. § 552(f)). The fact that the Attorney General's official activities as advisor to the President are considered to be the activities of an agency for FOIA purposes does not mean that the agency may exercise

control over the Attorney General's personal email account, any more than the agency could exercise control over the personal email account of any other employee.

Plaintiff's reliance on provisions of the FOIA that are directed at employees, rather than at agencies, is misplaced. *See* Pl. Br. 19, 36-37. The provisions cited by plaintiffs allow for disciplinary action, or contempt of court, when individual employees are responsible for an agency's failure to comply with its obligations under the FOIA. *See* 5 U.S.C. § 552(a)(4)(F)(i) (disciplinary action may be initiated by Special Counsel if a district court orders production of agency records improperly withheld, assesses attorney fees and litigation costs against the United States, and issues an additional written finding that agency personnel may have acted arbitrarily or capriciously); *id.* § 552(a)(4)(G) (district court may punish responsible employees for noncompliance with order of the court). They do not impose additional substantive obligations on agencies to produce documents.

Plaintiff at times suggests that the FOIA required the agency to ask Dr. Holdren to search his personal email. *See, e.g.*, Pl. Br. 35-36 ("OSTP does not allege that it ever even requested the documents from [Dr.

Holdren] (either to produce them, or review them for possible production), much less that he refused any such request."). This assertion appears to recognize that the agency itself lacked the capacity to search the email account, and thus lacked control over any emails that could be found there. More fundamentally, the suggestion that the agency must attempt to induce its employee to produce documents from a nongovernmental account cannot be reconciled with the well-established principle that the FOIA does not compel an agency to obtain additional records, but rather governs the disclosure of records over which the agency already has control. *See Kissinger*, 445 U.S. at 152; *Founding Church of Scientology*, 670 F.2d at 1163.

Plaintiff seeks to distinguish *Kissinger* on the ground that "in light of Kissinger's imminent departure, the government had no leverage over him to assist in the return of the documents." Pl. Br. 35. But the relevant point in *Kissinger* was not how easy or difficult it would have been for the agency to persuade the Secretary of State to turn over the records. The case turned on the agency's lack of possession or control at the time of the request: the Court held "that Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the

agency prior to the filing of the FOIA request." *Kissinger*, 445 U.S. at 150. Unless records are already in the agency's possession or control at the time of the request, the ease or difficulty with which it might gain control are of no relevance to the application of the FOIA.

Similarly irrelevant is plaintiff's observation that "Kissinger was no longer in office by the time the courts acquired jurisdiction of that case." Pl. Br. 37. The relevant point is that at the time of the FOIA request, Kissinger was still Secretary of State. *See Kissinger*, 445 U.S. at 142. The Court's analysis of whether records were withheld depended upon the timing of the request, rather than on the timing of the litigation. *See id.* at 151-55; *see also* 445 U.S. at 155 n.9 ("There is no question that a 'withholding' must here be gauged by the time at which the request is made . . . .").

3. Documents from nongovernmental email accounts are subject to the FOIA only insofar as copies are in the possession or control of the agency.

Plaintiff emphasizes that agencies have periodically produced documents from private email accounts in response to FOIA requests. Such production may occur when the government has possession of copies of such documents. That can happen for any number of reasons. First, as

plaintiff acknowledges, to the extent that employees use nongovernmental email accounts for work-related messages, they are instructed to send copies to their government email accounts. *See* Compl. ¶ 22 [JA 9]. Those instructions have now been codified in federal law: in November 2014 (after the request and the response at issue here), Congress amended the Federal Records Act to require federal employees to send copies of work-related electronic messages to their official email accounts. *See* 44 U.S.C. § 2911. Unlike documents that reside on a nongovernmental server, any copies of emails that reside in official email accounts are in the agency's possession or control and thus are "withheld" if they are not disclosed in response to a FOIA request.

Second, if an agency receives a FOIA request and has reason to believe that documents that would be responsive are improperly absent from agency files, in some circumstances the agency may voluntarily seek to retrieve those documents and then disclose them, as appropriate, to the requester. It is ordinarily of no moment that only the second of these steps (disclosure) is compelled by the FOIA. The requester receives the same documents regardless of the precise legal reasons that the agency obtained them. But the fact that agencies may sometimes obtain documents and

then disclose them does not demonstrate that the FOIA compels agencies to do so.

Here, plaintiff cites instances in which emails sent to or from Dr. Holdren's nongovernmental email account were also present on a government email account. *See* Email from John P. Holdren (official account) to John P. Holdren (nongovernmental account), Feb. 22, 2011 [JA 120] (email sent from official account); Email from John P. Holdren (nongovernmental account) to John P. Holdren (official account), Feb. 10, 2014 [JA 154] (email sent to official account); *see also* Wachter Decl. ¶¶ 6-7 [JA 177-78] (noting that Dr. Holdren's official email address was redacted from numerous emails on which plaintiff relies); *id.* ¶ 8 [JA 178] (discussing document sent from Dr. Holdren's official email address to nongovernmental account). Initially, the agency commenced a rolling production of the emails on the OSTP government account, which are subject to the FOIA. Letter from Jennifer Lee to Christopher C. Horner, Mar. 31, 2014, at 1 [JA 151]. But plaintiff objected to that production, making plain that plaintiff demanded a search of the nongovernmental account, not of the official one. *See* Letter from Christopher C. Horner to Jennifer Lee, at 2 [JA 115] (seeking production of emails "regardless of

whether those emails are with, or in, Mr. Holdren's ostp.gov email account"); *see also* Mem. Op. 9 n.3 [JA 194 n.3] (noting that the government stopped rolling production only after plaintiff asserted that the government was misunderstanding plaintiff's request). Plaintiff provides no authority for its apparent view that any FOIA requester can compel federal agencies to direct their employees to search nongovernmental email accounts for documents that may be responsive to FOIA requests.

Believing that the government had improperly declined to attempt to obtain documents from Dr. Holdren's nongovernmental email account, plaintiff brought a separate claim under the Federal Records Act. *See* Compl. ¶¶ 112-22 [JA 30-31]. The district court recognized that this claim invoked the proper legal mechanism to assert that there were agency records that were improperly outside agency files, but rejected it because plaintiff had not plausibly alleged that any such records existed. *See* Mem. Op. 17-18 [JA 202-03]. The district court explained that plaintiff has not even alleged that Dr. Holdren failed to copy his official email address on any correspondence sent from a nongovernmental account. *See id.* at 18-19 [JA 203-04]. Plaintiff has not appealed that ruling. *See* Pl. Br. 6. Having lost on its claim under the statute that governs the maintenance of records,

and having declined to appeal, plaintiff has no right to seek to regulate agency recordkeeping through the FOIA.

B. Cases that do not address FOIA's limitation to documents that the agency has "withheld" are inapposite.

1. Plaintiff devotes considerable energy to asserting that emails sent to or from Dr. Holdren's nongovernmental email account could properly be characterized as "agency records" within the meaning of the FOIA. The district court properly declined to reach that issue because plaintiff failed to demonstrate that the agency was "withholding" the records. Mem. Op. 9 n.4 [JA 194 n.4]. The district court's analysis follows the Supreme Court's decision in *Kissinger*. There, the Supreme Court held that a plaintiff must satisfy "three requirements" to obtain relief under the FOIA: "that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger*, 445 U.S. at 150. The Court "f[ound] it unnecessary to decide whether the [documents at issue in certain FOIA requests] were 'agency records' since [the Court] conclude[d] that a covered agency . . . has not 'withheld' those documents from the plaintiffs." *Id.*

Although the analysis of whether materials are agency records has been characterized as assessing "whether an agency has sufficient 'control'

over a document to make it an 'agency record,'" *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), the control at issue in the "agency record" analysis is different from the control at issue in the "withholding" analysis. The "agency record" requirement limits the universe of documents subject to the FOIA by excluding those documents that are not properly regarded as part of the agency's files, even though they may physically reside within the agency. *See id.* at 1068 ("[A]gency possession and power to disseminate a document are still insufficient by themselves to make it an 'agency record.'"). The "withholding" analysis focuses on the agency's practical ability and legal authority to withhold or disclose a document.

The cases analyzing the definition of "agency records" examine circumstances in which an agency asserts that it need not disclose even documents over which the agency has undisputed custody and control. As plaintiff properly recognizes, some documents may be within the agency's possession and control, but may not be agency records because they contain solely personal, rather than professional, information. While an "agency . . . may be withholding such a record, . . . the withholding would not violate FOIA, because FOIA only requires production of 'agency

records.'" Pl. Br. 41; *see also Bureau of Nat'l Affairs,* 742 F.2d at 1496 (holding that the Assistant Attorney General's "desk appointment calendars," which were kept at the Department of Justice, were not agency records and thus were not subject to the FOIA); *Kissinger*, 445 U.S. at 157 (holding that certain documents that physically entered Kissinger's office in the State Department were not "agency records"). Agencies may also possess other categories of records that are not subject to the FOIA. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 211 (D.C. Cir. 2013) (holding that visitor logs within the possession of the Secret Service were not agency records and thus were not subject to the FOIA).

Plaintiff is thus mistaken to rely on cases that address only whether a document constituted an "agency record," and did not address the issue presented here: whether the document at issue was "withheld" by the agency. In *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125 (D.C. Cir. 2005), for example, "the Government d[id] not suggest the [agency] lack[ed] either authority over, or the ability to retrieve, the documents." *Id.* at 133. Similarly, in *Burka v. U.S. Department of Health & Human Services*, 87 F.3d 508 (D.C. Cir. 1996), the agency disputed whether the requested materials were properly classified as "agency records," but did not dispute

that it was "withholding" them. To the contrary, this Court was uncertain whether the government was even "contest[ing] on appeal . . . that the agency exercised constructive control over the records at the time [the] FOIA request was filed," *id.* at 515 n.5, as the agency "plan[ned] to take physical possession . . . at the conclusion of the project," had "prohibited [the contractor with possession] from making any independent disclosures" and had "read and relied significantly on the information in writing articles and developing agency policies," *id.* at 515.

While the analysis in those cases might be relevant if it were necessary to determine whether the materials at issue here were "agency records," they do not authorize plaintiff to sidestep the separate requirement that relief under the FOIA is available only if an agency has possession or control of a document and "withhold[s]" it. And plaintiff likewise does not advance its argument by relying on various district-court cases that did not discuss the requirement that documents be withheld. *See, e.g.*, *Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175 (D.D.C. 2013).

2. Plaintiff is similarly wide of the mark in seeking to equate this case to cases involving obligations under discovery rules. *See* Pl. Br. 38-41, 48-49. Even in the separate context of discovery, plaintiff cites no case holding

that document requests require the government to search its employees' personal email accounts. As discussed above, the government has no control over those accounts.

In addition, the legal principles that plaintiff seeks to derive from the discovery cases plainly do not apply here. Plaintiff relies, for example, on a district-court decision that construed the Federal Rules of Civil Procedure to require a company to obtain "information in possession of its former chief executive officer (CEO), who no longer worked at the company." Pl. Br. 40 (citing *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445-46 (S.D.N.Y. 2000)). Regardless of whether that case or the others relied on by plaintiff were correctly decided on their own terms, there can be no dispute that the FOIA imposes no such obligation. In the FOIA context, the Supreme Court and this Court have made clear that agencies have no obligation to obtain documents that are not already in the agency's possession or control. *See Kissinger*, 445 U.S. at 151-54; *Founding Church of Scientology*, 670 F.2d at 1163.

And although the Supreme Court in *Kissinger* referred to the requirements for responding to a subpoena, the Court did not expand an agency's obligation to obtain documents in response to a FOIA request, as

plaintiff argues, when the Court pointed out that "historic equitable practice has long recognized that an individual does not improperly withhold a document sought pursuant to a subpoena by his refusal to sue a third party to obtain or recover possession." *Kissinger*, 445 U.S. at 154; *see* Pl. Br. 38. Rather, this statement underscores that the FOIA governs only the disclosure of the agency's own documents, and does not require agencies to acquire additional documents.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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SEPTEMBER 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6,554 words.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 552 (excerpts) A1

5 U.S.C. § 552 provides, in relevant part, as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

* * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. * * *

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term “search” means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

* * *

(4)

* * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).