

## Legal Sidebar

# DC Circuit Holds an Agency Official's Private Email Account Not Beyond the Reach of FOIA

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On July 5, 2016, the D.C. Circuit Court of Appeals, in [Competitive Enterprise Institute v. Office of Science and Technology Policy](#), held that the private email account of White House Office of Science and Technology Policy (OSTP) Director John Holdren is subject to search in response to a [Freedom of Information Act \(FOIA\)](#) request for work-related emails. The Director's former employer, the Woods Hole Research Center, maintained the email account on the whrc.org domain.

[Enacted in 1966](#), FOIA permits individuals to request records from federal agencies. In response to a FOIA request that reasonably describes the records sought, agencies are required to make reasonable efforts to search for the records. In 2013, the Competitive Enterprise Institute (CEI) submitted a FOIA request to OSTP for "all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)." CEI learned of the email address in other [FOIA litigation](#). OSTP denied the FOIA request for a search of the Director's non-official email because the account was private. CEI sued.

FOIA authorizes federal district courts to [enjoin](#) an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Federal jurisdiction depends on a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records." The issue here is whether the requested records are agency records. The Supreme Court adopted a [two-part test](#) to determine when a record is an "agency record": agency records are records (1) either created or obtained by an agency and (2) under agency control at the time of request.

In OSTP's view, it was not withholding agency records because the agency neither possessed nor controlled, nor created or obtained, the Director's emails in his nongovernmental account. To support its position, the government relied on the Supreme Court case [Kissinger v. Reporters Comm. For Freedom of the Press](#) which held that agencies "need not produce records maintained by another federal government agency or obtain records from any other sources." The district court granted OSTP's motion to dismiss concluding that the records were not agency records. CEI appealed.

A three-judge panel of the D.C. Circuit Court of Appeals reversed the lower court's dismissal. In an opinion written by Judge David Sentelle and joined by Judge Harry Edwards, the court ruled that the email records were under OSTP's "constructive" control. First, the court addressed whether OSTP's refusal to search the Director's private email was an improper withholding. OSTP argued that documents on a nongovernmental server were outside the control of federal agencies and beyond the scope of FOIA. CEI challenged the "logic of the proposition" that an agency director may place his work-related records beyond FOIA by simply using a private email account.

The court found no precise guidance to resolve this question. It rejected the government's contention that *Kissinger* was controlling, finding that when the FOIA requests were filed in *Kissinger*, the records were not in the agency's possession or *Kissinger*'s control. That differed from the OSTP situation because the emails were created by an agency official on an email account he maintained with a private organization when the FOIA requests were submitted. In addition, at the time the requests in *Kissinger* were received, the Secretary was holding the documents under a claim of right and the State Department apparently had ceded the documents to him. In contrast, in *CEI v. OSTP*, there was no

claim that the agency had ceded the records to the Director. Judge Sri Srinivasan wrote a separate opinion concurring in the judgment, setting forth his views as to why *Kissinger* was not controlling and when an agency is considered to hold records under FOIA.

Having dispensed with *Kissinger*, the court turned to [Burka v. U.S. Dep't of Health and Human Services](#), which it found to be "more nearly on point." In *Burka*, the FOIA requester sought computer tapes and questionnaires, produced as part of a survey of smoking habits and attitudes, which were held by the survey's contractor. The court in *Burka* held that the agency must search and disclose records that were not in the agency's possession, but were under its "constructive control." It reached its conclusion after applying [four factors](#) to determine whether an agency exercises sufficient control over a document to render it an agency record: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files."

With respect to the OSTP Director's emails maintained on the domain of a private entity, the court found the fact that the emails were in the possession of the agency head who had moved them off-site did not negate their agency character; that it wasn't apparent that the domain controlled the email to the exclusion of the account user; and that allowing department heads to exempt their emails from FOIA by simply maintaining departmental emails on another domain was inconsistent with FOIA.

Even more helpful to the court was its holding in [Ryan v. DOJ](#), where the FOIA requester sought documents in the possession of the Attorney General, and the agency asserted that the documents were not in the agency's control. There, the *Ryan* court found no basis in FOIA to view the Attorney General as separate from the department. Here, the court remarked that "an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency."

In 2014, Congress addressed this issue when it [passed](#) the Presidential and Federal Records Act Amendments ([Public Law 113-187](#)) requiring selected [White House](#) and [executive agency](#) officials and employees to [copy or forward work-related emails](#) from non-official email accounts to their official accounts within 20 days or be subject to [disciplinary actions](#). In this case, although the OSTP is a component of the Executive Office of the President and would fall within the scope of the email requirements, the FOIA requests involved were filed prior to the law's enactment. Further, notwithstanding whether work-related emails are forwarded to non-official accounts in violation of the act, the D.C. Circuit ruling seems to indicate that such emails could still be subject to FOIA.

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