D.C. Circuit: FOIA Follows Agency Chief's Emails Stored on a Private Server

By Charles D. Tobin

The U.S. Court of Appeals for the District of Columbia Circuit has decided that a White House agency cannot avoid its public records obligations to look for emails that an agency head stored on a private server. *Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 15-5128 (D.C. Cir. July 5, 2016).

In a closely watched decision that in many respects mirrors former Secretary of State Hillary Clinton's use of private email networks, the panel unanimously found that the Office of Science and Technology Policy (OSTP) had improperly responded to a Freedom of Information Act (FOIA) request for records of its director, John Holdren.

The decision stems from a lawsuit filed by the Competitive Enterprise Institute (CEI), a libertarian think-tank. CEI had sent the White House a FOIA request for "all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)."

The "whrc.org" domain is owned by the Woods Hole Research Center, where Holdren previously had worked as director. On its website, CEI describes Woods Hole as "an environmental pressure group". CEI had learned in earlier litigation that Holdren continued to use his old email address for government-related work.

OSTP responded to the lawsuit with a motion to dismiss, arguing that because the Woods Hole account is under the control of a private organization, and not the government, it was "beyond the reach of FOIA." The agency further claimed it was physically unable to search that account to comply with CEI's request.

The district court agreed with the government, dismissing the complaint under Federal Rule 12(b)(6). The district judge held that only government-controlled records systems were within FOIA's reach.

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The D.C. Circuit panel, composed of Judge Sri Srinivasan and Senior Judges Harry Edwards and David Sentelle, strongly disagreed in two separate opinions. In the controlling decision for the court, Senior Judge Sentelle characterized the White House's argument as an assertion that agency heads can avoid FOIA through "the simple expedient of using a private email account rather than the official government communication system." The court flatly rejected that premise.

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The court observed that while the White House may not operate the Woods Hole email servers, the account remains under Holdren's control. Noting that that "an agency always acts through its employees and officials" the court held that government records "do not lose their agency character just because the official who possesses them takes them out the door". Otherwise, the court noted, an agency head could avoid FOIA requests for "hard copy documents by leaving them in a file at his daughter's house and then claiming they are under her control."

The court remanded the decision to the district court with no specific instructions, but with an implicit suggestion that the trial judge order OSTP to require Holdren to search his Woods Hole account for responsive documents. The court of appeals also made clear it was "not ordering the specific disclosure of any document," and that any assertions of exemptions, or that the records yielded in a search do not constitute "agency records" under FOIA, must await further litigation in the district court.

Judge Srinivasan wrote a separate opinion, concurring in the judgment. His opinion chiefly departed from the majority's application of the precedent *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 147 (1980). In *Kissinger*, the Supreme Court held that FOIA did not require the government to retrieve and produce records that former National Security Advisor Henry Kissinger had gifted to the Library of Congress.

The majority in this case distinguished *Kissinger* on grounds that there, the agency had "ceded" the records to the agency head before he donated them to the Library of Congress. In contrast, the court held, there is no suggestion here that the White House had ceded to records to Holdren. And, under federal law governing records disposal, "it seems unlikely the agency could legally cede the records" to Holdren, according to the majority.

Judge Srinivasan in his concurrence noted that in *Kissinger*, the agency head had received a government legal opinion that the papers he donated, and which were later FOIA'd, were his personal papers. Kissinger himself therefore held the document under a "claim of right". Given that, Judge Srinivasan wrote, the law does not hold in blanket fashion that "because an agency acts only through individuals, an agency holds documents whenever an individual holds he documents." Instead, he would have resolved the case more narrowly:

> I would conclude here only that a current official's mere possession of assumed agency records in a (physical or virtual) location beyond the agency's ordinary domain, in and of itself, does not mean that the agency lacks the control necessary for a withholding.

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Judge Srinivasan added that he would leave the government free, on remand, to "present additional facts that would make it apparent that Holdren is holding the emails in his private account under a claim of right."

The facts of this case make the ruling compelling precedent for the several pending FOIA cases regarding former Secretary of State, and now Democratic Presidential Candidate, Hillary Clinton's use of a private email network at her home. Ironically, the appeals court in the *CEI v. OSTP* case released its ruling the same week as the Department of Justice announced the decision that it would not prosecute Clinton. We may expect, with that announcement and this new precedent, that the Clinton FOIA cases will proceed more rapidly now.