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CEI Files Lawsuit against Office of Science and Technology Policy

By Hans Bader • May 5, 2014

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Today, the Competitive Enterprise Institute [sued](#) the White House Office of Science and Technology Policy (OSTP) for [flouting](#) the Freedom of Information Act. CEI's Chris Horner asked OSTP to produce work-related emails that OSTP's Director, John Holdren, stored in an email account at his former employer, the environmental-pressure group Woods Hole Research Center. OSTP has resisted producing them. (The use of such non-official accounts for agency business frustrates federal open-government laws, and undermines government accountability, since such accounts are generally not searched in response to FOIA or congressional oversight requests seeking work-related communications or agency records. Moreover, the use of email accounts at a former employer that lobbies the federal government gives such pressure groups direct access to and control over public records, including highly sensitive information.)

What is ironic about this is that OSTP's Director, soon after taking office, lectured OSTP employees about *not* conducting official business using private email accounts, and about the need to forward all work-related communications to their agency email account in order to comply with federal record-keeping laws. (*See* May 10, 2010 Memo from OSTP Director John Holdren to all OSTP staff, *Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge*, at 1, available as Exhibit B to the letter [at this link](#).) Apparently, the longer an official is in power, and the less he fears losing power, the less he cares about government transparency and the rule of law.

Meanwhile, OSTP has thumbed its nose at CEI's [request under the Information Quality Act](#) that it correct OSTP Director John Holdren's notoriously [false claim](#), [criticized](#) or disagreed with by [climate scientists](#), that global warming is [leading to more severe cold weather](#). As of the time this blog post was published, OSTP's "Information Quality Guidelines" [website](#) continued to falsely claim that "OSTP has received no information quality correction requests. Any future requests will be posted on this page." It so claims even though CEI had submitted its most recent information quality request about a month ago (emailing it on April 13, and faxing it on April 14), and that same week, discussed that request by phone with an OSTP employee, who confirmed receipt of CEI's request, and stated that it would be posted on OSTP's web site.

OSTP made this false claim on its web site even though it was blatantly wrong at the time it was made: OSTP has received not one, but two CEI data quality correction requests, including a highly-publicized 2003 request that OSTP was sued over and resulted in a correction of OSTP's earlier climate change claims. *See* Chris Mooney, [Paralysis by Analysis: Jim Tozzi's Regulation to End All Regulation](#), *Washington Monthly*, May 1, 2004, at 23 ("Last August, the Competitive Enterprise Institute . . . filed suit under the Data Quality Act over a Clinton-era report on global warming, known as the National Assessment of Climate Change. Though the suit was ultimately settled out of court, government lawyers agreed to attach a disclaimer to the report.").

OSTP's recent attempt to evade FOIA is equally disturbing. OSTP first claimed that CEI lawyer Chris Horner's FOIA request was

not a FOIA request at all, even though it explicitly cited FOIA and FOIA statutory provisions and regulations. Then it interpreted Chris's request as covering only certain emails already found in Holdren's *official* OSTP email account. The latter contention tortured the English language, while its former contention was legally just wrong: judges have ruled that agencies have to produce records reflecting agency activities, even if they were "neither created by agency employees, nor . . . currently located on agency property." *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996). Here, the records were exchanged with an agency employee -- indeed, the agency's director! -- and recent rulings affirm that FOIA can be used to request agency records, even when they are in an official's private email account. (See, e.g., *Landmark Legal Foundation v. E.P.A.*, 2013 WL 4083285, *6 (D.D.C. Aug. 14, 2013) (refusing to dismiss a FOIA lawsuit, because EPA failed to search agency officials' personal email accounts); *CEI v. EPA*, No. 12-1617, 2014 WL 308093, at *14 (D.D.C. Jan. 29, 2014) (noting that a requester "can simply ask for work-related emails and agency records found in the specific employees' personal accounts; requesters" need not even identify the non-official email addresses at issue, which requesters may not know)).

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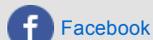
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