APPEAL UNDER THE FREEDOM OF INFORMATION ACT

April 25, 2022

Office of FOIA Services of the
Securities and Exchange Commission
Station Place
100 F Street NE
Mail Stop 2465
Washington, D.C. 20549

BY ELECTRONIC MAIL – foiapa@sec.gov

RE: Freedom of Information Act Appeal -- FOIA No. 22-01626-FOIA

Dear SEC General Counsel or other FOIA Services Officer,

Please consider this appeal of the above-cited and re-attached April 11, 2022 request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*., and 17 CFR § § 200.80.

Please note that this appeal is of SEC's denial of one request (as submitted) seeking the same information for two separate SEC officials, which SEC bifurcated and assigned two FOIA requests assigned the numbers 22-01625-FOIA and 22-01626-FOIA, which requests are substantively identical, although for some reason SEC has not expressly denied the former.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552 *et seq*. Your April 20, 2022 letter represents an adverse determination, in asserting that all requested information was categorically exempt from FOIA. Further, all procedural rules have been complied with as this request is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Appeal under the Freedom of Information Act" and includes a copy of the underlying request (Ex. 1), (4) sets forth grounds for reversal, and (5) was filed within 90 days of April 20, 2022, which is the date we received your initial determination.

II. PROCEEDINGS BELOW

This appeal involves one FOIA request sent by electronic mail to OSTP's FOIA officer on April 11, 2022, that sought:

> calendars as defined herein kept ***for*** SEC Commissioner Gary Gensler, by any party, for the period November 8, 2020 through April 11, 2022, that is not the publicly posted calendar available at https://www.sec.gov/foia/docs/sec-chair-calendar.htm; *and*
>
> calendars as defined herein kept ***by or for*** SEC Commissioner Allison Herren Lee, by any party, for the period November 8, 2020 through April 11, 2022 that is not the publicly posted calendar available at https://www.sec.gov/foia/docs/sec-chair-calendar.htm

The request then asserted:

> The calendars SEC posts online derived from original records are, e.g., at present, two months behind reality. EPA notes they likely therefore are the subject of editing. EPA seeks originals.
>
> Calendar as used herein includes **hard-copy calendars or appointment books** whether kept by the Commissioner, his or her Chief of Staff and/or named assistant in whole or in part for the Commissioner; **Outlook calendars and** *any* electronic system for maintaining appointments and the like for the Commissioner; **calendars on any phone** that is or has been used at any time for work-related purposes by the Commissioner or his or her Chief of Staff or named assistant, including but not limited to a phone(s) or other PDA issued to the named individual, whether Google/Gmail, Outlook or other.

On April 11, 2022, SEC bifurcated this request into two requests, assigning them request numbers 22-01625-FOIA (Gensler) and 22-01626-FOIA (Herren Lee). In its April 20, 2022 denial in full of 22-01626-FOIA, SEC wrote, in pertinent part:

> Please note that any calendars that may exist were created by staff for their personal use and convenience. They were not distributed to other employees so they could perform their duties and were not used to conduct agency business. Accordingly, those calendars are not agency records and are therefore exempt from the FOIA.
>
> As you may know, Commissioner Lee's calendars from January 21, 2021 to March 31, 2021, while she was designated Acting Chair of the Commission are publicly available at https://www.sec.gov/foia/docs/sec-chair-calendar.htm.

This response is deficient in several ways. First, it denied the existence of undeniable work-related calendars for the two months for which SEC has yet to synthesize the rest of the

requested information and publicly post Commissioner Herren Lee's schedule, which remains unpublished as of this date.

Additionally, the denial improperly categorically rejected in full the requested information, inaccurately recasting the entirety of all requested and any responsive information as "created by staff for their personal use and convenience [and] … not distributed to other employees so they could perform their duties and were not used to conduct agency business." SEC does not support this with further argument or demonstration; further, that characterization of the requested information is, as noted below, illogical and something of a non-sequitur.

Also, SEC provides no indication that it actually searched its agency records for the requested information or searched the described locations of the described information to reach this categorical conclusion. The response suggests only a categorical denial, which denial was made in a knee-jerk fashion without searching. By implication, the denial was made without having reached any reasoned conclusion relating to the records at issue.

The denial has an express premise that all requested information — which expressly covers only information pertaining to the Commissioner's position, not for the private individual, and information on any device that has been used at any time for work-related purposes.

To the extent that the requested information has not yet been obtained by the Commission, the law is clear and has been for some time that an agency is obligated to obtain all copies of such information just as staff are required to copy agency depositories or officials with work-related information (see, e.g., "Holdren memo", *infra*). Regardless of where the information is held, all work-related information described and all relevant calendars or locations for keeping calendars if used at any time for work-related purposes are covered by FOIA and are

potentially responsive barring application of one of FOIA's nine exemptions (none of which SEC cites in its April 20, 2022 letter).

In short, SEC assumes and/or implies that all requested information is on non-official devices or materials, or that all Commissioner calendars other than what SEC chooses to post online, often well after the fact, are actually personal, and that all requested information in any calendar was created solely for personal use. This is thoroughly implausible for reasons including but not limited to the fact that the calendars for Commissioners which SEC posts online are, inarguably, officially produced *post facto* (sometimes as long as two-plus months after the fact, as we can see) and are compiled from some other source or sources. SEC 's claim that all calendars in existence pertaining to the Commissioners' schedule were created purely for personal use is simply untenable. SEC puts itself in the unenviable position of arguing that the *post facto* calendars for each Commissioner which it posts online, sometimes two months or more after the fact, are simply invented, or possibly recalled with remarkable memory skills by each Commissioner.

Further, however, and more realistically, the materials from which these calendars are created as well as the clearly requested information on any calendar that is used at all for work-related purposes, must be obtained and searched for responsive records. We note that even in the event any Commissioner resists access to any non-official account and/or SEC resists complying with FOIA, by being placed on notice of these records its is obliged to search for it, and recognize them as potentially responsive. SEC must declare as exempt any non-work-related information in those calendars, and has the ability to offer redactions which it must support citing any applicable FOIA exemption that might apply to a particular record or portion of a record.

SEC might even have produced overwhelmingly redacted records claiming exemption b6, but it chose to instead categorically deny the request, plainly without searching any described location.

In fact, SEC cited no FOIA exemption at all. Its denial effectively declares a rewrite of FOIA precedent and is fatally flawed. On *de novo* review, we request SEC provide a proper response, consistent with its obligations under FOIA.

III. APPLICABLE LAW

It is well-established that an employee who chooses to perform public business on private accounts or equipment thereby makes that account or equipment subject to FOIA. SEC, which is subject to National Archives Records Administration (NARA) rules, is fully aware of this.

By SEC's April 11, 2022 letter, it plainly did not search any of the described repositories. As such, SEC is also implicitly asserting that it has neither requested the Commissioner comply with the law or notified the National Archivist of the possible loss of records, as required under 44 U.S.C. 3105.

Regardless, this denial represents use of FOIA as a withholding statute, as opposed to a disclosure statute, contrary to all judicial precedent on the Act going back to *EPA v. Mink*, 410 U.S. 73 (1973).

All correspondence made or received by federal officials in connection with the transaction of public business is in fact covered by FOIA, which takes the broadest view of "record" of all relevant federal statutes.[1] Under the Federal Records Act (44 U.S.C 3301, *et seq*.)

[1] See e.g., USEPA acknowledging that "[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." See, e.g., Environmental Protection Agency, What Is a Federal Record?, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. See, e.g., Frequent Questions about E-Mail and Records, United States Environmental Protection Agency ("Can I use a non-EPA account to send or receive EPA e-mail? No, do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-EPA e-mail system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping

Commissioners are required to copy SEC on all such work-related information using a non-SEC device, log, calendar or account, whether contemporaneously or, if later discovered as appears to be the case here, at a subsequent date, and have a continuing obligation to provide those records; they must do so at minimum when SEC exercises its duty to require that act. SEC has both the right and the obligation to obtain copies of the requested records, under t, and the right and obligation to obtain these copies under FOIA. That duty is not discretionary, on the part of either a Commissioner or the SEC. See, e.g., Memorandum of Opinion, *Competitive Enterprise Institute v. EPA*, 12-cv-1617, January 29, 2014, at 30 (Boasberg, J) (FOIA requesters "can simply ask for work-related emails and agency records found in the specific employees' personal accounts; requesters need not spell out the email addresses themselves." (emphasis added). See also, e.g., *Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5.[2]

We are interested in SEC's compliance with its legal obligation to maintain and preserve such information relating to the performance of official business as federal records and agency records, and its obligation to obtain copies of such records when created on non-agency accounts or devices (a practice which its regulations also discourage but which numerous parties including congressional investigators have established is nonetheless widespread).

Note about SEC's and Commissioners' continuing legal obligations

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system.") (emphasis in original), posted at www.epa.gov/records/faqs/email.htm and still available on the Wayback Machine at https://web.archive.org/web/20140220022347/www.epa.gov/records/faqs/email.htm

[2] Summary judgment precluded due to inadequate search where "EPA did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts that were in its possession and control," despite the existence of "evidence that upper-level EPA officials conducted official business from their personal email accounts." (italics in original); id. at *8, noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."

As noted, a widespread pattern of federal government employees using private emails and computers has been documented that, regardless of intent, evades (but does not, as a legal matter, defeat) federal record-keeping and other transparency laws including the Presidential Records Act, Federal Records Act and FOIA.[3]

We refer to a "Holdren memo" from during the Obama administration which generated much attention after White House officials — including, subsequently, the memo's author John Holdren — were showed to have used unofficial means to conduct official business and not copy the agency as required.

Mr. Holdren properly asserted his (and OSTP's) responsibilities when, after one OSTP employee was exposed to be engaging in this practice, he reaffirmed that forwarding such mail is mandatory. His May 2010 memo to all staff stated in pertinent part:

> If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account. In this way, all

[3] See e.g., Judson Berger, "EPA official scrutinized over emails to resign", FoxNews.com, February 19, 2013, http://www.foxnews.com/politics/2013/02/19/epa-official-scrutinized-over-emails-to-resign/; Jim Snyder, Brightsource Warned Of Embarrassment To Obama In Loan Delay, Bloomberg, June 6, 2012, www.bloomberg.com/news/2012-06-06/brightsource-warned-of-embarrassment-to-obama-from-loan-delays.html; Eric Lichtblau, Across From White House, Coffee With Lobbyists, New York Times, June 24, 2010, at A18, www.nytimes.com/2010/06/25/us/politics/25caribou.html (lobbyists "routinely get e-mail messages from White House staff members' personal accounts rather than from their official White House accounts, which can become subject to public review"). See Senate EPW Committee, Minority Report, A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered (Sept. 9, 2013) at 8, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; see also August 14, 2012 Letter from U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa and subcommittee Chairmen Jim Jordan and Trey Gowdy to Energy Secretary Steven Chu, http://oversight.house.gov/wp-content/uploads/2012/08/2012-08-14-DEI-Gowdy-Jordan-to-Chu-re-loan-program-emails.pdf ("at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business"). See also, e.g., Promises Made, Promises Broken: The Obama Administration's Disappointing Transparency Track Record, report by the U.S. House of Representatives Committee on Energy and Commerce, Vol. 1, Issue 3, July 31, 2012, http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReport.pdf, and supporting documents at http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReportSupportingDocs.pdf.

> correspondence related to government business—both incoming and outgoing—will be captured automatically in compliance with the FRA. In order to minimize the need to forward emails from personal accounts, please advise email senders to correspond with you regarding OSTP-related business on your OSTP account only.[4]

(emphases added).

The short version of the applicable legal principles is that using private assets to perform public business while impermissible does not succeed in making that any less the public's business; not forwarding the (in that case) emails, in further violation of the law, does not exempt records from the law and therefore is not a useful means of evading or exempting records from transparency laws. They are still subject to FOIA's reach, wherever they are.

If in fact SEC has not contemporaneously obtained copies of all of requested work-schedule related information, then similar "corrective action" as OSTP took in the above-referenced instance is again in order regarding Commissioners Gensler and Herren Lee, and now to satisfy this request under FOIA.

Importantly, agencies are therefore increasingly called to search an employee's private accounts and equipment. For example, USEPA produced former Region 8 Administrator James Martin's work-related ME.com emails to and from the environmentalist pressure group Environmental Defense addressing work-related issues to the Competitive Enterprise Institute. See *CEI v. EPA*, D.D.C., C.A. No. 12-1497 (ESH)(FOIA 08-FOI-00203-12).

Similarly, again because these emails represented the conduct of or otherwise related to official duties, Martin subsequently turned over to congressional investigators numerous other emails from the same account.[5] EPA produced these records to plaintiff in response to EPA

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[4] Memo from OSTP Director John Holdren to all OSTP staff, Subject: Reminder: Compliance with the Federal Records Act and the President's Ethics Pledge, May 10, 2010, available at http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf (herein, "Holdren memo").

[5] See Press Release and Letter from Letter from David Vitter, Ranking Member, Senate Committee on Environment and Public Works and U.S. House Committee on Oversight and Government Reform

FOIA-R8-2014-000358. See, e.g., Juliet Eilperin, "EPA Official Quits Amid Email Scrutiny," Washington Post, February 19, 2013, https://www.washingtonpost.com/national/health-science/epa-official-quits-amid-e-mail-scrutiny/2013/02/19/2ee812a4-7af6-11e2-9a75-dab0201670da_story.html.

CEI also obtained several hundred work-related emails from Region 9 Administrator Jared Blumenfeld's Comcast.net account in response to FOIA EPA-R9-2013-007631, and Region 2 Administrator Judith Enck's AOL account in response to FOIA EPA-R2-2014-001585. The same group also confronted this issue involving former National Oceanic and Atmospheric Administration (NOAA) official Susan Solomon, whose non-official account NOAA searched to respond to FOIA#2010-00199 (see, e.g., Department of Commerce, Office of Inspector General, "Response to Sen. James Inhofe's Request to OIG to Examine Issues Related to Internet Posting of Email Exchanges Taken from the Climatic Research Unit of the University of East Anglia, UK," February 18, 2011).

This policy is also reflected in U.S. federal statute (FRA of 1950 44 U.S.C. 3101 et seq., the E-Government Act of 2002 and other legislation) and regulation (36 C.F.R. Subchapter B, Records Management, and all applicable National Archives and Records Administration (NARA) mandated guidance), and reflected in United States Government Accountability Office, "Report to the Ranking Member, Committee on Finance, U.S. Senate: NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. Oversight and Management Improvements Initiated, but More Action Needed," GAO-11-15, October 2010, http://www.gao.gov/assets/320/310933.pdf.

Chairman Darrell Issa (R-Calif.) to Bob Perciasepe, Acting Administrator, Senate Committee on Environment and Public Works (Minority), In Light of New Information, Vitter, Issa Continue Investigation into Inappropriate Record Keeping Practices at EPA, May 13, 2013, http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9f04b9b3-9d61-b58f-525b-18ff44d2683f.

IV. SEC HAS FAILED TO SATISFY ITS OBLIGATIONS UNDER FOIA (AND FRA)

This is an administrative appeal for SEC's improper denial of a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Transparency in government is the subject of high-profile promises from the president and attorney general of the United States arguing forcefully against agencies failing to live up to their legal recordkeeping and disclosure obligations. These promises go back over many years and administrations.

Attorney General Holder stated, *inter alia*, "On his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA 'should be administered with a clear presumption: In the face of doubt, openness prevails.'" OIP Guidance, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government," http://www.justice.gov/oip/foiapost/2009foiapost8.htm. This and a related guidance elaborate on President Obama's memorandum.

When federal employees find themselves having created information 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 FOIA.[6] Similarly, when agencies learn of such correspondence or the use of such accounts for work-related correspondence they must obtain copies. Regardless of an official's original intent, this practice violates also results in the frustration of federal record-

[6] See also e.g., Government Accountability Office, "Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management," GAO-08-742, June 2008, http://www.gao.gov/assets/280/276561.pdf, at p. 37; Frequent Questions about E-Mail and Records, United States Environmental Protection Agency (FN 3, supra).

keeping and disclosure laws. See *Landmark Legal Foundation v. E.P.A.*, 2013 WL 4083285, *6 (D.D.C. Aug. 14, 2013).

The Department of Justice notes that "'Records' is not a statutorily defined term in FOIA. In fact it appears that the only definition of this term in the U.S. Code is that in the Federal Records Act. 44 U.S.C. § 3301." What is an "Agency Record?", U.S. Department of Justice FOIA Update Vol. II, No. 1, 1980, http://www.justice.gov/oip/foia_updates/Vol_II_1/page3.htm.

That definition of "records" for purposes of proper maintenance and destruction "includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them" (emphasis added).

"The definition [sic] of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." See e.g., Environmental Protection Agency, What Is a Federal Record?, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. The Federal Records Act requires a record somehow reflect the operations of government at some substantive level while FOIA covers far more, including phone logs, annotations and the most seemingly inconsequential piece of paper or electronic record in an agency's possession. At bottom "the question is whether the employee's creation of the documents can be attributed to the agency for the purposes of FOIA." Consumer Fed'n of America v. Dep't of Agriculture, 455 F.3d 283, 287 (D.C. Cir. 2006).

A record's status is not dictated by the account on which it is created or received. This has been most often affirmed in, but is by no means exclusive to, the context of private email accounts (see, e.g., "Agencies are also required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts on commercial systems such as Gmail, Hotmail, .Mac, etc.)", and when used during working hours or for work-related purposes "agencies must ensure that federal records sent or received on such systems are preserved in the appropriate recordkeeping system and that reasonable steps are taken to capture available transmission and receipt data needed by the agency for recordkeeping purposes." Government Accountability Office, Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management, GAO-08-742, June 2008, http://www.gao.gov/assets/280/276561.pdf, p. 37.

Agencies are clear about this in policy.[7] Then-OSTP Director Holdren's memo affirmed the law and policy in equally clear terms. FOIA asserts the broadest view of "records" among the relevant federal statutes. It covers emails sent or received on an employee's personal email account if their subject relates to official business. See e.g., Senate Committee on Environment

[7] See also, e.g., DOE acknowledges that fulfillment of these requirements, which originate in the Federal Records Act of 1950 44 U.S.C. 3101 et seq., the E-Government Act of 2002 and other legislation means that DOE must "Capture and manage records created or received via social media platforms, including websites and portals, or from personal email used for Department business", and "Ensure that departing Federal employees identify and transfer any records in their custody to an appropriate custodian, or the person assuming responsibility for the work." See "Your Records Management Responsibilities", U.S. Department of Energy, Office of IT Planning, Architecture, and E-Government, Office of the Chief Information Officer, July 2010, available at http://energy.gov/sites/prod/files/cioprod/documents/Your_Records_Management_Responsiiblities__2_.pdf. See also, DOE Order 243.1A, Records Management Program, http://energy.gov/sites/prod/files/o243%201a_Final_11-7-11.pdf, replacing similar requirements found in DOE Order 243.1, Records Management Program, 2-3-06. See also, e.g., September 11, 2012 Letter from Morgan Wright, U.S. Department of Energy, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and September 11, 2012 Letter from Eric J. Fygi, Deputy General Counsel, U.S. Department of Energy, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, affirming that DoE officials' work-related emails conducted on non-official accounts potential status as agency records and which therefore must be produced by the employee to the employee's agency.

and Public Works, Minority Report, A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered (Sept. 9, 2013) at 8 http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

SEC Owes EPA a Reasonable Search of All Locations Likely to Hold Potentially Responsive Records

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. See e.g., *Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); Steinberg v. DOJ, 23 F.3d 548, 551 (D.C. Cir. 1994).

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." 5 U.S.C. § 552(a)(3). See also *Iturralde*, 315 F.3d at 315; Steinberg, 23 F.3d at 551.

A search must be "reasonably calculated to uncover all relevant documents." See, e.g., *Nation Magazine v. U.S. Customs Serv*., 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. See *Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The search must be "'adequate'" on the "'facts of this case.'" *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir 1986) (internal citations omitted). See also, e.g., Landmark Legal Foundation v. EPA, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5 (summary judgment precluded due to inadequate search where "EPA did not search the personal email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts that were in its possession and control," despite the existence of

"evidence that upper-level EPA officials conducted official business from their personal email accounts") (italics in original); id. at *8 (noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."); Michael D. Pepson & Daniel Z. Epstein, Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?, 13 Engage J. 4, 4 (2012) (FOIA covers emails sent using private email accounts); Senate EPW Committee, Minority Report, A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered (Sept. 9, 2013) at 8 (FOIA "includes emails sent or received on an employee's personal email account" if subject "relates to official business"), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; accord *Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (officials' private email addresses covered under open-records laws); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96 (Pa.Cmwlth 2012) (same).

The reasonableness of any search for records is determined ad hoc but there are rules, including that it cannot be cursory. See *Citizens For Responsibility and Ethics in Washington v. U.S. Department of Justice,* 2006 WL 1518964 *4 (D.D.C. June 1, 2006) ("CREW") ("The Court is troubled by the fact that a mere two hour search that started in August took several months to complete and why the Government waited [for several months] to advise plaintiff of the results of the search."). Reasonable means that "all files likely to contain responsive materials . . . were searched." *Cuban v. SEC*, 795 F.Supp.2d 43, 48 (D.D.C. 2011).

The search also should be free from conflict. See e.g., *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are

personal without agency review; faulting Department of Justice for the fact that it "was aware that Michael Dettmer had withheld records as "personal"" but did not require that "he submit those records for review" by the Department).

Courts inquire into both the form of the search and whether the correct record repositories were searched. "[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." See e.g., *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An unsupervised search allowing for abuses is not reasonable and so does not satisfy FOIA's requirements. See Kempker-Cloyd v. Department of Justice, W.D. Mich. (1999). An agency must search "those files which officials expec[t will] contain the information requested." *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 30 n.38 (D.D.C. 1998). Agencies cannot structure their search techniques so as to deliberately overlook even a small and discrete set of data. See *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked).

SEC Owed and Has Failed to Provide EPA a Substantive Response to its Request

FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating "that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request." (5 U.S.C. § 552(a)(6)(C)(i)). Alternately, the agency must cite "exceptional circumstances" and request, and make the case for, an extension that is necessary and proper to the specific request. See also *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

A substantive agency response means that a covered agency must provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). See also *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing "the statutory requirement that [agencies] provide estimated dates of completion").

Agencies must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. See *CREW v. FEC*.

FOIA specifically requires agencies to immediately notify requesters with a particularized and substantive determination, "and the reasons therefor," as well as CEI's right to appeal; further, FOIA's unusual-circumstances safety valve to extend time to make a determination, and its exceptional-circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. Id., quoting 5 U.S.C. § 552(a)(6)(A)(i).

SEC has not provided any indication it is in fact processing our April 11, 2022 request, or sought and made its case for an extension of time to respond to either request as required when "exceptional circumstances" exist.

V. CONCLUSION

SEC owes EPA a *de novo* review of its request, a proper search, and a production of responsive information while identifying and supporting any claimed exemptions.

We look forward to your response.

Respectfully submitted,

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