Administrative Law & Regulation

Gmail.gov: When Politics Gets Personal, Does the Public Have a Right to Know?

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Note from the Editor:

This paper examines whether e-mail regarding official government business sent on personal accounts is subject to disclosure under the Freedom of Information Act ("FOIA"). As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, we offer links to other resources on this topic and invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- The Freedom of Information Act, 5 U.S.C. § 552, as Amended by Public Law No. 104-231, 110 Stat. 3048: http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page2.htm
- FOIA.gov, What Is FOIA?: http://www.foia.gov//
- Editorial, *Preserving D.C.'s Public Record*, Wash. Post., July 22, 2012 (on District of Columbia's version of FOIA): http://www.washingtonpost.com/opinions/preserving-dcs-public-record/2012/07/22/gJQAJpKz2W_story.html
- Democratic Nat'l Comm. v. U.S. Dept. of Justice, 539 F. Supp. 2d 363 (2008): http://www.leagle.com/xmlResult.aspx?xmldoc=2008902539FSupp2d363_1868.xml&docbase=CSLWAR3-2007-CURR
- Ryan J. Stanton, *State Court Rules that Government Officials' Personal E-mails Aren't Subject to FOIA*, Ann Arbor.com, Jan. 27, 2010: http://www.annarbor.com/news/state-court-rules-that-government-officials-personal-e-mails-arent-subject-to-foia/

Between 2005 and 2006, former Attorney General Alberto Gonzales dismissed several United States Attorneys—a decision that generated much public attention. In response to congressional inquiries concerning the U.S. Attorney dismissals, the White House disclosed that its political staff had used Republican National Committee ("RNC") e-mail accounts to engage in communications related to these dismissals.[1] This disclosure became central to a congressional investigation into whether the White House's political staff had used RNC e-mail accounts "to circumvent record-keeping requirements."[2] A report from the United States House of Representatives Committee on Oversight and Government Reform found that it was common for many of the eighty-eight White House officials who received RNC e-mail accounts to use them for official government business.[3] On March 19, 2007, the Democratic National Committee ("DNC") submitted a Freedom of Information Act ("FOIA") request to the U.S. Department of Justice ("DOJ") seeking documents "relating to . . . the appointment, performance, and dismissal of the United States Attorneys."[4] In responding to the DNC, the DOJ withheld certain e-mails based on Exemption 5 of the FOIA, which exempts from disclosure records that are privileged as part of a deliberative process.[5] Each of the withheld e-mails was addressed to or received from one or more individual White House staff members using an e-mail account owned and assigned by the RNC.[6] In deciding whether e-mail communications on RNC accounts were subject to exemption from disclosure under FOIA, U.S. District Court Judge Ellen Huvelle concluded that it was clear RNC e-mail accounts were used both for official and RNC business.[7] Judge Huvelle found that Exemption 5 provided grounds for the DOJ refusal to disclose these e-mails, conceding by implication that the e-mails would have been subject to disclosure under the FOIA if an exemption did not apply, without addressing the question whether agency employees' e-mails discussing official business that are exclusively sent from or received on personal e-mail accounts or communications devices are subject to the FOIA's disclosure provisions.[8] It is an open question, then, whether the use of non-government e-mail addresses to discuss official agency business can put those communications beyond the FOIA's reach. We argue that such communications are well within the province of the FOIA's disclosure mandate.

FOIA, codified at 5 U.S.C. § 552, is a disclosure statute that places a general obligation on federal executive branch agencies to "make information available to the public" and prescribes "specific modes of disclosure for certain classes of information."[9] FOIA provides a "statutory mechanism that permits the public to request and to obtain government data."[10] FOIA grants private actors a right of access to federal "agency records,"[11] thereby meaningfully safeguarding "citizens' right to be informed about what their government is up to."[12] The statute imposes an affirmative obligation on federal executive branch agencies to "make available for public inspection and copying" certain agency materials.[13] More importantly, FOIA

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allows "any person" to gain access to a wide variety of "agency records" upon request.[14]

The Supreme Court has "emphasized [that] the basic thrust of" FOIA is "disclosure, not secrecy. . . ."[15] FOIA was designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[16] In *NLRB v. Robbins Tire & Rubber Co.*,[17] the Court explained that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[18]

Today, the advent of technological developments, such as e-mail and text messaging, and the proliferation of personal electronic communications devices (e.g., home computers, laptops, Blackberrys) has presented new challenges to FOIA's transparency mandate and given rise to uncertainty about what constitutes an agency record. These technological developments have raised new threshold questions, e.g., are agency-related communications made on government-owned Blackberrys outside of work hours subject to FOIA? Does the possibility that federal employees might use personal electronic communications devices and personal e-mail accounts in an attempt to conduct agency business outside the reach of FOIA threaten to undermine FOIA's fundamental purpose and frustrate the very public policy concerns that gave impetus to its passage?[19] The practical reality is that, whether for nefarious or innocent reasons, federal agency employees have and will continue to conduct agency business using personal e-mail accounts and personal communications devices. Until Congress or the courts definitively clarify whether these work-related communications are subject to FOIA's disclosure provisions, a dangerous loophole enabling unscrupulous agency employees to intentionally evade the light of public scrutiny may exist.

The public's right of access to agency records, while broad, is subject to exemptions.[20] FOIA's disclosure provisions only apply to executive branch agencies; the courts and Congress are expressly excluded from FOIA.[21] And disclosure under FOIA is limited to "agency records."[22] While it is a question of first impression whether federal employees' personal e-mail records concerning agency matters are subject to disclosure as "agency records" under FOIA, FOIA's text, history, and structure as well as the application of existing case law provide a sound basis for concluding that these records are subject to disclosure under FOIA—like any other species of agency record. The mere fact that an e-mail is sent or received via a nongovernmental e-mail address (e.g., an agency employee's Gmail account) or communications device (e.g., a home computer) does not, standing alone, take the content of that e-mail, as a categorical matter, outside of the scope of FOIA's disclosure provisions: the medium of a communication cannot trump its content, purpose, use, and the context in which it was sent.

I. Practical Realities: Government Employees Use Personal E-Mail Accounts and Communications Devices to Conduct Agency Business

While there have not been any comprehensive empirical studies concerning the frequency with which employees of federal executive branch agencies use personal e-mail addresses and communications devices to conduct agency business, there is considerable anecdotal and circumstantial evidence indicating that the use of personal e-mail and communications devices to engage in agency business is a persistent concern.[23] A panoply of recent federal court decisions illustrates the need for final judicial—or congressional—resolution of these questions.[24] Moreover, a June 2007 Interim Report issued by the Committee on Oversight and Government Reform of the U.S. House of Representatives and a June 2008 Government Accountability Office ("GAO") report suggest that some federal employees deliberately use private e-mail accounts to evade public scrutiny of their conduct.[25]

II. The "Agency Records" Threshold for Triggering a FOIA Requester's Right of Access

A. Statutory Framework

Although "[t]he system of disclosure established by the FOIA is simple in theory,"[26] the practical reality is far different. Because FOIA, like many federal statutes, does not define vague but important statutory terms, courts have felt compelled to engage in a considerable amount of interstitial lawmaking to elucidate the precise contours of FOIA's disclosure provisions. This proposition holds particularly true with respect to questions regarding whether work-related communications authored or received by federal executive branch personnel constitute "agency records" under FOIA.

As a threshold matter, the sine qua non of a requester's right of access to agency materials is that the requested materials be "agency records," within the meaning of FOIA, as only "agency records" are within the ambit of FOIA's disclosure requirements.[27] Because federal courts only have jurisdiction to compel disclosure of "agency records,"[28] a condition precedent to triggering FOIA's judicially enforceable disclosure obligations is that the requested agency materials must constitute "agency records." Therefore, as Professor Janice Toran has explained, the "agency records" requirement for triggering a right of access under FOIA performs "a significant gatekeeping function," given that "[a] request for a record that does not have agency record status . . . need not be honored or even acknowledged."[29]

Although FOIA statutorily defines the term "agency,"[30] conspicuously absent from FOIA is a comprehensive definition of the term "agency records."[31] The legislative history of FOIA is unclear on this point as well.[32] And notwithstanding that the 1996 amendments to FOIA added a definition of the term "record,"[33] the definition of "record" only clarified that the "format" by which an agency maintains information is inapposite to the analysis of whether agency information constitutes an "agency record" under FOIA, making clear that even agency records maintained in an "electronic format," e.g., e-mails, are subject to FOIA's disclosure provisions.[34]

B. The Judicial Gloss

Because the FOIA statute does not define "agency records," the meaning of that term has largely been fleshed out by courts adjudicating concrete cases and controversies, and the Supreme Court and lower federal courts have developed a number of benchmarks for determining whether documents, communications, and other agency materials obtained or generated by agency personnel constitute "agency records" that are subject to FOIA's disclosure provisions. Two distinct

but related strands of jurisprudence have emerged that attempt to prescribe a principled framework for determining whether materials are "agency records" that are subject to FOIA: the first line of cases attempt to elucidate broad principled distinctions between materials that are "agency records" and those that are not; the second line of cases attempt to establish limits on FOIA requesters' right of access to personal materials that are created or used by federal employees who are employed by executive branch agencies that are subject to FOIA. The judicial gloss on FOIA's reference to "agency records," however, has not always been a model of clarity.

i. The Supreme Court Weighs In: General Touchstones

The seminal Supreme Court case expounding on the question of what agency materials constitute "agency records" within the meaning of FOIA is *Department of Justice v. Tax Analysts*,[35] which delineated a two-pronged test for determining whether agency information and materials are "agency records" that are subject to FOIA: "First, an agency must 'either create or obtain' the requested materials 'as a prerequisite to its becoming an "agency record" within the meaning of the FOIA.' . . . Second, the agency must be in control of the requested materials at the time the FOIA request is made."[36] The *Tax Analysts* Court explained that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties," reconciling that requirement with "*Kissinger*[] [*v. Reporters Comm. for Freedom of Press*'s] teaching that the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency."[37] In *Tax Analysts*, the Court applied the foregoing conjunctive two-part test in the course of holding that FOIA "requires the United States Department of Justice (Department) to make available copies of district court decisions that it receives in the course of litigating tax cases on behalf of the Federal Government."[38] Lower federal courts have subsequently refined the analysis for the "control" prong of the *Tax Analysts* test, frequently adopting a four-factor rubric for determining whether an agency has sufficient control over requested documents to render them "agency records" subject to FOIA;[39] and lower courts have consistently concluded that, under some circumstances, an agency can constructively control records that it does not have in its physical custody or possession.[40] Concordantly, Congress has since extended the scope of FOIA's disclosure provisions to include federally funded research data and agency information maintained by government contractors.[41]

ii. The Blurred Boundaries Between "Personal" and "Public"

Dovetailing with the uncertainty concerning the distinction between agency information and materials that are outside the scope of FOIA's disclosure provisions and "agency records" within that scope, a related question arises: how do courts demarcate the boundary between "agency records" and personal materials of executive branch agency personnel? Today, with the advent of technological developments, such as e-mail and text messaging, and the practical reality that federal employees frequently telecommute or even "webcommute" and use their personal communications devices (e.g., Blackberrys, laptop computers, tablets) and personal e-mail accounts for work-related purposes, this distinction is now a more salient one.[42]

As *Bureau of National Affairs v. Department of Justice*[43]—an early attempt to elucidate a distinction between "agency records" subject to FOIA and personal material outside of the ambit of the statute—and its progeny make abundantly clear, courts have consistently eschewed bright-line tests in favor of more functional totality-of-the-circumstances-type analyses.[44] In *Bureau of National Affairs*, for example, involving the "novel question . . . whether appointment calendars, phone logs and daily agendas of government officials are 'agency records' subject to disclosure under FOIA,"[45] the D.C. Circuit rejected a bright-line test and explained that the analysis "must . . . focus on the totality of the circumstances surrounding the creation, maintenance, and use of the document to determine whether the document is in fact an 'agency record' and not an employee's record that happens to be located physically within an agency."[46] The *Bureau of National Affairs* court noted in dictum that "[t]he term 'agency records' should not be manipulated to avoid the basic structure of the FOIA . . . ."[47]

The *Bureau of National Affairs* court elucidated that, with respect to documents and communications authored by agency employees, notwithstanding that "use [of that document or communication] . . . is not dispositive" of the question whether that document or communication is an "agency record" subject to FOIA,[48] "consideration of whether and to what extent that employee used the document to conduct agency business is highly relevant for determining whether that document is an 'agency record' within the meaning of FOIA."[49] The *Bureau of National Affairs* court indicated that "the purpose for which the document was created, the actual use of the document, and the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency" are "important considerations" for distinguishing between "agency records" and personal materials.[50] Although the *Bureau of National Affairs* court opined "that appointment materials that are created solely for an individual's convenience, that contain a mix of personal and business entries, and that may be disposed of at the individual's discretion are not 'agency records' under FOIA,"[51] it specifically concluded that daily agendas created "for the convenience of" and distributed to agency personnel "for the express purpose of facilitating [agency] activities" were "agency records."[52]

More recently, in *Consumer Federation of America v. Department of Agriculture*,[53] addressing the question "whether . . . electronic appointment calendars" of agency personnel qualified as "agency records" within the meaning of FOIA,[54] the D.C. Circuit intimated that a virtue of a totality-of-the-circumstances test is that it is capable of adapting to changed circumstances: unlike a rigid, bright-line test, a flexible, functional analysis has sufficient play in the proverbial joints to accommodate "technological advances."[55] Applying a functional, totality-of-the-circumstances analysis in the course of concluding that electronic appointment "calendars of . . . five senior USDA officials . . . [qualified as] 'agency records,'"[56] the *Consumer Federation of America* court reasoned that the way in

which the electronic calendars were used was dispositive under the facts of the case.[57]

Common sense, case law, and FOIA's plain language compel the conclusion that, irrespective of federal executive branch agencies' employees' reasons for using personal e-mail accounts or personal communications devices to conduct agency-related business within the scope of their employment, their work-related communications must be subject to FOIA's disclosure provisions.[58] Courts have consistently concluded that FOIA creates a presumption of disclosure,[59] placing the burden on the agency to justify withholding requested agency materials.[60] And at least one court has invalidated an agency regulation that was specifically designed to evade FOIA's disclosure requirements.[61] FOIA's structure and purpose, coupled with a logical extension of existing precedent, provides a sound basis for concluding that courts will not allow unscrupulous federal employees to shield their work-related communications from FOIA's disclosure requirements—and thereby avoid public scrutiny of their professional activities—through the simple expedient of using their personal e-mail accounts and personal communications devices to conduct agency business within the scope of their employment.

The precise question whether these categories of communications are subject to FOIA's disclosure requirements is nonetheless an issue of first impression.[62] And without any firm guidance from Congress or the courts making clear that work-related communications sent from personal e-mail addresses and communications devices are not categorically exempt from FOIA, federal agencies and their employees may be able to effectively evade public scrutiny of their actions, implicating the very concerns that gave impetus to promulgation of the FOIA statute in the first place.[63] But notwithstanding that the issue has yet to be litigated in federal court, application of existing precedent requires the conclusion that the foregoing communications are, in fact, "agency records" that are subject to FOIA's disclosure provisions. If it were otherwise, FOIA's transparency mandate could be frustrated at the caprice of executive branch agency employees.

C. Lessons from Existing Federal Regulations

Existing federal regulations buttress this conclusion. As a June 2007 GAO report explains, existing National Archives and Records Administration ("NARA") regulations implementing the Federal Records Act ("FRA") expressly contemplate the possibility that federal employees' work-related e-mails via private e-mail accounts can be "records" within the meaning of the FRA:

> According to the regulations, . . . [a]gencies are . . . 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.). Where agency staff have access to external systems, 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.[64]

If federal employees' work-related communications via "external e-mail systems" can be "records" for purposes of the FRA under existing NARA regulations, then it follows that those communications can be agency records subject to FOIA. Indeed, the U.S. Supreme Court has found the way in which the term "record" has been defined in other federal statutes, such as the Records Disposal Act and Presidential Records Act of 1978, to be highly persuasive in FOIA litigation addressing whether requested materials constitute "agency records."[65]

Moreover, several agencies have prescribed regulations implementing FOIA that provide that employees' private e-mail addresses are exempt from disclosure under 5 U.S.C. § 552(b)(6),[66] indicating that the drafters of those regulations believed that those e-mail addresses would otherwise be subject to disclosure under FOIA, as explained in greater detail below. And indeed, the DOJ has taken the position in litigation that federal employees' work-related communications via private e-mail addresses are subject to FOIA's exemptions, tacitly conceding that such communications are "agency records" otherwise subject to disclosure under FOIA: "There is simply no basis for the Court to conclude as a matter of law that federal employees communicating through 'GWB43.com' email accounts were necessarily acting as political advisors . . . [and] that any documents reflecting those communications fail to satisfy the intra-agency requirement."[67]

III. Lessons from the States

Analysis of recent state court cases construing analogous state statutes also supports the conclusion that agency employees' work-related communications sent or received via personal e-mail accounts and communications devices are subject to FOIA's disclosure provisions to the same extent as those sent or received via government-issued e-mail addresses and communications devices.[68] All fifty states have enacted FOIA-like records-disclosure statutes that allow the public to access state government records.[69] It is clear that state courts often use a content-based, functional analysis to determine whether government employees' e-mails are subject to disclosure under state records-disclosure statutes,[70] rather than categorically excluding government employees' work-related communications sent from personal e-mail addresses from disclosure under those statutes.

Indeed, at least two state courts have, in fact, addressed the question whether government employees' work-related communications using personal e-mail addresses are subject to public disclosure. *Mechling v. City of Monroe*,[71] for example, involved a request under the state of Washington's Public Disclosure Act for "all emails sent by, or received by Monroe City Council members, including those emails contained on their home or business computers, in which city business is discussed . . . not limiting the emails to those contained on the City's computer system."[72] In *Mechling*, the Court of Appeals of Washington reversed "the trial court's decision that personal e-mail addresses of the council members in e-mails discussing city business are exempt from disclosure under the personal information exemption of the public disclosure act (PDA)" and squarely "h[e]ld that the personal e-mail addresses used by city council members to discuss city business are not exempt from

disclosure . . . ."[73] Concordantly, in 2003, the Court of Appeals of Arkansas expressly declined to limit the scope of the Arkansas Freedom of Information Act's disclosure provisions to e-mails sent or received government e-mail addresses:

> We find nothing in the [state] Freedom of Information Act that specifies that the communications media by which the public's business is conducted are limited to publicly owned communications. The creation of a record of communications about the public's business is no less subject to the public's access because it was transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium. Emails transmitted between . . . [a state employee] and the governor that involved the public's business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services.[74]

And in 2010, in *Howell Education Association MEA/NEA v. Howell Board of Education*,[75] although the Court of Appeals of Michigan "conclude[d] that under the [state] FOIA statute the individual plaintiffs' personal e-mails were not rendered public records *solely* because they were captured in a public body's e-mail system's digital memory,"[76] the court pointedly noted that "[t]his is not to say that personal e-mails cannot become public records."[77] (The *Howell Education Association* court explicitly invited the state legislature to provide guidance on this issue: "[W]e believe the issue in this case is one that must be resolved by the Legislature, and we call upon the Legislature to address it . . . ."[78] Federal policymakers have the authority to amend FOIA to make clear to courts, agencies, and executive branch employees alike that work-related communications by federal executive branch agency employees cannot be insulated from disclosure under FOIA merely by virtue of the e-mail address from which they are sent or received or the fact that those communications were authored from or are stored on federal employees' personal communication devices.)

IV. Do Courts and Agencies Already Treat Federal Employees' Work-Related Communications from Private E-Mail Accounts as a Kind of "Agency Record" by Analyzing Whether These Communications Must Be Disclosed Through the Rubric of Exemptions?

By implication, when courts and agencies claim that "personal e-mail addresses" are exempt from disclosure, they effectively concede that they are "agency records." Federal courts only have jurisdiction to grant relief under FOIA when an agency's refusal to provide a FOIA requester with "agency records" is at issue.[79] It is well-established, black-letter law that a federal court can *only* reach the merits of a plaintiff's claim after satisfying itself that it has subject-matter jurisdiction to adjudicate that claim.[80] Thus, in the context of FOIA litigation, if a court does not conclude, as a threshold matter, that the requested agency materials are "agency records" under FOIA, it cannot reach the merits of the requester-plaintiff's underlying claims because it lacks subject-matter jurisdiction.[81] For example, a court cannot conclude that requested agency materials need not be disclosed because those materials are exempted from disclosure by the FOIA statute *unless* the court first concludes that the requested materials are "agency records."[82] In other words, a federal district court's determination that a statutory exemption to FOIA applies to bar disclosure of materials requested under FOIA is necessarily predicated on a finding that the requested materials are, in fact, "agency records."

A survey of recent FOIA case law reveals numerous instances where courts have analyzed whether personal e-mail addresses of various stripes are exempt from disclosure under FOIA without questioning their status as "agency records." In 2011, in *Erika A. Kellerhals, P.C. v. IRS*, the federal district court did not question the "agency record" status of a work-related e-mail sent from an IRS employee's personal e-mail account but rather indicated in passing that that e-mail may be exempt from disclosure.[83] In 2010, in *Government Accountability Project v. U.S. Department of State*,[84] the U.S. District Court for the District of Columbia concluded that the State Department properly "withheld the personal email addresses of several [private] individuals" under Exemption 6 of the FOIA.[85] In 2011, in *Smith v. Department of Labor*,[86] the D.C. District Court observed that "a personal e-mail address" may be exempt from disclosure under FOIA Exemption 6 when the public's interest in disclosure is outweighed by the individual's interest in keeping his or her personal e-mail address private.[87] Several other recent federal district court opinions suggest that both courts and agencies do not question the "agency records" status of personal e-mail addresses but rather question whether personal e-mail addresses are exempt from disclosure for privacy-based reasons.[88] And the Ninth Circuit recently opined that "[i]f . . . a particular email address is the only way to identify. . . [an individual, in this case a lobbyist] from. . . disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens' right to know 'what their government is up to.'"[89] There is no principled distinction between the personal e-mail addresses of private citizens and those of government employees; to the extent that the identity of the owner of a personal e-mail address alters the analysis for whether such an address is an "agency record," common sense dictates that an agency employees' personal e-mail address is more likely to constitute an "agency record" than that of a private citizen. If the content of e-mail communications sent by private citizens via their personal e-mail accounts to federal employees is not categorically exempt from FOIA, the same should hold true a fortiori with respect to communications sent or received by government employees via their personal e-mail accounts.

More germane to this article, in 2008, in *Democratic National Committee v. United States DOJ*,[90] in the course of upholding DOJ's decision to withhold federal employees' e-mails sent from RNC e-mail accounts (using the domain name GWB43.com) that were the subject of a FOIA request by the DNC and granting the government's motion for summary judgment,[91] the D.C. District Court explicitly rejected the DNC's invitation "to adopt a per se rule that any e-mails sent on the RNC servers are not covered by FOIA."[92] Many of the

e-mails in question "were sent between officials in the White House and the Department of Justice and were sent to or from an e-mail address with the domain name 'GWB43.com.'"[93] The DOJ invoked FOIA Exemption 5 to withhold the content of those e-mails on the ground that those communications were deliberative, predecisional interagency communications that would be privileged in discovery.[94] U.S. District Judge Ellen Huvelle noted that the DNC "fail[ed] to point to any case law that would indicate that the server where an e-mail is housed is relevant to its treatment under FOIA" and—correctly—reasoned that "because the form of the document does not factor into the analysis under FOIA, the Court cannot adopt a per se rule that any e-mails sent on . . . [nongovernmental] servers are not covered by FOIA."[95] As Judge Huvelle explained, to adopt the categorical, per se rule proposed by the DNC "would presumably mean that any e-mail sent or received from a personal account would no longer be 'official' or 'inter-agency' and therefore would not be covered by FOIA."[96]

Judge Huvelle's analysis is entirely consistent with the purpose, text, history, and structure of FOIA—a statute that is simply not amenable to bright-line rules. The logical corollary to the proposition that e-mails sent to or from personal e-mail accounts (even via nongovernmental servers and computers) can be properly withheld pursuant to a FOIA exemption is that those e-mails can also constitute "agency records," under certain circumstances, which must be disclosed in response to a FOIA request unless otherwise exempt. And logical extension of Judge Huvell's analysis in *Democratic National Committee* requires the conclusion that agency employees' communications sent to or from personal e-mail addresses are not categorically exempt from FOIA's disclosure provisions but rather subject to those provisions to the same extent as communications sent to or from government e-mail addresses or via other communications mediums.

Implicit in courts' and agencies' apparent practice of analyzing the question whether agency personnel's work-related communications via private e-mail accounts must be disclosed in response to FOIA requests through the lens of Exemption 6 or other FOIA exemptions is a tacit recognition that these communications are not categorically exempt from FOIA's disclosure provisions but rather subject to Exemption 6's balancing test, unless properly analyzed under another FOIA exemption. Exemption 6, codified at 5 U.S.C. § 552(b)(6), provides that FOIA does not require disclosure of "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy . . . ."[97] (Exemption 6 may properly be invoked under some circumstances to justify withholding agency personnel's personal e-mail addresses and communications sent from those addresses, in whole or in part, as such information almost certainly qualifies as a species of "similar file" that is subject to this exemption.)[98] Exemption 6, by its terms, invites courts and agencies to weigh countervailing interests, and it has been interpreted by the Supreme Court to require "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'"[99] And indeed, the plain language of Exemption 6 creates a statutory presumption of disclosure and instructs both courts and agencies to "tilt the balance in favor of disclosure."[100]

To be sure, federal executive branch agency personnel do have a reasonable expectation of privacy with respect to purely personal records, and their cognizable privacy interest in such information is frequently invoked to justify withholding of agency records pursuant to Exemption 6.[101] But as the D.C. Circuit suggested in the course of rejecting the claim that names of agency personnel below a certain grade were categorically exempt from disclosure, "[t]he scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted."[102] And notwithstanding that the precise boundary between professional and personal information is far from clear,[103] "[c]ourts have frequently held that disclosure of information about an individual's business or professional activities does not impinge significantly on cognizable interests in personal privacy."[104]

To the extent that federal executive branch agency employees have a cognizable privacy interest in their work-related communications sent from personal e-mail addresses, that interest must be balanced against the underlying purpose of FOIA: "[T]o permit the public to decide for itself whether government action is proper . . . ."[105] The public interest in disclosure is at its acme, of course, when requested communications are sent or received by agency personnel via personal e-mail addresses and personal communications devices in connection with the agency's performance of its statutory duties and contain information that will enable the public to better understand the workings of government and shed light on agency behavior (or misbehavior)—i.e., where the requested information is within the heartland of FOIA's disclosure mandate and implicates "citizens' right to be informed about 'what their government is up to.'"[106] Because Exemption 6 analysis is fact-specific and on a case-by-case basis, application of the foregoing balancing test to communications sent or received by agency personnel via personal e-mail addresses concerning agency business may very well militate toward the conclusion that those communications must be disclosed. This proposition holds true a fortiori when such communications are authored or received by agency personnel during working hours, discuss matters that are within the scope of their employment, and are sent or received on government-owned communications devices.

The Ninth Circuit's recent discussion of e-mail communications in *Yonemoto v. Department of Veterans Affairs* is instructive insofar as it illustrates that FOIA's basic structure is generally not amenable to bright-line, categorical rules, instead requiring functional, content-and-use-driven, case-by-case analysis:

> Insofar as the district court made a categorical privacy judgment, it erred. Such categorical determinations are rarely proper under the FOIA; they are appropriate only in those circumstances in which disclosing a type of record defined by its content, such as an identifiable individual's rap sheet, will invariably result in an invasion of personal privacy.
>
> An email, however, is defined not by its content but by its mode of transmission. We could no more conclude that

> releasing emails would inevitably invade someone's privacy in the FOIA sense than we could conclude that disclosing all letters, faxes, telegrams, or text messages would do so. With regard to all these modes of communication, the privacy interests at stake, "the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances."[107]

The *Yonemoto* court's reasoning holds true with respect to work-related communications sent from private e-mail addresses: the content, use, and function of the communication is more important than the mode of communication. If it were otherwise, reductio ad absurdum, agency employees could effectively insulate the vast majority of their work-related communications from disclosure through the simple expedient of exclusively conducting agency business via Gmail and Gchat.

V. A Word About Segregability Analysis

Another feature of the FOIA that buttresses the conclusion that work-related communications sent or received via agency personnel's personal e-mail addresses are subject to the statute's disclosure provisions bears brief mention: pursuant to 5 U.S.C. § 552(b), even where portions of a requested agency record are properly exempt from disclosure, nonexempt portions that are "reasonably segregable" must be disclosed.[108] As a general proposition, then, agency records that are partially exempt from disclosure under Exemption 6 or another statutory exemption must nonetheless be provided to requesters, albeit in a redacted form[109]—the mere fact that a portion of a requested agency record is exempt from disclosure generally does not allow an agency to withhold the entire agency record. In practice, requesters are frequently, though not invariably, more interested in the *content* of work-related communications sent or received by agency personnel via personal e-mail addresses than the personal e-mail addresses from which those communications were sent or received or portions of such e-mails in which purely personal matters are discussed. In those situations, requesters can simply stipulate in their FOIA request that the personal e-mail addresses and any discussion of purely personal matters may be withheld, thereby effectively preempting any Exemption 6 claim.[110]

VI. Conclusion

In theory, the FOIA's disclosure provisions should apply to work-related communications sent and received by executive branch agency personnel exclusively via private e-mail accounts and personal communications devices, such as text messages sent on personal cell phones and e-mails that are only accessed and sent from personal computers using personal e-mail addresses. But it would be practically impossible for even the most well-intentioned, experienced FOIA officer to gain access to these communications on behalf of a requester without resort to extraordinary means, e.g., subpoenaing government employees' e-mail records from Google. As a practical matter, at this time it is only feasible for requesters to gain access to work-related communications sent via personal communications devices and/or using personal e-mail addresses that are sent from or accessed on a government-issued computer or communication device, such as a Blackberry; forwarded or sent to at least one government e-mail address; or otherwise captured on government servers. Moreover, practical considerations aside, FOIA's transparency mandate must be balanced against competing normative values.

The tension between the compelling need for transparency in government and federal employees' reasonable expectations of privacy with respect to their purely personal electronic communications is not limited to the subject of this article.[111] On March 5, 2012, Congressman Darrell Issa, Chairman of the U.S. House of Representatives' Committee on Oversight and Government Reform, and Senator Charles E. Grassley, Ranking Member on the U.S. Senate's Committee on the Judiciary, sent a letter to Jeffrey D. Zients, Acting Director of the Office of Management and Budget ("OMB"), "request[ing] that OMB conduct a comprehensive survey . . . to determine agencies' policies with respect to monitoring federal employees' personal e-mail accounts."[112] Among other things, the proposed survey would address questions such as "[w]hether . . . [an] agency has an official policy for monitoring e-mail" and would request "description[s] of any such policy, including whether and to what extend the agency distinguishes between personal e-mails and official e-mails."[113]

The concerns giving rise to Congressman Issa and Senator Grassley's letter—the FDA's alleged unlawful selective monitoring of personal e-mail accounts of FDA employees "who raised concerns . . . about the effectiveness of the FDA's process for approving medical devices,"[114] which may have entailed the FDA gaining "access to personal e-mails that may have been transmitted from home computers or cell phones," as well as "intercept[ing] passwords to the personal e-mail accounts of . . . [those] employees"[115]—are distinguishable from those addressed in this article but illustrate a salient point: technological developments, such as e-mail and text messaging, have changed the way in which federal employees conduct agency-related business. As is often the case, the law has yet to catch up with the advent of technological advances and the practical reality that, for better or worse, federal employees have used and will continue to use personal e-mail addresses and personal communications devices to send and receive work-related communications. And it is difficult to articulate with clarity and specificity the appropriate balance between transparency and privacy—two legitimate competing values. If the OMB conducts the "comprehensive survey" of agencies' policies of monitoring federal employees' personal e-mail accounts that Congressman Issa and Senator Grassley advocate, it is likely that much-needed light will be shed on the extent to which federal employees' personal e-mail accounts are used to conduct agency business.

As Congressman Issa and Senator Grassley noted in their letter, "[i]n 2009, the Office of Legal Counsel (OLC) in the Department of Justice issued an opinion concluding that a government agency may monitor employees' computers in pursuit of a lawful purpose."[116] Moreover, as Congressman Issa and Senator Grassley point out, "[t]he current policy of the U.S. Office of Personnel Management (OPM) makes clear

that employees do not have the right to privacy when using government equipment and that such use may be monitored or recorded."[117] The 2009 OLC opinion and current OPM policy coupled with not only FOIA's public-policy goals and statutory language but the judicial gloss that has been placed on FOIA's disclosure provisions seem to require the conclusion that work-related e-mails sent from personal e-mail accounts that are sent or received via government computers are indeed subject to disclosure under FOIA.

The more difficult question is whether federal executive branch agency employees' work-related communications sent from and received on personal e-mail accounts and personal communications devices—i.e., agency-business-related communications that are never captured on government computers or servers—are (or should be) subject to FOIA's disclosure provisions. Although federal agencies do not—and, as a normative matter, should not—have untrammeled carte blanche authority to monitor federal employees' purely personal communications sent from personal communications devices, federal executive branch agency personnel should not be able to use personal communications devices, such as home computers, and personal e-mail accounts to intentionally circumvent the FOIA's disclosure provisions and evade public scrutiny of their professional conduct. Theoretically, such communications fall within the ambit of FOIA's disclosure provisions. In practice, however, it would not be technically feasible or reasonable to require FOIA officers to obtain such communications.

To illustrate why e-mail and other communications from nongovernmental addresses dealing with official agency business ought to be subject to disclosure under FOIA, consider an e-mail obtained by Cause of Action during its investigation into ex parte communications at the National Labor Relations Board (NLRB) (reproduced below).

This e-mail, sent from NLRB Region 19 Director Richard Ahearn to Acting NLRB General Counsel Lafe Solomon on Ahearn's personal e-mail account, was produced by the NLRB to Cause of Action in compliance with FOIA while redacting personal information or any information that is allegedly deliberative and thus exempt from disclosure pursuant to Exemption 5. This example highlights the standard that all federal agencies must meet, in our view, when determining whether personal e-mails or Blackberry messages dealing with official agency business are FOIAble agency records. Otherwise, use of private e-mail accounts and communications devices will become a mechanism for agencies and agency employees to engage in official business beyond the scope of public oversight. And that is the precise sort of behavior FOIA was established to protect against.

Ultimately, unless Congress legislatively clarifies whether the FOIA's disclosure provisions apply to communications sent or received via private e-mail accounts and personal communications devices, a federal district court will be compelled to squarely and comprehensively opine on the application of FOIA's disclosure provisions to federal employees' work-related communications sent through personal channels in the course of adjudicating whether a particular agency has improperly withheld agency records. The test case will, of course, begin with a FOIA request.

Endnotes

1 Sheryl Gay Stolberg, *Missing E-mail May Be Related to Prosecutors*, N.Y. Times, Apr. 13, 2007, at A1.

2 Democratic Nat'l Comm. v. U.S. DOJ, 539 F. Supp. 2d 363, 364 (D.D.C. 2008) (citations omitted and alterations in original).

3 *See* U.S. House, Committee on Oversight and Government Reform, Interim Report: Investigation of Possible Presidential Records Act Violations, Exec. Summary (June 2007).

4 *Democratic Nat'l Comm.*, 539 F. Supp. 2d at 364.

5 *See id.* at 365-66 & n.4.

6 *See id.*

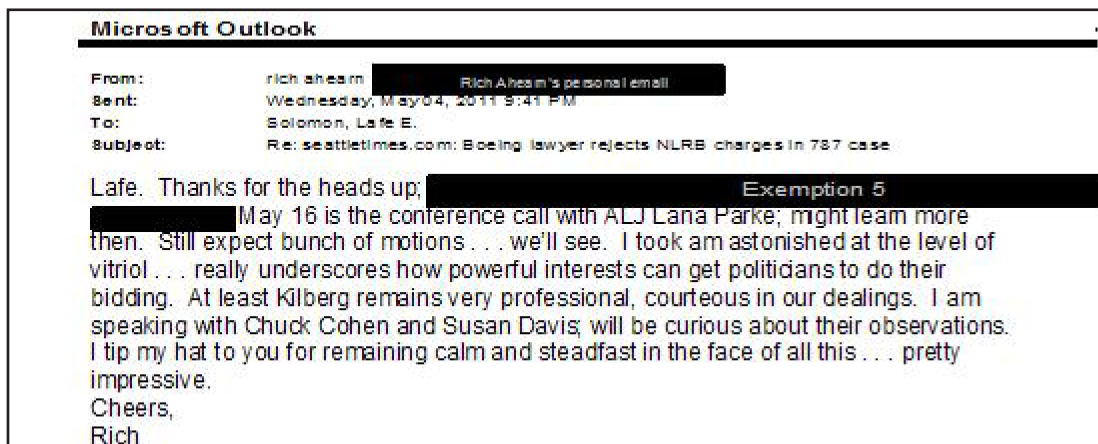
7 *See id.* at 367-68.

8 *See id.* at 368.

9 Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979) (citation omitted); *see* 5 U.S.C. § 552(a).

10 Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls over Government Information*, 45 Syracuse L. Rev. 999, 1004 (1995).

11 *Compare* 5 U.S.C. § 552(a) (imposing general obligation on federal executive branch agencies to upon request from "any person" provide access to "agency records"), *and* Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (discussing agencies obligation to "conduct[] a search reasonably calculated to uncover all relevant documents" in response to FOIA request), *with* 5 U.S.C. § 552(b) (listing nine categories of agency records that are statutorily exempt from disclosure, prescribing limits on public right of access to agency records).


Microsoft Outlook

From: rich ahearn [Rich Ahearn's personal email]
Sent: Wednesday, May 04, 2011 9:41 PM
To: Solomon, Lafe E.
Subject: Re: seattletimes.com: Boeing lawyer rejects NLRB charges in 787 case

Lafe. Thanks for the heads up; [Exemption 5] May 16 is the conference call with ALJ Lana Parke; might learn more then. Still expect bunch of motions . . . we'll see. I took am astonished at the level of vitriol . . . really underscores how powerful interests can get politicians to do their bidding. At least Kilberg remains very professional, courteous in our dealings. I am speaking with Chuck Cohen and Susan Davis; will be curious about their observations. I tip my hat to you for remaining calm and steadfast in the face of all this . . . pretty impressive.
Cheers,
Rich

12 U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 496 (1994) (citation and internal quotation marks omitted); *see* Clarifying and Protecting the Right of the Public to Information and for Other Purposes, S. Rep. No. 89-813, 89th Cong. 1st Sess., at 10 (1965) ("[G]overnment by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

13 *See* 5 U.S.C. § 552(a)(1)-(2). Such materials would include final opinions, orders, and statements of policy.

14 *See* 5 U.S.C. § 552(a)(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.").

15 Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

16 *Id*. (citation and internal quotation marks omitted).

17 437 U.S. 214 (1978).

18 *Id.* at 242.

19 *See infra* notes 105 & 109 and accompanying text.

20 *See* 5 U.S.C. § 552(b); *see also* U.S. DOJ v. Julian, 486 U.S. 1, 8 (1988) ("A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)."). *See generally Rose*, 425 U.S. at 361 (1976) ("[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.").

21 *See* 5 U.S.C. § 552(f) (defining "agency" for purposes of the FOIA); 5 U.S.C. § 551(1)(A)-(B) (excluding Congress and the courts from the definition of "agency").

22 A federal executive branch agency is only obligated to provide nonexempt "agency records" on request. *See* 5 U.S.C. § 552(a)(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." (emphasis added)).

23 *See infra* notes 24-25; *see also* Alexander J. Yoakum, *Technical Problem: How City of Dallas v. Dallas Morning News, LP Exposed a Major Loophole in the Texas Public Information Act*, 42 St. Mary's L. J. 297, 300 (2010) (arguing that the Texas Public Information Act creates problems when a person conducts official business through a private e-mail account or personal cell phone). Yoakum contends that the burden of establishing the right to withhold information within personal e-mails discussing public business should be on the government, as opposed to placing the burden of establishing that the content of the communication is subject to disclosure on the requesting party. Yoakum outlines a bright-line rule that Freedom of Information laws should ensure disclosure of all electronic records that relate to government business, regardless of the source. *Id*. at 300; *cf.* Peter S. Kozinets, *Access to the E-mail Records of Public Officials Safeguarding the Public's Right to Know*, 25 A.B.A. Comm. Law. 17, 18 (2007) (e-mail has become the regular forum for public employees to communicate within their respective agencies). *See generally* Richard J. Peltz, *Arkansas's Public Records Retention Program: Finding the FOIA's Absent Partner*, 28 U. Ark. Little Rock L. Rev. 175, 175 (2006) (indicating that if agencies maintain poor records-retention programs, threshold questions concerning public records requests will be rendered moot).

24 Although no federal court has directly opined on the issue addressed in this article, careful parsing of several recent cases indicates that this issue arises with some frequency. In a September 30, 2011 memorandum opinion issued by the U.S. District Court for the District of the Virgin Islands, for example, the court described a one-page document that the "IRS [had] withheld . . . in full" from a FOIA requester as "an email from a personal email account of an IRS employee containing his thoughts about then-proposed Notice 2007-19." Erika A. Kellerhals, P.C. v. IRS, 2011 U.S. Dist. LEXIS 113156, *5 (D.V.I. 2011). A September 29, 2011 Federal Communications Commission ("FCC") memorandum opinion and order noted that a document withheld from a FOIA request under Exemption 5 (which applies to certain intra-agency communications) had been "sent by an agency employee to his FCC email account from the personal email account of his spouse to which he has access on a home computer. . . ." *In re* Elec. Frontier Found. on Request for Inspection of Records, 26 FCC Rcd 13812, 13815 (F.C.C. 2011). In 2004, in a footnote, the U.S. District Court for the District of Columbia alluded to a "search of personal email accounts of employees" in the Department of Interior's Office of the Solicitor in response to a FOIA request. *See* Wilderness Soc'y v. United States DOI, 344 F. Supp. 2d 1, 21 (D.D.C. 2004) ("The plaintiff initially alleged that the defendants also improperly failed to search personal email accounts of DOI employees. Since this search has now been completed, the plaintiff appears to have abandoned this argument, except to the extent that the defendants have not searched the email accounts of employees in the SOL. Since DO search of the SOL has [sic] been completed yet, this Court assumes that a search of personal email accounts will occur as was done in other departments. Thus, the Court need not address this issue at this time. If the defendants fail to undertake a search of the personal email accounts of the SOL employees, the plaintiff is welcome to again challenge the sufficiency of the search."). In 2008, the D.C. District Court dismissed, without reaching the merits, a Federal Records Act claim based on an alleged Department of Education policy permitting employees to "use private e-mail accounts to conduct official business" on the ground that the plaintiff lacked standing to bring that claim. *See* Citizens for Responsibility & Ethics v. Dep't of Educ., 538 F. Supp. 2d 24, 25-29 (D.D.C. 2008), *summary judgment granted in part and denied in part*, 2009 U.S. Dist. LEXIS 4629 (D.D.C. 2009). A 2009 report and recommendation issued by a U.S. magistrate judge in the Northern District of California repeatedly referred to e-mails disclosed in response to a FOIA request with the "personal email addresses" of government employees redacted, without making clear whether the withheld e-mail addresses were government-issued or private e-mail accounts. *See, e.g.*, Ctr. for Biological Diversity v. OMB, 2009 U.S. Dist. LEXIS 82769, at *51-52 (N.D. Cal. 2009) ("Document 518: This email, dated 08/22/05, was sent by Wood[, then-Chief Counsel for the NHTSA,] to Toy, Theroux, Glassman, Rosen, and Runge. In the email, Wood sends copies of a draft of the CAFE regulations and of the EA (the attachments were not provided for review). *With the exception of the personal email address* of Wood, which the agency has withheld on privacy grounds, the email has been released." (emphasis added)).

25 The June 2007 Interim Report issued by the Committee on Oversight and Government Reform of the U.S. House of Representatives addressed whether alleged use of nongovernmental e-mail accounts for work-related communications violated the Presidential Records Act. *See* Interim Report: Investigation of Possible Presidential Records Act Violations, U.S. House Committee on Oversight and Government Reform (June 2007). The June 2008 GAO Report, entitled "Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management," noted that EPA officials "discovered an e-mail message from a former Acting Administrator instructing a private consultant not to use the Administrator's EPA e-mail account to discuss a sensitive government issue (World Trade Center issues) but to use a personal e-mail account." U.S. Govt. Accountability Office, Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management, GAO-08-742, at 38-39 (June 2008) (hereinafter "GAO Report").

26 U.S. DOJ v. Julian, 486 U.S. 1, 8 (1988).

27 *See* 5 U.S.C. § 552(a)(4)(B). *See generally* U.S. DOJ v. Tax Analysts, 492 U.S. 136, 142-46 (1989) (noting that FOIA's disclosure provisions only apply to "agency records"). The Supreme Court has made abundantly clear, however, that FOIA creates a presumption of disclosure and requires agencies seeking to withhold requested materials to rebut that presumption. *See id.* at 142 ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have *not* been 'improperly' 'withheld.'" (citations omitted)).

28 *See* 5 U.S.C. § 552(a)(4)(B) (federal courts have jurisdiction "to enjoin the agency from withholding *agency records* and to order the production of any *agency records* improperly withheld"); *see also* Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 150 (1980) ("[F]ederal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'").

29 Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 Ga. L. Rev. 121, 133 n.26 (1992).

30 *See* 5 U.S.C. § 552(f)(1) ("'[A]gency' as defined in section 551(1) of this title [5 U.S.C. § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . .").

31 *See* Forsham v. Harris, 445 U.S. 169, 183 (1980) (noting that "Congress . . . supplied no definition of agency records in the FOIA").

32 *See* McGehee v. CIA, 697 F.2d 1095, 1106 (D.D.C. 1983) ("As has often been remarked, the Freedom of Information Act, for all its attention to the treatment of 'agency records,' never defines that crucial phrase. A reading of the legislative history yields insignificant insight into Congress' conception of the sorts of materials the Act covers."), *vacated in part and aff'd in part*, 711 F.2d 1076 (D.C. Cir. 1983). The *Forsham* Court noted the dearth of legislative history on this point:

> The only direct reference to a definition of records in the legislative history, of which we are aware, occurred during the Senate hearings leading to the enactment of FOIA. A representative of the Interstate Commerce Commission commented that "[since] the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions."

Forsham, 445 U.S. at 184 (quoting Administrative Procedure Act: Hearings on S. 1160 et al. Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965)).

33 *See* 5 U.S.C. § 552(f)(2) ("'[R]ecord' and any other term used in this section in reference to information includes—(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.").

34 *See id.* The final House Report is probative of the policy justification for this amendment:

> [A] "record" under the FOIA includes electronically stored information. This articulates the existing general policy under the FOIA that all Government records are subject to the Act, regardless of the form in which they are stored by the agency. . . . The format in which data is maintained is not relevant under the FOIA. Computer tapes, computer disks, CD-ROMs, and all other digital or electronic media are records. Microfiche and microforms are records. When other, yet-to-be invented technologies are developed to store, maintain, produce, or otherwise record information, these will be records as well. When determining whether information is subject to the FOIA, the form or format in which it is maintained is not relevant to the decision.
>
> The primary focus should always be on whether information is subject to disclosure or is exempt, rather than the form or format it is stored in.

H.R. Rep. No. 104-795, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3449.

35 492 U.S. 136 (1989).

36 *Id.* at 144-45 (citation omitted).

37 *Id.* at 145 (quoting Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 157 (1980)). Courts have subsequently refined the analysis for the "control" prong of the *Tax Analysts* test, prescribing a general four-factor rubric for determining whether an agency has sufficient control over requested documents to render them "agency records" subject to FOIA. *See infra* note 39.

38 *Id.* at 138.

39 Given the comparative frequency of FOIA litigation in the District of Columbia, this article focuses primarily on D.C. case law. *See* Harry A. Hammitt et al., Litigation Under the Federal Open Government Laws 2010, at 382 (2010) ("Because the vast majority of FOIA lawsuits are filed in the District of Columbia, the district court and court of appeals there have developed a substantial body of expertise in FOIA matters that may be lacking in other jurisdictions."). The D.C. Circuit has described the four factors that are relevant to the *Tax Analysts* control inquiry this way:

> (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.

United We Stand Am., Inc. v. IRS, 359 F.3d 595, 599 (D.C. Cir. 2004). This four-factor analysis traces its genesis to *Burka v. United States Department of Health & Human Services.*, 318 U.S. App. D.C. 274 (D.C. Cir. 1996); as a result, these four factors are often referred to as "*Burka* factors." *See, e.g.*, Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 744 F. Supp. 2d 228, 234-236 (D.D.C. 2010), *aff'd*, 2011 U.S. App. LEXIS 16140 (D.C. Cir. 2011). This framework requires courts to balance the four factors. *See, e.g.*, Citizens for Responsibility & Ethics in Washington v. United States Dep't of Homeland Sec., 527 F. Supp. 2d 76, 97 (D.D.C. 2007), *appeal dismissed*, 2008 U.S. App. LEXIS 14714 (D.C. Cir. 2008). However, recent precedent suggests that the third and fourth factors may be the most significant. *See, e.g.,* Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 744 F. Supp. 2d at 235 ("Based on the four factor Burka test, two factors favor the plaintiff, but the two most important factors favor the defendant. The strength of the third and fourth factors tips the scales in favor of the defendant."). *But cf.* Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1492 (D.C. Cir. 1984) ("Use alone, however, is not dispositive; the other factors mentioned in *Kissinger* must also be considered: whether the document is in the agency's control, was generated within the agency, and has been placed into the agency's files.").

40 *See, e.g.,* Burka v. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (a data tape in the possession of a government contractor nonetheless constitutes an agency record); Los Alamos Study Group v. Dep't of Energy, No. 97-1412, 1998 U.S. Dist. LEXIS 23504 (D. N.M. 1998); In Def. of Animals v. NIH, 543 F. Supp. 2d 70 (D. D.C. 2008); Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 158 (2d Cir. 2010).

41 *See* Shelby Amendment, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998); 5 U.S.C. § 552(f)(2)(B).

42 *See* U.S. Office of Personnel Management, Status of Telework in the Federal Government: Report to Congress (Feb. 2011), *available at* http://www.telework.gov/Reports_and_Studies/Annual_Reports/2010teleworkreport.pdf (last visited April 9, 2012) (detailing frequency with which federal workers telecommute). *See generally* Corey A. Ciocchetti, *iBRIEF: eCOMMERCE: Monitoring Employee E-Mail: Efficient Workplaces vs. Employee Privacy*, 2001 Duke L. & Tech. Rev. 26 (2001) ("Employee use of electronic mail (e-mail) during business hours is a common characteristic of the 21st century American workplace. According to a recent study, over 130 million workers are currently flooding recipients with 2.8 billion e-mail messages each day.").

43 742 F.2d 1484 (D.C. Cir. 1984). Opinions of the U.S. Court of Appeals for the D.C. Circuit are often highly persuasive in and adopted by other federal jurisdictions. *See, e.g.*, Tybrin Corp. v. U.S. Dep't of the Air Force, 2009 U.S. Dist. LEXIS 12612, at *11-12 (S.D. Ohio 2009) ("Given the predominant role of the District of Columbia Circuit in applying the FOIA . . . [and] the absence of controlling authority in the Sixth Circuit, . . . this Court elects to follow the D.C. Circuit definition."); *see supra* note 39.

44 *See infra* notes 45-57 and accompanying text.

45 Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1486 (D.C. Cir. 1984).

46 *Id.* at 1492-93. Indeed, the *Bureau of National Affairs* court expressly "reject[ed] the government's invitation to hold that the treatment of documents for disposal and retention purposes under the various federal records management statutes determines their status under FOIA." *Id.* at 1493.

47 *Id.* at 1494.

48 *Id.* at 1492.

49 *Id.*

50 *Id.* at 1493; *see* Consumer Fed'n of Am. v. Dep't of Agric., 455 F.3d 283, 288 (D.C. Cir. 2006) (describing the "principal factors identified in *Bureau of National Affairs* as 'creation, location/possession, control, and use'").

51 *Bureau of Nat'l Affairs, Inc.*, 742 F.2d at 1486.

52 *Id.* at 1495.

53 455 F.3d 283 (D.C. Cir. 2006).

54 *Id.* at 285.

55 *Id.* at 287-88 ("We must nonetheless be careful to ensure that '[t]he term "agency records" . . . not be manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies.' . . . Mindful of this caution, our circuit has adopted a totality of the circumstances test to distinguish 'agency records' from personal records . . . . There is no precedent in which we have applied that test to facts directly paralleling those before us. This is due, at least in part, to the technological advances of recent years." (citations omitted)). The normative debate concerning whether totality-of-the-circumstances tests are appropriate or desirable is beyond the scope of this article. The authors do not express a position concerning that issue herein.

56 *Id.* at 293.

57 *See id.* at 288, 290 ("[U]se is the decisive factor here. As in *Bureau of National Affairs*, with creation, possession, and control not dispositive in determining whether the calendars are 'agency records,' we must shift our attention to the manner in which the documents were used within the agency.").

58 *Cf.* Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir. 1982) ("Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA.").

59 *See, e.g.*, Wis. Project v. U.S. DOC, 317 F.3d 275, 279 (D.C. Cir. 2003) ("FOIA . . . mandates a 'strong presumption in favor of disclosure,' under which the statutory exemptions to disclosure are to be 'narrowly construed' . . . ." (quoting U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991)); *accord id.* at 164 (noting that the basic purpose of the Freedom of Information Act is "to open agency action to the light of public scrutiny"); *see* Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); *see also Yeager*, 678 F.2d at 321 (FOIA "makes no distinction between records maintained in manual and computer storage system . . . ."); Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979) (Kennedy, J.), *cert. denied*, 446 U.S. 917 (1980) ("[C]omputer stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still 'records' for the purpose of the FOIA. . . . [T]he FOIA applies to computer tapes to the same extent it applies to any other documents . . . ."). Additionally, any application of Exemption 6 applies to personal, not business, privacy. *See* Wash. Post Co. v. Dep't of Agric., 943 F. Supp. 31, 37 n.6 (1996) ("[C]orporation, business and partnerships have no privacy interest whatsoever under Exemption 6 . . . .").

60 *See Ray*, 502 U.S. at 173 ("Consistent[] with th[e FOIA's] purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.").

61 *See, e.g.*, Teich v. FDA, 751 F. Supp. 243, 247 (1990) ("As counsel for the FDA conceded in oral argument, the presubmission review procedure was adopted specifically to avoid public disclosure of information as required by the FOIA. This is clearly an attempt by the agency to nullify a congressionally enacted law.").

62 *Cf. infra* Part IV.

63 *See supra* notes 15-18 and accompanying text.

64 GAO Report, *supra* note 25, at 37.

65 *See* Forsham v. Harris, 445 U.S. 169, 183-86 (1980) (using definitions of the term "record" in the Records Disposal Act, 44 U.S.C. § 3301 *et seq.*, and the Presidential Records Act of 1978, 44 U.S.C. § 2201, to determine the meaning Congress intended the term to have in FOIA).

66 *See, e.g.*, 32 C.F.R. § 518.13(f)(2) ("Home addresses, *including private e-mail addresses*, are normally not releasable without the consent of the individuals concerned." (emphasis added)).

67 Reply in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment, Democratic Nat'l Comm. v. U.S. Dep't of Justice, Civil Action No. 07-712 (ESH), 2007 U.S. Dist. Ct. Motions 345068, at *6 (D.D.C. Mar. 6, 2008).

68 *See infra* notes 69-78 and accompanying text.

69 *See* Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 1 Commlaw Conspectus 71, 81 (2003) ("[T]he legislatures in all fifty states have enacted freedom of information statutes, which, to varying degrees, open government records to public inspection.").

70 *See, e.g.*, Pulaski County v. Ark. Democrat-Gazette, Inc., 260 S.W.3d 718, 722-724 (Ark. 2007); Denver Publ. Co. v. Bd. of County Comm'rs of Arapahoe County, 121 P.3d 190, 199-200 (Colo. 2005) (using content-driven analysis).

71 222 P.3d 808 (Wash. Ct. App. 2009).

72 *Id.* at 811-12 (citation omitted).

73 *Id.* at 810-11.

74 Bradford v. Dir. Empl. Sec. Dep't, 128 S.W.3d 20, 27-28 (Ark. Ct. App. 2003).

75 789 N.W.2d 495 (Mich. Ct. App. 2010), *cert. denied*, 791 N.W.2d 719 (2010).

76 *Id.* at 497 (emphasis added).

77 *Id.* at 504. Expounding on this statement, the court provided the following example:

> [W]ere a teacher to be subjected to discipline for abusing the acceptable use policy and personal e-mails were used to support that discipline, the use of those e-mails would be related to one of the school's official functions—the discipline of a teacher—and, thus, the e-mails would become public records subject to [the state] FOIA.

Id. at 505.

78 *Id.* at 497.

79 *See* 5 U.S.C.S. § 552(a)(4)(B) ("On complaint, the district court of the United States . . . *has jurisdiction* to enjoin the agency from withholding *agency records* and to order the production of any agency records improperly withheld from the complainant." (emphasis added)); U.S. DOJ v. Tax Analysts, 492 U.S. 136, 142-43 (1989) (characterizing "agency records" as a "jurisdictional term[]"); *see also* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244 (2010) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.").

80 *See* Ruhrgas Ag v. Marathon Oil Co., 526 U.S. 574, 577 (1999).

81 Consistent with Article III's case-or-controversy requirement, federal courts must determine that they have jurisdiction to adjudicate the merits of a plaintiff's claims. This inquiry is conducted on a claim-by-claim basis—sua sponte, if necessary. *See* Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884) (if the parties fail to raise a defect in subject-matter jurisdiction, a federal court has a duty to raise and decide the point sua sponte).

82 In essence, the FOIA statute prescribes an order of operations for courts to use: first, the court must satisfy itself that the requested materials are "agency records," sua sponte, if necessary; second, the court will determine whether "agency records" must be disclosed or are statutorily exempt from disclosure.

83 Erika A. Kellerhals, P.C. v. IRS, 2011 U.S. Dist. LEXIS 113156, at *20 ("The IRS is withholding one document in part because it contains the personal information of an employee. In applying the personal privacy exemptions under FOIA, courts must balance the private and public interests involved. Kellerhals has not challenged the withholding of this document and asserts no public interest in its disclosure. The Court adopts the Magistrate Judge's recommendation that this document was validly withheld. Accordingly, the Court finds that the IRS has satisfied its burden to demonstrate that it is entitled to summary judgment on this issue.").

84 699 F. Supp. 2d 97 (D.D.C. 2010).

85 *Id.* at 105-06. Exemption 6 refers to 5 U.S.C. § 552(b)(6), which exempts from FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

86 798 F. Supp. 2d 274 (D.D.C. 2011).

87 *See id.* at 283-85.

88 *E.g.,* Ctr. for Biological Diversity v. OMB, 2009 U.S. Dist. LEXIS 82769, at *54-55, 63-64 (N.D. Cal. 2009); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 307 (D.D.C. 2007); Sakamoto v. U.S. EPA, 443 F. Supp. 2d 1182, 1192 (N.D. Cal. 2006); Kortlander v. BLM, 2011 U.S. Dist. LEXIS 103264, at *29-30 (D. Mont. 2011); Amnesty Int'l USA v. CIA, 2008 U.S. Dist. LEXIS 47882, at *19-20 (S.D.N.Y. 2008).

89 Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 595 F.3d 949, 961 (9th Cir. 2010) (citation omitted).

90 539 F. Supp. 2d 363 (D.D.C. 2008).

91 *See id.* at 367-68.

92 *Id.* at 368.

93 *Id.* at 364.

94 *See id.* at 365-66; *see also* 5 U.S.C. § 552(b)(5) ("[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from the FOIA's disclosure provisions.); DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) ("To qualify [under Exemption 5], a document must . . . satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.").

95 *Id.* at 368.

96 *Id.* at 368 n.7.

97 5 U.S.C. § 552(b)(6) (emphasis added). FOIA Exemption 7(C), codified at 5 U.S.C. § 552(b)(7)(C), by its terms, requires a similar balancing analysis, exempting from disclosure "records or information compiled for law enforcement purposes . . . to the extent that production of such . . . records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ."

98 *See, e.g.*, Gov't Accountability Project v. U.S. Dep't of State, 699 F. Supp. 2d 97, 106 (D.D.C. 2010) ("Because . . . [personal] email addresses can be identified as applying to particular individuals, they qualify as 'similar files' under Exemption 6 . . . ."); *see* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982) ("Congress' statements that it was creating a 'general exemption' for information contained in 'great quantities of files,' suggest that the phrase 'similar files' was to have a broad, rather than a narrow, meaning. This impression is confirmed by the frequent characterization of the 'clearly unwarranted invasion of personal privacy' language as a 'limitation' which holds Exemption 6 'within bounds.'" (citations omitted)).

99 Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (citation omitted); *accord* Dep't of State v. Ray, 502 U.S. 164 (1991).

100 Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971); *see* Wash. Post Co. v. Dep't of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1980) (explaining that "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the act"). *See generally Rose*, 425 U.S. at 371 (explaining that "[j]udicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in 'personnel' or 'similar' files," and listing cases).

101 *See, e.g.,* Beck v. Dep't of Justice, 997 F.2d 1489, 1492-1493 (D.C. Cir. 1993) ("The public's interest in disclosure of personnel files derives from the purpose of the Act—the preservation of 'the citizens' right to be informed about what their government is up to.' . . . Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct." (citations omitted)).

102 Armstrong v. Executive Office of the President, 97 F.3d 575, 581 (D.C. Cir. 1996); *cf.* Stern v. FBI, 837 F.2d 84 (D.C. Cir. 1984) (distinguishing privacy expectations of federal employees based on the scope of employees' authority).

103 *See, e.g.*, Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1188-89 (8th Cir. 2000) ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals.").

104 Hammitt et al., *supra* note 39, at 179; *see, e.g.*, Wash. Post Co. v. Dep't of Health & Human Servs., 690 F.2d 252, 261-62 (D.C. Cir. 1982); *see also* Cohen v. EPA, 575 F. Supp. 425, 429 (D.D.C. 1983) ("The privacy exemption does not apply to information regarding professional or business activities."). *See generally* Sims v. CIA (I), 642 F.2d 562, 575 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships.").

105 Int'l Bd. of Elec. Workers, Local No. 41 v. Dep't of Hous. & Urban Dev., 763 F.2d 435, 436 (D.C. Cir. 1985) (citation omitted).

106 U.S. DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989).

107 Yonemoto v. Dep't of Veterans Affairs, 2012 U.S. App. LEXIS 1108, at *31-32 (9th Cir. 2012) (citation omitted).

108 *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."); *see also* Trans-Pacific Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1026-1027 (D.C. Cir. 1999) ("FOIA specifically requires that, if a requested record contains information that is exempt from disclosure under one of the FOIA exemptions, 'any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.'" (citation omitted)).

109 *See generally* Arieff v. Dep't of Navy, 712 F.2d 1462, 1466 (D.C. Cir. 1983) ("[T]he exemptions of the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.").

110 "A requester's willingness to accept non-personally identifiable data may help substantially in overcoming an Exemption 6 claim." Hammitt et al., *supra* note 39, at 211. In the course of determining whether lobbyists' e-mail addresses could be withheld under Exemption 6, the Ninth Circuit reasoned that, absent a showing that a lobbyists' e-mail address was necessary to identify the author of the communication, release of his or her e-mail address would constitute an unwarranted violation of personal privacy. *See* Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 595 F.3d 949, 961 (9th Cir. 2010) ("[T]he public interest in disclosing the identities of the lobbyists' names is to shed light on which companies and which individuals influence government decision making . . . . [T]he carriers' agents' email addresses, when not needed to identify the party communicating with the government, are protected from release by Exemption 6. If, however, a particular email address is the only way to identify the carriers' agent at issue from the disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens' right to know 'what their government is up to.'" (citations omitted)).

111 *See generally* Justin Conforti, *Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the* Ortega *Test in* Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 462 (2009) ("[A] piece of technology like the BlackBerry has further blurred already fuzzy lines setting the workplace from an individual's personal world outside the office. Despite the ostensible benefits of employer-provided technology, such as laptops, cell phones and BlackBerries, this blurring has serious implications for employee expectations regarding privacy in communications sent on employer-provided technology.").

112 Letter from Chairman Darrell Issa, U.S. House Oversight Committee, and Ranking Member Charles E. Grassley, U.S. Senate Judiciary Committee, to Acting Director Jeffrey D. Zients, U.S. Office of Management and Budget, at 2 (March 5, 2012) (hereinafter "Issa-Grassley Letter").

113 *Id.*

114 *Id.* at 1. The content of the FDA employees' e-mails sent from their

personal e-mail accounts may very well constitute protected disclosures under the Whistleblower Protection Act. *See* 5 U.S.C. § 2302(b)(8).

115 Issa-Grassley Letter, *supra* note 112, at 2.

116 *Id.* at 1 (citing Memorandum for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Ass't Att'y General, Office of Legal Counsel, U.S. Dep't of Justice, Re: Legal Issues Relating to the Testing, Use, and Deployment of an Intrusion-Detection System (EINSTEIN 2.0) to Protect Unclassified Computer Networks in the Executive Branch (Jan. 9, 2009)).

117 *Id.* at 2 (citing 5 U.S.C. § 7501 *et seq.*; OPM Personal Use of Government Office Equipment Policy (June 2000)).