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BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRACY FORWARD FOUNDATION, .
Plaintiff, . Case Number 18-246
vs. .
UNITED STATES DEPARTMENT OF .
COMMERCE, . July 14, 2020
Defendant. . 12:02 p.m.
- - - - -

TRANSCRIPT OF TELEPHONIC MOTION HEARING
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

(All participants present telephonically.)

THE COURTROOM DEPUTY: We are in Civil Action 18-246, Democracy Forward Foundation versus United States Department of Commerce.

If I can have counsel for the parties identify themselves, starting with counsel for plaintiff.

MR. DUBNER: Thank you, Your Honor. This is Jeffrey Dubner on behalf of Democracy Forward Foundation.

THE COURT: Good afternoon, Mr. Dubner.

MR. WALKER: And good afternoon, Your Honor. This is Johnny Walker on behalf of Department of Commerce.

THE COURT: Good afternoon, Mr. Walker.

This hearing is being conducted by phone pursuant to the Chief Judge's standing order. Unfortunately, the court has had some technical difficulties today with the videos. So we are having to proceed by telephone.

I scheduled this hearing on the parties' cross-motions for summary judgment to get some clarification on the searches that Commerce has performed to date. And this morning, Commerce filed an additional declaration by Michael Bogomolny, which I have reviewed.

Mr. Walker, if I can start with you, I have some follow-up questions.

MR. WALKER: Certainly, Your Honor.

1 THE COURT: I want to be sure that I understand the
2 declarations that have been provided.

3 So the second Bogomolny -- am I saying that correctly?

4 MR. WALKER: I call him "Bogo," Your Honor. So I
5 don't know.

6 THE COURT: All right. So the second declaration
7 makes clear that you know from your searches of Commerce
8 accounts, official Commerce accounts, and that is, the
9 Secretary's official account and, I think, 50 or so Commerce
10 officials, that the Secretary received 190 unique e-mails at
11 e-mail account number 1 and 23, I think, at e-mail account
12 number 2.

13 Is that correct?

14 MR. WALKER: That's correct. And I will -- as we
15 described in the declaration, that indicates individual e-mails,
16 maybe perhaps over the course of a thread. So even if you have
17 a thread in which there are three e-mails received, each of
18 those three would be reflected in that count.

19 THE COURT: Okay. Understood.

20 He also sent 40 unique e-mails from account number 1, but
21 he did not send any from account number 2 because the declarant
22 represents that he no longer uses that account.

23 Is that correct?

24 MR. WALKER: That's correct, Your Honor. The
25 Secretary has informed declarant that the Secretary -- or

1 someone has informed declarant, I believe, that the Secretary
2 has not accessed that e-mail account since becoming Secretary of
3 Commerce and indeed, shortly before becoming Secretary of
4 Commerce, sent out an e-mail from that e-mail address to an
5 undisclosed contact list directing everyone not to send any
6 further e-mails to that account, that his new e-mail account
7 would be the icloud.com account.

8 THE COURT: All right. So you agree that all of these
9 unique e-mails are agency records?

10 MR. WALKER: I would agree that -- not necessarily,
11 Your Honor. I don't think there has been much in the record to
12 demonstrate whether or not they're agency records. I think they
13 are more likely to be agency records after they arrive within
14 the Department of Commerce's e-mail systems.

15 As you can imagine, a lot of these e-mails start with a
16 reporter or an acquaintance of the Secretary reaching out to him
17 saying, hey, would you like to attend this summit, would you
18 like to attend this event, can we get a statement on the record.
19 And to the extent that one of those e-mails just went to the
20 Secretary's personal account and the Secretary never responded
21 or acted upon it or took any official action with respect to
22 that account, I do not believe it would be an agency record.

23 THE COURT: So you don't believe that -- these e-mails
24 that you produced in the initial production that reflected that
25 some were received on the personal e-mails, do you agree that

1 those are not related to official business and would qualify as
2 agency records?

3 MR. WALKER: I think the agency record test is a bit
4 more complex. It's articulated by the Court of Appeals in the
5 *Burka* case. It goes to the intent of the creator and the
6 ability of the agency to use and dispose of the record, the
7 extent to which agency personnel have read and relied on it, and
8 the degree to which the document was integrated into the
9 agency's record system or filed. That would be an individual
10 analysis that would have to be conducted of each and every one
11 of these e-mails.

12 And I am not prepared to say today that all of them would
13 be agency records. And as I say, certainly to the extent that
14 they exist on the Secretary's personal account, I think it is
15 highly doubtful that they would be agency records.

16 THE COURT: All right. But for purposes of the
17 pending motion, the government has made no such argument that
18 the documents that it produced were not agency records. Rather,
19 it argued that there is no need to do a further search because
20 any additional search would be duplicative.

21 Right?

22 MR. WALKER: We have certainly argued that some of the
23 records that plaintiff has presented as indicating that there
24 are agency records on the Secretary's personal account are not
25 agency records.

1 THE COURT: So you are disputing that these e-mails
2 that you produced to them that reflect that some came from the
3 Secretary's personal account, you are arguing those are not
4 agency records?

5 MR. WALKER: I believe certainly some of them would
6 not be agency records, Your Honor. I am not prepared to say
7 what proportion of them.

8 THE COURT: Well, it would be helpful to me to what
9 extent you concede that there are a number of e-mails that you
10 don't dispute are agency records that were found on his personal
11 e-mail accounts. Of these 190 and 40 on account number 1 and
12 the 23 on account number 2, it would be helpful to me to know to
13 what extent you dispute that those are agency records.

14 And I understand you can't do that right now, but do you at
15 least concede -- for purposes of this argument, do you concede
16 that there are a handful at least that you would concede are
17 official agency records that relate to official business that
18 meet the test?

19 MR. WALKER: I would concede certainly that some of
20 the records that have been produced are agency records, but one
21 must keep in mind that those records have been transmitted at
22 some point from the Secretary's personal accounts to the
23 Department of Commerce account. So I wouldn't --

24 THE COURT: But after that fact, do you concede that
25 any of the e-mails that were on the Secretary's personal account

1 are, you know, related to official business that would meet the
2 test of an agency record if they were found on a Commerce e-mail
3 account?

4 MR. WALKER: No, Your Honor, I am not prepared to
5 concede that today. I don't have a -- I am not prepared to make
6 a representation. I certainly don't have any basis to concede
7 that today.

8 THE COURT: I just don't understand why the government
9 hasn't made that argument in its briefing to date. If you've
10 produced all these e-mails that -- I understand you suggest that
11 some are just travel and that is not really an agency record,
12 not a full record, I guess? I'm not quite sure what the
13 government's argument is on that. But aside from, you know,
14 argument in the brief regarding these are just travel records or
15 these are just parties, the government hasn't made that argument
16 in its briefs --

17 MR. WALKER: We certainly have --

18 THE COURT: -- for the e-mails that have been
19 produced.

20 MR. WALKER: I believe we have to the extent that
21 plaintiff has presented examples. Plaintiff presented a
22 handful, I think six examples of e-mails in its opposition and
23 reply brief, and we did address each of those e-mails, the
24 extent to which they were agency records.

25 Plaintiff has provided a much greater amount in the final

1 reply that it filed, I think 18 total records, that it contends
2 were sent to or from Secretary Ross's personal account without
3 copying the official account.

4 THE COURT: Just to make sure I understand the
5 government's position right now, you don't concede that a single
6 e-mail that was on the Secretary's personal account is an
7 official agency record?

8 MR. WALKER: We don't concede it. I don't necessarily
9 dispute it right now, Your Honor. As I say --

10 THE COURT: Well, I'm going to need -- do you dispute
11 it?

12 MR. WALKER: Well, the problem, Your Honor, is that
13 the test for agency record is not so easy to apply. The
14 totality of the circumstances test, it is fact-specific and
15 individualized, and it would have to be performed with respect
16 to each and every one of these e-mails to the extent that it
17 exists only on the Secretary's personal account. And that's
18 just not something that has been done to date.

19 THE COURT: Okay. Well, looking at the statute,
20 Section 2911(a) of Title 44 requires government employees to
21 copy or forward any official e-mails to their official e-mail
22 account in 20 days.

23 Do you concede that there are some e-mails that meet that
24 definition that the Secretary did not forward to his official
25 e-mail account?

1 MR. WALKER: Well, I would just clarify somewhat that
2 particular statutory provision. It requires the forwarding or
3 copying of any e-mail sent or created by that individual. So to
4 the extent that the Secretary merely received an e-mail to his
5 personal account, it would not require that that e-mail be
6 copied or forwarded to an official account.

7 THE COURT: And so you -- at this point you don't
8 concede that he created an e-mail, an official e-mail?

9 MR. WALKER: We concede that there are some e-mails
10 created by the Secretary on his personal account that were not
11 copied to his own account. They were copied to other Commerce
12 accounts but not to his own account.

13 THE COURT: But you concede that he did not comply
14 with 2911(a) with respect to some official e-mails?

15 MR. WALKER: For a very small number of official
16 e-mails, we do concede that.

17 THE COURT: And how many?

18 MR. WALKER: I think we identified five in the revised
19 declaration that we said originated from the Secretary's
20 personal account but did not copy one of his official accounts.
21 I have a correction to that. I believe there are actually six.
22 Many of those are actually attachments to plaintiff's reply
23 brief. So they are Exhibit A-2, A-4, A-7, A-8 -- and I will
24 note that A-7 and A-8 are duplicative originating e-mails --
25 A-11, A-12. And A-15 originates from Secretary Ross and is

1 copied to a Department of Commerce account, but I don't think we
2 would say that A-15 is an agency record. That's an e-mail from
3 Secretary Ross to his wife regarding a partially redacted
4 security issue that is copied to an ethics officer at the
5 Department of Commerce. So I am not prepared to concede that
6 that is an agency record, but I believe that the other six that
7 I mentioned -- five unique ones that I mentioned would be.

8 THE COURT: Okay. So you concede at least five
9 e-mails are agency records that were on the Secretary's personal
10 e-mail and not forwarded to his official e-mail?

11 MR. WALKER: That were originated by the Secretary
12 from his personal e-mail and not copied or forwarded to his
13 official e-mail. All of those were sent to another department
14 e-mail.

15 THE COURT: All right. And so you agree Commerce is
16 not entitled to the presumption that all agency records were
17 copied or forwarded to an agency account?

18 MR. WALKER: Yes, Your Honor. We are not relying on
19 that presumption.

20 THE COURT: Does Commerce have any internal policy or
21 regulation that regulates how employees use their personal
22 e-mail accounts for official business?

23 MR. WALKER: Not that I am aware of, Your Honor.

24 THE COURT: All right. So you are not relying on the
25 presumption. Yet, you argue that any search of the Secretary's

1 personal e-mails would be duplicative.

2 And the problem I am having with that is neither Cannon nor
3 Bogomolny state that the Secretary routinely forwarded or copied
4 all Commerce-related e-mails to his official account that came
5 into his personal account.

6 Right? Am I correct about that?

7 There are descriptions of the Secretary's practices being
8 limited to the productions that you've made as opposed to his
9 practices in general.

10 MR. WALKER: That's correct, Your Honor. I think what
11 we would argue is -- we are not relying on either a presumption
12 of compliance or actual strict compliance with the forwarding
13 policy in the statute as the basis for the adequacy of our
14 search.

15 What we are relying on is the actual results of the search
16 and what the results of those search actually show about the
17 Secretary's --

18 THE COURT: But you haven't searched his personal
19 account. You're relying on what's been produced. The bucket of
20 documents you are looking at are those that ended up on other
21 e-mails, not what could be in his own personal e-mail.

22 MR. WALKER: That's correct, Your Honor. But those
23 e-mails do not show that the Secretary ever originated any
24 e-mails from his personal account without copying some
25 department account that was searched.

1 And you could argue and the obvious rejoinder to that is,
2 well, if there was an e-mail that solely originated from his
3 personal account related to department business that was not
4 copied to a department account, the search wouldn't capture
5 that.

6 That's not exactly true. I mean, the search does capture
7 several e-mails originating from outside of the Department of
8 Commerce that came into -- or from a third party to the
9 Secretary's personal e-mail, and those do end up in the
10 Department of Commerce's systems once the agency takes some
11 official action towards them.

12 So to the extent that any e-mail originated with the
13 Secretary's personal account to another third-party account, one
14 would expect that to eventually come into the department's
15 e-mail systems once the department takes an official action
16 towards them, and there are just no instances of that in the
17 e-mails that have been located.

18 THE COURT: But you're asking me to make assumptions
19 in a case where the Secretary has not followed the law in terms
20 of how he uses his personal e-mail.

21 So doesn't precedent in this court suggest that in these
22 circumstances when it is clear that agency records are on
23 personal e-mail accounts, that those accounts need to be
24 searched to ensure all official e-mails have been found?

25 MR. WALKER: I don't think any other case presents

1 quite the circumstances that our case does. I mean, certainly,
2 we are asking the Court to look at this through a lens that
3 other District Court cases have not looked at this. We are not
4 providing a declaration about this summarizing the Secretary's
5 e-mail practices, and we are not relying on --

6 THE COURT: And why not? I'm surprised. I've had a
7 similar case that involved a DOJ official, and they did provide
8 a declaration. And in that case the individual did search his
9 accounts.

10 It just seems here that to meet your burden that you've
11 done a search that is reasonably calculated to discover
12 requested documents, that that's what I need from you.

13 MR. WALKER: What makes this case different from those
14 other cases, Your Honor, is that here the FOIA request itself
15 from the plaintiff was specifically structured and devised to
16 probe the Secretary's personal e-mail practices. This isn't a
17 FOIA request that sought documents about a particular subject
18 matter and there was some indication in the result of those
19 documents that the relevant official used a personal address to
20 correspond about that subject matter.

21 What the plaintiffs have asked about is any use of the
22 Secretary's personal e-mail address for any agency business or
23 anything involving the Department of Commerce whatsoever. And a
24 broad search for any documents containing the e-mail accounts of
25 the -- the personal e-mail accounts of the Secretary was

1 conducted.

2 So here, the results of the search are particularly
3 informative about the Secretary's e-mail practices in a way
4 that, I think, is more probative and more descriptive than, you
5 know, a general representation in an affidavit or a presumption
6 of compliance with the statute.

7 THE COURT: So just to make sure I am understanding
8 your argument, the fact that you say at a minimum there are five
9 such e-mails that he wrote that you concede are official agency
10 records, you concede that he didn't comply with the federal
11 statute, and yet, you are asking me to assume because he cc'd
12 other people in these five instances that I can be confident
13 that Commerce's search was reasonably calculated to discover all
14 documents, including those that may have been sent from the
15 Secretary outside, to other people other than -- either others
16 in Commerce that weren't the 50 you searched or to someone on
17 the outside.

18 I'm having a hard time making that leap based on the record
19 that is before me in light of other cases in which, you know,
20 one e-mail alone has been sufficient to have the agency do a
21 search of the personal e-mail to ensure that nothing has been
22 missed.

23 MR. WALKER: And I think, Your Honor, there are two
24 main points I would like to make towards that argument.

25 One is, out of the entire course of the production, we only

1 have those five unique e-mails over the course of well over a
2 year in which the Secretary used his personal e-mail address to
3 conduct any agency business whatsoever. And I think that
4 indicates that there was not a widespread practice by the
5 Secretary of using the personal accounts to conduct agency
6 business --

7 THE COURT: Based on your Commerce production, I don't
8 know that you can say that categorically. I don't know anything
9 about his practices right now from him. But how can you say
10 that those five e-mails, that that's it? It's his account, and
11 it's 50 Commerce employees. It's not all of Commerce, nor is it
12 everyone on the outside, and nor do I know anything about his
13 practices from him.

14 MR. WALKER: Well, we have represented that we
15 searched the accounts of -- those 50 accounts at Commerce that
16 were searched after all of the accounts with whom the Secretary
17 corresponded. And the fact that there are only five unique
18 instances that the Secretary used his personal account for any
19 reason over the course of that period indicates that it is not a
20 widespread practice of the Secretary to use his personal
21 accounts to conduct agency business.

22 THE COURT: And how do I know that those are the only
23 Commerce accounts to which he corresponded? What's my basis for
24 that?

25 MR. WALKER: It is in our sworn declaration. Those

1 were the custodians that the department -- we came up with those
2 custodians in collaboration with Democracy Forward Foundation.
3 Democracy Forward Foundation did not name them all by name. It
4 gave us a lot of just positions within the Department of
5 Commerce with whom the Secretary regularly interacts. And it is
6 our declarants' understanding that we have captured every
7 account within the Department of Commerce with whom the
8 Secretary e-mailed.

9 THE COURT: And that's based on what the Secretary
10 told those declarants?

11 MR. WALKER: I'm not sure the declarants specifically
12 were stating that.

13 THE COURT: I'm sorry?

14 MR. WALKER: I'm not sure exactly how the declarant
15 came about that information, but it is the declarant's
16 representation.

17 THE COURT: Well, what's not clear is did the
18 declarant come up with that based on searches the declarant did
19 of what? Is it those 50, or is it something more? How does the
20 declarant even know that?

21 MR. WALKER: It's not clear to me, Your Honor. We can
22 certainly provide a supplemental declaration on that.

23 THE COURT: Okay. Paragraph 12 of your supplemental
24 declaration states that "because the Secretary's wife uses a
25 personal e-mail address, we considered searching for" e-mail

1 number 1 "was particularly warranted, regardless of whether the
2 Secretary ever held out that address as being a personal e-mail
3 address for himself."

4 I'm not following what that paragraph is telling me.

5 MR. WALKER: Sure. I think what -- so there were
6 three e-mail addresses associated with the same account
7 essentially. There's the @icloud.com, @me.com, the one
8 mentioned in this paragraph 12, and @mac.com. Those are all
9 associated with the same account. The Secretary did -- we know
10 that the Secretary only ever actively used the @icloud.com
11 e-mail address.

12 I think what the declarant here is saying is that we
13 nevertheless decided to search the @me.com address because
14 that's what the Secretary's wife used. The assumption was that
15 spouses may tend to use the same e-mail address --

16 THE COURT: I'm sorry. Did you mean to say you
17 actually searched these accounts or you searched for these
18 accounts?

19 MR. WALKER: Sorry. We searched for that account.

20 THE COURT: So none of these accounts have been
21 searched at this point?

22 MR. WALKER: None of the Secretary's personal accounts
23 have been searched, but we have done a search of the
24 department's records for any mention of those accounts.

25 THE COURT: Okay. So the me.com and mac.com, there's

1 nothing from those accounts, and what you are saying is
2 anything -- am I correct that what you are saying is anything
3 that would be in those accounts would be captured by the iCloud
4 account?

5 MR. WALKER: Not necessarily. I think they are all
6 just -- they're different e-mail addresses that come along with
7 the same account. The Secretary chose only to send and receive
8 e-mails from the @icloud.com account, never gave out the @me.com
9 account as his e-mail address, never gave out the @mac.com
10 account as his e-mail address. And so we don't see any e-mail
11 potentially received from those because they were never given
12 out as such. They were e-mail addresses that the Secretary had
13 access to by virtue of the account that came with the
14 @icloud.com account.

15 THE COURT: All right. And with respect to the e-mail
16 account number 2, Commerce's position on that is regardless what
17 I decide with respect to account number 1, that account should
18 not be searched because he didn't use it after he became
19 Secretary. And that's your position even if individuals on the
20 outside sent him e-mails that related to official Commerce
21 business that he never received because he never opened them
22 because he wasn't using it.

23 Am I fairly portraying your position?

24 MR. WALKER: Yes, that's correct, Your Honor.
25 Certainly, whatever the Court decides, an e-mail that comes into

1 a defunct e-mail account that no agency official ever looks at
2 or reads would not be an agency record.

3 THE COURT: All right. Mr. Walker, are there any
4 additional points you would like to make before I hear from
5 Mr. Dubner?

6 MR. WALKER: No, not at this time, Your Honor.

7 THE COURT: Mr. Dubner, I take it you have had a
8 chance to review the supplemental declaration filed this
9 morning?

10 I think you might be muted.

11 MR. DUBNER: My apologies, Your Honor. You are
12 absolutely right.

13 We have reviewed the supplemental declaration. We, of
14 course, haven't had a chance to fully digest it, but I am
15 familiar with its content.

16 THE COURT: All right. I am familiar with your
17 arguments in your brief. Are there any additional points you
18 would like to make?

19 MR. DUBNER: A few points in response to counsel's
20 argument today.

21 I think to start with, his suggestion that e-mails received
22 at the account number 1 might not be agency records before they
23 were forwarded, that position is really untenable after the
24 *Competitive Enterprise Institute* case. Counsel relied on the
25 *Burka* decision from 1996. So that was applied and considered in

1 *Competitive Enterprise Institute*, and the D.C. Circuit made
2 clear that, you know, keeping e-mails on another domain does not
3 change their agency nature.

4 And like we said, the department has deprived the citizens
5 of the right to know what the department is up to by maintaining
6 his departmental e-mails on an account in another domain. The
7 purposes of the Federal Records Act and FOIA are hardly served.

8 So I think that that distinction is really not a defensible
9 one in terms of what is and isn't an agency record.

10 On a similar note, there is a distinction that seems to be
11 being made by the government between e-mails originated by
12 Secretary Ross and e-mails just sent by Secretary Ross. That
13 also, I think, is not a meaningful distinction. Whether an
14 e-mail was because Secretary Ross started the chain or whether
15 because he received an e-mail in his personal account and
16 responded to it or forwarded it on, both of those are agency
17 records created by the Secretary and are subject to the specific
18 requirement of 2311, that he send it on to his official account.

19 So rather than the five or six such records that defendants
20 concede, which of course is a significant number in and of
21 itself, the 18 exhibits in Exhibit A of our reply brief, which
22 range from the Census to companies that have matters that they
23 believe have national security and economic competitiveness
24 implications, to the European Commission of Trade, that wide
25 range of areas. There are records that fail to comply with the

1 Federal Records Act in all of those and not just the five or
2 six.

3 We would concede, as the Court pointed out, the government
4 really hasn't argued previously that there aren't -- that a
5 significant portion of these documents are not agency records.
6 There is, I believe, one that I recall them identifying before,
7 Exhibit M from our opening declaration, and we would concede
8 that that one might not be an agency record. We don't know
9 enough about the context to know.

10 But beyond that one document, there's been no argument and,
11 you know, we are not aware of any plausible argument with regard
12 to any document in particular that they wouldn't be agency
13 records.

14 I would also dispute their arguments here that because our
15 FOIA was, I think -- were devised to probe his e-mail practices,
16 that the regular rules of FOIA don't apply. That argument could
17 just as easily have been made about *Judicial Watch v. DOJ*, this
18 Court's case, or *Competitive Enterprise Institute v. Judicial*
19 *Watch v. DOJ*, the search was -- and this is from page 432 of the
20 opinion. It was a FOIA request for all e-mails conducting
21 official business sent or received over a 10-month period from a
22 personal account.

23 So that's basically indistinguishable from our FOIA, and in
24 fact, it's a longer period than our FOIA initially requested had
25 the search been conducted promptly. If the search had been

1 conducted promptly within FOIA's timetables, then it would have
2 been about a five-month search rather than a 10-month search
3 there.

4 Similarly, in *Competitive Enterprise Institute*, the FOIA
5 was for all policy/OSTT-related e-mails. That's from 827 F.3d
6 145 at 146. And so again, it is really indistinguishable from
7 our search. So the suggestion that that provides some sort of
8 distinction really isn't plausible here.

9 I am happy to discuss in more detail any of the issues the
10 Court raised previously or would like us to discuss either in
11 terms of, you know, their compliance with FOIA law and the
12 implications under the court's precedence or the appropriate
13 remedy or anything of that nature.

14 THE COURT: Let me ask you, Mr. Dubner, with respect
15 to e-mail account number 2, I understand your argument about the
16 received versus sent doesn't matter. But what about a situation
17 in which the Secretary represents, although definitely not
18 firsthand, through a declarant, but represents that this was an
19 e-mail not used? Should that matter in my calculus?

20 MR. DUBNER: I think it likely should. As we just
21 received this information this morning, I haven't fully thought
22 it through, but that does seem right to me. And one potential
23 solution is to only search account number 1 at this point. If
24 the government's representations and predictions about what will
25 be found from that search turn out to be inaccurate, then a

1 search of account number 2 might ultimately be appropriate. But
2 at this point, what they said does make sense. If indeed he
3 never used that again and, you know, all of those e-mails just
4 went unnoticed, you know, we would have no problem with leaving
5 that one unsearched certainly at this stage.

6 THE COURT: All right. Mr. Walker, let me give you a
7 chance to respond to any of Mr. Dubner's points.

8 MR. WALKER: I do just want to clarify my position or
9 the government's position on records that are received by a
10 personal e-mail account. It is not necessarily that I would
11 categorically say that no such record would ever be an agency
12 record, but it certainly does depend on the context.

13 What we know from these records is that there were a number
14 of social invitations or event invitations that the Secretary
15 received on a personal account. I think generally those would
16 not be considered agency records to the extent that an
17 invitation was simply received.

18 THE COURT: But why -- aren't some of these addressed
19 to him as "Secretary," and don't they relate to his official
20 business?

21 MR. WALKER: I mean, they would each have to be
22 analyzed individually. Certainly, the Secretary has a social
23 life outside of the official business he conducts as Secretary
24 of Commerce. And to the extent that an ambassador invites the
25 Secretary to a weekend party, I don't know that that would

1 necessarily be an agency record.

2 There are cases, though, that when those records have been
3 forwarded to the agency and, therefore, appear in our search,
4 for purposes of obtaining an ethics review, that they would
5 likely then become agency record.

6 So I want to clarify, our position is not so categorical.
7 And we did argue on page 7 of our opposition and reply that
8 those simple invitations would generally not be considered
9 agency records until forwarded to the Department of Commerce for
10 purposes of obtaining an ethics clearance.

11 THE COURT: Okay. But to circle back to our
12 conversation earlier, you concede, even under your -- with your
13 position, that there are five agency records that were in the
14 Secretary's personal e-mail accounts at a minimum; right? The
15 plaintiff argues up to 18 here on the record, but you are
16 conceding that there are five?

17 MR. WALKER: I think I would concede that there are
18 four. I think there's one of those five that is a little
19 doubtful. Particularly, A-4 in plaintiff's reply is one of the
20 ones that I mentioned, and I think that's doubtful.

21 THE COURT: That is helpful. Is there anything else
22 you would like to state, Mr. Walker?

23 MR. WALKER: No. Thank you, Your Honor, for the time.

24 THE COURT: Okay. I will -- I hope to issue a
25 decision on this within the week. So I appreciate you all being

1 available, and I appreciate the supplemental declaration. You
2 can expect me to issue an opinion within the week. All right?

3 Thank you all.

4 (Proceedings adjourned at 12:35 p.m.)

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8 CERTIFICATE OF OFFICIAL COURT REPORTER

9

10 I, Sara A. Wick, certify that the foregoing is a
11 correct transcript from the record of proceedings in the
12 above-entitled matter.

13

14 Please Note: This hearing occurred during the
15 COVID-19 pandemic and is, therefore, subject to the
16 technological limitations of court reporting remotely.

17

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19 /s/ Sara A. Wick

July 15, 2020

20 SIGNATURE OF COURT REPORTER

DATE

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