**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD FOUNDATION, *Plaintiff*, v. UNITED STATES DEPARTMENT OF COMMERCE, *Defendant*.	Civil Action No. 18-0246-DLF

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Wilbur Ross, Secretary of the Department of Commerce ("DOC" or the "Department"), used nongovernmental email accounts to create and send agency records on numerous occasions. On several of these occasions, Secretary Ross failed to comply with 44 U.S.C. § 2911(a), which requires every "officer or employee of an executive agency" to copy "an official electronic messaging account of the officer or employee" when sending records from a nongovernmental account, or to forward "a complete copy of the record to an official electronic messaging account of the officer or employee" within 20 days. Moreover, Secretary Ross received hundreds of emails at his personal accounts from other government employees, foreign entities, and private citizens with interests before the agency.

None of this is in dispute. It is therefore beyond question that Secretary Ross's nongovernmental email accounts contain agency records, and that he did not follow the Congressionally mandated process for ensuring that those agency records were properly preserved in the Department's record management system. Where a Freedom of Information Act ("FOIA") requester "identif[ies] evidence that a specific private email address has been used for agency business," *Hunton & Williams LLP v. EPA*, 248 F. Supp. 3d 220, 237 (D.D.C. 2017), agencies must search those accounts to ensure that they have "conduct[ed] a good faith, reasonable search of those systems of records likely to possess the requested records," *id.* at 235 (quoting *Marino v. Dep't of Justice*, 993 F. Supp. 2d 1, 9 (D.D.C 2013)). Even a single email typically requires a search. *Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175, 181-82 (D.D.C. 2013).

Nevertheless, the Department has refused to conduct *any* search of Secretary Ross's nongovernmental accounts. Its sole justification for this refusal is its conclusory assumption that "any agency records in the Secretary's personal email account would be duplicative of the emails

that Commerce has already located and released." Def.'s Mem., ECF No. 23-1, at 7. This assertion is not supported by any evidence regarding Secretary Ross's email practices or the content of his email accounts; it is bare, self-serving speculation. The caselaw and the practice in this and other courts make clear that this is insufficient where a FOIA requester has concretely shown that nongovernmental accounts contain agency records.

Accordingly, the Court should grant summary judgment to Plaintiff Democracy Forward Foundation ("DFF"), holding that the Department has failed to satisfy its obligations under FOIA, ordering the Department to search Secretary Ross's nongovernmental email accounts for responsive records, and granting limited discovery into Secretary Ross's email use to facilitate search for and release of all responsive documents.

BACKGROUND

DFF filed a FOIA request on May 19, 2017, seeking "communications … sent to or from any nongovernmental email address established, controlled, or used by the Secretary of Commerce, Wilbur Ross" and related documents, from January 20, 2017 through the date on which the search was conducted. *See* Cannon Decl., ECF No. 23-3, Ex. 1. DFF subsequently agreed to narrow the scope of the Department's search. *See* Pl.'s Counter-Statement of Material Facts ("Pl.'s SOF") ¶ 3.

Over the next several months, DFF repeatedly attempted to ascertain the status of the FOIA request, reaching out to DOC by email or phone at least eight times between September 18, 2017 and January 4, 2018. *Id.* ¶ 3. Each time, the Department either did not respond or provided vague assertions that the search was ongoing. *Id.* ¶ 4. After receiving verbatim responses several weeks apart claiming that "[t]he searches are still being completed for [the FOIA request] from one office unit," DFF sent a list of questions regarding the content and status

of the search to DOC. *Id.* ¶¶ 5, 7. The Department refused to respond. *Id.* ¶ 7. After waiting four weeks for a response, DFF filed suit to compel compliance with its FOIA request. *See* ECF No. 1.

After DFF filed suit, DOC continued to claim that searches were underway through April and May 2018. Pl.'s SOF ¶ 9. Despite its repeated representations that searches were underway, however, the Department has now conceded that it did not even begin searching Secretary Ross's official accounts until May 12, 2018, nearly a year after submission of the FOIA request and three months after DFF filed this suit to compel compliance with FOIA. Def.'s Statement of Material Facts ("Def.'s SOF"), ECF No. 23-2, ¶ 6.

After various delays and refusals to meet and confer, and without telling DFF the scope of its search, the Department produced what it represented to be a complete production on July 11, 2018. Pl.'s SOF ¶ 11. The search returned 23 documents, consisting almost exclusively of documents a Commerce employee or third party had emailed both Secretary Ross's personal and governmental email accounts. Pl.'s SOF ¶ 11. In August 2018, the DOC for the first time answered some of the questions DFF had been asking since January 4, acknowledging that it had searched only Secretary Ross's official accounts and limited its search to January 20, 2017 through June 9, 2017. Dubner Decl. ¶ 13; Def.'s SOF ¶¶ 6-7. Even this barebones search produced multiple instances of Secretary Ross using his personal email account to email another Department officer, then–Chief of Staff Wendy Teramoto, at her personal email address. *Id.* ¶ 20; Dubner Decl. Exs. E, F.

DFF therefore requested that the Department search other Commerce personnel's email accounts for additional appearances of Secretary Ross's personal email accounts. Additionally, because the FOIA request called for production of documents from "January 20, 2017, to the

date the search is conducted," Cannon Decl. Ex. 1, but the Department had unilaterally cut off the original search some eleven months earlier than the date it conducted the search, DFF requested that the Department search all accounts through May 12, 2018. Pl.'s SOF ¶ 13; Dubner Decl. ¶ 14.

After various delays, production of the resulting documents concluded on May 14, 2019. Pl.'s SOF ¶ 14. Many documents were redacted in significant part, often containing no text beyond the sender, recipient, and date information; similarly, DOC stripped all metadata from the documents prior to producing them. *Id.* ¶¶ 15-16; *see, e.g.*, Dubner Decl. Exs. A, B, C. While the Department indicated in many instances whether an address for Secretary Ross was governmental or nongovernmental, many documents leave that unstated or leave off recipients of earlier emails in an email chain altogether. Pl.'s SOF ¶ 15; *see, e.g.*, Dubner Decl. Exs. B, C, D. The Department claimed deliberative process privilege under 5 U.S.C. § 552(b)(5) over approximately 20 separate emails sent to or from Secretary Ross's personal email accounts, along with dozens more records discussing earlier emails sent to or from Secretary Ross's personal email accounts. Pl.'s SOF ¶ 27.

The document production includes at least 27 distinct emails sent by Secretary Ross from a personal email account. Pl.'s SOF ¶ 18. Despite the statutory requirement that every "officer or employee of an executive agency" copy "an official electronic messaging account of the officer or employee" when sending records from a nongovernmental account, or forward "a complete copy of the record to an official electronic messaging account of the officer or employee" within 20 days, 44 U.S.C. § 2911(a),[1] Secretary Ross copied his official accounts or forwarded his email

[1] DFF has been unable to find any written DOC policy implementing § 2911. The most recent public statement regarding DOC policy that DFF has found is a 2013 letter from the Department's Inspector General to Congress, which states that DOC policy prohibits using personal email accounts to conduct official business while "working from a remote location" and requires "all users of network services in the Office of the Secretary" to sign an

on just 9 occasions. Pl.'s SOF ¶ 18. For example, in March and April 2018, Secretary Ross sent emails to Commerce employees regarding discussions with the European Commissioner for Trade, without copying his official accounts. *Id.* ¶ 19; Dubner Decl. Exs. C, G. Similarly, in both March and July 2018, Secretary Ross sent drafts of public statements or op-eds to Commerce employees, without copying his official accounts. Pl.'s SOF ¶ 19; Dubner Decl. Exs. B, H.

On at least 25 other occasions, government employees either inside or outside the Department of Commerce emailed Secretary Ross directly at one of his four nongovernmental email accounts, without emailing his official governmental account. Pl.'s SOF ¶ 21. For example, in July 2018, the U.S. Ambassador to Germany, Richard Grenell, repeatedly emailed one of Secretary Ross's nongovernmental accounts, along with another Commerce employee, regarding a meeting between Ambassador Grenell and German automakers. *Id.* ¶ 21(a); Dubner Decl. Exs. I, J. That same month, Earl Comstock, then director of the Department's Office of Policy and Strategic Planning, emailed Secretary Ross at one of his personal email addresses, along with two other Commerce employees, to discuss White House talking points on an unknown subject. Pl.'s SOF ¶ 21(b); Dubner Decl. Ex. A. Mr. Comstock contacted Secretary Ross about agency business at his personal address on other occasions as well. Pl.'s SOF ¶ 21(c); Dubner Decl. Exs. K, L.

On at least 22 more occasions, private citizens or foreign government officials emailed Secretary Ross at his personal email account. Pl.'s SOF ¶ 22. These typically appeared in the Department's production when Secretary Ross forwarded them to Commerce personnel to schedule a meeting. *Id.* The production contained just one instance of Secretary Ross copying

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agreement acknowledging that they "may not use personal e-mail … to send official DOC business information." Letter from Todd J. Zinser, Inspector General, DOC to Lamar Smith, Chairman, Committee on Science, Space and Technology at 2 (May 20, 2013), https://www.oig.doc.gov/OIGPublications/2013.05.20-IG-to-Smith.pdf.

Commerce personnel on emails from private citizens or foreign entities that do *not* involve scheduling in-person meetings. *Id.* ¶ 23; Dubner Decl. Ex. M. On multiple occasions, Secretary Ross responded to a private citizen without copying *any* governmental account; those emails only appeared in the production because the private citizen responded and the conversation turned to scheduling. Pl.'s SOF ¶ 24; Dubner Decl. Exs. N, O.

Similarly, the production includes at least 13 examples of third parties contacting Secretary Ross's wife at a personal email account without emailing Secretary Ross, including several invitations for Secretary Ross to meet with ambassadors to the United States, other foreign dignitaries, or international businesspeople. Pl.'s SOF ¶ 25; *see, e.g.*, Dubner Decl. Exs. P, Q, R. These appeared in the production only if Secretary Ross's wife forwarded them for ethics review and/or scheduling. Several more emails were discovered by the Department's searches only because a third-party sender also included another Commerce employee, or subsequently forwarded the email to an official departmental email account. Pl.'s SOF ¶ 22.

Additionally, it appears that many documents that should have appeared in multiple custodians' files were missing from some custodians—including, potentially, Secretary Ross himself. The Department informed DFF that it was not using deduplication software, which means that each email on which multiple custodians were copied should have appeared once per custodian. *See* Pl.'s SOF ¶ 28; Dubner Decl. ¶¶ 22, 32. On numerous occasions, however, the production contains fewer copies than would be expected if the documents were retained appropriately by the Department. Pl.'s SOF ¶ 28(a)-(c).

Because these documents showed that Secretary Ross sent and received agency records from his personal email accounts, DFF requested that the Department search those email accounts. Asserting that the production only showed Secretary Ross receiving some emails at his

personal address that he forwarded on to his governmental address and starting a couple draft emails on his iPad that he then sent to other Department employees, and that it could proffer a declaration indicating that Secretary Ross does not generally use his personal email for business purposes, the agency refused. Pl.'s SOF ¶¶ 30-31.

Since the Department's refusal, the National Archives and Records Administration ("NARA") has also expressed concern regarding Secretary Ross's use of nongovernmental email accounts. On October 9, 2019, NARA sent a letter to Commerce stating that it had "become aware of a potential unauthorized disposition of U.S. Department of Commerce records."[2] Additionally, detailed allegations in another case suggest that other DOC employees used personal email for agency business—including former Senior Advisor and Counsel to the Secretary James Uthmeier, a custodian here who frequently corresponded with Secretary Ross. *See* NYIC Pls.' Mot. for Sanctions, *State of New York v. U.S. Dep't of Commerce*, ECF No. 635, No. 18-cv-2921, at 18-21 (S.D.N.Y. July 16, 2019).

LEGAL STANDARD

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) (quoting *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009)). "[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 144 (D.D.C. 2015) (quoting *Itturalde v. Comptroller of Currency*,

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[2] Letter from Laurence Brewer, Chief Records Officer for the U.S. Government, to Jennifer Jessup, Office of the Chief Information Officer, Department of Commerce (Oct. 9, 2019), https://www.archives.gov/files/records-mgmt/resources/ud-2020-0001-doc-open-letter.pdf. The letter noted that the Department of Commerce does not currently have "a formally designated Senior Agency Official for Records Management and an Agency Records Officer." *Id.*

315 F.3d 311, 315 (D.C. Cir. 2003)). Searches are adequate if they are "reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). An agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested," *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), and cannot conclude its search "if there are additional sources that are likely to turn up the information requested," *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (internal quotation marks omitted).

To prevail on a motion for summary judgment, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980) (internal quotation marks omitted) (quoting *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). Defendants may carry this burden through declarations, but "such affidavits would suffice only if they were relatively detailed, nonconclusory, and not impugned by evidence in the record of bad faith on the part of the agency." *McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983). The "agency must show beyond material doubt" that its search was "reasonably calculated to uncover all relevant documents." *Morley*, 508 F.3d at 1114 (quoting *Weisberg*, 705 F.2d at 1351). "Once the agency has provided a reasonably detailed affidavit describing its search, the burden shifts to the FOIA requester to produce 'countervailing evidence' suggesting that a genuine dispute of material fact exists as to the adequacy of the search." *Hunton & Williams*, 248 F. Supp. 3d at 236 (quoting *Morley*, 508 F.3d at 1116). "[A] requester can satisfy its burden to present 'countervailing evidence' in the context of personal email accounts by identifying evidence that a specific private

email address has been used for agency business." *Id.* at 237 (citing *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 146 (D.C. Cir. 2016)).

FOIA defendants are entitled to rely on an initial presumption that their employees "properly discharged the duty to forward official business communications from a personal email account to an official email account." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 319 F. Supp. 3d 431, 437-38 (D.D.C. 2018). This is only a presumption, however, and is "subject to rebuttal." *Wright v. Admin. for Children & Families*, No. 15-cv-218, 2016 WL 5922293, at *8 (D.D.C. Oct. 11, 2016). "Evidence of a record on a personal account is sufficient to raise a question of compliance with recordkeeping obligations, rendering the presumption of compliance inapplicable." *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 377 F. Supp. 3d 428, 435 (S.D.N.Y. 2019); *see also Landmark Legal Found. v. EPA*, 959 F. Supp. 2d 175, 181-82 (D.D.C. 2013) (denying summary judgment to agency that had not searched personal email accounts of agency head and two other "upper-level" officers where search of agency servers had produced one email originating from one officer's personal account). In such a case, the agency "must ask relevant employees if they used private email accounts relating to the [agency's] business and, if so, to produce the documents." *Brennan Center*, 377 F. Supp. 3d at 435-36. A "reasonable probability that the only responsive e-mails" on an unsearched server are duplicates is insufficient to eliminate this obligation. *Judicial Watch, Inc. v. U.S. Dep't of State*, 272 F. Supp. 3d 88, 94-95 (D.D.C. 2017).

ARGUMENT

I. Secretary Ross's Personal Email Accounts Contain Numerous Agency Records, Requiring a Search.

The Department does not and could not deny that Secretary Ross's personal email accounts contain agency records. To the contrary, the Department has asserted deliberative

process privilege over numerous documents sent to or from those nongovernmental accounts. Pl.'s SOF ¶ 27. The deliberative process privilege covers only "inter-agency or intra-agency memorandums or letters," 5 U.S.C. § 552(b)(5), so an assertion that a document is protected by the deliberative process privilege is tantamount to an admission that the document is an agency record. *Cf. Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 241 F. Supp. 3d 14, 17-18 (D.D.C. 2017) ("'[R]ecords includes any 'recorded information' 'made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency … as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value in them.'" (quoting 44 U.S.C. § 3301(a)(1)(A))).

The undisputed fact that Secretary Ross's personal email accounts contain numerous agency records requires the Department to search those accounts, absent detailed assurances that the productions to date capture all agency records that may be on those servers. Courts have consistently compelled searches on far lesser showings, and the Court should follow suit here.

Landmark Legal Foundation illustrates the proper outcome in a case such as this. In that case, the EPA had responded to a FOIA request by searching EPA servers and producing "emails sent between EPA accounts … as well as emails between EPA accounts and outside accounts, but not emails between the personal accounts of EPA leaders and non-EPA accounts." 959 F. Supp. 2d at 180. This production included a single "email originating from the personal email account of then-Deputy Administrator Robert Perciasepe," *id.* at 181, which was "sent from Mr. Perciasepe's personal email account to an official EPA account," *id.* at 181 n.5. EPA did not dispute that "official business was being conducted from the personal email accounts," but nonetheless refused to search them. *Id.* at 181. The court held that this single email (together with

"several similar allegations raised in the media and by Congress") was enough to justify a search of not only the Deputy Administrator's personal accounts, but also the EPA's Administrator and Chief of Staff. *Id.* at 182.

The evidence here is far stronger than in *Landmark Legal Foundation*. There, the only concrete evidence of official business conducted on personal email was *one email* from one officer—yet this was enough to require a search of three officers, including the agency's head. Here, DFF has identified dozens of uses of personal accounts for official business, including not only Secretary Ross himself but his Chief of Staff as well. *See, e.g.*, Dubner Decl. Exs. E, F. Indeed, Secretary Ross used his personal email account to communicate about agency business with his Chief of Staff *at her personal email account*. *Id.* Such communications would ordinarily evade capture in the Department's official servers altogether, and the Department provides no reason to assume—let alone detailed, nonconclusory evidence—that these two emails are the only two instances on which those private-to-private emails occurred. And much like the media and Congressional concerns cited by the court in *Landmark Legal Foundation*, DFF's concerns are reinforced by NARA's inquiry into Secretary Ross's use of private email and credible allegations that other DOC officials with whom Secretary Ross corresponded used nongovernmental accounts as well. *See supra* p. 8.

The recent Southern District of New York case of *Brennan Center* is also instructive. There, two DOJ employees, including an Acting Assistant Attorney General (the "Acting AAG"), used private email accounts to send and receive agency records. 377 F. Supp. 3d at 433. The Acting AAG waited as long as 84 days before forwarding agency records from his private account to his official account, while the other employee forwarded the correspondence she received within two days. *Id.* Presented with this evidence, DOJ flatly refused to search those

private email accounts, making essentially the same argument as the Department makes here. *Id.* at 435. ("Defendants argue that … there is no evidence that private email accounts contained agency records that were not also included in an official government repository."). The court rejected this argument, observing that "the existence of emails on personal accounts, and [the Acting AAG's] failure to forward emails timely, raise a material question whether 'government email account[s] [are] the only record system likely to contain agency records responsive to [Plaintiffs'] FOIA requests.'" *Id.* (quoting *Judicial Watch*, 319 F. Supp. 3d at 438). It therefore ordered a search of the employees' private email accounts. *Id.* at 436.[3]

The evidence here is even more powerful than in *Brennan Center*. The plaintiff there identified just four instances where private email accounts were used for agency records; here, DFF has identified dozens. There, the Acting AAG had waited 84 days before belatedly complying with Federal law and DOJ policy by forwarding the emails to his personal account; here, the Secretary did not forward the emails to his personal account *at all* on at least 18 occasions. *See supra* pp. 5-6.

DFF has therefore amply carried its burden to compel a search of Secretary Ross's nongovernmental email accounts. The Court should grant summary judgment to DFF and order the Department to search the email accounts at issue.

[3] Notably, the court granted the plaintiff's motion for summary judgment not only as to the Acting AAG who had failed to timely forward correspondence to his official account, but also as to the employee who had properly forwarded the two emails she received at her personal account within a day. *See Brennan Ctr.*, 377 F. Supp. 3d at 433, 436. Thus, the Court appears to have concluded that the existence of the records alone, even without the failure to follow Federal law, sufficed to preclude the agency's refusal to search the private accounts or at least provide concrete evidence for concluding that there were no non-duplicative documents on those accounts.

II. The Department's Conclusory Assertion That the Agency Records in Secretary Ross's Nongovernmental Accounts Are Wholly Duplicative Is Insufficient to Justify Its Refusal to Search Those Accounts.

To justify their refusal to search Secretary Ross's nongovernmental accounts, the Department insisted in the parties' meet-and-confer that the production only showed Secretary Ross using his personal account to compose drafts from his iPad and forwarding emails received at his personal account to his governmental account. Pl.'s SOF ¶ 29. The Department has rightly abandoned those claims, which are demonstrably false. *See, e.g.*, Dubner Decl. Exs. C, E, F, G. Now, they offer just one excuse for shielding Secretary Ross's nongovernmental accounts from a FOIA search: that those accounts are not "likely to contain responsive records that are not duplicative of what Commerce has already released." Def.'s Mem. at 7.

Even if "there is a reasonable probability that the only responsive e-mails" in the relevant accounts "are duplicates of e-mails … [that] have already been produced to Plaintiff," this does not suffice to carry the Department's burden. *Judicial Watch*, 272 F. Supp. 3d at 94. Rather, courts require concrete assurances that no non-duplicative records exist before accepting that it is "beyond material doubt" that a search of additional document repositories is "unlikely to produce any marginal return." *Id.* at 95 (quoting *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998)). But even on the Department's terms, its conclusory assertion is far from sufficient to justify walling off Secretary Ross's nongovernmental accounts from FOIA, as both the Department's declaration and the cases the Department cites show.

A. The Department's Conclusory Assertion Does Not Justify the Department's Refusal to Search Secretary Ross's Nongovernmental Accounts.

To carry an agency's burden of showing "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents," *Morley*, 508 F.3d at 1114 (quoting *Weisberg*, 705 F.2d at 1351) (brackets omitted), it must submit affidavits that are

"relatively detailed, nonconclusory and not impugned by evidence in the record of bad faith on the part of the agency," *McGehee*, 697 F.2d at 1102. In the ordinary case, once it has been shown that an employee used nongovernmental email accounts to conduct agency business, the agency searches those accounts and/or provides a declaration from the government employee explaining their email practices and how they can be certain that all agency records in their personal accounts were copied onto the agency's servers.[4]

Here, the Department has refused to do either. Instead, it seeks to carry its burden entirely through a declaration by Michael A. Cannon, the Chief of the General Litigation Division within its Office of the General Counsel. ECF No. 23-3. Mr. Cannon offers no information about the Secretary's email practices, nor does he provide any reason to believe he has any percipient knowledge about those email practices. Instead, he merely recites the search process that the Department conducted and offers general descriptions of the documents that were produced. Cannon Decl. ¶¶ 7-19. He then concludes, without explanation, that "[t]he Department determined that the searches were reasonably likely to locate all responsive nonduplicative records." *Id.* ¶ 20. The only attempt to tie this conclusion to his summary of the produced

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[4] *See, e.g.*, *Judicial Watch*, 319 F. Supp. 3d at 438-39 (describing electronic and manual searches of employee's personal account); *Competitive Enter. Inst.*, 241 F. Supp. 3d 14, 18-19, 21-22 (describing multiple declarations attesting that employee followed the required practice of forwarding work-related emails to his governmental account at all times); *Hunton & Williams*, 248 F. Supp. 3d at 237 ("Here, the Corps initially searched the personal email account of one particular employee because that employee 'appeared to have conducted … business using a personal email account.'"); *Judicial Watch*, 272 F. Supp. 3d at 94 ("True, communications between Secretary Clinton and someone using a state.gov email account would have passed through and presumably been saved on a State server. However, if an email did not involve any state.gov user, the message would have passed through only the Secretary's private server and, therefore, would be beyond the immediate reach of State. Because of this circumstance, unlike the ordinary case, State could not look solely to its own records systems to adequately respond to Plaintiff's demand. Rather, it had to, and did, look to other sources for the requested information."); *cf. Brennan Ctr.*, 377 F. Supp. 3d at 435-36 (where employee failed to forward emails timely to his governmental account, agency required to search personal account); *Landmark Legal Found.*, 959 F. Supp. 2d at 182 (requiring search where plaintiff identified "one concrete example of a personal email being used for official purposes").

documents is a conclusory, unreasoned sentence that "[t]he results of the search indicate such." *Id.*

Mr. Cannon's statement is the sole basis for the Department's assertion that "no other location is likely to contain responsive records that are not duplicative of what Commerce has already released." Def.'s Mem. at 6-7 (citing Def.'s SOF ¶ 32, which in turn cites Cannon Decl. ¶ 20). It does not come close to justifying that conclusion. As Mr. Cannon concedes, the searches could only locate documents that "transited through the Department of Commerce's mail servers." Cannon Decl. ¶ 17. The searches by their very nature could only capture

> emails sent to the Secretary's personal email addresses that copied a DOC account, … emails forwarded from the Secretary's personal email accounts to a DOC account, … replies from the Secretary's personal email accounts that copied a DOC account, and … emails that originated from the Secretary's personal email accounts that were addressed to a DOC employee or which copied a DOC employee.

Id. ¶ 18.

The Department's searches were entirely incapable of capturing documents that were sent between the Secretary and private individuals or governmental employees outside of the Department of Commerce, except for those that happened to be copied or forwarded to a Department email address. The searches provide Mr. Cannon no basis whatsoever for asserting that all documents in Secretary Ross's private accounts were transmitted to Department servers, and thus no basis to justify the Department's supposed determination that all agency records in those accounts are duplicative of those already located. The assertion that all documents within Secretary Ross's account are likely to be duplicative is nothing but conclusory, self-serving speculation, and therefore cannot carry the Department's burden. *See McGehee*, 697 F.2d at 1102.

The absence of any evidence regarding Secretary Ross's email practices is particularly damning because it is clear that he has not followed the Congressionally mandated practice of copying or forwarding emails to "an official electronic messaging account of the officer or employee." 44 U.S.C. § 2911(a). As noted above, the production reveals at least 18 instances where Secretary Ross created agency records on a personal email account but chose not to transmit them to his official account. Pl.'s SOF ¶ 18. The presumption that the Secretary ensured that all agency records entered Commerce servers is thus inapplicable here. *See, e.g.*, *Judicial Watch*, 319 F. Supp. 3d at 438 (presumption inapplicable where "there is a question whether [employee] properly discharged his duty to forward official business communications from his personal email account to his official account"); *Brennan Ctr.*, 377 F. Supp. 3d at 435 (same). Lacking *any* evidence that Secretary Ross took steps to ensure that all agency records in his personal email accounts found their way to Commerce's servers—much less "reasonably detailed evidence," *Hunton & Williams*, 248 F. Supp. 3d at 236—the Department's search cannot be adequate until it searches those nongovernmental accounts.

The Department's conclusory justification defies belief for additional reasons. The production contains dozens of emails sent to the personal accounts of Secretary Ross and/or his wife from private citizens or foreign dignitaries seeking meetings with Secretary Ross. *See* Pl.'s SOF ¶¶ 22, 25. These happened to be captured by the production when Secretary Ross or his wife sent them for scheduling and/or ethics review. *Id.* But the production contains barely any instances of a private citizen or foreign dignitary contacting Secretary Ross at a personal email account about something *other* than a meeting request. It is implausible, to say the least, to suggest that it just so happens that every citizen or interested foreign party who contacted the Secretary at a nongovernmental account did so to request a meeting, and virtually never to

discuss any other issue. The Department presents no basis whatsoever for this leap of logic. The far more likely explanation is that Secretary Ross received other emails but did not forward them because they did not implicate his meeting schedule. Indeed, the production includes evidence of exactly this: former Speaker of the House Newt Gingrich emailed Secretary Ross's personal email address to recommend that he speak with a "very close friend of [Indian Prime Minister Narendra] Modi" about potential investment in the United States. Dubner Decl. Ex. O. Secretary Ross first responded to Speaker Gingrich without copying any Commerce account—an email that would not have been captured in the production had the discussion not then turned to scheduling a meeting, at which point Secretary Ross copied Commerce accounts. *Id.*[5]

Finally, even if the Department's assertions could somehow be construed as "relatively detailed [and] nonconclusory" and its unreasoned assumptions ignored, they would still be deficient due to "evidence in the record of bad faith on the part of the agency." *McGehee*, 697 F.2d at 1102. The Department took fully two years to process DFF's straightforward request, and did not even begin processing it until several months after DFF filed suit. *See* Pl.'s SOF ¶¶ 1, 8, 10. While the Department repeatedly represented from November 2017 through May 2018 that searches were ongoing, *see* Pl.'s SOF ¶¶ 4-5 & 9, its declarant has now sworn under oath that searches did not even *begin* until May 2018, *see* Cannon Decl. ¶ 8. Its initial search excluded the accounts of dozens of employees with whom Secretary Ross corresponded from his personal account, and covered barely a third of the time period called for by the FOIA request. *See* Pl.'s SOF ¶¶ 11-13. This search, which DOC represented as "complet[ing] its release of records," captured less than 10% of the documents contained on the Office of the Secretary's servers. Pl.'s

[5] To be sure, Secretary Ross's conduct complied with 44 U.S.C. § 2911 in this particular occasion, since he copied his official account when he forwarded the email to his schedulers. As shown above, of course, this is the exception and not the rule.

SOF ¶ 13. And the Department provided false justifications for refusing to search Secretary Ross's email accounts when conferring with DFF. *See supra* pp. 7-8.

The D.C. Circuit has found far lesser indicia of bad faith to "vitiate the credit to which agency affidavits are ordinarily entitled." *McGehee*, 697 F.2d at 1113. In *McGehee*, the Court found "significant evidence suggesting that the agency has not processed McGehee's request in good faith" based on "two facts": first, that "it took almost two and one-half years before the [agency] processed McGehee's reasonably straightforward request," and "made no substantive response whatsoever until compelled to do so by order of the District Court"; and second, that the agency failed to disclose the cut-off date it was using for the search. *Id.* If that sufficed to make a grant of summary judgment to the agency reversible error, *id.*, the evidence here perforce requires denial of the Department's motion.

B. The Cases Cited by the Department Illustrate the Baselessness of Its Position.

The Department relies principally on *Judicial Watch v. DOJ* and *Competitive Enterprise Institute* to justify its position. *See* Def.'s Mem. at 7-8. Far from supporting the Department's intransigence, those cases show just how indefensible it is.

In *Judicial Watch*, this Court considered a FOIA request for agency records in the personal email account of a DOJ employee who had used that account to communicate with a private citizen about apparent agency business on at least one occasion, found in the WikiLeaks email hack. 319 F. Supp. 3d at 433. In response to that FOIA request, the employee searched "his personal Gmail email account," first using search terms and then "by manually reviewing his personal email account's sent, inbox, and trash folders." *Id.* at 433, 435. As part of this manual search, the employee "reviewed the subject lines and to/from fields of all emails from the inbox, trash, and sent folders and opened and read any emails that, based on either their subject line,

author, or recipient, could have been potentially DOJ-related." *Id.* at 435 (internal quotation marks omitted). He also "opened and read every single email in any of his archived folders that could have contained DOJ-related emails." *Id.* (internal quotation marks omitted). The agency also confirmed that he "understood his obligations under the Federal Records Act" to copy or forward all agency records to his official account. *Id.* In addition, "Department of Justice attorneys in [the Office of Information Policy], the Office of Legislative Affairs, and the Civil Division" met with the employee, requesting yet a third set of searches (consisting of both search terms and a manual review of all emails in chronological order), which the employee performed. *Id.* at 436. All of this was documented by two detailed declarations describing the searches and the employee's email practices. *Id.* at 434-36, 439-40.

Judicial Watch shows the process as it should be. The FOIA requester presented evidence that a nongovernmental account had been used to create and send agency records. In response, the agency, despite the employee's insistence that there were no agency records in the account, required the employee to search that account four different times through multiple means, including "comprehensive manual searches." *Id.* at 439. The agency then presented detailed declarations about the specific mechanics of the searches of the private email account, as well as the employee's specific individual email practices. In these circumstances—after two rounds of search term–based review and two rounds of manual review, accompanied by detailed declarations about the content of the nongovernmental account and the employee's personal email practices—the Court found that the "electronic and manual searches" of the nongovernmental account "satisfied [DOJ's] burden to show that its search was adequate." *Id.* at 439.

The Department's process in this case, of course, bears no resemblance at all to the process observed in *Judicial Watch*. The Department has flatly refused to search the nongovernmental accounts and has declined to proffer any information about the relevant employee's email practices. *Judicial Watch* thus aptly demonstrates how far short the Department has fallen.

The same is true of *Competitive Enterprise Institute*. There, like here, the agency had initially refused to search or provide any information about the relevant employee's governmental account, despite evidence from earlier FOIA litigation "that the address had apparently been used for some work-related correspondence." 827 F.3d at 146. The D.C. Circuit rejected this flat refusal, finding it to be an improper withholding. *Id.* at 147; *see id.* at 150 ("If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, [FOIA's] purpose is hardly served.").

On remand, the employee submitted a detailed declaration swearing under oath that "[w]hen [he] received a work-related email on his [private] account," he complied with the "Federal law requir[ing] him to forward the email to his official email account at [the agency] or to copy his official [agency] email account on the correspondence." *Competitive Enter. Inst.*, 241 F. Supp. 3d at 18. The plaintiff did not dispute this in any way, leaving both the declarations and the presumption that the employee complied with federal law and agency policy unrebutted. *Id.* at 21-22. Moreover, the agency "show[ed] that [the employee] complied with the policy on approximately 4,500 occasions," demonstrating a "pattern of compliance" on which the court could rely. *Id.* at 22. In contrast, the plaintiff could not "point[] to any specific instance when [the

employee] did, or even may have, violated [agency] policy." *Id.* On these facts, the Court concluded that no search of the private account was needed. *Id.* at 23.

Here again, there is a vast gulf between the Department's caselaw and its conduct. The Department has not even attempted to claim that Secretary Ross complied with the Federal Records Act. Instead, the evidence shows definitively that he did not: there are at least 18 occasions in which he emailed other government employees without copying his official account, and dozens more in which he received agency records at his nongovernmental account without forwarding them to his official account. *See supra* pp. 5-7. This is the exact opposite of the facts found to satisfy an agency's obligations in *Competitive Enterprise Institute*.

III. Limited Discovery Is Appropriate to Facilitate a Comprehensive Search and Production.

Given the Department's incomplete representations and production to date—and given the year it took DOC to produce even 23 documents and the two and a half years it has taken to reach the current stage—the Court should grant limited discovery to facilitate an expeditious search that is "reasonably calculated to uncover all relevant documents." *Morley*, 508 F.3d at 1114 (quoting *Weisberg*, 705 F.2d at 1351).

While "[d]iscovery in FOIA is rare," it may be appropriate where the agency's declarations are not "reasonably detailed [and] submitted in good faith and the court is [not] satisfied that no factual dispute remains." *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). If the plaintiff "raises a sufficient question as to the agency's good faith in processing documents," such as "extreme delay" or other "evidence of some wrongdoing," limited discovery may be appropriate. *Landmark Legal Found.*, 959 F. Supp. 2d at 184 (internal quotation marks and citations omitted).

As *Landmark Legal Foundation* held, "[t]he possibility that unsearched personal email accounts may have been used for official business" is a circumstance that can require limited discovery. *Id.* This is particularly so where it is possible that "the agency purposefully excluded the top leaders of the [agency] from the search, at least initially." *Id.* And discovery is further warranted where there is a risk of spoliation of records that should have been subject to agency preservation policies and should have been searched. *Id.* at 184 n.7.

All of these circumstances pertain here. It is undisputed that personal email accounts were used for official business and that the agency's initial searches excluded numerous email accounts where responsive records were likely to be found, leaving out 90% of the documents produced to date. *See* Pl.'s SOF ¶¶ 11-14. DOC has not to date provided any assurances regarding the preservation of documents in Secretary Ross's personal email accounts. *See Id.* ¶ 31. Moreover, there is substantial evidence that some documents were not properly preserved or searched in the official accounts that *were* searched in this case, given the unexplained low number of copies of some documents. *See* Pl.'s SOF ¶ 28.

Given this confluence of troubling circumstances, this is the rare case where limited discovery is appropriate. Accordingly, the Court should grant DFF limited discovery into Secretary Ross's email practices, the preservation and searching of responsive documents, and the document repositories that may be likely to contain responsive documents.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to Plaintiff Democracy Forward Foundation and deny summary judgment to Defendant Department of Commerce, and enter the proposed order submitted herewith.

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Respectfully submitted,

/s/ Jeffrey B. Dubner

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