

**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

**DECLARATION OF JEFFREY B. DUBNER**

I, Jeffrey B. Dubner, declare as follows:

1. The facts in this declaration are based on my personal knowledge.
2. I am a member in good standing of the bars of the District of Columbia and the U.S. District Court for the District of Columbia, among others.
3. I am Senior Counsel at Democracy Forward Foundation (“DFF”). I represent DFF in this litigation and have been the principal attorney negotiating the FOIA request at issue in this case with the Department of Commerce (“DOC” or the “Department”) and its counsel at the U.S. Attorney’s Office for the District of Columbia.

**I. Facts Regarding DOC’s Initial Searches**

4. DFF filed the FOIA request at issue in these motions on May 19, 2017. DOC assigned that FOIA request the tracking number DOC-IOI-2017-001235.
5. In the interest of reducing the burden on DOC, DFF agreed to narrow the scope of the required search on September 6, 2017.
6. After agreeing to narrow the scope of the request, DFF repeatedly attempted to ascertain the status of this request over the following several months. I or another DFF attorney

sent emails or left voicemails for the assigned FOIA officer on at least eight occasions between September 18, 2017 and January 4, 2018.

7. To each of these inquiries, DOC either stated that the search was ongoing or declined to respond.

8. In response to our inquiries, DOC sent verbatim emails several weeks apart, on November 17, 2017 and January 3, 2018, that suggested that the Department had not made any progress on the search. Specifically, the Department said in both emails that “The searches are still being completed for 001235 from one office unit.” (I learned only later that the Department was apparently only searching one office unit for responsive documents.)

9. After receiving the second email, I sent a list of questions regarding the content and status of the search to DOC the following day, January 4, 2018, and requested a response by January 11, 2018. DOC never responded to that email.

10. Given DOC’s apparent lack of progress on the request, DFF filed suit on February 2, 2018.

11. DOC continued to claim that its searches were underway in April 2018, and asserted on May 1 that the agency’s search was complete, but revealed information that required an additional search.

12. After various delays and refusals to meet and confer, DOC produced 23 documents amounting to 56 pages on July 11, 2018. DOC represented that this “completed its release of records.” ECF No. 10 ¶ 7.

13. On August 14, 2018, DOC answered some of the questions I had posed to it as early as January 4, 2018. It explained for the first time that “Secretary Ross’ government email

accounts” were the only accounts searched, and that the date range for the searches was January 20, 2017 through June 9, 2017.

14. The same day that DOC provided this information, I contacted counsel for DOC to request follow-up searches on Department employees with whom Secretary Ross was likely to have corresponded, and to search accounts through at least May 12, 2018, the date on which DOC had represented the initial search was completed. We requested that DOC search the governmental accounts of 16 specific individuals, as well as other political appointees in the Office of the Secretary and any predecessors or successors. DOC subsequently agreed to that search.

15. The only search terms used for these searches were the names of Secretary Ross’s four nongovernmental email accounts. DOC reported that the searches produced nearly 9,000 potentially responsive emails.

16. On May 14, 2019, after some delays, DOC completed production of 257 additional documents totaling 613 pages of emails.

## **II. Description of Documents Produced in Litigation**

17. I have reviewed all of the documents produced in response to our FOIA request.

18. Many of the documents are heavily redacted, making it difficult to make definitive statements about the document production. *See, e.g.*, Exs. A, B, C. In particular, the specific address that Secretary Ross used is almost always redacted; while the Department indicated on many documents which email addresses were governmental and which were nongovernmental, it did not do so across the board. Additionally, emails in a longer email chain often do not specify the recipients of early emails in the chain, making it impossible to know for

sure whether governmental or nongovernmental accounts were used and who was copied. *See, e.g.,* Exs. B, C, D.

19. DOC also stripped the documents of all metadata before production, further complicating the ability to make definitive statements about the number of documents that share certain characteristics, apparent gaps in the production, and the like.

20. That said, I can provide the following observations and summary of the produced documents.

21. The first production consisted of 23 documents, almost exclusively reflecting instances when a Commerce employee or third party had simultaneously emailed Secretary Ross's personal and governmental email accounts. It also included two instances of Secretary Ross using his personal email account to email then-Chief of Staff Wendy Teramoto at her personal email address. *See* Exs. E, F. One of these emails appeared in the production only because Ms. Teramoto subsequently responded to her official account. *See* Ex. E.

22. The subsequent production, covering other official DOC accounts, consisted of 257 documents. In total, DOC produced 280 documents, consisting entirely of emails and email threads. Counsel for DOC informed me on March 4, 2019 that it was unable to use deduplication software at that time; the resulting production therefore included multiple copies of some emails.

23. The document production included at least 27 distinct emails sent by Secretary Ross from a personal email account. As far as I could find in the production, Secretary Ross copied his official DOC email account or forwarded the email to that account on just 9 occasions.

24. 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. 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. Exs. B, H.

25. On at least 25 other occasions, government employees either inside or outside DOC emailed Secretary Ross directly at one of his four nongovernmental email accounts, without emailing his official governmental account.

26. 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. 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. Ex. A. Mr. Comstock contacted Secretary Ross about agency business at his personal address on other occasions as well. Exs. K, L.

27. On at least 22 occasions, private citizens or foreign government officials emailed Secretary Ross at his personal email account. *See, e.g.*, Exs. M, N, O. The majority of these emails appeared in the production only because Secretary Ross or his wife forwarded them to Commerce personnel to schedule a meeting (and/or check with ethics personnel whether a meeting was possible). Several others appeared only because the third-party sender also included another Commerce employee, or subsequently forwarded the email to an official departmental email account.

28. As far as I could find, the production contained just one example of Secretary Ross forwarding an email received from a private citizen or foreign entity that did *not* involve

potential meetings. Ex. M. Indeed, on multiple occasions, Secretary Ross responded to a private citizen without copying any governmental account; these emails only appeared in the production because the private citizen responded and the conversation turned to scheduling. *See* Exs. N, O.

29. The production also included at least 13 instances in which a private citizen or foreign official emailed Secretary Ross's wife's personal account regarding Secretary Ross's official business without emailing one of Secretary Ross's email accounts. Most of these instances involved inviting Secretary Ross to an event with a foreign dignitary and/or international businessperson. *See, e.g.*, Exs. P, Q, R.

30. The production also includes evidence that Secretary Ross affirmatively instructed a person with business before the Department to contact him at a nongovernmental address on at least one occasion. Ex. S.

31. DOC 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. It also claimed deliberative process privilege and/or attorney-client privilege of dozens more documents that discussed emails sent to or from Secretary Ross's personal email accounts, but did not themselves contain privileged material.

32. Additionally, gaps in the production suggest that some emails were missing from some custodians' official accounts. Because DOC was not deduplicating the production, *see supra* ¶ 22, any email sent from one custodian's official account to another, or sent to multiple custodians' official accounts, should have multiple copies in the production—one copy for each custodian. This is frequently not the case.

33. For example, a document regarding a dinner with the outgoing Japanese Ambassador to the United States was sent from custodian Macie Leach to three other custodians,

yet only appears in the production once. Ex. P. By contrast, an email Ms. Leach sent to the same three custodians regarding a different invitation appears twice (i.e., two fewer times than one would expect). Ex. T.

34. While I have not made a comprehensive tally of such instances, my review to date suggests that this is a frequent occurrence. Of the 20 emails that I analyzed for this issue, only two had the expected number of copies. Of the five emails I reviewed with this question in mind that were sent to or from Wilbur Ross's governmental account, none had the expected number of copies. *See* Exs. D, U, V (missing one copy); Exs. W, X (missing two copies).

35. All of the documents attached hereto as exhibits are true and correct copies of documents as produced by the DOC in response to this FOIA. All redactions were applied by the Department.

### **III. Communications After DOC's Initial Searches**

36. As shown above, the documents produced from DOC's searches within the Office of the Secretary showed that Secretary Ross had repeatedly used his personal email address to conduct agency business, and had rarely forwarded those emails to his official governmental account. Accordingly, after reviewing a draft *Vaughn* index of selected documents, I requested on August 2, 2019 that the agency search Secretary Ross's nongovernmental email accounts.

37. On August 13, 2019 I met and conferred by telephone with the Department's agency counsel and litigation counsel. Agency counsel informed me that DOC believed it had done a reasonable search. DOC counsel claimed 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.

DOC counsel also stated that the Department could provide a declaration indicating that Secretary Ross does not generally use his personal email for business purposes.

38. After this conversation, we concluded that we were at an impasse, leading to the instant briefing.

39. While preparing the briefing for this motion, DFF realized that it had not yet received any assurances regarding the preservation of documents in Secretary Ross's personal email accounts. Accordingly, DFF contacted counsel for DOC on November 1, 2019 to confirm that any auto-deleting functions had been turned off and that anyone with access to the accounts had been instructed not to delete documents, and to ask when those communications occurred. As of November 6, 2019, DOC has not responded to this inquiry.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed November 6, 2019, in Washington, DC

  
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Jeffrey B. Dubner  
Senior Counsel  
Democracy Forward Foundation