UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION Plaintiff, vs. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 1:12-cv-01726 (RCL)

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed.R.Civ.P 56 and Local Rule 7, Plaintiff Landmark Legal Foundation ("Landmark" or "Plaintiff") respectfully submits this opposition to Defendant Environmental Protection Agency's ("EPA" or "Defendant") motion for summary judgment. For the reasons stated herein, Landmark requests the Court deny Defendant's Motion and award limited discovery to resolve material questions of fact related to whether EPA conducted a good faith search for records responsive to Landmark's Freedom of Information Act ("FOIA") request.

I. INTRODUCTION

The FOIA request at issue in this case sought records that would reveal whether or not EPA's political officials were participating in the improper manipulation of the Agency's regulatory agenda in order to improve President Barack Obama's prospects in the 2012 general election. In stark contrast to the Obama Administration's expressed commitment to being the

most transparent administration in the history of the republic, however, the EPA has engaged in a breathless pattern of obfuscation and apparent deception in its response to Landmark's FOIA.

EPA's misconduct appears to have begun at the outset, although it was not until its summary judgment papers were filed that Landmark was made aware of the extent of the Agency's improper activities. In particular, EPA discloses in its papers that the records for the Agency's two most senior officials and a senior staff member were not "adequately" searched until the end of April, 2013. Former Administrator Lisa P. Jackson, current Administrator (then Deputy Administrator) Bob Perciasepe, and Jackson's chief of staff's records all appear to have been excluded from the search for responsive records. Their exclusion appears to be the result of EPA's apparent bad faith implementation of an agreement to narrow the scope of search to EPA's senior officials in the Washington, D.C. headquarters. While any reasonable search would obviously would include the two most senior political officials, EPA FOIA administrators omitted these officials.

After Ms. Jackson left office, five months elapsed before her files were searched for responsive records. This delay is particularly troubling in this case because Landmark's request was submitted four months prior to Ms. Jackson's departure and because Landmark had specifically requested that the search include personal records for records reflecting official EPA business.

EPA's unilateral decision to omit the very individuals most likely to have records responsive to Landmark's request is a strong indication of bad faith on the part of EPA. The Agency should not be rewarded with a favorable ruling on its motion for summary judgment. Instead, this Court should deny the motion and grant Landmark limited discovery in order to determine whether EPA has acted in bad faith, and whether sanctions pursuant to 5 U.S.C. §

552(a)(4)(F) ought to be applied against any EPA employee. Moreover, Landmark ought to be allowed discovery in order to determine the scope of EPA's records systems and the adequacy of EPA's fulfillment of its obligation to comply with its search obligations.

Finally, Landmark notes that EPA's *Vaughn* index presents sweeping application of the deliberative process exemption set forth in FOIA exemption 5. Moreover, the assertion of Exemption 6's privacy exemption is not legally justified with respect to the official government email addresses of White House officials and should be disallowed by the Court.

II. BACKGROUND

In July 2012, major media outlets published news reports indicating that EPA was intentionally delaying the issuance of controversial new regulations until after the November election. Pl.'s Complaint at ¶ 6. Other news reports suggested that political observers "see a crass political calculation at play: Don't give Romney any more ammunition before the election – and then open the floodgates after the polls close." Pl.'s Complaint at ¶ 8.

Troubled by these reports Landmark, on August 17, 2012, submitted to EPA a FOIA request seeking records evidencing communications between EPA officials and individuals or organizations outside of EPA relating to planned, but not yet proposed, rules or regulations. Pl.'s Complaint at ¶ 10, Pl's Complaint Exhibit 1 (Landmark's Aug. 17, 2012 FOIA Request). Specifically, Landmark requested the following:

> Any and all records identifying the names of individuals, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. For the purposes of this request, "communications of any kind" does not include public comments or other records available on the rulemaking docket.

> Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential election of 2012.

Landmark requested a waiver of fees and expedited processing. Pl.'s Complaint at ¶ 12, Pl.'s Complaint Exhibit 1 (Landmark's Aug. 17, 2012 FOIA Request). In its request, Landmark explained that timely release of responsive records was necessary because such records relate directly to whether EPA was delaying implementation of crucial regulations for political reasons. Landmark noted that delaying finalization "raises the possibility that the EPA's leadership is intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public..." Pl.'s Complaint, Exhibit 1 (Landmark's Aug. 17, 2012 FOIA Request). Further, Landmark explained that the "health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Pl.'s Complaint, Exhibit 1 (Landmark's Aug. 17, 2012 FOIA Request).

EPA acknowledged receipt of the Request on August 29, 2012 and, at the same time, granted Landmark's request for a fee waiver but denied expedited processing. Pl.'s Complaint Exhibit 2. Shortly thereafter, on September 14, 2012, Landmark appealed this denial. Pl.'s Complaint at ¶ 14.

On September 27, 2012 EPA requested that Landmark narrow the scope of its request. Matthew C. Forys Declaration at ¶ 4. Notably, EPA claimed that Landmark's request could be read to apply to every EPA employee in every EPA office throughout the country. Matthew C. Forys Declaration at ¶ 3. Landmark informed EPA that the request was aimed primarily at records that would indicate whether EPA's senior decisionmakers were engaged in efforts to manipulate EPA's official business for political purposes and coordinating such efforts with the

White House or with special interest groups. EPA requested that the scope be narrowed to apply only to the most senior policymaking officials in the EPA headquarters. Matthew C. Forys Declaration at ¶ 6. Landmark agreed to limit the scope of its request to "senior officials in EPA HQ." Matthew C. Forys Declaration at ¶ 7. At no time did Landmark contemplate, discuss or agree to exclude then Administrator Lisa Jackson, Deputy Administrator Robert Perciasepe, or the Administrator's chief of staff from the request. Matthew C. Forys Declaration at ¶ 8.

On October 18, 2012, EPA rejected Landmark's appeal of EPA's denial of expedited processing. Pl's Complaint at ¶ 15. Having exhausted its administrative remedies, Landmark initiated the instant suit on October 22, 2012.

Landmark and EPA agreed to a production and scheduling order proposed by EPA and signed by the Court on January 19, 2013, requiring EPA to produce responsive records by February 7, 2013 and February 27, 2013 (for documents to be reviewed by the Executive Office of the President) respectively. Landmark consented to an additional production on March 14, 2013 (but was not asked for and did not agree to any corresponding delay in the briefing schedule). The order provided for a "meet and confer" period and, in the absence of agreement regarding withholdings, required EPA to file any dispositive motions on or before March 30, 2013. Scheduling Order, February 19, 2013 (Pacer Dkt. No. 23).

On March 21, 2013 counsel for EPA and Plaintiff met and conferred about various matters in this case. EPA staff elected not to participate in the meeting. Michael J. O'Neill Declaration, ¶ 3, 4. Landmark registered concerns about EPA's search and record production. In particular, Landmark requested that EPA address, among others, the following issues:

i.) The inconsistent and inappropriate withholding of former Administrator Lisa Jackson's government email address;

ii.) Concerns that the EPA search for records was limited to email exchanges between and among EPA officials; and

iii.) Whether personal emails were searched given the production of at least one record from the Deputy Administrator's email account indicating he had received official email on his personal email account. Michael J. O'Neill Declaration, ¶ ¶ 3, 5, 6, and 7.

In response, EPA represented that the Administrator's email address would be released. Michael J. O'Neill Declaration, Exhibit D.[1] In addition, counsel for EPA asserted that questions regarding the scope of EPA's search would be answered by EPA's summary judgment papers. Michael J. O'Neill Declaration, Exhibit D. During the March 21, 2013 meet and confer session and throughout the email exchanges with counsel for Defendant, counsel for Plaintiff reasonably believed that any search for responsive records included a timely search of the office of the Administrator, the office of the Deputy Administrator and the office of the Chief of Staff in the Office of the Administrator. Michael J. O'Neill Declaration ¶ 13.

On April 3, 2013, the Court denied Defendant's first motion for an extension of time until May 15, 2013 and ordered the Defendant's Motion for Summary Judgment to be filed no later than April 30, 2013. On April 12, 2013, Defendant provided to Landmark a "final" production.

On April 30, 2013, EPA requested an additional extension of time. In support of this request, Defendant's counsel noted that "there were a number of additional documents that may potentially be responsive to your request which have not yet been reviewed by the agency." Michael J. O'Neill Declaration, ¶ 14; Exhibit F. Defendant did not, however, disclose that the additional records were located as a result of EPA's recognition that it had not conducted an adequate or timely search of the former Administrator's office for responsive records. Rather, in

[1] EPA continued to withhold other redacted email addresses belonging to White House officials pursuant to the privacy exception in Exemption 6. *See e.g. Vaughn* index pp. 41, 42, and 180.

its Motion for Extension of Time to file this summary judgment, EPA -- without elaboration -- justified extending the deadline by simply stating "in the process of finalizing the pleadings, EPA determined that another search [for responsive records] is required and that there are a number of additional documents that may potentially be responsive to the Plaintiff's request."[2] In fact, EPA's newly discovered records essentially doubled the number of records responsive to Landmark's request. See Defendant's Memorandum, p. 8.

EPA's Motion for Summary Judgment was filed on May 15, 2013, at which time the supplemental production of records was also made.

III. THE FOIA OBLIGATES AN AGENCY TO PERFORM AN "ADEQUATE SEARCH" FOR RESPONSIVE RECORDS AND PRODUCE THOSE RECORDS UNLESS CERTAIN EXEMPTIONS APPLY

A. FOIA Generally

The Freedom of Information Act, 5 U.S. C. § 552 et seq., is a mandatory disclosure statute requiring federal agencies to release requested records to the public upon a request made by any person, unless one of more of nine limited statutory exemptions apply. The FOIA allows citizens to know "what the government is up to." *NARA v. Favish,* 541 U.S. 157, 171 (2004) (quoting *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773 (1989)). Moreover, the FOIA acts as a check against corruption by holding the government accountable to those it governs. *NLRB v. Robbins Tire & Rubber, Co.*, 437 U.S. 214, 242 (1978).

An agency is required to conduct an adequate search for responsive records and to timely release all responsive records to the requester. To the extent exemptions are asserted, the agency is required to justify its withholdings and a reviewing court is to "narrowly construe" the

[2] Contrary to the Wachter declaration's assertion, EPA did not "immediately" notify either Landmark or the Court of its failure to conduct an adequate search of the former Administrator's records.

exemptions. *See FBI v. Abramson,* 456 U.S. 615, 630 (1982). Moreover, where an exemption is properly asserted, the agency is required to release all nonexempt information to the extent it can be reasonably segregated from exempt information. 5 U.S.C. § 552(b).

B. Summary Judgment Is Appropriate Under FOIA When An Agency Conducts An Adequate Search, Releases Nonexempt Records and Justifies Withholdings.

Summary judgment in FOIA cases should be granted only when the record demonstrates that there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See Comptel v. FCC,* 2012 U.S. Dist. LEXIS 179059 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). To justify summary judgment in FOIA cases, the agency bears the burden of demonstrating that it has complied fully with its obligations to conduct an adequate search, to release all nonexempt records, and to justify its withholding of responsive records. *See* 5 U.S.C. § 552(a)(4)(b); *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press,* 489 U.S. 749, 755 (1989).

Agencies must satisfy this burden by submitting declarations that demonstrate "beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *CREW v. National Archives and Records Administration,* 583 F.Supp. 2d 146, 167 (D.D.C. 2008) (quoting *Weisberg v. U.S. Dept. of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983). Summary judgment will not be granted where the agency's affidavits do not "denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." *Id.* at 168. Moreover, "if a review of the record raises substantial doubt, particularly in view of 'well-defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Iturralde v. Comptroller of the Currency,*315 F.3d 311, 314 (D.C.

Cir. 2003) (quoting *Valencia-Lucena*, 180 F.3d 321, 326 (D.C. Cir. 1999)). "To prevail on summary judgment, then, the defending 'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

1. An Agency Must Establish That It Utilized Reasonable Methods In Searching For Responsive Records.

Declarations sufficient to justify summary judgment ordinarily identify the types of files that an agency maintains, state the search terms that were employed to search through the files selected for the search, and contain an averment that all files reasonably expected to contain the requested records were, in fact, searched. *Oglesby v. United States Dept. of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Declarations should show "that the search method was reasonably calculated to uncover all relevant documents." *Id.* ("[A]t the very least, [the Agency] was required to explain in its affidavit that no other record system was likely to produce responsive documents.")

The description of a search is inadequate when it fails to describe in any detail what records were searched, by whom, and through what process. *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1992). *See The Nation Magazine, Washington Bureau v. United States Customs Service*, 71 F.3d 885, 890-891 (D.C. Cir. 1996) (affidavit that described more than 113 systems of records in detail, explained the methodology for determining which systems would be searched, and the terms of search held sufficient to support adequacy of search claim). Moreover, an agency declaration that merely states which offices were contacted in an attempt to locate responsive records, but that does not describe the searches undertaken or the file systems searched is inadequate. *Antonelli v. Bureau of Alcohol, Tobacco & Firearms*, 2005 U.S. Dist.

LEXIS 17089 (D.D.C. 2005). *See CREW v. National Archives*, 583 F. Supp. 2d 146, 168 (D.D.C. 2008) (holding that agency conducted reasonable search based on declaration which described search methods used, location of specific files, description of files containing responsive information, and names of personnel conducting search).

"The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure." *Morley*, 508 F.3d at 1114 (quoting *Campbell v. United States DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1998)). The initial burden for demonstrating an adequate search rests with the government and its supporting declarations are entitled to a presumption of good faith. *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). However, a requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Morley*, 508 F.3d at 1116 (quoting *Founding Church of Scientology of Wash., D.C., Inc. v Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979)). Moreover, when evidence of bad faith in the agency's search is produced, the court may permit the requester to conduct discovery. *Hall v. CIA*, 881 F.Supp. 2d 38, 73 (D.D.C. 2012) (quoting *Voinche v. FBI*, 412 F.Supp. 2d 60, 71 (D.D.C. 2006) (citing *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 812 (2nd Cir. 1994).

This Court has held that it "will evaluate the search's reasonableness based on what it knows at the conclusion of the search rather than on the agency's speculation at the initiation of the search." *Institute for Policy Studies v. CIA*, 885 F. Supp. 2d 120, 139 (D.D.C. 2012). Accordingly, concerns raised by Plaintiff as to the adequacy of EPA's search -- and EPA's response or failure to address such concerns during the production process -- should be considered in the Court's analysis.

The agency will have a wide range of inquiries concerning the adequacy of the search if it finds progressively more documents at each stage of the case, thereby undercutting its assertion that the search had been adequate and "does not inspire confidence in the thoroughness" of the agency's search. O'Reilly, *Federal Information Disclosure*, Vol. 1, § 8:54 (quoting *Vymetalik v. Office of Personnel Management*, Civ. No. 83-0548 (D.D.C. 1983)).

2. An Agency Must Justify Withholding Responsive Records.

An agency bears the burden of defending its withholding of records responsive to a FOIA request. A *Vaughn* index is the device used by the EPA in this matter, which stems from the decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). A proper *Vaughn* index must itemize records withheld in whole or in part and for each provide a specific FOIA exemption and the relevant part of the agency's nondisclosure justification. *Id.* at 827. Moreover, the agency must expressly indicate for each document that any reasonably segregable information has been disclosed

IV. EPA FAILED TO PERFORM AN ADEQUATE SEARCH AND FAILED TO PROPERLY JUSTIFY WITHHOLDINGS.

EPA's search in response to Landmark's FOIA request was defective and deficient from the very beginning, both in terms of the officials whose records were searched and in terms of the search parameters itself. The Agency's summary judgment request is not remotely justified based on the record presently before the Court.

A. EPA Unreasonably and Improperly Limited The Search.

EPA’s asserts in its “Statement of Material Facts As To Which There Is No Genuine Issue” and in the Declaration of Eric E. Wachter that the scope of Landmark’s FOIA request had been narrowed "by agreement" to “'senior officials’ in the EPA’s headquarters offices, with senior officials being identified as Program Administrators, Deputy Administrators and Chiefs of

Staff in EPA's headquarters offices." (Defendant's Statement of Material Facts, p. 2, Wachter Declaration, p. 4.) The record demonstrates that this representation is incorrect.

EPA sought to limit the scope of the request to senior EPA officials in the Washington, D.C. headquarters. After an exchange of telephone calls, EPA provided examples of how far down the chain of command the Agency proposed to extend the search. Ultimately, Landmark agreed to limit the scope to "senior officials in EPA HQ" with the provision that Landmark could expand the scope later. Matthew C. Forys Declarations ¶ 7.

During telephone phone conversations and email exchanges relating to EPA's request to narrow the scope of the FOIA request, Landmark's counsel reiterated the malfeasance suggested by the news stories that had prompted the FOIA in the first place: the possible politicization of the EPA's leadership. Matthew C. Forys Declaration ¶ 3. Landmark's initial FOIA request stressed this theme repeatedly. For example, Landmark stated:

> The possibility that individuals within the EPA consider political ramifications during the rulemaking process and alter their schedule according to the electoral calendar would significantly contribute to the public understanding of government operations or activities. Indeed, if individuals within the EPA discuss these considerations with outside groups or receive instructions to alter their regulatory timetable, the general public would have great interest in such information and would have a significantly greater understanding of the EPA's true activities. Disclosure could demonstrate that the EPA is attempting to shield its true policy intentions from public view during the election season- the time when many Americans are most focused on policy issues such as environmental regulation. Disclosure of such records will allow Landmark to determine if the EPA seeks to protect the public wellbeing first and foremost. (Landmark FOIA Request, p. 5.)

Elsewhere, Landmark wrote:

> This delay [in the issuance of regulations until after the 2012 elections] raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's *leadership* is intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's *leadership* is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. (emphasis added) (Landmark FOIA Request, p. 6-7.)

Landmark's response to the EPA's suggested narrowing of scope further reflects the understanding that all senior officials in EPA's Washington headquarters were covered by the narrowed search agreement. Landmark did not include any limiting language beyond stating that EPA could search for responsive records from "senior officials in EPA HQ" with the provision that Landmark could expand the scope later. Properly read in the context of the negotiations, the only reasonable and good faith reading of the narrowing agreement would have included the Administrator, her chief of staff, and Deputy Administrator.

It strains credulity to conclude that Landmark would have only been interested in emails from the White House instructing deputy chiefs of staff to delay issuance of regulations until after the 2012 election, but not emails from the White House to the EPA Administrator. Just as preposterous is that Landmark's request would not include in its request a "heads up" text message from the Deputy Administrator to one of his former colleagues at the Audubon Society regarding politically motivated delays in the issuance of regulations until after an upcoming election.

Furthermore, it seems rather obvious that any attempt by the White House to apply political pressure on the EPA would certainly involve the EPA's *political appointees*, including the Administrator. On the whole, Landmark's discussions with EPA's counsel, the frequent references to leadership and policy decisions within the initial FOIA and the plain meaning of the words "senior officials at EPA HQ" should have been enough to convey Landmark's intentions. The purposeful attempt to exclude the Administrator from the initial search is difficult for Landmark to ascribe to a good faith misunderstanding.

EPA's decision to limit its initial search to exclude the most senior official in the EPA, the EPA Administrator, appears, at best, to have been an arbitrary or capricious effort by any

agency employees to avoid full disclosure of records responsive to Landmark's request. At worst, it was a deceitful attempt to avoid complying with the FOIA. In either case, EPA's unilateral exclusion of the most senior policy making official is a strong indicator of bad faith on EPA's part.

Landmark acknowledges that delay in an agency's fulfilling its FOIA duties to search for responsive records ordinarily does not constitute bad faith on an agency's part. However, in the context of this case, EPA's delay appears to be the result of employee misconduct. In addition, the delay has stretched over the transition period from one administrator to another, raising the possibility of spoliation of records during the transition period -- particularly those EPA business records that may have been held by the former administrator in her personal email or other personal repositories, such as her cell phone or other personal device.

The Court should order discovery for the purpose of examining this issue and whether sanctions are appropriate pursuant to 5 U.S.C. § 552(a)(4)(F). *See Citizens for Responsibility and Ethics in Washington v. United States DOJ,* 2006 LEXIS 34857 (D.D.C. 2006). Even though EPA ultimately conducted a search of the Administrator's, Deputy Administrator's and Administrator's chief of staff's offices, the EPA's apparent bad faith delay of those searches should be examined to determine whether spoliation of the former Administrator's records has occurred.

B. The Agency Declaration is Vague, Conclusory, and Does Not Describe a Search Sufficient for Summary Judgment.

The Wachter declaration fails to meet applicable standards for the sufficiency of a declaration in support of summary judgment in a FOIA action. The declaration does not "denote which files were searched or by whom. *CREW v. National Archives,* 583 F. Supp. 2d at 167. Nor does it reflect any systematic approach to document location and does not provide

information specific enough to enable Landmark to challenge to procedure utilized. *Id.* The Wachter Declaration does not disclose what filing systems EPA employs, what files exist, what files were actually searched or by whom. Moreover, the Wachter declaration does not include an averment that "all files reasonably expected to contain the requested records were, in fact, searched" as required by *Oglesby*, 920 F.2d at 68.

For example, the May 14, 2013 production of supplemental responsive records contains attachments to email from EPA's "correspondence management system" yet, the Wachter declaration makes no mention of this system, or any other records management system. Nor does the declaration indicate whether this particular system was searched for all officials covered by Landmark's request.

Mr. Wachter indicates that his "office initiated a search for records . . . by electronic mail." Wachter Declaration ¶11. He goes on to report that the electronic message was sent to designated coordinators in each of EPA's HQ offices, and that the coordinators are responsible for directing FOIA requests "to the individuals who are likely to have responsive records." Wachter Declaration ¶12. Mr. Wachter does not, however, indicate whether or how the FOIA coordinators carried out this task. An additional communication, described as an "Update and FAQ" was sent to the FOIA coordinators providing a link to a records collection database and instructed individuals to upload potentially responsive information to the database. Id. "Each headquarters office was individually responsible for uploading their responsive documents to the collection database. My staff and OGC staff were able to track who had uploaded documents into the records collection database after the documents were uploaded." Id. Again, the Wachter Declaration is silent regarding whether or not all officials with responsive records complied with the request -- only that once anyone uploaded a record, Mr. Wachter's office would know who

uploaded the record. This information is not helpful to determining whether the search was adequate.

Mr. Wachter next describes EPA's collection of responsive records, but never notes what officials actually conducted searches, what records were searched, what direction was given, and whether all responsive records were collected. Moreover, the Wachter Declaration provides confirmation that former Administrator Lisa Jackson's records were omitted from the search. "**This request has been modified.** The search only applies to assistant administrators, deputy assistant administrators and chiefs of staff in EPA headquarters." Wachter Declaration, ¶ 12 (emphasis in original). This description is even more restrictive than the search terms EPA asserts were applicable -- omitting the Administrator's chief of staff and the Deputy Administrator from the search. The Wachter Declaration does not explain, nor even acknowledge this dramatic further limitation on the scope of the search.

As a result, records of the three individuals most likely to have records responsive to Landmark's request were not searched until days before EPA filed its summary judgment papers. Moreover, the wrongful omission of Jackson's records from the search resulted in the potential spoliation of records that should have been searched prior to her departure, particularly those records that may have been found on her personal electronic devices, which are now out of EPA's reach.

C. EPA Ignored Landmark's Objections to Search Scope.

During the parties' March 21, 2013 meeting, Landmark raised significant concerns about the adequacy of EPA's search and record production. Among other concerns discussed, Landmark presented three principle objections: First, that EPA appears to have limited its search to emails, email chains and attachments to those emails. There is no indication that EPA

searched other repositories of data, nor does Mr. Wachter's Declaration indicate that EPA made any effort to search beyond emails and email attachments. Second, it appears that EPA made no effort to search personal email databases of EPA officials, despite the fact that at least one Agency record originated from the personal email of Deputy Administrator Robert Perciasepe. Michael J. O'Neill Declaration Exhibit A, (EPA Document #32). Third, the use of at least one alias email address by the former administrator continues to raise serious questions concerning EPA's compliance with its FOIA obligations.[3]

However, the Wachter Declaration does not acknowledge, let alone provide any explanation or cure for, the defects and concerns raised by Landmark as to the adequacy of EPA's search and record production. In particular, the declaration does not explain what record repositories were searched. Nor is there any response to Landmark's inquiry as to whether covered EPA officials were instructed to search their personal records for responsive information.

Given EPA's revelation in its summary judgment papers that the former Administrator and Deputy Administrator Perciasepe's records were not adequately reviewed in the initial search, it is particularly troubling that EPA does not explain through the Wachter Declaration whether or not either Ms. Jackson or Mr. Perciasepe's personal email or other personal communication devices were searched for responsive records during the "supplemental" search. The search of Mr. Perciasepe's records occurred well after Landmark specifically noted that an email sent to his personal email account was in fact released by EPA. Yet there is no way to test the adequacy of the search of his records based on the Wachter Declaration.

[3] The *Washington Times* has reported further evidence that former Administrator Jackson used her alter ego, "Richard Windsor" extensively. The alter ego was awarded EPA's "scholar of ethical behavior" award each year from 2010 through 2012. Stephen Dinan, "Newly released emails show EPA director's extensive use of fictional alter ego," June, 2, 2013, http://www.washingtontimes.com/news/2013/jun/2/newly-released-emails-show-epa-directors-extensive/?utm_source=RSS_Feed&utm_medium=RSS.

Moreover, despite assurances that this issue would be addressed in the summary judgment papers, the motion, memorandum and supporting affidavit, statement of undisputed facts, and *Vaughn* Index are all silent on the matter. In addition to the one example in the released records, Plaintiff is aware of a Congressional investigation as well as additional ongoing FOIA disputes arising from evidence that numerous EPA officials (as well as other executive branch officials) regularly use private communication accounts to conduct official government business. *See* Stephen Dinan, "Congress demands EPA's secret email accounts," *Washington Times,* November 17, 2012, http://www.washingtontimes.com/news/2012/nov/17/congress-demands-epas-secret-email-accounts/.

Directly relevant to this case, additional published reports point to the use of private email addresses by EPA employees, reportedly in part to avoid FOIA obligations. Jack Gillum, "Obama Political Appointees Using Secret Email Accounts," Associated Press, June 4, 2013, www.huffingtonpost.com/2013/06/04/obama-email_n_3382900.html. Landmark's request that private records be included in the search for responsive records was reasonable and warranted. EPA's failure to address the issue renders its summary judgment request inadequate on the record before the court. The Wachter Declaration does not give Landmark or the Court sufficient information to test the sufficiency of the EPA's search in light of this troublesome information.

Finally, with the Wachter declaration's description of the "additional" search of the Administrator's records, it is all the more clear that EPA did not take any steps to ensure that all repositories of records likely to have responsive records were searched. EPA's failure and refusal to remedy the defects in its search is more evidence of bad faith in the Agency's response to Landmark's FOIA request. In light of these omissions and deficiencies, EPA's search was

neither reasonable nor adequate based on the record before the court at this time and the summary judgment motion should be denied.

D. EPA's Exemption Assertions Are Not Justified By The Record.

EPA has asserted exemption 5 (deliberative process) and Exemption 6 (personal privacy) in support of its withholding of certain records. The *Vaughn* index does not provide sufficient justifications for these assertions in numerous instances.

1. EPA's Exemption 5 Deliberative Process Claims Are Insufficient.

Exemption 5 excludes from mandatory release "inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The minimal information given in the affidavit and *Vaughn* index provide the court with no way of knowing if the EPA has properly applied this standard in exempting material from the two records identified. Moreover, "[t]o ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed." In many cases, the EPA has provided no hint of a final agency policy its "predecisional" material preceded. The index must provide "specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA." *Morley*, 508 F.3d at1127 (citing *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)); *Central States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)).

The following examples of records withheld in full under Exemption 5 are illustrative of the deficiency found throughout:

1. EPA-360 & EPA-361 (p. 204 of the Vaughn Index).

Justification for withholding:

"EPA-361 is an email chain of five emails memorializing communications between Lisa Jackson, EPA Administrator; Bob Perciasepe, Deputy Administrator; and Gina McCarthy, Assistant Administrator for the Office of Air and Radiation. The email chain involves the preparation of a meeting with the White House to discuss a number of EPA proposed rulemakings. EPA-360 is encapsulated in EPA-361. This record was withheld in full."

"*The purpose of the White House meeting is to provide an update on a number of EPA proposed rulemakings, which include the new source performance standards for power plants."* [No further description of what proposed rulemakings were to be discussed.]

2. EPA-396, EPA-397, EPA-398 (p. 220 of the Vaughn Index)

Justification for withholding:

"EPA-396 is an email from Brendan Gilfillan, a staff member within the Office of External Affairs and Environmental Education, to Bob Perciasepe, the Deputy Administrator. The email forwards an email from Mr. Gilfillan to Clark Stevens, in the Executive Office of the President that contains the text of a draft blog entry." [No description of the blog entry or subject matter of the withheld material.]

EPA-397 & EPA-398 also relate to this blog entry and are withheld in full.

3. EPA-421 (p. 232 of the Vaughn Index)

"EPA-421 is an email from Janet McCabe, Principal Deputy Assistant Administrator of the Office of Air and Radiation to senior EPA officials, including Gina McCarthy, the Assistant Administrator of the Office of Air and Radiation, which contains a summary and analysis of a meeting with Las Brisas." [No description provided.]

4. EPA-460 through EPA-464 (pp. 247-250 of the Vaughn Index)

Justification provided as to EPA-464 (identical description and justification proffered for all records).

"EPA-464 contains an email string of 3 email messages and includes the full text of documents EPA-460 and EPA-463)."

"[This document] discusses EPA policy and future decisionmaking regarding particulate matter in the context of proposed rule-making."
"The withheld information is protected because it is an internal conversation that reflects the analyses, advice, and deliberations of EPA's management in working together with OMB and OAQPS/EPA." [Limited specificity as to description of withheld materials – "particulate matter."]

5. EPA-539 (p. 281 of the Vaughn Index)

"EPA-539 is an email chain memorializing communications betweem (sic) Micheal (sic) Goo an, Associate Administrator for the Office of Policy and Bob Perciasepe, Deputy Administrator, copying other EPA employees. The EPA senior managers are discussing a meeting with Michael Bradley, an industry representative, and other policy issues and potential outreach on the Clean Water Act (CWA) section 316(b) and its related proposed rulemaking." [No specificity as to what proposed rules they are discussing.]

6. EPA-549 (p. 285 of the Vaughn Index)

"EPA-549 is an email from a senior to the then-Deputy Administrator of the EPA. The email concerns an upcoming meeting with utility company CEOs. The email discusses EPA's work on a rulemaking, called the 316b rule, and provides key points about the rulemaking and timing to the Deputy Administrator. The email also provides an analysis of the use of a study conducted by the Office of Water for the rulemaking and provides the advisor's opinion on arguments that may be raised by the CEO's against the study." [Maybe an insufficient description??]

7. EPA-559 & EPA-560 (p. 289 of the Vaughn Index)

"EPA-559 is an email string containing two emails between Bob Perciasepe, Deputy Administrator and Gina McCarthy, Assistant Administrator for the Office of Air and Radiation. The email discusses a pending EPA rulemaking related to heavy duty vehicles and emissions."

"The email concerns a question related to an update on significant EPA actions. The email reflects discussion related to the timing and the need for the rule between the Deputy Administrator and the Assistant Administrator." [Possible insufficient description of the rule they are discussing?]

2. EPA's Privacy Exemption Assertions Are Not Legally Justified.

EPA's assertion of Exemption 6 privacy provision has been at issue throughout this litigation. In its initial production, dated February 7, 2013, EPA redacted the email address of former Administrator Lisa Jackson, asserting FOIA exemption (b)(6) (personal privacy). 5 U.S.C. 552(b)(6). Ultimately, EPA dropped this dubious assertion for records of the former Administrator, but not before EPA an extended period of time. EPA continues, however, to assert the privilege without legal justification for official government email addresses of certain White House officials. Coupled with the Agency's failure or inability to explain exactly what

email accounts are held by which officials and whether or not all alias, private or official accounts have been searched, EPA's Exemption 6 assertion is not sufficient.

IV. Conclusion

The record in this case leaves substantial doubt as to the sufficiency of the search and the good faith conduct of EPA officials in the processing of Landmark's FOIA request at issue in this cause of action. Accordingly, EPA is not entitled to summary judgment. The Court should deny the motion and instead should order EPA to submit to discovery in order to afford Landmark the opportunity to determine the circumstances surrounding EPA's improper limitation of the scope of its search for responsive records -- including whether EPA employees have acted in bad faith; and to determine the actual scope of EPA's search for responsive records. Finally, the Court should award Landmark its attorneys fees and costs incurred to conduct such discovery.

Respectfully submitted,

Landmark Legal Foundation

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing Memorandum of Points and Authorities In Opposition To Defendant's Motion For Summary Judgment was filed electronically with the Court by using the CM/ECF system on this 4th day of June, 2013. Parties that are registered CM/ECF users will be served by the District Court's CM/ECF system.

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