

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

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COMPETITIVE ENTERPRISE		)
INSTITUTE,		)
		)
Plaintiff,		)
		)
v.		)
		)
OFFICE OF SCIENCE AND		)
TECHNOLOGY POLICY,		)
		)
Defendant.		)
<hr/>		)

Civil Action No. 1:14-cv-01806-APM

**DECLARATION OF RACHAEL LEONARD**

I, Rachael Leonard, declare as follows:

**ABOUT OSTP AND THE DECLARANT**

1. Congress established the Office of Science and Technology Policy (“OSTP”) in 1976 with a broad mandate to advise the President and others within the Executive Office of the President on the effects of science and technology on domestic and international affairs. The 1976 Act also authorizes OSTP to lead interagency efforts to develop and implement sound science and technology policies and budgets, and to work with the private sector, state and local governments, the science and higher education communities, and other nations toward this end.

2. Dr. John P. Holdren is Director of OSTP. He also serves as Assistant to the President for Science and Technology and Co-Chair of the President’s Council of Advisors on Science and Technology. On behalf of the President, Dr. Holdren heads the National Science and Technology Council, which is the principal means within the Executive Branch to coordinate science and technology policy across the diverse entities that make up the Federal research and development enterprise. As OSTP Director, Dr. Holdren makes the final determination on many

types of decisions, including those involving coordination of Federal science and technology policy.

3. I, Rachael Leonard, am the declarant and Chief Freedom of Information Act (“FOIA”) Officer for OSTP. As OSTP’s Chief FOIA Officer, I oversee OSTP’s FOIA processing and am responsible for coordinating the agency’s search and recovery efforts related to responsive documents. I also address legal questions, act as the public liaison with FOIA requestors, and serve as the person within OSTP to whom FOIA requestors may appeal. I report to the OSTP Director and Chief of Staff. I have been working on FOIA issues for about 8 years. The statements made in this declaration are based on my personal knowledge and information made available to me in the performance of my official duties.

**THE POLAR VORTEX AND  
PLAINTIFF’S INFORMATION QUALITY ACT REQUEST**

4. On January 8, 2014, OSTP posted a two-minute video titled, “The Polar Vortex Explained in 2 Minutes” on [www.whitehouse.gov](http://www.whitehouse.gov). A true and correct version of that video can be viewed at the following Internet address: <http://www.whitehouse.gov/photos-and-video/video/2014/01/08/polar-vortex-explained-2-minutes>.

5. On January 8, 2014, OSTP posted a blog post by Ms. Becky Fried titled, “We the Geeks: ‘Polar Vortex’ and Extreme Weather.” Ms. Fried was OSTP’s Senior Communications Advisor and Web Editor, and is currently OSTP’s Deputy Assistant Director for Strategic Communications. A true and correct copy of that blog post can be seen at the following Internet address: <http://www.whitehouse.gov/blog/2014/01/08/we-geeks-polar-vortex-and-extreme-weather>.

6. On April 14, 2014, Plaintiff Competitive Enterprise Institute (“CEI”) submitted a request for correction under the Information Quality Act (the “Request for Correction”). *See* Pub. L. No.

106-554, § 515, 114 Stat. 2763, 2763A-153 to 2763A-154 (2000), 44 U.S.C. § 3516, note. A true and correct copy of that Request for Correction is attached as Exhibit A to this declaration.

7. In a letter dated June 6, 2014, OSTP denied CEI's Request for Correction. A true and correct copy of that denial letter and the appendix to that denial letter are attached as Exhibit B to this declaration.

8. In a June 19, 2014 letter, CEI appealed OSTP's June 6 denial of its request. A true and correct copy of that appeal letter is attached as Exhibit C to this declaration.

9. In an August 4, 2014 letter, OSTP denied CEI's appeal. A true and correct copy of that appeal denial and the appendices to that appeal denial are attached as Exhibit D to this declaration.

#### **CHRONOLOGY OF PLAINTIFF'S FOIA REQUEST**

10. OSTP received FOIA Request No. 14-66 (the "FOIA Request") from CEI on June 16, 2014. A true and correct copy of the FOIA Request is attached as Exhibit E to this declaration. The FOIA Request sought the following three categories of documents:

- A. Documents referencing or discussing whether the following quote by Dr. Holdren in "The Polar Vortex Explained in 2 Minutes" should be regarded as Dr. Holdren's own personal opinion or should instead be regarded as the position or view of OSTP: "a growing body of evidence suggests that the extreme cold being experienced by much of the United States as we speak is a pattern that we can expect to see with increasing frequency as global warming continues";
- B. Documents related to the production of "The Polar Vortex Explained in 2 Minutes," including documents related to the cost of the video's preparation, which staff spent time producing it, and the agency resources and staff time spent producing it; and
- C. Documents referencing or discussing whether the following quote in the blog post "We the Geeks: 'Polar Vortex' and Extreme Weather" should be regarded as Ms. Fried's personal opinion or should instead be regarded as the position or view of OSTP: "we also know that this week's cold spell is of a type there's reason to believe may become more frequent in a world that's getting warmer, on average, because of greenhouse-gas pollution."

11. OSTP responded to the FOIA Request in a letter to CEI dated July 9, 2014 (the “Response”). OSTP enclosed with the Response 11 pages of documents responsive to CEI’s request. OSTP withheld portions of those documents under 5 U.S.C. §§ 552(b)(5) and (b)(6). A true and correct copy of the Response and the 11 partially redacted pages released to CEI with the Response are attached as Exhibit F to this declaration.

12. CEI appealed the Response in a letter dated August 4, 2014 (the “Appeal”). A true and correct copy of the Appeal and the exhibits CEI included with the Appeal are attached as Exhibit G to this declaration.

13. OSTP responded to the Appeal in a letter to CEI dated September 5, 2014 (the “Appeal Response”). OSTP released one additional document responsive to CEI’s request, and further advised CEI that it was withholding 47 pages in full pursuant to 5 U.S.C. § 552(b)(5). A true and correct copy of the Appeal Response and the additional page released with the Appeal Response are attached as Exhibit H to this declaration.

14. CEI received all non-exempt records responsive to the FOIA Request and the Appeal between June 2014 and September 2014.

15. On October 29, 2014, CEI filed suit against OSTP in U.S. District Court for the District of Columbia. CEI has since clarified that it is not challenging OSTP’s withholdings pursuant to 5 U.S.C. § 552(b)(6), but only those materials withheld under 5 U.S.C. § 552(b)(5).

#### **SEARCH PROCESS AND PRODUCTION OF RESPONSIVE DOCUMENTS**

16. Upon receipt of the FOIA Request, OSTP assigned it OSTP FOIA No. 14-66, logged the request into its FOIA log and began processing it immediately. Initially, OSTP determined the individuals at OSTP who had a role in producing the video and who thus could potentially have records responsive to the FOIA Request. Those individuals – a total of four

people – included Dr. Holdren (the narrator of the video), Dr. Holdren’s assistant, Ms. Fried, and one additional staff member who assisted Dr. Holdren in preparing the video. OSTP instructed these four individuals to conduct a search of their records for any potentially responsive material. In doing so, OSTP explained to these four individuals that the FOIA Request sought all documents related to “The Polar Vortex Explained in 2 Minutes” and that they should thus provide all documents related to the content, scheduling, or logistics of that video. OSTP also asked these four staff if they were aware of any other potential records custodians at OSTP. No other custodians were identified. The four OSTP staff individually searched their paper and electronic records and provided all potentially responsive records.

17. Once all records were put into date order, OSTP reviewed the documents and identified 11 pages that were responsive to the FOIA Request. OSTP then applied the relevant FOIA exemptions. OSTP released all 11 pages of responsive records to CEI on July 9, 2014, withholding portions of the 11 pages under 5 U.S.C. § 552(b)(5) (“Exemption 5”), and 5 U.S.C. § 552(b)(6) (“Exemption 6”).

18. As noted above, CEI appealed OSTP’s Response in a letter dated August 4, 2014. As OSTP’s Chief FOIA Officer, I was responsible for reviewing and responding to the Appeal. Upon receiving the Appeal, I assigned it OSTP FOIA Appeal No. 14-66(A) and logged it into OSTP’s FOIA log. I then reviewed CEI’s claim in the Appeal that OSTP had conducted an insufficient search and production.

19. Based on several clarifications the Appeal made to the FOIA Request, I directed three OSTP staff members (discussed individually below) to undertake new searches for records potentially responsive to the request.

20. In the Appeal, CEI stated that the FOIA Request “sought, among other things, ‘documents related to [‘The Polar Vortex Explained in 2 Minutes’] cost of production’” and noted that a “contractor” worked on the video. OSTP does not have a video contractor and thus does not generally maintain information related to the cost of producing videos. On this basis, OSTP had not initially requested a search of OSTP invoices, bills, and contracting documents. Out of an abundance of caution, I contacted the OSTP staff person who handles OSTP’s contracts and asked her to conduct a search of her records for invoices, bills, contracting documents, and any other records that might be responsive to the FOIA Request. The staff person conducted a search of her records and located no records responsive to the FOIA Request or the Appeal.

21. The Appeal also highlighted that the FOIA Request sought “what agency resources were used in producing [the video], the amount of staff time that was spent producing it, and whose time was spent producing it.” OSTP does not generally hire video contractors or maintain staff timesheets with a breakdown of the time spent on individual projects, such as the production of a video. On this basis, OSTP had not initially requested a search of its personnel and human resources records for timesheets, personnel records, and other records that might be responsive to the FOIA Request. Out of an abundance of caution, I contacted the OSTP staff person who maintains personnel and human resources records and asked her to conduct a search of her records for timesheets, personnel records, and other records that might be responsive to the FOIA Request or the Appeal. The staff person conducted a search of her records and located no records responsive to the FOIA Request or the Appeal.

22. The Appeal further clarified that OSTP’s response to CEI’s Request for Correction was within the scope of the FOIA Request. OSTP had not previously understood

CEI's FOIA Request to encompass the Agency's response to CEI's Request for Correction. In response to CEI's clarification in its appeal, I identified the OSTP staff member who had drafted the response to CEI's request and incorporated comments from others – I then directed that staff member to conduct a search of her records for materials related to the Agency's response to CEI's Request for Correction. The staff member conducted a new search and located a one-page calendar invitation, the final version of the agency's Data Quality Act response letter (of which CEI had enclosed a copy with the Appeal), and 47 pages consisting of drafts of the Data Quality Act response letter. OSTP released the calendar invitation to CEI with its Appeal Response. OSTP did not enclose a copy of its final Data Quality Act letter to CEI with the Appeal Response because CEI already had a copy of that letter, which it provided to OSTP as an attachment to the Appeal. OSTP determined that the remaining 47 pages were protected from release by FOIA Exemption 5 and withheld those pages in full.

#### **FOIA EXEMPTION 5**

23. Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>1</sup> Congress and the courts have recognized the need to shield agency deliberations from public disclosure. “The deliberative process privilege protects ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’”<sup>2</sup>

24. The deliberative process privilege is the only aspect of Exemption 5 asserted here:

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<sup>1</sup> 5 U.S.C. § 552(b)(5) (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110175, 121 Stat. 2524.

<sup>2</sup> *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)).

The privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted, and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.<sup>3</sup>

25. OSTP redacted or withheld certain deliberative material responsive to CEI's requests under Exemption 5 because release of such material would result in the type of harm that Exemption 5 specifically protects against. For the deliberative process privilege to apply, the communication must be: (1) "inter-agency" or "intra-agency," (2) "predecisional," and (3) "deliberative." 5 U.S.C. § 552(b)(5); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). All material withheld under Exemption 5 remained within the Executive Branch. All portions withheld or redacted were predecisional and reflect internal deliberations and discussions that OSTP relies on in fulfilling its statutory mission. Disclosure of the deliberative portions withheld under Exemption 5 would harm OSTP's ability to engage in candid, internal discussion. Disclosure would also frustrate the policy behind the deliberative process privilege, as incorporated through Exemption 5.

26. The 47 pages withheld in full were draft versions of the final OSTP Data Quality Act response provided to CEI. As noted above, the 47 pages remained internal to the Executive Branch. In these 47 pages, OSTP staff were engaged in deliberative conversations and edits in order to help formulate OSTP's response to CEI's Request for Correction. Disclosure of deliberative draft documents that were not ultimately finalized or adopted by the Agency risks confusing the public concerning the Agency's position. Disclosure of these deliberative draft materials would also seriously undermine the quality and integrity of OSTP's decisionmaking

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<sup>3</sup> *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).



process, by deterring OSTP staff from exercising candor in developing the Agency's responses to such requests.

27. All 47 withheld pages were marked DRAFT when created, and several pages contain draft edits, including redlines and comment bubbles from OSTP staff.

28. As explained above, OSTP also withheld portions of the eleven pages it produced to CEI on July 9 under Exemption 5. These withholdings are summarized in the paragraphs below and in the *Vaughn* index (accompanied by the corresponding documents with associated document numbers) attached as Exhibit I to this Declaration.

29. OSTP partially redacted two emails discussing communications between NASA and a separate agency on how to address inquiries concerning the polar vortex (IDs 3.01 and 3.02). OSTP withheld these materials because they reflect an effort to formulate the Executive Branch's response to inquiries on a particular topic, and they involve inter-agency consultations on an ongoing scientific and policy issue. These redactions are discussed further in the attached *Vaughn* index.

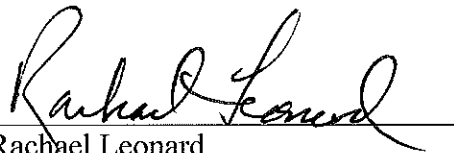
30. OSTP partially redacted three emails among OSTP officials describing the Agency's collection of information and recommendations and the timing of internal review, a response to a particular recommendation, as well as discussion of comments and ideas concerning possible content for the video "The Polar Vortex Explained in 2 Minutes" (IDs 2.01, 2.02 and 2.03). OSTP redacted another email containing the website and password to access a privately hosted online video (ID 2.04). These redactions are discussed further in the attached *Vaughn* index. In a separate email, OSTP had previously redacted the room number where a meeting was held, but OSTP has since made a discretionary release of that information to CEI.

31. Finally, OSTP redacted a fragment of a sentence in one email to withhold discussion of communications on scientific issues between Dr. Holdren and senior Administration officials at a prior meeting (ID 1.01). That redaction is discussed further in the attached *Vaughn* index.

32. OSTP conducted a careful, line-by-line review of each document withheld in full or in part and concluded that there was no reasonably segregable factual or non-deliberative information responsive to CEI's request.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 23, 2015

A handwritten signature in cursive script, reading "Rachael Leonard", written over a horizontal line.

Rachael Leonard  
Chief FOIA Officer  
Office of Science and Technology Policy