FREEDOM OF INFORMATION ACT APPEAL

September 1, 2016

Deputy Chief Freedom of Information Officer
United States Department of Health and Human Services
5600 Fishers Lane, Room 19-01
Rockville, Maryland 20857

Re: Appeal of Initial Determination, FOIA Case No. 45376 (NIH/NTP)

BY ELECTRONIC MAIL: foiarequest@psc.hhs.gov

To HHS Deputy Chief Freedom of Information Officer,

On behalf of the Free Market Environmental Law Clinic (FME Law), please accept this appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. for the reasons set forth below.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552. Pursuant to 45 CFR 5 Subpart C [Sec. 5.34 Appeal of denials], you have jurisdiction because HHS has replied to our request for certain described records by denying them, claiming that what it possesses are not in fact agency records.

We note up front that, HHS's claim notwithstanding, the subject records remain the records associated with an outstanding FOIA request, and those records in HHS's possession which satisfy the request's search parameters must be preserved until they are no longer the subject of such a request. If in processing this appeal HHS determines that the records have since been deleted it must recover them from its system.

We appeal this initial determination of "no records" on the basis that these records in HHS's possession are indeed "agency records" subject to release under FOIA and because HHS/ NTP has not responded with regard to the request for records associated with appointment of Ms. Jahnke to the IARC committee. All procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as a "Freedom of Information Act Appeal" and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 30 days of HHS's adverse determination dated August 18, 2016, sent by regular mail and received by requesters on August 23, 2016.

II. PROCEEDINGS BELOW

This appeal involves one FOIA Request, sent by electronic mail on August 8, 2016 to NIEHS's Freedom of Information Office at stockton@niehs.nih.gov seeking:

1) All email correspondence (including attachments) sent to or from any account used for NIEHS-related correspondence (whether using a government or private email address) of Gloria D. Jahnke, over the period April 1, 2014 through March 30, 2016, inclusive, which either includes any of the following in either the To:, From:, cc:, bcc:, Subject fields or the body of the email:

Glyphosate
Cancer Assessment Review Committee (CARC)
International Agency for Research on Cancer (IARC)
Monograph 112
Factor GMO

Peter Egeghy
Aaron Blair
Catherine Eiden
Matthew Martin
Ivan Rusyn
Tom Burke
Kurt Straif
Christopher J. Portier Vincent Cogliano
Kathryn Guyton
Elena Sharoykina
Dennis Dean Weisenburger
KP Cantor
Martyn Smith
Linda Birnbaum
John Bucher
Fiorella Belpoggi

or,

2) Any records related to the appointment of Ms. Jahnke as a member or contributor to the IARC Monographs on Evaluation of Carcinogenic Risks to Humans Volume 112 and/or the IARC meeting in Lyon, France held on March 3 – 10, 2015.

HHS Response to this Request

HHS assigned this request identification number FOIA Case No. 45376 by letter dated August 15, 2016.

In a letter dated August 18, 2016, HHS stated in pertinent part:

> "The NIEHS, National Toxicology Program, NTP searched its files and no records responsive to your request were located. NTP returned the following explanation as to why NIEHS has no records responsive to your request: "Dr. Jahnke's involvement was as a scientist with expertise in the field, not as an NTP representative. Records from Dr. Jahnke are not NIEHS records based on the four factors to consider for evaluating agency "control" of a record, as described in the Department of Justice Procedural Requirements" (citation and factors as set forth are omitted)."

This letter served as HHS's final response by virtue of HHS notifying requesters of their right to appeal.

III. ARGUMENTS SUPPORTING REVERSAL

Standards of Review:
All Doubts Must be Resolved in Favor of Disclosure

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the

agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in our underlying request to HHS to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government." Accordingly, the President has directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA."

The Records NIH holds are Agency Records under *CEI v. OSTP and under* the *Burka* Test.

As the Justice Department explains[1]:

> The Supreme Court had articulated a two-part test for determining what constitutes "agency records" under FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.[2]

The records we seek were either created by the agency on agency equipment or were received by

[1] Department of Justice Guide to the Freedom of Information Act, "Agency Records" p. 34.

[2] *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

the agency through agency email systems, are related to Ms. Jahnke's official duties and, being on the Agency's email system, are under agency control and were so at the time we made our information request.

It does not avail the agency to argue that records at issue are not under the control of the agency under the four part *Burka* test.[3] They are. Before examining each of the *Burka* prongs, we suggest that such a test is only a guide to the fundamental question as to whether the emails and attachments were "under its 'constructive control'"[4] and must used and interpreted in conjunction with *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy.* In *CEI v. OSTP*, the D.C. Circuit makes clear that emails in an email account of a government employee, even one under the control of a third party, when involving regular communications of government employees, are within the constructive control of the government and are subject to release under FOIA if not otherwise exempted. The NIEHS emails, both those sent by Ms. Jahnke and those received by her regarding her discussions of glyphosate, even with IARC, are within the actual control of the government and an analysis of the *Burka* prongs strengthens that fact.

Under part (1) of the test, the fact that the emails and associated documents are on the agency's electronic equipment and have not been purged by the agency, the mere existence of those documents on agency equipment, and created by NIH employees, demonstrates an intent by the agency to retain control over those documents. Indeed, only NIEHS can control and/or dispose of them.

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[3] *See, Burka v. HHS*, 87 F.3d 508,515 (D.C. Cir. 1996).

[4] *See, Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 2016 U.S. App. Lexis 12357 (D.C. Cir. July 5, 2016), citing to *Burka v. HHS*, 87 F.3d at 510-13.

Nor does IARC's claim of sole ownership of materials adequately satisfy the intent factor of the *Burka* test. As admitted in the August 12th letter, "IARC does not encourage participants to retain working drafts of documents." This is not a prohibition of retention of such documents nor a prohibition of the use of those documents by Ms. Jahnke. Notably, Ms. Jahnke claims she retained no "hard copies" of documents from the IARC meeting. This is a non sequitur. Our request did not cover "hard copies" but was restricted to "email correspondence (including attachments)." Ms. Jahnke does not claim she retained no electronic copies of emails and associated documents. To the degree she did, it indicates her intent to control the documents, apparently as allowed by IARC under its discretionary standard for retention.

With regard to the claim by IARC that emails its staff sends demonstrate an intent to retain control, the mere fact that it emails the communications and documents undercuts any claim of an ability to control their distribution, making a claim of intent mere puffery. The agency's "back office" IT department has access to all emails on the agency's system, and thus Ms. Jahnke could never control potential further distribution of the IARC emails. Nor is there any evidence that either Ms. Jahnke or the agency would suffer any form of enforcement or discipline by IARC if she did further distribute those emails. IARC knows that once its emails are sent, it has no control over them. Indeed, IARC's intent on secrecy is only manifest in how it operates its face to face meetings and its use of a "password secured FTP site" for its working documents. It does not use a secure email server for which its contributors, such as Ms. Jahnke, might use, complete with an IARC server address and IARC-managed password. Indeed, even if it did, under *CEI v. OSTP*, emails from or to Ms. Jahnke would be subject to FOIA.

Arguably, to demonstrate an intent of control over IARC-initiated emails, IARC must take the step of requesting NTP to restrict distribution of its emails and attachments, and NTP must agree to do so.[5] IARC's discretionary standard for retention of its documents is a facial demonstration that it does not have the intent to control its records. Further, NTP offers no evidence that it entered into a confidentiality agreement with IARC or otherwise agreed to prevent distribution of IARC emails. The same is true for Ms. Jahnke. The absence of a specific request for confidentiality and a specific agreement to confidentiality defeats any *Burka* prong (1) argument that IARC has demonstrated the legally cognizable intent to control their emails, although *CEI v. OSTP* may have now overtaken the *McErlean* holding, now requiring no more than a demonstration that the emails involved government business, as the requested documents clearly do.

Nor can IARC's claim of confidentiality protect the emails under FOIA. To do so, it, and NTP must claim Exemption 4 status for the emails sent by IARC. It has not, but even if it did, under 5 U.S.C. 21 552(b)(4), to claim confidentiality, IARC must provide the government with evidence that its documents and emails contain either trade secretes or contain information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. IARC, by its own policies, relies exclusively on published, peer-reviewed papers, none of which contain trade secrets or commercial or financial information. IARC has never claimed that it relies on, uses or distributes such material. Thus, the "confidentiality" claimed by IARC is not sufficient for recognition of confidentiality under FOIA.

In light of the above, NIEHS meets the conditions of *Bruka* prong (1).

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[5] *See, McErlean v. DOJ*, No. 97-7831, 1999 WL 791680, at *11 (S.D.N.Y. Sept. 30 1999).

Under *Burka* part (2) prong, NTP had and continues to have the ability to use and dispose of the records as they see fit. The bald claim that NTP does not have the ability to use and dispose of Ms. Jahnke's records related to IARC is false on its face. First, Ms. Jahnke could, at any time, have disposed of the emails, but did not. As we state repeatedly herein, Ms. Jehnke ***is*** NTP, NIEHS and NIH. "[A]n agency always acts through its employees and officials."[6]

Nor is the argument that NTP relies exclusively on the final publish monograph controlling. NTP has and continues to rely on the work of Ms. Jahnke. Ms. Jahnke cannot erase from her memory the arguments and discussion made regarding development of the monograph, including any existent within the emails and attachments sought. Ms. Jahnke has and continues to perform in an NTP role regarding assessment of glyphosate. It is impossible for her to divorce her memory and thoughts associated with the IARC glyphosate monograph preparation and her continuing work on glyphosate within the U.S. federal system. Nor has she, or NTP, so claimed.

There is no "bamboo" wall available in the human mind. Even when confronted with the demand that they ignore disallowed evidence and testimony, judges and juries cannot "erase the and other memories that inform their consideration and govern their interpretations of the case."[7] The same is true of anyone, including NTP scientists. In the case of the judicial process, at least there is a remedy (a new trial). There is no such remedy sufficient to prevent NTP from "having the ability to use" information in the emails and attachments when Ms. Jahnke reasonably and inevitably incorporates concepts, theories, and conclusions she heard or read during the IARC

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[6] *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 2016 U.S. App. Lexis 12357 (D.C. Cir. July 5, 2016)

[7] Norton, A., Republic of Signs: Liberal Theory and American Popular Culture, University of Chicago Press (1993) p. 148.

monograph preparation or in IARC-originating emails into her NTP work. Thus, NIEHS meets the conditions of *Bruka* prong (2).

NIEHS suggests that "NTP has not read and will not rely on any of the documents Dr. Jahnke received from IARC, nor on any other records she may possess such as emails." In making this statement, NIEHS fails to recognize that "an agency always acts through its employees and officials."[8] Under *Burka* prong (3), NTP's reliance on Ms. Jahnke's participation in the IARC process is manifest and NIH/NTP's statement otherwise is ill-informed and inaccurate. As recently as this year, Ms. Jahnke co-authored an article discussing the credibility of study results.[9] This was a major discussion point amongst the authors of IARC Monograph 112, of which Ms. Jahnke was also a co-author.[10] Ms. Jehnke ***is*** NTP, NIEHS and NIH. In the 2016 paper on the credibility of study results, she categorically states her affiliation as "Office of the Report on Carcinogens, Division of the National Toxicology Program, National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH), Research Triangle Park, NC, USA." Ms. Jahnke wrote the 2016 paper while acting as an NIEHS employee. Under federal rule, she had to have authority to represent herself as an NIEHS employee, granted by her management.[11] It is impossible for NIEHS to argue that Ms. Jahnke's preparation of the 2016

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[8] *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 2016 U.S. App. Lexis 12357 (D.C. Cir. July 5, 2016)

[9] Rooney, A.A., et al., How credible are the study results? Evaluating and applying internal validity tools to literature-based assessments of environmental health hazards, Environ Int (2016), http://dx.doi.org/10.1016/j.envint.2016.01.005

[10] *See, e.g.,* IARC Monographs - 112, Section 2.1 and Table 2.1 ("Limitations").

[11] *See*, 5 CFR 5501.106(d)(1)(ii).

paper, and her participation on the IARC committee was unrelated to her official duties within the meaning of 5 CFR 2635.807(a)(2)(i)(B) through (E) and specifically (E)(1).

NIEHS admits Ms. Jahnke read the emails and associated documents. In light of her authorship of both Monograph 112 and the 2016 paper, NIEHS cannot credibly argue she relied on those emails, associated documents and their content. Thus, NIEHS meets the conditions of *Bruka* prong (3).

Finally, under *Bruka* prong (4), NIEHS cannot credibly argue that the emails, sitting on an NIEHS computer server and subject to federal records retention policies have not been incorporated into the agency's record system. As NIH itself explains, "The official records of the National Institutes of Health are created by or for NIH or received by NIH in the course of doing business."[12] The fact that they were related to her official duties place them subject to records retention requirements. If, in fact, NIEHS has failed to properly maintain them under 44 U.S.C. Chapter 31, this does not remove the records from the agency's record system, even where NIEHS claims they were not added to NTP files. Without question, the emails are in a file likely entitled "inbox" associated with Ms. Jahnke's electronic account, on a server maintained and managed by NIEHS. Fore these reasons NIEHS meets the conditions of *Bruka* prong (4).

Because NIEHS basis its "no records" response exclusively on the *Bruka* test, and in light of the above, we ask that you reject the "no records" finding and produce the records sought.

Non-*Burka* Records Arguments

We have found that, upon appeal, agencies tend to dredge up additional arguments in order to maintain their original decision. To that end, we make additional arguments as to why

[12] NIH Policy Manual 1743.

the records sought are records subject to FOIA.

The Department of Justice notes that "'Records' is not a statutorily defined term in FOIA. In fact it appears that the only definition of this term in the U.S. Code is that in the Federal Records Act. 44 U.S.C. § 3301." *What is an "Agency Record?"*, U.S. Department of Justice FOIA Update Vol. II, No. 1, 1980, http://www.justice.gov/oip/foia_updates/Vol_II_1/page3.htm.[13]

That definition of "records" for purposes of proper maintenance and destruction is notably broad. It "includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."

Yet, "The definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act."[14] The Records Act does require the document to somehow reflect the operations of government at some substantive level, while FOIA covers far more still, including annotations and the most seemingly inconsequential piece of paper or electronic record ***in an agency's possession***. At bottom "the question is whether the employee's

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13 *See also e.g.,* U.S. Department of Health and Human Services, Federal Emails Are Records, phttp://www.hhs.gov/ocio/policy/recordsmanagement/federalemailsarecordshtml.html

14 *See, e.g.,* Environmental Protection Agency, *What Is a Federal Record?*, http://www.epa.gov/records/tools/toolkits/procedures/part2.htm.

creation of the documents can be attributed to the agency for the purposes of FOIA." *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006).

Indeed it is so broad that correspondence need not be sited on the government system, as the records on HHS/NTP's system responsive to this request are. Agencies interpret extant record-keeping policy and FOIA as allowing for searching an employee's private accounts and equipment as well.[15] *See, e.g.*, August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher C. Horner, Competitive Enterprise Institute in response to NOAA FOIA#2010-00199, stating in pertinent part, "NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions." (p. 2).

That NOAA circumstance is relevant and instructive in the instant matter. The context of that request includes a subsequent inquiry by the Department of Commerce Inspector General. NOAA's Dr. Susan Solomon similarly declined to produce her emails for possible release under several FOIA requests, having rationalized that she was really working for the UN's Intergovernmental Panel on Climate Change (IPCC) when sending or receiving them on her NOAA system. So NOAA repeatedly claimed 'no records', until one day after informing me on the phone that a delay in responding to my request was due to deliberating over what were

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[15] That agency control is an important factor is longstanding precedent, which issue and reach of FOIA were further affirmed recently by the D.C. Circuit in *Competitive Enterprise Institute v. White House Office of Science and Technology Policy*, 1:14-cv-00765, D.C. Cir., decided July 5, 2016.

agency records and what were IPCC records. But of course there are no such things as IPCC records on NOAA's system, as NOAA and the White House OSTP later acknowledged in response to other requests.

The investigators' summary of their findings is too exhaustive to replicate here, though it is available online (Department of Commerce Inspector General, "Examination of issues related to internet posting of emails from Climatic Research Unit," alternately styled "Response to Sen. James Inhofe's Request to OIG to Examine Issues Related to Internet Posting of Email Exchanges Taken from the Climatic Research Unit of the University of East Anglia, UK," February 18, 2011; see pertinent discussion at PDF p. 18, doc page numbers 13-16).

We note our experience with this same argument invoked recently by George Mason University — a move that was also overturned, in this case by the Virginia courts — that their faculty's advocacy of using RICO laws against those who oppose their political agenda, on the University's system, was not substantively related to their work for the University. There, too, the court disagreed and ordered the school to release the records.

At bottom, Ms. Jahnke was allowed by her management to participate in the IARC Monograph 112 process, and otherwise to publish papers associated with data quality - an issue of considerable significance within the Monograph 112 process, in full knowledge that (1) both the data quality and glyphosate issues are matters to which Ms. Jahnke is presently assigned or has been assigned during the year previous to the date of the emails; and, (2) deals in significant part with ongoing NIEHS and associated federal agency discussions regarding characterization of glyphosate as a carcinogen. If Ms. Jahnke received any form of compensation from IARC, she did so in violation of 5 CFR 2635.807(a) and the public has a right to records documenting

that fact. If Ms. Jahnke did not receive any form of compensation from IARC, then she participated as an NIEHS employee and the public has a right to records of her government activities.

The "Appointment" Records

NIEHS' "no records" response made no statement regarding the second part of our information request, to wit:

> 2) Any records related to the appointment of Ms. Jahnke as a member or contributor to the IARC Monographs on Evaluation of Carcinogenic Risks to Humans Volume 112 and/or the IARC meeting in Lyon, France held on March 3 – 10, 2015.

NIEHS either failed to conduct a search for "appointment" records, or did so and withheld them without providing a reason why they were withheld. Under previously stated regulations, Ms. Jahnke could not participate in the IARC activities absent approval by her management. There is no exemption for such an approval. There is no exception for an invitation to participate in an IARC activity. Application for visa's and international passports and State Department approval of such international activities are not exempted under FOIA. NIEHS' silence on this portion of the request documents a failure to comply with FOIA. We ask that you acknowledge this failure and produce the requested records.

HHS Owes a Reasonable Search and Processing of All Potentially Responsive Records

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

NIEHS makes the claim that it searched its files. It's reply suggests that in fact no search was conducted. Instead, it appears, the agency concluded that any responsive emails and attachments would not be agency records under FOIA, and did no more that raise an inadequate *Burka* defense. Absent a review of each email and attachments, NIEHS could not make a conclusion as to whether the emails were responsive to the search terms AND associated with government business. NIEHS has provided no information to contradict the reasonable inference that they made an adequate search. As such NIEHS has failed to properly respond within the statuary period of time, with all that that also implies under FOIA.

The term "search" means to "review, manually or by automated means, agency records *for the purpose of locating those records which are responsive to a request*." 5 U.S.C. § 552(a)(3). *See also Iturralde*, 315 F.3d at 315; *Steinberg,* 23 F.3d at 551 (emphasis added).

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). The search must be "'adequate'" on the "'facts of this case.'" *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir 1986) (internal citations omitted).

The reasonableness of the search activity is determined *ad hoc* but there are rules, including that it cannot be cursory. *See Citizens For Responsibility and Ethics in Washington v. U.S. Department of Justice*, 2006 WL 1518964 *4 (D.D.C. June 1, 2006) ("CREW") ("The Court is troubled by the fact that a mere two hour search that started in August took several months to

complete and why the Government waited [for several months] to advise plaintiff of the results of the search."). Reasonable means that "all files likely to contain responsive materials . . . were searched." *Cuban v. SEC*, 795 F.Supp.2d 43, 48 (D.D.C. 2011).

Courts inquire into both the form of the search *and* whether the correct record repositories were searched. "[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *See e.g., Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). We note with special attention that the Department of Justice declined to defend a "search" by a NOAA employee in which the employee was left to unilaterally assert that, whatever existed, they wouldn't be "agency records" for FOIA purposes. The Department followed well recognized law, knowing an unsupervised search allowing for abuses is not reasonable and so does not satisfy FOIA's requirements.[16] See *Kempker-Cloyd v. Department of Justice*, W.D. Mich. (1999). An agency must search "those files which officials expec[t will] contain the information requested." *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 30 n.38 (D.D.C. 1998). Agencies cannot structure their search techniques so as to deliberately overlook even a small and discrete set of data. *See Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989)

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[16] *See*, discussion at page 12, *supra*, referring to the August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Christopher C. Horner, Competitive Enterprise Institute.

(*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)).

The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

Accordingly, when an agency withholds or denies the existence of requested documents or that documents requested even, technically, "exist", that it is reasonable to believe exist, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n.3; *Consumer Fed'n of America,* 455 F.3d at 287; *Burka*, 87 F.3d at 515.

Among the burdens are the Agency's burden to demonstrate 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). As noted NIEHS offered no such evidence let alone proof.

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). For example, the Agency will not obtain summary judgment in an action seeking records in a case such as this 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)).

HHS Must Establish it Used Reasonable Methods
in Processing Potentially Responsive Records

For NIEHS to demonstrate it satisfied its burden to make an adequate search, declarations ordinarily must 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).

HHS would have to 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).

In this case, there is evidence suggesting that NIEHS conducted no search at all, instead merely categorically denying such documents as described would be the agency's, prohibiting review or other processing as required by FOIA. This despite the numerous keywords/terms Further, this despite that **Ms. Jahnke is identified for — and, indeed according to IARC procedures, *self-identifies* — her participation in producing the relevant Monograph at issue in this request as "Gloria D. Jahnke, National Institute of the Environmental Health**

Sciences, USA" (see https://monographs.iarc.fr/ENG/Meetings/vol112-participants.pdf)[17]. That is to say that NTP's response was simply a dodge of its obligations under FOIA to avoid producing records.

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). HHS has provided no demonstration of the sort required to dispense with actions such as this request, despite the ease with which it could do so.

Further, "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 District Court for the District of Columbia 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).

NIEHS in its FOIA Duties

FOIA provides that a requesting party is entitled to a substantive agency response within

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[17] See e.g., "(e) The IARC Secretariat consists of scientists who are designated by IARC and who have relevant expertise. They serve as rapporteurs and participate in all discussions. When requested by the meeting chair or subgroup chair, they may also draft text or prepare tables and analyses.
Before an invitation is extended, each potential participant, including the IARC Secretariat, **completes the WHO Declaration of Interests to report** financial interests, **employment** and consulting, and **individual and institutional research support related to the subject of the meeting" (emphases added)** http://monographs.iarc.fr/ENG/Preamble/currenta5participants0706.php It seems likely that these forms further solidify that the representation of Ms. Jahnke's participation as NIEHS is not in error.

twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating "that the agency is exercising due diligence in responding to the request . . . . Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request." (5 U.S.C. § 552(a)(6)(C)(i)). Alternatively, the agency must cite "exceptional circumstances" and request, and make the case for, an extension that is necessary and proper to the specific request. *See, e.g., Buc v. FDA*, 762 F.Supp.2d 62, 67-73 (D.D.C. 2011).

Absent any indication that NIEHS employee Jahnke was not in fact pursuing agency-related responsibilities when sending or receiving these records and, more stringently, that this work in fact had no relation to her NIEHS work or duties at all, NIEHS' determination is on its face improper. NIEHS has the burden here, with the records being on its system as well as *prima facie* work-related for substantive reasons relating to the overlap between Ms. Jahnke's NIEHS work and the subject matter of records sought. It is inarguable that NIEHS not only substantially funds IARC[18] — surely the strongest proof than the international body's work is directly related to an agency's mission — but IARC expressly invited NIEHS officials "to attend the [3-10 March 2015 Volume 112 Working Group] meeting as a Representative of your agency."[19]

NIEHS's Gloria Jahnke did participate in that meeting, as a representative of her agency, specifically "Gloria D. Jahnke, National Institute of the Environmental Health Sciences, USA"

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[18] *See*, NIEHS, "Peer Consultation of NIEHS' Contribution to IARC Monograph Programme" p. 2, (2004) ("Since 1992, National Institute of Environmental Health Sciences (NIEHS) and the National Toxicology Program (NTP) have made an annual contribution of approximately $90,000 to the IARC Monograph Program." *Available at*, www.tera.org/Peer/NIEHS%20report%20final.pdf .

[19] *See*, email chain in email from James W. Stephens to Ed Murray wherein Mona Saraiya (CDC/ONDIEH/NCCDPHP) states, I often get these we have a direct connection /coop with IARC".

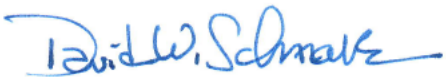
https://monographs.iarc.fr/ENG/Meetings/vol112-participants.pdf. IARC producers required her to self-identify and she did so an an NIEHS employee.

As a final note, we reserve all rights to argue that NIEHS has failed to provide a timely processing or response, on which we need not further administratively appeal given the statutory time for that has passed, but can seek immediate judicial review. Failure to satisfy its obligation or remedy its failure to do so is arbitrary and capricious for reasons of NIEHS' obligations articulated, *supra*.

IV. CONCLUSION

NIEHS' initial determination improperly failed to demonstrate it satisfied its relevant burden(s) described, *supra*. As such, and as NIEHS' "Final response" letter indicated, requesters may appeal this as a denial of their request. By statute and regulation NIEHS is obligated to reverse this initial determination, and provide a proper response satisfying its burden of demonstrating that it has complied fully with its obligations to conduct an adequate search, and demonstrate this.

Respectfully submitted,



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ON BEHALF OF:
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