



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

FEB 12 2013

Christopher C. Horner
1489 Kinross Lane
Keswick, VA 22947

Dear Mr. Horner:

This responds to your Freedom of Information Act (FOIA) (5 U.S.C. § 552) appeal of the no records response provided by National Oceanic and Atmospheric Administration (NOAA) to your May 4, 2012 request for copies of all emails to, from or copied to six NOAA scientists between July 1, 2011, and May 4, 2012, dealing with "NOAA staff using official resources in the work-related American Meteorological Society (AMS) Information Statement on Climate Change." The six scientists are Thomas Karl, Thomas Bogdan, Wassila Thiaw, Ahsha Tribble, Richard Rosen, and Louis Uccellini. By letter dated June 5, 2012, Wendy Shumacher, NOAA FOIA Officer, responded by stating that NOAA had no records responsive to the request. NOAA acknowledged that it had located an unspecified number of documents, but that the records were personal records not agency records. For the reasons discussed below, your appeal is denied.

All 116 of the documents located by NOAA are personal records.¹ Personal records are documents created by an agency employee and possibly physically maintained at the agency, but are not subject to FOIA because they were created and used for the personal convenience of the employee. See Consumer Fed'n of Am. v. USDA, 455 F.3d 283, 288-93 (D.C. Cir. 2006). In the instant case, all 116 documents are personal records – the NOAA scientists in AMS's leadership serve in their personal capacity. Under 18 U.S.C. § 208(a), a criminal statute, Federal employees are prohibited from participating as a Government official in any particular matter that affects the financial interests of a private organization in which the employee serves as an officer, director, or trustee. The Office of Legal Counsel of the Department of Justice (OLC) has issued an opinion stating that a Federal employee may not serve on the Board of Directors of a non-Government organization as an official activity. OLC Memorandum for the General Counsel of the Federal Bureau of Investigation, dated November 19, 1996. Further, under Government-wide Standards of Conduct, a Federal employee may not engage in an outside activity if it conflicts with his Government duties. As such, NOAA scientists who work in AMS leadership positions do so in their personal capacity.

We looked into the possibility that the documents that were otherwise personal had been converted to agency records by NOAA. Whether a document is considered an "agency record" under the FOIA depends on a two-part test articulated by the Supreme Court: (1) were the records either created or obtained by an agency and (2) are any such records under agency control at the time of the FOIA request. DOJ v. Tax Analysts, 492 U.S. 136, 144-45 (1989). In the instant case, all the documents created or obtained by NOAA scientists while working as board members for AMS are physically in NOAA's custody. As such, the determination of whether the documents are agency records hinges upon whether NOAA controls the documents.

¹ All 116 documents are emails. Many are individual emails that are the constituent components of longer email conversations or are duplicates of the same email received by more than one of the scientists.

Courts have identified four factors to consider when evaluating agency "control" of records: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record systems or files." Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts v. DOJ, 845 F.2d 1060, 1069 (D.C. Cir. 1988)). In the instant situation, all four factors result in a conclusion that none of the 116 documents were converted into agency records. On the first factor, the scientists knew they were only permitted to work in AMS's leadership in their personal capacity and thus intended to retain control of the documents only in their personal capacity, not as NOAA records. On the second factor, while NOAA could technically use or dispose of the documents given its universal access to all NOAA employee emails, NOAA did not intend to use or dispose of any of the documents in questions because they were considered personal records. Rather, it was up to the individual scientist to decide to use or dispose of the documents, not NOAA. On the third factor, no NOAA employees, other than those NOAA scientists who are serving in their personal capacities as AMS board members, have relied or read the documents. On the fourth factor, the documents have not been integrated into the agency's record systems or files other than to the extent that all emails are automatically archived.

The matters discussed in your appeal as to why the documents must be agency records are unpersuasive. Just because documents can be located in NOAA's computer systems does not mean that the records cannot be still be personal. The very definition of a personal record incorporates the idea that the documents are in the government's hands, but they are nonetheless personal in nature. See Consumer Fed'n of Am. v. USDA, 455 F.3d at 288-93. Just because the government has access to all documents archived in NOAA's email system does not automatically mean they are agency records. Instead, the multi-step process for determining whether the otherwise personal records have been converted to agency records, as articulated by DOJ v. Tax Analysts and Burka, must be utilized. As discussed *supra*, this process results in a conclusion that the records are still personal and have not been converted to agency records.

The remainder of matters discussed in your appeal can be combined into the argument that the work the employees conduct for AMS is so closely related to their official NOAA work that they must be doing the AMS work in their official capacity. NOAA works with AMS in an official capacity at times, including to co-sponsor events and to send employees to AMS events. This does not mean, however, that every time a NOAA employee works with AMS it comes with official NOAA imprimatur. Finally, AMS does have members of its board who are Federal employees, this does not mean that NOAA has sanctioned the scientists to work on AMS's board in their official capacity. NOAA cannot control how a private entity like AMS describes the qualifications of its board members, especially when such descriptions of their current work titles are accurate.

This is the final decision of the Department of Commerce. You have the right to obtain judicial review of this partial denial of your FOIA appeal as provided in 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in dark ink, appearing to read "Barbara S. Fredericks". The signature is fluid and cursive, with the first name "Barbara" written in a larger, more prominent script than the last name "Fredericks".

Barbara S. Fredericks
Assistant General Counsel for Administration