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Court: Private-account email can be subject to FOIA

By **JOSH GERSTEIN** | 07/05/16 12:00 PM EDT | Updated 07/05/16 02:29 PM EDT

On the same day that the FBI announced that the criminal investigation of Hillary Clinton's use of a private email server is likely to conclude without any charges, a federal appeals court issued a ruling that could complicate and prolong a slew of ongoing civil lawsuits over access to the messages Clinton and her top aides traded on personal accounts.

In a decision Tuesday in a case not involving Clinton directly, the U.S. Court of Appeals for the D.C. Circuit held that messages contained in a personal email account can sometimes be considered government records subject to Freedom of Information Act requests.

The case ruled on by the D.C. Circuit focused on a relatively obscure White House unit: the Office of Science and Technology Policy.

At least one federal judge handling a FOIA suit focused on Clinton's emails said last month he was

watching to see how the D.C. Circuit ruled in the dispute involving Obama science adviser John Holdren and an account he kept on a server at the non-profit Woods Hole Research Center in Massachusetts.

After the free-market-oriented Competitive Enterprise Institute filed suit over a request for work-related emails sent to or from that private account used by Holdren, U.S. District Court Judge Gladys Kessler ruled last year that the government had no duty to search an email account that wasn't part of OSTP's official system.

But the three D.C. Circuit judges who ruled Tuesday all said Kessler was too rash in throwing out the suit and they agreed the case should be reinstated.

While the opinions in the case make no mention of Clinton or her private server, it seems evident that all three appeals judges involved are aware of the obvious analogy.

"If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control," Judge David Sentelle wrote in an opinion joined by Judge Harry Edwards.

Judge Sri Srinivasan wrote separately, but came to much the same conclusion: that the fact a different domain name was used was not a sufficient basis—standing alone—to defeat a FOIA lawsuit.

"A current official's mere possession of assumed agency records in a (physical or virtual) location beyond the agency's ordinary domain, in and of itself, does not mean that the agency lacks the control necessary for a withholding," Srinivasan wrote.

It was not entirely clear on what points Srinivasan disagreed with his colleagues, but his opinion seemed a tad friendlier towards Clinton's predicament. He suggested that an agency might have no duty to obtain a former official's records in response to a FOIA request or suit, and might not even have the legal obligation to do so even if a current official was involved.

Still, some of the suits in litigation over Clinton's emails involve requests sent to State while Clinton was still secretary.

While it's difficult to predict exactly how the appeals court's decision will affect the ongoing Clinton-related FOIA litigation, the ruling seems likely to bolster efforts by conservative groups to press for more answers from Clinton, her aides and the State Department about how her private server system was set up, why it wasn't searched in response to FOIA requests and how Clinton's lawyers determined that about 32,000 messages in her account were purely personal.

Clinton had that set of messages erased at about the same time she turned over to the State Department about 30,000 messages her team deemed work-related. The FBI recovered some of the

deleted messages during its investigation and the new D.C. Circuit ruling could make it more likely some of those messages will eventually be made public.

The Justice Department declined to comment on the decision, but the loss could not have come as much of a surprise since at oral arguments in the Holdren case in January the judges were clearly deeply skeptical of the government's position.

The group pressing for broader access to Holdren's email hailed the ruling as an important precedent.

"While today's ruling is a major victory for government transparency, it's stunning that it takes a court decision for federal employees to be held accountable to the law," CEI senior fellow Marlo Lewis said. "The 'most transparent administration in history' has proven over and over that it has no intention of actually letting the American public know what it is doing. … Director Holdren is not the first agency head to be found using private email for his government work, but as we continue our legal battle in this case, we seek for this unlawful behavior to come to an end."