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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR  
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February 20, 2014

The Honorable Arthur A. Elkins, Jr.  
Inspector General  
U.S. Environmental Protection Agency  
Office of Inspector General  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Dear Mr. Elkins:

I write to express the Committee on Environment and Public Works (EPW) concerns regarding the Environmental Protection Agency (EPA) Office of Inspector General (OIG) report, *Congressionally Requested Inquiry into the EPA's Use of Private and Alias Email Accounts*, released on September 26, 2013.<sup>1</sup> The Committee is particularly concerned that the scope of the investigation was artificially narrow, and whether deliberate or otherwise, provided cover for inappropriate behavior of EPA officials. Further, the Committee has uncovered flaws in the investigative methodology that raises questions about the integrity of the OIG's conclusions, which appears to have exonerated certain EPA officials.

As you are aware, the discovery that EPA officials had been using private and alias email accounts to conduct official agency business prompted the report. Notably Administrator Lisa Jackson and Regional 8 Administrator James Martin resigned their positions shortly after news of their questionable email practices was revealed.<sup>2</sup> In response, several Congressional Committees, including EPW, expressed serious concerns that the actions of several high-ranking EPA officials may have violated transparency statutes,<sup>3</sup> namely the Federal Records Act (FRA) and the Freedom of Information Act (FOIA). EPW staff met with and shared evidence of their concerns with your office on multiple occasions,<sup>4</sup> which were included in a comprehensive Committee report, entitled, *A Call for Sunshine: EPA's FOIA and Fed. Records Failures*

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<sup>1</sup> OFFICE OF INSPECTOR GEN., ENVTL. PROT. AGENCY, REPORT NO. 13-P-0433, CONGRESSIONALLY REQUESTED INQUIRY INTO THE EPA'S USE OF PRIVATE AND ALIAS EMAIL ACCOUNTS (Sept. 26, 2013) [hereinafter OIG Report].

<sup>2</sup> Michael Bastasch, *EPA Chief Jackson Resigns Amid Transparency Investigations Into Secret Emails*, THE DAILY CALLER, (Dec. 28, 2012 1:26 PM) <http://dailycaller.com/2012/12/28/epa-chief-jackson-resigns-amid-transparency-investigations/>; C.J. Ciaramella, *Former EPA Official Used Private Email, Contrary to Agency Claims*, THE WASHINGTON FREE BEACON, (Mar. 8, 2013, 4:04 PM) <http://freebeacon.com/youve-got-mail-trouble/>.

<sup>3</sup> MINORITY OFFICE, S. COMM. ON ENV'T & PUB. WORKS, A CALL FOR SUNSHINE: EPA'S FOIA AND FED. RECORDS FAILURES UNCOVERED 9-15 (Sept. 9, 2013) [hereinafter EPW Report].

<sup>4</sup> Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell Issa, Chairman, H. Comm. on Oversight, & Gov't Reform, & Hon. Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Arthur Elkins, Jr., Inspector Gen., Env'tl. Prot. Agency (Feb. 7, 2013).

*Uncovered* that was shared with your office.<sup>5</sup> Despite these concerns, the OIG report concluded that your office, “found no evidence that the EPA used, promoted or encouraged the use of private ‘non-governmental’ email accounts to circumvent records management.”<sup>6</sup> Many media outlets relied on this conclusion to declare that there was nothing wrong with the Agency’s practices.<sup>7</sup> However, such a conclusion is contrary to the facts, which have been made clear to your office.

In the first instance, the OIG inappropriately concluded that the use of alias email accounts was acceptable. The Committee has already exposed how former Administrator Jackson’s practice of using the “Richard Windsor” alias email account could impair the Agency’s ability to comply with both FOIA and the FRA.<sup>8</sup> Additionally, EPW revealed that use of another individual’s identity (e.g. Richard Windsor) for the alias email account had never been done before, primarily because such practice violated several internal policies, including EPA’s policy requiring an email adequately identify the sender.<sup>9</sup> However, instead of conducting a thorough review of the practice, which would have included a comparative examination of the practice over time, your investigators simply relied on EPA’s word that past administrators had used similar alias accounts to conclude that there was nothing improper.<sup>10</sup> As a practical matter, it seems impossible to conclude nothing was wrong with the current practice without comparing it to past practices. Further, though your office recognized that use of these accounts “present risks to agency’s records management efforts[,]” your investigators did not ask questions or make any recommendations to protect the Agency from such risks.<sup>11</sup>

Moreover, the report’s conclusion that EPA officials did not use personal email accounts to conduct agency business is false. The Committee has presented a wealth of evidence demonstrating EPA officials using personal email accounts to conduct agency business. At least two Regional Administrators,<sup>12</sup> and multiple individuals at EPA HQ, including, former Administrator Lisa Jackson, Deputy Administrator Bob Perciasepe, Senior Policy Counsel Bob Sussman, and former Associate Administrator for Congressional and Intergovernmental Relations David McIntosh, along with several others,<sup>13</sup> all used a private email address to

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<sup>5</sup> E-mail from Republican Staff, S. Comm. on Env’t. & Pub. Works, to Staff, Office of Inspector Gen., Env’tl. Prot. Agency (Sept. 9, 2013 02:09 PM).

<sup>6</sup> OIG Report, *supra* note 1.

<sup>7</sup> Stephen Dinan, *EPA Officials Cleared of Email Abuse Charges*, THE WASHINGTON TIMES (Sept. 30, 2013) <http://www.washingtontimes.com/news/2013/sep/30/epa-officials-cleared-email-abuse-charges/>.

<sup>8</sup> Freedom of Information Act 5 U.S.C. § 552 *et seq.* (2012); Federal Records Management Act 44 U.S.C. § 2901 *et seq.* (2012).

<sup>9</sup> EPW Report, *supra* note 4; Env’tl. Prot. Agency, *Frequent Questions about E-Mail & Records*, <http://www.epa.gov/records/faqs/email.htm> (last visited Feb. 18, 2014).

<sup>10</sup> Briefing for Staff of S. Comm. on Env’t & Pub. Works (Jan. 24, 2014).

<sup>11</sup> OIG Report, *supra* note 1.

<sup>12</sup> Jared Blumenfeld, Adm’r Region 9 & James Martin, former Adm’r Region 8, *see* EPW Report, *supra* note 4.

<sup>13</sup> Michelle DePass, Asst. Adm’r for Int’l & Tribal Affairs; Mathy Stanislaus, Asst. Adm’r for Solid Waste & Emergency Response; M. Allyn Brooks-Lasure, Dep. Assoc. Adm’r for Public Affairs; Brendan Gilfillan, Dep. Press Sec’y; David Cohen, Spokesman; Robert Goulding, former Dir. of Operations; Michael Moats, former Chief Speechwriter; Seth Oster, former Assoc. Adm’r for the Office of External Affairs & Env’tl. Educ.; Larry Elworth, former Chief Agric. Advisor; Tseming Yang, former Dep. Gen. Counsel; Diane Thompson, former Chief of Staff.

conduct agency business.<sup>14</sup> In doing so, each of these individuals violated EPA's internal policy prohibiting personal email use, and some even admitted that they used their personal email accounts to conduct agency business without capturing it in EPA's internal email system—an apparent violation of the FRA.<sup>15</sup>

In addition to ignoring these facts, the OIG's narrow scope of review contributed to the inadequacy of the report. For example, the OIG relied on voluntary staff interviews, rather than compelling interviews with EPA officials already known to use personal email. Investigators never actually spoke to Administrator Jackson or Scott Fulton, two senior level officials who played central roles in the "Richard Windsor" controversy.<sup>16</sup> While your office claimed that Jackson and Fulton refused to cooperate after they departed the Agency, the OIG failed to mention that both Jackson and Fulton were at the Agency at the time the OIG received the request for an investigation. Accordingly, both Jackson and Fulton were within your office's jurisdiction in the beginning of your investigation and could have been interviewed by your office.<sup>17</sup>

Not only did the OIG fail to interview certain officials, the decision to rely solely on interviews reveals additional weaknesses. In fact, the Committee has evidence that at least one current EPA employee, Region 9 Administrator Jared Blumenfeld outright lied to your investigators. As you are aware, he has since admitted to the Committee that he did in fact use his private email account to conduct agency business. Moreover, he has turned close to 1,500 pages of emails sent or received on his private account pursuant to a FOIA, obtained from his private account.<sup>18</sup> It does not appear that there were any consequences for his attempt to mislead and obstruct your investigation.

Moreover, the OIG never examined in any way, actual staff emails.<sup>19</sup> Even when the OIG had notice that an EPA employee had used his personal account, OIG investigators did not seek to review their private email accounts to verify their claims. Rather, the OIG claimed to

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<sup>14</sup> EPW Report, *supra* note 4.

<sup>15</sup> *Id.* at 12–14

<sup>16</sup> E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Env'tl. Prot. Agency, to Lisa Jackson, Former Adm'r, Env'tl. Prot. Agency (Apr. 16, 2013 04:32 PM); E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Env'tl. Prot. Agency, to Lisa Jackson, Former Adm'r, Env'tl. Prot. Agency (May 2, 2013 03:06 PM); E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Env'tl. Prot. Agency, to Scott Fulton, Former Gen. Counsel, Env'tl. Prot. Agency (Apr. 11, 2013 05:37 PM); E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Env'tl. Prot. Agency, to Scott Fulton, Former Gen. Counsel, Env'tl. Prot. Agency (May 2, 2013 03:01 PM); Briefing for Staff of S. Comm. on Env't & Pub. Works (Jan. 24, 2014).

<sup>17</sup> Letter from Hon. Ralph Hall, Chairman, H. Comm. on Sci., Space & Tech., to Arthur Elkins, Jr., Inspector Gen., Env'tl. Prot. Agency (Nov. 15, 2012); Press Release, Env'tl. Prot. Agency, Statement Announcing Her Leaving Cabinet After State of Union (Dec. 27, 2012), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/0/3B1C073659F5E6A785257AE100548961>; *EPA's Counsel Plans to Retire, Leaving Another Top Slot Open*, INSIDEEPA.COM, (Nov. 28, 2012), <http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/epas-counsel-plans-to-retain-leaving-another-top-slot-open/menu-id-565.html>.

<sup>18</sup> See FOIA Request No. EPA-R9-2013-007631, *available at* <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28008301d>.

<sup>19</sup> *Id.* at 5; Briefing for Staff of S. Comm. on Env't & Pub. Works (Jan. 24, 2014).

have no authority to review EPA officials' private email accounts.<sup>20</sup> Such a conclusion ignores court holdings that recognize records contained on a private email account, are in fact agency records.<sup>21</sup> As such, it would seem reasonable that the IG should have access to EPA records, regardless of where those records originated. By limiting its authority, the IG limited the scope of the investigation and was left to rely on the representation of EPA employees.

Finally, your office made no attempt to obtain outside information to determine if EPA officials had used private email to conduct Agency business. While your office claimed it did not have the authority to look at officials' private email accounts, your investigators could have reviewed documents produced in response to FOIA requests, which could have captured the use of private email. In fact, the existence of the Richard Windsor email account was uncovered through emails produced in response to a FOIA request.<sup>22</sup> In addition, several emails between EPA officials using their personal email accounts to communicate with environmental groups have also been exposed through FOIA responses.<sup>23</sup> However, your investigators did not seek to review FOIA productions to pressure test the assertions of conflicted EPA employees.

The Committee is concerned that the deficiencies discussed above call into question the conclusions your office made in the report. Moreover, in light of the evidence contradicting the OIG's findings, it appears the audit may have been conducted in a manner that inappropriately provided cover for EPA's problematic email practices. These concerns require your immediate attention. It is my hope that sharing this information with you will only strengthen your responsiveness to Congress and independence from the Agency to most effectively serve the American people.

Sincerely,



David Vitter  
Ranking Member  
Committee on Environment and Public Works

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<sup>20</sup> Briefing for Staff of S. Comm. on Env't & Pub. Works (Jan. 24, 2014).

<sup>21</sup> *Landmark Legal Foundation v. E.P.A.*, 2013 WL 4083285 (D.D.C., 2013), *See also* Michael Pepson & Daniel Epstein, *Gmail.Gov: When Politics Gets Personal, Does The Public Have A Right To Know?* 13 Engage: J. Federalist Soc'y Prac. Groups 4, 8 (Noting "a federal district court's determination that a statutory exemption to FOIA applies to bar disclosure of materials requested under FOIA is necessarily predicated on a finding that the requested materials are, in fact, "agency records." Going on to cite cases in which courts have moved to rule on exemptions regarding personal emails including among others: Erika A. Kellerhals, P.C. v. I.R.S., CIV. 2009-90, 2011 WL 4591063 (D.V.I. Sept. 30, 2011); Govt. Accountability Project v. U.S. Dept. of State, 699 F. Supp. 2d 97 (D.D.C. 2010); Smith v. Dept. of Lab., 798 F. Supp. 2d 274 (D.D.C. 2011)).

<sup>22</sup> Stephen Dinan, *Newly released emails show EPA director's extensive use of fictional alter ego*, The Washington Times, June 2, 2013, <http://www.washingtontimes.com/news/2013/jun/2/newly-released-emails-show-epa-directors-extensive/?page=all>; Michael Bastasch, *EPA chief's secret 'alias' email account revealed*, THE DAILY CALLER, Nov. 12, 2012, <http://dailycaller.com/2012/11/12/epa-chiefs-secret-alias-email-account-revealed/>.

<sup>23</sup> EPW Report, *supra* note 4.