

United States Senate Environment and Public Works Committee

Minority Report

A Call for Sunshine:



EPA's FOIA and Federal Records Failures Uncovered

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U.S. Senate Environment and Public Works Committee (Minority)

EXECUTIVE SUMMARY

At the beginning of his first term, President Obama pledged that his Administration “will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration.”¹ Within the first month of his second term, President Obama further claimed that his “is the most transparent administration in history.”² Former U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson echoed these sentiments in the so-called “Fishbowl Memo” stating that, “The American people will not trust us to protect their health or their environment if they do not trust us to be transparent and inclusive in our decision-making...To earn this trust, we must conduct business with the public openly and fairly.”³ However, at least with respect to EPA, it appears that this commitment to transparency has been illusory and detached from actual practice. In reality, from day one of the Obama Administration, the EPA has pursued a path of obfuscation, operating in the shadows, and out of legally required sunlight.

Specifically, the Agency established an alias identity to hide the actions of the former Administrator; has purposefully been unresponsive to FOIA requests, oftentimes redacting information the public has a right to know; and mismanaged its electronic records system such that federal records have been jeopardized. Moreover, EPA’s leadership abandoned the historic model of a specialized public servant who seeks to fairly administer the law and has instead embraced a number of controversial tactics to advance a secretive agenda. These tactics include circumventing transparency obligations to avoid public scrutiny and manipulation of the FOIA process to benefit their allies. Finally, as Congress has raised questions about EPA’s lack of transparency, the Agency has steadfastly ignored its constitutional obligation to subject itself to Congressional oversight, apparently in an effort to prevent the public from knowing what is going on behind closed doors.

¹ Memorandum from President Barack Obama, *Transparency and Open Government* (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

² Jonathan Easley, *Obama says his is ‘most transparent administration’ ever*, THE HILL, Feb. 14, 2013, <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

³ Robin Bravender, *Jackson commits to transparency*, ENVIRONMENT & ENERGY NEWS, Apr. 24, 2009, <http://www.eenews.net/greenwire/stories/77182>.

This report provides a detailed accounting of EPA's actions under the Obama Administration that reveals multiple attempts to hinder transparency. Each item in this report makes clear: the Obama EPA operates in such a way that frustrates oversight and impedes the public's ability to know what their government is up to.

FINDINGS

- The Committee's investigation of EPA's record keeping practices originated with concerns over former EPA Administrator Lisa Jackson's use of a secondary, alias email account. The discovery of the "Richard Windsor" account triggered a closer look into EPA's record keeping practices. Thereafter, the Committee found EPA employees inappropriately using personal email accounts to conduct official business. The Committee also found EPA's system for capturing and preserving federal records is haphazard and riddled with internal conflicts-of-interest.
- In addition to its troubling record keeping practices, EPA has a dismal history of competently and timely responding to FOIA requests. Notably, on multiple occasions EPA has either acted deliberately or out of extreme carelessness to delay and hamper FOIA requests from American citizens.
- The Richard Windsor account was used well beyond the scope of the secondary email accounts employed by prior EPA Administrators and other cabinet-level officials. Moreover, it appears that the Richard Windsor account violates EPA's own records policy.
- EPA officials revealed that the Agency's FOIA office, the individuals responsible for proper administration of FOIA, may have been entirely unaware of the Richard Windsor account.
- Multiple high ranking officials have used non-EPA email accounts to conduct official agency business. Use of non-official, or personal email accounts expressly violates internal EPA policy that forbids the use of non-official e-mail accounts to conduct official agency business.
- The impediments to EPA transparency extend beyond EPA's framework for managing information and identifying responsive documents. EPA's shortcomings also involve the manner in which EPA responds to FOIA requests, including the prolific, and often

inappropriate, use of exemptions to withhold information from the public, as well as the scope of responses to FOIA requests. These failures prevent the Agency from satisfying its duty to be proactive in disclosing information to the public, as well as its duty to respond fully and promptly to the request.

- The manner in which EPA has trained its staff on the implementation of transparency laws is insufficient. Regional employees have not taken the proper training and lack a comprehensive understanding of how to process a FOIA request.
- In one instance it appears that EPA deliberately altered the date on a FOIA response to avoid the legal consequences of missing a deadline and then excluded this document from a FOIA production to avoid scrutiny and embarrassment.
- EPA has also exploited FOIA to protect its own interests while disregarding the public interest by acting with bias in processing fee waiver requests and facilitating requests for environmentalist allies.

TABLE OF CONTENTS

INTRODUCTION.....	7
EPA’s Obligations under the Freedom of Information Act and Federal Records Act	8
<i>Alarming E-mail Practices</i>	<i>9</i>
<i>Employees’ Prolific Use of Personal Email</i>	<i>12</i>
<i>Inadequate Records Management.....</i>	<i>15</i>
<i>Need for Records Training of All Employees.....</i>	<i>16</i>
<i>Expectations for Reform.....</i>	<i>18</i>
EPA’s Duty to be Responsive.....	19
<i>Falling Short of the Standard</i>	<i>20</i>
<i>Misapplication and Abuse of Exemptions</i>	<i>23</i>
EPA’s Responsibility to Remain Unbiased.....	24
<i>Politicizing Fee Waivers</i>	<i>25</i>
<i>Improper Release of Private Citizens’ Information</i>	<i>27</i>
CONCLUSION	30

INTRODUCTION

As President Obama articulated in his Freedom of Information Act (FOIA) Memorandum, “[a] democracy requires accountability and accountability requires transparency.... In our democracy, the FOIA, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.”⁴ In advancing this goal, the President declared that “[o]penness will strengthen our democracy and promote efficiency and effectiveness in Government.”⁵ Unfortunately, the Senate Committee on Environment and Public Works continues to uncover a disconcerting number of instances wherein EPA has failed to live up to this stated goal. The Committee's investigation of EPA's record keeping practices originated with concerns over former EPA Administrator Lisa Jackson's use of a secondary, alias email account. The discovery of the "Richard Windsor" account triggered a closer look into EPA's record keeping practices. Thereafter, the Committee found EPA employees inappropriately using personal email accounts to conduct official business. The Committee also recognized EPA's system for capturing and preserving federal records is haphazard and riddled with internal conflicts-of-interest.

In addition to its troubling record keeping practices, EPA has a dismal history of competently and timely responding to FOIA requests. Notably, on multiple occasions EPA has either acted deliberately or out of extreme carelessness to delay and hamper FOIA requests from American citizens. When EPA does release information responsive to a FOIA request, the documents are heavily redacted, abusing legal exemptions in an attempt to provide as little information to the requestor as possible. Moreover, the Committee is aware of instances where the Agency has withheld information that is responsive to requests, for the simple reason that it may embarrass the Agency. EPA's poor track record suggests that the Agency does not take its transparency obligations seriously, and purposefully hides information from the public to protect the Agency's allies and radical agenda.

⁴ Memorandum from President Barack Obama, *Freedom of Information Act* (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁵ Memorandum from President Barack Obama, *Transparency and Open Government* (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

EPA's Obligations under Freedom of Information Act and Federal Records Act

Federal agencies, including the EPA, should have a comprehensive and consistent policy on records retention and FOIA administration in accordance with the Federal Records Act (FRA) and the FOIA.⁶ The FRA governs the collection, retention, and preservation of federal records.⁷ It mandates that all agencies "create and maintain authentic, reliable, and usable records."⁸ The definition of a record is broad and includes documents, regardless of form or characteristics, made or received by an agency in connection with the transaction of public business.⁹ In short, if a document relates to official business, it is considered a record. This includes emails sent or received on an employee's personal email account.¹⁰ The FOIA works in tandem with the FRA and provides the public access to agency records.¹¹ The FRA, therefore, ensures that agencies properly collect and retain records to administer the FOIA. To comply with the FOIA, an agency relies on searching records to generate a FOIA response. Accordingly, without adequately preserving agency records, the American people may be limited in their ability to obtain a complete FOIA response. All federal employees may potentially create federal records and, therefore, have records management responsibilities. The National Archive and Records Administration's (NARA) regulations require agencies to "inform all employees that they are responsible and accountable for keeping accurate and complete records of their activities."¹²

⁶ See 44 U.S.C. § 3101 (2013).

⁷ *Id.*

⁸ See 36 C.F.R. § 1220.32 (2013); see also *Presidential Records in the New Millennium: Updating the Presidential Records Act and other Federal Recordkeeping Statutes to Improve Electronic Records Preservation: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70518/pdf/CHRG-112hhrg70518.pdf>.

⁹ Records are defined as "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 the data in them." See 44 U.S.C. § 3301 (2013).

¹⁰ *Presidential Records in the New Millennium: Updating the Presidential Records Act and other Federal Recordkeeping Statutes to Improve Electronic Records Preservation: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 35-37 (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70518/pdf/CHRG-112hhrg70518.pdf>.

¹¹ National security, personal privacy, and trade secrets are among the categories of information that are protected from public release pursuant to the Freedom of Information Act. See 5 U.S.C. § 552(b).

¹² See 36 C.F.R. § 1222.24 (2013).

The Committee has uncovered substantial evidence that calls into question the integrity of EPA's system for identifying and preserving federal records. In the first instance, the Committee has learned that the Agency assigned a secret alias email address to former EPA Administrators. Further frustrating the integrity of the system is the fact the Agency cannot indicate definitively if these accounts were reviewed in records requests.¹³ In addition, our investigation has revealed that multiple high ranking officials have used non-EPA email accounts to conduct official agency business. These practices have the potential to undermine the Agency's ability to preserve records under the FRA and to appropriately respond to FOIA requests.

The Committee notes, that although the Agency has agreed to reform practices as required under records keeping laws, an agreement made with Senate EPW Republicans pursuant to the Gina McCarthy nomination and confirmation process, the Inspector General review is ongoing and such agreement does not obviate outstanding concerns regarding multiple instances of failure to reply or adequately respond to FOIA requests.

Alarming E-mail Practices

Since the Committee learned that the former EPA Administrator Lisa Jackson had a secondary, alias email account under the name of Richard Windsor (windsor.richard@epa.gov), the Committee has embarked on an in-depth inquiry to understand how EPA administers its transparency and record keeping obligations. While Congress and the public have raised serious concerns over EPA's use of an alias account, EPA has defended its practice on the grounds that, "everyone is doing it."¹⁴ However, the Committee's investigation has revealed that the Richard Windsor account was used well beyond the scope of the secondary email accounts employed by prior EPA Administrators and other cabinet-level officials. Moreover, it appears that, the Richard Windsor account violates EPA's own records policy.

¹³ Briefing for staff of H. Comm. on Oversight & Gov't Reform (Feb. 25, 2013).

¹⁴ Press Release, U.S. Senate Comm. on Env't & Public Works, *Eye on the EPA: Transparency Request #1, FOIA Failures* (Apr. 22, 2013) available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=331eecf3-eba0-2412-32c3-6f6beef731d0.

EPA's policy requires email records to include transmission data that identifies the sender and the recipient(s). This information is considered "essential elements that constitute a complete e-mail record."¹⁵ However, these essential elements are clearly missing on emails sent and received by "Richard Windsor," since Windsor is fictitious. Accordingly, it appears that a key method used to identify agency records is missing from the alias account.

In addition to violating internal records policy, Jackson's alias account took on an identity separate from the Administrator herself. While it is true that former Administrators have used an alternative email address – such as "ToConnor" or "ToWhit,"¹⁶ the Committee has obtained proof that Richard Windsor went further than masking the identity of the sender and was in fact used as a separate secret identity. In at least one instance, Jackson actually carried on correspondence as the fictional Richard Windsor in an email chain with an unsuspecting individual who emailed "Richard" and asked "him" to pass along information to the Administrator.¹⁷ Replying as "Richard," the Administrator agreed to the request.¹⁸ In a separate instance, the Committee learned that "EPA awarded certificates naming 'Richard Windsor' a 'scholar of ethical behavior.'"¹⁹

The fact that the Administrator of the EPA operated under a secret identity is alarming enough. However, a Congressional briefing sparked additional concerns.²⁰ EPA officials revealed that the Agency's FOIA office, the individuals responsible for proper administration of

¹⁵ PowerPoint, U.S. Env'tl. Prot. Agency, *EPA Records and ECMS Briefing: EPA Incoming Political Appointees* (2009), available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67.

¹⁶ Dina Cappiello, *Tofu? ToWhit? Senators discuss EPA email aliases*, The Associated Press, Apr. 11, 2013, <http://bigstory.ap.org/article/tofu-towhit-congress-reveals-epa-email-aliases>.

¹⁷ E-mail from Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor," to Michael Martin, Founder and CEO, Effect Partners (Mar. 4, 2010, 10:43:23 AM), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c90d98cd-056c-4ca8-b8ce-034d2d240c0f.

¹⁸ E-mail from Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor," to Robert Goulding, U.S. Env'tl. Prot. Agency (Mar. 11, 2010, 07:17 AM), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c90d98cd-056c-4ca8-b8ce-034d2d240c0f.

¹⁹ CJ Ciaramella, *Richard Windsor, Model Employee: Fake EPA employee received awards from the EPA*, THE WASHINGTON FREE BEACON, Jun. 3, 2013, <http://freebeacon.com/richard-windsor-model-employee/>.

²⁰ Briefing for staff of H. Comm. on Oversight & Gov't Reform (Feb. 25, 2013).

FOIA, may have been entirely unaware of the Richard Windsor account.²¹ Moreover, none of the EPA officials present at the briefing knew who was responsible for archiving and preserving the Administrator's emails.²² In fact, none of the officials could even attest to whether *any* of Jackson's alias emails were ever archived for federal record keeping purposes;²³ either Jackson herself or a personal assistant performed these duties. Such a scheme would allow the Administrator to determine the scope of a FOIA response that touched on her correspondence, creating the potential for a conflict-of-interest inconsistent with the intent of federal sunshine laws.

Notwithstanding the record keeping obstacles created by the Richard Windsor account, there was no consistent policy in place to determine what individuals had access to Jackson via the secret account. In fact, the Committee has learned that other senior officials in the Obama Administration were without knowledge of Jackson's alias account. According to an email from former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, to the Richard Windsor account, Sunstein explained to Jackson that, "I have your special email from my friend Lisa H. – hope that's ok!"²⁴ In another example, Deputy Director and General Counsel for the White House Council on Environmental Quality, Gary Guzy, responded to Jackson as if she was an assistant named "Richard."²⁵ While Jackson later corrects Guzy noting, "Its Lisa Jackson and that's my private email,"²⁶ this exchange illustrates yet another example of the Richard Windsor account defying transparency norms. It appears Jackson merely handpicked individuals, in and out of the government, with whom she shared her "special" email address, yet Congress and the public were excluded. Notably, the Committee has identified

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ E-mail from Cass R. Sunstein, Adm'r, Office of Information & Regulatory Affairs, Office of Management and Budget, to Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor" (Feb. 12, 2009, 02:06 PM), 394, <http://www.epa.gov/epafoia1/docs/Release-4-Part-C.pdf>.

²⁵ E-mail from Gary S. Guzy, Deputy Dir. & Gen. Counsel, Council on Environmental Quality, to Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor" (Feb. 16, 2010, 02:43 PM), 417, <http://www.epa.gov/epafoia1/docs/Release-4-Part-F.pdf>.

²⁶ E-mail from Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor," to Gary S. Guzy, Deputy Dir. & Gen. Counsel, Council on Environmental Quality (Feb. 16, 2010, 03:21 PM), 417, <http://www.epa.gov/epafoia1/docs/Release-4-Part-F.pdf>.

emails from an environmental lobbyist at Siemens Corporation, as well as the President of Greener by Design, communicating with Jackson via her Richard Windsor account.²⁷

Employees' Prolific Use of Personal Email

In addition to the concerns surrounding the Richard Windsor alias email account, the Committee has also uncovered evidence that the use of *non-official* email accounts was a widespread practice across the Agency. Use of non-official, or personal email accounts expressly violates internal EPA policy that forbids the use of non-official e-mail accounts to conduct official agency business. EPA record keeping policy instructs employees:

Do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-official email system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping system.²⁸

This policy is meant to ensure that such offline communications do not occur, and on the rare instances in which they do, the documents are still preserved as federal records. To be clear, the medium an agency official uses to communicate is inconsequential to these transparency statutes; if the content qualifies as a federal record, then it should be treated and preserved as such. If such communications are not properly captured and stored, it follows that they will not be produced in response to a FOIA request – resulting in a breach of two federal statutes. The Government Accountability Office (GAO) has notified the Agency of the weakness in this policy; however, the EPA under the Obama Administration failed to adopt GAO's recommendations.²⁹

²⁷ E-mail from Alison Taylor, Vice President, Siemens Corp., to Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor" (Dec. 8, 2009, 06:55 PM),

http://www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_A.pdf; E-mail from Adam Zellner, President, Greener by Design, to Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as "Richard Windsor" (Jan. 21, 2010, 03:00 PM), 158, <http://www.epa.gov/epafoia1/docs/Part-FF.pdf>.

²⁸ ENVTL. PROT. AGENCY, *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm> (last accessed Sept. 6, 2013).

²⁹ GOV'T ACCOUNTABILITY OFFICE, FEDERAL RECORDS: NATIONAL ARCHIVES AND SELECTED AGENCIES NEED TO STRENGTHEN E-MAIL MANAGEMENT, 61, GAO008-742 (June 2008).

Despite the Agency's policy and multiple statements denying the truth,³⁰ the Committee has discovered that former Region 8 Administrator James Martin regularly used a non-official e-mail account to correspond with individuals and groups outside of EPA, regarding Agency business. For example, Martin regularly communicated with Vickie Patton, General Counsel of the Environmental Defense Fund, about Agency priorities on a private account.³¹ On multiple occasions, Martin also corresponded with Alan Salazar, Chief Strategy Officer for Governor Hickenlooper,³² and staff of the Colorado Conservation League, as well as others.³³

In addition to Martin, the Committee has obtained evidence that Region 9 Administrator Jared Blumenfeld used his private email account (@Comcast.net) for work purposes.³⁴ Ranking Member Vitter and House Committee on Oversight and Government Reform Chairman Darrell Issa (R-CA-49) sent Blumenfeld a letter asking for his cooperation and personal certification of whether he captured federal records from his private account.³⁵ While the letter requested that Blumenfeld provide a direct response, which would be as simple as "yes" or "no," EPA headquarters replied on his behalf, indicating that there was no issue with the email in question.³⁶ When the media questioned EPA about Blumenfeld's email practices, EPA responded that,

³⁰ EPA announced to the press: "As detailed in public filings, the regional administrator does not use his personal account to conduct official business... That Mr. Martin responded to one email sent to a personal email account to confirm a meeting that appears on his official government calendar does not alter that fact." See CJ Ciaramella, *EPA Official Resigns: Another snared in secret email prove says GOP senator*, THE WASHINGTON FREE BEACON, Feb. 19, 2013, <http://freebeacon.com/epa-official-resigns/>.

²⁸ E-mail from James Martin, Adm'r, U.S. Env'tl. Prot. Agency Region 8, to Vickie Patton, Env'tl. Defense Fund (Apr. 16, 2012, 10:12:05 AM), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8432c575-ed1a-4aab-b614-7e1623096a86.

²⁹ E-mail from James Martin, Adm'r, U.S. Env'tl. Prot. Agency Region 8, to Alan Salazar, Chief Strategy Officer for Colo. Gov. Hickenlooper (Aug. 4, 2012, 10:12:14 AM), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=7e8937bf-d7a7-4f3e-8129-12f319748a0e.

³³ E-mail from Pete Maysmith, Executive Director, Colorado Conservation Voters, to James Martin, Adm'r, U.S. Env'tl. Prot. Agency Region 8 (Dec. 12, 2012, 12:47:31 PM), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=d86b4d1f-bf89-4828-aec1-5e24a2e436ac.

³⁴ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Jared Blumenfeld, Reg'l Adm'r, U.S. Env'tl. Prot. Agency Region 9 (Mar. 18, 2013).

³⁵ *Id.*

³⁶ Letter from Arvin Ganesan, Assoc. Adm'r, U.S. Env'tl. Prot. Agency, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (Apr. 9, 2013).

“There's nothing wrong with this.”³⁷ Despite EPA's protestations to the contrary, using a personal email address to conduct official business violates its own internal policy. Accordingly, the Committee notified Blumenfeld that EPA's response was inadequate as it required a direct response from him as to whether or not he used non-official email accounts to conduct agency business. After several inquiries went unanswered, the Committee received a response letter from Blumenfeld on September 6, 2013, certifying that he has in fact used a non-official email account for agency business.³⁸

The use of private email to conduct agency business is not restricted to EPA's regional offices, as the Committee has discovered that multiple senior officials at EPA headquarters engaged in such email practices. Notably, former Administrator Lisa Jackson on at least one occasion instructed an environmental lobbyist with Siemens Corporation to communicate via Jackson's personal email account.³⁹ In response to a letter by Ranking Member Vitter and House Committee on Oversight and Government Reform Chairman Darrell Issa questioning Jackson's personal email use, Jackson's attorney indicated that the former Administrator had used personal email, but she no longer has responsive emails in her possession.⁴⁰ The Committee has also uncovered emails that reveal former Senior Policy Counsel Bob Sussman⁴¹ and former Associate Administrator for Congressional and Intergovernmental Relations David McIntosh⁴² used private email accounts to conduct Agency business.

Finally, it has come to the Committee's attention that EPA encourages the use of instant messaging (IM) via platforms like “Sametime Connect,” “G-Chat,” and AOL Instant Messenger

³⁷ Press Release, U.S. Senate Comm. on Env't & Public Works, *Eye on the EPA: Transparency Request #2, Inconsistent E-mail Practices and Policies* (Apr. 23, 2013), http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=38b021a0-b096-a376-6e0f-3a95fab62e39.

³⁸ Letter from Jared Blumenfeld, Reg'l Adm'r, U.S. Env'tl. Prot. Agency Region 9, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (Sept. 6, 2013).

³⁹ Specifically, Jackson instructed, “P.S. Can you use my home email rather than this one when you need to contact me directly? Tx, Lisa.” E-mail from Alison Taylor, Vice President, Siemens Corp., to Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, as “Richard Windsor” (Dec. 8, 2009, 06:55 PM), http://www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_A.pdf;

⁴⁰ Letter from Barry Coburn, Coburn & Greenbaum PLLC, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (Sept. 4, 2013).

⁴¹ E-mail from Bob Sussman, to Lisa Jackson as Richard Windsor, Adm'r, U.S. Env'tl. Prot. Agency (Feb. 16, 2009, 09:21 AM).

⁴² E-mail from David McIntosh, to Lisa Jackson as Richard Windsor, Adm'r, U.S. Env'tl. Prot. Agency (Mar. 9, 2010, 05: 12 PM).

to communicate with individuals outside the Agency.⁴³ While EPA policy explicitly states that content on IMs can be considered a federal record,⁴⁴ the Committee is not aware of a single instance of EPA releasing IMs in response to a FOIA or Congressional request.⁴⁵ Although the Agency has prompted the EPA's Inspector General to focus on potential problems relating to EPA's treatment of IMs,⁴⁶ this merely acknowledges the problem without providing a solution, or notifying the public of deficiencies in prior FOIA responses.

Inadequate Records Management

In order to fulfill their obligations under the Federal Records Act (FRA) and the Freedom of Information Act (FOIA), federal agencies should have a sensible system to access documents to adequately preserve records and respond to FOIA requests. Specifically, the U.S. Attorney General has advised that “[o]pen government requires not just a presumption of disclosure, but also an *effective system* for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA” (emphasis added).⁴⁷ However, the Committee has uncovered several defects in EPA's system of preserving and searching for records. The use of both alias and personal email accounts has significant implications for transparency and will impede record collection efforts. In addition, EPA's record keeping ability has been impaired by the recent migration to a new server, poor employee training, and minimal support from the Department of Justice.

Prior to EPA's transition to Microsoft Office 365 on February 19, 2013, each EPA employee was responsible for proactively selecting emails as records to be archived, then

⁴³ PowerPoint, U.S. Env'tl. Prot. Agency, *Web Collaboration Tools WWG* (2010) available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9ff2bab4-4e26-4fe1-b9b7-bc7f2f8bc51e.

⁴⁴ NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *Frequently asked questions about Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html> (last accessed Sept. 6, 2013).

⁴⁵ This includes an extensive search of EPA's FOIA responses available on FOIAonline. See <https://foiaonline.regulations.gov/foia/action/public/search> (last accessed Sept. 6, 2013).

⁴⁶ Letter from Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, to all employees of the U.S. Env'tl. Prot. Agency (Apr. 8, 2013) available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8ce8ca6f-58f2-45e2-9a2c-c1ba65ec88f1.

⁴⁷ Memorandum from U.S. Attorney General Eric Holder, *The Freedom of Information Act* (Mar. 19, 2009) available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

moving them into separate files within the former Lotus Notes system. This system gave too much discretion to an individual employee; essentially it was an honor system whereby individual employees were trusted with the authority to capture what they deemed to be potentially responsive records. Under this system, searches for responsive records to a FOIA request may be limited to the handpicked records an employee retained. Accordingly, this system had the potential to impede the American people's rightful access to government information. While the EPA no longer uses Lotus Notes, EPA's recent transition to Microsoft Office has generated similar challenges. Importantly, EPA employees continue to maintain a considerable amount of discretion in determining which documents are preserved as federal records and which documents are responsive to FOIA requests.⁴⁸

Need for Records Training of All Employees

While EPA's system to preserve records is inadequate, more troubling is the lack of oversight over individual employee retention of responsive records and subsequent searches under FOIA. According to former Acting Administrator Bob Perciasepe, recordkeeping is "a daily responsibility of every EPA employee. Maintaining records consistent with our statutory and regulatory obligations is a central tenet for doing the public's business in an open and transparent manner."⁴⁹ However, absent consistent and mandatory training on the preservation and collection of records, Perciasepe's directive was empty.

Evidence suggests that the manner in which EPA has trained its staff on the implementation of transparency laws is insufficient. Notably, there is an apparent disconnect between EPA headquarters (HQ) and EPA regional offices on how to comply with FOIA. When an individual submits a FOIA request, EPA HQ sends the request to either the appropriate office

⁴⁸ Perciasepe stated, "The Agency has employees whose work responsibilities include managing, coordinating and responding to FOIA requests, but we all have the responsibility to know and be aware of our FOIA obligations so that we can respond appropriately and fully when requested." Letter from Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, to all employees of the U.S. Env'tl. Prot. Agency (Apr. 8, 2013) *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8ce8ca6f-58f2-45e2-9a2c-c1ba65ec88f1.

⁴⁹ Letter from Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, to all employees of the U.S. Env'tl. Prot. Agency (Apr. 8, 2013) *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8ce8ca6f-58f2-45e2-9a2c-c1ba65ec88f1.

within HQ, or to the regional office wherein responsive documents may be located.⁵⁰ However, regional offices do not have adequate access to guidance from the Office of General Counsel (OGC). Furthermore, the Committee has learned that regional employees have not taken the proper training and lack a comprehensive understanding of how to process a FOIA request.

As a result, EPA fields a team of oft-confused and misinformed staff. In one instance, a Region 6 official expressed this lack of sufficient training in an email: “I cannot provide guidance on what can be released. According to ORC [the Office of Regional Counsel], we should have taken that training and are apparently on our own.”⁵¹ Additionally, another befuddled regional employee stated her frustration in determining the FOIA processing costs on a different occasion: “I cannot figure out how we would have an estimate until everyone has finished their search for responsive documents? Bottom line – how do I answer OGCs e-mail so we sound like we know what we are doing?”⁵² In light of these communications, the Committee is concerned that EPA employees nation-wide are not receiving adequate training from HQ or support from ORC, OGC, and FOIA officers.

Aside from EPA’s internal offices, the Office of Information Policy within the Department of Justice (DOJ) has the responsibility of encouraging and enforcing agency compliance with FOIA and ensuring that relevant guidelines are implemented across the government.⁵³ As such, the Committee alerted Attorney General Eric Holder to the dangers of EPA’s current records management practices and lack of training.⁵⁴ The Committee requested that Attorney General Holder initiate an investigation into the EPA’s FOIA practices and brief

⁵⁰ Briefing for staff of S. Comm. on Env’t & Pub. Works & H. Comm. on Oversight & Gov’t Reform, including James B. Martin, former Adm’r, U.S. Env’tl. Prot. Agency Region 8 (Apr. 22, 2013); *See also* U.S. ENVTL. PROT. AGENCY, *Freedom of Information Act (FOIA): Policy and Guidance*, <http://www.epa.gov/epafoia/reference.html> (last accessed Sept. 6, 2013).

⁵¹ E-mail from Joe Kordzi, U.S. Env’tl. Prot. Agency Region 6, to Carrie Thomas, U.S. Env’tl. Prot. Agency Region 6 (Jan. 4, 2011, 11:19 AM) *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=cd4e677a-52b9-412f-9464-d2963fee7dec.

⁵² E-mail from Lucinda Watson, U.S. Env’tl. Prot. Agency Region 6, to Carrie Thomas, U.S. Env’tl. Prot. Agency Region 6 (Jan. 13, 2011, 12:49 PM) *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=cd4e677a-52b9-412f-9464-d2963fee7dec.

⁵³ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, Hon. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Attorney General, U.S. Dep’t of Justice (Mar. 7, 2013).

⁵⁴ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, Hon. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Attorney General, U.S. Dep’t of Justice (Mar. 7, 2013).

Congressional staff on the results by April 4, 2013.⁵⁵ After several months, DOJ provided a delayed response letter on July 26, 2013, which affirmed the Committee's concerns.⁵⁶

Expectations for Reform

Although EPA has done little to prove its commitment to training its employees thus far, the Committee acknowledges EPA's recent promises for reform. In a response letter to the Committee on April 8, 2013, former Acting Administrator Bob Perciasepe reiterated the Obama Administration's commitment to transparency and ensuring accountability within the Agency. He made concessions that "further improvements" should be made, and notified the Committee that he had:

Charged [EPA's] Assistant Administrator for the Office of Environmental Information with, among other things: (1) providing mandatory in-depth training of FOIA coordinators, officers, employees and managers who make decisions on the release of documents by December 31, 2013, with a focus on exemptions, redactions and discretionary release, and (2) providing FOIA training for all EPA staff in FY 2014 focusing on what is a FOIA request, roles and responsibilities in responding to FOIA requests, timeliness of response, and exemptions and discretionary release. FOIA training also will become a mandatory part of new employee orientation.⁵⁷

These steps appear promising, as the Agency attempts to "strive for excellence with respect to transparency and accountability."⁵⁸ However, until reforms have been implemented and tested against the letter and spirit of the law, judgment should be reserved.

⁵⁵ *Id.*

⁵⁶ Letter from Peter J. Kadzik, Principal Dep. Assistant Attorney General, U.S. Dep't of Justice, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (July 26, 2013).

⁵⁷ Letter from Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (Apr. 8, 2013).

⁵⁸ Letter from Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (Apr. 8, 2013).

EPA's Duty to be Responsive

The impediments to EPA transparency extend beyond EPA's framework for managing information and identifying responsive documents. EPA's shortcomings also involve the manner in which EPA responds to FOIA requests, including the prolific, and often inappropriate, use of exemptions to withhold information from the public, as well as the scope of responses to FOIA requests.⁵⁹ These failures prevent the Agency from satisfying its duty to be proactive in disclosing information to the public, as well as its duty to respond fully and promptly to the request.

EPA has a duty to be responsive and impartial in responding to all FOIA requests. The Department of Justice, the agency charged with overseeing compliance with the FOIA, articulated clear instructions for every agency to follow. According to these guidelines, agencies should not withhold information simply because it may do so legally. Rather, the Attorney General strongly encourages agencies to closely evaluate responsive material and release even protected information when doing so will not harm the agency's protected interest. In carrying out this duty, agencies are encouraged to make discretionary, and if appropriate, partial disclosures of information.⁶⁰ In every case, agencies should take reasonable steps to segregate and release non-exempt information. Under no circumstances should the agencies "keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."⁶¹

However, EPA has time and again failed to live up to these clear transparency objectives. According to the Society for Environmental Journalists (SEJ), "The EPA is one of the most closed, opaque agencies to the press" and "the policies [Gina McCarthy] endorsed bottleneck the free flow of information to the public."⁶² The EPW Committee has also uncovered substantial evidence that the EPA struggles to realize the President's commitment to transparency, though

⁵⁹ Floor Speech by Senator David Vitter, U.S. Senate, 113th Cong., Mar. 13, 2013, *available at* <http://congress.gov/cgi-lis/query/D?r113:10:./temp/~r113l472qJ::>

⁶⁰ Memorandum from Eric Holder, U.S. Attorney General, Dep't of Justice, (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶¹ Memorandum from Eric Holder, U.S. Attorney General, Dep't of Justice, (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶² Open letter from the Society of Environmental Journalists (Apr. 10, 2013), *available at* <http://www.sej.org/new-epa-head-must-ensure-transparency-reversing-block-reporters-access>.

they are not alone in this shortcoming.⁶³ On multiple occasions, the Committee has uncovered instances where EPA has either acted deliberately or out of extreme carelessness to delay and obstruct FOIA requests from American citizens. As a result, Congress, the press, and ultimately the American people have been denied their statutory right to know what the EPA is doing.

Falling Short of the Standard

The Committee has learned of multiple instances in which EPA's FOIA response has fallen woefully short of fulfilling its duty to be responsive and impartial. In March 2013, the Committee brought its concerns to the Department of Justice and requested an investigation into inappropriate FOIA practices at EPA. In this letter, several members of Congress raised concerns that EPA had a standard protocol for responding to undesirable FOIA and fee waiver requests.⁶⁴ Specifically, the letter focused on email correspondence whereby Geoffrey Wilcox of the Office of General Counsel (OGC) advised a Region 6 official:

Unless something had changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests. One of the first steps is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of \$ they agreed to pay.⁶⁵

Essentially, the OGC advised the region that the EPA policy is to impose procedural and financial hurdles for the requester. This stands in sharp contrast to the Attorney General's instruction that "FOIA professionals should be mindful of their obligation to work 'in a spirit of

⁶³ Steve Inskip, *AP Analysis Finds U.S. Tightening Grip on Information*, NATIONAL PUBLIC RADIO, Mar. 13, 2013, <http://www.npr.org/2013/03/13/174174579/ap-analysis-finds-u-s-tightening-grip-on-information>.

⁶⁴ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Attorney General, U.S. Dep't of Justice (Mar. 7, 2013).

⁶⁵ E-mail from Geoffrey Wilcox, Office of General Counsel, U.S. Env'tl. Prot. Agency, to Joe Kordzi, U.S. Env'tl. Prot. Agency Region 6 (Jan. 12, 2011, 05:22 PM) available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=cd4e677a-52b9-412f-9464-d2963fee7dec.

cooperation' with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed."⁶⁶

Furthermore, the Committee is aware of other examples where the Agency has either acted with extreme carelessness or mal intent. For example, EPA literally lost a FOIA request submitted by the U.S. Chamber of Commerce (Chamber), and demonstrated complete disregard for missed statutory deadlines.⁶⁷ In this instance, EPA originally requested and Chamber granted a 45-day extension to respond to the FOIA request on September 14, 2012, which pushed EPA's deadline to December 1, 2012.⁶⁸ However, EPA missed this deadline and on January 25, 2013, EPA informed the Chamber that the request no longer appeared on the Agency's FOIA list.⁶⁹ As of March 1, 2013 – after eight months of no progress - it was determined that the FOIA request was definitely lost.⁷⁰

Insufficient and Falsified Responses

The EPW Committee is also aware that EPA has failed to fully respond to other FOIA requests. One example includes EPA's response to a FOIA inquiry from the Competitive Enterprise Institute (CEI), which requested EPA's FOIA fee waiver determinations from January 1, 2012 to April 26, 2013.⁷¹ While EPA's response included over 1,200 pages of documents to

⁶⁶ Memorandum from Eric Holder, U.S. Attorney General, Dep't of Justice, (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶⁷ *The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 12 (2013) (testimony of William L. Kovacs, Senior Vice President, Env't, Tech., & Regulatory Affairs, U.S. Chamber of Commerce) *available at* <http://judiciary.house.gov/hearings/113th/02282013/Kovacs%2002282013.pdf> [hereinafter *Kovacs Testimony before H. Subcomm. on Regulatory Reform, Commercial & Antitrust Law*, 2013].

⁶⁸ Kovacs Testimony before H. Subcomm. on Regulatory Reform, Commercial & Antitrust Law, 2013.

⁶⁹ Kovacs Testimony before H. Subcomm. on Regulatory Reform, Commercial & Antitrust Law, 2013.

⁷⁰ Kovacs Testimony before H. Subcomm. on Regulatory Reform, Commercial & Antitrust Law, 2013.

⁷¹ FOIA request submitted by Christopher C. Horner, Competitive Enterprise Institute, Tracking No. EPA-HQ-2013-004176, FOIAonline (Mar. 5, 2013), *available at* <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2800340b9>.

CEI, the Agency did not provide a complete response, as the Committee uncovered at least one responsive document submitted to the Institute for Energy Research (IER) that was withheld.⁷²

This particular exclusion is noteworthy, as it appears that the correspondence in question, which was not produced by EPA, was actually doctored by the Agency. IER received the doctored letter in response to a FOIA request, sent on November 19, 2012, which asked for documents related to Administrator Jackson's potential use of an alias email address to avoid public scrutiny of the Agency's activities on the Keystone XL pipeline permit application.⁷³ EPA denied this request in a letter dated December 1, 2012.⁷⁴ However, backlighting revealed that the letter was originally dated December 18, 2012.⁷⁵ While it is possible the Agency altered the date to fix an administrative mistake, the Committee suspects that EPA acted with negligence or continued effort to delay the response, followed by a deliberate attempt to mislead. EPA would have had a motive to deceive because agencies are required to respond to FOIA requests within 20 business days, and may not request an extension for more than ten working days, except in unusual circumstances.⁷⁶ Moreover, under the OPEN Government Act of 2007, "An agency cannot assess fees if the response is delayed beyond thirty days of the initial request date."⁷⁷ Accordingly, it appears that EPA deliberately altered the date to avoid the legal consequences of missing a deadline and then excluded this document from a FOIA production to avoid scrutiny and embarrassment.⁷⁸ Namely, EPA would not have been legally able to assess IER fees if they had, in fact, missed their statutory deadline.

⁷² Letter from Larry F. Gottesman, National FOIA Officer, U.S. Evtl. Prot. Agency, to Daniel Simmons, Institute for Energy Research (Dec. 1, 2013), available at <http://www.instituteforenergyresearch.org/wp-content/uploads/2013/01/EPA-FOIA-Fee-Waiver-Denial-12.31.12.pdf>.

⁷³ Press Release, Institute for Energy Research, *IER Renews Keystone KL FOIA Request, Cites Lisa Jackson Alias* (Nov. 19, 2012) available at <http://www.instituteforenergyresearch.org/2012/11/19/ier-renews-keystone-xl-foia-request-cites-lisa-jackson-alias/>.

⁷⁴ Letter from Larry F. Gottesman, National FOIA Officer, U.S. Evtl. Prot. Agency, to Daniel Simmons, Institute for Energy Research (Dec. 1, 2013) available at <http://www.instituteforenergyresearch.org/wp-content/uploads/2013/01/EPA-FOIA-Fee-Waiver-Denial-12.31.12.pdf>.

⁷⁵ Press Release, Institute for Energy Research, *Breaking News: EPA Cover-up Exposed?* (Jan. 16, 2013) available at <http://www.instituteforenergyresearch.org/2013/01/16/epa-cover-up-exposed/>; see also Image of backlit letter available at http://www.instituteforenergyresearch.org/?attachment_id=15331.

⁷⁶ See 5 U.S.C. § 552(a)(6).

⁷⁷ See 5 U.S.C. § 552 (a)(6)(C)(iii).

⁷⁸ Press Release, Institute for Energy Research, *Breaking News: EPA Cover-up Exposed?* (Jan. 16, 2013), <http://www.instituteforenergyresearch.org/2013/01/16/epa-cover-up-exposed/>.

Misapplication and Abuse of Exemptions

EPA has not only manipulated the FOIA process; the Agency has also exploited FOIA to protect its own interests while disregarding the public interest.⁷⁹ While FOIA provides nine exemptions designed to protect the disclosure of delicate information,⁸⁰ President Obama has made clear to federal agencies that “The [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails.”⁸¹ Despite the President’s directive, the Committee has observed EPA excessively applying FOIA exemption 5 and 6 to redact information that should be open to the public.

EPA frequently invokes exemption 5, an exemption meant to safeguard the government’s deliberate policymaking process, to information the statute did not intend to shield, such as employees’ reaction to news articles. This information is clearly inconsequential to an agency’s deliberative process.⁸² Moreover, President Obama has previously instructed federal agencies that information should not be redacted “merely because officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.”⁸³ In other FOIA releases, EPA has redacted the entire email message, including the subject, the text and signature block by repeatedly claiming deliberative process under exemption 5.⁸⁴ As a practical matter,

⁷⁹ Letter from Hon. Deb Fischer, U.S. Senator, Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, Hon. James Inhofe, U.S. Senator, Hon. John Barrasso, U.S. Senator, Hon. Mike Crapo, U.S. Senator, Hon. Roger Wicker, U.S. Senator, Hon. John Boozman, U.S. Senator, Hon. Jeff Sessions, U.S. Senator, to Hon. Bob Perciasepe, Acting Adm’r, U.S. Env’tl. Prot. Agency (Apr. 4, 2013).

⁸⁰ See 5 U.S.C. § 552.

⁸¹ Memorandum from President Barack Obama, 74 Fed. Reg. 4683 (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁸² Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t. Reform, Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, to Hon. Gina McCarthy, Assistant Adm’r for the Office of Air and Radiation, U.S. Env’tl. Prot. Agency (Apr. 10, 2013).

⁸³ Memorandum from President Barack Obama, 74 Fed. Reg. 4683 (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁸⁴ See Part A, Release 2 - HQ- FOI-01268-12, Email from Allyn Brooks-LaSure to Richard Windsor (Apr. 15, 2009, 01268-EPA-97); Email from Seth Oster to Richard Windsor (June 24, 2009, 01268-EPA-207); Email from Scott Fulton to Richard Windsor (Aug. 15, 2009, 01268-EPA-261), <http://www.epa.gov/foia/docs/Part-A-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf> (last accessed Apr. 8, 2013); *see also* Part C, Release 2 - HQ-FOI-01268-12, Email from Seth Oster to Richard Windsor (Jan. 20, 2010, 01268-EPA-527); Email from Seth Oster to Richard Windsor (Jan. 8, 2010, 01268-EPA-518); Email from Arvin Ganesan to Richard Windsor (Feb. 24, 2010, 01268-EPA-548), <http://www.epa.gov/foia/docs/Part-C-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf> (last accessed Apr. 8, 2013).

such redactions render the document completely unresponsive. Moreover, this practice ignores the U.S. Attorney General's instructions to identify portions of a document that may be released, even if other sections contain protected information.⁸⁵

In addition, the Committee has discovered instances where EPA applies exemption 6 to withhold EPA officials' email addresses. However, the U.S. Attorney General's guidance states that exemption 6 applies only when an individual's personal interest in protecting information outweighs the public interest in obtaining the information.⁸⁶ The rule requires a balancing test where the courts, the Attorney General and President Obama have instructed agencies to give weight to the public interest and encourage public disclosure.⁸⁷ The Supreme Court has interpreted the public interest as the American people's desire to know "what the government is up to."⁸⁸ While the privacy of personal information deserves delicate treatment in this analysis, the Supreme Court has cautioned that the privacy interest in exemption 6 "belongs to the individual, not the agency holding the information."⁸⁹ Based on these facts and legal analysis, it is clear that EPA had unjustifiably used FOIA exemption 6 to withhold the Richard Windsor email address, as well as others, that the public has a right to know.

EPA's Responsibility to Remain Unbiased

⁸⁵ Memorandum from Eric Holder, U.S. Attorney General, Dep't of Justice, (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>; *see also* Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, to Hon. Gina McCarthy, Assistant Adm'r for the Office of Air and Radiation, U.S. Env'tl. Prot. Agency (Apr. 10, 2013).

⁸⁶ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur Elkins, Inspector General, U.S. Env'tl. Prot. Agency (Feb. 7, 2013).

⁸⁷ Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, to Hon. Gina McCarthy, Assistant Adm'r for the Office of Air and Radiation, U.S. Env'tl. Prot. Agency (Apr. 10, 2013); *see also* Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur Elkins, Inspector General, U.S. Env'tl. Prot. Agency (Feb. 7, 2013).

⁸⁸ *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)); *see also* Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur Elkins, Inspector General, U.S. Env'tl. Prot. Agency (Feb. 7, 2013).

⁸⁹ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't. & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur Elkins, Inspector General, U.S. Env'tl. Prot. Agency (Feb. 7, 2013), note 10.

In addition to the EPA's troubles with transparency, there are serious questions related to the cozy relationship between EPA leadership and environmental allies. The Committee is concerned that EPA's leadership has abandoned the historic model of specialized public servant who seeks to fairly administer the law and has instead embraced a number of controversial tactics to advance a radical green agenda, while avoiding meaningful accountability. Agencies are extended great deference under the law because they are theoretically composed of neutral, non-biased, highly specialized public servants with "more than ordinary knowledge" about certain policy matters.⁹⁰ Further, agencies are bound to a policy of neutrality pursuant to the Administrative Procedure Act (APA).⁹¹ The APA guarantees due process and equal access to information for all citizens and serves as yet another important access tool for those seeking information about government activities.⁹² However, the Committee uncovered EPA's practices that deviate from these neutrality requirements, including, biased processing of FOIA fee waiver requests and FOIA administration that neglects the public interest.

Politicizing Fee Waivers

The Committee has raised concerns over what appears to be a clear and inappropriate bias at EPA to award fee waiver requests for national environmental organizations, while at the same time categorically denying fee waivers requested by states, and rejecting the majority of fee waiver requests from conservative-leaning groups.⁹³ This is troubling because the "fee waiver"

⁹⁰ See *Chevron v. U.S.*, 467 U.S. 487, 482-84 (1984). It is a "well settled principle" that great deference is accorded to agencies by the Court when Congress has remained silent on the issue and a full understanding of the policy in the given situation calls for a level of "more than ordinary knowledge" of the matter. This deference is provided for in situations in which the agency's construction of the statute is not arbitrary, capricious, or manifestly contrary to the statute.

⁹¹ The Administrative Procedure Act, 5 U.S.C. § 500 *et seq* (1946). See also, *Administrative Procedure Hearings Before the Committee on the Judiciary The U.S. House of Representatives, Seventy-ninth Congress, First Session: On the Subject of Federal Administrative Procedure*, 79th Cong. 49 (1945) (statement of David A Simmons, President, American Bar Association).

⁹² *Id.* See also CONG. REC. March 26, 1946 at 298 (statement by Willis Smith), available at http://www.justice.gov/jmd/lis/legislative_histories/pl79-404/proceedings-05-1946.pdf. "The purpose of which is to improve the administration of justice by prescribing fair administrative procedure. [The APA] is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government."

⁹³ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. James Inhofe, Ranking Member, S. Subcomm. on Oversight, Comm. on Env't & Pub. Works, Hon. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency (May 17, 2013) [hereinafter *FOIA Fee Waiver Letter*].

provision under the law is the primary way to provide the public with a pathway to obtain government documents.⁹⁴ Otherwise, fees associated with the collection and dissemination of this data could pose an insurmountable hurdle to the public.⁹⁵ Accordingly, the law allows an agency to waive fees if the release of information will benefit the public as a whole. Specifically, the law states: “Fees may be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁹⁶

Under the Obama Administration, EPA has failed to embrace the principals behind the FOIA fee waiver process. Instead, the Agency has used the process to subsidize their allies’ access to information. In effect, EPA has unequivocally politicized the fee waiver process.⁹⁷ After reviewing over 1,200 pages of EPA fee waiver determination letters sent between January 1, 2012, and April 26, 2013, the Committee has identified clear patterns of misuse.⁹⁸ Based on the Committee’s analysis, EPA granted 92% of requests for fee waivers made by key environmental groups, such as Sierra Club, EarthJustice, National Resources Defense Council, and Public Employees for Environmental Responsibility.⁹⁹ In a shocking disparity, EPA only granted fee waivers for conservative-leaning think tanks 27% of the time.¹⁰⁰ Moreover, EPA denied nearly every request for a fee waiver from state, local, and tribal government entities.¹⁰¹ Based on this analysis, it appears that EPA facilitates the FOIA process by granting fee waivers for major environmental groups, while simultaneously using it as a barrier against states and conservative organizations.¹⁰² This clear abuse of discretion suggests that EPA’s actions may be part of a broader scheme to advance the Agency’s political agenda.

⁹⁴ See 5 U.S.C. 552.

⁹⁵ H.R. REP. NO. 109-226, A CITIZEN’S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS (2005), available at <http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt50/pdf/CRPT-106hrpt50.pdf> [hereinafter *Citizen’s Guide to FOIA*].

⁹⁶ Citizen’s Guide to FOIA.

⁹⁷ FOIA Fee Waiver Letter.

⁹⁸ FOIA Fee Waiver Letter.

⁹⁹ FOIA Fee Waiver Letter, attachment, 2.

¹⁰⁰ FOIA Fee Waiver Letter, attachment, 4.

¹⁰¹ FOIA Fee Waiver Letter, attachment, 3.

¹⁰² FOIA Fee Waiver Letter, attachment, 1.

On May 17, 2013, the Committee informed the Agency of this discrepancy and requested additional information as well as a briefing, to repair the problem.¹⁰³ In response, EPA spokeswoman Alisha Johnson made a statement to the press that EPA “make[s] FOIA waiver determinations based on legal requirements, and these are consistently applied to all fee-waiver requests, so those determinations are not based on the identity of the reporter or the requester in general... to ensure that [EPA’s] FOIA process remains fair and transparent.”¹⁰⁴ Despite these statements, former Acting Administrator Perciasepe requested that the EPA’s Office of the Inspector General (OIG) conduct an audit into the Agency’s FOIA fee waiver practices.¹⁰⁵

Notwithstanding the OIG’s investigation into EPA’s FOIA fee waiver process, Congressional oversight is required. The commitment by the OIG to evaluate “equity in decision making used by EPA for fee-waiver decisions”¹⁰⁶ is undermined by more recent public statements by the Agency, claiming that advocates never had to pay any fees to the EPA, regardless of whether the Agency officially waived the cost.¹⁰⁷ This is a red herring that ignores the fact that as a matter of law EPA could not assess fees, and glosses over the real issue: the Agency erected procedural barriers for states and conservative groups in an effort to delay or avoid responding to the request. Accordingly, these statements call into question the Agency’s sincerity in resolving the matter.

Improper Release of Private Citizens’ Information

In addition to EPA’s bias in granting fee waivers for national environmental groups, EPA has also improperly released private and confidential business information of farmers and

¹⁰³ FOIA Fee Waiver Letter.

¹⁰⁴ Jillian Kay Melchior, *The EPA’s Conservative Problem*, NATIONAL REVIEW, May 22, 2013, <http://www.nationalreview.com/article/349009/epa%E2%80%99s-conservative-problem-jillian-kay-melchior>.

¹⁰⁵ Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Env’tl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm’r and Chief Information Officer, Office of Environmental Information, U.S. Env’tl. Prot. Agency, *Notification of Evaluation of EPA’s Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013) available at http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf.

¹⁰⁶ Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Env’tl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm’r and Chief Information Officer, Office of Environmental Information, U.S. Env’tl. Prot. Agency, *Notification of Evaluation of EPA’s Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013), available at http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf.

¹⁰⁷ Erica Martinson, *EPA: Numbers disprove conservative claim of bias*, POLITICO PRO, Jun. 10, 2013, <http://www.politico.com/story/2013/06/epa-numbers-disprove-conservative-claim-of-bias-92460.html>.

ranchers to national environmental groups. For years environmentalist have been advocating for the regulation of concentrated animal feeding operations (CAFOs). In response, EPA has attempted, on several occasions, to collect comprehensive data from CAFOs.¹⁰⁸ EPA proposed a rule (CAFO Reporting Rule) in October 2011 that would have required CAFO owners to submit information on their operations, including location and contact information. EPA withdrew this rule in July 2012 and instead began working with states to gather the data. Before any of the CAFO data collected by EPA was made public, EarthJustice, Natural Resources Defense Council (NRDC) and the Pew Charitable Trust, submitted FOIA requests for the data in October 2012.¹⁰⁹ This timeline alone suggests that these groups were privy to EPA's plan to collect the data, and raises the possibility that EPA may have been collecting the data on the groups' behalf. Moreover, Acting Administrator for the Office of Water, Nancy Stoner, previously served as the Co-Director of the NRDC's water program.¹¹⁰ Accordingly, it appears that a former NRDC employee released non-public information to her former colleagues on a matter she had worked on prior to her employment at the EPA.

In addition to EPA serving as an apparent information bundler for these environmental allies, the Agency also handed over all the data without any consideration for the farmers' and ranchers' information that was enclosed. As a result, EPA included private information of CAFO owners that should have been redacted, including the precise locations of CAFOs, the animal type and number of head therein, as well as their personal contact information, including names, addresses, phone numbers, and email addresses.¹¹¹ Importantly, such release of personal contact information could result in serious and unacceptable risks for farmers, ranchers, and their families – a risk exemption 6 was designed to avoid.¹¹² FOIA exemption 6 was intended to protect private citizens and private information; it was not intended to hide public records as EPA has practiced throughout the Obama Administration.

¹⁰⁸ Letter from Hon. Deb Fischer, U.S. Senator, Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. James Inhofe, U.S. Senator, Hon. John Barrasso, U.S. Senator, Hon. Mike Crapo, U.S. Senator, Hon. Roger Wicker, U.S. Senator, Hon. John Boozman, U.S. Senator, Hon. Jeff Sessions, U.S. Senator, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency (Apr. 4, 2013) [hereinafter *CAFO Letter*].

¹⁰⁹ *Id.*

¹¹⁰ U.S. Env'tl. Prot. Agency, *About EPA: Nancy Stoner, Acting Assistant Administrator for Water*, <http://www2.epa.gov/aboutepa/nancy-stoner-acting-assistant-administrator-water> (last accessed Jul. 10, 2013).

¹¹¹ EPA's release of the geographical location and the animal specifications of CAFOs falls within the broad definition of business information and should have been withheld. *See CAFO Letter*.

¹¹² *Id.*

The Committee wrote EPA expressing its concerns over the CAFO FOIA response on April 4, 2013, and asked a series of questions on EPA's handling of the request.¹¹³ EPA subsequently admitted their FOIA response included private information of CAFO owners in ten states and then asked the three FOIA requesters to either destroy or return EPA's original FOIA response.¹¹⁴ Thereafter, EPA provided the FOIA requesters with new copies of the response that included redactions for the same ten states.¹¹⁵ In providing the data a second time, Nancy Stoner said: "The EPA has thoroughly evaluated every data element from each of these states and concluded that personal information ... implicates a substantial privacy interest that outweighs any public interest in disclosure."¹¹⁶ However, within weeks of the second release, EPA acknowledged that the Agency had failed to conduct a thorough review and had *again* released data that should have been redacted.¹¹⁷ Accordingly, EPA asked the three requesters to destroy or return the second FOIA response and thereafter, the Agency had to send the three requesters a newly redacted response – a *third* time.¹¹⁸ Subsequently, the American Farm Bureau and the National Pork Producers Council have obtained a temporary restraining order in federal district court asking the court to prevent EPA from releasing additional information on livestock producers under FOIA.¹¹⁹

On July 15, 2013, the Committee received a delayed response letter from EPA, which failed to address the Committee's concerns.¹²⁰ In the first instance, the response did not include any of the requested documents relating to the FOIA requests. Moreover, the response failed to identify the EPA officials in charge of investigating the release and those responsible for processing the FOIA requests. Indeed, the response affirmed the Committee's concerns that the information released included "personal information – personal names, phone numbers, email addresses, individual mailing addresses (as opposed to business addresses) and some notes related to personal matters – implicates a privacy interest that outweighs any public interest in

¹¹³ *Id.*

¹¹⁴ Letter from Nancy Stoner, Acting Assistant Adm'r for the Office of Water, U.S. Env'tl. Prot. Agency, to Agricultural Groups (Feb. 28, 2013).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Amanda Peterka, *EPA stumbles again in releasing more CAFO documents*, ENVIRONMENT & ENERGY DAILY, May 3, 2013, <http://www.eenews.net/stories/1059980558>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Letter from Nancy Stoner, Acting Assistant Adm'r for the Office of Water, U.S. Env'tl. Prot. Agency, to Hon. Deb Fischer, U.S. Senator (July 15, 2013).

disclosure.”¹²¹ As such, the Committee remains disturbed by the Agency’s administration of these FOIA requests given the individuals whose information was compromised. Such actions defeat the integrity of the Agency’s neutrality, and EPA’s gross negligence in repeatedly submitting erred responses exposes the Agency’s true misuse of the FOIA process.

CONCLUSION

The Committee’s investigation reveals that under the leadership of Lisa P. Jackson, EPA developed a culture of secrecy and evasion, which has since allowed them to hide their actions from the public and from Congress. Ultimately, the purpose of using secret emails, personal emails, applying excessive redactions to documents released via FOIA, and erecting other barriers to transparency is to avoid scrutiny and accountability. These actions were taken contrary to official EPA policy and sometimes, contrary to the law. While in some instances the Agency has begrudgingly admitted their mistakes, the culture of secrecy runs deep, and it will take the proactive intervention of EPA’s new leadership to right the ship and require the transparency the President promised the American people.

¹²¹ *Id.*