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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

April 4, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Dear Acting Administrator Perciasepe:

We write to express concern and seek further information regarding the Environmental Protection Agency's (EPA) recent release of personal and confidential business information relating to concentrated animal feeding operations (CAFOs) to environmental groups in response to a Freedom of Information Act (FOIA) request.[1] This action demonstrates a troubling disregard for the interests of both private citizens and competitive businesses. We understand that you are currently investigating the propriety of the FOIA releases and whether the releases contain sensitive information not already publicly available.[2] EPA claims that the recipients of the information have agreed not to disseminate the data EPA provided to them.[3] Since the information has already been released, EPA's assertion that the groups will not distribute the information is hardly reassuring. As such, the lack of appropriate safeguards within EPA's FOIA office requires your immediate attention.

As you are aware, FOIA's purpose is to provide the public with a means to access government information.[4] The statute essentially enables people to learn "'what their government is up to.'"[5] FOIA is not, however, a mechanism by which private citizens or organizations may obtain personal information of other private citizens, or confidential business information.[6]

EPA's recent and overbroad application of FOIA exemptions with respect to agency information undermines FOIA's purpose by preventing the public from learning what the agency is up to.[7] Conversely, in releasing the personal and confidential information of CAFO owners,

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[1] Amanda Peterka, *EPA probes release of CAFO data to enviro groups*, Mar. 6, 2013, http://www.eenews.net/Greenwire/2013/03/06/archive/2?terms=EPA+probes+release+of+CAFO+data+to+enviro+groups.

[2] Letter from Nancy Stoner, EPA Office of Water Acting Assistant Administrator, to Agricultural Groups (Feb. 28, 2013).

[3] Peterka *supra* note 1.

[4] 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[5] 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)).

[6] *Id.*

[7] *See* David Vitter, *Clearing the Air on an Opaque EPA: EPA nominee Gina McCarthy has an awful lot to answer for*, Mar. 13, 2013, http://www.usnews.com/opinion/articles/2013/03/13/obama-epa-nominee-gina-mccarthy-has-a-lot-to-answer-for. *See also* Letter from Hon. David Vitter et al., to Hon. Arthur Elkins, Inspector Gen., Envtl. Prot. Agency (Feb. 7, 2013).

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EPA has shown no regard for the privacy and safety of private citizens, and businesses. EPA's current application of FOIA thus represents the antithesis of a transparent government and an offensive abuse of agency discretion.

Pursuant to its long term effort to regulate CAFOs, 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.[8] EPA withdrew this rule in July 2012[9] and instead began working with states to gather the data.[10] In October 2012, three environmental groups submitted FOIA requests to EPA requesting information relating to CAFOs.[11] In response, the EPA released to these three groups the information EPA had gathered from more than 30 state permitting authorities.[12] However, not all of the information provided to EPA should have been released in such a careless fashion. The comprehensive data released provides the precise locations of CAFOs, the animal type and number of head, as well as the personal contact information, including the names, addresses, phone numbers, and email addresses of CAFO owners.[13] The Department of Homeland Security had previously informed EPA that the release of such information could constitute a domestic security risk.[14] EPA's disregard for the implications of the release of this information is alarming.

FOIA provides nine exemptions designed to protect the disclosure of certain information.[15] Exemption 4 shields the disclosure of information related to the proprietary interests of business,[16] and exemption 6 safeguards the privacy interests of individuals.[17] In this instance, 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.[18] Moreover, EPA's release of the CAFO owners' personal contact information could result in serious and unacceptable risks for farmers, ranchers, and their families – a risk exemption 6 was designed to avoid.[19]

In an attempt to calm the fears of the individuals affected, EPA has reported that the three environmental groups who currently have possession of this information have agreed not to

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[8] National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 204 (proposed Oct. 21, 2011) (to be codified at 40 C.F.R. pt. 9 and 122).
[9] National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 77 Fed. Reg. 140 (Jul. 20, 2012).
[10] Amanda Peterka, *Beef industry slams EPA for giving enviros access to CAFO data*, Feb. 21, 2013, http://www.eenews.net/Greenwire/2013/02/21/archive/7.
[11] Peterka *supra* note 1.
[12] *Id.*
[13] KDHE refuses to provide EPA with Kansas CAFO information, http://www.thestockexchangenews.com/2013/03/08/kdhe-refuses-to-provide-epa-with-kansas-cafo-information/ (Mar. 8, 2013).
[14] Peterka *supra* note 9.
[15] 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.
[16] 5 U.S.C. § 552(b)(4).
[17] 5 U.S.C. § 552(b)(6).
[18] 5 U.S.C. § 552(b)(4). *See also* Department of Justice Guide to the Freedom of Information Act: Exemption 4 (2009), http://www.justice.gov/oip/foia_guide09/exemption4.pdf.
[19] 5 U.S.C. § 552(b)(6). *See also* Department of Justice Guide to the Freedom of Information Act: Exemption 6 (2009), http://www.justice.gov/oip/foia_guide09/exemption6.pdf.

disseminate the data.[20] This assurance is hollow. As the Supreme Court of the United States confirmed in *Favish*, and as EPA is aware, "release to one is release to all."[21] Accordingly, EPA has no ability to ensure that this information will be kept private, and, moreover, private requestors cannot legally withhold the information.[22] Since the very purpose of FOIA is to provide information about the government for public dissemination, an agency cannot control what an individual or organization does with information procured through a FOIA request. As such, the Senate Committee on Environment and Public Works is disappointed that EPA sought to downplay the seriousness of their mistake by inaccurately claiming that the information released will remain private.

EPA has stated that the agency plans to do an investigation to ensure that any legitimate privacy concerns are addressed.[23] While we support this initiative, we request that you brief the Committee staff on the status of your investigation by no later than April 18, 2013.

Additionally, we request that you respond to the following questions and requests no later than April 18, 2013:

1. Please detail the steps EPA is taking to investigate this privacy breach.

2. Who at EPA is in charge of the investigation?

3. Is the agency examining possible conflicts of interest or inappropriate relationships between EPA employees and groups requesting the information, in particular regarding Nancy Stoner and/or her staff?

4. Who was responsible for processing and executing the above mentioned FOIA requests?

5. What was the purpose of compiling the information released? How does the agency plan to use it? Does EPA intend to develop a national database of CAFOs? If so, will the database include information about producers and facilities not subject to regulation under the Clean Water Act?

6. How much time, money, and staff did EPA dedicate to bundling the information distributed pursuant to the above mentioned FOIA requests?

7. Please provide all documents referring or relating to the CAFO FOIA requests from Earthjustice, Natural Resources Defense Council, and Pew Charitable Trusts, including any emails sent or received on personal or private accounts.

8. For each state from which EPA sought to obtain information on livestock agriculture, please provide copies of all written, electronic, or other communications between EPA,

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[20] Peterka *supra* note 1.
[21] Supreme Court Rules for "Survivor Privacy" in *Favish*, http://www.justice.gov/oip/foiapost/2004foiapost12.htm (Apr. 9, 2004). *See also* National Archives & Records Administration v. Favish, 124 S. Ct. 1570, 1580 (2004).
[22] *Id.*
[23] Peterka *supra* note 1.

its agents and partners, and the individual states from which EPA collected information on livestock facilities. In particular, this includes but is not limited to copies of all emails or other written communication with the individual states describing the types of information and the public nature of that information, which EPA sought. In addition, please provide copies of any written correspondence received from the states, including cover letters or other electronic or written communications transmitting the information. If no written records exist to memorialize the request or the response received from the states, please indicate why, and provide specific details on the state officials with whom communications were made, their authority to release records, and the general custodial chain of records that describes how EPA obtained each state's data.

9. If a party other than EPA's Office of Water obtained the information, please include that information and all correspondence between the states and that third party, including but not limited to EPA Regional Offices, the Association of Clean Water Administrators, or third-party contractors, such as Tetra Tech. Please also include copies of all communications between these third parties and EPA.

Thank you for your prompt attention to this matter. If you have questions regarding this request, please contact Laura Atcheson with the Senate Committee on Environment and Public Works at (202) 224-6176.

Sincerely,

Deb Fischer
U.S. Senator

David Vitter
U.S. Senator

James Inhofe
U.S. Senator

John Barrasso
U.S. Senator

Mike Crapo
U.S. Senator

Roger Wicker
U.S. Senator

John Boozman
U.S. Senator

Jeff Sessions
U.S. Senator

cc: The Honorable Nancy Stoner
Acting Assistant Administrator for Water