DESTRUCTION OF RECORDS AT EPA: WHEN RECORDS MUST BE KEPT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT &
SUBCOMMITTEE ON ENVIRONMENT

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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March 26, 2015

DESTRUCTION OF RECORDS AT EPA: WHEN RECORDS MUST BE KEPT

THURSDAY, MARCH 26, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT &
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY,
Washington, D.C.

The Subcommittees met, pursuant to call, at 10:26 a.m., in Room 2318 of the Rayburn House Office Building, Hon. Barry Loudermilk [Chairman of the Subcommittee on Oversight] presiding.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

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Subcommittee on Oversight
Subcommittee on Environment

Destruction of Records at EPA – When Records Must Be Kept

Thursday, March 26, 2015
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

Witnesses

Mr. Paul M. Wester, Jr., Chief Records Officer, National Archives and Records Administration

Mr. Kevin Christensen, Assistant Inspector General for Audit, Office of Inspector General, Environmental Protection Agency

Dr. David Schnare, Former Senior Attorney, EPA Office of Enforcement and Compliance Assurance; Director, Free-Market Environmental Law Clinic; Director, Center for Environmental Stewardship, Thomas Jefferson Institute for Public Policy; and General Counsel, Energy & Environment Legal Institute

U.S. House of Representatives
Committee on Science, Space, and Technology
Subcommittee on Oversight
Subcommittee on Environment

HEARING CHARTER

Destruction of Records at EPA – When Records Must Be Kept

Thursday, March 26, 2015
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

Purpose

On March 26, 2015, the Subcommittees on Oversight and Environment will hold a hearing titled, "Destruction of Records at EPA – When Records Must Be Kept." The hearing will clarify when the Federal Records Act (FRA) applies to certain information and how the FRA has been implemented at the Environment Protection Agency (EPA). In particular, the hearing will review the safeguards that are in place to prevent both the inadvertent as well as intentional destruction of information that should be preserved as a federal record.

Witnesses

- **Mr. Paul M. Wester, Jr.**, Chief Records Officer, National Archives and Records Administration
- **Mr. Kevin Christensen**, Assistant Inspector General for Audit, Office of Inspector General, Environmental Protection Agency
- **Dr. David Schnare**, Former Senior Attorney, EPA Office of Enforcement and Compliance Assurance; Director, Free-Market Environmental Law Clinic; Director, Center for Environmental Stewardship, Thomas Jefferson Institute for Public Policy; and General Counsel, Energy & Environment Legal Institute

Background

Federal Records Act

Federal records are kept for a number of reasons, including institutional memory, ensuring effective and efficient administration of an organization, and to "make possible a proper scrutiny by the Congress..."[1] Agencies are required to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency..."[2] The Federal Records Act (FRA) of

[1] 36 C.F.R. § 1222.22
[2] 44 U.S.C. § 3101

1950 was most recently amended in September of 2014,[3] which included the clarification that it is the information that is important to preserve and not the medium in which that information was created or received.[4] This acknowledges that in the digital age, there are almost endless ways to create and receive information that would qualify as a federal record and, thus, must be preserved. In fact, the head of each Federal Agency must create a records management program that is both "economical and efficient."[5]

Both the Administrator of the relevant Agency and the Archivist at the National Archives and Records Administration (NARA) are responsible for the management of Federal Agencies' records.[6] The FRA requires federal agencies to determine if information they create or receive is a federal record based on criteria set forth in the FRA, subsequent amendments, and clarifying regulations.[7] Once the information is determined to be a federal record, the Act provides guidance, along with NARA, on how the federal record is to be destroyed or stored and then forwarded to NARA.[8] Whether it is destroyed or forwarded to NARA is determined by whether the federal record is considered temporary.[9] If it is temporary, it may be deleted. However, if it has "administrative, legal, research or other value" then it would warrant preservation.[10] Agencies are supposed to work with NARA once it is determined that the information is a federal record under NARA guidelines.[11] Furthermore, when there is confusion or some doubt about whether information is a record, NARA requires that the information be presumed a record.[12]

EPA Policies and Compliance

According to the Administration in a January 21, 2009 "Transparency and Open Government" memorandum, all Federal Agencies are to "disclose information rapidly in forms that the public can readily find and use ... [and] harness new technologies..."[13] The EPA has implemented a number of policies in accordance with the Federal Records Act that should provide the necessary safeguards to ensure that information created and received by the agency is properly collected. However, although the policies set certain guidelines and criteria to use in fulfilling their responsibility to uphold the requirements under the FRA, in the end, the agency relies on individual employees to determine what constitutes a federal record. It is therefore

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[3] 44 U.S.C. Chapters 21, 22, 29, 31, and 33.
[4] CRS Report R43072, *Common Questions About Federal Records and Related Agency Requirements* by Wendy Davis (February, 2015). (Referencing U.S. Congress, Senate Committee on Homeland Security and Government Affairs, *Presidential and Federal Records Act Amendments of 2014,* 113th Cong., 2nd see., July 23, 2014, S.Rept. 113-218 (Washington: GPO, 2014), p.5.)
[5] 44 U.S.C. § 3102
[6] *See* P.L. 98-497 (1984).
[7] *See Supra* note 3; *see also* 36 C.F.R. §1222.22
[8] *Id.*
[9] 36 C.F.R. § 1220.18
[10] 44 U.S.C. § 3303a(a).
[11] *See* U.S.C. § 3302
[12] 36 C.F.R. § 1222.16(b)(1).
[13] The White House, *Transparency and Open Government*, Presidential Memorandum to heads of executives departments and agencies, Washington, DC, January 21, 2009, at https://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/

incumbent upon each employee to analyze the information against the backdrop of criminal prosecution.[14]

Committee Inquiries

Given that Administrator Gina McCarthy has deleted thousands of text messages that the Committee believes may have been required to be preserved under the FRA, this Committee wants to know what safeguards the EPA has implemented to ensure that information, worthy of capture under the FRA, is in fact collected and not inadvertently or intentionally destroyed. Furthermore, are there technologies available that could automatically capture electronic information and store it for future review as a safeguard against destruction?

To find out more information about text message preservation at the EPA, the Committee sent a letter to the EPA's Office of Inspector General (OIG) in November 2014 to review EPA's compliance with its records management policies and how text messages used for official business are being preserved for federal record keeping. The OIG's report on this matter is expected later this year.

In addition, the Committee sent letters to the EPA in January and March of 2015 to conduct its own investigation of EPA's policies and procedures for preserving electronic records as federal records and its compliance with such policies and procedures.

Further, back in 2012, the Committee requested that the OIG review EPA's use of private and alias email accounts to conduct official business in an apparent subversion of the FRA.[15] The OIG released their findings in a September 2013 Report.[16] Given the recent allegations that thousands of texts messages have been and continue to be deleted, the Committee would like to discuss the finding of that report and whether the policy recommendations have not only been implemented, but whether they are in fact effective at preserving information that should be preserved under the FRA.

[14] *See* 18 U.S.C. §§ 1519 and 2071
[15] Committee on Science, Space, and Technology's November 15, 2012 letter to the EPA OIG, at http://science.house.gov/letter/letters-questioning-administration-officials%E2%80%99-use-secret-email-accounts
[16] EPA OIG Report No. 13-P-0433, *Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts,* at http://www.epa.gov/oig/reports/2013/20130926-13-P-0433.pdf

Chairman LOUDERMILK. The Committee on Science, Space, and Technology joint hearing of the Subcommittee on Oversight and the Subcommittee on Environment will come to order.

Without objection, the Chair is authorized to declare a recess of the Committee at any time.

Good morning, and welcome today to the hearing titled "Destruction of Records at EPA: When Records Must Be Kept."

In front of you are packets containing the written testimony, biographies, and Truth in Testimony disclosures for today's witnesses.

I recognize myself for five minutes for an opening statement.

Good morning, everyone. I want to welcome and thank all of our witnesses for being here today. As you might know, it was brought to this Committee's attention last fall that the Environmental Protection Agency deleted thousands of text messages that it may have needed to preserve as federal records. At that time, EPA spokeswoman Liz Purchia was quoted as saying that, "The agency maintains that the text messages neither had to be preserved nor were subject to disclosure. The text messages can be legally deleted."

It is stated in the Federal Records Act that the head of each federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency's activities. The Federal Records Act was updated this past September to further clarify that it is the information that is important to preserve and not the medium in which that information was created or received. This amendment was put into place to ensure that no matter how the information is transmitted in this digital age, if the information qualifies as a federal record, it must be preserved as a federal record.

Further, the EPA's records management policy approved in 2009 seems to contradict Ms. Purchia's statement by noting that each office within the EPA is required to establish and maintain a records management program with the following minimum requirements: Create, receive, and maintain official records providing adequate and proper documentation and evidence of EPA's activities; manage records, in any format, in accordance with applicable statutes, regulations, and EPA policy and guidance; and maintain electronic records.

Considering that approximately 5,000 of EPA's personnel are issued mobile devices by the Agency, we must be certain that the policies and procedures in place are strong enough to protect and safeguard the text messages that qualify as federal record that may be purposefully or even mistakenly deleted.

This Committee began its investigation into the preservation of text messages as federal records last November when it asked the EPA Inspector General to look into the matter. Since then, the Committee has continued its Congressional oversight of this important matter by trying to work with the EPA to learn more about this situation. From the information that the Committee has obtained thus far, it appears that although EPA employees are allowed to use their work phones for text messaging, there are vir-

tually no text messages preserved as federal records. I find this extremely hard to believe.

What is disappointing to me is that it has been fairly difficult to obtain helpful documents from the EPA in order to conduct our investigation since the first letter sent to the Administrator in January. This slow rolling and lack of a complete response is unfortunately not something new to the Committee in its interactions with the Administration. It has the unfortunate resemblance to the Committee's obstructed investigation of the role of the U.S. Chief Technology Officer with the development and rollout of HealthCare.gov.

As the chairman of this Committee's Oversight Subcommittee, I want to ensure that we restore transparency and accountability across the government and this Administration, with today's focus being on the EPA.

With that, I look forward to today's hearing where I hope to learn from our witnesses more about the policies and procedures that have been in place to ensure valuable federal records are preserved. In the end, I would like to know what is being done or what can be done to protect the inadvertent or intentional destruction of federal records to ensure the highest level of transparency that is owed to the American people.

[The prepared statement of Mr. Loudermilk follows:]

PREPARED STATEMENT OF OVERSIGHT SUBCOMMITTEE CHAIRMAN BARRY LOUDERMILK

Good morning everyone. I want to welcome and thank all of our witnesses for being here today.

As you might know, it was brought to this Committee's attention last fall that the Environmental Protection Agency (EPA) deleted thousands of text messages that it may have needed to preserve as federal records. At that time, EPA spokeswoman Liz Purchia was quoted as saying that,

" . . . the agency maintains that the text messages neither had to be preserved nor were subject to disclosure. Text messages can legally be deleted."

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Chairman LOUDERMILK. I now recognize the Ranking Member of the Subcommittee on Oversight, the gentleman from Virginia, Mr. Beyer, for an opening statement.

Mr. BEYER. Thank you, Chairman Loudermilk, and thank you for coming and testifying with us today.

I want to make three points this morning in my opening remarks. First: I think we can all agree that federal recordkeeping is important and requires some modifications as our modes of communication change. Second: Many people misunderstand or intentionally mischaracterize what constitutes federal recordkeeping. And third: We should stick to the facts in the Science Committee, of all places, and we should not let intentional mischaracterizations color our process or our handling of an allegation.

So first, we can all be in consensus that it is important to properly preserve government records. We can also agree that we should continue to improve the system that allows federal employees to identify and maintain records in accordance with the Federal Records Act. If there is a problem, we must correct it. If an agency or individual is not properly preserving records, we must acknowledge that and take proper next steps. If federal records have been intentionally deleted or destroyed, then individuals should be held accountable. But just because a record is deleted does not mean that a federal record has been destroyed.

My second point is that many people, including perhaps Members of Congress, misunderstand what is and is not a federal record. This understanding extends to non-transitory records that must be collected and preserved, and what constitutes a transitory record that does not require preservation. Living in the digital age, we all know that we generate far more written communications in more forms than ever before. Identifying, collecting and storing all the data generated in a federal agency is neither necessary, realistic nor economical. On average, only about ten percent of a federal agency's data constitutes a federal record. In addition, despite some misperceptions, personal emails may be used for official government business provided the record is preserved by cc'ing it to the agency email address.

Now to the third point: We should not engage in mischaracterizations. And if others do, we should not encourage or celebrate these mischaracterizations. In September 2013 the EPA IG's office released a report titled: "Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts." This was requested by Chairman Smith and others, but some Members of Congress publicly mischaracterized the findings of the IG, making false accusations as a result. In one instance, some claimed that a specific EPA Regional Administrator lied to OIG investigators and used his private email to conduct agency business. What was not realized, and was not acknowledged, was that this practice is permitted under the Federal Records Act. In fact, in the OIG's lengthy public response to set the record straight, they noted that the EPA official had cc'd all of his work-related records from their private email to their government epa.gov account, and that rather than lying to the OIG investigators that the individual's "statement to the OIG was corroborated by the emails obtained by the OIG."

These sorts of sweeping and false characterizations are troubling, and I point to them because I am deeply concerned by the written testimony I read earlier by Dr. David Schnare for this hearing today. His testimony alleges that senior EPA officials, including Administrator Gina McCarthy, have "blatantly violated the Federal Records Act, intentionally not followed the law and kept Agency records secret in order to conceal contacts with individuals or groups outside the Agency." Dr. Schnare has made unsupported and sweeping allegations against the EPA in the past also. I am attaching to my statement four documents related to a 2012 lawsuit filed by Dr. Schnare against the EPA accusing the Agency, and its then-Administrator Lisa Jackson, of participating in human experiments he likened to horrific experiments conducted by Nazi doctors on prisoners in concentration camps during World War II and claimed the EPA was using "secret gas chambers" to conduct these studies on airborne particulate matter. The case was dismissed after Dr. Schnare's lawsuit resulted in multiple newspaper headlines, such as these: "EPA's secret gas chamber experiments: A deceitful failure," and "EPA charged with lethal experiments on hundreds of unsuspecting subjects." If there are legitimate issues with EPA recordkeeping or the processing of FOIA requests, then let us look at these issues and let us address them in a serious way, and I am happy to work with my colleagues on both sides of the aisle in a productive way to do so. We have the reasoned and careful testimony of the EPA Inspector General's office and the National Archives, and there is little there to turn into sensational headlines, and I commend these testimonies to my colleagues' attention as being educational and fact-based.

Mr. Chair, I yield back.

[The prepared statement of Mr. Beyer follows:]

PREPARED STATEMENT OF SUBCOMMITTEE ON OVERSIGHT
MINORITY RANKING MEMBER DONALD S. BEYER, JR.

Good morning!

I want to make three points this morning in my opening remarks.

First: I think we can all agree that federal recordkeeping is important AND requires some modifications as our modes of communication change.

Second: Many people misunderstand or intentionally mischaracterize what constitutes federal recordkeeping.

And third: We should stick to the facts in the Science Committee of all places, and we should not let intentional mischaracterizations color our process or our handling of an allegation.

So first: We can all be in consensus that it is important to properly preserve government records. We can also agree that we should continue to improve the system that allows federal employees to identify and maintain records, in accordance with the Federal Records Act.

If there is a problem, we must correct it. If an agency or individual is not properly preserving records, we must acknowledge that and take proper next steps. If federal records have been intentionally deleted or destroyed, then individuals should be held to account. But just because a record is deleted does not mean that a Federal Record has been destroyed.

My second point is that many people, including perhaps Members of Congress, misunderstand what is and is not a Federal Record. This understanding extends to "non-transitory" records that must be collected and preserved, and what constitutes a "transitory" record that does not require preservation. Living in the digital age we all know that we generate far more written communications in more forms than ever before. Identifying, collecting and storing ALL the data generated in a federal agency is neither necessary, realistic nor economical. On average, only about 10 percent of a federal agency's data constitutes a federal record. In addition, despite some misperceptions, personal e-mails may be used for official government business provided the record is preserved by cc'ing it to your agency email address.

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These sorts of sweeping and false characterizations are troubling and I point to them because I am deeply concerned by the written testimony submitted by Dr. David Schnare for this hearing today. His testimony alleges that senior EPA officials, including Administrator Gina McCarthy, "have blatantly violated the Federal Records Act," intentionally not followed the law and kept Agency records "secret" in order to conceal contacts with individuals or groups outside the Agency. Dr. Schnare has made unsupported and sweeping allegations against the EPA in the past too. I am attaching to my statement four documents related to a 2012 lawsuit filed by Dr. Schnare against the EPA accusing the Agency, and its then-Administrator Lisa Jackson, of participating in human experiments he likened to horrific experiments conducted by Nazi doctors on prisoners in concentration camps during World War II and claimed the EPA was using "secret gas chambers" to conduct these studies on airborne particulate matter. The case was dismissed after Dr. Schnare's lawsuit resulted in multiple newspaper headlines, such as these: "EPA's secret gas chamber experiments: A deceitful failure," and "EPA Charged With Lethal Experiments on Hundreds of Unsuspecting Subjects."

If there are indeed legitimate issues with EPA record keeping or the processing of FOIA requests, then let us look into those issues and address them. I am happy to work with my colleagues in a productive way to do so. However, I do not believe it is productive to allow someone who shows such disregard for the facts to testify. It does not lend to the credibility of this hearing or this In contrast, I look forward to the reasoned and careful testimony of the EPA Inspector General's office and the National Archives. There is little there to turn into sensational headlines, but I commend those testimonies to my colleagues' attention as being educational and fact-based.

I yield back.

Chairman LOUDERMILK. Thank you, Mr. Beyer, and I appreciate that, and it is the intention of this Subcommittee to look into this matter, and cooperation by the Agency is one of the things that would be very helpful, and that is what we are seeking to do.

At this point I now recognize the chairman of the Subcommittee on Environment, the gentleman from Oklahoma, Mr. Bridenstine, for an opening statement.

Mr. BRIDENSTINE. Thank you, Chairman Loudermilk, and thank you for your leadership on this issue. I would also like to thank Chairman Lamar Smith for his leadership on this very important issue. Welcome to all of our witnesses, and thank you for being with us today.

Time and time again, we have seen the Environmental Protection Agency use the regulatory process to increase the federal government's authority and bypass Congressional intent at the expense of states' rights. The EPA's regulations have an enormous cost, stifling businesses, destroying jobs, and increasing the cost of living for Americans, especially those in my district. The EPA seems to believe it should be able to operate without oversight.

Just last week, this Committee helped usher through the House two bills that would simply require greater transparency and more balanced and public input into EPA's rulemaking processes. Unfortunately, the President has threatened to veto both bills.

Today's hearing topic covers the same unfortunate theme. Federal archiving laws exist, as the Federal Records Act states, "to protect the legal and financial rights of persons directly affected by the agency's activities." And I can tell you in my home State of Oklahoma, in my constituency, there are many people directly affected by the Agency's activities. However, the EPA would have us believe that despite the fact that thousands of text messages are being sent and received, virtually none is important enough to qualify as a federal record and require preservation, and therefore can be deleted by the individuals sending and receiving them.

If we, as representatives of the American people, people who are directly affected by EPA's activities, are not provided with the information necessary to verify that the agency's practices are fulfilling both the letter and the spirit of the law, how can we know that the agency isn't getting rid of the very records it is required to preserve? EPA is once again refusing to comply with the Committee's requests, necessitating the chairman's issuance of a subpoena yesterday to compel production. EPA's refusal to turn over records and documents is yet another example of the lack of accountability and transparency that has become a hallmark of this agency in its dealings with Congress.

We here in the House are not alone. Members of the public who request information can expect the same. The Center for Effective Government recently released a report grading federal agencies on how responsive they are to FOIA requests; the EPA received a D. Again, I believe that we here in Congress have a responsibility, on behalf of the people we represent, to oversee the actions of agencies like the EPA. This is important when those actions have such significant impacts on all of us, and particularly the impacts in my State of Oklahoma. The EPA has a responsibility and an obligation to provide the information we have requested.

I thank the witnesses for being with us today and I look forward to your testimony. I yield back.

[The prepared statement of Mr. Bridenstine follows:]

PREPARED STATEMENT OF SUBCOMMITTEE ON ENVIRONMENT
CHAIRMAN JIM BRIDENSTINE

Time and time again, we have seen the Environmental Protection Agency, use the regulatory process to increase the federal government's authority and bypass Congressional intent, at the expense of states' rights. The EPA's regulations have an enormous cost, stifling businesses, destroying jobs, and increasing the cost of living for Americans.

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EPA is once again refusing to comply with the Committee's requests, necessitating the Chairman's issuance of a subpoena yesterday to compel production.

EPA's refusal to turn over records and documents is yet another example of the lack of accountability and transparency that has become a hallmark of this agency in its dealings with Congress. We here in the House are not alone; members of the public who request information can expect the same. The Center for Effective Government recently released a report grading federal agencies on how responsive they are to FOIA requests, and the EPA received a "D."

Again, I believe that we here in Congress have a responsibility, on behalf of the people we represent, to oversee the actions of agencies like the EPA. This is important when those actions have such significant impacts on all of us, and particularly on my home state of Oklahoma. The EPA has a responsibility and an obligation to provide the information we have requested. I thank the witnesses for being with us today and look forward to their testimony.

Chairman LOUDERMILK. Thank you, Mr. Bridenstine.

I now recognize the Ranking Member of the Subcommittee on Environment, the gentlewoman from Oregon, Ms. Bonamici, for her opening statement.

Ms. BONAMICI. Thank you very much, Mr. Chairman.

As someone who strongly believes in transparent government, I would certainly take issue with any government agency unlawfully destroying records. I do want to point out, however, that the title of today's hearing, "Destruction of Records at EPA—When Records Must Be Kept," makes it appear that we have reached a verdict before we have examined the evidence. Given that the EPA Inspector General is beginning an investigation into this issue at the request of Chairman Smith, it would have been more prudent to wait until the investigation had came back with to report before holding this hearing.

And just yesterday, the chairman issued a subpoena to Administrator McCarthy requiring that the Agency turn over billing records and text messages, without redaction, for the past six years. The EPA has been responsive to numerous Committee re-

quests for information on this topic, so the issuance of this subpoena seems premature and hard to justify.

Nevertheless, I am pleased that both the EPA's Assistant Inspector General and the Chief Records Officer of the National Archives and Records Administration are here today to provide us with some background on the preservation of federal records. I am also interested in reviewing the actions taken by EPA in response to the Inspector General's 2013 report on the Agency's email practices. It is my understanding that the EPA steadfastly maintains that the Agency did not circumvent federal record management responsibilities, a claim that was validated by the 2013 report, and reiterated in a letter to our Senate colleagues in 2014. I am attaching both the report and the letter to my statement.

In this modern age of rapid, often electronic communication, important questions are rightly raised about the nature of federal records. Is a note passed between colleagues at a meeting a federal record? Does it depend on what it says? What about a text message from an assistant to a supervisor about ordering the donuts for a breakfast meeting?

The process of conducting business within the government is complex and nuanced, and it stands to reason that the law governing the retention and preservation of the records of such business is equally nuanced. Both the Federal Records Act and the National Archives and Records Administration Act provide guidance on how such items should be preserved and when they can properly be destroyed.

Now, having had an opportunity to review the testimony, I am somewhat puzzled about part of the hearing today. It is easy to understand why both the EPA IG and NARA have been asked to testify, but I do hope we get clarification about what Dr. Schnare's role is here today. Is he here as General Counsel of E&E Legal, the group that apparently sent the FOIA request to the EPA asking for text messages? I see that Dr. Schnare says he has years of experience responding to FOIA requests, but is he here claiming to be an expert on record retention?

Also, Dr. Schnare's testimony in places is quite accusatory, and I do hope that any opinions are clearly conveyed as just that: opinions. For example, in the place in the testimony when Dr. Schnare states, ostensibly as fact, that EPA senior management is "pleased" when they allegedly destroy public records. So I acknowledge Dr. Schnare is a lawyer and a Ph.D., but he is neither judge nor jury. So I will be listening carefully, as I hope all Members will do, to determine what specific evidence is provided to support such serious accusations.

Now, make no mistake: willfully and unlawfully destroying or deleting, or attempting to destroy or delete federal records carry severe fines and sometimes prison terms, and I am wholly supportive of efforts to ensure the proper preservation of government records, and equally supportive of holding accountable those who have intentionally and unlawfully destroyed federal records. But let us not be quick to condemn until we have fully understood if the obligations and actions were consistent with the law.

Thank you, Mr. Chairman, and I yield back the balance of my time.

[The prepared statement of Ms. Bonamici follows:]

PREPARED STATEMENT OF SUBCOMMITTEE ON OVERSIGHT
MINORITY RANKING MEMBER SUZANNE BONAMICI

Thank you Mr. Chair. As someone who strongly believes transparent government, I would certainly take issue with any government agency unlawfully destroying records. However, the title of today's hearing, "Destruction of Records at EPA - When Records Must Be Kept," makes it appear that we have reached a verdict before we have examined any evidence.

Given that the EPA Inspector General is just beginning an investigation into this issue at the request of Chairman Smith, it would have been more prudent to wait until the investigation had something to report before holding this hearing.

Just yesterday, the Chairman issued a subpoena to Administrator McCarthy requiring that the Agency turn over billing records and text messages, without redaction, for the past six years. EPA has been responsive to the numerous Committee requests for information on this topic, so the issuance of this subpoena seems quite premature and hard to justify. Nevertheless, I am pleased that both the EPA's Assistant Inspector General and the Chief Records Officer of the National Archives and Records Administration are here today to provide us with some background on the preservation of federal records. I am also interested in reviewing the actions taken by EPA in response to the Inspector General's 2013 report on the Agency's emailpractices.

It is my understanding that EPA steadfastly maintains that the Agency did not use private or secondary emails to circumvent federal record management responsibilities, a claim that was validated by the 2013 report, and reiterated in a letter to our Senate colleagues in 2014. I am attaching both the report and the letter to my statement.

In this modern age of rapid, often electronic communication, important questions are rightly raised about the nature of federal records. Is a note passed between colleagues at a meeting a federal record? What about a text message from an assistant to a supervisor about ordering donuts for a breakfast meeting? The process of conducting business within the government is complex and nuanced, and it stands to reason that the law governing the retention and preservation of the records of such business is equally nuanced. Both the Federal Records Act and NARA provide guidance on how such items should be preserved and when they can properly be destroyed.

Having had an opportunity to review the testimony, I am somewhat puzzled about why we are hearing from one of the witnesses called to this hearing. It is easy to understand why both the EPA IG and NARA have been asked to testify. But I'm wondering what Dr. Schnare's role is today. Is he here as General Counsel of E&E Legal, the group that apparently sent the FOIA request to the EPA asking for text messages? I see that Dr. Schnare says he has years of experience responding to FOIA requests, but is he here claiming to be an expert on record retention? His testimony is quite accusatory; I do hope that any opinions are clearly conveyed as just that—opinions—like the place in the testimony when Dr. Schnare state, ostensibly as fact, that EPA senior management is "pleased" when they allegedly destroy public records.

And I am already concerned based on the written testimony that some of these accusations could be considered defamatory. Dr. Schnare is a Phd and a lawyer, but he is neither judge nor jury.

I will be listening carefully, as I hope all members will do, to determine what specific evidence Dr Schnare has to support such serious accusations. Make no mistake: willfully and unlawfully destroying or deleting, or attempting to destroy or delete, federal records carry severe fines and prison terms. I am wholly supportive of efforts to ensure the proper preservation of government records, and equally supportive of holding accountable those who have intentionally and unlawfully destroyed federal records. But let us not be quick to condemn until we have fully understood if the obligations and actions were consistent with the law.

I yield back.

Chairman LOUDERMILK. Thank you, Ms. Bonamici, and let me remind the Members of this hearing that the evidence is that text messages were in fact deleted, which was confirmed by the EPA.

At this point I recognize the chairman of the full Committee, Mr. Smith.

Chairman SMITH. Thank you, Mr. Chairman, and let me add my thanks to yours for our expert testimony today. We really do appreciate all three of you all being here, and you have much to contribute, and we will get to questions and answers in a few minutes.

Mr. Chairman, this Committee often addresses technical and scientific integrity standards. However, in the past few years, the Committee has had to repeatedly examine the standard of transparency and accountability. Unfortunately, certain agencies and federal officials have failed to meet it.

We have seen a disregard for agency transparency several times in recent years across the federal government such as with Lois Lerner's IRS targeting controversy and Hillary Clinton's secret server issue.

We have also seen this within the agencies under this Committee's jurisdiction. There have been transparency issues at the EPA going back as far as the Clinton Administration, and just this past year, a federal judge held the EPA in contempt for disregarding a court order not to destroy records. In that case, former EPA Administrator Carol Browner asked an employee to delete all her as well as other senior officials' computer files as a new Administration was about to take over. Her excuse was that she wanted to have some games removed from her computer. Yes, she was undoubtedly playing games.

Not long after the contempt finding, reports surfaced that EPA Administrator Lisa Jackson created a secret email account under the pseudonym Richard Windsor in an apparent attempt to conceal emails. It has been reported that this led to her resignation.

At the EPA, lack of transparency is even more pronounced when coupled with the EPA's use of secret science to justify costly regulations. What is clear is that this Administration has failed to meet its promise of being the most transparent in American history. We would settle for just plain transparent.

Recently, a majority—listen to this—a majority of the Inspectors General signed a letter to the Administration criticizing its lack of cooperation in providing public documents, and many in the media say that this Administration is the least forthcoming they can remember.

Today the Committee once again examines the EPA's practices for the preservation of federal records and how they may reflect how this Agency makes its decisions on scientific issues. Last year, the Committee learned that since 2009, the current EPA Administrator Gina McCarthy has deleted thousands of text messages from her official mobile device. The EPA claims that these text messages are all of a personal nature and therefore not subject to the Federal Records Act. But it is simply not believable that of the almost 6,000 text messages between 2009 and 2013 and many since, that only one was related to EPA business. The single text message produced by EPA was received at the start of this year. This was months after the EPA Office of Inspector General began its investigation and within days of receiving a letter of inquiry from this Committee. While Committee staff has repeatedly asked for certain unredacted documents that the EPA has already collected under a FOIA request, the EPA has failed to turn over these documents.

This pattern of withholding, concealing, and destroying records must stop.

The American people deserve an open and transparent government. This firm belief in transparency and the disappointing response to this Committee's request from the EPA compelled the Committee to authorize a subpoena yesterday. This stonewalling and slow-rolling of documents in response to Congressional requests must end. Americans deserve to have the facts.

I hope, Mr. Chairman, that today's witnesses will provide additional information crucial to this investigation, and I will yield back the balance of my time.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF FULL COMMITTEE CHAIRMAN LAMAR S. SMITH

Thank you, Chairman Loudermilk, for holding this hearing. I also thank the witnesses for being here today to provide their valuable testimony.

This Committee often addresses technical and scientific integrity standards. However, in the past few years, the Committee has had to repeatedly examine the standard of transparency and accountability. Unfortunately, certain agencies and federal officials have failed to meet it.

We have seen a disregard for agency transparency several times in recent years across the federal government—such as with Lois Lerner's 11IRS targeting controversy" and Hillary Clinton's "secret server" issue.

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Not long after the contempt finding, reports surfaced that EPA Administrator Lisa Jackson created a secret email account under the pseudonym "Richard Windsor" in an apparent attempt to conceal emails. It has been reported that this unfortunate incident lead to her resignation.

At the EPA, lack of transparency is even more pronounced when coupled with the EPA's use of "secret science" to justify costly regulations. What is clear is that this Administration has failed to meet its promise of being the most transparent in American history. We would settle for just plain transparent.

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I hope that today's witnesses will provide additional information crucial to this investigation.

Chairman LOUDERMILK. Thank you, Mr. Chairman.

I now recognize the Ranking Member of the full Committee, Ms. Johnson.

Ms. JOHNSON. Thank you very much, Mr. Chairman.

I learned yesterday that the chairman of the full Committee issued a subpoena to the Environmental Protection Agency for documents related to allegations of text and email messages being deleted at EPA. When the Committee adopted the new subpoena rules at the beginning of this Congress, he assured the Minority that when he issued a subpoena, it would not come as a surprise. Yesterday we saw the first subpoena go out, and let me assure you that we were surprised.

As we understand it, the chairman sent two letters asking for documents, one on January 27, 2015, and one on March 6, 2015. EPA was in the process of producing records responsive to these two requests, which had different scopes, over the last two weeks. Just Friday, EPA sent an email to the Majority that read, in part, "I do want to emphasize our strong desire to continue to work with the Committee in a cooperative manner." Then five days later, on March 25th, the chairman issued his subpoena.

It is a longstanding tradition in relations between the Legislative and Executive branches that there is an expectation that the two sides will accommodate the legitimate needs of each other in struggles over documents. And the fact of the matter is that EPA was complying with the Committee's request, consistent with their responsibility to try to protect the Administrator's privacy regarding personal contact and billing information. This subpoena was thus entirely unnecessary from an oversight perspective. However, from a press-release perspective, I imagine that issuing the subpoena before this hearing may be considered a score, to be a clever move. But issuing a subpoena for press impact undermines the seriousness of the chairman's oversight work. That is not good for the Committee, the Congress, or the country.

I am attaching to my statement a timeline of contacts on this matter so that people can see that EPA was in truth working to meet our needs, and I would ask unanimous consent to allow this to be attached to my comments.

Chairman LOUDERMILK. I am sorry. Will the lady——

Ms. JOHNSON. Today's hearing, sadly, is about political theater and inflammatory claims that are not tied to any real facts. There are a lot of allegations being made about text messages and EPA, but these are not a lot of facts and it is just not facts that we can rely on to know what really happened.

To the degree that we know anything, it is that EPA is probably doing about as well as any agency in trying to keep up with the changing landscape of communications technologies and the obligations to retain records. We also know that the most inflated claims regarding former EPA Administrator Lisa Jackson's use of email were found to be largely unsubstantiated or just plain wrong.

In spite of that, we will have a witness appearing before us today who has been at the center of a steady attack on EPA regarding allegations that its employees lie, that they purposefully delete and

withhold records, and that the top political officials take satisfaction in skirting the law. In short, there will be a lot of heated rhetoric at today's hearing, but not much evidence.

I wish this Committee would not be rushing to judgment in an attempt to score political points, and instead would let the IG do its job and finish its probe into these allegations. Then we will know whether or not we have a mountain or a molehill and we can act accordingly.

I thank you, Mr. Chairman, and I hope that our witnesses realize they are under oath today. Thank you. I yield back.

[The prepared statement of Ms. Johnson follows:]

PREPARED STATEMENT OF FULL COMMITTEE
RANKING MEMBER EDDIE BERNICE JOHNSON

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Thank you, and I yield back.

Chairman LOUDERMILK. Thank you, Ms. Johnson.

The letter sent in March put both the EPA and the Minority on notice that the Committee would compel its production if the documents were not turned over in an unredacted form.

Also, if there are Members who wish to submit additional opening statements, their statements will be added to the record at this point.

At this point I ask unanimous consent to enter the documents into the record. Without objection, the documents are entered.

Chairman LOUDERMILK. At this time I would like to introduce our witnesses.

Our first witness is Mr. Paul M. Wester. Mr. Wester is the Chief Records Officer for the National Archives and Records Administration, or NARA.

The next witness on today's panel is Mr. Kevin Christensen. Mr. Christensen is the Assistant Inspector General for Audit for the Office of the Inspector General at the Environmental Protection Agency. Welcome.

Today's final witness is Dr. David Schnare. Dr. Schnare is a former Senior Attorney at the EPA's Office of Enforcement and Compliance Assurance. He is also the Director of the Free Market Environmental Law Clinic, the Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute for Public Policy, and General Counsel at the Energy and Environment Legal Institute.

Welcome to all of our witnesses here today.

Pursuant to Committee rules, all witnesses will be sworn in before they testify. If you will please rise and raise your right hand? Do you solemnly swear or affirm that the testimony that you will give here today will be the truth, the whole truth and nothing but the truth, so help you God? Let the record reflect that the witnesses answered in the affirmative.

Before we begin, I will request that our witnesses please limit your testimony to five minutes. It seems there will be another series of votes, which could happen at any time, and I want to make sure that we have time for discussion. Your entire written statement will be made part of the record. And if we do have votes coming up, we will suspend for those votes and then come back here for the remainder of the testimony.

I now recognize Mr. Wester for five minutes to present his testimony.

TESTIMONY OF MR. PAUL M. WESTER, JR., CHIEF RECORDS OFFICER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Mr. WESTER. Chairman Loudermilk, Chairman Bridenstine, Ranking Member Beyer, and Ranking Member Bonamici, and other distinguished Members of the Committee, I am Paul Wester, the Chief Records Officer for the U.S. Government at the National Archives and Records Administration. Thank you for holding this hearing on the importance of federal recordkeeping and the challenges agencies face managing government records.

In my prepared testimony, I provided a detailed summary of a number of recent activities that the National Archives, the Office of Management and Budget, and other federal agencies across the government have undertaken to improve the management of government records. I also make special note of the enactment by the 113th Congress of the Presidential and Federal Records Act

Amendments of 2014 under the leadership of Chairman Issa and Ranking Member Cummings of the House Oversight and Government Reform Committee. I look forward to answering questions this Committee may have on those activities.

The Committee asked me to address three specific questions today. First, what does the Federal Records Act require of federal agencies? The Federal Records Act requirements for federal agencies are found at 44 U.S.C. Chapter 31, which is titled "Records management by federal agencies." At a high level, agency heads are responsible for ensuring several things including the adequate and proper documentation of agency activities, a program of management to ensure effective controls over the creation, maintenance, and use of records in the conduct of their current business, and compliance with NARA guidance and regulations and compliance with other sections of the Federal Records Act that give NARA authority to promulgate guidance, regulations, and records disposition authority to federal agencies.

The second question the Committee asked me to address today is what are transitory records and how is the disposition of them different than other federal records. Under the General Record Schedule 23, records common to most agencies within—records common to most offices within agencies, transitory records are defined at item 7 as records of short-term interest, 180 days or less, including records in electronic form like email messages or text messages, which have minimal or no documentary or evidential value. Included are such records as routine requests for information or publications and copies of replies which require no administrative action, no policy decision and no special compilation or research for the reply or originating office copies of letters of transmittal that do not add any information to that contained in the transmitted material and receiving office copy if filed separately from transmitted material and records documenting routine activities containing no substantive information such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling-related activities. The disposition of these records is destroy immediately or when no longer needed for reference, or according to a predetermined time period or business rule like implementing an auto-delete feature on an email system. The disposition of transitory records is not different from the disposition of other federal records. Federal employees are encouraged to dispose of transitory records consistent with the General Records Schedule 23 just as they are encouraged to carry out disposition of other federal records according to agency-specific and NARA-approved records disposition schedules.

The third issue that the Committee asked me to address is EPA's compliance with the Federal Records Act itself. As a general matter, NARA cannot speak authoritatively to agency compliance with the Federal Records Act. Departments and agencies are responsible for managing their programs consistent with the Act. I can say that the EPA has participated in NARA's annual Records Management Self-Assessment, also known as the RMSA, since it was established in 2009. The RMSA is a self-reported evaluation of compliance with NARA's records management regulations. NARA does some validation of survey responses but the validation is limited to

the verification that records management program policies are in place. Overall, the EPA has scored well on the self-assessment since we have administered it since 2009.

Like other agencies, EPA has self-reported records management issues to NARA as required in the Federal Records Act. My staff and I work to resolve these issues with the EPA records management staff. EPA has been responsive and cooperative with NARA in these dialogs and has provided supplementary information to NARA as it has been requested.

In conclusion, the management of federal records in all their forms is a central, animating issue for the National Archives and for the government as a whole. In that regard, the Science Committee's interest in records management at the EPA and all its sister agencies is also topic of interest to the National Archives.

The talented staff of the National Archives and Records Administration looks forward to working on records management with EPA now and for many years to come. The long-term success of the National Archives and the historical record of our Nation depends on our collective success.

Thank you for the opportunity to appear today. I look forward to answering your questions.

[The prepared statement of Mr. Wester follows:]

TESTIMONY OF PAUL M. WESTER, JR.

CHIEF RECORDS OFFICER FOR THE U.S. GOVERNMENT

BEFORE THE

COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY

SUBCOMMITTEE ON OVERSIGHT

SUBCOMMITTEE ON ENVIRONMENT

U.S. HOUSE OF REPRESENTATIVES

MARCH 26, 2015

Chairman Lowdermilk, Chairman Bridenstine, Ranking Member Beyer, Ranking Member Bonamici, and Distinguished Members of the Committee:

Thank you for holding this hearing on the importance of federal record keeping and the challenges agencies face managing agency records.

As background and context on government-wide records management issues and the National Archives and Records Administration's latest work in this area, I would like to review briefly the activities of the current Administration and the last Congress.

On November 28, 2011, the President issued a Presidential Memorandum on Managing Government Records. As part of the administration's broader Open Government Initiative, the Memorandum launched a multi-year, executive branch-wide effort to reform and modernize records management policies and practices.

In the Memorandum, President Obama stated:

> When records are well managed, agencies can use them to assess the impact of programs, to reduce redundant efforts, to save money, and to share knowledge within and across their organizations. In these ways, proper records management is the backbone of open Government.

Essentially, what the President called on the National Archives and the rest of the federal government to do was move us from a traditional, analog records environment to a more sophisticated, digital records and information management world.

At the President's direction, in August 2012, the Archivist of the United States, David Ferriero, joined with the acting Director of the Office of Management and Budget (OMB) to issue an implementing directive to all heads of executive departments and agencies and independent agencies.

This Managing Government Records Directive (OMB-M-12-18) describes two high-level goals and a series of actions that the National Archives and Records Administration, OMB, and all Departments and agencies of the federal government must take to modernize records management policies and practices.

Within this document, NARA and OMB identified two high-level goals:

- First, require electronic recordkeeping to ensure transparency, efficiency, and accountability.
- Second, demonstrate compliance with federal records management statutes and regulations.

There are a number of activities associated with each of these goals, but two of the top line actions include:

- By the end of 2016, federal agencies must manage all email records in an electronic format.
- By the end of 2019, federal agencies must manage all permanent electronic records electronically to the fullest extent possible.

Our work is not done, but I believe that the Presidential Memorandum and the implementing Directive have set us on the path to addressing the challenges in modernizing and reforming records management.

Last September 15, OMB and NARA provided additional guidance to federal agencies regarding their responsibilities for managing email records. The Guidance on Managing Email Directive (OMB-M-14-16) reiterates agencies obligations under the Managing Government Records Directive (OMB-M-12-18) and provides compilation of NARA's latest direction to agencies on managing their email records.

At the end of the 113th Congress, through the leadership of Chairman Issa and Ranking Member Cummings of the House Oversight and Government Reform Committee, the Congress passed the Presidential and Federal Records Act Amendments of 2014, now Public Law 113-187.

Among the amendments, the first substantive changes to the Federal Records Act since the 1950s, is 44 U.S.C. 2911, "Disclosure requirement for official business conducted using non-official electronic messaging accounts." The statute states:

> (a) IN GENERAL.—An officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee—
>
> > (1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or
> >
> > (2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.
>
> (b) ADVERSE ACTIONS.—The intentional violation of subsection (a) (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

We believe this statutory change, and the other changes to the Federal Records Act enacted through PL 113-187, will clarify the responsibilities federal employees have in managing federal records and will improve the management of electronic records across the government.

The Federal Records Act and Federal Agency Requirements

The Federal Records Act requirements for federal agencies are found at 44 U.S.C. Chapter 31, Records Management by Federal Agencies. At a high level, agency heads are responsible for ensuring several things, including:

- The adequate and proper documentation of agency activities (44 U.S.C. 3101).
- A program of management to ensure effective controls over the creation, maintenance, and use of records in the conduct of their current business (44 U.S.C. 3102(1)).
- Compliance with NARA guidance and regulations, and compliance with other sections of the Federal Records Act that give NARA authority to promulgate guidance, regulations, and records disposition authority to federal agencies (44 U.S.C. 3102(2) and (3)).

The regulations implementing the Federal Records Act are found at 36 C.F.R. Chapter 12, Subchapter B—Records Management. NARA provides additional guidance to agencies at its records management website, http://www.archives.gov/records-mgmt/.

What Are Transitory Records?

Under General Records Schedule 23, Records Common to Most Offices within Agencies, transitory records are defined at Item 7 as:

> Records of short-term (180 days or less) interest, including in electronic form (e.g., e-mail messages), which have minimal or no documentary or evidential value. Included are such records as:
>
> - Routine requests for information or publications and copies of replies which require no administrative action, no policy decision, and no special compilation or research for reply;
> - Originating office copies of letters of transmittal that do not add any information to that contained in the transmitted material, and receiving office copy if filed separately from transmitted material;
> - Quasi-official notices including memoranda and other records that do not serve as the basis of official actions, such as notices of holidays or charity and welfare fund appeals, bond campaigns, and similar records;
> - Records documenting routine activities containing no substantive information, such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling related activities;
> - Suspense and tickler files or "to-do" and task lists that serve as a reminder that an action is required on a given date or that a reply to action is expected, and if not received, should be traced on a given date.

The disposition of these records is: "Destroy immediately, or when no longer needed for reference, or according to a predetermined time period or business rule (e.g., implementing the auto-delete feature of electronic mail systems)."

The disposition of transitory records is not different from the disposition of other federal records. Federal employees are encouraged to dispose of transitory records consistent with General Records Schedule 23, as they are encouraged to carry out disposition of other federal records according to the agency-specific, NARA-approved records disposition schedules.

EPA's Compliance with the Federal Records Act

As a general matter, NARA cannot speak authoritatively to agency compliance with the Federal Records Act. EPA has participated in NARA's annual Records Management Self-Assessment (RMSA) survey since it was established in 2009. The RMSA is a self-reported evaluation of compliance with NARA's records management regulations. NARA does some validation of survey responses, but the validation is limited to the verification that records management program policies are in place. Overall, the EPA has scored well on the self-assessment. More information on the RMSA can be found at http://www.archives.gov/records-mgmt/resources/self-assessment.html.

Like other agencies, EPA has self-reported records management issues to NARA (44 U.S.C. 3105 and § 3106), which my staff and I work to resolve with EPA records management staff. EPA has been responsive and cooperative with NARA staff in these dialogues, and has provided all supplementary information NARA requested. NARA is also aware of the EPA Inspector General Report, 13-P-0433, Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts. NARA is aware that the report found no evidence that the EPA used, promoted or encouraged the use of private "non-governmental" email accounts to circumvent records management responsibilities, and that as of the time the report was issued EPA had completed 2 of the 5 OIG recommendations. NARA is familiar with the various activities that the EPA is undertaking to address the three remaining recommendations. More broadly, NARA is aware of the ongoing work of the EPA's Federal Records Program, including an increased focus on annual records training, development of an EZ-Email Records capture tool that works with the EPA's new email system, development of new guidance specifically related to text-message records retention, and promotion of records management through periodic Agency-wide records management days.

Related to the broader government-wide oversight issue, NARA's FY 2016 budget request includes a request for additional staff to expand our oversight activities, with an emphasis on electronic records management compliance. Enhancing this oversight function will allow NARA to better understand the challenges EPA and other agencies are facing as they transition from an analog to an electronic approach to managing their federal records.

Conclusion

The management of federal records in all of their forms is a central, animating issue for the National Archives and the government as a whole. In that regard, the Science Committee's interest in records management at the EPA, and all its sister agencies, is also topic of interest to the National Archives.

The talented staff of the National Archives and Records Administration looks forward to working on records management with EPA now and for many years to come. The long-term success of the National Archives – and the historical record of our nation – depends on our collective success.

Thank you for the opportunity to appear today. I look forward to answering your questions.

Biographical Note – Paul M. Wester, Jr.

Paul M. Wester, Jr. is the first Chief Records Officer for the U.S. Government. David Ferriero, the Archivist of the United States, named Mr. Wester to this position effective March 13, 2011.

As the Chief Records Officer, Mr. Wester leads records management throughout the Federal Government, with an emphasis on electronic records. He is responsible for issuing Federal records management policy and guidance; liaisoning with Office of Management and Budget (OMB), the U.S. Congress, and other stakeholders on records management issues; and serving as an ombudsman between agencies and the Archivist to ensure that NARA and the agencies it serves meet their statutory mandates and records management requirements.

Mr. Wester played a leading role in developing the Presidential Memorandum on Managing Government Records that was issued by the Obama Administration in November 2011 and the subsequent implementing directive from the Director of the Office of Management and Budget, and the Archivist of the United States in August 2012. These policy documents advance the current administration's larger Open Government goals associated transparency, participation, and collaboration.

Prior to his current appointment, Mr. Wester served as the Director of Modern Records Programs in the National Archives and Records Administration's Office of Records Services – Washington, DC. In this position, Mr. Wester was responsible for the overall management and performance of NARA's agency-facing activities in the Washington, DC area. Mr. Wester also directed NARA's National Records Management Program, coordinating the activities of headquarters and regional records management staff in support of NARA's overall strategic plan.

Mr. Wester holds an undergraduate degree in history and Master of Arts and Master of Library Science degrees from the University of Maryland. In 2013, he was named the Distinguished Archives Alumnus of the Year by the College of Information Studies at the University of Maryland. In 2014, Mr. Wester received the Executive Leadership Award in Government-wide Records Management from the Association for Federal Information Resources Management.

Mr. Wester is also an Adjunct Instructor University of Maryland's the College of Information Studies, teaching graduate-level classes in records and information management, and the leadership and management of cultural institutions.

Chairman LOUDERMILK. Thank you, Mr. Wester, and I now recognize Mr. Christensen for five minutes to present his testimony.

TESTIMONY OF MR. KEVIN CHRISTENSEN,
ASSISTANT INSPECTOR GENERAL FOR AUDIT,
OFFICE OF INSPECTOR GENERAL,
ENVIRONMENTAL PROTECTION AGENCY

Mr. CHRISTENSEN. Good morning, Chairman Loudermilk, Chairman Bridenstine, Ranking Member Beyer, and Ranking Member Bonamici, and the Members of the Subcommittees. I am Kevin Christensen, the EPA OIG, Office of Inspector General, the Assistant Inspector General for Office of Audit. Today I will discuss three matters: the records management policies of the EPA, OIG's report congressionally requested inquiry into EPA's use of private and alias email accounts, and EPA's compliance with the Federal Records Act. I will highlight some of the EPA's most significant records management policies and procedures.

In June 2009, the records management policy was revised to establish responsibilities and requirements to ensure that the Agency is in compliance with federal laws and regulations and the best practices for managing records. In June 2013, the records management policy was again revised to provide EPA employees with guidance when using personal email accounts to conduct government business and instant messaging. Recently in February 2015, the records management policy was revised further to include guidance on the use of text message on EPA's information system and personal devices. The EPA has also published several reminders to Agency senior officials and employees regarding their records management responsibilities.

In response to a request from the House Committee on Science, Space, and Technology, the OIG completed an audit to determine whether the EPA followed applicable laws and regulations when using private and alias email accounts to conduct official business. We issued our final report in September 2013. The audit found no indications that EPA senior officials had used, promoted or encouraged the use of private non-governmental email accounts to circumvent records management responsibilities or any EPA senior official reprimanded, counseled or took administrative actions against personnel for the use of private email or alias email accounts for conducting official government business.

We uncovered no facts to support Agency senior officials had used private email intentionally to circumvent federal record-keeping responsibilities. We determined that assigning personnel multiple email accounts is widely practiced within the Agency.

However, this is not limited to EPA senior officials and presents risk to the EPA's records management efforts if these additional email accounts are not searched during FOIA requests or preserved as records.

We also conducted an audit of the Clean Water Act Section 404 permit notification reviews for surface coalmining and issued our report in February 2012. We found without complete records, it was difficult for the EPA to know the permit status and the resolution of EPA's comments related to the Clean Water Act.

Additionally, we are currently conducting an audit reviewing the processes for preserving text messages. The objectives include whether EPA implemented policies and procedures to determine which text messages to preserve and steps to ensure that the employees are knowledgeable of this guidance, implemented processes to respond to Congressional and FOIA requests involving agency employees' text messages, used text messages for informational business, and deleted, destroyed, lost or misplaced text messages needs for records management, and if applicable, the rationale for destroying text communication records. We anticipate this audit to be completed in September of 2015.

I am here today at the request of the Committee to report on how the EPA has conducted itself in line with relevant laws and rules—laws and records—rules for records management. Today I have outlined the records management policies within EPA and the result of our audit work into EPA records management practices along with the ongoing work into the Agency text messaging. We are committed to working with Congress and the EPA to help realize the benefits of an effective records management program that enables and supports the Agency work to fulfill its mission.

This concludes my statement. Thank you for the opportunity to testify before you today. I will be pleased to answer any questions you may have.

[The prepared statement of Mr. Christensen follows:]

[redacted]

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Records Management Practices at the EPA

Statement of Kevin Christensen
Assistant Inspector General for Audits

Before the Committee on Science, Space, and Technology
Subcommittees on Oversight and Environment
U.S. House of Representatives

March 26, 2015

Statement of Kevin Christensen
Assistant Inspector General for Audits
Office of Inspector General
U.S. Environmental Protection Agency
Before the
Committee on Science, Space, and Technology
Subcommittees on Oversight and Environment
U.S. House of Representatives
March 26, 2015

Good morning, Chairman Loudermilk, Chairman Bridenstine, Ranking Member Beyer, Ranking Member Bonamici and members of the subcommittees. I am Kevin Christensen, Assistant Inspector General for the Office of Audit at the U.S. Environmental Protection Agency (EPA). Thank you for inviting me to appear before you. Today I will discuss three matters: (1) Records management policies at the EPA from 2009 to the present; (2) the Office of Inspector General's (OIG's) report *Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts* (Report No. 13-P-0433) and (3) the EPA's compliance with the Federal Records Act.

Overview of the EPA OIG

The OIG is an independent and objective office within the EPA that is uniquely charged with conducting audits and investigations related to programs and operations at the agency. The views expressed in my testimony are based on findings and recommendations of the OIG and are not intended to reflect the EPA's position.

I. Records Management Policies at the EPA

I have highlighted some of the EPA's most significant records management policies and procedures that have been in place between 2009 and the present. Most of these documents are available on the EPA's internal Records Management Web page, which separates the EPA's policy and guidance into two categories: Directives/Procedures and Memoranda. The Directives/Procedures section lists the EPA-specific records management guidance that agency personnel must follow. The Memoranda section lists pertinent reminders to EPA personnel regarding their records management responsibilities. The EPA's Records Management Web page lists the following policies:

- **EPA Records Management Policies**

    1. **EPA Policy CIO 2155.1**, *Records Management Policy*, published June 2009: This policy established responsibilities and requirements for managing the EPA's records to ensure that the agency is in compliance with federal laws and regulations, EPA policies and best practices for managing records.

    2. **EPA Policy CIO 2155.2** *Interim Records Management Policy,* published in June 2013: This interim policy provided EPA employees with records management

guidance when they used personal email accounts to conduct government business and text messaging, instant messaging or other transient messaging technologies on EPA information systems.

3. **EPA Policy CIO 2155.3** *Records Management Policy,* published in February 2015: This update provided EPA employees with records management guidance when they use text messaging on EPA information systems and personal devices.

- **EPA Records Management Manual,** published February 2007: This manual prescribes requirements and responsibilities for conducting the EPA's records management program to ensure that the agency is in compliance with federal laws and regulations, EPA policies and best practices.

- **Records Schedules:** These schedules are the EPA's official policies on how long to keep agency records (retention) and what to do with them afterwards (disposition).

- **EPA Policy CIO 2155-P-04.0**, *Preservation of Separating, Transferring or Separated Personnel's Records in Accordance with the Federal Records Act*, published December 2014: This procedure describes how to manage records of separating, transferring or separated EPA personnel.

- **EPA Policy CIO 2155.P-01.0**, *Vital Records Procedure*, published June 2009: This procedure prescribes requirements and responsibilities for establishing and maintaining the EPA's vital records program.

Since November 1995, the EPA also has published several reminders to agency senior officials and employees regarding their records management responsibilities. These include:

- **Chief Information Officer Memorandum**, *Managing Records for Departing Senior Agency Officials*, published September 2008 and August 2007: This memorandum reminds all senior EPA officials of their responsibility to follow federal record-keeping requirements for maintaining and disposing of agency records when they leave the EPA.

- **Chief Information Officer Memorandum**, *Scheduling Agency Electronic Information Systems as Required by Section 207(e) of the E-Government Act of 2002*, published March 2008: This memorandum reminds senior EPA officials of the responsibility to improve management of electronic records, including the identification and scheduling of electronic records and incorporating records management and archival functions into new information systems.

- **Chief Information Officer Memorandum**, *Calendars of Agency Senior Officials,* published November 2007: This memorandum reminds senior EPA officials that their calendars are designated as permanent government records.

- **General Counsel Memorandum**, *E-Mail Legal Requirements,* published November 1995: This memorandum outlines the legal responsibilities of EPA employees relating to the creation, maintenance and disposition of electronic mail.

II. OIG's Report on the EPA's Use of Private and Alias Email Accounts

In response to a request from the House Committee on Science, Space, and Technology, the OIG initiated an audit to determine whether the EPA followed applicable laws and regulations when using private and alias email accounts to conduct official business. In particular, the OIG sought to determine whether the EPA 1) promoted or encouraged the use of private or alias email accounts to conduct official government business; 2) reprimanded, counseled or took administrative actions against any employees using private or alias email accounts; 3) established and implemented email records management policies and procedures for collecting, maintaining and accessing records created from any private or alias email accounts; 4) provided adequate training to employees concerning the use of private or alias email accounts to conduct official government business; and 5) established and implemented oversight processes to ensure that employees comply with federal records management requirements pertaining to electronic records from private or alias email accounts.

We conducted audit field work from December 2012 to June 2013, resulting in interviews of more than 100 EPA personnel responsible for implementing and complying with the EPA's federal records guidance. These interviews included the acting EPA Administrator, Assistant and Regional Administrators from five program and five regional offices, and the former Region 8 Administrator, as well as senior agency personnel with direct oversight of the EPA's National Records Management Program. The OIG issued its final report on September 26, 2013.

We found no evidence that senior EPA officials had used, promoted or encouraged the use of private "nongovernmental" email accounts to circumvent records management responsibilities or reprimanded, counseled or took administrative actions against personnel for using private email or alias accounts for conducting official government business. EPA senior officials were aware of the agency records management policies, and we uncovered no evidence that these individuals had used private email intentionally to circumvent federal record-keeping responsibilities.

For the purpose of our audit, an alias email account was defined as a secondary "epa.gov" account used to conduct EPA business. Our audit noted that the previous EPA Administrator and the subsequent acting EPA Administrator (the Deputy Administrator) each had two EPA email accounts, one intended for messages from the public and one for communicating with select senior EPA officials. Interviews with selected Assistant and Regional Administrators and records management officials disclosed that the practice of assigning personnel access to multiple email accounts is widely practiced within the agency. However, this practice is not limited to senior EPA officials, and presents risks to the agency's records management efforts if these additional email accounts are not searched to preserve federal records. Additionally, the EPA had not:

- Provided guidance on preserving records created from private email accounts.
- Implemented oversight processes to provide regular training on records management responsibilities.
- Implemented consistent employee out-processing procedures to ensure that federal records are not identified and preserved before an employee departs the agency.
- Deployed an automated tool to create federal records from its new email system.

We made five recommendations to the EPA to address the above findings and the EPA concurred with these recommendations. Prior to our final report issuance, the EPA 1) published an updated interim records management policy to provide guidance to agency employees on the rules for using private email accounts when conducting government business and 2) developed a process to train all EPA employees and contractors on their records management responsibilities. The EPA also reported completing corrective action to implement an electronic content management tool to capture email records within the agency's new email system in December 2013. For the remaining two recommendations, the EPA reported completing the corrective actions in November and December 2014, respectively. To date, the OIG has not verified the completion of the corrective actions.

Additionally, in response to our 2013 audit report on the EPA's use of alias and private email accounts, the agency reported that it completed corrective actions for two recommendations in June and July 2013; one recommendation in December 2013; and the remaining two recommendations in November and December 2014, respectively.

III. EPA's Compliance with the Federal Records Act

The Federal Records Act regulations, 44 U.S. Code Chapter 33, Section 3301, define "records" as including "all recorded information, regardless of form or characteristics, made or received by a Federal agency 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 United States Government or because of the informational value of data in them."

In this regard and in addition to the above audit, the OIG conducted the following audits regarding the EPA's ability to comply with provisions of the Federal Records Act:

- *EPA Should Strengthen Records Management on Clean Water Act (CWA) Section 404 Permit Notification Reviews for Surface Coal Mining* (Report No. 12-P-0249), issued February 2, 2012: We found that, without sufficient records, it is difficult for the EPA to know the permit status and the resolution of the EPA's comments related to the CWA. Furthermore, the lack of records makes it difficult for the EPA to determine whether its review activities have the environmental impact envisioned by the CWA. As a result, the EPA risks not being in compliance with the Federal Records Act and EPA policy. The OIG made four recommendations to the EPA for improving its record-keeping processes related to Section 404 of the CWA. The EPA concurred with all four recommendations and, in May 2013, reported that it had completed all corrective actions to improve the record-keeping capabilities of its system that maintains official records which document the agency's role in CWA Section 404 permit notification reviews. The OIG has not verified the completion of the corrective actions.

Additionally, the following audit of the EPA's records management practices is ongoing:

- *Audit of EPA Processes for Preserving Text Messages*: The objectives are to determine whether the EPA: 1) implemented policies and procedures to determine which text messages to preserve and steps to ensure that employees are knowledgeable of this guidance; 2) implemented processes to respond to congressional and Freedom of

Information Act requests involving agency employees' text messages; 3) used text messages (on government-issued or personal devices) for official business; 4) deleted, destroyed, lost or misplaced text messages needed for records management; and, if applicable, the rationale for destroying text communication records; 5) took disciplinary actions against employees for deleting, destroying, losing or misplacing text communication records; and 6) notified the National Archives and Records Administration about the potential loss of any federal text records, and how often the losses occurred.

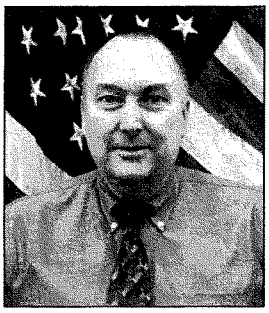
Conclusion

I am here at the request of this committee to report on how the EPA has conducted itself in line with relevant laws and rules for records management. Today, I have outlined the prevailing records management policies within the EPA, and the results of our audit work into the EPA's records management practices along with our ongoing audit work into the agency's text messaging practices.

As previously discussed, the OIG issued two audit reports dated February 2012 and September 2013 on the EPA's efforts to comply with federal records requirements. These reports collectively included nine recommendations for how the EPA could improve its records management practices. The EPA has taken significant steps to publish policies that address compliance with National Archives and Records Administration and Federal Records Act requirements. The EPA's leadership has shown a commitment to address many of the problems and weaknesses identified by the OIG. We are proud to have brought these issues to light and are committed to working with this committee and the EPA to help realize the benefits of an effective records management program that enables and supports the agency's work to fulfill its mission.

This concludes my statement. Thank you for the opportunity to testify before you today. I will be pleased to answer any questions that you may have.

Biography of Assistant Inspector General for Audit Kevin Christensen



Kevin Christensen is the Assistant Inspector General for Audit, Office of Inspector General (OIG), at the U.S. Environmental Protection Agency (EPA). He oversees the OIG's Office of Audit, consisting of five product lines with 90 personnel. His office conducts financial and performance audits, attestation engagements, and special reviews of EPA and U.S. Chemical Safety and Hazard Investigation Board programs, including grantee and contractor performance. Audits review compliance with federal policies and regulations to determine whether programs are effective and efficient in producing environmental results and achieving agency goals and themes.

Mr. Christensen began his government career in the military, serving 9 years as a Naval officer. Upon leaving the Navy, he worked at the Naval Audit Service, where he became a manager. His experience included managing various assignments—both overseas and in the United States—of intelligence programs, major systems acquisition, financial, supply and logistics, readiness, special bonus and incentive pay, research and development, procurement/contract administration procedures, cash/financial management procedures, organizational structure analysis, grantee or contractor performance, and quality assurance.

Mr. Christensen subsequently joined the EPA OIG in 2008 and served for 4 years as a member of the OIG referencing staff. He was a technical expert on *Government Auditing Standards* and the Inspector General Act, and led audit teams completing peer reviews of other OIGs. He also served as the acting Deputy Assistant Inspector General for Audit and the acting Assistant Inspector General for Audit.

Mr. Christensen graduated from Nebraska Wesleyan University with degrees in chemistry and biology. He is very active as a leader in the Boy Scouts, and spends his free time backpacking, hiking, camping and riding his bike.

Chairman LOUDERMILK. Thank you, Mr. Christensen.

I now recognize Dr. Schnare for five minutes to present his testimony.

TESTIMONY OF DR. DAVID SCHNARE, FORMER SR. ATTORNEY, EPA OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE; DIRECTOR, FREE-MARKET ENVIRONMENTAL LAW CLINIC; DIRECTOR, CENTER FOR ENVIRONMENTAL STEWARDSHIP, THOMAS JEFFERSON INSTITUTE FOR PUBLIC POLICY; GENERAL COUNSEL, ENERGY & ENVIRONMENT LEGAL INSTITUTE

Dr. SCHNARE. Thank you, Mr. Chairman, all the Members of the Committee. I appreciate your interest in this subject. My role here today apparently is to be a foil, and all I wish to do is to be a witness, and so I will fulfill that role.

The question before the Committee today is whether it can have confidence that EPA is implementing the Freedom of Information Act and the Public Records Act, especially in the context of text messages. My three decades and more of experience at EPA including working with very high officials including the political-appointee level suggests, sadly, that you cannot.

Let me make a few points, and I will rest on my written testimony. Let me first say that with regard to fake email addresses, there has been a change in the culture of the Agency. For example, Administrator Whitman had an email address called "towit," rather clever, I thought, but when you received an email from that private email account, it said "from Administrator Whitman," unlike Administrator Johnson, who when she used "Richard Windsor" showed it as coming from Richard Windsor. This is a level of artifice that frankly is inappropriate and was a change from previous Administrations.

Secondly, I have had the pleasure, if you will, if having to deal with a great deal of civil discovery and Freedom of Information request activities, and had to help senior officials with review of documents that they had in their personal possession. We managed a 7-million-page discovery request in a civil case. We ended up producing 2.2 million pages of material. The privilege log stood taller than I am myself. The fact is that when you get large requests of this kind, many hands make light work, and so the slowdown of the Agency in producing documents is merely a question of whether they are going to put the people on it and spread the work or not.

Thirdly, there is a critical time when Agency officials and where they are and what they are doing is important to know. When the Agency is making decisions, for example, on a regulatory matter, after the record closes, ex parte communications are inappropriate. So if you see a text message between the Administrator and someone who is an advocate or lobbyist and it says "I'll see you at Starbucks at 3," that may seem as though it is a benign text message that has no content or meaning and could be destroyed, but it is more than that. It is an indication that the Administrator is meeting or some official is meeting with someone from outside the Agency at a time when one must take great care in what those

meetings are and what is said about them and how they are recorded, and thus it is important for the public to know when Administrators and other high officials are talking to people, and that includes the media and the press, and we have seen documents that say during this period of time when text messages were destroyed, that in fact the phone records show the records were made—the text messages were made to members of the media.

And so when you look at what is going on and how text messages are used and what has been kept secret, you have to actually ask someone who has been in the belly of the beast. I have had the fortune of having to go through senior executives' materials for purposes of production, and inevitably, one finds messages and materials you really don't wish to make public because they are embarrassing, not because they shouldn't be released, and indeed, there are almost always files set aside that you are not—you are asked not to look at, and in fact, some of these folks have said to me when I identify some of these, "Oh, I really don't want those out. Let's just ignore those." And when I asked for help from the Administrator's office on Freedom of Information requests to which they must respond and they did not, my own senior management went up and asked for that, and the answer we got back was "let it go."

And so, Mr. Chairman, I will be happy to answer your questions. I thank you for the opportunity to come up here. I didn't seek it but I will be happy to answer your questions as you may choose.

[The prepared statement of Dr. Schnare follows:]

Testimony Before the
United States House of Representatives
Committee on Science, Space, and Technology
Washington, D.C.

Thursday, March 26, 2015

"EPA's Compliance with the Federal Records Act and the Freedom of Information Act"

Presented by
David W. Schnare, Esq. Ph.D.
[Short biography follows the testimony.]

Good morning Mr. Chairman and Members of the Committee. You have asked me to address EPA's compliance with the Federal Records Act and the Freedom of Information Act. To place my testimony in context, let me introduce myself. Currently I serve as General Counsel for the Energy & Environment Legal Institute and am Director of the Free Market Environmental Law Clinic. Previously I served as a scientist, attorney and director of a economic, legislative and policy branch, all within the U.S. Environmental Protection Agency (EPA). I retired from EPA after 33 years of service. My experience as a responder to Federal and State Freedom of Information Acts (FOIA) extends back four decades and includes my service in the United States Navy and while at the University of North Carolina – Chapel Hill.

In the year prior to my retirement from EPA (2011), I served as a member and major author of a study on how EPA could improve the speed and quality of responses to FOIA and civil enforcement discovery. I am pleased to report that EPA implemented most of the recommendations we made – recommendations that allow the Agency to speed FOIA responses, document review and redactions. The most important changes shift public records collection to a "back office" effort, freeing EPA staff from having to seek responsive records. Because a single EPA office now collects the public records, at least those in electronic form, it improves the overall quality of the process and evens out that quality across the agency.

Having an improved electronic capability, however, does not solve the many problems this Committee is investigating. Before I discuss the continuing problems, let me identify the relevant requirements EPA is required to meet, in particular with respect to emails and text messages.

EPA's Public Records Retention Responsibilities

This Committee is well aware of the federal laws and regulations with which EPA must comply. Let me highlight the critical requirements on which EPA seems to fail too often.

EPA manages its records management through regulations and Agency policies. The

Agency's Chief Information Officer issued Interim Records Management Policy, CIO 2155.2, which states that each office within EPA is required to establish and maintain a records management program with a number of minimum requirements, including:

> "Manage records, in any format (e.g., paper, email, IMs, electronic documents, spreadsheets, presentations, images, maps, video, blogs, and other social media tools that generate communications), in accordance with applicable statutes, regulations, and EPA policy and guidance."[1]

EPA is required to not simply manage records, but to maintain them as well:

> "Maintain electronic records, (e.g., email, IMs, electronic documents, spreadsheets, presentations, images, video, blogs, and other social media tools that generate communications), in an approved electronic records management system."[2]

EPA also provides specific direction relative to the protection and retention of public records on mobile devices, including text messages.[3] The Agency policy is to require retention of "non-transitory" records – records defined as any record that does not meet the definition of a "transitory" record.[4]

Citing to the National Archives and Records Administration (NARA) General Records Schedule No. 23 (GRS 23), and EPA Records Schedule 167, EPA defines "transitory" records as:

> "records of short-term (180 days or less) interest, which have minimal or no documentary or evidential value. An example of a transitory record is a record documenting routine activities containing no substantive information, such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling related activities. Transitory records can be deleted immediately, or when no longer needed for reference, or according to a predetermined time period or business rule.[5]

Note, however, that while many employees may delete calendar and scheduling related activities under Item 5 (Schedules of Daily Activities), "high level officials" may do so only with specific approval of a submission for destruction of such records made to NARA – otherwise they must be retained for two years.[6] Further, "transitory" records are, by NARA definition, "routine" and only routine requests, notices and activities.

Preservation of Text Messages

Particularly at issue in this hearing are text messages. Anyone with a child older than 12 and younger than 30 knows that text messages are the modern equivalent of a phone call. This is

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[1] EPA Information Policy, "Interim Records Management Policy," CIO Approval Date June 28, 2013, available at: http://www.epa.gov/records/policy/2155/CIO-2155.2.pdf.
[2] *Id.*
[3] EPA website, "Frequent Questions about Mobile and Portable Devices, and Records," available at: http://www.epa.gov/records/faqs/pda.htm.
[4] *Id.*
[5] *Id.*
[6] National Archives and Records Administration (NARA) General Records Schedule No. 23, available at: http://www.archives.gov/records-mgmt/grs/grs23.html.

especially true for government officials. But, unlike telephone calls, they are public records subject to preservation under federal law, unless they are transitory.

EPA gives examples of what is and is not "transitory":[7]

> "An example of a text message that qualifies as a transitory record (which can be deleted when it is no longer needed) might be:
>
> *"I'm 5 minutes behind";*
>
> while an example of a text message that qualifies as a non-transitory record (and which would be required to be forwarded into your EPA email account for longer term preservation under a records schedule) might be:
>
> *"I'm 5 minutes behind, go ahead and make the decision without me."*
>
> In the first example, the record value of the message is only to those participants in the meeting who may be wondering where a colleague is, and thus there is no long term value of the message that requires its preservation beyond the start of the meeting. In the second example, the informational value of the message extends beyond the meeting's time-frame, to document information about who participated in an agency decision or action.

EPA then exhorts the important point that employees, including the Administrator of EPA herself, have repeatedly ignored:

> As this example demonstrates, **you need to pay careful attention to use of text messaging as it relates to Agency business to ensure proper management of non-transitory federal records.**

There should be no confusion on the duty to preserve text messages, also known as instant messages. Each of the three CIO Records Management Policies issued under CIO 2155 (versions 1, 2 and 3), the most recent of which is dated February 10, 2015, clearly explain that

> "users of text messaging, instant messaging or other transient messaging technologies on EPA information systems are responsible for ensuring that messages that result in the creation of a substantive (or non-transitory) federal records are saved for FRA purposes and placed in a recordkeeping system. For example, if a text message on an EPA mobile device is received or sent that qualifies as a substantive (or non-transitory) federal record, it must be saved into an approved recordkeeping system.[8]
>
> In a letter to this Committee, EPA admits of this duty:

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[7] EPA, "Frequent Questions about Mobile and Portable Devices, and Records," available at: http://www.epa.gov/records/faqs/pda.htm.

[8] EPA, Records Management Policy CIO 2155.3, 2/10/2015, available at: http://www.epa.gov/records/policy/2155/rm_policy_cio_2155-3.pdf.

"It is the responsibility of the employee to preserve any records from their device that needs to be saved as EPA records. This is in accordance with established EPA Policies regarding retention of EPA records."[9]

Nor is the process of preserving these text message public records hidden, secret or hard to find. Although not available to the public, EPA provides a two-page explanation entitled "Instructions on Saving Text-Messages" on its in-house "intranet."[10] And the Agency provides instructions on how to save instant messages as well.[11]

And, for those employees who don't wish to read the full policy, EPA provides a chart, giving them still another means to understand their responsibilities:

The following chart summarizes your obligations:

What is the retention and where is it stored?	Forward to EPA Email?
Transitory – stored only on the device	**No**
Transitory – stored on the device AND agency systems	**No**
Non-Transitory– stored only on the device	**Yes (then save with EZ Email Records from EPA email)**
Non-Transitory– stored on the device AND agency systems	**No (but save with EZ Email Records from EPA email)**

(*emphasis in the original*).[12]

The problem at EPA is not about the technology, the public records policy or the law, it is about the employees, the culture and the failure of senior managers, including political appointees, to follow the law. The current culture is to keep secret that which should be available to the public.

The Requirements of the Freedom of Information Act

This Committee is well aware of the reach of the Freedom of Information Act and the duty of EPA employees to properly implement that act. Among these duties is both the need to "respond" in

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[9] Letter from The Honorable Representative Lamar Smith, Chairman, United States House of Representatives Committee on Science, Space, and Technology to the Honorable Arthur A. Elkins, Jr., EPA Inspector General (Nov. 10, 2014).
[10] *Id*, linking to: http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf.
[11] *Id*, linking to: http://intranet.epa.gov/ecms/guides/im.htm.
[12] *Op cite*, note 7 *supra*.

a timely fashion and as well the duty to "produce records promptly."[13]

As well, EPA must conduct a proper search to find responsive records. The Department of Justice has addressed this duty:[14]

> As a general rule, courts require agencies to undertake a search that is "reasonably calculated to uncover all relevant documents."[15] The Court of Appeals for the District of Columbia has held that "'the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.'"[16]
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> * * *
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> Courts have disfavored searches that are based on unreasonable interpretations of the scope of the request,[17]or which exclude files where records might have been located.[18] In addition, the reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations, or whether the agency improperly limited its search to certain record systems.[19]
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> An agency generally "is not obligated to look beyond the four corners of the request for leads to the location of responsive documents," but courts have found that an agency does "need to pursue a lead it cannot in good faith ignore, i.e., a lead that is both clear and certain."[20]

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[13] *See*, 5 U.S.C. § 552(a)(6)(C)(i); *and see* CREW v. FEC, 711 F.3d 180, 189 (D.C. Cir. 2013) (holding that, after processing FOIA request and making determination, agency may still need some additional time to physically redact, duplicate or assemble for production documents located, however, **"agency must do so and then produce records 'promptly'"**); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2845, 2008 WL 2523819, at *15 (E.D. Cal. June 20, 2008) (supporting practice of releasing documents "on a rolling basis" if necessary, as this respects statute's "prompt release" requirement).

[14] Department of Justice, "Department of Justice Guide to the Freedom of Information Act", available at: http://www.justice.gov/oip/doj-guide-freedom-information-act-0, Chapter: "Procedural Requirements" available at http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf#p39.

[15] See Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983); Campbell v. SSA, 446 F. App'x 477, 480 (3d Cir. June 3, 2011) (same) (citing Weisberg, 705 F.2d at 1351);

[16] Jennings v. DOJ, 230 F. App'x 1, 1 (D.C. Cir. 2007) (quoting Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003)); Delorme v. EOUSA, No. 12-0535, 2012 WL 5839513, at *1 (D.D.C. Nov. 16, 2012).

[17] Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (stating that when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); Nat'l Sec. Counselors v. CIA, 549 F. Supp. 2d 6, 12-13 (D.D.C. 2012) (agreeing that agency might have unreasonably limited scope of request because search results indicated that agency was aware that plaintiff sought records related to particular subject);

[18] Canning v. DOJ, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that when agency was aware that subject of request used two names, it should have conducted search under both names).

[19] Davis v. DOJ, 460 F.3d 92, 105 (D.C. Cir. 2006) (remanding case "to provide the agency an opportunity to evaluate [search] alternatives" including nonagency internet search tools).

[20] 0 See, e.g., Kowalczyk, 73 F.3d at 389; Int'l Counsel Bureau v. DOD, 864 F. Supp. 2d 101, 108 (D.D.C. 2012) (finding search inadequate because agency did not provide "a satisfactory response to [plaintiff's] contention that it should have searched for records using an alternate spelling of [a detainee's] name that [plaintiff] discovered from the Department's own records").

With regard to emails, text messages and instant messaging, EPA senior officials have failed in these two duties – not because they lack the ability to comply with the law, but because they lack the willingness to do so. This unwillingness has trickled down to junior staff.

The EPA Culture of Secrecy

EPA has prided itself on being an innovative agency, a leader in many areas of executive department bureaucracy. For example, as an experienced EPA analyst, I was asked to teach cost-benefit analysis to the Corps of Engineers, to lecture the Ukrainian government on free-market economics and to teach compliance with the Small Business Regulatory Enforcement Fairness Act throughout the federal executive. I am but one example of how EPA staff have been far ahead of many other federal agencies. This includes FOIA implementation. The Agency's technological approach to FOIA may be the most sophisticated inside the "Beltway."

Further, enterprising staff have dedicated time to employing new technologies, including the emergence of emails, the use of text and instant messaging and exploitation of social media. EPA encourages use of new technology and these efforts show up on the internet. For example, EPA prepared an 83 page PowerPoint presentation on how to use electronic tools to collaborate with "external partners."[21] This presentation encourages use of instant messaging, other "real-time" correspondence tools, and even encourages using AOL and Yahoo and asking 3rd parties to set up chat rooms.[22]

But, this presentation also documents the culture of disregard for agency duties under public records and FOIA requirements. It characterizes FOIA and NARA rules as "Federal Laws that Constrain Federal Administration of Public-Facing Web Collaboration Tools." The next section of the presentation describes "Creative Solutions to Dealing with Federal Constraints" and openly suggests way to circumvent public records acts. Specifically, EPA encourages its employees to help outside parties to sponsor the web-based collaboration tools, noting that "As long as we are only participants, not administrators of a web collaboration site, the site is not limited by those same [FOIA and Public Records Act] constraints."

Efforts to avoid the duty to comply with FOIA and records retention requirements starts at the top of the Agency. Perhaps the most troublesome is where staff working directly in the Office of the Administrator simply refuse to comply with FOIA. EPA failed to respond to a request for emails from and to Administrator Jackson when it disregarded all emails send by and to "Richard Windsor," a pseudonym the Administrator used in place of her "public" persona email address. It is not as though EPA was unaware of the law. EPA staff are routinely trained on how to conduct FOIA searches and since 1994, the law on looking for pseudonyms was well established. *See*, *Canning v. DOJ*, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that **when agency was aware that subject of request used two names, it should have conducted search under both names**) (*emphasis added*).

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[21] *See*, EPA, "Web Collaboration Tools" available at: http://semanticommunity.info/@api/deki/files/993/Web_Collaboration_Tools_WWG_Oct_06.ppt.

[22] Notably, the presentation fails to indicate that reference to these commercial applications does not constitute EPA endorsement of them, as required under Federal law. This is but one more example of the willingness of the Agency to simple ignore their legal duties.

The EPA Office of Executive Secretariat employee[23] whose duty is to respond to FOIA requests made of the Administrator knew Ms. Jackson used the Richard Windsor address but never informed the FOIA "back office" that assembles the responsive emails for his privilege review. Once caught out, this employee exacerbated his misanthropic behavior, informing the requestor that he would only process 100 emails a month and the Agency would not be done until the next century.

To put this "100 a month" number into perspective, let me share with you my experience on FOIA document reviews. With a colleague in the Department of Justice, I managed a civil enforcement discovery request that sought records dating from 1970 and found in every EPA Regional office as well as four headquarters offices; and in several Federal Records Centers. We employed over 50 attorneys to conduct privilege review and to redact records as necessary. This work is identical to review of responsive records for exceptions under FOIA – exemptions that allow the Agency to withhold the public records. We reviewed over 7 million pages of records, producing 2.2 million. On the basis of that experience, and four decades of having to respond to both State and Federal FOIA requests, I suggest that it takes approximately one hour to review 100 emails and even less time to review 100 text messages. In fact, with the new technologies EPA has installed in the past two years, it should take even less time.

EPA's refusal to produce the Richard Windsor emails is a blatant violation of the FOIA duty to produce records promptly. However, that employee has not been reprimanded and based on EPA's official response to the request, has not been instructed to accelerate his production.

Thus, it should come as no shock that the current Administrator, Ms. McCarthy, and those who support her FOIA responsibilities in the Office of the Administrator and in the Office of Environmental Information's Office of Information Collection have blatantly violated the Federal Records Act.

EPA acknowledged before the U.S. District Court for the District of Columbia that it has destroyed all copies of text message correspondence sent to or from current Administrator Gina McCarthy's EPA-assigned account when Ms. McCarthy was Assistant Administrator for Air and Radiation. EPA explained that this was because all 5,932 text messages on Ms. McCarthy's EPA phone identified in response to that request were "personal." But, they weren't. The FOIA requester was able to obtain EPA telephony metadata records for seven months, in response to a different FOIA request. These showed Ms. McCarthy corresponding, by her EPA-provided text message account, with eleven EPA co-workers' EPA-provided accounts, including those of Ms. McCarthy's senior policy aides.

When this misbehavior surfaced, Ms. McCarthy, when asked by Agency employees to explain her response to a FOIA request for her text messages, created additional public records

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[23] Jonathon Newton. Mr. Newton has become well known within the Agency as uncooperative and unresponsive with regard to obtaining his assistance in searching for and reviewing emails and other documents in the custody of the Administrator. In my personal experience, on two occasions he simply never met his duties and in each case I was forced to respond to the FOIA requests without his input, despite knowing that in so doing the responses were legally deficient. My management chain was informed and failed to provide any assistance in dealing with this problem, one continuingly resident in the Office of the Administrator.

that explain her texting practices. EPA now refuses to release all of those public records, including the steps taken to retrieve her text messages. EPA is withholding hundreds of emails responsive to this request in full, and hundreds of others in part, according to redacted emails and an index it has provided plaintiff. This list of emails withheld in full also withholds the identities of all parties to each email except the sender.

There is a reason EPA employees are emboldened to flout FOIA and public records preservation duties. There is no penalty if they do and senior management is pleased when they do. Destroying public records allows senior management to keep secret its contacts outside the agency. They are more free to collude with political advocates, including those who are supposed to be bound by non-profit restrictions disallowing direct lobbying.

Nor, of course, is EPA an Administration outlier. There is no need to list other agencies and other Presidential appointees who simply ignore public records act requirements.

Conclusion

EPA's culture of failing to meet its duty under the Freedom of Information Act and the Federal Records Act must change, but Congressional oversight, alone, is insufficient. Although there are sanctions for disobeying the law, those sanctions are too cumbersome and have never been used. Courts have refused to sanction Agencies unless there is clear evidence of an intent to violate the law, a very high evidentiary hurdle, especially in cases where the court does not allow or disfavors civil discovery and deposition of agency employees. Even where such discovery is available, the cost is prohibitive and prevents most information requesters from using all available legal tools.

Thomas Jefferson instructs us that "Whenever people are well-informed they can be trusted with their own government;" and, "when a man assumes a public trust, he should consider himself as public property." That is the essence of FOIA and the purpose of the FRA. Until EPA hews to this standard, it fails the nation and deserves sanctions sufficient to bring it back within the confines of the law and public trust.

Short Narrative Biography
Of
David W. Schnare, Esq. Ph.D.

Dr. Schnare is Director of the Free-Market Environmental Law Clinic, Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute for Public Policy and General Counsel for the Energy & Environment Legal Institute. He has retired from 33 years in public service as a senior attorney and scientist with the U.S. Environmental Protection Agency's Office of Enforcement. He has served on the staff of the Senate Appropriates Committee, as the nation's Senior Regulatory Economist with the U.S. Office of Advocacy for Small Business and as a trial attorney with the U.S. Department of Justice and the Office of the Virginia Attorney General. A Member of Sigma Xi, the scientific research society of North America, he published his first peer-reviewed scientific contribution in 1970 and has edited or published chapters in ten books addressing scientific issues and 36 peer-reviewed research contributions, all while in full-time government service. He has published over a dozen peer-reviewed policy reports for non-profit organizations. He is lead counsel on several cases involving both state and federal freedom of information acts and Constitutional questions.

David W. Schnare, Esq. Ph.D.

Dr. Schnare is Director of the Free-Market Environmental Law Clinic, Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute for Public Policy and General Counsel for the Energy & Environment Legal Institute. He has retired from 33 years in public service as a senior attorney and scientist with the U.S. Environmental Protection Agency's Office of Enforcement. He has served on the staff of the Senate Appropriates Committee, as the nation's Senior Regulatory Economist with the U.S. Office of Advocacy for Small Business and as a trial attorney with the U.S. Department of Justice and the Office of the Virginia Attorney General. A Member of Sigma Xi, the scientific research society of North America, he published his first peer-reviewed scientific contribution in 1970 and has edited or published chapters in ten books addressing scientific issues and 36 peer-reviewed research contributions, all while in full-time government service. He has published over a dozen peer-reviewed policy reports for non-profit organizations. He is lead counsel on several cases involving both state and federal freedom of information acts and Constitutional questions.

Dr. Schnare believes that the wealth of a community defines the amount of public investment a community can make and that investments in culture, spirituality, environmentalism, education and research should be balanced and reflect the interests and needs of the community. He champions the steward's ethic, including a responsibility to the inheritors of his own generation.

Chairman LOUDERMILK. And thank you for your testimony, and to all of our witnesses, we really appreciate you coming here to testify. The purpose of this Subcommittee hearing is not to put our witnesses on trial; it is to get to the bottom of why messages were deleted and what changes need to be made, and I assure you that is the purpose of this hearing.

I now recognize myself for five minutes for questions. This question I will present to each one of our witnesses. The one text message record involving Gina McCarthy provided to this Committee was coincidentally sent about a week after the Committee inquired with the Agency about text message retention. What is even more interesting is that the text message came from Gene Karpinski, the President of the League of Conservation Voters, and he said, "Karpinski here. Great job on the EPA comments on Keystone. I feel like the end is very near."

First, Dr. Schnare, as someone who once worked at the Agency, do you find that there was a culture of text messaging or giving out government-issued cell phone numbers to outside groups?

Dr. SCHNARE. It was routine, and the way it worked was, before there were text messages—and I am said to say I remember when we thought fax was a pretty cool thing—the telephone was the way you engaged in these conversations. There was no record other than that you made the call, and that is how people dealt with these outside groups where they didn't really wish to have it known what they were saying and it didn't matter what Administration you were in, that is the practice.

As text messaging came along, it became the shorthand way to do precisely the same thing. So what we have now is a culture of text messages to be very brief but to essentially engage in those kinds of communications that generally you didn't want to have public or you didn't need to have public. That is not the only reason people use text messages. They use them for a variety of purposes but that became one of the mechanisms used to engage in private conversations.

Chairman LOUDERMILK. Thank you, sir.

Mr. Wester, do you know if text messages like these with the heads of agencies or departments speaking with outside influential groups are commonly preserved as federal records?

Mr. WESTER. What I do know is that records that are created or received in the conduct of federal business, which can include text messages and other kinds of electronic communications that document those transactions can be federal records and often are federal records and need to be managed appropriately. Sometimes they can be characterized as transitory records, as I described in my testimony. Otherwise there are specific schedules that are in place within agencies that require different kinds of dispositions for those kinds of materials, but what you are describing, it sounds like it is a message that has been created and received in the conduct of federal business, which means it is a federal record that needs to be managed appropriately. It is a question of which disposition applies to it.

Chairman LOUDERMILK. Thank you, sir.

Mr. Christensen, in your role as Assistant Inspector General for Audit at the EPA OIG, have you found there to be a practice of text

messaging or giving out government-issued cell phone numbers to outside groups? In addition, do you know if the text messages like these between the Administrator at the EPA speaking with outside influential groups are commonly preserved as federal records using EPA's policies and procedures over the years?

Mr. CHRISTENSEN. Sir, we had one audit ongoing, which I mentioned in my testimony, about the text messages. We are still in the field work or the initial research phase of that. We have not reached any conclusions so I couldn't provide any definite yes or no on that answer. We would be happy to share the results when we get finished with the audit.

Chairman LOUDERMILK. Working inside the EPA, would it be common practice that 100 percent of text messages in a four-year period would all be transitory or personal in nature?

Mr. CHRISTENSEN. We haven't completed our work so we haven't come to any conclusion based on our report.

Chairman LOUDERMILK. All right. Thank you.

Considering groups like the League of Conservation Voters can influence important policy decisions that the EPA weighs in on that eventually affect the daily lives of Americans, I find it necessary that communications like these are brought forward and recorded as federal records in order to ensure transparency. Without transparency at the EPA, as we see in the only text message example, there is an appearance of impropriety and undue influence on the EPA's decision makers that could essentially end up hurting American taxpayers without their knowledge of it ever occurring, and that is the context of where we want to go with this.

I will yield back my time at this point. I am sure others have several questions that they would like to engage in, and at this time I recognize Mr. Beyer for five minutes.

Mr. BEYER. Thank you, Mr. Chairman.

I would like to begin just by noting that there is a world of difference between deleting text messages and deleting a federal record and we need to be clear and careful in this matter.

I am new to text messaging. I discovered I had no choice because my children would not return my phone calls, but they answer my text messages right away. And I discovered with my U.S. Congress-issued cell phone that almost all the text messages I get from the staff are: are you still stuck on the 14th Street Bridge; I will meet you at the Science Committee room; votes are called—virtually nothing—I have never seen a vote recommendation or anything else. They have all been in emails or handed to me but never text message because they are a few things long.

I want to just quickly repeat some of the points from Mr. Wester and Mr. Christensen. From Mr. Wester, he said there is—Mr. Christensen rather, Phase 3, no evidence—"We uncovered no evidence of these individuals that used private email intentionally to circumvent federal recordkeeping responsibilities." Page 4, "We made five recommendations of the EPA and the EPA agency reported completed corrective actions for two in June and July of '13, one in December of '13, the remaining two recommendations in November and December 2014." And finally, the last page, "The EPA has taken significant steps to publish policies that address compliance with NARA and the Federal Records Act requirements. And

the EPA's leadership has shown a commitment to address many of the problems and weaknesses identified by the OIG." And in Mr. Wester's statement on page 5, "The EPA has been responsive and cooperative with NARA staff in these dialogues and has provided all supplementary information NARA has requested." So there is a lot of good stuff up there.

But in Dr. Schnare's written testimony, the last page, you say that "There is no penalty if EPA employees"—"EPA employees are emboldened to flout FOIA and public record preservation duties. There is no penalty if they do, and senior management is pleased when they do. Destroying public records allows senior management to keep secret its outside contacts outside the agency, more free to collude with political advocates, including those who are supposed to be bound by nonprofit restrictions, disallowing direct lobbying."

Those are very strong statements, especially that senior management is pleased. How do you know this as a fact and did you ever take these to the Inspector General?

Dr. SCHNARE. I know it is a fact because I am a witness to some of those statements and that is the kind of thing people will say at senior levels, including political appointee levels. You get—when you are as old and gray as I am and you have been around as long as I have, you know, you do work that is of a sensitive nature with people at high political office, and you have loyalty to them and they share statements that otherwise perhaps they might not have and should not have. And I am not going to name names here today, but the fact of the matter is people will say things like, yeah, I got rid of all of that or they will never find that; I have washed that machine clean. That happens. It is not frequent and I don't think you see junior members of EPA do it.

I am very proud of my experience at EPA. I am very proud of the people at EPA and what they have done, but from time to time, the culture changes and it did change under the current Administration.

With respect to making report to the Inspector General, I have done—from time to time called colleagues of mine in the office and pointed out things but not on this subject.

Mr. BEYER. Can I ask, Mr. Christensen, you do have a hotline where people can report these allegations are ongoing?

Mr. CHRISTENSEN. Yes, the—

Mr. BEYER. Or something like a hotline?

Mr. CHRISTENSEN. Yes, the OIG does have a hotline run by our Office of Investigations.

Mr. BEYER. If someone like Dr. Schnare had reported these things, would you have taken him seriously and investigated them?

Mr. CHRISTENSEN. It would have been going into the Office of Investigations and they would have taken the appropriate action that they saw fit. It is outside of my office so I don't oversee that myself.

Mr. BEYER. Dr. Schnare talked about the Richard Windsor/Lisa Jackson email thing. Did you do any investigation on that and did you find any violations of federal law or federal regulation there?

Mr. CHRISTENSEN. During the audit that we did, the—titled "Congressionally Requested Inquiry into EPA's Use of Private and Alias Email Accounts," we did come across that and we did not find any violations, as you saw in the report.

Mr. BEYER. Okay. Mr. Chairman, I yield back. Thank you very much.

Chairman LOUDERMILK. Thank you, sir.

I now recognize Mr. Bridenstine of Oklahoma.

Mr. BRIDENSTINE. Thank you, Mr. Chairman.

This is a question for Mr. Wester. In 2011 in a hearing before the House Oversight Committee Brook Colangelo, who was then the White House Chief Information Officer, said the following: "We have also upgraded our email and Blackberry servers to improve reliability and we are the first administration to begin archiving SNS text and pin-to-pin messages on EOP Blackberry devices." The White House CIO made this statement back in 2011. Have other agencies started to follow this practice in the four years since then?

Mr. WESTER. So what has happened since then—I should say two things, first, that Mr. Colangelo is operating under the Presidential Records Acts within the White House, which are separate laws that govern what goes on in the rest of the federal government with the Federal Records Act upon which I am an expert witness in.

The second point I would make is that since that time, agencies have identified text messaging and instant messaging along with email management as issues that they needed to address and have guidance put in place within their agencies so that they understand what the value of this material is and how effective it needs to be managed over time. So I would characterize it more as an emerging issue that needs to be dealt with first from a policy perspective and then by implementing technology to make that policy happen within each of the agencies across the government.

Mr. BRIDENSTINE. Has the EPA implemented these policies?

Mr. WESTER. The EPA is in the process of implementing policies specific to text messaging, and part of what they have discussed with us and our staff at the National Archives are the different policies that they are intending to or have implemented or intend to implement with training and specific policy guidance on how to identify substantive records versus transitory records what kind of actions individual EPA employees need to take to manage those substantive records and that have enduring or continuing value so that they are maintained through the end of their retention period.

Mr. BRIDENSTINE. So it would appear that if it is important for the White House, it would also be important for the EPA, is that correct?

Mr. WESTER. Yes, they are governed by two separate statutes, but yes.

Mr. BRIDENSTINE. Okay. On your agency's website there is a frequently-asked-questions section for agency records managers.

Mr. WESTER. Um-hum.

Mr. BRIDENSTINE. One of those FAQs is for instant messaging. The FAQ states, "Agencies that allow IM traffic, instant messaging traffic, on their networks must recognize that such content may be a federal record," and it says, "The ephemeral nature of IM heightens the need for users to be aware that they may be creating records using this application and to properly manage and preserve record content."

Mr. Wester, EPA has repeatedly told this committee that text messages are really just "transitory records" and therefore not sub-

ject to archiving rules. This FAQ seems to urge a bit more caution. Isn't it true that the text messages are just as capable as qualifying as a federal record as any other electronic communication?

Mr. WESTER. The short answer to your question is yes. One of the things that I tried to reiterate as part of my testimony is that transitory records have a retention of up to 180 days so the value of them is generally less than other federal records, but as it states on our frequently asked questions, with text messages and instant messaging and other kinds of more ephemeral—as it is characterized in the FAQ—electronic communication, that material still needs to be managed as federal record material if it rises to the level of being a federal record.

Mr. BRIDENSTINE. So regardless of the medium that the person uses to communicate, the content is what determines whether or not is a federal record——

Mr. WESTER. Yes, sir.

Mr. BRIDENSTINE. Okay. Is it appropriate for individual employees to be the arbiter—and this is just for, you know, as we go forward as a nation, how do we deal with these kind of activities—for the individual employees to be the arbiter of what is a record and what is not a record? The individual employee is responsible for determining that. Is that appropriate or should—and maybe the Federal Records Act be updated so that maybe a third party would be responsible for determining what is a Federal record and what is a personal record?

Mr. WESTER. So right now under the Federal Records Act individual federal employees, over 2 million of them across the government, are empowered to make that decision every day based on their understanding of the work that they conduct and we expect them to be able to understand the rules and guidance and make that determination of record versus non-record or record versus personal material and manage it appropriately.

Over the longer term the archives hopes that technologies can be brought to bear to do auto categorization using machine learning and those sorts of things so that we can have these processes done in an automated way so that we can eliminate the possibility of human error or other sorts of things that would possibly—

Mr. BRIDENSTINE. Real quick, last question.

Mr. WESTER. Sure.

Mr. BRIDENSTINE. Is it true that under General Record 23 and EPA Schedule 167 that senior officials may not delete electronic records without permission from NARA?

Mr. WESTER. I would have to look at the schedule and get back to you on that specifically.

Mr. BRIDENSTINE. Okay. I would appreciate that.

Mr. WESTER. I will do that. Thank you.

Mr. BRIDENSTINE. Thank you so much. I will yield back.

Chairman LOUDERMILK. The Chair now recognizes the gentlewoman from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you very much, Mr. Chairman. I want to start by aligning myself with the comments of Ranking Member Beyer. I do want to point out some concerns, Dr. Schnare, that you are mentioning, some problems that you observed at the EPA. I am a little troubled that you did not come forward in an effective way

while you were there but suddenly now are expressing this concern in a more litigious fashion.

So, Dr. Schnare, I want to have a better understanding of what hats you are wearing today, who you are working for and who is funding your organizations. Apparently the financial disclosure form you filled out for the Committee, it contains limited conflict-of-interest disclosures but of course we are big on transparency so please help me understand how you are supported in your work. So since your retirement you are listed as a—from the EPA you are listed as a Director for the Center for Environmental Stewardship at the Thomas Jefferson Institute for Public Policy, a Director of the Free Market Environmental Law Clinic, General Counsel for the Energy and Environmental Legal Institute, past Director of the Occoquan—I hope I said that right—Watershed Coalition, Chairman of the Coalitions of Environmental and Land Use Committee, and you are CEO of Schnare and Associates. So that is quite a list.

So are we leaving out any corporations on which you serve as an officer or director or employee or any other entities that were established by you?

Dr. SCHNARE. No, you are not, although Schnare and Associates no longer exists; I don't have time for that. The long list you gave is just a wonderful list of activities that I have been involved in. For example, in the Thomas Jefferson Institute for almost two decades I worked with them, all of it pro bono.

Ms. BONAMICI. Terrific. And I wanted to ask you, as Counsel of the Energy and Environment Legal Institute, so you filed many lawsuits against the EPA and other agencies and also have filed public submissions to propose to EPA rulemakings on behalf of, for example, oil, gas, and mining companies. So have you been paid for creating and/or filing those submissions?

Dr. SCHNARE. I am General Counsel for Energy and Environment Legal Institute. I don't draw a salary. I work pro bono.

Ms. BONAMICI. So you don't receive any legal fees for your work on these lawsuits?

Dr. SCHNARE. I don't.

Ms. BONAMICI. And how are your various corporations supported, through contributions or do you sell products or services?

Dr. SCHNARE. We don't sell products or services. These are 501(c)(3)'s, which of course can sell products and services but you have to pay taxes on those. The ones with whom I have been involved have all been 501(c)(3)'s that do not provide services.

Ms. BONAMICI. Do you receive financial or in-kind support from foundations or other nonprofits?

Dr. SCHNARE. Much like every Member behind the dais that is an elected official, we all get donations and we get donations from folks in an interesting way. Implied in your question, for example, is whether there is a quid pro quo for the money we get, much like your money. When you are given donations, large donations from single individuals, no one here in this room would suggest that you were being purchased, that there is a quid pro quo. Those people donate to you because you take positions and have views with which they are comfortable and that they want to see supported, and that is true exactly for the kinds of—

Ms. BONAMICI. I am going to reclaim my time——

Dr. SCHNARE. —things that we are—

Ms. BONAMICI. —and ask Mr. Christensen a question. Thank you.

Dr. Schnare—Mr. Christensen, Dr. Schnare claims that senior agency officials were destroying records and interfering with FOIA requests. So I know your office conducted the examination of the complaints surrounding former Administrator Lisa Jackson regarding destruction or withholding of email. So can you explain to us what your office found? Did you find any evidence of willful destruction?

Mr. CHRISTENSEN. As I said in my oral statement, we did not find any evidence of intentionally destroying.

Ms. BONAMICI. And did you find any evidence of a pattern of encouraging employees for engaging in destruction or obstruction of records requests?

Mr. CHRISTENSEN. No, we do not.

Ms. BONAMICI. Okay. And, Mr. Wester, I wanted to ask you to follow up on a comment you made about the work that is being done to change over to a system that may automatically preserve records. Can you just—this is a Science, Space, and Technology Committee. Could you tell us a little bit about that?

Mr. WESTER. So one of the things that we are working on at the National Archives is implementing a policy for managing email records across the government called Capstone, and what we are encouraging agencies to do is capture all of their email records and identifying the level at which above—a certain line within an agency all of the records are presumptively permanent and would be eventually transferred to the National Archives for permanent retention and accessed by the public. And then beneath that line following this Capstone policy identifying different shorter-term retentions that still protect the rights and interests of the government, allow for agencies to carry out their business on a daily basis, and protect the rights and interests of citizens, and then be able to destroy those records after a shorter period of time, usually somewhere around seven years when there is a statute of limitations passing.

Ms. BONAMICI. Thank you. We look forward to following up with you on that effort.

And I yield back the balance of my time. Thank you, Mr. Chairman.

Chairman LOUDERMILK. Thank you. I now recognize the Chairman of the full Committee, Mr. Smith from Texas.

Chairman SMITH. All right. Thank you, Mr. Chairman. First of all, I want to thank Dr. Schnare for his replies to some questions he just had. One, I want to thank you for your pro bono work. I know that has got to be a sacrifice. And secondly, I would like to thank you for your trenchant answer and response to putting contributions in context. I thought that was exactly right.

Let me address my first question to all three of you and start with Mr. Wester. And I think a yes-or-no answer will be fine here. Using a commonsense standard, is it credible that someone could send 6,000 text messages on an official Blackberry or later on an official iPhone and that only one of those text messages would be work-related?

Mr. WESTER. I would want to see how—the content, the structure, and the whole volume of text messages was before I can make that determination.

Chairman SMITH. Right. And I agree with you and that was the reason for the subpoena, so we could get those records and determine that exact point.

Mr. Christensen, is it credible?

Mr. CHRISTENSEN. Again, I would be similar to Mr. Wester here. I would need to see what the context was a——

Chairman SMITH. Okay.

Mr. CHRISTENSEN. —and we have the audit ongoing and we have not completed our work on that.

Chairman SMITH. Right. I understand that, but just using the commonsense standard, without saying definitively one way or the other, is it credible that 6,000 text messages would be sent that would not be related to work and the messages all sent on official devices?

Mr. CHRISTENSEN. I would question it and that would be why I would want to see the context before I reached a conclusion.

Chairman SMITH. Good. I have got two yeses to the subpoena.

And, Dr. Schnare, what do you think?

Dr. SCHNARE. Let me give you two more. I think that that level of texting is going to inevitably have something in it, but I would share with you that Judge Collier, who has to deal with this matter of law when we brought the matter, made the comment that he thought it was implausible and so I defer to the Judge.

Chairman SMITH. I like implausible. To me that is a synonym for incredible or not credible.

And, Dr. Schnare, just to follow up on a couple of other things, this goes back to your written testimony, and I know you didn't have time to cover all of your written testimony in your verbal testimony, but in your written testimony you indicate that EPA officials "lack a willingness to properly search for records when requested to do so. Could you elaborate on this and tell us what you base your opinion upon?"

Dr. SCHNARE. Well, I can base it on personal opinion—or personal experience rather. When I was at the Agency I spent more time than anyone would like having to respond to civil discovery and to FOIA, which are quite similar. In two cases I had FOIA, which I was responsible for the final response, that required responses from several regional offices, several offices within the Agency, including the Office of the Administrator. We were under a time deadline, we had to communicate with the requester to get additional time, but the one office that never responded and refused to respond was the Office of the Administrator.

And my approach to this, the only approach I had available besides talking directly to the young man who was supposed to be doing that job, was to go up my own chain of command, which I did, all the way to the presidential appointee and ask that he talk to Chief of Staff and shake things up and loosen it up. The answer I got back unhappily was just let it go.

And so on two occasions we had situations where clearly there were documents within that office and clearly we weren't going to

get them, and so I was forced to complete and close out the FOIA request without being able to obtain those documents.

Chairman SMITH. That says a lot. Also in your written statement you say there is a culture "to keep secret what should be available to the public." Is this along the same lines of that personal experience you just recounted?

Dr. SCHNARE. Yes.

Chairman SMITH. And then lastly, you mentioned in your statement, staff working directly in the Office of the Administrator simply refused to comply with FOIA. Anything you want to add to your observations there?

Dr. SCHNARE. Well, I think I gave you the two examples——

Chairman SMITH. Okay.

Dr. SCHNARE. —to which I was referring.

Chairman SMITH. Believe me, that was plenty. Thank you, Dr. Schnare.

I yield back. Thank you, Mr. Chairman.

Chairman LOUDERMILK. Thank you, Mr. Chairman.

The Chair now recognizes the gentlewoman from Maryland, Ms. Edwards.

Ms. EDWARDS. Thank you very much, Mr. Chairman, and thank you to our witnesses.

I think today I am just going to focus on Dr. Schnare. And, Dr. Schnare, I just want to focus not on the Ph.D. part but on the J.D. part. You are a licensed attorney?

Dr. SCHNARE. I am. I am licensed in Virginia and the District of Columbia.

Ms. EDWARDS. And how long have you been licensed?

Dr. SCHNARE. Over a decade.

Ms. EDWARDS. And so when you testify here about things that other people said and everything, you are probably glad that we are actually not in a courtroom because a lot of that is just hearsay, isn't it?

Dr. SCHNARE. What I observed myself is not and obviously——

Ms. EDWARDS. No, you testified earlier about things that you heard other people saying or that you knew of other people saying but not that you heard directly, but never mind that. I just want to ask you for a moment you also testified that in the things that you heard that were blatantly illegal, don't you have an obligation as an attorney? What is your obligation as a licensed attorney? Because I mean I am not licensed anymore but I do remember taking the oath. What is your obligation?

Dr. SCHNARE. Well, the obligation of any attorney is it to try to counsel people into the—what is known as the trail of the law or the path of the law.

Ms. EDWARDS. No, no, no. You—as a licensed attorney, your obligation is to the court, to the bench, and in your profession, your ethical obligation is actually to report that wrongdoing, isn't it?

Dr. SCHNARE. Yes, and——

Ms. EDWARDS. Okay.

Dr. SCHNARE. —the question is to whom——

Ms. EDWARDS. So, thank you. You said yes, right?

Dr. SCHNARE. —so if you report to the—your own chain, you have done that.

Ms. EDWARDS. Thank you. Thank you. I don't think so. I think as a licensed attorney, you have more of an obligation than that.

I just want to go back to some of the—you referred to yourself as a climate change skeptic, right?

Dr. SCHNARE. I have no idea what that has to do with text messages today but——

Ms. EDWARDS. Let me just ask——

Dr. SCHNARE. —that is certainly true.

Ms. EDWARDS. —it is not up to you to determine what I can ask you.

You referred to yourself as a climate change skeptic, is that correct?

Dr. SCHNARE. Yes.

Ms. EDWARDS. Right. And so I want to look at something that I find again on the J.D. part and not on the Ph.D. what is disserving. In 2011 an attorney representing the University of Virginia gave sworn testimony regarding a lawsuit you were involved in surrounding Dr. Michael Mann's emails. That attorney testified and I want to quote this. "The fact that Dr. Schnare has, for whatever reason, felt compelled to make misleading statements to me about his employment status with the EPA and demonstrably false statements about his having obtained requisite approvals to represent the American Tradition Institute in this lawsuit while still being employed by the EPA is extremely troubling and has destroyed Dr. Schnare's credibility in my mind."

That is from a university—an attorney representing the University of Virginia that is pretty strong accusations from the Associate General Counsel at UVA. So how do you actually represent, Dr. Schnare, an outside client without clearance from the EPA?

Dr. SCHNARE. What——

Ms. EDWARDS. Is that appropriate?

Dr. SCHNARE. What you do is you get permission, which I had done and what many employees do. There is a process for getting and——

Ms. EDWARDS. So you got permission to represent a client who was a challenging the—challenging your employer? I find that really——

Dr. SCHNARE. No, that is not at all accurate, and those kinds of inaccuracies from someone who has been a lawyer and an attorney is disturbing to me.

Ms. EDWARDS. Oh, you know what, I am just like, you know, just a regular old street lawyer, you know, so don't hold that against me.

Let me see. Dr. Schnare, in your original testimony that you circulated to the Committee, to your credit you did expunge an element of that testimony that might have defamed an individual. However, in the original testimony you accuse someone of not cooperating in the searches of Administrator's records and admitted that you were aware they had not done adequate searches. In fact, you wrote, "In each case I was forced to respond to the FOIA request without his input despite knowing that in doing so the responses were legally deficient.

Is it your obligation as an attorney to submit responses that are legally deficient?

Dr. SCHNARE. Of course not but that doesn't mean that that isn't the way it sometimes happens——

Ms. EDWARDS. So——

Dr. SCHNARE. —especially when your senior managers——

Ms. EDWARDS. —let me reclaim my time——

Dr. SCHNARE. —tell you what to do and how to do it.

Ms. EDWARDS. —I only have 30 seconds, Dr. Schnare, and it is not yours. So I just want to be really clear that you have submitted legally deficient responses, you have misled a general counsel, you have witnessed wrongdoing and not reported it. Why is it that someone shouldn't file a claim against you to have you disbarred and to have your license removed?

With that, I yield the balance of my time.

Chairman LOUDERMILK. Thank you. And again, we appreciate the witnesses volunteering your time to come here, and you are not compelled to answer questions that are outside the scope of this hearing. We want to make sure the hearing stays focused on the issue at hand. And again, I want to tell you we appreciate each and every one of you taking your time to be here.

I now recognize the gentleman from Florida, Mr. Posey.

I recognize the gentleman from Ohio, Mr. Johnson.

Mr. JOHNSON. Okay. Thank you, Mr. Chairman. You know, I spent 26–1/2 years in the Air Force and I had—as a commander I had a lot of opportunities to deal with the Inspector General on many different occasions and issues, and I have got some real concerns this morning, Mr. Christensen, that I would like to address with you.

The EPA Office of Inspector General's September 13, 2013, report found no evidence that the EPA used, promoted, or encouraged the use of private nongovernmental email accounts to circumvent records management. Were you at the EPA at that time in the Inspector General's Office at the time that investigation was done?

Mr. CHRISTENSEN. I was within the EPA when that audit work was done.

Mr. JOHNSON. In the Inspector General's Office?

Mr. CHRISTENSEN. Yes, sir.

Mr. JOHNSON. Okay. This finding is even more surprising given that revelation of the use of this secret account led to both Administrator Lisa Jackson and senior official Scott Fulton's resignation. What is puzzling to me is learning that the investigators never actually spoke with Administrator Lisa Jackson or Scott Fulton, who both were at the EPA when the OIG received the request for an investigation.

In my experience with the Inspector General, certainly within the United States Air Force, the veracity of the investigation and the consequences and the accountability associated with the findings were taken very, very seriously by everyone. So why did the OIG fail to interview Administrator Jackson and Scott Fulton even though they were still at the agency when the investigation began?

Mr. CHRISTENSEN. Sir, I was in a different position at that time and I would have to get back to you——

Mr. JOHNSON. Okay. Please get back to me.

Mr. CHRISTENSEN. —because I did not——

Mr. JOHNSON. How did the EPA Office of Inspector General conclude that senior officials did not use private or alias email addresses to circumvent records management without ever speaking to these individuals? I mean it is pretty common sense that there is no way they could have, correct?

Mr. CHRISTENSEN. There could be other evidence but I would have to get back to you, sir, on that——

Mr. JOHNSON. Okay. Please get back to me on that.

According to the testimony we have heard this morning, it appears that the office in charge of FOIA was not aware that the Richard Windsor email account was associated with Administrator Lisa Jackson. If this is true, then didn't having an alias email account violate EPA's own policies about having an unidentifiable email account? If that is true that that Richard Windsor account was associated with Administrator Jackson, didn't that violate EPA's own policies?

Mr. CHRISTENSEN. I would have to look into that and get back to you.

Mr. JOHNSON. Do you know the policy?

Mr. CHRISTENSEN. I have seen the policy, sir.

Mr. JOHNSON. As the Assistant Inspector General, if you know the policy, doesn't that violate the policy? That is a yes-or-no question.

Mr. CHRISTENSEN. I would have to get back to you and confirm.

Mr. JOHNSON. Okay. Please do that also.

The 2013 report's finding that the EPA did not use private email to subvert the Federal Records Act also seems questionable given that Region 9 Administrator Jared Blumenfeld admitted to having misled your investigators and subsequently turned over 1,500 pages of emails sent via his private email account. Are you aware that the Region 9 Administrator Mr. Blumenfeld admitted that he lied to your investigators about his use of that private email account for official business?

Mr. CHRISTENSEN. I have heard that, sir, and it was the auditors and I think we have heard today that the government email was cc'ed on——

Mr. JOHNSON. Do you plan on amending your conclusions in your report to reflect that evidence?

Mr. CHRISTENSEN. There is no plan right now, sir.

Mr. JOHNSON. Why not? Are there no consequences in the EPA when violations of the EPA's policies are conducted? Why would you not amend the report?

Mr. CHRISTENSEN. That report was put out based on what we had at the time.

Mr. JOHNSON. I said amendment. I said are you planning on amending the report?

Mr. CHRISTENSEN. No, we are not, sir.

Mr. JOHNSON. You are not? Okay. Well, I have got to question the veracity of the EPA's OIG operation. When can we expect you to get back to me on the questions that you said you would get back to me on?

Mr. CHRISTENSEN. We will get back to you this week, sir.

Mr. JOHNSON. Okay. Very good. Thank you very much.

Mr. Chairman, I yield back.

Chairman LOUDERMILK. Thank you.

And as all Members are aware, there are votes currently going on on the Floor so this committee will stand in recess until ten minutes after the last vote.

[Recess.]

Chairman LOUDERMILK. If everyone will take their seat, we will reconvene this hearing.

We appreciate your indulgence as we had to go deal with matters of the State.

At this point the Chair recognizes the gentleman from Alabama, Mr. Palmer.

Mr. PALMER. Thank you, Mr. Chairman.

Mr. Christensen, I appreciate your willingness to be here and testify. I appreciate the work that the Inspector General's Office does. It is absolutely critical to the functioning of our government. And I just want to ask you, in your work with EPA have you found them to be forthcoming? I mean when you have requested documents and other information, have they been forthcoming with you?

Mr. CHRISTENSEN. Yes, sir.

Mr. PALMER. Well, I find that interesting considering that the Inspector General for the EPA was one of 47 Inspectors General who sent a letter to the Committee on Oversight and Government Reform complaining that federal organizations, including the EPA, were impeding investigations by withholding information. Were you aware of that?

Mr. CHRISTENSEN. Yes, sir. That was the deal with the CSB impeding an investigation.

Mr. PALMER. My impression was it wasn't just the CSB but do you agree with Mr. Elkins' assessment that the EPA was not forthcoming?

Mr. CHRISTENSEN. There have been times where the EPA has not been forthcoming at the beginning but eventually we have gotten all the documentation.

Mr. PALMER. Now, in regard to the CSB matter, and this is in the context of the problems with EPA not coming forward, he said that this impairment by the EPA was ongoing when he arrived four years ago. Now, this testimony was given September 10, 2014, and he said it is still not resolved. And it seems to me that there is a culture here of almost, for lack of a better way to put it, lawlessness.

Mr. CHRISTENSEN. I believe I stand corrected when I said CSB earlier. I believe that is with the Office of Homeland Security, sir, within EPA.

Mr. PALMER. That particular reference was to Homeland Security; it was also in regard to the CSB. I have got the testimony right here. And I just want to ask you. Does it not seem odd that the EPA would in your opinion be cooperative when they haven't been with other people?

Mr. CHRISTENSEN. Ultimately, we have—for audits we have had cooperation ultimately. I think with the testimony you are talking about was with some of our investigations, which would be underneath the Office of Investigations.

Mr. PALMER. Okay. Dr. Schnare, in your testimony you talk about a culture of secrecy, and I just want to read something here that you said in your written testimony that says EPA prepared an 83-page PowerPoint presentation on how to use electronic tools to collaborate with external partners. This presentation encourages use of instant messaging, other real-time correspondence tools, and even encourages using AOL and Yahoo and asking third parties to set up chat rooms, the purpose of which, according to this was, is that if it—it encourages employees to help outside parties to sponsor the web-based collaboration tools, noting that as long as we are only participants, not administrators of a web collaboration site, the site is not limited by those same FOIA and Public Records Act constraints. I can't think of a better word to use than conspiracy. If you have got a better word for this, it seems that this is organized in an attempt to keep certain information from the public and from Congress for that matter. How do you respond to that?

Dr. SCHNARE. Congressman, EPA employees, like many government employees, have the challenge of trying to do their job, stay on top of new technologies, use everything they can, and we encourage innovation, but there came a time in the Agency in 1980 when we had a disagreements within the Agency. They were kept within the Agency and there was one point, and then at that point in time after there was a culture shift and there was a lot of leaking going on, a lot of whistleblowing without being called a whistleblower, it was a situation in which younger people at the Agency simply felt they should speak out on things they cared about personally and they disregarded the authority and the chain of command. It happened.

Now, the next change in culture really came with the current Administration where in fact basically it was Katy bar the door; we are going to do anything we can. And so what we ended up seeing is a great deal of we will just keep this to ourselves.

Mr. PALMER. Well, in regard to the 5,932 emails and the fact that, as I understand it, there are two months of text messages that are missing, it kind of begs the question how much work Ms. McCarthy was able to get done? I mean I don't think my teenage daughters text that much.

Mr. Chairman, I believe my time is expired. I yield.

Chairman LOUDERMILK. Since it appears we have a few more minutes, we will do a short second round. The Ranking Member has agreed to that.

And with that I will recognize myself for a question.

Mr. Christensen, is there a written policy or an existing policy within the EPA that regulates or restricts the private use of cell phone—government/taxpayer-issued cell phone by employees of the EPA?

Mr. CHRISTENSEN. Are you talking cell phone usage or with emails and text messages?

Chairman LOUDERMILK. Well, since you can use the cell for text, for email, for all of those, I would anticipate that whatever policy would cover any use of the cell phone so——

Mr. CHRISTENSEN. Yes, in June 2013 the records management policy was amended to include the personal email and private—from private email, so that would cover the cell phone. Also in Feb-

ruary 2015 the—they amended the records management policy to cover the text messaging.

Chairman LOUDERMILK. You say they covered it. What is the regulation? Does it prohibit? Is there a certain number or amount that you can use? Specifically getting at——

Mr. CHRISTENSEN. It doesn't get into anything on the number. It is just how you would do the records management for those.

Chairman LOUDERMILK. So if the information that we are getting is correct, that for a four-year period that cell phone in question was used exclusively—text message-wise exclusively for personal use, you are saying an exclusive personal use of a cell phone would not violate existing EPA policy?

Mr. CHRISTENSEN. There was none that I know of but I would have to get back to you on that, sir.

Chairman LOUDERMILK. Dr. Schnare, is that a common—in your experience in the EPA, using a taxpayer-funded device exclusively for personal use, was that a common practice or was it known to violate at least common practice or some type of policy?

Dr. SCHNARE. Mr. Chairman, the policy is laid out in our email policy, not in our records management policy. And it is clear that while there are uses—and this was—this was what happened when the internet first came in and was used a lot—it was made clear that the use of email and voiceover protocol and the like for personal purposes could be done but should not be the dominant use. And so, yes, you are allowed to do some of that and it was more on the order of, honey, I am on my way home or please pick up a loaf of bread, but for the exclusive use for personal purposes would just be—it is not done that way. I don't know anyone that would do it that way.

Chairman LOUDERMILK. Mr. Wester, I know that this is outside of your purview of the actual regulations, but with your working with other agencies, have you encountered to where a public-funded or taxpayer-funded government-issued device was allowed to be exclusively used for personal use?

Mr. WESTER. I am not familiar with anything like that. Most agencies have appropriate-use policies for different kinds of office equipment that is given to them, and that is usually where those kinds of things are covered.

Chairman LOUDERMILK. Okay. Thank you.

With that, I now recognize Mr. Beyer for five minutes.

Mr. BEYER. Thank you, Mr. Chairman.

Chairman Loudermilk, one thing that I would love to clarify is that Members from the majority today have made statements about Lisa Jackson leaving the EPA over the Richard Windsor email issue, and I just never heard that before on our side and not necessarily right now but if the majority could share the source of that information, we would very much appreciate it.

Mr. Christensen, we mentioned the Chemical Safety Board, the CSB. Is that part of the EPA?

Mr. CHRISTENSEN. It is not part of the EPA but the EPA OIG has jurisdiction over the Chemical Safety Board.

Mr. BEYER. So it is your responsibility but it is an independent agency?

Mr. CHRISTENSEN. Yes, sir.

Mr. BEYER. So if they have had problems with transparency and the like, it does not necessarily reflect poorly on the EPA?

Mr. CHRISTENSEN. That is correct, sir.

Mr. BEYER. How many employees does the EPA have, Mr. Christensen?

Mr. CHRISTENSEN. Just over 15,000 right now, between 15 and 16,000.

Mr. BEYER. I know this is an evolving art but do you have any idea how many text messages from each employee would be considered a federal record?

Mr. CHRISTENSEN. I have no idea on that, sir.

Mr. BEYER. Certainly not every text message, though. I am just trying—we are trying——

Mr. CHRISTENSEN. I have no information to respond to that, sir.

Mr. BEYER. I am trying to do the math on 2009, six years times 15,000 employees times the number of text messages and wondering how much time, effort, and money it is going to take to review all that.

Mr. CHRISTENSEN. It would be a big effort, sir.

Mr. BEYER. When the GAO and the IG are asked to work together on the same issue, how do you work that out?

Mr. CHRISTENSEN. We haven't been asked to work together on any issue that I know of, sir.

Mr. BEYER. Okay. You have certainly been doing this for a while. Does the issuance of the subpoena by this committee, will that interfere in any way with your ability to carry out a timely investigation?

Mr. CHRISTENSEN. It shouldn't impact our audit work, sir.

Mr. BEYER. Mr. Chairman, that is all I have so I yield back.

Chairman LOUDERMILK. I thank the gentleman and recognize the gentleman from Texas, Mr. Babin, for five minutes.

Mr. BABIN. Thank you, Mr. Chairman.

With an Administration that has claimed that it would be the most transparent in history, we seem to have a repeated pattern of the exact opposite. I believe we need a new level of accountability not only at the EPA but for this entire Administration.

And, Dr. Schnare, in your opening statement you describe a culture of secrecy at the EPA. What can be done in the future to ensure more accountability and transparency in terms of what the leadership should be telling folks?

Dr. SCHNARE. I am going to offer you something I have been thinking about in that regard. I don't believe it is possible to easily motivate or to alter the culture at the top of an agency but I do think there are some things that could be put in place that would have an effect on the career employees who can actually change the culture on their own.

It is very difficult to reprimand a person for failing to follow the Freedom of Information Act. They are never credited for doing a good job; it is just part of that ten percent other duties as assigned. But I believe that if there were a sanction that went to the pocketbook of the employee——

Mr. BABIN. Yes.

Dr. SCHNARE. —that said you don't do that job and you suffer a $5,000 fine out of your own pocket, then the employee would go up

his management chain and say I am not doing that for you, sir. Ma'am, I am giving these emails away. Because they are not going to put themselves at risk. And so that is something that this body would have to look at, what kind of sanctions would be available, but presently, there really are none.

Mr. BABIN. But you—if I understood you to say the senior leadership at the agency or any agency for that matter, they are the ones that need to set the standard and they lead to a culture of secrecy or not, don't you agree?

Dr. SCHNARE. Congressman, policy is personnel. There is no way around it.

Mr. BABIN. Right.

Dr. SCHNARE. It is the people that make the difference. All I am suggesting to you is that in this town over my last 40 years that is not an approach that I see as very helpful. People do what they do. But I do think there are ways to get to it that would have a greater effect by making the public servants, the people who come into government particularly because they want to serve and who are honest and good people.

Scott Fulton's name was mentioned earlier today. Scott Fulton is one of the most honorable men I know. He is a great guy. What happened and how he was involved in an investigation I have no idea but I know this: Scott Fulton is not the kind of guy who would lie, cheat, or steal.

Mr. BABIN. Well, and I have heard the opposing side, the other side today talk about thousands and thousands, the vast volume of emails or texts. Does that really matter whether it is a vast volume or whether it is just a few?

Dr. SCHNARE. Let me just share very simply——

Mr. BABIN. It is still a record. It is a record.

Dr. SCHNARE. That is right. And in a case I brought against EPA, when we settled the matter, EPA came to me and said as part of the settlement we are going to require Region 10 to—every employee in Region 10 to be re-trained on FOIA because clearly they did not respond adequately in this case. That wasn't our request and I don't really think it came from EPA. I think it came from the AUSA who was trying to negotiate a deal.

But the reality is it is up to the individuals to do the job and you have got to give them the tools. And I credit the Agency and in particular Larry Gottesman, for doing a wonderful job in getting the tools available. It is, however, the culture.

Mr. BABIN. All right. Following that up then, during your time at the EPA, how often was agency staff reminded that what they were working on could be construed as federal records and that would need to be preserved? Did you hear this? Did you experience it?

Dr. SCHNARE. Well, we had—with some regularity there was an online training the folks had to do and they do regular time. Now, at the end of my career I was a lawyer and we had to do more training than most so I don't know how it reached out to everyone. But every employee that comes into the agency is required to get FOIA training. What we found, though, in our recommendations briefly was that no one remembers it. So when we built the system to try to help people do it, we helped re-teach them what their re-

sponsibilities were, but that doesn't reach to text messages, it doesn't reached to clearing out your own email box for the most part.

Mr. BABIN. And it needs to be so.

Dr. SCHNARE. I agree, sir.

Mr. BABIN. Okay. Thank you very much. I yield back, Mr. Chairman.

Chairman LOUDERMILK. Thank you, Mr. Babin.

Mr. PALMER. Would you yield the balance of your time?

Chairman LOUDERMILK. The Chair will recognize Mr. Palmer for five minutes.

Mr. PALMER. Thank you, Mr. Chairman.

I just want to make a clarification in regard to the testimony by Arthur Elkins, the Inspector General for the EPA, that that was specific to the EPA. And I will read from the testimony a question asked by Congressman John Mica, a Republican on the Oversight and Government Reform Committee, and he says this, he says, "Mr. Elkins, with the EPA it appears that actions taken by the EPA in really ignoring you and allowing whistleblowers and others to be intimidated, this has undermined your position as Inspector General to conduct your legitimate investigative oversight responsibilities. Would that be a fair statement?" Mr. Christensen, I would like to add this to my comments to you, that Mr. Elkins' response was, "yeah, that would be a fair statement."

So in regard to this pattern of obstruction and impeding investigations, I think it is fairly clear. In regard to the comments made to Dr. Schnare about coming forward, I think that when you add to the impeding of information being brought forward, the withholding of documents and atmosphere of intimidation, I do believe there is a culture at EPA that needs to be thoroughly investigated.

I yield the balance of my time.

Chairman LOUDERMILK. First of all, I want to thank the witnesses for your attendance here today and your testimony. There is still a lot that needs to be determined here and hopefully as we receive the results from our subpoena that we will be able to continue on.

We would like to in the future have more cooperation out of these agencies, especially when we are just trying to do the will of the people and make sure that we are following our own laws and policies.

The record will remain open for two weeks for additional written comments and written questions from the Members. This hearing is adjourned.

[Whereupon, at 12:42 p.m., the Subcommittees were adjourned.]

Appendix I

Answers to Post-Hearing Questions

ANSWERS TO POST-HEARING QUESTIONS

Responses by Mr. Paul M. Wester, Jr.

House of Representatives
Committee on Science, Space, and Technology
Questions for the Record
Paul M. Wester Jr.
Chief Records Officer for the U.S. Government
National Archives and Records Administration

FINAL RESPONSES: 06-05-2015

1. **You indicated at the hearing that you would get back to the Committee regarding the following question:**

   - **Is it true that under General Record 23 in EPA's Schedule 167, that senior officials may not delete electronic records without permission from NARA? If not, please explain your rationale.**

All agencies must secure authority from NARA to dispose of Federal records. This disposition authority comes from agency-specific records schedules submitted to and approved by the Archivist of the United States and from the General Records Schedules applicable for records common to most agencies. Agencies have the responsibility to properly implement their schedules. Under NARA's regulations at 36 CFR 1226.10, the application of approved schedules is mandatory except in limited circumstances specified in the regulations. Agencies, including EPA, can apply GRS 23, item7 to destroy transitory files according to the retention standards specified in the schedule without further permission from NARA.

2. **A recent AP article states that "The Obama administration set a new record again for more often than ever censoring government files or outright denying access to them last year under the U.S. Freedom of Information Act... It also acknowledged in nearly 1 in 3 cases that its initial decisions to withhold or censor records were improper under the law-but only when it was challenged."**

   - **Is there any way to indicate that less records are being submitted to be preserved as federal records under this administration in comparison to previous administrations? Please explain your answer.**

Every Federal agency is responsible for establishing a records management program to properly identify and manage their records. Only those records appraised as having permanent value are transferred to the National Archives for permanent preservation, which we estimate at roughly three percent of all federal records; such transfers of permanent records usually take place 15-30 years after the records are created. All other records can be destroyed under an approved records schedule.

3. **At a May 2011 Oversight Committee hearing, David Ferriero, the Archivist of the United States, was asked whether he was comfortable with an individual with basic records maintenance training deciding which of that individual's own communications should be preserved as record. Mr. Ferriero responded, "No, I am not. Any time there is human intervention, then I am not comfortable." (Oversight & Government Reform Hearing No. 112-45; May 3, 2011)**

   - **What does it say about that system when the Federal Government's own Archivists are "not comfortable" with it?**

We have made a concerted effort to provide guidance supporting automated solutions and to research emerging technology. These steps support an agency's ability to implement a recordkeeping system where less action is required by the end user. This is critical to the success Managing Government Records Directive milestone, which requires agencies to manage all of their email electronically by the end of 2016, and our efforts to modernize the management of other types of government records. Nonetheless, federal employees play an important role in managing records, including by ensuring that non-records and personal papers are not part of agency recordkeeping systems.

   - **Are you personally comfortable with an individual, who has had a basic level of record maintenance training at the EPA, deciding which of that individual's own communications should be preserved as record? Please explain your answer.**

While we are interested in pursuing automated solutions for records management in agencies, they must still be developed, deployed, and perfected. In the current recordkeeping environment, federal employees continue to play an important role in managing their records, and they require the appropriate training that agencies provide them to carry out their responsibilities.

4. **Do you find that the EPA's policies and even the Federal Record Act, are written in a way that best preserves records?**

Congress recently passed the Presidential and Federal Records Act Amendments of 2014, which modernize records management by focusing more directly on electronic records and complement our efforts to implement the President's 2011 Memorandum on Managing Government Records. EPA took note of this recent legislation in issuing an updated agency-wide records management policy statement. The statement emphasizes that agency business should first and foremost be conducted on EPA official information systems. The statement also invokes the recently enacted provision of the Federal

Records Act prohibiting the use of non-agency electronic messaging accounts unless such records are copied or forwarded to the official's agency email account within 20 days of creation or transmission. We will continue our leadership efforts to modernize Federal recordkeeping by establishing goals for transitioning to electronic records and identifying effective approaches for managing and preserving electronic records regardless of format.

5. Do you know whether or not any text messages were preserved as federal records under Ms. McCarthy's leadership of the Office of Air and Radiation?

We have no direct knowledge regarding the preservation of Gina McCarthy's text messages during a three year period as head of the Office of Air and Radiation. The EPA report to NARA of October 10, 2014, on management of text messages stated that the agency located no records responsive to a FOIA request for text messages sent or received during her tenure as head of the Office of Air and Radiation.

6. There are technologies available to store electronic communications, such as the cloud and other platforms.

- **Does it surprise you that EPA does not have a system for backing up text messages when senior employees apparently text quite often?**

- **Would it be overly burdensome for the EPA to back up text messages and other electronic communications?**

EPA has issued agency-wide guidance on appropriate management of text messages, discouraging the use of text messaging, on any mobile device, to send or receive substantive agency records. Substantive records located only an employee's mobile device are to be transferred to an EPA recordkeeping system on a regular basis, according to the guidance. If a text message is a substantive (or non-transitory) record, then it and related contextual information must be forwarded to an approved EPA email system and saved as a record on a regular basis.

We understand that EPA does back up its e-mail through a cloud-based email service. Though we cannot speak for the agency, we should note that the EPA report of October 10, 2014, states that most text messages do not qualify as records. To the extent that any text message qualifies as a Federal record, EPA has stated it likely would be a transitory record that could be destroyed when no longer needed in compliance with General Records Schedule 23 and the Federal Records Act. On May 6, 2015, I responded to the EPA's report, and stated the following:

Based on the representations in your report, we believe that you have acted appropriately in addressing any potential unauthorized disposal. We recognize that text messages are commonly used for personal communications or to convey information which is transitory in nature. Moreover, it is common practice among federal agencies that each individual employee makes this determination for themselves based on agency policy, which is also the case for EPA.

7. Do you think it is best practice to solely rely on each individual in agencies like the EPA to determine if they have produced a federal record electronically?

Almost every federal employee sends and receives scores of electronic messages, as well as attachments in the form of reports, spreadsheets, and presentations, on a daily basis. Many if not most of these messages are non-record copies received or sent for informational purposes or transitory records of short-term value. Federal employees have historically received records management guidance and training, to distinguish records from non-record materials, and have been responsible for doing so since the passage of the Federal Records Act in 1950. More specifically, employees with specified duties and responsibilities are best positioned to determine whether recorded information created and accumulated in connection with their transaction of public business is appropriate for preservation by the agency as evidence of its organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Moreover, it is common practice among federal agencies that each individual employee makes this determination for themselves based on agency policy, which is also the case for EPA. However, we recognize that few people have the time or expertise to sort and file each and every email consistently, numerous times a day, which is why we have encouraged agencies to adopt automated approaches to managing email records, such as the Capstone approach.

8. In August of 2012, NARA and OMB issued a joint directive that, among other things, required federal officials to "work with private industry and other stakeholders to produce economically viable automated records management solutions." Specifically, the directive required NARA to produce a comprehensive plan for the "automated management of email, social media, and other types of digital record content."

- **Can you please tell us what steps have been taken to fulfill this portion of that directive, particularly in relation to text messages?**

The Automated Records Management Report and Plan was released in September 2014. The report addresses categories of suitable approaches for automating electronic records management and discusses their outcomes, benefits, and risks. It covers the goals of electronic records automation, what work we have accomplished to date, and a framework of five suitable approaches to automation that the Federal government can pursue.

The second part of the report, or plan, remains a living document. It will be revised at least once a year as we complete initial tasks and assess the feasibility of the initiatives we will start exploring in the first year.

A related report on open-source tools for the records management community was also released in March 2015.

Also, in response to another part of the 2012 joint NARA/OMB Managing Government Records Directive, NARA issued a bulletin providing "Guidance on a New Approach to Managing Email Records," known as the Capstone approach.

9. Is it true that someone who wishes to avoid records being kept could use text messaging to convey information and then rely on a self-serving theory that text messages are not substantive and therefore do not fall under the Federal Records Act?

- **Are you aware that you can send a text message from your computer?**

- **Does your answer distinguish between SMS (texting); MMS, and IM?**

Our guidance to agencies has long maintained that federal records can be created or received on any medium, and that regardless of the tools or platforms used, records must be appropriately captured and managed. This would include IM, SMS, MMS, and any other messaging technology that may be used by employees carrying out official business. Later this year, we will be issuing an update to our existing guidance on instant messaging to further clarify these points.

10. To your knowledge, do any agencies, including the EPA, currently automatically save text messages?

- **We believe this option is available through a number of different carriers. If this is true, would NARA support its use?**

EPA does not automatically save text messages. It has provided guidance to

employees on transferring text messages that qualify as records to an agency recordkeeping system.

11. In your testimony, you reference provisions of the Presidential and Federal Records Act Amendments of 2014 that strengthen agencies' statutory requirements for records management.

- **Does it even matter how many regulations are issued or how many times agencies update their policies, if in the end the entire preservation system still hinges on the discretion of individual employees? Isn't this what you would call an inherent flaw?**

Proper training of employees is a critical component of the success of any records management program in Federal agencies. Individual employees currently have a significant role in ensuring the records documenting their activities are captured. Agencies are responsible for ensuring their employees have proper training to carry out this function. However, we recognize that as the volume and complexity of records increases, this may become increasingly difficult to achieve. We are hopeful that technology solutions can be implemented to automate as much of the individual employee's responsibilities as possible.

12. Since hindsight often really is 20/20, don't you worry about "transitory" records that might one day be considered worthy of permanent preservation?

- **How is this rectified in the regulations, if at all?**
- **Can this issue be rectified?**

Determining the value and disposition of federal records – i.e., whether records are permanent or temporary, and if temporary, how long should the agency must maintain them – is a judgment that is made jointly by NARA and each agency in accordance with the Federal Records Act, its implementing regulations, and NARA guidance. Any judgment can be second-guessed in hindsight, and NARA's regulations require that records schedules be updated to reflect changes in recordkeeping practices. If an agency fails to follow its records management responsibilities, the Federal Records Act authorizes the Archivist to withdraw an Agency's authority to dispose of records, and NARA's regulations at 36 CFR 1226.16 specify the process for withdrawing disposal authority and cite specific circumstances where it can be used. These include "when required to ensure the preservation of Government records."

13. In your written statement, you indicated that "Managing Government Records Directive (OMB-M-12-18)" describes two high-level goals. One of those goals is "electronic recordkeeping to ensure transparency, efficient, and accountability."

- **How efficient and transparent can a records management program be when there appear to be no back-up procedures in the event of both inadvertent and intentional record loss?**

Our regulations make a clear distinction between backup systems and recordkeeping systems. In general, backup systems are not designed to be and do not have the same functionality as recordkeeping systems. Agencies must develop appropriate information management practices to manage their records to reduce the likelihood of inadvertent or intentional loss.

14. Where are federal records actually kept?

Records are maintained in the legal custody of Federal agencies until they are ready for destruction or transfer to the National Archives. The vast majority of federal records are temporary and are destroyed at the time specified by the appropriate records schedule. The remaining permanent records are transferred to the custody of the National Archives. When records are no longer being actively used by an agency, they are often transferred to a records storage facility operated either by the agency, NARA or a private contractor until they are ready for final disposition.

15. Is there a way to search for federal records?

Agencies are required to maintain their records in a retrievable fashion. How this is accomplished in any given agency depends on the type and format of the records and the record-keeping systems used by the agency.

16. Could you explain how the various schedules work? Who determines what records fit into which schedule? Can a particular record's schedule change over time or circumstance?

Agency records officers are responsible for developing appropriate record schedules, which are then reviewed and approved by NARA. If an agency finds that records no longer fit under an approved record schedule, they are required to submit either a new schedule or propose revisions to the existing schedule for NARA's approval.

17. There has been a lot of news coverage of former Secretary of State Hillary Clinton's records management program.

- **Does the Federal Records Act prohibit the exclusive use of a personal email account for government business?**

- **If multiple employees only communicate through private email accounts, doesn't that subvert the Federal Records Act?**

The Federal Records Act does not prohibit the exclusive use of a personal email account for government business. The Presidential and Federal Records Act Amendments of 2014 now requires that federal employees "may not create or send a record using a non-official electronic messaging account unless such officer or employee (1) copies . . . or (2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record."

18. **How does one show intent to subvert the Federal Records Act if they claim that all their communications with an individual that they know was personal?**

    - **What are the factors used to determine what is a personal communication and what is a business communication?**

    - **Does there have to be a provable preexisting friendship? And even so, if a lifelong friend is lobbying you on a government matter, wouldn't that still be classified as government business?**

Our regulations clearly define personal files, distinguish them from official records, and provide explicit guidance for their management. Personal files are "documentary materials belonging to an individual that are not used to conduct agency business" (36 CFR 1220.18). Personal files must be designated as such and must be maintained separately from the office's official records (36 CFR 1222.20(b)). Moreover, documentary materials that are labeled "personal," "confidential," or "private," or similarly designated, but are used in the transaction of public business, are Federal records regardless of such labels.

Any message made or received in the transaction of public business is presumed to be a Federal record and must be managed as such. The nature of the relationship between the sender and recipient has no bearing on that determination. If the information concerns the official position and duties of the individual, it is a record.

19. **I was surprised to read in your written statement that "NARA cannot speak authoritatively to agency compliance with the Federal Records Act." I then saw that since the beginning of the Obama Administration, the EPA has self-reported their compliance with NARA.**

    - **Does NARA support self-reporting compliance?**

Yes, NARA requires self-reporting of compliance with Federal records management statutes and regulations in the form of the annual Records Management Self-Assessment (RMSA). NARA conducts self-assessments, as well as inspections and evaluations, in our capacity as the oversight entity for Federal records management. The goal of the self-assessments is to determine whether agencies are compliant with statutory records management requirements. In addition, agencies use the RMSA as a chance to review their records management programs and to identify areas that can be improved. NARA validates the answers to the RSMA to get a sense of the accuracy of agency responses and to understand how agencies are interpreting the questions. We use a variety of methods in the validation process, including document requests and interviews from a statistically random sampling of responding agencies, and agency inspections.

- **How has EPA scored on its self-reported compliance?**

2014 91
2013 92
2012 93
2011 93
2010 75*
2009 100**

*It took several years for the questionnaire and scoring to stabilize. The 2010 questionnaire focused question on training which caused a scoring anomaly that was adjusted in 2011.

**2009 was a pilot year and the questionnaire was less detailed than it is now.

- **Has any agency scored poorly on their self-assessment?**

Yes, we have agencies that score poorly. The following are the statistics for the most recent RMSA. This full report will be published in Fall 2015.

Risk factors	Point scale on scale of 0 to 100 points	Percentage of respondents	Total number of respondents
Low Risk	90-100	34%	87
Moderate Risk	60-89	47%	121
High Risk	below 60	20%	51

Prior year reports are available at NARA's RMSA website at this link.

- **How was reporting done in previous Administrations?**

Prior to 2009, NARA did not have agencies report regularly on compliance with statutes and regulations. NARA started the RMSA in response to an audit by the Government Accountability Office (GAO 08-742) in which GAO found that NARA's oversight activities were limited and needed to be expanded.

20. You indicated in your statement that NARA "cannot speak authoritatively to agency compliance," but then in the next paragraph you seem to authoritatively restate the findings of that report. You seem to be basing your entire opinion on the EPA's self-assessment and an OIG report that appears to have had some serious issues.

- **Were you aware of the Senate Minority Staff Report of 2013 and their February 2014 critique of the OIG's findings?**

- **Given you cannot "authoritatively speak" about agency compliance, wouldn't it have made sense to include reference to this opposing view?**

As stated in the testimony, NARA conducts a limited validation of the RMSA survey responses through the existence of records management policies. EPA has self-reported records management issues as required by the Federal Records Act. NARA staff has worked with EPA as these issues arise and they have been cooperative. We continue to work with EPA, and all agencies, to improve records management across the federal government.

Questions Submitted by Environment Subcommittee Ranking Member Suzanne Bonamici

1. In his written testimony, Dr. Schnare seems to imply that high level officials cannot immediately delete or destroy transitory records and that they must be retained for two years unless NARA provides specific approval for destruction. Can you please clarify the policy under General Records Schedule 23 as it relates to the disposition of transitory records and high level officials?

Transitory records are those records which have minimal or no documentary or evidential value. The GRS 23 defines transitory records and allows those records to be destroyed immediately, or when no longer need for reference, or according to a pre-established business rule (such as the auto-delete function of email systems). GRS 23 may be used by all agency employees and officials. Its use by high-level officials is not precluded by the schedule. Agencies must determine if this disposition is appropriate for their use.

Responses by Mr. Kevin Christensen

HOUSE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
Joint Subcommittee on Oversight and Subcommittee on Environment Hearing
(March 26, 2015)
"Destruction of Records at EPA – When Records Must Be Kept"

Questions for the Record for Kevin Christensen, Assistant Inspector General for Audit
U.S. Environmental Protection Agency

Questions Submitted By Oversight Subcommittee Chairman Barry Loudermilk
and Environment Subcommittee Chairman Jim Bridenstine

1. **A recent AP article stated that "The Obama administration set a new record again for more often than ever censoring government files or outright denying access to them last year under the U.S. Freedom of Information Act. It also acknowledged in nearly 1 in 3 cases that its initial decisions to withhold or censor records were improper under the law- but only when it was challenged."**

   - **In your role as Assistant Inspector General for Audit at the EPA OIG, has it been brought to your attention that the EPA is "more often than ever censoring their government files or outright denying access to them"?**

     I am not aware of such a record at the EPA. The OIG's conclusions and recommendations on the EPA's practices under the Freedom of Information Act (FOIA) are captured in the following four reports issued since 2009:

     - No Indications of Bias Found in a Sample of Freedom of Information Act Fee Waiver Decisions But the EPA Could Improve Its Process, July 16, 2014, Report No. 14-P-0319.
     - Briefing Report of EPA's Processes to Release Information Under the Freedom of Information Act, May 16, 2014, Report No. 14-P-0262.
     - Congressionally Requested Inquiry Into EPA's Handling of Freedom of Information Act Requests, January 10, 2011, Report No. 11-P-0063.
     - EPA Has Improved Its Response to Freedom of Information Act Requests but Further Improvement Is Needed, March 25, 2009, Report No. 09-P-0127.

     Our May 16, 2014, report found that each EPA region and headquarters office has its own processes for addressing FOIA requests. While these vary, all lead to decisions to release or withhold information based on an evaluation of the exemptions and exclusions prescribed in the FOIA. To improve its FOIA processes, the EPA approved agencywide interim FOIA procedures in September 2013 and finalized them in September 2014.

In July 2014, we issued a report on our review of the EPA's FOIA process for granting fee waivers. This audit was initiated at the request of the EPA's Deputy Administrator due to concerns expressed by members of Congress and other stakeholders that the EPA's FOIA fee waiver process was biased in favor of environmental groups. We evaluated whether the EPA was implementing the FOIA fee waiver provisions in accordance with regulations; adhered to timely and unbiased treatment of requests for fee waivers; and tracked the elements of fee waiver requests to demonstrate timely and unbiased treatment. Our review and analysis of FOIA data showed no indications of bias as alleged.

- **Will the EPA OIG investigate this claim?**

  The OIG has not scheduled an audit examining deliberate censorship or denial of access to records. However, our ongoing audit of the EPA's text message practices includes an objective to determine whether the EPA has implemented processes to respond to congressional and FOIA requests involving agency employees' text messages. This audit also will include following up on recommendations related to the EPA's implementation of the new FOIA guidance.

2. **Did the EPA's Records Management Policy in 2009 incorporate text messages?**

   The EPA's February 2007 Records Management Manual emphasizes that records vary widely in physical forms and characteristics, and they may be in paper, electronic or other media formats. The manual defines an instant message as an exchange between two or more people that occurs in real time through the use of a specialized software. Email messages and information on personal digital assistants are listed as examples of electronic records. The EPA's 2009 Records Management Policy required each office to establish and maintain a records management program, and to manage records, in any format, in accordance with applicable statutes, regulations and EPA policy and guidance.

   - **If not, when did the EPA specifically incorporate text messages into their records management policy?**

     The EPA revised its records management policy in February 2015 to incorporate language on the types of text messages that are to be preserved and those that can be deleted. The policy discourages the use of personal electronic messaging systems, including text messaging, to send or receive agency records, but to the extent such use occurs, the individual creating or sending the record from a non-EPA electronic messaging system must forward the message to his or her EPA email account at the time of transmission or within 20 days of creating or transmitting the message. The policy also discourages the use of text messaging on a mobile device for transmitting or receiving non-transitory (substantive) agency records. The EPA defines transitory records as records of short-term interest (180 days or less), which have minimal, no documentary or evidential value and are notifications of meetings and similar routine

activities. A non-transitory (substantive) record is any record that does not meet the definition of a transitory record.

In instances of emergency or environmental notification, the policy requires employees to save and manage any text message records related to their work by forwarding those text message records to their EPA email accounts and saving the records in the EPA's record-keeping system.

- **When did the Agency start granting employees text messaging capabilities?**

  Since the late 1990s, the EPA has authorized employees to transmit text messages using various messaging platforms (for example, AOL and Yahoo Instant Messenger). Over the years, the messaging platforms available have evolved to the current use of smartphones, cellular phones, and PC and mobile-based software integrated within the EPA's Microsoft Office 365 productivity suite.

3. **When Ms. McCarthy was at the Office of Air and Radiation, was she in charge of her Office's compliance for federal records retention?**

   When Ms. McCarthy was the Assistant Administrator for the Office of Air and Radiation, the EPA's 2009 Records Management Policy was in effect. That policy indicated that the Assistant Administrators, Regional Administrators, Chief Information Officer, General Counsel, Inspector General, and Laboratory/Center/Office Directors were responsible for implementing a records management program within their respective areas of responsibility to accomplish the objectives identified in federal regulations and EPA policies and procedures.

   - **Were any text messages preserved as federal records under Ms. McCarthy's leadership?**

     The OIG currently is conducting an audit of the EPA's practices for managing and preserving text messages. The scope of this audit covers practices of the current EPA administrator, Ms. McCarthy, as well as the practices of other senior EPA officials.

4. **In EPA's 2009 Records Management Policy, it states "All EPA employees are responsible for…destroying records only in accordance with approved records schedules and never removing records from EPA without authorization."**

   - **Over 5,000 of Ms. McCarthy's text messages have been deleted. Was an approved record schedule or authorization used?**

     The OIG currently is conducting an audit of the EPA's practices for managing and preserving text messages. The scope of this audit covers practices of the current EPA administrator, Ms. McCarthy, as well as the practices of other senior EPA officials.

5. **In addition, in EPA's 2009 Records Management Policy, it states, "The Inspector General assists in determining the retention of Agency records that may be needed for internal investigation and audit purposes."**

   - **How has your office assisted the EPA in the retention of text messages as Agency records?**

     The OIG provides input on the EPA's records retention schedules as part of the agency's policy clearance procedure.

   - **If not, since the Agency allows text messaging on its government-issued devices to employees, why hasn't the OIG's office been more involved?**

     In addition, the OIG currently is conducting an audit of the EPA's practices for managing and preserving text messages.

6. **Going back to the OIG investigation of Richard Windsor, it doesn't appear that the OIG ever examined any of the actual emails in question to determine whether they in fact dealt with EPA official business. In subsequent litigation, it appears that the OIG claimed that they had no authority to do so. This is surprising given that multiple courts have held that such emails are "agency records."**

   - **Are employees who conduct official business via private or alias email accounts subject to the jurisdiction of the OIG?**

     Yes, employees are subject to the jurisdiction of the OIG while they are employed by the EPA.

   - **If yes, why didn't the OIG review any emails during its investigation?**

     Prior to the OIG initiating its audit on the use of private and alias email accounts for official business, audit staff met with House Science staff on November 28, 2012, and December 11, 2012, to discuss prior audit work and the scope, methodologies and anticipated timeframes for the new audit.

     The OIG explained that its audit approach for requesting, reviewing and examining private email accounts would be a complex process involving obtaining employees' releases to access their private email accounts; working with various Internet service providers to obtain the required data; and, if needed, obtaining subpoenas to compel cooperation by the various parties. The OIG estimated that it would have taken approximately 18-24 months to complete its examination of all the private email accounts within the scope of the audit. In order to accommodate House Science staff's request for information by later summer 2013, the OIG outlined an approach that would provide the committee a snapshot of the EPA's email practices regarding the use alias and private email

accounts; committee staff concurred with that approach. Accordingly, audit steps to review alias or private email accounts were not included within the original methodology and committee staff indicated that members would send the OIG a request for additional work if more information was needed. To date, the OIG has not received a request to conduct additional work on this matter.

Ultimately, however, between the OIG's draft and final reports to the agency, the EPA's Office of General Counsel provided the OIG with over 1,200 emails released to Congress under FOIA. During our review of these emails, the OIG did not discover any information that would have changed the conclusions reached in the draft report. As such, the OIG issued its findings on September 26, 2013.

- **Without reviewing any emails, do you think the OIG's investigation was effective?**

  As noted above, our review ultimately included over 1,200 emails and interviews with over 140 agency officials and staff.

  The audit report's conclusions and recommendations were valid and supported. The OIG is not aware of any additional information that would have changed the report's conclusions, findings and recommendations. Our audit determined that secondary EPA email accounts present risks to records management efforts if they are not searched to preserve federal records. It also identified that the EPA had not (1) provided guidance on preserving records from private email accounts, (2) implemented oversight processes to ensure locations provide consistent and regular training on records management responsibilities, and employees complete available training on their delegated National Records Management Program duties or (3) implemented an automated tool to create federal records from its new email system. Further, the audit identified inconsistencies in employee out-processing procedures posing risks that federal records were not being identified and preserved before an employee departed the agency. The EPA not only concurred with the report's recommendations but also completed recommended actions or established plans to take corrective actions to address our findings. In addition, in 2013, the EPA updated the agency's records management policy to provide guidance to personnel regarding roles and responsibilities for records management.

- **Even if you maintain the lack of authority to review the emails, wouldn't it be incumbent upon your investigators to look at those private emails produced through FOIA requests?**

  The OIG may, and routinely does, review government and private email accounts pursuant to authorities granted under the Inspector General Act and the Electronic Communications Privacy Act of 1986, which, in certain circumstances, allows federal law enforcement offices access to private email accounts on Internet service providers' servers.

OIG auditors and House Science staff agreed that the methodology for the audit on private email accounts would not include a review of emails. However, between the issuance of our draft audit report and prior to issuing the final report, the EPA's Office of General Counsel provided the OIG with over 1,200 emails released to Congress under FOIA. Upon our review of these emails, the OIG did not discover any information that would have changed the conclusions reached in the draft report. As such, the OIG issued its audit report on September 26, 2013.

7. **After learning about the deletion of text messages from EPA agency phones, this Committee sent the OIG a request to investigate the policies and procedures in place at the EPA to preserve messages as federal records as well as their compliance with such standards.**

   - **Can you assure this Committee that the OIG's report on text messages will be conducted in a more thorough fashion than the OIG report on private and alias emails?**

     The OIG takes its responsibilities very seriously and adheres to a system of quality control to reasonably assure the performance of all of our audit work. The OIG follows auditing standards issued by the U.S. Government Accountability Office which require that we plan and perform our work to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. Our external peer reviewers consistently recognize that the OIG performs its work in accordance with these standards.

   - **What steps will be taken to conduct the investigation?**

     The OIG deploys appropriate qualitative analysis as part of our audit methodologies. One objective of the OIG's ongoing audit titled "EPA Processes for Preserving Text Messages" is to determine whether the EPA adhered to applicable laws, regulations, and agency policies and procedures for records management, and preserved text messages when conducting official business. Specifically, we plan to determine whether the EPA: (1) implemented policies and procedures to determine which text messages to preserve and steps to ensure employees are knowledgeable of this guidance; (2) implemented processes to respond to congressional and FOIA requests involving agency employees' text messages; (3) used text messages (on government-issued or personal devices) for official business; (4) deleted, destroyed, lost or misplaced text messages needed for records management; and, if applicable, the rationale for destroying text communication records; (5) took disciplinary actions against employees for deleting, destroying, losing or misplacing text communication records; and (6) notified the National Archives and Records Administration (NARA) about the potential loss of any federal text records, and how often the losses occurred.

8. **Do you find that the EPA's policies, and even the Federal Record Act, are written in a way that best preserves records? Please explain your answer.**

   The National Archives and Records Administration (NARA) requires federal employees to (1) create records needed to do the business of their agency, record decisions and actions taken, and document activities for which they are responsible; (2) maintain records so that information can be found when needed; and (3) carry out the disposition of records under their control in accordance with agency records schedules and federal regulations. The EPA has developed record management policies and procedures consistent with NARA requirements. While well written policies and procedures serve as the foundation for an effective internal controls program, an implemented oversight process is essential to ensure that employees are complying with established guidance. As noted in the EPA's 2013 Records Management Self-Assessment report to NARA, the EPA has yet to implement processes to review its records management program to ensure that it is efficient, effective and compliant with all applicable records management laws and regulations.

9. **There are technologies available to store electronic communications, such as the cloud and other platforms.**

   - **Does it surprise you that EPA does not have a system for backing up text messages when senior employees apparently text quite often?**

     The EPA has developed procedures for employees to follow when creating and sending text messages that are transitory and non-transitory (or substantive) from mobile devices. The EPA defines transitory records as records of short-term interest (180 days or less), which have minimal or no documentary or evidential value, such as notifications of meetings and similar routine activities. A non-transitory (substantive) record is any record that does not meet the definition of a transitory record.

   - **Would it be overly burdensome for the EPA to back up text messages and other electronic communications? If so, please explain why.**

     EPA officials are in a better position to answer this question since they have a more in-depth understanding of the technologies that are compatible with the agency's current infrastructure and the required knowledge base needed to manage new technologies. However, whether the EPA implements new technology or continues with its current record-keeping practices, no program would be effective without a management oversight process to ensure that the program is achieving the desired result.

10. Do you think it is best practice to solely rely on each individual in agencies like the EPA to determine if they have produced a federal record electronically?

NARA recognizes that many agencies' employees manage their own email accounts and apply their own understanding of federal records management. NARA also recognizes that all employees are required to review each message, identify its value and either delete it or move it to a record-keeping system. NARA further recognizes that placing the responsibility on employees to make decisions on an email-by-email basis can create a tremendous burden. That agency, therefore, has recommended that all agencies immediately begin to adopt automated or rules-based records management policies for email management, such as the Capstone approach. To this end, EPA officials are in a better position to comment on whether implementing a Capstone or another automated approach is feasible within its current email infrastructure. Currently, the EPA has developed record management policies and procedures consistent with NARA requirements.

Responses by Dr. David Schnare

HOUSE COMMITTEE ON SCIENCE, SPACE, AND
TECHNOLOGY SUBCOMMITTEE ON OVERSIGHT
SUBCOMMITTEE ON ENVIRONMENT

"Destruction of Records at EPA – When Records Must Be Kept" Thursday, March 26, 2015

QUESTIONS FOR THE RECORD

Dr. David Schnare

Questions submitted by House Science, Space, and Technology Oversight Subcommittee Chairman Barry Loudermilk and Environment Subcommittee Chairman Jim Bridenstine

1. You have indicated that you have firsthand knowledge of how the EPA responds to FOIA requests. In your written statement, you mention that the Office of Executive Secretariat indicated that, in one example, the office only had the capacity to process 100 emails a month and therefore would take close to a hundred years to properly respond. This appears to be contrary to FOIA as well as this Administration's claim to support transparency.

    - Do you believe that this is the kind of transparency the American public can expect to receive from the EPA today?

RESPONSE

No. My testimony explained that the Office of the Executive Secretariat informed us it would only process 100 emails a month. That amounts to one hour of work a month. This is the kind of antagonistic, sophomoric response that we have found this one office within EPA to give to an organization that does not agree with EPA's political agenda. Normally, EPA professionals respond in a relatively timely and appropriate manner, and have done so for our requests. The Office of Executive Secretariat services the Office of the Administrator and neither the Administrator nor the OES has been timely or transparent. That appears to be what the American public has had to put up with from this Administration.

    - Over the last 30 years, is this how the EPA has responded to public requests?

RESPONSE

No. This is not only not the kind of transparency the American public deserves, it is not what EPA traditionally has done and can do. A typical employee familiar with the public records at issue can process 100 emails an hour and can put in two to four hours a day and still conduct their normal business.

2. A recent AP article stated that "The Obama administration set a new record again for more often than ever censoring government files or outright denying access to them last year under the U.S. Freedom of Information Act... It also acknowledged in nearly 1 in 3 cases that its initial decisions to withhold or censor records were improper under the law - but only when it was challenged."

    - Considering your institutional knowledge of EPA compliance and FOIA requests, does this surprise you?

RESPONSE

This finding saddens me, but does not surprise me. EPA once had the reputation of being one of the most FOIA responsive agencies in the U.S. government. This Administration, however, has demonstrated a lack of willingness to open its files to the public and has improperly denied requests frequently. The Committee may find it interesting that in my interactions with Assistant U.S. Attorneys who represent federal agencies in most FOIA litigation, the AUSA's have routinely voiced frustration that unlike most of their clients, EPA plays games, is not forthcoming and places the government in very difficult defensive positions – ones that the AUSA's think are likely to lose at court.

3. Do you find that the EPA's policies, and even the Federal Record Act, are written in a way that best preserves records? Please explain you answer.

RESPONSE

EPA may need to update its policies regarding text and instant messaging, but in general the problem at EPA is not the written policy, it is the failure of employees to follow that policy. This problem is exacerbated by the culture of disregard for FOIA duties demonstrated by the Agency's top managers and political appointees. The problem is not policy, it is personnel.

4. When Ms. McCarthy was at the Office of Air and Radiation, you were working at the EPA. Do you recall her Office's compliance with federal records retention?

RESPONSE

FOIA compliance is a matter of public record. There is a weekly report on FOIA compliance submitted to the FOIA communications office for each major office within EPA. I encourage the Committee to ask EPA for that record for the past decade and you will see how well each major office complied with the deadlines established in the Act.

5. Do you know whether or not any text messages were preserved as federal records under Ms. McCarthy's leadership of the Office of Air and Radiation?

RESPONSE

We have asked for text messages from Ms. McCarthy during her period as AA for Air and the Agency has informed us they were not preserved. We have sought the same records from the National Security Agency and they refused to inform us as to whether or not they had them. According to the telephone company providing service to Ms. McCarthy, NSA was given those text messages.

6. There are technologies available to store electronic communications, such as the cloud and other platforms.

    - Does it surprise you that EPA does not have a system for backing up text messages when senior employees apparently text quite often?

RESPONSE

No. EPA has not dedicated the funds to back up text messages. This is a problem that arose under the current Administration. The Agency simply has not made this a priority.

    - Would it be overly burdensome for the EPA to back up text messages and other electronic communications? If so, please explain why.

RESPONSE

No. The software to capture all forms of written electronic communications in searchable form has been available for several years. It is routinely used in civil litigation.

7. Do you think it is best practice to solely rely on each individual in agencies like the EPA to determine if they have produced a federal record electronically?

RESPONSE

No. Because the level of trust in the executive branch has dropped to record low levels; because more citizens are taking an active role in policy discussions; and, because the ease of transparency has grown to a point where true full transparency can be easily accomplished, these agencies should have independent staffs who can cull responsive documents and develop credibility in their transparency without the pressure of personal interest in the transparency. Under current practices, employees are being forced to balance their own behavior with the public's right to see that behavior. Too often the wrong balance is struck.

Question Submitted by Oversight Subcommittee Ranking Member Don Beyer

1. Many of your online biographies include a reference to your having been, "Formerly the nation's Chief Regulatory Analyst for Small Business (Office of Small Business Advocacy). Could you provide more details about this part of your career? When did you serve in this capacity? Were you detailed to SBA during this time or what was your employment status? Please provide the name of your supervisors and any associates that you can recall.

RESPONSE

I served as the Senior Advisor on Regulatory Analysis for the Office of Advocacy within the Small Business Administration in 1999. Jere Glover, then Chief Counsel for Advocacy, asked EPA to lend me to them on an extended detail. Mr. Glover had determined that the federal regulatory agencies did not have sufficient information and training on the Regulatory Flexibility Act and his own office did not have sufficient regulatory analysis expertise to deal with the crush of federal regulations. EPA acceded to his request. I served on detail from EPA and remained an EPA employee. The following excerpt from the Congressional Record Volume 145, Number 53 (Monday, April 19, 1999), Senate, Pages S3825-S3829, will provide you some understanding of what I did and with whom I worked.

> **NTMA's future Chairman of the Board, Roger Sustar, recently completed his work on a SBREFA panel with OSHA regarding the draft ergonomics program standard. This was NTMA's first experience in the panel process--and it was amazing! Seeing OSHA sit down and listen to the real small business people this standard would affect was something we would not have dreamed of just a couple of short years ago. While there is still a month before the final panel report is printed, it was a terrific experience to have input before a final ergonomics rule was proposed. I am looking forward to the panel report's recommended changes to the proposed standard, based on the input of small business entity representatives.**
>
> **It is also appropriate to say that the SBA's Office of Advocacy played a key role in the panel process, and that their help was invaluable. Jere Glover and his staff, particularly Claudia Rayford and David Schnare, ensured that small business' voice was heard during the process. NTMA is very supportive of the Office of Advocacy and all they do.**

I note, Ms. Rayford is the current Acting Chief Counsel for Advocacy.

2. You testified that during your time at EPA you had felt a need to call your colleagues at the Inspector General's office from time to time, about other issues, but did not inform the IG when it came to the specific alleged wrongdoings you spoke of in your testimony. I am surprised that you would call your colleagues regarding other activities but not about alleged activities which you now claim to have strong objections to. Could you please elaborate as to why you did not feel that the misconduct you allege to have witnessed regarding records retention and provision did not rise to the level of something worthy of your reporting to the IG?

RESPONSE

The failure of the Administrator's office to contribute to a FOIA request was an unusual event. I informed my entire management chain and had a personal conversation with the Assistant Administrator for the Office of Enforcement and Compliance Assurance, a Presidential Appointee about this problem. The AA made inquiries and directed me to process the FOIA response without the Administrator's Office's input. The AA indicated the matter would be addressed at the AA and above level. At that point, there was no reason to engage the IG's office, my having been relieved of any further responsibility for the failure of the Administrator and her offices.

Questions Submitted by Environment Subcommittee Ranking Member Suzanne Bonamici

During the hearing I asked about potential financial conflicts of interest. In response you suggested that you were as transparent as Members of Congress regarding financial contributions, but you provided no substantive answer. Federal election law requires that Members of Congress publicly disclose the name, address, occupation, employer, and date of contribution for each individual who contributes $200 or more to a candidate. I want to ask again that you disclose to the Congress and the public the sources of the support you and the organizations you serve receive.

1. Please disclose the financial support (include the names of donors, date of award, and the associated amount) received from corporations, foundations or individuals to support the Free Market Environmental Law Clinic.

RESPONSE

The premise to this question is incorrect and reflects sloppy work by your staff. Rather than address the issues before the committee, the questions your staff prepared wasted the committee's time with questions whose only intent was to engage in a failed attempt to impeach my credibility, in part by intimating that I represented interests other than my own. Attempting to make such a connection and use it to impeach a witness does not only rely on a formal logical fallacy, it engenders the loss of comity and good will that

demonstrates a failure to engage citizens in honest discussion about the nature of governance and the state of the nation. And it reflects on you personally and a sad failure to manage and instruct your staff.

To correct the baseless *ad hominem* in your staff's question, here is the exact statement I made at the hearing:

> **"Implied in your question, for example, is whether there is a quid pro quo for the money we get, much like your money. When you are given donations, large donations from single individuals, no one here in this room would suggest that you were being purchased, that there is a quid pro quo. Those people donate to you because you take positions and have views with which they are comfortable and that they want to see supported, and that is true exactly for the kinds of . . .**

You cut off my response, probably because it completely exposed the silliness of the question your staff prepared for you and made you look foolish.

The questions your staff prepared for you continue to attempt to deflect the Committee's and the public attention away from the issues the Committee wishes to take up. They should be ashamed and repentant. They embarrass the Committee, the Democrat party, the First Congressional District of Oregon and you.

As you well know, and as the Supreme Court explained long ago, Federal law and IRS regulations allow 501(c)(3) non-profit charitable organizations to keep the confidences of their donors and to not disclose those donors names. The Board of Directors of the Clinic recognizes that right and exercises it and for good reason.

Organizations like Lane Community College, the University of Oregon, and the University of Oregon School Of Law, all your alma maters, the Sierra Club, the Natural Resources Defense Council, the American Civil Liberties Union, each recognize that they are better able to raise the funds necessary to engage in their charitable and educational work by maintaining the confidentiality of their donors. You have not asked this kind of question from those organizations and you shouldn't. I look forward to your apology for broaching this subject and have already accepted the apology from Chairman Smith on behalf of the full committee.

2. Please disclose the in-kind support (include the names of donors, date of award, and the value and type of in-kind support) received from corporations, foundations, or individuals to support the Free Market Environmental Law Clinic.

RESPONSE

The Clinic has not received in-kind support.

3. Please disclose the financial support (include the names of donors, date of award, and the associated amount) received from corporations, foundations or individuals

to support the American Tradition Institute and/or the Environmental Law Center at ATI.

RESPONSE

See the response to question number 2.

4. Please disclose the in-kind support (include the names of donors, date of award, and the value and type of in-kind support) received from corporations, foundations, or individuals to support the Thomas Jefferson Institute and/or the Center for Environmental Stewardship at TJI.

RESPONSE

I am not responsible for TJI development, fund-raising or generation of in-kind support and simply don't know what they get. I have contacted the President of the Institute and have been instructed to inform you that if you want that information, you may contact him directly.

5. Please disclose the financial support (include the names of donors, date of award, and the associated amount) received from corporations, foundations or individuals to support the Thomas Jefferson Institute and/or the Center for Environmental Stewardship at TJI.

RESPONSE

See the response to question number 2.

6. Please disclose the in-kind support (include the names of donors, date of award, and the value and type of in-kind support) received from corporations, foundations, or individuals to support the American Tradition Institute and/or the Environmental Law Center at ATI.

RESPONSE

To the best of my knowledge, the Institute has not received in-kind support.

7. Have you received any financial compensation for your legal services provided to the Free Market Environmental Law Clinic, the American Tradition Institute, the Thomas Jefferson Institute, the Energy & Environment Legal Institute, or any other organization in your ten-plus years as a licensed attorney?

RESPONSE

See the response to question number 2.

I am not an employee of any of the named organizations and do not receive any salary from them. I maintain a private legal practice and have had many clients. Some of them pay me and much of that work is pro bono.

Questions Submitted by Rep. Donna Edwards

Dr. Schnare, you served as a senior attorney in the Office of Enforcement and Compliance Assurance. This experience was offered as a rationale by the Majority in offering you as an "expert witness" on the issue of how EPA handles records and records requests. However, it appears that on one or more occasions you did work for clients other than the EPA and that is a little surprising.

RESPONSE

No one having familiarity with the federal government, including Congressional staff, would find it surprising that federal employees who are attorneys often engage in legal representation outside their government duties. A competent staff member of the Committee, a sitting Member of the House of Representatives and certainly a candidate for the U.S. Senate from Maryland should know that federal attorneys have many allowed and approved outside activities. Like me, most of that work is done pro bono. We work for citizen groups, churches, synagogues, mosques, local governmental boards and family members. Licensed attorneys, but probably not so called "street lawyers", as you describe yourself, know that we have a standing duty to engage in pro bono work. Our local bars strongly encourage it and honor attorneys, including government attorneys, for this effort. Any surprise on this reflects a deep ignorance of the work of citizens of the 4th Maryland District and the State of Maryland and their commitment to helping others.

1. You noted that you requested a waiver from your employer, EPA, to do pro bono work for the American Tradition Institute in its case against the University of Virginia for access to Dr. Michael Mann's emails. Please provide the approval you received pursuant to your request.

RESPONSE

The premise to this question is incorrect and reflects sloppy work by your staff and an obvious effort to grandstand in a manner intended to improve your failing chances to win the Maryland Senate primary race in which you are viewed as a distant third to Cummings and Van Hollen, and in which you failed to obtain the endorsement of Senate Minority Leader Reid.

Rather than address the issues before the committee, the questions your staff prepared waste the committee's time with questions whose only intent was to engage in a failed attempt to engage in the politics of personal destruction, an act that engenders the loss of comity and good will and demonstrates a failure to engage citizens in honest discussion about the nature of governance and the state of the nation. And, it reflects on you personally and is a sad failure to manage and instruct your staff. It suggests you are not made of the material of a Senator Mikulski, a reasoned and respected advocate who knows the difference between policy and political lunacy.

Had your staff done a proper job, they would have found the document I insert into the records at this point, an affidavit filed in the litigation involving the University of Virginia. In that affidavit I offer sworn testimony stating:

> **"Ms. Duross [an EPA deputy ethics officer] also stated that my approvals for my law firm activities (Schnare and Associates) and approvals for the Thomas Jefferson Institute for Public Policy were sufficient to cover any activities in the instant matter."**

The questions your staff prepared for you continue to attempt to deflect the Committee's and the public attention away from the issues the Committee wishes to take up. They should be ashamed and repentant. They embarrass the Committee, the Democrat party, Maryland's 4th Congressional District and you. I look forward to your apology for broaching this subject and have already accepted the apology from Chairman Smith on behalf of the full committee.

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

THE AMERICAN TRADITION INSTITUTE, and **THE HONORABLE DELEGATE ROBERT MARSHALL**	
Petitioners,	Civil Docket No. CL 11-3236
v.	Affidavit of David W. Schnare
RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA,	
Respondent.	

AFFIDAVIT OF DAVID W. SCHNARE

On this day, David W. Schnare personally appeared before me, a certified Notary Public in and for the Commonwealth of Virginia, and after first being duly sworn to tell the truth, testified as follows:

1. My name is David W. Schnare. I am licensed to practice law in the Commonwealth of Virginia (VA Bar. No. 44522) and am subject to the Virginia Rules of Professional Conduct established by the Supreme Court of the Commonwealth of Virginia. I am also a member of the U.S. Courts of Appeal for the Second and Fourth Circuits and the Supreme Court of the United States.

2. I am the Director of the Environmental Law Center at American Tradition Institute (ATI), Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute for Public Policy and Director of the nascent George Mason Environmental Law Clinic. I am an appointee to the Chesapeake Bay Exceptions Review Commission of Fairfax County, the

largest urban county in the nation, and Chairman of the Environmental and Land Use Committee of the Occoquan Watershed Coalition, an organization of 143 homeowners associations in western Fairfax County, Virginia.

3. ATI has no in-house counsel and uses Hackstaff Law Group of Denver, Colorado, when it needs corporate legal advice.

4. In the recent past, I have been CEO of Schnare and Associates, Inc., a professional corporation providing legal representation, legal and policy analysis.

5. I retired from 37 years of federal service to this nation on September 30, 2011. I gave 33 years of service within the U.S. Environmental Protection Agency (EPA).

6. My professional affiliations are public knowledge and have been available on the internet for many years. *See, e.g.*,

http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23a539ea-802a-23ad-45fd-606dcd273a3a&Witness_ID=10fdc301-084b-4845-af15-c0cfdd2b4493, first published Sept. 2007, *see* http://web.archive.org/web/20070926230854/http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23a539ea-802a-23ad-45fd-606dcd273a3a&Witness_ID=10fdc301-084b-4845-af15-c0cfdd2b4493;

http://www.epa.gov/compliance/resources/cases/civil/caa/aleris.html, published Aug. 2009.

http://www.owccoalition.org/owcbios.htm, first published Mar. 2001, *see*, http://web.archive.org/web/20010303030914/http://www.owccoalition.org/owcbios.htm;

http://www.thomasjeffersoninst.org/staff_scholars.php, first published Nov. 2010) *see*, http://web.archive.org/web/20101108001119/http://www.thomasjeffersoninst.org/staff_scholars.php (November 2010);

http://thehardlook.typepad.com/about.html, first published July 2008, *see*, http://web.archive.org/web/20080724005251/http://thehardlook.typepad.com/about.html;

7. Throughout my federal career, I have actively contributed *pro bono* services to non-federal organizations (*see* Exhibit 3), routinely specifying an activity is not associated with EPA, as required under federal and EPA ethics regulations. *See, e.g.*, Exhibit 2, note 1, which states:

Dr. Schnare is the Institute's Senior Fellow for Energy and the Environment. His position with the Institute is pro bono. He has been employed by the U.S. Environmental Protection Agency for 30 years and currently serves as a Senior Counsel in the Office of Civil Enforcement prosecuting violations of the nation's Clean Air Act. This testimony reflects the views of the author and does not necessarily reflect the position of the U.S. EPA or the Thomas Jefferson Institute.

And see, the standard bio I provide conveners for speeches:

David W. Schnare, Esq. Ph.D. Dr. Schnare is a senior attorney with the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance and President of Schnare & Associates, an administrative and environmental law appellate practice. He has served on the staff of the Senate Appropriates Committee and as the nation's Senior Regulatory Economist with the U.S. Office of Advocacy for Small Business. He holds the position of Director of the Center for Environmental Stewardship at the Thomas Jefferson Institute. HIS REMARKS TODAY ARE HIS OWN AND DO NOT REPRESENT ANY ORGANIZATION WITH WHOM HE IS OTHERWISE AFFILIATED.

8. On May 24, 2011, outside a courtroom in Prince William County Circuit Court, during casual introductory conversation between me and Richard Kast, counsel representing the University of Virginia (UVA), Mr. Kast inquired as to my professional background. To the best of my memory I stated, "I have worked for the U.S. EPA for many years and I'm here today doing *pro bono* public interest law." This was accurate and not misleading. This statement follows a long-standing practice of federal employees to minimize their federal responsibilities when acting outside a federal capacity. We do this to ensure there is no confusion as to whom we represent. This was a very brief, informal inter-personal conversation and did not take the form of any formal exchange as to potential conflicts of interest or other formalist representation. At no time did I state or imply that I was "formerly" with EPA. Mr. Kast did not indicate he took this to mean I had departed EPA, such as by asking me when I left the Agency, if I left the Agency, or other follow-up. Had Mr. Kast asked whether or when I separated from EPA, I would have informed him of my employment status at EPA and my authority to engage in outside activity

under the ethics rules, something I have done countless times during my 33 years with EPA. Further, this is the first allegation in 33 years that my standard reply has been characterized as misleading.

9. In my interaction with Mr. Kast, I closely followed the federal rules with regard to stating my representations, to wit:

> 5 C.F.R. 2635.807(b) Reference to official position. An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking

10. My *pro bono* litigation activities began in 2000 and have continued ever since. The first such representation is documented at *Jessup v. American Kennel Club, Inc.*, 210 F.3d 111 (2d Cir. N.Y. 2000).

11. To pursue *pro bono* and other outside activities, I have routinely filed outside employment notices as required under federal and EPA ethics rules. *See, e.g.,* Exhibit 9, a 2008 filing to present a paper, and Exhibit 10, the 2010 filing to act as *pro bono* Director of the ATI Environmental Law Center.

12. The November 16, 2010, ethics filing was made contemporaneous with the transition of the Western Traditions Institute into the American Tradition Institute and was made the day following my statement of intent to the ATI Board to serve as the Director of the ATI Environmental Law Center, subject to filing of the ethics memoranda. Exhibit 5 is the metadata associated with that memorandum, showing the memo was created and last edited on November 16, 2010, the same day it was signed and hand-carried to the initial addressee, Greg Fried. This memorandum was not "purportedly" prepared on November 16th, the clear evidence shows it was in fact prepared on that date.

13. Recently, on November 18, 2011, I spoke with Phil Brooks, Director of EPA's Air Enforcement Division and Mr. Fried's immediate supervisor regarding his investigation on the handling of the memorandum. Mr. Brooks informed me that his investigation revealed that Mr. Fried had received the memorandum on the date it had been prepared, but failed to forward it to Mr. Kushner, the Deputy Ethics Officer.[1] Until Mr. Brooks contacted me as part of his investigative, I was not aware Mr. Fried had failed to carry out his duties in this regard. I was aware, however, that Mr. Fried had the memorandum as it was hand-delivered to him on the day it was created and we spent about half an hour discussing the nature of the outside activity. Neither at that time nor at any time thereafter did Mr. Fried voice concern to me about the contents of the memorandum

14. While Mr. Kushner, the Deputy Ethics Officer may not have received a copy of the memorandum, he had constructive knowledge of its existence and clear knowledge of the outside activity as it was listed on the 2011 OMP Form 450, and Ms. Jeanne Duross, who manages ethics matters for Mr. Kushner, discussed the filing with me in August or September 2011. See, Exhibit 4, documenting Ms. Duross' February 7, 2011 receipt of the form and the clear notice of my outside activities with ATI.

15. In his affidavit, Richard Kast misrepresented EPA's October 6, 2011, FOIA response to Peter Fontaine regarding documents associated with my outside employment. Mr. Fontaine, like me, is a former EPA enforcement attorney.[2] He is also a personal friend of Ms.

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[1] Mr. Brooks related to me that when asked about why he had not forwarded the memorandum, Mr. Fried replied, "I fucked up." EPA's FOIA response to Mr. Fontaine now makes every effort to shield Mr. Fried from public criticism for his failure. I have long known Mr. Fried. He is a relatively inexperienced supervisor, but is intelligent, resourceful and highly motivated. He works long hours to do a job that is, by any measure, overwhelming to a new supervisor. I believe Mr. Fried simply did not understand the significance of the memorandum, had never received one before, and has learned a hard lesson that I personally hope does not limit his advancement at EPA.

[2] Mr. Fontaine and I share more than history as enforcement attorneys working in the Air Enforcement Division. Both Mr. Fontaine and I received the EPA's Award for Excellence, an award given annually to one lawyer in the

Justina Fugh, Senior Counsel for Ethics, the EPA official who signed the response letter. In the letter (Kast Aff. Exhibit 26), Ms. Fugh states that my responsibility as follows:

> "In order to engage in outside activity that involves the practice of a profession or that deals in significant part with any ongoing Agency program, policy or operation, Mr. Schnare was required to seek prior approval from his Deputy Ethics Official. 5 C.P.R. § 2634.801 and 5 C.P.R. §640 1.1 03.

Ms. Fugh then indicates they have no record of Mr. Kushner receiving or approving the request. The letter is notably silent on the fact that I did what Ms. Fugh indicated I was required to do. It is also silent on Mr. Fried's failure to forward my memorandum to Mr. Kushner or the fact that Mr. Kushner had constructive notice of the memorandum and actual notice of the activity.

16. On November 18, 2011, I contacted Ms. Fugh to inquire as to my duties as a former EPA employee to correct the FOIA response in order to deal with the omissions and her intimation that the letter was no more than "purportedly prepared". At a point when she was aware that the metadata for the letter, all still in the custody of EPA, as well as the investigation by Mr. Brooks and the statements by Mr. Fried as to his failures, indicate her adverb was inaccurate, she offered the following response to my query as to my ethical duties to correct the letter. She said, "You have none, and neither do I." She then abruptly ended the telephone call. I note that, in my experience and as reported by others, this abruptness is normal behavior for Ms. Fugh, and thus dismiss it. However, I also not for the record her admission during the telephone call of Agency management error, defensiveness over this inaccuracy and unwillingness to acknowledge an ethical duty to go on the record as to having not fully and honestly represented to her friend Mr. Fontaine the full facts of the matter.

120-lawyer Office of Enforcement and Compliance Assurance, he in 1994 and me in 1996. I do not know if he was ever given the Agency's highest award (Gold Medal). I have been awarded five EPA Gold Medals and another five Bronze Medals.

17. Ms. Jeanne Duross indicated to me on September 29, 2011, that Mr. Fontaine and Ms. Fugh had discussed this matter prior to his submission of his FOIA request. During that meeting, Ms. Duross also stated that my approvals for my law firm activities (Schnare and Associates) and approvals for the Thomas Jefferson Institute for Public Policy were sufficient to cover any activities in the instant matter.

18. The EPA Fugh letter also fails to indicate that no federal employee is barred from representing himself at law, even against the agency for which they work. *See*, 5 C.F.R. § 3801.106(b)(i). "Outside Employment." In light of this rule, the approval for outside employment to represent myself in the instant matter cannot be denied, mooting whether it was ever approved.

19. I am a Petitioner in this matter and represent my own interests, interests identical to those of the other petitioners, and thus have no conflict of interest and have a legal right to an approval of my application for outside employment which would have been granted for the instant case had the memorandum been forwarded to Mr. Kushner.

20. I should also note that this case is not the only one being prosecuted by ATI. ATI is in federal district court in Colorado on a constitutional issue and in the District of Columbia district court on a matter involving a federal FOIA. Because I am not a plaintiff in either matter, I am not entered in either case, a practice exactly as stated in the outside employment memorandum.

21. I note that it is not possible for me to have a conflict of interest in this case as nothing now before this Court in the above titled matter has any relationship to any issue or matter before the U.S. EPA, much less any particular matter on which I worked while an EPA

attorney. This is even more particularly true in light of my recusal from working on the climate-related endangerment finding at EPA, a recusal made before creation of ATI. *See,* Exhibit 6.

22. I reiterate my statement in my outside employment memo that I have performed my duties outside of normal duty hours. Thus, they were either performed prior to commencement of my work day, after the work day, during lunch or break periods or while on leave. Every email sent to by me to Mr. Kast was sent through a non-governmental email system allowed by EPA to be used by its employees and not sent through the EPA email system.

23. I have made no misleading statement to Richard Kast about my employment status with EPA and made no false statements, demonstrable or otherwise, about conflicts of interest with EPA while being employed by EPA.

24. ATI is not a competitor of the University of Virginia (UVA), Pennsylvania State University (PSU) or any of their faculty associated with global warming and climate change. ATI does not offer products or services in competition with UVA or PSU. ATI is not a competitor for research grants, professional publications, scientific research or any other normal element of a UVA or PSU faculty member or the universities at large. ATI does not make company decisions that affect contracts, marketing, employment, pricing, product design, or any decisions that reflect similar or corresponding activities by UVA or PSU.

25. I do not participate in ATI decision-making with regard to contracts, marketing, employment, pricing, product design, or research grant proposals of the kind similar to those decisions made by UVA or PSU. Nor do I participate in ATI decision-making with regard to contracts, marketing, employment, pricing, or product design. My function with each organization involves legal and policy analysis, case selection and litigation.

26. I have agreed to comply with the Protective Order issued by the Court in this matter, have signed an agreement to that effect and have previously reiterated my commitment to honor this duty, both in line with the Court's Order and under the Virginia Rules of Professional Conduct. I reiterate this commitment again today in this sworn affidavit.

David W. Schnare

Seen to and subscribed before me on this 24th day of October, 2011.

My commission expires: 1/31/2013

Lindsey William Smith
Notary Public
Commonwealth of Virginia
Registration #7300833
My Comm. Exp. 1-31-2013

2. In your waiver request you agreed to comply with a number of conditions. Did you comply with all of those conditions?

RESPONSE

Yes, to the best of my knowledge.

3. According to a filing by the counsel for the University of Virginia, you sent e-mails and filed court documents repeatedly during normal hours of business. How were you able to do this without violating the condition that all pro-bono work in the case would be conducted outside "normal duty hours"?

RESPONSE

See the explanation provided in the affidavit provided in response to question number 1.

4. According to a filing by the counsel for University of Virginia, you did not timely disclose your status as a full time counsel to EPA. When did you make such a disclosure? Why had you not clearly disclosed this from the beginning of your dealings with UVA's counsel?

RESPONSE

I had no duty to disclose my employment status with EPA or with any other private client I may have had. A licensed attorney, which probably includes the staff who drafted this question for you, but of course does not include you, would know that this question is the kind of silly question only a "street lawyer" would ask, but not a competent attorney.

5. According to the counsel for the University of Virginia, when you did disclose your status as an EPA-employed counsel, you claimed that you "had authority from the agency to do pro bono public interest law for over 5 years now." Please provide the documentation associated with this EPA-granted authority.

RESPONSE

See the affidavit provided in response to question number 1.

6. According to the counsel for the University of Virginia you provided a document dated November 16, 2010 that purported to be your request for

"Approval of Outside Employment" to do pro-bono work for ATI. EPA was unable to find any record of a submission of that request in November of 2010 and the ethics officers that you would have consulted with to clear the request claimed no recollection of any such consultation. Please offer your best explanation of this complete lack of records associated with your request? If you have documentation that verifies your claims, please provide that to the Committee.

RESPONSE

The premise of your question is entirely false, again reflecting the incompetence of your staff. See the affidavit provided in response to question number 1.

7. Please provide a list of all non-governmental clients for whom you served in a legal capacity during your tenure as an EPA counsel. In each case, please provide documentation that this legal work was undertaken consistent with the rules at EPA for outside representation.

RESPONSE

Under law and the rules of professional responsibility, and under EPA regulations and policy, agency attorneys engaging in authorized outside legal practice (and there are many) have no duty to name their private clients. They need only identify the kinds of cases and matters in which they engage and must certify that they do not take up matters of the kind they address in their capacity as EPA attorneys. I am no different from them and make the same certifications as them.

8. At the time of your effort to serve as counsel, alongside Chris Horner, in the case ATI had brought against UVA for Dr. Mann's emails, the EPA was dealing with a series of legal challenges to its effort to regulate greenhouse gases. First, there were petitions seeking that EPA reconsider its Endangerment Finding. When EPA rejected those petitions in July 2010, a series of challenges were filed against the four specific regulatory proposals based on the Endangerment Finding. On January 2, 2011, petitioners in some of these cases filed a stay with the court seeking to block EPA from moving forward with regulation until the cases could be heard. A key argument for some parties--notably including the Competitive Enterprise Institute with which Chris Horner is associated--in both the petition to reconsider the finding and then the stay was an argument that e-mails that had been revealed in the so-called "Climategate" case revealed that the science EPA relied upon was, as some characterized it, unreliable. Dr. Michael Mann was one of the prominent scientists whose emails were partially compromised in "Climategate." Against this background, please

answer the following questions.

A. At the time you sought to represent ATI in the Michael Mann records case, were you aware that EPA was being sued regarding its proposed regulation of greenhouse gases?

RESPONSE

At the time I engaged in Virginia Freedom of Information Act litigation with the University of Virginia, I had recused myself from any work within EPA regarding climate issues. As a result, I did no work on anything related to greenhouse gases or climate issues.

B. Was your office at EPA involved in responses to either the requests for reconsideration of the Endangerment Finding or subsequent cases against proposed regulations?

RESPONSE

See response to question (A). Further, no.

C. Were you personally consulted in your capacity as a senior attorney with EPA in any of these matters?

RESPONSE

See response to question (A)

D. Did you attend any meetings at EPA in which this significant regulatory effort, and associated legal challenges, was discussed?

RESPONSE

See response to question (A). Further, no.

E. Were you aware that one of the arguments made by the Competitive Enterprise Institute, among other parties, in their filings was that the emails released in the Climategate incident revealed that the science which EPA relied upon for its endangerment finding was alleged to be unreliable?

RESPONSE

See response to question (A). Further, no.

F. Were you aware at that time that Chris Horner, co-counsel in the ATI case, was also affiliated with the Competitive Enterprise Institute?

RESPONSE

See response to question (A). Further, yes, but that is of no significance in light of the response to question (A).

G. If released, Dr. Mann's emails from his time at the University of Virginia would reasonably be expected to have been used--perhaps misused through cherry-picking of quotes out of context--as further evidence by attorneys for the Competitive Enterprise Institute and others in their suits against EPA. Can you explain how your representation of ATI in this suit did not conflict with your obligations to the client who employed you, the Environmental Protection Agency?

RESPONSE

See response to question (A).

Appendix II

Additional Material for the Record

MCCARTHY TEXT

Emerson, Michael

From: [redacted]
Sent: Tuesday, February 10, 2015 7:35 AM
To: Wachter, Eric
Subject: Fwd:
Attachments: text_0.txt; ATT00001.htm

Categories: Record Saved - Shared

Eric this is a text message that I forwarded to my email. Can you make sure it's preserved as a record? Thanks

Sent from my iPhone

Begin forwarded message:

From: <[redacted]@mms.att.net>
Date: February 5, 2015 at 3:58:12 PM EST
To: [redacted]

Emerson, Michael

From: [redacted]
Sent: Thursday, February 05, 2015 4:04 PM
To: Gene Karpinsky
Subject: Your Message

Gene - I received your text message earlier today but I do not use text messaging for work purposes. Please make sure in the future to use my email address. The best one to use is McCarthy.gina@epa.gov

Thanks

Sent from my iPhone

Emerson, Michael

From: [redacted]@mms.att.net
Sent: Thursday, February 05, 2015 3:58 PM
To: [redacted]
Attachments: text_0.txt

Categories: Record Saved - Shared

Karpinski here. Great job on the EPA comments on keystone. I feel like the end is very near.....

From: Gene Karpinski
Received: Feb 5,2015

Subject:Keystone

Thx.

Federal Laws that Constrain Federal Administration of Public-Facing Web Collaboration Tools

- National Archives and Records Administration (NARA)
- Federal Advisory Committee Act (FACA)
- Paperwork Reduction Act (PRA)
- National Institute of Standards and Technology (NIST)
- Section 508
- and more!

Also, you have to work within normal EPA business practices:

Communication procedures, managerial approval, ethics, etc.

Creative Solutions to Dealing with Federal Constraints

1) Use EPA's existing web tools: These include EPA's Environmental Science Connector, Quickr, Portal, Lyris listserv. New 'workspace' and 'social networking' tools are coming (eg. Websphere?).

2) Keep trying to create better and better external facing collaborative Websites. Eventually, we'll figure out how to work within our constraints and still get the job done. Each attempt can help grow best practices. (eg. Greenversations, Discussion forums, Watershed Central, Yammer anyone?)

(Slide 1 of 2)

Creative Solutions to Dealing with Federal Constraints

3) Join existent collaborative Website community with a similar mission and advertise that your users should use that platform for their workgroup needs and discussions. As long as we are only participants, not administrators of a web collaboration site, the site is not limited by those same constraints.

4) Suggest or designate 3rd party partners with the authority to build, administer, foster, and manage a Web community. You can even teach them how to do this. (eg. Yahoo Groups, Ning, GovLoops groups)

5) Wait a couple years. More than likely, this very common collaborative Website' issue will trickle up both at EPA and across government in the next two years, and a much better solution will come to fruition. (eg. Fedspace, OMB Max Wiki)

(slide 2 of 2)

SENATE EPW LETTER TO EPA OIG

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

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.[1] 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.[2] In response, several Congressional Committees, including EPW, expressed serious concerns that the actions of several high-ranking EPA officials may have violated transparency statutes,[3] 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,[4] which were included in a comprehensive Committee report, entitled, *A Call for Sunshine: EPA's FOIA and Fed. Records Failures*

[1] 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].
[2] Michael Bastasch, *EPA Chief Jackson Resigns Amid Transparency Investigaitons 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/.
[3] 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].
[4] 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., Envtl. Prot. Agency (Feb. 7, 2013).

Uncovered that was shared with your office.[5] 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."[6] Many media outlets relied on this conclusion to declare that there was nothing wrong with the Agency's practices.[7] 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.[8] 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.[9] 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.[10] 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.[11]

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,[12] 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,[13] all used a private email address to

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[5] E-mail from Republican Staff, S. Comm. on Env't. & Pub. Works, to Staff, Office of Inspector Gen., Envtl. Prot. Agency (Sept. 9, 2013 02:09 PM).
[6] OIG Report, *supra* note 1.
[7] 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/.
[8] Freedom of Information Act 5 U.S.C. § 552 *et seq.* (2012); Federal Records Management Act 44 U.S.C. § 2901 *et seq.* (2012).
[9] EPW Report, *supra* note 4; Envtl. Prot. Agency, Frequent Questions about E-Mail & Records, http://www.epa.gov/records/faqs/email.htm (last visited Feb. 18, 2014).
[10] Briefing for Staff of S. Comm. on Env't & Pub. Works (Jan. 24, 2014).
[11] OIG Report, *supra* note 1.
[12] Jared Blumenfeld, Adm'r Region 9 & James Martin, former Adm'r Region 8, *see* EPW Report, *supra* note 4.
[13] 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 & Envtl. Educ.; Larry Elworth, former Chief Agric. Advisor; Tseming Yang, former Dep. Gen. Counsel; Diane Thompson, former Chief of Staff.

conduct agency business.[14] 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.[15]

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.[16] 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.[17]

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.[18] 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.[19] 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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[14] EPW Report, *supra* note 4.
[15] *Id.* at 12–14
[16] E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Envtl. Prot. Agency, to Lisa Jackson, Former Adm'r, Envtl. Prot. Agency (Apr. 16, 2013 04:32 PM); E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Envtl. Prot. Agency, to Lisa Jackson, Former Adm'r, Envtl. Prot. Agency (May 2, 2013 03:06 PM); E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Envtl. Prot. Agency, to Scott Fulton, Former Gen. Counsel, Envtl. Prot. Agency (Apr. 11, 2013 05:37 PM); E-mail from Michael Goode, Project Manager, Office of Audit, Office of Inspector Gen. Envtl. Prot. Agency, to Scott Fulton, Former Gen. Counsel, Envtl. Prot. Agency (May 2, 2013 03:01 PM); Briefing for Staff of S. Comm. on Env't & Pub. Works (Jan. 24, 2014).
[17] Letter from Hon. Ralph Hall, Chairman, H. Comm. on Sci., Space & Tech., to Arthur Elkins, Jr., Inspector Gen., Envtl. Prot. Agency (Nov. 15, 2012); Press Release, Envtl. Prot. Agency, Statement Announcing Her Leaving Cabinet After State of Union (Dec. 27, 2012), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/3B1C073659F5E6A785257AE10054896I; *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-retire-leaving-another-top-slot-open/menu-id-565.html.
[18] *See* FOIA Request No. EPA-R9-2013-007631, *available at* https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28008301d.
[19] *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.[20] Such a conclusion ignores court holdings that recognize records contained on a private email account, are in fact agency records.[21] 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.[22] In addition, several emails between EPA officials using their personal email accounts to communicate with environmental groups have also been exposed through FOIA responses.[23] 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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[20] Briefing for Staff of S. Comm. on Env't & Pub. Works (Jan. 24, 2014).

[21] *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)).

[22] 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/.

[23] EPW Report, *supra* note 4.

[redacted]

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts

Report No. 13-P-0433 **September 26, 2013**

Scan this mobile code to learn more about the EPA OIG.

Report Contributors:

Rudolph M. Brevard
Michael Goode
Eric K. Jackson Jr.
Teresa Richardson
Gina Ross
Sabrena Stewart

Abbreviations

CFR	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
GAO	U.S. Government Accountability Office
NARA	National Archives and Records Administration
NRPM	National Records Management Program
OIG	Office of Inspector General
OMB	Office of Management and Budget

Hotline

To report fraud, waste, or abuse, contact us through one of the following methods:

email:	OIG_Hotline@epa.gov	**write:**	EPA Inspector General Hotline
phone:	1-888-546-8740		1200 Pennsylvania Avenue, NW
fax:	202-566-2599		Mailcode 2431T
online:	http://www.epa.gov/oig/hotline.htm		Washington, DC 20460

U.S. Environmental Protection Agency
Office of Inspector General

13-P-0433
September 26, 2013

At a Glance

Why We Did This Review

We conducted this audit in response to a request by the U.S. House of Representatives Committee on Science, Space, and Technology for information about the U.S. Environmental Protection Agency's (EPA's) practices when using private and alias email accounts to conduct official business.

The EPA's records management program is managed through the agency's National Records Management Program. The agency's records officer, located within the Office of Environmental Information, is responsible for leading the program in accordance with EPA policy, procedures, and federal statutes and regulations.

This report addresses the following EPA theme:

- *Embracing EPA as a high performing organization.*

For further information, contact our public affairs office at (202) 566-2391.

The full report is at: www.epa.gov/oig/reports/2013/20130926-13-P-0433.pdf

Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts

What We Found

We found no evidence that the EPA used, promoted or encouraged the use of private "non-governmental" email accounts to circumvent records management responsibilities or reprimanded, counseled or took administrative actions against personnel for using private email or alias accounts for conducting official government business. EPA senior officials said they were aware of the agency records management policies and, based only on discussions with these senior officials, the OIG found no evidence that these individuals had used private email to circumvent federal recordkeeping responsibilities.

The previous EPA Administrator and the then Acting EPA Administrator who followed were issued two EPA email accounts. One account was made available to the public to communicate with the EPA Administrator and the other was used to communicate internally with EPA personnel. This was the common practice for previous Administrators. The practice is widely used within the agency and is not limited to senior EPA officials. These secondary EPA email accounts present risks to records management efforts if they are not searched to preserve federal records.

The agency recognizes it is not practical to completely eliminate the use of private email accounts. However, the agency had not provided guidance on preserving records from private email accounts. The EPA has not implemented oversight processes to ensure locations provide consistent and regular training on records management responsibilities, and employees complete available training on their delegated National Records Management Program duties. Inconsistencies in employee out-processing procedures pose risks that federal records are not identified and preserved before an employee departs the agency. EPA also lacks an automated tool to create federal records from its new email system.

Recommendations and Planned Agency Corrective Actions

We recommend that the assistant administrator for the Office of Environmental Information develop and implement oversight processes to update agency guidance on the use of private email accounts, train employees and contractors on records management responsibilities, strengthen relationships between federal records preservation and employee out processing, and deliver a system to create federal records from the new system. The EPA concurred with many of our recommendations but did ask that we clarify aspects of two findings. The agency has either completed recommended actions or plans to take corrective actions to address our findings.

Noteworthy Achievements

EPA created a records policy to provide guidance to personnel regarding roles and responsibilities for records management. In fiscal year 2009, the EPA declared electronic content management an agency-level weakness. In its fiscal year 2012 Agency Financial Report, the EPA cited as part of its corrective action plan that it launched two pilot projects to evaluate tools for eDiscovery and the management of email records. Over the past 4 years, the EPA has taken various actions to close out this agency-level weakness.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

September 26, 2013

MEMORANDUM

SUBJECT: Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts
Report No. 13-P-0433

FROM: Arthur A. Elkins Jr.

TO: Renee Wynn, Acting Assistant Administrator and Chief Information Officer
Office of Environmental Information

This is our report on the subject audit conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG identified and the corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position.

Action Required

The EPA agreed with all five of our recommendations. The agency completed agreed-upon corrective actions associated with recommendations 1 and 2 and the OIG considers these recommendations closed. Recommendations 3 through 5 are considered open with agreed-upon corrective actions pending. We accept EPA's response and planned corrective actions and no further response is needed.

If you or your staff have any questions regarding this report, please contact Richard Eyermann, the acting assistant inspector general for the Office of Audit, at (202) 566-0565 or eyermann.richard@epa.gov; or Rudolph Brevard, director for Information Resources Management Audits, at (202) 566-0893 or brevard.rudy@epa.gov.

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Chapter 1
Introduction

Purpose

We conducted this audit in response to a U.S. House of Representatives Committee on Science, Space, and Technology request for information about whether the U.S. Environmental Protection Agency (EPA) follows applicable laws and regulations when using private and alias email accounts to conduct official business. Specifically, in response to the committee's request, the Office of the Inspector General (OIG) sought to determine whether the EPA:

- Promoted or encouraged the use of private or alias email accounts to conduct official government business.
- Reprimanded, counseled, or took administrative actions against any employees using private or alias email accounts.
- Established and implemented email records management policies and procedures for collecting, maintaining and accessing records created from any private or alias email accounts.
- Provided adequate training to employees concerning the use of private or alias email accounts to conduct official government business.
- Established and implemented oversight processes to ensure employees comply with federal records management requirements pertaining to electronic records from private or alias email accounts.

Background

National Archives and Records Administration

The National Archives and Records Administration (NARA) is responsible for overseeing agencies' adequacy of documentation and records disposition programs and practices. NARA issues regulations and provides guidance and assistance to federal agencies on ensuring adequate and proper documentation of the organization, functions, policies, decision, procedures and essential transactions of the federal government; and ensuring proper records disposition, including standards for improving the management of records.

Private and Alias Email

Private email accounts for the purposes of this review are defined as any non- ".gov" email addresses used to conduct EPA business. Alias email is defined as a secondary "epa.gov" account used to conduct EPA business. EPA stated that

alias email accounts have been used by prior EPA Administrators given the large volume of emails sent to their public EPA accounts.

Agency Record Management

The EPA manages its official records through its National Records Management Program (NRMP). The Office of Information Collection within the EPA's Office of Environmental Information oversees the NRMP. The agency records officer is responsible for leading the NRMP in accordance with the EPA policy, procedures, and federal statutes and regulations. The agency records management program lists the following as the agency records officer's responsibilities:

- Developing an overall records management strategy.
- Producing and updating EPA records management policies, procedures, standards and guidance.
- Cooperating with other units in developing policies and guidance on the application of technology to records management.
- Conducting specialized briefings on records management.
- Assisting records programs across the agency with advice and technical expertise.

Noteworthy Achievements

The EPA took steps to improve its records management practices. For example, the EPA created a records policy to provide guidance to personnel on the roles and responsibilities pertaining to records management. In addition, in fiscal year 2009, the EPA declared electronic content management an agency-level weakness. In its fiscal year 2012 Agency Financial Report, the EPA stated that it has either completed or initiated the following corrective actions to address this agency-level weakness:

- Established a new Quality Information Council Electronic Content Subcommittee.
- Developed a charter for the subcommittee.
- Established two enterprise-wide workgroups under the subcommittee.
- Developed interim procedures to address the storage and preservation of electronically stored information.
- Launched two pilot projects to evaluate tools for eDiscovery and the management of email records. The results of the pilot projects will be used to inform the subcommittee's decisions on future policy or tool implementation.

The agency has also stated that it will develop a validation strategy to assess the effectiveness of various activities undertaken to redress the identified weakness. The validation strategy will consist of processes that allow the agency to review and determine whether policies and tools are being implemented and utilized.

Scope and Methodology

We conducted this audit from December 2012 to June 2013. We performed this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on the audit objectives.

To obtain a broad understanding of EPA officials records management responsibilities, we reviewed agency records management policies and procedures; the Code of Federal Regulations (CFR) in 36 CFR Chapter XII – National Archives and Records Administration; Office and Management Budget (OMB) Circular A-123, *Management's Responsibilities for Internal Control;* and OMB Circular A-130, *Management of Federal Information Resources.*

We met with the then Acting EPA Administrator (currently the Deputy Administrator), staff and officials from the Office of the Administrator, officials from the Office of General Counsel, and appointed or acting assistant and regional administrators from the following program and regional offices, to gather an understanding of their background and experience with federal records requirements:

- Office of Environmental Information
- Office of Air and Radiation
- Office of International and Tribal Affairs
- Office of Research and Development
- Office of Chemical Safety and Pollution Prevention
- Region 2, New York, New York
- Region 3, Philadelphia, Pennsylvania
- Region 6, Dallas, Texas
- Region 8, Denver, Colorado
- Region 9, San Francisco, California

We met with offices' information management officers, senior information officials, regional records officers, records liaison officers, email administrators, human resource directors, and Freedom of Information Act officers responsible for implementing and complying with the EPA federal records guidance. We also met with the EPA representative responsible for the direct oversight of the agency's NRMP regarding that oversight and to obtain an understanding of the implemented internal controls around EPA's ability to maintain electronic records and other records management practices.

We also met with the former Region 8 regional administrator to gain his perspective on what EPA could do to strengthen its electronic records management practices. We requested interviews with the most recent former EPA Administrator and general counsel to gain their perspective on the agency's

records management practices. We did not receive a response from these two former employees on our requests for interviews.

We followed up on the status of recommendations made by the U.S. Government Accountability Office (GAO) in its report *National Archives and Selected Agencies Need to Strengthen Email Management* (GAO-08-742), issued June 2008. The report recommended that the EPA:

- Revise the agency's policies to ensure that they appropriately reflect NARA's requirement on instructing staff on the management and preservation of email messages sent or received from nongovernmental email systems.

- Develop and apply oversight practices, such as reviews and monitoring of records management training and practices, that are adequate to ensure that policies are effective and staff are adequately trained and implementing policies appropriately.

The GAO noted that the EPA was in the process of improving the implementation of its electronic content management system in order to collect federal records within the agency's email system.

Chapter 2
The EPA's Use of Private and Alias Email Accounts

The EPA lacks internal controls to ensure the identification and preservation of records when using private and alias email accounts for conducting government business. The agency lacks controls to ensure agency employees and contractors are trained on the records management responsibilities and a process to create records from its new email system. Federal guidance issued by NARA requires agencies to appropriately identify and preserve records for its decisions. Federal guidance also specifies records management training requirements as well as the requirements when using automated systems to preserve email records. The weaknesses noted occurred because the EPA had not created records management policies and procedures for private email account usage, and had not conducted oversight to ensure employees and contractors were provided consistent and regular training on records management responsibilities. Further, the EPA lacks controls to ensure out-processing procedures identify potential records, and lacks an automated process to create federal records from its new email system. If these critical issues are not corrected, the agency faces the risk that records needed to document the EPA's decisions would not be available. This could potentially undermine the public's confidence in the transparency of the EPA's operations and ultimately erode the public's trust in the agency's stewardship of the nation's environmental programs.

Results of Review

We found no evidence to support that the EPA used, promoted, or encouraged the use of private email accounts to circumvent records management responsibilities. Furthermore, EPA senior officials indicated that they were aware of the agency records management policies and, based only on discussions with these senior officials, the OIG found no evidence that these individuals had used private or alias email to circumvent federal recordkeeping responsibilities. We noted that the previous EPA Administrator and the subsequent Acting EPA Administrator (the Deputy Administrator) each had two EPA email accounts, one intended for messages from the public and one for communicating with select senior EPA officials. Interviews with selected assistant and regional administrators and records management officials disclosed that the practice of assigning personnel access to multiple email accounts is widely practiced within the agency. We found no evidence to support that the EPA reprimanded, counseled or took administrative actions against personnel for using private and alias email accounts.

Personnel have access to multiple EPA email accounts for various purposes. These include sending out mass email notifications, transmitting or receiving documents in support of special projects, or linking the email account to an agency publicly available website to provide the public with a method to

correspond with the EPA. Each of these additionally assigned email accounts could potentially contain federal records or other documents subject to Freedom of Information Act requests or litigation holds. Our audit disclosed that these secondary email accounts present risks to the agency's records management efforts if they are not searched to preserve federal records.

In addition to needed improvements over internal controls surrounding secondary email accounts, more oversight is needed to strengthen policies and procedures regarding the use of private email accounts, processes for training employees and contractors on their records management responsibilities, and practices for preserving records when employees depart the agency. The EPA should also ensure that it implements a tool to create records directly from its new email system.

The EPA Lacks Records Management Policies and Procedures Regarding Private Email Account Usage

The EPA lacks consistent practices regarding what steps employees should take to preserve federal records when they use private email accounts for conducting government business. Instead, in October 2012, in response to increased attention brought on the agency due to media articles and inquires into the EPA records retention practices, EPA officials placed an alert on its Intranet advising employees the following:

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

Title 36 CFR Chapter XII – National Archives and Records Administration, Part 1236, states that agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.

The EPA had not developed or implemented policies or procedures regarding the preservation of email messages sent or received from private email systems. While the EPA alert advises employees not to use outside email systems to conduct official business, the alert does not instruct employees on the management and preservation of email messages sent from outside email systems if it were to occur. Senior agency officials and office representatives cited reasons why the complete nonuse of personal electronic equipment (which includes computers, mobile devices and email accounts) when the employee is not within the office is not practical.

Senior agency officials and office representatives noted as one reason the proliferation of personal mobile devices that are not allowed access to the agency's

network. The officials also cited as another reason the increased use of unscheduled telework, during which employees unexpectedly worked off site when they did not have their assigned government equipment with them. However, given these growing concerns, the EPA had not taken steps to provide employees guidance as to when they may use private electronic equipment—including computers, mobile devices and email accounts—to conduct government business.

Without effective records management policies and procedures that address collecting, maintaining and accessing records created from private email accounts, the EPA risks the possibility that agency personnel are not conducting government business in a manner consistent with management's desires. The EPA also risks the possibility that agency personnel are not capturing potential records needed to document agency decisions.

The EPA Lacks Records Management Training for Private and Alias Email Usage

The EPA lacks internal controls to ensure that personnel are trained on their responsibilities for preserving records from private and alias accounts used to conduct official government business. As noted, the EPA does not have formal guidance on the use of private email accounts and subsequently has not provided training in this area. Further, the agency has not conducted training on its existing records management policies and procedures, which govern government records since 2009. Our discussion with agency representatives raises doubt as to whether the EPA will meet the latest requirement to inform all personnel of their records management responsibilities.

Federal guidance requires training of personnel on their records management responsibilities. Specifically:

- NARA states that federal agencies must provide guidance and training to all agency personnel on their records management responsibilities, including identification of federal records, in all formats and media.

- OMB Circular A-123 reiterates management's responsibility for establishing internal control to train personnel to possess the proper knowledge and skills to perform their assigned duties. OMB Circular A-130 requires agencies to train all employees and contractors on their federal records management responsibilities.

- OMB Memorandum M-12-18, *Managing Government Records*, requires agencies to inform employees of their records management responsibilities by December 31, 2014.

The EPA had not provided records management training to employees and contractors in over 3 years. The agency last provided agencywide records

management training in fiscal years 2007 and 2009. While the training discussed creating records within government email systems, neither of these two training courses addressed the usage of private email accounts to conduct official government business. The training also has not been updated to place emphasis on creating records when employees are assigned secondary email accounts. The agency plans to incorporate the use of private or secondary email accounts in future training courses to fulfill the OMB training requirement to inform employees of their records management responsibilities. However the agency has not established a firm date for when it would develop or offer the training course.

The EPA's NRMP did not establish controls to ensure consistent training of records management responsibilities within the regional and program offices or ensure employees with specific NRPM responsibilities took available training. We noted that the EPA created an organizational structure for its records management program with clearly defined roles and responsibilities. The EPA also has training available for agency records officers, liaisons and coordinators. However, the agency lacked processes to ensure the structure functioned as intended and specialized training was taken when needed.

According to a program office records liaison officer, the officers rely upon the headquarters NRPM official to provide training for them to use to train their personnel. Records liaison officers could not provide records to show how many personnel within their offices were trained on records management responsibilities in general or specifically trained on the office's policy on using personnel email accounts when conducting official government business. Our interviews also disclosed that the agency relies upon the records liaison officers to take additional training to carry out their delegated duties and the agency does not monitor whether the records liaison officers took training.

The lack of consistent records management training increases the risk that agency employees neither understand nor fully comply with federal records management requirements. This also has led to records management training, when given, being delivered in an ad hoc and informal manner with no measure to ensure the information reached the specified target audience. As such, we believe the agency has limited assurance that all applicable personnel are trained on records management responsibilities, and raises questions as to whether any provided training was delivered in sufficient frequency to ensure personnel could appropriately carry out their responsibilities.

The EPA Lacks Practices for Collecting and Preserving Records for Employees Separating From Regional Offices

The EPA lacks internal controls to ensure that regional offices consistently collect and preserve electronic records for separating employees. Our audit disclosed that regional offices lacked processes for notifying individuals with records management responsibilities about employee separation from the agency, to

ensure that all records were identified before the employee's departure. Management at regional offices did not consistently validate that separating employees turned over electronic records. This included collecting and preserving electronic records in alias email accounts known as "mail-in accounts," as well as files on flash drives and external hard drives.

EPA Order 3110.5A and Employee Separation Checklist Form 3110-1 outline the agency's employee separation procedures. The procedures state that management is responsible for certifying receipt of items listed on Form 3110-1, which includes the identification and transfer of agency records. The procedure assigns departing employees with responsibility to identify and transfer agency records. The procedure also assigns the employee's supervisor and program office records manager responsibility to validate the receipt of records through signature.

Weaknesses within regional separation procedures exist due to the NRMP manager not conducting oversight to ensure that federal records procedures were fully integrated. Our review disclosed that regional notification procedures for departing employees did not allow time to identify and preserve official records. We also found that managers with records responsibilities did not consistently take steps to validate collection and preservation of records before employee departure. For example:

- Regions lacked internal controls to ensure employee separation checklists reached individuals with records management responsibilities in order for them to preserve federal records. This included taking steps to have employees search for potential records residing within alias email accounts the employee manages or on other electronic media devices within the employee's control.

- Some employees bypass their supervisor or administrative officer and go directly to the regional human resource office to start the separation process. As such, individuals tasked with records management responsibilities do not know that an employee is departing until the employee arrives with the separation checklist for clearance signature.

- Regional separation checklists did not include an area where regional office managers tasked with records management responsibilities could sign off on employee separation forms. Some regional separation checklist forms did not include an agency requirement to identify and transfer records.

- Regional office managers not tasked with records management responsibilities were signing off on employee separation forms without conducting steps to ensure that collection and preservation of the separating employees' electronic records had occurred. One regional human resource staff member also stated that they typically have to sign off on employee clearance forms for employees who depart at the end of the year, when most supervisors are taking leave (use or lose) at holiday time.

Without effective employee separation processes that ensure identification and collection of agency records from all electronic media used for collection and storage, the EPA risks losing historical records that support its decisions. EPA human resource offices are signing off that agency records were preserved even though they were not in a position to know this information. The weaknesses have also left regional counsels with insufficient time to have employees search to ensure that all records are preserved for ligation holds, and with the information to prompt employees to search for records that may be contained within alias email accounts, flash drives and external hard drives.

The EPA Lacks Tool to Place Email in Its Electronic Content Management System for Its New Email System

The EPA deployed its new email system without the capability to place new email system records in its electronic content management system. During its audit, the GAO noted that email records retention in the EPA was primarily a print-and-file system and noted that the EPA developed an oversight plan and pilot-tested a records management survey tool.

Subsequent to the GAO report, in fiscal year 2009, the EPA declared electronic content management an agency-level weakness. In its fiscal year 2012 Agency Financial Report, the EPA noted that inconsistencies in how electronic content is maintained and stored have started to impact critical processes related to electronic records management. The EPA cited as part of its corrective action plan that it would launch two pilot projects to evaluate tools for eDiscovery and the management of email records.

The EPA implemented its new email system without providing a means for agency employees to create federal records in the agency's electronic content management system. During the past 4 fiscal years, the EPA has been taking steps to complete corrective actions to close out the electronic content management agency-level weakness by the projected completion date of fiscal year 2013. Based on information on the agency's electronic content management website, employees are directed to print and file email records until an electronic content management system is in place to store records. However, the website provides no information as to when the EPA would provide a solution for creating federal records from its new email system. We believe that the EPA will not be in a position to close out the agency-level weakness by its projected fiscal year 2013 completion date.

Agency Actions Prior to Issuance of Final Report

On June 28, 2013, the EPA issued Interim Records Management Policy CIO 2155.2. This policy states that official agency business should first and foremost be done on official EPA information systems (e.g., email, instant messaging, computer work stations, and shared service solutions). The policy specifies that the record creator must ensure that any use of a non-governmental

system does not affect the preservation of federal records for Federal Records Act purposes, or the ability to identify and process those records, if requested, under the Freedom of Information Act or for other official business (e.g., litigation or congressional oversight requests.).

Also, on July 31, 2013, the agency deployed its new mandatory records management training for all agency staff, contractors and grantees that have access to EPA information systems. The EPA indicated that over 30 percent of agency employees have already taken the training.

Recommendations

We recommend that the assistant administrator and chief information officer, Office of Environmental Information:

1. Develop and implement records management policies and procedures regarding the use of private email accounts when conducting official government business.

2. Develop internal controls to ensure that all EPA employees and contractors complete training on their records management responsibilities.

3. Develop and implement internal controls to monitor and track completion of training for personnel with specific delegated duties and responsibilities outlined in the NRMP guidance.

4. Conduct outreach with all EPA offices to ensure that locally developed separation policies and procedures, as well as the associated employee separation checklist, include records management retention practices consistent with agency guidance. This should include ensuring that:

    a. Locations' out-processing procedures contain practices where notifications are sent to individuals with records management responsibilities in a timely manner to aid in capturing electronic records from separating employees.

    b. Locations include steps to have employees search for potential records residing within alias email accounts that the employee manages or on other electronic media devices within the employee's control.

    c. Locations have special out-processing procedures that contain a method for collecting records from departing employees during the holiday season or times of limited staffing.

d. Locations update their locally developed out-processing checklist to ensure an area exists for where records managers can note their records management certifications as required by agency policy.

5. Establish a revised date for when the EPA will implement an electronic content management tool to capture email records within the agency's new email system.

Agency Response and OIG Evaluation

The agency provided a corrective action plan with milestones to address all the report recommendations. The agency completed corrective actions associated with recommendations 1 and 2 and the OIG considers these recommendations closed. Recommendations 3, 4 and 5 are considered open with corrective actions pending.

Although the EPA agreed to perform corrective actions for our recommendations, the agency believed the report did not:

- Recognize the distinction between secondary accounts used by EPA Administrators for a specific purpose and secondary email accounts used for purposes such as sending out mass email notifications, transmitting or receiving documents in support of special projects, or linking the email account to an agency publicly available website to provide the public with a method to correspond with the EPA.

- Reflect the issuance of the EPA Interim Records Management Policy CIO 2155.2 on June 28, 2013, which strongly discourages the use of private non-EPA email accounts

Our audit disclosed that the agency uses secondary email accounts similarly throughout the EPA. These secondary email accounts can send and receive email messages as well as create records that could be subject to Freedom of Information Act or litigation requests. The agency also had not implemented policies that make distinctions between secondary email accounts used by senior agency official and secondary email accounts used for other purposes. As such, we made no differentiation between these accounts during our audit. Our audit disclosed that secondary email accounts pose risks to the agency and the EPA should take steps to strengthen the management control structure surrounding these accounts.

We updated the final report to recognize that the EPA issued its interim records management procedure subsequent to the OIG issuing its discussion draft report.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in $000s)	
Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	11	Develop and implement records management policies and procedures regarding the use of private email accounts when conducting official government business.	C	Assistant Administrator and Chief Information Officer, Office of Environmental Information	6/28/13		
2	11	Develop internal controls to ensure that all EPA employees and contractors complete training on their records management responsibilities.	C	Assistant Administrator and Chief Information Officer, Office of Environmental Information	7/31/13		
3	11	Develop and implement internal controls to monitor and track completion of training for personnel with specific delegated duties and responsibilities outlined in the NRMP guidance.	O	Assistant Administrator and Chief Information Officer, Office of Environmental Information	12/31/13		
4	11	Conduct outreach with all EPA offices to ensure that locally developed separation policies and procedures, as well as the associated employee separation checklist, include records management retention practices consistent with agency guidance. This should include ensuring that: a. Locations' out-processing procedures contain practices where notifications are sent to individuals with records management responsibilities in a timely manner to aid in capturing electronic records from separating employees. b. Locations include steps to have employees search for potential records residing within alias email accounts that the employee manages or on other electronic media devices within the employee's control. c. Locations have special out-processing procedures that contain a method for collecting records from departing employees during the holiday season or times of limited staffing. d. Locations update their locally developed out-processing checklist to ensure an area exists for where records managers can note their records management certifications as required by agency policy.	O	Assistant Administrator and Chief Information Officer, Office of Environmental Information	12/31/13		
5	12	Establish a revised date for when the EPA will implement an electronic content management tool to capture email records within the agency's new email system.	O	Assistant Administrator and Chief Information Officer, Office of Environmental Information	12/31/13		

[1] O = recommendation is open with agreed-to corrective actions pending
C = recommendation is closed with all agreed-to actions completed
U = recommendation is unresolved with resolution efforts in progress

Appendix A

Agency Response to Draft Report

August 27, 2013

MEMORANDUM

SUBJECT: Response to the Office of Inspector General Draft Report No. OA-FY13-0113 Congressionally Requested Inquiry into the EPA's Use of Private and Alias Email Accounts, dated July 19, 2013

FROM: Renee P. Wynn
Acting Assistant Administrator and Chief Information Officer

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the issues and recommendations described in Draft Report No. OA-FYI3-0113.

Over the last several months, the agency has undertaken many important actions designed to improve the agency's records management and preservation program. Because of the connection between these efforts and some of the issues discussed in your draft report, and because we believe the report should be evaluated with an understanding of these efforts, I detail the efforts below.

Improved Training on Information Management Responsibilities

The EPA has launched a multi-faceted training effort to ensure every employee at the agency understands his or her records management responsibilities. First and foremost in the agency's training program is mandatory training for all employees of the EPA on records management. On July 31,2013, Deputy Administrator Robert Perciasepe announced the availability of this new training, reminding employees that "records management is the daily responsibility of every EPA employee." The training focuses on the foundations of records management, providing guidance on how to identify and preserve Federal records. Less than three weeks after the training was announced - and more than a month before the training must be completed on September 30, 2013 - over 30% of agency employees have already taken the training.

In addition to training for all employees, the EPA is working with the Department of Justice's Office of Information Policy on in-depth training for the agency's Freedom of Information Act (FOIA) professionals. The Office of Information Policy is the office within the Department of Justice that develops guidance for Executive Branch agencies on our responsibilities under FOIA, and is understood by government and non-government organizations alike as the government's foremost FOIA experts. The EPA is excited to welcome DOJ for this training, which the agency expects to conduct in September 2013.

Following up on 2013's Records Management training, the EPA will conduct mandatory training for all of our employees on their individual and collective responsibilities ttt1der FOIA in 2014. This training is expected to focus on the requirements of FOIA; the importance of timely, accurate responses; and the role every employee plays in the agency's efforts to comply with the Act. In addition to these training modules, the EPA has completely overhauled our Records intranet site. This site, at http://intranet.epa.gov/records, serves as an agency-wide records management resource, and provides guidance to employees as well as links to a variety of information law resources.

Updated Policies For Employee Conduct

In addition to a renewed focus on training for employees, the EPA has begun the process of reviewing, updating, and reissuing agency policies for the effective management of agency information resources. First among that effort was a review of the agency's Records Policy, with the specific intent of addressing the use of personal email and consolidating our records retention schedules to make them easier for staff to use and more adaptable to electronic records management tools.

In June 2013, the EPA issued its Interim Records Management Policy CI0-2155.2, which strongly discourages the use of private non-EPA email accounts, stating that "Official Agency business should first and foremost be done on official EPA information systems." Further, the Interim Policy goes on to instruct employees on how to manage and preserve email messages sent from outside email systems if use of a non-EPA email system were to occur. The Interim Policy instructs employees that once the electronic files have been captured in an approved EPA records management system, they should be removed from non-EPA information systems, unless subject to an obligation to preserve the files in their original location. The EPA initiated the process to finalize this policy shortly after issuing in interim form.

On September 30th, the EPA will issue its first agency-wide Interim FOIA Procedures. The EPA expects these procedures will increase consistency and predictability in the processing of FOIA requests across the agency's programs and regions. The procedures define key roles and responsibilities in the processing of FOIA requests, and detail the basic steps of processing a request, from receipt to document collection to production.

Advanced Technology for Managing Agency Information

The EPA has also embarked on an ambitious effort to improve the technology available to employees for managing, preserving, and producing agency information. In 2010, the EPA established the Electronic Content Subcommittee of the Quality and Information Council. (The Council was established in 1999, to address enterprise-wide information management issues and to develop agency policies to guide the EPA in the areas of information technology and information management.) The Electronic Content Subcommittee was established to focus particularly on the challenge of creating, preserving, maintaining, and retrieving the range of electronic information at the agency. Under the auspices of that Committee, the agency's eDiscovery Workgroup led the way in launching an enterprise-wide litigation hold solution in October of2012. For the first time, the EPA now issues, maintains, tracks, and monitors all litigation holds issued to agency employees in a single system. This consolidation helps the

agency ensure it is preserving all information subject to a litigation-based preservation obligation, and increases consistency and efficiency at the same time. The Workgroup has also made significant progress towards the full launch of electronic search and review tools that will be used for more comprehensive and efficient information requests and document productions.

The agency is also poised to release an "EZ Records" tool to assist employees with their records management obligations. The EZ Records tool will allow employees to designate emails as records with just one click of a mouse, increasing the likelihood that employees will preserve email records as soon as they are created. To help encourage use of the tool, in October 2013, the EPA will launch an Agency-wide, mandatory training on how to capture email records using the new EPA-developed tools for records preservation.

Response to the Draft Report

The agency has welcomed this evaluation by the Office of Inspector General. The "Agency's Response to Report Recommendations" attachment details EPA's response to each recommendation and provides an estimated date of completion. In addition to the responses to the Report's specific recommendations, the agency would also like to respond to certain aspects of the narrative portions of the report as well.

Specifically on the use of private, non-EPA email accounts, the report correctly finds that the agency has not "promoted or encouraged the use of private ' non-governmental' email accounts to conduct official government business." In fact, the agency has taken many steps to discourage the use of non-EPA email accounts unless necessitated by special circumstances. Since 2009, the agency has stated both in its records training for senior officials and on its records intranet site Frequently Asked Questions that EPA staff generally should not use non-government email accounts to conduct official agency business. EPA's records officer provides this information as part of the on-boarding process for political appointees and senior officials in Headquarters, as well as consults with Records Liaison Officers to provide this information to officials located in the agency's regional office. We believe that the report should more clearly recognize these previous efforts to provide guidance on this issue. In addition, the report does not reflect that all employees at headquarters receive basic records management training as part of the onboarding process, and are provided information about the extensive self-help section of the Records Program intranet site.

The agency believes that the report could be more helpful for our efforts to improve our records management program by making a clearer distinction among the types of email accounts addressed in the report. The report uses both "private" and "personal" to describe email accounts that are not maintained on an EPA system. We encourage the OIG to use consistent nomenclature in the final report, to ensure all recipients of the report understand the guidance provided.

We also strongly encourage the OIG to more clearly distinguish between non-EPA email accounts and "secondary" official epa.gov email accounts. Secondary epa.gov accounts are official government accounts that are assigned to an employee to a program within the EPA as part of that employee's or programs official government duties. Emails sent to or from these

accounts are sent two or from the EPA email system in the same manner and form as an email to or from a "primary" account is sent to or from the EPA email system. These accounts are different from non-EPA email accounts, and, as such the two may require different actions to ensure compliance with an employee's information management responsibilities.

Additionally, the report also seems to conflate various types of secondary official epa.gov email accounts. There are a variety of uses for secondary accounts that are different from a regular, day to day email account of a single employee. Currently, the agency has only identified a need for the Administrator or Deputy Administrator to have a secondary account that is specific to her or him and that is used as her or his day to day official government email account. These secondary, official government accounts permit the Administrator and Deputy Administrator to conduct agency business by maintaining a manageable, working email account for daily correspondence with staff and other officials, and the EPA's practice of issuing such accounts has been reported and documented to the National Archives and Records Administration (NARA) since 2008. This practice is appropriate and commonplace within the federal government. The Administrator's primary account, which is provided to the public, is rendered impractical because of the large volume (over 1 million emails annually) of mail it receives from outside the agency. The EPA actively monitors both the primary and secondary accounts, and ensures that all emails to either type of account are properly reviewed for preservation under the Federal Records Act and produced under the FOIA or other production obligation. The agency strongly believes that the final report should more clearly reflect the very limited existence and use of this type of secondary official email account.

The other types of "secondary" accounts discussed in the report are generally not accounts assigned to or used by an individual employee for her day to day email communications. These accounts are also used for practical purposes, such as sending out mass email notifications, transmitting or receiving documents in support of special projects, or linking the email account to a publicly available website of the agency to provide the public with a method to correspond with the EPA. An example of this type of secondary account is the "contact us" email account for the EPA's Sun Wise program. This account is used to answer questions from the public about the Sun Wise program and is designated as Sun Wise Staff (sunwise@epa.gov) . This type of secondary account might be more clearly identified as a "group" account or "special purpose" account. We strongly believe that the final report should make this distinction, and clarify the draft report's conclusion that: "This practice is widely used within the agency and not limited to senior officials." My office has no information that indicates the use of "secondary" day to day government email accounts, such as the one used by the Administrator and which was the subject of the Congressional inquiry, is widely used within the agency, and the draft report does not include information to the contrary.

The use of both types of secondary accounts is authorized and appropriate, therefore, the agency has not reprimanded, counseled, or taken administrative actions against personnel using the accounts for conducting official government business. Use of secondary accounts does not alter or interfere with the preservation requirements under the Federal Records Act or disclosure requirements under the Freedom of Information Act and Congressional document requests. Further, all agency-issued email accounts, including primary accounts and any type of secondary accounts, are subject to the same current agency records policies and procedures for managing

records, both created and received on these accounts and are subject to the current agency disclosure policies for responding to information requests. In addition, the report does not indicate in the Scope and Methodology section that staff members who manage the secondary official government account assigned to the Administrator were consulted during this audit. I believe that these individuals may provide valuable additional information about existing practices and procedures for capturing and producing records from these accounts to ensure the agency complies with preservation and disclosure requirements.

Finally, while the agency agrees with many of the recommendations in the report, some of the recommendations (specifically 3 and 4) go beyond the issue of "Private and Alias" email account usage. As you can see from the information detailed above, these recommendations relate to issues already identified and actively being addressed by the EPA's Office of Environmental Information (OEI).

Our response to your recommendations is attached.

We look forward to discussing this report with you and to working with your office to improve EPA's records management program. If you have any questions regarding this response, please contact John Ellis, Agency Records Officer, of the Office of Information Collection/Collection Strategies Division/Records and Content Management Branch on (202) 566-1643.

Attachment

cc: Vaughn Noga
Andrew Battin
Jeff Wells
John Moses
Erin Collard
John Ellis
Scott Dockum
Brenda Young

AGENCY'S RESPONSE TO RECOMMENDATIONS: OIG Report OA-FY13-113

No.	Draft Report Recommendation	Agency Response	Estimated Completion by Quarter and FY
1.	Develop and implement records management policies and procedures regarding the use of private email accounts when conducting official government business. (page 11)	EPA issued an Interim Records Management Policy CIO-2155.2, on June 28, 2013 which strongly discourages the use of private non-EPA email accounts and instructs employees on the management and preservation of email messages sent from outside email systems if it were to occur. EPA has initiated a process to finalize Records Management Policy CIO-2155.2	Completed Q3 FY2013 In progress Q3 FY2014
2.	Develop internal controls to ensure that all EPA employees and contractors complete training on their records management responsibilities. (page 11)	EPA developed mandatory records management training for all EPA staff, contractors and grantees. The training was deployed agencywide July 31, 2013 and is to be completed by September 30, 2013.	In progress - Q4 FY2013
3.	Develop and implement internal controls to monitor and track completion of training for personnel with specific delegated duties and responsibilities outlined in the National Records Management Program (NRMP) guidance. (page 11)	Records Liaison Officers are required to obtain the NARA Certification in Federal Records Management. This training is tracked by NARA and periodically reported to the Agency Records Officers. Although this recommendation does not appear to specifically relate to private or secondary email accounts, the NRMP will request an updated report from NARA and follow-up with any RLO that has not received the certification. Non compliance will be reported to the management for appropriate action.	Q1 FY2014
4.	Conduct outreach with all EPA offices to ensure that locally developed separation policies and procedures, as well as the associated employee separation checklist, include records management retention practices consistent with agency guidance.	EPA's National Records Management Program, via the Quality and Information Council's agency-wide Records Workgroup, has been working with OARM to develop a consolidated employee separation and transfer procedure. Although this recommendation	Q1 FY 2014

	This should include ensuring that: a. Locations' out-processing procedures contain practices where notifications are sent to individuals with records management responsibilities in a timely manner to aid in capturing electronic records from separating employees. (page 11)	does not appear to specifically relate to private or secondary email accounts, the procedure will include a requirement that Records Liaison Officers, Records Contacts and Document Control Staff are notified 2 weeks in advance of an employee's separation, when possible. This will alert the staff with specific records management responsibilities to aid separating staff in capturing their records.	
4.	b. Locations include steps to have employees search for potential records residing within alias email accounts that the employee manages or on other electronic media devices within the employee's control. (page 11)	EPA's National Records Management Program, via the Quality and Information Council's agency-wide Records Workgroup, and OARM will include in the separation process and procedures, steps to have employees search for potential records residing within the secondary or group email accounts that the employee manages. A checklist will also be provided which will include all possible locations where records (paper and electronic) might be found.	Q1 FY 2014
4.	c. Locations have special out-processing procedures that contain a method for collecting records from departing employees during the holiday season or times of limited staffing. (page 11)	Although this recommendation does not appear to specifically relate to private or secondary email accounts, the EPA's National Records Management Program, via the Quality and Information Council's agency-wide Records Workgroup, and OARM will include in the separation procedure safeguards to ensure that separating employee information is captured during the holiday season and other times of limited staffing.	Q1 FY 2014
4.	d. Locations update their locally developed out-processing checklist to ensure an area exists for where records managers can note their records management certifications as required by agency policy. (page 12)	Although this recommendation does not appear to specifically relate to private or secondary email accounts, the EPA's National Records Management Program and OARM will include in the separation process and procedures an out-processing checklist to ensure an area exists	Q1 FY2014

		for records managers to certify as required by policy.	
5.	Establish a revised date for when the EPA will implement an electronic content management tool to capture email records within the agency's new email system. (page 12)	In addition to the Lotus Notes email records solution, which is already developed, an email records solution for MS Office 365 is under development. Although this recommendation does not appear to specifically relate to private or secondary email accounts, the EPA will deploy agency-wide the email records solution for both Lotus Notes and MS Office 365.	Q4 FY2013 Q1 FY2014

No.	Findings	Agency Explanation/Response	Proposed Alternative
1.	The report states that, "the previous EPA Administrator and current Acting EPA Administrator each had two EPA email accounts, one intended for messages from the public and one for communicating with select senior officials." (page 5) Further the report notes, "that the practice of assigning personnel access to multiple email accounts is widely practiced within the agency." (page 5)	This statement does not recognize the distinction between secondary accounts used by EPA Administrators for a specific purpose, and secondary email accounts used for purposes such as sending out mass email notifications, transmitting or receiving documents in support of special projects, or linking the email account to an agency publicly available website to provide the public with a method to correspond with the EPA.	Revise the report to recognize this distinction.
2.	The report states that "EPA had not developed or implemented policies or procedures regarding the preservation of email messages sent or received from private email systems." (page 6) Further, the report notes that [EPA], "...does not instruct employees on the management and preservation of email messages sent from outside email systems if it were to occur." (page 6)	Please modify the statement to reflect the issuance of the EPA Interim Records Management Policy CIO-2155.2, on June 28, 2013 which strongly discourages the use of private non-EPA email accounts and instructs employees on the management and preservation of email messages sent from outside email systems if it were to occur. EPA has initiated the process to finalize EPA Records Management Policy CIO-2155.2	Revise the report to indicate that EPA put in place policy and procedures and training regarding the proper management of email records sent from private accounts. In progress Q3 FY2014

Appendix B

Distribution

Office of the Administrator
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United States Senate
Environment and Public Works Committee

Minority Report

A Call for Sunshine:

EPA's FOIA and Federal Records Failures Uncovered

September 9, 2013

Contact: Luke Bolar – Luke_Bolar@epw.senate.gov (202) 224-6176
Cheyenne Steel – Cheyenne_Steel@epw.senate.gov (202) 224-6176
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.

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[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.

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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.

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[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]

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[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.

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[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

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[15] PowerPoint, U.S. Envtl. 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. Envtl. 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. Envtl. Prot. Agency, as "Richard Windsor," to Robert Goulding, U.S. Envtl. 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

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[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. Envtl. 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. Envtl. 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. Envtl. 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]

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[27] E-mail from Alison Taylor, Vice President, Siemens Corp., to Lisa Jackson, Adm'r, U.S. Envtl. 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. Envtl. 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,

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[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. Envtl. Prot. Agency Region 8, to Vickie Patton, Envtl. Defense Fund (Apr. 16, 2012, 10:12:05 AM), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8432e575-ed1a-4aab-b614-7e1623096a86.

[29] E-mail from James Martin, Adm'r, U.S. Envtl. 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. Envtl. 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. Envtl. Prot. Agency Region 9 (Mar. 18, 2013).

[35] *Id.*

[36] Letter from Arvin Ganesan, Assoc. Adm'r, U.S. Envtl. 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 Sussman[41] and former Associate Administrator for Congressional and Intergovernmental Relations David McIntosh[42] 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. Envtl. 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. Envtl. 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. Envtl. Prot. Agency (Feb. 16, 2009, 09:21 AM).

[42] E-mail from David McIntosh, to Lisa Jackson as Richard Windsor, Adm'r, U.S. Envtl. 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. Envtl. 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. Envtl. Prot. Agency, to all employees of the U.S. Envtl. 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. Envtl. Prot. Agency, to all employees of the U.S. Envtl. 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. Envtl. Prot. Agency, to all employees of the U.S. Envtl. 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. Envtl. 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/epafoia1/reference.html (last accessed Sept. 6, 2013).

[51] E-mail from Joe Kordzi, U.S. Envtl. Prot. Agency Region 6, to Carrie Thomas, U.S. Envtl. 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. Envtl. Prot. Agency Region 6, to Carrie Thomas, U.S. Envtl. 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.

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[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. Envtl. 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. Envtl. 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 America 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 Inskeep, *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. Envtl. Prot. Agency, to Joe Kordzi, U.S. Envtl. 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

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[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.

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[72] Letter from Larry F. Gottesman, National FOIA Officer, U.S. Envtl. 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. Envtl. 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,

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[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. Envtl. 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 & 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. Envtl. 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

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[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. Envtl. 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. Envtl. 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. Envtl. 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. Envtl. 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. Envtl. 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. Envtl. 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"

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[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/ls/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. Envtl. 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.

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[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

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[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. Envtl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm'r and Chief Information Officer, Office of Environmental Information,. U.S. Envtl. 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. Envtl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm'r and Chief Information Officer, Office of Environmental Information,. U.S. Envtl. 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.

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[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. Envtl. Prot. Agency (Apr. 4, 2013) [hereinafter *CAFO Letter*].
[109] *Id.*
[110] U.S. Envtl. 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

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[113] *Id.*
[114] Letter from Nancy Stoner, Acting Assistant Adm'r for the Office of Water, U.S. Envtl. 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. Envtl. 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.*

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
SUBCOMMITTEE ON ENVIRONMENT

HEARING CHARTER

Reality Check Part II: The Impact of EPA's Proposed Ozone Standards on Rural America

Wednesday, April 29, 2015
2:00 p.m. – 4:00 p.m.
2318 Rayburn House Office Building

PURPOSE

The Environment Subcommittee will hold a hearing entitled *Reality Check: The Impact and Achievability of EPA's Proposed Ozone Standards* on Wednesday, April 29, 2015, at 2:00 p.m. in Room 2318 of the Rayburn House Office Building. The purpose of the hearing is to examine the scientific basis of the Environmental Protection Agency's (EPA) proposed National Ambient Air Quality Standards (NAAQS) for ozone. In addition, witnesses will discuss impacts of these proposed national standards to rural and agricultural sectors of our country in order to meet such standards.

WITNESSES

- **The Honorable Jim Reese,** Secretary and Commissioner of Agriculture, Oklahoma State Board of Agriculture
- **Ms. Cara Keslar**, Monitoring Section Supervisor, Wyoming Department of Environmental Quality - Air Quality Division
- **Dr. Paul J. Miller**, Deputy Director and Chief Scientist, Northeast States for Coordinated Air Use Management
- **Mr. Kevin Abernathy**, Director of Regulatory Affairs, Milk Producers Council; Vice Chair, Dairy CARES
- **The Honorable Todd Hiett,** Commissioner, Oklahoma Corporation Commission

BACKGROUND

Ozone (O_3) is a gas that occurs both in the Earth's upper atmosphere as well as at ground level (troposphere). Ozone in the upper atmosphere helps protect the Earth from the sun's harmful rays such as ultraviolet radiation. Ozone at ground level is not directly emitted into the air, but instead is created by chemical reactions between precursor emissions, specifically

nitrogen oxide (NOx) and volatile organic compounds (VOC).[1] Ground level ozone is commonly referred to as smog.

The Clean Air Act of 1970 (P.L. 91-604, with major legislative updates in 1977 and 1990) directed EPA to set NAAQS for pollutants considered harmful to public health and the environment.[2] EPA has set standards for six criteria pollutants, including carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution (particulate matter), and sulfur dioxide. The Clean Air Act specifies two categories of standards: primary standards for public health protection and secondary standards for public welfare protection.

The Clean Air Act requires EPA to review the NAAQS every five years to ensure adequate health and environmental protection is being provided. In 1997, EPA replaced the existing ozone NAAQS with an 8-hour standard of 84 parts per billion (using standard rounding conventions). In 2008, EPA issued a final rule revising the ozone standard to a level of 75 parts per billion.[3] Last February, EPA finalized[4] a new set of requirements that state, tribal, and local air quality management agencies must meet for areas where air quality exceeds the 2008 NAAQS.[5] In July 2011, outside of the normal five year review process, EPA submitted a rule for reconsideration of the 2008 ozone NAAQS that President Obama then subsequently withdrew in September 2011.[6]

Based on the advice of the Clean Air Scientific Advisory Committee (CASAC), the EPA proposed an updated ozone NAAQS which appeared in the Federal Register on December 17, 2014.[7] The proposal would set more stringent standards, by lowering the primary standard from the current 75 parts per billion (ppb) to a range of 65 to 70 ppb. Publication in the Federal Register begins the public comment period that ended on March 17, 2015. The agency must address significant public comments when it publishes the final standard. **[is there any news on when that might be published?]**

COMPLIANCE WITH THE NAAQS

When the EPA revises the NAAQS for ozone, it must designate areas in the US which meet *attainment* or *nonattainment* of the standard. Attainment refers to a state or region complying with federal regulations, while nonattainment is an area that exceeds the regulated limit. States must individually develop a plan to comply with the NAAQS, including proposals for bringing nonattainment areas into attainment. Reductions in ozone levels can be achieved by a variety of methods including pollution control technologies. Ozone control technologies generally target nitrogen oxides (NOx) and volatile organic compounds (VOCs). Control strategies focus on mission limits along with control equipment that may address specific industrial processes. State environmental agencies must then develop State Implementation Plans

[1] http://www.epa.gov/air/ozonepollution/basic.html
[2] http://www.epa.gov/air/criteria.html
[3] http://www.gpo.gov/fdsys/pkg/FR-2008-03-27/html/E8-5645.htm
[4] http://www.epa.gov/groundlevelozone/actions.html#feb2015i
[5] http://www.epa.gov/groundlevelozone/pdfs/20150213fr.pdf
[6] http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards
[7] http://www.gpo.gov/fdsys/pkg/FR-2014-12-17/pdf/2014-28674.pdf

(SIPs).[8] Specifically, after each revised NAAQS is promulgated, both the EPA and states must undertake the following actions:

- **"Within two years after NAAQS promulgation:** With input from the states and tribes, EPA must identify or 'designate' areas as meeting (attainment areas) or not meeting (nonattainment areas) the standards. Designations are based on the most recent set of air monitoring data.
- **Within three years after NAAQS promulgation:** All states must submit plans, known as state implementation plans (SIPs), to show they have the basic air quality management program components in place to implement a new or revised NAAQS, as specified in Clean Air Act section 110.
- **Within 18-36 months after designations:** Due dates for nonattainment area SIPs are based on the area designation date and vary by pollutant and area classification. SIPs for Ozone, $PM_{2.5}$, and CO nonattainment areas are generally due within 36 months from the date of designation. Each nonattainment area SIP must outline the strategies and emissions control measures that show how the area will improve air quality and meet the NAAQS. In addition, the CAA mandates that areas adopt certain specified control requirements."[9]

After a state submits its implementation plan, EPA then reviews and either approves it in full, in part, or disapproves. The public has an opportunity to submit comments on EPA's proposed actions. If a state fails to submit a plan or if EPA disapproves of the plan, EPA is required to develop a federal implementation plan.[10]

SECONDARY STANDARD

In addition to issuing the primary standard, the EPA is required to issue secondary standards that protect the public welfare under Section 109 of the Clean Air Act. The secondary standard is intended to protect ecosystems and sensitive plants. Currently, the secondary ozone standard is equal to the primary ozone standard, based on short-term (8 hour) average concentration measurements. However, plants and foliage are more sensitive to long-term cumulative ozone exposure, causing stunted growth or injury. A cumulative index of exposure is better correlated with plant growth effects than the 8-hour average concentration used to measure human health effects. An appropriate cumulative index must consider not only ambient concentrations of ozone but also other relevant physiological processes.[11]

ADDITIONAL READING

- U.S. Environmental Protection Agency, National Ambient Air Quality Standards for Ozone, Proposed Rule. Available at: https://www.federalregister.gov/articles/2014/12/17/2014-28674/national-ambient-air-quality-standards-for-ozone
- U.S. Environmental Protection Agency, Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone. Available at: http://www.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf

[8] http://www.epa.gov/airquality/urbanair/sipstatus/overview.html
[9] http://www.epa.gov/airquality/urbanair/sipstatus/process.html
[10] Ibid
[11] pp 75316 of the Federal Register, Proposed Rule, National Ambient Air Quality Standards for Ozone

Appendix A:

Table of Historical Ozone NAAQS[12]

Final Rule/Decision	Primary/ Secondary	Indicator	Averaging Time	Level	Form
1971 36 FR 8186 Apr 30, 1971	Primary and Secondary	Total photochemical oxidants	1-hour	0.08 ppm	Not to be exceeded more than one hour per year
1979 44 FR 8202 Feb 8, 1979	Primary and Secondary	O_3	1-hour	0.12 ppm	Attainment is defined when the expected number of days per calendar year, with maximum hourly average concentration greater than 0.12 ppm, is equal to or less than 1
1993 58 FR 13008 Mar 9, 1993	EPA decided that revisions to the standards were not warranted at the time				
1997 62 FR 38856 Jul 18, 1997	Primary and Secondary	O_3	8-hour	0.08 ppm	Annual fourth-highest daily maximum 8-hr concentration, averaged over 3 years
2008 73 FR 16483 Mar 27, 2008	Primary and Secondary	O_3	8-hour	0.075 ppm	Annual fourth-highest daily maximum 8-hr concentration, averaged over 3 years

[12] http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_history.html

Appendix B:

Percent Change in Air Quality[13]

	1980 vs. 2013	1990 vs. 2013	2000 vs. 2013
Carbon Monoxide (CO)	-84	-76	-59
Ozone (O_3) (8-hr)	-33	-23	-18
Lead (Pb)	-92	-87	-60
Nitrogen Dioxide (NO_2) (annual)	-58	-50	-40
Nitrogen Dioxide (NO_2) (1-hour)	-60	-46	-29
PM_{10} (24-hr)	---	-34	-30
$PM_{2.5}$ (annual)	---	---	-34
$PM_{2.5}$ (24-hr)	---	---	-34
Sulfur Dioxide (SO_2) (1-hour)	-81	-76	-62

Notes:

1. --- Trend data not available
2. Negative numbers indicate improvements in air quality
3. In 2010, EPA established new 1-hour average National Ambient Air Quality Standards for NO2 and SO2

[13] http://www.epa.gov/airtrends/aqtrends.html

Appendix C:

Percent Change in Emissions:[14]

	1980 vs. 2013	1990 vs. 2013	2000 vs. 2013
Carbon Monoxide (CO)	-67	-59	-42
Lead (Pb)	-99	-80	-50
Nitrogen Oxides (NO_x)	-52	-48	-41
Volatile Organic Compounds (VOC)	-53	-39	-18
Direct PM_{10}	-50	-20	-17
Direct $PM_{2.5}$	---	-24	-32
Sulfur Dioxide (SO_2)	-81	-78	-69

Notes:
1. --- Trend data not available
2. Direct PM10 emissions for 1980 are based on data since 1985
3. Negative numbers indicate reductions in emissions
4. Percent change in emissions based on thousand tons units

National and local air quality trends graphs showing the nation's progress towards clean air are available for: carbon monoxide (CO), ozone (O_3), lead (Pb), nitrogen dioxide (NO_2), particulate matter (PM), and sulfur dioxide (SO_2).

[14] http://www.epa.gov/airtrends/aqtrends.html

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