

Congress of the United States

Washington, DC 20510

February 7, 2013

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,

We are writing to request that you expand the Environmental Protection Agency Office of Inspector General's (EPA OIG) ongoing audit of EPA's electronic records management practices. As described in a December 13, 2012, memorandum, the objective of the audit is, "[t]o determine whether EPA follows applicable laws and regulations when using private and alias email accounts to conduct official business."¹ This audit was originally requested by the House Committee on Science, Space, and Technology, pursuant to its concern for the Administrator's use of the "Richard Windsor" alias email account.² Since this initial request was sent, it has come to our attention that EPA is invoking questionable Freedom of Information Act (FOIA) exceptions to prevent the public from knowing the various email address(es) used by the Administrator.³ Specifically, EPA has been improperly invoking Exemption 6 of FOIA to hide the email account name, the domain name, and the server used by Lisa Jackson in her capacity as Administrator. Accordingly, we write to request that you broaden the EPA OIG's investigation in order to determine whether the agency is in fact invoking FOIA exemptions improperly.

We believe EPA has blocked all identifying information in documents turned over pursuant to Congressional inquiries and citizens' FOIA requests for emails either sent to or from Lisa Jackson's alias email account. Specifically, since Congress first became aware of the alias email account, EPA has cited Exemption 6 to redact the entire email address and the account name in every email either sent or received by Lisa Jackson's alias email account.⁴ In doing so, the agency not only denied the public knowledge of the domain name, but also the server she used. According to the Department of Justice (DOJ) FOIA guidance, "[e]xemption 6 protects information about individuals "in personnel and medical files and similar files," when the disclosure of such information, "would constitute a clearly unwarranted invasion of personal

¹ Memorandum from Melissa M. Heist, Asst. Inspector Gen. for Audit, U.S. Evtl. Prot. Agency, *Audit of Certain EPA Electronic Records Management Practices Project No. OA-FY13-0113* (Dec. 13, 2012) [on file with authors].

² Letter from Hon. Ralph Hall, Chairman, H. Comm. on Science, Space & Tech., to Arthur Elkins, Inspector Gen. U.S. Evtl. Prot. Agency (Nov. 15, 2012).

³ See http://epw.senate.gov/public/files/1_14_2013_EPW%20released%20documents.pdf (last accessed Feb. 6, 2013).

⁴ See [http://www.epa.gov/foia/docs/HQ-FOI-01268-12-First-Release-Mass-Mailers-and-OPA-Clips\(Combined\).pdf](http://www.epa.gov/foia/docs/HQ-FOI-01268-12-First-Release-Mass-Mailers-and-OPA-Clips(Combined).pdf).

privacy.”⁵ Moreover, on January 21, 2009, President Obama instructed agencies that information subject to a FOIA request should not be withheld “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.”⁶

EPA’s application of Exemption 6 to the Administrator’s alias account is facially improper, and does not withstand scrutiny when compared to approved uses of the exemption. In the first instance, the suggestion that under these circumstances a work email address could be considered a matter of personal privacy is absurd. This logical conclusion is backed up by a substantial body of legal opinion. DOJ guidance states that Exemption 6 applies only when an individual’s personal interest in protecting information outweighs the public interest in obtaining the information.⁷ The rule requires a balancing test where the courts, U.S. Attorney General Eric Holder and President Obama have instructed agencies to give weight to the public interest and encourage public disclosure.⁸ Specifically, the Supreme Court has interpreted the public interest as the American people’s desire to know “what the government is up to.”⁹ 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.*”¹⁰ (emphasis added).

In the present case, EPA’s use of Exemption 6 to redact both the Administrator’s alias email account name, domain name, and server, cannot be withheld pursuant to Exemption 6 because EPA has already asserted control over the Administrator’s secondary email account and verified the account was used exclusively for internal agency correspondence.¹¹ As such, the Administrator has no personal privacy interest in her alias email account. Moreover, it is beyond question that she does not have a personal privacy interest in the server she used for her work correspondence.

Assuming, *arguendo*, that the Administrator, as an individual distinct from the agency, has a privacy interest in the name and address of her secondary email account, the public interest still prevails. Notably, whether or not the Administrator has communicated on a government

⁵ U.S. Dep’t of Justice, *Guide to the Freedom of Information Act: Exemption 6*, http://www.justice.gov/oip/foia_guide09/exemption6.pdf (last accessed Feb. 6, 2013).

⁶ Memorandum from President Barack Obama, *Freedom of Information Act Memorandum for the Heads of Executive Departments and Agencies* (Jan. 21, 2009) available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

⁷ *Id.*

⁸ *Id.*; see Memorandum from Attorney Gen. Eric Holder, *The Freedom of Information Act (FOIA) Memorandum for Heads of Executive Departments and Agencies* (Mar. 19, 2009) available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>; see *supra* note 6.

⁹ *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989); see also U.S. Dep’t of Justice, *The Freedom of Information Act (FOIA): About*, <http://www.justice.gov/open/foia.html> (last accessed Feb. 6, 2013).

¹⁰ See *id.*

¹¹ See Memorandum from John B. Ellis, Agency Records Officer, Envtl. Prot. Agency, to Paul Wester, Dir., Modern Records Program, Nat’l Archives & Records Admin. (Apr. 11, 2008).

email server in a transparent way is critical to understanding “what the government is up to.”¹² The Administrator’s use of an alias email account has spurred national media attention and multiple Congressional Committee inquiries, which demonstrate the level of public interest in obtaining this information.¹³ Moreover, the Administrator’s alias email account, under the name of Richard Windsor and the email address of windsor.richard@epa.gov has already been revealed through a separate FOIA response.¹⁴ Therefore, no further damage could accrue to the Administrator’s personal privacy interests by revealing the alias account in the present case. Application of the balancing test demonstrates clearly that the public’s right to know outweighs any personal privacy interest the Administrator may claim.

Finally, if in fact EPA has misled Congress and the public and the Administrator has been using a personal email account to transact official business, and this is the basis for the claim of personal privacy interest, not only would such use directly violate EPA policy,¹⁵ but the assertion would also fail the balancing test. The American people have a significant interest in knowing whether or not government officials are conducting official business from personal email accounts. Moreover, the Government Accountability Office (GAO) has cautioned the use of private email for official business and the threat it poses to the preservation of agency records under the Federal Records Act.¹⁶ Indeed, GAO recommended EPA revise agency records management policies to ensure adequate training and preservation of private emails in a July 2008 report; however, EPA has yet to adopt GAO’s recommendation and officially implement a revised policy.¹⁷ Based on these facts and legal analysis, it is clear to us that under all possible circumstances, the EPA has unjustifiably used FOIA Exemption 6 to withhold from the public information it has a right to know.

EPA’s abuse of Exemption 6 to redact the email account name, domain name, and server used by the Administrator raises several concerns that require your immediate attention. According to President Obama’s January 21, 2009, FOIA memo for heads of executive departments and agencies, “[t]he Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”¹⁸ Moreover, Exemption 6 is a narrow exemption that should not be wrongfully expanded to protect the interest of the agency separate and apart from the individual. Based on documents the Committees have obtained, EPA is clearly deviating from President Obama’s openness initiative and from the letter of the law. It also appears that EPA is hiding information the public has a right to know in violation of

¹² *Supra* note 9.

¹³ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space & Tech., to Hon. Lisa Jackson, Adm’r, Env’tl. Prot. Agency (Jan. 23, 2013); Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Hon. Lisa Jackson, Adm’r, Env’tl. Prot. Agency (Jan. 15, 2013); Letter from Hon. Fred Upton, Chairman, H. Energy & Commerce Comm., to Hon. Lisa Jackson, Adm’r, Env’tl. Prot. Agency (Dec. 13, 2012).

¹⁴ See http://www.progressivereform.org/articles/FOIA_EPA_Email_Exchange.pdf; see also Erica Martinson, *Lisa Jackson’s ‘Windsor’ Knot*, POLITICO (Nov. 20, 2012), <http://www.politico.com/news/stories/1112/84112.html>.

¹⁵ ENVTL. PROT. AGENCY, Frequent Questions about E-Mail and Records, <http://www.epa.gov/records/faqs/email.htm> (last accessed Feb. 6, 2013).

¹⁶ GOV’T ACCOUNTABILITY OFFICE, FEDERAL RECORDS: NATIONAL ARCHIVES AND SELECTED AGENCIES NEED TO STRENGTHEN E-MAIL MANAGEMENT, 61, GAO008-742 (June 2008), <http://www.gao.gov/products/GAO-08-742>.

¹⁷ See *Id.*

¹⁸ *Supra* note 6.

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Federal law. Accordingly, we request that you broaden your current investigation to also determine whether EPA has abused its discretion in redacting the email account name, domain name, and server for Lisa Jackson's alias email account.

Thank you for your prompt attention to this matter. If you have any questions, please contact Kristina Moore with the Committee on Environment and Public Works at (202) 224-6176, Tyler Grimm with the Committee on Oversight and Government Reform at (202) 225-5074, or Tom Hammond with the Committee on Science, Space, and Technology at (202) 225-6371.

Sincerely,



David Vitter
Ranking Member
Environment and Public Works



Darrell Issa
Chairman
Oversight and Government Reform



Lamar Smith
Chairman
Science, Space, and Technology

cc: Barbara Boxer, Chairman, Committee on Environment and Public Works
cc: Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform
cc: Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology