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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY
STAFF DIRECTOR

January 19, 2012

The Honorable Steven Chu
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Mr. Secretary:

Since May 2011, the Committee on Oversight and Government Reform has been investigating the creation of the U.S. Department of Energy's (DOE) Hydraulic Fracturing Advisory Panel (Advisory Panel). As previously stated, the Committee is concerned the Advisory Panel members were chosen for political reasons and many lack the knowledge and experience in the actual practice of hydraulic fracturing. This disparity led the Committee to perform oversight on both DOE's decision-making process in devising the Advisory Panel and the input received from other federal agencies when selecting the members of the Advisory Panel.

For over six months, DOE has continually obstructed the Committee's constitutional duty to conduct oversight, failing to produce all documents responsive to the Committee's inquiry. After making numerous accommodations to the Department, DOE's continued lack of cooperation led the Committee to issue a subpoena for the requested documents to DOE on October 5, 2011.¹ Since the issuance of the subpoena, DOE has unlawfully continued to refuse to supply all of the relevant documents listed in the subpoena. DOE does not have the legal right to pick and choose the parts of a congressional subpoena with which it will comply.

DOE has made it clear that it does not intend to fully comply with the terms of the Committee's October 5, 2011, subpoena. DOE continues to assert the unacceptable excuse that full production of the documents requested in the subpoena would have a "chilling effect" on future applications for similar positions. On October 12, 2011, Assistant Secretary for Congressional and Intergovernmental Affairs Jeff Lane asserted the following:

DOE previously has written that your request for information about the selection of members of the advisory panel would include candid discussions regarding candidates for

¹ Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Steven Chu, Secretary, DOE, Oct. 5, 2011.

appointment to the advisory panel DOE has also stated in previous correspondence that documents responsive to this request include deliberations amongst senior government officials, for which the Department has a serious confidentiality interest to consider before releasing such communications.²

Such an argument is not a valid, legal excuse for an agency to withhold documents responsive to a Congressional subpoena. As explained in my November 21, 2011, letter, the only valid basis upon which to withhold documents from Congress is an assertion of executive privilege.³ The DC Circuit Court of Appeals ruled in *In re Sealed Case* that executive privilege pertains only to documents that relate specifically to the decision making of the President.⁴ DOE has neither raised this assertion nor is the executive privilege claim available in this circumstance.

In an effort to respond to DOE's concerns, the Committee agreed to review all responsive documents *in camera*. Committee staff reviewed documents *in camera* on August 29, 2011, September 30, 2011, and December 14, 2011. Despite this accommodation, at the December 14, 2011, meeting, political appointees from the Office of Congressional Affairs and the General Counsel's office acknowledged that DOE had identified nearly 200 additional documents also responsive to the subpoena. However, DOE refused to produce these documents to the Committee for review. Instead, DOE offered a briefing to Committee staff regarding these remaining documents.⁵ A briefing discussing the documents requested does not fulfill the Committee's request for these documents and is an unacceptable response to the Committee's legally binding subpoena.

DOE's continued refusal to comply with a validly issued Congressional subpoena is unacceptable. In previous correspondence with DOE, the Committee has well documented the numerous requests and accommodations made to the Department in order to review these documents. I hope that you will cease these obstructive efforts and immediately comply with the Committee's subpoena. As explained to DOE multiple times, the Committee is willing to review the remaining responsive documents *in camera* in order to determine whether they are necessary to obtain to fulfill the Committee's responsibility to the American people. In addition, to assist the Committee in understanding the extent of the Department's continued obstruction of the Committee's investigation as well as to continue the Committee's oversight on the creation of the Hydraulic Fracturing Advisory Panel, I request that you make the following individuals available for transcribed interviews starting the week of February 19, 2012:

² Letter from Jeff Lane, Assistant Secretary for Congressional and Intergovernmental Affairs, DOE, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Oct. 12, 2011.

³ Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Steven Chu, Secretary, DOE, Nov. 12, 2011.

⁴ 121 F.3d 729,745 (D.C. Cir. 1997).

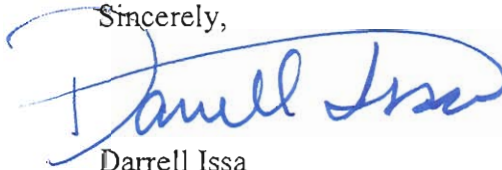
⁵ E-mail from Christopher Davis, Deputy Assistant Secretary for House Affairs, to Joseph Brazauskas, Counsel, H. Comm. on Oversight & Gov't Reform (Dec. 22, 2011, 15:43 EST) (on file with author).

1. Timothy G. Lynch, Acting General Counsel and Deputy Counsel for Litigation & Enforcement
2. Christopher Davis, Deputy Assistant Secretary for House Affairs
3. Brandon Hurlbut, Chief of Staff
4. Amy Bodette, Assistant to Secretary Chu
5. Ian Adams, Assistant to Secretary Chu
6. Renee Stone, Senior Advisor to the Secretary of Energy
7. Mackey Dykes, White House Liaison

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

The DOE's Office of Congressional Affairs should contact the Committee to make arrangements for scheduling the interviews. If you have any questions about this request, please contact Kristina Moore or Joseph Brazauskas of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman

Attachment

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

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Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

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