



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

JAN 16 2015

THE INSPECTOR GENERAL

MEMORANDUM

SUBJECT: Chemical Safety and Hazard Board

FROM: Arthur Elkins, Inspector General,
Environmental Protection Agency

A handwritten signature in blue ink, appearing to read "Arthur C. Elkins", is written over the typed name of the sender.

TO: The President

On or about February 6, 2013, the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG)¹ received information which alleged that Rafael Moure-Eraso, Chairman, Chemical Safety and Hazard Investigation Board (CSB);² Richard Loeb, General Counsel, CSB; and Daniel Horowitz, Managing Director, CSB, were conducting official CSB business via non-government email accounts.

Based upon the foregoing information, my office initiated an investigation which found information sufficient to support a conclusion that CSB Chairman Moure-Eraso, Loeb and Horowitz used private, non-government email systems³ to communicate on CSB matters and by using this approach those communications were not preserved as official records. Title 36 CFR Chapter XII—National Archives and Records Administration, Part 1236, states:

Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that

¹ See *Consolidated Appropriations Act of 2012*, Pub. L. 112-74 (“notwithstanding any other provision of law, the individual appointed to the position of Inspector General of the [EPA] shall, by virtue of such appointment, also hold the position of Inspector General of the [CSB]”).

² U.S. Chemical Safety and Hazard Investigation Board. Accessed at <http://www.csb.gov/>

³ During the course of this investigation, the OIG made requests to CSB for communications pertaining to official CSB matters that were sent via non-government email systems, which include the emails in question. CSB declined to provide all the requested documents and emails, and provided others that were heavily redacted versions. This refusal of access to the OIG constituted a “particularly serious or flagrant problem” under the Inspector General Act, and the OIG was therefore compelled to pursue the statutory remedy of issuing a “7-day letter” to Chairman Moure-Eraso, which it did on September 5, 2013. CSB nevertheless again refused to provide the emails to OIG and chose instead to forward the IG’s 7-day letter to Congress, as required by the Inspector General Act. The House Oversight and Government Reform Committee held a hearing on these and related matters on June 19, 2014. Following the hearing, the Committee directed CSB to turn over the emails, which CSB subsequently did.

Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.⁴

Chairman Moure-Eraso's rationale for this purposeful circumvention was that he was seeking legal advice from Loeb concerning draft communications being prepared for the rest of the CSB Board. Moure-Eraso did not believe he could trust a CSB employee working within the CSB's Office of General Counsel who he believed could access the CSB email network. Loeb, General Counsel for the CSB, stated that he had never informed the CSB's FOIA office that there were CSB work-related communications being sent, via non-government email, between Moure-Eraso and himself. These communications on non-government email systems about official government business would never be able to be searched or found in response to a FOIA request, and therefore, would not be made available to the public.

The investigation found that Moure-Eraso, Loeb and Horowitz did not ensure that official business they conducted on non-governmental email systems was preserved on agency systems and that they purposefully employed non-governmental systems so certain CSB business did not appear on CSB systems. The investigation found evidence sufficient to conclude that these actions were in violation of the Federal Records Act and the implementing NARA regulations as well as inconsistent with the Executive Memorandum on Transparency and Open Government dated January 21, 2009.⁵

This investigation has not resulted in any basis for criminal prosecution. Rather, because you appoint Chairman Moure-Eraso and he is head of the agency with no one higher at CSB to whom he reports, I am presenting this Report of Investigation for your determination of what administrative action may be warranted.

If I can provide any additional information, please do not hesitate to contact me at (202) 566-0847.

Attachment

I. Report of Investigation

⁴ 36 CFR 1236.22(b). The Federal Records Act, 44 U.S.C. § 3101, makes the head of each federal agency responsible to preserve records of the essential transactions of the agency. The National Archives and Records Administration is responsible for overseeing agencies' adequacy of documentation and records disposition and practices, and implements these Federal Records Act requirements under regulations set forth in 36 CFR part 1236.

⁵ White House Memorandum, Subject: Transparency and Open Government, January 21, 2009.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF THE INSPECTOR GENERAL
OFFICE OF INVESTIGATIONS
1301 CONSTITUTION AVE, NW
EPA WEST BUILDING
WASHINGTON, DC 20004**

REFERRED FOR ACTION REPORT OF INVESTIGATION CONCERNING

**MOURE-ERASO, RAFAEL, POLITICAL APPOINTEE, CHAIRMAN, CSB (ET AL)
OI-AR-2013-ADM-0068**

TABLE OF CONTENTS

| | |
|--|-----------|
| Narrative | Section A |
| Prosecutive Status | Section B |
| Possible Applicable Laws, Regulations, and Policies | Section C |
| Exhibits | |

Distribution:

Barack Obama
President of the United States



Special Agents
Office of Professional Responsibility

Approved by:



Special Agent in Charge
Office of Professional Responsibility

Reviewed by:

A handwritten signature in blue ink, appearing to read 'Patrick Sullivan', written over a horizontal line.

Patrick Sullivan
Assistant Inspector General
Office of Investigations

**OFFICE OF INSPECTOR GENERAL
OFFICE OF INVESTIGATIONS**

| | | | |
|------------------------|---|---------------------|---|
| CASE NO.: | OI-AR-2013-ADM-0068 | DATE OPENED: | 4/15/2013 |
| CASE TITLE: | MOURE-ERASO, RAFAEL, POLITICAL APPOINTEE, CHAIRMAN, CSB (ET AL) | CASE AGENT: |  |
| CASE CATEGORY: | EMPLOYEE INTEGRITY | OFFICE: | OFFICE OF INVESTIGATIONS - HEADQUARTERS |
| JOINT AGENCIES: | NONE | | |
| JURISDICTION: | WASHINGTON, DC | | |

SECTION A - NARRATIVE

Introduction

On or about February 6, 2013, the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG)¹ received a complaint alleging that Rafael Moure-Eraso (Chairman Moure-Eraso), Chairman, Chemical Safety and Hazard Investigation Board (CSB);² Richard Loeb (Loeb), General Counsel, CSB; and Daniel Horowitz (Horowitz), Managing Director, CSB, were conducting official CSB business via non-government email systems . (Exhibit I)

Synopsis

This investigation found information sufficient to support a conclusion that CSB Chairman Moure-Eraso, Loeb and Horowitz used private, non-government email systems³ to communicate on CSB matters and by using this approach those communications were not preserved as official records. Title 36 CFR Chapter XII—National Archives and Records Administration, Part 1236, states:

¹ See *Consolidated Appropriations Act of 2012, Pub. L. 112-74* (“notwithstanding any other provision of law, the individual appointed to the position of Inspector General of the [EPA] shall, by virtue of such appointment, also hold the position of Inspector General of the [CSB]”).

² U.S. Chemical Safety and Hazard Investigation Board. Accessed at <http://www.csb.gov/>

³ During the course of this investigation, the OIG made requests to CSB for communications pertaining to official CSB matters that were sent via non-government email systems, which include the emails in question. CSB declined to provide all the requested documents and emails, and provided others that were heavily redacted versions. This refusal of access to the OIG constituted a “particularly serious or flagrant problem” under the Inspector General Act, and the OIG was therefore compelled to pursue the statutory remedy of issuing a “7-day letter” to Chairman Moure-Eraso, which it did on September 5, 2013. CSB nevertheless again refused to provide the emails to OIG and chose instead to forward the IG’s 7-day letter to Congress, as required by the Inspector General Act. The House Oversight and Government Reform Committee held a hearing on these and related matters on June 19, 2014. Following the hearing, the Committee directed CSB to turn over the emails, which CSB subsequently did.

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.⁴

Chairman Moure-Eraso's rationale for this purposeful circumvention was that he was seeking legal advice from Loeb concerning draft communications being prepared for the rest of the CSB Board. Moure-Eraso did not believe he could trust a CSB employee working within the CSB's Office of General Counsel who he believed could access the CSB email network. Loeb, General Counsel for the CSB, stated that he had never informed the CSB's FOIA office that there were CSB work-related communications being sent, via non-government email, between Moure-Eraso and himself. These official government business communications would never be able to be searched or found in response to a FOIA request, and therefore, would not be made available to the public.

The investigation found that Moure-Eraso and Loeb did not ensure that official business they conducted on non-governmental email systems was preserved on agency systems and that they purposefully employed non-governmental systems so certain CSB business did not appear on CSB systems. The investigation found evidence sufficient to conclude that these actions were in violation of the Federal Records Act and the implementing NARA regulations as well as inconsistent with the Executive Memorandum on Transparency and Open Government dated January 21, 2009.⁵

This investigation has not resulted in any basis for criminal prosecution. OIG presents this Report of Investigation to the President for his determination of what administrative action may be warranted because Chairman Moure-Eraso is appointed by and serves the President.

Impact

The CSB conducted official government business in violation of a federal statute, regulation and Presidential instruction that exist to ensure that the public can observe the workings of its government and that records of governmental actions are preserved. Such action diminishes the integrity of the agency, its program functionality and the public trust in the CSB.

Details

Investigation Disclosed Allegations Supported

Allegation 1: Chairman Moure-Eraso used a non-government email system to communicate on official CSB matters and did not preserve the communications as official records.

⁴ 36 CFR 1236.22(b). The Federal Records Act, 44 U.S.C. § 3101, makes the head of each federal agency responsible to preserve records of the essential transactions of the agency. The National Archives and Records Administration is responsible for overseeing agencies' adequacy of documentation and records disposition and practices, and implements these Federal Records Act requirements under regulations set forth in 36 CFR part 1236.

⁵ White House Memorandum, Subject: Transparency and Open Government, January 21, 2009.

Allegation 1 Findings: Supported. Chairman Moure-Eraso used a non-government email system to communicate on official CSB matters and did not preserve the communications as official records.

Allegation 1 Investigative Results: On March 7, 2013, Chairman Moure-Eraso was interviewed, with counsel present, by EPA OIG Special Agents concerning his use of a private, non-government, email account to send official CSB correspondence.

Specifically, Chairman Moure-Eraso was asked why he did not use a regular CSB account. The Chairman responded that he wanted “legal advice” from Loeb on draft communications he was preparing for the CSB Board before he sent out his final communication. Chairman Moure-Eraso further said he wanted to “Avoid [the] danger of OGC seeing;” that the “General Counsel [REDACTED]” was not a friend of mine;” there was a “hostile environment;” and “I did not feel that I trust (sic).”

Chairman Moure-Eraso elaborated that he mostly used his personal Gmail account for “advice” concerning hostile emails he was receiving from CSB Board Members. Chairman Moure-Eraso stated that he sent CSB communications via his Gmail account to get Loeb’s “legal opinion” regarding how to deal with the CSB Board Members’ hostile communications. Chairman Moure-Eraso stated that, for the majority of these communications with Loeb, he used his personal Gmail account.

Chairman Moure-Eraso was asked if Loeb ever advised him to set up a private email account. He responded that “he [Loeb] would recommend in some communications with him that I could use that [private] account.” Chairman Moure-Eraso said he also communicated with Loeb on this private account concerning things that were not CSB related. Moure-Eraso was asked why Loeb recommended he set up a private Gmail account. He responded that the “general idea, [sic] some things that might not be matters of federal accounts.” Chairman Moure-Eraso stated that the private email account that he was referring to was [REDACTED]@gmail.com. (Exhibit 2)

On March 8, 2013, Loeb was interviewed, with counsel present, by EPA OIG Special Agents concerning his use of a private, non-government, email account to send official CSB correspondence. Loeb stated that he and Chairman Moure-Eraso “did communicate” on official CSB matters via his private Gmail account. Loeb stated he helped edit CSB letters, which were sent to him by Chairman Moure-Eraso from his private email account. Loeb was asked whether he responded back to Chairman Moure-Eraso’s CSB work-related communications via the private email. Loeb stated that he did “reply” by the private email method in which he received the email.

Loeb was asked whether he ever recommended to Chairman Moure-Eraso that he communicate with Loeb on CSB matters using a private Gmail system rather than communicate using the CSB governmental email system. Loeb confirmed he “did suggest” and “did recommend” that Chairman Moure-Eraso get a Gmail account. Loeb “told him [Moure-Eraso] to get a Gmail account” because, at the time, Moure-Eraso was using a “UMass Lowell account,” and Loeb did not think it was a “good idea” to use a private employer’s email system. Loeb explained that Chairman Moure-Eraso was a “novice” computer user and may have just used the “drop down” when sending out email from his private Gmail account (Exhibit 3).

Chairman Moure-Eraso was asked if he communicated with [REDACTED] a private attorney who was representing CSB, using his gmail account concerning CSB matters. Chairman Moure-Eraso stated “Yes,” but that it was Loeb who engaged in “99 percent” of the communications with [REDACTED].

Chairman Moure-Eraso stated further that it was Loeb who recommended [REDACTED] be hired by the CSB, and it was Loeb who made the arrangements. (Exhibit 2)

The following are examples of Chairman Moure-Eraso's use of a non-government email system to communicate on official CSB matters relating to the Deepwater-Macando investigation and the CSB case backlog:

Example 1: On August 21, 2013, Chairman Moure-Eraso sent an email via a private, non-government, email system to Loeb and Horowitz, stating:

Pretty hard hitting stuff. Even [REDACTED] drank the Kool-Aid. I am at a lost [sic] of how to respond. [REDACTED] talks of resolving the issue in Griffons public meetings where we have to put in the agenda our "poor conduct". Are we really in a "terrible downward spiral"? Griffon, of course will love that. It seems to me that without discharging our enormous stone mill around of heads of Deepwater-Macondo investigation, we are not going to see the light of day. To have a final report by September 30 is becoming a matter of life or death. Same with TESORO. (Exhibit 4)

Example 2: On January 17, 2012, Chairman Moure-Eraso sent Loeb, via a private, non-government, email system, an email titled "Quorum" stating:

Propose email

Mark [this is CSB Board member Mark Griffon]

At tomorrows [sic] Quorum meeting, we should try to continue the discussion about the backlog once we have scoped the Deepwater/Macando investigation. Once we are clear as possible of a timeline for DW/M we could consolidate the plans and timelines that were presented in the matrix of our last quorum meeting. That would determine the priorities for investigation teams. That is on line [sic] with what we discussed in the last quorum meeting. About our backlog and "anticipated impact on chemical safety" and how to "avoid backlogs in the future" I will welcome to hear any ideas you want to share with the group about those issues. There are still a few hours to prepare a presentation. (Exhibit 5)

This evidence, including his own admissions, demonstrates that Moure-Eraso, in multiple instances, conducted official CSB business on personal email systems, and he did not preserve those communications on an appropriate agency recordkeeping system. This supports a conclusion that these actions violate the Federal Records Act, the implementing NARA regulations, and the Executive Memorandum.

Allegation 2: Loeb used a non-government email system to communicate on official CSB matters and did not preserve the communications as official records.

Allegation 2 Findings: Supported. Loeb used a non-government email system to communicate on official CSB matters and did not preserve the communications as official records.

Allegation 2 Investigative Results: Loeb stated that he and Chairman Moure-Eraso "did communicate" on official CSB matters via his private Gmail account. Loeb stated he helped edit CSB letters, which were sent to him by Chairman Moure-Eraso from his private email account. Loeb was asked whether he

responded back to Chairman Moure-Eraso's CSB work-related communications via the private email. Loeb stated that he did "reply" by the private email method in which he received the email. Loeb stated that "to the extent I can," he communicated on "CSB email."

On August 13, 2013, EPA OIG Associate Counsel [REDACTED] memorialized a phone conversation [REDACTED] had with Loeb via telephone. [REDACTED] stated in part:

Mr. Loeb stated that CSB officials "were not using personal email accounts in order to conduct business off CSB servers," but then Mr. Loeb immediately stated that they actually "did purposefully and for a time, use personal emails to keep information off the CSB servers because certain disgruntled employees (at least one) appeared to have access to CSB servers" and that they (CSB) was (sic) concerned about that person having access to certain emails. (Exhibit 6)

The following are examples of Loeb's use of a personal, non-government email system to communicate on official CSB matters, which relate to CSB responses to the Office of Special Counsel investigation and an Equal Employment Opportunity matter:

Example 1: On February 23, 2012, Loeb in an email to Horowitz, via a non-government email system titled "OSC" [Office of Special Counsel], stated, in part:

That said, I just spent 45 minutes on the phone with [REDACTED] at OSC. [REDACTED] is not going to [REDACTED] any longer from the case. [REDACTED] thinks the case is a waste of time and that the OSC attorney/investigator assigned to the matter is just pursuing it because it interests [REDACTED] and because [REDACTED] has gotten so much input from various people at the CSB. [High level OSC employee] said that [REDACTED] (whose name [REDACTED] gave me) realizes that this is just a political witch hunt. However, apparently [REDACTED] does not [REDACTED] the investigator [REDACTED] (that's not [REDACTED] style). [REDACTED] thinks we may be able to shut this down with some well written letters to OSC through [REDACTED] especially if they are addressed to the right people at OSC. (Exhibit 7)

Example 2: On July 7, 2012, Loeb in an email to Chairman Moure-Eraso and Loeb, via a non-government email system, titled "[REDACTED] OSC" stated:

[REDACTED]/OSC Attorney/Investigator] Began a one-year detail to [REDACTED] effective [REDACTED] 2012. Will not be back at OSC until [REDACTED] 2013. I will contact [REDACTED] on Monday to ask [REDACTED] to check "official" status of the complaints. (Exhibit 8)

Example 3: On May 21, 2012, the following email was forwarded "FYI" from Loeb to Chairman Moure-Eraso via non-government email systems. The original email was titled "DWH" and was sent from Loeb, via a Gmail account, to Mark Griffon, via a Comcast account:

Mark

I agree with you that the (b) (5)

[REDACTED]

[REDACTED] My legal concern is that we are essentially saying that (b) (5)

(b) (5) [redacted] That's a legal test that means (b) (5) [redacted]
[redacted]
[redacted]
[redacted]
[redacted]

Rcl (Exhibit 9)

Loeb was asked if he had ever informed the CSB's FOIA office that there were CSB work-related communications being sent, via private email, between Chairman Moure-Eraso and himself. Loeb responded that he had not.

This evidence demonstrates that Loeb, in multiple instances, conducted official CSB business on personal email systems, and he did not preserve those communications on an appropriate agency recordkeeping system. This supports a conclusion that these actions violate the Federal Records Act, the implementing NARA regulations, and the Executive Memorandum.

Allegation 3: Horowitz used a non-government email system to communicate on official CSB matters and did not preserve the communications as official records.

Allegation 3 Findings: Supported. Horowitz used a non-government email system to communicate on official CSB matters and did not preserve the communications as official records.

Allegation 3 Investigative Results: In a sworn statement dated February 12, 2013, Horowitz addressed his use of non-government email systems and stated: "No one has instructed [me] to create a private email for government use. However, I have sometimes communicated about CSB topics on private email; for example, in communicating from my home or when travelling." (Exhibit 10)

On March 7, 2013, Chairman Moure-Eraso, when interviewed by EPA OIG Special Agents, stated that Horowitz, to a lesser degree, also used his private email to communicate regarding CSB matters. (Exhibit 2)

The following are two examples of Horowitz's use of a personal, non-government email system to communicate on official CSB matters. These examples relate to draft communications for the CSB Chairman to third parties:

Example 1: On January 8, 2012, Horowitz sent an email to Chairman Moure-Eraso and Loeb, via non-government email, concerning a draft email to be sent from Chairman Moure-Eraso to the CSB Board Members. Horowitz stated:

Very nice
I might use a term other than "delicate personnel situation" which somehow suggests that I myself am in a tenuous position vis a vis the chair
How about "This only compounds an already troubling legal situation into which you have placed the agency." (Exhibit 11)

Example 2: On January 11, 2012, Loeb sent an email to [redacted] Conununications [a public affairs company contracted with the CSB], Horowitz, and [redacted] [CSB

Communications Director] via non-governmental email, discussing an attached draft letter for Chairman Moure-Eraso, which was being sent to [REDACTED] United Steelworkers.

In the email Loeb, in part, states: “I don’t not [sic] think that (b) (5) [REDACTED] should be included (I have deleted in the text. It suggests that a (b) (5) [REDACTED] (Exhibit 12)

Horowitz responds via non-governmental email: “Pls let’s send this – we need to move on” (Exhibit 13).

This evidence demonstrates that Horowitz conducted official CSB business on personal email systems and he did not preserve those communications on an appropriate agency recordkeeping system. This supports a conclusion that these actions violate the Federal Records Act, the implementing NARA regulations, and the Executive Memorandum.

Disposition

This Report of Investigation is being sent to the President of the United States, Barack Obama for review and any action deemed appropriate.

SECTION B – PROSECUTIVE STATUS

ADMINISTRATIVE/CRIMINAL/CIVIL ACTION(S):

The foregoing allegations were investigated as an administrative, not criminal, matter. On August 12, 2014, the EPA OIG contacted the Public Integrity Section, Department of Justice, for a consultation and, based upon the facts provided to the Public Integrity Section regarding the OIG's administrative investigation, the allegations will not be referred for prosecution.

SECTION C – POSSIBLE APPLICABLE LAWS, REGULATIONS, AND POLICIES

1. 44 U.S.C. Sec. 3101 Federal Records Act. 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.
2. 36 CFR 1236.22(b). 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.
3. White House Memorandum: Transparency and Open Government, January 21, 2009
 - Government should be transparent.
 - ...My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.

| EXHIBIT | DESCRIPTION DUE TO THE VOLUMINUS NATURE OF THE DOCUMENTS WHICH SUPPORT THE FOLLOWING EXHIBITS, THEY ARE PROVIDED AS ELECTRONIC ATTACHMENTS TO THIS REPORT OF INVESTIGATION ON A CD MARKED "EPA OIG CASE OI-AR-2013-ADM-0068: Exhibits, Contains information protected by the Privacy Act and is FOR OFFICIAL USE ONLY" | Attached PDF |
|----------------|--|--|
| 1. | Complaint Initiation; Chemical Safety Board Employees use of Private Email for Official Communications; COMP-2013-104 |  CSB Complaint Email REDACTED.pd |
| 2. | Memorandum of Interview, Rafael Moure-Eraso dated March 7, 2013 |  MOI Moure-Eraso.docx |
| 3. | Memorandum of Interview, Richard Loeb, dated March 8, 2013 |  MOI Loeb.docx |
| 4. | Email dated August 21, 2013 @ 11:57PM from Rafael Moure-Eraso to Loeb and Horowitz |  Email August 21, 2013 (E6).pdf |
| 5. | Email dated January 17, 2012 @ 11:49AM from Rafael Moure-Eraso to Richard Loeb and Daniel Horowitz |  Email January 17, 2012 (E8).pdf |
| 6. | Email dated August 13, 2013, by EPA OIG Associate Counsel [REDACTED] memorializing phone conversation with Richard Loeb |  [REDACTED] Email dated August 13 2013.pdf |
| 7. | Email dated February 22, 2012 @ 4:28PM from Richard Loeb to Daniel Horowitz |  Email February 22, 2012 (E11).pdf |
| 8. | Email dated July 7, 2012 @ 6:58PM from [REDACTED] to Richard Loeb and Daniel Horowitz |  Email July 7, 2012 (E12).pdf |
| 9. | Email dated May 21, 2012 @ 5:53PM from Richard Loeb to Rafael Moure-Eraso |  Email May 21, 2012 (E7).pdf |
| 10. | Sworn Statement, Daniel Horowitz, dated February 12, 2013 |  Horowitz Sworn Statement.pdf |

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|-----|---|---|
| 11. | Email dated January 8, 2012 @ 10:44AM from Daniel Horowitz to Richard Loeb and Rafael Moure-Eraso |  Email January 8, 2012 (E15).pdf |
| 12. | Email dated January 11, 2012 @ 9:35AM to [REDACTED], Daniel Horowitz, and [REDACTED] |  Email January 11, 2012 (E16).pdf |
| 13. | Email dated January 11, 2012 @ 10:44 AM to Richard Loeb, [REDACTED] |  Email from Horowitz dated Janu |