

# Congress of the United States

## House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6301

(202) 225-6371  
[www.science.house.gov](http://www.science.house.gov)

October 21, 2013

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

Dear Administrator McCarthy,

On March 12, 2013, I wrote then-Acting Administrator Robert Perciasepe a letter requesting unredacted copies of specific records relative to the inquiry by the Committee regarding the use of alias email accounts at the U.S. Environmental Protection Agency (EPA). I have yet to receive a reply to my letter despite numerous communications between our respective staff and multiple assurances from EPA staff that a response could be expected soon. I understand that the recent federal government shutdown may have had an impact on your staff's ability to address congressional inquiries, but my correspondence to the EPA is now over seven months old.

I would also draw your attention to a September 5, 2013, letter I sent to you with my colleague, Rep. Paul Broun, Chairman of the Oversight Subcommittee, regarding the use of dual, secondary or non-public email accounts at EPA. We requested a response by September 20<sup>th</sup>. That response is late as well.

I would appreciate your immediate attention to these two letters and direction to your staff to provide an expedited response to the Committee's concerns. The letters have taken on additional significance in light of the September 26, 2013, inquiry<sup>1</sup> into the agency's use of private and alias email accounts by the EPA's Office of Inspector General (OIG). The OIG report raises several concerns including that the EPA:

- Lacks records management policies and procedures regarding private email account usage;
- Lacks records management training for private and alias email usage;

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<sup>1</sup> "Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts," EPA OIG, Sept. 26, 2013, Report No. 13-P-0433, available at: <http://www.epa.gov/oig/reports/2013/20130926-13-P-0433.pdf>.

- Lacks practices for collecting and preserving records for employees separating from regional offices; and
- Lacks the tool to place email in its electronic content management system for its new email system.

For your reference, please find attached copies of the two letters awaiting responses. If you have any questions related to this request, please contact Mr. Raj Bharwani, Staff Director, Subcommittee on Oversight, at (202) 225-6371.

Sincerely,

A handwritten signature in cursive script, reading "Lamar S. Smith".

Rep. Lamar S. Smith  
Chairman  
Committee on Science, Space,  
and Technology

cc: Rep. Eddie Bernice Johnson  
Ranking Member  
Committee on Science, Space,  
and Technology

Attachments

# Congress of the United States

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September 5, 2013

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

Dear Administrator McCarthy,

Since November 2012, Members of the Science, Space, and Technology Committee have written your predecessor, Ms. Lisa Jackson, three times regarding the use of dual, secondary or non-public email accounts.<sup>1</sup> The response from the agency thus far has been incomplete and inadequate. We have not received replies to requests for information about EPA staff who use secondary and private email accounts for official government business, as well as the identity of such email addresses and accounts. The EPA has shown a blatant disregard for basic principles of transparency and as more information has come out, it appears that the agency has knowingly failed to correct this behavior. We write you today in the hopes that you will direct your staff to be more transparent and timely in responding to congressional requests for information, beginning with this one.

There have been several media reports on the issue of secret federal email accounts since the Committee's most recent letter in January, including a review by the *Associated Press* (AP) of "hundreds of pages of government emails"<sup>2</sup> acquired through a Freedom of Information Act (FOIA) request. These reports have identified troubling trends in the use of alternate e-mails by EPA and other federal agencies, including that the AP could not "independently find instances when material from any of the secret accounts it identified was turned over"<sup>3</sup> under "public records requests and congressional inquiries."<sup>4</sup>

These reports have taken on added significance following revelations based on recently released emails pursuant to a different FOIA request by a non-profit public policy organization, where it appears that Ms. Jackson not only used "her private email to conduct official business, including with a lobbyist,

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<sup>1</sup> Letters from Members of the House Science, Space, and Technology Committee to former EPA Administrator Lisa Jackson, January 24, 2013, available at: <http://science.house.gov/press-release/committee-demands-records-epa-administrator%E2%80%99s-%E2%80%99Crichard-windsor%E2%80%99D-alien-email-account>.

<sup>2</sup> Jack Gillum, "Top Obama Appointees Using Secret Email Accounts," *The Associated Press*, June 4, 2013, available at: <http://bigstory.ap.org/article/emails-top-obama-appointees-remain-mystery>; (hereinafter Gillum Article).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

in a possible violation of federal record laws,"<sup>5</sup> but appeared to encourage it by stating in an e-mail, "P.S. Can you use my home email rather than this one when you need to contact me directly? Tx, Lisa."<sup>6</sup> Reaction to this email include the chief counsel of government watchdog group Citizens for Responsibility and Ethics in Washington (CREW) characterizing it as "extremely troubling,"<sup>7</sup> while a Competitive Enterprise Institute (CEI) representative proclaimed, "This reflects a clear intention to violate law and policy."<sup>8</sup>

It is also worth noting that since these reports, Ms. Jackson has hired counsel "in the ongoing congressional investigation into her use of private and secret email addresses to conduct official business."<sup>9</sup>

Based on this and other emails, on August 14, 2013, a federal judge ruled in a case against EPA by Landmark Legal Foundation that, "U.S. EPA leaders may have used personal email accounts to 'skirt disclosure' under the Freedom of Information Act,"<sup>10</sup> and that the agency "must submit to questioning on its use of nongovernment email accounts."<sup>11</sup> The judge denied EPA a summary judgment stating that evidence "may indicate bad faith on the part of the agency."<sup>12</sup> He further added that EPA's "failure to deny the allegations that personal accounts were being used to conduct official business leaves open the possibility that they were."<sup>13</sup>

It is important to note that Landmark sued EPA after the agency failed to provide records pursuant to an agreement between the two entities in which Landmark narrowed its initial broad FOIA request down to just "*senior officials in EPA HQ*."<sup>14</sup> Following this agreement, EPA's exclusion of any records from the Administrator, Deputy Administrator, and Chief of Staff, led the judge to conclude that EPA's actions suggested "an unreasonable and bad faith reading of Landmark's FOIA request and subsequent agreement to narrow its scope."<sup>15</sup> He further added that EPA's explanations for the mistake "contain numerous inconsistencies and reversals which undermine confidence in their truthfulness."<sup>16</sup>

This is not the first time Landmark has had to sue the EPA to obtain information. In 2003, the same federal judge referenced above held the agency in contempt of the law for destroying computer files sought by Landmark. On January 19, 2001, the last day of the Clinton Administration, the judge issued a protective order to preserve all documents potentially relevant to a FOIA request by Landmark.

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<sup>5</sup> CJ Ciaramella, "Lisa Jackson Contacted Lobbyist from Private Email," *The Washington Free Beacon*, August 14, 2013, available at: <http://freebeacon.com/lisa-jackson-contacted-lobbyist-from-private-email>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> CJ Ciaramella, "Former EPA Admin Lisa Jackson Hires Lawyer for Email Investigation," *The Washington Free Beacon*, August 21, 2013, available at: <http://freebeacon.com/former-epa-admin-lisa-jackson-hires-lawyer-for-email-investigation>.

<sup>10</sup> Emily Yehle, "EPA: Judge Says Officials May Have 'Purposely' Used Personal Emails to Dodge FOIA," *E&E News*, August 15, 2013, available at: <http://www.eenews.net/greenwire/stories/1059986068>; (hereinafter Yehle Article.)

<sup>11</sup> Ibid.

<sup>12</sup> *Landmark Legal Foundation v. Environmental Protection Agency*, Case 1:12-cv-01726-RCL, available at: [http://www.eenews.net/assets/2013/08/15/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2013/08/15/document_gw_03.pdf).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid; Emphasis in original.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

Incredibly, as then EPA-Administrator Ms. Carol Browner herself testified, she instructed a technician to delete her work computer files that very same day.<sup>17</sup>

EPA's actions appear to contradict virtually every guidance on openness and transparency espoused by President Obama. In one of his initial memos early in his first term, President Obama highlighted his commitment to transparency by stating:

My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government... Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. 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.<sup>18</sup>

Specifically regarding FOIA, the President provided clear direction in another 2009 memo that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government."<sup>19</sup> FOIA is the law by which people can "access information from the federal government. It is often described as the law that keeps citizens in the know about their government."<sup>20</sup> Given the President's directions and the significance of FOIA to Americans, the allegations against EPA need to be taken seriously, and addressed accordingly.

Ms. Jackson's departure from EPA after reports about the use of secret emails for official business and the inability of the EPA to provide records from these accounts raise several red flags. Due to the agency's non-responsiveness, it is apparent the EPA does not have appropriate procedures in place to collect, maintain and access records created by personal email accounts or secret aliases. This concern was part of the reason Members of the Committee last year requested that the EPA's Office of Inspector General review EPA's practices relative to the use of alias and secondary emails for official business. As the executive director of National Security Counselors, an open government group, articulately stated:

What happens when that person doesn't work there anymore? He leaves and someone makes a request (to review emails) in two years? Who's going to know to search the other accounts? You would hope that agencies doing this would keep a list of aliases in a desk drawer, but you know that isn't happening.<sup>21</sup>

We are deeply concerned by what appears to be a pattern of behavior at EPA that is directed at subverting transparency. To better evaluate the impact of the use of personal and secondary email and aliases on the preservation of federal records, the ability of the public to access government information,

<sup>17</sup> John Heilprin, "Judge Slams EPA Over Erased Computer Files," *The Associated Press*, July 24, 2003, available at: <http://www.seattlepi.com/national/article/Judge-slams-EPA-over-erased-computer-files-1120161.php>.

<sup>18</sup> Memorandum from President Obama, "Transparency and Open Government," January 21, 2009, available at: [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment).

<sup>19</sup> Memorandum from President Obama, "Freedom of Information Act," January 21, 2009, available at: [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

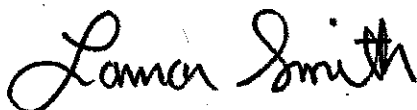
<sup>20</sup> US DOJ FOIA.gov website, available at: <http://www.foia.gov>.

<sup>21</sup> Gillum Article, *supra*, note 2.

and the Committee's ability to conduct oversight, we would appreciate replies to the following questions by September 20, 2013:

- 1) Please identify all EPA staff who use or have used secondary email accounts, as well as their account alias or aliases.
- 2) Please identify all staff who use or have used private email accounts for official government business, as well as the email address used.
- 3) What steps are you taking to ensure the agency has an accurate list of all alternate, alias and personal e-mail account information of EPA staff on which any official business was, is being, or could be conducted? Specifically, in the case of Ms. Jackson, how will you ensure the agency possesses all of Ms. Jackson's email accounts when it complies with the recent court ruling that EPA "submit to reasonable discovery"<sup>22</sup> by Landmark Legal Foundation?
- 4) Part of Landmark's lawsuit alleges that EPA failed to fully respond to its FOIA request because the agency withheld "emails of former Administrator Lisa Jackson and other top officials."<sup>23</sup> Whose emails did EPA withhold and is your name on that list?
- 5) Given that the EPA OIG is conducting an audit of EPA's FOIA practices as well as a review of EPA's compliance with the Federal Records Act and FOIA, specifically the agency's use of private email accounts and/or aliases, what plans do you have to update relevant EPA policies as well as training for agency staff over these issues?
- 6) Is EPA cooperating with the *Associated Press* in its review of federal secret email accounts? If so, what information has the agency discovered up to this point, and when is the final response expected to be submitted? If not, why not?
- 7) Please provide unredacted copies of all records, as defined by the attachment, relating to any private, secondary or alias email accounts used by yourself, the former EPA Administrator Ms. Lisa Jackson, and EPA senior management, to conduct official business.

If you have any questions related to this request, please contact Mr. Raj Bharwani, Staff Director, Subcommittee on Oversight, at (202) 225-6371.



Rep. Lamar S. Smith  
Chairman  
Committee on Science, Space,  
and Technology

Sincerely,



Rep. Paul Broun, M.D.  
Chairman  
Subcommittee on Oversight

cc: Rep. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology  
Rep. Dan Maffei, Ranking Member, Subcommittee on Oversight

Attachment

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<sup>22</sup> Yehle Article, *supra*, note 10.

<sup>23</sup> Ibid.

## ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.
2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

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March 12, 2013

Mr. Robert Perciasepe  
Acting Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, DC 20004

Dear Mr. Perciasepe,

As the Environmental Protection Agency (EPA) seeks to enact expansive and far-reaching regulations that will impact the livelihood of every citizen, Congress has increasingly asserted its oversight prerogatives in order to ensure that the agency properly adheres to the regulatory process, operates in a transparent manner, and makes decisions based upon science, not ideology. In order to further inform the Committee's inquiry related to the use of alias email accounts at the EPA,<sup>1</sup> as well as our understanding of how EPA uses science to implement its regulatory authority, please provide unredacted copies of the following records.

- 1) Email from Scott Fulton to Bob Perciasepe, and Richard Windsor (Lisa Jackson), Subject: "Re: GHG BACT," July 14, 2010, 10:02 am.
- 2) Email from Seth Oster to Richard Windsor (Lisa Jackson), Bob Sussman, Diane Thompson, Gina McCarthy, Lisa Heinzerling, and Allyn Brooks-LaSure, Subject: "Re: BNA: EPA Said to Be Nearing proposal to Limit Stationary Sources' Carbon Dioxide Emissions," August 21, 2009, 10:58 am.
- 3) Email from Barbara Bennett to Richard Windsor (Lisa Jackson), Diana Thompson, and Bob Perciasepe, Subject: "Fw: Pass through," December 2, 2009, 4:32 pm.
- 4) Email from Adora Andy to Richard Windsor (Lisa Jackson), Diane Thompson, Bob Perciasepe, Bob Sussman, Gina McCarthy, Lisa Heinzerling, Seth Oster, Allyn Brooks-LaSure, David McIntosh, Arvin Ganesan, Subject: "HEADS UP:....," November 12, 2009, 4:09 pm.

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<sup>1</sup> See <http://science.house.gov/press-release/committee-demands-records-epa-administrator%E2%80%99s-%E2%80%99Richard-windsor%E2%80%99D-alias-email-account>. See also <http://science.house.gov/press-release/smith-issa-vitter-expose-epa%E2%80%99s-attempt-hide-emails-call-further-investigation>

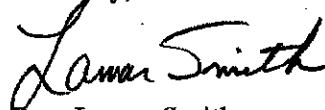


Mr. Perciasepe  
Page two  
March 12, 2013

As the nation recognizes Sunshine Week, I hope you will embrace the President's directives on transparency,<sup>2</sup> accountability, and open government<sup>3</sup> by quickly addressing this request. The public needs to know that EPA is using the authorities granted to it by Congress in a prudent manner that respects the public's trust.

Please provide these records by 5:00 pm on March 22, 2013. When producing documents to the Science, Space, and Technology Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. We prefer, if possible, to receive all documents in electronic format. If you have any questions related to this request, please contact Mr. Tom Hammond, Staff Director, Subcommittee on Oversight, at (202) 225-6371.

Sincerely,

A handwritten signature in black ink that reads "Lamar Smith". The signature is written in a cursive, flowing style.

Rep. Lamar Smith  
Chairman

CC: Rep. Eddie Bernice Johnson  
Ranking Member

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<sup>2</sup> Presidential Documents, Freedom of Information Act Memo, January 21, 2009, accessed at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1773.pdf>

<sup>3</sup> Presidential Documents, Transparency and Open Government Memo, January 21, 2009, accessed at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>