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Committee on Science, Space, and Technology
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"EPA's Compliance with the Federal Records Act and the Freedom of Information Act"

Presented by
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[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/2 l 55/CI0-2155 .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:
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> *"I'm 5 minutes behind";*
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> 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:
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> *"I'm 5 minutes behind, go ahead and make the decision without me."*
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> 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]
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> 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

[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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> * * *
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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] [redacted]

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
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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.