



A 501(c)(3) Nonprofit Corporation

May 19, 2014

VIA E-MAIL AND FACSIMILE

Larry Gottesman
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Facsimile: (202) 566-2147
E-mail: hq.foia.epa.gov

RE: Freedom of Information Act Request

Dear Mr. Gottesman:

Cause of Action hereby requests access to the following records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552:

- 1) All documents and communications between and among employees of the U.S. Environmental Protection Agency (EPA) and employees of the Executive Office of the President, including, but not limited to, the White House Office and the Office of Management and Budget, referring or relating to congressional requests for information. The relevant time period for this request is April 15, 2009 to May 15, 2014.
- 2) All documents produced to the House Committee on Oversight and Government Reform in response to their November 7, 2013 subpoena served upon EPA Administrator Gina McCarthy.¹

Request for public interest fee waiver

Cause of Action requests a waiver of any and all applicable fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). This provision provides that requested records shall be furnished without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”² The requested records would unquestionably shed light on the “operations or activities of the government,”³ namely EPA’s policies and procedures with respect to records involving White House equities. Moreover,

¹ See Ex. 1, attached.

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ *Id.*

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disclosure would “contribute significantly” to the public’s understanding of EPA operations.⁴ To date, EPA has not disclosed to the public—either through its regulations or policy memoranda—how it processes agency records that are deemed to contain White House equities. Cause of Action has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Cause of Action’s staff members have a wealth of experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through Cause of Action’s regularly published online newsletter, memoranda, reports, or press releases.⁵

Further, Cause of Action, a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, does not have a commercial interest in making this request. The requested information will be used solely to educate the general public regarding EPA’s heretofore undisclosed FOIA policy and procedures for processing records with White House equities.

Request for news media status

For fee purposes, Cause of Action also qualifies as a “representative of the news media” as defined by the statute. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. *See id.*

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.⁶ These distinct works are distributed to the through various media, including Cause of Action’s website, which has been viewed just under 120,000 times in the past year alone.⁷ Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via email.

The statutory definition of a “representative of the news media” unequivocally commands that organizations such as Cause of Action that electronically disseminate

⁴ *Id.*

⁵ *See* <http://www.causeofaction.org>.

⁶ *See, e.g.*, CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), *available at* <http://causeofaction.org/grading-government-white-house-targets-document-requesters/>; *see also* CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), *available at* <http://causeofaction.org/2013/09/23/greentech-automotive-a-venture-capitalized-by-cronyism-2/>; *see also* CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), *available at* <http://causeofaction.org/2013/08/02/political-profiteering-how-forest-city-enterprises-makes-private-profits-at-the-expense-of-americas-taxpayers/>.

⁷ *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

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information and publications via “alternative media shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.⁸

Record production and contact information

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, email, .pdf). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by e-mail at Daniel.Epstein@causeofaction.org or by telephone at (202) 499-4232. Thank you for your attention to this matter.



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

Encl.: Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Hon. Gina McCarthy, Adm’r, U.S. Env’tl. Protec. Agency (May 15, 2014).

⁸ See, e.g., FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep’t of Energy (July 1, 2013, Dep’t of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).

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House of Representatives

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May 15, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Ms. McCarthy:

On April 10, 2013, Senator Vitter and I wrote to you in your capacity as the Assistant Administrator for the Office of Air and Radiation regarding several issues at the Environmental Protection Agency. These issues included the agency's non-compliance with federal records laws, failure to cooperate with congressional oversight, and the agency's numerous attempts to avoid transparency and conceal its problems.¹ In particular, Senator Vitter and I pointed out that EPA was operating under the false pretense that its responses to Freedom of Information Act requests constituted productions in response to congressional document requests. EPA also appeared to be improperly redacting portions of documents in its FOIA responses.²

In the April 10 letter, we requested four sets of documents, including specific documents that EPA had previously provided to other entities in response to FOIA requests. On April 25, 2013, in an effort to accommodate EPA's expressed interest in an efficient document production process, Committee staff prioritized certain categories of documents requested in the April 10 letter.³ These documents included 106 redacted e-mails that EPA had previously released to the public pursuant to separate FOIA requests. The letter requested that the e-mails be provided in unredacted form to Congress.

Although EPA initially indicated that it would cooperate with the Committee's request, such cooperation never actually materialized. This change in position, which became a steadfast refusal, was contrary to EPA's initial willingness to cooperate. Therefore, on June 27, 2013, Senator Vitter and I wrote to then-Acting Administrator Bob Perciasepe to urge EPA to produce

¹ Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (OGR), & Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (EPW), to Hon. Gina McCarthy, Ass't Adm'r, Office of Air and Radiation, U.S. Env'tl. Protec. Agency (Apr. 10, 2013).

² *Id.* As the April 10, 2013, letter makes clear, the EPA's reliance on its FOIA responses that include FOIA exemptions in response to Congressional inquires is in direct conflict with the law. Congress is not included within the scope of FOIA, and agencies cannot use FOIA exemptions to withhold information from Congress.

³ Teleconference between EPW staff, OGR staff, & EPA staff (Apr. 25, 2013).

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the unredacted documents pursuant to our April 10 letter.⁴ EPA still did not produce the requested documents.

Over three months later, the reason for EPA's change of position relating to the Committee's investigation became clear. On September 30, 2013, EPA responded to a FOIA request from Cause of Action, a non-partisan government accountability organization.⁵ In the response, EPA released a partially redacted June 13, 2013, e-mail from Kevin Minoli, the EPA Acting Principal Deputy General Counsel, to Daniel Dominguez, a Special Assistant to the President at the White House. The e-mail stated:

Folks here would like to send up a second set of documents in response to the attachment to the Issa/Vitter April 10th letter that has a list of 106 documents they want in unredacted form. . . . Please take a look and lets [sic] discuss early next week.⁶

As of September 30, the Committee still had not received the 106 e-mails that Mr. Minoli mentioned in his e-mail to the White House. This creates the appearance that, even though EPA was willing to produce unredacted copies of the 106 documents in response to the Committee's request, the White House blocked it from doing so. The previously unknown White House involvement in EPA's refusal to produce unredacted copies of the documents was highly suspicious, and raised questions about possible White House obstruction of congressional oversight.

In order to finally obtain a copy of the 106 e-mails first requested in April 2013, and to uncover the extent of the White House's intervention and possible obstruction, on November 7, 2013, I issued a subpoena to you. The subpoena required that you produce, in unredacted form:

1. All documents and communications between and among employees of the U.S. Environmental Protection Agency and employees of the Executive Office of the President, including, but not limited to, the White House Office and the Office of Management and Budget, referring or relating to congressional requests for information.
2. All documents identified in the Addendum to Request 4 attached to the April 10, 2013, letter to EPA Administrator Gina McCarthy from House Oversight and Government Reform Committee Chairman Darrell Issa and Senate Committee on Environment and Public Works Ranking Member David Vitter, a copy of which is attached hereto.⁷

⁴ Letter from Hon. Darrell Issa, Chairman, OGR, & Hon. David Vitter, Ranking Member, EPW, to Hon. Bob Perciasepe, Acting Adm'r, EPA (June 27, 2013).

⁵ Related Documents: White House Equities in FOIA Requests, Cause of Action (Apr. 2, 2014), *available at*: <http://causeofaction.org/related-documents-white-house-equities-foia-requests/>.

⁶ E-mail from Kevin Minoli, Acting Principal Deputy Gen. Counsel, EPA, to Daniel Dominguez, Special Assistant to the President, White House (June 13, 2013).

⁷ OGR, Subpoena to Hon. Gina McCarthy, Adm'r, EPA (Nov. 7, 2013).

The following week, EPA responded to this subpoena and finally produced, as required by law, the 106 documents referenced in paragraph two of the subpoena schedule—the same documents the White House apparently prevented EPA from producing five months earlier. When the Committee was finally able to review the unredacted e-mails, it was clear that the redactions applied to the FOIA production were made to hide embarrassing conversations between EPA staff. The redactions were not, in fact, covered by the FOIA exemptions cited by EPA. It is unacceptable for EPA to hide behind improper FOIA redactions.

Just as concerning, EPA has not produced a single document under paragraph one of the subpoena schedule. In fact, EPA Associate Administrator Laura Vaught wrote:

[T]he letter accompanying your subpoena raises the question of whether any entity interfered with the EPA's efforts to comply with your original request. I want to assure you that absolutely nothing of that sort occurred.⁸

Vaught made this assurance despite the existence of the June 13, 2013, e-mail in which EPA asked the White House about producing documents to the Committee. In spite of this unequivocal assurance, nearly six months later, EPA has yet to produce a single document responsive to subpoena paragraph one. EPA's refusal to comply with the legal obligations of the subpoena casts doubt on the reliability of Ms. Vaught's claim.

During a November 26, 2013, phone call, EPA staff complained both about the scope of paragraph one of the subpoena schedule and the fact that EPA needed to search for, and identify, the documents required under the subpoena.⁹ Committee staff suggested that EPA could begin its production by simply providing an unredacted copy of the June 13, 2013, e-mail between Kevin Minoli and Daniel Dominguez. To this day, EPA has not produced that e-mail. The fact that EPA has refused to produce a single document under paragraph one of the subpoena—a document that EPA partially released in response to a FOIA request—is an affront to the Committee's duty to conduct Constitutionally-mandated oversight of the Executive Branch.

At a February 6, 2014, meeting with EPA staff, Committee staff relayed my displeasure that EPA had not produced a single document under paragraph one of the subpoena schedule.¹⁰ EPA staff stated that they would "take back" my concerns, and insinuated that these documents might implicate executive privilege. Yet, more than three months later, EPA has still not produced a single document, and the President has not invoked executive privilege to prevent their release. Absent a proper invocation of executive privilege, you are legally required to produce these documents.

Despite EPA's obligation to cooperate with this Committee's oversight of the Executive Branch, it is apparent that, after six months of contumacious behavior, EPA has no intention of cooperating. EPA has failed to reciprocate the Committee's considerable efforts to

⁸ Letter from Laura Vaught, Assoc. Adm'r, EPA, to Hon. Darrell Issa, Chairman, OGR (Nov. 14, 2013).

⁹ Phone call between OGR staff & EPA staff (Nov. 26, 2013).

¹⁰ Meeting between OGR staff & EPA staff (Feb. 6, 2014).

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accommodate the agency's interests. That is unfortunate. Without EPA's voluntary cooperation, the Committee will have no alternative but to consider avenues to enforce compliance with the subpoena in order to obtain these documents. These documents are essential in determining whether White House or EPA employees have engaged in illegal conduct by actively obstructing this Committee's investigation. If no such activity occurred, as EPA assures the Committee, then EPA should have no difficulty whatsoever in producing these documents to the Committee immediately.

Therefore, please produce all documents pursuant to paragraph one of the November 7, 2013, subpoena as soon as possible, but no later than 5:00 p.m. on May 29, 2014. The Committee will consider the full range of options to enforce the subpoena if EPA continues to withhold documents covered by the subpoena.

The EPA's posture with respect to the Committee's oversight is, unfortunately, consistent with a pattern that has been observed at several other federal agencies. The alarming frequency with which legislative affairs staff put up roadblocks—including citing privileges that do not apply to Congress, withholding documents to protect vague institutional interests, and treating subpoenas like FOIA requests, among many others—creates the appearance that it is the Administration's policy to obstruct congressional oversight. Alternatively, legislative affairs staffs throughout the federal bureaucracy lack the ability or the tools to respond efficiently to congressional document requests. So that the Committee can better understand how and why EPA has been unable or unwilling to cooperate, please make the following individuals available for transcribed interviews:

1. Kevin Minoli, Acting Principal Deputy General Counsel
2. Tom Dickerson, Senior Legislative and Oversight Counsel

Thank you for your attention to this request. Please contact Tyler Grimm of the Committee staff at (202) 225-5074 if you have any questions about this matter.

Sincerely,



Darrell Issa
Chairman

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