

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

V.

UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY,

Defendant.

Civil Action No. 17-533 (JEB)

## MOTION FOR SUMMARY JUDGMENT

This Freedom of Information Act (“FOIA”) case is based on a FOIA request made by Plaintiff, Judicial Watch, Inc., to Defendant United States Environmental Protection Agency (“EPA”). The request seeks two categories of documents relating to the alleged use by EPA officials of Signal, an application that allows the encryption of communications made by mobile devices. Pursuant to Rule 56 of the Federal Rules of Civil Procedures, Defendant EPA hereby moves for summary judgment. As detailed in the attached statement of material facts not in genuine dispute and memorandum of points and authorities, there is no genuine issue as to

any material fact and Defendant is entitled to judgment as a matter of law.

Respectfully submitted,

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## DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendant submits, in accordance with LCvR 7(h), the following statement of material facts as to which there is no genuine issue to be tried:

1. On February 3, 2017, plaintiff mailed a FOIA request to EPA that was received by EPA on February 14, 2017. R. 1, Complaint, at ¶¶ 5 and 6, and Exhibit A hereto, declaration of Larry F. Gottesman, EPA’s National Freedom of Information Act Officer (“Gottesman Decl.”), ¶ 2.

2. The request sought two categories of records. R. 1, at ¶ 5(1) and (2).

3. The first category requested “[a]ny and all work-related communications sent to or from the following EPA officials using the app known as

“Signal,” for the period February 3, 2016 to the present: a. Administrator (or Acting); b. Deputy Administrator (or Acting); c. Assistant Administrator (or Acting), Office of Air and Radiation; d. Assistant Administrator (or Acting), Office of Chemical Safety and Pollution Prevention; e. Assistant Administrator (or Acting), Office of Enforcement and Compliance Assurance; f. Assistant Administrator (or Acting), Office of Land and Emergency Management; g. Assistant Administrator (or Acting), Office of International and Tribal Affairs; and h. Chief Financial Officer (or Acting). *Id.*

4. The second category requested “[a]ny and all records requesting or approving the use of the messaging app known as “Signal” by any EPA personnel for official business. The time frame for the requested records is July 1, 2014 to the present.” *Id.*

No Records Responsive to Part One Were Found

*Search for Records from Current Employees*

5. As part of the Agency’s search for records, EPA identified eight current employees that held positions listed in part one of the FOIA request during the time frame of the requested records. The individuals were: Catherine McCabe, Acting Administrator; Michael Flynn, Acting Deputy Administrator; Sarah Dunham, Acting Administrator for the Office of Air and Radiation; Wendy

Cleland-Hamnett, Acting Administrator for the Office of Chemical Safety and Pollution Prevention; Lawrence Starfield, Acting Administrator for the Office of Enforcement and Compliance Assurance; Barry Breen, Acting Administrator for the Office of Land and Emergency Management; Jane Nishida, Acting Administrator for the Office of International and Tribal Affairs, and David Bloom, Acting Chief Financial Officer. Exhibit B hereto, declaration of Liza V. Hearn, Director of the Endpoint & Collaboration Solutions Division (“Hearn Decl.”), ¶ 6. These eight officials are the Agency employees likely to know whether they received or sent communications using Signal, i.e., whether it is likely that there are records that they sent or received that are responsive to part one of the FOIA request. *Id.*

6. Two of the current officials acted in the indicated roles during the entire date range of part one of Judicial Watch’s request, February 3, 2016, to February 14, 2017: Jane Nishida, Acting Administrator for the Office of International and Tribal Affairs, and David Bloom, Acting Chief Financial Officer. Gottesman Decl. ¶ 4.

7. The remaining six current officials held the indicated positions from on or about January 20, 2017, to February 14, 2017, the date EPA received the request. Those six officials were Catherine McCabe, Acting Administrator;

Michael Flynn, Acting Deputy Administrator; Sarah Dunham, Acting Administrator for the Office of Air and Radiation; Wendy Cleland-Hamnett, Acting Administrator for the Office of Chemical Safety and Pollution Prevention; Lawrence Starfield, Acting Administrator for the Office of Enforcement and Compliance Assurance; and Barry Breen, Acting Administrator for the Office of Land and Emergency Management. *Id.*

8. EPA also identified six former employees who held the indicated positions from the beginning of the time period for plaintiff's request, February 3, 2016, to approximately January 20, 2017. Hearn's Decl. ¶¶ 18 and 20. Those six former employees are Gina McCarthy, former EPA Administrator, Stan Meiberg, former Deputy Administrator, Janet McCabe, former Assistant Administrator for the Office of Air and Radiation, Jim Jones, former Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, and Mathy Stanislaus, former Assistant Administrator for the Office of Land and Emergency Management and Cynthia Giles former Assistant Administrator for the Office of Enforcement and Compliance Assurance. *Id.*

9. EPA uses a software tool known as Mobile Device Management ("MDM") software that is installed on all compatible Agency-issued mobile devices. MDM software enables EPA to centrally manage certain settings and

features within the operating system of an Agency-issued mobile device. *Id.*, ¶ 3.

10. MDM software is used to standardize the numerous available device settings across the Agency to enhance the security and performance of the devices and to support end-user compliance with applicable policies for use of the devices. *Id.*, ¶ 3.

11. MDM software permits the EPA to obtain information about what mobile applications or “apps” are installed on Agency devices that have the MDM software installed on the device by running a report that returns then-current information about the devices. The majority of currently issued EPA mobile devices are compatible with the MDM software and have the software installed on the device. *Id.*, ¶¶ 3 and 4.

12. The Agency also manages a small number of other mobile devices such as mobile wifi hotspots, or older “flip phones,” which are not compatible with or managed by the MDM software. The Agency mobile devices that are not compatible with or managed by the MDM software generally do not have an operating system that would permit mobile apps to be downloaded to the device. *Id.*, ¶ 3.

13. On February 3, 2017, the then-acting Division Director of the Endpoint & Collaboration Solutions Division received a request from the Office of Inspector

General asking for assistance in identifying whether certain mobile apps, including Signal, had been downloaded to Agency-issued mobile devices. *Id.*, ¶ 5.

14. The EPA's MDM software enables Agency mobile devices to periodically update a database with information about the mobile device, including which mobile apps are installed on the device. These updates from the device to the database happen approximately every two to three days, depending on the signal strength and connectivity of the device. *Id.*, ¶ 4.

15. On February 7, 2017, an EPA contractor generated a report of the information contained in the MDM database from all Agency devices enrolled in the MDM software. *Id.*, ¶ 5.

16. Devices assigned to seven of these eight officials appeared in the February 7, 2017 report. *Id.*, ¶ 7. None of the devices assigned to these seven officials that appeared in the report showed as having the mobile app "Signal" installed as of the date the report was run. *Id.* One of the eight officials did not have any assigned device appear in the report. *Id.* This official was asked about their use of the Signal app on Agency-issued devices, and this official responded that they had not used Signal on an Agency-issued device during the period of February 3, 2016 to February 14, 2017. Gottesman Decl. ¶¶ 8-10.

17. The MDM program does not have the capability to generate reports



with historical data, *i.e.*, data prior to the date the report is run. Hearn Decl. ¶ 4.

18. The EPA's National Freedom of Information Act Officer also contacted the eight EPA officials identified in Paragraph 5 by email on July 17, 2017, and asked the individuals, "[t]o the best of your recollection, are you aware of sending or receiving work-related communications through the use of a messaging application known as 'Signal' on a personal device during the period of February 3, 2016 to February 14, 2017?" Gottesman Decl., ¶ 5.

19. All eight officials responded to the National Freedom of Information Act Officer by written response in the form of an email reply. The responses were either sent personally by the official or, in one case, by the official's Chief of Staff. *Id.*, ¶ 6.

20. All eight officials replied that, to the best of their knowledge, they did not send or receive work-related communications through the use of the messaging application known as "Signal" on a personal device during the period of February 3, 2016, to February 14, 2017. *Id.*, ¶ 7.

21. The EPA's National Freedom of Information Act Officer contacted the eight EPA officials identified in Paragraph 5 again by email on July 24, 2017, and asked the individuals, "[t]o the best of your recollection, are you aware of sending or receiving work-related communications through the use of a messaging

application known as ‘Signal’ on an Agency-issued device during the period of February 3, 2016 to February 14, 2017?” *Id.*, ¶ 8.

22. All eight officials personally responded by written response in the form of an email reply. *Id.*, ¶ 9.

23. All eight officials replied that, to the best of their knowledge, they did not send or receive work-related communications through the use of the messaging application known as “Signal” on an Agency-issued device during the period of February 3, 2016, to February 14, 2017. *Id.*, ¶ 10.

*Search for Records from Former Employees*

24. The current procedures required for the return of an Agency-issued mobile device to the Agency when an employee retires or leaves the Agency were established in November 2016 to further improve upon the Agency’s management of Agency records on mobile devices. Hearn Decl., ¶ 13. The procedures require, among other things, that an employee complete a Mobile Device Acknowledgement Form, before turning in the device for re-use by the Agency or for destruction, as appropriate. Under the procedures, the Mobile Device Acknowledgement Form must be completed by the employee after he/she reviews the contents of the mobile device and ensures that any records stored only on the mobile device, such as text messages or pictures, are properly transferred to other

Agency systems prior to the device being turned in for reissuance, reprovisioning, or disposition. *Id.*

25. If the employee is not able to complete the Mobile Device Acknowledgment Form before he or she leaves the Agency, the employee's supervisor must review the device's contents and complete the form. *Id.*

26. The Mobile Device Acknowledgement Form requires employees to attest to the following statement: "I hereby attest that I have met my obligation to preserve agency records transmitted or stored on this device in the course of official agency business that may be subject to preservation or production requirements under the Federal Records Act, the Privacy Act, the Freedom of Information Act, litigation holds, or court preservation orders. By signing below, I attest that all such records have been preserved on EPA systems in a manner consistent with EPA guidance and are not solely preserved on this mobile device." *Id.*, ¶ 14.

27. Under the procedures, the program or Region's eBusiness Orderer and/or Working Capital Fund Account Manager is responsible for ensuring that a completed Mobile Device Acknowledgement Form is then uploaded into the Agency's eBusiness system before a request for cancellation of service to the mobile device can be processed. *Id.*, ¶ 15.

28. The cancellation process includes termination of the cellular service, disconnection from the Agency's email system and removal of the device from the MDM software. *Id.*

29. A cancellation order has been processed for the mobile devices of all six former Agency officials, listed in ¶ 8 above, and those devices are no longer enrolled in the MDM software. *Id.* Because EPA does not collect passwords from separating employees, and because the devices of the six former employees are no longer enrolled in the MDM software, even for those former employees' mobile devices that are still physically available and have not been reissued, EPA could not search the content of locked devices to determine whether the Signal app was present at the time of the employees' separation from the Agency. *Id.* ¶¶ 15 and 17.

30. There are signed copies of the Mobile Device Acknowledgement Form for five of the former-employees who held the positions listed in the FOIA request from the beginning of the time period of the FOIA request, February 3, 2016, to approximately January 20, 2017. Those former employees are Gina McCarthy, former EPA Administrator, Stan Meiberg, former Deputy Administrator, Janet McCabe, former Assistant Administrator for the Office of Air and Radiation, Jim Jones, former Assistant Administrator for the Office of Chemical Safety and

Pollution Prevention, and Mathy Stanislaus, former Assistant Administrator for the Office of Land and Emergency Management. *Id.* ¶ 18.

31. There is also an Agency form titled “EPA Records Management Checklist for Separating/Transferring or Separated Personnel” which requires employees to initial that they have managed the records in multiple storage locations, including mobile devices, and to sign the following statement: “To the best of my knowledge, I certify that all U.S. Government documentary materials (preservation of litigation holds, audits, and congressional inquiry materials), in any format, have been identified and transferred to the appropriate recordkeeping system or designee and that the statements made on this Checklist are true, accurate, and complete.” *Id.*, ¶ 19.

32. There is a signed copy of the EPA Records Management Checklist for Separating/Transferring or Separated Personnel for former Assistant Administrator for the Office of Enforcement and Compliance Assurance, Cynthia Giles, who held that position from the beginning of the time period of the FOIA request, February 3, 2016, to approximately January 20, 2017. *Id.*, ¶ 20. The staff who worked with Cynthia Giles to manage her records before her departure were not aware that the Mobile Device Acknowledgement Form should have been completed for departing employees, and therefore only requested that Ms. Giles complete the

EPA Records Management Checklist for Separating/ Transferring or Separated Personnel form, which she did. *Id.*

33. There is no reason to believe that any of the six former EPA officials identified in paragraphs 30 and 32 had Signal installed on their mobile devices. However, if one or more of the six former EPA officials had Signal installed on their mobile devices, and if they had forwarded messages from Signal into Agency files, the Agency does not know where or how such a message would have been placed into Agency systems. *Id.*, ¶ 21.

No Records Responsive To Part Two Were Found

34. As the Division Director of the Endpoint & Collaboration Solutions Division, declarant Hearn is familiar with EPA policies and procedures regarding the use of mobile apps on Agency-issued mobile devices, and she is familiar with the Agency's history of approving for Agency use software apps developed by third-parties. *Id.*, ¶ 8.

35. EPA's Social Media Policy ("the Policy"), approved on June 20, 2011, provides guidance to Agency employees regarding the approval of third party software apps, including social media tools. The Policy states that, "EPA will only use third party [social media] sites that have been approved for Agency use, and such use must be in accordance with approved Terms of Service (ToS)

agreements.” *Id.*

36. The Policy also states that the Agency’s Chief Information Officer within the Office of Environmental Information and the Associate Administrator for the Office of Public Affairs (formerly the Office of External Affairs and Environmental Education) are jointly responsible for monitoring compliance with the Policy. *Id.*

37. Prior to June 2016, EPA program offices interested in using third-party web, social media, and mobile apps for official Agency business could request approval from the Office of Environmental Information or from the Office of Web Communications within the Office of Public Affairs. *Id.*, ¶ 9.

38. Declarant Hearn spoke to the Acting Director of the Office of Web Communications regarding this approval process, and she was informed that to the best of the knowledge of the Acting Director, the Office of Web Communications has never received a request by an EPA employee to use Signal on Agency-issued mobile devices. *Id.*

39. To the best of Declarant Hearn’s knowledge, the Office of Information Technology Operations has not received a request by an EPA employee to use Signal on Agency-issued mobile devices from 2014 to later. *Id.*

40. For the period 2014 to June 2016, the Office of Web Communications

and the Office of Information Technology Operations are the two Agency components likely to have records responsive to Judicial Watch's request for all records requesting or approving the use of Signal by any EPA personnel for official business. *Id.*

41. As the Division Director of the Endpoint & Collaboration Solutions Division, Declarant Hearn is also familiar with the mobile app approval process that EPA instituted in June 2016. This approval process is specific to third-party developed mobile apps. *Id.*, ¶ 10.

42. Under the 2016 mobile app approval process, an EPA employee may apply to use a new mobile app by first identifying an Agency business need for the app. If the employee subsequently obtains approval from his or her manager, the employee may then submit his or her request to the Agency's Mobile Application Approval Committee, which will review the request and conduct security and legal reviews. *Id.*

43. The Mobile Application Approval Committee is the Agency component likely to have records from the period June 2016 to the present reflecting any request and/or any approval by the Agency of the use of the Signal app. *Id.*, ¶ 12.

44. Declarant Hearn has reviewed the log of all requests for approval



under the current process, and she confirms that since the current mobile app approval procedures were established in June 2016, the Mobile Application Approval Committee has not received any requests from employees to use the app known as “Signal.” *Id.*

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

The claims in this case arise under the Freedom of Information Act (“FOIA”) and pertain to Plaintiff Judicial Watch’s FOIA request seeking two categories of records: (a) work-related communications sent or received using the Signal mobile application or “app” by individuals holding eight specified EPA senior Agency positions (in a permanent or acting status) from February 3, 2016, to the present, and (b) records requesting or approving the use of the Signal app by EPA personnel for official business for the period from July 1, 2014, to the present. Signal is a mobile app that allows encrypted voice and messaging communications.

Plaintiff's FOIA request appears to be based on a February 2, 2017, news article, citing an unattributed source, that claimed that fewer than a dozen unnamed EPA career employees (out of thousands) were using the Signal app to communicate. *See* "Federal workers turn to encryption to thwart Trump", <http://www.politico.com/story/2017/02/federal-workers-signal-app-234510> (lasted visited August 3, 2017.) The first part of the FOIA request focused solely on individuals holding eight senior management positions within the Agency and sought all work-related communications sent or received by them on Signal without regard to subject matter. Plaintiff's request for records from officials holding these eight senior management positions, therefore appear to be based on pure speculation on the part of Plaintiff that one or more of these individuals used Signal to communicate about Agency business. The second part of the FOIA request focused on EPA employees requesting or receiving approval to use the Signal app; an app that was never approved for official use. It is unsurprising then that the Agency, after conducting a thorough search for responsive records, found no responsive records.

As detailed below and in the attached declarations, Defendant conducted a thorough and adequate search for records responsive to the request, and none were

found. Summary Judgment should, therefore, be granted to EPA, and this case should be dismissed with prejudice.

### Factual Background

Defendant incorporates herein the preceding Statement of Material Facts Not In Genuine Dispute (hereafter, “Statement of Material Facts”), the Declaration of Larry F. Gottesman (hereafter Gottesman Decl.), which is Exhibit A hereto, and the Declaration of Elizabeth V. Hearn (hereafter Hearn Decl.), which is Exhibit B hereto.

### LEGAL STANDARDS

#### The Summary Judgment Standard In FOIA Cases

Summary judgment is appropriate when the pleadings and evidence show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (interpreting Rule 56(c), the prior version of Rule 56(a)); *Guajacq v. EDF, Inc.*, 601 F.3d 565, 575 (D.C. Cir. 2010). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A genuine issue of material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. Once the moving party

has met its burden, the nonmoving party “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

The “vast majority” of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) (“CREW”); *Wheeler v. Department of Justice*, 403 F. Supp. 2d 1, 5-8 (D.D.C. 2005). An agency is entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located either has been produced to the plaintiff or is exempt in whole or in part from disclosure. *See Weisberg v. Dep’t of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). District courts rely on summary judgment motions to resolve FOIA claims because “[d]iscovery is generally unavailable in FOIA actions.” *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C.2003) (citing *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000)).

To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGhee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977

(1974); *Wheeler*, 403 F. Supp. 2d at 6. “[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe ‘the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’”

*CREW*, 478 F.Supp.2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Further, in FOIA cases, agency affidavits are accorded “a presumption of good faith.” *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

A plaintiff “cannot rebut the good faith presumption” afforded to an agency’s supporting affidavits “through purely speculative claims about the existence and discoverability of other documents.” *Brown v. Dep’t of Justice*, 742 F. Supp. 2d. 126, 129 (D.D.C. 2010) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks and citations omitted)). See also *Cappabianca v. Commissioner, U.S. Customs Serv.*, 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) (“once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment”) (citing *Miscavige v. IRS*, 2 F.3d. 366, 368 (11th Cir. 1993)).

### Standard for an Adequate FOIA Search

In FOIA cases, the agency must demonstrate that it has made “a good faith effort to conduct a search for the requested records, using methods that can reasonably be expected to produce the information requested.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of an agency's search for responsive records under FOIA is determined by a standard of reasonableness. *See McGehee v. CIA*, 697 F.2d 1095, 1100 (D.C. Cir. 1983); *Elliott v. Department of Agriculture*, 596 F.3d 842, 851 (D.C. Cir. 2010). The search must be “reasonably calculated to uncover all relevant documents.” *Weisberg v. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith.” *Miller*, 779 F.2d at 1383; *see also Schoenman v. F.B.I.*, 763 F. Supp.2d 173, 188 (D.D.C. 2011).

Because the search need only be reasonable rather than exhaustive, this standard does not place upon the agency a requirement that it prove that all responsive documents have been located. *See Harrison v. Federal Bureau of Prisons*, 681 F.Supp.2d 681, 81 (D.D.C. 2010); *see also Miller v. Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1986); *Campaign for Responsible*

*Transplantation v. FDA*, 219 F. Supp. 2d 106, 110-11 (D.D.C. 2002). An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *See Oglesby v. Department of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *see also Kowalczyk v. Department of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). Moreover, there is no requirement that the search be perfect. *See Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). The adequacy of a search is “dependent upon the circumstances of the case,” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990), and is measured by “the reasonableness of the [agency’s] effort in light of the specific request.” *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). EPA FOIA regulations also specify that when conducting a search for responsive documents, “an office will ordinarily include only those records in its possession as of the date the request was received in the Headquarters or Regional FOI Office. If any other state is used, the office will inform you of that date.” 40 C.F.R. § 2.103(a).

Once the agency has met its burden, then the burden shifts to the requester to rebut the evidence by contradicting the defendant's account of the search procedure or by showing bad faith on the part of the agency. *See Steinberg v. Department of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). It is insufficient, however, for a requester to attempt to rebut agency affidavits with "purely speculative claims



about the existence and discoverability of other documents." *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Particularly relevant to the present case, where the existence of documents is itself speculative, "the failure of a search to produce particular documents, or 'mere speculation that as yet uncovered documents might exist,' does not undermine the adequacy of a search." *Lasko v. DOJ*, No. 10-5068, 2010 WL 3521595, at \*1 (D.C. Cir. Sept. 3, 2010) (quoting *Wilber v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004)); accord *Steinberg*, 23 F.3d at 552 (noting that requester's "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search" for them (quoting *SafeCard*, 926 F.2d at 1201)).

### ARGUMENT

#### A. EPA Conducted a Reasonable Search for Records from Senior Officials (Part One of the Request)

##### *1. The search for records from current employees.*

In response to Plaintiff's request, EPA identified eight current Agency employees who had held the senior positions specified in the FOIA request. Statement of Material Facts at ¶ 5. Although Plaintiff provided no evidence indicating that the identified senior management employees holding those positions ever used the Signal app to communicate about Agency business, EPA nevertheless used two methods to undertake a search for potentially responsive

records from these current employees. First, EPA relied on data available from the mobile devices of current Agency employees to determine whether the Signal app was installed on the Agency-issued devices of the eight current Agency employees. Second, EPA also asked the eight current Agency employees about their use of the Signal app on both Agency-issued and personal mobile devices during the relevant time frame of the request. Under both approaches, the Agency determined that no responsive records could be located.

Under the first method, EPA relied on available data from Mobile Device Management (“MDM”) software. Statement of Material Facts at ¶ 11. This software can report the mobile apps installed on the Agency’s enrolled mobile devices as of the date the report is run. *Id.* At the request of EPA’s Office of Inspector General, EPA ran a report on February 7, 2017, using the MDM software. Statement of Material Facts at ¶ 13, 15. Devices assigned to seven of these eight officials appeared in the February 7, 2017 report. None of the devices assigned to these seven officials that appeared in the report showed as having the mobile app “Signal” installed as of the date the report was run. *Id.*, at ¶ 16.

One of the eight officials holding a position listed in the FOIA request did not have any assigned device appear in the report. As noted in the Hearn Declaration, the reports provide then-current data reported by enrolled devices, and

are subject to signal strength and connectivity of the devices. Hearn Decl. ¶ 4. However, as discussed below, this official, along with the other current employees, was asked about their use of the Signal app on Agency-issued devices, and this official responded that they had not used Signal on an Agency-issued device during the period of February 3, 2016 to February 14, 2017. Gottesman Decl., ¶¶ 8-9.

EPA did not merely rely on the February 7, 2017 report and undertook a further method of searching to provide additional certainty. Under the second search method, EPA contacted the current officials to ask them to provide additional information about their possible use of the Signal app beyond what was reflected in the February 7, 2017, report described above. These officials advised EPA that they had not used Signal for work-related communications on either their Agency-issued or their personal mobile devices during the entire relevant time frame of the request. Statement of Material Facts, at ¶¶ 18-23.

An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *See Oglesby*, 920 F.2d at 68; *see also Kowalczyk*, 73 F.3d at 389. The agency met this standard here. Although the Agency had no reason to believe that any of the identified officials had used the Signal app, the Agency nevertheless

relied on a search of Agency mobile devices using the MDM software to determine whether any of the eight identified current employees had installed the Signal app. The Agency also took an additional step, and contacted the eight EPA officials by email, asking them whether they were “aware of sending or receiving work-related communications through the use of a messaging application known as ‘Signal.’” Statement of Material Facts, at ¶¶ 18-23. The Agency not only asked these individuals about their work-issued mobile devices, but also asked about their personal devices. As detailed above, the eight current officials confirmed that, to the best of their knowledge, they did not send or receive work-related communications through the use of the messaging application known as “Signal” on an Agency-issued device, or on a personal mobile device, during the period of February 3, 2016, to February 14, 2017.

EPA did what FOIA requires, searching through the MDM software and asking questions of the eight identified current employees, even when the Agency had no reason to believe that responsive records existed. These eight officials are the Agency employees likely to know whether they received or sent communications using Signal, *i.e.*, whether it is likely that there are records that they sent or received that are responsive to part one of the FOIA request. Statement of Material Facts, ¶ 5. EPA diligently searched for records from this

group of current EPA employees that could possibly have had responsive records and found none. Requiring additional searching beyond the multiple steps the Agency has already taken would be requiring the Agency to go far beyond FOIA's requirements. EPA has demonstrated that it made "a good faith effort to conduct a search for the requested records, using methods that can reasonably be expected to produce the information requested," *Oglesby*, 920 F.2d at 68.

2. *The search for records from former employees.*

EPA determined that six former officials held positions designated in the FOIA request during the beginning of the time period relevant to Part One of Plaintiff's request. Statement of Material Facts at ¶ 8. These former employees were political appointees who left the Agency at the time of the transition to the Trump administration in January 2017, and therefore unlikely to have generated the types of work-related records sought in Plaintiff's request, or that were the subject of the alleged use of Signal in media reports.

Nonetheless, the Agency undertook reasonable steps to also search for responsive records from former officials. The February 7, 2017, MDM report did not address whether these officials' mobile devices contained the Signal app because that report only included information about current, active Agency-issued devices that were at that date enrolled in the MDM software. *Id.* at ¶¶ 11, 14, and

17. EPA confirmed that the devices for all six former employees were no longer enrolled in the MDM software program; therefore, an MDM report would not provide information about those devices. *Id.* at ¶ 29. EPA does not have any policy requiring separating employees to turn over their passwords when they separate from the Agency. *Id.* Because EPA does not collect passwords from separating employees, and because the devices of the six former employees are no longer enrolled in the MDM software, even for those former employees' mobile devices that are still physically available and have not been reissued, EPA could not search the content of locked devices to determine whether the Signal app was present at the time of the employees' separation from the Agency. *Id.*

However, EPA's search for records from these former officials did not stop there. EPA asked its staff to determine whether the former officials managed any EPA record content on these devices before their departure. EPA was able to determine that all six former employees documented the management of record-content stored on their mobile devices prior to leaving the Agency. Statement of Material Facts at ¶¶ 30, 32. All six employees personally certified that they managed any record content stored only on the mobile device, such as text messages or photos, by copying or saving such records to an Agency system before leaving the Agency and turning in their mobile device. *Id.*

As explained above, there is no reason to believe that responsive records generated by the former officials exist and could be located by EPA. Even if, hypothetically, one or more of the six former EPA officials had Signal installed on their mobile devices, and if they had forwarded messages from Signal into Agency files, the Agency does not know where or how such a message would be placed in Agency systems. Statement of Material Facts at ¶ 33. An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *See Oglesby*, 920 F.2d at 68; *see also Kowalczyk*, 73 F.3d at 389. The Agency has demonstrated a good faith effort and conducted an adequate search for responsive records, finding none.

**B. EPA Conducted a Reasonable Search for Records Relating to Requests for Approval of the Signal app (Part Two of the Request)**

Finally, the Agency searched for records relating to requests for approval of the use of the Signal app, and after conducting a reasonable search, found no records. As the discussion below explains, the Signal app has never been approved for use for official business by Agency employees. As the Division Director of the Endpoint & Collaboration Solutions Division which oversees the configuration and maintenance of Agency-issued mobile devices, and with sixteen years serving as a Branch Chief or higher in relevant offices at EPA, declarant Hearn is familiar with EPA policies and procedures regarding the use of mobile

apps on Agency-issued mobile devices. Hearn's Decl. ¶¶ 1-2. Declarant Hearn is also familiar with the Agency's history of approving for Agency use software apps developed by third-parties. Statement of Material Facts at ¶ 8. She explained that EPA's Social Media Policy, approved on June 20, 2011, provides guidance to Agency employees regarding the approval of third party software apps, including social media tools. The Policy states that, "EPA will only use third party [social media] sites that have been approved for Agency use, and such use must be in accordance with approved Terms of Service (ToS) agreements." *Id.*

Prior to June 2016, EPA program offices interested in using third-party web, social media, and mobile apps for official Agency business could request approval from the Office of Environmental Information or from the Office of Web Communications within the Office of Public Affairs. *Id.*, ¶ 9. Declarant Hearn spoke to the Acting Director of the Office of Web Communications, who advised her that, to the best of the knowledge of the Acting Director, the Office of Web Communications has never received a request by an EPA employee to use Signal on Agency-issued mobile devices. *Id.* To the best of Declarant Hearn's knowledge, the Office of Information Technology Operations also has not received a request by an EPA employee to use Signal on Agency-issued mobile devices from 2014 to later. *Id.*



For the period 2014 to June 2016, the Office of Web Communications and the Office of Information Technology Operations were the two Agency components likely to have records responsive to Judicial Watch's request for all records requesting or approving the use of Signal by any EPA personnel for official business. *Id.* Therefore, it was appropriate to contact the officials in these two offices to determine whether responsive records were likely to be found for the time period of January 1, 2014 – June 2016. *See, e.g., Thomas v. Comptroller of the Currency*, 684 F.Supp.2d 29 (D.D.C. 2010) (agency's decision not to search where there was no reasonable expectation of finding responsive records was proper under the FOIA).

In June 2016, EPA instituted an approval process for mobile applications. This approval process is specific to third-party developed mobile apps. *Id.*, ¶ 10. Under the 2016 mobile app approval process, an EPA employee may apply to use a new mobile app by first identifying an Agency business need for the app. If the employee subsequently obtains approval from his or her manager, the employee may then submit his or her request to the Agency's Mobile Application Approval Committee, which will review the request and conduct security and legal reviews. *Id.*

The Mobile Application Approval Committee is the Agency component

likely to have records from the period June 2016 to the present reflecting any request and/or any approval by the Agency of the use of the Signal app. *Id.*, ¶ 12. Declarant Hearn has reviewed the log of all requests for approval under the current process, and she confirms that since the current mobile app approval procedures were established in June 2016, the Mobile Application Approval Committee has not received any requests from employees to use the app known as “Signal.” *Id.*

### CONCLUSION

EPA is entitled to judgment as a matter of law because it has conducted an adequate search for responsive records, and none were found. EPA has demonstrated through detailed, non-conclusory declarations that it searched everywhere responsive records could reasonably be expected to exist. As the D.C. Circuit has recognized, “the issue is *not* whether any further documents might conceivably exist, but rather whether the government’s search for responsive documents was adequate.” *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir 1982)

(per curiam) (emphasis in original). For the reasons set forth above, EPA requests that this Court grant EPA's motion for summary judgment.

Respectfully submitted,

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United States Attorney for  
the District of Columbia

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

V.

UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY,

Defendant.

Civil Action No. 17-533 (JEB)

## ORDER

UPON CONSIDERATION of defendant's motion for summary judgment  
and the response thereto, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2017,

ORDERED that defendant's motion for summary judgment is hereby granted; and it is further

ORDERED that this case is dismissed with prejudice. This is a final, appealable order.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17-533 (JEB)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Defendant.	)	
	)	

**DECLARATION OF LARRY F. GOTTESMAN**

1. I am the National Freedom of Information Act (“FOIA”) Officer for the United States Environmental Protection Agency (“EPA” or “Agency”). I have been in this position since 2005. In this role, I am responsible for the Agency’s overall compliance with the FOIA. I track the efficiency of the Agency’s processing of FOIA requests and appeals, and have general oversight responsibilities for the Agency’s FOIA program. I declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge and/or on information supplied to me by employees in other EPA offices.

2. I am aware of a FOIA request from Judicial Watch, dated February 3, 2017, which was received by the Agency on February 14, 2017, and designated as FOIA Request Number EPA-HQ-2017-003920. I understand that part 1 of the FOIA request seeks work-related

communications sent or received using the messaging application known as “Signal” by individuals holding certain EPA positions from February 3, 2016 to February 14, 2017. I understand that part 2 of the FOIA request seeks records requesting or approving the use of “Signal” by EPA personnel for official business, from July 1, 2014 to February 14, 2017. I have personally read and reviewed this FOIA request as part of my duties.

3. As part of the Agency’s search for records, EPA identified eight current employees that held positions listed in part 1 of the FOIA request during the time frame of the requested records. The eight employees are Catherine McCabe, Mike Flynn, Sarah Dunham, Wendy Cleland-Hamnett, Lawrence Starfield, Barry Breen, Jane Nishida, and David Bloom.

4. Two officials acted in the indicated roles during the entire date range of part 1 of Judicial Watch’s request, February 3, 2016, to February 14, 2017: Jane Nishida, Acting Administrator for the Office of International and Tribal Affairs, and David Bloom, Acting Chief Financial Officer. The remaining six officials acted in the indicated roles from on or about January 20, 2017 to February 14, 2017, the date EPA received the request. Those six officials were Catherine McCabe, Acting Administrator; Michael Flynn, Acting Deputy Administrator; Sarah Dunham, Acting Administrator for the Office of Air and Radiation; Wendy Cleland-Hamnett, Acting Administrator for the Office of Chemical Safety and Pollution Prevention; Lawrence Starfield, Acting Administrator for the Office of Enforcement and Compliance Assurance; and Barry Breen, Acting Administrator for the Office of Land and Emergency Management.

5. I contacted the eight EPA officials identified in Paragraph 4 by email on July 17, 2017, and asked the individuals, “[t]o the best of your recollection, are you aware of sending or

receiving work-related communications through the use of a messaging application known as 'Signal' on a personal device during the period of February 3, 2016 to February 14, 2017?"

6. All eight officials responded to my email inquiry by written response in the form of an email reply. The responses were either sent personally by the official, or in one case, by the official's Chief of Staff, after they consulted with the official who directed them to respond on their behalf.

7. All eight officials replied that, to the best of their knowledge, they did not send or receive work-related communications through the use of the messaging application known as "Signal" on a personal device during the period of February 3, 2016 to February 14, 2017.

8. I contacted the eight EPA officials identified in Paragraph 4 again by email on July 24, 2017, and asked the individuals, "[t]o the best of your recollection, are you aware of sending or receiving work-related communications through the use of a messaging application known as 'Signal' on an Agency-issued device during the period of February 3, 2016 to February 14, 2017?"

9. All eight officials personally responded to my email inquiry by written response in the form of an email reply.

10. All eight officials replied that, to the best of their knowledge, they did not send or receive work-related communications through the use of the messaging application known as "Signal" on an Agency-issued device during the period of February 3, 2016 to February 14, 2017.

11. Based on the responses that I received from the eight individuals identified in Paragraph 4, I found no information indicating that they sent or received work-related messages

using the messaging application "Signal" during the period of February 3, 2016 to February 14, 2017 on a personal or Agency-issued mobile device.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this 28<sup>th</sup> day of July, 2017.



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Larry F. Gottesman  
National FOIA Officer  
Office of Environmental Information  
U.S. Environmental Protection Agency



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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JUDICIAL WATCH,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

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) Civil Action No. 17-533 (JEB)  
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**DECLARATION OF ELIZABETH (“LIZA”) V. HEARNS**

1. I am the Division Director of the Endpoint & Collaboration Solutions Division within the Office of Information Technology Operations, Office of Environmental Information (“OEI”) at the United States Environmental Protection Agency (“EPA”). I have been in this position, or its equivalent, since July 25, 2016. I have been with EPA since 1992 and with OEI (and its predecessor office) since 1999. Prior to my current position, I was the Acting Deputy Office Director for the Office of Technology Operations and Planning (“OTOP”) from January 2015 to July 2016. Prior to that I was the Acting Associate Office Director for OTOP from October 2013 to December 2014. Prior to that I was the Associate Division Director for the Enterprise Desktop and Solutions Division from October 2010 to September 2013. Prior to that I was the Branch Chief for the Desktop and Collaborations Solutions Branch within the Enterprise Desktop Solutions Division from September 2001 to October 2010. I declare that the following statements are true and correct to the best of my knowledge and belief, and that they are based

upon my personal knowledge and/or information supplied to me by employees within my organization and employees in other EPA offices.

2. The Office of Information Technology Operations is the office in EPA responsible for the Agency's Information Technology hardware systems, including mobile devices. The Endpoint & Collaboration Solutions Division is, among other things, responsible for appropriate configuration and maintenance of end-user technologies, including mobile devices.

3. In my role as Division Director of the Endpoint & Collaboration Solutions Division, I oversee the deployment, maintenance, and use of a software known as Mobile Device Management ("MDM") software that is installed on all compatible Agency-issued mobile devices. MDM software enables the Agency to centrally manage certain settings and features within the operating system of an Agency-issued mobile device. MDM software is used by the Agency to standardize the numerous available device settings across the Agency to enhance the security and performance of the devices and to support end-user compliance with applicable policies for use of the device. The majority of currently issued EPA mobile devices are compatible with the MDM software and have the software installed on the devices. The Agency also manages a small number of other mobile devices including, for example, mobile wifi hotspots and older "flip phones", which are not compatible with or managed by the MDM software. In my experience, the Agency mobile devices that are not compatible with or managed by the MDM software generally do not have an operating system that would permit mobile applications or "apps" to be downloaded to the device.

4. MDM software permits the Agency to obtain information about what mobile apps are installed on Agency devices that are enrolled in the MDM software by enabling the Agency

to run a report that returns then-current information about the devices. The Agency's MDM software enables Agency mobile devices to periodically update a database with information about the mobile device, including which mobile apps are installed on a device. The devices update the database approximately every two to three days, dependent upon on the signal strength and connectivity of the device. EPA's contractor has the ability to run a report from this database which provides device information that reflects data as of each device's last update. The reports that are generated from the MDM database contain only the most recent update reported from Agency devices enrolled in MDM software. EPA does not have the capability to generate reports with historical data (*i.e.*, data prior to the date the report is run).

5. On February 3, 2017, while I was on annual leave, the then-acting Division Director of the Endpoint & Collaboration Solutions Division received a request from the Office of Inspector General asking for assistance in identifying whether certain mobile apps, including Signal, had been downloaded to Agency-issued mobile devices. The acting Division Director instructed another employee in my Division to work with an Agency contractor to run a report that would provide information about the Agency's mobile devices, including information about which mobile apps were installed on the devices, in accordance with the request from the Office of Inspector General. On February 7, 2017, the contractor generated a report of the information contained in the database from all Agency devices enrolled in the MDM software. On February 9, 2017, the requested information from that report was provided to the OEI Acting Assistant Administrator.

6. The individuals holding the positions listed in the FOIA request at the time of the February 7, 2017 report were: Catherine McCabe, Acting Administrator; Michael Flynn, Acting Deputy Administrator; Sarah Dunham, Acting Administrator for the Office of Air and Radiation;

Wendy Cleland-Hamnett, Acting Administrator for the Office of Chemical Safety and Pollution Prevention; Lawrence Starfield, Acting Administrator for the Office of Enforcement and Compliance Assurance; Barry Breen, Acting Administrator for the Office of Land and Emergency Management; Jane Nishida, Acting Administrator for the Office of International and Tribal Affairs, and David Bloom, Acting Chief Financial Officer. These eight officials are the Agency employees likely to know whether they received or sent communications using Signal, *i.e.*, whether it is likely that there are records that they sent or received that are responsive to part one of the FOIA request.

7. Devices assigned to seven of these eight officials appeared in the February 7, 2017 report. None of the devices assigned to these seven officials that appeared in the report showed as having the mobile app “Signal” installed as of the date the report was run. One of the eight officials did not have any assigned device appear in the report.

8. As the Division Director of the Endpoint & Collaboration Solutions Division, I am familiar with EPA policies and procedures regarding the use of mobile apps on Agency-issued mobile devices. I am familiar with the Agency’s history of approving software apps developed by third-parties for Agency use. EPA’s Social Media Policy (“the Policy”), approved on June 20, 2011, provides relevant guidance to Agency employees regarding the approval of third party software apps, including social media tools. The Policy states that, “EPA will only use third party [social media] sites that have been approved for Agency use, and such use must be in accordance with approved Terms of Service (ToS) agreements.” The Policy also states that the Agency’s Chief Information Officer within the Office of Environmental Information and the Associate Administrator for the Office of Public Affairs (formerly the Office of External Affairs and Environmental Education) are jointly responsible for monitoring compliance with the Policy.



9. Prior to June 2016, EPA program offices interested in using third-party web, social media and mobile apps for official Agency business could request approval from the Office of Environmental Information or from the Office of Web Communications within the Office of Public Affairs. I have spoken to Jessica Orquina, Acting Director of the Office of Web Communications, regarding this approval process. Ms. Orquina has informed me that, to the best of her knowledge, the Office of Web Communications has never received a request by an EPA employee to use Signal on Agency-issued mobile devices. To the best of my knowledge, the Office of Information Technology Operations (formerly the Office of Information Technology Operations and Planning) has also not received a request by an EPA employee to use Signal on Agency-issued mobile devices from 2014 or later. For the period of 2014 to June 2016, the Office of Web Communications and the Office of Information Technology Operations are the two Agency components likely to have records responsive to Judicial Watch's request for all records requesting or approving the use of Signal by any EPA personnel for official business.

10. As the Division Director of the Endpoint & Collaboration Solutions Division, I am also familiar with the mobile app approval process that EPA instituted in June, 2016. This approval process is specific to third-party developed mobile apps. Under the 2016 mobile app approval process, an EPA employee may apply to use a new mobile app by first identifying an Agency business need for the app. If the employee subsequently obtains approval from his or her manager, the employee may then submit his or her request to the Agency's Mobile Application Approval Committee, which will review the request and conduct security and legal reviews. If the Mobile Application Approval Committee approves the app, it will be placed in the Agency's Mobile Applications Catalog ("App Catalog") for employees to download through the App Catalog if desired. If the Mobile Application Approval Committee denies the request for use of

an app, the office requesting use of the app may request that the Agency's Risk Executive Group review the request if the office deems use of the app to be mission critical. The Risk Executive Group will then evaluate the request and any identified security and legal risks and make a recommendation to the Agency's Chief Information Officer as to whether to approve or deny the request for use of the app.

11. Users of Agency-issued mobile devices are authorized to download apps that appear in the App Catalog, which is distinct from the Apple "App Store" that is available by default on Apple mobile devices. As of June 12, 2017, EPA began updating the devices in order to utilize a feature of the MDM software that enables the Agency to remove the Apple "App Store" from enrolled devices to support user compliance with the process outlined in Paragraph 10. EPA estimates that the device updates that enable EPA to utilize this feature will continue until March 2018. At this time, EPA does not plan on removing the Apple "App Store" from the enrolled devices of emergency response officials, in order to allow those officials access to all available apps in emergency circumstances. EPA is currently evaluating alternative monitoring and approval options for mobile apps on the devices of emergency response officials.

12. I have reviewed the log of all requests for approval that the Mobile Application Approval Committee received under the June 2016 process and can confirm that since the current mobile app approval procedures were established in June of 2016, the Mobile Application Approval Committee has not received any requests from employees to use the app known as "Signal." The Mobile Application Approval Committee is the Agency component likely to have records from the period of June 2016 to the present reflecting any request by an employee and/or any approval by the Agency of the use of the Signal app. The Signal app is not

approved for use for official business by Agency employees, and the app does not appear in the EPA App Catalog.

13. I am also familiar with the procedures required for the return of an Agency-issued mobile device to the Agency when an employee retires or leaves the Agency. These procedures were established in November of 2016 to further improve upon the Agency's management of Agency records on mobile devices. The procedures require, among other things, that an employee complete a Mobile Device Acknowledgement Form, before turning in the device for re-use by the Agency or for destruction, as appropriate. Under the procedures, the Mobile Device Acknowledgement Form must be completed by the employee after he/she reviews the contents of the mobile device and ensures that any records stored only on the mobile device, such as text messages or pictures, are properly transferred to other Agency systems prior to the device being turned in for reissuance, reprovisioning or disposition. If the employee is not able to complete the Mobile Device Acknowledgment Form before he or she leaves the Agency, the employee's supervisor must review the device's contents and complete the form.

14. The Mobile Device Acknowledgement Form requires employees to attest to the following statement: "I hereby attest that I have met my obligation to preserve agency records transmitted or stored on this device in the course of official agency business that may be subject to preservation or production requirements under the Federal Records Act, the Privacy Act, the Freedom of Information Act, litigation holds, or court preservation orders. By signing below, I attest that all such records have been preserved on EPA systems in a manner consistent with EPA guidance and are not solely preserved on this mobile device."

15. Under the procedures, the program or Region's eBusiness Orderer and/or Working Capital Fund Account Manager is responsible for ensuring that a completed Mobile

Device Acknowledgement Form is then uploaded into the Agency's eBusiness system before a request for cancellation of service to the mobile device can be processed. The cancellation process includes termination of the cellular service, disconnection from the Agency's email system and removal of the device from the MDM software. I have confirmed that a cancellation order has been processed for the mobile devices of all six former employees referenced in paragraphs 16 and 18 below, and that those devices are no longer enrolled in the MDM software. Because the devices of the six former employees are no longer enrolled in the MDM software, EPA is unable to reset the passwords to those devices in order to access or inspect the content of those devices.

16. EPA also does not have a policy instructing employees to turn over their passwords when they separate from the Agency. For security reasons, to the contrary, EPA explicitly instructs employees not to share their passwords. As such, we have no reason to believe that we could find the mobile device passwords to the mobile devices of the six former employees. In addition, there is no database or other centralized location where EPA could locate these passwords.

17. Because EPA does not collect passwords from separating employees, and because the devices of the six former employees are no longer enrolled in the MDM software, even for those former employees' mobile devices that are still physically available and have not been reissued, EPA could not search the content of locked devices to determine whether the Signal app was present at the time of the employees' separation from the Agency.

18. I have reviewed and am familiar with signed copies of the Mobile Device Acknowledgement Form for five former-employees, who held five of the positions listed in the FOIA request from the beginning of the time period of the FOIA request, February 3, 2016, to



approximately January 20, 2017. Those former employees are Gina McCarthy, former EPA Administrator, Stan Meiberg, former Deputy Administrator, Janet McCabe, former Assistant Administrator for the Office of Air and Radiation, Jim Jones, former Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, and Mathy Stanislaus, former Assistant Administrator for the Office of Land and Emergency Management.

19. I am also familiar with an Agency form titled "EPA Records Management Checklist for Separating/Transferring or Separated Personnel" which requires employees to initial that they have managed the records in multiple storage locations, including mobile devices, and to sign the following statement: "To the best of my knowledge, I certify that all U.S. Government documentary materials (preservation of litigation holds, audits, and congressional inquiry materials), in any format, have been identified and transferred to the appropriate recordkeeping system or designee and that the statements made on this Checklist are true, accurate, and complete."

20. I understand that Cynthia Giles held the position of Assistant Administrator for the Office of Enforcement and Compliance Assurance from the beginning of the time period of the FOIA request, February 3, 2016, to approximately January 20, 2017. I understand that the staff who worked with Cynthia Giles to manage her records before her departure stated they were not aware that the Mobile Device Acknowledgement Form should have been used for departing employees, and therefore only requested that Ms. Giles complete the EPA Records Management Checklist for Separating/Transferring or Separated Personnel form. I have reviewed and am familiar with an initialed and signed copy of the EPA Records Management Checklist for Separating/Transferring or Separated Personnel for Cynthia Giles.

21. I have no reason to believe that any of the six former EPA officials identified above had Signal installed on their mobile devices. However, if one or more of the six former EPA officials had Signal installed on their mobile devices, and if they had forwarded messages from Signal into Agency files, the Agency does not know where or how such a message would have been placed into Agency systems.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this 15<sup>th</sup> day of August, 2017.

A handwritten signature in black ink, appearing to read "Elizabeth V. Hearn", written over a horizontal line.

Elizabeth ("Liza") V. Hearn  
Division Director, Endpoint & Collaboration  
Solutions Division  
Office of Information Technology Operations  
Office of Environmental Information