



**REQUEST UNDER THE FREEDOM OF INFORMATION ACT**

December 17, 2013

National Freedom of Information Office  
U.S. EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

**RE: FOIA Request for Agency Records: Certain EPA Officials' Text Messages**

**BY ELECTRONIC MAIL:** [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

To EPA's National Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,<sup>1</sup> **copies of all text messages** sent to or from a mobile telephone/personal data assistant provided by EPA for the use of any of the a) following EPA employees,<sup>2</sup> b) during the period covering **June 1, 2009 to the date you process this request**, inclusive:

- 1) **Joe Goffman, Senior Counsel OAR**
- 2) **Janet McCabe**
- 3) **Margo Oge, [director of the Environmental Protection Agency's office of transportation and air quality](#) (retired late 2012)**
- 4) **3) Cindy Huang, Staff Assistant To the Assistant Administrator**
- 4) **Scott Fulton, former EPA General Counsel**
- 5) **Steve Page, Director, OAQPS, Research Triangle Park (RTP)**
- 6) **Peter Tsirigotis, Director, Sector Policies and Programs Division, OAR: OAQPS, RTP**
- 7) **Mike Flynn, Director, Office of Radiation and Indoor Air, EPA HQ**
- 8) **Bob Perciasepe**
- 9) **Curt Spalding, Regional Administrator EPA Region 1**
- 10) **Nancy Grantham, Director, EPA R1, Office of Public Affairs**
- 11) **Ira W. Leighton, former deputy RA, Region 1**

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<sup>1</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 27-28, *infra*.

<sup>2</sup> To assist with identification we cite these employees' positions at some point during the period covered by this request, though several held more than one during their EPA employment, and we do not limit our request to their service in the identified positions but instead to the stated time parameters.

## **Background to this Records Request, including Public Interest**

As part of our establishing the public interest in these records please consider the following.

Text message metadata provided to us by EPA identify the above-named employees as text-message correspondents of now-Administrator Gina McCarthy on her phone/PDA provided for EPA-related correspondence. The requested records, which belong to the taxpayer and are subject to disclosure under the Freedom of Information Act,<sup>3</sup> represents basic, non-analysis but factual information reflecting correspondence activity on personal data assistants/telephones provided to federal employees solely for work-related communications, and which specific information will answer a serious, substantive outstanding question regarding Agency record preservation practices and claims made by the current EPA administrator (a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct, *see Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003)).

EPA has informed us through other proceedings that Ms. McCarthy's text message correspondence associated with her account, which under law and policy must be retained like email, was not preserved.<sup>4</sup> That is so even though the EPA-provided accounts, devices, and

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<sup>3</sup> EPA has produced what responsive information it says it holds in response to FOIA request HQ-2013-005618, and *Competitive Enterprise Institute v. EPA*, vc: 13-1074 (D.D.C.).

<sup>4</sup> *See, e.g., Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent/received by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not [sic] required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

functions such as texting were provided them by EPA for EPA business, subject to federal law and agency equipment use and record-retention regulation and policy and disclosure laws.<sup>5</sup>

EPA and Ms. McCarthy have informed us through DoJ counsel for EPA that to the best of Ms. McCarthy's recollection all of her many thousands of text correspondence we identified that she sent or received on that device were personal, if on her EPA-provided PDA provided solely for EPA-related communications. This was by way of explaining (though as a matter of law, not excusing) destruction of the transcripts of each of these.

EPA-provided billing information for Ms. McCarthy's EPA phone/PDA containing metadata for her texting activity during the above-cited periods affirm that Ms. McCarthy's asserted (through counsel) recollection was not accurate, but that she regularly texted EPA colleagues on her EPA-provided mobile device provided solely for EPA-related correspondence.

Further illustrating CEI's continuing efforts to obtain information shedding light on the electronic correspondence and record-keeping practices we discuss herein relevant to this request, CEI first sought, then was forced to sue for, Ms. McCarthy's text messages on eighteen specified dates (*see Complaint in Competitive Enterprise Institute v. United States Environmental Protection Agency*, D.D.C. Civil Action No. 13-779). At that point, EPA provided CEI with a "no records" response. EPA stated that it has been unable to locate any such texts in response to

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<sup>5</sup> See also, e.g., Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform,, to Hon. Lisa Jackson, Vice President of Environmental Initiatives, Apple, Inc., and former Administrator, U.S. Env'tl. Prot. Agency (August 15, 2013, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=83a0e7cb-b869-e4c1-9b5e-1a2b94cf1367](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=83a0e7cb-b869-e4c1-9b5e-1a2b94cf1367)).

CEI's FOIA request.<sup>6</sup> This is even though Ms. McCarthy sent or received many thousands of such text messages such that, on the basis of information later obtained under FOIA request EPA-HQ-006937, CEI calculated the odds that Ms. McCarthy did not text on those eighteen dates as one in 7.9 sextillion.<sup>7</sup> But EPA did not preserve text messages from those eighteen dates or otherwise.<sup>8</sup> CEI dismissed the suit without prejudice in light of the claim that no responsive documents remained. *See Stipulation of Dismissal*, 9/13/2013 (docket #8).

CEI later obtained the information showing that in fact EPA was not preserving, that is was destroying, all such correspondence. Ultimately, this led to CEI again suing for relevant text/metadata agency records (see *Complaint in Competitive Enterprise Institute v. United States*

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<sup>6</sup> See, e.g., *Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials “with personal digital assistants that have text messaging capability”), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that “Ms. McCarthy uses text messaging,” but arguing that “they were not required to be preserved by the Agency.”); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that “Ms. McCarthy used the texting function on her EPA phone,” and that “none of her texts over the period encompassing the 18 specific dates at issue in CEI’s FOIA request (July 9, 2009, to June 29, 2012) were preserved”).

<sup>7</sup> See document sent by EPA to CEI counsel attached to Aug. 20 Horner email, with PDF file bearing title “202-596-0247 - Text bill - Jul 09-June 12.pdf,” produced in response to FOIA Request HQ-2013-006937 (submitted, June 3, 2013). Details are found at <http://cei.org/news-releases/odds-epa-not-destroying-gina-mccarthy-text-messages-1-79-sextillion>, including CEI’s explanation of its probability estimate (<http://www.scribd.com/doc/157256436/McCarthy-Texting-Probability>).

<sup>8</sup> See, e.g., Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that “Ms. McCarthy uses text messaging,” if arguing that “they were not required to be preserved by the Agency.”); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that “Ms. McCarthy used the texting function on her EPA phone,” and that “none of her texts over the period encompassing the 18 specific dates at issue in CEI’s FOIA request (July 9, 2009, to June 29, 2012) were preserved”).

*Environmental Protection Agency*, D.D.C. Civil Action No. 13- 1074). Records produced in that case affirm that Ms. McCarthy did in fact use the EPA-provided phone for a purpose it was provided by the taxpayer, that is, to text numerous senior EPA officials.

For all of the above reasons and more detailed, *infra*, and with EPA having provided the identity of at least certain of Ms. McCarthy's EPA texting correspondents, we now seek these correspondents' text transcripts. These will inform us of the nature of their correspondence with Ms. McCarthy whose copies of which have been destroyed. Further, EPA's response will allow the public to learn whether EPA has been destroying text correspondence of all senior Air Office employees who EPA provided text messaging capability, or whether EPA merely allowed certain officials to destroy their own records, including Ms. McCarthy and Lisa Jackson (whose identified text correspondence EPA has also informed us it does not possess; *see* EPA's 9/18/2013 response to FOIA HQ-2013-009235).

We are interested in EPA's compliance with its legal obligation to maintain and preserve (particularly) work-related text messages sent or received on Agency devices, provided for the performance of Agency duties, as federal records and Agency records. Text messages, like the other alternative to email EPA provides its employees, instant messages, are unquestionably records,<sup>9</sup> about which there is at present no information indicating EPA manages them as federal records and/or as "records" under FOIA. Indeed, it is our understanding including by

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<sup>9</sup> *See, e.g.*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html>, <http://www.epa.gov/records/faqs/email.htm>, and Memo to All Staff, "Transparency at EPA" by Acting Administrator Bob Perciasepe dated April 8, 2013 (*e.g.*, "Finally, the Inspector General currently is conducting an audit of the agency's records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit and to working collaboratively to strengthen our records management system and policies.").

information and belief, that EPA has uniformly declined or otherwise failed to produce text message transcripts or discussions in response to FOIA or congressional oversight requests for “records” or “electronic records”.

There is now an additional element to this issue, with EPA’s recent production in cv: 13-1074 showing that Ms. McCarthy did in fact use her EPA-provided phone for texting EPA officials, contrary to representations made to us by EPA/Ms. McCarthy through their Department of Justice counsel. CEI already has established that EPA did not preserve Lisa Jackson’s text messages, in request HQ-2013-009235.

As EPA is aware this request and responsive records are directly related to a fairly high-profile and nonetheless important issue we are presently litigating with EPA, the Agency’s electronic record production and preservation practices. These efforts include a recent request to enjoin the practice of systematic destruction of this class of records, an alternative to email that must be, but apparently is not being, preserved just like email (*CEI v. EPA*, D.D.C. cv: 13-1532 (RMC)).

## **EPA Owes CEI a Reasonable Search**

FOIA, as EPA makes plain, has the broadest definition of the term “records” in relevant federal recordkeeping and disclosure statutory regimes.<sup>10</sup> FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). The act is

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<sup>10</sup> For example, EPA acknowledges on its website that “[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” Environmental Protection Agency, “What Is a Federal Record?” <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>. See also 44 U.S.C. § 3301 (2013).

Further,

In accordance with the Federal Records Act and guidance from the D.C. Circuit, federal agencies must preserve e-mail messages if they are: “made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”

Letter of January 28, 2013 from Darrell Issa, Chairman, Oversight and Government Reform, and David Vitter, Ranking Member, Environment and Public Works, to James B. Martin, Administrator, Region 8, U.S. Environmental Protection Agency, at 1-2 (letter available at <http://wattsupwiththat.files.wordpress.com/2013/01/region-8-joint-letter-finalvitterissa-01292013-1.pdf>; Vitter, Issa Investigate EPA’s Transparency Problem, More Suspicious E-Mail Accounts; EPA Region 8 Administrator Violates E-Mail Rule, Uses Private E-Mail Accounts to Conduct Official Business, State News Service, January 29, 2013 (publishing text of the letter) (available in Westlaw Allnews database at 1/29/13 States News Serv. 00:00:00), citing *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1278 (D.C. Cir. 1993).



designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

A search must be “reasonably calculated to uncover all relevant documents.” *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is “reasonable,” courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (“reasonableness” is assessed “consistent with congressional intent tilting the scale in favor of disclosure”).

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty “to ensure that abuse and conflicts of interest do not occur.” *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). *See also Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at \*12, \*24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it “was aware that employee had withheld records as ‘personal’ but did not require that ‘he submit those records for review’ by the Department.)).

## Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

EPA must release “factual content”. As the D.C. Court of Appeals noted, an agency must “describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.” *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (who, what, when, *e.g.*, To, From, Date, and typically Subject) is not “deliberative”. As the courts have emphasized, “the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

Pursuant to high-profile and repeated promises and instructions from the president and attorney general we request EPA err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate which withholdings they may be able to justify. We repeat by reference our detailed discussion of the background to and public interest of the requested records from pp. 3-7, *supra*.

This is particularly true for any information that EPA seeks to claim as reflecting (the oft-abused, per even Attorney General Holder) “deliberative process”, in the absence of any actual formal EPA deliberation being underway truly antecedent to the adoption of an agency policy on the relevant matters (*see, e.g., Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)). In fact, the likelihood of this is near zero., which is highly unlikely due to the nature of records that would be responsive to this request. It is also true for correspondence which may be embarrassing for the activism, perspectives or personal relationships it may reveal but which -- as precedent makes abundantly clear -- do not qualify a record as “personal”.

Therefore, if EPA claims any records or portions thereof are exempt under *any* of FOIA’s discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21, 2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

Nonetheless, if your office withholds any portion of the requested records as exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that

some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b).

That means, for example, EPA must cease its ongoing pattern with CEI of over-broad claims of b5 “deliberative process” exemptions to withhold information which is not in fact truly antecedent to the adoption of an agency policy but merely embarrassing or inconvenient to disclose (*see e.g.*, EPA’s expansive b5 withholdings including also inexplicable withholding *in full* of emails in *CEI v EPA*, D.C.C. CV:12-1617; *Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment*, pp. 25-38, Sept. 11, 2013).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. Further, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d at 223-24.

**Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index.** If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

**Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.**

Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments and related email, text or Instant message threads as the case may be.

#### Request for Fee Waiver

**This discussion is detailed as a result of our recent experience of agencies, particularly EPA, improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.<sup>11</sup>**

- 1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest**

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii)

("Documents shall be furnished without any charge...if disclosure of the information is in the

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<sup>11</sup> See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); see also "Groups Protest CIA's Covert Attack on Public Access," OpenTheGovernment.org, February 23, 2012, <http://www.openthegovernment.org/node/3372>.

public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”).

EPA has expressly or effectively waived fees for CEI’s similar requests cited herein.

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.

867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).<sup>12</sup>

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.”

*Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at

8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, “insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, Agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

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<sup>12</sup> This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

Requester’s ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “‘toll gates” on the public access road to information.’” *Better Gov’t Ass’n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” That is true in the instant matter as well.



Indeed, CEI is precisely the sort of group the courts have identified in establishing this precedent.

Indeed, requester is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

**The subject matter of the requested records specifically concerns identifiable operations or activities of the government.** The requested records directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever": is EPA properly maintaining correspondence sent and received on an alternative to electronic mail, on devices provided by EPA to senior officials exclusively for the performance of Agency duties with extremely limited circumstantial exceptions permitted, which class of records has apparently never been produced by EPA in response to FOIA and congressional requests for "records" and/or "electronic records".

This promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency").

Particularly after Requester's recent discoveries using FOIA, its publicizing certain Agency record-management and electronic communication practices, controversial EPA correspondence (*e.g.*, re: Richard Windsor, use of non-official email accounts, destruction of text messages) and CEI's other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency. This request, when satisfied, will further inform this ongoing public discussion.

Potentially responsive records reflecting whether or not EPA has maintained and preserved text messages sent and received on Agency devices unquestionably reflect "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

**Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** The disclosure of the requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the administration's transparency, returned in the above-cited search "study obama transparency", and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration's own promises and continuing

claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, would be arbitrary and capricious, as would be denial that shedding light on **this heretofore unexplored but important aspect** of the issue would further and significantly inform the public.

Further, CEI is preparing a report on the specific issue of EPA electronic record preservation, including text messages, instant messages and non-EPA email accounts.

However, **the Department of Justice’s Freedom of Information Act Guide makes it clear that, in the DoJ’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available in the public domain, these are forms obtained and held only by EPA or its telephony carrier(s). Further, however, **this aspect of the important public debate, of heretofore never produced text message records and related practices, has yet to be explored outside of this request and our related requests most of which are ongoing.**

As such, this aspect of the important public debate, of the use by senior officials and Agency practices regarding text messaging as an alternative to email, is presently unfolding (see discussion of evolving EPA productions to CEI in this particular subject-matter realm, and related litigation producing the records that directly prompted the instant request), and related issues of electronic record preservation and other practices which have become the subject of congressional oversight including a recent hearing and inspector general scrutiny. It is therefore

clear that the requested records are “likely to contribute” to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

**The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.**

CEI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government’s operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like

EPA's,<sup>13</sup> specifically in the past year-plus relating to transparency and electronic record practices.

EPA has not exacted fees for these requests for the same reason it cannot now, and also cannot now for all reasons stated herein.

Requester intends to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and

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<sup>13</sup> See, e.g., Stephen Dinan, "Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle", *Washington Times*, April 30, 2011, at A1. Other outlets covering this dissemination include Peter Foster, "More Good News for Keystone", *National Post*, Jan. 9, 2013, at 11; Juliet Eilperin, "EPA IG Audits Jackson's Private E-mail Account", *Washington Post*, December 19, at A6; James Gill, "From the Same Town, But Universes Apart", *New Orleans Times-Picayune*, Jan. 2, 2013, at B1; Kyle Smith, "Hide & Sneak", *New York Post*, Jan. 6, 2013, at 23. <http://www.breitbart.com/Big-Government/2013/01/27/EPA-email-Scandal-worse-than-originally-thought>; <http://www.breitbart.com/Big-Government/2013/01/14/epa-lisa-jackson-emails>; <http://www.breitbart.com/Big-Government/2013/02/22/EPA-Releases-Doc-Dump-Of-Black-Papers-On-Former-Chief-s-Alternative-E-Mail-Account>; Christopher C. Horner, EPA Circles Wagons in 'Richard Windsor' Email Scandal, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. See also, Stephen Dinan, "EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy," *Washington Times*, April 9, 2013, at A4; Stephen Dinan, "Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages," *Washington Times*, April 2, 2013, at A1; Christopher C. Horner, "EPA administrators invent excuses to avoid transparency", *Washington Examiner*, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301>.

national and local radio shows, and weekly on the radio shows “Garrison” on WIBC Indianapolis and the nationally syndicated “Battle Line with Alan Nathan”).<sup>14</sup>

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<sup>14</sup> To avoid EPA’s pattern of unsupportedly denying CEI’s requests for fee waiver we provide an extensive if still not exclusive list of evidence of our intention, practice and ability to broadly disseminate information obtained from FOIA requests: Written Statement of Hans Bader, U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing Entitled Lasting Implications of the General Motors Bailout, June 22, 2011, <http://www.scribd.com/doc/58462911/Hans-Bader-Statement-for-Regulatory-Affairs-Subcommittee>; Hans Bader, Obama Administration Knew for Weeks That GM Would Make Fraudulent Claims, Examiner.com, June 2, 2011, <http://www.examiner.com/article/obama-administration-knew-for-weeks-that-gm-would-make-fraudulent-claims>; Christine Hall, Delayed Release of Auto Bailout Documents by Treasury Dept. Reveals Cozy PR Relationship: Agency Coughs Up Material on Eve of Obama Administration Hoopla, Press release, Competitive Enterprise Institute, June 2, 2011, <http://cei.org/news-releases/delayed-release-auto-bailout-documents-treasury-dept-reveals-cozy-pr-relationship> (this document is also available in Westlaw from the State News Service); Nicole Ciandella, CEI FOIA Request Reveals Relationship Between Treasury Department and GM, Open Market (Competitive Enterprise Institute blog), June 3, 2011, <http://www.openmarket.org/2011/06/03/cei-foia-request-reveals-relationship-between-treasury-department-and-gm/>; Hans Bader, Recently-Released Documents Reveal Obama Administration’s Complicity in Deception about Auto Bailout, Global Warming.Org (CEI blog), June 2, 2011, <http://www.globalwarming.org/2011/06/02/recently-released-documents-reveal-obama-administration%E2%80%99s-complicity-in-deception-about-auto-bailout/>; Lee Doren, Hearing Today Will Shed Light on Negative Implications of General Motors Bailout, Press Release, Competitive Enterprise Institute, June 22, 2011, <http://cei.org/news-releases/hearing-today-will-shed-light-negative-implications-general-motors-bailout>; Hans Bader, Obama Administration Flouts FOIA Law, *Washington Examiner*, March 18, 2011, pg. 26; Stephen Dinan, “Researcher: NASA hiding climate data”, *Washington Times*, A1, December 3, 2009, <http://www.washingtontimes.com/news/2009/dec/03/researcher-says-nasa-hiding-climate-data/?page=all>; <http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/>; <http://legaltimes.typepad.com/blt/2010/05/foia-suit-seeks-nasas-global-warming-data-.html>; <http://legaltimes.typepad.com/blt/2010/05/page/2/>; <http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html>.

See also, [http://www.cbsnews.com/8301-504383\\_162-5314040-504383.html](http://www.cbsnews.com/8301-504383_162-5314040-504383.html); [http://www.cbsnews.com/8301-504383\\_162-5322108-504383.html](http://www.cbsnews.com/8301-504383_162-5322108-504383.html); <http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/>; <http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2>; <http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memofound/>.

Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.<sup>15</sup> For a list of exemplar publications, please see <http://cei.org/publications>. Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique)(*See, e.g.,* [www.openmarket.org](http://www.openmarket.org), one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and [www.globalwarming.org](http://www.globalwarming.org) (another CEI blog); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

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<sup>15</sup> *See EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

CEI also is regularly cited in newspapers,<sup>16</sup> law reviews,<sup>17</sup> and legal and scholarly publications.<sup>18</sup>

With a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

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<sup>16</sup> See, e.g., Al Neuharth, “Why Bail Out Bosses Who Messed It Up,” *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, “Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan,” *Crain’s Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, “You Might Suppose That President Obama Has His Hands ...,” *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI’s OpenMarket blog); Hal Davis, “Earth’s Temperature Is Rising and So Is Debate About It,” *Dayton Daily News*, April 22, 2006, at A6 (citing CEI’s GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, “Think-Tanking” (reprinting relevant commentary from OpenMarket); Mark Landsbaum, “Blogwatch: Biofuel Follies,” *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, “Best of the Blogs,” Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

<sup>17</sup> See, e.g., Robert Hardaway, “The Great American Housing Bubble,” 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

<sup>18</sup> See, e.g., Bruce Yandle, “Bootleggers, Baptists, and the Global Warming Battle,” 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI’s GlobalWarming.Org); Deepa Badrinarayana, “The Emerging Constitutional Challenge of Climate Change: India in Perspective,” 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, “Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources,” 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, “The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives,” 30 *Denver Journal of International Law and Policy* 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, “Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac,” 6 *North Carolina Banking Institute* 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).



**The disclosure will contribute “significantly” to public understanding of government operations or activities.** We repeat and incorporate here by reference the above from discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities. After disclosure of these records, the public’s understanding of this unexplored aspect of the now highly controversial claims of executive branch and administration transparency, and this heretofore unexplored but important aspect of the administration’s electronic record practices (text message use and retention or destruction), will inherently be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

**As such**, the Requester has stated “with reasonable specificity that its request pertains to operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the “significant public interest” test, which we will then appeal while requesting EPA

proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...”) and 40 C.F.R. §2.107(d)(1) (“No search or review fees will be charged for requests by educational institutions...or representatives of the news media.”). However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions all in fulfillment of CEI’s mission from pages 20-24, *supra*,

For these reasons, Requester qualifies as a “representative[] of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep’t of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at \*32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women’s Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

### **CONCLUSION**

We expect the Agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears.").

**We expect all aspects of this request be processed free from conflict of interest.**

We request the Agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013). FOIA

specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Id.*, at 186 (D.C. Cir. 2013). *See also*, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at \*14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the Agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher C. Horner", written over a light blue horizontal line.

Christopher C. Horner, Esq.

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