UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 12-1617 (JEB)
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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SUMMARY OF ARGUMENT

Defendant's motion for summary judgment should be rejected, because it has not complied with this Court's order that it produce a representative sample *Vaughn* Index of 172 fully-withheld documents, has not consistently sampled every tenth document, omitted several hundred records from its sampling, and has instead demonstrated that its withholding of documents under FOIA exemptions is based on unreliable and often erroneous privilege claims. *See, e.g., Bonner v. Department of State*, 928 F.2d 1148, 1152-54 (D.C. Cir. 1990). Thus, it has not met its burden of justifying its withholding in full or part of thousands of documents responsive to plaintiff's FOIA request. *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("the burden is on the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the FOIA"); *accord U.S. Dept. of Justice v. Reporters Committee For Freedom of Press,* 489 U.S. 749, 755 (1989); *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); *Church of Scientology v. U.S. Dept. of Justice*, 30 F.3d 224, 228 (1st Cir. 1994).

The FOIA request at issue, moreover, uncovered serious flaws in EPA's transparency practices that fueled a major controversy. The request focused on emails sent to or from EPA Administrator Lisa Jackson's "secondary email accounts."[1] The Administrator's use of such accounts, especially one using a "Richard Windsor" alias, has become a highly publicized issue attracting widespread media coverage and Congressional scrutiny.[2] This week, a Senate

[1] *See* Docket No. 24-4, exhibit 1 (attaching the FOIA request).

[2] *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; Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Washington Times, April 9, 2013, at A4.

committee minority report noted that the Richard Windsor account at issue in this case has triggered "an in-depth inquiry" by Congress into "how EPA administers its transparency and record keeping obligations."[3] Also this week it was the subject of a hearing by the House Committee on Oversight and Government Reform.[4]

Although EPA claims it is entitled to judicial deference and a presumption of good faith, this is at odds with its many obviously improper withholdings and redactions in this case, recent revelations of improper withholdings by EPA in other cases, and violations of FOIA and federal record laws by high-ranking EPA officials. In a recent case, Judge Lamberth not only ruled against EPA in a case in which the Agency exhibited some of the same behavior, but called into question the credibility of Eric E. Wachter, whose declaration is also the basis for EPA's summary judgment motion in this case. *See Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013). In addition, that ruling noted that when an agency produces hundreds of improperly-withheld documents right before filing its summary judgment motion – as EPA recently did in this case -- it must provide an explanation for its about-face, and why it originally withheld them – something EPA has not done here.

Moreover, the sample *Vaughn* Index EPA has submitted improperly and repeatedly relies on boilerplate justifications for withholding material under the deliberative-process privilege, that shed little if any light on the information it is withholding, and thus fail to meet its burden of showing that the material is privileged. *See King v. United States Dep't of Justice*, 830 F.2d 210,

[3] Senate Environment and Public Works Comm., Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered (*Sept. 9, 2013) at 9*,* www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62.

[4] *See, e.g.,* Erica Martinson, *Jackson Denies Email Secrecy at House Hearing*, Politico, September 11, 2013, http://www.politico.com/story/2013/09/lisa-jackson-email-secrecy-96550.html?hp=r17.

219–25 (D.C.Cir.1987); *Vaughn v. Rosen,* 484 F.2d 820, 826 (D.C. Cir. 1973); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009); *Wiener v. FBI,* 943 F.2d 972, 977–79 (9th Cir. 1991); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999). To an even greater extent, EPA relies on boilerplate excuses for withholding 1400 documents in their entirety, rather than producing them in redacted form. Its excuses for doing so lack "reasonable specificity" and contain no individualized explanation for withholding them in their entirety, failing to meet its legal burden of submitting a "detailed justification" proving that those documents could not be produced in redacted form. *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C.Cir.1977); *Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996).

EPA routinely withholds communications related to media coverage that have no direct connection to actual policy formulation, and thus do not qualify for deliberative-process privilege. It also withholds documents not demonstrated to be "inter-agency" or "intra-agency" communications covered by that exemption to FOIA.

Further, in numerous documents EPA not only withheld private email addresses of certain correspondents (including those of EPA employees), but in many cases, it went to the extra length of redacting the persons' identities, including EPA employees, even when using their EPA email accounts. This is contrary to FOIA and EPA's own rules. Whatever privacy interest an EPA employee might otherwise have, when using a non-official email account without copying her official account as required, is outweighed by the taxpayer's right to know the identities of which employees are so stepping outside of their federal record-keeping obligations. Moreover, there is no conceivable privacy interest in refusing to disclose an EPA employee's identity using an EPA email account for EPA business.

For all of these reasons, Defendant must at minimum reprocess all of the documents it

has withheld or redacted, and provide a *Vaughn* Index for all withheld-in-full and partially withheld emails, not just a small sample.

I. EPA's Record of Violating FOIA and Improperly Withholding Documents Does Not Justify Deferring to Its Claims

EPA argues that summary judgment should be granted in its favor because the Search Declaration of Eric E. Wachter alleges a reasonable, good-faith search, *see* Doc. 24-1, at 4, 6. But all the good faith in the world could not justify EPA's violation of D.C. Circuit FOIA precedents and this Court's order to provide a representative *Vaughn* sample Index, as we describe below. More importantly, any presumption of good faith on the part of the EPA has been dispelled by recent, serial revelations of improper record-keeping and search practices, concealment of agency records, improper withholdings and violations of FOIA by high-ranking EPA officials, and the recent ruling against EPA by Judge Lamberth of this Court.

Less than three weeks ago, on August 14, Judge Lamberth ruled against EPA in a FOIA case that, like the instant one, involved the issues of secondary email accounts and the adequacy of EPA's disclosures. The judge denied EPA summary judgment on the adequacy of its search, due to the "possibility that EPA engaged in … apparently bad faith interpretation" of Landmark's FOIA request. *Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285, *6 (D.D.C. Aug. 14, 2013). The court cited EPA's "inconsistent filings" (*Id.*), the "numerous inconsistencies and reversals" in its briefs and affidavits (*id.* at *8), "the potential spoliation of records that should have been searched" (*id.* at *8 n.7), and EPA's previous record of contempt in a related matter. *Id.* It pointed out that the

> "possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposely attempted to skirt disclosure under the FOIA. (footnote omitted). The possibility that the agency

> purposefully excluded the top leaders of the EPA from the search, at least initially, suggests an unreasonably and bad faith reading of Landmark's FOIA request …."

Id. at *8.

Most relevant to the instant case is Judge Lamberth's assessment of the credibility and veracity of Eric E. Wachter, director of the EPA Administrator's Office of the Executive Secretariat, who is in overall charge of handling the FOIA responsibilities of that Office. Mr. Wachter's declaration is the basis for EPA's summary judgment motion in this lawsuit. In *Landmark*, Judge Lamberth found that Mr. Wachter's declaration was seriously lacking in credibility. He repeatedly found that central claims made by Mr. Wachter were "inconsistent" (*id.* at **1-2 & fn. 3) and "vague" (*id.* at *3) and that Mr. Wachter's evasive "silence speaks volumes" (*id.* at 5).

In light of these disturbing facts, the judge concluded that neither Wachter nor EPA were entitled to a presumption of good faith, as would be necessary to grant EPA summary judgment based on its declarations. Thus, genuine issues of material fact remained over whether EPA was continuing to improperly withhold documents.

Under the *Landmark* decision, it is sufficient for the plaintiff to show that there was a "*possibility* that, one way or another, the agency engaged in bad faith conduct." *Id.* at *6 (emphasis added). But plaintiff can show more than such a mere possibility. Indeed, the evasiveness and improper withholding manifested in the *Landmark* case is just one symptom of a persistent pattern of misconduct by EPA officials that has made its way into the public record. For example, "the Agency established an alias identity to hide the actions of the former Administrator; has purposefully been unresponsive to FOIA requests, oftentimes redacting information the public has a right to know; and mismanaged its electronic records system such

that federal records have been jeopardized," noted a Senate Committee report this week.[7]

"The Committee found EPA employees inappropriately using personal email accounts to conduct official business," *id.* at 4, resulting in the potential loss of records covered by FOIA.[8] "Multiple high ranking officials have used non-EPA email accounts to conduct official agency business." *Id.* at 9. "The use of *non-official* email accounts was a widespread practice across the Agency. Use of non-official, or personal email accounts expressly violates internal EPA policy that forbids the use of non-official e-mail accounts to conduct official agency business." *Id.* at 12. Moreover, "the Agency assigned a secret alias email address to former EPA Administrators," *id.* at 9, such as the "Richard Windsor" alias account used by Lisa Jackson. *See id.* at 9-12. Due to the secrecy that surrounds them, "the Agency cannot indicate definitively if these accounts were reviewed in records requests." *Id.* at 9. For example, "EPA officials revealed that the Agency's FOIA office, the individuals responsible for proper administration of FOIA, may have been entirely unaware of the Richard Windsor account." *Id.* at 4, 10-11.

"EPA has a dismal history of competently and timely responding to FOIA requests." *Id.* at 4. For example, "EPA deliberately altered the date on a FOIA response to avoid the legal consequences of missing a deadline and then excluded this document from a FOIA production to avoid scrutiny and embarrassment." *Id.* at 5; *see id.* at 22. "When EPA does release information responsive to a FOIA request, the documents are heavily redacted, abusing legal exemptions in an attempt to provide as little information to the requestor as possible. Moreover, the Committee

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[7] United States Senate Environment and Public Works Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013), at p. 2, available at www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62) (visited Sept. 11, 2013); *see Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003) (court may take judicial notice of government document from web site).

[8] *See id.* at 14 (former Administrator "no longer has responsive emails" in which she "used personal email").

is aware of instances where the Agency has withheld information that is responsive to requests, for the simple reason that it may embarrass the Agency." *Id.* at 7. Moreover, "EPA's system for capturing and preserving federal records is haphazard and riddled with internal conflicts-of-interest." *Id.* at 4.

News reports have likewise chronicled how high-ranking "EPA officials" have improperly concealed and withheld documents, after "using private email addresses to conduct official business." *See* Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Washington Times, April 2, 2013, at A1.[9] This practice is widespread even though such records are covered by FOIA and its disclosure obligations,[10] and even though EPA itself, in accordance with to federal record-keeping laws[11] formally "*prohibits*

[9] *See Logan v. Denny's*, 259 F.3d 558, 578 & n.9 (6th Cir. 2001) (taking "judicial notice" of "newspaper articles" about "defendant's past history" of violating the law and citing news stories about settlements to resolve allegations against it.).

[10] *See, e.g., Landmark*, 2013 WL 4083285, *5 (summary judgment precluded due to inadequate search where "EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff," but rather only searched only "accounts *that were in its possession and control*," despite the existence of "evidence that upper-level EPA officials conducted official business from their personal email accounts") (italics in original); *id.* at *8 (noting that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA."); Michael D. Pepson & Daniel Z. Epstein, *Gmail.Gov: When Politics Gets Personal, Does the Public Have a Right to Know?*, 13 Engage J. 4, 4 (2012) (FOIA covers emails sent using private email accounts); Senate EPW Committee, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8 (FOIA "includes emails sent or received on an employee's personal email account" if subject "relates to official business"), www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62; *accord Mollick v. Township of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (officials' private email addresses covered under open-records laws); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95-96 (Pa.Cmwlth 2012) (same).

[11] Other agencies have likewise noted that the Federal Records Act forbids such practices. *See Memorandum for All OSTP Employees* from John P. Holdren, Assistant to the President for Science and Technology, May 10, 2010 (http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf) (" the Federal Records Act (FRA). . . requires that" federal "employees preserve records of government business, including emails. See 44 U.S.C. § 3301. . .To ensure that we comply with the FRA with respect to emails, all OSTP-related email communications should be conducted using your OSTP email accounts.. . . If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. . . . this way, all correspondence related to government business . . .will be captured automatically in compliance with the FRA."); Nancy Scola, *White House Deputy CTO Andrew McLaughlin Slapped for Gmailing with Googlers*, Tech President, May 17, 2010 (http://techpresident.com/blog-entry/white-house-

the use of non-EPA E-Mail systems when conducting agency business."[12]

For example, "former Region 8 Administrator James Martin regularly used a non-official e-mail account to correspond with individuals and groups outside of EPA, regarding Agency business," such as with a state government official, and the staff of the Colorado Conservation League.[13] "In one instance," he "used his personal email account to collaborate with the Environmental Defense Fund about where hearings on agency greenhouse gas rules could be held for maximum effect."[14] *Id.* He also used that account "to correspond with Ms. [Lisa] Jackson," then the EPA's Administrator, on her EPA email account in the fictitious name of "Richard Windsor" known only to certain associates and colleagues.[15] Although plaintiff sought

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deputy-cto-andrew-mclaughlin-slapped-gmailing-googlers) (describing this memo).

Ironically, Mr. Holdren, the author of the above memo, himself violated its strictures by using personal email to correspond with EPA in the records at issue in this very case. See document #5574 (using his Woods Hole email address (jholdren@whrc.org)),in *CEI v. EPA Draft Index of Withholdings 01268* ((available at https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip); *Vaughn Index – Every 100th (Redacted Documents*), Docket No. 24-6, at doc. 4963, pg. 22 (EPA withholds the email address; "Dr. Holden's email address" was "withheld under FOIA Exemption 6 because they are personal contact information. . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

[12] *See* April 10, 2013 letter to Assistant Administrator Gina McCarthy from Rep. Darrell Issa and Sen. David Vitter at 3 & n.18 (http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=a7f9b814-27e6-467b-9a9d-0aa5acd9650f), (emphasis in original), *quoting* EPA, *NRMP Alert: Do Not Use Outside Email Systems to Conduct Agency Business*. EPA instructs employees to not "use a non-EPA account to send or receive EPA e-mail," to "not use any outside e-mail system to conduct official Agency business." EPA, *Frequent Questions about E-Mail and Records*, available at www.epa.gov/records/faqs/email.htm.

[13] Senate Environment and Public Works Comm., Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013), at 13 www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=513a8b4f-abd7-40ef-a43b-dec0081b5a62 .

[14] Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, *supra. See also A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered,* at 13; Dinan, *EPA Officials Lied About Email Use, Senator Says,* Washington Times, March 11, 2013, at A4 (available in Westlaw at 2013 WLNR 6053470).

[15] Stephen Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Washington Times, Aug. 14, 2013, at A1 (available at 2013 WLNR 20170438); Dinan, *EPA Officials Lied About Email Use,* supra. *See also A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered,* at 10-11 (government officials who corresponded with "Richard Windsor" sometimes thought it was someone other than Administrator Jackson).

such emails from Mr. Martin through a FOIA request,[16] he concealed the existence of most of them, until his emails became the focus of Congressional investigators.[17] EPA inaccurately claimed that Martin only "used his private email for business" on "one" occasion, rather than "the multiple instances" in which that actually occurred.[18] Mr. Martin asserts that EPA made this statement without checking with him as to whether it was true.[19] Martin's belated disclosure of the emails forced him to resign and EPA to withdraw its pending summary judgment motion in that case.[20]

Moreover, "Congressional inquiries also have uncovered other top officials who used private emails to conduct agency business — a violation of open-records laws."[21] Such examples

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[16] *See CEI v. EPA*, D.D.C. No. 12-1497, Docket Doc. #1 (complaint filed 9/11/2012, describing and quoting the relevant FOIA request); Docket Doc. # 11-1 (*Declaration of James B. Martin in Support of Defendant's Motion for Summary Judgment*, filed Nov. 19, 2012, attaching the relevant FOIA request as Exhibit 1 thereto).

[17] *See* Stephen Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Washington Times, August 14, 2013, at A1.

[18] Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Wash. Times, Aug. 14, 2013, at A1; *see also U.S. Senator David Vitter Hearing Statement Summary: Nomination Hearing for Ms. Gina McCarthy to Lead U.S. Environmental Protection Agency Before the Senate Committee on Environment and Public Works*, U.S. Federal News, April 11, 2013 (available in Westlaw at 4/11/13 US Fed. News 00:00:00).

[19] *See* Statement, Sen. David Vitter, "Vitter: EPA Lied about Region 8 Administrator's Email Use", March 8, 2013. http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=4ba862dc-c7d0-158a-c18b-c30d33b30168&Region_id=&Issue_id=.

[20] *See Stephen Dinan, EPA Officials Lied About Email Use, Senator Says,* Washington Times, March 11, 2013, at A4 ("Mr. Martin and Ms. Jackson both resigned last month, after Mr. Vitter and Rep. Darrell E. Issa, California Republican and chairman of the House oversight committee, began an investigation into the emails"); *Stipulation of Settlement and Dismissal of All Claims Except for Attorney's Fees* in CEI v. EPA, No. 12-1497, Docket Doc. 26, filed 4/24/2013, at ¶¶ 4-6 (discussing the belated disclosures, Mr. Martin's resignation, and EPA's withdrawal of its summary judgment motion); *U.S. Senator David Vitter Hearing Statement Summary: Nomination Hearing for Ms. Gina McCarthy to Lead U.S. Environmental Protection Agency Before the Senate Committee on Environment and Public Works*, U.S. Federal News, April 11, 2013 (available in Westlaw at 4/11/13 US Fed. News 00:00:00) ("EPA Region 8 Administrator James Martin resigned after lying to a federal court, and after EPA lied that he was not using his private email account to conduct official business in violation of the Federal Records Act and the Freedom of Information Act."); Dinan, *Suit Says EPA Balks at Release of Records*, supra; Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, supra.

[21] Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy,* Washington Times, Apr. 9, 2013, at A4; *see also* Senate Environment and Public Works Committee, Minority Staff, *Sunshine Week –*

of high-ranking EPA officials using private email accounts to skirt FOIA continue to come to light, both in this case, and in other FOIA cases before judges of this Court:

> Documents show that Lisa P. Jackson, as EPA chief, told a lobbyist to shift their conversations to her "home email" account rather than using official government accounts, in a move that appears to contravene the intent of federal sunshine laws. . .In Ms. Jackson's case, the information, released as part of a Freedom of Information Act request, shows she told a vice president at Siemens AG, a multinational electronics corporation, to communicate with her on a private email account rather than at her EPA addresses. "P.S. Can you use my home email rather than this one when you need to contact me directly? Tx, Lisa," Ms. Jackson wrote in a December 2009 email to Siemens USA's vice president for sustainability, Alison Taylor, after the woman asked Ms. Jackson to schedule a meeting with a company executive. Ms. Jackson resigned as head of the Environmental Protection Agency late last year, just as questions about her use of emails were beginning to rise - particularly over whether she was using a secondary government address attached to the name "Richard Windsor" to avoid scrutiny.[22]
>
> Similarly, Deputy Administrator Perciasepe – the very official who pledged to improve

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Friday, March 15th: Dubious E-mail Practices ("Multiple EPA employees have used non-EPA e-mail accounts to conduct agency business, including: Acting Administrator Bob Perciasepe using perciasepe.org; Region 8 Administrator James Martin used me.com; Region 9 Administrator Jared Blumenfeld used comcast.net; and former Deputy General Counsel Tsemin Yang used gmail.com.") (www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=fbadd0c4-6eb9-4e3b-97a1-952fa0b46595) (visited 9/11/2013).

[22] Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Wash. Times, Aug. 14, 2013, at A1. That December 2009 email is found in one of the documents produced in this case, document #3168, *see Freedom of lnformation Act Request HQ-FOI-01268-12, Fifth Release Part A*, p. 64, www.epa.gov/foia/docs/Fifth_Release_Attachments_Part_A.pdf (visited 9/11/ 2013). *Accord* Senate Environment and Public Works Comm., Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 14 ("former Administrator Lisa Jackson on at least one occasion instructed an environmental lobbyist with Siemens Corporation to communicate via Jackson's personal email account.").

For additional examples of Jackson using personal email accounts for government business, see the following examples of her personal email address being redacted despite EPA claiming official deliberative-process privilege for the related emails. *See, e.g. Vaughn Index - Every 10th (Withheld in Full Documents)* (Docket No. 24-5) at pp. 31-32, documents #2165 (EPA Administrator Lisa Jackson), documents ## 1914, 1947-49, 2159-60, 2162-65, 2264, 2307 (more such Lisa Jackson emails using redacted non-official address but claiming (b)(5) privilege); documents ## 2439, 2481, 2529-30 (using the monicker "Lisa at Home" or "Lisa Home").

For additional examples of Lisa Jackson's use of a Verizon private email account for Alison Taylor of Siemens, and a non-EPA AT&T Blackberry account, see the documents produced by EPA in this case, available at EPA's Frequently Requested Records page, www.epa.gov/epafoia1/frequent.html, specifically, FOIA production, Release 3 Part AA (pages --not document #s -- 282, 283, 285, 286, 287, 288, 289, 290, 603) (www.epa.gov/epafoia1/docs/Part-AA.pdf); Release 3 Part EE (docs ## 3198, 3225, 3543) (www.epa.gov/epafoia1/docs/Part-EE.pdf), Part FF, doc. # 3543 (www.epa.gov/epafoia1/docs/Part-FF.pdf); Part II, doc. # 3790 (www.epa.gov/epafoia1/docs/Part-II.pdf) (all visited Sept. 11, 2013).

the EPA's compliance with its "statutory and regulatory obligations" regarding "email"[23] – uses multiple personal email addresses to conduct official business, as in this very case.[24] So do EPA regional administrators like Region 2 Administrator Judith Enck,[25] and Region 9 Administrator Jared Blumenfeld (jaredblumenfeld@comcast.net)[26] who has just acknowledged doing so after this was first discovered in emails produced in the instant case.[27] Other agency officials like Deputy General Counsel Tsemin Yang,[28] "former Senior Policy Counsel Bob Sussman and

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[23] Ben Geman, *EPA Vows Better Records Management Amid Criticism*, The Hill, April 8; *see also* Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy,* Washington Times, April 9, 2013, at A4 ("In a letter to all employees, acting administrator Bob Perciasepe singled out emails and instant messages as areas where the Environmental Protection Agency needs to do a better job. He warned that the agency's auditor is looking into how well they are complying."); May 1 letter from Perciasepe to Sen. Vitter, *ante*, at footnote 12.

[24] *See, e.g.*, document #704 (bperciasepe@audobon.org), in the index of documents withheld, *CEI v. EPA Draft Index of Withholdings 01268*, https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip; Ben Geman, *Top EPA Official Used Personal Email Address*, The Hill, Feb. 19, 2013 (http://thehill.com/blogs/e2-wire/e2-wire/283821-top-epa-official-used-personal-email-address) ("Newly released documents show that the acting head of the Environmental Protection Agency has used a personal email address for internal communication. . .Internal documents EPA released on Feb. 15 through Freedom of Information Act litigation show that in 2010, Robert Perciasepe, who was then EPA's deputy administrator, used the account " bob@perciasepe.org" in a message to three other officials. . . Sen. David Vitter (R-La.) . . . pounced on the disclosure, calling it part of an effort to "dodge the agency's mandatory recordkeeping policy.". . .The Perciasepe email is contained in records (available here) released to the Competitive Enterprise Institute . . . about just-departed EPA Administrator Lisa Jackson's use of a secondary government email account under the name Richard Windsor.").

[25] *See* documents ## 1127, 1520, 1521, 7096, 7098, 7173, in *CEI v. EPA Draft Index of Withholdings 01268* (2011 communications with, *e.g.,* "enckj", which email addresses are redacted as "b6 privacy"), available from https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip; *compare Judith A. Enck, Administrator for EPA's Region 2 Office in New York*, http://www2.epa.gov/aboutepa/judith-enck-administrator-epas-region-2-office-new-york, (Judith Enck has been Region 2 Administrator since 11/5/2009).

[26] *See, e.g.,* email of 11/19/2011 at 1:27 p.m., found in Second Release, Part P, pg. 125, www.epa.gov/foia/docs/Second-Release-Part-P.pdf (part of February 15, 2013 release); *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered,* at 13-14; September 5, 2013 letter from Jared Blumenfeld, to Rep. Darrell Issa, at 1 ("There are other examples of emails to or from my Comcast.net account that are related to my work");*Vitter, Issa Question EPA Region 9 Administrator on Personal Email Use*, Press Release, Mar. 19, 2013, www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=8311f916-0582-7f13-d6ff-ece347aed24e).

[27] *See, e.g.,* letters from Jared Blumenthal to Sens. Barbara Boxer and David Vitter, and Reps. Darrell Issa and Elijah Cummings, September 6, 2013. See also letter from Sen. Vitter and Chmn. Issa to Blumenfeld, March 19, 2013, www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=8311f916-0582-7f13-d6ff-ece347aed24e&Region_id=&Issue_id=.

[28] Senate Environment and Public Works Committee, Minority Staff, *Sunshine Week – Friday, March 15th:*

former Associate Administrator for Congressional and Intergovernmental Relations David McIntosh used private email accounts to conduct Agency business" as well.[29] Finally, a 2008 memo discusses how EPA apparently violated federal records laws in the past, with regard to preservation of email.[30]

II. EPA Erroneously Classified 299 Records As Exempt In Their Entirety, and Has Never Explained Why It Did So

As this Court noted in its June 27 order, EPA withheld 1715 documents in full. *See* Doc. No. 17 at 1. That order, which instructed EPA to sample those documents, came after EPA had issued what it called its "final release" of documents in this case in April.[31] But it now turns out that a large number of the 1715 documents were wrongly withheld as privileged, for reasons that EPA has never explained. On August 7, shortly before its summary judgment motion was due, EPA announced a "supplemental" release of 299 additional documents.[32] It did not explain why

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Dubious E-mail Practices (EPA employees who "have used non-EPA e-mail accounts to conduct agency business" include Yang, who "used gmail.com," as well as "Bob Perciasepe using perciasepe.org; Region 8 Administrator James Martin used me.com," and Blumenfeld, who "used comcast.net").

[29] *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered,* at 14.

[30] See April 11, 2008 letter to Paul Wester, Director, Modern Records Program, National Archives and Records Administration, from John B. Ellis of the EPA, at 1 ("I am writing to inform you of a possible unauthorized destruction of computer files maintained by the U.S. Environmental Protection Agency (EPA or Agency) that may have contained email records that had not yet been captured in a record keeping system in accordance with EPA and National Archives and Records Administration requirements") (http://epw.senate.gov/public/_files/2008_EPA_Archives_Memo_HILITED.pdf); Dina Cappiello, Associated Press, *Tofu? To Whit? Senators Discuss EPA Email Aliases*, April 11, 2013 (available in Westlaw at 4/11/13 AP DataStream 21:03:57) ("That practice [of using secondary email accounts] was described in a 2008 memo from the agency's records officer to the National Archives and Records Administration about the 'possible unauthorized destruction' of emails from secondary accounts," and "possible lost emails from the alias account of" a former EPA administrator"); *see also* Docket No. 19-1 (July 23, 2013), at ¶¶2-3 & Exhibit 2 (attaching that memo); Complaint, Exhibit 3 (Docket No. 1-3)(same).

[31] *See* April 15, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, Competitive Enterprise Institute, at 1 ("Fourth Release Cover Letter") ("Enclosed is the fourth of four sets of documents responsive to your Freedom of Information Act request, HQ-FOI-01268-12. This final release consists of emails . . .") (http://www.epa.gov/foia/docs/Fourth-Release-Cover-Letter.pdf).

[32] *See* August 7, 2013 letter from Wachter to Horner, at 1 ("Fifth Release Cover Letter"),

the documents had previously been withheld, except to say cryptically that "the agency determined that certain records were inadvertently categorized as withheld-in-full," and that "as you are aware, the EPA will be filing a dispositive motion . . . on or before August 12, 2013."[33]

This case is much like the recent *Landmark* case, where "on the eve of filing a summary judgment motion, weeks after issuing its purportedly 'final' disclosures in this matter, EPA apparently determined that these disclosures were inadequate, and subsequently disclosed additional records from the Administrator." *Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285, *5 (D.D.C. Aug. 14, 2013). The court denied EPA summary judgment on this ground, noting that "EPA provides no explanation for this error, how it was caught, or by whom, much less any description of what led to the error in the first instance." *Id.*.

Similarly, EPA in this case has never explained why it once believed the documents were privileged (if it in fact did), why it changed its mind, why it waited until right before its summary judgment motion to produce them, or why it chose to withhold them in their entirety rather than merely redact any privileged material. That impeaches the reliability of its privilege claims, and the *Vaughn* Indexes and summary judgment papers based on them. When an agency belatedly produces additional documents "on the eve of filing a summary judgment motion," the agency needs explain the earlier "error" in withholding them, reveal "how it was caught," and describe "what led to the error" in the first place. *Id.* at *5. But EPA has done no such thing.

These obvious questions remain completely unanswered in EPA's motion papers, such as the Declaration of Eric E. Wachter. If there were an innocent explanation, EPA would surely

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www.epa.gov/foia/docs/Fifth_Release_Cover_Letter.pdf

[33] *Id.*

have provided it.[34] Like the proverbial dog that didn't bark,[35] EPA's "silence speaks volumes, " *Landmark*, *4, *5, casting strong doubt on its claims. Eric Wachter's declaration never explains *why* the records were originally withheld, merely stating that EPA admits that "299 records were inadvertently categorized to be withheld in full." *See* Doc. 24-4 at ¶14. ("Incorrectly" would be a more accurate description than "inadvertently," since a decision to withhold a specific document is a conscious choice, not an accident like a typo. How does one "inadvertently" withhold a document 299 times? To "categorize" such documents as withheld in full on its list of withheld documents, EPA had to first conclude both that they contained privileged material; then determine that they were so full of privileged material that no part of them could be released even in redacted form; and then add each such document to its list of documents withheld in full. That reflects detailed recordkeeping and conscious planning, not "inadvertence.") Wachter never provides any hint of "how" the errors were "caught," or any "description of what led to the error in the first instance." *See Landmark*, 2013 WL 4083285, *5.

This was not an isolated oversight or miscoding. The 299 records constitute over 17 percent of the documents withheld – similar in order of magnitude to error rates the D.C. Circuit has found intolerable. *Bonner v. Department of State*, 928 F.2d 1148, 1152-54 (D.C. Cir. 1990) ("an error rate of 25% in a representative sample is 'unacceptably high.'"). 48 of these documents contained no privileged material at all (and thus were belatedly released in full),

[34] "'When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to' that party." *Radio TV Reports v. Ingersoll*, 742 F.Supp. 19, 22 (D.D.C. 1990), *quoting UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C.Cir.1972); *accord Baxter v. Palmigiano,* 425 U.S. 308, 316–29 (1976); *Clifton v. U.S.*, 45 U.S. 242, 247 (1846); *Gray v. Great American Recreation Ass'n,* 970 F.2d 1081, 1082 (2d Cir.1992). The nonproduction of available witnesses or evidence, "permits the inference that its *tenor is unfavorable to the party's cause.*" 2 Wigmore, *Evidence In Trials At Common Law,* § 285 (Chadbourn rev. 1979).

[35] *See* Wikipedia, *Silver Blaze* (dog's failure to bark proved absence of intruder in this Sherlock Holmes story).

while 251 contained only limited or *de minimis* amounts of supposedly exempt material (such as the presence of a sender's personal email address) and thus had to be produced in redacted form.

III. EPA Has Not Submitted Valid Sample *Vaughn* Indexes In Support of Its Motion.

A. EPA Has Sample-Indexed Only 142 Fully-Withheld Documents, Not the 172 Ordered By the Court

The court ordered EPA to sample "172 fully-withheld documents" – "10%" of the 1715 documents withheld at that time. *See* June 27 Order at 2 (Docket # 17) ("The Court will therefore order the EPA to sample 10% of the fully withheld documents and 1% of the partially withheld ones – *i.e.*, 172 fully withheld documents and 50 partially withheld documents."). EPA, however, has not sampled 172 fully-withheld documents. Rather, it has sampled only 142 fully-withheld documents. *See Vaughn Index - Every 10th (Withheld in Full Documents),* Docket No. 24-5 (sample *Vaughn* Index consisting of 142 entries). That is 10 percent of the fully-withheld documents, *after* subtracting the 299 documents belatedly released after EPA improperly withheld them until the eve of filing its motion for summary judgment, just as in the *Landmark* case. A late-hour release of improperly withheld records does not relieve EPA of its duty to comply with the court's express order to sample 172 records. *See Bonner*, 928 F.2d at 1152.

B. EPA Has Wrongly Removed Documents From Its Sample By Releasing Them Without Explanation On The Eve of Summary Judgment

Unfortunately for EPA, the D.C. Circuit has ruled that an agency cannot reduce its sample by releasing documents that it improperly withheld, or remove such documents from its sampling, since allowing an agency to do that would enable it to hide its mistakes by releasing improperly classified documents that otherwise would appear in the sample (a sample that the court uses to assess whether the agency is properly processing documents; this is a threat

particularly acute in this case where EPA inexplicably on occasion deviated from sampling "every tenth" document, suggesting it possibly wanted to avoid sampling certain records). Instead, EPA must include those released documents in its sample. *See Bonner v. Department of State*, 928 F.2d 1148, 1152-54 (D.C. Cir. 1990).

For example, in *Bonner*, the D.C. Circuit ruled that where an agency had been ordered to produce a sample of 63 documents, it could not shrink the sample to 44 documents by releasing documents initially withheld, even if the agency was not acting in "bad faith" in doing so. *Id.* at 1152. This is because the agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents." *Id.* at 1154. Moreover, the "court must determine whether the 19 fully released documents were properly redacted when the [agency] . . . initially reviewed them. If the court determines that the [agency's] exemption claims for significant portions of these 19 documents do not survive inspection, then the propriety of withholding other responsive, but non-sample, documents would come to the fore. . . . [A]n error rate of 25% in a representative sample is 'unacceptably high.' . . . if the error rate for the sample . . . should prove to be unacceptably high, the [agency] must then reprocess all of the over 1,700 documents at issue" and justify and revisit its prior privilege claim for each document). *Id.* at 1154, *quoting Meeropol v. Meese*, 790 F.2d 942, 960 (D.C. Cir. 1986).

Releasing erroneously-withheld documents that would otherwise be in the sample, rather than sampling them, renders the sample unrepresentative and invalid. *See Bonner*, 928 F.2d at 1150 (agreeing with FOIA requestor "that the State Department's full release of the 19 documents, without accounting for the excisions originally made, destroyed the representativeness of the sample"). EPA's selective release of these 299 documents, which if sampled would have highlighted to the court EPA's improper withholding of documents, made its sample

unrepresentative, hid its widespread errors, and artificially reduced the error rate of that sample by removing erroneously-classified documents from it, in violation of this Court's order that "the sample must be chosen randomly" and be "representative." *See* June 27 Order at 2. Under the D.C. Circuit's *Bonner* decision, EPA may not remove documents from its sample just by releasing them; it was required to "justify its initial withholdings and [was] not relieved of that burden by a later turnover of sample documents." *Bonner*, 928 F.2d at 1152. But it did remove such documents from its sample, in turn dropping its required 172 sampled records to a mere 142. For example, as we explain below, EPA released – rather than sampled – the first document it was supposed to sample, under the court's order to sample "every tenth document." (Similarly, of the 48 documents that were initially withheld in full, but later released without any redactions in August, none were in fact sampled, even though at least ten percent of them (5 of them) would have been fully *Vaughn*-indexed if they had been properly included in the population to be sampled.[37])

C. EPA Did Not Consistently Follow This Court's Order to Sample "Every Tenth Fully Withheld Document"

[37] *See CEI v. EPA Draft Index of Withholdings 01268* (produced to plaintiff in summer 2012, with cover letter dated June 7, 2013), https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip; see their production of documents in full that had been withheld in full, see FOIA production, Fifth Release Attachments Part A, http://www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_A.pdf (producing documents 659, 1691, 2014, 2304, 2471, 2478, 2848, 2849, 2857, 2870, 2878, 2918, 2948, 3034, 3035, 3039, 3075, 3155, 3161, 3162, 3167, 3168, 3174, 3212, 3226, 3227, 3233, 3234, 3308, 4337, 4343, 4357, 4363, 4385, 4386, 4443, 4500, 6779, 7178) (visited 9/11/2013). *Compare Vaughn Index - Every 10th (Withheld in Full Documents),* Docket Doc. 24-5 (*Vaughn* sample for fully-withheld documents, listing 18, 58, 87, 124, 161, 193, 255, 321, 370, 447, 469, 542, 636, 728, 771, 804, 829, 874, 914, 969, 1013, 1056, 1085, 1113, 1141, 1220, 1274, 1333, 1403, 1424, 1532, 1651, 1785, 1804, 1922, 1964, 1984, 1997, 2016, 2054, 2092, 2108, 2118, 2148, 2165, 2181, 2199, 2225, 2257, 2276, 2287, 2309, 2324, 2344, 2361, 2374, 2394, 2447, 2463, 2484, 2495, 2507, 2521, 2541, 2591, 2601, 2612, 2623, 2633, 2651, 2663, 2673, 2688, 2700, 2720, 2736, 2754, 2765, 2778, 2794, 2805, 2822, 2833, 2846, 2874, 2900, 2916, 2958, 2968, 2979, 2994, 3008, 3022, 3050, 3068, 3085, 3118, 3141, 3169, 3186, 3210, 3232, 3253, 3269, 3438, 3562, 3758, 3879, 3930, 3994, 4025, 4098, 4165, 4235, 4323, 4359, 4381, 4400, 4431, 4458, 4473, 4490, 4507, 4528, 4574, 5081, 6430, 6547, 6617, 6663, 6716, 6795, 6859, 6932, 6956, 7032, 7111, 7190, 7232, 7304, 7363) and *Vaughn Index - Every 100th (Redacted Documents),* Doc. 24-6 (*Vaughn* sample for partially-withheld documents).

The court's order required EPA to sample "every tenth fully withheld document." *See* Docket # 17 at 2-3. The first such document to be sampled would thus be the tenth document that EPA fully withheld, Document 01268-EPA-19 (which we will refer to for short as "#19"); that is, the tenth fully-withheld document contained in the list of withheld documents that EPA provided to plaintiff in advance of its summary judgment motion.[38] That list identified fully-withheld documents with the "WIF" legend, and redacted documents as "Redact."[39] But that tenth document was released,[40] and instead of it, EPA chose to sample the 9th document, document #18 (01268-EPA-18). (It did not qualify as the tenth document under *either* EPA's "initial withholdings," as *Bonner* requires, *see id*, 928 F.2d at 1152, or *after* its release of the 299 documents previously withheld based on erroneous privilege claims.[41]) Closer scrutiny of EPA's

[38] The list is entitled *CEI v. EPA Draft Index of Withholdings 01268*, and is available at https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip. The document itself is perhaps too big (27 megabytes) to file with the court. EPA's counsel has confirmed that the document found at the preceding link was indeed sent by EPA to plaintiff in the instant case. *See Bader Declaration*, Exh. 2 (attaching email correspondence among counsel). Plaintiff received the list from EPA after EPA filed its motion for sampling in June. The document is also posted at http://cei.org/sites/default/files/CEI%20v.%20EPA%20No.%2012-1617%20DRAFT%20INDEX%20OF%20WITHHOLDINGS%2001268.pdf. Excerpts from that Index, such as the documents cited in footnote 39, 41, and 42, are attached to the Bader Declaration as Exhibit 1.

[39] *See CEI v. EPA Draft Index of Withholdings 01268* (produced to plaintiff in August 2012, with cover letter dated June 7, 2013) (available at links in footnote 38); June 7, 2013 letter from Lynn Kelly, EPA, to Christopher C. Horner, at 1 ("If the entry ends in 'WIF' it indicates that the document listed was withheld in full."). The first ten fully-withheld documents were ##1,2,8,9,13,14,15,17,18, and 19 (see pp. 1-3: pg. 1 (01268-EPA-1, 01268-EPA-2, 01268-EPA-8); pg. 2 (01268-EPA-9,01268-EPA-13, 01268-EPA-14, and 01268-EPA-15); pg. 3 (01268-EPA-17, 01268-EPA-18, 01268-EPA-19)). EPA's sample *Vaughn* Index includes only document #18 from among these documents. *See Vaughn Index - Every 10th (Withheld in Full Documents),* Document No. 24-5, at pg. 1 (listing "01268-EPA-18").

[40] *See* FOIA production, Fifth Release, www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_B.pdf (visited 9/11/2013).

[41] The tenth document left *after* accounting for the release of those documents would have been #25 ("01268-EPA-25"), which was the 11th document *before* accounting for the release.

sampling reveals that, while EPA typically sampled every tenth successive (fully withheld) document, on occasion it chose not to, and mysteriously selected another record instead.[42]

The use of this 9th document, rather than tenth document, is a sign of unreliable sampling, and it belies the title found on the bottom of EPA's sample *Vaughn* Index, which includes the words "every 10th ("*Vaughn Index - **Every 10th** (Withheld in Full Documents)*") It also belies EPA's claim in its Statement of Undisputed Facts (*see* ¶ 15) that it sampled "every 10th fully withheld document." While EPA's Statement conclusorily claims that it sampled "every 10th fully withheld document," it does not cite any sworn affidavit or declaration for this claim, which is contrary to what it did in some instances. Instead, it cites only the sample *Vaughn* Indices themselves, which do not discuss how the sampling was conducted, but whose content belies this claim (by including some documents that were *not* every tenth document, *see ante* at fn. 39-42).

C. EPA Did Not Number, Much Less Sample, Many Partly-Withheld Documents

EPA's sampling of partially-withheld documents was also faulty, because it did not number, much less sample, some collections of redacted documents. For example, many of the documents in document release Part 3, Subpart AA, were redacted, yet not numbered, and there is no sign that any such documents were sampled.[47] EPA further did not number several

[42] For example, after sampling the ninth document, EPA chose to sample not the tenth document after that, or even the tenth document after the first ten documents on its entire Index of documents withheld, but rather than 22nd document on the Index. *See CEI v. EPA Draft Index of Withholdings 01268* (available at links in footnote 38) (listing as documents withheld in full, or "WIF," ## 25, 31, 33, 37, 38, 40, 46, 48, 49, 53, 55, 56, 58); *Vaughn Index - Every 10th (Withheld in Full Documents),* at 3-4 (showing #58 being sampled, but the others not). This is not the "tenth" or "every tenth" document under any interpretation of this Court's order.

Similarly, it later sampled the ninth document in a series of fully-withheld documents. *See CEI v. EPA Draft Index of Withholdings 01268* (listing as documents withheld in full, or "WIF," ## 259, 260, 265, 279, 280, 283, 285, 318, 321) (available at https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip); *Vaughn Index - Every 10th (Withheld in Full Documents),* at 3-4 (showing #321 being sampled, but the others not).

[47] *See, e.g.,* EPA's Third Release of Documents, March 15, 2013, Part AA, http://www.epa.gov/epafoia1/docs/Part-AA.pdf (redacted but unpaginated documents at pages 10, 11, 74, 75, 77, 282, 283, 285, 296, 287, 288, 289, 290, 291, 421, 457, 461, 464, 469, 471, 472, 551, 603, 619, and 633) (visited, Sept. 11, 2013) ; March 15, 2013 letter

hundreds and possibly over a thousand records released in certain Parts of its production, with no explanation, but leaving Plaintiff unable to readily discern the actual number of documents produced (*see e.g.*, Release 3 Part AA, Release 2 Parts N, O, P, Q, R, S, T, U.[48]).

Further, of the 7,364 documents supposedly identified in EPA's list of withheld Documents (in full or part) produced pursuant to this Court's Order, 666 document numbers (or 9%) are missing, leaving 6,718 documents.[49] While our initial reaction to this was to assume that the missing numbers simply meant the documents had been released in full to plaintiff after further review (EPA earlier claimed to plaintiff that that explains such missing numbers), it is not certain that this is a full explanation, since EPA's own motion papers are inconsistent about the number of documents actually withheld (for example, first saying that 1,416 have been withheld in full,[50] and later saying that 1,821 have been withheld in full[51]).

These discrepancies, like the others described above, show EPA's production and sampling were unreliable, making summary judgment improper. *See Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) ("the "defending 'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'"); *Valencia-*

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from Eric E. Wachter, EPA, to Christopher C. Horner,. CEI ("Third Release Cover Letter") (enclosing these documents), http://www.epa.gov/epafoia1/docs/Third-Release-Cover-Letter.pdf .

[48] *See* Plaintiff's Statement of Genuine Issues at 7 nn. 17-25 (providing hyperlinks to these releases).

[49] *See, e.g.,* docs. ## 39, 50, 85-6, 150, 151, 184-5, 197, 214, 223, 250, 256, 262, 268, 270, 286, 331, 337, 362, 366, 368, 379-80, 403, 419, 439, 460, 466-7, 476, 497-8, 521, 526, 530-1, 538, 543, 545-7, 550, 559, 571, 588, 593, 599, 603-4, 612, 621, 629, 631, 647, 649, 653, 661-2, 664, 670, 684, 690, 697, 707, 712, 725, 737, 740, 743, 750, 756, 766-7, 772, 805, 809, 828, 838, 847, 849, 853, 857-8, 871, 884, 887, 889, 891, 902-3, 910, 918, 925, 933-5, 972-4, in *CEI v. EPA Draft Index of Withholdings 01268* (available at links in footnote 38).

[50] *See* Defendant's Statement of Facts, ¶ 13 ("5,234 documents were released in part, and 1,416 documents were withheld in full.") (Docket No. 24-3).

[51] *See* Defendant's Memorandum at 17 ("6,942 of the 8,763 instances (or 79%) where Defendant claimed information was exempt, the information was redacted rather than withheld in full"; 8,763 minus 6,942 is 1,821).

Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999)) (possibly "overlooked materials" make summary judgment improper).

D. EPA's Index of Documents Withheld, On Which It Based the Sample, Was Itself Unreliable

EPA's list of withheld documents, from which it compiled the sample *Vaughn* Indexes filed with the Court, does not accurately describe the documents' status under *either* EPA's "initial withholdings," *see Bonner*, *see id*, 928 F.2d at 1152, or taking into account its subsequent, final release of improperly-withheld documents. For example, it lists as partially withheld documents (such as ##91 and 131) that it later described as having been released in redacted form after previously having been fully withheld.[52] On the other hand, it lists as withheld in full ("WIF") documents, such as ##19, 33, 37, 38, that EPA released in part in its final release in August[53], and also lists as withheld in full other documents such as ##659 and 1691 that were released in full in August.[54] Additionally, as to the unreliability of EPA's redactions/withholdings, we note that EPA withheld in full one email discussion as part of a heavily redacted exchange, that it released in full elsewhere (*see e.g.*, discussion redacted in record number 01268-523, released in 01268-529).

IV. EPA Improperly Relies On Boilerplate Privilege Claims for Withholding Many Documents

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[52] See *CEI v. EPA Draft Index of Withholdings 01268* (available at links in footnote 38) (listing as "redacted" #91, p. 13, and #131, p. 18); *compare* FOIA production, Fifth Release, Part B, www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_B.pdf (producing these documents in redacted form, as part of a collection of documents previously withheld in full); August 7 letter from Eric E. Wachter to Christopher C. Horner, http://www.epa.gov/epafoia1/docs/Fifth_Release_Cover_Letter.pdf (describing the released documents as previously having been withheld-in-full).

[53] *See* FOIA production, Fifth Release, Part B, www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_B.pdf. (documents released in redacted form); *CEI v. EPA Draft Index of Withholdings 01268* (still listing these docs.).

[54] *See* www.epa.gov/epafoia1/docs/Fifth_Release_Attachments_Part_A.pdf (documents released in full); *CEI v. EPA Draft Index of Withholdings 01268* (still listing these documents).

It is blackletter law that an agency cannot rely on "boilerplate" privilege claims, or provide "identical justifications" for withholding each of a series of withheld documents, nor can it simply recite that the withholding of a document meets statutory standards without tailoring "the explanation to" each "specific document," and with a "contextual description" of how those standards apply to "the specific facts" of each document. *King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) ("[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate."); *Vaughn v. Rosen,* 484 F.2d 820, 826 (D.C. Cir. 1973) ("generalized" or conclusory exemption claims are insufficient); *Wiener v. FBI,* 943 F.2d. 972, 977–79 (9th Cir. 1991) ("boilerplate" explanations without an effort to "tailor the explanation to the specific document withheld" were insufficient); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999) (agency's *Vaughn* Index must apply statutory standards for exemption "to the specific facts of the documents at hand," giving a "contextual description" of "the documents subject to redaction" and "the specific redactions made to the various documents."); *ACLU v. Office of the Director of Nat. Intelligence,* No. 10-449, 2011 WL 5563520, *6 (S.D.N.Y. Nov. 15, 2011) (improper for an agency to submit a *Vaughn* Index "proffering conclusory and nearly identical justifications for" withholding each document); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009) (agency must "'disclose as much information as possible" in its Vaughn Index,'" and not merely "parrot" or "recite the statutory standards'").

But that is exactly what EPA has done here. The material portions of the "description and justification" EPA gives in its sample *Vaughn* Index for the documents it withheld in full is largely the same, verbatim, for most of those documents, reciting many of the exact same passages to withhold completely different documents. For example, EPA states over and over

again (repeating the exact same "categorical" claims about the "anticipated consequences of disclosure," *see King, supra*, such as a generalized "chilling effect"):

> The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the analyses, advice, and deliberations of EPA's management when deliberating about official public responses. These communications were pre decisional because they reflect the decisionmaking process related to whether to accept the interview request, and how and when to communicate with the public about developing Agency actions. The email string represents staff opinions and judgments that were under consideration by EPA. Release would have a chilling effect on the Agency's ability to have open and frank discussions among its staff and may harm the Agency's decisionmaking by chilling the open discussion of issues and approaches to communicating with the press, and the ability to coordinate with the White House. Furthermore, release could cause public confusion by disclosure of reasons, rationales, and conclusions that were not in fact ultimately the position of the EPA or the U.S. Government. The withheld information does not contain reasonably segregable factual information. To the extent any of the withheld information contains facts, the facts reflect Agency deliberations. The selection of those facts was an integral part of the deliberations, and the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document.[55]

Similar material is found over and over again in EPA's sample *Vaughn* Indexes.[56] While there are some slight variations or minor differences in wording among these boilerplate claims for

[55] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents),* Docket No. 24-5, documents ##18, 2181, & 3068 (identical), pp. 1, 64, and *Vaughn Index – Every 100th (Redacted Documents*), doc. # 2243 (identical); *see also Vaughn Index - Every 10th (Withheld in Full Documents), ##* 2344, 2805, 2874, 2916 & 2968, pp. 37, 55, 58, 60 (almost identical) ("The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the analyses, advice, and deliberations of EPA's management when deliberating about official public responses. These communications were pre decisional because they reflect the decisionmaking process related to how to coordinate among Agency offices, and how and when to communicate with the public about developing Agency actions. The email string represents staff opinions and judgments that were under consideration by EPA. Release would have a chilling effect on the Agency's ability to have open and frank discussions among its staff and may harm the Agency's decisionmaking by chilling the open discussion of issues and approaches to communicating with the press and the public, and harm the ability to coordinate announcement of actions in advance with White House staff. Furthermore, release could cause public confusion by disclosure of reasons, rationales, and conclusions that were not in fact ultimately the position of the EPA or the U.S. Government."); *Vaughn Index – Every 100th (Redacted Documents*), doc. # 1307 (four sentences nearly identical).

[56] *See, e.g.,* documents ## 1220, 2199 (pp. 19, 33), in *Vaughn Index – Every 10th (Withheld in Full Documents)*, (Docket No. 24-5), and docs. ##148 and 3088 in *Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6) ("The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the advice and deliberations of EPA's management in formulating a decision about public representation of the Agency. These communications were developed to assist in the decisionmaking process and represent the opinions and judgments that were under consideration by EPA. The withheld information does not represent an official Agency decision or policy and instead reflects analysis and recommendations still in

example, they variously recite that the withheld communication relates to a "public response," [57] or "public representation" of the agency,[58] or that it discusses "whether to accept [an] interview request,"[59] or "how to coordinate" PR "among agency offices"[60] – none of these things is sufficiently connected to agency policy actions to qualify for deliberative-process privilege. *See Fox News Network v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 281 (S.D.N.Y. 2012) ("public response" justification was insufficiently connected to agency "policy action").[61] Thus, these

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development at the agency. Release would have a chilling effect on the Agency's ability to have open and frank discussions among its staff during the internal decision-making process regarding the Agency's public outreach and may harm the Agency's decisionmaking by chilling the open discussion of issues and approaches when formulating the Agency's public stance"); *id.,* documents ##293 and 1550 ("The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the advice and deliberations of EPA's management in formulating a decision about the public communications, stance, and outreach of the Agency. These communications were developed to assist in the decisionmaking process and represent the opinions and judgments that were under consideration by EPA as part of the decisionmaking process on what would eventually be the Agency's public stance. The withheld information does not represent an official Agency decision or policy and instead reflects analysis and recommendations still in development at the agency. Release would have a chilling effect on the Agency's ability to have open and frank discussions among its staff during the internal decision-making process regarding the Agency's public outreach and may harm the Agency's decisionmaking by chilling the open discussion of issues and approaches when formulating the Agency's public stance. Furthermore, release could cause public confusion by disclosure of items, potential agency stances, and proposed actions that were not in fact ultimately the public stance or actions of the Agency."); documents ## 1085, 1113, 1141, 6716 (pp. 16, 17, 18, 87) in *Vaughn Index - Every 10th (Withheld in Full Documents),* Docket No. 24-5 (each of these documents contains the identical nine-sentence boilerplate claim of privilege and non-segregability); documents ## 1013, 1056, 1424 (pp. 15, 16, 22) (each of these contains an identical nine-sentence boilerplate claim of privilege and non-segregability); *see also* ## 1785, 1804, pp. 24, 24-25 (identical nine sentence passage, beginning with "The withheld information is protected"); ##2994, 3008 (pp. 61, 62)(identical eight sentence passage beginning with "The withheld information is protected"); ## 2736, 2794 (pp. 52, 55) (identical eight sentence passage beginning with "The withheld information is protected"); ## 124 and 2361 (pp. 3, 38) (identical eight sentence passage beginning with "The withheld information is protected") & #3268, pg. 69 (almost identical).

[57] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents)*, documents ##18, 2181, 2344, 2805, 2874, 2916, 2968 & 3068, and *Vaughn Index – Every 100th (Redacted Documents*), docs. ## 1307 & 2243.

[58] *See, e.g.* ,docs. ## 1220, 2199 (pp. 19, 33), in *Vaughn Index – Every 10th (Withheld in Full Documents)*, Docket No. 24-5, and docs. ##148 and 3088 in *Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6).

[59] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents),* Docket No. 24-5, documents ##18, 2181, & 3068, pp. 1, 64, and *Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6), doc. # 2243.

[60] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents), ##* 2344, 2805, 2874, 2916 & 2968, pp. 37, 55, 58, 60.

[61] *See also Judicial Watch v. HHS*, 27 F.Supp.2d 240, 245 (D.D.C. 1998) ("deliberative process privilege does not protect documents that merely state or explain agency decisions").

boilerplate privilege claims do not meet EPA's burden of proof. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (burden of proof is on agency to show withheld material is privileged and meets each element required for exemption cited).

V. EPA Improperly Withholds Many Documents Without Showing They Are Directly Related to Actual Policy Formulation of the Kind Contemplated by Exemption 5.

Citing the deliberative-process privilege in FOIA's Exemption 5, EPA has withheld some documents that clearly are *not* related to the kind of policy formulation protected by that privilege, and has withheld many others without *showing* (as opposed to merely alleging) that they are protected. For example, EPA wrongly redacted one email thread not because it involved formulation of substantive EPA policy, but merely because it involved discussion of a "decision, yet-to-be-made, about scheduling a conference call."[63] Such scheduling matters are not covered by the deliberative-process privilege. *Elkem Metals Co. v. U.S.,* 24 C.I.T. 1395, 1401-03, 126 F.Supp.2d 567, 576-77 (C.I.T. 2000) (privilege did not protect "a draft of the ITC's issuance of a schedule for the conduct of its changed circumstances reviews," or agency's "draft of a proposed work schedule" or "another proposed work schedule"; items were "not protected by the deliberative process privilege," especially since "disclosure" of "scheduling information" would not "discourage candid discussions within the agency" and such information did not "reflect the give-and-take" of the agency's "decision-making process"). Indeed, "it is impossible" to argue that the content of "such scheduling requests, if disclosed, would chill the open and frank deliberations" on policy protected by the deliberative-process privilege.[64] (Despite such

[63] *See Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6), document #5274, pg. 24.

[64] *Judicial Watch, Inc. v. Commission on U.S.-Pacific Trade and Inv. Policy*, No. 97-0099, 1999 WL 33944413, *6, (D.D.C. Sept. 30, 1999); *cf. Hennessey v. U.S. Agency For Intern. Development,* 121 F.3d 698, 1997 WL 537998, *5 (4th Cir. Sept. 2, 1997)(unpublished) (even "construction scheduling dispute" that gave rise to legal claim against agency was not shielded by deliberative-process privilege because it did "not bear on a policy-oriented judgment of

precedent, EPA also withholds all discussion in an email titled "Schedule for WOUS Rulemaking."[65])

Similarly baseless is EPA's claim of privilege to avoid releasing a document that might shed light on the "use of the Administrator's limited time."[66] To put it mildly, any such discussion is "peripheral to actual policy formulation." *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994). It has no discernible connection to any identifiable agency policy or proposal, *compare Vaughn v. Rosen,* 523 F.2d 1136, 1143 (D.C.Cir.1975) (finding an agency's efforts to evaluate and change its personnel policies, rules and standards too amorphous to qualify as a process for the purposes of the deliberative process privilege), and even if it did somehow indirectly affect agency policy, that would not be sufficient to justify withholding it. To be privileged, communication must not only be "antecedent to the adoption of an agency policy," *Jordan,* 591 F.2d at 774, but also must be deliberative, *i.e.*, "a *direct* part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1976) (emphasis added).

EPA withheld a remarkable variety of information as "pre-decisional", including comments among EPA officials about an email actress Ashley Judd sent to former administrator

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the kind contemplated by Exemption 5"; even if a "decision regarding such a matter "can be regarded as a 'policy,'" it is not the "'stuff of the deliberative process privilege" if it is at the "very outer limits" of what is a policy).

[65] *See Vaughn Index - Every 100th (Redacted Documents),* document #6069 , at pg. 31 (Docket No. 24-6) ("Schedule for WOUS Rulemaking"), found redacted in FOIA production, Release 4, Part S, www.epa.gov/foia/docs/Release-4-Part-S.pdf (visited 9/11/2013).

[66] *See, e.g., Vaughn Index – Every 10th (Withheld in Full Documents)* (Docket No. 24-5), document # 2688, pg. 50 (claiming deliberative process privilege to avoid releasing communication reflecting "decisionmaking about strategic use of the Administrator's limited time.").

Jackson insisting that Ms. Judd really didn't criticize the administrator as had been reported[67], numerous documents forwarded as "FYI", "Purely FYI, or "This is just an FYI,"[68] correspondence with public relations professionals/political consultants,[69] a summary of requests and arguments made by public (elected) officials against an EPA rule,[70] and focus group questions and results[71] (even though survey and research results are not privileged, especially when they "merely provide the raw data upon which decisions can be made."[72]).

In many other instances, EPA withheld[73] or redacted[74] internal communication regarding media coverage or inquiries, without explaining how producing the communication would reveal

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[67] *See* document # 736, FOIA production, Release 2 Part C, available at www.epa.gov/epafoia1/docs/Part-C-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf (visited, Sept. 11, 2013).

[68] Respectively *see, e.g.,* doc. ## 62 (in Release 2 Part A), 4418 (in Release 2 Part E), 1131, 4026 (Release 3 Part KK) redacted in its entirety. The document releases are available at EPA's "Frequently-Requested Records" page, available at www.epa.gov/foia/frequent.html and at www.epa.gov/epafoia1/frequent.html (visited, Sept. 11, 2013).

[69] *See* docs. ## 1975, 3624, 3627, in Release 3 Part MM, available at www.epa.gov/epafoia1/docs/Part-MM.pdf.

[70] *See* doc. # 4131, in Release III, Part KK, available at www.epa.gov/epafoia1/docs/Part-KK.pdf (visited, 9/11/13).

[71] *See Vaughn Index – Every 10th (Withheld in Full Documents)* (Docket No. 24-5), Power Point attachment to doc. # 4359 titled "show9949 final.ppt", both the email and focus group results withheld in full.

[72] *Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1976) (survey results not protected); *Rashid v. HHS*, No. 98-098, Slip Op. at 13-14 (D.D.C. Mar. 2, 2000) ("The results of research are factual and not deliberative information")

[73] *See, e.g., Vaughn Index – Every 10th (Withheld in Full Documents)* (Docket No. 24-5), doc. #18 (withholding "internal email chain, consisting of three emails, from an employee in the Office of External Affairs and Environmental Education, to Administrator Lisa Jackson discussing the outcome of a call with the White House Press office related to an interview request from a New York Times reporter. . . Release would have a chilling effect on the Agency's ability to have open and frank discussions among its staff and may harm the Agency's decisionmaking by chilling the open discussion of issues and approaches to communicating with the press, and the ability to coordinate with the White House"); #1220 (withholding email thread regarding PR-related question from regional administrator; "The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the advice and deliberations of EPA's management in formulating a decision about public representation of the Agency").

[74] *See, e.g., Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6), Docs. #148 ("public representation of an agency"); #1019 (general "public affairs and public outreach"); #1307 ("discussing the press article and possible agency responses"); # 2834 ("Media inquiries" and "how to respond to potential inquiries"); #293 ("public stance"/"draft op-ed piece"/"formulating a decision about the public communications. . .of the agency"); #3915 ("publishing a blogpost"); #4305 ("How to respond to the news article"); *see also Vaughn Index – Every 10th (Withheld in Full Documents)* (Docket No. 24-5), doc. ##4400, 6859 (blog post), #4431 ("Wall Street Jounal" [sic] article); *Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6), Docs. #293 ("op-ed").

any deliberations about developing agency policies. For example, it redacted one merely because it discussed "whether to accept the interview request" from a reporter.[75] (Oddly, EPA cited not just Exemption 5, but purported privacy interests as well, to redact such communications, like comments about a run-of-the-mill CNN story about climate-change issues).[76]

The largest class or certainly one of the largest classes of withheld information appears to be emails discussing media coverage of EPA actions,[77] including releasing "Google News Alerts" for "Lisa Jackson" but withholding the entirety of discussions about them.[78] EPA also

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[75] *See Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6), docs. # 2243 ("official public responses" to Media query and even "whether to accept the interview request") ("Document EPA-2243 contains an internal email chain, among staff in the Office of External Affairs and Environmental Education, the Director of Operations, and Administrator Lisa Jackson discussing the an interview request from a US News and World Report reporter. Internal portions of the e-mail discussing the request, including recommended options and approaches, have been withheld. . .The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the analyses, advice, and deliberations of EPA's management when deliberating about official public responses. These communications were pre decisional because they reflect the decisionmaking process related to whether to accept the interview request, and how and when to communicate with the public about developing Agency actions."); *cf. id.,* doc. 293 (similarly dubious invocation of privilege as to discussion of "decision of who to send to speak" at a speech).

[76] *See, e.g., Freedom of lnformation Act Request HQ-FOI-01268-12, Competitive Enterprise Institute v. EPA*, C.A. No. 1:12-cv-01617, *Second Release (02-15-13)* at docs. ##540-541, pp. 52-58 (invoking both Exemptions 5 and 6) (www.epa.gov/foia/docs/Part-C-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf).

[77] A non-exclusive sampling of such withholdings includes produced, redacted docs. ## 28, 29, 30, 35, 47, 51, 52, 62, 64, 82, 83, 84, 126, 134 135, 136, 189, 198 , 244, 251, 252, 267, 272, 274, 277, 286, 322, 323, 324, 332, 341, 349, 354, 355, 363, 374, 375, 378, 398, 421, 423, 424, 425, 429, 432, 433, 434, 436, 441, 453, 465, 493, 517, 518, 523, 527, 539, 548, 605, 609, 610, 615, 619, 627, 682, 744, 745, 746, 751, 752, 762, 779, 794, 825, 845, 848, 862, 879, 882, 892, 894, 942, 954-957, 962, 963,, 988, 1005, 1006, 1019, 1020, 1034, 1035, 1057, 1067, 1071, 1082, 1083, 1088, 1089, 1092, 1101, 1108, 1133, 1150, 1151, 1154-57, 1167, 1168, 1175, 1176, 1177, 1191, 1192, 1193, 1194, 1200, 1215, 1216, 1227, 1243, 1277, 1279, 1298, 1307, 1308, 1334, 1335, 1337, 1340, 1341, 1342, 1369, 1371, 1491, 1493, 1495, 1496, 1497, 1503, 1507, 1516, 1517, 1518, 1608, 2643, 2657, 2679, 2680, 2702, 2709, 2745, 2678, 2747, 2751, 2762, 2791, 2818, 1933, 1976, 1977, 1978, 1979, 1980, 1981, 2020, 2027, 2055, 2056, 2059, 2062, 2083, 2097, 2140, 2203-05, 2231, 2236, 2348, 2407, 2408, 3983, 3985, 3986, 3987, 3988, 4001, 4004, 4009, 4013, 4016, 4038, 4043, 4072, 4073, 4082, 4097, 4144, 4145, 4146, 4147, 4153, 4159, 4174, 4175, 4193, 4256, 4266, 4267, 4286, 4287, 4288, 2085, 2086, 2087, 3748, 5663, 5715, 5441, 4878. *See* EPA, *Frequently-Requested Records: Freedom of lnformation Act Request HQ-FOI-01268-12, Competitive Enterprise Institute v. EPA, C.A. No. 1:12-cv-01617* (www.epa.gov/foia/frequent.html) (releases in FOIA production).

[78] *See Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6) docs. ## 45, 57, 77, 79, 80, 81 310, 619, 620. 623, 683, 1090, 4270.

withheld commentary about an op-ed by an elected official,[79] and on a proposed piece of legislation (as opposed to on an Agency regulation).[80] One example of such withholding of commentary on reporters or their stories on EPA as "deliberative" is mocked by the response of copied recipients of emoticon ":)" and "lol! got it!"[81]

But even draft responses to press inquiries that contain agency rationales are not protected by Exemption 5 when they pertain primarily to past developments or agency actions, rather than to developing agency policies. *Fox News Network, LLC v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 279 (S.D.N.Y. 2012) (holding them unprotected); *see Jordan v. U.S. Dept. of Transportation*, 591 F.2d 753, 774 (D.C. Cir. 1978)(To be privileged, communication must be "antecedent to the adoption of an agency policy"). While it is may be true that such communications in response to media inquiries reveal agency officials' "discussion of issues and approaches to communicating with the press,"[82] and inherently reflect "a decision about public representation of the Agency,"[83] those are not a sufficient ground for withholding them, since what Exemption 5 aims to protect is discussion of policy, not PR.

Communications cannot be withheld if they have only a "peripheral" relation to "actual policy formulation," *Ethyl Corp.*, 25 F.3d at 1248; *accord In re Delphi Corp.*, 276 F.R.D. 81

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[79] *See* doc. # 458, Release 2 Part B, available at www.epa.gov/foia/docs/Part-B-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf (visited, Sept. 11, 2013).

[80] *See* doc. # 304, Release 2 Part B, *supra*.

[81] *See* Release 2, Part C, redacted doc. # 539, and unredacted responses in doc. ## 540, 541, all commenting on a CNN story (found at www.epa.gov/foia/docs/Part-C-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf) (visited, Sept. 11, 2013).

[82] *See Vaughn Index – Every 10th (Withheld in Full Documents)* (Docket No. 24-5), doc. #18 (withholding "internal email chain, consisting of three emails, from an employee . . .discussing the outcome of a call with the White House Press office related to an interview request from a New York Times reporter" because "release would have " the effect of "chilling the open discussion of issues and approaches to communicating with the press").

[83] *See Vaughn Index – Every 10th (Withheld in Full Documents)* (Docket No. 24-5), doc. #1220.

(S.D.N.Y. 2011). Yet the subjects EPA seeks to withhold information on – such as an employee deciding whether to "schedule a conference call" or talk to a reporter, or how to use one's "limited time" – have at best such a peripheral relationship (and probably none at all).

This is fatal to EPA's position, because the burden of proof is on the agency to prove both elements of the deliberative process privilege. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The agency must identify the larger policy-making process to which the document contributes. *See Access Reports v. Dept. of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991). Moreover, not every report or memorandum qualifies as deliberative, even when it reflects the author's views on policy matters. *See Hennessey v. U.S. Agency for Int'l Development*, No. 97-1133, 1997 WL 437998, *5 (4th Cir. Sept. 2, 1997) (determining that "report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5," *citing Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1420, 1437 (D.C. Cir. 1992)); *Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001) ("It is not enough to say that a memorandum 'expresses the author's views' on a matter [because the] role played by the document in the course of the deliberative process must also be established").

Less absurd, but still insufficient, are EPA's cursory rationales for withholding materials like communications in response to Congressional inquiries. Communications in response to Congressional queries are not protected where, for example, the communication "appears mostly to reflect decisions that had already been made." *Houser v. Blank,* No. 10-3105, Slip Copy, 2013 WL 873793, *3 (S.D.N.Y. March 11, 2013); *Judicial Watch v. HHS*, 27 F.Supp.2d 240, 245 (D.D.C. 1998) ("deliberative process privilege does not protect documents that merely state or explain agency decisions"). EPA does not show the communications about Congressional

hearings it withheld[84] or redacted[85] in its sample *Vaughn* Index went beyond such run-of-the-mill unprivileged communications. It was not enough for EPA to say that a communication was "part of an internal conversation reflecting the commentary of an EPA senior official,"[86] since officials' commentary or "views" are not protected absent a direct connection to "actual policy formulation" by the agency. *Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001) ("It is not enough to say that a memorandum 'expresses the author's views' on a matter [because the] role played by the document in the course of the deliberative process must also be established").

Similarly, merely discussing "whether to accept the call" from a member of Congress[87] was not privileged, contrary to EPA's claims, since that is just too "peripheral to actual policy

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[84] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents)*, doc. #804 ("Document EPA-804 contains an email from the Associate Administrator for the Office of Congressional and Intergovernmental Affairs to Administrator Lisa Jackson relating to a proposed call to the Administrator from Senator Diane Feinstein. EPA-804 was withheld in full. The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal conversation which reflects the analyses, advice, and deliberations of EPA's staff when deliberating about communicating with members of Congress. The information and advice provided were predecisional because they reflect the decisionmaking process related to whether to accept the call, and how to prepare for potential points of debate or discussion."); #1333 ("Document EPA-1333 is an email sent by Administrator Lisa Jackson to herself that contains a 2 page briefing document authored by a Deputy Associate Administrator for legislative affairs. The attachment contains information and advice regarding issues related to proposed upcoming meeting with Senator Jack Reed. EPA-1333 was withheld in full. The withheld information is protected under Exemption 5's deliberative process privilege because it is an internal briefing document which reflects the analyses, advice, and deliberations of EPA's staff when deciding about how to communicate with members of Congress").

[85] *See, e.g., Vaughn Index – Every 100th (Redacted Documents*) (Docket No. 24-6), docs. #3676 ("Commentary" possibly related to briefing for a hearing, not clear if it related to decisions already made, which often are the subject of Congressional hearings) ("Document EPA-3676 is an email string containing three messages related to testimony in a hearing. It originates with an email from the Special Assistant to the Senior Policy Counsel to the Administrator to Administrator Lisa Jackson and other senior staff, which she forwarded to other senior staff. The third, and most recent, message is the Associate Administrator for the Office of Congressional and Intergovernmental Relations's response The withheld material, consisting of one sentence and another phrase, is protected under Exemption 5's deliberative process privilege because it is part of an internal conversation reflecting the commentary of an EPA senior official; it does not represent an official Agency decision or policy."), #1768.

[86] *See id.*

[87] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents)*, Doc. #804 ("Document EPA-804 contains an email from the Associate Administrator for the Office of Congressional and Intergovernmental Affairs to Administrator Lisa Jackson relating to a proposed call to the Administrator from Senator Diane Feinstein. EPA-804 was withheld in full. The withheld information is protected under Exemption 5's deliberative process privilege

formulation." *See Ethyl Corp., supra*, at 1248. For the same reason, it is not enough for EPA to withhold a briefing document merely because it reveals EPA "deciding about how to communicate with members of Congress," without tying it to the development of agency policies.[88] *See National Security Archive v. FBI*, No. 88-1507, 1993 WL 128499, at **2-3 (D.D.C. Apr. 15, 1993) (briefing papers not protected).

EPA also wrongly withheld in their entirety documents that pertained at least in part to past events, rather than developing policies,[89] even though documents are only protected if they are "antecedent to the adoption of an agency policy,"[90] and the deliberative process privilege does not apply to factual statements underlying predecisional recommendations.[91] Agencies

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because it is an internal conversation which reflects the analyses, advice, and deliberations of EPA's staff when deliberating about communicating with members of Congress. The information and advice provided were predecisional because they reflect the decisionmaking process related to whether to accept the call, and how to prepare for potential points of debate or discussion.")

[88] *See Vaughn Index - Every 10th (Withheld in Full Documents)*, Doc. #1333.

[89] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents)*, Doc. #542 ("The email and attached 2 page draft document relate to the development of public statements for the occasion of the Agency's 40th Anniversary. EPA-542 was withheld in full. The withheld information is protected under Exemption 5's deliberative process privilege because it reflects deliberations over the content of a draft of a statement designed for the public about the Agency's accomplishments . . .Release would have a chilling effect on the decision-making process related to . . . public statements surrounding significant Agency milestones."); *See also* produced record docs. # 570, (redacted in its entirety some internally circulated ""snippets from Congressional testimony"); # 348 (redacting commentary about an interview already given); produced record doc. # 115 (fully redacted comments on a speech already given; produced record doc. # 406, withholding commentary about news coverage of a speech already given).

[90] *Jordan v. U.S. Dept. of Transportation*, 591 F.2d 753, 774 (D.C. Cir. 1978); *see Houser v. Blank,* No. 10-3105, Slip Copy, 2013 WL 873793, *3 (S.D.N.Y. March 11, 2013) (communications that "mostly . . . reflect decisions that had already been made" are not protected); *Badhwar v. U.S. Dept. of Justice*, 622 F.Supp. 1364, 1372 (D.D.C. 1981) ("There is nothing predecisional about a recitation of corrective action already taken").

[91] *Bilbrey v. U.S. Dept. of Air Force*, No. 00-0539, Slip Op. at 10-11 (W.D. Mo. June 30, 2011); *accord Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) ("the privilege applies only to the 'opinion' or 'recommendatory' portion of the report, not to factual information which is contained in the document."). For example, it does not apply to factual materials such as research or surveys relied upon in agency recommendations. *See Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1976) (survey results cannot be protected where they merely "provide the raw data upon which decisions can be made"); *Rashid v. HHS*, No. 98-098, Slip Op. at 13-14 (D.D.C. March 2, 2000) ("The results of research are factual and not deliberative information").

Yet EPA withheld things such as staff presentations. *See Vaughn Index – Every 10th (Withheld in Full Documents)*

cannot withhold entire documents simply by claiming that the facts are inextricably intertwined with protected views on matters of policy, without showing how the factual information could reveal protected material. *See API v. EPA*, 846 F.Supp. 83, 90-91 (D.D.C. 1994).

VI. EPA Improperly Relies on Blanket Assertions to Withhold Documents In Full, Rather Than Producing Them in Redacted Form, Violating Its Duty to Provide a Fact-Specific, "Detailed Justification" for Each Individual Document

EPA does not provide any individualized justification for withholding the fully-withheld documents in their entirety. Under 5 U.S.C. § 552(b), any "reasonably segregable" information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are "inextricably intertwined with exempt portions." *Trans–Pacific Policing v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C.Cir.1999) (court has "an affirmative duty to consider the segregability issue *sua sponte*."); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977). An agency must provide a "detailed justification," not just"conclusory statements" to demonstrate that it has released all reasonably segregable information. *Mead Data*, 566 F.2d at 261. "The government must show with reasonable specificity why a document cannot be further segregated." *Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); *see Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996) ("reasonable specificity" required). EPA has done nothing of the sort.

(Power Point attachment to doc. # 4359 titled "show9949 final.ppt", both the email and focus group presentation withheld in full). Privilege does not cover documents that merely apply pre-existing legal principles and rules. *See Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (Chief Counsel's "nonbinding" FSA's to field offices were not predecisional because they "constitute agency law"); *Nissei Sangyo, Ltd. v. I.R.S.*, No. 95-1019, 1997 U.S. Dist. LEXIS 22473, at **23-24 (D.D.C. May 8, 1997) (tax audit in which agency was merely "applying published tax laws to factual information regarding a taxpayer" not privileged); *Md. Coalition for Integrated Educ. v. U.S. Dept. of Educ.*, No. 89-2851, Slip Op. at 5-6 (D.D.C. July 20, 1992) (compliance "review" based on "existing policies").

Instead, in its *Vaughn* Index, EPA almost invariably recites the following mantra (without any "contextual description," *see Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999), that would explain its departure from the usual rule that a document must be produced in redacted form rather than entirely withheld):

> The withheld information does not contain reasonably segregable factual information. To the extent any of the withheld information contains facts, the facts reflect Agency deliberations. The selection of those facts was an integral part of the deliberations, and the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document.[92]

But "a blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability ... Rather, for each entry the defendant is required to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.'" *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90 (D.D.C. 2009), *quoting Wilderness Soc'y v. Dep't of Interior*, 344 F.Supp.2d 1, 19 (D.D.C.2004) (quoting *Animal Legal Defense Fund v. Dep't of Air Force*, 44 F.Supp.2d 295 (D.D.C.1999)).

But EPA "has not done this. Rather, it simply states that as to" virtually "all of the withheld documents," that the "information withheld ... is not reasonably segregable" because it is so inextricably "intertwined with" protected material that segregation is not possible. *Defenders of Wildlife, supra,* at 90-91. "This explanation is insufficient, because it 'does not "show with reasonable specificity why the documents cannot be further segregated' and

[92] *See, e.g.,* documents ## 18, 87, 161, 193, 255, 321, 447, 469, 542, 636, 728, 804, 829, 874, 1013, 1056, 1113, 1141, 1220, 1274, 1333, 1403, 1474, 1785, 1804, 1922, 1997, 2148, 2165, 2181, 2199, 2225, 2257, 2276, 2309, 2324, 2344, 2374, 2394, 2447, 2463, 2495, 2507, 2521, 2541, 2574, 2591, 2601, 2623, 2633, 2651, 2663, 2673, 2688, 2700, 2720, 2754, 2765, 2794, 2805, 2822, 2833, 2846, 2874, 2900, 2958, 2968, 2979, 2994, 3008, 3022, 3050, 3068, 3085, 3118, 3141, 3169, 3186, 3210, 3232, 3253, 3269, 3438, 3758, 3879, 3930, 4025, 4098, 4165, 4235, 4359, 4458, 4473, 6716 in *Vaughn Index - Every 10th (Withheld in Full Documents),* Docket No. 24-5; *see also id.* at ## 1085, 1524, 1984, 2108, 2118, 2287, 2736, 4323, 6617 (containing this passage to invoke deliberative-process privilege, as well as another boilerplate passage to invoke attorney-client privilege).

additional portions disclosed."'" *Id., quoting Hertzberg v. Veneman*, 273 F.Supp.2d at 90-91 (*citing Armstrong v. Executive Office of the President*, 97 F.3d 575, 578 (D.C.Cir.1996)). Such "boilerplate" explanations without an effort to "tailor the explanation to the specific document withheld" are insufficient. *Wiener v. FBI,* 943 F.2d. 972, 977–79 (9th Cir. 1991).

The exceptions to these boilerplate excuses for not producing the documents in redacted form, are where it provides no explanation *at all* – even of the boilerplate variety -- for withholding the document in full, rather than just redacting it.[93]

EPA's boilerplate non-segregability claims shed little light on its refusal to produce the documents in redacted form. For example, EPA withheld in full "a 2 page background briefing document. The attachment contains information and advice regarding issues related to consideration of a renewable electricity standard."[94] Although EPA claims that "the withheld information does not contain reasonably segregable factual information," it does not deny that "the withheld information contains facts," or explain why "the factual information contained therein is inextricably intertwined with the deliberative discussion concerning this document." Such briefing documents are commonly produced in FOIA litigation, and nothing about them as a category renders them subject to withholding in full. *See, e.g., National Security Archive v. FBI*, No. 88-1507, 1993 WL 128499, at **2-3 (D.D.C. Apr. 15, 1993) (briefing papers not protected). Similarly, EPA withheld in their entirety documents that pertained at least in part to past events, rather than developing policies.[95]

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[93] *See, e.g.,* documents ## 370 (pp. 6-7), #914 (pg. 14), #1651 (pp. 23-24), #1964 (pg. 26), #2054 (pp. 28-29), #2612 (pg. 46), #3994 (pg. 73), in *Vaughn Index - Every 10th (Withheld in Full Documents),* Docket No. 24-5.

[94] *Vaughn Index - Every 10th (Withheld in Full Documents)*, doc. # 87.

[95] *See, e.g., Vaughn Index - Every 10th (Withheld in Full Documents)* (Docket No. 24-5), document #542 ("The email and attached 2 page draft document relate to the development of public statements for the occasion of the

VII. EPA Has Not Explained Why It Could Not Produce the Fully Withheld Documents in Redacted Form, Given Its Manifest Ability to Redact and Produce Even the Tiniest Bits of Information to FOIA Requesters When It Wishes to Do So.

When it wishes to do so, EPA releases even the tiniest bits of documents, eliminating all substantive discussion among EPA employees, and leaving in nothing but the sender and recipients, date and time of transmission, and subject line, or portions thereof.[96] Similarly, it withheld almost everything in many other messages, such as redacting out the seven topics that a reporter was expected to raise with EPA.[97] Yet despite its ability to redact any conceivably sensitive material, it chose to withhold more than 1,400 documents in their entirety.

VIII. EPA Improperly Withholds Documents That Are Not "Inter-Agency" or "Intra-Agency" Communications as Required By Exemption 5.

Regardless of whether they would otherwise be privileged, communications are not protected by Exemption 5 unless they are between, or within, agencies covered by FOIA, *i.e.,* "inter-agency" or "intra-agency" communications. 5 U.S.C. § 552(b)(5)(Exemption 5 protects only "inter-agency or intra-agency memorandums or letters which would not be available by law

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Agency's 40th Anniversary. EPA-542 was withheld in full. The withheld information is protected under Exemption 5's deliberative process privilege because it reflects deliberations over the content of a draft of a statement designed for the public about the Agency's accomplishments . . .Release would have a chilling effect on the decision-making process related to . . . public statements surrounding significant Agency milestones.")

[96] For a non-exhaustive list of examples, *see* (1) The documents found in Release Two [(docs. ## 88, 97, 98, 189, 210, 211, 215, 221, 231, 241, 246, 249, 261, 273, 289, 290 (even part of "Subject" field redacted), 291, 294-5, 302, 303, 313-5, 327, 334-5, 339-40, 350, 353, 373, 376-7, 395, 422, 435, 437, 438, 440, 459, 471, 480, 482-5, 486, 487-8, 496, 500-01, 508, 512-5, 516) (available at http://www.epa.gov/epafoia1/frequent.html); and (2) The documents found in Release Three Part KK [(docs. ## 01268- 4002, 4007, 4026, 4034, 4035, 4045, 4050, 4069, 4070, 4071, 4076, 4103, 4123-26, 4131, 4133-37, 4141, 4150-52, 4161, 4164, 4189, 4196, 4198, 4202-3, 4207-10, 4227-8, 4231 (even "Subject" field redacted), 4260, 4260, 4264-5, 4269, 4297, 4299, 4302, 4304, 4308, 4313) (www.epa.gov/foia/docs/Part-KK.pdf). For examples in which only the tiniest bits of information were left (due to deletion of all substantive EPA employee discussion) other than forwarded information from outside the agency, *see* docs. ## 45, 57, 77, 79, 80, 81, 310, 1090, 4270 (all about "Google alerts" re "Lisa Jackson", which alert is what's released) 115 (commenting on a speech by another, already given, which is what's released).

[97] *See* document #77 (redacting after "These are areas the reporter may likely cover:"), image reproduced in William Yeatman, *What EPA Transparency Looks Like in Most Open, Honest Administration Ever*, GlobalWarming.Org, Feb. 22, 2013 (www.globalwarming.org/2013/02/22/what-epa-transparency-looks-like-in-most-open-honest-administration-ever/) (found in Release Two); *see also id.*, reproducing docs. 261, 241, 206, 207, 132, 97, 78, 57.

to a party other than an agency in litigation with the agency.") If a sender or recipient is not employed by a covered executive-branch agency, the communication is not covered by Exemption 5, even if it would otherwise be covered by the deliberative-process privilege. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *Center for Int'l Envtl. Law v. Office of the U.S. Trade Rep.,* 237 F. Supp. 2d 17, 25-27 (D.D.C. 2002)..

Yet EPA frequently improperly withholds communications under Exemption 5 even when they are exchanged with outside parties, such as lobbyists and representatives of public relations firms like Dewey Square and energy companies like BP.[98] Similarly, EPA frequently withholds documents as privileged without even indicating the identity of some senders or recipients, leaving it unclear whether the privilege has been waived by sharing it with people outside the agency.[99] That does not satisfy EPA's burden of proving that each element of the

[98] *See CEI v. EPA Draft Index of Withholdings 01268*, invoking deliberative process privilege in documents ## 1975 (communication with Minyon Moore of Dewey Square (mmoore@deweysquare.com), who is also a political operative); #3936 (copies sent to valerie.corr@bp.com, and ronald.rybarczyk@bp.com), ## 3624, 3627 (shared with Maggie Moran, a PR specialist and Democratic political operative), #1055 (copies Dan Ryan dryan0@msn.com); #1968 (copies John Watson in New Jersey); #3628 (shared with Adam Zellner with Green by Design); #4927 (copies mbrueger@nwlink.com); #4006 (sent only to Phaedra Ellis Lamkins @greenforall.org, an environmental pressure group); #4827 (copies Harold Varmus "@mskcc.org" , in July 2009, a year before he assumed his government post); #4831 (copies to Varmus, in July 2009, a year before he assumed his government post, and to Carnegie Mellon University's Deborah Stine, a private address), #5495 (copies Joe Aldy at Harvard).

The suspect nature of EPA's privilege claims is illustrated by EPA's claiming privilege for what is in essence a discussion of how to help a company grow its business. See doc. #367, in FOIA production, Release 2, Part B, /www.epa.gov/epafoia1/docs/Part-B-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf. This communication with a self-interested outside party cannot be privileged. *See Merit Energy v. Dept. of* Interior, 180 F.Supp.2d 1184, 1191 (D. Colo. 2001).

[99] *See, e.g.,* documents ## 475 (sole recipient redacted and blacked out despite claim of deliberative-process privilege), 710 (sole author redacted), 218 (two recipients redacted), 220 (four recipients blacked out); 289 (one recipient redacted), 477 (one recipient redacted), 709 (same), 812 (same), 833 (same), 1709 (same), 1710 (same), 1903 (two recipients redacted), 1907 (one recipient redacted), 1967 (same), 2158 (same), 2357 (three recipients), 2898 (two recipients), 2960 (one recipient), 4827 (same), 4831 (same), 4832 (same), 4837 (same), 4926 (3 recipients), 4927 (6 recipients) in *CEI v. EPA Draft Index of Withholdings 01268* (available at the links in footnote 38). *See also* document # 2766 (listing recipient Sam Myers, who does not appear in EPA's employee directory, with email address redacted, making it unclear if the recipient is EPA employee).

deliberative process privilege applies. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

IX. EPA Improperly Withholds on Privacy Grounds the Identity and Email Addresses of Authors and Recipients of Messages That Are a Matter of Public Interest.

In many other cases as well, EPA has redacted, or simply not listed, all[100] or some[101] of the recipients (or senders) of a message, citing FOIA's privacy exception, Exemption 6. This is improper, both because their identities can be a matter of public interest, and EPA has not even shown that they have a reasonable expectation of privacy. To justifying withholding this information, EPA must show that its release "would constitute a clearly unwarranted invasion of the person's privacy," and, if so, "balance the individual's privacy interest against the extent to which FOIA's central purpose of opening agency action to public scrutiny would be served by disclosure." *Electronic Frontier Foundation v. Office of the Dir. of Nat. Intelligence*, 639 F.3d 876, 886 (9th Cir.2010) ("*EFF*").

If the redacted recipients were lobbyists,[102] for example, that would obviously be of public interest and thus not exempt from disclosure. *See EFF*, 639 F.3d at 887-89 (emails with lobbyists were covered by FOIA, in light of the "public's interest in knowing which politically active groups affect government decision making," and "obtaining information about the effects

[100] No recipients are listed in the index of withheld documents, for the following listed documents: ## 5, 6, 26, 27, 72, 89, 90, 92, 109, 142, 143, 154, 155, 171, 179, 236, 281, 338, 361, 396, 402, 417, 449, 464, 506, 510, 520, 522 (all four recipients redacted), 594, 663, 669, 791, 798, 802, 807, 877, 881, 938, 978, 1014, 1016, 1233, 1402, 1476, 1544, 1580, 2178, 2893. *See CEI v. EPA Draft Index of Withholdings 01268.* All recipients are redacted for others. *See* documents ## 186, 218, 220, 289, 522 (all four recipients redacted), 669. No sender was listed, or the only author was redacted, for documents ## 669 and 2881. EPA has cited Exemption 6 for these withholdings.

[101] *See, e.g.,* documents ##1927 (redacting a recipient), 1928 (same). 2357 (four recipients, although one is listed as an EPA employee). *Cf.* #2176 (deleting email address of former EPA official McCabe who may now be lobbyist).

[102] This is not a fanciful hypothetical. *See, e.g.,* Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Wash. Times, Aug. 14, 2013, at A1 (former EPA Administrator communicated with lobbyist for Siemens via private email); *see* document #3168, Fifth Release Part A, p. 64, www.epa.gov/foia/docs/Fifth_Release_Attachments_Part_A.pdf.

of lobbying on government decision making," and "the methods through which well-connected" lobbyists use to wield that influence; "With knowledge of the lobbyists' identities, the public will be able to determine how the Executive Branch used advice from particular individuals and corporations in reaching its own policy decisions.").

Similarly, emails sent by EPA employees from non-official email addresses (and their identities) are not covered by Exemption 6. EPA employees' use of personal email accounts to conduct agency business – which can violate the Federal Records Act and in some cases lead to violations of FOIA -- is currently a matter of keen public interest, news coverage, and Congressional inquiries.[103] The level of public interest in that topic is far greater than in other, more mundane topics that the courts have held to be of sufficient import for disclosure, like the relocation incentives paid by a single office of an agency. *See, e.g., Yonemoto v. Department of Veterans*, 686 F.3d 681, 698-99 (9th Cir. 2012) ("there is a strong public interest in the primary substance of this email: how much the Honolulu VA has to pay to relocate employees it hires from other locales . . . and the possible effects of those incentives on hiring decisions.").

Yet EPA has routinely redacted the names and non-official email addresses of EPA

[103] *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 (discussing how CEI's Christopher Horner "exposed former EPA chief Lisa P. Jackson's private email account" and those of other EPA officials; and how "several congressional committees looking into the EPA also discovered other agency officials using personal emails to conduct government business - a violation of the Freedom of Information Act"; "The EPA's internal auditor also is looking into how well the agency is complying with the law."); Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Wash. Times, Apr. 9, 2013, at A4 ("The Environmental Protection Agency said Monday that it will retrain all employees on how to comply with open-records laws and acknowledged that it needs to do better at storing instant-message communications, after the agency came under severe fire from members of Congress who say it appears to have broken those laws. . . acting administrator Bob Perciasepe singled out emails and instant messages as areas where the Environmental Protection Agency needs to do a better job. He warned that the agency's auditor is looking into how well they are complying" in "an admission that the agency has fallen short on its obligations."); Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Wash. Times, Apr. 2, 2013, at A1 ("EPA officials were using private email addresses to conduct official business"; "James Martin, who at the time was administrator of EPA's Region 8, used his personal email account to collaborate with the Environmental Defense Fund about where hearings on agency greenhouse gas rules could be held for maximum effect.").

employees in its index of withheld documents, which consists of work-related agency records responsive to plaintiff's FOIA request.[104] For example, EPA has redacted the personal, non-official email addresses of high-ranking EPA employees (like the EPA Administrator, and Deputy Administrator Perciasepe) who sent or received work-related emails (in violation of EPA policy) using such private email accounts without cc:ing their work-related account, even though those accounts were used to transmit emails that are the subject of deliberative-process-privilege claims by EPA.[105] This withholding makes it more difficult, if not impossible for subsequent FOIA requests and requesters to identify those non-official accounts to request work-related emails and agency records found in them.

While the public interest in this topic outweighs whatever privacy interest EPA employees might have in their personal email addresses, there is also no reasonable expectation of privacy in such emails in the first place, since the use of such personal email accounts for work-related correspondence explicitly violates agency policy, and such emails' release thus

[104] For examples of EPA non-official email addresses being redacted, *see Vaughn Index - Every 10th (Withheld in Full Documents)* (Docket No. 24-5) at pp. 38, 51, docs. # #2361 (Allyn Brooks-Lasure), #2720 (Michelle DePass) *see also CEI v. EPA Draft Index of Withholdings 01268*, showing such communications, for the following employees (with the document numbers listed): Michelle DePass (## 159, 491, 492, 2421, 2539, 272-22, 4671, 4774, (also, #s 2720-3, also raising the question whether "mdpnyc" is also DePass), Mathy Stanislaus (133, 254, 255, 2720-22), Megan Cryan (220), Diane Thompson (658, 3125, 4735), Seth Oster (718, 1000, 1751, 1752, 2854, 2855, 2896, 3347, 3348, 3349, 3350, 3483, 3664, 3893-96, 4204, 4305, 4518, 4519, 4521, 4522-24, 6838), Bob Perciasepe (770, 1501, 3831, 3832, 5324, 5653, 5983), Perciasepe also still using bperciasepe@audobon.org at #704, David McIntosh (1915, 3636), Allyn Brooks-Lasure (94, 1912, 2298, 2299, 2361, 6209), Robert Goulding (1967, 2131), Glenn Paulson (7337), Michael Moats (2650, 2671, 3294, 3435, 3693, 4229), David Cohen (846 [cohen1207]; 4256), Paul Anastas (3104, 5056), Judith Enck (7097, 7174).

[105] *See, e.g. Vaughn Index - Every 10th (Withheld in Full Documents)* (Docket No. 24-5) at pp. 31-32, 38, 51, documents ##1927-28, 2361 (Allyn Brooks-Lasure), (withholding emails as covered by deliberative-process privilege, and thus allegedly work-related), #2720 (Michelle DePass); *see also* documents ## 491, 492, 2421 (Michelle DePass) (withholding emails as covered by deliberative-process privilege, and thus allegedly work-related), 133, 254, 255, 2720, 2722 (Mathy Stanislaus) (same), 220 (Megan Cryan)(same), 658 (Diane Thompson) (same), 718, 1000, 1751, 2854-55, 2896 (Seth Oster)(same), 770 (Bob Perciasepe)(same), 2158 (unknown), 2162, 2164, (EPA Administrator Lisa Jackson), 1915 (David McIntosh), 2671 (Michael Moats,, in *CEI v. EPA Draft Index of Withholdings 01268. See also, e.g.,* document ## 1907 (sent to both personal and official email accounts for David McIntosh), 2650 (sent to both personal and official email accounts for Michael Moats).

"would" not "constitute a clearly unwarranted invasion of the person's privacy." *See EFF*, 639 F.3d at 886. Instead, there is a strong public interest in exposing such violations.

And these are violations. "*EPA prohibits the use of non-EPA E-Mail systems when conducting agency business*. This guidance is stated in Agency Records Training, New Employee Orientations, and Briefings for Senior Agency Officials."[107] Breaches of such agency regulations are themselves a matter of public concern, making their concealment through redactions of email addresses especially unwarranted.[108] EPA's guidance for employees about how to comply with the Federal Records Act and agency regulations emphasizes that emails sent by agency employees should be preserved in the agency's public records even if they are sent using a non-official email account, and that the senders and recipients of such messages should not be deleted: EPA instructs employees to not "use a non-EPA account to send or receive EPA e-mail," to "not use any outside e-mail system to conduct official Agency business"; and, if an employee nevertheless decides to "use a non-EPA e-mail system," the employee must ensure "that any e-mail records and attachments are saved in" the employee's "office's recordkeeping system," including retaining "data about the sender, received, date, and time of the email," which means that the employee is forbidden to "delete the names of the sender and addressee."[109]

EPA also routinely withholds the names of its own employees, citing Exemption 6, without explaining why this is needed to protect their privacy, or why these putative privacy

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[107] *See* April 10, 2013 letter to Assistant Administrator Gina McCarthy from Rep. Darrell Issa and Sen. David Vitter at 3 & n.18 (www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=a7f9b814-27e6-467b-9a9d-0aa5acd9650f), *quoting* EPA, *NRMP Alert: Do Not Use Outside Email Systems to Conduct Agency Business*.

[108] *See, e.g., Knapp v. Whitaker*, 757 F.2d 827, 840 (7th Cir. 1985) (violation of agency policy about mileage allowances was matter of public concern, as was misleading failure to disclose agency policies).

[109] EPA, *Frequent Questions about E-Mail and Records*, available at www.epa.gov/records/faqs/email.htm. *See also* EPA, *Maintaining and Disposing of Federal Records*, *www.epa.gov/records/tools/disposing.htm* ("E-Mail messages" constitute federal records subject to Federal Records Act and agency recordkeeping requirements).

interests are not be outweighed by the public interest in the subject of the underlying email (indeed, EPA does not even list the subject line for these emails).[110] *Compare EFF*, 639 F.3d at 886 (must show that it "would constitute a clearly unwarranted invasion of the person's privacy") (emphasis added).

Similarly, EPA repeatedly withholds the (apparently official) email address of former EPA Administrator and Presidential advisor Carol Browner on the grounds that this is necessary "to avoid potential unsolicited communications; the personal privacy interest of the individuals in this case, and to prevent possible burden of unsolicited email."[111] However, Browner left her position more than one year before Plaintiff even filed its FOIA request, and faces no threat of receiving unwanted emails at her government email address. As such, there is no reason to refuse to disclose this presumably public but now inactive email address. On the other hand, if it is not a public email address, and she instead used unofficial email accounts for public business upon her return to government, EPA has no justification for concealing that. Indeed, what accounts Ms. Browner used upon her return to government is of considerable public interest, since her emailing and document retention practices, which involved destruction of her computer hard drive in violation of a court order, were previously the subject of a costly, major investigation and litigation. *See Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70 (D.D.C. 2003).

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[110] EPA redacts the identities of putative EPA staff while leaving the EPA domain of the email address in the document. *See* documents ## 220 (three employee identities redacted), 475, 1715-1746 (31 successive emails), 1780, 1789, 1799, 1800, 1801, 1818, 1819, 1823, 1842, 1843, 1844, 1850, 1851, 1852, 1855, 1857, 1858, 1863, 1886, 1889-1897 (8 successive emails), 2130, 2136, 2357, 2475, 2609, 2639, 2695, 2894, 2898 (two employee identities redacted), 3160, 3263, 3272, 3277, 3306, 3309, 3329, 3368, 3369 (four employee identities redacted), 3370, 3450, 3461, 3470, 3532, 3727, 3737, 3738, 3762, 3767, 3771, 3772, 3828, 3979, 4027, 4080, 4242, 4283 (two employee identities redacted), 4554, 4706, 4742, 4743, 4745, 4754, 4764, 4874, 4924, 4926, 4985, 5214, 5215, 5485, 5487, 6018. *See CEI v. EPA Draft Index of Withholdings 01268* (listing these documents).

[111] *See, e.g., Vaughn Index – Every 100th (Redacted Documents)* (Docket No. 24-6), docs. ## 4860, 5530

X. EPA Has Not Justified Its Large-Scale Redaction of Many Documents

An agency cannot redact documents without providing an individualized justification for the particular document, the particular redactions made, and why the specific redactions were necessary. *See Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999) (agency's *Vaughn* Index must apply statutory standards for exemption "to the specific facts of the documents at hand," giving a "contextual description" of "the documents subject to redaction" and "the specific redactions made to the various documents.").

The largest class of redactions, including often the entirety of discussion and equally often nearly the entirety, is discussion about media coverage of EPA,[112] hardly a sensitive topic within the heartland of the deliberative-process privilege. *See Fox News Network, LLC v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 279 (S.D.N.Y. 2012) (holding draft response to press inquiry unprotected). For example, the perfunctory forwarding of an automatically-transmitted "Google Alert" regarding outside media coverage of an individual has too little connection to agency policy to qualify as privileged.[113] *Compare Fox News*, 911 F.Supp.2d at 279 (draft response to media inquiry was not privileged, even though that response revealed far more about agency officials' mental impressions than receipt or transmittal of a Google alert or news clippings would reveal about EPA officials' thinking in this case). "In other FOIA releases, EPA

[112] The following non-exhaustive examples come from a review of Release Two, in which all or virtually discussion of media coverage or certain reporters was redacted. *See* docs. ## 29, 47, 52 (this being one of a series of related correspondence threads all similarly redacted in full or near-full), 62, 64, 78, 80, 81, 310, 1090, 4270 (all about "Google alerts" re "Lisa Jackson", which alert is what's released, while surrounding material is redacted), 82, 83, 84, 96, 136, 189, 200-204, 206, 207, 241, 244, 251-2, 267, 274, 277, 301, 304, 310, 322-4, 354, 360, 363, 372, 374-5, 378, 398, 421, 423-4, 425, 429-30, 441, 442-4, 453, 458, 465, 493, 509, 517.

[113] *Compare* docs. ## 62, 64, 78, 80 81, 310, 1090, 4270 (all about "Google alerts" re "Lisa Jackson")
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has redacted the entire email message, including the subject, the text and signature block by repeatedly claiming deliberative process under exemption."[114]

When it fails to provide such an individualized justification for redactions, summary judgment will be denied, even when (as is not true for the documents at issue in this case) review of the document itself makes "fairly clear" that the redacted material "related to the asserted exemption," since "the government's failure to include this detail in its affidavit undermines one of the key purposes of [a] *Vaughn* [Index] by shifting to the courts the burden to wade through pages of material in search of contextual support for the government's own redactions." *Halpern*, 181 F.3d at 294.

CONCLUSION

For the foregoing reasons, this Court should deny EPA's motion for summary judgment, and order EPA to reprocess all of the documents it has withheld or redacted and provide a *Vaughn* Index for all withheld documents.

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Respectfully submitted,

By: */s/ Hans Bader*

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[114] *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered,* at 23, c*iting* Part A, Release 2 - HQ- FOI-01268-12, Email from Allyn Brooks-LaSure to Richard Windsor (Apr. 15, 2009, 01268-EPA-97); Email from Seth Oster to Richard Windsor (June 24, 2009, 01268-EPA-207); Email from Scott Fulton to Richard Windsor (Aug. 15, 2009, 01268-EPA-261), http://www.epa.gov/foia/docs/Part-A-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf ; Part C, Release 2 - HQ-FOI-01268-12, Email from Seth Oster to Richard Windsor (Jan. 20, 2010, 01268-EPA-527); Email from Seth Oster to Richard Windsor (Jan. 8, 2010, 01268-EPA-518); Email from Arvin Ganesan to Richard Windsor (Feb. 24, 2010, 01268-EPA-548), www.epa.gov/foia/docs/Part-C-HQ-FOI-01268-12-ReleaseRedact-NoAttachments-Production-2.pdf .