

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE)
1899 L Street, N.W., 12th Floor)
Washington, D.C. 20036)

Plaintiff,)

v.)

Civil Action No. 13-1532

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)
1200 Pennsylvania Avenue, N.W.)
Washington, D.C. 20460)

Defendant.)

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND WRIT OF MANDAMUS**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action to enjoin and prevent the destruction of certain EPA text message transcripts (“texts” or “text messages”), by EPA pursuant to a policy and practice that violates the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Records Act (“FRA”).¹
- 2) On April 26, 2013, CEI submitted a FOIA request seeking text messages created on an account associated with an EPA-assigned personal digital assistant or personal data assistant (PDA), and sent or received by then-Assistant Administrator for Air and Radiation Gina McCarthy, on eighteen specified dates (Ms. McCarthy has since been promoted to EPA

¹ See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*

Administrator). On August 19, 2013, after obtaining documents indicating former EPA Administrator Lisa P. Jackson sent/received EPA-related text messages on May 27, 2010, CEI submitted another request for copies of text messages, this time for “copies of all EPA-related text messages sent and/or received by” Jackson on that date.²

- 3) Defendant EPA has not provided any of the records responsive to either FOIA request. Instead, it has destroyed them, as part of a policy and practice of destroying such records, in violation of the FRA and FOIA; as a result, it has been unable to locate any such texts in response to plaintiff’s FOIA requests.³ That is so even though both of the above EPA officials sent such text messages on EPA-provided accounts/devices assigned to them for EPA business.
- 4) EPA has produced documents revealing that Ms. McCarthy sent/received many thousands of text messages using her EPA-provided PDA, none of which EPA preserved. (This information was produced in response to a separate FOIA request seeking phone bills related to Ms. McCarthy’s text messages.⁴ Plaintiff has not obtained any billing information regarding Ms. Jackson’s account(s)).

² See FOIA request HQ-2013-009235.

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

⁴ See document sent by EPA to plaintiff’s counsel attached to July 26, 2013 email to Chris Horner, with PDF file bearing title “202-596-0247 - Text bill - Jul 09-June 12.pdf,” produced in response to FOIA Request HQ-2013-006937, which sought certain text-related phone bills and invoices. That document provided metadata showing 5,392 text messages during billing periods from July 2009 to July 2012.

- 5) Text messaging is provided to certain EPA officials as an alternative medium of communication to email, specifically for the purpose of enabling performance of official functions. For example, former EPA Administrator Lisa Jackson used her text messaging function to discuss a potential green-jobs opportunity for a “cotton absorbent company” whose CEO she apparently met at a “Climate Rally.”⁵ But when plaintiff recently sought those very text messages referenced in an email obtained under FOIA and addressed to Jackson in her capacity as “Administrator Jackson,” EPA issued a “no-records” response. This reflected that the texts, which like email are “created” when sent or received, were destroyed by EPA. Worse, EPA indicated in response to plaintiff that text messages were not preserved, despite their obvious relation to EPA’s work, on the grounds that such communications are “unrecord material not subject to the Federal Records Act,”⁶ and that it is EPA’s position that this allows Agency officials to destroy their correspondence.
- 6) These representations notwithstanding, texts sent by EPA officials using devices provided by the agency are in fact “agency records” under federal record-keeping and disclosure laws, just like email.⁷ Like emails, their transmission and content are of significant public interest,

⁵ See Email from EPA Administrator Lisa Jackson using her EPA “Richard Windsor” account to Aaron Dickerson, 6/4/2010 3:36 PM, enclosing email from Michael Martin to Aaron Dickerson, May 27, 2010, at 18:43:30 (“Administrator Jackson and I had txt’d this am about” a green-jobs opportunity for a “cotton absorbent company” Jackson had met at “the Climate Rally”). This email can be found in *Freedom of Information Act Request HQ-FOI-01268-12*, Fourth Release (04/15/13), Part C, on the 22nd of 508 pages in that document, which is currently available at www.epa.gov/epafoia/docs/Release-4-Part-C.pdf (visited 10/2/2013). It is one of the releases of documents in response to a FOIA request that is currently found on EPA’s *Frequently Requested Records* page, available at www.epa.gov/epafoia/frequent.html.

⁶ See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, at 1 (“no records exist” responsive to request HQ-2013-009235 for “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010”; agency claims that “not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example your provide certainly suggest unrecord material not subject to the Federal Records Act.”)

⁷ See *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm (“Common Agency records maintained on Mobile Devices include e-mail . . .and any other information related to

especially due to EPA's recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests for specified "records" and "electronic records" in particular.

- 7) Plaintiff CEI states on information and belief that a senior Agency official cautioned Ms. McCarthy to cease sending text messages due to concerns about the propriety of her texting about Congressional oversight efforts specifically on days when she testified before either the House or Senate. This information prompted plaintiff's first request for text messages sent or received on those eighteen dates she appeared before one or the other body.
- 8) EPA practice of destroying this entire class of records is illegal, regardless of what medium of communication it applies to. "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an

your work at EPA. . . Records created on your Mobile Device should be transferred to your office's recordkeeping system on a regular basis. . . **Is the information on my Mobile Device subject to FOIA . . . ?** Yes, information on your Mobile Device may be requested under FOIA or in response to litigation. **My Mobile Device was not provided by the Agency. Do these rules still apply to me?** Yes, if you have Agency records on a personally-owned Mobile Device, they still need to be captured in an approved recordkeeping system."); 44 U.S.C. § 3301 (records include "all. . . machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them."); 36 C.F.R. 1236.22 ("electronic mail records" covered; "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved"); *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1284, 1288 (D.C. Cir. 1993) ("electronic communications systems contain preservable records" covered by the Federal Records Act," and "do produce federal records"); *id.* at 1288 ("agencies have an obligation . . . to undertake periodic [compliance] reviews to assure that" record preservation procedures "are being adhered to," requirements that "apply to all electronic systems used by agency employees to create electronic records, not just . . . to 'official' agency electronic records systems . . . defendant agencies must undertake some periodic review of their employees' electronic recordkeeping practices."); *Landmark Legal Foundation v. EPA*, 2013 WL 4083285, *5 (D.D.C. Aug. 14, 2013) (denying EPA summary judgment in FOIA case where EPA did not search the individual "email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff,"; noting "the possibility. . . that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA.").

entire set of” electronic or “email documents” generated by high-ranking officials like Gina McCarthy over a multi-year period.⁸

- 9) EPA has failed to preserve these documents despite previously being warned by the courts to stop deleting and destroying electronically-stored information and other documents. *See, e.g., Union Pac. R.R. Co. v. U.S. Envtl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA from deleting or destroying any potentially relevant electronically-stored information, and also ordering EPA to identify, collect, and preserve such information relevant to company’s FOIA request as well as designate an expert on electronically-stored information to “insure the enforcement” of the temporary restraining order, in light of evidence that “the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific's FOIA request”; eight emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company's FOIA request).⁹
- 10) Since the text messages at issue were sent by the EPA’s current administrator and her predecessor, these records and whether EPA fulfilled its obligation to maintain and to produce them are of significant public interest. This is especially true given that these officials were the officials specifically charged with responsibility for ensuring that recordkeeping laws were complied with, and therefore presumably were aware of this system under which their own correspondence was being destroyed.

⁸ *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

⁹ *See also Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285 (D.D.C. Aug. 14, 2013) (judge denied EPA summary judgment based on “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.*, as well as the “possibility that EPA engaged in ... apparently bad faith interpretation” of a FOIA request. *Id.* at *6); *Union Pacific R. Co. v. U.S. E.P.A.*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

- 11) Despite the above, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications,¹⁰ EPA has failed to preserve these documents (as required by the Federal Records Act), much less to produce them in response to FOIA requests. EPA has failed to preserve these documents despite previously being warned by the courts to stop erasing and failing to preserve documents.
- 12) Accordingly, plaintiff files this lawsuit to compel EPA to comply with the law.

PARTIES

- 13) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources. CEI regularly files, and

¹⁰ See, e.g., *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”); *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 (“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”); *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 . . . 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 [open-government] laws” in an apparent “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.”).

will continue to file, FOIA requests with EPA, as part of this initiative, as is illustrated by a number of such cases on this Court's docket.¹¹

- 14) Defendant EPA is a federal agency headquartered in Washington, D.C. whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

- 15) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question (as do resolution of disputes under the Federal Records Act; the Administrative Procedure Act; and the Mandamus Act, all of which are applicable in this case. This court also has jurisdiction of the mandamus claim pursuant to 28 U.S.C. § 1361).
- 16) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

FURTHER FACTUAL BACKGROUND

- 17) EPA has not provided any records in response to CEI's FOIA request for former Assistant Administrator (and current EPA Administrator) McCarthy's text messages or former Administrator Jackson's text messages.
- 18) EPA has also not provided any text messages in response to congressional requests for certain described "all records" or "all electronic records".
- 19) This is despite the fact that transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will "be administered with a clear presumption: In the face of doubt, openness prevails" (*See* Attorney General Eric Holder, *OIP Guidance*,

¹¹ *See, e.g., Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil actions ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074 (all involving FOIA requests to EPA by plaintiff).

President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government", www.justice.gov/oip/foiapist/2009foiapist8.htm; Memorandum for the Heads of Executive Departments, www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.)

Plaintiff CEI's FOIA Request for Certain Specified Text Messages of Gina McCarthy (EPA-HQ-2013-006005)

20) On April 26, 2013, CEI submitted a FOIA Request by electronic mail, seeking:

copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency, on the following eighteen days:

2009: July 9, 2009; July 14, 2009

2010: July 22, 2010; March 4, 2010; March 24, 2010

2011: March 1, 2011; March 13, 2011; March 24, 2011; April 13, 2011; May 13, 2011; June 30, 2011; September 8, 2011; September 15, 2011; October 12, 2011; October 25, 2011

2012: February 28, 2012; June 19, 2012; June 29, 2012.

Defendant's Response to Plaintiff's FOIA Request

21) EPA assigned this request identification number EPA-HQ-2013-006005 by letter dated and sent by email on May 9, 2013.

22) Defendant EPA's only response was to acknowledge receipt of the request, say it would respond to the request at some unspecified future time, and inform CEI that its request was "non-billable" under FOIA.¹² (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)). This constitutes a non-substantive response.¹³

¹² *See* May 9, 2013 letter from National FOIA Officer Larry Gottesman to CEI counsel Christopher Horner.

¹³ *See* *CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013) ("CREW") (administrative remedies are deemed exhausted unless, within the 20-day period, agency has at least informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and withhold under any FOIA exemptions).

- 23) In light of EPA's failure to provide any substantive response within the 20-day deadline for responding to FOIA requests, CEI, having exhausted its administrative remedies, sued EPA for its non-compliance with FOIA on May 29, 2013.¹⁴
- 24) After CEI sued, EPA provided plaintiff with a "no records" response. EPA stated that it has been unable to locate any such texts in response to plaintiff's FOIA request.¹⁵ It did so even though Ms. McCarthy sent or received many thousands of such text messages such that, on the basis of information later obtained under FOIA request EPA-HQ-006937, the statistical probability that Ms. McCarthy did not text on any of those eighteen dates is virtually zero.¹⁶ But EPA did not preserve text messages from those eighteen dates or otherwise.¹⁷ CEI dismissed the suit without prejudice in light of the claim that no responsive documents remained. *See Stipulation of Dismissal*, 9/13/2013 (docket #8). It later obtained the

¹⁴ See *Complaint in Competitive Enterprise Institute v. United States Environmental Protection Agency*, D.D.C. Civil Action No. 13-779; *Answer* ¶36 (not denying plaintiff had exhausted its administrative remedies), ¶¶ 25-27 (not denying the specific facts showing exhaustion).

¹⁵ See, e.g., *Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

¹⁶ See document sent by EPA to plaintiff's counsel attached to Aug. 20 Horner email, with PDF file bearing title "202-596-0247 - Text bill - Jul 09-June 12.pdf," produced in response to FOIA Request HQ-2013-006937 (submitted, June 3, 2013). CEI staff estimated the odds of this actually occurring as one in 7.9 sextillion. See <http://cei.org/news-releases/odds-epa-not-destroying-gina-mccarthy-text-messages-1-79-sextillion> (giving the odds, which they calculated at www.scribd.com/doc/157256436/McCarthy-Texting-Probability)

¹⁷ See, e.g., email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

information showing that in fact EPA was not preserving, and instead was destroying, all such correspondence.

**Plaintiff CEI's FOIA Request for Seeking Certain Specified Text
Text Messages of Lisa P. Jackson (EPA-HQ-2013-009235)**

- 25) On August 19, 2013, plaintiff submitted a FOIA request seeking “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010.”¹⁸
- 26) This FOIA request, submitted to EPA by email to hq.foia@epa.gov, sought to obtain the text messages in which former EPA Administrator Lisa Jackson reportedly discussed business opportunities sought by a “cotton absorbent company” whose CEO she was described as meeting at a “Climate Rally.”¹⁹ These text messages, as described in Jackson’s own email thread, occurred in the context of EPA’s involvement in the clean-up efforts surrounding the Deepwater Horizon drilling platform explosion and oil leak in the Gulf of Mexico, and the company in question sought to promote its purportedly environmentally-friendly products to the EPA for use in conjunction with the cleanup.

Defendant's Response to Plaintiff's FOIA Request

- 27) EPA assigned this request identification number EPA-HQ-2013-009235.
- 28) Although the text messages’ occurrence was memorialized in Administrator Jackson’s own email addressing the subject,²⁰ an email that EPA produced as being work-related, on

¹⁸ See FOIA request HQ-2013-009235.

¹⁹ See Email from EPA Administrator Lisa Jackson using her EPA “Richard Windsor” account to Aaron Dickerson, 6/4/2010 3:36 PM, enclosing email from Michael Martin to Aaron Dickerson, May 27, 2010, at 18:43:30 (“Administrator Jackson and I had txt’d this am about” a green-jobs opportunity for a “cotton absorbent company” Jackson had met at “the Climate Rally”). This email is available as *Freedom of Information Act Request HQ-FOI-01268-12, Fourth Release, Part C* (pg. 22 of 508 pages), at www.epa.gov/epafoia1/docs/Release-4-Part-C.pdf (visited Sept. 25, 2013). It is part of a collection of records found on EPA's *Frequently-Requested Records* web page, www.epa.gov/epafoia1/frequent.html.

²⁰ See footnote 19 above.

September 18, 2013, EPA issued a “no-records” response, reflecting the correspondence’s destruction by EPA.

- 29) EPA indicated that the messages had not been preserved, despite their obvious relation to EPA’s work, and despite their being addressed to Jackson in her capacity as “Administrator Jackson,” on the grounds that such communications are “unrecord material not subject to the Federal Records Act,” and so EPA destroys them.²¹
- 30) In that September 18, 2013 “no records” letter, Eric E. Wachter, the Director of EPA’s Office of the Executive Secretariat, did not deny that Jackson exchanged such messages, but excused EPA’s failure to produce them by claiming that “not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example you provide certainly suggest unrecord material not subject to the Federal Records Act.”
- 31) Wachter did not explain what constitutes “unrecord material,” or why he used this peculiar phrase defined nowhere in any statute, regulation, or dictionary. Assuming that “unrecord material” means documents not covered by federal records laws, he did not explain how EPA-related communications could possibly *not* be subject to such laws (like the Federal Records Act and FOIA, which has the broadest definition of record among relevant laws²²) when they are addressed to senior EPA officials like Jackson in their official

²¹ See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, at 1 (“no records exist” responsive to request HQ-2013-009235 for “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010” for this reason).

²² EPA acknowledges on its website that “[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” See, e.g., Environmental Protection Agency, *What Is a Federal Record?*, <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>.

capacity; are exchanged with such officials using EPA-supplied devices for creating and transmitting records; and address a subject whose discussion, in email form, was preserved and produced under FOIA as an agency “record.”

- 32) In taking this position that such agency records can be destroyed as “unrecord material,” Wachter was acting as a high-ranking agency official in charge of EPA FOIA and record-keeping policies and practices. Wachter heads the office that is in charge of “processing Freedom of Information (‘FOIA’) requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator; managing the Administrator’s and Deputy Administrator’s executive correspondence; and administering the EPA’s electronic correspondence tracking system.”²³ Moreover, the policy of document destruction and failure to preserve documents implicates high-ranking EPA officials, such as its current and former Administrator, who are specifically assigned responsibility for agency policy.
- 33) In another FOIA case before this Court concluded earlier this year, seeking EPA-related emails on the non-official email account of then-Region 8 Administrator James Martin, EPA similarly asserted that such correspondence were not Agency records,²⁴ only to eventually abandon that position.
- 34) In the *Landmark* case, another judge of this court took issue with the credibility of Eric Wachter, who issued this no-records response regarding Lisa Jackson’s text messages. *See Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285, *6 (D.D.C. Aug. 14, 2013). In that case, Judge Lamberth noted that Mr. Wachter’s declaration was seriously lacking in credibility. He repeatedly found that central claims made by Mr. Wachter were

²³ See *Search Declaration of Eric E. Wachter*, at ¶2, in *CEI v. EPA*, No. 12-1617 (D.D.C. filed, 8/21/2013) (docket doc. # 24-4).

²⁴ See *CEI v. EPA*, D.D.C. Civil Action No. 12-1497 (ESH), *Memorandum of Points and Authorities In Support of Defendant’s Motion for Summary Judgment* at 4-5.

“inconsistent” (*id.* at **1-2 & fn. 3) and “vague” (*id.* at *3) and that Mr. Wachter’s evasive “silence speaks volumes” (*id.* at 5).

LEGAL ARGUMENTS

Text Messages are “Agency Records” Under Federal Record-Keeping and Disclosure Laws, and Under EPA’s Implementing Policies

- 35) EPA provides certain employees with PDAs and text messaging capability as an option to email for official or otherwise work-related internal or external communications.
- 36) Text messaging correspondence are agency records and must be maintained and produced as such, under the Federal Records Act and FOIA. *See, e.g.*, National Archives, *Frequently Asked Questions About Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html> (Instant Messaging (IM) content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm; *Memo to All Staff, “Transparency at EPA,”* by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).²⁵

²⁵ *See also* April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems), available at http://epw.senate.gov/public/_files/2008_EPA_Archives_Memo_HILITED.pdf; *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67.

37) Former EPA Administrator Jackson and current EPA Administrator McCarthy had a duty under the Federal Records Act (FRA) not to destroy text messages, and to take remedial action once such destruction occurred. For example, under the FRA, each agency head

shall notify the Archivist [the head of the National Archives and Records Administration] of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.²⁶

EPA has responded to such information by informing the Archivist, in the past, when learning of similar destruction of emails.²⁷

38) However, neither Jackson nor McCarthy has taken any such action, despite having the duty to do so in their capacity as head of the agency (indeed, according to EPA they are the officials who destroyed their own correspondence). Nor has the Archivist ever been notified of the destruction or loss of the records. Nor has EPA taken other remedial actions, as is required to comply with its duty under the FRA to “establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist”²⁸ and “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency....”²⁹

²⁶ 44 U.S.C. § 3106.

²⁷ See April 11, 2008 letter from John B. Ellis, Agency Records Officer, United States Environmental Protection Agency, to Paul Wester, Director, Modern Records Program, National Archives and Records Administration, at 1-3.

²⁸ Id. § 3105.

²⁹ 44 U.S.C. § 3101.

FIRST CLAIM FOR RELIEF

Duty to Preserve and Not Destroy Text Messages -- Declaratory Judgment

- 39) Plaintiff re-alleges paragraphs 1-38 as if fully set out herein.
- 40) EPA's pattern, practice, and ongoing policy of destroying, and not preserving, a class of records (text messages sent and received on EPA-supplied devices) violates the Federal Records Act and illegally denies the public access to records covered by the Freedom of Information Act.³⁰ It is also arbitrary and capricious agency action that violates the Administrative Procedure Act (APA), 5 U.S.C. § 704, et seq.³¹ EPA's failure to take remedial action and to notify the Archivist of the loss of the documents despite clear statutory mandates also is actionable under the APA.³²
- 41) Plaintiff CEI regularly files FOIA requests with EPA seeking agency records, as the docket of this District illustrates.³³ CEI has filed, and will continue to file, such FOIA requests seeking emails, text messages, and instant messages from EPA regarding high-ranking EPA officials, including those encompassed by the Office of the Administrator and the Assistant Administrator for the Office of Air and Radiation. This is part of CEI's ongoing

³⁰ See, e.g., *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C.Cir.1988) (separate from claims seeking relief for specific FOIA requests, requesting parties may also assert a "claim that an agency policy or practice will impair the party's lawful access to information in the future"); *Hajro v. U.S. C.I.S.*, 832 F.Supp.2d 1095 (N.D. Cal. 2012) (attorneys could bring lawsuit challenging pattern or practice of agency delays in responding to Freedom of Information Act requests submitted on behalf of their client).

³¹ See, e.g., *CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (rejecting motion to dismiss claims over agency's allegedly illegal destruction and failure to preserve emails under the APA, 5 U.S.C. §§ 704-06, and the Mandamus Act, 28 U.S.C. § 1361).

³² See *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) ("the FRA requires the agency head and Archivist to take enforcement action" in response to destruction of records; "On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.").

³³ See, e.g., *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil actions ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074 (all involving FOIA requests to EPA by plaintiff).

transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.

- 42) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 43) Plaintiff has a statutory right to the information it seeks.
- 44) Defendant has acknowledged, directly and through counsel, destroying these correspondence.
- 45) Moreover, federal regulations mandate that “Records shall not be disposed of while they are the subject of a pending . . . lawsuit under the FOIA” such as this one (or plaintiff’s previously-filed FOIA lawsuits seeking electronic records).³⁴
- 46) Further, it is a violation of the U.S. Code to willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy any record, proceeding, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any public officer of the United States, or attempt or act with intent to do so.³⁵
- 47) As a regular FOIA requester, CEI will continue to experience ongoing harm in the form of lost information and destruction of the documents it seeks unless this court declares EPA’s policy of not preserving text messages illegal and puts an end to it.
- 48) EPA has not disavowed or repudiated its position justifying the destruction of such agency documents. EPA has instead defended the practice as appropriate. It clearly intends to apply this objectionable position in future FOIA requests by plaintiff. It is therefore evident that

³⁴ 40 C.F.R. § 2.106.

³⁵ 18 USC § 2071 - Concealment, removal, or mutilation generally.

the impermissible practice is a continuing one, that plaintiff will experience a continuing injury due to this practice, and that no relief is forthcoming.³⁶

- 49) “The case is fit for review because it presents a clear-cut legal question,” whether EPA’s document preservation policy regarding text messages is “inconsistent” with federal record management laws such as the Federal Records Act and FOIA.³⁷
- 50) This Court should issue a declaratory judgment that EPA has violated its duty to preserve records under the Federal Records Act and FOIA; has acted arbitrarily, capriciously, and illegally in violation of the APA; and that it has a duty to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices.
- 51) EPA should also be required to disclose how it came to design and implement a system whereby absolutely no record of this class of correspondence is preserved. EPA has failed to preserve not only the text messages, but also all metadata about them. For example, according to EPA, it is aware that its arrangement with its telephone carrier fails to preserve the telephone numbers to which text messages were sent or from where they were received.³⁸ This makes it impossible to cross-check McCarthy’s claims that each of the thousands of text messages on her EPA phone were all personal rather than work-related. EPA should also be required to reveal just how this system of record destruction operates, and who was responsible for putting it in place.

³⁶ See *Better Gov’t Ass’n v. Dept. of State*, 780 F.2d 86, 90-92 (D.C. Cir. 1992).

³⁷ See *Venetian Casino Resort LLC v. EEOC*, 409 F.3d 359, 365 (D.C. Cir. 2005).

³⁸ See Email from DoJ counsel for EPA Mark Nebeker to Chris Horner, counsel for CEI, copying Cindy Anderson of EPA OGC, at 9/12/2013 1:54 PM (admitting that “Although phone calls are delineated by each number called and the airtime and charges, that is not true for text messages. It is my understanding the Agency does not receive a record from Verizon (or, in this case, its predecessor, AT&T) of individual text messages made by its employees, including Ms. McCarthy.”) This involved FOIA request HQ-2013-006937 and *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. Civil Action No. 13-1074, seeking McCarthy’s text-message metadata information from phone bills, which is also being destroyed. In a subsequent email Ms. Anderson asserted that with AT&T, a very limited amount of metadata had been preserved, from April 2011 to November 2011. See Email from Cindy Anderson to Chris Horner, September 17, 2013 9:17 AM.

SECOND CLAIM FOR RELIEF

Duty to Preserve and Not Destroy Text Messages – Injunctive Relief

- 52) Plaintiff re-alleges paragraphs 1-51 as if fully set out herein
- 53) EPA will continue its unlawful policy of destroying and not preserving text messages unless it is enjoined from so doing, even though that policy violates the Federal Records Act, destroys documents subject to FOIA, and is arbitrary and capricious agency action violative of the Administrative Procedure Act. “In utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate ... to bar future violations that are likely to occur.”³⁹ Courts have previously found that injunctive relief is necessary to prevent EPA from deleting or destroying documents subject to FOIA.⁴⁰
- 54) Thus, CEI is entitled to injunctive relief forbidding EPA to destroy and/or not preserve text messages.
- 55) In addition, CEI is entitled to preliminary injunctive relief forbidding such practices, because the destruction and failure to preserve documents results in irreparable harm by forever eliminating access to those documents, and because there is a strong public interest in ensuring an agency’s compliance with federal record management laws such as the Federal Records Act and FOIA,⁴¹ and with regulations commanding that records not “be disposed of while they are the subject of a pending . . . lawsuit under the FOIA.”⁴²

³⁹ See *Long v. United States Internal Revenue Service*, 693 F.2d 907, 909 (9th Cir.1982).

⁴⁰ See, e.g., *Union Pac. R.R. Co. v. U.S. Env'tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order in light of evidence that “the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific's FOIA request”; emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company's FOIA request); *Union Pac. R.R. Co. v. EPA*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

⁴¹ See *EPIC v. Department of Justice*, 416 F.Supp.2d 30, 40-42 (D.D.C. 2006) (granting preliminary injunction to expedite response to FOIA request, because even delay in producing documents is irreparable harm; and noting that

56) This Court should enter an injunction ordering EPA to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices; establish safeguards against their removal and loss; and to notify the head of the National Archives and Records Administration of any destruction, removal, or loss of such records.

THIRD CLAIM FOR RELIEF

Duty to Preserve and Not Destroy Text Messages – Writ of Mandamus

57) Plaintiff re-alleges paragraphs 1-56 as if fully set out herein.

58) Plaintiff has a clear right to relief under laws such as the Federal Records Act; the defendant has a clear duty to act; and there is no other adequate remedy available to plaintiff.

59) CEI has a clear statutory right to the records that it seeks, EPA has not fulfilled its clear statutory obligations to preserve and provide such records, and there is no legal basis for destroying them.⁴³

60) Thus, this destruction of documents justifies the grant of a writ of mandamus or other extraordinary relief, and gives rise to a remedy under the Mandamus Act, 28 U.S.C. 1361.⁴⁴

Accordingly, this court should issue a writ of mandamus.

there is a strong public interest in enforcing compliance with federal laws such as FOIA) (“there is an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate.”), quoting *Jacksonville Port Auth. v. Adams.*, 556 F.2d 52, 59 (D.C.Cir.1977); *Union Pac. R.R. Co. v. U.S. Envtl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA and its employees from deleting or destroying emails in violation of FOIA, and finding “irreparable harm” from EPA’s “pattern of deleting relevant emails”).

⁴² 40 C.F.R. § 2.106.

⁴³ See *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (“the FRA requires the agency head and Archivist to take enforcement action. . . On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.”).

⁴⁴ See *CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (agency’s destruction of numerous emails gave rise to mandamus claim).

FOURTH CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 61) Plaintiff re-alleges paragraphs 1-60 as if fully set out herein.
- 62) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 63) Pursuant to 28 U.S.C. § 2412, this Court may award fees against the United States where its position was not substantially justified. Here, EPA's position contradicts federal record-keeping and other laws, and is not substantially justified.
- 64) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 3rd day of October, 2013,



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