



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
ENVIRONMENTAL INFORMATION

October 10, 2014

Paul M. Wester, Jr.  
Chief Records Officer for the United States Government  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6002

Dear Mr. Wester:

In an effort to ensure compliance with 44 U.S.C. § 3106, 36 C.F.R. §§ 1230.14 and 1230.16, the Environmental Protection Agency (EPA or Agency) has determined that it should notify the National Archives and Records Administration (NARA) of all relevant facts regarding the Agency's management of text messages under the Federal Records Act. As explained below, EPA has no reason to believe federal records have been unlawfully destroyed, however, the Agency would like to report all relevant circumstances related to its management of this material under the Federal Records Act.

For nearly a decade, the Agency has provided guidance to employees that federal records existing solely on mobile devices must be transferred to more permanent Agency systems on a regular basis. Recently, there has been public interest and attention on the Agency's policies and procedures related to text messages. Some of this public interest relates to ongoing litigation against EPA for its records-management policies pertaining to text messages. In one such court case (which is currently pending), an outside group argued that unlawful destruction of federal records occurred because EPA located no records responsive to the outside group's FOIA request for certain text messages from a three-year period.

It is correct that none of the requested text messages were produced or preserved. But after a careful review of the matter including information I reviewed personally and information which was provided to me by other employees, EPA has determined that it is not aware of federal records that were unlawfully destroyed. For the reasons discussed below, EPA has no reason to believe that text messages existed that qualified as federal records and were unlawfully destroyed. EPA cannot, however, determine with absolute, unequivocal certainty the content of

every single text message that may at one point have existed. Out of an abundance of caution, then, EPA is submitting this report pursuant to 36 C.F.R. § 1230.14 in order to notify NARA of the situation and obtain any guidance, resources, or other insights that NARA may have to offer.

### **The office maintaining the potential federal records**

Mobile devices are issued to a number of employees throughout EPA's headquarters and regional offices, including to senior officials within these offices. Approximately 5,000 of EPA's personnel are issued a mobile device by the Agency. EPA has determined that the primary location where text message content would be stored in the first instance is only on the physical devices themselves; unless the user determines the message is a federal record and, consistent with Agency guidance, captures the text message in some other Agency system such as email. Whether or not the content is also stored by the mobile device service provider for some period of time depends on which provider is supporting the device, but in general it appears that service providers only keep text message content for a very limited period of time. Therefore, the office maintaining the records could be any office with an employee who has been issued a mobile device by the Agency.

### **A description of the potential federal records with volume and dates, if known**

It is not possible to specifically describe the subject matter of the text messages at issue. Texting could theoretically occur on any subject matter, though as discussed below, we believe text messaging would typically focus on mundane, routine matters such as scheduling. Additionally, text messages may relate to personal matters, including personal scheduling matters such as communicating with family about the employee's schedule. This type of limited personal use is consistent with Agency policy.

As for dates, it is again not possible to specifically describe the records potentially at issue. The loss of text message content on a mobile device could occur for a variety of reasons. For example, if an employee's device broke and then was replaced with a new one, any text message content stored solely on the old device would be lost. Similarly, if an employee separated from federal service, any text message content that was not moved to a different storage place prior to or after the separation would be erased as part of re-purposing the device for a new employee to use. Because individuals are instructed to capture all records prior to their separation, the mobile devices are repurposed and the text message content stored on the device at that time, if any, is deleted.

In February of 2013, EPA underwent a major upgrade to its email system and transitioned from a Lotus Notes-based email system to a Microsoft Outlook-based email system. This upgrade also impacted Agency-issued mobile devices. This transition required EPA to reset mobile devices to default settings in order for the devices to connect to the Microsoft servers, which would delete any content that was saved only on the device, including text messages. Because of this, prior to the transition, EPA informed users of the need to save information from the devices, and

provided instructions to users about how to save or back up information stored only on the devices. Specifically, the Office of Environmental Information issued guidance to all Blackberry users that advised them that content saved only to the devices would be deleted as the result of the transition, explained how to prepare the Blackberry devices for transition, included instructions for manually saving certain information to Agency computers, and instructed employees to contact their help desk if they had any questions. The instructions unequivocally stated that all content on the device would be deleted, and that users were individually responsible for saving any content stored only on the device.

With respect to the volume of text message content at issue, the Agency cannot provide a specific estimate of the quantity of text messages sent or received by Agency employees. That information is not independently captured in Agency systems, and is no longer available from the mobile-device service providers.

As explained more fully in the following section, the inherent limitations of text messaging from a hand-held mobile device lead the Agency to conclude that very few—if any—text messages would qualify for preservation as a federal record in the first place. Because EPA has adequately communicated with staff about the importance of preserving any text message that does qualify as a federal record, the Agency believes that no federal records were lost.

### **Circumstances surrounding the potential loss of records**

Recently, an outside group alleged that EPA unlawfully destroyed federal records because EPA located no records responsive to the group's FOIA request for text messages sent or received by EPA Administrator Gina McCarthy when she was the Assistant Administrator for the Office of Air and Radiation. As explained above, the Agency is not aware of any information confirming or verifying that a text message that qualified as a federal record existed, or, that any such record, if it existed was destroyed in contravention of the Federal Records Act. Even if one were to conclude that a text message qualified as a federal record, the destruction of that text message does not automatically constitute a violation of the Federal Records Act. The Act only requires that records be maintained consistent with approved Records Schedules. General Records Schedule 23 authorizes the immediate destruction of "Transitory Files," which the schedule describes as having "minimal or no documentary or evidential value." To the extent any text message qualifies as a federal record, EPA believes it would likely be a "Transitory File" that could be immediately destroyed in compliance with the General Records Schedule 23 and the Federal Records Act.

First, Agency text messages are inherently unlikely to qualify as a federal record. The practical limitations of text messaging from a hand-held mobile device—short messages typed without the availability of a full keyboard—make it highly unlikely that a text message would ever be sufficiently substantive to qualify as a federal record, *i.e.* as "appropriate for preservation . . . as

evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.” 44 U.S.C. § 3301.

This conclusion is confirmed by the text message content EPA has recently reviewed in connection with a FOIA request for text messages sent or received on certain agency-issued mobile devices. The documents that EPA produced under FOIA (which applies to more than federal records) make clear that the EPA-related messages were not federal records, as the following examples demonstrate:

- Text message sent by Curt Spalding, January 22, 2014 1:47 PM “Hi. Off to Ft. Lauderdale. Plane on time.”
- Text message sent by Curt Spalding, January 9, 2014, 5:32 PM “In line.”
- Text message sent by Curt Spalding, January 9, 2014, 5:32 PM “Amtak is here.”
- Text message sent by Curt Spalding, January 9, 2014, 5:29 PM “Train is delayed. May want to use mbta.”
- Text message sent by Curt Spalding, January 9, 2014, 5:28 PM “At downtown now”
- Text message sent by Curt Spalding, January 9, 2014, 5:24 PM “At park street now”
- Text message sent by Curt Spalding, January 9, 2014, 5:23 PM “You go and I’ll get the next train”
- Text message sent by Curt Spalding, January 9, 2014, 5:21 PM “Just at MGH”
- Text message sent by Curt Spalding, January 7, 2014, 10:07 AM “Will take gov car so I can see Bob.”
- Text message sent by Peter Tsirigotis, December 15, 2013 10:15 AM “I did it all myself last night. The team will have more to do tomorrow.”
- Text message sent by Peter Tsirigotis, December 15, 2013 7:10 AM “We are out again this morning. Will check in w you when I return after lunch.”
- Text message sent by Peter Tsirigotis, December 17, 2013 6:47 AM “U talk to janet re the recon letter?”
- Text message sent to Peter Tsirigotis, December 7, 2013 11:17 AM “Peter, I need to work from home next week. I will try to arrange to get my laptop Sunday or Monday.”
- Text message sent to Peter Tsirigotis, December 9, 2013 10:34 AM “Tell HQ that I said you can’t come up there on Tuesday. Will that work?”
- Text message sent to Peter Tsirigotis, December 9, 2013 7:57 PM “Only have 1:05 or 4:25pm on AA. I put you on the 4:25pm, but if it has to be closer to 3 pm, I will call back and try to get you on USAir.”
- Text message sent from Peter Tsirigotis, December 9, 2013 8:34 PM “Do it. I have to be back by 5 pm. If no usair, put me on the 1:05.”

- Text message sent to Peter Tsirigotis, December 9, 2013 8:43 PM “Ok, will try to get you on the USAir at 3pm, but if not will try the 1:05 on AA”
- Text message sent from Peter Tsirigotis, December 11, 2013 4:09 PM “Doing better? What do I do with my travel receipts for last week?”
- Text message sent to Peter Tsirigotis, December 9, 2013 8:51 PM “Please look at email I just forwarded to you before I change your flight again.”
- Text message sent to Peter Tsirigotis, December 27, 2013 9:24 AM “Just wanted to be sure that you saw my email to not use single sign on box on PP+ when it comes up.”
- Text message sent to Steve Page, December 18, 2013 2:42 PM “Need to talk to you asap re [Redacted under (b)(6)]esp before tomorrow am if possible. Thanks. Karen 919-607-3622.”
- Text message sent to Steve Page, December 20, 2013 4:54 PM “Please see my email to you for feedback asap. I also talked with Peter. My cell is 919-607-3622. Thanks so much.”
- Text message sent to Steve Page, December 21, 2013 2:15 PM “EPA email system is up at the moment if you can check the redrafted response that I just sent. System goes up and down so can be iffy. Thanks. Karen”

As shown, these text messages reflect incomplete sentences concerning travel delays, scheduling, or other logistical inquiries. These examples confirm the Agency’s understanding of how Agency employees use text messaging, and the Agency’s conclusion that it is unlikely that text messages would ever rise to the level of being a federal record.

Anecdotal accounts of Agency employees’ practices confirm this as well. Many employees with mobile devices use the device primarily as a telephone, or a means by which to monitor email and calendar information, and use text messaging only incidentally to coordinate with schedulers, other staff, or even family, over logistical matters when time or circumstances do not permit communication by other means. Many employees do not use the texting feature of their phones at all. To the extent the texting functionality is utilized at all by an employee, these devices normally lack full keyboard functionality, and are not designed for lengthy or substantive written communication or decision-making. Thus, given the inherent limitations on texting, combined with the available evidence regarding Agency employees’ actual practices, EPA is not aware—and thinks it very unlikely—that any text messages ever existed that rose to the level of constituting federal records.

Second, in the unlikely scenario where a text message in and of itself qualified as a federal record appropriate for preservation by the Agency, EPA has had longstanding guidance to its employees that such a record should be transferred to longer term storage on Agency systems as appropriate. Since at least 2005, EPA has had a Frequently Asked Questions document posted for employees and the public regarding records and mobile devices. This document is available

at <http://www.epa.gov/records/faqs/pda.htm>. This guidance states clearly that “[r]ecords created on your Mobile Device should be transferred to your office’s recordkeeping system on a regular basis.” EPA employees have therefore been appropriately instructed to preserve any federal record on their mobile device by transferring the record to longer-term storage on Agency systems. This guidance is consistent with and complemented by myriad other Agency guidance on general records management. This includes guidance such as “What is a Federal Record” <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>, the Agency’s Interim Records Management Policy, <http://www.epa.gov/records/policy/2155/CIO-2155.2.pdf>, and the Records Management Manual <http://www.epa.gov/records/policy/manual/ch01.htm>, which all clearly specify records can exist in any format.

Third, EPA has no reason to believe that any employee(s) failed to comply with the requirements of the Federal Records Act and the above-referenced EPA guidance with respect to text messages. EPA is not aware of any information demonstrating, or even suggesting, that an Agency text message qualified as a federal record and that it was not preserved.

Recent interest in EPA’s practices pertaining to text messages has focused on certain high-level Agency officials, such as former Administrator Lisa Jackson, and former Acting Administrator Bob Perciasepe. EPA is not aware of, and has no reason to believe, that either of those employees sent or received text messages constituting federal records that were not preserved. For example, EPA understands that it was the practice of former Administrator Jackson to direct work-related contacts towards more formal channels of communication, since she believed text messaging was not an appropriate form of communication for conducting substantive Agency business. EPA also understands that, despite an e-mail from a non-governmental official (a company CEO) stating that he had “txt’d” with Administrator Jackson at one point, former Administrator Jackson doubts that any such text message actually existed. With respect to former Acting Administrator Bob Perciasepe, EPA understands that in regard to Agency business, virtually his only communication using text messages was to the IT department when the Agency’s email was not working.

Both former Administrator Jackson and former Acting Administrator Perciasepe have departed EPA. Upon their departures from the Agency, EPA staff collected the mobile devices assigned to them in order to reprocess the devices for use by other Agency employees. This process would have deleted information stored only on the device that had not been moved to another storage location, and reset the device to default settings. For all the reasons outlined above, EPA does not believe that this resulted in the loss of any federal records.

With respect to EPA’s current Administrator, Gina McCarthy, the Administrator has indicated that to the best of her recollection she does not use text messaging for Agency business, and uses text messaging for personal business. Information produced in response to a FOIA request does indicate that during a three year period as the Assistant Administrator for the Office of Air and Radiation, approximately 5,000 text messages were sent or received on a mobile device assigned

to Ms. McCarthy. In responding to FOIA requests for text messaging information related to Ms. McCarthy, EPA staff consulted with her about her use of text messaging. To the best of her recollection, she used text messaging for family and other personal business, not government business. Available billing information shows that only about 120 of the text messages sent or received by Ms. McCarthy during this three year period were exchanged between her device and a device assigned to another EPA employee. The remainder of the text messages were exchanged with phone numbers belonging to family members, friends, and non-EPA or personal acquaintances. It is the Agency's understanding that the messages exchanged with EPA-assigned numbers were also personal in nature (*i.e.* arranging to meet socially after work) or non-substantive schedule-related. The Agency has no reason to believe these messages were appropriate for preservation as documentation of Agency business under the Federal Records Act.

Finally, even assuming some text messages constituted federal records and were destroyed, EPA has no reason to believe such destruction was unlawful. Specifically, any such destruction was likely entirely lawful based on General Records Schedule 23-7, Transitory Files. That records schedule permits immediate destruction of Transitory Files, which are defined as having "minimal or no documentary or evidential value" such as:

- Routine requests for information or publications and copies of replies which require no administrative action, no policy decision, and no special compilation or research for reply;
- Originating office copies of letters of transmittal that do not add any information to that contained in the transmitted material, and receiving office copy if filed separately from transmitted material; and
- Records documenting routine activities containing no substantive information, such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling related activities.

To the extent text messages are used at all by an employee for matters that relate to substantive agency business, it is highly likely that text messages would fall within one or more of the above categories. Text messages typically do not contain any substantive information, and to the extent that they do, such substantive information is likely captured in underlying transmitted material sent through a more formal mode of communication.

#### **Actions taken to salvage, retrieve or reconstruct the records**

Although EPA does not believe that any federal records have been lost (let alone unlawfully destroyed), EPA nonetheless has investigated the possibility of reconstructing the text messages that once existed. The Agency has concluded that, for a wide variety of reasons, including the upgrade to Microsoft Outlook, physical damage to individual devices, and normal re-purposing of devices from separated employees, that any destroyed text message content is not recoverable

from the devices themselves. Additionally, the Agency's mobile device service providers do not maintain a long-term back up of the text messages and, therefore, the messages are not recoverable even from the service providers. Having exhausted available avenues for recovery of the records, no further recovery efforts are planned at this time, except that, as discussed below, the Agency continues to implement broader policies to mitigate the risk that any similar situation could arise in the future.

### **Continuing Actions & Improvements**

As explained above, the Agency has no reason to believe that federal records have been unlawfully destroyed. The Agency has consistently provided necessary and appropriate guidance at all times to its employees to ensure the preservation of federal records in the form of text messages, EPA is always committed to continuing to update and improve its Records program in the face of changing technology. EPA is continuously updating and improving the training and tools available to Agency employees to equip them to properly manage and maintain federal records, and EPA is committed to keeping this guidance up to date with the latest available information. For the past two years, EPA has required all employees to take mandatory Records Management training, and plans to continue this annual training requirement. The Agency has also instituted a Quarterly Records Management Day, with reminders sent by the Office of the Administrator and the Acting Chief Information Officer, to promote good records management practices and highlight specific issues.

In June of 2013, EPA updated its Agency Records Policy by issuing the Interim Records Management Policy CIO-2155.2 and is close to issuing a final version of this policy. EPA also provides individual records training to political appointees when they join the Agency.

With respect to text messages, EPA has already provided employees with specific written how-to instructions for capturing text messages that may qualify as federal records into Agency systems. EPA also plans to update its existing 2005 FAQs on mobile devices and records management with any additional questions or guidance that are useful for assisting employees with identifying text message content that may qualify as a federal record. This document will also be updated to provide employees with "best practices" for use of text messages to help accomplish the Agency's mission and ensure compliance with the Federal Records Act. Once these existing resources are updated, EPA will highlight them through a mass-mailer or other Agency-wide notice mechanism by January 1, 2015 (and will continue to make them available to all employees after that date).

Additionally, EPA plans to include mobile devices in the next round of annual records training, and include the topic as part of an upcoming Quarterly Records Management Day. EPA has also been reviewing records retention with respect to multiple communications technologies, including text messages, through a cross-Agency Records Workgroup. EPA is working towards standardizing and improving its procedures for separating personnel, which will include standardizing the process for clearing mobile devices for records before reprocessing them.

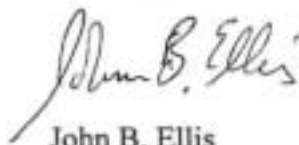


Mr. Paul Wester  
October 9, 2014  
Page 9 of 9

EPA would welcome any information, resources, or other guidance on mobile devices that NARA could provide to assist EPA and other federal agencies in further developing the resources available to employees in this area.

Should you have any questions, you may contact me via email at [ellis.john@epa.gov](mailto:ellis.john@epa.gov) or via telephone at (202) 566-1643.

Sincerely,

A handwritten signature in black ink that reads "John B. Ellis". The signature is written in a cursive style with a large initial "J".

John B. Ellis  
EPA Records Officer