



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

APR 23 2015

OFFICE OF  
GENERAL COUNSEL

The Honorable Lamar Smith  
Chairman  
Committee on Science, Space and Technology  
U.S. House of Representatives  
Washington, D.C. 20515-6301

Dear Mr. Chairman:

I write in response to the March 25, 2015, subpoena issued by the House Science, Space and Technology Committee (Committee) to the Environmental Protection Agency (EPA or Agency). Your subpoena seeks "billing records for any and all...mobile electronic devices issued by the government to Administrator McCarthy;" "records revealing any telephone numbers to which texts were sent, or from which texts were received;" "communications regarding the official use of text messaging;" and "text messages that have been retained by the EPA as Agency records."

As you know, staff of the EPA and staff of the Committee have been working together to satisfy the Committee's eight active requests to EPA, including its requests of January 27 and March 6 for information on this subject. EPA respects Congress's important oversight role, and strives to respond to Congressional requests regardless of whether the compulsory subpoena process is invoked. In this instance, since your subpoena broadens the scope of portions of these two previous requests, the EPA was not given the opportunity to first provide through the routine oversight process some of the information provided today.

In the interest of full transparency, EPA is providing the complete text of retained text messages with only minimal portions redacted, such as medical information, to protect personal privacy. EPA is also providing the phone numbers associated with any text message to or from a government device assigned to Administrator McCarthy.<sup>1</sup> With the exception of the Administrator's family, these numbers are unredacted. The significant majority of text messages sent to or from Administrator McCarthy on an EPA device are to or from her family. Your staff has indicated that your Committee has no interest in such messages, and we have accordingly redacted the numbers of her family members. Despite our understanding that many messages

---

<sup>1</sup> In an abundance of caution, EPA has gathered records for every mobile device to which a wireless provider had assigned a number—even where, as in the case of a wireless hotspot, it is highly impractical, if not technically infeasible, to send a text message using the device. EPA has also included records that relate to temporary devices assigned, per security protocols, to the Administrator for each international trip. The production includes, depending on the device and time period covered, both AT&T and Verizon-formatted billing statements, as well as detailed spreadsheets that EPA staff invested hundreds of person-hours to create using raw data made accessible by virtue of our contract with the carriers.

beyond those with her family are purely personal messages, such as communications with personal friends both within and outside the environmental field, the balance of the numbers reflected in the documents produced today have not been redacted. The Agency hopes that these individuals are not subject to inquiry by Congress or others.

It is my further hope that with today's production of the information covered by the subpoena, the Committee's questions on this matter will be answered. As always, EPA staff are willing to discuss the production with Committee staff should there be questions. In addition to providing the information to the Committee, and in an effort to be fully transparent on this issue, EPA has also made the information produced today available via the EPA's public website.

Finally, I would like to take this opportunity to address an assumption in your letter of January 27, 2015, that EPA acted in contravention of federal law when it did not retain employee text messages. That contention, which seemingly underlies your subpoena, is not supported by the law or the facts.

The Federal Records Act (FRA) does not establish a one-size-fits-all rule for the preservation of messages or information generated by a federal employee. First, Congress, through the FRA, instructed federal employees to preserve *only* those messages that constitute federal records. Federal records are materials made or received in the course of public business that are preserved or appropriate for preservation as evidence of operations of the government or for their informational value. Not every document made or received by a government employee is a federal record. For example, federal records do not include personal notes, personal messages between friends or colleagues, or other materials that do not meet the statutory definition. Furthermore, not all federal records are subject to a lengthy preservation obligation. The FRA requires employees to preserve records only for as long as an applicable records disposition schedule provides. Importantly, according to the National Archives and Records Administration General Records Schedule 23, Item 7, records that are considered transitory under the FRA should be "destroy[ed] immediately, or when no longer needed for reference...." *See* General Records Schedule 23, at <http://www.archives.gov/records-mgmt/grs/grs23.html>.

In response to previous requests, EPA produced text messages that were on the mobile devices of employees who had sent or received a text message from a device assigned to the Administrator. Tellingly, not a single one of the messages provided was of a substantive nature. Those messages did not document the business of the government, and did not have a lasting value. Those messages pertaining to the Administrator demonstrated that she uses text messages in the same way citizens across the United States use text messages—for things like letting someone know she is running late. Administrator McCarthy has routinely explained, both in public and in internal statements, that she predominantly uses text messaging as a way to communicate with her family and friends. Those statements are supported by the information provided to the Committee today. The Administrator is on duty twenty-four hours a day, seven days a week, traveling regularly throughout the Nation. Her use of text messaging on her government-issued devices as a tool to stay connected with her family is entirely proper, and does not invoke record retention obligations covered by the FRA.

The EPA is committed to doing the public's business in the public eye. The Agency follows the official public process for major actions mandated by Congress, and gives full meaning to each and every public step in that process. At the end the process, federal law gives any interested party the opportunity to have a court review the agency's action to ensure it is supported by the record. At all times, the Agency is committed to faithful compliance with the law and adherence to the best available science; this is how we pursue our mission to protect human health and the environment, and we do so in a manner that is transparent and in the public interest. Any suggestion that the Agency is somehow evading public scrutiny of its work through the use of text messages is misguided, and belied by the absolute rigor in which the Agency faithfully complies with its obligations of public engagement and transparency in rulemaking.

As the federal government moves away from paper records to digital information management, the EPA is firmly committed to ensuring that all our employees' mobile device usage remains fully compliant with the FRA. If you have additional questions, do not hesitate to contact me, or your staff may contact Tom Dickerson at (202) 564-3638.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Garbow', written in a cursive style.

Avi S. Garbow  
General Counsel

cc: The Honorable Eddie Bernice Johnson  
Ranking Member