To: Farren, Victor[Farren.Victor@epa.gov]
Cc: White, Elizabeth[white.elizabeth@epa.gov]
From: Hammitt, Jennifer
Sent: Wed 11/1/2017 7:31:38 PM
Subject: FW: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Ex. 5 - Deliberative Process/ACP/AWP

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From: Sara Creighton [mailto:sara.creighton@americanoversight.org]
Sent: Monday, October 30, 2017 5:11 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Thank you for your responses. We just have three follow-up questions/concerns:

1) Based on the description of the search below, it appears that no hard-copy documents were searched. Assuming that is correct, we would like to better understand why the agency did not believe that a search of hard-copy correspondence was reasonably likely to identify responsive records.

2) With respect to the one email and attachments withheld in full under Exemption 6, the explanation below is a little bit confusing, so we wanted to clarify a few things. First, the explanation below suggests that the correspondence between the EPA employee and the person at Dow was wholly personal in nature. If that is correct, it's not clear why its was deemed to be an agency record at all. However, we are willing to accept the agency's representation that it was, in fact, purely personal in nature. Second, based on the search parameters provided below, we understood the agency to have searched only for records containing the keywords pesticide and/or chlorpyrifos. If the email exchange in question hit on either of those terms, it seems unlikely to have been entirely personal in nature. If, on the other hand, the search wasn't limited to those terms, then we would just request clarification as to how the search was done.

3) With respect to the list of custodians whose files were searched, in addition to the 11 enumerated custodians you mentioned below, our FOIA request also asked the agency to search the records of "any other political appointees or SES employees in the Office of the Administrator." Is it the agency's position that there were no other such individuals as of July 10 (date of search)? Or did they just limit their search only to the enumerated names in our request? If the latter, we would like to know who the other political appointees or SES employees in the Office of the Administrator were as of the date of the search so that we

can identify whether we believe any of them should have been included in the list of custodians.

Thank you,

Sara

Would they be willing to do a search of hard-copy correspondence in correspondence files of identified officials (and/or other political appointees).

On Oct 30, 2017, at 3:53 PM, Walker, Johnny (USADC) <Johnny.Walker@usdoj.gov> wrote:

Sara,

The EPA's responses are interpolated with the inquiries in your October 19 email below. The responses are in red font. Let me know if this resolves the identified issues or if you have any other questions.

Johnny

From: Walker, Johnny (USADC)
Sent: Monday, October 30, 2017 11:52 AM
To: 'Sara Creighton' <sara.creighton@americanoversight.org>
Subject: RE: American Oversight v. EPA, 17-1227, Follow-Up on Documents

I emailed with EPA on Friday and their responses were nearly finalized. Hopefully I can get you something today.

From: Sara Creighton [mailto:sara.creighton@americanoversight.org]
Sent: Monday, October 30, 2017 11:48 AM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: Re: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Any update from the EPA? We would obviously need the answers to these questions at least somewhat in advance of our status report so that we can evaluate whether we intend to challenge anything. If we don't have answers, I think we'll just need to file a status report that proposes a summary judgment briefing schedule, and then we'll see if we can resolve any outstanding issues before the government's brief is due.

Best,

Sara

On Oct 19, 2017, at 5:29 PM, Walker, Johnny (USADC) <Johnny.Walker@usdoj.gov> wrote:

Sara,

I'll put these questions to the agency and get back to you.

Johnny

From: Sara Creighton [mailto:sara.creighton@americanoversight.org]
Sent: Thursday, October 19, 2017 4:51 PM
To: Walker, Johnny (USADC) <JWalker3@usa.doj.gov>
Subject: American Oversight v. EPA, 17-1227, Follow-Up on Documents

Johnny,

Thank you for completing production in this case. We have a few follow-up questions:

1) First, could you please provide us some more information about what the agency did to search for records responsive to our request? In particular, we would like to know (a) what custodians' files were searched, (b) what locations were searched (only email, or also other servers or hard copy locations?); (c) what search terms or methods were used to locate relevant files, and (d) what the date range for the search was (presumably based on the date the search was conducted).

This search was done based on the parameters that EPA staff negotiated with American Oversight, as per email exchanges dated June 27-June 28, 2017. Specifically, EPA searched the Outlook email accounts of: Scott Pruitt, Mike Flynn, Wendy Cleland-Hamnet, Richard Keigwin, Ryan Jackson, John Reeder, David Schnare, David Kreutzer, Don Benton, and George Sugiyama, who were the individuals listed in American Oversight's request. EPA also searched the email account of Shannon Kenny, who was the transition team coordinator and who would possess all communications with individuals, such as Myron Ebell, who were on the transition team but were not employed by EPA.

Because the request asked for "communications," EPA searched the Outlook email accounts, which include emails, calendar invites, instant message chats, and text messages or other messages from alternative messaging systems forwarded in to EPA accounts as per EPA's records policy. The Outlook email accounts represent the repository likely to contain records of "communications" with outside parties as requested. The parameters used for the electronic search are below:

Date Range:

01/20/2017 - 07/10/2017 (date of search)

Key Words:

Part 1:

Domain Name - TO: FROM: or CC:

"americanchemistry.com" OR "croplifeamerica.org" OR "fb.org" OR "soygrowers.com" OR "americansugarbeet.org" OR "ncga.com" OR "okfarmbureau.org" OR "cotton.org" OR "ccgga.org" OR "ccqc.org" OR "cafreshfruit.com" OR "ffva.com" OR "almondalliance.org" OR "wga.com" OR "dow.com" OR "dowagro.com" OR "adama.com" OR "fmc.com" OR "cfbf.com"

Part 2:

Domain Name - TO: FROM: or CC:

"house.gov" OR "senate.gov" OR "heritage.org" OR "heritageaction.org" OR "cato.org" OR "uschamber.com"

CONTAINING KEYWORD: (pesticide* OR chlorpyrifos)

2) Second, could you provide us with more information about the basis for the (b)(6) redactions on the pages listed below? For some, it seems like the redacted portions likely just reflect personal information (weekend plans, etc.), but we would like confirmation of the agency's position about what is personal in those emails. For others, it appears that the full name/email for certain individuals was redacted, and we would like to understand the agency's position

about why they believe that merely revealing those individuals' participation in these communications would be an unwarranted invasion of their privacy.

- EPA-HQ-2017-006057-0000187

The redacted information is personal email addresses of what appear to be outside parties, that cannot be reasonably segregated nor identified beyond the address.

- EPA-HQ-2017-006057-0000188

Same document, personal email addresses and/or cell numbers

- EPA-HQ-2017-006057-0000192

Attachment, contains personal email addresses of non-EPA individuals that cannot be reasonably segregated or identified.

- EPA-HQ-2017-006057-0000197

The redacted information is personal email addresses of what appear to be outside parties, that cannot be reasonably segregated nor identified beyond the address.

- EPA-HQ-2017-006057-0000335

The redacted information relates to family and leave plans of an individual, the release of which would constitute an unwarranted invasion of personal privacy.

- EPA-HQ-2017-006057-0000336

Same document, family and leave plans and personal cell numbers

- EPA-HQ-2017-006057-0000338

Same exchange (earlier contained email) with family and leave plans of an individual.

- EPA-HQ-2017-006057-0000383

The redacted information relates to family and leave plans of an individual, the release of which would constitute an unwarranted invasion of personal privacy.

- EPA-HQ-2017-006057-0000386

Same exchange (earlier contained email) with family and leave plans of an individual.

- EPA-HQ-2017-006057-0000391

Personal email address of Jim Cowles, who is named in the released portion.

3) Third, we have questions about the four documents that were withheld from the 10/13 production, for which the agency has asserted Exemptions 6 and 4. It is not clear to us from the index provided with the production why an email from an executive at Dow Chemical to an EPA political appointee could possibly be withheld under Exemption 6. Given the conclusion that this was an agency record that was responsive to the request, and that one attachment to it was withheld under Exemption 4, we don't think the records could be purely personal in nature, and don't see how else they might qualify under Exemption 6.

The documents withheld under Exemption 6 consist of an email and two attachments. They were considered responsive because, under the terms of the request, it appeared that ANY communications between individuals at Dow and the named EPA individuals are "responsive." If the request is in fact for only information related to chlorpyrifos or pesticides, this email and these two attachments, containing the personal information of an individual and not related to pesticides, would not be responsive.

The document withheld under Exemption 4 is not related in any way to the documents withheld under Exemption 6. Rather, the document withheld under Exemption 4 is a powerpoint presentation received as an attachment to an email that was released with Bates number EPA-HQ-2017-006057_0000097. The presentation relates to the pesticide Sulfoxaflor. The EPA can further inquire with our pesticide office regarding the potential release of this document if American Oversight is interested in obtaining this document.

4) Finally, we have questions about the agency's decision to withhold the decision memorandum requested in part (5) of our FOIA request pursuant to Exemption 5. Assuming that it is, in fact, a memorandum reflecting the final decision made by the agency, and reflects the agency's reason therefore, it should no longer be considered predecisional. *See Judicial Watch Inc. v. HHS*, 27 F. Supp. 2d 240, 245 (D.D.C. 1998) (noting that "deliberative process privilege does not protect documents that merely state or explain agency decisions"). At a minimum, even if parts of the memorandum discuss other positions that the agency ultimately did not take, those parts of the memorandum should simply be redacted, and the remaining, non-exempt materials should be segregated and produced.

The EPA has evaluated this memorandum and has determined that was drafted in order to provide internal advice to the Administrator regarding an Agency action. The document states on its face that it is internal and deliberative, and purports to be a recommendation and not a final decision of the agency. This internal and deliberative memorandum represents the Agency's internal advisory process and as such is not, in our view, reasonably segregable. The final decision and action taken by the Agency on this matter is in the public record.

We would appreciate any additional information you can provide us in response to these questions. We very much hope to avoid summary judgment briefing by working with the agency on these issues if at all possible.

Best,

Sara Creighton