

September 12, 2017

**BY FACSIMILE: (202) 357-5901**

David S. Ferriero  
Archivist of the United States  
700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20408

Dear Mr. Ferriero:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that you evaluate actions of the U.S. Environmental Protection Agency (“EPA”) and EPA Administrator Scott Pruitt that appear to violate the Federal Records Act (“FRA”), and make recommendations to the EPA for their correction pursuant to the statutory authority the FRA, 44 U.S.C. § 2115(b), confers on you.

Preservation of our nation’s history is entrusted to you as Archivist of the United States. Your ability to fulfill this critical responsibility depends on federal agencies’ compliance with the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.*, 3010, *et seq.*, and 3301 *et seq.* From his first day in office Mr. Pruitt has ignored, if not outright flouted, these responsibilities by acting in near total secrecy and preventing the EPA from creating records that document its essential policies, decisions, procedures and transactions. These actions deprive the American public of its historical legacy, hinder meaningful oversight, and deprive those individuals and entities directly affected by EPA’s activities of the information necessary to protect their legal and financial rights.

Congress enacted the FRA in part to ensure “[a]ccurate and complete documentation of the policies and transactions of the Federal Government[.]” 44 U.S.C. § 2901(1). Toward that end, the FRA imposes on agency heads the obligations to both “*make and preserve* records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.” 44 U.S.C. § 3101 (emphasis added). Further, under the FRA each agency head must maintain an active records management program that provides for effective controls over the *creation and use* of federal records. 44 U.S.C. § 3102 (emphasis added).

Upon a finding that agency has violated or is violating these and other enumerated FRA provisions, the FRA directs the Archivist to:

- (1) inform in writing the head of the agency concerned of the violation and make recommendations for its correction; and

(2) unless satisfactory corrective measures are demonstrably commenced within a reasonable time, submit a written report of the matter to the President and the Congress.

44 U.S.C. § 2115(b). The D.C. Circuit has identified this provision as a key component of the “FRA’s enforcement scheme.” *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1279 (D.C. Cir. 1993).

The reported actions of EPA Administrator Pruitt appear to conflict directly with his obligations under the FRA. Mr. Pruitt reportedly is carrying out his agency’s agenda in secrecy, contrary to his obligation to create records adequately documenting the EPA’s “functions, policies, decisions, procedures and essential transactions.” 44 U.S.C. § 3101. As an example, the *New York Times* has reported that in meetings with Mr. Pruitt employees “are sometimes told not to take notes.”<sup>1</sup> Mr. Pruitt himself goes out of his way to “make[] important phone calls from other offices rather than use the phone in his office[.]” *Id.* Mr. Pruitt’s “penchant for secrecy” also is reflected in his termination of the longstanding practice to publicly post the appointment calendars of the Administrator and top EPA aides. *Id.*

Even more troubling, Mr. Pruitt and his top aides seem to be avoiding the creation of written documentation that explains why the EPA is making some of its major regulatory changes. According to the *New York Times*, aides to Mr. Pruitt “recently asked career employees to make major changes in a rule regulating water quality in the United States – *without any records of the changes they were being ordered to make.*” *Id.* (emphasis added). That same rule was initially backed up by an analysis of “the economic benefits of preventing water pollution,” but once Mr. Pruitt decided to reverse the rule, EPA ““economists were verbally told to produce a new study that changed the wetlands benefit[.]”<sup>2</sup>

These are just some of the ways Mr. Pruitt and the EPA are evading public scrutiny of their decisions by failing to create records in the first place. Not only are these actions problematic from a public policy perspective, but they appear to violate the FRA requirement to document and preserve records reflecting essential EPA decisions and policies and documenting how they are made. Adequate documentation is one of the two main pillars of the FRA; the EPA’s failure to create this documentation undermines the goals of the FRA and deprives the public of access to the most basic record of the agency.

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<sup>1</sup> Coral Davenport and Eric Lipton, *Scott Pruitt is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, *New York Times*, Aug. 11, 2017, available at <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html?mcubz=0>.

<sup>2</sup> Davenport and Lipton, *New York Times*, Aug. 11, 2017, quoting Elizabeth Southerland, a former senior official in EPA’s water office.

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We therefore respectfully request that you exercise your authority to review the EPA's actions and make recommendations for any violations to be redressed.

Sincerely,



Noah Bookbinder  
Executive Director

cc: Chairman John Barrasso  
Ranking Member Thomas R. Carper  
Chairman Trey Goudy  
Ranking Member Elijah Cummings  
Chairman Greg Walden  
Ranking Member Frank Pallone, Jr.  
Chairman Ron Johnson  
Ranking Member Claire McCaskill

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