

Exhibit 1

Personal Email FOIA Request



July 24, 2013

VIA EXPRESS MAIL

Carmen L. Mallon
Chief of Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001

Chief, FOIA/PA Branch
Civil Rights Division
Department of Justice
Room 311, NALC Building
Washington, D.C. 20530-0001

Re. FREEDOM OF INFORMATION ACT REQUEST
Expedited Processing and Fee Waiver Requested
Private Communications Services

To Whom It May Concern:

This is a Freedom of Information Act ("FOIA") request pursuant to 5 U.S.C. Section 552 *et seq.* and 28 CFR 16.1 *et seq.*, relating to the use of private communication services for the conduct of official Department of Justice ("Department") business by political appointees of the Department.

Recent media reports raise the question as to the extent to which Executive Branch employees in the federal government are using private email, text messaging, instant messaging and other private communication services for the conduct of official government business. For example, at least two senior EPA officials were found to have used their private email accounts for the conduct of public business. C.J. Ciaramella, "EPA Official Resigns," *The Washington Free Beacon*, Feb. 19, 2013 (<http://freebeacon.com/epa-official-resigns>).

In addition, the House Committee on Oversight and Government Reform has revealed that more than a dozen Energy Department employees used private email accounts "to discuss

decisions involving taxpayer-funded loans,” in 2011 and 2012 – including loans made to and defaulted on by solar-panel maker Solyndra. Carol D. Leonnig and Joe Stephens, “Energy Dept. loan chief warned staff that personal e-mail could be subpoenaed,” *Washington Post*, Aug. 14, 2012 (http://www.washingtonpost.com/politics/energy-department-loan-program-staffers-were-warned-not-to-use-personal-e-mail/2012/08/14/900621fa-e61f-11e1-8f62-58260e3940a0_story.html).

Officials at the Department of Justice have also been alleged to be using private accounts. News reports have indicated that the former Assistant Attorney General for the Department’s Civil Rights Division used his private email account to conduct official business over a thousand times.

Labor Secretary nominee Tom Perez used his private email account to leak information about official business while he was assistant attorney general for the Justice Department’s Civil Rights Division, the House Committee on Oversight and Government Reform said in a Wednesday letter to Perez. C.J. Ciaramella, “Perez Used Private Email for Gov Business,” *The Washington Free Beacon*, April 18, 2013 (<http://freebeacon.com/perez-used-private-email-for-gov-business/>).

The story cites House Oversight Committee Chairman Darrell Issa, who alleged that Perez used his personal email account nearly 1,200 since 2009 to conduct official business.

These incidents and many others like them that continue to be reported in the media raise very serious questions about a pattern and practice among the members of the Executive Branch to use private communication services in the conduct of official government business. In particular, the use of private services appears to be an intentional strategy employed to avoid the obligation attendant to the conduct of an open and transparent government. Moreover, these tactics appear designed to frustrate the purposes of the FOIA and the National Archives Records Act, 44 U.S.C. Section 2101, *et seq.*

As this request relates to a matter of significant current and ongoing public interest and debate, and given the threat these practices pose to the Federal Government’s commitment to openness and transparency, it is imperative that this FOIA request be given expedited processing. *See* Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment. In addition, as Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program, Landmark requests the waiver of all fees and costs associated with this request.

I. Records Requested

Records evincing the use of any private or personal email account, text messaging service, instant messaging service, or any other private electronic communication, included but not limited to those sent via any social media service such as Facebook, Google Plus or other private platform, for the conduct of Department business **from January 20, 2009 to July 15, 2013**

Landmark limits its request to disclosure of the above described records for:

1. All **political appointees**;
2. All individuals serving in the **Senior Executive Service (“SES”)** (whether those individuals are, or have served in, political or career positions) of the Department;
3. Individuals in the **Office of the Attorney General** (whether those individuals are, or have served in, political or career positions);
4. Individuals in the **Office of the Deputy Attorney General** (whether those individuals are, or have served in, political or career positions);
5. Individuals in the **Civil Rights Division** (whether those individuals are, or have served in, political or career positions).

II. Fee Waiver & Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Department regulations allow for waiver or reduction of fees. 28 CFR 16.11.

Requesters must demonstrate:

- (i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and
- (ii) Disclosure of the information is not primarily in the commercial interest of the requester. 28 CFR 16.11(k).

As demonstrated below, Landmark satisfies each of these factors.

1. Release of Requested Records is in the Public Interest Because it is likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.

In addition to Department regulations, the FOIA requires the Department to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v. BATF, 964 F. Supp.494, 498 (D.D.C. 1997). Further, “the amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’” McClellan Ecological Seepage Situation v. Carucci 835 F.2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy went on to explain that the 1986 amendment’s purpose was “to remove the roadblocks and technicalities which have been

used by various federal agencies to deny waiver or reduction of fees under FOIA.” 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the Department’s regulations set forth factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors.

a. Whether the subject of the requested records concerns “the operation or activities of the government.”

This factor concerns the subject of the request. 28 CFR 16.11(k)(2)(i). Landmark seeks government records related to Department political appointees’ use of private email accounts or other similar electronic communication services to conduct official government business. Clearly, the documents relating to the use of private modes of communication are relevant to whether political appointees are attempting to frustrate their FOIA obligations and frustrate principles of open government. This matter, therefore, concerns the operations or activities of the government.

b. Whether the disclosure is “likely to contribute to an understanding of government operation or activities.”

This factor concerns the informative value of the information to be disclosed. The disclosure of the records sought will contribute to the public’s knowledge of whether Department officials attempted to circumvent their FOIA obligations or other legal duties by conducting official business through the use of personal email or other private electronic communication services. This has obviously not been made available to the public. In fact, it has been willfully kept from the public. Notably, even in an instance where Congress has demanded release of information, federal agencies have been slow to respond. The release of records showing that Department employees are using private email accounts would help shed light on government activities that aren’t conducted in public view. This would undoubtedly contribute to an understanding of government operation or activities.

c. Whether the disclosure of the requested information will contribute to “public understanding.”

This factor concerns the contribution to an understanding of the subject by the public likely to result from disclosure. 28 CFR 16.11(k)(2)(iii). The disclosure of the requested information will contribute to the public understanding of the Department’s operations as a result of Landmark’s long record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the “public understanding” of the Department’s conduct and operations:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;
2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;
3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;
4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;
5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such numerous articles in the past;
6. Landmark will issue press releases to specific media outlets; and
7. Landmark staff will appear on television and radio programs.¹

Landmark has a proven record of ensuring that information it receives pursuant to FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the *Associated Press*, *The Wall Street Journal*, *The Washington Post*, *The Washington Times*, and the Fox News Channel.

d. Whether disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

This factor concerns the significance of the contribution to public understanding. 28 CFR 16.11(k)(2)(iv). The disclosure of the records requested will contribute significantly to the public understanding of government operations or activities. The use of private email or other electronic communication services to conduct official business is clearly designed to prevent public understanding of government operations or activities. Indeed, if individuals within the Department secretly discussed their regulatory plans with outside groups, the general public would have great interest in such information and would have a significantly greater understanding of the Department's true activities. Disclosure could demonstrate that the Department has shielded its true policy intentions from public view.

Landmark clearly satisfies each of these four factors.

¹ See *Judicial Watch, Inc. v. Rosotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided “nine ways in which it communicates collected information to the public” sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

2. Disclosure of Requested Material is Not in Landmark's Commercial Interest.

In order for a fee waiver to be granted, the disclosure of the requested material must not be in the commercial interest of the requester. 28 CFR 16.11(k)(ii). Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information is consistent with Landmark's mission to educate the public concerning the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest non-profit organization. Accordingly, a waiver of fees should be granted.

B. Landmark's Request Should Receive Expedited Processing.

Under Department regulations, requests may be taken out of order and given expedited treatment. 28 CFR 16.5(d). In order to receive expedited process, a FOIA request must show any one of four factors:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) *An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;*
- (iii) The loss of substantial due process rights; or
- (iv) *A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.* (emphasis added) 28 CFR 16.5(d).

Department of Justice regulations thus track the FOIA's requirement for expedited processing when a compelling need has been established. The regulations have added an additional factor relating to government integrity. Landmark meets both of these factors for expedited processing.

1. Urgency to Inform.

a. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of tremendous public interest and debate as shown by the cited articles. The political appointees at senior levels across the

Obama Administration have been using private emails to shield their activities from public scrutiny. This raises the possibility that the Obama Administration has improperly politicized federal agencies and the possibility that the Department leadership is intentionally concealing its regulatory activity from an unwary public. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the Department's activities have been politicized. The country's entire system of justice is at risk with by improper or corrupt management at the Department. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the federal government. Furthermore, the federal government has shown itself incapable of responding quickly to address this issue, as the recent example of EPA's delayed response to repeated congressional requests for email information attests. See Juliet Eilperin, "EPA IG Audits Jackson's Private E-Mail Account," *Washington Post*, Dec. 19, 2012; "House Republicans try again for EPA 'Richard Windsor' email records," *Daily Caller*, Jan. 25, 2013, <http://dailycaller.com/2013/01/25/house-republicans-try-again-for-epa-richard-windsor-email-records/#ixzz2ZuEdxRxM>. In short, Landmark meets the factors for a compelling need.

b. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast and electronic media outlets, including the *Washington Post*, *Washington Times*, *The New York Times*, *Wall Street Journal*, and many other national publications. Landmark's work is often discussed on national radio talk shows. Landmark's only purpose in seeking this information, furthermore, is to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the general public and does not accept any government funds. Accordingly, Landmark must disseminate information about its activities to the general public in order to function.

In *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that the group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

As noted on Landmark's website, "Among Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark fully expects the Department to fully comply with the legal mandates set forth in the FOIA.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Department conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest. Furthermore, please provide assurances that Department officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request. Additionally, be aware that any actions taken in contravention of the Department's responsibilities will be raised if this request becomes the subject of litigation.

2. Government Integrity.

For reasons similar to those describing the urgency to inform the public about the matter, Landmark's request relates to an area that has called into question the integrity of numerous officials at the highest levels of the Executive Branch. Officials have apparently been flouting their obligations to conduct their business transparently. The use of private email accounts has been the subject of intense media scrutiny for several months because of its implications on government integrity. In short, Landmark's request fulfills the requirements of 28 CFR 16.5(d)(iv).

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citation to applicable exemptions and supporting case law.

Please also note, while Landmark realizes that the Department considers requests for fee waivers on a case-by-case basis, the Department has granted Landmark's requests in the past. Moreover, Landmark has successfully litigated the issue of whether it qualifies for a fee waiver in federal court.

For the reasons stated above, Landmark asks that the Department grant Landmark's fee waiver. You may contact Matthew Forys at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Forys's attention at the following address:

Matthew Forys
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Department regulations and as required by law, I certify, to the best of my knowledge and belief, that the above facts are true and correct.

29 Nov 2015

Date



Matthew Forys
Asst. General Counsel
Landmark Legal Foundation