

Judicial Watch Sues the EPA Over Use of an App

The government watchdog group Judicial Watch filed a Freedom of Information Act lawsuit Wednesday in the U.S. District Court for the District of Columbia against the Environmental Protection Agency after it failed to comply with a request for information regarding communications sent or received by officials who may have used the cell phone encryption application Signal.

Signal is an app for use on smartphones and tablet computers that allows for encrypted communications that can only be viewed by the sender and the receiver. In February, Politico reported that many Obama administration holdovers in government had turned to using the app in order to “thwart” President Donald Trump.

The report stated:

Whether inside the Environmental Protection Agency, within the Foreign Service, on the edges of the Labor Department or beyond, employees are using new technology ... to organize letters, talk strategy or contact media outlets and other groups to express their dissent ...

Fearing for their jobs, the employees began communicating incognito using the app Signal shortly after Trump’s inauguration ...

[T]he goal is to “create a network across the agency” of people who will raise red flags if Trump’s appointees do anything unlawful.

Judicial Watch immediately requested the following from the EPA:

1. Any and all work-related communications sent to or from the following EPA officials using the app known as Signal, for the period February 3, 2016 to the present:

- Administrator (or Acting),
- Deputy Administrator (or Acting),
- Assistant Administrator (or Acting), Office of Air and Radiation,
- Assistant Administrator (or Acting), Office of Chemical Safety and Pollution Prevention,
- Assistant Administrator (or Acting), Office of Enforcement and Compliance Assurance,
- Assistant Administrator (or Acting), Office of Land and Emergency Management,
- Assistant Administrator (or Acting), Office of International and Tribal Affairs and
- Chief Financial Officer (or Acting).

2. Any and all records requesting or approving the use of the messaging app known as "Signal" by any EPA personnel for official business. The time frame for the requested records is July 1, 2014 to the present.

The EPA has not responded to Judicial Watch's request, which prompted Wednesday's court filing. The group's president, Tom Fitton, said his goal is to expose how the "Deep State" is working to undermine not only the president, but the rule of law.

"Let's hope the Trump administration enforces FOIA and turns over these records," he said. "Given EPA's checkered history on records retention and transparency, it is disturbing to see reports that career civil servants and appointed officials may now be attempting to use high-tech blocking devices to circumvent the Federal Records Act and the Freedom of Information Act altogether."

To document his assertion, Fitton released the following information after filing the lawsuit:

Signal has long been touted within the high-tech community as an encryption device particularly effective for blocking government access to smartphone messaging. In a 2015 article entitled "Signal Keeps Your I-Phone Calls and Texts Safe from Government Oversight," advised, "Don't want someone else handing your text messages, pictures, video or phone conversations over to the government? There's an app for that. An iOS app called Signal is a project out of Open Whisper Systems, a not-for-profit collective of hackers dedicated to making it harder for prying government eyes to get a hold of your information."

The use of private encryption software such as Signal by federal officials and employees not only may make it difficult for their work to be overseen; it also may make it impossible for federal agencies to fulfill their record-keeping and transparency obligations under the Federal Records and Freedom of Information Acts. The Federal Records Act requires federal employees to preserve all records of work-related communications on government servers, even if such communications occur over non-government emails, phones or text messages. The records must be forwarded on to the agency for preservation and archiving, and the records are subject to release under the Freedom of Information Act, unless specifically exempted.

The Environmental Protection Agency has a history of employees' failing to preserve records and using private emails to conduct agency business or conducting official business through non-official communications channels:

- According to a September 20, 2016, report put out by the Energy and Environment Legal Institute, which was based upon emails obtained under FOIA: "Moving select correspondence about EPA-related business to non-official email accounts was an understood, deliberate and widespread practice in the Obama EPA."

- According to a December 21, 2016, Inspector General Report, the EPA's "mobile device-management processes do not prevent employees from changing the device's configuration settings for retaining text messages on all government-issued mobile devices." Apparently, at least one EPA employee set his phone to delete messages automatically after 30 days.
- Although excluded from the body of the IG report, the Inspector General reportedly told the chairman of the House Committee on Science, Space and Technology, Lamar Smith, who requested the IG investigation, that EPA officials archived only 86 text messages out of 3.1 million messages sent and received by agency employees in 2015.
- Chairman Smith originally requested the IG report in November 2014 after it was revealed that high-ranking EPA officials, including then-EPA Administrator Gina McCarthy, may have deleted texts to hide official business. {eoa}