

# Congress of the United States

## House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6301

(202) 225-6371  
[www.science.house.gov](http://www.science.house.gov)

February 16, 2017

The Honorable Maura Healey  
Attorney General  
Commonwealth of Massachusetts  
One Ashburton Place  
Boston, MA 02108-1518

Dear Attorney General,

The Science, Space, and Technology Committee (“Committee”) is continuing its investigation of potential adverse effects of the actions of the “Green 20” attorneys general on the national scientific enterprise, dating back to May 2016. After your repeated refusals to comply with requests for voluntary production of relevant documents necessary to aid the Committee’s investigation, on July 13, 2016, the Committee served you with a subpoena *duces tecum*. Unfortunately, though the Committee gave you ample opportunity to cooperate with the investigation, you continued to obstruct legitimate congressional oversight with your refusal to comply with that subpoena for the duration of the 114th Congress. The Committee is hereby reauthorizing the investigation into the actions of your office and reissuing the subpoena.

The Committee’s constitutional authorities and jurisdictional prerogatives have been extensively laid out in past correspondence and are incorporated by reference here.<sup>1</sup> The Committee maintains these authorities and prerogatives as valid exercises of congressional oversight, and has reauthorized its investigation for the 115th Congress. Please find enclosed the Committee’s reissued subpoena, dated February 16, 2017, in force for the remainder of the 115th Congress. The subpoena has been updated and narrowed to include documents and communications that would best aid the investigation at its current stage. Likewise, the schedule instructions have been updated to reflect rules and practice adopted by the Committee in the 115th Congress.

In addition, it has come to the Committee’s attention that your office may be concerned that full compliance with the Committee’s subpoena would necessitate waiver of various

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<sup>1</sup> Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Maura Healey (Aug. 30, 2016); letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Maura Healey (July 6, 2016); letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Maura Healey (June 17, 2016); letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Maura Healey (May 18, 2016).

common law privileges in ongoing or future third-party litigation, though currently it is difficult to comprehend that such common law privileges could validly be claimed in response to the Committee's narrowed and reissued subpoena. As an initial matter, such a concern regarding disclosure of purportedly confidential information does not obviate your legal obligation to comply in a full and timely manner with the Committee's subpoena.<sup>2</sup> Additionally, both jurisprudence and past practice support the notion that compliance with a compulsory demand from Congress does not constitute waiver. For example, when considering whether tobacco companies had waived certain privileges by producing documents to the House Energy and Commerce Committee, a court reasoned that "[a]s an initial matter, the involuntary or compelled production of privileged or protected documents does not waive otherwise applicable claims of privilege or protection so long as the privilege holder objects and takes reasonable steps to protect its claims of privilege and protection."<sup>3</sup> To that end, under any theory of waiver, production of a privilege log remains not only a requirement of the Committee's subpoena, but also a permissible and wise practice.<sup>4</sup> In fact, identifying with particularity those documents over which your office asserts various privileges, and cataloguing those documents in a privilege log, is necessary *both* to establish "reasonable efforts"<sup>5</sup> in retaining privilege by avoiding production of the underlying privilege-sensitive documents, and as a first step in compliance with the demands of the subpoena itself. While Congress maintains the prerogative to reject all common law privileges, as stated in my August 30, 2016, letter and in the attached subpoena instructions, it is advisable that you clearly articulate objections and catalogue such claims in a

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<sup>2</sup> See, e.g. *Watkins v. U.S.*, 354 U.S. 1978, 1987-88 (1957) ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action . . . [and] [i]t their unremitting obligation to respond to subpoenas"); *U.S. v. Bryan*, 339 U.S. 323, (1950) ("A subpoena has never been treated as an invitation to a game of hare and hounds . . . [; w]e have often iterated the importance of this public duty, in which every person within the jurisdiction of the Government is bound to perform when properly summoned"); *Exxon Corp. v. FTC*, 589 F.2d 582, 589-91 (D.C. Cir. 1978) (Congress may not be denied access to highly confidential documents; compliance with congressional requests are not public disclosure); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976) (compliance with a congressional subpoena and production of trade secret information does not constitute public disclosure).

<sup>3</sup> *Int'l Union of Operating Eng'rs, Local No. 132, Health and Welfare Fund v. Philip Morris*, No. 97-0708, 1999 WL 33659387, at \*2 (S.D. W. Va. June 28, 1999) (citing *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) and *Shields v. Sturm Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989)); see also *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1156-57 (D.C. Cir. 1979) (holding no waiver of privilege as a consequence of disclosure to Congress).

<sup>4</sup> For example, in 2009 the House Committee on Oversight and Government Reform, under the leadership of Chairman Edolphus Towns, demanded production of highly sensitive legal advice that implicated attorney-client privileges from Bank of America (BoA). Though BoA initially asked the Committee to withdraw its request on the basis that compliance "could result in the waiver of its privilege" with respect to open investigations with the New York Attorney General and the Security and Exchange Commission, the Chairman declined. BoA promptly provided a "detailed log of the privileged documents," and the Committee and BoA came to an agreement soon thereafter. D. Jean Veta & Brian D. Smith, *Congressional Investigations: Bank of America and Recent Developments in Attorney-Client Privilege*, 3 BLOOMBERG LAW RPTS. 124, 3 n.12 (2010), available at <https://www.cov.com/-/media/files/corporate/publications/2010/12/congressional-investigations---bank-of-america-and-recent-developments-in-attorney-client-privile.pdf>.

<sup>5</sup> See *Anaya v. CBS Broadcasting, Inc.*, 2007 U.S. Dist. LEXIS 55164, at \*24 (D.N.M. Apr. 30, 2007).

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privilege log in a timely manner, as the Committee's subpoena requires. Only then may the Committee evaluate such claims and discuss any desired accommodation with you.

The Committee welcomes the opportunity to discuss the ongoing investigation and scope of the reissued subpoena with you and your staff. To arrange a meeting or discuss matters over the phone, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, reading "Lamar Smith". The signature is fluid and cursive, with the first name "Lamar" and last name "Smith" clearly distinguishable.

Lamar Smith  
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

# SUBPOENA

## BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To The Honorable Maura Tracy Healey  
Attorney General of Massachusetts

You are hereby commanded to be and appear before the  
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

- ☒ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: March 2, 2017

Time: 12:00 noon

- ☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

- ☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

To any authorized staff member or the U.S. Marshals Service

\_\_\_\_\_ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at  
the city of Washington, D.C. this 16<sup>th</sup> day of February, 2017.

Lamar Smith  
Chairman or Authorized Member

Attest:

Karen S. Haas  
Clerk



## **SCHEDULE**

In accordance with the attached schedule instructions, you, Maura Tracy Healey, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts and the following individuals: Peter Frumhoff, Matthew Pawa, Lee Wasserman, May Boeve, Kenneth Kimmell, Ken Berlin, Dan Stiles, Richard Heede, Sharon Eubanks, Erin Suhr, Tom Steyer, and former Vice President Al Gore; referring or relating to climate change, environmental scientific research, and/or the Clean Power Plan.
2. All documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts and the following individuals: Wendy Morgan, Peter Washburn, Scot Kline, Lemuel Srolovic, Michael Meade, Matthew Levine, Elizabeth Wilkins, James Gignac, Jerry Reid, Paul Garrahan, Greg Schultz, Claude Earl Walker, Daniel Rhodes, Laura Watson, Eric Soufer, Damien LaVera, Daniel Lavoie, Natalia Salgado, Brian Mahanna, Joan Smith, and Tasha L. Bartlett; referring or relating to climate change, environmental scientific research, and/or the Clean Power Plan.
3. All documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President; referring or relating to the Office of the Attorney General of Massachusetts' investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.
4. All documents and communications referring or relating to the following subjects:
  - a) the Attorneys General Climate Change Coalition;
  - b) the AGs United for Clean Power;
  - c) the happy hour scheduled for March 28, 2016, with participants from the New York Attorney General's Environmental Protection Bureau and visiting assistant attorneys general as discussed in an email message dated March 17, 2016, from Michael Meade to Scot Kline and Wendy Morgan, among others;
  - d) the March 29, 2016, Climate Change Coalition meeting and press event as well as any associated meetings and discussions; and

### **Schedule Instructions**

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the subpoena cannot be made in full by March 2, 2017, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than March 1, 2017, at 12:00 noon. Any objections or claims of privilege are waived if you fail to provide an explanation of why full compliance is not possible and a log identifying with specificity the ground(s) for withholding each withheld document, as required in paragraph 12, prior to the subpoena compliance date.
12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to the constitution or any statute, rule, or regulation.
13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges such as privileges over law-enforcement sensitive disclosures or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements. Any assertion by a request recipient of any such non-constitutional legal bases for withholding documents or other materials shall be of no legal force and effect and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Chair of the Committee has consented to recognize the assertion as valid.
14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
16. The things described in the schedule shall be produced in their current condition, as of February 16, 2017.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2015 to present. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
18. All documents shall be Bates-stamped sequentially and produced sequentially.
19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.
20. Upon completion of the production, you must submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a log provided to the Committee, as described in (12) above, or identified as provided in (11) and (14) above.
21. When representing a witness or entity before the Committee in response to this subpoena, counsel for the witness or entity must promptly submit to the Committee a notice of appearance specifying the following: (a) counsel's name, firm or organization, and contact information; and (b) each client represented by the counsel in connection with the proceeding. Submission of a notice of appearance constitutes acknowledgement that counsel is authorized to accept service of process by the Committee on behalf of such client(s), and that counsel is bound by and agrees to comply with all applicable House and Committee rules and regulations.



### **Schedule Definitions**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.
8. “You” or “your” means and refers to you as a natural person and, as Attorney General of Massachusetts and any of the agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Office of the Attorney General of Massachusetts.