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House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051
FACSIMILE (202) 225-4784
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May 16, 2008

The Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, DC 20503

Dear Ms. Dudley:

I am writing to advise you that when you appear before the Committee on May 20, 2008, you should appear with documents.

On March 14, 2008, I wrote to request that you provide the Committee with documents relating to EPA's revised national ambient air quality standards for ozone. Jeff Rosen, General Counsel for the Office of Management and Budget, responded on March 26, 2008, by providing copies of a number of responsive documents, including two versions of the proposed rule, three pieces of correspondence between EPA and OMB, and records of two OMB meetings with outside parties. All of the documents provided by OMB were either part of the publicly available docket or were expected to be placed in the docket. In his letter, Mr. Rosen also stated that OMB would not be providing an unspecified number of documents responsive to the Committee's request, citing "the confidentiality of the Executive Branch deliberative and consultative process."¹

On April 16, 2008, the Committee issued a subpoena for the responsive documents that you had failed to produce voluntarily.

Since that time, you have produced additional documents to the Committee, which I appreciate. However, you continue to withhold approximately 1,900 pages of documents. According to OMB staff and the White House counsel, approximately 275 pages of documents are communications between the Office of Information and Regulatory Affairs (OIRA) and other White House officials outside of OMB. The remaining 1,625 pages of documents relate to internal OIRA communications about EPA's revised ozone standards. These documents have

¹ Letter from Jeffrey A. Rosen, General Counsel, Office of Management and Budget, to Chairman Henry A. Waxman (Mar. 26, 2008).

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been completely withheld from the Committee. You have given the Committee no date by which these documents will be provided, nor have you indicated that these documents will ever be provided to the Committee.

The Committee has a track record of seeking to reach reasonable accommodations with the White House on access to White House records. My consistent approach has been to get the information that the Committee needs to fulfill its oversight responsibilities, not to provoke avoidable conflicts over access to documents. As part of this accommodation process, the Committee has obtained access in other investigations to internal communications among senior officials in the Bush White House, such as communications to and from Assistants to the President and the office of the White House counsel, as well as draft communications between cabinet secretaries and the President.²

In this case, the Committee has not been provided sufficient access to the information to understand why the President rejected the recommendations of EPA Administrator Stephen Johnson. The Clean Air Act specifies the factors that may be permissibly considered in setting air quality standards and those that may not. The record before the Committee does not provide enough insight into the deliberations inside the White House to assess whether the President and other White House officials acted in compliance with the requirements of the law.

I do not question the good faith with which you and White House counsel have sought to respond to the Committee's inquiries, but we have reached a point where you are withholding documents that the Committee needs to complete its oversight. In this circumstance, the Committee and House precedents are clear. You must provide the documents to the Committee unless they are subject to a valid claim of executive privilege. As Ranking Member Davis and I wrote to James Connaughton last summer, you have "two basic options for each of the documents: provide the document to the Committee or assert executive privilege with respect to the document."³

The chairmen who preceded me on this Committee have consistently taken this same position. When Dan Burton was Chairman, his counsel wrote White House counsel: "[T]he only privilege under which the President may withhold subpoenaed documents is executive

² During the Clinton Administration, the Committee routinely received access to internal White House documents. Among the types of materials that were produced to the Committee were communications between the Vice President and his staff and confidential communications involving White House counsel. See Minority Staff Report, House Committee on Government Reform, *Congressional Oversight of the Clinton Administration* (Jan. 17, 2006).

³ Letter from Chairman Henry A. Waxman and Ranking Member Tom Davis to James L. Connaughton, Chairman of the White House Council on Environmental Quality (July 27, 2007).

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privilege.”⁴ When he was Chairman, Tom Davis wrote Mr. Connaughton: “Congress does not recognize deliberative process as a basis for withholding information and could not provide effective oversight without access to deliberative materials.”⁵

You will be testifying before the Committee on Tuesday, May 20, 2008, regarding the revised national ambient air quality standards for ozone. Unless the President asserts a valid claim of executive privilege with respect to the documents being withheld by OMB, you will be expected to personally bring the documents to the hearing. The Committee’s subpoena was directed to you and you will be in defiance of the subpoena if you appear at the hearing without the documents.

Sincerely,



Henry A. Waxman
Chairman

cc: Tom Davis
Ranking Minority Member

⁴ Letter from John Rowley, Chief Counsel to Chairman Dan Burton, to Lanny Breuer, Special Counsel to the President (Apr. 18, 1997).

⁵ Letter from Chairman Davis to James L. Connaughton, Chairman, White House Council on Environmental Quality (Sept. 20, 2006).