

DOC HASTINGS, WA
CHAIRMAN
DON YOUNG, AK
JOHN J. DUNCAN, JR., TN
LOUIE GOHMERT, TX
ROB BISHOP, UT
DOUG LAMBORN, CO
ROBERT J. WITTMAN, VA
PAUL C. BROUN, GA
JOHN FLEMING, LA
MIKE COFFMAN, CO
TOM MCCLINTOCK, CA
GLENN THOMPSON, PA
JEFF DENHAM, CA
DAN BENISHEK, MI
DAVID RIVERA, FL
JEFF DUNCAN, SC
SCOTT R. TIPTON, CO
PAUL A. GOSAR, AZ
RAUL R. LABRADOR, ID
KRISTI L. NOEM, SD
STEVE SOUTHERLAND II, FL
BILL FLORES, TX
ANDY HARRIS, MD
JEFFREY M. LANDRY, LA
JON RUNYAN, NJ
BILL JOHNSON, OH
MARK AMODEI, NV

TODD YOUNG
CHIEF OF STAFF

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

January 25, 2012

EDWARD J. MARKEY, MA
RANKING DEMOCRATIC MEMBER
DALE E. KILDEE, MI
PETER A. DEFAZIO, OR
ENI F.H. FALDOMAVAEGA, AS
FRANK PALLONE, JR., NJ
GHACE F. NAPOLITANO, CA
RUSH D. HOLT, NJ
RAUL M. GRIJALVA, AZ
MADELEINE Z. BORDALLO, GU
JIM COSTA, CA
DAN BOREN, OK
GREGORIO KILIJI CAMACHO SABLAN, CNMI
MARTIN HEINRICH, NM
BEN RAY LUJAN, NM
JOHN P. SARBANES, MD
BETTY SUTTON, OH
NIKI TSONGAS, MA
PEDRO R. PIERLUISI, PR
JOHN GARAMENDI, CA
COLLEEN W. HANABUSA, HI

JEFFREY DUNCAN
DEMOCRATIC STAFF DIRECTOR

The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1951 Constitution Avenue, NW
Washington, DC 20240

Dear Mr. Secretary:

It is with disappointment and deep frustration that we must again write regarding the Department of the Interior's failure to comply in a meaningful way to our April 25, 2011 request seeking 5 categories of documents related to White House edits that led to the inclusion of the 6-month Gulf of Mexico drilling moratorium in the Executive Summary of the final May 27, 2010 report entitled, "Increased Safety Measures for Energy Development on the Outer Continental Shelf" ("ISM Report"). The revisions in question implied that the moratorium had been peer reviewed by technical experts, who had provided input into the report's recommendations, when in fact, they had not reviewed or endorsed the moratorium in the Executive Summary of the final report. A November 8, 2010 report from the Department's Office of Inspector General ("OIG") "determined that the White House edit of the original DOI draft Executive Summary led to the implication that the moratorium recommendation had been peer reviewed by the experts." Many months have passed and yet the Department has provided virtually no responsive materials and, in fact, has blocked the OIG from providing documents requested by the Committee. This letter provides notice of our intent to move to compel cooperation and production of documents and communications in accordance with the deadlines listed below.

I. Department's Failure to Comply

Since our April 25, 2011 request, the Department has flouted this inquiry and defied repeated efforts to obtain documents and communications related to this matter. To be clear, during this nine months the Department has provided 15 pages of documents responsive to the requests that were not already disclosed by the OIG.

Following our April 25, 2011 request letter, an inquiry was received from Department staff in May 2011 seeking clarification of one part of the request, which was promptly provided.

Then, not a single page of responsive material was provided by the Department until August 1, 2011, when the Department provided us copies of the OIG's report and 11 attachments – all of which the OIG had already promptly provided to us on May 11, 2011. Despite having provided no information that was not already in our possession, the Department said in this August 1, 2011 communication that it could not further respond to our request without additional clarification. Our original April 25, 2011 request sufficiently described the narrow universe of information sought and the fact that the Department produced not a single document or communication that was not assembled and already disclosed by the OIG is not due to a lack of clarity, but a lack of compliance.

The request seeks 5 categories of documents related to the editing of the Executive Summary, including drafts and emails transmitting edits to Executive Summary of the final ISM Report and communications with the peer reviewers on the draft. The Department is certainly aware of which Department officials, likely limited in number, would have been engaged in editing and review of this document, and these activities occurred only during a defined period of time between April and June 2010. However, the Department has provided zero documents in response.

During an August 2, 2011 meeting, Committee staff reiterated that full compliance with the request was expected and provided specific subjects within our request that we wanted the Department to address in its response: information about who from the White House was involved in editing the document, communications between the Department and the peer reviewers before and after the ISM Report was issued, and the internal management clearance form for the report. In an August 15, 2011 letter, we encouraged the Department to seek clarification promptly of the request as necessary, adding the “fact that an item request may require the production of a large number of documents or documents that DOI prefers not to produce does not make the request unclear.” In a letter dated August 16, 2011, the Department provided copies of seven almost identical form letters sent by Deputy Secretary David Hayes apologizing to the peer reviewers for falsely conveying their endorsement of the six-month drilling moratorium, along with a copy of the internal management clearance form for the final report. We do not understand why it took the Department almost 4 month to provide us with these 8 documents totaling just 15 pages. All the more incredible is that these 15 pages are the sum total to date of the Department's own efforts to respond to our request.

We also have very real concerns about the adequacy of the Department's search for documents. For example, during an August 19, 2011, meeting, Department staff informed Committee staff they had not identified any emails between Department staff and the peer reviewers sent *after* the report was issued and explained the search had been limited to only the email files of only one DOI official. Committee staff responded that the Department needed to search the email files of additional Department staff. In a September 28, 2011 letter, we said we expected the Department to produce by October 5, 2011 emails sent between the additional Department staff and peer reviewers after release of the ISM Report. After passage of this deadline with no response, we sent a letter on October 13, 2011 reiterating our request for these emails. Several days later, we received a letter dated October 13, 2011 from Department staff stating the Department was still in the process of searching for and processing these emails and it

expected “to respond to the Committee’s request regarding these communications in the near future.” We are still awaiting the Department’s response three months later.

To be clear, documents concerning communications between Department officials and White House staff or with the peer reviewers about drafts of the ISM Report were included within the scope of our original April 25 request, and our subsequent efforts to provide clarity to the Department were intended to prod compliance and in no way diminished our repeatedly stated interest in obtaining all documents concerning these communications. Our understanding is that Department officials communicated with the peer reviewers on or about May 23, 2010 as part of their review of the draft ISM Report, that after the final report was issued one of the peer reviewers personally contacted a DOI official who later informed you about his concerns with the Executive Summary and then drafted the apology letter, and that you hosted a conference call with the peer reviewers in June 2010. Yet the Department has provided no documents on these matters in the nine months since our request, including drafts of the apology letters, emails concerning the peer reviewers comments to DOI staff before and after the ISM Report was issued, or the June 2010 conference call with the peer reviewers.

II. Department’s Deliberate Withholding of Office of Inspector General Documents

In addition to its near total defiance of our oversight requests, the Department has intervened and frustrated our attempts to obtain information from the OIG about its investigation into the editing of the ISM Report. The Department has actively prevented the OIG from providing documents to us.

As described above, we sent a separate request to the OIG also on April 25, 2011. The OIG promptly responded on May 11, 2011 and provided us with a copy of its November 2010 investigative report and copies of 11 attachments to the report. The OIG’s response, however, informed us it was unable to provide 6 additional attachments that the Department’s Office of Solicitor had claimed “reflect or constitute predecisional and deliberative interagency communications relating to the manner in which the 30-Day Safety Report was finalized, and thus raise important confidentiality interests of the Executive Branch.” The OIG’s letter said the Solicitor’s Office would be communicating directly with us to discuss its claim. The OIG concluded by clarifying that its investigation was “unable to independently conclude whether the implications contained in the 30-Day Report were intentional or not.”

We did not receive any communication from the Department about its concerns until after we sent a follow up letter on July 18, 2011. During a July 29, 2011 conference call, Solicitor’s Office staff offered to provide an index of the 6 withheld attachments and to allow Committee staff to review 1 of the 6 withheld attachments. Committee staff agreed to this as an interim step but reiterated that we continued to expect compliance with the full request. During the August 2 meeting described above, Committee staff reviewed this 1 attachment: a copy of an OIG document summarizing emails between DOI senior officials and White House staff sent May 26, 2010 and May 27, 2010 that were transmitting edits to the Executive Summary.

In a letter dated August 1, 2011 letter, Department staff stated that it was unable to provide us with a copy of that one withheld attachment because it implicated important Executive Branch confidentiality interests. It did not provide any explanation about why it could not provide the other 5 documents being withheld. As described above, we sent a letter to you on August 15, 2011 expressing frustration with the Department's response to this and two other requests for information. In a letter dated August 16, 2011, your staff offered to make available for inspection two more of the withheld attachments to the OIG report. [As described above, this letter also transmitted copies of the apology letter Deputy Secretary Hayes sent to the peer reviewers and the internal management clearance form for the final report.]

On August 19, 2011, Committee staff reviewed these 2 withheld OIG attachments: copies of two emails between Department officials and White House staff transmitting the drafts of the Executive Summary that were discussed in the other OIG attachment Committee staff had reviewed on August 2. The Department's August 16 letter states these two emails "constitute all of the email communications between senior officials in the Department and White House staff that were described in the [previously reviewed OIG document]." However, this narrow response does not make clear whether the Department has other potentially responsive documents reflecting communications with the White House or edits made by the White House that were not described in the OIG document.

In a letter dated August 17, 2001, the OIG provided us an additional 22 documents and informed us that it was unable to provide an additional 7 documents it had identified per directions from the Department's Solicitor's Office. So, at the aforementioned August 19, 2011 meeting, Committee staff requested copies of the 7 newly identified OIG documents that the Department was withholding, to which Department staff responded they could not provide these 7 documents until after they had reviewed them. In the letter dated September 28, 2011 discussed above – sent almost a month and a half after we were first informed that the Department needed to review the 7 newly identified OIG documents – we reiterated our request for the 7 documents supposedly undergoing review. After no response, we sent yet another letter on October 13, 2011, demanding full and complete compliance with the request. It is difficult to comprehend how it could legitimately take the Department two months to review these 7 documents.

By letter dated October 13, 2011, Department staff responded that the 7 newly identified OIG documents concern Executive Branch confidentiality interests and "do not pertain to the subject of your inquiry." It is not appropriate for the Department to unilaterally determine what does or does not pertain to our investigation. It also strains credulity to say the documents in question, which were compiled by the OIG as part of its investigation into the White House's editing of the ISM Report, do not pertain to our investigation into the White House's editing of the ISM report. The Department has also asserted that these documents implicate some confidentiality interest without claiming any specific privilege and offers a belated "accommodation" of providing Committee staff with more information on these documents. This is unacceptable and is consistent with the pattern of delay the Department employs in response to the Committee's requests.

We have difficulty understanding the Department's concern about releasing these OIG documents, other than the fact some of them discuss communications between Department officials and White House staff. That alone is an insufficient excuse for withholding the OIG documents from the Committee. The events discussed in the documents are already publicly known and reflected in the OIG's public November 2010 report. Furthermore, disclosure of these documents could not injure an ongoing deliberative process, as the ISM Report was finalized and publically released a year and a half ago and already subject to litigation, which the Department lost. The production of all 13 documents that the Department has blocked the Inspector General from providing is expected by February 1, 2012 absent a valid claim of Executive Privilege by the President.

III. Department's Vague Privilege Claims are Without Merit

We have exhibited considerable patience and restraint in light of the Department's disregard for this legitimate oversight request. The Department has generally and vaguely said a number of the documents we are seeking implicate confidentiality interests of the Executive Branch. As has been explicitly expressed in multiple letters and staff conference calls, the generalized claim of an Executive Branch confidentiality interest is not a legal basis for withholding information from Congress. Even if this claim could be considered a privilege assertion, as we have noted to you on numerous occasions, including our April 25 request letter and July 18 and August 15 follow up letters, claims of privileges are considered under Committee on Natural Resources Rule 4(h) and, similar to all common-law privileges, are applicable only at the discretion of the Chairman. We are especially troubled by the Department's apparent disregard for our oversight authority, notwithstanding the President's stated commitment to create "*an unprecedented level of openness in Government.*" See Memorandum for the Heads of Executive Departments and Agencies regarding Transparency and Open Government, Jan. 21, 2009. (Emphasis added.)

The President has advised agencies that "*[i]n the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.*" See Memorandum for the Heads of Executive Departments and Agencies regarding Freedom of Information Act, Jan. 21, 2009. (Emphasis added.) As part of the Department's efforts to implement the President's policy in favor of openness, you issued a memorandum on July 2, 2009 to all Department employees that, "*The Department will only withhold information when we reasonably can foresee that its release would harm an interest protected by a FOIA exemption (e.g., our national security or the privacy interests of individuals) or when disclosure is prohibited by statute. The President's and Attorney General's messages extend beyond the boundaries of the FOIA. They call upon agencies to aggressively increase proactive disclosures of information that is of interest to the public, thus vastly increasing information that is available on the internet. Our goal is to increase transparency.*" (Emphasis added.)

To date, the Department has asserted a generalized claim of an Executive Branch confidentiality interest as the reason for refusing to provide requested material. As we expressed in the letter dated August 15, 2011, this is not a legal basis for withholding information from Congress. The Department has failed to provide a detailed privilege log identifying the documents it is withholding in full or in part and the legal basis that would justify applicability of a privilege to the withheld information, despite repeated requests for the Department to do so.

As best we understand the Department's arguments to date, the Department considers certain withheld information to be protected from disclosure to Congress by the deliberative process privilege. As a qualified privilege, the deliberative process privilege is not an absolute bar against disclosure and, regardless, cannot be used to shield purely factual information. Even under its faulty logic, the Department would be obligated to examine each document and provide non-privileged portions in response to a public request under the Freedom of Information Act ("FOIA"). The Department's response to our April 25 request appears to fall short even of what it would be obligated to provide the public under FOIA. In contrast, the Department here is making a blanket claim of the privilege to withhold broad categories of information from Congress and appears to be refusing to provide even non-exempt documents or portions of documents or a detailed explanation of its search and withholdings. This is unacceptable and cannot continue.

IV. Final Opportunity for the Department to Comply

It is expected that the following items will be provided by the Department no later than February 9, 2012. Although these subject areas were encapsulated within the categories of documents in our April 25 request, we request the Department provide copies of these specific documents described below by this date. This in no way limits or excuses the Department from full compliance with complying with these prior, standing requests not reflected below. Please focus your response on documents generated by, received by, or prepared for Elizabeth Birnbaum, Walter Cruikshank, Mary Katherine Ishee, David Hayes, Steve Black, Neil Kemkar, Hilary Tompkins, Constance Rogers, Wilma Lewis, and Rhea Suh between the dates of April 20, 2010 and June 30, 2010, including any documents prepared for or sent to Secretary Salazar. Based on our review of the material provided by the OIG, it is expected that such documents exist and the Department should be able to locate them without any undue delay or burden. An attachment to this letter provides additional information about responding to the Committee's request, including definitions and instructions for compliance.

1. Documents concerning the decision to include a moratorium in final ISM Report, including any analysis of legal authority for or economic impacts from the 6-month moratorium included in the Executive Summary.
2. Documents, including emails or other communications, concerning edits, revisions, or changes to the draft Executive Summary of the ISM Report made prior to May 25, 2010.

3. Documents, including emails or other communications, concerning edits, revisions, or changes to the draft Executive Summary of the ISM Report made on or after May 25, 2010.
4. Documents concerning communications with the peer reviewers, including emails or other documents transmitting drafts of the ISM Report and/or Executive Summary to the peer reviewers and talking points or other materials, meeting summaries, or staff notes concerning any conference calls or meetings with peer reviewers that occurred in May 2010.
5. Documents related to the apology letter David Hayes sent to peer reviewers on or about June 4, 2010, including drafts of the letters.
6. Documents concerning any conference calls and/or any follow up meeting between Secretary Salazar and peer reviewers during June 2010, including emails, calendar entries, talking points or other briefing materials, and meeting notes.
7. Documents concerning drafts of any press releases or communications materials concerning the release of the ISM Report and/or the 6-month moratorium referenced in the Executive Summary of the ISM Report.

In addition, due to the Department's lack of compliance to date, we request the Department provide the following information by February 2, 2012:

8. Documents, including emails or memoranda, sent by the Department to staff with instructions for assisting with or responding to the OIG's 2010 investigation into the editing of the ISM Report.
9. Documents, including emails, sent by the Department instructing staff to search for and/or collect records responsive to our April 25 request to the Department.
10. Copies of the 13 OIG documents the Department claims are either not responsive or withheld on a claim of Executive Branch confidentiality interest.
11. Copies of any emails related to communications with the peer reviewers, as described in our September 28 and October 13, 2010 letters.
12. A copy of any index of administrative record prepared for the *Hornbeck* litigation challenging the 6-month moratorium referenced in the Executive Summary of the ISM Report.

Please contact us, or have your staff your staff contact Byron R. Brown, Senior Counsel for Oversight, Office of Oversight and Investigations, with any questions regarding this request, or to make arrangements for the production of the requested material.

Thank you for the Department's prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doc Hastings".

Doc Hastings
Chairman
Natural Resources Committee

A handwritten signature in blue ink, appearing to read "Doug Lamborn".

Doug Lamborn
Subcommittee Chairman
Energy and Mineral Resources

Responding to Committee Document Requests

A. 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, recorded notes, letters, notices, confirmations, receipts, checks, envelopes, presentations, pamphlets, brochures, interoffice and intra office communications, electronic mails (e-mails), notations of any type of conversation, telephone call, voice mail, phone mail, meeting or other communication, diaries, analyses, summaries, messages, correspondence, circulars, opinions, 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 electronic, mechanical, and electric records or representations of any kind, 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.
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 face-to-face, in a meeting, by telephone, mail, e-mail, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this document request. The singular includes the plural. The masculine includes the feminine.
4. As used herein, “referring” or “relating” means and includes “constituting,” “pertaining,” “evidencing,” “reflecting,” “describing,” or “having anything to do with,” and in each instance, directly or indirectly. These terms mean, without limitation, any reference or relationship which either (a) provides information with respect to the subject of the inquiry, or (b) might lead to individuals who, or documents which, might possess or contain information with respect to the subject of the inquiry.

B. Instructions

1. In complying with this document request, you are required to produce all responsive documents, materials, or items that are in your possession, custody, or control, whether held by you or your past or present agents, employees, representatives, subsidiaries, affiliates, divisions, partnerships, and departments acting on your behalf. You are also

required to 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. No records, documents, data or information called for by this request shall 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 document request has been, or is also known by any other name than that herein denoted, the document request shall be read also to include them under that alternative identification.
3. Each document produced shall be produced in a form that renders that document capable of being printed or copied.
4. Documents produced in response to this document request shall be produced together with copies of file labels, dividers, envelopes, or identifying markers with which they were associated when this document request was served. Documents produced to this document request shall also identify to which paragraph from the document request such documents are responsive. Moreover, please include with your response, an index identifying each record and label (preferably by bates stamping) the documents. The Committee prefers, if possible, to receive all documents in electronic format.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses documents that are non-identical or identical copies of the same document.
6. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer back-up tape), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.
7. If compliance with the document request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
8. In the event that a document is withheld, in whole or in part, based on a claim of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter of the document; (d) the date, author, and any recipients; and (e) the relationship of the author and recipients to each other. Claims of privileges are considered under Committee on

Natural Resources Rule 4(h) and, similar to all common-law privileges, are recognized only at the discretion of the Committee.

9. If any document responsive to this document request 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 by which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this document request 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 request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. This request is continuing in nature and applies to any newly-discovered information. Any 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 location or discovery subsequent thereto.
12. Production materials should be delivered to:

Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515