UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 23 2019

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy,

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letter dated July 22, 2019 to Administrator Andrew Wheeler, in which you sought information related to the EPA's recent regulatory updates that bring the EPA into compliance with the requirements of the Freedom of Information Act (FOIA).

On June 26, 2019, the EPA published in the *Federal Register* the Agency's "Freedom of Information Act Regulations Update." 84 Fed. Reg. 30028. The Agency updated its FOIA regulations to bring the EPA into compliance with current FOIA statutory requirements at the direction of Congress. The EPA had no discretion for the changes mandated by the amendments to FOIA in 2007, 2009, and 2016 passed by Congress. Congress specifically mandated that we update our regulations to come into compliance with the statutory changes. Most agencies and departments met this obligation by 2016—for whatever reason the Obama Administration EPA did not. The Agency's regulations now finally comply with amendments that go back more than a decade.

In 2018, the U.S. Government Accountability Office issued a report urging agencies to update their FOIA regulations to bring them into compliance with a series of FOIA amendments enacted over the last several years. The Agency's updated regulations are now in compliance with these amendments. Despite inaccurate claims by the media and others that the updated regulations increase the ability of political appointees to claim that portions of a document are not responsive to a FOIA request or are exempt from disclosure, political appointees have no additional or expanded authority under the updated regulations. The updated regulations do not and cannot change the statute Congress passed, nor do they expand the EPA's authority to determine responsive records. The EPA's updated regulation does not authorize the Agency to withhold a portion of a record as not responsive in violation of the statute or applicable case law.

The only discretionary change, not mandated by Congressional amendments, in the updated regulations was adopted consistent with the recommendations from the FOIA Federal Advisory Committee—an advisory committee convened by the National Archives, independent of any EPA authority, which develops consensus recommendations for improving FOIA administration

and proactive disclosures. In 2018, the FOIA Federal Advisory Committee, recommended that federal departments and agencies "centralize FOIA processing where appropriate." Therefore, at the specific direction of the FOIA Federal Advisory Committee, the Agency's recent updates provided for the centralization of the submission and receipt of all requests. The EPA is not centralizing the processing and response to all requests, merely the submission and receipt of all requests—the decision-making authority for FOIA responses remains with the offices that are document custodians. Regional and program offices will still conduct search, collection, review, and record releases once the Nationals FOIA Office has assigned a request to a Region or program office.

When the Agency's career FOIA attorneys provided Congress with bipartisan briefings on the updated regulations, the only significant concern mentioned was the potential for confusion during the centralization transition. In response to those concerns, the Agency voluntarily instituted a glidepath towards implementing centralized intake by instructing Regions that receive improperly submitted mailed or emailed requests directly from requesters to continue accepting those requests until August 23, 2019. For requests improperly submitted after August 23, 2019, the Agency also instructed Regions to inform requesters of the proper methods for submitting FOIA requests under the updated FOIA regulation.

The EPA strongly believes that the actions the Agency took to update the regulations were a direct response to comply with current FOIA statutory requirements and improve the Agency's FOIA response at the direction of Congress and independent consensus recommendations.

If the you have questions regarding specific changes to the Agency's FOIA regulations or program beyond the information that is already public, the Agency is willing to work with your staff on how best to accommodate those interests. If you have further questions, you may contact me, or your staff may contact Kristien Knapp in the EPA's Office of Congressional and Intergovernmental Relations at Knapp.Kristien@epa.gov or (202) 564-3277.

Sincerely,

Joseph A. Brazauskas, Jr.
Associate Administrator