United States Senate
WASHINGTON, DC 20510

July 22, 2019

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator Wheeler,

We write to express significant concerns about the "FOIA Regulations Update" final rule promulgated by the Environmental Protection Agency (EPA) – without any opportunity for public comment – on June 26, 2019.[1] While we appreciate the agency's commitment to updating its regulations in response to recent FOIA amendments, the rule purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA.

First, the rule expressly cites political appointees – including but not limited to the EPA Administrator and his Deputy Administrators – as authorized to "issue final determinations whether to release or withhold" documents in response to FOIA requests.[2] We note that the EPA's operative memorandum setting forth the agency's "awareness notification process" – by which senior agency officials are made aware of the release of certain information through FOIA – makes clear that such a process is "not an approval process" and that "FOIA staff…determine whether information should be released or withheld" under FOIA.[3] This new rule, however, appears to supersede that memorandum, affirming political appointees' power to decide what information is released or withheld in response to FOIA requests. While FOIA does not preclude this authority, experience under the Obama administration and prior administrations shows that the involvement of political appointees making determinations can add unnecessary delays to the review process, potentially violating FOIA's statutory deadlines. Expressly affirming appointees' authority to issue final determinations may embolden future senior officials and increase the

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[1] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30028 (June 26, 2019) (online at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf).

[2] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30033 (June 26, 2019) (to be codified at 40 C.F.R. § 2.103(b)) (online at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf).

[3] Environmental Protection Agency, Office of the Administrator, *Awareness Notification Process for Select Freedom of Information Act Releases* (Nov. 1, 2018) (online at http://www.environmentalintegrity.org/wp-content/uploads/2018/11/epa-memo.pdf).

chances – under any administration – that final FOIA determinations are unnecessarily delayed or driven by political considerations rather than the law.

Second, the rule requires that all FOIA requests be sent to the EPA's headquarters in Washington. D.C.[4] This effectively sidelines the EPA's regional offices, which may previously have been the point of easiest access for many requesters. Making matters worse, the rule does not require the EPA to inform requesters that a request has been erroneously submitted to an EPA program or regional office. Rather, "the EPA will not consider the request received by the Agency."[5] We are concerned that this hard and fast rule – without further notice procedures – may leave requesters accustomed to submitting requests to a regional office unaware their request will never receive a response.

Third, the rule appears to provide the EPA with authority to withhold information in violation of controlling legal precedent on FOIA. The rule authorizes officials or their delegates to "release or withhold a record *or a portion of a record* on the basis of *responsiveness*."[6] This appears to directly conflict with a 2016 decision by the D.C. Circuit, which found "no statutory basis for redacting ostensibly non-responsive information from a record deemed responsive."[7] Rather, "the sole basis on which [an agency] may withhold particular information within that record is if the information falls within one of the statutory exemptions from FOIA's disclosure mandate."[8] This ruling prevents agencies from withholding portions of otherwise responsive records under the rationale that such portions are not responsive to the FOIA request – compelling the disclosure of the entire record unless a specific FOIA exemption applies. Thus, the rule appears to authorize exactly what the D.C. Circuit's holding prohibits.

Finally, the EPA's decision to proceed with a final rule without providing any opportunity for public comment only further frustrates what should have been a transparent and publicly accountable dialogue. The EPA claims the rule change qualifies for the "good cause" exception to the public comment requirements of the Administrative Procedure Act (APA) in part because its revisions are "insignificant in impact and inconsequential to the public."[9] It is difficult to understand, however, how a rule that limits where requests may be made and appears

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[4] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30030 (June 26, 2019) (online at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf).

[5] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30030 (June 26, 2019) (online at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf).

[6] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30033 (June 26, 2019) (to be codified at 40 C.F.R. § 2.103(b)) (online at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf). (emphasis added)

[7] *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016).

[8] *Id.*

[9] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30029 (June 26, 2019) (online at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf).

to affirm political appointees' authority to redact information in ways that may violate binding precedent is "insignificant" or "inconsequential."

Given the potentially serious issues we have identified above, we urge you to reconsider your implementation of—or provide sufficient opportunity for public comment on—the "FOIA Regulations Update" final rule. At minimum, we urge you to at least provide additional transition time to ensure that the public and requesters are fully aware of the nature and impact of these policy changes. Thank you for your attention to this critical issue.

Sincerely,

PATRICK LEAHY
United States Senate

CHARLES E. GRASSLEY
United States Senate

DIANNE FEINSTEIN
United States Senate

JOHN CORNYN
United States Senate