Message

**From**: EPA Press Office [press@epa.gov]
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**Subject**: EPA's Response to Society of Environmental Journalists

# EPA's Response to Society of Environmental Journalists

This week several media outlets misrepresented EPA's new FOIA regulation, and were forced to correct their misreporting. This new regulation brings the Agency into compliance with the Congressional amendments to FOIA from 2007, 2009, and 2016. Congress provided all federal departments and agencies until the end of 2016 to update their FOIA regulations. The Obama administration failed to meet this deadline.

Yesterday, the Society of Environmental Journalists (SEJ), whose mission states that they strive to "strengthen the quality" of environmental journalism, sent a letter to EPA Administrator Andrew Wheeler which included numerous inaccuracies that were regurgitated from false articles. Below is EPA's response to the SEJ, signed by EPA career officials.

**BELOW IS THE LETTER IN FULL:**

Dear Director Parker:

On behalf of the Administrator of the U.S. Environmental Protection Agency, we write in response to your letter dated, June 26, 2019. Together we manage the Agency's National Freedom of Information Act Office, which advises the Agency on legal issues pertaining to FOIA requests, coordination, and project management. Additionally, we are the two career attorneys tasked with providing the recommendations to update the Agency's FOIA regulations.

This week EPA finalized an updated FOIA regulation that brings the Agency into compliance with a series of Congressional amendments. Unfortunately, a series of false and misleading claims have relayed inaccurate information to the public about this updated regulation. The Agency believes it is important to address these significant misrepresentations and emphasize that the update to the Agency's FOIA regulation in no way expands or increases the authority of political officials in the FOIA process. The Agency's updated regulation does not grant political officials' additional authority to

review or withhold FOIA documents, their authority will remain consistent with the authority granted to them under the past regulation.

**1. EPA did not expand political officials' oversight of FOIA responses.**

EPA's updated FOIA regulation did not change the political officials with FOIA decisionmaking authority or expand their authority.

In fact, the FOIA decisionmakers identified in EPA's updated regulation are nearly identical to the list in EPA's old regulations at 40 CFR 2.104(h).

EPA's updated regulation now expressly lists the Administrator, who always had full FOIA decisionmaking authority under the statute, itself. The updated regulations have not increased or otherwise altered the Administrator's authority to make decisions under FOIA.

EPA's updated regulation also expressly lists the Deputies in Program and Regional Offices. These officials always had FOIA decisionmaking authority under the regulations as "designees." Deputies most frequently include the top career official in each program and regional office. Rather than expanding political officials' oversight - which this language did not do — this change expressly recognizes the role of career officials.

In fact, FOIA responses are rarely, issued by political employees -- to the contrary, such decisions typically are issued at the career director or career branch chief level. The updated regulation is not expected to impact or alter that practice.

**2. EPA did not expand political officials' power.**

EPA's updated regulation did not and cannot change the statute Congress passed.

FOIA determinations have always included decisions to withhold records or to issue "no records" responses. The updated regulation does not grant more power than EPA's prior regulations.

EPA's prior rules provided in section 104(g) that "[a]n adverse determination consists of . . . a determination that a requested record does not exist or cannot be located[.]" EPA's new updated regulation does not state anything more than this.

**3. EPA's decision to centralize the intake process will speed FOIA processing, not slow it.**

EPA's decision to streamline submission of FOIA requests to its National FOIA Office will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

In 2018, the FOIA Federal Advisory Committee, convened by the National Archives, recommended that federal departments and agencies "centralize FOIA processing where appropriate." Centralized FOIA submission will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

Many other departments and agencies have gone further than EPA in streamlining the FOIA processing, such as Department of State, USAID, Social Security Administration (in the Office of General Counsel), the Securities and Exchange Commission, and Commodity Futures Trading Commission (in the Office of General Counsel), among others. EPA has left the FOIA response decisionmaking authority with the offices that are document custodians. Department of Labor has a similar centralized FOIA submission mailbox and decentralized FOIA processing and response structure.

Centralized FOIA intake and initial review will allow EPA to minimize coordination required for initial assignment of FOIA requests and to ensure consistency in early outreach to requesters.

**4. EPA's decision to publish a final rule does not violate Administrative law**

EPA's decision to increase efficiency by providing a single location for the public to submit FOIA requests is a procedural rule that does not require notice and comment under the Administrative Procedure Act.

EPA also published its FOIA updated regulation as a final rule without notice and public comment because EPA had no discretion for the changes mandated by the amendments to FOIA in 2007, 2009, and 2016.

Many other agencies similarly published final rules to implement these amendments without notice and comment. Those include:

- Housing and Urban Development. 82 FR 3619 (01/12/2017)
- NEH, National Foundation on the Arts and the Humanities, 82 FR 44 (01/03/2017)
- U.S. Nuclear Regulatory Commission, 81 FR 96344 (12/30/2016)
- Department of Energy, 81 FR 94915 (12/27/2016)
- U.S. International Trade Commission, 81 FR 86575 (12/01/2016)
- Farm Credit Administration, 81 FR 63365 (09/15/2019)
- Surface Transportation Board, 81 FR 90750 (12/15/2019)
- Office of Special Counsel, 82 FR 15609 (03/30/2017)
- National Labor Relations Board, 82 FR 11748 (02/24/2017)
- National Council on Disability, 81 FR 93791 (12/22/2016)
- Tennessee Valley Authority, 82 FR 41511 (09/01/2017)
- Defense Nuclear Facilities Safety Board, 82 FR 30722 (07/03/2017)

**5. EPA regions are still empowered to grant requests**

Under the updated regulation regional offices have the authority to grant FOIA requests.

The updated regulation only centralizes the intake of FOIA requests to the National FOIA Office; it does not centralize the searching, reviewing, or production of records.

The updated regulation, like the 2002 regulations, continues to provide regional administrators, their deputies, and delegates the authority to issue final determinations.

Best Regards,

Elise Packard, Acting Deputy General Counsel for Operations

Timothy Epp, Acting Director, National EPA FOIA Office

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