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October 31, 2019

Andrew Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20004

Joseph Brazauskas, Jr.
Associate Administrator
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20004

Dear Administrator Wheeler and Associate Administrator Brazauskas,

I am writing with concerns regarding your response to my July 9, 2019 letter regarding the final rule to revise the Environmental Protection Agency's (EPA) regulations under the Freedom of Information Act (FOIA) pursuant to the FOIA Improvement Act of 2016 (2016 FOIA Amendments).[1] In your response, sent months later on October 23, 2019, you raised two points that undermine your claim that the EPA only updated its guidelines to come into compliance with the requirements of FOIA.

Government transparency is central to our democracy. As I explained in my initial letter, ensuring public access to information regarding the government's legislative and regulatory work holds our government accountable to the people. This is the purpose of FOIA requests, but EPA's new rule makes the public process for accessing information more opaque. While we appreciate EPA's work to come into compliance with Congressional updates to FOIA, this does not excuse the process by which the EPA attempted to update its rules—especially those changes not mandated by Congress.

EPA Clearly Violated Federal Rulemaking Procedures

The agency states that the EPA used the Good Cause and Procedural Exceptions under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(A), to issue a final rule without providing notice or an opportunity for public comment. The Administrative Procedure Act establishes a formal process for federal agency rulemaking, but also allows agencies to break from the normal rulemaking process when there is "good cause."[2] The "good cause" exception allows an agency to circumvent the rulemaking process if the agency believes that public notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest."[3]

In order to qualify for the "good cause" exception's "unnecessary" designation, all changes must be mandated by Congress and must be outside of the agency's ability to modify. EPA claimed this designation, which I contested in my original letter. Despite continuing to claim the "good

[1] https://www.congress.gov/114/plaws/publ185/PLAW-114publ185.pdf
[2] https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf
[3] http://uscode.house.gov/view.xhtml?req=(title:5%20section:553%20edition:prelim)

cause" exception in your response, your letter acknowledges that a discretionary claim was included in the EPA's FOIA updates:

> **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… 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.

Your response stands in direct contrast to the claim that all updates were required by law and that it was therefore unnecessary to allow the public to engage in the rulemaking process. The FOIA Federal Advisory Committee's recommendations are not federal law, a fact the EPA should understand.

The FOIA Federal Advisory Committee's charter is clear that, **"The committee will be advisory only."** While we appreciate the EPA's consideration of the FOIA Federal Advisory Committee's recommendations, their recommendations are not sufficient for the use of "good cause" to circumvent public comment as no Congressional action has been taken on their recommendations. In addition, your response was clear that EPA understood that the centralization process included in the rule was not mandated by Congressional updates to FOIA.

Additionally, the EPA did not implement the Federal Advisory Committee's recommendations on centralization as intended and ignored additional recommendations meant to increase transparency and proactive reporting, such as releasing all unclassified agency reports, top Administration personnel schedules, and lobbying activities. The advisory committee recommended centralizing FOIA processing only when appropriate, but instead the EPA instead centralized FOIA submissions, which is very different.

Centralized FOIA processing, when done properly, allows for one official to search and review records even when held by various offices, thereby eliminating substantial waiting time and duplication of efforts. Centralized submissions with continued decentralized processing instead increases delays as FOIA request are routed to the appropriate office or branch. A comment period for the rule may have revealed similar concerns and recommendations.

EPA Recognized That Comment and Changes Were Necessary

Associate Administrator Brazauskas wrote that attorneys from the EPA provided Members of Congress with briefings on the updated regulations, and some Members raised concerns with the new rule. As a result of these concerns, EPA instituted a glidepath towards implementation:

> 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…

It is problematic that EPA solicited the feedback of a select few Members after the final rule was published. Instead, the EPA should have provided an opportunity to millions of Americans across the United States, including my constituents in Orange County, to give input while this rule was still being considered. By conducting this briefing for Members of Congress and subsequently implementing changes, the EPA demonstrated that it understood the value and necessity of feedback and comments.

Had you given the public the opportunity to comment on this rule, as you were legally obligated to do, experts and stakeholders could have raised additional concerns. This "glidepath" could have been included in the rule. This process stands in contrast to the goals of both the APA and FOIA.

I again request that the EPA revisit the rule and follow the process established under the Administrative Procedure Act to issue a request for information, a proposed rule for comments, and eventually, a revised final rule. Additionally, I once again ask that you provide all legal memoranda provided to the Administrator's office that was used to support the publication of this rule outside of the APA process.

Sincerely,

Katie Porter
Member of Congress