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July 9, 2019

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

Dear Administrator Wheeler,

I am writing with concerns regarding the recently released 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

Government transparency is central to our democracy. At a time when climate change threatens our communities, public access to the government's work to address this crisis is essential. The purpose of FOIA requests is to provide the public with information regarding government actions and decision making. The rule, as published by EPA, will make the public process for accessing information more opaque. It is particularly concerning that the EPA chose to write this rule without public input.

In the rule, the agency states that the EPA is using 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. I believe that the argument provided in the final rule to utilize the good cause exception is without merit, and therefore request that the EPA rescind the final rule and instead follow the appropriate rulemaking process. Before choosing to substantially and formally change the FOIA process at EPA, members of the public should be afforded the opportunity to weigh in with the agency regarding this proposal.

The APA establishes a formal process by which federal agencies are required to make rules. The law allows for exceptions in the case of what is known as "good cause."² The good cause exception allows for an agency to circumvent the typical rulemaking process if the agency believes that public notice and comment procedures are "impracticable, unnecessary,

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>

or contrary to the public interest.”³ This enables an agency to issue a rule without providing prior notice or an opportunity for public comment and review.

Good cause exceptions are often limited to “emergencies; contexts where prior notice would subvert the underlying statutory scheme; and situations where Congress intends to waive Section 553’s requirements.”⁴ Contexts where the agency believes that public comment would strongly oppose the rule is not considered an eligible good cause exception.

In the final rule, the agency writes that the EPA has determined that there is good cause to revise its FOIA regulations because “the agency lacks discretion to reach a different outcome in response to comment.”⁵ I fail to see how the reason, as written and justified in the final rule, qualifies as a good cause that is “impracticable, unnecessary, or contrary to the public interest,” and I believe that this interpretation violates the intent of Congress as well as the precedent set by other agencies as they’ve come into compliance with the 2016 FOIA Amendments. In fact, no other federal agency has claimed good cause for circumnavigating APA while coming into compliance with the 2016 FOIA Amendments. The Department of Treasury, National Aeronautics and Space Administration, the Food and Drug Administration, and the Securities and Exchange Commission have all followed the regular rule making process in updating their respective FOIA policies.⁶

The assertion that “these regulatory revisions are insignificant in impact and inconsequential to the public” seems to try to classify the rule as “unnecessary” under the “good cause” exception, but the EPA rule goes beyond the narrow requirements directed by Congress in the 2016 FOIA Amendments.⁷ For example, the rule requires that all FOIA requests are directed through the central office, which is not statutorily required. The use of the good cause exemption is therefore inappropriate, given that such an exemption is only available in instances where a change was specifically directed in law. Moreover, this change is both significant and consequential to the public, given that the new process would likely significantly delay FOIA requests as the EPA is not set up to oversee centralized processing. I believe that these regulatory revisions are significant in impact and consequential to public access to important and necessary information.

While I understand the agency’s desire to update it’s 2002 regulations, I have strong concerns with the process in which it was done. With this in mind, I request that EPA revisit the rule and follow the appropriate process established under the Administrative Procedure Act to issue a request for information, a proposed rule for comments, and eventually, a

³ [http://uscode.house.gov/view.xhtml?req=\(title:5%20section:553%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:5%20section:553%20edition:prelim))

⁴ <https://fas.org/sgp/crs/misc/R44356.pdf>

⁵ <https://federalregister.gov/d/2019-13290>

⁶ <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1505-AC35>,

<https://reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2700-AE47>,

<https://reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0910-AH69>,

<https://reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=3235-AM25>

⁷ <https://federalregister.gov/d/2019-13290>

revised final rule. Additionally, I 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. Finally, I ask that you provide any other examples of which the agency is aware where other agencies circumvented the APA in updating their FOIA policies to reflect the 2016 change in law.

Please do not hesitate to reach out to Jessica Seigel on my staff at 202-225-5611 if you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Katie Porter". The signature is written in a cursive, flowing style.

Katie Porter
Member of Congress