

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 11, 2018

The Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Administrator Pruitt:

I am writing regarding very troubling reports that you may be avoiding producing records under the Freedom of Information Act (FOIA) relating to your tenure as Administrator of the Environmental Protection Agency (EPA). Given the vast number of allegations against you, the American people deserve more transparency regarding your actions—not less.

According to one of your former top Republican aides, you intentionally sought to delay producing records relating to your tenure by directing your front office staff to respond first to old requests from the Obama Administration. Other Republican political appointees on your senior staff confirmed your new “first in, first out” policy, which appears to contradict EPA regulations and Department of Justice guidance.

In addition, according to internal EPA documents, you have instituted a new process requiring senior political appointees to review FOIA responses before they are released—a practice our Committee has condemned on a bipartisan basis in the past. Your actions are particularly troubling in light of multiple reports that you have retaliated against EPA staff who disclose waste, fraud, and abuse.

Under your tenure, EPA’s front office is now responding more slowly, withholding more information, and rejecting more requests, according to EPA’s own data and independent sources. Combined with your refusal to produce documents requested by Congress, your actions in delaying records under FOIA raise concerns about a fundamental lack of transparency at EPA.

Withholding Records From Administrator’s Office

On April 10, 2018, Kevin Chmielewski, your former Deputy Chief of Staff for Operations and a campaign aide to President Donald Trump, informed staff from my office and several other congressional offices that you appear to be intentionally delaying the release of documents under FOIA relating to your tenure at EPA.

Mr. Chmielewski stated that you directed your staff not to respond to FOIA requests regarding your tenure until requests from the Obama Administration had been completed. According to Mr. Chmielewski, during a meeting of your front office senior staff, you directed staff to justify this tactic using the talking point of “first in, first out.”

On May 18, 2018, Millan Hupp, your former Director of Scheduling and Advance, confirmed Mr. Chmielewski’s account that the Administrator directed this “first in, first out” policy during a senior staff meeting. During a transcribed interview with Republican and Democratic Committee staff, she had this exchange:

Q: Did the Administrator ever announce at a staff meeting that the Administrator’s office should treat FOIA requests as first in, first out?

A: I have heard discussions about that, yes.

Q: With the Administrator?

A: He has made mention of it, yes.¹

Ms. Hupp confirmed that you discussed responding to FOIA requests from the Obama Administration rather than requests for information about your own tenure:

Q: When he or someone else discussed first in, first out, did anyone indicate that first in, first out meant that the office should fulfill the old requests from the previous administration before you work to fulfill the current requests of this administration?

A: That was the nature of the discussions I was exposed to. I was not part of the decision-making.

Q: Can you describe that discussion?

Q: I don’t recall ever having any lengthy in-depth discussions about this as this is not part of my job description, but anything that I heard on it was related to first in, first out.

Q: And who do you recall [having] those discussions with?

A: I mean, I recall the Administrator bringing it up.²

In a separate transcribed interview on May 22, 2018, your former Senior Advisor, Sarah Greenwalt, informed Committee staff that she disagreed with the first in, first out policy and recommended against it:

Q: What was, practically speaking, a better way to handle FOIAs?

A: Not first-in, first-out.

Q: I mean—

A: To evaluate them as they come in, recognizing that some FOIAs are larger than others and more time-consuming and more complicated than others.

Q: Was your suggestion to do those first or later?

¹ House Committee on Oversight and Government Reform, Interview of Millan Hupp (May 18, 2018).

² *Id.*

Q: My suggestion was to balance everything, the deadlines that we have with the responsibility to work with those requesters to try to get them the information in as timely a way as we can.³

The orders you apparently gave to delay producing documents relating to your tenure appear to directly contradict EPA's own FOIA regulations, as well as guidance issued by the Department of Justice. EPA regulations require the agency to use "multitrack processing" in which simple requests are processed more quickly than complex requests. EPA regulations provide that if the agency determines that a request would be placed in the slower track, the agency would provide the requester with the opportunity to narrow the scope of the request.⁴ Guidance issued by the Department of Justice encourages agencies to use multi-track processing so that simple requests are processed more quickly and do not get stuck behind older, more complex requests.⁵

New Political Review Process Established to Filter FOIA Responses

According to internal EPA documents, the agency has established a new process in which political appointees review FOIA responses before they are released instead of allowing career employees to handle these matters.⁶ According to one report, your political appointees were "chastising career employees who released documents in accordance with FOIA without letting them screen the records first."⁷

On June 6, 2017, Attorney-Advisor Jonathan Newton sent an email instructing FOIA coordinators at EPA to send pending FOIA releases for review by three Trump Administration political appointees. The email stated: "please send copies of pending FOIA releases to Ryan Jackson, Liz Bowman, and Amy Graham, 48 hours before the release."⁸

In July 2017, Mr. Jackson sent a memo to the heads of six EPA offices inside and outside the Office of the Administrator. The memo stated:

By this memorandum, I am asking you to implement a pilot project centralizing all incoming Freedom of Information Act requests directed to the Immediate Office of the

³ House Committee on Oversight and Government Reform, Interview of Sarah Greenwalt (May 22, 2018).

⁴ 40 C.F.R. § 2.104.

⁵ Department of Justice, *OIP Guidance for Further Improvement* (2012) (online at www.justice.gov/oip/blog/foia-guidance-10).

⁶ *EPA Clamps Down on Document Requests Linked to Pruitt*, Politico (May 6, 2018) (online at www.politico.com/story/2018/05/06/pruitt-epa-document-requests-570289). These documents were produced following litigation by the Natural Resources Defense Council, after EPA failed to provide them in response to a FOIA request.

⁷ *Id.*

⁸ Email from Jonathan Newton, Attorney Advisor, Office of the Executive Secretariat, to Staff, Environmental Protection Agency (June 6, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/Newton%20email.pdf>).

Office of the Administrator, the Office of Public Affairs (OPA), the Office of Policy (OP), and the Office of Congressional and Intergovernmental Relations (OCIR) consistent with the attached project description.⁹

Mr. Jackson attached to his memo a document entitled “AO FOIA Centralization Pilot Project Description.” This document describes a process in which a “FOIA Expert Assistance Team (FEAT) Team” within the Office of General Counsel would review FOIA requests, develop a strategy for responding, and “ensure appropriate consultation with senior officials in the relevant offices through the lifecycle of a request,” including “a pre-production awareness review opportunity for material to be released and ensuring the official authorizing a response is authorized to do so under the applicable agency guidance and delegations.”¹⁰

On August 2, 2017, Becky Dolph, Director of the FEAT Team, sent an email to Mr. Jackson, writing, “As we are implementing the pilot, I have instructed my staff that no AO requests are to be issued without the opportunity for an awareness review by you, OPA and the senior leadership of any other affected offices.”¹¹

On August 8, 2017, Brian Hope, the Acting Director of the Office of the Executive Secretariat, sent an email to several attorneys in your office, writing:

Ryan Jackson has just issued instructions to have all AO FOIA releases reviewed by the FEAT team prior to distribution for awareness review by the political team. Please send Becky Dolph all proposed releases that are currently in the awareness review process, as well as all future proposed releases. At the conclusion of her team’s review, they will forward the proposed release for the political team’s awareness review.¹²

Ms. Greenwalt told Committee staff in her interview that she reviewed responses to FOIA requests and identified potential additional redactions as part of EPA’s awareness review as part of her duties as the Senior Advisor for Water and Cross-Cutting Issues.¹³

⁹ Email from Ryan Jackson, Chief of Staff, to Kevin Minoli, Acting General Counsel, Samantha Dravis, Associate Administrator for Policy, et al., Environmental Protection Agency (July 24, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/R.%20Jackson%20Email%20with%20Memo.pdf>).

¹⁰ Environmental Protection Agency, *AO FOIA Centralization Pilot Project Description* (July 21, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/AO%20Pilot%20Project%20Description.pdf>).

¹¹ Email from Becky Dolph, Director, FOIA Expert Assistance Team Office, to Ryan Jackson, Chief of Staff, Environmental Protection Agency (Aug. 2, 2018) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/B.%20Dolph%20Email.pdf>).

¹² Email from Brian Hope, Acting Director, Office of the Executive Secretariat, to Jonathan Newton, Frederick No, et al., Environmental Protection Agency (Aug. 8, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/B.%20Hope%20Email.pdf>).

¹³ House Committee on Oversight and Government Reform, Interview of Sarah Greenwalt (May 22, 2018).

Slowing of FOIA Responses

According to multiple sources of data over the past several years, FOIA responses from your office have slowed dramatically under your tenure as Administrator.

For example, the nonpartisan watchdog organization Project on Government Oversight has reported that only 16.6% of FOIA requests to your office, the Office of the Administrator, were closed from January 20, 2017, to December 29, 2017, compared to a closure rate of 78.76% for all EPA requests during that same period.¹⁴

In addition, according to EPA's FOIA report for Fiscal Year 2017, EPA granted full requests at a lower rate in 2017 than in the last year of the Obama Administration in 2016, and it also denied full requests at a higher rate than in the last year of the Obama Administration.¹⁵

According to this data, EPA also rejected requests for not being "reasonably described" in 2017 at four times the rate as in 2016. In 2016, EPA rejected 114 requests for not being reasonably described, which represented 1% of the requests processed that year. In 2017, EPA rejected nearly 5% of requests for this same reason, and most of those (89%) were requests for information from EPA headquarters.¹⁶

In one example, the open government organization American Oversight filed a FOIA request for all "emails between Scott Pruitt and Ryan Jackson (Chief of Staff), John Reeder (Deputy Chief of Staff), or Mike Flynn (Acting Deputy Administrator) from June 1, 2017, to June 15, 2017."¹⁷ EPA responded that this request did not "reasonably define a set of records to search" and did not "provide details such as the subject matters, titles or key terms."¹⁸

It is difficult to understand why that EPA could not locate the records described by American Oversight. According to the FOIA Guide issued by the Department of Justice, courts have recognized "that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a 'reasonable amount of effort.'"¹⁹

¹⁴ Project on Government Oversight, *EPA Drags Its Feet with Records Requests Aimed at Scott Pruitt's Office* (Feb. 25, 2017) (online at www.pogo.org/blog/2018/02/epa-drags-its-feet-with-foia-records-requests-aimed-at-scott-pruitts-office.html).

¹⁵ Environmental Protection Agency, *EPA FOIA Annual Report for Fiscal Year 2017* (Mar. 2018) (online at www.epa.gov/sites/production/files/2018-03/documents/2017_foia_annual_report.pdf); Environmental Protection Agency, *EPA FOIA Annual Report for Fiscal Year 2016* (Mar. 2017) (online at www.epa.gov/sites/production/files/2017-01/documents/2016_foia_annual_report.pdf).

¹⁶ *Id.*

¹⁷ American Oversight, *FOIA Request* (EPA-HQ-2017-008848) (June 23, 2017).

¹⁸ *American Oversight v. U.S. Environmental Protection Agency*, Case No. 18-cv-364 (TJK) (Feb. 16, 2017) (online at www.americanoversight.org/document/complaint-american-oversight-v-epa-epa-pruitt-emails).

¹⁹ Department of Justice, *Guide to the Freedom of Information Act* (July 24, 2013) (online at www.justice.gov/oip/doj-guide-freedom-information-act-0).

Conclusion and Request for Documents

Your actions injecting politics into the FOIA process mark a stark departure from previous practice. In 2015, the EPA Inspector General issued a report concluding that political appointees in the Obama Administration had very little involvement in the FOIA process. The report stated: “All interviewees said that political appointees are rarely involved in the FOIA response process and only participate when the appointees themselves have responsive records to provide.”²⁰

When allegations of political interference did arise during the previous Administration, both Democrats and Republicans made clear that civil servants should be allowed to do their jobs without interference. For example, during a hearing before our Committee in 2011, our current Chairman, Rep. Trey Gowdy, criticized an official from the Department of Homeland Security for having political appointees review FOIA responses. He asked the witness, “Would you concede that slow walking or taking your time in complying with an otherwise legitimate FOIA request could be interference?”²¹

Based on the information set forth above, I request that you produce, by June 25, 2018, the following documents covering the period between, January 20, 2017, to the present:

1. all documents and communications referring or relating to the order in which FOIA requests should be processed at EPA;
2. all documents and communications referring or relating to any process used by EPA to prioritize responses to FOIA requests;
3. all documents and communications referring or relating to FOIA requests that were rejected for being not reasonably described;
4. all documents and communications referring or relating to the process for determining whether a FOIA request is reasonably described;
5. all documents and communications referring or relating to the process for handling FOIA requests for information from the Office of the Administrator;
6. all responses provided to FOIA requests for information from the Office of the Administrator;

²⁰ Office of the Inspector General, Environmental Protection Agency, *Response to Congressional Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act* (Aug. 20, 2015) (online at www.epa.gov/sites/production/files/2015-09/documents/20150820-15-p-0261.pdf).

²¹ House Committee on Oversight and Government Reform, *Hearing on Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?*, 112th Cong. (Mar. 31, 2011) (online at www.gpo.gov/fdsys/pkg/CHRG-112hhr67719/pdf/CHRG-112hhr67719.pdf).

The Honorable Scott Pruitt

Page 7

7. documents and communications referring or relating to reviews by Trump Administration political appointees to review FOIA requests or responses; and
8. documents and communications referring or relating to any review of FOIA requests or responses by White House employees.

Thank you for your prompt attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "E. E. Cummings". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Elijah E. Cummings
Ranking Member

cc: The Honorable Trey Gowdy, Chairman