

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 13, 2018

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to request that you issue a subpoena to compel the Environmental Protection Agency (EPA) to produce documents it has failed to produce about policies implemented by ousted Administrator Scott Pruitt to withhold information about his tenure in response to Freedom of Information Act (FOIA) requests.

On June 11, 2018, I wrote to former Administrator Pruitt requesting that he produce documents by June 25, 2018.¹ EPA's only response to date has been an email from an EPA official providing a link to documents already publicly released under FOIA—some of the same documents I already cited in my request letter. Information recently obtained by the Committee confirms that EPA is using a process in which political appointees review FOIA requests and hand select requests to be processed by a different team if they are complex or “politically charged.” Responses to FOIAs are at times deliberately delayed, and political appointees review responses to FOIA requests before they are released. In at least one instance, EPA gave favorable treatment to an industry lobbyist.

During a Committee hearing in 2011, you criticized an official from the Department of Homeland Security for having political appointees review FOIA responses. You asked the witness, “Would you concede that slow walking or taking your time in complying with an otherwise legitimate FOIA request could be interference?”² I ask that you show that same concern for the way this Administration is implementing FOIA.

¹ Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Administrator Scott Pruitt, Environmental Protection Agency (June 11, 2018) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf>).

² 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-112hhrg67719/pdf/CHRG-112hhrg67719.pdf).

Special Process for “Politically Charged” FOIA Requests

On June 29, 2018, bipartisan Committee staff interviewed Administrator Pruitt’s Chief of Staff, Ryan Jackson, who continues to serve in that capacity despite Administrator Pruitt’s departure. Mr. Jackson confirmed that EPA is using a new process for responding to FOIA requests for information from the Office of the Administrator or other “complex” and “politically charged” FOIA requests. He stated:

Deputy Administrator Perciasepe established this FEAT team. I can’t remember what the acronym stands for at this point, but I think it’s FOIA Expertise Assistance Team, in not the environmental information office but general counsel’s office to help process some of the more complex, maybe even politically charged FOIA productions.³

According to Mr. Jackson, he or Elizabeth Beacham White, the Director of the Executive Secretariat, run a list of FOIA requests through the Office of Public Affairs to decide which requests will be processed:

- Q: Who makes the determination if they go to the FEAT team or elsewhere in the agency?
- A: So—
- Q: Are these only for requests about the Administrator’s office records or is this for the whole all of EPA?
- A: Primarily it’s FOIA requests that deal with emails for documents that deal with individuals that work in the office of the Administrator, but not always. If it’s complex, if it’s very involved, the FEAT team gets involved.
- Q: So who decides whether it goes to the FEAT team or not?
- A: Well, we have our own, Eric Wachter, [who’s] in charge of the office of the administrative—the Office of the Executive Secretariat who gets a list of the FOIAs that are coming into the agency each week.
- Q: Who is that?
- A: It is the director of the Office of the Executive Secretariat.
- Q: I need to know the person’s name. Who is it that—
- A: Her name is Elizabeth White. She and I have our public affairs office, to the extent that we have the opportunity to, will identify certain productions that we are interested in getting help with. There’s really limited amount of people at EPA that really work on FOIA productions. We probably get just at headquarters alone, and I think that this may only involve the Administrator’s office, and what I mean by that is the office of policy, office of congressional affairs, office of—not just Pruitt’s office, probably 40 to 60 new FOIAs a week.⁴

Mr. Jackson pointed to a FOIA request by the Sierra Club for email communications between senior EPA officials and outside entities as an example of a “politically charged” request:

³ House Committee on Oversight and Government Reform, Interview of Ryan Jackson (June 29, 2018).

⁴ *Id.*

- Q: So you used the term politically charged as one of the categories. Can you describe what that means?
- A: Well, you know, we are talking about the Sierra Club release, the request was—I can't remember the original request, but the request was we would like to get all of the emails sent by, or maybe received by, but definitely sent by this group of people since they began working at EPA. So, that's pretty much a fishing expedition. There's a bit of a disagreement on if that's even a proper request. But we tried to accommodate that request really at much and probably more than what we needed to. We really needed to—
- Q: So what would make that a politically charged—that's the piece I am not—there are a lot of very broad FOIA requests that every agency receives. What differentiates one from the next? What about that one made it politically charged, in your view?
- A: There's no—there was no reason for it. There was no topic. It was just a fishing expedition. And so when I say it's politically charged, there's no real FOIA, you know, Freedom of Information Act reason for it, it is just simply submitted to us to see what we will produce. And so what I wanted to do—
- Q: So you don't think that intercommunications between the Administrator, senior staff with outside entities—you don't think there's a public interest, a legitimate public interest in those?
- A: There is a huge legitimate public interest, but I think it is really important at the same time to specify what you are interested in, because FOIA is not meant to allow open ended requests and to be as if, you know, the requester is a fly on the wall.
- Q: So are there particular groups that if they send requests that they are automatically sent to the FEAT team or categorized?
- A: No. It just depends on what it is.
- Q: So it's the breadth of the request? The subject of the request?
- A: Sometimes.⁵

Mr. Pruitt's Senior Counsel, Samantha Dravis, said during her transcribed interview that in some cases, the Office of General Counsel identifies responsive documents rather than the custodian of the documents:

So my understanding is that during the Obama administration it was individual custodians. So if there's a request for your emails, you would search your own files and your own emails. In the Pruitt era, we—that was shifted. And it is career Agency officials, I believe in the Office of General Counsel, who run the search. They go through my emails. They pull the relevant documents. And they make the relevant redactions, if any.⁶

⁵ *Id.*

⁶ House Committee on Oversight and Government Reform, Interview of Samantha Dravis (June 28, 2018).

Deliberate Delays in Responding to FOIA Requests

According to Mr. Jackson, some FOIA responses are deliberately delayed:

- Q: [C]an you think of times when there were FOIA productions came to you and you saw things that you thought out to be redacted and you flagged that?
- A: Probably so. But we also, you know, make decisions on we've got this FOIA working on this track, this FOIA working on this track, maybe it would be best to wait on this FOIA production until we get this much bigger one done, there may be, you know, just like a week or two delay in that, so that we can just produce them all at one time.
- Q: Can you think of a specific example when that's happened?
- A: I think that I can think of a few examples of that, but it's been a while back, and so I'm going to—I'm really going to butcher my recollection of it if I tried. I mean, it's happened, though. I'm going to butcher my explanation if I just rely on my recollection of it.
- Q: If you would just give it a shot. I mean—
- A: Yeah. It's occurred. We try to coincide releases. I can't—I can't remember what those may be.⁷

Mr. Jackson confirmed that EPA is using a “first in, first out” policy in which requests from the current Administrator are delayed in order to respond to requests from previous Administrations:

- Q: So it's just FOIA regulations require multitrack processing which seems at odds with this new policy. Can you explain that?
- A: You'd have to tell me more of what you mean.
- Q: Well, if the regulations require processing requests on two different tracks, complex requests and simple requests.
- A: Uh-huh.
- Q: And it is first in, first out within those different tracks, not a larger first in and first out. But what I have heard you saying sounds like older requests were prioritized over new requests.
- A: It is the case that the 10 years of FOIA requests that were in a state of I think they were not being responded to at all, some are cleared out. And then we move forward with the request that we receive in the order in which we received them. Now if—even while we were clearing out that 10-year backlog we receive a new request that is just, you know, a few pages, we would kick that out, we would produce that and kick that out—because just because there's 10 years of backlog doesn't mean that there is 10-years of backlog in every program office, some program offices didn't have any. And so if—and especially in those cases, if we received a FOIA request that dealt with program offices that didn't have a backlog and especially in a situation where it was

⁷ House Committee on Oversight and Government Reform, Interview of Ryan Jackson (June 29, 2018).

easily responded to, that was just produced.⁸

Ms. Dravis confirmed that EPA is using a “first in, first out” policy for responding to FOIA requests:

- Q: During Mr. Pruitt’s tenure, it’s our understanding the EPA switched the FOIA policy to a first in, first out arrangement. Do you have any knowledge of that?
A: I do recall that we implemented a policy of, more or less, first in, first out.⁹

Political Appointees Review FOIA Responses Before Release

Mr. Jackson confirmed that he and other political appointees have the ability to review FOIA responses before they are produced to requesters:

Like I said, I probably do receive a number of them. I don’t really know that I receive all of them. There are new individuals in that process now, not only is public affairs aware of what is going out, our Office of Executive Secretariat, when that was issued is when we discovered—we found that not only is there 10-years of backlog, but there is this very decentralized way that FOIAs are produced.¹⁰

Ms. Dravis said during her transcribed interview that she also sometimes reviewed FOIA responses before they were released:

- Q: Did you ever personally review a potential response that wasn’t about your equity?
A: I may have. I may have, yes. I may have, but not for an equitable review but just an FYI.
Q: Do you remember specifically which—
A: I don’t remember specifics, but I think if it was highly significant, then it could be something that, perhaps, myself or the communications team or, you know, senior officials could be given an FYI of.¹¹

Mr. Jackson also said that he has weighed in to recommend redactions:

- Q: I just want to know what’s happening now and who’s reviewing them before they go out. And then also whether you have the opportunity to object. If you see something that’s redacted that you think shouldn’t be or something you think wasn’t redacted that you think ought to be, do you have the opportunity to weigh in on that?
A: I have the opportunity.
Q: And did you ever exercise that opportunity?

⁸ *Id.*

⁹ House Committee on Oversight and Government Reform, Interview of Samantha Dravis (June 28, 2018).

¹⁰ House Committee on Oversight and Government Reform, Interview of Ryan Jackson (June 29, 2018).

¹¹ House Committee on Oversight and Government Reform, Interview of Samantha Dravis (June 28, 2018).

A: I have stressed that personal information like cell phones, Social Security numbers, really get a second pair of eyes and a double scrubbing because we have released those and we shouldn't have. Sometimes there's been a couple of times when I have received a request and I have added to it or we're aware of other documents that I thought were responsive. I don't know if it meets the legal definition of responsive and we have added to it.¹²

An email produced by EPA in response to FOIA litigation by the Sierra Club indicates that Mr. Jackson helped the National Pork Producers Council obtain a meeting with EPA policy staff and lawyers about a pending FOIA request following a request by Mr. Jackson's personal friend, Michael Formica, who serves as an Assistant Vice President for the Pork Producers Council.¹³

During his transcribed interview with Committee staff, Mr. Jackson had this exchange:

Q: Is it typical for you to I guess facilitate getting the FOIA office to help a FOIA requester get an answer to their FOIA?

A: Well, when—in this case what it appears to me is that Michael emailed me about a FOIA request that they had. People email me about a lot of things and people email me with asking help for a lot of things. I would love to be able to bird dog all of those issues and respond to everybody and I can't. In this case, Byron has had quite a bit of experience with FOIA, actually Byron was a career deputy general counsel in OGC during the Bush administration and Obama administration. And I just asked if he could help me with processing that. I don't know that I even met with these folks on this meeting and really I am not sure what came of it.

Q: Okay. If the Sierra Club, and [NRDC], American [O]versight reached out to [you] with similar requests would you facilitate a meeting for them?

A: It's a possibility.

Q: Because they seem to all be having to litigate to get a response to their FOIA requests?

A: Well, I suggest that if they target their requests a little bit more so that I could more readily help them, that might help them out.

Q: Do you have a relationship, a personal one with Michael Formica?

A: Yeah, I've known Michael for years.

Q: So is the facilitation of the FOIA request done in this case because he's a personal friend of yours or because he worked for the National Pork Producers

¹² House Committee on Oversight and Government Reform, Interview of Ryan Jackson (June 29, 2018).

¹³ Email from Michael C. Formica, National Pork Producers Council, to Chief of Staff Ryan Jackson, Environmental Protection Agency (July 3, 2017); Email from Chief of Staff Ryan Jackson, Environmental Protection Agency, to Deputy Chief of Staff Byron Brown, Environmental Protection Agency (July 3, 2017); Email from Michael C. Formica, National Pork Producers Council, to Chief of Staff Ryan Jackson, Environmental Protection Agency (July 11, 2017) (online at https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/ED_001523_00003623_0_ef19927b-c085-4aaa-a9a5-cbb6b9f7a86f.pdf).

Council?

- A: It's because I was contacted by someone asking that I could—if I could help with this. As I described, Byron has years of experience with FOIA productions. I thought that he could help me with responding to it. I don't know that I had any further contact with Michael on this.
- Q: Yeah. My question is did you do it because Michael is a friend of yours?
- A: No.
- Q: Did you do it because Michael works for the National Pork Producers Council?
- A: No.
- Q: So did you do it because you wanted to assist the National Pork Producers Council in getting a response to their FOIA?
- A: Yes or getting someone to actually meet with them and help them. I don't know what the FOIA was about, other than livestock emissions.
- Q: So if you don't know what the FOIA was about, how do you know that you did it because you wanted them to respond to that particular FOIA?
- A: What now?
- Q: So you said you didn't do this because Michael Formica is a friend of yours, right?
- A: Uh-huh.
- Q: Are you sure on that one?
- A: Yes.
- Q: Okay. And you didn't do it because he sent you a FOIA from the National Pork Producers Council, right?
- A: Right.
- Q: So then the reason you must have done it, I assume, was based on the specifics of the FOIA that you wanted to assist someone based on the specifics that was in the FOIA.
- A: Not necessarily. I mean if somebody contacts me, I am assuming it's because they have exhausted as many things as they can in order to get whatever remedy that they are looking for. Maybe not, but I'm assuming so. If there's an opportunity for me to facilitate them getting a meeting so that they can—and maybe not even get what they're looking for but at least get their matter addressed, whether it be, you know, full cooperation with it or simply being told no and why, I am going to try to do that.
- Q: Have you tried to do that for other entities trying to get FOIA responses?
- A: I don't remember one, but I don't know that I ever got asked about anybody else, anybody else's FOIA response.¹⁴

Subpoena Request

For the reasons described above, I request that you issue a subpoena for the following documents covering the period between January 20, 2017, to the present:

¹⁴ House Committee on Oversight and Government Reform, Interview of Ryan Jackson (June 29, 2018).

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;
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.

If you choose not to issue these subpoenas yourself, then we ask that you place this matter on the agenda for our next regularly scheduled business meeting so all Committee Members will have the opportunity to vote on a motion to issue these subpoenas.

Thank you for your consideration of this request.

Sincerely,



Elijah E. Cummings
Ranking Member