



Society of Environmental Journalists

1629 K Street NW, Suite 300, Washington, DC 20006
Phone: 202-558-2055 • sej@sej.org • www.sej.org

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Elise Packard, Deputy General Counsel for Operations
Timothy Epp, Acting Director, National FOIA Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW Mail Code: 1101A
Washington, DC 20460

Dear Ms. Packard and Mr. Epp:

Your response to our June 26 letter about the EPA's FOIA regulation "update" fails to persuade that this action is strictly a legal housekeeping matter to comply with changes mandated by Congress. The Society of Environmental Journalists (SEJ) remains concerned that the final rule includes changes that undermine the spirit – if not the letter of – the Freedom of Information Act and make it harder for the press and the public to access records to which they are entitled.

Moreover, we reiterate our objection – shared now by the Reporters Committee for Freedom of the Press and many other journalism organizations – that you have violated the Administrative Procedures Act by failing to provide public notice and opportunity to comment in advance of finalizing the rule.

Before elaborating, I feel compelled to address the criticism directed at SEJ in an EPA news release, which charged that our letter contained "numerous inaccuracies" that had been "regurgitated" from "false" news articles about the rule. Your letter, which was distributed publicly with that news release, implicitly echoed the same charges.

To set the record straight, SEJ based its concerns and objections on a review of the EPA rule itself, not on press coverage of it. Contrary to what's implied in your letter, SEJ did not say that the rule "expands" political appointees' authority over FOIA requests. We said it "grants" such authority to the EPA administrator and a batch of other political appointees. We believe that an examination of the new and old versions of the rule justifies that characterization.

In EPA's old FOIA regulation, § 2.104(h) says that the Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices have authority to issue "initial determinations" to deny FOIA requests.

The new rule lists those offices and others and says all now have authority to make "final determinations" of whether to release or withhold records on the basis of "responsiveness" – something not mentioned in the old rule – or on one or more exemptions specifically provided under the FOIA. We're troubled by the language changes, which do seem to elevate and expand the authority of political appointees.



CALOUSTE GULBENKIAN
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We should note that the recent letter from the Reporters Committee for Freedom of the Press, cosigned by SEJ and other journalism groups, challenges the legality of other language in that provision, which grants those listed political appointees the authority to withhold “a portion of a record” deemed not responsive to a FOIA request. The DC Circuit Court of Appeals has ruled that agencies may not redact supposedly “nonresponsive” information from a record that’s otherwise responsive to a FOIA request.

The media groups’ letter also raises the same concern SEJ has with this provision, saying that “to allow political appointees to claim that portions of a document are not responsive to a FOIA request or are exempt from disclosure could encourage politicized, arbitrary, and otherwise unlawful handling of FOIA requests.”

Our letter, regrettably, did mischaracterize the wording of another provision, but our concern about its import remains as strong as ever. We said the new rule “centralizes final authority” to grant or deny FOIA requests in EPA HQ. In fact, the new rule centralizes the intake of all FOIA requests at HQ.

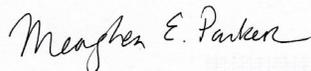
You say under the new rule, regional offices could still be assigned to respond to some requests. Even so, we can’t help but see this as a step backward in the agency’s already lamentable record in handling FOIA requests. Under the old rule, regional offices were officially authorized to receive FOIA requests, and journalists often had greater success with requests filed with regional offices than with EPA HQ. Now, by requiring all requests go first to HQ, the new rule creates a chokepoint that will at best slow their handling, and, we fear, make them more vulnerable to political interference.

Finally, despite your assertion that other agencies have followed similar procedures to update their FOIA rules, we remain convinced that in this case, especially given the issues raised above, your issuance of a final rule – without first proposing it and offering the public an opportunity to comment – is unlawful and unjustified.

To conclude, as we said in our initial letter, we believe this new rule will make journalists’ jobs even more difficult, and by extension, it “will impede the public’s access to environmental information and its right to know how tax dollars are spent.”

We strongly urge you once again to withdraw this rule and revise it after seeking public comment. Meanwhile, we extend an invitation to meet, either in person or by phone, to discuss how the EPA can hew more closely to the essence of the Freedom of Information Act.

Sincerely,

A handwritten signature in black ink that reads "Meaghan E. Parker". The signature is written in a cursive style and is positioned above a light gray rectangular background.

Meaghan E. Parker
Executive Director