



December 19, 2022

Office of General Counsel  
Docket No. EPA-HQ-OGC-2022-0085  
Environmental Protection Agency Docket Center (EPA/DC) (28221T)  
1200 Pennsylvania Ave. NW  
Washington, DC 20460-0001

**Re: Comments on EPA’s Proposed Freedom of Information Act Regulations; Phase II  
(Docket #: EPA-HQ-OGC-2022-0885)**

Please accept the following comments from the Center for Biological Diversity (“Center”), Citizens for Responsibility and Ethics in Washington (“CREW”), and Environmental Integrity Project (“EIP”) in response to the Environmental Protection Agency’s (“EPA”) proposed revisions to the Freedom of Information Act (“FOIA”) regulations. While the proposed revisions make important process changes and clarifications, the regulations still permit unnecessary political meddling into EPA’s FOIA process in complete contravention of government transparency and public accountability.

We appreciate the EPA’s efforts to define ordinary search cut-off dates and expedite review for records pertaining to environmental justice related issues. These long overdue reforms codify case-law and improve access to information for environmental justice communities. However, we remain concerned that political appointees are still given unprecedented latitude to meddle into the FOIA process, with proposed revisions failing to affirmatively bar the unlawful withholding of records based on responsiveness. Proposed changes to the methods of submissions continue to centralize FOIA submissions in Washington, D.C. – where most political appointees are located – while still providing no process to correct infirmities if a requester uses a previously permissible method. Government transparency is essential to modern

democracy, and a political process that interferes with the public right to receive documents and hold agencies accountable runs contrary to the purpose of FOIA.

In 2019, the EPA quietly published – without notice and comment – a sweeping overhaul of the rules governing its process for responding to records request under FOIA.<sup>1</sup> This rule granted political appointees unprecedented authority to withhold documents and deny FOIA requests based on “responsiveness” while instituting practices that significantly delayed response time. The EPA also secretly implemented “policy directives” that politicized the FOIA process, increased, delays, and limited access to public records.<sup>2</sup> As part of a settlement agreement with the Center and CREW on aspects of this 2019 rule, the EPA agreed to seek comment on methods for submission, and whether political appointees could withhold documents. However, the EPA is also proposing additional changes, as well as an expedited review for environmental justice purposes. Given the EPA’s historical lack of respect for the FOIA process, we sincerely hope that these efforts are not in vain, and that the EPA takes meaningful steps to improve the FOIA process and expand access to public records in the spirit of government transparency.<sup>3</sup>

The Center is a non-profit environmental organization with over 1.7 million members and online activists dedicated to the protection of native species and their habitats through science, policy and environmental laws. As government watchdogs, the Center’s missions of wildlife conservation and effective enforcement of environmental laws relies on the timely review of complete FOIA responses. The Center currently has at least 40 FOIA requests to the EPA seeking records that inform the Center’s advancement of its mission to advocate for imperiled species and their habitats, and the Center will submit more records requests to the EPA in the future.

CREW is a non-profit, non-partisan organization committed to protecting the rights of citizens to be informed about the activities of government officials and agencies. To advance its mission, CREW routinely submits FOIA requests to federal agencies and disseminates the records it obtains to the public. CREW currently has dozens of FOIA requests pending with the EPA and intends to submit more requests in the future.

EIP is a national nonprofit organization dedicated to advocating for more effective enforcement of environmental laws. EIP has three primary goals: (1) to provide objective analyses of how the failure to enforce or implement environmental laws increases pollution and affects public health; (2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) to help local communities obtain the protection of environmental laws. To achieve its mission, EIP regularly submits FOIA requests

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<sup>1</sup> Freedom of Information Act Regulations Update, 84 Fed. Reg. 30,028 (June 26, 2019)

<sup>2</sup> EPA Memorandum re: Awareness Notification Process for Select Freedom of Information Act Releases (2018) available at: <http://www.environmentalintegrity.org/wp-content/uploads/2018/11/epa-memo.pdf>

<sup>3</sup> *Landmark Legal Found. v. EPA*, 82 F. Supp. 3d 211, 227 (D.D.C. 2015) (admonishing EPA for repeated FOIA violations).

for records regarding EPA agency matters, such as compliance assurance, enforcement, and EPA rulemaking and policy.

As frequent FOIA requesters of EPA records, we appreciate the opportunity to comment on the proposed rule.

## **I. The EPA’s Decision to Use of a “Date-of-search Cut-off” Complies with Caselaw and Results in Much Fuller Search and Disclosure.**

We support the EPA’s decision to revise 40 CFR 2.103(a) and the identified “ordinary” search cut-off date from “as of the date the request was received” to “as of the date that the Agency begins its search.” A date-of-search cut-off ensures that any records that would be included through a search conducted with a more restrictive date-of-request cut-off, resulting in a fuller search and disclosure.

Courts have consistently favored the date-of-search cut-off, and the “the D.C. Circuit has all but endorsed the use of date-of-search as the cut-off date for FOIA requests.”<sup>4</sup> For an agency like the EPA with a large backlog of FOIA requests, a search conducted using a date-of-search would capture “a potentially large number of relevant documents” created after the date of the request and lead to a much fuller search and disclosure.<sup>5</sup> A search cut-off based on the date that a FOIA search begins is therefore appropriate. By making this change, the EPA will ensure fuller and more accurate responses to records request.

## **II. The Inclusion of Environmental Justice Expedited Processing Criteria is an Effective First Step to Increase Timely Access to Information for Disproportionately Affected Communities.**

The EPA has recognized the important role that timely access to information plays in the opportunity for meaningful involvement by communities that experienced disproportionately high and adverse human health of environmental effects. We support the inclusion of environmental justice expedited processing criteria as a good first step to addressing these issues, and hope that the EPA continues to work with affected communities to remove barriers to information.

The EPA is appropriately utilizing its authority under 5 U.S.C. 552(a)(6)(E)(i) to promulgate regulations to provide for “expedited processing” “in other cases” by targeting an understood need for timely access to information for communities with environmental justice concerns. While we cannot comment on examples of pressing needs, community concerns, whether the

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<sup>4</sup> *Edmonds Inst. v. U.S. Dep’t of Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005).

<sup>5</sup> *Public Citizen v. Dep’t of State*, 276 F.3d 634, 644, 349 U.S. App. D.C. 291 (D.C. Cir. 2010); *McGehee v. C.I.A.*, 697 F.2d 1095, 1104 (D.C. Cir. 1983)

criteria are reasonably tailored, or whether the use of EJScreen is appropriate, we are supportive of the EPA's decision to grant fee waivers to those who qualify for environmental justice expedited processing.

### **III. The EPA Should Restore Historical Methods of Submission, or Alternatively, Provide Notice to Requesters Using Historical Methods and a Method for Curing Infirmities.**

In 2019, the EPA unilaterally removed the option of submitting FOIA requests by email, facsimile, or directly to regional offices, instead requiring that requests must be directly submitted to the EPA's National FOIA Office in Washington D.C.

We remain concerned about an increased risk of political interference caused by the centralization of FOIA intake, although the EPA has indicated that its "awareness review" process does not relate to the intake of FOIA requests. The EPA has also clarified that only *intake* is centralized, while *processing* will still occur at the appropriate regional office. Regardless of these representations, centralizing intake at the FOIA process in D.C. inherently increases the opportunity for political meddling and reduces efficiency. Even before the centralization efforts, EPA headquarters was the site of massive delays, and it is still unclear whether the modest hiring increase will support further FOIA work. Accordingly, the EPA should restore the ability of requesters to submit directly to regional offices. Regional office staff likely have subject matter expertise on the requested records, and can make quicker intake determinations to produce records more efficiently.

If the EPA decides to continue down this path, it must provide a method for requesters using historical methods to be notified of, and given an opportunity to cure, infirmities in their erroneous submission. The EPA's proposed clarifications still do not explain whether, if a requester uses one of the prohibited methods, the EPA will alert them that the request has not been officially received. Without some system of notice, an unknowledgeable requestor may consider their request received, and wait patiently in ignorance for a reply that is never coming. There is also no opportunity for a requestor using a prohibited method to appeal EPA's constructive denial of a request. While ideally the EPA will restore historical methods of submission, a notification system must be implemented if it decides to continue to prohibit email, facsimile, and direct submission to regional offices.

#### **IV. The EPA Must Affirmatively Clarify that Political Appointees Cannot Make Eleventh Hour Policy Decision to Withhold Records through a “Political Awareness Review.”**

The EPA’s proposal to remove a clause in 40 C.F.R. 2.103(b) does not go far enough to address concerning political interference in the FOIA process. Removing this clause is absolutely necessary to prevent the EPA from illegally withholding portions of records on the basis of responsiveness, but doing so does not address the practice of “political awareness review” designed to allow senior political appointees the opportunity to review and approve all FOIA responses processed by the EPA Office of the Administrator.

Under the Obama Administration and before, political appointees at the EPA were rarely involved in the FOIA process at all, except to provide responsive records.<sup>6</sup> The EPA eliminated this longstanding bipartisan practice in June 2017, with the Trump administration implementing a “political awareness review” policy for “politically charged” FOIA requests, not only authorizing political staff to issue FOIA determinations and overrule career FOIA staff, but also requiring them to approve all records prior to release.

In the EPA’s own words, this “awareness review process” informs “senior officials” of FOIA releases “that may be of particular interest to the press, the public, and/or Congress” and is intended to allow leadership to “respond efficiently to inquiries about such releases.”<sup>7</sup> In practice, the process allowed political appointees the authority to review records responsive to FOIA requests before EPA produces those records to the FOIA requester, or in other words, when those records are typically made public.

The EPA’s decision to allow political appointees to select and review records in responding to FOIA requests inserts political meddling into EPA’s FOIA process on an unprecedented scale. Reports indicated that political staff were “chastising career employees who release documents in accordance with FOIA without letting them screen records first.”<sup>8</sup> Senior political staff even informed the House of Representatives Committee on Oversight and Government Reform staff that they “reviewed response to request and *identified potential additional redactions* as part of EPA’s awareness review.”<sup>9</sup> This process marks a stark departure from previous practice, and any

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<sup>6</sup> EPA, Office of Inspector General, Report No. 15-N-0261, Response to Cong. Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act (Aug. 20, 2015) (“Awareness Memo”)

<sup>7</sup> Memorandum from Chief of Staff Ryan Jackson to General Counsel et al., (Nov. 16, 2018) available at:

<sup>8</sup> *EPA Clamps Down on Document Requests Linked to Pruitt*, Politico (May 6, 2018) available at: [www.politico.com/story/2018/05/06/pruitt-epa-document-requests-570289](http://www.politico.com/story/2018/05/06/pruitt-epa-document-requests-570289)

<sup>9</sup> Letter from Rep. Elijah E. Cummings, Ranking Minority Member of the H.R. Comm. on Gov’t Oversight and Gov’t Reform, to Scott Pruitt, Adm’r of the EPA (Jun. 11, 2018) available at:

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf>

revisions to regulations should make sure that civil servants are able to do their jobs without political interference.

While the EPA claims that removing the clause will “allow the Act to speak for itself,” it has still not explained or described its process for selecting FOIA requests for awareness review, a process which is most certainly not detailed within FOIA. What has been made clear is that the implementation of “political awareness review” has caused considerable delay in the EPA’s FOIA processing, with EPA itself noting that the process adds an additional nine days to response time.<sup>10</sup> Prior to directing staff to implementing these additional bureaucratic hurdles, the EPA routinely failed to timely respond. It is against this backdrop that the risk of further delay must be assessed, as these FOIA directives affect the future of all Center requests.<sup>11</sup>

The EPA seeks to remove the clause in 40 C.F.R. 2.103(b) to provide clarity, but in doing so, the EPA must ensure that unelucidated directives that authorize political meddling do not corrupt the FOIA process. The EPA should affirmatively bar the process of “political awareness review.”

#### **V. Revisions Must Affirmatively Clarify that the EPA Cannot Withhold Portions of Records on the Basis on Responsiveness.**

The EPA seeks to remove a clause in 40 C.F.R. 2.103(b) in an effort to “ensure clarity and allow the Act to speak for itself” by removing phrasing that authorizes political appointees “to release or withhold a portion of a record on the basis of responsiveness.” Allowing the FOIA to speak for itself and removing the clause is preferable, but the EPA should affirmatively state that non-responsiveness is not a legal justification to withhold records or portions of records, and that it has no authority to do so based on well-settled caselaw.

An agency cannot withhold a portion of a record by claiming that portion is not responsive to the request. According to the D.C. Circuit, “once the government concludes that a particular record is responsive to a disclosure request, the sole basis on which it may withhold particular information within that record is if the information falls within one of the statutory exemptions from FOIA’s disclosure mandate.”<sup>12</sup> FOIA enumerates nine exemptions for which an agency can decide to withhold records, none of which deal with the issue of responsiveness.<sup>13</sup> The 2019 Rule unlawfully authorized the EPA to withhold records based on responsiveness, and we appreciate that this provision is sought to be removed. However, the EPA should clarify that EPA officials may not withhold portions of records based on responsiveness, as it violates FOIA and runs contrary to well-settled D.C. Circuit precedent.

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<sup>10</sup> Awareness Memo

<sup>11</sup> See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2556 (2019) (considering “historical[.]” experience in evaluating future injury).

<sup>12</sup> *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016)

<sup>13</sup> 5. U.S.C. sec. 552(b)

Even prior to the decision in *Am. Immigration Lawyers*, “non-responsiveness” determinations were heavily disfavored by the Department of Justice, and FOIA guidance strongly discouraged agencies from asserting that records were “nonresponsive” and also stated that in any instance in which a requester disagrees, “the document pages involved should be included without question by the agency.”<sup>14</sup> After the decision in *Am. Immigration Lawyers*, the Department of Justice guidance was specifically revised to clarify that “it is not permissible to redact information within a record as ‘non-responsive,’” and that once an agency’s search has identified a record, the agency “must process it in its entirety for exemption.” There is a clear command to agencies that portions of responsive records cannot be withheld on the basis of responsiveness, and while removing the clause is a welcome step, the EPA should affirmatively clarify this in regulation.

## **VI. The EPA’s Clarification of Reasonably Described Records Requires Additional Detail.**

The EPA seeks to require that records should be described “in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort” instead of “in a way that will permit EPA employees to identify and locate them.” While the EPA justifies this change by citing caselaw and the legislative history of FOIA, we remain concerned that the proposed change does not provide sufficient clarity.

The D.C. Circuit has recognized that a FOIA request reasonably describes the records sought “if it enable[s] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.”<sup>15</sup> There is a discrepancy between the quoted language and the proposed language, as an EPA employee familiar with the subject area will clearly require a different level of effort to identify records, and EPA should clarify to make sure that there are no situations where records, easily identifiable by a subject matter expert, are deemed insufficiently described. The Department of Justice also supports this additional detail, as its FOIA Guide notes that 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.’”<sup>16</sup> Additional detail is warranted to prevent the unnecessary rejection of FOIA requests.

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<sup>14</sup> U.S. DOJ. OIP Guidance: Determining the Scope of a FOIA Request, FOIA Update, Vol. XVI, No. 3 (1995), at 2-4.

<sup>15</sup> *Truitt v. Dep’t of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990), quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 5-6 (1974) (emphasis added)

<sup>16</sup> Dep’t of Justice, Guide to the Freedom of Information Act (July 24, 2013) available at: [www.justice.gov/oip/doj-guide-freedom-information-act-0](http://www.justice.gov/oip/doj-guide-freedom-information-act-0) (emphasis added)

## **VII. In Most Circumstances, 20 Calendar Days is an Appropriate Timeframe for Requesters to Respond to an EPA Notice that Records are Not Reasonably Described.**

In most cases, a 20-calendar-day timeline for the requester to respond to EPA's notice that the requester has not reasonably described records sought is appropriate. Current regulations do allow a requester an opportunity to modify, but do not specify a time limit. As long as the EPA continues to allow a requester to submit a new request, even after the EPA closes a request upon the aforementioned 20-day deadline, the EPA's proposed 20-day timeline is reasonable.

However, there will undoubtedly be situations where unusual and unique circumstances will make the 20-day timeline unreasonable (*e.g.*, sickness, injury), and the EPA should have some procedure that allows for extensions to be requested, and liberally granted, to respond to notices.

## **VIII. Conclusion**

While we appreciate the EPA's efforts to clarify aspects of FOIA to better reflect settled caselaw while including an expedited review for environmental justice communities, we remain concerned that some revisions do not go far enough to prevent political meddling in the FOIA process. The EPA must restore historical methods of submission, ensure that "political awareness review" is no longer employed, and affirmatively state that it cannot partially withhold records based on responsiveness. These actions will advance FOIA's purpose of government transparency and accountability.

Thank you for your consideration of these comments,

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