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July 9, 2019

VIA EMAIL

Re: Proposed Revisions to the Environmental Protection Agency's Freedom of Information Act Regulations, RIN 2015-AA02/Docket No. FRL-9995-48-OGC

Dear Mr. Creech:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”), and the 38 news media organizations identified below (collectively, the “News Media Coalition”) write regarding the proposed revisions to the regulations of the Environmental Protection Agency (“EPA”) implementing the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or the “Act”), which were published on June 26, 2019, 84 Fed. Reg. 30,028 (June 26, 2019) (to be codified at 40 C.F.R. 2) (hereinafter, the “Proposed Rule”). As stated herein, the News Media Coalition is deeply concerned about the Proposed Rule, which contains provisions that undermine the Act, are impermissible under clear, binding D.C. Circuit precedent, and would diminish journalists’ ability to gather and report information to the public about the actions of the EPA and its personnel. Equally concerning is the EPA’s attempt to implement the Proposed Rule without giving members of the press and the public adequate notice and an opportunity to comment pursuant to the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* (“APA”). For these reasons, the News Media Coalition urges the EPA to suspend implementation of the Proposed Rule and open it to public comment for a period of no fewer than 60 days.

A fundamental tenet of administrative rulemaking is notice of a proposed rule to interested parties and the opportunity to comment. *See* 5 U.S.C. § 553(b); *id.* § 553(c) (requiring notice and opportunity to participate). That process facilitates the valuable “exchange of views, information, and criticism between interested persons and the agency.” *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977). Deviation from the APA’s ordinary notice and comment process is only permissible in extreme situations; as the D.C. Circuit has stated, “exceptions to the provisions of section 553 will be narrowly construed and only reluctantly countenanced.” *Am. Fed’n of Gov’t Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (internal quotations and citation omitted). Simply put, the exceptions to the APA’s notice and comment requirement “are not

‘escape clauses’ that may be arbitrarily utilized at the agency’s whim[.]” *id.* at 1156; rather, the “good cause” exception “should be limited to emergency situations.” *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001) (citation omitted). Here, the EPA has identified no emergency that would justify bypassing public comment on the Proposed Rule. And, given the significant consequences the Proposed Rule would have for the public’s right to be informed about the actions of the EPA, the failure to provide for a public comment period is inexcusable.¹

The News Media Coalition has identified a number of provisions of the Proposed Rule that should be revised or removed in their entirety. First, the provision stating that the EPA Administrator and other senior officials may decide “whether to release or withhold a record or portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue ‘no records’ responses” is contrary to law and should be removed. Proposed Rule § 2.103(b). The Act does not permit the Administrator or other senior officials to withhold a portion of a record on the ground that it is not “responsive” to a FOIA request. In *American Immigration Lawyers Ass’n v. Executive Office for Immigration Review*, the D.C. Circuit expressly held that agencies may *not* redact non-responsive information from a record deemed to be responsive to a FOIA request. 830 F.3d 667, 677 (D.C. Cir. 2016). The Proposed Rule’s suggestion to the contrary—that partial “responsiveness” determinations are permissible—accordingly must be removed.

The Proposed Rule’s reference to “no records” determinations also requires revision. *See* Proposed Rule 2.103(b). On its face, it appears to suggest that senior EPA officials are permitted to unilaterally inform a requester that “no records” responsive to a FOIA request exist. Without more explanation of the authority for this provision and the circumstances in which it will be used, it is unclear how the EPA is interpreting its responsibilities and obligations under FOIA.

Finally, that the Proposed Rule purports 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. *See, e.g.*, Dino Grandoni, *House Democrat accuses Scott Pruitt of delaying public-records requests by answering Obama-era ones first*, *The Washington Post* (Jun. 11, 2018)² (reporting that former aides to then-Administrator Scott Pruitt told “congressional investigators that the EPA delayed producing emails and other government documents sought by members of the public through [FOIA] requests by choosing instead to respond to old petitions made during the Obama administration first”); Dave Phillips, *Generals Sought More Positive Coverage on Head Injuries, Document Shows*, *N.Y. Times* (Sept. 29, 2015)³ (reporting that two “top Army generals recently discussed trying to kill an article in *The New York Times* on concussions at West Point by withholding information so the Army could encourage competing news organizations to publish a more favorable story”). The public should have an opportunity to explain why granting

¹ Likewise, the EPA’s assertion that the APA’s procedural exception (5 U.S.C. § 553(b)(3)(A)) applies is clearly erroneous given the substantive changes in Section 2.103 of the Proposed Rule. *Cf.* 40 C.F.R. § 2.103; *see also, e.g., Sprint Corp. v. F.C.C.*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“new rules that work substantive changes in prior regulations are subject to the APA’s procedures.”)

² https://www.washingtonpost.com/news/energy-environment/wp/2018/06/11/house-democrat-accuses-scott-pruitt-of-delaying-public-records-requests-by-answering-obama-era-ones-first/?utm_term=.e718000f4f12.

³ <https://www.nytimes.com/2015/09/30/us/generals-sought-more-positive-coverage-document-shows.html>

political appointees authority to override the FOIA decisions of career FOIA officers undermines the Act and should not be implemented.

The EPA’s contention that a notice and comment period for the Proposed Rule “is unnecessary because the agency lacks discretion to reach a different outcome in response to comment” is specious. Not only is there no requirement that the EPA implement those aspects of the Proposed Rule identified above but, with respect to the provision purporting to allow for partial “non-responsive” determinations, it is also *prohibited* from implementing the Proposed Rule. *See Am. Immigration Lawyers Ass’n*, 830 F.3d at 677.

Given the significant effect the Proposed Rule would have on the EPA’s administration of FOIA, and in the absence of any emergency, the APA’s normal notice and comment process must be followed. That process is designed to facilitate “genuine interchange” between agencies and individuals. *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982). And input from the press and the public should certainly be sought and considered by the EPA with respect to the implementation of a law as critical to government transparency and accountability as FOIA.

For the foregoing reasons, the News Media Coalition strongly urges the EPA to suspend implementation of the Proposed Rule and to open it to public comment for a period of no fewer than 60 days.

Sincerely,

The Reporters Committee for
Freedom of the Press
American Society of News Editors
The Associated Press
Associated Press Media Editors
Association of Alternative Newsmedia
Cable News Network, Inc.
Californians Aware
The Center for Public Integrity
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The Daily Beast Company LLC
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First Amendment Coalition
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Society of Environmental Journalists
Society of Professional Journalists
Student Press Law Center