

March 7, 2013

The Honorable Eric H. Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Holder:

President Obama has made a commitment to the American people to be the most transparent Administration ever. According to the President, “[o]penness will strengthen our democracy and promote efficiency and effectiveness in Government.”<sup>1</sup> To achieve this element of our democracy, the Freedom of Information Act<sup>2</sup> (FOIA) created a mechanism for the American people to access information about its government. As such, proper application of the FOIA and consistent implementation of the process throughout the federal government is critical to fostering the Administration’s pledge to transparency. The Office of Information Policy within the Department of Justice is responsible for encouraging agency compliance with the FOIA and for ensuring that the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines are fully implemented across the government.<sup>3</sup> Unfortunately, in a limited document production recently obtained by the Committees, we have learned that the Environmental Protection Agency (EPA) has struggled to observe the President’s commitment to transparency: their staff is poorly trained, does not place a priority on responding to FOIA requests, and appears to be more interested in erecting barriers than in ensuring requests are promptly and properly fulfilled. We bring the following items to your attention because we are deeply concerned that the poor administration of the FOIA at the EPA will undermine the President’s promise of transparency.

In the first instance, it appears that the EPA has failed to properly train its staff on how to process FOIA requests. According to your March 19, 2009, memorandum on the FOIA, “[the] responsibility for effective FOIA administration belongs to all of us – it is not merely a task assigned to an agency’s FOIA staff.”<sup>4</sup> However, documents obtained by the Committees demonstrate a clear lack of responsibility and haphazard administration of the FOIA within the EPA. E-mails between the EPA Regional 6 officials regarding two FOIA requests related to the

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<sup>1</sup> Memorandum from President Barack Obama, *Transparency and Open Government* (January 21, 2009) available at [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment).

<sup>2</sup> See 5 U.S.C. § 552.

<sup>3</sup> See <http://www.justice.gov/oip/about-us.html> (last accessed March 5, 2013).

<sup>4</sup> Memorandum from Attorney Gen. Eric Holder, *The Freedom of Information Act (FOIA) Memorandum for Heads of Executive Departments and Agencies* (Mar. 19, 2009) available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

EPA's Federal Implementation Plans (FIPs) for Oklahoma and New Mexico reveal a confused and misinformed staff. Specifically, when Joe Kordzi, a Region 6 official forwarded two FOIA requests to other Region 6 employees he stated, "I cannot provide guidance on what can be released. According to [Office of Regional Counsel] ORC, we should have taken that training and are apparently on our own."<sup>5</sup> This lack of training is not entirely shocking in light of former Regional Administrator Al Armendariz's blatant disrespect for the FOIA, referring to the process as "FOIA nonsense."<sup>6</sup>

In addition to not being properly trained, it appears that EPA employees are also not receiving adequate support from the ORC, Office of General Counsel (OGC) and FOIA officers while processing FOIA responses. According to your FOIA guidance, "FOIA professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests."<sup>7</sup> Yet the e-mail chain reveals that one regional employee explained, "I'm sorry for not starting [the FOIA response] earlier, but I was busy with the FIPs and my efforts to get clarification/help on this didn't work out."<sup>8</sup> On another occasion, an employee stated, "I cannot figure out how we would have an estimate until everyone has finished their search for responsive documents? Bottom line – how do I answer OGC's e-mail so we sound like we know what we are doing?"<sup>9</sup> As the exchanges demonstrate, the EPA employees processing FOIA requests have not received the support they need to promptly comply with the law. We are concerned by this lack of support and knowledge about FOIA and believe if employees do not have proper training and they are not receiving assistance, it is likely that they are not properly processing FOIA requests.

Other e-mail exchanges raise concerns about the priorities of the EPA upon receipt of FOIA requests. Geoffrey Wilcox, of the OGC, advised Region 6 officials that:

Unless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests. One of the first steps is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of \$ they agreed to pay.<sup>10</sup>

Notably, Mr. Wilcox's guidance on "such FOIA requests" is subject to several interpretations that raise additional questions about the EPA's commitment to processing FOIA requests. In light of the controversial nature of the requests in question,<sup>11</sup> a possible reading of

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<sup>5</sup> [On file with authors].

<sup>6</sup> [On file with authors].

<sup>7</sup> *Supra* note 4.

<sup>8</sup> [On file with authors].

<sup>9</sup> [On file with authors].

<sup>10</sup> [On file with authors].

<sup>11</sup> The FOIA requests asked for disclosure of documents related to the EPA's denial of Oklahoma and New Mexico's Regional Haze State Implementation Plan (SIP) and decision to impose a Federal Implementation Plan (FIP) for Regional Haze. The EPA's FIP was an unprecedented rulemaking that usurped the State's authority under the Clean Air Act and denied every SIP on the eve of the deadline because of a "sue and settle" agreement with environmental groups.

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the statement suggests that “such FOIA requests” could refer to unfavorable requests that question the EPA policies. Alternatively, “such FOIA requests” could mean any FOIA request. Either way, his guidance appears to suggest that the EPA automatically informs a petitioner that their request is over broad and that the fees will be more than what the requestor agreed to pay. This is obviously problematic as such guidance would delay the EPA’s production even if a request was narrow or if a requestor was subject to a fee waiver.

We have also uncovered documents that show the EPA delayed the FOIA process in a way that conflicts with FOIA guidance. According to President Obama’s FOIA memorandum, “[i]n responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.”<sup>12</sup> You have also declared that “[l]ong delays should not be viewed as an inevitable and insurmountable consequence of high demand.”<sup>13</sup> However, in the initial e-mail, Mr. Kordzi says, “assume we are also late on this one as well.”<sup>14</sup>

Finally, it is unclear whether the EPA required the requestor to pay a fee despite the fact that it appears the agency missed the statutory thirty day limitation to assess fees.<sup>15</sup> As you are aware, under the OPEN Government Act of 2007, agencies cannot assess search fees if they are not meeting the deadlines in the FOIA.<sup>16</sup> While it is not clear from the face of the e-mails whether fees were, in fact, assessed, it is clear that the EPA was very concerned about its ability to collect fees. In this case, the request was submitted on November 22, 2010, and on January 13, 2011, two days before the response to the Oklahoma request was due, an official in the ORC advised staff they were sending a “letter suspending the request until we get a sufficient fee commitment.”<sup>17</sup>

The mismanagement of FOIA requests at multiple levels of the EPA requires your immediate attention. Given concerns from both Congress and open government advocates that the federal bureaucracy often hinders the Administration’s transparency pledge, it is imperative we ensure the FOIA’s requirements are met.<sup>18</sup> As such, we request that you initiate an investigation into the EPA’s compliance with the FOIA and all applicable guidance. Moreover, we request that you brief our staff on the results of your investigation no later than April 4, 2013.

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<sup>12</sup> Memorandum from President Barack Obama, *Freedom of Information Act Memorandum for the Heads of Executive Departments and Agencies* (Jan. 21, 2009) available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

<sup>13</sup> *Supra* note 4.

<sup>14</sup> [On file with authors].

<sup>15</sup> 5 U.S.C. Section 552 (a)(6). Agencies shall respond within twenty business days to requests, and may not request an extension for more than ten working days except in unusual circumstances

<sup>16</sup> 5 U.S.C. Section 552(a)(6)(C)(iii). Under the OPEN Government Act of 2007 Amendments to FOIA, an agency cannot assess fees if the response is delayed beyond thirty days of the initial request date.

<sup>17</sup> [On file with authors].

<sup>18</sup> *See, e.g., Jim Snyder & Danielle Ivory, Obama Cabinet Flunks Disclosure Test With 19 in 20 Ignoring Law*, BLOOMBERG, Sep. 27, 2012, <http://www.bloomberg.com/news/2012-09-28/obama-cabinet-flunks-disclosure-test-with-19-in-20-ignoring-law.html>.

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Thank you for your prompt attention to this matter. If you have any questions, please contact Kristina Moore with the Committee on Environment and Public Works at (202) 224-6176, Nathan Hallford with the Committee on the Judiciary at (202) 224-5225, or Kristin Nelson with the Committee on Oversight and Government Reform at (202) 225-5074.

Sincerely,

David Vitter  
Ranking Member  
Senate Committee on Environment and  
Public Works

Darrell Issa  
Chairman  
House Committee on Oversight  
and Government Reform Committee

Charles E. Grassley  
Ranking Member  
Senate Committee on the Judiciary

Cc: The Hon. Barbara Boxer, Chairman, Senate Committee on Environment and Public Works

The Hon. Elijah Cummings, Ranking Minority Member, House Committee on Oversight and Government Reform

The Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary