

January 14, 2021

Via E-Mail Contact Forms

Hon. Raúl M. Grijalva, Chair
Natural Resources Committee
United States House of Representatives
1324 Longworth House Office Building
Washington, DC 20515

Hon. Carolyn B. Maloney, Chair
Committee on Oversight and Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Hon. Frank Pallone, Chair
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
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Hon. Lindsey Graham, Chair
Hon. Dick Durbin
Senate Committee on the Judiciary
United States Senate
224 Dirksen Senate Building
Washington, DC 20510

Hon. Lisa Murkowski, Chair
Hon. Joe Manchin
Senate Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Building
Washington, DC 20510

Re: Freedom of Information Act Delays and Recommendations for Reform

Dear Members of Congress:

We write on behalf of fourteen conservation and transparency groups to highlight examples of agency delay we encountered during our efforts to hold the Trump Administration accountable through requests for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The egregious and often politically motivated delay we experienced violates the letter and spirit of

the law. We request your assistance in implementing solutions so that the public can benefit from greater transparency and accountability in the future.

Some of these issues were first exposed by the U.S. Department of the Interior's Office of the Inspector General in a report issued in August 2020 regarding the strategic delay of records related to then-Acting Secretary Bernhardt.¹ A series of record releases to reporters and environmental groups during Scott Pruitt's tenure as U.S. Environmental Protection Agency administrator also revealed how Mr. Pruitt's political aides intentionally slow-walked certain FOIA responses.² In this letter, we highlight additional examples at Interior, EPA, and other agencies with responsibilities for public lands and the environment. Many of the Trump Administration's efforts to undermine transparency appear to have been politically motivated. However, the transition to a new administration will not, on its own, resolve the loopholes in FOIA that allowed President Trump's political appointees to manipulate and undermine the FOIA process (a process intended to be removed from political interference). The undersigned organizations request legislative fixes to effect enduring change.

Although it is certainly not the only defect in how FOIA is implemented, this letter focuses on one high priority issue that all of the undersigned groups regularly face: improper delay. Agencies' long delay in releasing records often means that by the time the requester receives key records, they are stale. In other words, the moment in which the records may have informed public opinion or policymaking, or helped to provide the necessary check on federal executive agencies, has passed. While some of this delay may be a result of understaffing, that is not the full story. As the August 2020 report and other examples below demonstrate, many delays have been strategic and purely intended to postpone for as long as possible releasing the information needed to hold federal agencies accountable for any wrongdoing.

Further investigation will undoubtedly reveal even more examples of improper political interference. Whether delay is intentional or simply the result of a lack of resources, it often has the effect of undermining FOIA's primary purpose--transparency--and should therefore be a key priority for reform.

Below we detail the problem by sharing anecdotes from our work and propose a set of potential solutions. These are preliminary legislative ideas, and we welcome the opportunity to brainstorm with you further how to assemble them into a package for legislation. Although addressing the issues below will not resolve the full range of possible improvements to FOIA, when paired with meaningful repercussions for an agency's failure to comply with deadlines,

¹ U.S. Office of Inspector General, U.S. Department of the Interior. "Alleged Interference in FOIA Litigation Process," Aug. 11, 2020, https://www.doi.ig.gov/sites/doi.ig.gov/files/WebRedacted_Alleged_FOIAInterference.pdf (hereinafter "OIG Report").

² Letter from then-Ranking Member Elijah E. Cummings of the House Oversight Committee, to former EPA Administrator Scott Pruitt, June 11, 2018.

these changes will go a long way toward ensuring more transparency and government accountability.

I. Examples of Politically-Motivated and Otherwise Improper FOIA Delays

A. Department of the Interior (DOI)

- **Delay of Bernhardt records released in response to National Monuments FOIA litigation.** Southern Utah Wilderness Alliance (SUWA), Sierra Club, Center for Biological Diversity and others sued the DOI for failing to respond to their requests for documents related to the decision to shrink national monuments in Utah. In investigating DOI's response to litigation brought by SUWA, Sierra Club and others (Southern Utah Wilderness Alliance et al. v. Dept of Interior et al., Case No. 17-cv-02314, D.D.C), the Office of Inspector General for the Department of Interior found that Hubbel Relat, then the DOI's counselor to the Secretary of Interior, explicitly directed Office of Solicitor attorney-advisors to remove 253 pages referencing David Bernhardt from a set of documents that were to be released to requesters in February 2019 per court order.³ At the time, Bernhardt was awaiting confirmation for the position of Secretary of Interior. Those pages were ultimately released in December 2019, eight months after Congress confirmed Bernhardt as Secretary. As a result, the requesters and the public were denied the benefit of reviewing Bernhardt's correspondence on the national monuments issue prior to his confirmation.
- **Delay of Bernhardt records released in response to Sierra Club FOIAs for external communications.** Sierra Club experienced a similar, suspicious delay of records related to Bernhardt in response to a different FOIA request. Sierra Club first requested the external communications of Bernhardt, and other senior DOI officials, in September 2017. Following DOI's failure to respond to the request, Sierra Club brought suit in February 2018 and negotiated a schedule for production of responsive documents. In April 2019, DOI represented to the Court that it had completed producing Bernhardt's documents although it had only produced 110 email strings for an eight-month period. Despite Sierra Club raising serious concerns over a period of months about the adequacy of DOI's search, DOI only disclosed in May 2019 that the agency identified an error in its search methodology that resulted in disclosure of over 16,000 additional records—including over 1,000 email messages for Bernhardt. Because of the delays, these messages were not disclosed until after Secretary Bernhardt's nomination had been confirmed by the Senate.
- **Delay of release of communications between senior DOI officials and White House in response to Sierra Club FOIAs for external communications.** In responding to

³ OIG Report, at 3.

Sierra Club's requests for records of other DOI staff in 2018 and 2019, and following litigation to force production, DOI set aside approximately 200 pages of documents for "White House equities review," claiming that an additional layer of review was needed for documents that involved White House staff. Despite the small volume of documents, DOI stated in early 2020 that this review would require an additional two months beyond the long delays already experienced. When DOI finally produced the White House-related documents more than six months later, they were some of the last to be produced over several years of litigation. A batch finally released on October 30, 2020 (four days before the 2020 presidential election) included emails from 2017 revealing that Ryan Zinke, then Secretary of the Interior, and Scott Pruitt, then EPA Administrator, planned an "official stop" at a partisan event held by the Republican Attorney Generals Association, with dinner paid for by the Rule of Law Defense fund (a right-wing political organization). The flights to this event were paid for by the Department of Interior, and ultimately, American taxpayers. By the time the documents revealing this information were released, both Zinke and Pruitt had resigned, and other staff involved had also left the government, creating barriers to any investigation of the matter for waste, fraud, abuse, or legal violations.

- **Delay in Release of Records Regarding Raise of Shasta Dam.** Shortly after President Trump took office, DOI's Bureau of Reclamation announced an aggressive plan to raise the height of Shasta Dam in California, with construction set to begin in the end of 2020. On behalf of several organizations, Earthjustice submitted numerous FOIA requests with Reclamation in 2019, seeking information regarding Reclamation's plans, including critical information about dam safety, the impacts of the dam raise on fish and wildlife, and dealings between the Secretary of the Interior and Westlands Water District, one of the Secretary's former lobbying clients, which stands to gain from the dam raise. After months of stalling, Reclamation failed to respond to the FOIA requests, and Earthjustice filed suit in December 2019 to compel the release of responsive records. While the FOIA lawsuit was pending, Reclamation moved forward with the project and issued a draft environmental impact statement in August 2020. Although Earthjustice's lawsuit forced Reclamation to release some responsive records before the comment period on the EIS closed, its releases remain incomplete. Reclamation also restricted its release of responsive records to those generated through the date of the FOIA *requests* many months before (rather than the date the search was actually conducted), thus ensuring that productions of most records would be stale. Reclamation's improper foot-dragging has hampered the public's ability to understand and comment on the impacts of the project. What is more, Reclamation intends to reach a final decision on the dam raise any day, regardless of whether it ever fully responds to the FOIA requests currently under litigation. The public is therefore left in the dark on key issues and cannot raise

objections to the dam raise before the agency reaches a final decision.

- **Delay in Release of Records Regarding Executive Order 13,927, Accelerating the Nation’s Economic Recovery From the COVID-19 Emergency by Expediting Infrastructure Investments.** In June and July of 2020, the Center for Biological Diversity requested records from numerous agencies, including DOI’s Office of the Secretary (“OS”), seeking records showing action taken by each of these agencies in response to Executive Order (“EO”) 13,927, Accelerating the Nation’s Economic Recovery From the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities. When President Trump issued the EO, he specifically directed the heads of agencies to exploit provisions under the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act. After receiving no records, the Center filed suit in July 2020 and its first amended complaint in August 2020. While many agencies began to produce records after the Center sued, the DOI OS first estimated a production of December 2020, approximately 6 months after the Center submitted its FOIA request. To date, while DOI OS has identified responsive records, it state that it required consultation with “an external entity.” By the time the consultation concluded in January, 2021, the information was stale.

B. Environmental Protection Agency

- **Delay in Release of Scott Pruitt’s Communications.** The Center for Biological Diversity first requested the communication records of then-EPA Administrator Scott Pruitt in late February 2017—less than two weeks after he was confirmed—and submitted subsequent requests for the same records. EPA refused to search, claiming that the Center’s requests did not provide key terms, subject matters, or titles of custodians to search. Then, after the Center filed a first amended complaint in May 2017, EPA maintained that it would only search for records through the date of the Center’s FOIA request, from February 17 through 28, 2017. The Center repeatedly asked EPA to use the date of the agency’s search, not the request date. Although EPA released some redacted emails that had been sent to Mr. Pruitt, EPA did not provide any emails that Mr. Pruitt sent or any text messages, instant messages, or phone logs as the Center requested. Only after the parties filed cross motions for summary judgment, on Sunday, July 8, 2018—mere days after Scott Pruitt resigned as EPA Administrator due to career-ending scandals revealed by FOIA requests—an assistant to former Administrator Pruitt located potentially responsive records in Mr. Pruitt’s personal email accounts. A mere two weeks later, EPA took action to stay briefing and resolve the Center’s two related cases. Only then did EPA agree to search for and process all text messages, to search Mr. Pruitt’s personal email accounts, and to process all emails through the day Mr. Pruitt left the agency according to a proposed production schedule. Although the agency ultimately

released hundreds of previously withheld records, by the time EPA finally released responsive records, Mr. Pruitt had been long gone and the information was stale.

Likewise, Sierra Club requested Mr. Pruitt's external communications in the summer of 2017, including any work-related emails sent from his personal email account. Sierra Club was forced to sue EPA when the agency ignored the request. Although EPA then insisted for months there was no need to search Mr. Pruitt's personal email for responsive documents, and provided only one outgoing email message from Mr. Pruitt for the 10 months he had been in office at the time, following his resignation, EPA produced several dozen emails from his personal account from that same period. These emails were forwarded to his official government account on the day of his resignation (July 5, 2018) despite EPA policy that such messages be forwarded to a government account within 20 days of being created.

- **Delay in Release of Records of Meetings with Industry Groups.** On December 6, 2018, the Center for Biological Diversity requested records generated in connection with meetings and discussions between EPA and CropLife America, an industry trade group that represents and advocates on behalf of pesticide manufacturers, formulators, and distributors. After receiving no records for six months the Center sued in May 2019. Alleging delays caused by competing FOIA cases, EPA did not provide a production schedule until December 2019. EPA then proposed a production schedule that began in August 2020 and would be completed by October 2020. EPA failed to produce *any* attachments to e-mail or calendar records, incomprehensibly alleging that the FOIA request did not seek attachments. In a November 4, 2020 report to the Court, EPA stated that it intended to produce outstanding attachments by December 7, 2020. Later in November 2020, EPA stated it would be conducting a re-review of approximately 700 records because they “may have been erroneously coded as ‘not responsive’” and further delayed producing those records until December 18, 2020. EPA effectively delayed producing the requested records that would reveal improper influence by industry groups by over two years, and only released them after the November 2020 presidential election.

C. Other Agencies

- **Delay in Release of Stuart Levenbach's Communications and Schedules.** On April 4, 2018 and December 6, 2018, the Center for Biological Diversity requested the communication records and schedules of Stuart Levenbach, the Chief of Staff of the National Oceanic and Atmospheric Administration (“NOAA”), which reports directly to the Under Secretary of Commerce for Oceans and Atmosphere (commonly known as the NOAA “Administrator”). Since January 20, 2017 to at least the date of commencing this action in May 2019, NOAA has not had a Senate-confirmed NOAA Administrator and had three Acting Administrators. Since the appointment of Mr. Levenbach significant

policy changes have occurred at NOAA, such as authorizing seismic surveys in the Atlantic Ocean that can harm marine life and proposing extensive changes to the regulations implementing the Endangered Species Act. After receiving no records, the Center filed suit in May 2019. While NOAA started to produce records in November 2019, 11 months since requesting records, NOAA missed productions in January, March, August, and September 2020, even with the Center agreeing to NOAA's request to reduce the review of records down from 400 to 300 per month. Furthermore, while NOAA started to produce calendars in October 2019 (10 months after requesting schedules), the calendars were illegible and meeting information was cut off and missing on at least 29 days. Even though the Center informed NOAA of these issues in October 2019 and NOAA stated it would resolve these issues by March 2020, to date NOAA has failed to produce corrected calendars and now uses COVID-19 to try to justify their delay. By the time NOAA returns to their offices post COVID-19, President-elect Biden will have been sworn in and Mr. Levenbach's information will likely be stale.

- **Delay in Release of Energy Secretary Rick Perry's Calendars.** On December 10, 2018, Food & Water Watch requested the Department of Energy ("DOE") to produce all meeting calendars for Secretary Rick Perry, Deputy Secretary Dan Brouillette, and agency's Chief of Staff from January 31, 2017 to the date of production. As a former and now-current board member of Energy Transfer Partners, a fossil fuel pipeline company with nearly \$100 billion in assets, timely production of calendars was necessary to determine whether Secretary Perry was showing considerable favor to clients and the industry for which he had previously worked. On January 9, 2019, DOE timely produced previously-released calendars for the time period of March to June 2017. At that point, the DOE FOIA staff went silent for three months, when on April 2, 2019, DOE finally stated that they were still processing materials and that Food & Water Watch would receive production in "the next few weeks." DOE did not produce any further materials until five months later on August 1, 2019 when they released a few months of stale two-year-old previously-released calendars for Brian McCormack and Dan Brouillette - and did so only on the condition that Food & Water Watch waive all appeal rights concerning the copious redactions. On October 9, 2019, when asked for a status update, DOE vaguely responded that it would send "the rest of the information as quickly as we can." DOE did not produce further records until February 2020 - six months after their last production - and only produced then-18-month old calendars for Dan Brouillette. Only after Rick Perry had left office as Secretary of Energy and Donald Trump had been impeached by the U.S. House of Representatives for activity related to Secretary Perry's trip to Ukraine, DOE began monthly production of records that were by that point stale and largely publicly available. Moreover, DOE only produced records that were previously released to other parties, and only did so under the stipulation that administrative appeal rights would be denied for this production. By this point, all

information contained within these calendars was nearly three years old and stale.

- **Delay in Production of Communications Related to Department of Energy Loan Guarantees.** In mid-April 2019, Food & Water Watch submitted a request to DOE seeking records related to a loan guarantee application for a natural gas liquids storage and trading facility under the clean energy loan guarantee program established in Title XVII of the Energy Policy Act of 2005, 42 U.S.C. § 16511, *et. seq.* This was a time-sensitive request, as the project developer had recently been invited to apply to a second stage of the application process for a project that ostensibly did not meet the Energy Policy Act’s statutory definition of an eligible project. Specifically, Food & Water Watch was interested in how the loan program staff determined that construction of new fossil fuel infrastructure designed to support plastics manufacturing fit the statutory definition of a project that “[a]void[s], reduce[s] or sequester[s] greenhouse gases.” After DOE produced only previously released records under the condition of waiving appeal rights, Food & Water Watch was forced to resubmit its request, as the records were over-redacted and did not completely address the original search parameters. DOE did not produce records until August 28, 2019, and Food & Water Watch timely appealed DOE’s failure to adequately search and excessive redactions. DOE granted Food & Water Watch’s appeal, in relevant part, on January 13, 2020. DOE’s FOIA officers then refused to respond to Food & Water Watch’s outreach attempts for over seven months. In order to compel compliance with FOIA, litigation commenced in federal court on August 6, 2020. DOE did not make a final production until January 11, 2021 - nearly two years after the initial request. Moreover, production consisted primarily of heavily-redacted records that are now over three years old despite the request clearly seeking relevant records up to the date of production.

II. Recommendations for Closing the Loopholes That Allow Strategic Delay

A. Enact Center for Biological Diversity Proposal on Waiver of Privileges.

Federal agencies consistently ignore FOIA’s statutory deadlines, releasing records months and even years after they are requested such that information becomes stale before its release. Center for Biological Diversity recommends, and the other undersigned groups agree, that Congress enact FOIA reform that would require that after six months from the date that an agency conducts a search for records responsive to a FOIA request, all waivable privileges are waived for the records that are yet to be produced. This would provide an incentive for agencies to review and produce the more potentially consequential responsive records first rather than leaving them until the end.

B. Strengthen the Presumption in Favor of Disclosure.

Congress should place a specific burden on the agency responding to a FOIA request to justify any withholdings or redactions at the request stage, or else the agency waives its right to withhold the information. Agencies must provide specific reasons why redacted information or fully withheld records fall within the scope of any claimed exemption, and why it will cause foreseeable harm, at the time that the agency produces a redacted record or identifies a fully withheld record, rather than only when the requester asks for follow up or during litigation.

C. Eliminate the Lag Time Between Search and Production.

Congress should mandate that an agency must conduct a search for responsive records no longer than one month prior to releasing the records to the requester. In other words, if the agency delays beyond one month from the time of its search in producing records, it must conduct a renewed search to locate any additional responsive records that may have been created or received during the delay, in addition to any other applicable legal remedies for delay.

D. Mandate Additional Affirmative Disclosure by Agencies.

Requiring agencies to release additional categories of records affirmatively would reduce the burden on members of the public to request that records be released under FOIA, would reduce volume of FOIA requests that agencies' receive (including the number of requests seeking the same commonly requested categories of records), and thus would reduce agency FOIA delays and backlogs. Congress should mandate that agencies affirmatively post to their web sites, in an easily searchable format, commonly requested categories of records that should be presumptively public (and thus should require minimal review for privileges), including detailed calendars of senior staff, communications between agencies and regulated entities, and records that agencies have already determined are releasable under FOIA.

E. Mandate That Agencies Use Electronic Document Management Tools.

Many agencies have still not invested in modern electronic document management tools that allow for more efficient search and collection of responsive documents, removal of duplicates, and refinement of searches using metadata. This creates significant FOIA delays and inefficiencies that would be easily avoidable through modest investments in upgrades to their record management systems. In the year 2021, there is no excuse for federal agencies still to be using outdated systems that require manual reviews of records when software is readily available to speed up the process.

Likewise, agencies' use of FOIA Online, a one-stop portal for submitting and tracking FOIA requests, remains incomplete.⁴ Mandating that all agencies use a uniform one-stop site for FOIA requests, whether FOIA Online or another platform, would help streamline the FOIA process.

⁴ FOIA Online, Participating Agencies,
<https://foiaonline.gov/foiaonline/action/public/home#participatingAgencies>

We appreciate your considering these important issues and would welcome the opportunity to discuss these preliminary legislative ideas further with you and your staff at your convenience.

Sincerely,

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