



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

July 15, 2018

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Cummings:

In a letter from you in your capacity as the Ranking Member of the Committee on Oversight and Government Reform (Committee) to the Honorable Trey Gowdy, Chairman of the Committee, you raised questions regarding the Environmental Protection Agency's (EPA's) process for responding to Freedom of Information Act (FOIA) requests. The letter highlighted the role of EPA's FOIA Expert Assistance Team (FEAT) in that process. I write to provide information as to the origin and role of the FEAT, and to offer to brief Committee staff on the same.

In 2013, EPA's FOIA program was routinely the subject of litigation, public criticism, and Congressional oversight (including oversight by this Committee). Then-Acting Administrator of EPA Robert Perciasepe turned to me and my counterpart in the Office of Environmental Information and gave us the following task: make the FOIA process at EPA better. In response, the FOIA Expert Assistance Team, affectionately known as the FEAT, was created. The purpose of the FEAT was to provide strategic direction and project management assistance on the most challenging or complex FOIA requests. Here is how the FEAT was described in its original Functional Statement:

Under the supervision of the Senior Counsel, this unit provides legal counsel on all issues pertaining to selected FOIA requests that have been determined to be [the] most complex and/or potentially sensitive requests received across the Agency. Utilizing an extraordinary breadth of FOIA knowledge and experience, together with in-depth organizational and external awareness, the team provides advice and guidance to the highest echelons of management within the Agency.

Throughout its history, there have been three ways a FOIA request became a “FEAT FOIA”: a request from the lead office, a request from the Office of the Administrator, and an independent decision by the FEAT Director. The FEAT would engage on approximately 3% of EPA’s FOIA requests each year, with the level of engagement on each request adjusting to the specific needs presented by that request. Among the first FEAT “deployments” – where DC-based experts travel to locations across the agency to help lead a response to a FOIA request – was the Team’s engagement with EPA’s Region 10 in response to requests related to Bristol Bay, Alaska. Other major “FEAT FOIAs” include requests related to the spill of polluted water from Gold King Mine, EPA’s response to Volkswagen’s use of defeat devices, and drinking water contamination in Flint, Michigan.

In addition to work on specific FOIA requests, the FEAT also helped keep senior leaders informed of new requests that the agency received each week, coordinated inter-agency review with the Executive Office of the President (EOP) where the EOP had equities in the responsive documents, and made senior leaders aware of impending FOIA productions. There are multiple benefits to making senior leaders – political and career – aware of productions before they are actually produced: the Office of Congressional and Intergovernmental Affairs can determine if the documents are also responsive to a Congressional request for information and, if so, ensure Congress receives the documents at the same time or slightly before the requestor; the Office of Public Affairs can prepare any communications materials deemed necessary based on the documents to be produced; when the documents are from or about a particular employee, keeping that employee informed throughout the process when appropriate, including at the response stage, can significantly increase their confidence in and respect for the FOIA Program into the future; and, while not meant as a quality control tool, to the extent a mistake is identified, it can be corrected. This “awareness review” process does not itself violate FOIA and can be completed without causing undue delay.

In early 2017, the FEAT began to take on a new responsibility: providing programmatic training and support to an office that was struggling to meet its FOIA responsibilities. FEAT members were “embedded” with OGC’s External Civil Rights Compliance Office and OGC’s Ethics Office to help those offices gain experience and confidence in their FOIA abilities. Based in part on that experience, EPA Chief of Staff Ryan Jackson asked the FEAT to assist the Administrator’s Office (AO) in improving its FOIA program. The AO had seen a 415% increase in the number of incoming FOIA requests compared to 2016 and the volume had overwhelmed the small staff that was designated to respond to such requests. The AO Centralization Pilot Project was designed to see if the FEAT could “deploy” to an office within EPA, assess the strengths and weaknesses of the office’s current FOIA program, and build a consolidated cadre of employees who would be focused exclusively on FOIA and other information requests. The expectation was that by centralizing and prioritizing the responsibility for FOIA requests, the office would produce more timely responses with fewer errors that necessitated less resources.

After multiple lean events and prototype exercises, the FEAT and representatives from the AO Immediate Office (OEX), the Office of Public Affairs (OPA), the Office of Policy (OP) and the Office of Congressional and Intergovernmental Relations (OCIR) (collectively referred to as AO4) began to implement the AO FOIA Centralization Pilot Project on April 31, 2018. With the support of the Chief of Staff, the FEAT hired three new employees to support this effort, and AO4 offices recruited new information experts as well. Currently, the FEAT is coordinating the centralized FOIA efforts for the 1,453 FOIA requests pending with the AO4 offices (as of June 18, 2018).

Through the Pilot Project, the FEAT and the AO4 Offices have built a foundation for a dramatically improved FOIA program. The team painstakingly categorized 1,442 requests and assigned a project lead for each. There was no existing categorization scheme for the team to turn to, so as they reviewed the requests they developed a unique taxonomy for classifying all existing and incoming requests. They also began the practice of stamping each document processed as part of the pilot with a unique identifier so that every document can be tracked at all stages of the response process.

These behind the scenes efforts enabled two key advancements that generated tangible results for requestors. First, on June 6, 2018, every one of the 1,163 requestors with a request pending in the AO4 received an update on their specific request that included a tracking number, where the request currently stood in the queue of pending requests, and an estimated response date. Many of those dates were months into the future, and so the letters offered the assistance of EPA's FOIA Public Liaison and the Office of Government Information Services, and committed to providing interim releases, if possible. That commitment is meaningful, because the second advancement is that release to one requestor now means release to all. The agency often receives multiple requests for the same information. Because the team has now identified every pending request as relating to one or more standardized subject areas, and because when the team reviews a document it also identifies that document as relating to one or more of the same standardized subject areas, the team can instantly identify all pending requests to which a document is responsive and send the production to each of those requestors as well. That innovation alone has incredible potential to reduce the time it takes the AO to respond to requests. While much more progress must be made, since implementation, the team has completed its response to 100 requests and provided interim responses to 341 additional requests.

EPA's FOIA program is far from perfect. The number of requests that are pending for more than the statutory or agreed upon time for responding has increased. As a result, EPA now faces over 70 lawsuits under FOIA – a 500% increase over the pre-2017 high. Ultimately, the head of an agency sets the tone and the commitment of EPA's senior leaders will be essential for the program to improve. The work of the FEAT and the AO4 Team, however, has laid a foundation from which EPA's FOIA program could be a model of what a FOIA program should be, not an example of what a FOIA program should not be. I invite you, other members of the Committee, and Committee staff to visit our offices to see first-

hand the effort that is being made and the work that has been done to put the agency on the cusp of that future. If you have further questions or would like to schedule a briefing, you may contact me at minoli.kevin@epa.gov or (202) 564-8064, or your staff may contact Neil Bigioni, Acting Director, National FOIA Office, at bigioni.neil@epa.gov or (202) 564-2281, or Kristien Knapp, Office of Congressional and Intergovernmental Relations at knapp.kristien@epa.gov or (202) 564-3277.

Sincerely,



Kevin S. Minoli
Principal Deputy General Counsel &
Designated Agency Ethics Official

cc: The Honorable Trey Gowdy
Chairman, Committee on Oversight and Government Reform