



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

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MEMORANDUM

SUBJECT: Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests

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PURPOSE

This memorandum states the policy of EPA for responding to requests under the Freedom of Information Act (FOIA) for the names of potentially responsible parties (PRPs) at CERCLA sites.

II. BACKGROUND

On March 30, 1983, EPA issued guidance on releasing the identities of potentially responsible parties under CERCLA. This guidance provided for case-by-case review and discretionary disclosure of the identities of PRPs in certain limited circumstances. In general, before the March 30 guidance, EPA did not release the names of PRPs in response to FOIA requests.

On June 28, 1983, the Federal District Court for the District of Columbia decided in Cohen v. EPA that EPA had not met its burden of establishing that disclosing the identities of PRPs would harm the Agency's enforcement efforts. The case involved EPA's decision to withhold the identities of potentially responsible parties as provided by FOIA exemptions under 5 U.S.C. §§552(b)7(A), 7(C), and 5.

The court granted the plaintiff's motion for summary judgment on finding that:

1. For Exemption 7(A) -- notice letters are investigatory records compiled for law enforcement purposes, but EPA did not establish that disclosure of the notice letters would harm the investigation;

2. For Exemption 7(C) -- the identities of the PRPs who received notice letters does not fall into the category of a protected privacy interest; and

3. For Exemption 5 -- notice letters are not predecisional documents.

III. POLICY

As a result of the Cohen decision and the Administrator's policy of conducting business in a more open atmosphere, and in light of the resource demands involved in case-by-case review of the names of notice letter recipients, the March 30, 1983, guidance has been reevaluated. The new guidance is set forth below.

1. In response to a FOIA request, EPA will release the names of PRPs who have received notice letters about a CERCLA site.

2. An exception to the policy of disclosing the names of PRPs who received notice letters may be made only when EPA determines that disclosure of a particular name will cause such interference with an ongoing enforcement proceeding that discretionary disclosure is clearly unwarranted. If EPA decides to withhold the name of a PRP who received a notice letter, EPA must support the conclusion that disclosure will cause substantial harm to the law enforcement proceeding in writing with concurrence by the Regional Counsel. The written documentation may not consist of general statements; it must include the particular facts relating to the specific PRP and site that led to the conclusion to withhold.

3. The names of parties who have not yet received notice letters may be predecisional and therefore exempt from disclosure under Exemption 5 of the FOIA. These names also may be exempt as investigatory records under Exemption 7(A). However, in its discretion EPA may release this material.

4. Although EPA usually will release the names of PRPs only in response to FOIA requests, the Agency may elect to release the information on its own initiative in appropriate circumstances.

5. Disclosure of the names of PRPs and the names of sites does not constitute a waiver of EPA's right to withhold other information developed for an enforcement action that EPA determines is exempt from disclosure. Even if information is exempt from disclosure under Exemption 2, 5, or 7 of FOIA, EPA has discretion

to release the information; however, EPA may exercise its discretion to release the information only after the appropriate Regional Counsel reviews the information to ensure that disclosure will not interfere with an enforcement action.

IV. PROCEDURES TO IMPLEMENT POLICY

EPA Headquarters or a Regional Office should follow the procedure below to respond to a FOIA request for the names of PRPs or other information about a CERCLA site.

1. Quality assure the list of PRPs regularly and particularly before sending notice letters to PRPs for a site. Perform an in depth quality assurance of PRP lists every 6 months. Headquarters will hold Regional Offices accountable for inadequate quality assurance of PRP information.

2. Immediately notify Headquarters whenever a Regional Office decides, in accordance with the guidance in Item III.2 above, that disclosing the name of a PRP will cause substantial harm to an enforcement effort. Regional Offices also should notify Headquarters if withholding a name is no longer required.

3. If additional information is requested about a PRP or a site, consult with the Regional Counsel for a decision on whether disclosure will interfere with enforcement at the site.

4. Submit the list of names, or names and information, to the requester with a brief explanation of how EPA defines PRP for purposes of sending notice letters.

5. Include with the list of names the following disclaimer:

This list represents EPA's preliminary findings on the identities of potentially responsible parties. EPA makes no assertions that parties on this list are liable for any hazard or contamination at any CERCLA site.

6. Use the term "potentially responsible party" in responses to FOIA requests if none of the parties named in a notice letter has been found liable by a court.

V. FIRST RESPONSE TO FOIA REQUESTS

Ten working days after the date of this policy, Headquarters will respond to the current backlog of requests for all PRP names with the quality assured list.

Any Regional Office that intends to withhold any PRP names, as provided by Item III.2 above, must have completed the required documentation and notified Headquarters before the FOIA response date. If you have any questions about this policy, contact Susan Cary Watkins (FTS 382-2032).