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Eric C. Schwaab
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
United States Department of Commerce
1315 East West Highway
Silver Spring, MD 20910

July 29, 2011

Mr. Schwaab:

I am writing about my continued disappointment with your office's unresponsiveness to my numerous requests for documents concerning systemic problems at the National Marine Fisheries Service.

On May 27, my subcommittee staff sent a list of documents to your Legislative Affairs staff. Since the requested documents were germane to a field hearing held in Boston on June 20, a reasonable deadline of June 14 was provided. NOAA representatives were not made available to meet with my staff until the morning of June 17 – the Friday before the hearing.

NOAA's representatives did not bring any of the requested documents to that meeting, thereby depriving my staff of the ability to ask questions about them. Later that afternoon, a courier arrived with a letter from NOAA Legislative Director John Gray and a small fraction of the documents my staff requested.

On its face, that kind of response to a Congressional office would be interpreted by most Americans as evidence of an agency with a transparency problem. I pointed this out at the hearing, which you attended as a witness, and reiterated my interest in seeing the missing documents produced.

On June 30, I made a direct request to you for those documents in the course of asking post-hearing questions for the official hearing record. As you will recall, the distinguished chairman asked that all witnesses promptly respond to those questions. Accordingly, I set a July 29 deadline.

On July 11, a NOAA employee wrote back to my staff, stating that work was underway on answering my questions, adding that "Often our ability to provide QFRs within the Committee timeframe is compromised by the extensive clearance process the responses must undergo, but we will do our best to meet your deadline."

Today is July 29 and I have not received the missing documents or the answers necessary to complete the hearing record. No further timeline for completion has been provided by NOAA. While NOAA's initial unwillingness to provide certain documents was an unfortunate situation with a number of plausible explanations, I must now consider the logical conclusion that your agency feels itself to be above

Congressional oversight. This behavior is disrespectful to the American people, Congress, and the Massachusetts fishermen who have suffered because of NOAA's mismanagement of the fisheries.

It is clear that NOAA has thus far failed to honor President Obama's stated commitment to transparency. It is concerning to me that an agency which has issued large fines to fishermen for paperwork errors has not produced documents when requested to do so by a Member of Congress. My concern is amplified by NOAA's history of shredding documents while under investigation.

In addition, because this letter seeks additional information in connection with this duly authorized investigation on a matter within the Subcommittee's jurisdiction, I take strong issue with the Department's previous determination to treat my requests for information as requests under the Freedom of Information Act. The text and legislative history of the Freedom of Information Act make explicitly clear that FOIA was intended to have "absolutely no effect upon congressional access to information." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2429 (describing provision codified at 5 U.S.C. § 552(c)); accord Federal Public Records Law: Hearings Before a Subcomm. of the House Comm. on Government Operations (Part I), 89th Cong., 1st Sess. 23, 142-43 (1965). As the Senate Judiciary Committee has commented, "the nonapplicability of the FOIA to Congress cannot be overstated." S. Rep. No. 854, 93d Cong., 2d Sess. 35 (1974). Indeed, the Executive Branch has long understood that the bills that evolved into FOIA "in no way concerned, indeed they expressly exclude from their scope, the question of the reach of the investigative power of the Congress vis-a-vis executive agencies." Federal Public Records Law: Hearings Before a Subcomm. of the House Comm. on Government Operations (Part II), 89th Cong., 1st Sess. 523 (1965) (letter of Assistant HEW Secretary Wilbur J. Cohen).

Obviously, in their private capacity, Members of Congress have the same rights under FOIA to obtain government information enjoyed by "any person," 5 U.S.C. § 552(a)(3), but as the legislative history of FOIA makes clear, "the Congress has the additional rights of access to all Government information which it deems necessary to carry out its functions." H.R. Rep. No. 1497, at 12, 1966 U.S.C.C.A.N. 2418, 2429.

In furtherance of this investigation, please provide all documents related to the Commerce Department legal review that Secretary Locke relied upon when he chose not to discipline NOAA employees whose poor conduct was described by Special Master Charles B. Swartwood, III.

In his May 17, 2011 Decision Memo responding to Special Master Swartwood's report, Secretary Locke wrote the following:

In light of this systemic failing, I find after legal review that none of the conduct described in the report undertaken by any individual NOAA lawyer or law enforcement officer warrants disciplinary action against any employee mentioned in Judge Swartwood's report. At bottom, these problems were not the product of individual bad acts, but rather the result of conduct enabled and even encouraged by the management and enforcement culture in place at the time.

In order to better understand Secretary Locke's decision, I am requesting that you provide me with all documents related to that legal review.

Additionally, I am requesting all memoranda from the Commerce Department Office of Assistant General Counsel for Administration Barbara Fredericks (or staff) regarding the possibility of discipline for current or former leadership at the NOAA Office of Law Enforcement or Office of General Counsel for Enforcement Litigation. My request as a Member of Congress includes the forty one documents you located but did not release in response to a November 24, 2010 request from a private attorney (NOAA FOIA Request No. 2011-00113).

As you heard at the Boston field hearing, there is bipartisan concern among members of both chambers about the lack of accountability at NOAA. My constituents have trouble trusting an agency that declines to clear its ranks of those who broke their trust for so long. On their behalf, I asked you at the hearing what it took to get fired from NOAA. Today I am left wondering what it takes to get NOAA to fulfill a simple document request.

I echo the President's assertion that "Openness will strengthen our democracy and promote efficiency and effectiveness in Government." NOAA has an opportunity to meet the worthy bar he has set in this area by providing these documents without delay.

Sincerely,

Scott P. Brown
United States Senator

cc:

The Hon. Gary Locke
Secretary, United States Department of Commerce

The Hon. Jane Lubchenco, PhD
Undersecretary for Oceans and Atmosphere, United States Department of Commerce
Administrator, National Oceanographic and Atmospheric Administration