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Is the DEP Taking the 'Public' Out of 'Public Records'?

Posted By [Jon Whiten](#) On June 11, 2009 @ 9:44 pm In [Lead Story](#), [News](#) | [No Comments](#)



A memo leaked out of the New Jersey Department of Environmental Protection (DEP) earlier this month amounts to a “gag order on environmental scientists,” critics contend, while open government advocates say the DEP is going too far in restricting information. The DEP, however, says the critics’ allegations are baseless.

The [memo in question](#), written on June 1 by DEP director of policy, planning and science Jeanne Herb, lays out guidelines for employees on the disclosure of technical and scientific reports. It comes hot on the heels of the April release — via the state Open Public Records Act (OPRA) — of a [risk assessment \(full report here\)](#) from DEP scientists that called on the department to implement drastically tighter cleanup standards for the toxic hexavalent chromium found in Jersey City and elsewhere.

Critics say the release of that risk assessment — and the [political pressure](#) on the DEP that resulted — caught the department off guard and led it to clamp down on scientific information it doesn’t want to have to abide by.

Without public dissemination of scientific findings, NJ Sierra Club director Jeff Tittel says, there won’t be any public pressure to tighten potentially harmful policies.

“If you ‘do not have’ any science, then there is no reason to change the policy. An example would be the chromium standard — new studies show the standard for ingestion should be strengthened,” Tittel says. “But if there’s ‘no study,’ there’s no need to change policy, even though the public could be hurt.”

DEP spokeswoman Elaine Makatura says the risk assessment and the information guideline memos are not related. “There’s no correlation that I’m aware of,” she says.

She says the Jeanne Herb memo is simply part of an ongoing reorganization within the department. When asked whether or not the memo amounts to a “gag order,” as critics contend, Makatura says it absolutely does not. “That’s laughable,” she says.

‘An Abuse of the OPRA Process’

The June 1 memo advises that final DEP reports are not to be released until approved by management and the department’s press office, and asks that draft data and reports not be released. It also says that these reports “are not subject to public access under an OPRA exemption.”

“It’s outrageous,” Joe Morris, chromium cleanup project director for the Interfaith Community Organization (ICO), says of the DEP memo. “This seems like an abuse of the OPRA process.”

He says that he believes the department will be selective in how it implements the guidelines.

“They’ll release the science they like and suppress the science they don’t like,” Morris says. “If they don’t like something, they can just leave it in draft form.”

Morris, a veteran of chromium cleanup fights in Hudson County, has decades of experience dealing with the DEP. He says the department has become more secretive under Gov. Jon Corzine.

“This is a real departure from the way that the DEP has conducted science discussions in the past,” he says. He points out that when former DEP commissioner Bradley Campbell, who was appointed by Gov. Jim McGreevey and served until 2006, convened the Chromium Workgroup, study drafts were willingly shared along the way with ICO and other community stakeholders.

A recent DEP response to an open records request seems to prove Morris’ point.

After the June 1 memo was released, ICO filed an OPRA request seeking documents related to the peer review of the April report that called for stricter chromium cleanup standards.

On Wednesday, ICO was informed by DEP that its request was denied, since the documents “are part of the deliberative process and confidential until the draft document has been finalized.”

ICO says it will likely appeal the denial to the state Government Records Council, which oversees OPRA law (and, incidentally, was [recently sued](#) by an open government organization for allegedly violating OPRA law).

‘Shrouded With a Cloak of Deliberation’

Several open government advocates agree with Morris that the DEP seems to have overstepped its bounds.

“It looks to me like an unnecessarily clunky system that’s designed more to stop information from reaching the public than it is to protect the public,” New Jersey Foundation for Open Government (NJFOG) president Ron Miskoff says.

While noting that he’s not a lawyer, Miskoff points out that “the spirit of OPRA is to come down on the side of openness,” not secrecy. With these guidelines, the DEP is not presuming disclosure, he says, likening the move to a controversial 2001 memo written by then-U.S. Attorney General John Ashcroft. The Ashcroft memo overturned the previous presumption of disclosure for federal records, one of the keystones of what is widely regarded among experts to be the most secretive presidential administration in American history.

The Ashcroft directive was considered so severe that Barack Obama, on his first full day as president, directed his administration to reverse it, saying the government “stands on the side not of those who seek to withhold information, but those who seek to make it known.” Less than two months later, Attorney General Eric Holder issued formal guidelines overturning the Ashcroft memo.

“These historic measures do mark the beginning of a new era of openness in our country,” Obama said at the time. “And I will, I hope, do something to make government trustworthy in the eyes of the

American people, in the days and weeks, months and years to come. That's a pretty good place to start."

Miskoff, echoing the president's remarks, says the DEP needs to — at the very least — give off the appearance that information isn't being hidden.

"The appearance of openness leads to more openness," Miskoff says. He points out that when people feel like the government is not going to give them records, they often stop trying. With that in mind, he says the DEP's action will likely "have a chilling effect on people who'd like to know more about the environment."

Makatura, the DEP spokeswoman, stands behind the DEP's transparency record.

"I think that the department's reputation for being open and transparent is evident in the continual updating of its webpages and its continual release of information to the public," she says. "The department has nothing to hide."

But one attorney who specializes in OPRA law isn't so sure.

"The department appears to be creating or reinforcing multiple levels of bureaucracy that data and studies must pass through before they become 'final,'" Walter M. Luers says. "OPRA shields from disclosure documents that are 'deliberative'; this is called the 'deliberative process privilege.' However, data is not deliberative — data is objective. I would be concerned that data is being shrouded with a cloak of deliberation."

Luers says the memo also doesn't seem to distinguish between information disclosed to the public and information available under OPRA.

"Not all records may be 'released' to the public, but that does not necessarily mean that if DEP receives an OPRA request for a document that they can deny access," he says. "Specifically, a 'Final Report' must go through seven steps before being posted on the DEP website, but if a report is truly 'Final,' then it would be disclosable under OPRA, regardless of whether it was cleared for publication on the DEP's website."

From Trenton to Jersey City

This open government battle plays out as the DEP, along with the city and PPG Industries, recently finalized a revised settlement to clean up tons of hexavalent chromium along Garfield Avenue. The settlement says PPG must clean up the sites under the terms of "Applicable Remedial Provisions," which is defined as "all applicable statutes, regulations and laws including the DEP Commissioner's Chromium Policy as it now exists or may be adopted in the future."

Currently, the DEP remedial guidelines — laid out by former commissioner Lisa Jackson — call for excavation of the chromium to a level of 20 parts per million (ppm), down to 20 feet.

But the DEP's now-shuttered Division of Science, Research and Technology (DSRT) recently recommended to implement a cleanup standard of 1 ppm in a risk assessment that was uncovered via OPRA. The DSRT recommendation was based on a new federal National Toxicology Program (NTP) study that shows a clear link between ingesting hexavalent chromium and the development of cancer in mice and rats.

Jersey City corporation counsel Bill Matsikoudis has repeatedly stressed that PPG will have to comply if the DEP adopts the 1 ppm standard. But he says the DEP's recent actions on what's considered public information will have no effect on the PPG settlement process.

Matsikoudis points to language in the settlement agreement as proof that the public will be kept in the loop. In the agreement, the court-appointed site administrator will "attend and participate in community

or public meetings to discuss proposed remedial measures at the PPG sites.”

However, under the DEP’s new guidelines, it would appear that Jersey City residents would continue to be left in the dark about scientific developments at the department. In fact, the recommendation for a stricter standard, released in April, still has not been publicly disseminated by the DEP on its websites, and would not even be available via OPRA under the new guidelines. Actions such as these lead advocates to question whether the DEP should be involved in the Garfield Avenue cleanup at all.

“This is just another illustration of why jurisdiction on chromium needs to be taken away from the DEP,” Morris says.

NJFOG’s Miskoff says that if the department is playing politics with key information about human health and safety, it’s the public who ultimately loses.

“I don’t want to be drinking [dangerous levels of] chromium in my water, or eating it,” he says. “It could be life-threatening.”



Tags: [chromium](#), [Department of Environmental Protection](#), [environment](#), [Interfaith Community Organization](#), [New Jersey Foundation for Open Government](#), [OPRA](#), [PPG Industries](#), [public records](#), [science](#)

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