

# EXHIBIT

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Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

1875 Eye Street, NW, Suite 800, Washington, DC 20006

July 15, 2016

**VIA EMAIL**

U.S. Department of Justice  
Tax Division  
ATTN: Carmen M. Banerjee, Division Counsel  
Post Office Box 227  
Ben Franklin Station  
Washington, DC 20044  
TaxDiv.FOIAPA@usdoj.gov

**Re: Freedom of Information Act Request**

Dear Ms. Banerjee:

I write on behalf of the Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to:

1. The entirety of each record, any portion of which contains email communications between Norah E. Bringer and Gretchen M. Wolfinger discussing Ms. Bringer’s transition into a detail at the White House Counsel’s Office. This item also includes the entirety of each record that contains any email reply to the above-described records. The time period for this item of the request is May 2014.
2. The entirety of each record, any portion of which contains the Current Practices for Attorney Assignments, Transfers, and Details to the White House. The time period for this item of the request is November 2011.

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about) (last visited June 21, 2016).

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute qualifies as a “representative of the news media” under FOIA.<sup>2</sup> As the D.C. Circuit recently held, the “representative of the news media” test focuses on the requestor, not the specific FOIA request at issue.<sup>3</sup> CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.<sup>4</sup> Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>5</sup> These distinct works are distributed to the public through various media, including the Institute’s website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”<sup>6</sup> In light of the foregoing, numerous federal agencies—including the DOJ—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(b)(6).

<sup>3</sup> See *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1121 (D.C. Cir. 2015)

<sup>4</sup> The DOJ definition of “representative of the news media,” 28 C.F.R. § 16.10(b)(6), is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. See *Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, however, CoA Institute qualifies as a representative of the news media.

<sup>5</sup> See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program*, CAUSE OF ACTION (May 19, 2015), available at <http://goo.gl/Byditl>; CAUSE OF ACTION, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://goo.gl/MqObwV>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com*, CAUSE OF ACTION (Sept. 8, 2014), available at <http://goo.gl/935qAi>; CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://goo.gl/BiaEaH>; CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://goo.gl/N0xSvs>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://goo.gl/GpP1wR>.

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>7</sup> See, e.g., FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); see also FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request 796939, Dep’t of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep’t of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep’t of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep’t of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep’t of Interior (Aug. 3, 2015); FOIA Request 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request F-2015-106, Fed. Comm’n Comm’n (Dec. 12, 2014); FOIA Request LR-2015-0115, Nat’l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request GO-14-307, Dep’t of Energy (Nat’l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013).

**Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>8</sup>

**Record Production and Contact Information**

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or by e-mail at james.valvo@causeofaction.org. Thank you for your attention to this matter.



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R. JAMES VALVO, III  
COUNSEL & SENIOR POLICY ADVISOR

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<sup>8</sup> See, e.g., 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

# EXHIBIT

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**Department of Justice, Tax Division  
Current Practices for Attorney Assignments, Transfers, and Details  
November 2011**

**A. Assignments and Transfers within the Tax Division**

**NR**

**B. Details outside the Tax Division**

**NR**

**NR**

**NR**

**2. Details outside the Department of Justice**

- Any Tax Division attorney seeking permission for a detail outside the Department of Justice must obtain the written approval of his or her Section Chief, the appropriate DAAG, and the AAG. The Division will evaluate all such details on a case-by-case basis.
- The Division must then obtain the approval for the detail from the Deputy Attorney General (except for details to Congress, which are discussed separately below).
- Non-reimbursable details are disfavored, for budget reasons. The Department requires that an employee who wishes to work on a non-DOJ, non-reimbursable detail be performing work during the detail that is related to the mission of the Department.

**NR**

**b. Details to the White House**

- The White House, on occasion, offers detail opportunities to particular individuals; historically, these details have not been advertised.
- Tax Division attorneys have occasionally held White House details for a specific purpose (for example, to assist in vetting potential presidential nominees for executive branch or judicial positions).
- The White House is required by law to reimburse agencies for any period of a detail that exceeds 180 calendar days in a fiscal year

**NR**

# EXHIBIT

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**From:** Wolfinger, Gretchen M. (TAX)  
</o=USDOJ/ou=TAX/cn=Recipients/cn=Mailboxes/cn=gwolfing>  
**Sent:** Thursday, May 22, 2014 4:17 PM  
**To:** Bringer, Norah E. (TAX) <Norah.E.Bringer@tax.USDOJ.gov>  
**Subject:** RE: NR

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**Non-Responsive**

**Non-Responsive**

# Non-Responsive

-----Original Message-----

From: Bringer, Norah E. (TAX)

Sent: Thursday, May 22, 2014 3:49 PM

To: Wolfinger, Gretchen M. (TAX)

Cc: Banerjee, Carmen M. (TAX); Rothenberg, Gilbert S (TAX); Klimas, Geoffrey J. (TAX)

Subject: RE: **Non-Responsive**

Gretchen,

## Non-Responsive

**Non-Responsive**

as I transition into a detail at the White House Counsel's Office sometime next month.

## Non-Responsive

All the best,  
Norah

Norah E. Bringer  
Trial Attorney, Tax Division  
U.S. Department of Justice  
Telephone: (202) 307-6224  
Fax: (202) 514-6866  
norah.e.bringer@usdoj.gov

# Non-Responsive

**Non-Responsive**

**Non-Responsive**

**Non-Responsive**

# EXHIBIT

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**U.S. Department of Justice**

**Tax Division**

*Please reply to:* *Civil Trial Section, Eastern Region*  
*P.O. Box 227*  
*Washington, D.C. 20044*  
*Fax No. 202-514-6866*

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DJ 5-16-4842  
CMN 2015101461

March 25, 2016

**By FEDEX and E-mail**  
Ryan Mulvey  
Lee Steven  
Cause of Action Institute  
1875 Eye Street, NW  
Suite 800  
Washington, DC 20006

Re: *Cause of Action Institute v. Internal Revenue Serv., Dep't of Justice*  
No. 1:15-cv-00770 (D.D.C.)

Dear Messrs. Mulvey and Steven:

This letter provides an update regarding the processing of Cause of Action Institute's ("CA Institute") April 2015 Freedom of Information Act ("FOIA") request submitted to the Department of Justice, Tax Division that is at issue in this case. In addition, this letter provides an update regarding approximately 400 pages of documents that the Department of Justice, Justice Management Division referred to the Department of Justice's Office of Information Policy ("OIP") for OIP's processing.

Enclosed with this letter are records that the Department of Justice Tax Division has instructed me to release to you in the Freedom of Information Act ("FOIA") case named above. The disc contains records bearing control numbers TAX-APR-0000443 – 0000777. The documents are responsive to the FOIA request submitted to the Tax Division on April 15, 2015, and since clarified by the parties. The Tax Division is withholding some pages in that range in part, and the basis for those redactions is indicated on the documents. Please note that non-responsive information has been redacted and identified with the designation "NR."

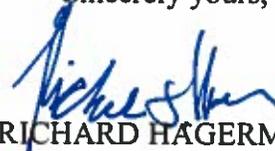
The Tax Division has not yet completed its response to the April 2015 FOIA request, and it is continuing to review records that it identified as potentially responsive to that request. The Tax Division will make an additional release of responsive records and provide an update to CA Institute no later than April 26, 2016. The Tax Division presently estimates that it will complete its release on or before May 23, 2016.

- 2 -

OIP recently informed me that (a) it is continuing to process the referral from the Justice Management Division; and (b) OIP estimates that it will complete its processing of the referral by May 6, 2016. Accordingly, I will provide an update on or before that date.

Should you have any questions or difficulties opening the files, please contact me at 202-616-9832 or [Richard.j.hagerman@usdoj.gov](mailto:Richard.j.hagerman@usdoj.gov).

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Richard Hagerman", is written over the typed name.

RICHARD HAGERMAN

Trial Attorney

Civil Trial Section, Eastern Region

# EXHIBIT

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**U.S. Department of Justice**

**Tax Division**

*Civil Trial Section, Eastern Region  
P.O. Box 227  
Ben Franklin Station  
Washington, D.C. 20044*

*Facsimile No. (202) 514-6866*

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August 9, 2016

CMB: BWILLIS  
FOIPA/TAX # 11018

**Sent by E-Mail: james.valvo@causeofaction.org**

Mr. James Valvo, III, Esq.

Dear Mr. Valvo:

This acknowledges receipt of your Freedom of Information Act request dated July 15, 2016. The Tax Division's Freedom of Information Act (FOIA) and Privacy Act (PA) Unit received your perfected request on July 15, 2016. This is a follow up to my short e-mail of last week.

We understand from your request that you seek access to the following:

1. **The entirety of each record, any portion of which contains email communications between Norah E. Bringer and Gretchen M. Wolfinger discussing Ms. Bringer's transition into a detail at the White House Counsel's Office. This item also includes the entirety of each record that contains any email reply to the above-described records. The time period for this item of the request is May 2014.**
2. **The entirety of each record, any portion of which contains the Current Practices for Attorney Assignments, Transfers, and Details to the White House. The time period for this item of the request is November 2011.**

We seek clarification of the scope of your request. I propose a short conference call on Monday August 15, 2016 any time between 9:30 am and 3:30 pm. Please e-mail me the time that works for you, and the best number for me to call. If Friday is

James Valvo, III, Esq.  
FOIPA/TAX # 11018  
Sent by E-Mail: james.valvo@causeofaction.org

inconvenient for you, please propose a date and time early next week with the number for me to call.

After we confer, please provide us with written memorialization of our discussion. Please refer to the tracking number located on the upper left-hand corner of this letter in all communications to us. Your communications should be directed to Ms. Billie Willis of the FOIA and PA Unit. She can be reached by any of the following ways:

- by telephone at 202 307-0462;
- by regular mail addressed to her at the Freedom of Information Act (FOIA) and Privacy Act (PA) Unit, Tax Division, U. S. Department of Justice, P. O. Box 227, Ben Franklin Station, Washington, D. C. 20044;
- by fax, 202 514-6866; or
- e-mail at TaxDiv.FOIAPA@usdoj.gov.

Sincerely yours,



Carmen M. Banerjee  
Division Counsel  
for FOIA and PA Matters

# EXHIBIT

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## James Valvo

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**From:** Banerjee, Carmen M. (TAX) <Carmen.M.Banerjee@usdoj.gov>  
**Sent:** Monday, August 15, 2016 1:46 PM  
**To:** James Valvo  
**Subject:** RE: FOIA #11018 - Valvo

Thank you, James.

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**From:** James Valvo [mailto:james.valvo@causeofaction.org]  
**Sent:** Monday, August 15, 2016 1:41 PM  
**To:** Banerjee, Carmen M. (TAX)  
**Subject:** RE: FOIA #11018 - Valvo

Ms. Banerjee,

This email summarizes our phone call today regarding the scope of FOIA #11018.

I explained that CoA Institute is seeking the entirety of the two records I sent you previous to the call. Those records are (1) an email chain on or about May 22, 2014 between, among others, Norah Bringer and Gretchen Wolfinger, and (2) a November 2011 report entitled Current Practices for Attorney Assignments, Transfers, and Details.

DOJ-Tax had previously released versions of these records to CoA Institute in response to a different FOIA request, but with significant information withheld as “non-responsive.” I explained to you that CoA Institute’s position is that these were improper uses of “non-responsive” as a withholding tool and that this current request, FOIA #11018, requested the entirety of these records. CoA Institute does not envision DOJ-Tax needing to conduct any additional searches for responsive records; we only seek the entirety of these two records.

After I explained the scope and intent of our request, you asked if I had any materials to support our position. I then sent you a link to a recent case from the D.C. Circuit, *American Immigration Lawyers Association v. Executive Office for Immigration Review*. In that case, the Circuit wrote: “if the government identifies a record as responsive to a FOIA request, can the government nonetheless redact particular information within the responsive record on the basis that the information is non-responsive? We find no authority in the statute for the government to do so.”

I hope that this email and our phone call help clarify CoA Institute’s request. Please do not hesitate to contact me if you have further questions.

Best,

James Valvo | Counsel & Senior Policy Advisor | Cause of Action Institute  
1875 Eye Street, NW, Suite 800  
Washington, DC 20006  
[james.valvo@causeofaction.org](mailto:james.valvo@causeofaction.org)  
202-417-3576

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# EXHIBIT

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U.S. Department of Justice

Tax Division

Washington, D.C. 20533

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September 20, 2016

CDC:CMB:CBANERJE  
FOIPA/TAX # 11018

**Sent by E-Mail: [james.valvo@causeofaction.org](mailto:james.valvo@causeofaction.org)**

Mr. James Valvo, III, Esq.  
Clause of Action Institute  
1875 Eye Street, NW, Ste 800  
Washington, DC 20006

Dear Mr. Valvo, III:

This responds to your Freedom of Information Act request dated July 15, 2016 as you clarified on August 15, 2016 by phone call and two e-mails on the same day. The Tax Division's Freedom of Information Act (FOIA) and Privacy Act (PA) Unit received your request on July 15, 2016; it was perfected on July 15, 2016.

We understand from your request that you seek information about:

- yourself.
- a third party taxpayer (individual).
- a third party taxpayer (entity).
- the Division's policies or procedures.
- other.

The Tax Division has determined that two records are responsive to your clarified request:

- One record is released in full and enclosed with this letter
- One record on one page is withheld in full based upon:
  - Exemption 3 in conjunction with 26 U.S.C. § 6103 to withhold confidential taxpayer information associated with individuals or entities other than yourself.

James Valvo, III , Esq.  
FOIPA/TAX # 11018  
Sent by E-Mail: james.valvo@causeofaction.org

- 5 U.S.C. § 552(b)(5) (Exemption 5) with the attorney-work product doctrine to withhold information created by attorneys, or on their behalf, in anticipation of litigation.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Thereafter, judicial review of the final determination will be available in the District Court of the United States located in the district in which you reside, where you have your principal place of business, in which the agency records are located, or in the District of Columbia.<sup>1</sup> Additionally, the Office of Government Information Services (OGIS) offers FOIA requesters mediation services as a non-exclusive alternative to litigation. Please see <https://ogis.archives.gov/about-ogis/requesting-assistance.htm> for more information.

Sincerely yours,

Carmen M. Banerjee  
Senior Division Counsel  
for FOIA and PA Matters

Enclosures (1)

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<sup>1</sup>For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

**Department of Justice, Tax Division  
Current Practices for Attorney Assignments, Transfers, and Details  
November 2011**

**A. Assignments and Transfers within the Tax Division**

**1. Assignments as Counsel in the Office of the Assistant Attorney General**

- Deputy Assistant Attorneys General (DAAG) with career positions at the Tax Division have typically selected their counsel from within the Division on temporary assignments that have generally lasted for approximately one year.
- Assistant Attorneys General (AAG) and non-career DAAGs have sometimes used the Schedule C appointment process to select counsel from outside the Division, and at other times have selected Division attorneys on temporary assignments.
- Before serving as DAAG counsel on a temporary assignment, Tax Division attorneys normally must have completed their four-year commitment.
- Temporary assignments as counsel are not advertised positions. The AAG or DAAG usually solicits recommendations from the Section Chiefs prior to selecting Tax Division attorneys for these assignments.

**2. Cross-Section Assignments and Transfers**

- Temporary assignments or permanent transfers of Tax Division attorneys to other sections within the Division, including the FLU, provide a useful means of balancing section workloads, maximizing attorney productivity, promoting professional development, and enhancing job satisfaction.
- Assignments and transfers may also be used to fill vacancies when outside hiring is not permitted.
- Assignments and transfers may be subject to conditions, such as requiring the transferring attorney to retain certain case assignments, or to extend his/her commitment to the Division.
- Cross-section assignments and transfers require the recommendation of both Section Chiefs and the approval of the appropriate DAAG(s).

**B. Details outside the Tax Division**

**1. Details within the Department of Justice**

**a. SAUSA Details**

- The Tax Division assigns each of its incoming Honors Program criminal prosecutors to a mandatory six-month detail as a Special Assistant United States Attorney with a local U.S. Attorney's Office (ED VA, MD, or DC). Lateral hires may also be assigned a SAUSA detail, depending on the nature of their prior litigation experience.

- The Division occasionally gives its civil litigators the opportunity to participate in a six-month SAUSA detail with a local U.S. Attorney's Office, on a case-by-case basis and depending on workload needs and budget constraints. Any civil attorney seeking permission for a SAUSA detail must obtain the written approval of his or her Section Chief, the appropriate DAAG, and the AAG. As SAUSA details are non-reimbursable, permission will not be routinely granted.

#### **b. Other Department Details**

- The Justice Department occasionally seeks attorneys or advertises details for specific time frames and specific purposes to assist in important Department initiatives.
  - For example, in 2010 the Department advertised for attorneys to serve one-year details assisting in the establishment of the rule of law in Iraq and Afghanistan.
- The Tax Division usually notifies all of its attorneys of these opportunities; other postings may be found on the Office of Attorney Recruitment and Management's (OARM's) website.
- The Division is generally supportive of its attorneys applying for Department details, if Division workload permits.
- However, selection for these details is solely within the discretion of the Department and/or the advertising component.
- Department details are generally reimbursable – that is, the Department or the advertising component pays the attorney's salary during the detail.
- Any Tax Division attorney seeking permission for a reimbursable Department detail must obtain the written approval of his or her Section Chief and the appropriate DAAG. If the detail is non-reimbursable, the AAG must also approve.

#### **2. Details outside the Department of Justice**

- Any Tax Division attorney seeking permission for a detail outside the Department of Justice must obtain the written approval of his or her Section Chief, the appropriate DAAG, and the AAG. The Division will evaluate all such details on a case-by-case basis.
- The Division must then obtain the approval for the detail from the Deputy Attorney General (except for details to Congress, which are discussed separately below).
- Non-reimbursable details are disfavored, for budget reasons. The Department requires that an employee who wishes to work on a non-DOJ, non-reimbursable detail be performing work during the detail that is related to the mission of the Department.

**a. Details to Other Agencies**

- Other agencies will occasionally advertise details in a government-wide posting or in some other manner. The Tax Division does not generally advertise or otherwise promote these details within the Division.

**b. Details to the White House**

- The White House, on occasion, offers detail opportunities to particular individuals; historically, these details have not been advertised.
- Tax Division attorneys have occasionally held White House details for a specific purpose (for example, to assist in vetting potential presidential nominees for executive branch or judicial positions).
- The White House is required by law to reimburse agencies for any period of a detail that exceeds 180 calendar days in a fiscal year

**c. Details to Congress**

- In addition to all required component-level approvals, the Department requires that its Office of Legislative Affairs approve all details to Congress.

Record 1. Non-responsive

Record 2. Non-responsive

Record 3. non-responsive

Record 4. non-responsive

Record 5. non-responsive

Record 5-continued. non-responsive

Record 6. non-responsive

Record 7. b3 with 6103, b5 with atty work prod

Record 8. Non- responsive

Record 8-continued. Non- responsive

Record 9. Non- responsive

Record 9- continued. Non- responsive

Record 9- continued. Non- responsive

# EXHIBIT

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1875 Eye Street, NW, Suite 800, Washington, DC 20006

September 27, 2016

**VIA CERTIFIED MAIL**

Melanie Pustay  
Director  
Office of Information Policy  
United States Department of Justice  
1425 New York Avenue, NW, Suite 11050  
Washington, DC 20530-001

**Re: Freedom of Information Act Appeal, FOIAPA/TAX #11018**

Dear Ms. Pustay:

This is a timely administrative appeal of an adverse Freedom of Information Act (“FOIA”) determination by the Department of Justice Tax Division (“DOJ-Tax”) to FOIA request #11018. Cause of Action Institute (“CoA Institute”) appeals the agency’s improper definition of a “record,” its use of “nonresponsive” redactions to withhold information responsive to the request, its improper use of Exemptions 3 and 5, and its failure to conduct a segregability analysis.

**Background**

On July 15, 2016, CoA Institute sent a FOIA request to DOJ-Tax seeking two records related to the detailing of DOJ attorneys to the White House.<sup>1</sup> DOJ-Tax had previously produced the same two records to CoA Institute in response to a different FOIA request, but DOJ-Tax had redacted large amounts of information in those records as “nonresponsive.”<sup>2</sup> On August 9, 2016, DOJ-Tax acknowledged receipt of the request, assigned it the tracking number #11018, and requested a conference to clarify the scope of the request.<sup>3</sup> On August 15, 2016, CoA Institute

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<sup>1</sup> Letter from R. James Valvo, III, CoA Inst., to Tax Div., Dep’t of Justice (July 15, 2016) (Ex. 1). CoA Institute sought to be categorized as a representative of the news media. *Id.* at 2.

<sup>2</sup> See Exs. 2 & 3. These two records were produced in response to FOIA request #10874 through litigation in *Cause of Action Institute v. Internal Revenue Service*, No. 15-770 (D.D.C. documents produced Mar. 25, 2016) (Ex. 4).

<sup>3</sup> See Letter from Carmen M. Banerjee, Div. Counsel, Tax Div., Dep’t of Justice, to R. James Valvo, III, CoA Inst. (Aug. 9, 2016) (Ex. 5).

Ms. Melanie Pustay  
September 27, 2016  
Page 2

and DOJ-Tax held a phone conference to discuss the scope of the request. CoA Institute summarized the call in a follow-up email, writing:

CoA Institute is seeking the entirety of the two records I sent you previous to the call. Those records are (1) an email chain on or about May 22, 2014 between, among others, Norah Bringer and Gretchen Wolfinger, and (2) a November 2011 report entitled Current Practices for Attorney Assignments, Transfers, and Details.

DOJ-Tax had previously released versions of these records to CoA Institute in response to a different FOIA request, but with significant information withheld as “non-responsive.” I explained to you that CoA Institute’s position is that these were improper uses of “non-responsive” as a withholding tool and that this current request, FOIA #11018, requested the entirety of these records. CoA Institute does not envision DOJ-Tax needing to conduct any additional searches for responsive records; we only seek the entirety of these two records.<sup>4</sup>

On September 20, 2016, DOJ-Tax issued its final determination on request #11018.<sup>5</sup> DOJ-Tax stated that it found two records responsive to the request and that it was releasing one of the records in full. The second record, however, was withheld in its entirety based on Exemption 3 (in conjunction with 26 U.S.C. § 6103) and Exemption 5 (attorney-work product).<sup>6</sup> In addition to those two records, DOJ-Tax produced redacted versions of what it claims are eight other records. It redacted those eight records in full as “non-responsive.”<sup>7</sup>

## Discussion

### **I. Response to Item 1**

Item 1 of FOIA request #11018 sought the “entirety of each record, any portion of which contains email communications between Norah E. Bringer and Gretchen M. Wolfinger discussing Ms. Bringer’s transition into a detail at the White House Counsel’s Office. This item also includes the entirety of each record that contains any email reply to the above-described records.”<sup>8</sup> CoA Institute identified the specific record it sought in response to this item during its August 15, 2016 phone conference with DOJ-Tax and by sending to DOJ-Tax a copy of the redacted record, produced in response to a previous FOIA request, which it now sought without the redactions. CoA Institute explained that DOJ-Tax did not need to conduct an additional search for any other records responsive to Item 1 of the request.<sup>9</sup> To avoid DOJ-Tax asserting that any information in that record was non-responsive, CoA Institute requested the “entirety of

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<sup>4</sup> Email chain between R. James Valvo, III, CoA Inst., & Carmen M. Banerjee, Div. Counsel, Tax Div., Dep’t of Justice (Aug. 15, 2016) (Ex. 6). DOJ-Tax acknowledged receipt of this summary of the conversation. *Id.*

<sup>5</sup> Final Determination Letter from Carmen M. Banerjee, Div. Counsel, Tax Div., Dep’t of Justice, to R. James Valvo, III, CoA Inst. (Sept. 20, 2016) (Ex. 7). DOJ-Tax did not respond to CoA Institute’s request to be categorized as a representative of the news media; it also did not assess any fees.

<sup>6</sup> *Id.* at 1–2.

<sup>7</sup> See Document Production from Tax Div., Dep’t of Justice to, CoA Inst. (Sept. 20, 2016) (Ex. 8).

<sup>8</sup> Ex. 1 at 1.

<sup>9</sup> See Ex. 6.

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[the] record.”<sup>10</sup> By definition, no portion of the record can be deemed non-responsive to the request.

Instead of releasing the record in its entirety, DOJ-Tax segmented the record into nine distinct records and withheld all of them by asserting a combination of redactions under “non-responsive,” Exemption 3, and Exemption 5.<sup>11</sup> A comparison of the record as originally produced with the record as re-produced in response to request #11018 demonstrates that DOJ-Tax made several errors in its response.

### 1. *Improper Segmentation of a Record*

During the telephone conference clarifying FOIA request #11018, CoA Institute drew DOJ-Tax’s attention to a recent D.C. Circuit decision, *American Immigration Lawyers Association v. Executive Office for Immigration Review*, which held that it is improper for an agency to use “non-responsive” as a redaction to withhold information within a responsive record.<sup>12</sup> Instead of following the court’s ruling, DOJ-Tax segmented the record responsive to Item 1 of the request into nine records.<sup>13</sup> It even went so far as to claim that email headers, containing such information as the email sender, recipient, date, and subject matter, were distinct records from the body of that same email.<sup>14</sup> DOJ-Tax withheld eight of those “records” in full as non-responsive; the remaining “record” was withheld in full under Exemptions 3 and 5.<sup>15</sup>

FOIA provides access to records, not information.<sup>16</sup> FOIA defines a record as, *inter alia*, “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format[.]”<sup>17</sup> In *Department of Justice v. Tax Analysts*, the Supreme Court held that “materials . . . qualify as ‘agency records’” when an agency (1) creates or obtains the materials, and (2) the agency is “in control of the requested materials at the time the FOIA request is made.”<sup>18</sup> Although it is possible for material to be a record but not an agency record subject to FOIA,<sup>19</sup> that distinction is not at issue in this case because the requested material concerns an email conversation involving DOJ-Tax employees (and thus is material created by the agency) and the record of that email conversation is in DOJ-Tax control.

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<sup>10</sup> Ex. 1 at 1.

<sup>11</sup> Ex. 8 at 4–9.

<sup>12</sup> See Ex. 5; *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at \*8 (D.C. Cir. July 29, 2016) (“The statute does not provide for . . . redacting nonexempt information within responsive records.”).

<sup>13</sup> See Ex. 8 at 4–9.

<sup>14</sup> Compare Ex. 2 at 1 with Ex. 7 at 4 (segmenting email header and email body into distinct records).

<sup>15</sup> See Ex. 8 at 4–9.

<sup>16</sup> See *Am. Immigration Lawyers Ass’n*, 2016 WL 4056405, at \*8 (“FOIA calls for disclosure of a responsive record, not disclosure of responsive information within a record.”).

<sup>17</sup> 5 U.S.C. § 552(f)(2)(A).

<sup>18</sup> *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

<sup>19</sup> See, e.g., *Goland v. Cent. Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978) (agency may possess “congressional records” not subject to FOIA); *Bureau of Nat’l Affairs, Inc. v. Dep’t of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (agency may possess “personal records” not subject to FOIA).

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In addition, the material responsive to Item 1 of the request constitutes a single record. In response to an earlier FOIA request from CoA Institute (FOIA request #10874), DOJ-Tax produced an agency record that was an email from Ms. Wolfinger to Ms. Bringer dated May 22, 2014 at 4:17 PM.<sup>20</sup> That record contained (1) Ms. Wolfinger's email response to an email written by Ms. Bringer,<sup>21</sup> (2) Ms. Bringer's original email message,<sup>22</sup> and (3) three additional pages that appear to be information included as part of Ms. Bringer's original email message.<sup>23</sup> When Ms. Wolfinger sent her reply email to Ms. Bringer she created an email chain that contained all three of those components in a single record. That record was created by the agency and it was in the agency's control when CoA Institute requested access to it, as evidenced by the fact that DOJ-Tax produced the entire email chain (albeit mostly redacted) in response to CoA Institute FOIA request #10874.

In FOIA request #11018, CoA Institute requested the entirety of that record, not just the portion of the record that DOJ-Tax redacted under Exemptions 3 and 5. Item 1 of the request sought the entirety of any May 2014 "email communications between Norah E. Bringer and Gretchen M. Wolfinger discussing Ms. Bringer's transition into a detail at the White House Counsel's Office. This item also includes the entirety of each record that contains any email reply to the above-described records."<sup>24</sup> Ms. Bringer's email of May 22, 2014 at 3:49 PM discusses her transition to the White House and Ms. Wolfinger's email of May 22, 2014 at 4:17 PM is an email reply to Ms. Bringer's email.<sup>25</sup> To help clarify the scope of its request, CoA Institute provided the previously-received copy of the record and explained that it wished to receive the entirety of that record with all "non-responsive" redactions eliminated. The entirety of the record, including Ms. Wolfinger's email response to Ms. Bringer, Ms. Bringer's original email, and the additional pages of information, is responsive to the request.

DOJ-Tax's attempt to avoid releasing the entirety of a responsive record by dividing it into nine distinct records is improper and belied by its own prior actions. DOJ-Tax already conceded that the email chain is a single record when it produced that record in response to FOIA request #10874. If DOJ-Tax did not consider the email chain to be a single record in response to Request #10874, there is no reason it would have produced the multiple pages of the record redacted as non-responsive. Instead, it would have disregarded those pages and not produced them to CoA Institute at all. That is, the portions of the email chain that DOJ-Tax now claims are records 1, 2, 3, 4, 5, 8, and 9 would not have been included in the original production, if those portions were truly distinct records.

Finally, the DOJ-Tax position that an email header is a distinct record from the body of the same email is foreclosed by judicial precedent. In the Federal Records Act context, the D.C.

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<sup>20</sup> See Ex. 2.

<sup>21</sup> *Id.* at 1-3

<sup>22</sup> *Id.* at 3 (note "-----Original Message-----").

<sup>23</sup> *Id.* at 4-6.

<sup>24</sup> Ex. 1 at 1.

<sup>25</sup> To the extent that DOJ-Tax misinterpreted CoA Institute's use of the word "reply" to mean a substantive reply to the issue of Ms. Bringer's detail and that the substance of Ms. Wolfinger's email does not discuss that issue, CoA Institute hereby clarifies that by the use of the phrase "email reply" it means any email sent in response to the receipt of Ms. Bringer's email regardless of the substance of that response.

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Circuit in *Armstrong v. Executive Office of the President* held that without the associated metadata — such as sender, recipient, date, and time — emails amount to little more than “dismembered documents[.]”<sup>26</sup> The same reasoning applies in the FOIA context because the statute “compels disclosure of the responsive record . . . as a unit[.]”<sup>27</sup>

### 2. *Improper Use of “Nonresponsive” to Redact Responsive Information*

Item 1 of the request sought not only the entirety of the email chain between Ms. Bringer and Ms. Wolfinger but also the “entirety of each record that contains any email reply to the above-described records.”<sup>28</sup> Other than what it now designates as Record 7, DOJ-Tax marked the rest of the email chain between Ms. Wolfinger and Ms. Bringer as non-responsive to FOIA request #11018. An examination of the record as originally produced to CoA Institute, however, reveals that Ms. Wolfinger replied to Ms. Bringer’s email about her detail at the White House. Ms. Bringer sent an email at 3:49 PM on May 22, 2014 in which she revealed she was transitioning into a detail at the White House.<sup>29</sup> Ms. Wolfinger replied to Ms. Bringer’s email the same day at 4:17 PM.<sup>30</sup> Ms. Wolfinger’s reply in its entirety is thus responsive to the request because CoA Institute requested email replies to any emails discussing Ms. Bringer’s detail at the White House.<sup>31</sup> Even if DOJ-Tax claims that the email chain is nine distinct records, all of the records that comprise an email response to Ms. Bringer’s original message are responsive to FOIA request #11018 and should not have been withheld as non-responsive.

### 3. *Improper Use of Exemptions 3 and 5 and Failure to Segregate*

DOJ-Tax withheld the entirety of what it now designates as Record 7 by asserting Exemption 3 (in conjunction with 28 U.S.C. § 6103) and Exemption 5.<sup>32</sup> Examining this assertion in light of the record as originally produced shows that DOJ-Tax has been overbroad in its application of the claimed exemptions. Record 7 contains, *inter alia*, a salutation, a phrase about Ms. Bringer “transition[ing] into a detail at the White House,” and a signature block.<sup>33</sup> None of the information in those sections is protected by either 28 U.S.C. § 6103 or the attorney-work product privilege and thus should not have been redacted.

In addition to those sections, DOJ-Tax originally redacted four other sections of Ms. Bringer’s email as non-responsive.<sup>34</sup> Request #11018 sought the entirety of the record and therefore, by definition, any redaction as non-responsive would no longer be appropriate. It appears that DOJ-Tax is now taking the position that the portions of the email originally redacted as non-responsive are now being withheld under Exemptions 3 and 5. Even if that were a proper assertion of those exemptions, DOJ-Tax is required to undertake a segregability analysis and

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<sup>26</sup> *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1284–85 (D.C. Cir. 1993).

<sup>27</sup> *Am. Immigration Lawyers Ass’n*, 2016 WL 4056405, at \*8.

<sup>28</sup> Ex. 1 at 1.

<sup>29</sup> Ex. 2 at 3. This email appears to be what DOJ-Tax termed Record 7 in its response to Request #11018. Compare Ex. 2 at 3 with Ex. 8 at 6.

<sup>30</sup> Ex. 2 at 1.

<sup>31</sup> Ex. 1 at 1.

<sup>32</sup> Ex. 8 at 6.

<sup>33</sup> Ex. 2 at 3.

<sup>34</sup> *See id.*

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only withhold information that falls within those exemptions.<sup>35</sup> There is no evidence that DOJ-Tax made such an analysis.

## II. Response to Item 2

Item 2 of the request sought the entirety of a report entitled “Current Practices for Attorney Assignments, Transfers, and Details to the White House.”<sup>36</sup> DOJ-Tax had previously produced this record to CoA Institute but with several sections within the record redacted as non-responsive.<sup>37</sup> In response to Request #11018, DOJ-Tax released the record in full.<sup>38</sup> There is no adverse determination on this item of the request, and CoA Institute therefore does not appeal this aspect of the DOJ-Tax response.

### Conclusion

Thank you for your attention to this matter. If you have any questions about this appeal, you may contact me by email at [james.valvo@causeofaction.org](mailto:james.valvo@causeofaction.org).

Sincerely,



R. JAMES VALVO, III  
COUNSEL & SENIOR POLICY ADVISOR

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<sup>35</sup> See 5 U.S.C. § 552(b); *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (when conducting segregability analysis, “FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information.”).

<sup>36</sup> Ex. 1 at 1.

<sup>37</sup> Ex. 3.

<sup>38</sup> Ex. 8 at 1–3.

# EXHIBIT

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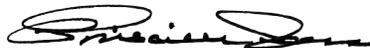
Dear Mr. Valvo,

This is to advise you that your administrative appeal from the action of the Tax Division regarding Request No. 11018 was received by this Office on 09/28/2016.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number DOJ-AP-2016-005667. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your request or appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. Mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at (202) 514-3642. If you have submitted your appeal through FOIAonline, you may also obtain an update on the status of your appeal by logging into your account.

Sincerely,



Priscilla Jones

Supervisory Administrative Specialist