



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

June 24, 2016

**VIA CERTIFIED MAIL**

U.S. Department of Justice  
Office of Information Policy  
ATTN: Laurie Day, Chief, Initial Response Staff  
1425 New York Avenue, N.W., Ste. 11050  
Washington, D.C. 20530-0001

U.S. Department of Justice  
Federal Bureau of Investigation  
Records Management Division  
Record/Information Dissemination Section  
ATTN: David M. Hardy, Chief  
170 Marcel Drive  
Winchester, VA 22602-4843

**Re: Freedom of Information Act Request**

Dear Ms. Day and Mr. Hardy:

I write on behalf of the Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that 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. To that end, CoA Institute is examining potential politicization of decision-making at the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”) with respect to the redaction of the Omar Mateen 9-1-1 telephone call transcript(s).

On June 20, 2016, the FBI released a redacted transcript of a portion of a 9-1-1 call that Orlando, Florida shooter Omar Mateen made during his horrific rampage.<sup>2</sup> While there are twenty-eight (28) minutes’ worth of tape in total, the FBI has not explained when, if ever, it will release the entirety of the transcripts it has compiled.<sup>3</sup> Shortly before the release of the redacted transcript, U.S.

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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).

<sup>2</sup> See Julie Vitkovskaya, *You alright know what I did’: Read excerpts of Oma Mateen’s 911 calls to Orlando police*, WASH. POST (June 20, 2016), <http://wapo.st/28LwgnP>.

<sup>3</sup> Robert Mackey, *FBI Still Concealing Almost All of What the Orlando Gunman Said*, THE INTERCEPT (June 20, 2016), <http://bit.ly/28Nyu4U>.

Attorney General Loretta Lynch indicated that the Obama Administration intended to withhold information linking the killings in Orlando to the Islamic State in order “to avoid re-victimizing those people that went through this horror.”<sup>4</sup> Attorney General Lynch failed to provide any explanation as to how releasing transcripts containing information that is already public knowledge would “re-victimize” survivors.

The decision to redact the information confirming the shooter’s motive was met with immediate criticism. Speaker of the U.S. House of Representatives Paul Ryan commented that “[s]electively editing this transcript is preposterous. We know the shooter was a radical Islamist extremist inspired by ISIS. We also know he intentionally targeted the LGBT community. The administration should release the full, unredacted transcript so the public is clear-eyed about who did this, and why.”<sup>5</sup> After less than one day of sustained criticism, the DOJ reversed course and decided to release the partial transcript without redactions.<sup>6</sup> Yet, despite changing course, the DOJ still attempted to whitewash its record by withholding critical information from the American people. For example, the American public has been denied any information concerning who, in fact, ordered the redactions in the first place. While the White House has blamed the DOJ,<sup>7</sup> the agency has refused to indicate which authority ordered the redactions.<sup>8</sup>

Accordingly, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period of June 12, 2016 to the present:<sup>9</sup>

1. All records, including final agency memoranda, directing DOJ or FBI personnel to redact and, later, to un-redact, the Omar Mateen 9-1-1 telephone call transcript.
2. All records concerning the decision to redact the Omar Mateen 9-1-1 telephone call transcript, including all communications regarding any document responsive to Item 1 of this request.
3. All communications between and among, the Office of the Attorney General, the FBI, and the Executive Office of the President, including the White House Office, concerning the Omar Mateen 9-1-1 telephone call transcript.
4. All records reflecting words, names, terms, or phrases that the DOJ, including the FBI or any other component, directs its employees to redact before the public release of any transcript or similar document.
5. All transcripts of any 9-1-1 telephone call placed by, or believed to have been placed by, Omar Mateen on June 12, 2016, without redaction.

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<sup>4</sup> Tom LoBianco, *Lynch: Authorities to release limited transcripts of calls with Orlando shooter*, CNN (June 19, 2016), <http://cnn.it/28KXG8o>.

<sup>5</sup> Press Release, U.S. Speaker of the House Paul Ryan, Statement on Release of Orlando Shooter 911 Transcript (June 20, 2016), available at <http://1.usa.gov/28Ls9pn>.

<sup>6</sup> Matt Zapotosky & Mark Berman, *FBI reversed initial decision to redact ISIS mentions from Orlando 911 transcript*, WASH. POST (June 20, 2016), <http://wapo.st/28M9q0L>.

<sup>7</sup> See, e.g., S.A. Miller, *White House blames Justice for redacting ‘radical Islam’ from Orlando shooter transcript*, WASH. TIMES (June 20, 2016), <http://bit.ly/28Z2A3o>

<sup>8</sup> Josh Gerstein, *Lynch won’t say who edited Orlando 911 transcript*, POLITICO (June 22, 2016), <http://politi.co/28PuVe5>.

<sup>9</sup> For the purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

### **Request for Expedited Processing**

CoA Institute hereby requests expedited processing of its request because (1) CoA Institute is “primarily engaged in disseminating information” and (2) the requested records pertain to “actual or alleged Federal government activity,” about which there exists an “urgency to inform the public.”<sup>10</sup>

***1. CoA Institute is primarily engaged in disseminating information as a representative of the news media.***

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.<sup>11</sup> CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

***2. There is an urgency to inform the public about actual Federal government activity.***

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia Circuit established a multi-factor test to determine whether a FOIA requester properly satisfies the “urgency to inform” standard.<sup>12</sup> These factors include: (1) whether a request concerns a “matter of current exigency to the American public”; (2) whether the consequences of delaying a response would “compromise a significant recognized interest”; (3) whether the request concerns “federal government activity”; and, (4) whether the requester has proffered credible “allegations regarding governmental activity.”<sup>13</sup>

In this case, the requested records concern the decision by DOJ and FBI to redact, and later to revisit, redactions in an especially important 9-1-1 telephone call transcript that may, in fact, reveal domestic terrorist activity. To the extent the decision-making that led to these redactions was politicized, there an urgent need to inform the public. This issue is already being widely covered by the news media.<sup>14</sup> In short, the CoA Institute request does not seek records of a merely “newsworthy” topic, but rather “subject[s] of a currently unfolding story.”<sup>15</sup> CoA Institute seeks records that unquestionably concern the activity of the Federal government, insofar as they reflect DOJ and FBI decision-making and communications with the Executive Office of the President. The requested records may therefore reveal potential impropriety.

In this sense, delay in production of the requested records would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose of the FOIA” is to allow the American people access to information that might “contribute significantly to public understanding of the operations or activities of the government.”<sup>16</sup> The ability of a government “watchdog”—CoA Institute—to secure such records as those sought in

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<sup>10</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii).

<sup>11</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info., Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

<sup>12</sup> 254 F.3d 300, 310–11 (D.C. Cir. 2001).

<sup>13</sup> *Id.*

<sup>14</sup> See *supra* notes 2–8.

<sup>15</sup> *Al-Fayed*, 254 F.3d at 311.

<sup>16</sup> *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

the instant request for the purposes of government accountability,<sup>17</sup> especially where a current exigency and unfolding story exists, thus weighs in favor of expedited processing.

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the DOJ shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>18</sup>

In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely, the decision-making processes at the DOJ and the FBI which led to the redaction and revised release of the Omar Mateen 9-1-1 telephone call transcript. Further, the request records could provide insight into potential politicization of this process. These sorts of records have not been widely distributed, and their disclosure and dissemination would contribute to public understanding about DOJ and FBI operations, especially as they pertain to public relations and transparency efforts. There is a particularly significant public interest in understanding whether the White House played any role in the redaction of the transcript in question, and the DOJ has not been forthcoming in this respect.<sup>19</sup>

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through the Institute’s regularly published online newsletter, memoranda, reports, or press releases.<sup>20</sup> In addition, as CoA Institute is a non-profit organization, as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

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

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under FOIA.<sup>21</sup> As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>22</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>23</sup>

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<sup>17</sup> See *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) (“[O]btaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”); see also *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

<sup>18</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k)(1); see also *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>19</sup> See, e.g., *supra* note 8.

<sup>20</sup> See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>21</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(b)(6).

<sup>22</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>23</sup> The DOJ definition of “representative of the news media,” 28 C.F.R. § 16.11(b)(6), is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated “organized and operated” standard

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>24</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>25</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>26</sup>

### **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

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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>24</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>25</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>26</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 CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 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 780831, Dep't of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm'n (July 23, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Comm'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 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 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 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); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

Ms. Laurie Day & Mr. David M. Hardy

June 24, 2016

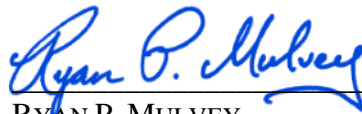
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and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>27</sup>

### **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 ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.



RYAN P. MULVEY  
COUNSEL

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<sup>27</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).