

March 22, 2012

VIA CERTIFIED MAIL

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

RE: Freedom of Information Act Request

Dear Commissioner Shulman:

We write on behalf of Cause of Action, a nonprofit, nonpartisan public interest organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom.

We write to request information concerning the Internal Revenue Service's (IRS) oversight of coalition lobbying. Coalition lobbying, sometimes called "stealth lobbying," occurs when

[L]ike-minded companies form a loosely knit compact and spend lots of money lobbying the government. The arrangement is legal, but it exposes loopholes that prevent the public from finding out how much money each company pays and whether one business exerts more control over the others.¹

According to David Levinthal at the Center for Responsive Politics, "[s]tealth lobbying [organizations] . . . are finding, if not loopholes, then ways around the spirit of the law . . . [c]ompanies that are lobbying Congress are not necessarily disclosing the full strength of their lobbying."² The Center for Responsive Politics reported lobbying coalitions have spent over \$100 million on lobbying efforts between 1998 and 2006.³

¹ Jim McElhatton, *Obama nominee omitted ties to biotech*, WASH. TIMES, Sept. 8, 2009, available at <http://www.washingtontimes.com/news/2009/sep/08/obama-nominee-omitted-ties-to-biotech/print/> (last visited Oct. 19, 2009).

² *Id.*

³ Lindsay Renick Mayer, *Under the Radar*, OPENSECRETSBLOG, (Apr. 12, 2007), available at <http://www.opensecrets.org/news/2007/04/under-the-radar.html> (last visited Jan. 15, 2012).

In 2002, the Congressional Research Service (CRS) examined lobbyist registration forms, congressional testimony and media databases and found 135 lobbying coalitions for which it could find only limited information or none at all.⁴ According to a *New York Times* article following the CRS report, “[t]hanks to a loophole in the federal lobbying law, some companies and individuals — especially those pursuing controversial or potentially embarrassing causes — are using coalitions to conceal their identities.”⁵

In 1995, Congress passed, and the President signed, the Lobbying Disclosure Act, which provided an exception for coalitions. Section 3, part 2 of the Lobbying Disclosure Act of 1995 states, “[concerning] a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members.”⁶ In 2007, the Lobbying Disclosure Act was amended by the Honest Leadership and Open Government Act,⁷ to capture coalition lobbying by requiring disclosure of contributions of more than \$5,000 to a registrant or a client to fund the lobbying activities of the registrant.⁸

But even these recent attempts at greater transparency have proven elusive to ensuring government accountability. For example, Tara O’Toole, the Undersecretary of Science and Technology at the Department of Homeland Security, “never reported her involvement with the lobbying group called the Alliance for Biosecurity in a recent government ethics filing.”⁹ The Alliance for Biosecurity (the Alliance) is a membership organization (described as a “coalition” under the Lobbying Disclosure Act) composed of taxable and tax-exempt corporations advised by the Center for Biosecurity at the University of Pittsburgh School of Medicine.¹⁰ Since 2005, the Alliance has reportedly spent over \$500,000 lobbying Congress and federal agencies, including the Department of Homeland Security (DHS).

Cause of Action is concerned about the risk that lobbying coalitions are exercising political influence without paying taxes under the Internal Revenue Code. In order to avoid the disclosure requirements of the Lobbying Disclosure Act, many organizations are simply not incorporating. Cause of Action seeks to provide the public with a better understanding of the rules that apply to coalitions and to ensure that lobbying entities are paying taxes and are in compliance with IRS regulations. Therefore, pursuant to the

⁴ Alison Mitchell, *Loophole Lets Lobbyists Hide Clients’ Identity*, N.Y. TIMES, (July 8, 2002), available at http://www.nytimes.com/learning/teachers/featured_articles/20020708monday.html (last visited Jan. 15, 2012).

⁵ *Id.*

⁶ LOBBYING DISCLOSURE ACT, 2 U.S.C. § 1602(7), P.L. 104-65, §3(7).

⁷ HONEST LEADERSHIP & OPEN GOV’T ACT, P.L. 110-81.

⁸ *Id.* at § 207.

⁹ Jim McElhatton, *Obama nominee omitted ties to biotech*, WASH. TIMES, Sept. 8, 2009, available at <http://www.washingtontimes.com/news/2009/sep/08/obama-nominee-omitted-ties-to-biotech/print/> (last visited Oct. 19, 2009).

¹⁰ Website, THE ALLIANCE FOR BIOSECURITY, available at http://www.upmc-biosecurity.org/website/special_topics/alliance_for_biosecurity (last visited Oct. 1, 2009).

provisions of Freedom of Information Act (FOIA)¹¹ and the IRS's FOIA regulations,¹² Cause of Action hereby requests that the IRS produce the following documents within twenty (20) days:

1. All documents referring or relating to the tax-exempt status of unincorporated coalitions residing at tax-exempt corporations, including reporting requirements concerning these coalitions' lobbying activities.
2. All documents referring or relating to the disclosure requirements of tax-exempt entities that sponsor or provide resources to a coalition, concerning the coalition's lobbying and other activities.
3. All documents referring or relating to those organizations for which the IRS has:
 - a. Conducted a criminal investigation, civil audit, or examination, reviewed whistleblower-informant claims, found abusive tax schemes, and published alerts or abusive tax scheme investor lists concerning coalitions which lobby and/or "stealth" lobbyists from 2004 to the present.
 - b. For each identified, summarize the subsequent allegations and action by the IRS, including penalties, fines, reports, memoranda or other assessments made against those investigated coalitions.
 - c. Provide any documents reflecting coalitions' response to any IRS criminal investigation, audit, examination, whistleblower-informant claim, alert or publication.

Cause of Action Is Entitled to a Complete Waiver of Fees Due to its Non-Profit, Public-Interest Purpose.

Cause of Action requests a waiver of both search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). As you know, that statute provides that the requested documents shall be furnished 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." Cause of Action, in the present matter, satisfies all of the required elements for a fee waiver.

1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

The subject matter of the requested records specifically concerns identifiable "operations or activities of the government" because it relates to the IRS's revenue gathering process. Information about the IRS's oversight of coalition and "stealth"

¹¹ 5 U.S.C. § 552.

¹² 26 C.F.R. § 601.702.

lobbying will provide significant understanding of the IRS's operations and activities. Disclosure of the requested information is therefore likely to contribute significantly to the understanding by the public at large of the operations and activities of the government, *see, e.g., Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006), as opposed to the individual understanding of the requester or a narrow segment of interested persons. The documents requested are also not in the public domain, and therefore would be of value to members of the public through disclosure.

2) Disclosure of the requested information is not in the commercial interest of Cause of Action.

Cause of Action is a nonprofit organization as defined under Section 501(c)(3) of the Internal Revenue Code. Our organization is committed to protecting the public's right to be aware of the activities of government agencies and to ensuring the lawful and appropriate use of government funds by those agencies. Cause of Action will make no profit from the disclosure of this information and will use it to further the knowledge-interests of the general public in the operations of the IRS. Even if disclosure of information creates a profit motive, that is not dispositive for the commercial interest test; media or scholars could have a profit motive, as long as the dissemination of the information is in their professional capacity and would further the public interest. *See Campbell v. Department of Justice*, 164 F.3d 20, 38 (D.C. Cir. 1998).

3) Cause of Action has an ability to disseminate the requested information to the public and specifically intends to do so.

Cause of Action uses a combination of research, litigation, advocacy, and regularly disseminated publications to advance its mission. Our staff has a combined 20 years of expertise in government oversight, investigative reporting, and federal public interest litigation experience. 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 Cause of Action's regularly published online newsletter, memoranda, reports, or press releases. In addition, Cause of Action will disseminate any relevant documents it acquires from this request to the public through its website, www.causeofaction.org, which also includes links to thousands of pages of documents Cause of Action acquired through its previous FOIA requests, as well as documents related to Cause of Action's litigation and agency complaints. Finally, Cause of Action intends to compile a report on the Lobbying Disclosure Act's effect on the IRS's ability to gather revenue from coalition lobbying organizations which may be published on www.causeofaction.org, distributed to the news media, and sent to interested persons through our regular periodical, including "Agency Check." An ability to show the presence of a website with occasional, consistent traffic is enough to show that a requester has an ability to disseminate information. *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197 (D.D.C. 2009).

The release of information garnered through this request is not in Cause of Action's commercial interest pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Because disclosure of this information is in the public interest and will contribute significantly to public understanding of the operations or activities of the government, any fees should be waived pursuant to both FOIA and agency regulations.

Cause of Action Is Entitled to a News Media Requester Status.

Cause of Action's activities clearly fall within the statutory definition of this term. 5 U.S.C. § 552(a)(4)(A)(ii)(III) defines "representative[s] of the news media" broadly to include organizations that disseminate news through electronic communications, including "*publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public.*" 5 U.S.C. § 552(a)(4)(A)(ii)(III) (emphasis added). Moreover, the FOIA statute itself, as amended in 2007, explicitly defines "representative of the news media"—a term that had previously been undefined in the statute—to specifically include organizations, such as Cause of Action, that regularly publish and disseminate online periodicals, e.g., newsletters.¹³ The statutory definition unequivocally commands that organizations that electronically disseminate information and publications via "alternative media *shall* be considered to be news-media entities."¹⁴ As the plain language of the statute makes abundantly clear, an organization that regularly disseminates news via an online newsletter or periodical, such as Cause of Action, is a "representative of the news media" under FOIA.

In *Electronic Privacy Information Center v. Dep't of Defense*, the court broadly construed a Department of Defense regulation defining "representative of the news media" to include a 501(c)(3) that, like Cause of Action, maintains a frequently visited website and regularly publishes an e-mail newsletter.¹⁵ Under well-established

¹³ The FOIA statute, as amended in 2007, defines "representative of the news media" as follows:

[T]he term "a representative of the news media" means any person or entity that 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. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), *such alternative media shall be considered to be news-media entities.*

5 U.S.C. § 552(a)(ii)(III) (emphasis added).

¹⁴ *Id.* (emphasis added). See generally *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (noting the well-established proposition that, as used in statutes, the word "shall" is generally imperative or mandatory).

¹⁵ 241 F. Supp. 2d. 5, 12-15 (D.D.C. 2003). The court pointedly noted that "a 'periodical,' unlike a daily newspaper, has been defined simply as 'a publication issued at regular intervals of more than one day.'" *Id.* at 14 n.4 (quoting American Heritage Dictionary, Second College Edition, at p. 923 (2000)).

precedent, then, a 501(c)(3) requester that regularly publishes online newsletters, such as Cause of Action, is entitled to a fee waiver as a “representative of the news media,” where the agency’s own regulations explicitly provide that “publishers of periodicals” qualify as representatives of the news media.¹⁶

The information requested here concerns current events and will undoubtedly be of current interest to a large segment of the general public. Cause of Action will ultimately disseminate the information it is statutorily entitled to, *inter alia*, through its regularly published online newsletter. Additionally, Cause of Action will take the information that is disclosed, using its editorial skills and judgment, to create a report on the tax consequences of the Lobbying Disclosure Act and its effect on the IRS’s ability to gather revenue from coalition lobbying organizations that will be distributed to other media sources and distributed to interested persons through our newsletters.

The plain language of 5 U.S.C. § 552(a)(4)(A)(ii)(III), controlling precedent, and the agency’s regulations unequivocally require the conclusion that Cause of Action is a representative of the news media.

Production of Documents and Contact Information

We call your attention to President Obama’s January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.¹⁷

If it is your position that any portion of the requested records is exempt from disclosure, Cause of Action requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1972). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient identifying information “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Moreover, the *Vaughn* index must “describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added). Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons

¹⁶ See *id.* at 12 (agency’s “own regulation establishes that...[an organization] is a representative of the news media” because the organization “publishes a periodical..., which is a biweekly electronic newsletter” (citations omitted)).

¹⁷ PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

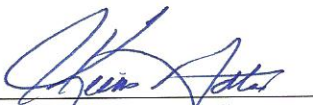
why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Id.* at 224 (citing *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

In the event that some portions of the requested records are properly exempt from disclosure, please redact such portions and produce all remaining reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed throughout the document. *See Mead Data Central*, 566 F.2d at 261. Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

In an effort to facilitate record production within the statutory time limit, Cause of Action prefers to accept documents in electronic format (e.g., e-mail, .pdfs). When necessary, Cause of Action will accept the “rolling production” of documents, but requests that you provide prompt notification of any intent to produce documents on a rolling basis.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact Keith Gates (Keith.Gates@causeofaction.org) or Will Hild (Will.Hild@causeofaction.org) at (202) 507.5880. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,


J. KEITH GATES
SENIOR ATTORNEY

Encl. Responding to Document Requests, Definitions

Responding to Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to Cause of Action.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by, any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. Cause of Action's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in Cause of Action's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with Cause of Action Foundation staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents that would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009, to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural numbers, and vice versa. The masculine includes the feminine and neutral genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.