CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

December 18, 2015

The Honorable Ashton B. Carter
Secretary of Defense
U.S. Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1155

Mr. Peter Levine, Chief FOIA Officer
U.S. Department of Defense
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

Re: Freedom of Information Act Request and Federal Records Act Notification

Dear Secretary Carter and Mr. Levine:

We write on behalf of Cause of Action Institute ("CA Institute"), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[1] In carrying out its mission, CA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are investigating instances where high-ranking government officials have used personal devices and accounts to conduct official agency business. Based on recent news reports, we understand that Secretary Ashton Carter used personal email to conduct official business in violation of the policies of the Department of Defense ("DOD").[2] In response, we are submitting a Freedom of Information Act request and notifying the Secretary of a possible violation of the Federal Records Act and his duty to address that violation.

I. FREEDOM OF INFORMATION ACT REQUEST

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), CA Institute hereby requests access to the following:

1. All records of official agency business created or received by Secretary Carter on any personal email account;

[1] *See* CAUSE OF ACTION, *About*, www.causeofaction.org/about/.
[2] *See, e.g.*, Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), http://goo.gl/pnWJvM.

2. All records of official agency business created or received by Secretary Carter via text or instant message on any personal device, including, but not limited to, messages created or received by Short Message Service, Multimedia Messaging Service, BlackBerry Messenger, Google Chat/Hangouts, or Facebook Messenger;

3. All communications between any official from DOD or the Executive Office of the President (including, but not limited to, the Office of the White House Counsel or the Office of the President) and Secretary Carter concerning the use of personal devices or accounts for official agency business, whether generally or specifically with respect to Secretary Carter's personal devices and accounts;

4. All records relating to DOD's efforts to retrieve and/or retain agency records created or received by Secretary Carter on his personal devices or accounts; and,

5. All records reflecting notification by DOD to the Archivist of the United States pursuant to 44 U.S.C. § 3106 concerning agency records created or received by Secretary Carter on his personal devices or accounts.

Request for Expedited Processing

CA Institute hereby requests expedited processing of its request because (1) it 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."[3]

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

As discussed below, CA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.[4] Cause of Action 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 has properly satisfied the "urgency to inform" standard.[5] These factors include: (1) whether a request concerns a "matter of current exigency to the American public"; (2) whether the

[3] 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 286.4(d)(3)(ii).
[4] *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)).
[5] 254 F.3d 300, 310-11 (D.C. Cir. 2001).

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."[6]

In this case, the requested records concern DOD's highest-ranking official potentially violating federal law and agency rules and regulations. The issue is being widely covered by the news media.[7] Congressional interest in the subject is naturally acute.[8] In short, CA Institute's request does not seek records of merely "newsworthy" topics, but rather "subject[s] of a currently unfolding story."[9] CA Institute seeks records that unquestionably concern the activity of the Federal government, insofar as they reflect communications between high-ranking DOD officials, NARA, and employees of the Office of the White House Counsel and the Executive Office of the President. These communications may reveal potential impropriety in the manner and content of the correspondence, as well as explain how Secretary Carter's use of personal email came to light.

In this sense, delay in the production of the request 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*."[10] The ability of a government "watchdog"—CA Institute—to secure such records as those sought in the instant request for the purposes of government accountability,[11] especially where a current exigency and unfolding story exists, thus weighs in favor of expedited processing.

Request for a Public Interest Fee Waiver

CA Institute requests a waiver of any and all applicable fees. FOIA provides that an agency 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

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[6] *Id.*; *see also* 32 C.F.R. § 286.4(d)(3)(ii)(A) ("Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest.").

[7] *See, e.g.*, SCHMIDT, *supra* note 2; Ben Brumfield, *Ashton Carter used personal email for some government business*, CNN (Dec. 17, 2015), http://goo.gl/bm1Goa; *US Defence Secretary Ash Carter admits personal email 'mistake'*, BBC (Dec. 17, 2015), http://goo.gl/VbvEDm; Krishnadev Calamur, *Ash Carter's Use of a Personal Email Account*, THE ATLANTIC (Dec. 17, 2015), http://goo.gl/bEhcCu.

[8] *See, e.g.*, Michael S. Schmidt, *Ashton Carter Emails Sought by Senate Armed Services Committee*, N.Y. TIMES (Dec. 17, 2015), http://goo.gl/N1EPu3; Ray Locker & Tom Vanden Brook, *Senate panel wants Defense chief's email*, USA TODAY (Dec. 17, 2015), http://goo.gl/gCMbXN.

[9] *Al-Fayed*, 254 F.3d at 311.

[10] *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

[11] *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.").

commercial interest of the requester."[12] In this case, the requested records would unquestionably shed light on the "operations or activities of the government," namely, the extent to which Secretary Carter used personal email or text messaging on personal devices to conduct official business in contravention of DOD polices. The requested records would also demonstrate whether DOD properly retrieved and retained these official records.

Disclosure is likely to "contribute significantly" to public understanding of such matters because, to date, the public has not known whether DOD's leadership used personal email or text messaging to conduct official business. Nor does the public know whether DOD ever undertook efforts to retrieve and retain such personal electronic communications. Public interest in these matters is particularly acute in light of scandals surrounding the use of personal email by the heads of the Departments of State and Homeland Security, as well as congressional efforts to prevent the use of personal email for government business.[13]

CA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Our staff has a wealth of 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 CA Institute's regularly published online newsletter, memoranda, reports, or press releases.[14] In addition, as CA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in this request.

Request To Be Classified as a Representative of the News Media

For fee status purposes, CA Institute also qualifies as a "representative of the news media" under FOIA.[15] 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.[16] CA 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.[17] Although it is not required by the statute, CA Institute gathers the news it regularly

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[12] 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.28(d)(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).

[13] *See, e.g.*, Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), http://goo.gl/IGEY6l; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton's Deleted Emails*, WALL ST. J. (Dec. 8, 2015), http://goo.gl/A6WoLB; Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials' Private Email Docs*, DAILY CALLER (Nov. 18, 2015), http://goo.gl/b3xlaZ; Rachel Witkin, *Sec. Jeh Johnson: 'Whoops' on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), http://goo.gl/KH3SA7;

[14] *See also Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

[15] 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7)(i)).

[16] *See Cause of Action*, 799 F.3d at 1121.

[17] CA Institute notes that DOD's definition of "representative of the news media" (32 C.F.R. § 286.28(e)(7)(i)) is in conflict with the statutory definition and controlling case law. DOD has improperly retained the outdated "organized and operated" standard that Congress abrogated when it provided a statutory definition in the OPEN

publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. We do not merely make raw information available to the public, but rather distribute distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.[18] These distinct works are distributed to the public through various media, including CA Institute's website, Twitter, and Facebook. CA Institute also provides news updates to subscribers via email.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as CA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."[19] In light of the foregoing, numerous federal agencies have appropriately recognized CA Institute's news media status in connection with its FOIA requests.[20]

Government Act of 2007. *Id.* 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, CA Institute qualifies as a representative of the news media.

[18] *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.

[19] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

[20] *See, e.g.*, 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 145-FOI-13785, Dep't of Justice (Jun. 16, 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. Commc'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).

Record Preservation Requirement

CA 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.[21]

Record Production

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, we request that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

II. NOTIFICATION OF POTENTIAL FEDERAL RECORDS ACT VIOLATION

As explained below, DOD and Secretary Carter may not have complied with certain obligations under the Federal Records Act ("FRA").[22] The FRA requires DOD to preserve, among other things, all incoming and outgoing correspondence to and from the Secretary; to notify the Archivist of the United States when federal records are improperly removed from agency custody; and to recover any such removed federal records.

Specifically, the FRA was enacted to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government" and the "[j]udicious preservation and disposal of records."[23] The FRA requires all agency heads, including Secretary Carter, to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,"[24] and to establish "safeguards" against the removal or loss of records, including notifications to agency officials and employees that records may not be alienated or destroyed unless authorized and of "the penalties provided by law for the unlawful

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[21] *See* 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means disposal of an unscheduled or permanent record; disposal prior to the end of the NARA-approved retention period of a temporary record . . . ; and 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).

[22] The Federal Records Act refers to the collection of statutes and regulations that govern the creation, management, and disposal of the records of federal agencies. *See* 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R pts. 1220–1239.

[23] 44 U.S.C. §§ 2902(1), (5).

[24] *Id.* § 3102; *see also id.* § 3301 (defining federal records); 36 C.F.R. § 1220.18 (The definition of record includes any material, "regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.").

removal or destruction of records."[25] The FRA also requires the "head of each Federal agency"—in this case, Secretary Carter—to notify the Archivist of the United States "of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency[.]"[26] In addition to notification, the FRA instructs that an agency head, with the assistance of the Archivist and the Attorney General, "*shall* initiate action" to recover "records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency."[27] In any situation where the head of the agency does not initiate action for the recovery of unlawfully removed records, the Archivist is required to request the Attorney General to initiate such action and to notify Congress of this request.[28]

DOD's records management program details that records, "regardless of media or security classification, will be created, maintained and used, disposed, and preserved to document the transaction of business and mission . . . [and] will be maintained in accordance with guidance issued by National Archives and Records Administration . . . and Office of Management and Budget M-12-18[.]"[29] As it relates to email, it is DOD policy that "[e]mail messages that include record or non-record material cannot be copied or removed as personal files because these messages were used to conduct DoD business."[30]

The National Archives and Record Administration ("NARA") also has provided guidance that makes clear that emails and other electronic communications of federal employees are federal records and that employees should not use personal accounts for official business. In a 2013 bulletin, NARA explained that "email messages created or received in the course of official business are Federal records . . . , and agency employees must manage them accordingly. Under NARA's current policy and regulations, defined in 36 C.F.R. § 1236.22(a), agencies must issue instructions to staff on the identification, management, retention, and disposition of email messages determined to be Federal records."[31] NARA has instructed that "agency employees should not generally use personal email accounts to conduct official agency business" and if they do so, they "must ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices. Agency policies and procedures must also ensure compliance with other statutes and obligations, such as FOIA[.]"[32] In addition to email, NARA has explained that all "[e]lectronic messages created or received in

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[25] 44 U.S.C. § 3105; *see also* 36 C.F.R. § 1230.10 (requiring agency heads to "[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records"); *id*. § 1230.12 ("The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both (18 U.S.C. 641 and 2071).").
[26] 44 U.S.C. § 3106(a).
[27] *Id*. (emphasis added). Removal of records is defined as "selling, donating, loaning, transferring, stealing, *or otherwise allowing* a record to leave the custody of a Federal agency without the permission of the Archivist of the United States." 36 C.F.R. 1230.3(b) (emphasis added).
[28] 44 U.S.C. §§ 2905(a), 3106(b).
[29] Dep't of Def., DoD Records Management Program 1 (Feb. 24, 2015) (Number 5015.02).
[30] *Id*. at 5.
[31] Nat'l Archives & Records Admin., Bull. No. 2013-03, Guidance for Agency Employees on the Management of Federal Records, including Email Accounts (Sept. 9, 2013), *available at* https://goo.gl/JTFQ1l.
[32] *Id*.

the course of agency business are Federal records. Like all Federal records, these electronic messages must be scheduled for disposition."[33] In this context, electronic messages include "[c]hat/[i]nstant messaging," "[t]ext messaging, also known as Multimedia Messaging Service (MMS) and Short Message Service (SMS)," and "[o]ther messaging platforms or apps, such as social media or mobile device applications. These include text, media, and voice messages."[34]

Secretary Carter's use of personal email to conduct official government business is a potential violation of the FRA,[35] in addition to the above DOD and NARA rules. To the extent that any email record created or received by Secretary Carter was not retained in or copied to the DOD's official recordkeeping system, Secretary Carter is obligated to (1) notify the Archivist of the United States that federal records under his agency's control have been unlawfully removed from DOD; and, to the extent he has not already done so, (2) take all steps necessary to ensure recovery of those federal records. If he fails to undertake these obligations, then the duty falls to the Archivist to take the necessary steps through the Attorney General to recover the removed records and to notify Congress of the same.[36] The same obligations apply with respect to any text message, instant message, or other electronic message records created or received by Secretary Carter on a personal device. We look forward to Secretary Carter complying with his statutory obligations or, in the alternative, to providing notice that he has complied with all relevant FRA obligations.

If you have any questions, please contact Ryan Mulvey or James Valvo by email at ryan.mulvey@causeofaction.org or james.valvo@causeofaction.org or by telephone at (202) 499-4232. Thank you for your attention to this matter.

RYAN P. MULVEY
COUNSEL

R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

[33] Nat'l Archives & Records Admin., Bull. No. 2015-02, Guidance on Managing Electronic Messages (July 29, 2015), *available at* http://goo.gl/9h3mpJ.
[34] *Id.*
[35] 44 U.S.C. § 2911 ("An officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee–(1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or (2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.").
[36] 44 U.S.C. §§ 2905(a), 3106(b); *see also Armstrong v. Bush*, 924 F.2d 282, 292 (D.C. Cir. 1991) ("Recognizing that this created 'the anomalous situation . . . whereby an agency head has a duty to initiate action to recover records *which he himself has removed*,' Congress amended the FRA to require the Archivist to ask the Attorney General to sue and to notify Congress if the agency head failed to make a similar request of the Attorney General.") (emphasis added).