



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

December 21, 2015

**VIA EMAIL**

The Honorable David S. Ferriero  
Archivist of the United States  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001  
Email: foia@nara.gov

**Re: Freedom of Information Act Request**

Dear Archivist Ferriero:

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.<sup>1</sup> 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 in possible violation of the Federal Records Act (“FRA”).<sup>2</sup>

**Secretary Ashton Carter’s Violation of Defense Department Record Policies**

Based on recent news reports, we understand that Secretary of Defense Ashton Carter used personal email to conduct official business in violation of the policies of the Department of Defense (“DOD”).<sup>3</sup> Secretary Carter’s failure to comply with DOD’s record management

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<sup>1</sup> See CAUSE OF ACTION, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/) (last accessed Dec. 21, 2015).

<sup>2</sup> 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.

<sup>3</sup> 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>. 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 [“NARA”]. . . and Office of Management and Budget M-12-18[.]” Dep’t of Def., DoD Records Management Program 1 (Feb. 24, 2015) (Number 5015.02). 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.” *Id.* at 5. NARA provides similar guidance with respect to the preservation of emails. 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/JTFQ11>. Further, NARA recommends that agency employees “should not generally use

policies raises serious legal concerns, especially in light of previous instances of agency heads using personal email to conduct agency business.<sup>4</sup> Indeed, Secretary Carter's actions suggest potential FRA violations.<sup>5</sup> To the extent that Secretary Carter created and received email records on his personal device without ensuring that those records were contemporaneously archived in the DOD's official recordkeeping system, Secretary Carter is legally obliged to notify the Archivist of the United States that federal records have been unlawfully removed from DOD's custody and to make efforts to recover any such removed federal records.<sup>6</sup> In the absence of this required action, the Archivist himself must (1) request the Attorney General of the United States to initiate an action to recover the removed records and (2) notify Congress of the same.<sup>7</sup>

### **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 relating to any permission granted to Secretary Carter to use a personal device or account for the conduct of official agency business, or any waiver granted to him regarding compliance with the FRA, National Archives and Records Administration ("NARA") regulations, or DOD regulations in respect of the same;
2. All records reflecting notification from DOD to the Archivist of the United States and/or NARA pursuant to 44 U.S.C. § 3106 concerning federal records created or received by Secretary Carter on his personal devices or accounts.
3. All records, including but not limited to, email communications, memoranda, and letters, reflecting NARA's internal response to any notification responsive to Item Two of this request.

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personal email accounts," or if they do, that they "ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices." *Id.*

<sup>4</sup> See, e.g., 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>;

<sup>5</sup> See 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.").

<sup>6</sup> *Id.* § 3106(a). 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).

<sup>7</sup> 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).

4. All communications from NARA to DOD seeking information from DOD about Secretary Carter's use of a personal device or account, and any response from DOD thereto.
5. All records reflecting NARA's efforts, if any, to assist DOD in recovering federal records created or received by Secretary Carter on his personal devices or accounts, or to initiate a recovery of those records through the Attorney General. In the latter case, this request also seeks all records of any correspondence with Congress.
6. All communications between NARA and the Executive Office of the President (including, but not limited to, the Office of the White House Counsel or the Office of the President) concerning Secretary Carter's use of personal email or devices.

### **Request for Expedited Processing**

CA Institute 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."<sup>8</sup>

***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.<sup>9</sup> CA 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 has properly satisfied the "urgency to inform" standard.<sup>10</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>11</sup>

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<sup>8</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 36 C.F.R. § 1250.28(a)(3).

<sup>9</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>10</sup> 254 F.3d 300, 310–11 (D.C. Cir. 2001).

<sup>11</sup> *Id.*

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.<sup>12</sup> Congressional interest in the subject is naturally acute.<sup>13</sup> In short, CA Institute's request does not seek records of merely "newsworthy" topics, but rather "subject[s] of a currently unfolding story."<sup>14</sup> CA Institute seeks records that unquestionably concern the activity of the Federal government, insofar as they reflect NARA's response to notification from DOD about potential FRA violations. Further, the records may reflect deliberations between NARA and high-ranking officials at DOD, the Department of Justice, the Executive Office of the President, and Congress. These communications may reveal potential impropriety in the manner by which the controversy surrounding Secretary Carter's use of personal email is being handled. Importantly, NARA and other agencies have granted CA Institute's prior requests for expedited processing of requests concerning the use of private email by agency heads and the potential attendant FRA violations.<sup>15</sup>

Delay in the production of this 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."<sup>16</sup> The ability of a government "watchdog"—CA Institute—to secure such records as those sought in this 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**

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

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<sup>12</sup> See, e.g., SCHMIDT, *supra* note 3; see also Rebecca Kheel, *Pentagon releases 34 pages of private Carter emails*, THE HILL (Dec. 18, 2015), <http://goo.gl/YWIKSW>; 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>.

<sup>13</sup> See, e.g., Kristina Wong, *McCain launches review of Pentagon chief's personal email account*, THE HILL (Dec. 17, 2015), <http://goo.gl/KII5O0>; 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>.

<sup>14</sup> *Al-Fayed*, 254 F.3d at 311.

<sup>15</sup> See Email from FOIA@nara.gov, Nat'l Archives & Records Admin., to CA Institute (Oct. 2, 2015) (granting expedited processing of Request No. NGC15-648) (on file with CA Institute); Email from Joseph A. Scanlon, FOIA & Privacy Officer, Nat'l Archives & Records Admin., to CA Institute (Mar. 30, 2015) (granting expedited processing on Request No. NGC15-159) (on file with CA Institute); Letter from Requester Commc'ns Branch, Office of Info. Programs & Servs., Dep't of State, to CA Institute (Apr. 14, 2015) (granting expedited processing on Request No. F-2015-4785) (on file with CA Institute).

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

<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.").

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 would unquestionably shed light on the “operations or activities of the government,” namely, the extent to which DOD has notified NARA of potential FRA violations, and whether either agency has made efforts to retrieve removed records from Secretary Carter’s personal accounts and devices.

Disclosure is likely to “contribute significantly” to public understanding of such matters because, to date, the public has not known the extent to which DOD’s leadership undertook efforts to notify NARA about, or attempt to retrieve and retain, Secretary Carter’s personal electronic communications. Public interest in these matters is particularly heightened in light of similar 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.<sup>19</sup>

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.<sup>20</sup> 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.<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> 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.<sup>23</sup> Although it is not required by the statute, CA Institute gathers the news it regularly

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<sup>18</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 36 C.F.R. § 1250.56; *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.,* Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://goo.gl/IGEY6l>; *see also supra* note 4.

<sup>20</sup> *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).

<sup>21</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 36 C.F.R. §§ 1250.3(q), 1250.54(b).

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

<sup>23</sup> CA Institute notes that NARA’s definition of “representative of the news media” (36 C.F.R. § 1250.3(q)) is in conflict with the statutory definition and controlling case law. NARA 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. *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’

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.<sup>24</sup> 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."<sup>25</sup> In light of the foregoing, numerous federal agencies have appropriately recognized CA Institute's news media status in connection with its FOIA requests.<sup>26</sup>

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requirement to the statutory definition."'). Under either definition, however, CA 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 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.<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, we request that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions, please contact Ryan Mulvey or James Valvo by email at [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org) or [james.valvo@causeofaction.org](mailto: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

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<sup>27</sup> 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).