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June 24, 2016

**VIA CERTIFIED MAIL**

Karen Neuman  
Chief Privacy Officer/Chief FOIA Officer  
U.S. Department of Homeland Security  
245 Murray Lane SW STOP-0655  
Washington, D.C. 20528-0655

Mike Miron, Director  
Homeland Security Advisory Council  
DHS Mailstop 0385  
245 Murray Lane, SW  
Washington DC 20528-0385

**Re: Freedom of Information Act Request**

Dear Ms. Neuman and Mr. Miron:

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 interested in the recent release by the Department of Homeland Security (“DHS”) Homeland Security Advisory Council (“HSAC”) Countering Violent Extremism (“CVE”) Subcommittee of a report recommending that law enforcement involved in fighting violent extremism “[r]eject religiously-charged terminology and problematic positioning by using plain meaning American English.”<sup>2</sup>

Specifically, the Council recommends using “American English instead of religious, legal and cultural terms like ‘*jihad*,’ ‘*sharia*,’ ‘*takfir*’ or ‘*umma*.’”<sup>3</sup> Yet, the use of specific, accurate, and even technical terminology in law enforcement is integral to counter-terrorism operations and training. Indeed, as former Central Intelligence Agency (“CIA”) analyst and State Department

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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 23, 2016).

<sup>2</sup> U.S. DEP’T OF HOMELAND SEC., HOMELAND SEC. ADVISORY COUNCIL, COUNTERING VIOLENT EXTREMISM SUBCOMM., INTERIM REPORT AND RECOMMENDATIONS at 13 (June 2016), <http://1.usa.gov/28OwWpA>.

<sup>3</sup> *Id.*

counterterrorism expert Larry C. Johnson has explained, “[t]he least understood and most important counterterrorism resource is training.”<sup>4</sup>

Political censorship not only chills public access to information, but also undermines public safety. Counterterrorism experts Daniel Benjamin and Steve Simon, both former National Security Council staffers, commented that “jihadists comprise a social movement, not just a cluster of terrorist organizations, and they are totally opportunistic and endlessly plastic in how they accommodate to circumstances. They thrive on our preconceptions and our instinctive determination to come up with rigid schematizations, and we will get the better of them only when our thinking is as flexible and innovative as theirs.”<sup>5</sup>

The sort of politicized law enforcement censorship exemplified in the CVE interim report—which, incidentally, is not a novel phenomenon<sup>6</sup>—inevitably justifies the “rigid schematization[]” that threatens public safety.<sup>7</sup> This, in turn, discourages informed law enforcement training and ignores the reality that, “[f]or numerous jihadists, the state is more or less relevant depending on their interpretation of Islam[.]”<sup>8</sup> In his February 12, 2015 testimony before the Senate Select Committee on Intelligence, National Counterterrorism Center Director Nicholas Rasmussen explicitly used the terms “jihad” and “sharia” in discussing current terrorist threats.<sup>9</sup> In light of this, the proposed DHS policy on censorship seems not only counter-intuitive but dangerous.

Accordingly, to better understand the extent of this censorship and its effect on law enforcement activities, CoA Institute hereby requests access, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to the following categories of records:

- (1) All communications between the DHS Office of the Secretary (“DHS-OS”) and the Executive Office of the President (“EOP”), including the White House Office, regarding the use of religious or cultural terminology in counter-terrorism law enforcement, including but not limited to the terms “sharia,” “jihad,” “takfir,” or “umma.”
- (2) All communications between the DHS-OS and any member of the HSAC regarding the use of religious or cultural terminology in counter-terrorism law enforcement, including but not limited to the terms “sharia,” “jihad,” “takfir,” or “umma.”
- (3) All communications between DHS Secretary Jeh Johnson and the U.S. Department of State Special Representative to Muslim Communities, Farah Pandith, regarding the use of

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<sup>4</sup> Larry C. Johnson, *Counterterrorism*, in THE SAGE ENCYCLOPEDIA OF TERRORISM (Gus Martin ed. 2011).

<sup>5</sup> Daniel Benjamin & Steve Simon, *Zarqawi’s Life After Death*, N.Y. TIMES (June 9, 2006), <http://nyti.ms/2906XMZ>; see also DANIEL BENJAMIN & STEVE SIMON, THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT (2005); DANIEL BENJAMIN & STEVE SIMON, THE AGE OF SACRED TERROR: RADICAL ISLAM’S WAR AGAINST AMERICA (2002).

<sup>6</sup> Philip Haney, *DHS ordered me to scrub records of Muslims with terror ties*, The Hill (Feb. 5, 2016), <http://bit.ly/28VmZst>.

<sup>7</sup> See Dennis A. Pluchinsky, *Global Jihadist Recidivism: A Red Flag*, 31 STUDIES IN CONFLICT & TERRORISM at 188 (2008) (“At its core, jihadist recidivism is a manpower concern. The global jihad movement obtains its manpower from three sources: (1) Muslim recruits, (2) converts, and (3) released jihadists. From a counterterrorism perspective, terrorists must be either killed or captured. The more terrorists that are killed, especially experienced operatives or leaders, the more damage to the operational capability of a group.”).

<sup>8</sup> M.A. Innes, *Deconstructing Political Orthodoxies on Insurgent and Terrorist Sanctuaries*, 31 STUDIES IN CONFLICT & TERRORISM (2008) at 258, 262.

<sup>9</sup> *Current Terrorist Threat to the United States, Hearing Before the U.S. S. Select Comm. on Intelligence* (Feb. 12, 2015) (testimony of the Hon. Nicholas J. Rasmussen, Dir., Nat’l Counterterrorism Ctr.), available at <http://1.usa.gov/28PGfnx>.

religious or cultural terminology in counter-terrorism law enforcement, including but not limited to the terms “sharia,” “jihad,” “takfir,” or “umma.”

- (4) All communications between the DHS-OS or the HSAC and any of the following organizations regarding the use of religious or cultural terminology in counter-terrorism law enforcement, including but not limited to the terms “sharia,” “jihad,” “takfir,” or “umma”:
  - a. Islamic Society of North America (“ISNA”);
  - b. North American Islamic Trust (“NAIT”);
  - c. Council on American-Islamic Relations (“CAIR”).
- (5) All communications between the DHS-OS or the HSAC and any component of the CIA, Department of Justice, Federal Bureau of Investigation, or Department of State regarding the use of religious or cultural terminology in counter-terrorism law enforcement, including but not limited to the terms “sharia,” “jihad,” “takfir,” or “umma.”
- (6) All records reflecting the principal concerns motivating the HSAC to recommend that DHS personnel “reject religiously-charged terminology” and “religious, legal and cultural terms” such as “sharia,” “jihad,” “takfir,” or “umma,” including any record reflecting the influence of the EOP or outside stake-holders.
- (7) All records, including final agency memoranda, guidance, proposed regulations, or training materials, directing DHS personnel to cease from using certain terminology to describe terrorism or to remove or redact any prior use of such terms in DHS records. The time period for this item of the request is January 21, 2009 to the present.

Unless specified, the time period for all items of this request is January 2014 to the present.<sup>10</sup>

### **CoA Institute Is Entitled To a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the DHS 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>11</sup>

In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely, the manner by which DHS law enforcement personnel report suspected and confirmed instances of terrorist or extremist activity. Further, responsive records would reveal the decision-making process that led to DHS to recommend avoiding religious and cultural terminology, including the potential influence of the White House and other non-governmental political interests in effecting this change in practice. These records have not been distributed, and their disclosure and dissemination would contribute to public understanding about DHS operations.

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<sup>10</sup> See, e.g., *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(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).

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>12</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.

### **CoA Institute Is a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a "representative of the news media" under FOIA.<sup>13</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>14</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>15</sup> Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>16</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>17</sup> In light of the foregoing,

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<sup>12</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>13</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(b)(6).

<sup>14</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>15</sup> The DHS definition of "representative of the news media," 6 C.F.R. § 5.11(b)(6), is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated "organized and operated" standard 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>16</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>17</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

numerous federal agencies—including the DHS—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.<sup>18</sup>

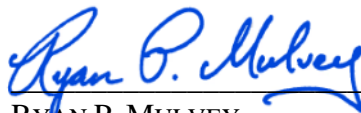
### **Record Preservation Requirement**

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 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>19</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>18</sup> See, e.g., FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 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 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. 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).

<sup>19</sup> See 6 C.F.R. § 5.10 (“Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.”); see also 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).