



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

July 1, 2016

VIA CERTIFIED MAIL

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

Re: Freedom of Information Act Request

Dear Ms. Day:

I write on behalf of the Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, CoA Institute is examining the private meeting between Attorney General Loretta Lynch and President Bill Clinton that occurred on June 27, 2015, at the Phoenix airport (the “Meeting”).² The Department of Justice (“DOJ”) apparently attempted to keep the Meeting secret, as the Federal Bureau of Investigation told reporters on the ground: “no photos, no pictures, no cell phones.”³

The Meeting raises serious concerns about the Attorney General’s impartiality in two pending DOJ investigations, one into former Secretary of State Hillary Clinton’s use of a personal email server to house official government records and the other into the Clinton Foundation. On July 1, 2015, there were conflicting reports about whether Attorney General Lynch will effectively

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited June 21, 2016).

² See, e.g., Mark Landler, *Meeting Between Bill Clinton and Loretta Lynch Provokes Political Furor*, N.Y. TIMES, June 30, 2016, <http://nyti.ms/29dYA12>; Christopher Sign, *US Attorney General Loretta Lynch, Bill Clinton meet privately in Phoenix before Benghazi report*, ABC15 ARIZONA, June 29, 2016, <http://bit.ly/297Jdsd>; Kevin Johnson, *Loretta Lynch, Bill Clinton meeting raises eyebrows*, USA TODAY, June 30, 2016, <http://usat.ly/29awEd9>; Anita Kumar, *Democrat questions meeting between AG, Bill Clinton amid email inquiry*, THE NEWS & OBSERVER, June 30, 2016, <http://bit.ly/299QBBO>.

³ Larry O’Connor, *Reporter: FBI ordered ‘no photos, no pictures, no cell phones’ during Clinton/Lynch meeting*, HOT AIR, July 1, 2016, <http://bit.ly/299UOWd>.

recuse herself from making decisions on the investigations and will instead defer to prosecutors and the FBI.⁴

Accordingly, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period of June 1, 2016 to the present:⁵

1. Attorney General Loretta Lynch’s schedule for June 26, 27, and 28, 2016, including but not limited to pre- and post-meeting email which concern the Meeting in any way.
2. All records, transcripts, or recordings of the Meeting.
3. All records including notes and/or memoranda by or to the Attorney General in either the Office of the Secretary or the Office of Legal Counsel discussing the Meeting either before or after it occurred. This item includes any advice given or memoranda created in response to the Meeting or news of the Meeting.
4. All records including notes and/or memoranda by or to the Attorney General in either the Office of the Secretary or the Office of Legal Counsel relating to the Attorney General’s decision whether to effectively recuse herself and accept the recommendation of career prosecutors and the FBI in the ongoing investigations relating to former Secretary of State Hillary Clinton and the Clinton Foundation.
5. Any records reflecting the FBI decision or authority to restrict reporters and others on the ground from using cell phones or taking pictures.

Request for Expedited Processing

CoA Institute hereby requests expedited processing of its request because (1) CoA Institute is “primarily engaged in disseminating information” and (2) the requested records pertain to “actual or alleged Federal government activity,” about which there exists an “urgency to inform the public.”⁶

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

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.⁷ CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

⁴ Compare Matt Apuzzo, *Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry, Official Says*, N.Y. TIMES, July 1, 2016, <http://nyti.ms/29auREU>, with Jeff Poor, *Bloomberg’s Halperin DOJ Source: Loretta Lynch ‘Is Not Recusing Herself’*, BREITBART.COM, July 1, 2016, <http://bit.ly/29gBrg6>.

⁵ For the purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

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

⁷ *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)).

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

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia Circuit established a multi-factor test to determine whether a FOIA requester properly satisfies the “urgency to inform” standard.⁸ 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.”⁹

In this case, the requested records concern a private meeting between the highest-ranking member of the Department of Justice and the target of investigations her department is conducting. This behavior raises serious concerns about the department’s impartiality and the responsive records will influence the public’s perception of the result of those investigations. This issue is already being widely covered by the news media.¹⁰ In short, the CoA Institute request does not seek records of a merely “newsworthy” topic, but rather “subject[s] of a currently unfolding story.”¹¹ CoA Institute seeks records that unquestionably concern the activity of the Federal government.

In this sense, delay in production of the requested records would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose of the FOIA” is to allow the American people access to information that might “contribute significantly to public understanding of the operations or activities of the government.”¹² The ability of a government “watchdog”—CoA Institute—to secure such records as those sought in the instant request for the purposes of government accountability,¹³ especially where a current exigency and unfolding story exists, thus weighs in favor of expedited processing.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of all applicable fees. The FOIA and applicable regulations provide that the DOJ shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹⁴

In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely, the decision-making processes at the DOJ both leading up to and following the Attorney General’s private meeting with President Clinton. Further, the request records could provide insight into the department’s reaction to the meeting and steps it took to control the fallout. These sorts of records have not been widely distributed, and their disclosure and

⁸ 254 F.3d 300, 310–11 (D.C. Cir. 2001).

⁹ *Id.*

¹⁰ *See supra* note 2.

¹¹ *Al-Fayed*, 254 F.3d at 311.

¹² *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

¹³ *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.”).

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

dissemination would contribute to public understanding about the issue, especially as they pertain to public relations and transparency efforts.

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.¹⁵ In addition, as CoA Institute is a non-profit organization, as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

Request To Be Classified as a Representative of the News Media

For fee status purposes, CoA Institute also qualifies as a "representative of the news media" under FOIA.¹⁶ As the D.C. Circuit recently held, the "representative of the news media" test focuses on the requestor, not the specific FOIA request at issue.¹⁷ 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.¹⁸ 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.¹⁹ 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."²⁰ In light of the foregoing,

¹⁵ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(b)(6).

¹⁷ See *Cause of Action*, 799 F.3d at 1121.

¹⁸ The DOJ definition of "representative of the news media," 28 C.F.R. § 16.11(b)(6), is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated "organized and operated" standard 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.

¹⁹ 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>.

²⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

numerous federal agencies—including the DOJ—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.²¹

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.²²

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 james.valvo@causeofaction.org. Thank you for your attention to this matter.


R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

²¹ See, e.g., FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); see also FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep’t of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep’t of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep’t of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep’t of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep’t of Interior (Aug. 3, 2015); FOIA Request 780831, Dep’t of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 15-00326-F, Dep’t of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep’t of Energy (Nat’l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Comm’n Comm’n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep’t of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep’t of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat’l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep’t of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep’t of Interior (Office of Sec’y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep’t of Energy (Nat’l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep’t of Energy (Nat’l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat’l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm’n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep’t of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep’t of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).

²² See, e.g., 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).