



August 31, 2016

VIA EMAIL

Ms. Clarice Julka
FOIA Officer
U.S. Department of the Interior
MS-7328, MIB
1849 C Street NW
Washington, D.C. 20240
os_foia@ios.doi.gov

Re: Freedom of Information Act Request

Dear Ms. Julka:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that 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, we are examining the Department of the Interior (“DOI”) decision to withdraw the Atlantic Outer Continental Shelf (“OCS”) from the 2017-2022 OCS Oil and Gas Leasing Program (“Program”).

When DOI released its Draft Proposed Program (“DPP”) in January 2015, it included one lease sale in the Atlantic Region.² The inclusion of the Atlantic in the DPP enjoyed broad support. As DOI commented, “the Governors of Virginia, North Carolina, and South Carolina requested that the Mid-Atlantic and South Atlantic Planning Areas be included in the DPP.”³ Members of the congressional delegations from affected East Coast states, including Senator Tim Kaine of Virginia, also supported the inclusion of the Atlantic Planning Areas.⁴

As part of the planning process for the Program, DOI solicited comments from the Department of Defense (“DoD”) regarding potential impacts on military operations. DoD did

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

² BUREAU OF OCEAN ENERGY MANAGEMENT, 2017-2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM 9-8 (2015), available at <http://www.boem.gov/2017-2022-DPP/>.

³ *Id.* at S-9.

⁴ See, e.g., Press Release, Sen. Mark Warner & Sen. Tim Kaine, Statement of U.S. Sen. Warner & Kaine on Interior Department’s Mid-Atlantic Offshore Plan (Jan. 27, 2015), available at <http://www.kaine.senate.gov/press-releases/statement-of-us-sen-warner-and-kaine-on-interior-departments-mid-atlantic-offshore-plan-> (“This is a significant step in a multi-year process that should result in the safe, responsible development of energy resources off the Virginia and mid-Atlantic coasts.”).

not have prohibitive concerns about the inclusion of the Atlantic Region. In fact, in its October 2015 Mission Compatibility Planning Assessment (“Assessment”), the DoD categorized only 5% of the included Atlantic Planning Areas as “No Oil and Gas Activity.”⁵ According to the DoD, the remaining 95% of the Atlantic Planning Areas could be included subject to certain conditions.⁶

Public comments on the DPP also weighed in favor of including the Atlantic Region. In the Proposed Program, DOI acknowledged that a majority of the more than one million public comments it received were in support of Atlantic area leasing.⁷

Despite this record, on March 15, 2016, DOI announced its decision to withdraw the Atlantic Planning Areas from the Program. Secretary Sally Jewell explained that DOI had “heard from many corners that now is not the time to offer oil and gas leasing off the Atlantic coast. When you factor in conflicts with national defense, economic activities such as fishing and tourism, and opposition from many local communities, it simply doesn’t make sense to move forward with any lease sales in the coming five years.”⁸

The DOI decision came as a surprise to many, including Senator Kaine, a longtime supporter of offshore energy development who had been involved in the issue at both the state and federal levels for years. In a statement released the day the Proposed Program was announced he said:

I am particularly struck by the material objections of the Department of Defense to the incompatibility of drilling with naval operations off Virginia’s coast, cited by the BOEM as one of the three principal reasons for their decision. I have participated in this debate for over a decade as a Governor and member of the Senate Armed Services Committee. The DOD has been relatively quiet during this public debate and has never shared their objections with me before. I look forward to additional discussions with DOD to understand its position.⁹

⁵ DEPARTMENT OF DEFENSE, DOD MISSION COMPATIBILITY PLANNING ASSESSMENT: BOEM 2017-2022 OUTER CONTINENTAL SHELF (OCS) OIL AND GAS LEASING DRAFT PROPOSED PROGRAM 30 (2015), *available at* <http://www.boem.gov/2017-2022-DoD-OCS-Report/>.

⁶ *Id.*

⁷ BUREAU OF OCEAN ENERGY MANAGEMENT, 2017-2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED PROGRAM 3-1 (2016), *available at* <http://www.boem.gov/2017-2022-Proposed-Program-Decision/> (“Of the [approximately 1,083,500] comments received on the DPP, slightly more than half stated support for Atlantic area leasing.”).

⁸ Press Release, Department of the Interior, Interior Department Announces Next Step in Offshore Oil and Gas Leasing Planning Process for 2017-2022 (Mar. 15, 2016), *available at* <https://www.doi.gov/pressreleases/interior-department-announces-next-step-offshore-oil-and-gas-leasing-planning-process>.

⁹ Press Release, Sen. Tim Kaine, Kaine Statement on Atlantic Oil Drilling Announcement (Mar. 15, 2016), *available at* <http://www.kaine.senate.gov/press-releases/kaine-statement-on-atlantic-oil-drilling-announcement>.

However, Senator Kaine, like DOI, would dramatically reverse course on offshore energy development in the Atlantic within months.¹⁰ In August 2016 – less than one month after Hillary Clinton selected him as her vice presidential running mate – Senator Kaine claimed that his newly-discovered opposition to Atlantic offshore development stemmed from DoD objections.¹¹ DOI, meanwhile, has insisted that the withdrawal of the Atlantic Planning Areas was not predominantly attributable to the DoD.¹²

The changing positions of both the Department of the Interior and Senator Kaine raise questions about whether DOI withdrew the Mid- and South Atlantic Planning Areas from the 2017-2022 Program due to political pressure.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period of November 1, 2015 to March 15, 2016:¹³

1. All communications concerning the Atlantic OCS and the 2017-2022 OCS Oil and Gas Leasing Program between or among DOI and its bureaus, including but not limited to the Office of the Secretary and the Bureau of Ocean Energy Management;
2. All communications concerning the Atlantic OCS and the 2017-2022 OCS Oil and Gas Leasing Program between DOI, including its bureaus, and any of the following:
 - a. The White House;
 - b. The Department of Defense; and
 - c. Any email address ending in “@kaine.senate.gov.”

¹⁰ See T. Becket Adams, *Kaine Hit for Flipping on Offshore Drilling*, WASHINGTON EXAM’R, Aug. 15, 2016, <http://www.washingtonexaminer.com/kaine-hit-for-flipping-on-offshore-drilling/article/2599411> (“Vice presidential candidate Sen. Tim Kaine, D-Va., is being accused of flip-flopping on offshore drilling after he said this weekend he agrees with Hillary Clinton that it should be banned.”).

¹¹ Rising Response, *Tim Kaine Asked About His Offshore Drilling Flip Flop*, YOUTUBE (Aug. 16, 2016), <https://www.youtube.com/watch?v=swTchJIdCw0>.

¹² See Charlie Passut, *Obama Administration Removes Atlantic from 2017-2022 OCS Lease Plan*, NATURAL GAS INTELLIGENCE DAILY, March 15, 2016, <http://www.naturalgasintel.com/articles/105701-obama-administration-removes-atlantic-from-2017-2022-ocs-lease-plan> (“‘The DOD comments to us, were one among many factors,’ Jewell said. ‘We weren’t just waiting for DOD to weigh in. This has been something that has had multiple public meetings over a prolonged period of time -- over a year -- and an assessment of all of those comments led to this decision.’”).

¹³ For purposes of this request, the term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at *7-9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the 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 commercial interest of the requester.”¹⁴

In this case, the requested records unquestionably concern the “operations or activities of the government,” namely the DOI decision to withdraw parts of the Atlantic OCS from the forthcoming 2017-2022 Oil and Gas Leasing Program. DOI has attributed its decision to opposition from the public and the DoD, but there is little evidence in the record that the public and the DoD strongly opposed the inclusion of the Atlantic Planning Areas. In fact, the DOI DPP and Proposed Program and the DoD Assessment seem to suggest the opposite. The requested records would therefore shed light on how DOI decided to withdraw the Atlantic Planning Areas from the Program and would further the public’s interest in better understanding the factors DOI considered. Such details have not been made publicly available.

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 is properly focused 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. 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,

¹⁴ 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a); *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).

¹⁵ *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).

¹⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.70.

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

newsletters, and congressional testimony and statements for the record.¹⁸ 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.”¹⁹ In light of the foregoing, numerous federal agencies—including DOI—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.²⁰

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

¹⁸ See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwpP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

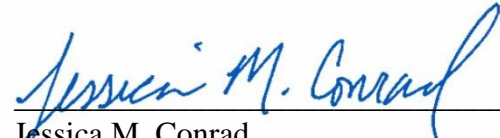
²⁰ See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep’t of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep’t of Labor (Mar. 7, 2016); 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 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. 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).

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 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 jessica.conrad@causeofaction.org. Thank you for your attention to this matter.



Jessica M. Conrad
Counsel

²¹ See 43 C.F.R. § 2.68(b) (“Materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or lawsuit is pending. This is true even if they would otherwise be authorized for disposition or destruction under the General Records Schedule 4.2 of NARA or another NARA-approved records schedule, such as DAA-0048-2013-0001.”); 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).