



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

October 18, 2016

VIA E-MAIL

U.S. Department of Veterans Affairs
Office of Assistant Secretary for Information and Technology
Attention: James P. Horan, Director, FOIA Service
810 Vermont Avenue NW
(005R1C) VACO
Washington, D.C. 20420
vacofiaservice@va.gov

Re: Freedom of Information Act Request

Dear Mr. Horan:

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 whether the upcoming White House transition at the Department of Veterans Affairs (“VA”) is being conducted in a nonpartisan manner.

In May 2016, President Obama issued an Executive Order regarding the White House transition.² The Executive Order states that “[i]t is the policy of the United States to undertake all reasonable efforts to ensure that presidential transitions are well-coordinated and effective, without regard to party affiliation.”³ According to information obtained by CoA Institute, Gina Farrissee, the Deputy Chief of Staff at VA, is apparently a key member of the VA White House transition team that is preparing the agency for the next administration. If true, this arrangement creates the appearance that the transition process will be managed by Obama Administration political appointees because Ms. Farrissee was an Obama Administration appointee until May 2016.⁴ That is, the Obama Administration reportedly appointed Ms. Farrissee to serve as the VA’s Assistant Human Resources Secretary in September 2013.⁵ Nearly three years later, on

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

² Exec. Order—Facilitation of a Presidential Transition, May 6, 2016, *available at* <http://bit.ly/1V6142Z>.

³ *Id.*

⁴ See Nicole Ogrysko, *VA Names New Deputy Chief of Staff*, FEDERAL NEWS RADIO, May 2, 2016, *available at* <http://bit.ly/1W5V0Zc>.

⁵ *Id.*

May 2, 2016, the VA announced that it had named Ms. Farrisee the VA's Deputy Chief of Staff, a career position.⁶

Ms. Farrisee's role on the VA White House transition team raises concerns about whether party affiliation may play a role in the transition process at the VA. According to media reports, each Executive Branch agency, including the VA reportedly has a transition leader at both the political level and career level.⁷ Although it is common for political appointees to participate on transition teams,⁸ in this case it appears a former political appointee will be playing the role of a nonpartisan career employee, an apparent conflict of interest. If Ms. Farrisee is playing the lead role of a career employee while another official serves as the political appointee lead, the top two roles on the White House transition team are led by current or former political appointees, raising questions about the transition process.

Accordingly, 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 January 1, 2016 to the present:⁹

1. All records relating to the conversion of Gina Farrisee from a political appointee at the Department of Veterans to a career position, including but not limited to any request to the Office of Personnel Management for approval of that conversion and any grant of such approval by the Office of Personnel Management.
2. All records, including but not limited to email communications, relating to Gina Farrisee's role on the VA Presidential transition team.

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

⁶ See *id.* It is unclear whether the Office of Personnel Management ("OPM") approved Ms. Farrisee's conversion from a political appointment to a career position. For additional information about the requirement to obtain OPM approval for such conversions, see Memorandum from Beth F. Cobert, Acting Director, OPM, to Heads of Executive Departments and Agencies, *Appointments and Awards During the 2016 Presidential Election Period*, Jan. 11, 2016, available at <http://bit.ly/2dh6rcM>; Memorandum from John M. Berry, Director, OMB, to Heads of Executive Departments and Agencies, *Political Appointees and Career Civil Service Positions*, Nov. 5, 2009, available at <http://bit.ly/2dSJT8C>.

⁷ See Jory Heckman, *How Career Feds Can Set the Stage for the Next Administration*, FED. NEWS RADIO, Sept. 6, 2016, available at <http://bit.ly/2dZdlas>.

⁸ *Id.*

⁹ For 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). 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").

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.”¹⁰ In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely whether the White House transition is being conducted in a nonpartisan manner and without regard to party affiliation. These records are not available to the public and will provide insight into the policies and procedures used by VA relating to selecting a White House transition team and whether any career civil servants are members of the transition team.

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.¹¹ 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.¹² 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.¹³ 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.¹⁴ 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.¹⁵ These distinct works

¹⁰ 5 U.S.C. § 552(a)(4)(A)(iii); § 1.561; *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).

¹¹ *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).

¹² 5 U.S.C. § 552(a)(4)(A)(ii)(II); § 1.561 (b)(7).

¹³ *See Cause of Action*, 799 F.3d at 1121.

¹⁴ *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.

¹⁵ *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/2apTwwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST

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."¹⁶ In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹⁷

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.¹⁸

CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁷ 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. 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).

¹⁸ See 15 C.F.R. § 4.3(d) ("Components shall not dispose records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.") 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).

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) 407-9964 or by e-mail at lamar.echols@causeofaction.org. Thank you for your attention to this matter.



Lamar Echols
Counsel

