



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

December 15, 2016

VIA E-MAIL

U.S. Department of Labor
Office of the Solicitor
Division of Management and Administrative Legal Services
200 Constitution Avenue, NW, Room N-2420
Washington, DC 20210
Email: foiarequests@dol.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

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.

According to *Politico*, Department of Labor (“DOL”) Secretary Thomas Perez is running for chairman of the Democratic National Committee (“DNC”).² Secretary Perez has been “significantly stepping up his outreach to voting members of the Democratic National Committee, speaking to a number of them Monday.”³ Moreover, Secretary Perez reportedly “emailed all neutral and supportive party chairs, vice chairs and executive directors Wednesday morning, asking them to join him on a conference call.”⁴ This raises concerns that Secretary Perez may be using his official position to advance his political campaign. Further, it is unclear whether Secretary Perez is using resources paid for by taxpayers to benefit his likely political campaign, including government issued computers, office space, mobile devices, staff, or email.

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

² Daniel Stauss, *Tom Perez Formally Jumps into DNC Race*, *POLITICO*, Dec. 15, 2016, available at <http://www.politico.com/story/2016/12/tom-perez-running-dnc-chairman-232698>.

³ Daniel Strauss & Gabriel DeBenedetti, *Labor Secretary Perez Steps Up DNC Outreach*, *POLITICO*, Dec. 12, 2016, available at <http://www.politico.com/story/2016/12/tom-perez-dnc-232541>.

⁴ Edward-Isaac Dove, *Perez Set to Make His Run for DNC Chair Official*, *POLITICO*, Dec. 14, 2016, available at <http://www.politico.com/story/2016/12/tom-perez-dnc-chair-232621>.

The Hatch Act prohibits federal employees from engaging in certain types of political activities.⁵ In particular, it prohibits federal employees from using their official authority or influence for the purpose of interfering with or affecting the results of an election.⁶ As such, we are examining whether Secretary Perez used his position in the federal government to further his apparent candidacy for chairman of the DNC.

In 2013, then-Secretary Hilda Solis, Mr. Perez's predecessor, resigned while being investigated for Hatch Act violations.⁷ Ms. Solis allegedly solicited campaign contributions from a subordinate employee by leaving voicemails on a government issued phone, resulting in an investigation by the Federal Bureau of Investigation.⁸ Also, during the Obama Administration, former Health and Human Services Secretary Kathleen Sebelius and Housing and Urban Development Secretary Julian Castro became the first two Cabinet-level officials in U.S. history to be cited by the Office of Special Counsel for Hatch Act violations.⁹

American taxpayers have a right to know if senior government officials are continuing to use government positions and resources to further political campaigns. In order to ascertain whether prohibited political conduct is still occurring at DOL and to learn whether appropriate controls are in place, CoA Institute requests additional information.

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 December 12, 2016 to December 15, 2016.

1. All records, including emails, text messages, voicemails, calendars, and schedules reflecting meetings or communications among and between Secretary Perez, governors,¹⁰ and voting members¹¹ of the DNC.
2. A copy of Secretary Perez's schedule for December 12, 2016 to December 15, 2016.

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

⁵ 5 U.S.C. §§ 7321-632.

⁶ *Id.*, § 7323(a)(1).

⁷ Abby Sewell, *Rep. Issa Says Recording is Evidence of Improper Fundraising by Solis*, L.A. TIMES, July 16, 2014, available at <http://www.latimes.com/local/lanow/la-me-ln-hilda-solis-recording-20140716-story.html>.

⁸ *Id.*

⁹ Josh Gerstein, *Ethics Agency Says HUD Chief Castro Violated Hatch Act*, POLITICO, July 18, 2016, available at <http://www.politico.com/story/2016/07/julian-castro-ethics-hud-hatch-225732>.

¹⁰ See Jonathan Martin, *Labor Secretary Thomas Perez is Said to Plan Run to Lead D.N.C.*, N.Y. TIMES, Dec. 12, 2016, available at <http://www.nytimes.com/2016/12/12/us/politics/thomas-perez-democratic-national-committee.html>.

¹¹ See Strauss & Debenedetti, *supra* note 3.

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.”¹² In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely all details and instances where a government employee may have used his official position with the government or government resources to advance his own political campaign. These records are not available to the public and will provide insight into the policies and procedures used by DOL related to government employees conducting political activity.

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ These distinct works

¹² 5 U.S.C. § 552(a)(4)(A)(iii); *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).

¹³ *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).

¹⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁵ *See Cause of Action*, 799 F.3d at 1121.

¹⁶ CoA Institute notes that the agency’s definition of “representative of the news media” (15 C.F.R. § 4.11 (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.

¹⁷ *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

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."¹⁸ In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹⁹

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.²⁰

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

¹⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁹ *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).

²⁰ *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

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