



January 18, 2017

VIA E-MAIL

Alexis Graves, FOIA Officer
U.S. Department of Agriculture
1400 Independence Ave., SW
Room 428-W, Whitten Building
Washington, DC 20250-0706
E-Mail: USDAFOIA@ocio.usda.gov

Re: Freedom of Information Act Request

Dear Ms. Graves:

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.

On January 13, 2017, just one week before his tenure was set to expire, Department of Agriculture (“USDA”) Secretary Tom Vilsack announced his departure from USDA.² According to news reports published before his resignation, Secretary Tom Vilsack was expected to become president and CEO of the U.S. Dairy Export Council.³ Four days after resigning from USDA, Vilsack confirmed that he would be joining the U.S. Dairy Export Council as CEO.⁴ The abrupt timing of Vilsack’s departure raises questions about potential conflicts of interest. When a Cabinet-level official begins negotiating for private employment while still serving in government, federal conflict of interest laws apply.⁵ The Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”) states that Executive Branch employees who are required to file public financial reports may not directly negotiate for future employment unless the individual’s ethics office is notified in writing within three business days after negotiations

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

² Helena Bottemiller Evich & Catherine Boudreau, *Vilsack Departs Agriculture Dep’t*, POLITICO, Jan 13., 2017, available at <http://politi.co/2ilmHAH>.

³ Sara Wyant & Philip Brasher, *Vilsack Expected to Take Over Dairy Export Council*, AGRIPULSE, Jan. 3, 2017, available at <http://bit.ly/2iaspBb>.

⁴ Donnelle Eller, *Vilsack Confirms He’s Becoming U.S. Dairy Export Council CEO*, DES MOINES REGISTER, Jan. 17, 2017, available at <http://dmreg.co/2jHGzv4>.

⁵ See Congressional Research Service, Jack Maskell, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, Jan. 7, 2014, available at <http://bit.ly/2j12Kik>.

begin.⁶ The individual is also required to recuse himself from any government matter for which such negotiations may create a conflict of interest and notify the individual's ethics office about the recusal.⁷ In this case, if then-Secretary Vilsack began negotiation or agreed to subsequent employment with the U.S. Dairy Export Council while still serving at the USDA, it appears that the USDA Office of Ethics or USDA Office the General Counsel should have been notified in writing.

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, 2015 to the present:⁸

1. All records relating to Secretary Tom Vilsack, notifying the USDA Office of Ethics or USDA Office of the General Counsel about negotiations for subsequent employment with the U.S. Dairy Export Council.
2. All records relating to Secretary Tom Vilsack, notifying the USDA Office of Ethics or USDA Office of the General Counsel about any matters, from which Secretary Vilsack requested to be recused as a result of negotiations for employment with the U.S. Dairy Export Council.

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."⁹ In this case, the requested records unquestionably shed light on the "operations or activities of the government," as they relate to whether Secretary Vilsack complied with the STOCK Act by notifying the USDA Office of Ethics or USDA Office of General Counsel about allegedly negotiating for employment with the U.S. Dairy Export Council. These records are not available to the public and will provide insight into whether Secretary Vilsack notified the appropriate officials in writing within three days of beginning employment negotiations and whether those negotiations led to recusals from any USDA matters.

⁶ P.L. 112-105, Section 17, 126 Stat. 303.

⁷ *Id.*

⁸ For purposes of this request, the term "present" should be construed as the date on which the agency begins its search for responsive records. *Contra* 12 C.F.R. § 404.6(d); *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").

⁹ 5 U.S.C. § 552(a)(4)(A)(iii); 12 C.F.R. § 404.10(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).

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.¹⁰ 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.¹¹ 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.¹² 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.¹³ 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.¹⁴ 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

¹⁰ 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).

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 12 C.F.R. § 404.2; 12 C.F.R. § 404.9(b).

¹² See *Cause of Action*, 799 F.3d at 1121.

¹³ CoA Institute notes that the agency's definition of “representative of the news media” 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.

¹⁴ 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/2apTwqP>; 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>.

publications via “alternative media[,] shall be considered to be news-media entities.”¹⁵ In light of the foregoing, numerous federal agencies have appropriately recognized the Institute’s news media status in connection with its FOIA requests.¹⁶

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.¹⁷

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.

¹⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁶ 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).

¹⁷ See 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).

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