IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-2226-RBW

CAUSE OF ACTION INSTITUTE'S RESPONSE TO DEPARTMENT OF JUSTICE'S MOTION FOR SUMMARY JUDGEMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

R. James Valvo, III
D.C. Bar No. 1017390
Lee A. Steven
D.C. Bar. No. 468543
CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, DC 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
james.valvo@causeofaction.org
lee.steven@causeofaction.org

Counsel for Plaintiff

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INTRODUCTION

This case presents the novel question of the definition of a "record" under the Freedom of Information Act ("FOIA") and whether an agency may segment a single record into multiple records to withhold information as non-responsive. The case arises in the aftermath of the D.C. Circuit's decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review* ("*AILA*"), which held that an agency may not redact information within an otherwise responsive record simply because the subject matter of that information is non-responsive to the FOIA request. Instead, the D.C. Circuit held that an agency must disclose responsive records as a unit, subject to the FOIA's nine statutory exemptions.

In responding to a FOIA request sent by Plaintiff Cause of Action Institute ("CoA Institute"), and despite CoA Institute bringing the *AILA* authority to the agency's attention during the administrative stage of this case, Defendant Department of Justice ("DOJ") did not adhere to the D.C. Circuit's ruling. It instead broke a single responsive record into nine separate records and redacted eight of those records in their entirety under a claim of "non-responsive." CoA Institute brought this suit to resolve the issue of the definition of a record and the application of the non-responsive redaction. The DOJ now attempts to sidestep these issues by voluntarily ceasing the offending behavior through the re-production of the document as a single record with support for its redactions on grounds other than "non-responsive." While doing so, the DOJ has published official guidance that seeks to justify its original treatment of the record at issue. As such, this case is not moot despite the DOJ's voluntary cessation of the offending behavior.

BACKGROUND

I. PROCEDURAL HISTORY

There are no genuine disputes as to any material facts in this case. By letter, dated July 15, 2016, CoA Institute sent a FOIA request to the DOJ seeking access to two records. Compl. ¶ 6. The DOJ had previously produced the same two records to CoA Institute in response to a different FOIA request (FOIA request #10874), but the agency had withheld large amounts of information within those records by applying redactions bearing the label "non-responsive." Compl. ¶ 7. CoA Institute's July 15, 2016 request (FOIA Request #11018) sought production of those same two records without any non-responsive redactions and therefore asked for the entirety of each record. Compl. ¶ 8.

In a phone call to clarify the scope of the request, the parties subsequently agreed that the request covered only "(1) an email chain on or about May 22, 2014 between, among others, Norah Bringer and Gretchen Wolfinger, and (2) a November 2011 report entitled Current Practices for Attorney Assignments, Transfers, and Details," and that, because the DOJ had previously located those two records, it did not need to conduct an additional search for responsive records. Compl. ¶¶ 11–13; Banerjee Decl. ¶¶ 11–15. During the phone call to clarify the request, CoA Institute drew the DOJ's attention to the D.C. Circuit's decision in *AILA*, which holds that the use of "non-responsive" as a redaction tool to withhold information under the FOIA is improper. *See* Compl. Ex. 6.

By letter, dated September 20, 2016, the DOJ issued its final determination on the request and produced records. Compl. ¶ 14. The DOJ produced the entirety of the November 2011 report with no redactions; as this was not an adverse determination, the November 2011 report and that item of the request were not included in this suit. Compl. ¶ 16; *see also* Compl. Ex. 8

at 7 (CoA Institute administrative appeal recognizing that the DOJ had properly produced this record).

CoA Institute disputed the production of the May 2014 email chain, however, because the DOJ broke that chain into what it claimed were nine distinct records[1] and withheld each such element in its entirety. Compl. ¶ 17. In breaking the email chain into distinct records, the DOJ went so far as to claim that email headers were separate records from the body of that same email. Compl. ¶ 19. The DOJ withheld all of the designated records as "non-responsive" with the exception of what it designated as "Record 7," which it withheld in full based on Exemptions 3 and 5. Compl. ¶ 17. CoA Institute administratively appealed this adverse determination; the DOJ did not respond to the appeal within the statutory deadline; and this suit followed. Compl. ¶¶ 18–22, 24–25.

The CoA Institute Complaint asserted three bases to support its claim that the DOJ had violated the FOIA in its treatment of the May 2014 email chain. First, CoA Institute claimed that the DOJ had improperly segmented one record into nine records so as to apply "non-responsive" redactions. Compl. ¶¶ 29–30. Second, CoA Institute claimed that the use of "non-responsive" as a redaction tool was improper. Compl. ¶¶ 30, 37–38. Third, CoA Institute claimed that, with respect to the designated "Record 7," the DOJ was overbroad in its application of Exemptions 3 and 5 and had failed to conduct a segregability analysis. Compl. ¶ 34–35.

On January 11, 2017, the DOJ's Office of Information Policy issued guidance on how the agency—and other agencies that follow its guidance—should interpret and implement *AILA*. Valvo Decl. ¶ 10; Valvo Decl. Ex. 3. The guidance also describes the process by which the DOJ will define a "record" in response to each FOIA request that it receives. Valvo Decl. ¶ 11; Valvo

[1] The DOJ now asserts that the email chain consists of eight emails and not nine records, as it originally indicated on the September 20, 2016 production. *See* Mot. for Summ. J. at 2 n.2.

Decl. Ex. 4 [hereinafter DOJ Guidance]. On January 18, 2017, the DOJ filed its Answer and Motion for Summary Judgment. ECF Nos. 11–12. Contemporaneous to those filings, the DOJ re-produced the May 2014 email chain directly to CoA Institute with no redactions marked "non-responsive," a reduction in the use of Exemptions 3 and 5 in email it had previously designated as "Record 7," evidencing that the DOJ had conducted a segregability analysis, and, apparently, no longer breaking the email chain into multiple records.[2] Valvo Decl. ¶¶ 8–9; Valvo Decl. Exs. 1–2. For the first time in this case, the DOJ invoked Exemptions 6 and 7 on the majority of its redactions. Valvo Decl. ¶ 9; Valvo Decl. Ex. 1.

In its Motion for Summary Judgment, the DOJ abandons the position it took at the administrative level that portions of the email chain were "non-responsive" to the request. *See* Mot. for Summ. J. at 15 ("DOJ is not withholding any information based on responsiveness"). Instead, the DOJ "stand[s] solely on FOIA exemptions, not responsiveness" to withhold information within the email chain. *Id*. The DOJ also claims, without citation, that "the definitional issue [of what is a record] is moot." *Id*.

II. SUMMARY JUDGEMENT IN FOIA CASES

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). In a FOIA case, a district court must determine *de novo* "whether the agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under the FOIA." *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (quoting *Gallant v. Nat'l Labor Relations Bd.*, 26 F.3d 168, 171 (D.C. Cir. 1994)); *see also* 5 U.S.C. § 552(a)(4)(B) ("[T]he

[2] *But see* Valvo Decl. Ex. 1 at 2 (a notation in the reproduced email chain designating a portion of that chain as "Record 5").

burden is on the agency to sustain its action[.]"). An agency may meet this burden by supplying affidavits justifying its response. 5 U.S.C. § 552(a)(4)(B). A court may resolve the motion for "summary judgment on the basis of . . . agency affidavits . . . if the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). A district court should consider "the pleadings, the discovery materials on file, and any affidavits or declarations," *Nat'l Ass'n of Criminal Def. Lawyers v. Exec. Office for U.S. Attorneys*, 75 F. Supp. 3d 552, 555 (D.D.C. 2014), *aff'd on other grounds* 829 F.3d 741 (D.C. Cir. 2016), and "all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester." *Schoenman v. Fed. Bureau of Investigation*, 575 F. Supp. 2d 136, 148 (D.D.C. 2008) (citing *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350–51 (D.C. Cir. 1983)).

When both parties file motions for summary judgment, each motion must stand on its own. *See Huffman v. W. Nuclear, Inc.*, 486 U.S. 663, 664 n. 11 (1988) (noting that although the defendant "styled its response to respondents' motion for summary judgment as a cross-motion for summary judgment as well as a memorandum in opposition, [the defendant's] successful opposition to respondents' motion is insufficient to establish that it is entitled to summary judgment in its favor").

Here, it is proper for this Court to resolve both the DOJ's Motion for Summary Judgment and CoA Institute's Cross-Motion for Summary Judgment because none of the facts underlying either motion are in dispute and the Court may resolve the purely legal issues.

ARGUMENT

I. THE DOJ'S RE-PRODUCTION OF THE RECORD AT ISSUE CONCEDES ALL ISSUES RAISED IN THE COMPLAINT

A. The DOJ Voluntarily Abandoned Its Position in Response to CoA Institute's Complaint

As noted, the CoA Institute Complaint asserted three bases to support its claim that the DOJ had violated the FOIA in its treatment of the May 2014 email chain. The DOJ's subsequent re-production of the email chain and its Motion for Summary Judgment demonstrate that CoA Institute has prevailed on all of its FOIA claims.

When the DOJ first produced the email chain at issue in this litigation on March 25, 2016, it treated the email chain as one record but withheld large portions of the record as non-responsive. *See* Compl. Exs. 3–4. CoA Institute believed the DOJ treatment of the record to be improper and submitted a follow-up FOIA request on July 15, 2016 seeking the entirety of the record so as to prevent the DOJ from asserting that any portion of the record could be considered non-responsive. *See* Compl. Ex. 1 at 1.

Two weeks after CoA Institute filed its July 15, 2016 request, the United States Court of Appeals for the District of Columbia Circuit released its decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016) [hereinafter *AILA*]. That decision holds that FOIA "does not provide for . . . redacting nonexempt information within responsive records." *Id*. at 677. Instead, the FOIA "compels disclosure of the responsive record—*i.e.*, as a unit—except insofar as the agency may redact information falling within a statutory exemption. . . . FOIA calls for disclosure of a responsive record, not disclosure of responsive information within a record." *Id*.

CoA Institute brought this binding precedent to the DOJ's attention during a phone call clarifying the scope of the request and in an email memorializing that phone call. *See* Compl.

Ex. 6; Banerjee Decl. ¶ 13 (acknowledging receipt of email memorializing the phone call). However, when the DOJ produced the record to CoA Institute for the second time, it continued to apply redactions bearing the label "non-responsive" and actually expanded the redactions to withhold more information than the first production. *See* Compl. Ex. 7 at 7–12. It sought to justify its actions by subdividing what had originally been a single record into nine distinct records, eight of which, it alleged, were non-responsive. *Id.*

It was not until CoA Institute was forced to spend the time and money to bring this lawsuit that the DOJ abandoned its position. As noted, the DOJ's re-production of the email chain on January 18, 2017 no longer subdivides that single record into multiple records, *see* Valvo Decl. Ex. 1, and its Motion for Summary Judgment states that it is "not withholding any information based on responsiveness." Mot. for Summ. J. at 15. CoA Institute accordingly has prevailed on these first two bases of its claim.

The third component of CoA Institute's claim is that the DOJ was overbroad in its application of Exemptions 3 and 5 and failed to conduct a segregability analysis with respect to that portion of the production that it originally labelled "Record 7." Compl. ¶¶ 34–35. The DOJ's re-production of the email chain in conjunction with its Motion for Summary Judgment demonstrates that the DOJ has now conducted the requisite segregability analysis and removed the overbroad use of exemptions. *Compare* Compl. Ex. 7 at 9 (so-called "Record 7" withheld in full), *with* Valvo Decl. Ex. 1 at 3 (proper application of exemptions with non-exempt material released). CoA Institute accordingly has prevailed on this basis of its claim as well.

B. CoA Institute Does Not Challenge the Remaining Assertions of FOIA Exemptions in the Re-Produced Email Chain

The DOJ dedicates the majority of its Motion for Summary Judgment to defending against claims CoA Institute never raised. When the DOJ produced the email chain for the third

time on January 18, 2017 it finally conducted a proper segregability analysis and applied valid FOIA exemptions. CoA Institute does not now and has never challenged the application of Exemptions 3, 5, 6, and 7 as properly applied by the DOJ in its third try at producing the requested record.

CoA Institute's Complaint claimed that the DOJ improperly redacted information as non-responsive and that it was overbroad in its use of Exemptions 3 and 5 as to that portion of the email chain labelled "Record 7" in its second production on September 20, 2016. By re-producing the email chain on January 18, 2017 without any non-responsive redactions, with a narrower application of Exemptions 3 and 5, and with the new application of Exemptions 6 and 7, the DOJ effectively has conceded that the email chain as produced on September 20, 2016, which is the subject of the Complaint, was improper.

Accordingly, as the agency has conceded the issues presented in the Complaint, CoA Institute does not oppose the DOJ's Motion for Summary Judgment as to its application of exemptions and redactions in the January 18, 2017 production.

C. CoA Institute Intends to Move for Attorney Fees and Costs

A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Larsen v. U.S. Navy*, 525 F.3d 1, 3 (D.C. Cir. 2008) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). This may occur when the plaintiff has "obtained all the relief that [it has] sought." *Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984). However, a case is not over if it is "nearly moot." *True the Vote, Inc. v. Internal Revenue Serv.*, 831 F.3d 551, 561 (D.C. Cir. 2016).

Accordingly, even if this Court finds that the DOJ's voluntary cessation of its improper use of "non-responsive" redactions and segmentation of one record into multiple records has mooted CoA Institute's claim that the DOJ improperly withheld responsive records, and this

Court finds that no mootness exception applies (*see* Section II below), that does not resolve the issue of whether CoA Institute may be awarded fees and costs. *See Harvey v. Lynch*, 123 F. Supp. 3d 3, 8 (D.D.C. 2015) ("The conclusion that this Court lacks jurisdiction to hear Plaintiff's case, however, does not dispose of Plaintiff's request that he be paid his costs for bringing this action.").

CoA Institute has substantially prevailed in this action, as the DOJ has abandoned the three bases upon which CoA Institute sued. Therefore, upon completion of summary judgment proceedings, CoA Institute intends to move for attorney fees and costs.

II. COA INSTITUTE'S CLAIM IS NOT MOOT

"The mootness doctrine ensures compliance with Article III's case and controversy requirement by limiting federal courts to deciding actual, ongoing controversies. Accordingly, mootness must be assessed at all stages of the litigation to ensure a live controversy remains. A case is moot if [the court's] decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Aref v. Lynch*, 833 F.3d 242, 250 (D.C. Cir. 2016) (internal quotation marks and alterations omitted) (citing *Am. Bar Ass'n v. Fed. Trade Comm'n*, 636 F.3d 641, 645 (D.C. Cir. 2011), and *21st Century Telesis Joint Venture v. Fed. Commc'ns Comm'n*, 318 F.3d 192, 198 (D.C. Cir. 2003)).

Two exceptions to the mootness doctrine are relevant here. First, a court may retain jurisdiction where the mootness is created by the defendant's voluntary cessation of the challenged behavior. Second, a court may retain jurisdiction if the challenged behavior is capable of repetition yet evading review. Both of these exceptions apply in this case.

A. The DOJ's Voluntary Change in Position after CoA Institute Filed Its Complaint Demonstrates that this Case Is Not Moot

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Id.* (quoting *City of Mesquite*, 455 U.S. at 289) (alterations omitted). The Supreme Court has established a "stringent" standard for when a defendant may moot a claim through its voluntary conduct. *Id.* The party asserting mootness bears the "heavy burden" of establishing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). The Supreme Court has established that the policy behind this exception is to resolve the "dispute over the legality of the challenged practices[,] [which] . . . together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citations omitted).

Despite voluntary cessation, a case may still be moot if (1) "there is no reasonable expectation that the alleged violation will recur" and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (alterations and citations omitted). Although government actors receive more leeway on this standard because it is presumed they will act lawfully, *see, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. Secs. & Exchange Comm'n*, 858 F. Supp. 2d 51, 61–62 (D.D.C. 2012) (collecting cases) [hereinafter *CREW v. SEC*], that presumption has more force where there has been a "formally announced change[] to official government policy,"

Sossamon v. Lone Star State of Tex., 560 F.3d 316, 325 (5th Cir. 2009), and less force where there is "no certainty" of government forbearance or in fact an announced government intention to resume the challenged action. *City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 & n. 11 (1982).

In this case, the DOJ has failed to carry its "heavy burden" that the voluntary cessation exception does not apply. As an initial matter, the DOJ barely supports its assertion that mootness applies at all. *See* Mot. for Summ. J. at 14–15 (supplying a scant two paragraphs and citing no cases in support of its claim). The DOJ waited until after CoA Institute filed suit—in fact, until the very day its Motion for Summary Judgment was due—to reverse its position and concede that the entirety of the email chain, as CoA Institute had claimed from the beginning, was responsive to its FOIA request. Further, although the DOJ is no longer attempting to segment the email chain into multiple records as a basis for redacting information, Mot. for Summ J. at 15, it does not explicitly concede that the email chain is one record. Absent a court decision that the DOJ's use of "non-responsive" redactions and treatment of one record as many records is improper, the "dispute over the legality of the challenged practices" and the "public interest in having the legality of the practices settled" will remain unresolved. *W.T. Grant Co*., 345 U.S. at 632.

In the context of records-release cases, the D.C. Circuit has held that an agency cannot so easily evade judicial review of its behavior. *See Byrd v. Envtl. Prot. Agency*, 174 F.3d 239, 244 (D.C. Cir. 1999) (holding that despite an agency releasing records under the Federal Advisory Committee Act the case was not moot because absent a ruling, the agency was free to return to its prior position); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) ("[T]he release of the specific documents that prompted the [FOIA] suit" does not moot the case

if agency behavior "evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA[.]"). Here, the DOJ originally failed to abide by the terms of the FOIA, as interpreted by *AILA*, even though that case was brought to its attention at the administrative stage, and the agency changed its behavior only after CoA Institute brought suit. There is no indication in the record that the agency will not act in a similarly improper manner in the future.

This Court should not presume that the DOJ will refrain from returning to its old ways. District courts in this circuit have cited *Sossamon* for the proposition that "[w]ithout evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." *See, e.g.*, *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 36–37 (D.D.C. 2012); *CREW v. SEC*, 858 F. Supp. 2d at 51; *Nat'l Ass'n of Home Builders v. Salazar*, 827 F. Supp. 2d 1, 5 & n.5 (D.D.C. 2011) ("Our own Court of Appeals has not spoken directly to this issue."). Here, the DOJ has issued a change to government policy that, if implemented as written, will ensure the continuation of the same offending behavior challenged in this litigation.

One week before filing its Answer and Motion for Summary Judgment, the DOJ released new guidance that formally allows the DOJ to treat records in the same way that it did when it produced the email chain at issue in this case to CoA Institute on September 20, 2016. Valvo Decl. ¶¶ 10–11. In particular, the guidance states that "based on the subject of a particular FOIA request, an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a 'record' for purposes of the FOIA." DOJ Guidance at 2. It also advises that a "paragraph within an email or document could potentially constitute a distinct record, but only if the subject of the request is sufficiently specific to pertain only to that paragraph and the subject of the paragraph is sufficiently distinct from the surrounding

paragraphs to constitute a distinct record." *Id*. at 3. Finally, it states that, "[i]f the individual emails within a string of emails have been divided into separate 'records,' then each individual responsive email should be counted when calculating the number of 'records' processed or withheld." *Id*. at 3.

Although this guidance document was issued after the DOJ's administrative decision in this case and CoA Institute's Complaint, it was issued before the DOJ made the determination in this litigation to reverse course and remove the offending "non-responsive" redactions and notations that broke the email chain into multiple records. The guidance outlines that the DOJ's institutional position—and its advice to other agencies that follow its FOIA guidance—is that the exact behavior challenged in this case is acceptable. *See Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (A claim is not moot when the agency "has no intention of abandoning th[e] policy because it does not believe the policy violates FOIA."). The guidance's repeated invocation of emails and email chains speaks directly to the issues at bar and is evidence that the DOJ should not receive the presumption that a government actor will not return to the challenged behavior.

As this Court cannot be assured that the DOJ's voluntary cessation of the challenged behavior only in this case will prevent it from returning to its old ways once the case is over, and because the DOJ's official FOIA guidance indicates that it likely will return to its ways, CoA Institute's claims are not moot.

B. The DOJ's Actions Are Capable of Repetition yet Evading Review

A court should also deny a defendant's assertion of mootness if the injury is "capable of repetition yet evading judicial review." *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)). This exception has two conjunctive prongs. First, "the

challenged action must be too short to be fully litigated prior to cessation or expiration." *Id.* Second, "there must be a 'reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* (citation omitted). Both of these prongs are met in this case.

1. The DOJ's challenged behavior in this case is too short to be fully litigated because the agency is free, as it did here, to reverse its position after a complaint has been filed but before a court rules

The D.C. Circuit "has held that agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (citations omitted); *see also Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citing two-year rule in procurement context); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (twelve-month imprisonment "too short to be fully litigated").

In *McDonnell Douglas Corp. v. National Aeronautics & Space Administration*, a district court in this Circuit made the sweeping claim that the "'capable of repetition, yet evading review' doctrine does not apply to FOIA disclosures." 102 F. Supp. 2d 21, 23 (D.D.C. 2000). The *McDonnell Douglas* court relied on *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 839 (D.C. Cir. 1985). An examination of both *Gulf Oil* and *McDonnell Douglas*, however, reveals that those cases should be distinguished from the instant case.

Gulf Oil was a "reverse FOIA case" where Gulf Oil sued the Secretary of Labor to prevent the disclosure of information about its corporate headquarters. 778 F.2d at 835. The court found that Gulf Oil's right to litigate any disclosure of its records had been protected:

> The prolonged proceedings of this case are testimony that the first requirement under the "capable of repetition, yet evading review" exception is not met with regard to FOIA disclosures. [The Department of Labor] notified Gulf of [the FOIA] request for the 1973 plan, gave Gulf an opportunity to oppose the disclosure, and notified Gulf of the decision to disclose and agreed not to disclose the plan pending a judicial determination on the merits. When [the requester] withdrew its request *eleven years later*, the document still had not been disclosed.

> Gulf will undoubtedly be accorded a similar opportunity to litigate fully any future decision to disclose a document.

Id. at 839 (emphasis added).

McDonnell Douglas also was a "reverse FOIA case" and that court found that—like Gulf Oil—McDonnell Douglas had been provided a full opportunity to litigate any disclosure of its records. 102 F. Supp. 2d at 23 ("Although this case is moot, it is important to note that [McDonnell Douglas] 'will undoubtedly be accorded a similar opportunity to litigate fully any future decision to disclose a document.'") (quoting *Gulf Oil*, 778 F.2d at 839).

In this case, by contrast, CoA Institute has not been afforded an opportunity to fully litigate its claim. Instead, the DOJ has attempted to cut the case short by voluntarily ceasing its offending behavior without an admission of wrongdoing or judicial determination of the legality of its prior conduct. As discussed above and further below, this court can reasonably expect that CoA Institute will be subject to the same actions again from the DOJ, but when CoA Institute brings suit to challenge those actions, the DOJ can simply voluntarily withdraw the offending claims of "non-responsive" and the improper segmentation of records as it did here. Thus, the short duration of the DOJ's offending conduct precludes judicial review (*i.e.*, the DOJ will always be able to produce records in the administrative setting with offending redactions and segmentation, and then re-produce those records in litigation without the offending redactions and segmentation before the court can rule). *See Ctr. for the Study of Servs. v. Dep't of Health & Human Servs.*, 130 F. Supp. 3d 1, 8–9 (D.D.C. 2015) ("Given the time required for a FOIA case to fully ripen and the Government's statement that [it will continue its redaction practices] . . . the Court has little difficulty concluding that this action is not moot."); *cf. World Publ'g Co. v. Dep't of Justice*, No. 09-574, 2011 WL 1238383, at *1 n.2 (N.D. Okla. Mar. 28, 2011) (case not moot because "[d]ue to speedy trial laws, federal indictees awaiting trial do not generally

maintain such status long enough for a civil FOIA lawsuit to take shape"). This case, therefore, meets the first prong of the "capable of repetition, yet evading review" test.

2. CoA Institute is reasonably expected to be subject to the same treatment again because it is a frequent FOIA requester and litigator, and because the DOJ has not abandoned its policy

In addition to a claim being too short to fully litigate, to qualify for the "capable of repetition, yet evading review" mootness exception there "must be a 'reasonable expectation that the same complaining party will be subject to the same action again.'" *Honeywell*, 628 F.3d at 576 (alterations and citation omitted). The "same action" need not be identical in fact but may instead be the same *legal wrong* stemming from "particular agency policies, regulations, guidelines, or recurrent identical agency actions." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 324 (D.C. Cir. 2014) (citation omitted). The Supreme Court has provided that it examines "whether the controversy [is] *capable* of repetition and not . . . whether the claimant [has] demonstrated that a recurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 318 n. 6 (1988) (emphasis in original). A plaintiff can move beyond mere "conclusory assertions" and "creat[e] a reasonable expectation that the [defendant] will repeat its purportedly unauthorized actions" by showing either that the defendant has "a policy it ha[s] determined to continue . . . [or] a consistent pattern of behavior[.]" *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187–88 (1979) (citations omitted).

This case meets the applicable standard because CoA Institute is a frequent FOIA requester and litigator, has more than twenty FOIA requests currently pending at the DOJ, and the DOJ has not recanted the disputed legal position but instead has issued guidance reaffirming its position that the challenged behavior is acceptable. *See, e.g.*, *Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108 (D.C. Cir. 2015); *Cause of Action v. Internal Revenue Serv.*, 125 F.

Supp. 3d 145 (D.D.C. 2015); *Cause of Action v. Treasury Inspector Gen. for Tax Admin*., 70 F. Supp. 3d 45 (D.D.C. 2014).

CoA Institute regularly requests access under the FOIA to the records of federal agencies. Compl. ¶ 4. Other than the request at issue in this case, CoA Institute currently has twenty-one FOIA requests pending with the DOJ. Valvo Decl. ¶ 12. In addition to those requests, CoA Institute is currently in litigation with the DOJ over request numbers 10816 and 10829. *See CoA Inst. v. Internal Revenue Serv. & Dep't of Justice*, No. 15-cv-770 (D.D.C. filed May 26, 2015). That litigation has resulted in more than a dozen rolling productions and several hundreds of records, many of which were improperly redacted in the same manner as the original records underlying this case. Valvo Decl. ¶¶ 4–5; Compl. Exs. 2–4. In addition, many of the pending FOIA requests with the DOJ seek access to email communications, which the DOJ will have occasion to treat in the same manner it did here. Valvo Decl. ¶ 14. CoA Institute's exposure to the same treatment is magnified by the fact that, in this litigation, the DOJ has not acknowledged that its use of "non-responsive" redactions and its segmentation of one record into multiple records was inappropriate. Quite the opposite, the DOJ has issued guidance reaffirming the legal position it took at the administrative stage. Valvo Decl. ¶ 10–11; DOJ Guidance; *see also Ill. State Bd. of Elections*, 440 U.S. at 188 (A defendant with "a policy it ha[s] determined to continue" increases the "reasonable expectation" that a plaintiff will be injured again.).

In *Consumers Council of Missouri v. Department of Health & Human Services*, a district court acknowledged that it was plausible for a FOIA requester to meet the second prong of this exception to mootness, even though in "most cases in which courts have found FOIA claims moot by the voluntary production of documents, the 'capable of repetition yet evading review' exception could not apply because there was no reason that the plaintiff would again request

records from the same agency once all the information has been produced." No. 14-1682, 2015 WL 1868703, at *2 (E.D. Mo. Apr. 23, 2015). In that case, the court ultimately found the requester did not meet the test, but for reasons that are inapplicable here. First, the court found the agency had established processes to mitigate the requesters' concerns about delay. *Id*. at *3. Second, the court noted the agency changed its regulation to increase the proactive release of the information at issue. *Id*. The court concluded that "[i]n light of these prospects for change with respect to the release of information . . . , the Court agrees with [the Department of Health and Human Services ("HHS")] that at this point, Plaintiff has no basis to contend it will be subject to the same alleged injury." *Id*. The posture of this case shows that, unlike the HHS in *Consumers Council of Missouri*, the DOJ's refusal to install remedial measures or recant its previous position only increases the risk that CoA Institute will again be subject to the same offending behavior in future cases.

Given that the DOJ's voluntary cessation of the challenged behavior does not preclude it from repeating its offending behavior, the DOJ's announced policy that explicitly grants it a license to engage in the offending behavior again, and the fact that CoA Institute regularly submits FOIA requests to the DOJ, CoA Institute's injury is capable of repetition yet evading review. Accordingly, its claim against the DOJ for using "non-responsive" as a redaction tool and improperly segmenting one record into multiple records is not moot.

III. THE DOJ'S USE OF "NON-RESPONSIVE" AND SEGMENTATION OF ONE RECORD INTO MULTIPLE RECORDS IS IMPROPER

As the case is not moot, the Court should grant CoA Institute's Cross-Motion for Summary Judgment by finding that the DOJ violated the FOIA by redacting information as non-responsive and improperly segmenting one record into multiple records.

The FOIA provides requesters access to records, not information. *AILA*, 830 F.3d at 677. The FOIA allows access to "agency records,"[3] and there is a great deal of jurisprudence interpreting that term. *See, e.g.*, *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). This case presents the unresolved antecedent question of the definition of a "record." Following the D.C. Circuit's decision in *AILA*, this question is now closely tied to agency use of "non-responsive" as a basis for withholding specific information.

Before *AILA*, agencies—including the DOJ as exemplified in this case—took the position that they could redact material within a record on the basis that the subject matter of the redacted content was not responsive to the request.[4] The D.C. Circuit has now foreclosed that practice. *See AILA*, 830 F.3d at 677 ("The statute does not provide for withholding responsive but non-exempt records or for redacting nonexempt information within responsive records."). Instead, as demonstrated by the DOJ's behavior in this case and its new guidance, agencies believe they are empowered to treat individual sections or portions of records as actually separate and distinct individual records and then withhold those supposedly distinct records in their entirety as "non-responsive" to the request. Such behavior makes a mockery of *AILA*.

A. The DOJ's Definition of a Record Should Be Reviewed *De Novo*

Courts should review the definition of "record" that agencies apply during informal adjudications of FOIA requests *de novo* because Congress has not entrusted the administration of FOIA to any single agency.

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[3] Federal agencies maintain some types of records that are not agency records subject to the FOIA. *See, e.g.*, *Goland v. Cent. Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978) (agency may possess "congressional records" not subject to FOIA); *Bureau of Nat'l Affairs, Inc. v. Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (agency may possess "personal records" not subject to the FOIA). The distinction between an agency record and a non-agency record is not at issue in this case because the requested material concerns an email conversation involving DOJ employees (and thus is material created by the agency) and the record of that email conversation is under the DOJ's control.

[4] *See, e.g.*, Compl. Ex. 2 (redacting portions of a report on DOJ's practices on attorney transfers and details that did not relate to details to the White House, which was the subject of the FOIA request).

If a statutory term is ambiguous and an agency provides its interpretation of that statutory term in a proceeding that has the force of law, courts defer to the agency's interpretation so long as the interpretation is reasonable. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984). This doctrine has been recognized as applying in formal rulemakings, notice-and-comment rulemakings, and formal adjudications; however, as relevant to this case, informal adjudications have not been treated uniformly. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring) (noting that applying "*Chevron* deference [to informal adjudications] ha[s] produced so much confusion in the lower courts"); *id*. at n.* (collecting cases). If *Chevron* does not apply to an agency interpretation of an ambiguous statutory term, courts apply the less-deferential *Skidmore* test. *See Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944) (court considers agency approach so long as it has the "power to persuade").

Courts deny *Chevron* deference to agency interpretations of the FOIA because the statute applies across the government and is not organic to any single agency. Therefore, the "meaning of FOIA should be the same no matter which agency is asked to produce its records." *Tax Analysts v. Internal Revenue Serv*., 117 F.3d 607, 613 (D.C. Cir. 1997) [hereinafter *Tax Analysts v. IRS*]. As such, courts "owe no particular deference to an agency's interpretation of FOIA." *Cause of Action,* 799 F.3d at 1115 (citation and alterations omitted); *see also Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 307 (D.C. Cir. 2001) ("Indeed, it is precisely because FOIA's terms apply government-wide that we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*[.]").

Courts have refused to provide deference to agency interpretations of other statutory terms in FOIA. *See Cause of Action*, 799 F.3d at 1115 (no deference to agency interpretation of

fee provisions); *Al-Fayed*, 254 F.3d at 307 (no deference to agency interpretation of "compelling need"); *Reporters Comm. for Freedom of Press v. Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (no deference to agency interpretation of exemptions) *rev'd on other grounds*, 489 U.S. 749 (1989). This rejection of deference to *interpretations* of statutory terms is contrasted with the deference the FOIA demands and courts have recognized for the *application* of exemptions. *See* 5 U.S.C. § 552(a)(4)(B) (affording "substantial weight" to agency affidavits); *Campbell v. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998) ("Because the FBI specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.").

The definition of "record" is a statutory term and agency interpretations of that term accordingly should receive no deference so that the "meaning of FOIA [will] be the same no matter which agency is asked to produce its records." *Tax Analysts v. IRS*, 117 F.3d at 613.

B. The Segmentation of a Single Record into Nine Records Was Improper

An email chain is one record. This conclusion is mandated by both a close reading of the statute and because the person who creates the final email in a chain has control over the contents of the entire chain in the record that he or she is creating. To find otherwise is to invite the type of abuse the DOJ demonstrated in this case in its second production of the email chain. *See* Compl. Ex. 7 at 7–12 (DOJ claiming email headers are separate records than the body of the email).

Agencies are required to process requests for agency records in the following sequence. "[F]irst, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records." *AILA*, 830 F.3d at 677. The *AILA* court recognized that this left open the threshold question of what constitutes a record, but chose not to resolve the question. *Id*. at 678–79. Nevertheless, it found "it difficult to believe

that any reasonable understanding of a 'record' would permit withholding an individual sentence within a paragraph within an email on the ground that the sentence alone could be conceived of as a distinct, nonresponsive 'record.'" *Id*. at 679. This caution by the *AILA* court must be taken into account, as any approach that would allow the piecemeal segmentation of a record into multiple sub-units would open the door to abuse, as shown by the DOJ's behavior in this case.

1. The Definition of "Record" under FOIA

The FOIA is codified with the Administrative Procedure Act ("APA"). The APA definitions section does not define the term "record." *See* 5 U.S.C. § 551. The FOIA itself, however, defines a "record" as, *inter alia*, "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format[.]" *Id*. § 552(f)(2)(A).[5] The FOIA's definitions in Section 552 provide further clarity on and are more specific than the APA's definitions in Section 551. *Compare id*. § 551 ("For the propose of this subchapter"), *with id*. § 552(f) ("For the purposes of this section"); *compare also id*. § 551(1) (defining agency), *with id*. § 552(f)(1) (beginning with and building upon the APA definition of agency).

The *AILA* court appears to have missed this distinction. *See* 830 F.3d at 678 ("Although FOIA includes a definitions section, *id*. § 551, that section provides no definition of the term 'record.' Elsewhere, the statute describes the term 'record' as 'includ[ing] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format,' *id*. § 552(f)[.]") (alteration in original). The *AILA* court found that the statutory definition "provides little help in understanding what is a 'record' in the first place" and

[5] The definition also includes "any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C. § 552(f)(2)(B).

then turned to the Privacy Act, Presidential Records Act, and Federal Records Act in search of the term's treatment in analogous statutes. *Id*.

This Court should conduct its analysis within the context of the FOIA's text because that text contains two clauses that are sufficient to establish a definition of the term and to discern congressional intent. *See Lamie v. U.S. Tr*., 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text[.]").

The first clause of the definition—"any information that would be an agency record subject to the requirements of this section"—describes the type of material that qualifies as a record. This clause imports the Supreme Court's decision in *Tax Analysts*, which requires that an agency either (1) "create or obtain the requested materials as a prerequisite" to it being subject to the FOIA, and (2) "be in control of the requested materials at the time the FOIA request is made." 492 U.S. at 144–45.[6] The second clause of the definition—"when maintained by an agency in any format, including an electronic format"—describes the status of that material in the agency's hands just before the requester submits a request.[7]

As a first pass, therefore, a record under FOIA is material maintained by the agency in whatever format the agency maintains that material.

This understanding entails that, contrary to the DOJ guidance, records exist objectively—they are not epiphenomena of the intent of the requester and the interpretation of that intent by the agency official conducting the search. Notably, a requester does not have a right to ask an agency to create or manipulate a record in response to a FOIA request because only records that

[6] There is no dispute in this case that the email chain in question is "information that would be an agency record subject to the requirements of this section."

[7] *See N. Y. Times Co. v. Nat'l Aeronautics & Space Admin*., 920 F.2d 1002, 1005 (D.C. Cir. 1990) (audio tapes are a "record" because "FOIA makes no distinction between information in lexical and that in non-lexical form; all information is equally covered by the general norm of disclosure, and equally subject to the same specific exemptions therefrom.").

exist in fact must be produced. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) (FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained."); *Goland*, 607 F.2d at 353 (An "agency is not required to reorganize its files in response to a plaintiff's request[.]") (quotation marks, alterations, and citation omitted). *But see Schladetsch v. Dep't of Housing & Urban Dev.*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because HUD has conceded that it possesses in its databases the discrete pieces of information which Mr. Schladetsch seeks, extracting and compiling that data does not amount to the creation of a new record."). As a corollary, therefore, the agency should be bound to process the material responsive to a request in the form and format that the agency currently maintains that material; it should not be allowed artificially to divide an existing record into multiple records whenever it wishes to withhold information it does not want to produce.

The current definition of "record" in 5 U.S.C. §552(f)(2) was added to the FOIA by the Electronic Freedom of Information Act Amendments of 1996. Pub. L. 104-123, § 3, 110 Stat. 3048, 3049. That definition was added to ensure that electronic records, in addition to paper documents and other tangible objects, were covered. *See* H.R. Rep. 104-795, 18 (1996) ("Records which are subject to the FOIA shall be made available under the FOIA when the records are maintained in electronic format. This clarifies existing practice by making the statute explicit on this point."); *id*. at 11 ("FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitutes no impediment to public accessibility."); S. Rep. 104-272, 27 (1996) (FOIA "requires that Federal agencies provide records to requesters in *any form or format in which the agency maintains those records*[.]")

(emphasis added). Thus, it was Congress's intent to provide access to materials in the form and format the agency currently maintains them.

In light of the above, a complete and proper definition of a "record" under the FOIA is (1) any material containing information, (2) created or obtained by an agency, (3) within an agency's control when a request is submitted, and (4) in its full native form and format as maintained by an agency at the time of a request, "*i.e.*, as a unit." *AILA*, 830 F.3d at 677.

2. The DOJ's Content and Subject Matter Based Definition of a Record Is Untenable

The DOJ's approach to defining a record is that the "nature of a FOIA 'record' is defined by both the content of a document *and* the subject of the request." DOJ Guidance at 2 (emphasis in original). The DOJ advises agencies to look to the Privacy Act's definition of a record because it:

> allows for a more fine-tuned, content-based approach to the decision, which applies irrespective of the physical attributes of a document. Thus, a "record" can potentially constitute an entire document, a single page of a multipage document, or an individual paragraph of a document. Moreover, based on the subject of a particular FOIA request, an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a "record" for purposes of the FOIA.

Id.

As an initial matter, this approach is completely divorced from and makes no attempt to reconcile with the statutory text. An examination of the example in the DOJ's guidance exposes the flaw in its position. The guidance states:

> For example, if a document consists of a list of summaries of complaints against immigration judges organized by the name of each judge, and the subject of the FOIA request is "complaints against all immigration judges" then the entire document is the "record" for purposes of that FOIA request because the entire document is a "collection or grouping of information" on the subject of the request. Conversely, if the FOIA request specifically concerns "complaints against Judge Smith," then only the complaint summaries concerning Judge Smith

> would constitute the "record" for purposes of that FOIA request, as only those portions would be the "collection or grouping of information" on Judge Smith.

Id. at 2–3. This approach violates the first principle of *AILA*: FOIA provides access to records and exemptions are applied only to information within those records. 830 F.3d at 677. A proper formulation of the DOJ's example would be as follows. If there is a document that contains a list of summaries of complaints, then that entire document, as a unit, is a record because that is the form and format of that information that the agency maintains. Thus, if a requester seeks access to records of complaints against all immigration judges, then the entire record is responsive and must be produced, subject to any applicable exemptions. If, however, a requester seeks access to complaints against Judge Smith, then a search for records responsive to that request would return the same document—and that document must be produced "as a unit," also subject to any applicable exemptions. *AILA*, 830 F.3d at 677.

By contrast, the DOJ guidance provides that it is the process of interpreting the scope of the request and the process of searching that creates the "record" for each case. It states that "there are a range of ways to define what is a 'record,' and that it is the very process of searching for what has been requested by each requester that forms the basis for the determination." DOJ Guidance at 2. In addition to violating *AILA*, the DOJ position creates incongruities with other areas of FOIA law.

First, it conflicts with the rule that the "meaning of FOIA should be the same no matter which agency is asked to produce its records." *Tax Analysts v. IRS*, 117 F.3d at 613. This rule would be violated because, for example, one agency may treat its email chains as single records, whereas another agency may wish to segment email chains into multiple records on a case-by-case basis. Even the same email chain within a single agency may be treated differently, depending upon the nature of the request.

Second, the DOJ guidance produces incoherence with the rule that requesters may only submit requests for records that already exist at the time of their request. *See Judicial Watch, Inc. v. Dep't of Commerce*, 583 F.3d 871, 874 (D.C. Cir. 2009) ("FOIA . . . applies only to existing records[.]") (citation omitted); H.R. Rep. 104-795, 6 (congressional report accompanying 1996 amendments stating FOIA provides access to "existing records of Federal departments and agencies"). If, however, a "record" does not exist until the agency defines it during its search in response to a request, how can that record also be said to exist before the request is submitted?[8] The DOJ might respond that the item that needs to pre-exist a request is a document and not the "record," as it wishes to define it. *See* DOJ Guidance (using term "document" thirty-two times). But that substitution of terms offends statutory interpretation. The term "document" only appears in FOIA six times, all in reference to the fees agencies may charge for document handling. The term "record" appears nearly one-hundred times and in all of the operative subsections discussing search and disclosure. *See, e.g.*, 5 U.S.C. § 552(a)(2)(D) (requiring proactive disclosure of "copies of records"); *id* § 552(a)(3)(A) (agencies must disclose upon "any request for records"); *id.* § 552(a)(3)(A) (requesters must "reasonably describe[] such records"); *id.* § 552(a)(3)(D) (agencies must search "agency records for the purpose of locating those records which are responsive to a request"). In any event, it is records to which a FOIA requester has a right, not documents. *Id.* § 552(a)(3)(A) ("[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.").

[8] *See* Aristotle, Metaphysics, Book IV, pt. 3 (350 BC), *available at* http://bit.ly/2kEdTpp ("[T]he most certain of all principles" is that "it is impossible for anyone to believe the same thing to be and not to be" because "it is impossible that contrary attributes should belong at the same time to the same subject[.]").

The DOJ's position also creates a conflict with the FOIA's judicial-review provision. The FOIA provides that venue for a FOIA lawsuit is proper, *inter alia*, in the district "in which the agency records are situated[.]" *Id.* § 552(a)(4)(B). In a case where the requester is seeking to bring suit based on delay and before the agency has begun or completed its search, the DOJ's position, under its new guidance, logically must be that the agency has not yet defined the "records" in that case. If that position is correct, the records are not yet "situated" anywhere and the venue option is nullified. Elementary cannons of statutory construction prohibit such a conclusion. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Courts should construe meaning "to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citation omitted); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (A court should "interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted); *see generally* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174–83 (1st ed. 2012) (discussing the surplusage and harmonious-reading cannons).

The more natural and harmonious reading of the FOIA is that records must already exist *in fact* within an agency's control before a request is submitted, wholly apart from the subject matter of the request and the agency's search. This would harmonize all of the subsections listed above. The agency would be able to proactively disclose a record, a requester would be able to seek access to it and could reasonably describe it, and venue would be proper wherever the record was situated.

3. An Email Chain Is One Record

Under the FOIA, an email chain is one record because the final email in that chain quotes and incorporates previous emails into a single whole, *i.e.*, a unit.

The incorporation of previously distinct records into a new, larger record is common practice and does not counsel in favor of allowing an agency to later segment the whole record whenever it wishes to avoid disclosure of the various parts of that record. For example, an agency may write a report and append to that report various exhibits, such as a letter or a memorandum. The report as a whole (*i.e.*, with its exhibits) constitutes a record. Although the various exhibits, if created or received by the agency, are standalone records in their original form, once they are appended to the report they become a portion of that larger record. In that situation, it would be inappropriate (unless a recognized FOIA exemption applied) for an agency to produce the report and withhold the exhibits (or some of the exhibits) simply because the exhibits contained a different subject matter than the report proper or also existed as standalone records. In effect, the DOJ concedes this much. *See* DOJ Guidance at 1 ("[T]he requester might seek a specific report. The agency will search for the requested report and when it locates it, the entirety of the report will be the 'record' that is processed.").

The same result should apply to an email chain. An email chain is created whenever a user replies to an email and the email program automatically appends to that email the original or previous email(s) in the discussion. The most recent email in the chain is akin to a report with multiple exhibits attached to it, and, like a complete copy of a report, the email chain (unless deleted) is stored on the computer as a unit. If it is later viewed or printed, the entirety of the email chain, not just one element in the chain, will be visible.

Another consideration counsels in favor of this understanding. When replying to an email, it is possible to alter or remove content in the previous emails. The fact that it is possible to do so means that the creator of the final email in the chain has control over the final content of the record, and that content may differ from the individual emails in the chain as originally sent.

A review of the email chain at issue in this case illustrates these points. *See* Valvo Decl. Ex. 1. When Ms. Wolfinger created an email on May 22, 2014 at 4:17 PM, that email constituted a single record containing (1) Ms. Wolfinger's email response to an email written by Ms. Bringer, (2) Ms. Bringer's email message from 4:15 PM,[9] and (3) six additional emails covering five additional pages. When Ms. Wolfinger sent her final reply email to Ms. Bringer she created an email chain that quoted and incorporated all of the previous emails into one new single record. That email chain, as a unit, was created by the agency, was maintained as a unit in the agency's record-keeping system, and was in the agency's control when CoA Institute requested access to it. It constituted a single record and was produced as such in the DOJ's original production on March 25, 2016.

The DOJ's subsequent treatment of the email chain at issue demonstrates the danger of the DOJ's current guidance. In response to CoA Institute's original Request #10874, the DOJ produced the email chain as a single record with multiple redactions bearing the mark "non-responsive." *See* Compl. ¶ 7; Compl. Exs. 2–3. Once it was faced with *AILA*'s direction that the use of "non-responsive" was improper, the DOJ attempted an alternative method to withhold information by claiming that the email chain was multiple records. That duplicity reveals that the DOJ's true position is that an email chain is one record, but that it will manipulate that understanding if it is a convenient way to withhold information. The DOJ would have this Court believe that a single email chain is one record or nine records depending upon the result it wishes to reach. That position cannot stand.

[9] Valvo Decl. Ex. 1 at 1 (note "-----Original Message-----").

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, this Court should (1) grant DOJ's Motion for Summary Judgment as to the application of exemptions in the January 18, 2017 production; (2) find that CoA Institute' claims regarding the use of "non-responsive" redactions and segmentation of one record into multiple records is not moot; (3) grant CoA Institute's Cross-Motion for Summary Judgment finding DOJ's use of "non-responsive" redactions and segmentation of one record into multiple records is improper; and (4) order briefing on attorney fees and costs.

Date: February 8, 2017

Respectfully submitted,

/s/ R. James Valvo, III

R. James Valvo, III
D.C. Bar No. 1017390
Lee A. Steven
D.C. Bar. No. 468543

CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, DC 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
james.valvo@causeofaction.org
lee.steven@causeofaction.org

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that, on February 8, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the District of Columbia by using the ECF system, thereby serving all persons required to be served.

Date: February 8, 2017

/s/ R. James Valvo, III
R. James Valvo, III