



March 23, 2017

VIA E-MAIL

Mr. Gary M. Stern
General Counsel and Chief FOIA Officer
National Archives and Records Administration
8601 Adelphi Road, Rm. 3110
College Park, MD 20740-6001
E-mail: FOIA@NARA.gov

Re: Freedom of Information Act Request

Dear Mr. Stern:

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 February 1, 2017, Laurence Brewer, Chief Records Officer for the U.S. Government, wrote Consumer Financial Protection Bureau (“CFPB”) Director Richard Cordray concerning the possible alienation of agency records.² Citing media reports, Mr. Brewer requested information and a report from CFPB “within 30 calendar days” concerning “the specific action CFPB has taken to investigate these allegations, and the steps CFPB will take to mitigate future risk.”³ Mr. Brewer also asked for a report, pursuant to 36 C.F.R. 1230.14, if “CFPB determines that an unauthorized removal [of records] has occurred.”⁴

¹ See CAUSE OF ACTION, *About*, www.causeofaction.org/about/ (last accessed Oct. 12, 2016).

² Letter from Laurence Brewer, Chief Records Officer, NARA, to Richard Cordray, Director, CFPB (Feb. 1, 2017) (attached as Ex. 1).

³ *Id.* (citing 36 C.F.R. 1230.16(b) for authority in asking for the report).

⁴ *Id.*

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute requests access to the following records for the time period February 1, 2017 to the present:⁵

1. All communications and reports received from CFPB in response to the February 1, 2017 letter from Mr. Brewer.
2. All other communications sent to or received from CFPB.
3. All internal agency records—including but not limited to email, memoranda, letters, text messages, and reports—regarding the requests in Mr. Brewer’s February 1, 2017 letter.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that NARA shall furnish the 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.”⁶ Disclosure is in the public interest as it will contribute significantly to public understanding of CFPB’s recordkeeping practices and NARA’s oversight of the same. Mr. Brewer’s letter cited a recent media report that raised the possibility that CFPB may not be properly preserving agency records created on mobile device(s).⁷ Furthermore, if CFPB failed to respond to Mr. Brewer’s letter or otherwise to fulfill its legal duties, this must be brought to the public’s attention.

CoA Institute has 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

⁵ For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677-78 (D.C. Cir. 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”).

⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 36 C.F.R. § 1250.56; *see 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).

⁷ *See* Justin Caruso, *Exclusive: CFPB Head Cordray Used Private Device, Didn’t Create Records of Messages*, DAILY CALLER (Jan. 23, 2017), <http://bit.ly/2k0eGB6> (“But the CFPB told our source, in response to a FOIA request on Aug. 31, 2016, that it had no official records for Cordray’s texts going back to Jan. 1, 2015[.]”).

responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public through CoA Institute's regularly published online newsletter, memoranda, reports, or press releases.⁸ 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 the FOIA.⁹ 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.¹⁰ 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.¹¹ 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.¹² These distinct works are distributed to the public through various media, including CoA Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via email.

⁸ 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).

⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(I); 22 C.F.R. § 171.14(b)(5)(ii)(C).

¹⁰ See *Cause of Action*, 799 F.3d at 1121.

¹¹ CoA Institute notes that the NARA definition of “representative of the news media” (36 C.F.R. § 1250.3(q)) is in conflict with the statutory definition and controlling case law. NARA has improperly retain the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *Id.* at 1225 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [T]here is not 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.

¹² See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

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.”¹³ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute as a news media organization in connection with its FOIA requests.¹⁴

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.¹⁵

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

¹³ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁴ 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).

¹⁵ 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).

records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions, please contact me by email at eric.bolinder@causeofaction.org or by telephone at (202) 470-2396. Thank you for your attention to this matter.



ERIC R. BOLINDER
COUNSEL