

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

May 18, 2017

VIA CERTIFIED MAIL

U.S. Department of Justice
Office of Information Policy
ATTN: Laurie Day, Chief, Initial Request Staff
1425 New York Avenue, N.W., Ste. 11050
Washington, D.C. 20530-0001

Re: Freedom of Information Act Request

Dear Ms. Day:

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 investigative and legal tools to educate the public about the importance of government transparency and accountability.

According to recent reports, Representative Jeb Hensarling, Chairman of the United States House of Representatives Committee on Financial Services, sent a letter to various agencies under his Committee’s jurisdiction that directed them to treat all records exchanged with the Committee as “congressional records” not subject to the FOIA.² Specifically, Chairman Hensarling claimed that any communications with an agency, and any “documents created or compiled [by an agency] . . . in connection with any responses” to a congressional inquiry, could not qualify as “agency records,” regardless of whether they included a “legend” indicating how they could be used.³ Chairman Hensarling also argued that all such records would be “subject to the absolute protections of the Speech or Debate Clause of the Constitution.”⁴

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records:

1. All communications between or among the Department of Justice’s (“DOJ”) (i) Office of Information Policy or (ii) Office of Legislative Affairs, and any of the following agencies concerning or relating to Representative Jeb Hensarling’s directive to treat all records exchanged with the Committee on Financial Services as “congressional records” for purposes of the FOIA:
 - a. Department of the Treasury;

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/ (last accessed May 18, 2017).

² Mary Ann Georgantopoulos, *These Federal Agencies Agreed To Conceal Some Of Their Communications From The Public*, BUZZFEED NEWS (May 8, 2017), <http://bzfd.it/2rihpcY>; Mary Ann Georgantopoulos & Daniel Wagner, *A House Committee Doesn’t Want You To See Its Correspondence With Government Officials*, BUZZFEED NEWS (May 4, 2017), <http://bzfd.it/2ruLXFO>.

³ See, e.g., Letter from Jeb Hensarling, Chairman, U.S. H.R. Comm. on Fin. Servs., to Steven Mnuchin, Sec’y, Dep’t of the Treasury (Apr. 3, 2017) (attached as Exhibit 1).

⁴ *Id.*

- b. Department of Housing and Urban Development;
- c. Board of Governors of the Federal Reserve;
- d. Securities and Exchange Commission;
- e. Consumer Financial Protection Bureau;
- f. National Credit Union Administration;
- g. Office of the Comptroller of the Currency;
- h. Federal Deposit Insurance Corporation;
- i. Export-Import Bank of the United States;
- j. Federal Emergency Management Agency
- k. Financial Stability Oversight Council;
- l. Federal Housing Finance Agency.

The time period for this item of the request is March 10, 2017 to the present.

2. All communications between or among the DOJ's (i) Office of Information Policy or (ii) Office of Legislative Affairs, and any of the following entities or individuals concerning or relating to the treatment under the FOIA of records exchanged between Executive Branch agencies and Congress (*i.e.*, congressional committees, Members, and/or congressional staff):
 - a. White House Office, including the Office of the White House Counsel;
 - b. United States House of Representatives Office of General Counsel;
 - c. United States House of Representatives Committee on Ways and Means;
 - d. United States House of Representatives Committee on Financial Services;
 - e. Representative Jeb Hensarling, or any member of Representative Hensarling's staff;
 - f. Representative Maxine Waters, or any member of Representative Waters's staff.

The time period for this item of the request is January 20, 2017 to the present.⁵

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

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA and relevant regulations provide that the DOJ 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.”⁶ In this case, the requested records would shed light on the “operations or activities of the government,” namely, the DOJ’s communications with Congress and other agencies concerning the treatment of certain types of records under the FOIA.

Disclosure is likely to “contribute significantly” to public understanding of these matters because, to date, the records that CoA Institute seeks have not been made publicly available. CoA Institute intends to educate the public about the DOJ’s involvement with Chairman Hensarling’s controversial FOIA directive, and the DOJ’s efforts, if any, to advise other agencies as to how they should respond to that directive. The definition of an “agency record,” particularly vis-à-vis records concerning Congress, is a pressing issue for the requester community.⁷ Significant media coverage of this issue demonstrates that the requested records likely would contribute to public understanding of the “congressional records” determination and to the ongoing debate over the good government and transparency implications of Chairman Hensarling’s directive.⁸

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 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 a regularly published online newsletter, memoranda, reports, or press releases.⁹ CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and, accordingly, has no commercial interest in making this request.

Request To Be Classified as a Representative of the News Media

For fee purposes, CoA Institute qualifies as a “representative of the news media.”¹⁰ As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.¹¹ CoA Institute satisfies this test because it gathers information of

“non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to react 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); 28 C.F.R. § 16.10(k); 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 *Cause of Action Institute Signs Coalition Letter Opposing Congressional Interference with the FOIA* (May 10, 2017), available at <http://coainst.org/2qVs7qc>; see also Mary Ann Georgantopoulos, *Government Watchdog Groups Say Congressman’s FOIA Letters Set “A Troubling Precedent,”* BUZZFEED NEWS (May 9, 2017), <http://bzfd.it/2qA5uUY>.

⁸ See *supra* note 2, see also Ryan Mulvey, *The next front in the FOIA War: Congress blocking disclosure of its dealings with the Executive Branch*, THE HILL (May 8, 2017), <http://coainst.org/2qYBhyW>; GOP lawmaker challenged for shielding records: ‘What is he trying to hide?’, THE GUARDIAN (May 6, 2017), <http://bit.ly/2pOK3IU>;

⁹ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(b)(6).

¹¹ See *Cause of Action*, 799 F.3d at 1121.

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. 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 product, 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 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.”¹³ In light of the foregoing, numerous federal agencies, including DOJ components, have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.¹⁴

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/2apTwpP>; 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>.

¹³ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁴ See, e.g., FOIA Request 2016-11-008, Dep't of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep't of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Management (Oct. 21, 2016); FOIA Request 092320167031, Centers for Medicare & Medicaid Services (Oct. 17, 2016); FOIA Request 17-00054-F, Dep't of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-09-101, Dep't of the Treasury (Sept. 21, 2016); FOIA Request DOC-OIG-2016-001732, Dept. of Commerce (Sept. 15, 2016); FOIA Request OS-2016-00435, Dep't of the Interior (Aug. 31, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dept. of State (Aug. 11, 2016); FOIA Request 2016-08-070, Dep't of the Treasury (Aug. 10, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep't of the Interior (Aug. 10, 2016); 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. Comm'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 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).

Record Preservation Requirement

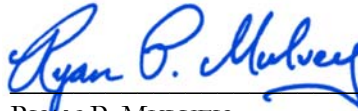
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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 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) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
COUNSEL

¹⁵ See 28 C.F.R. § 16.9 (“Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.”); 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).

EXHIBIT

1

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

April 3, 2017

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

Dear Secretary Mnuchin:

Re: Committee Intent to Control Congressional Records

I write on behalf of the Committee on Financial Services of the U.S. House of Representatives ("Committee") to inform you and the Department of the Treasury ("Agency") of the Committee's practices and procedures during the 115th Congress.

As you may be aware, the Committee has legislative and oversight jurisdiction over the Agency, pursuant to U.S. House of Representatives Rule X.1(h). Accordingly, the Committee's Members and staff may communicate with you and your Agency in connection with various legislative, oversight, and investigative matters. Because of the often sensitive and confidential nature of such communications, and in order to ensure the unfettered flow of information necessary to assist the Committee in performing its important legislative and oversight functions, the Committee intends to retain control of all such communications, and will be entrusting them to your agency only for use in handling those matters. Likewise, any documents created or compiled by your agency in connection with any responses to such Committee communications, including but not limited to any replies to the Committee, are also records of the Committee and remain subject to the Committee's control.

All such documents and communications constitute congressional records, not "agency records," for purposes of the Freedom of Information Act, and remain subject to congressional control even when in the physical possession of the Agency. As such, they should be segregated from agency records, and access to them should be limited to Agency personnel who need such access for purposes of providing information or assistance to the Committee. Additionally, such congressional records are subject to the absolute protections of the Speech or Debate Clause of the Constitution, U.S. Const. art. I, § 6, cl. 1.

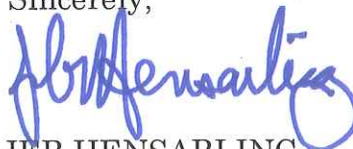
The Hon. Steven Mnuchin
April 3, 2017
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Accordingly, the Committee expects that the Agency will decline to produce any such congressional records in response to a request under the Freedom of Information Act or any other provision of law or agreement, on the grounds that such documents (i) are not the Agency's documents to produce, and (ii) are constitutionally privileged, in addition to any other grounds the Agency may assert.

It is the Committee's policy to include a legend on its legislative, oversight, and investigative correspondence to the Agency reflecting its intent to retain control of all such communications and responsive documents. The legend is included as a matter of best practice, but accidental failure to include the legend on a particular legislative, oversight, or investigative communication is immaterial, because the Committee intends to retain control over all such communications and any documents created or compiled in response thereto.

To ensure that the Agency and the Committee efficiently communicate in the future regarding the maintenance, confidentiality, and disposition of the Committee's congressional records, by no later than May 1, 2017, please respond to the Committee in writing to confirm that your Agency will decline to produce any congressional records in response to a request under the Freedom of Information Act or any other provision of law or agreement, that your Agency will discuss said request with the Committee, that your Agency has policies and procedures in place to address this issue, and that these policies and procedures have been shared with appropriate Agency personnel. If you have any questions regarding this request, please have your staff contact Brett Sisto of the Committee staff at (202) 225-7502. We look forward to working with them in the future.

Sincerely,



JEB HENSARLING
Chairman

cc: The Honorable Maxine Waters, Ranking Member
The Honorable Richard Berner, Director, Office of Financial Research
The Honorable Michael T. McRaith, Director, Federal Insurance Office