



October 31, 2016

VIA CERTIFIED MAIL

Mr. Mark Graff
FOIA Officer
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear Mr. Graff:

We 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. To that end, we are examining the Administration’s designations of new national monuments and expansion of existing monuments under the Antiquities Act of 1906, 54 U.S.C. § 320301 (“Antiquities Act” or the “Act”). In addition, we are looking into current and potential proposals for the President to exercise his authority under that Act. The Administration’s broad and frequent use of the Antiquities Act raises questions about the lack of transparency and consultation with local stakeholders leading up to the President’s designation of national monuments.² As relevant here, we are seeking to better understand the process leading to the President’s issuance of Proclamation 9496 of September 15, 2016, 81 Fed. Reg. 65,161 (Sept. 21, 2016), which established the Northeast Canyons and Seamounts Marine National Monument.³

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

² President Obama has used the Antiquities Act to establish more new national monuments than any other president. See Douglas Brinkley, Op-Ed., *Obama the Monument Maker*, N.Y. TIMES, Aug. 27, 2016, available at <http://www.nytimes.com/2016/08/28/opinion/sunday/obama-the-monument-maker.html>.

³ The national monument is comprised of two separate units, the “Canyons Unit” covering approximately 941 square miles, and the “Seamounts Unit” covering 3,972 square miles. Proclamation No. 9496, 81 Fed. Reg. 65, 161 (Sept. 21, 2016).

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period of January 1, 2012, to the present:⁴

1. All records or communications (including emails from governmental and nongovernmental accounts, text messages, and emails) referring or relating to use of the Antiquities Act to create a national monument in the Atlantic Ocean.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁵ In this case, given congressional and public concerns that the Antiquities Act process lacks transparency and a meaningful opportunity for public participation, as well as related concerns about collusion between favored third-party interest groups and Administration officials, there is significant public interest in educating the public at large about the Administration’s use of the Antiquities Act of 1906. The broad public interest in better understanding the Administration’s Antiquities Act designation process is underscored by the extensive media coverage its Presidential Proclamations have received,⁶ as well as numerous congressional hearings relating to the Administration’s expansive interpretation and aggressive use of the Act.⁷

⁴ 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*, No. 15-5201, 2016 WL 4056405, at *7-9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

⁵ 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

⁶ *See, e.g.,* Cynthia Barnett, *Obama Creates Connecticut-Size Ocean park, First in Atlantic*, NAT’L GEOGRAPHIC, Sept. 15, 2016, available at <http://news.nationalgeographic.com/2016/09/obama-creates-a-monument-bigger-than-connecticut-in-the-atlantic/>; Richard Perez-Pena, *Obama Designates National Monument in Maine, to Dismay of Some*, N.Y. TIMES, Aug. 24, 2016, http://www.nytimes.com/2016/08/25/us/obama-maine-katahdin-woods-and-waters.html?_r=0; THE CONSERVATION, *The Antiquities Act and America’s National Parks*, U.S. NEWS, Aug. 19, 2016, available at <http://www.usnews.com/news/articles/2016-08-19/the-antiquities-act-and-americas-national-parks>; Donald J. Kochan, *Midnight Monuments*, THE HILL, Oct. 3, 2016, available at <http://64.147.104.30/blogs/congress-blog/energy-environment/298916-midnight-monuments>.

⁷ *See, e.g., Oversight Hearing, supra* note 10; *Field Hearing on Elevating Local Voices and Promoting Transparency for a Potential Monument Designation in Maine Before the H. Comm. on Natural Resources* 114th Cong. (2016), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=400497>; *see also Legislative Hearing on H.R. 5780, “Utah Public Lands Initiative Act” Before the Subcomm. On Federal Lands of the H. Comm. on Natural Resources*, 114th Cong. (2016), available at

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through the Institute's regularly published online newsletter, memoranda, reports, or press releases.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 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

<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=401106>; *Legislative Hearing on H.R. 302, H.R. 758, H.R. 817, H.R. 845, H.R. 846 and H.R. 2147 Before the Subcomm. on Natural Parks, Forest and Public Lands of the H. Comm. on Natural Resources*, 112th Cong. (2011), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=258136>.

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)(II); see also 16 C.F.R. § 4.11(b)(6).

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

¹¹ CoA Institute notes that the agency's definition of "representative of the news media" (16 C.F.R. § 4.11(b)(6)) is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated "organized and operated" standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. See *Cause of Action*, 799 F.3d at 1125 ("Congress . . . omitted the 'organized and operated' language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an 'organized and operated' requirement to the statutory definition."). Under either definition, however, CoA Institute qualifies as a representative of the news media.

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/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

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 have appropriately recognized the Institute's news media status 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

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. 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 OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

¹⁵ See 15 C.F.R. § 4.3(d) ("Components shall not dispose of records 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).

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 us by telephone at (202) 499-4232 or by email at kara.mckenna@causeofaction.org or michael.pepson@causeofaction.org. Thank you for your attention to this matter.

CAUSE OF ACTION INSTITUTE



MICHAEL PEPSON
COUNSEL



KARA E. MCKENNA
COUNSEL