



A 501(c)(3) Nonprofit Corporation

November 4, 2016

VIA CERTIFIED MAIL

Ms. Susan Bauman
BLM FOIA Specialist
The Bureau of Land Management
Utah State Office
440 West 200 South, Ste. 500
Salt Lake City, UT 84101

Re: Freedom of Information Act Request

Dear Ms. Bauman:

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. To that end, we are examining both the Administration’s potential designations of new national monuments under the Antiquities Act of 1906, 54 U.S.C. § 320301 (“Antiquities Act” or the “Act”) and the management of existing monuments.

From its inception, a central purpose of the Antiquities Act has been the protection and preservation of historically or scientifically significant structures and objects. The Act contemplates that the reservation of lands designated as national monuments shall be “compatible” with the “proper care and management of the objects to be protected.”² In practice, the management and care of a designated national monument falls on the agency or agencies stipulated in the presidential proclamation establishing a monument.³ In particular, CoA Institute is seeking to better understand the Bureau of Land Management’s (“BLM”) role in the care and management of Grand Staircase-Escalante National Monument (“Grand Staircase-Escalante”) and other BLM-controlled lands in southeastern Utah, including the lands lying within the boundary of the proposed Bears Ears National Monument.⁴ The proposal by the Bears Ears Inter-

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

² See 54 U.S.C. § 320301(b) (requiring that the land reservation be “confined to the smallest area compatible” to meet such needs).

³ See e.g. Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996) (stating that “[t]he Secretary of the Interior shall manage the monument through the Bureau of Land Management...” and that the Secretary “shall prepare, within 3 years, a management plan for this monument, and shall promulgate such regulations for its management as he deems appropriate.”).

⁴ See THE BEARS EARS INTER-TRIBAL COAL., *Proposal to President Barack Obama for the Creation of Bears Ears National Monument*, Oct. 15, 2015, available at <http://www.bearscoalition.org/wp->

Tribal Coalition (the “Coalition”)⁵ calls for the creation of a new national monument in San Juan County, Utah and includes over 1.4 million acres of BLM lands.⁶ In addition, CoA Institute is interested in the role, if any, third-party groups and local governments play in the care and management of these lands and Grand Staircase-Escalante.

Recent reports suggest there are an increasing number of incidents of looting and vandalism in the BLM-managed Grand Staircase-Escalante National Monument located in Kane and Garfield Counties, Utah.⁷ For example, in 2015, BLM indicated that “monument patrols restored 1,234 square feet of rock that had been defaced.”⁸ It is alleged that the rate of damage has since doubled.⁹ Outside of these passing references in media reports, there appears to be limited public information and statistics regarding these types of incidents in Grand Staircase-Escalante.

Relatedly, concerns of looting have also arisen in BLM-managed lands in neighboring San Juan County.¹⁰ As with the incidents reported in Grand Staircase-Escalante, the reports related to the scope and volume of looting and vandalism are limited to various media reports and assertions made by third-party groups.¹¹ For example, proponents pushing the designation of Bears Ears as a national monument have cited “rampant looting” as a key reason why the lands should be protected under the Antiquities Act.¹² The Coalition baldly states that “[m]ore than a

content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf [hereinafter *The Bears Ears Proposal*].

⁵ The Coalition is comprised of members from five Tribes including, the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe. *See generally*, BEARS EARS COALITION, <http://www.bearscoalition.org/> (last visited Nov. 3, 2016).

⁶ J.R. CARLSON ET AL., THE ADVISABILITY OF DESIGNATING THE BEARS EARS AS A MONUMENT UNDER THE ANTIQUITIES ACT, at 1.1 (Oct. 2016) (on file with CoA Institute).

⁷ Brian Maffley, *Vandalism increasing in Utah national parks*, THE SALT LAKE TRIBUNE, Apr. 5, 2016, <http://www.sltrib.com/home/3741977-155/vandalism-increasing-in-utah-national-parks> (last updated Apr. 6, 2016, 12:50 pm).

⁸ *Id.* During the same time period, BLM rangers conducted some 1,462 backcountry patrols at Grand Staircase-Escalante. *See Rangers investigate vandalism at Grand Staircase-Escalante National Monument*, FOX13NOW.COM, Apr. 4, 2016, <http://fox13now.com/2016/04/04/rangers-investigate-vandalism-at-grand-staircase-escalante-national-monument/> (last updated Sept. 13, 2016).

⁹ *Id.*

¹⁰ *See* David Roberts, Op-Ed., *Saving What’s Left of Utah’s Lost World*, N.Y. TIMES, Apr. 11, 2015, available at http://www.nytimes.com/2015/04/12/opinion/sunday/saving-whats-left-of-utahs-lost-world.html?_r=1 (alleging that Cedar Mesa, which is located within the boundaries of the proposed Bears Ears National Monument, “is hammered every year by rampant looting that a small number of rangers are powerless to stop.”).

¹¹ There were “six confirmed looting incidents” in the first six months of 2016 within the boundaries of the proposed Bears Ears National Monument, “and at least two dozen over the past five years.” Juliet Eilperin, *A major Native American site is being looted. Will Obama risk armed confrontation to save it?*, Wash. Post, June 5, 2016, available at https://www.washingtonpost.com/politics/a-major-native-american-site-is-being-looted-will-obama-risk-armed-conflict-to-save-it/2016/06/05/bf2dfcfc-1dff-11e6-8c7b-6931e66333e7_story.html.

¹² In contrast, “critics say a monument designation won’t come with any additional money to assure the degradation won’t continue.” *Bears Ears coalition leader says Jewell order lacks equality for the tribes*,

dozen serious looting cases were reported between May 2014 and April 2015.”¹³ Similarly, a “Fact Sheet” by the Friends of Cedar Mesa¹⁴ states that “[b]etween October 2011 and June 2016, the Bureau of Land Management Monticello Field Office investigated at least 28 incidents of looting, vandalism and serious damage to archaeological sites in San Juan County.”¹⁵ This is in contrast to other reports indicating that “between 2011 and May of 2015, BLM law enforcement in San Juan County Utah had identified two (2) criminal cases involving the excavation and/or removal of archaeological resources in San Juan County,” in which the proposed Bears Ears National Monument is completely located.¹⁶ The lack of public information regarding the frequency and scope of such events is problematic. Transparent reporting from BLM would provide both an understanding of how BLM manages and cares for the lands and objects under its supervision, as well as providing objective information regarding the impact national monument designations may or may not have on protecting lands and objects.

Further, CoA Institute has become aware that BLM and the Friends of Cedar Mesa have entered a unique partnership wherein the non-profit “is offering a standing reward of up to \$2,500 for information leading to the successful prosecution of anyone who loots, vandalizes, or causes other serious damage to archaeological sites, including those on BLM-managed lands.”¹⁷ Public information regarding this program and the relationship between BLM and Friends of Cedar Mesa is limited.¹⁸

KSL.com, Oct. 21, 2016, *available at* <https://www.ksl.com/index.php?sid=41937233&nid=148&title=bears-ears-coalition-leader-says-jewell-order-lacks-equality-for-tribes>.

¹³ *The Bears Ears Proposal*, at 35.

¹⁴ Friends of Cedar Mesa is a non-profit organization found by a former BLM employee and is focused on “good stewardship that protects the natural and cultural integrity of public lands in San Juan County, Utah.” The organization previously sought a special management area for Cedar Mesa and the surrounding environs, however it has since thrown its support behind the Coalition and *The Bears Ears Proposal*. *See generally*, FRIENDS OF CEDAR MESA, <http://www.friendsofcedarmesa.org/> (last visited Nov. 3, 2016).

¹⁵ FRIENDS OF CEDAR MESA, *Cultural Resource Damage in Southeastern UT & Bears Ears Region*, *available at* http://www.friendsofcedarmesa.org/wp-content/uploads/2016/09/FCM-BearsEars-damagebrief_9-19-16-NO-BONES-web.pdf.

¹⁶ Sheriff Rick Eldredge, Letter to the Editor, *Ongoing problem of skewing the facts*, SAN JUAN RECORD, May 2015 (on file with CoA Institute).

¹⁷ Press Release, Bureau of Land Management Utah State Office, \$2,500 Rewards Offered for Information on Archaeological Resource Vandalism (May 5, 2016) *available at* http://www.blm.gov/ut/st/en/info/newsroom/2016/may/_2_500_rewards_offered.html.

¹⁸ *See e.g.*, FRIENDS OF CEDAR MESA, *Anti-Looting Reward Fund*, *available at* <http://www.friendsofcedarmesa.org/reward/>; Jim Mimiaga, *Reward offered to catch looters in SE Utah*, THE CORTEZ J., May 17, 2016, *available at* <http://www.cortezjournal.com/article/20160517/NEWS01/160519883/Reward-offered-to-catch-looters-in-SE-Utah>.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period January 1, 2011, to the present:¹⁹

1. All records (including emails from governmental and personal email accounts, text messages, and voicemails) to or from the BLM Grand Staircase-Escalante National Monument Office, BLM Utah State Office (including the BLM Utah Office of Law Enforcement), and/or BLM National Office (including the Office of Law Enforcement) reflecting, referring, or relating to reports or incidents of looting, vandalism, and/or damage to antiquities contained within the boundaries of the Grand Staircase-Escalante National Monument (including summarization of incidents or statistical reports).
2. All records (including emails from governmental and personal email accounts, text messages, and voicemails) to or from the BLM Canyon Country District Office, BLM Monticello Field Office, BLM Utah State Office (including the BLM Utah Office of Law Enforcement), and/or BLM National Office (including the Office of Law Enforcement) reflecting, referring, or relating to reports or incidents of looting, vandalism, and/or damage to antiquities contained within San Juan County, Utah (including summarization of incidents or statistical reports).
3. All records (including emails from governmental and personal email accounts, text messages, and voicemails) to or from the BLM Canyon Country District Office, BLM Monticello Field Office, BLM Utah State Office (including the BLM Utah Office of Law Enforcement), and/or BLM National Office (including the Office of Law Enforcement) reflecting, referring, or relating to the partnership with Friends of Cedar Mesa to provide rewards for information leading to conviction in cases regarding looting, vandalism, desecration of human remains, and other damage to archaeological resources on BLM lands in San Juan County, Utah.

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

¹⁹ 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”).

primarily in the commercial interest of the requester.”²⁰ 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,²¹ as well as numerous congressional hearings relating to the Administration’s expansive interpretation and aggressive use of the Act.²²

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.²³ 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.

²⁰ 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.43(a); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

²¹ *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>.

²² *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* <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 National 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>.

²³ *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).

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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ 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.”²⁸ In light of the foregoing, numerous federal agencies—including the Department of Interior—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.²⁹

²⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see* 43 C.F.R. § 2.70.

²⁵ *See Cause of Action*, 799 F.3d at 1121.

²⁶ *See* 43 C.F.R. § 2.70.

²⁷ *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>.

²⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁹ *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-

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.³⁰

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 email at kara.mckenna@causeofaction.org. Thank you for your attention to this matter.

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).

³⁰ See 43 C.F.R. § 2.43(b); 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).

CAUSE OF ACTION INSTITUTE



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