

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability™

June 1, 2017

**VIA E-MAIL**

Ms. Ann Dunkin  
Chief Information Officer  
National Freedom of Information Office  
Environmental Protection Agency  
1200 Pennsylvania Avenue (2822T), NW  
Washington, DC 20460  
hq.foia@epa.gov

**Re: Freedom of Information Act Request**

Dear Ms. Dunkin:

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.<sup>1</sup> 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 Environmental Protection Agency’s (“EPA”) consent decree with Harley-Davidson, Inc. and its subsidiary companies (collectively, “Harley-Davidson”) to settle alleged Clean Air Act (“CAA”) violations.

On August 18, 2016, EPA and the Department of Justice (“DOJ”) filed a Complaint against Harley-Davidson under Title II of the CAA.<sup>2</sup> The Complaint alleges that Harley-Davidson sold 12,682 improperly labeled motorcycles from 2006 to 2008, and sold approximately 340,000 aftermarket tuners from 2008 to 2015.<sup>3</sup> The Complaint disingenuously refers to these aftermarket tuners as “defeat devices”—the same term used by EPA to describe the covertly and illegally installed emissions control devices in the Volkswagen diesel scandal.<sup>4</sup> But notably, the Harley-Davidson “defeat devices” were freely and intentionally purchased by individuals, and came with labels that detailed what ‘performance enhancements are considered street legal and for competition-use only’ and warned against improperly using the devices.”<sup>5</sup>

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about) (last accessed May 26, 2017).

<sup>2</sup> Compl., *United States v. Harley-Davidson, Inc.*, No. 16-cv-01687 (D.D.C. filed Aug. 18, 2016), ECF No. 1.

<sup>3</sup> *Id.* ¶¶ 16–19.

<sup>4</sup> Am. Compl., *In re: Volkswagen “Clean Diesel” Marketing*, No. 15-md-02672 28 (N.D. Cal. filed Oct. 7, 2016).

<sup>5</sup> Ariel Wittenberg, *EPA finds defeat devices in Harley-Davidson motorcycles*, E&E GREENWIRE (Aug. 18, 2016), <https://www.eenews.net/greenwire/stories/1060041795/>.

Harley-Davidson maintains that these products, which have been sold for over two decades, “[were] and [are] legal to use in race conditions in the U.S.”<sup>6</sup>

To avoid “a prolonged legal battle with the EPA,” Harley-Davidson decided to settle the case without admitting any liability.<sup>7</sup> To that end, Harley-Davidson, DOJ, and EPA filed a consent decree with the court on August 18, 2016.<sup>8</sup> The consent decree imposes a \$12 million civil penalty on Harley-Davidson and a \$3 million expenditure on an “Emissions Mitigation Project” to be implemented by the American Lung Association of the Northeast (“ALA”).<sup>9</sup> This “Emissions Mitigation Project” requires Harley-Davidson to fund a “wood-burning appliance changeout and retrofit.”<sup>10</sup> The project is defined as a “supplemental environmental project” (“SEP”) because it falls within EPA’s prosecutorial discretion when negotiating a civil penalty.<sup>11</sup> EPA issued a 2015 guidance document outlining the legal requirements enforcement officials must adhere to when crafting an SEP.<sup>12</sup> The SEP Policy exists “to ensure that SEPs are within the Agency’s and a federal court’s authority, and do not run afoul of any Constitutional or statutory requirements” and “may not be waived[.]”<sup>13</sup> The guidance states that EPA’s prosecutorial discretion to settle enforcement actions “does not extend to the inclusion of SEPs that do not have a nexus to the violations being resolved.”<sup>14</sup> EPA must also not choose or recommend any third-party entity tasked with implementing the SEP.<sup>15</sup> Despite these clear guidelines, the Harley-Davidson consent decree may unlawfully fail to comport with the SEP Policy by not establishing a “sufficient nexus” between the SEP and the underlying violations.<sup>16</sup> EPA may also have violated the guidance by recommending or choosing a favored group to be the third-party implementing entity.

Based on the foregoing, CoA Institute is submitting this Freedom of Information Act request and, separately, recommending that Administrator Pruitt reject the unlawful supplemental environmental project required by the Consent Decree.

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<sup>6</sup> Press Release, Harley-Davidson, Inc., Harley-Davidson, EPA reach settlement (Aug. 18, 2016), <http://www.prnewswire.com/news-releases/harley-davidson-epa-reach-settlement-300315469.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Consent Decree, *United States v. Harley-Davidson, Inc.*, No. 16-cv-01687 (D.D.C. filed Aug. 18, 2016), ECF No. 2.

<sup>9</sup> Consent Decree ¶ 8; Consent Decree App. A.

<sup>10</sup> Consent Decree App. A at 2.

<sup>11</sup> See Memorandum from Susan Shinkman, Dir., Office of Civil Enf’t, Env’tl. Prot. Agency, to Reg’l Counsels *et al.*, EPA 3–4 (Nov. 14, 2012).

<sup>12</sup> U.S. ENVTL. PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 7 (Mar. 10, 2015) [hereinafter SEP Policy].

<sup>13</sup> *Id.* (footnote omitted).

<sup>14</sup> *Id.* n.8.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* at 7.

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period January 1, 2015 to the present:<sup>17</sup>

1. All records relating to the selection of the American Lung Association of the Northeast as the implementing entity for the Emissions Mitigation Project, including all communications between EPA employees and the American Lung Association of the Northeast.
2. All records relating to the selection of a wood-burning appliance changeout and retrofit as the Emissions Mitigation Project to be funded by Harley-Davidson.
3. The approval memorandum, as required by the SEP Policy, that authorized the Emissions Mitigation Project.<sup>18</sup>

### **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.”<sup>19</sup> In this case, EPA appears to have violated its own guidance on using SEPs to settle enforcement actions. The SEP Policy exists to prevent unlawful transfers of (what would otherwise be) taxpayer money to favored political groups and to ensure that constitutional and statutory requirements are met. The use of SEPs in consent decrees has also sparked congressional interest and been the subject of review by the Government Accountability Office and the DOJ Office of Legal Counsel.<sup>20</sup> The selection of the ALA as the implementing entity also raises public concerns about whether Harley-Davidson by

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<sup>17</sup> 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”).

<sup>18</sup> SEP Policy, *supra* note 10, at 11 (“The EPA also has an obligation to make a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations, and this should be documented by the case team in its SEP approval memo and case file.”).

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1); *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).

<sup>20</sup> *See* U.S. GOV’T ACCOUNTABILITY OFFICE, B-210210, DONATIONS UNDER SETTLEMENT AGREEMENTS (Sept. 14, 1983); U.S. GOV’T ACCOUNTABILITY OFFICE, B-247155, EPA AUTHORITY TO SETTLE MOBILE SOURCE AIR POLLUTION ENFORCEMENT ACTIONS (July 7, 1992); Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980).

itself selected the implementing entity as required by the SEP Policy.<sup>21</sup> We are trying to learn whether EPA violated SEP Policy by “direct[ing], recommend[ing], or propos[ing]” the selection of the third-party implementing entity in the Harley-Davidson consent decree.

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> These distinct works

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<sup>21</sup> SEP Policy, *supra* note 10, at 9.

<sup>22</sup> *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).

<sup>23</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(b)(6).

<sup>24</sup> *See Cause of Action*, 799 F.3d at 1121.

<sup>25</sup> CoA Institute notes that the agency’s definition of “representative of the news media” (40 C.F.R. § 2.107(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.

<sup>26</sup> *See, e.g.,* CoA Institute, *Sec. Vilsack followed ethics guidelines when negotiating his future employment*, (Feb. 3, 2017), <http://coainst.org/2mJljJe>; COA INSTITUTE, INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION (Oct. 2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; COA INSTITUTE, MEMORANDUM: LEGAL ANALYSIS OF FORMER SECRETARY OF STATE HILLARY CLINTON’S USE OF A PRIVATE SERVER TO STORE EMAIL RECORDS (Aug. 24, 2015), <http://coainst.org/2eXhXe1>; CoA Institute, *CIA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhhP>; *Hearing on Revisiting IRS Targeting: Progress of Agency Reforms and*

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."<sup>27</sup> In light of the foregoing, numerous federal agencies—including EPA—have appropriately recognized the Institute's news media status in connection with its FOIA requests.<sup>28</sup>

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*Congressional Options Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. (Aug. 5, 2015) (statement of Erica L. Marshall, Counsel, CoA Inst.), <http://coainst.org/2mJC8DH>; *Hearing on Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 114th Cong. (June 3, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2mrwHr1>; *Hearing on Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program Before the H. Comm. on the Judiciary*, 114th Cong. (May 19, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2n7LxWG>; CoA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), <http://coainst.org/2as088a>; *Hearing on Potential Reforms to the Freedom of Information Act (FOIA) Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 27, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2lLsph8>; *Hearing on IRS: TIGTA Update Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 26, 2015) (statement of Prashant K. Khetan, Chief Counsel, CoA Inst.), <http://coainst.org/2nn5iFJ>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), <http://coainst.org/2aJ8sm5>; CoA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), <http://coainst.org/2aFWxUZ>; CoA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), <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), <http://coainst.org/2aJh901>; CoA Institute, *Newsletters*, <http://causeofaction.org/media/news/newsletter/>.

<sup>27</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>28</sup> 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 2016-HQFO-00502, Dept. of Homeland Security (Aug. 1, 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

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### **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.<sup>29</sup>

### **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 [travis.millsaps@causeofaction.org](mailto:travis.millsaps@causeofaction.org). Thank you for your attention to this matter.



Travis G. Millsaps  
Counsel

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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).

<sup>29</sup> See 40 C.F.R. § 2.106; 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).