

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 8, 2017

VIA ELECTRONIC MAIL

U.S. Officer of Personnel Management
ATTN: Trina Porter, FOIA Public Liaison
FOIA Requester Service Center
1900 E Street, N.W., Room 4458
Washington, D.C. 20415-7900
E-mail: foia@opm.gov

Re: Freedom of Information Act Request

Dear Ms. Porter:

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 news reports, when responding to a congressional request for cybersecurity information,² the Office of Personnel Management’s (“OPM”) Legislative Director, Janel Fitzhugh, informed Democratic Representative Kathleen Rice’s legislative staff that the OPM would “only speak with the chair people of [congressional] committees.”³ Specifically, Ms. Fitzhugh said that “she needed a Republican committee chairman to co-sign the letter in order to get a response.”⁴ When asked for details, Ms. Fitzhugh stated that this “edict to require a committee chairman signature” was “passed down” by the OPM’s Chief of Staff, Jason Simmons.⁵

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 20, 2017 to the present:⁶

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/ (last accessed June 8, 2017).

² See New Democrat Coalition, Press Release: New Democrat Coalition Members Urge OPM to Improve Cybersecurity Hiring Process (May 4, 2017), available at <http://bit.ly/2ra2eP3>.

³ Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>.

⁴ Yashar Ali, *Democrat Needs GOP Sign-Off To Get Question Answered, Federal Agency Says*, HUFFINGTON POST (June 1, 2017), <http://bit.ly/2s7RgOR>.

⁵ *Id.*

⁶ 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 a 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 (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”).

1. All records concerning the OPM's policy or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests for the disclosure of agency documents, including any records describing or discussing the "order" from Jason Simmons referenced by Janel Fitzhugh.
2. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (*e.g.*, Office of the White House Counsel), concerning (a) White House review of congressional oversight or records requests or (b) any form of pre-production review of draft responses to any congressional requester (*i.e.*, Congressional committees, chairmen, or individual Members) by White House staff or OPM officials or employees.
3. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (*e.g.*, Office of the White House Counsel), concerning (a) White House review of FOIA requests, including White House consultation on agency records containing "White House equities," or (b) any form of pre-production review of draft responses to any FOIA requester by White House staff or OPM officials or employees.

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 OPM 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."⁷

In this case, the requested records will shed light on the "operations or activities of the government," namely, the OPM's procedures for handling congressional oversight requests or individual Member's requests for information. Such records may shed light on current and historical practices, particularly in light of allegations that the Trump Administration has introduced a new policy.⁸ The records would thus provide the public with insight into those matters and contribute to ongoing debate about the importance of transparency. 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 its findings and to draw upon its published coverage of similar topics.⁹

⁷ 5 U.S.C. § 552(a)(4)(A)(iii); 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).

⁸ See Everett & Josh Dawsey, *supra* note 3; see also, *e.g.* Andy Wright & Justin Florence, *Fight It with FOLA: How Congress Can Respond to White House Attempts to Block Congressional Oversight*, JUST SECURITY (June 5, 2017), <http://bit.ly/2sjc8m9>; Justin Rood, *White House Silence to Lawmakers' Requests Raises Eyebrow, Questions*, PROJECT ON GOV'T OVERSIGHT (June 2, 2017), <http://bit.ly/2r9OmUR>.

⁹ See, *e.g.*, *White House FOLA Obstruction*, CAUSE OF ACTION INST., <http://bit.ly/2r0hBub> (last accessed June 8, 2017).

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.¹⁰ CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and, accordingly, it 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.”¹¹ 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.¹² 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.¹³ 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.¹⁴ 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.”¹⁵ In light of the foregoing,

¹⁰ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 5 C.F.R. § 294.103(c).

¹² See *Cause of Action*, 799 F.3d at 1121.

¹³ CoA Institute notes that the OPM’s definition of “representative of the news media,” 5 C.F.R. § 294.103(c), is in conflict with the statutory definition and controlling case law. The OPM 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. *Cause of Action*, 799 F.3d at 1225 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [T]here is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, CoA Institute qualifies as a news media requester.

¹⁴ See CAUSE OF ACTION INST., *Blog*, <http://www.causeofaction.org/media/blog> (last accessed June 6, 2016); see also, 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 PROFITTEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

numerous federal agencies have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.¹⁶

Record Preservation Requirement

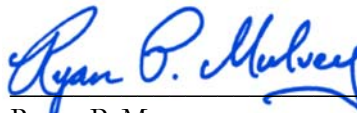
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.¹⁷

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

¹⁶ 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 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).

¹⁷ 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).