

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

June 19, 2017

### VIA EMAIL

Dionne Hardy  
FOIA Officer  
Office of Management and Budget  
1800 G Street, NW  
Washington, DC 20503  
OMBFOIA@omb.eop.gov

**Re: Freedom of Information Act Request**

Dear Ms. Hardy:

I write on behalf of Cause of Action Institute (CoA Institute<sup>1</sup>), 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 seeking the public comments and suggestions submitted to the Office of Management and Budget (“OMB”) via <https://www.whitehouse.gov/reorganizing-the-executive-branch> (“Reorganizing website”) regarding “improvements to the organization and functioning of the Executive Branch.”<sup>2</sup>

Between May 15, 2017 and June 12, 2017, more than 100,000 suggestions and ideas were submitted to OMB in response to President Trump’s March 13 executive order calling for a comprehensive plan to reorganize the executive branch (“Reorganization EO” of the “Order”).<sup>3</sup> In addition to the [regulations.gov](https://www.regulations.gov) website, which is routinely used by the federal government for gathering public comments, OMB also collected comments via an online form housed on a White House website.<sup>4</sup> There is a discrepancy between the reported number of comments and suggestions submitted via the Reorganizing website, which states that “100,000+ suggestions and ideas” were submitted, and [Regulations.gov](https://www.regulations.gov), which states that only 2,019 comments were received.<sup>5</sup> More troubling is the fact that the submitted comments and suggestions are not

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<sup>1</sup> See CAUSE OF ACTION INSTITUTE, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/).

<sup>2</sup> See Notice of Request for Comment on Government-Wide Reform, 82 Fed. Reg. 22355 (May 15, 2017).

<sup>3</sup> *Reorganizing the Executive Branch*, <https://www.whitehouse.gov/reorganizing-the-executive-branch> (last visited June 15, 2017); see also Proclamation No. 13781, 82 Fed. Reg. 13959 (Mar. 16, 2017).

<sup>4</sup> “Regulations.gov is a multi-agency website where citizens can view and comment on federal regulations and other agency actions that affect their daily lives. More than 35 federal departments and agencies participate in Regulations.gov, which is designed to encourage public involvement and citizen input.” See *Regulations.gov*, <https://www.gsa.gov/portal/content/102264> (last visited June 15, 2017); see also Request for Comments: Government-Wide Reform, [https://www.regulations.gov/document?D=OMB\\_FRDOC\\_0001-0201](https://www.regulations.gov/document?D=OMB_FRDOC_0001-0201) (last visited June 15, 2017).

<sup>5</sup> Compare *Reorganizing the Executive Branch*, <https://www.whitehouse.gov/reorganizing-the-executive-branch> (last visited June 15, 2017) (attached as Exhibit 1) and Request for Comments: Government-Wide

available for public viewing on either website.<sup>6</sup> Given that the Reorganization EO calls for the possible overhaul of the entire Executive Branch, the need for transparency and open public discourse in this matter is paramount.

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 May 15, 2017 until June 13, 2017:

1. All comments, suggestions, and ideas submitted to the Office of Management and Budget in response to the Notice of Request for Comment on Government-Wide Reform,<sup>7</sup> whether through <https://www.whitehouse.gov/reorganizing-the-executive-branch>, Regulations.gov, or any other means, written or electronic.

### **Request for Expedited Processing**

Pursuant to the FOIA and 5 C.F.R. § 1303.70, CoA Institute hereby requests expedited processing of its request because (1) CoA Institute is “primarily engaged in disseminating information” and (2) the requested records pertain to “actual or alleged federal government activity.”<sup>8</sup> Further, the requested records are a “matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which effect public confidence.”<sup>9</sup>

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization. CoA Institute gathers information of potential

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Reform, [https://www.regulations.gov/document?D=OMB\\_FRDOC\\_0001-0201](https://www.regulations.gov/document?D=OMB_FRDOC_0001-0201) (last visited June 15, 2017) (attached as Exhibit 2).

<sup>6</sup> See *id.*; see also Request for Comments: Government-Wide Reform Results, [https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=OMB\\_FRDOC\\_0001&refD=OMB\\_FRDOC\\_0001-0201](https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=OMB_FRDOC_0001&refD=OMB_FRDOC_0001-0201) (last visited June 15, 2017) (attached as Exhibit 3).

<sup>7</sup> 82 Fed. Reg. 22355 (May 15, 2017).

<sup>8</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 5 C.F.R. § 1303.70.

<sup>9</sup> *Id.*; see, e.g., Arianna Skibell, *100,000 Comments Rollin on How to Revamp Executive Branch*, June 13, 2017, available at <https://www.eenews.net/greenwire/2017/06/13/stories/1060055958>; Joe Davidson, *Overshadowed Executive Order Sets Stage for Threatened Federal Programs, Workforce. Layoffs Loom.*, Perspective, WASH. POST, Mar. 20, 2017, available at [https://www.washingtonpost.com/news/powerpost/wp/2017/03/20/overshadowed-executive-order-sets-stage-for-threatened-federal-programs-workforce/?utm\\_term=.949cf33f6d81](https://www.washingtonpost.com/news/powerpost/wp/2017/03/20/overshadowed-executive-order-sets-stage-for-threatened-federal-programs-workforce/?utm_term=.949cf33f6d81); Andrew Rudalevige, *Trump Wants to Reorganize the Executive Branch. Good Luck with That*, Analysis, WASH. POST, Mar. 16, 2017, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/16/trump-wants-to-reorganize-the-executive-branch-good-luck-to-him/?utm\\_term=.904041e6c156](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/16/trump-wants-to-reorganize-the-executive-branch-good-luck-to-him/?utm_term=.904041e6c156); Kevin Kosar, *Why Trump's Government Overhaul Won't Work*, The Agenda, POLITICO, Mar. 14, 2017, available at <http://www.politico.com/agenda/story/2017/03/trump-government-overhaul-fail-without-congress-000362>; Charles P. Pierce, *The Executive Branch is About to Be 'Reorganized' into Oblivion*, Esquire, Mar. 14, 2017, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/16/trump-wants-to-reorganize-the-executive-branch-good-luck-to-him/?utm\\_term=.904041e6c156](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/16/trump-wants-to-reorganize-the-executive-branch-good-luck-to-him/?utm_term=.904041e6c156); Kaitlin Collins, *Trump Signs Executive Order to Reorganize Federal Government and Reduce Waste*, THE DAILY CALLER, Mar. 13, 2017, available at <http://dailycaller.com/2017/03/13/trump-signs-executive-order-to-reorganize-federal-government-and-reduce-waste/>.

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>10</sup> The requested records are public comments and suggestions regarding how to potentially reorganize the executive branch of the federal government, a determination that could impact every American. Further, there is a pressing need to have this information released, as each agency head is required to submit a proposed plan to reorganize their agency, if appropriate, within 180 days of the Order (*i.e.*, by September 9, 2017).<sup>11</sup> Additionally, pursuant to an April 2017 memorandum from the OMB Director, agencies are expected to provide a “high-level draft of the Agency Reform Plan” by June 30, 2017.<sup>12</sup> The OMB Director is required to submit a proposed reorganization plan to the President within 180 days of the close of public comment (*i.e.*, by December 9, 2017).<sup>13</sup> It is essential that the public have full access to all of these public comments, suggestions, and ideas before a final reorganization plan is proposed.

### **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>14</sup> In this case, the government has restricted open access to public commentary providing suggestions and ideas for the executive reorganization plan from public view. Although the White House has indicated that “comments may be made public,” they have not been.<sup>15</sup> The plan could make major adjustments to the infrastructure of the executive branch which may drastically alter its operation. The American people have a right to remain informed and participate in the affairs of their government, particularly when changes may occur that affect the operation of the entity that regulates their everyday activities. By removing these comments from public view, the government withholds valuable information and ideas from political discourse. It would be disingenuous for an order calling for further governmental accountability and accessibility to keep the commentary on such processes away from the public eye. Indeed, if the government is going to be “more efficient, effective, and accountable to ... the American people,” the citizenry must be able to review and respond to the comments and opinions of other Americans.<sup>16</sup>

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<sup>10</sup> *Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info., Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

<sup>11</sup> Proclamation No. 13781.

<sup>12</sup> Memorandum from Mick Mulvaney, Director, Office of Management and Budget, Executive Office of the President, to the Heads of Executive Departments and Agencies (Apr. 12, 2017) *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf>.

<sup>13</sup> Proclamation No. 13781.

<sup>14</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 1303.70; *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>15</sup> *See Skibell supra* note 10.

<sup>16</sup> *Reorganizing the Executive Branch*, <https://www.whitehouse.gov/reorganizing-the-executive-branch> (last visited June 14, 2017).

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>17</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>18</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>19</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>20</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>21</sup> These distinct works

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<sup>17</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>18</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 5 C.F.R. § 1303.50(c).

<sup>19</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>20</sup> CoA Institute notes that the agency's definition of "representative of the news media" (5 C.F.R. § 1303.30(j)) 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>21</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 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

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>22</sup> In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.<sup>23</sup>

### **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

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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/2iLsph8>; *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/2apTqwP>; 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>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>23</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 OIG (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 Regulatory Comm'n (Feb. 13, 2015).

Ms. Dionne Hardy  
June 19, 2017  
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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>24</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 Kara.McKenna@causeofaction.org. Thank you for your attention to this matter.

CAUSE OF ACTION INSTITUTE



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KARA E. MCKENNA  
COUNSEL

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<sup>24</sup> 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).

# Exhibit 1



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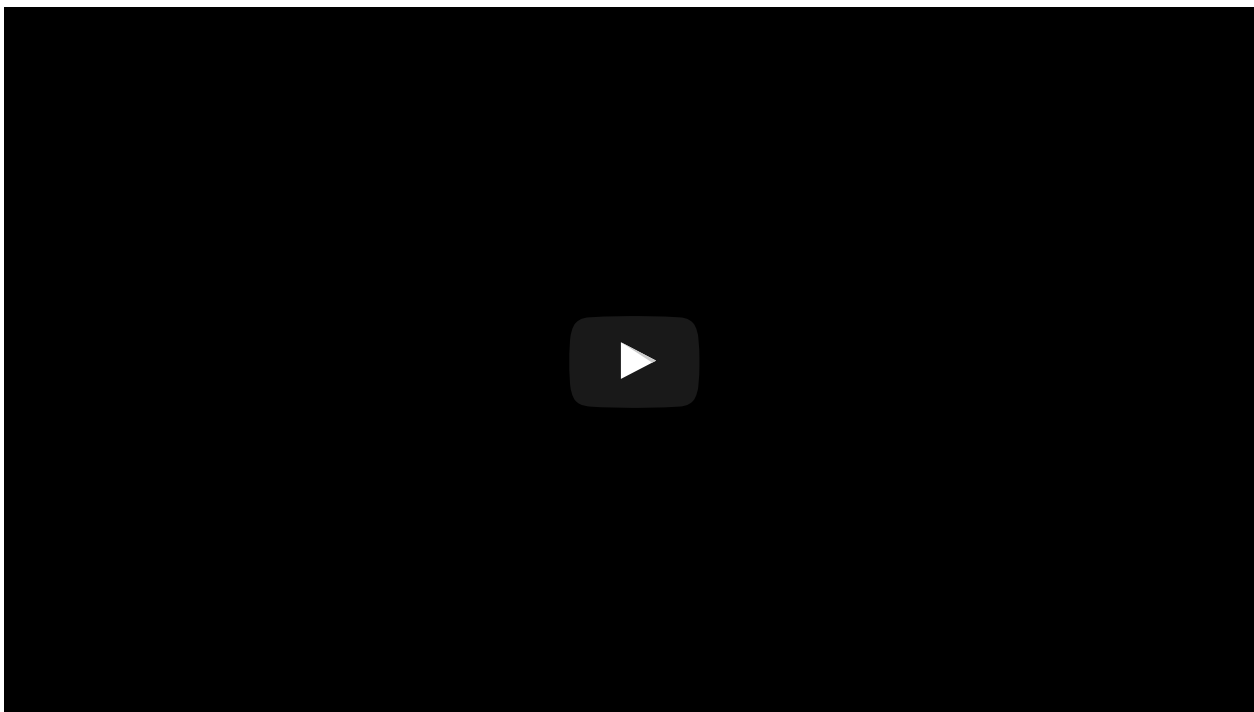
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# Reorganizing the Executive Branch



FOLLOW US:



On March 13th, President Donald J. Trump signed an Executive Order that will make the Federal government more efficient, effective, and accountable to you, the American people. This Executive Order directs the Director of the Office of Management and Budget to present the President with a plan



that recommends ways to reorganize the executive branch and eliminate unnecessary programs within government agencies.

**Our web form is now closed, but we are thrilled to announce that Americans came together and submitted more than 100,000+ suggestions and ideas to eliminate burdensome regulations, remove red tape and get government out of the way of government. With your help, we're making America great again!**

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# Exhibit 2

## N Request for Comments: Government-Wide Reform

This Notice document was issued by the **Office of Management and Budget (OMB)**

For related information, [Open Docket Folder](#) 

Comment Period Closed  
Jun 12 2017, at 11:59 PM ET

### Action

Notice of request for comment on Government-wide Reform.

### Summary

The Executive Office of the President invites the public to suggest improvements to the organization and functioning of the Executive Branch. These suggestions will help inform the development of the proposed Government-wide Reform Plan, designed to create a leaner, more accountable, and more efficient government that works for the American people.

### Dates

Comments are due by June 12, 2017.

### Addresses

Comments and suggestions on government reforms and improvements must be submitted electronically by June 12, 2017 to <https://www.whitehouse.gov/reorganizing-the-executive-branch>.

### Supplementary Information

On March 13, 2017, the President signed Executive Order 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, which established a public comment requirement for the formulation of a comprehensive plan for reorganizing the Executive Branch. On April 12, 2017, OMB issued Memorandum M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*, to chart the course for a restrained, effective, and accountable government to better serve the American people. Pursuant to Executive Order 13781 and Memorandum M-17-22, a White House Web site has been created to facilitate the collection of public comments to inform the development of the Government-wide Reform Plan. The American people are encouraged to provide their input on how the Federal government can best work for them.

Mick Mulvaney,  
OMB Director.

[FR Doc. 2017-09702 Filed 5-12-17; 8:45 am]  
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# Exhibit 3

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