

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

August 30, 2017

VIA FOIA ONLINE

Environmental Protection Agency
National Freedom of Information Office
ATTN: Ms. Ann Dunkin, Chief Information Officer
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, D.C. 20460

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.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.

Earlier this year, the press reported that a “small group of career [Environmental Protection Agency (“EPA”)] employees—numbering less [*sic*] than a dozen so far—[were] using an encrypted messaging app” called “Signal.”² Concerned that these officials might have been using Signal to avoid transparency laws, CoA Institute filed a Freedom of Information Act (“FOIA”) request and a notice under the Federal Records Act, alerting the EPA of its legal obligation to preserve records that evidence employees working on official government business, no matter the medium of their communication.³ That FOIA request is now the subject of ongoing litigation,⁴ as is a similar request submitted by Judicial Watch.⁵

As part of its recent motion for summary judgment in the Judicial Watch litigation, the EPA revealed that it “uses a software tool known as Mobile Device Management [(“MDM”),]” which is “installed on all compatible Agency-issued mobile devices” and, among other things, is capable of compiling a report that identifies which mobile applications are running on government-furnished

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last accessed Aug. 30, 2017).

² Andrew Restuccia, Marianne Levine, & Nahal Toosi, *Federal workers turn to encryption to thwart Trump*, POLITICO (Feb. 2, 2017), <http://politi.co/2km4Qrb>; *EPA Employees Are Using Encryption Technology To Hide Resistance To Trump—But Is It Legal?*, DAILY CALLER (Feb. 2, 2017), <http://bit.ly/2wJfqkI>.

³ Letter from CoA Inst. to Catherine McCabe, Acting Adm’r, & Ann Dunkin, Chief Info. Officer, Env’tl. Prot. Agency (Feb. 2, 2017) (on file with CoA Inst.); see also CoA Inst., Press Release: CoA Institute Investigates EPA Employees Using Electronic Messaging Apps to Thwart Transparency (Feb. 3, 2017), available at <http://coainst.org/2x4EUc7>; Alex Swoyer, *Lawsuit demands EPA say if employees using encrypted messages to evade open-records laws*, WASH. TIMES (Feb. 2, 2017), <http://bit.ly/2kWNMdn>.

⁴ *Cause of Action Inst. v. Env’tl. Prot. Agency*, No. 17-0509 (D.D.C. filed Mar. 21, 2017); see also CoA Inst., Press Release: Lawsuit Demands Records on EPA Employees’ Use of Encrypted Messaging App (Mar. 22, 2017), available at <http://coainst.org/2ocoSJR>; Steven Trader, *EPA Sued Over Employees’ Use of Encrypted Messaging App*, LAW360 (Mar. 23, 2017), <http://bit.ly/2wSpKai>.

⁵ *Judicial Watch, Inc. v. Env’tl. Prot. Agency*, No. 17-0533 (D.D.C. filed Mar. 23, 2017).

equipment.⁶ On February 3, 2017, the EPA “received a request from the Office of Inspector General [(“OIG”)] asking for assistance in identifying whether certain mobile apps, including Signal, had been downloaded” to EPA devices.⁷ Accordingly, on February 7, 2017, “an EPA contractor generated a report of the information contained in the MDM database from all Agency devices enrolled in the MDM software.”⁸ This report would have identified any devices that were then running Signal.

With the foregoing as background, and pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following:

1. The February 3, 2017 OIG request;
2. The February 7, 2017 MDM report;
3. The February 9, 2017 correspondence transmitting the results of the MDM report to the Acting Assistant Administrator of the Office of Environmental Information⁹; and,
4. All other records reflecting the total number of EPA devices on which, per the MDM report, Signal was installed. This includes any correspondence between the EPA and the OIG. The time period for this item of the request is February 7, 2017 to the present.¹⁰

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of all applicable fees. The FOIA and applicable regulations provide that the EPA shall furnish the 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.”¹¹

⁶ Def.’s Statement of Undisputed Material Facts at ¶¶ 9–11, *Judicial Watch, Inc. v. Env’tl. Prot. Agency*, No. 17-0533 (D.D.C. motion filed Aug. 15, 2017). While most “EPA mobile devices are compatible with the MDM software and have the software installed,” there are some “smaller number of other mobile devices such as mobile wifi hotspots, or older ‘flip phones,’ which are not compatible with or managed by the MDM software.” *Id.* ¶¶ 11–12.

⁷ *Id.* ¶ 13.

⁸ *Id.* ¶ 15.

⁹ Decl. of Elizabeth (“Liza”) V. Hearn at ¶ 5, *Judicial Watch v. Env’tl. Prot. Agency*, No. 17-0533 (D.D.C. declaration filed Aug. 15, 2017) (“On February 7, 2017, the [EPA] contractor generated a report of the information contained in the dataset from all Agency devices enrolled in the MDM software. On February 9, 2017, the requested information from that report was provided to the OEI Acting Assistant Administrator.”).

¹⁰ 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 (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”).

¹¹ 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1); 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).

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the extent to which EPA employees used an instant messaging application, Signal, and efforts by the agency to investigate its unauthorized use. Disclosure will “contribute significantly” to public understanding because, to date, the public has not known all relevant details of how the EPA attempted to retrieve these records. Public interest is particularly acute in light of press attention to the Signal matter;¹² other scandals surrounding record preservation and former Secretaries of State Colin Powell and Hillary Clinton, the heads of the Departments of Defense and Homeland Security; and broader congressional efforts.¹³

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 through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.¹⁴ 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 purposes, CoA Institute also qualifies as a “representative of the news media.”¹⁵ As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requester, not the specific request at issue.¹⁶ 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. 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.¹⁷

¹² See, e.g., CoA Inst., Press Release: CoA Institute Uncovers EPA Investigation into Employees’ Use of Encrypted Messaging App (Mar. 23, 2017), available at <http://coainst.org/2vJa7Nr>; see also Michael Bastasch, *EPA Is Investigating Employees Who Send Encrypted Text Messages*, DAILY CALLER (Mar. 23, 2017), <http://bit.ly/2xxt87Q>; Ralph R. Smith, *EPA Investigating Employee Covert Activity*, FEDSMITH (Mar. 24, 2017), <http://bit.ly/2xxsasa>.

¹³ See, e.g., Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://goo.gl/IGEY6l>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://goo.gl/pnWJvM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton’s Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://goo.gl/A6WoLB>; Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials’ Private Email Docs*, DAILY CALLER (Nov. 18, 2015), <http://goo.gl/b3xlaZ>; Rachel Witkin, *Sec. Jeh Johnson: ‘Whoops’ on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), <http://goo.gl/KH3SA7>.

¹⁴ 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).

¹⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(b)(6).

¹⁶ See *Cause of Action*, 799 F.3d at 1121.

¹⁷ 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

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."¹⁸ In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹⁹

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.²⁰

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.

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/2apTwwqP>; 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>.

¹⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

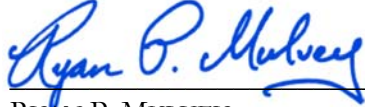
¹⁹ *See, e.g.*, FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); 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).

²⁰ *See* 40 C.F.R. § 2.106; *see also* 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).

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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