

CAUSE of ACTION INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

December 6, 2017

VIA E-MAIL

Consumer Financial Protection Bureau
Ms. Raynell D. Lazier, FOIA Manager, Operations Division/Chief FOIA Officer
1700 G Street, NW
Washington, DC 20552
E-mail: CFPB_FOIA@consumerfinance.gov

Re: Freedom of Information Act Request

Dear Ms. Lazier:

I write on behalf of Cause of Action Institute (CoA Institute²), 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.

A December 6, 2017 article by the *New York Times* reported that government employees at the Consumer Financial Protection Bureau (“CFPB”) are communicating among themselves using encrypted messaging applications:

One small group calls itself “Dumbledore’s Army,” according to two of the people who were familiar with their discussions. The name is a reference to a secret resistance force in the “Harry Potter” books.

An atmosphere of intense anxiety has taken hold, several employees said. In some cases, conversations between staff that used to take place by phone or text now happen almost exclusively in person or through encrypted messaging apps.²

CoA Institute is concerned that these individuals may be using the encrypted messaging applications to avoid transparency laws in an effort to conceal their communications from internal and external oversight. Under the Federal Records Act, the CFPB has a legal obligation to preserve federal records

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

² Jessica Silver-Greenberg, *Consumer Bureau’s New Leader Steers a Sudden Reversal*, N.Y. TIMES, Dec. 5, 2017, <https://www.nytimes.com/2017/12/05/business/cfpb-mick-mulvaney.html>.

created or received by its employees regardless of medium.³ Such messages also should be made available under the Freedom of Information Act (“FOIA”). If records have been destroyed or removed from agency custody, the CFPB has an obligation to notify the Archivist of the United States and initiate action to recover those records.⁴

CoA Institute is conducting an investigation into the CFPB’s reported use of encrypted messaging applications and any potential records destruction or failure to preserve. To that end, and pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period September 1, 2017 to the present:

1. All records reflecting the total number of CFPB devices on which encrypted messaging applications (e.g., Signal, Cyphr, WhatsApp, Viber, etc.)⁵ OR similar applications that automatically delete records (e.g., Snapchat) were installed. This includes any correspondence between CFPB and any other entity, such as the National Archives and Records Administration, the Federal Reserve Board of Governors Office of the Inspector General, or the White House.
2. Any internal policy memos, emails, guidelines, handbooks, or other materials detailing CFPB policies on the use of encrypted messaging apps.
3. All records reflecting efforts by CFPB to recover, investigate the use of, or archive messages sent over any encrypted messaging application OR similar applications that automatically delete records.
4. All communications sent or received over any encrypted messaging application OR similar applications that automatically delete records.

³ See 44 U.S.C. chs. 21, 29, 31, 33; NAT’L ARCHIVES & RECORDS ADMIN., BULL. 2015-02, GUIDANCE ON MANAGING ELECTRONIC MESSAGES (2015), *available at* <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>.

⁴ 44 U.S.C. § 3106(a); 36 CFR § 1230.14 (providing that “[t]he agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to the National Archives and Records Administration” and outlining the content of such a report).

⁵ This list contains examples of encrypted applications but is not intended to be an exhaustive list for search purposes.

5. All communications sent or received that contain the words “Dumbledore,” “Dumbledore’s Army,” “Snape,” “Voldemort,” “He-who-shall-not-be-named,” “encrypted message,” OR “encrypted messaging.”

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.”⁶ In this case, disclosure is in the public interest as it will significantly contribute to the public understanding of CFPB’s use of encrypted messaging applications and any possible record destruction. If individual CFPB employees are using these applications to evade the FOIA and the requirements of the FRA, the public, Congress, and other Executive Branch officials must be made aware. This is especially important given the requirements of 44 U.S.C. § 3106(a).

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.⁷ 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.⁸ As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA

⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 12 C.F.R. § 1070.22(e)(1)(iii) ; *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).

⁷ *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).

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 12 C.F.R. § 1070.22(b)(1)(iv).

request at issue.⁹ 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 products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.¹⁰ These

⁹ See *Cause of Action*, 799 F.3d at 1121.

¹⁰ See, e.g., CoA Institute, *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Institute, *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; COA INSTITUTE, SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL (Mar. 2017), <http://coainst.org/2y0fbOH>; 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, *CLA 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 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 DOCUMENTS 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/>.

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.”¹¹ In light of the foregoing, numerous federal agencies—including the CFPB—have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹²

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹² FOIA Request CFPB-2017-361-F, Consumer Fin. Prot. Bureau (June 13, 2017); *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); 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 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.

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.¹³

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) 470-2396 or by e-mail at eric.bolinder@causeofaction.org. Thank you for your attention to this matter.



Eric R. Bolinder
Counsel

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).

¹³ 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).