

CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

October 17, 2017

VIA ELECTRONIC MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Silver Spring, MD 20910
E-mail: FOIA@noaa.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

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. Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the April 1–15, 2017 issue of “*Fathoms*,” a NOAA-generated publication of the Greater Atlantic Regional Office.²

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of all applicable fees. The FOIA and applicable regulations provide that NOAA 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.”³

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the activity of the NMFS Northeast field staff, which regularly interacts with government employees, commercial fisherman, industry processors and dealers, and the general public (including third-party stakeholders, such as environmental advocates) on a variety of fisheries-management issues. The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, copies of *Fathoms* have not been made publicly available. CoA Institute intends to educate the interested public about the content and purpose of this publication.

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 exper-

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Oct. 17, 2017).

² See E-mail from Caleb Gilbert, NOAA, to “undisclosed-recipients” (Apr. 18, 2017) (attached as Exhibit 1).

³ 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(a); see *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015).

tise 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.⁴ In addition, CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, and 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.”⁵ 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.⁶ 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.⁷ Although 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.⁸ 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.”⁹ In light of the foregoing, numerous federal agencies—including the Department of Commerce—have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.¹⁰

⁴ 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).

⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(b)(6).

⁶ See *Cause of Action*, 799 F.3d at 1121.

⁷ CoA Institute notes that the Department of Commerce's definition of “representative of the news media” conflicts with the statutory definition and controlling case law. The agency has 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 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement[.]”).

⁸ See generally CAUSE OF ACTION INST., *Media*, www.causeofaction.org/media (last visited Sept. 11, 2017).

⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁰ 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 Mgmt. (Oct. 21, 2016); FOIA Request 092320167031, Ctrs. for Medicare & Medicaid Servs. (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, Office of Inspector Gen., Dep't 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, Dep't 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 CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request

Record Preservation Requirement

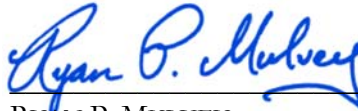
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.¹¹

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

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).

¹¹ See 15 C.F.R. § 4.3(d) (“Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit[.]”); see also 36 C.F.R. § 1230.3(b); *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

NMFS.GAR FSC - NOAA Service Account

From: NMFS.GAR FSC - NOAA Service Account
Sent: Tuesday, April 18, 2017 11:03 AM
To: undisclosed-recipients:
Bcc: NMFS.GAR.Fathoms@noaa.gov
Subject: April 1-15 Fathoms!

Hello Fathoms Readers,

[April 1st - 15th Fathoms](#) has been uploaded to the NMFS Northeast & Atlantic Field Staff website. Here you'll find current and archived editions of Fathoms as well as photos from the docks. Please download the PDF from the FSC website to see bookmarks.

Field Staff often blog live from the scene directly into our [WordPress site](#) and those blogs can be read there real time. A User ID and Password are required to view the [Live Blog](#). Contact the GARFO/IRM Help Desk at nmfs.gar.helpdesk@noaa.gov to get credentials.

Please remember (no matter which way you read it) this publication is restricted to NOAA and authorized personnel only.

Caleb Gilbert
Field Staff Collaboration
NOAA/Fisheries/Greater Atlantic and Northeast
55 Great Republic Drive, Gloucester, MA 01930
[Field Staff Collaboration Google Site](#)