

# CAUSE *of* ACTION

## INSTITUTE

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

December 11, 2017

### VIA FOIAonline

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

### **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.<sup>1</sup> 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 following National Oceanic and Atmospheric Administration (“NOAA”) records:

1. All weekly reports, charts, and transmittal e-mails that identify “high visibility” or otherwise “sensitive” FOIA requests.<sup>2</sup> The time period for this item of the request is December 2015 to the present.<sup>3</sup>
2. All memoranda, guidelines, procedures, processing metrics, or communications concerning any type of “sensitive review,” or handling of “high visibility” FOIA requests, including politically-sensitive requests or those submitted by news-media requesters. The scope of this item includes records defining or describing “high visibility” requests or pertaining to the justification and/or genesis of the weekly reports sought in Item One. The time period for this item of the request is January 2010 to the present.
3. All communications (including case summaries, memoranda, guidelines, or procedures) concerning the tracking of “transition cases,” *i.e.*, FOIA requests pertaining to the incoming Trump Administration. The scope of this item includes records of correspond-

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about) (last visited Dec. 11, 2017).

<sup>2</sup> See E-mail from Mark Graff, Nat’l Oceanic & Atmospheric Admin. (Apr. 21, 2017) (attached as Exhibit 1). “Sensitive” requests would include all those seeking records or information deemed of potential political or news interest, such that NOAA FOIA personnel or management either (1) considered the requests and/or responsive records worthy of review by non-career agency officials or (2) deemed it appropriate to notify non-career officials of the existence of the requests.

<sup>3</sup> 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. 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”).

ence between and amongst NOAA and (1) the Department of Commerce, (2) the Executive Office of the President (including the Office of the White House Counsel), (3) the Republican National Committee, or (4) Donald Trump's presidential transition team. The time period for this item of the request is November 9, 2016 to the present.

4. All communications between NOAA and the Department of Commerce Office of the Inspector General concerning audits, investigations, inspections, evaluations, or inquiries into the involvement of non-career officials in the FOIA process (*e.g.*, reviewing or approving proposed FOIA productions, *etc.*). The time periods for this item of the request are (1) August 23, 2010 to September 21, 2010 and (2) June 23, 2015 to August 14, 2015.

### **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.”<sup>4</sup>

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, NOAA’s practice of identifying incoming and “high visibility” FOIA requests. This practice suggests the sort of sensitive review FOIA process that has led to politicization at other agencies, multiple congressional investigations, and FOIA litigation.<sup>5</sup> The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, the records have not been made publicly available. CoA Institute intends to educate the interested public about the processing of “high visibility” requests at NOAA.

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.<sup>6</sup> 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.

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<sup>4</sup> 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).

<sup>5</sup> *See, e.g.*, Eliana Johnson, *The Obama Administration’s Newly Political Approach to FOIAs*, NAT’L REV. (June 9, 2015), <http://bit.ly/1UwGsit>; COA INST., GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), *available at* <http://coainst.org/2AEWiE2>; *see also* DHS Watchdog Claims Political Appointees No Longer Politicizing FOIA, COA INST. (Oct. 20, 2017), <http://coainst.org/2j9dbT7>; *CLA too busy for transparency*, COA INST. (Aug. 11, 2016), <http://coainst.org/2iDH0qO>; *White House and Treasury Department Politicize FOIA*, COA INST. (June 24, 2013), <http://coainst.org/2A4igPr>; *FOIA Follies: HUD Flags Sensitive Freedom of Information Act Requests for Extra Scrutiny; Political Appointees Involved*, COA INST. (July 31, 2013), <http://coainst.org/2kbV4Ix>.

<sup>6</sup> *See Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

### **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.”<sup>7</sup> 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.<sup>8</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>9</sup> 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.<sup>10</sup> 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.”<sup>11</sup> 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.<sup>12</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 the request

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(b)(6).

<sup>8</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>9</sup> 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[.]”).

<sup>10</sup> See generally CAUSE OF ACTION INST., *Media*, [www.causeofaction.org/media](http://www.causeofaction.org/media) (last visited Dec. 11, 2017).

<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>12</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 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 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).

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>13</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 [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org). Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY  
COUNSEL

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<sup>13</sup> 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

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**Mark Graff - NOAA Federal**

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**From:** Mark Graff - NOAA Federal  
**Sent:** Friday, April 21, 2017 10:41 AM  
**To:** Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal  
**Cc:** Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal)  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** TransitionCasessummary04-11-2017PTOedits4.17.17.docx; Weekly FOIA Incoming and High Visibility Requests 04.12.17 - 04.19.17.xls

Good Morning,

Attached please find this week's report.

This week, [REDACTED]  
[REDACTED]  
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[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
(b)(5)  
[REDACTED]

[REDACTED]  
(b)(5)  
[REDACTED]  
[REDACTED]

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
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