

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

February 22, 2018

VIA CERTIFIED MAIL

U.S. Office of Personnel Management
ATTN: Office of General Counsel (OGC)
1900 E Street, N.W.
Washington, D.C. 20415

Re: Freedom of Information Act Appeal, Request No. 2017-05158

Dear FOIA Appeals Officer:

This is a timely administrative appeal of the Office of Personnel Management's ("OPM") adverse determination on Cause of Action Institute's ("CoA Institute") June 8, 2017 Freedom of Information Act ("FOIA") request for records concerning policies and procedures for the processing of congressional oversight requests or individual Members' requests for information. Specifically, CoA Institute appeals the adequacy of OPM's search efforts and its withholdings under FOIA Exemption 6.

Procedural Background

On June 8, 2017, CoA Institute submitted a FOIA request to OPM seeking access to three categories of records concerning the agency's policies or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests from individual Members for the disclosure of agency documents.¹ CoA Institute also requested all records evidencing any White House directives on pre-production consultation or review of requests from Congress or under the FOIA.² Finally, CoA Institute requested a public interest fee waiver and categorization as a representative of the news media for fee purposes.³

By letter, dated June 15, 2017, OPM acknowledged receipt of CoA Institute's FOIA request, assigned it tracking number 2017-05158, and placed the request in the "complex" processing queue.⁴ OPM did not issue determinations on CoA Institute's fee category status or request for a fee waiver.

Eight months later, on February 14, 2018, OPM issued its final determination.⁵ The agency indicated that it had found "documents [totaling five (5) pages] that fit within the parameters of [Item] 1 of [CoA Institute's] FOIA request."⁶ Portions of these records—namely, two names and

¹ Letter from CoA Inst. to U.S. Office of Personnel Mgmt. at 2 (June 8, 2017) (attached as Exhibit 1).

² *Id.*

³ *Id.*

⁴ Letter from U.S. Office of Personnel Mgmt. to CoA Inst. (June 15, 2017) (attached as Exhibit 2).

⁵ Letter from U.S. Office of Personnel Mgmt. to CoA Inst. (February 14, 2018) (attached as Exhibit 3).

⁶ *Id.* at 1.

email addresses, were withheld under FOIA Exemption 6.⁷ OPM was unable to locate any records responsive to Items 2 and 3.⁸ This timely appeal follows the agency's determination.

Argument

I. OPM Failed to Conduct an Adequate Search for Responsive Records.

The FOIA and applicable regulations require that OPM “conduct a search reasonably calculated to uncover all relevant documents.”⁹ This search must pass “a ‘reasonableness’ test to determine the ‘adequacy’ of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure.”¹⁰ OPM is required to search where responsive records are likely to be found and it may not limit its search to exclude certain record systems, custodians, or offices, if they may contain responsive records.¹¹

In this case, OPM's search falls short of the required reasonableness because the agency failed to produce records in response to Item One that it previously acknowledged exist, according to congressional sources. On June 1, 2017, the *Huffington Post* reported that OPM's Legislative Director, Janel Fitzhugh, informed Democratic Representative Kathleen Rice's legislative staff that OPM would “only speak with the chair people of [congressional committees]” and would not process record requests without a “Republican committee chairman” co-signing the request.¹² This novel policy was described by Representative Rice, and one of her Republican colleagues, as an “unprecedented barrier.”¹³ Ms. Fitzhugh indicated that OPM's policy was set forth in an order issued by Jason Simmons, OPM's then-Chief of Staff.¹⁴ The existence of such a record was similarly reported by *Politico*,¹⁵ and both news articles were cited by CoA Institute in its June 8, 2017 FOIA request.¹⁶ Records pertaining to Mr. Simmons's directive, as well as the directive itself, should have been located, processed, and produced to CoA Institute.

Despite the publicly-acknowledged existence of a new policy for the handling of congressional requests, OPM only disclosed a single email linking to a May 1, 2017 Department of

⁷ OPM FOIA Production (attached as Exhibit 4).

⁸ Ex. 3 at 2.

⁹ *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks, alternations, and citation omitted).

¹⁰ *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

¹¹ *Callaway v. Dep't of the Treasury*, No. 08-5480, 2009 WL 10184495 at *2 (D.C. Cir. June 2, 2009).

¹² Yashar Ali, *Democrat Needs GOP Sign-Off To Get Question Answered, Federal Agency Says*, HUFFINGTON POST (June 1, 2017), <http://bit.ly/2s7RgOR>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats' oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>.

¹⁶ *See* Ex. 1 at 1 nn.3–4.

Justice Office of Legal Counsel (“OLC”) opinion letter.¹⁷ But that email, dated June 5, 2017, cannot possibly reflect Mr. Simmons’s order, as that directive was reported by the press a number of days earlier. Moreover, the OLC opinion cannot reasonably be understood to reflect official OPM policy or practice without further records evidencing its incorporation at and implementation by OPM. Indeed, the disclosed records do not contain *any* OPM-specific guidelines for the actual processing of congressional disclosure requests. OPM should therefore conduct a supplemental search targeted to locate all records addressing the agency’s current policies and procedures, its efforts to formalize relevant White House directives,¹⁸ and all other records potentially responsive to the remaining items of CoA Institute’s FOIA request.

II. OPM Misapplied Exemption 6 To Withhold Email Addresses and Employee Names.

FOIA Exemption 6 protects information about individuals in “personnel and medical files and similar files” when disclosure “would constitute a clearly unwarranted invasion of personal privacy.”¹⁹ OPM must first determine that the information at issue is contained in a personnel, medical, or “similar” file.²⁰ The agency then must identify the significant privacy interest in the requested information and evaluate that interest against the public interest in disclosure.²¹ Withholding is permitted only if disclosure “would constitute a clearly unwarranted invasion of personal privacy.”²² That is a high bar to meet. Indeed, “the presumption in favor of disclosure is as strong as can be found anywhere in the [FOIA],”²³ and *de minimis* privacy interests are insufficient to overcome the FOIA interest in disclosure.²⁴

¹⁷ See generally Ex. 4.

¹⁸ There is still confusion as to the Administration’s official position on the issues raised by CoA Institute’s FOIA request and the OLC opinion letter. See, e.g., Ryan P. Mulvey, *Is the White House misleading Congress over a contentious FOIA policy?*, THE HILL (Sept. 20, 2017), <http://bit.ly/2sCON04>; see also CoA Inst., *Senator Grassley Claims the Trump Administration is Rejecting the DOJ’s Opinion on Responding to Congressional Records Requests* (July 31, 2017), <http://coainst.org/2wkXziR>; CoA Inst., *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2016), <http://coainst.org/2eHooVq>; CoA Inst., *Is President Trump Directing Agencies To Ignore Democrats’ Oversight Requests?* (June 8, 2017), <http://coainst.org/2tJoiGo>.

¹⁹ 5 U.S.C. § 552(b)(6).

²⁰ *Id.*

²¹ See *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (“The balancing inquiry for FOIA Exemption 6 requires that we first determine whether disclosure of the files ‘would compromise a substantial, as opposed to *de minimis*, privacy interest,’ because ‘[i]f no significant privacy interest is implicated . . . FOIA demands disclosure.’” (quoting *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)).

²² 5 U.S.C. § 552(b)(6); see *Wash. Post Co. v. Dep’t of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (“[W]e balance competing interests to determine whether the invasion of privacy is clearly unwarranted.”).

²³ *Multi Ag Media LLC*, 515 F.3d at 1227 (citing *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002); see *Consumers’ Checkbook Ctr. for the Study of Servs. v. Dep’t of Health & Human Servs.*, 554 F.3d 1046, 1057 (D.C. Cir. 2009) (The FOIA “presumption favoring disclosure . . . is at its zenith under Exemption 6.”).

²⁴ *Multi Ag Media LLC*, 515 F.3d at 1229.

In this case, OPM used Exemption 6 to redact the names and email addresses of two agency employees.²⁵ Yet, as OPM's regulations stipulate, civilian federal employees, with limited exceptions that do not apply here,²⁶ do not enjoy any expectation of privacy in the non-disclosure of their names and other basic identifying information.²⁷ The operative consideration is whether the information at issue is purely "personal" or "related to job function."²⁸ Exemption 6 is properly applied only to details that do not shed light on the functions and operation of the government.²⁹ Examples of protected information include employees' home addresses,³⁰ home telephone numbers,³¹ medical records,³² and "core" personal information, such as marital status.³³

In this case, the redacted information should be released. OPM employees' names and work email addresses are not protected from disclosure.³⁴ Such information directly relates to the functioning of OPM, particularly with respect to the subject-matter of CoA Institute's FOIA request—namely, the procedures for processing congressional oversight and records requests. Disclosure would serve the public interest in knowing which OPM employees deliberated on this matter. Further, those employees' email addresses would be useful in evaluating the adequacy of the agency's search efforts—that is, the locations that may, or may not, have been searched—and in designing future FOIA requests.

To the extent that the employees in question used personal email accounts to conduct work-related business, OPM still cannot rely on Exemption 6 to protect the addresses. The same considerations discussed above militate in favor of disclosure. An agency employee may not attempt to avoid transparency and public accountability—that is, to circumvent the FOIA—by using a personal email account.³⁵ Indeed, courts have recognized that agency records in a personal email

²⁵ Ex. 4 at 1. Although it is possible that one of the two individuals at issue is a private individual, in such an instance there is an even stronger public interest in disclosure insofar as an OPM official was communicating with a non-government employee about agency procedures for processing congressional requests.

²⁶ These exceptions include federal employees involved in law enforcement, military positions, and other sensitive occupations. *E.g., Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 194 (2d Cir. 2012) (correctional officers, U.S. Marshals, nuclear materials couriers, internal revenue agents, game law enforcement agents, immigration inspectors, customs and border protection officers).

²⁷ See 5 C.F.R. § 293.311(a) (regulation specifying information in personnel files accessible by the public).

²⁸ *Cowdery, Ecker & Murphy, LLC v. Dep't of the Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007).

²⁹ See *Labr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973–74 (9th Cir. 2009) (Exemption 6's balancing test is undertaken in light of the extent to which disclosure "would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.").

³⁰ See, e.g., *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994) (protecting federal employees' home addresses); see also *Pub. Emps. for Envtl. Resp. v. U.S. Sec. Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304, 323–24 (D.D.C. 2012).

³¹ See, e.g., *Kidd v. Dep't of Justice*, 362 F. Supp. 2d 291, 296–97 (D.D.C. 2005).

³² See, e.g., *Plain Dealer Publ'g Co. v. Dep't of Labor*, 471 F. Supp. 1023, 1028–30 (D.D.C. 1979).

³³ See, e.g., *Info. Acquisition Corp. v. Dep't of Justice*, 444 F. Supp. 458, 463–64 (D.D.C. 1978).

³⁴ *Friedman v. U.S. Secret Serv.*, 923 F. Supp. 2d 262, 281–83 (D.D.C. 2013).

³⁵ Even if Exemption 6 could be used to withhold personal email addresses that were used for official agency business, OPM must disclose the names of the employees, or that portion of the email address that could be used to identify them. This duty is based on the agency's obligation to release non-exempt, reasonably-

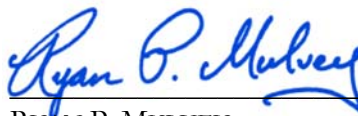
account remain under agency control and must be searched, processed, and disclosed in accordance with the FOIA.³⁶ The onus is on federal employees to avoid the use of personal accounts and devices if they wish to keep their email addresses private. In any case, OPM has failed to explain how disclosure of even personal email addresses in this instance could be reasonably foreseen to result in the sort of unwarranted invasion of personal privacy that Exemption 6 is meant to avoid.³⁷

Conclusion

For the foregoing reasons, OPM's final response to CoA Institute's June 8, 2017 FOIA request is inadequate. The agency has failed to conduct an adequate search and has misapplied FOIA Exemption 6.

Thank you for your attention to this matter. If you have any questions about this appeal, or the underlying request, feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL

segregable portions of records. See 5 U.S.C. § 552(b); see also *Perry-Torres v. Dep't of State*, 404 F. Supp. 2d 140, 144–45 (D.D.C. 2005) (“[An agency] explanation . . . should state that a line-by-line analysis . . . was conducted and that . . . no information can reasonably be segregated.”).

³⁶ E.g., *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (If an agency official “possesses what would otherwise be agency records [e.g., work-related email], the records do not lose their agency character just because the official . . . takes them out the door [e.g., to a private account][.]”).

³⁷ See 5 U.S.C. § 552(a)(8)(A)(i); *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-05254, 2017 WL 5972702, at *6 (N.D. Cal. Nov. 30, 2017), *appeal filed*, No. 17-17539 (9th Cir. Dec. 26, 2017) (The agency “does not provide any justification for how [the interest protected by the exemption] would be harmed by disclosure as required by the FOIA Improvement Act of 2016. Absent a showing of foreseeable harm . . . the documents must be disclosed.”) (citation omitted); see generally *id.* (citing *Cameranesi v. Dep't of Def.*, 56 F.3d 626, 639 (9th Cir. 2017) (“An agency must carry its burden of establishing a nontrivial privacy interest by showing that the requested disclosure has “the potential” to result in . . . harassment[.]” such as possible embarrassment and retaliatory action from ‘media, curious neighbors, and the public interest group itself, which might try to make unwanted contacts with the employees.’”).

EXHIBIT

1

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 8, 2017

VIA ELECTRONIC MAIL

U.S. Officer of Personnel Management
ATTN: Trina Porter, FOIA Public Liaison
FOIA Requester Service Center
1900 E Street, N.W., Room 4458
Washington, D.C. 20415-7900
E-mail: foia@opm.gov

Re: Freedom of Information Act Request

Dear Ms. Porter:

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.

According to recent news reports, when responding to a congressional request for cybersecurity information,² the Office of Personnel Management’s (“OPM”) Legislative Director, Janel Fitzhugh, informed Democratic Representative Kathleen Rice’s legislative staff that the OPM would “only speak with the chair people of [congressional] committees.”³ Specifically, Ms. Fitzhugh said that “she needed a Republican committee chairman to co-sign the letter in order to get a response.”⁴ When asked for details, Ms. Fitzhugh stated that this “edict to require a committee chairman signature” was “passed down” by the OPM’s Chief of Staff, Jason Simmons.⁵

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period of January 20, 2017 to the present:⁶

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/ (last accessed June 8, 2017).

² See New Democrat Coalition, Press Release: New Democrat Coalition Members Urge OPM to Improve Cybersecurity Hiring Process (May 4, 2017), available at <http://bit.ly/2ra2eP3>.

³ Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>.

⁴ Yashar Ali, *Democrat Needs GOP Sign-Off To Get Question Answered, Federal Agency Says*, HUFFINGTON POST (June 1, 2017), <http://bit.ly/2s7RgOR>.

⁵ *Id.*

⁶ 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 a 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”).

1. All records concerning the OPM's policy or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests for the disclosure of agency documents, including any records describing or discussing the "order" from Jason Simmons referenced by Janel Fitzhugh.
2. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (*e.g.*, Office of the White House Counsel), concerning (a) White House review of congressional oversight or records requests or (b) any form of pre-production review of draft responses to any congressional requester (*i.e.*, Congressional committees, chairmen, or individual Members) by White House staff or OPM officials or employees.
3. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (*e.g.*, Office of the White House Counsel), concerning (a) White House review of FOIA requests, including White House consultation on agency records containing "White House equities," or (b) any form of pre-production review of draft responses to any FOIA requester by White House staff or OPM officials or employees.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA and relevant regulations provide that the OPM 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."⁷

In this case, the requested records will shed light on the "operations or activities of the government," namely, the OPM's procedures for handling congressional oversight requests or individual Member's requests for information. Such records may shed light on current and historical practices, particularly in light of allegations that the Trump Administration has introduced a new policy.⁸ The records would thus provide the public with insight into those matters and contribute to ongoing debate about the importance of transparency. Disclosure is likely to "contribute significantly" to public understanding of these matters because, to date, the records that CoA Institute seeks have not been made publicly available. CoA Institute intends to educate the public about its findings and to draw upon its published coverage of similar topics.⁹

⁷ 5 U.S.C. § 552(a)(4)(A)(iii); 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).

⁸ See Everett & Josh Dawsey, *supra* note 3; see also, *e.g.* Andy Wright & Justin Florence, *Fight It with FOLA: How Congress Can Respond to White House Attempts to Block Congressional Oversight*, JUST SECURITY (June 5, 2017), <http://bit.ly/2sjc8m9>; Justin Rood, *White House Silence to Lawmakers' Requests Raises Eyebrow, Questions*, PROJECT ON GOV'T OVERSIGHT (June 2, 2017), <http://bit.ly/2r9OmUR>.

⁹ See, *e.g.*, *White House FOLA Obstruction*, CAUSE OF ACTION INST., <http://bit.ly/2r0hBub> (last accessed June 8, 2017).

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, whether through a regularly published online newsletter, memoranda, reports, or press releases.¹⁰ CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and, accordingly, 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 qualifies as a “representative of the news media.”¹¹ As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.¹² 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.¹³ 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.¹⁴ 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.”¹⁵ In light of the foregoing,

¹⁰ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 5 C.F.R. § 294.103(c).

¹² See *Cause of Action*, 799 F.3d at 1121.

¹³ CoA Institute notes that the OPM’s definition of “representative of the news media,” 5 C.F.R. § 294.103(c), is in conflict with the statutory definition and controlling case law. The OPM 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. *Cause of Action*, 799 F.3d at 1225 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [T]here is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, CoA Institute qualifies as a news media requester.

¹⁴ See CAUSE OF ACTION INST., *Blog*, <http://www.causeofaction.org/media/blog> (last accessed June 6, 2016); see also, 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 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/2apTwpP>; COA INSTITUTE, POLITICAL PROFITTEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

numerous federal agencies have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.¹⁶

Record Preservation Requirement

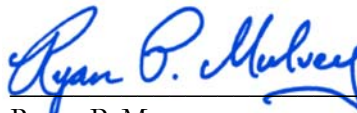
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.¹⁷

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

¹⁶ 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); 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 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. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014).

¹⁷ 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

2



Chief Information
Officer

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

June 15, 2017

Mr. Ryan Mulvey
Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, DC 20006

Re: 2017-05158

Dear Mr. Mulvey:

The U.S. Office of Personnel Management (OPM) has received your request for information pursuant to the Freedom of Information Act (FOIA; 5 USC 552, as amended), dated June 8, 2017.

Specifically, you requested:

"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.

"According to recent news reports, when responding to a congressional request for cybersecurity information,² the Office of Personnel Management's ('OPM') Legislative Director, Janel Fitzhugh, informed Democratic Representative Kathleen Rice's legislative staff that the OPM would 'only speak with the chair people of [congressional] committees.'³ Specifically, Ms. Fitzhugh said that 'she needed a Republican committee chairman to co-sign the letter in order to get a response.'⁴ When asked for details, Ms. Fitzhugh stated that this 'edict to require a committee chairman signature' was 'passed down' by the OPM's Chief of Staff, Jason Simmons.⁵

"Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ('FOIA'), CoA Institute hereby requests access to the following records for the time period of January 20, 2017 to the present.⁶

Page 2

Mr. Ryan Mulvey

Cause of Action Institute

Re: 2017-05158

June 15, 2017

1. "All records concerning the OPM's policy or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests for the disclosure of agency documents, including any records describing or discussing the 'order' from Jason Simmons referenced by Janel Fitzhugh.
2. "All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (e.g., Office of the White House Counsel), concerning (a) White House review of congressional oversight or records requests or (b) any form of pre-production review of draft responses to any congressional requester (i.e., Congressional committees, chairmen, or individual Members) by White House staff or OPM officials or employees.
3. "All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (e.g., Office of the White House Counsel), concerning (a) White House review of FOIA requests, including White House consultation on agency records containing 'White House equities,' or (b) any form of pre-production review of draft responses to any FOIA requester by White House staff or OPM officials or employees."

The FOIA request number for this request is 2017-05158. Please reference this number in any future communication with OPM about this request.

OPM processes FOIA requests on a "first-in, first-out" basis. The actual processing time will vary depending upon the complexity of the request and whether or not it involves voluminous records or extensive searches or consultations. OPM also processes FOIA requests on a multi-track basis. This means that simple requests, requiring minimal effort to respond, are processed in one track; and complex requests involving voluminous records, extensive searches or consultations (requiring more than 20 workdays to respond) are processed in another track. We have placed your request in the complex track.

If you have any questions regarding your request, you may contact the FOIA Requester Service Center by email at foia@opm.gov or by calling (202) 606-3642.

Sincerely,

Freedom of Information Act
Requester Service Center
Office of the Chief Information Officer

EXHIBIT

3



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Congressional
Legislative and
Intergovernmental
Affairs

FEB 14 2018

Mr. Ryan P. Mulvey
Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006
Office: (202) 400-2729
Cell: (202) 603-7698
Ryan.Mulvey@causeofaction.org

Re: FOIA # FC201705158

Dear Mr. Mulvey:

This letter is in response to your letter, dated June 8, 2017, Freedom of Information Act (FOIA) request. You requested "all records concerning the OPM's policy or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests for the disclosure of agency documents, including any records describing or discussing the "order" from Jason Simmons referenced by Janel Fitzhugh". Your letter was received in this office on June 15, 2017.

Because your letter seeks to gain access to records regarding Members of Congress, Congressional committees, State and local government officials, and those seeking elected office in Federal or State government, I am responding to your request as the Correspondence Analyst, Congressional, Legislative, and Intergovernmental Affairs.

Your FOIA request has three parts. The first part of your FOIA request is referenced in this response as point 1, which is listed above in the opening paragraph. After a search of our records, I have included documents that fit within the parameters of point 1 of your FOIA request. Please note that information contained within these documents contains certain personal information, which has been redacted, as permitted by the FOIA 5 U.S.C. § 552 (b) (6).

The second and third portion of your FOIA request is referenced in this response as point 2 and point 3. Point 2 and point 3 of your FOIA request requested records under the following parameters:

- "2. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (e.g., Office of the White House Counsel), concerning (a) White House review of congressional oversight or records requests or (b) any form of pre-production review of draft responses to any congressional

Mr. Ryan P. Mulvey FOIA # FC201705158

requester (i.e., Congressional committees, chairmen, or individual Members) by White House staff or OPM officials or employees.”

and...

“3. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (e.g., Office of the White House Counsel), concerning (a) White House review of FOIA requests, including White House consultation on agency records containing “White House equities,” or (b) any form of pre-production review of draft responses to any FOIA requester by White House staff or OPM officials or employees.”

After completing a search of our records, I was not able to locate any records responsive to point 2 or point 3 of your FOIA request.

Additionally, we must inform you that you have the right to appeal this determination. Should you wish to do so, pursuant to 5 CFR 294.110, you must send a copy of your initial request, a copy of the letter denying the request, and a statement as to why you believe the denying official erred within 90 days from the date of this letter to:

U.S. Office of Personnel Management
ATTN: Office of General Counsel (OGC)
1900 E Street, NW
Washington, DC 20415

NOTE: Both the front of the envelope and the first page of your letter should be clearly marked “FOIA Appeal.”

The U.S. National Archives and Records Administration’s Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways:

The U.S. National Archives and Records Administration (NARA)
Office of Government Information Services (OGIS)
8601 Adelphi Road
College Park, MD 20740-6001
Telephone: 202-741-5770 or 1-877-684-6448; Fax: 202-741-5769; OGIS Email: ogis@nara.gov

You may also seek additional assistance from OPM’s Public Liaison. The OPM FOIA Public Liaison can be reached as follows:

Email: foia@opm.gov
Telephone Hotline: 202-606-1153

Mr. Ryan P. Mulvey FOIA # FC201705158

Additionally, copies of the FOIA regulations are available to you at www.opm.gov/efoia.

Sincerely,



Jerson Matias
Correspondence Analyst
Congressional, Legislative,
and Intergovernmental Affairs

Enclosure

EXHIBIT

4

From: (b) (6)
To: (b) (6)
Subject: Letter Opinion
Date: Monday, June 05, 2017 4:52:50 PM

See following link;
<https://www.justice.gov/olc/file/966326/download>

Sent from my iPad

Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch

The constitutional authority to conduct oversight—that is, the authority to make official inquiries into and to conduct investigations of executive branch programs and activities—may be exercised only by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen).

Individual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee. They may request information from the Executive Branch, which may respond at its discretion, but such requests do not trigger any obligation to accommodate congressional needs and are not legally enforceable through a subpoena or contempt proceedings.

May 1, 2017

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

We understand that questions have been raised about the authority of individual members of Congress to conduct oversight of the Executive Branch. As briefly explained below, the constitutional authority to conduct oversight—that is, the authority to make official inquiries into and to conduct investigations of executive branch programs and activities—may be exercised only by each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen). Individual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee. Accordingly, the Executive Branch’s longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight.

The Constitution vests “[a]ll legislative Powers” in “a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. Const. art. I, § 1. The Supreme Court has recognized that one of those legislative powers is the implicit authority of each house of Congress to gather information in aid of its legislative function. See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Each house may exercise its authority directly—for example, by passing a resolution of inquiry seeking information from the Executive Branch. See 4 *Deschler’s Precedents of the United States House of Representatives*, ch. 15, § 2, at 30–50

(1981) (describing the practice of resolutions of inquiry and providing examples); Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure*, S. Doc. No. 101-28, at 882 (1992) (“The Senate itself could investigate or hear witnesses as it has on rare occasions[.]”).

In modern practice, however, each house typically conducts oversight “through delegations of authority to its committees, which act either through requests by the committee chairman, speaking on behalf of the committee, or through some other action by the committee itself.” *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289, 289 (2001) (“*Application of Privacy Act*”); see also Alissa M. Dolan et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 65 (Dec. 19, 2014). As the Supreme Court has explained, “[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose” and, in such circumstances, “committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony.” *Watkins v. United States*, 354 U.S. 178, 200–01 (1957).

By contrast, individual members, including ranking minority members, “generally do not act on behalf of congressional committees.” *Application of Privacy Act*, 25 Op. O.L.C. at 289; see also *id.* at 289–90 (concluding that “the Privacy Act’s congressional-disclosure exception does not generally apply to disclosures to ranking minority members,” because ranking minority members “are not authorized to make committee requests, act as the official recipient of information for a committee, or otherwise act on behalf of a committee”). Under existing congressional rules, those members have not been “endowed with the full power of the Congress” (*Watkins*, 354 U.S. at 201) to conduct oversight. See *Congressional Oversight Manual* at 65; see also *Exxon Corp. v. FTC*, 589 F.2d 582, 593 (D.C. Cir. 1978) (“[D]isclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities.”). Individual members who have not been authorized to conduct oversight are entitled to no more than “the *voluntary* cooperation of agency officials or private persons.” *Congressional Oversight Manual* at 65 (emphasis added).

The foregoing reflects the fundamental distinction between constitutionally authorized oversight and other congressional requests for infor-

mation. When a committee, subcommittee, or chairman exercising delegated oversight authority asks for information from the Executive Branch, that request triggers the “implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches.” *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977); *see also id.* at 130–131 (describing the “[n]egotiation between the two branches” as “a dynamic process affirmatively furthering the constitutional scheme”). Such oversight requests are enforceable by the issuance of a subpoena and the potential for contempt-of-Congress proceedings. *See McGrain*, 273 U.S. at 174; 2 U.S.C. §§ 192, 194; *see also* Standing Rules of the Senate, Rule XXVI(1), S. Doc. No. 113-18, at 31 (2013) (empowering all standing committees to issue subpoenas); Rules of the House of Representatives, 115th Cong., Rule XI, cl. 2(m)(1) (2017) (same). Upon receipt of a properly authorized oversight request, the Executive Branch’s longstanding policy has been to engage in the accommodation process by supplying the requested information “to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.” Memorandum for the Heads of Executive Departments and Agencies from President Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982). But a letter or inquiry from a member or members of Congress not authorized to conduct oversight is not properly considered an “oversight” request. *See Congressional Oversight Manual* at 56 (“Individual Members, Members not on a committee of jurisdiction, or minority Members of a jurisdictional committee, may, like any person, request agency records. When they do, however, they are not acting pursuant to Congress’s constitutional authority to conduct oversight and investigations.”). It does not trigger any obligation to accommodate congressional needs and is not legally enforceable through a subpoena or contempt proceedings.

Members who are not committee or subcommittee chairmen sometimes seek information about executive branch programs or activities, whether for legislation, constituent service, or other legitimate purposes (such as Senators’ role in providing advice and consent for presidential appointments) in the absence of delegated oversight authority. In those non-oversight contexts, the Executive Branch has historically exercised its discretion in determining whether and how to respond, following a general policy of providing only documents and information that are already public or would be available to the public through the Freedom of Information Act, 5 U.S.C. § 552. Whether it is appropriate to respond to re-

quests from individual members will depend on the circumstances. In general, agencies have provided information only when doing so would not be overly burdensome and would not interfere with their ability to respond in a timely manner to duly authorized oversight requests. In many instances, such discretionary responses furnish the agency with an opportunity to correct misperceptions or inaccurate factual statements that are the basis for a request.

CURTIS E. GANNON
Acting Assistant Attorney General
Office of Legal Counsel