



September 11, 2015

VIA E-MAIL

Ms. Karen Neuman
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane, S.W., STOP-0655
Washington, D.C. 20528-0655
E-mail: foia@hq.dhs.gov

Re: Freedom of Information Act Request

Dear Ms. Neuman:

I write on behalf of Cause of Action, a nonprofit strategic oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.¹ In carrying out its mission, Cause of Action uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), Cause of Action requests access to the following:

1. All records reflecting or referring to waivers from Department of Homeland Security (“DHS”) Sensitive Systems Policy Directive 4300A that were granted to Secretary Jeh Johnson, Deputy Secretary Alejandro Mayorkas, or any other DHS official.² This includes, but is not limited to, formal waivers,³ “informal” waivers,⁴ and any records concerning the approval or denial of a waiver request (e.g., correspondence with or amongst employees of

¹ See CAUSE OF ACTION, www.causeofaction.org.

² See generally U.S. DEP’T OF HOMELAND SEC., DHS SENSITIVE SYSTEMS POLICY DIRECTIVE 4300A (v11.0), at 8-9 (Apr. 30, 2014), available at <http://goo.gl/cX70aK>. Policy Directive 4300A “prohibit[s] activities including . . . Webmail, Instant Messaging (IM)” and other similar activities. *Id.* at 90. Specifically, “[t]he use of Internet Webmail (Gmail, Yahoo, AOL) or other personal email accounts is not authorized over DHS furnished equipment or network connections.” *Id.* at 111.

³ See generally U.S. DEP’T OF HOMELAND SEC., DHS 4300A SENSITIVE SYSTEMS HANDBOOK – ATTACHMENT B WAIVER REQUEST FORM (v11.0) (July 30, 2014), available at <http://goo.gl/3v7F9R>.

⁴ See Josh Rogin, *Homeland Security Leaders Bent Rules on Private E-Mail*, BLOOMBERG VIEW (July 20, 2015), <http://goo.gl/pmo82S> (“[Secretary] Johnson and [] 28 other senior officials sought and received informal waivers at different times over the past year[.]”).

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the Office of the Chief Information Officer related to the processing of a waiver request). The time frame for this item of the request is April 1, 2014 to the present.

2. All records containing or concerning guidelines, policies, or rules for official record retention that were issued or otherwise available to the waiver recipients identified in item one of this request. The time frame for this item of the request is April 1, 2014 to the present.
3. All official records created by any waiver recipient identified in item one of this request on Internet Webmail or other personal e-mail account from April 1, 2014 to the present.

Request for Public Interest Fee Waiver

Cause of Action requests a public interest waiver of all applicable fees.⁵ This provision provides that agencies 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, the requested records would unquestionably shed light on the “operations or activities of the government,” namely, the manner in which DHS exempted high-ranking officials from its agency-wide rule prohibiting the use of Web-based e-mail programs. The requested records may also demonstrate the sufficiency of the Department’s official record retention policies. Finally, the records may indicate whether DHS officials used private e-mail accounts for conducting official agency business and, if so, whether the official records they created were properly retained by DHS. This information is likely to contribute significantly to public understanding because, to date, the public knows very little about these matters.

Cause of Action has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Cause of Action’s staff has a wealth of 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 Cause of Action’s regularly published online newsletter, memoranda, reports, or press releases. Further, Cause of Action, a nonprofit organization under section 501(c)(3) of the Internal Revenue Code, does not have a commercial interest in making this request. The requested information will be used to educate the general public about DHS’s information security standards and certain DHS officials’ personal technology and electronic communication practices.

Request to be Classified as a Representative of the News Media

For fee status purposes, Cause of Action also qualifies as a “representative of the news media” under FOIA.⁷ As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the *requestor*, not the specific FOIA *request* at issue.⁸ Cause of Action satisfies this test because it gathers information of potential interest to a segment of the public, uses

⁵ 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ *Id.*

⁷ *Id.* § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(b)(6); *see also Cause of Action v. Fed. Trade Comm’n*, No. 13-5335, 2015 U.S. App. LEXIS 14934, at *15-24 (D.C. Cir. Aug. 25, 2015) (discussing proper application of public-interest fee waiver test).

⁸ *Cause of Action*, 2015 U.S. App. LEXIS 14934 at *30.

its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.⁹ Although it is not required by the statute, Cause of Action gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action 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 distinct works are distributed to the public through various media, including Cause of Action's website, which has been viewed approximately 100,000 times in the past year alone.¹¹ Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."¹² In light of the foregoing, numerous federal agencies – including DHS – have appropriately recognized Cause of Action's news media status in connection with its FOIA requests.¹³

⁹ Cause of Action notes that DHS's definition of "representative of the news media" (6 C.F.R. § 5.11(b)(6)) is in conflict with the statutory definition. DHS 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*, 2015 U.S. App. LEXIS 14934 at *42 ("[T]here is no basis for adding an 'organized and operated' requirement to the statutory definition."). Under either definition, however, Cause of Action qualifies as a representative of the news media.

¹⁰ See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program*, CAUSE OF ACTION (May 19, 2015), available at <http://goo.gl/Byditl>; CAUSE OF ACTION, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://goo.gl/MqObwV>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com*, CAUSE OF ACTION (Sept. 8, 2014), available at <http://goo.gl/935qAi>; CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://goo.gl/BiaEaH>; CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://goo.gl/N0xSvs>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://goo.gl/GpP1wR>.

¹¹ *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

¹² 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹³ See, e.g., FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); see also 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, U.S. 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, U.S. Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, U.S. 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. Comm'n (May 7, 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 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).

Record Preservation Requirement

Cause of Action requests that the disclosure officer responsible for the processing of this request issue an immediate hold upon any and all records responsive to this request, so as to prevent their disposal until such time as a final determination has been issued on Cause of Action's request and any possible administrative remedies for appeal have been exhausted.¹⁴

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 readily reproducible, the production should consist of load files that are compatible with Concordance® Evolution. If a certain portion of responsive records can be produced more readily, Cause of Action 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 Ryan Mulvey by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

CAUSE OF ACTION INSTITUTE

BY:



RYAN P. MULVEY
COUNSEL

¹⁴ 6 C.F.R. § 5.10 ("Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under FOIA.").