



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

1875 Eye Street NW, Suite 800 · Washington, D.C. 20006

July 1, 2016

VIA PRIORITY MAIL & E-MAIL

Associate General Counsel (General Law)
Mailstop 0655
U.S. Department of Homeland Security
Office of the General Counsel
Washington, D.C. 20528
E-mail: ogc@hq.dhs.gov

Re: Freedom of Information Act Appeal, FOIA No. 2015-HQFO-00691

Dear FOIA Appeals Officer:

This is a timely administrative appeal of the Department of Homeland Security (“DHS”) final response to a Cause of Action Institute (“CoA Institute”) Freedom of Information Act (“FOIA”) request for records concerning the exemption of high-ranking DHS officials from an agency-wide rule prohibiting the use of Web-based e-mail programs.

Procedural Background

On September 11, 2015, CoA Institute submitted a FOIA request to the DHS seeking access to three categories of records concerning webmail waivers issued to Secretary Jeh Johnson and twenty-eight senior DHS officials.¹ CoA Institute also requested treatment as a representative of the news media for fee purposes, as well as a public interest fee waiver.² On September 22, 2015, the DHS acknowledged receipt of the CoA Institute FOIA request, assigned it a tracking number, and indicated that the agency would invoke an automatic ten-day statutory extension of the response deadline.³ The DHS granted the CoA Institute request for news media requester status and conditionally granted the request for a public interest fee waiver.⁴

On May 6, 2016, the DHS issued its final determination.⁵ The agency identified a total of 691 responsive records: 24 pages were released in full; 459 pages were partially redacted; and

¹ Letter from CoA Inst. to Karen Neuman, Chief Privacy Officer/Chief FOIA Officer, Dep’t of Homeland Sec. (Sept. 11, 2015) (attached as Exhibit 1).

² *Id.*

³ Letter from Jimmy Wolfrey, FOIA Program Specialist, Dep’t of Homeland Sec., to CoA Inst. (Sept. 22, 2015) (attached as Exhibit 2).

⁴ *Id.*

⁵ Letter from Mia Day, FOIA Program Specialist, Dep’t of Homeland Sec., to CoA Inst. (May 6, 2016) (attached as Exhibit 3).

208 pages were withheld in their entirety.⁶ The agency justified its withholdings under FOIA Exemptions 5, in conjunction with the deliberative process and attorney-client privileges, and 6.

As set forth below, this final response is inadequate. The DHS failed to produce legible records; failed to reasonably segregate responsive material; failed to conduct an adequate search; and failed to properly invoke Exemption 5, in conjunction with the deliberative process and attorney-client privileges, as well as Exemption 6. Accordingly, the CoA Institute appeal should be granted and the underlying request remanded to the DHS FOIA office for further processing.

Discussion

As an initial matter, when responding to a FOIA request, an agency has a “duty to release legible, complete records.”⁷ This duty is grounded in the notion that “[t]he focus of the FOIA is *information*, not documents[.]”⁸ In this case, some of the records produced are illegible.⁹ The DHS should reprocess all responsive records and produce them in a legible format.

Similarly, when producing responsive records, the DHS must conduct a review to determine whether non-exempt, reasonably-segregable portions of a record can be disclosed “after deletion of the [exempt] portions.”¹⁰ The DHS cannot withhold an entire record simply because it contains some exempt material.¹¹ Considering the volume of records withheld in full—208 pages—some of the material contained therein may have been improperly redacted. Even records that would, in large part, be protected under the deliberative process and attorney-client privileges are likely to contain purely factual material that is neither confidential nor pre-decisional and deliberative. The DHS should re-review the 208 pages in question and to produce non-exempt segregable portions thereof.

With respect to search adequacy, the DHS “must conduct a search reasonably calculated to uncover all relevant documents.”¹² 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.”¹³ The DHS 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.¹⁴ In this case, the DHS search fell short of the required reasonableness because the agency failed to produce any records responsive to Item 3. This item sought “[a]ll official records created by any waiver recipient . . . on Internet Webmail or other personal e-mail account[s] from April 1, 2014 to the present.”¹⁵ Such records are known

⁶ *Id.*

⁷ *Cleary, Gottlieb, Steen & Hamilton v. Dep’t of Health & Human Servs.*, 844 F. Supp. 770, 779–80 (D.D.C. 1993).

⁸ *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (emphasis added).

⁹ See Exhibit 4 (sample illegible pages).

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

¹¹ See *Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982–83 (1st Cir. 1985).

¹² *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks, alterations, and citation omitted).

¹³ *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

¹⁴ *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495 at *2 (D.C. Cir. June 2, 2009).

¹⁵ CoA Inst. FOIA Request, *supra* note 1.

to exist.¹⁶ In a live discussion with Mike Allen of POLITICO, Secretary Johnson indicated that when he received communications concerning government business on his Gmail account, he forwarded them to his government account.¹⁷ It is reasonable to expect that other senior DHS officials behaved similarly when receiving work-related e-mail on their personal web-based accounts. The DHS should conduct a supplemental search targeted to identify all records potentially responsive to Item 3.

The DHS has also failed to justify its reliance on Exemption 5, in conjunction with the deliberative process and attorney-client privileges. As to the former privilege, the DHS has not adequately demonstrated that all records, including those withheld in full, are (1) pre-decisional, that is, “antecedent to the adoption of an agency policy,”¹⁸ and (2) deliberative, or “a direct part of . . . [a] process [of] mak[ing] recommendations or express[ing] opinions on legal or policy matters.”¹⁹ If any responsive material does not reflect the “give-and-take of the consultative process,”²⁰ its disclosure would not vitiate the purpose of the privilege, *i.e.*, to enhance the quality of agency decision-making.²¹

With respect to the attorney-client privilege, the DHS has failed to demonstrate that all relevant records, including those withheld in full, reflect confidential communications made by a client (*i.e.*, an agency component) to an attorney (*i.e.*, the Office of General Counsel) “for the purpose of securing . . . (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.”²² The privilege only applies to communications created in the context of an actual attorney-client relationship and not simply whenever an agency employee communicates with a lawyer.²³ Indeed, the privilege “must be ‘strictly confined within the narrowest possible limits consistent with the logic of its principle.’”²⁴ Because the DHS has not identified those portions of the produced records that it considers attorney-client communications, CoA Institute is uncertain as to the legitimacy of the use of the privilege, especially as it pertains to records withheld in full. The DHS should provide greater specificity in this regard.

Finally, CoA Institute challenges the use of Exemption 6 to withhold records, or portions of records, containing the names of federal employees and their positions, duty stations, or agency e-mail addresses.²⁵ All of this information must be disclosed in accordance with Office

¹⁶ *Cf. Boyd v. U.S. Marshal Serv.*, No. 99-2712, 2002 U.S. Dist. LEXIS 27734 at *4 (D.D.C. Mar. 15, 2002).

¹⁷ Joseph Marks, *Jeh Johnson on Gmail use: ‘Whoops’*, POLITICO (July 21, 2015), <http://politi.co/298nfFf>.

¹⁸ *Ancient Coin Collectors Guild v. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011).

¹⁹ *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975).

²⁰ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *see also Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010) (concluding that “[t]o the extent the documents . . . neither make recommendations for policy change nor reflect internal deliberations on the advisability of any particular course of action, they are not predecisional and deliberative”).

²¹ *See Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (observing that the “ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decision”).

²² *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984). In the government context, an agency is the “client” and its departmental counsel is the “attorney.” *See Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 618 (D.C. Cir. 1997).

²³ *See Brinton v. Dep’t of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (“[T]he attorney-client privilege applies only when information is the product of an attorney-client relationship and is maintained as confidential between attorney and client.”).

²⁴ *In re Lindsey*, 148 F.3d 1100, 1108 (D.C. Cir. 1988) (citation omitted).

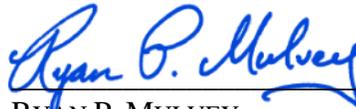
²⁵ FOIA Exemption 6 may be used only to withhold, *inter alia*, purely personal details of individuals that do not otherwise shed light on agency functions when the disclosure of such information would constitute a clearly

of Personnel Management regulations.²⁶ To the extent that the DHS used Exemption 6 in too broad a fashion, especially in withholding records in full, then it has done so improperly and should promptly produce responsive, non-exempt material.

Conclusion

For the foregoing reasons, the DHS final response to the September 11, 2015 CoA Institute FOIA request is inadequate. The agency has failed to properly invoke the deliberative process and attorney-client privileges, and Exemption 6; failed to conduct an adequate search; failed to reasonably segregate responsive material; and failed to produce legible records.

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



RYAN P. MULVEY
COUNSEL

unwarranted invasion of personal privacy. *See, e.g., Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994) (protecting federal employees' home addresses); *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).

²⁶ 5 C.F.R. § 293.311(a) (OPM regulation specifying that information in personnel files should be accessible by the public); *see Friedman v. U.S. Secret Serv.*, 923 F. Supp. 2d 262, 281–83 (D.D.C. 2013) (federal agency employees' names, work phone numbers, and work email addresses cannot be withheld under Exemption (6)).

EXHIBIT

1



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.").

EXHIBIT

2



**Homeland
Security**

Privacy Office, Mail Stop 0655

September 22, 2015

SENT VIA E-MAIL TO: RYAN.MULVEY@CAUSEOFACTION.ORG

Ryan P. Mulvey
Cause of Action
1919 Pennsylvania Avenue NW
Suite 650
Washington, DC 20006

Re: **2015-HQFO-00691**

Dear Mr. Mulvey:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated September 11, 2015, and to your request for a waiver of all assessable FOIA fees. Our office received your request on September 15, 2015. Specifically, you requested the following for the timeframe April 1, 2014 to present:

- 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 including but is not limited to, formal waivers, "informal waivers, and any records concerning the approval or denial of a waiver request (e.g., correspondence with or amongst employees of the Office of the Chief Information Officer related to the processing of a waiver request);
- 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; and
- 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.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Consistent with 6 C.F.R. § 5.5(a) of the DHS FOIA regulations, the Department processes FOIA requests according to their order of receipt. Although DHS' goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances. As your request seeks documents that will require a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request pursuant to 5 U.S.C. § 552(a)(6)(B). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

You have requested a fee waiver. The DHS FOIA Regulations at 6 CFR § 5.11(k)(2) set forth six factors DHS must evaluate to determine whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of

the government,” (2) Whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons, (4) Whether the contribution to public understanding of government operations or activities will be “significant,” (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure, and (6) Whether the magnitude of any identified commercial interest to the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

Upon review of the subject matter of your request, and an evaluation of the six factors identified above, DHS has determined that it will conditionally grant your request for a fee waiver. The fee waiver determination will be based upon a sampling of the responsive documents received from the various DHS program offices as a result of the searches conducted in response to your FOIA request. DHS will, pursuant to DHS regulations applicable to media requesters, process the first 100 pages. If upon review of these documents, DHS determines that the disclosure of the information contained in those documents does not meet the factors permitting DHS to waive the fees, then DHS will at that time either deny your request for a fee waiver entirely, or will allow for a percentage reduction in the amount of the fees corresponding to the amount of relevant material found that meets the factors allowing for a fee waiver. In either case, DHS will promptly notify you of its final decision regarding your request for a fee waiver and provide you with the responsive records as required by applicable law.

In the event that your fee waiver is denied, and you determine that you still want the records, provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to media requesters. As a media requester you will be charged 10 cents per page for duplication; the first 100 pages are free. In the event that your fee waiver is denied, we will construe the submission of your request as an agreement to pay up to \$25.00. This office will contact you before accruing any additional fees.

We have queried the appropriate component(s) of DHS for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2015-HQFO-00691**. Please refer to this identifier in any future correspondence. To check the status of your FOIA request, you may contact this office at 1-866-431-0486 or 202-343-1743, or you may check the status of your request online at <http://www.dhs.gov/foia-status>.

Sincerely,

A handwritten signature in black ink that reads "Jimmy Wolfrey". The signature is written in a cursive, slightly slanted style.

Jimmy Wolfrey
FOIA Program Specialist

EXHIBIT

3



Homeland
Security

May 06, 2016

SENT BY ELECTRONIC MAIL TO: RYAN.MULVEY@CAUSEOFACTION.ORG

Ryan P. Mulvey
Cause of Action
1919 Pennsylvania Avenue NW
Suite 650
Washington, DC 20006

Re: **2015-HQFO-00691**

Dear Mr. Mulvey:

This is the electronic final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated September 11, 2015, and received by this office on September 15, 2015. You are seeking the following records for the time frame of April 1, 2014 to present:

- 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 including but is not limited to, formal waivers, "informal waivers, and any records concerning the approval or denial of a waiver request (e.g., correspondence with or amongst employees of the Office of the Chief Information Officer related to the processing of a waiver request);
- 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; and
- 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.

A search of the DHS Management Directorate (MGMT), Chief Information Officer (CIO) for documents responsive to your request produced a total of 691 pages. Of those pages, I have determined that 24 pages of the records are releasable in their entirety, 459 pages are partially releasable, and 208 pages are withheld in their entirety pursuant to Title 5 U.S.C. § 552: (b)(5) and (b)(6), FOIA Exemptions 5 and 6.

Enclosed are 691 pages with certain information withheld as described below.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that portions of the responsive documents qualify for protection under the deliberative process privilege and attorney-client privilege.

- **Deliberative Process Privilege**

The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

- **Attorney-Client Privilege**

The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), Mailstop 0655, U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of FOIA allow DHS to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge. 6 CFR § 5.11(d)(4).

If you need to contact our office again about this matter, please refer to **2015-HQFO-00691**. This office can be reached at 1-866-431-0486 or 202-343-1743.

Sincerely,



Mia Day
FOIA Program Specialist

Enclosure(s): Responsive Documents, 691 pages

EXHIBIT

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Requester	Office	Requester	Approver	Reason	Date	Seven Day Access	Remedy	Date Added	Log Data
- all Webmail Exempt (b)(6)	USA	(b)(6)	Hans Jackson (LAN A/ISSM)	Access to FBI email (Special Agent)	6/14/2015		CRQ000000347443	Jun 20 2015	Maple, Charles (CTR)
Steve L Baker "Prober no k'd"	USA	Rohan Sreed	denied by Andy Stalder via email 6/13/15 prober no k'd				REG00000027585	Jun 20 2015	Maple, Charles (CTR)
(b)(6)	USA	Rosene Carter	Greg Fry	Demonstration	6/20/2014		INC000002064309		
	USA	Meghan Ludtke	Mike Brown Vince Mione	ILD job function & SCIF challenges	6/20/2014	Y	INA 000002043432		
	USA	Meghan Ludtke	Mike Brown Vince Mione	ILD job function & SCIF challenges	6/20/2014	Y	INA 000002043432		
	USA	Meghan Ludtke	Mike Brown Vince Mione	ILD job function & SCIF challenges	6/20/2014	Y	INC000002043432		
	USA	Meghan Ludtke	Mike Brown Vince Mione	ILD job function & SCIF challenges	6/20/2014	Y	INC000002043432		
	USA	Savitha Manohar on behalf of RGA	Vince Mione	Reasonable accommodation	4/15/2014	Y	INC000002013586		
Anderson James "James Anderson"	NPPD	None	None	None					
Thomas E. Giff "giff tmm"	OCIA	Leigh Hayes	Thomas E. Giff (my) - (srak Mike Brown)	Special access was not requested	6/23/2014	Y	REG00000027585	Jun 23 2014	Maple, Charles (CTR)
Benjamin Ward "Benjamin Ward"	OCIA	Leigh Hayes	Thomas E. Giff (my) - (srak Mike Brown)	Special access was not requested	6/23/2014	Y	REG00000027585	Jun 23 2014	Maple, Charles (CTR)
Christina G. "Christina G. Giff"	OCIA Data	Leigh Hayes	Leigh Hayes	Access to FBI email (Gregory)	7/28/2014		INC000002043432	Jul 28 2014	Maple, Charles (CTR)
Stacy "Stacy Giff"	OCIA	Savitha Manohar on behalf of OGC	Vince Mione Luke McCormack Mike Brown	No business reason - "routine"	7/20/2014	Y	INC000002093729		
Brenda S. "Brenda S. Giff"	OCIA	Vince Mione	Vince Mione	Initial setup	4/14/2014	Y			
Meghan "Meghan Giff"	OCIA	Vince Mione	Vince Mione	Initial setup	4/14/2014	Y			
Kristin "Kristin Giff"	OCIA	Meghan Ludtke	Mike Brown Vince Mione	ILD job function & SCIF challenges	6/20/2014	Y	INC000002043432		
Veneta "Veneta Giff"	OCIA	Greg Fry	Greg Fry	Job function	5/20/2014		INA 000002111161		
Wanda "Wanda Giff"	OCIA	Vince Mione	Vince Mione	Initial setup	4/14/2014				
Clara "Clara Giff"	OCIA	Rosene Carter	Greg Fry	Demonstration	8/15/2014		INC000002064309		
Debra "Debra Giff"	OCIA	Raf Parag	Greg Fry	Access to FBI email (Gregory)	7/28/2014		INC000002043432	Jul 28 2014	Maple, Charles (CTR)
Christina "Christina Giff"	OCIA	Jordan Guttmel	Vince Mione	"Two week stretch"	4/30/2014				
Rose "Rose Giff"	OCIA	Rosene Carter on behalf of Rosen	Greg Fry	Business need	7/7/2014	Y	INC000002064309		
Marian "Marian Giff"	OCIA	Rosene Carter	Greg Fry	Demonstration	8/15/2014	Y	INA 000002064309		
Shirley "Shirley Giff"	OCIA	Vince Mione via Rosene Carter	Vince Mione	Initial setup	4/14/2014		INA 000002064309		
ANNA "ANNA Giff"	OCIA	Vince Mione via Rosene Carter	Vince Mione	Initial setup	4/14/2014		INC000002064309		
John "John Giff"	OCIA	Vince Mione	Vince Mione	Initial setup	4/14/2014	Y	INC000002064309		
MRI "MRI Giff"	OCIA	None	None	None					

Full-Webmail-Exempt	Office	Requestor	Approver	Reason	Date	Seven Day Access	Remedy	Date Added	Log Data Changed By
(b)(6)	CS&C	(b)(6)	Harry Jackson (LAN A/ISSM)	Access to FBI email (Special Agent)	1/24/2015		CR000000347843	Jan 20 2015	Major, Charles (CTR)
Nick, Robert "Robert Nield"	CS&C	Robert Nield	Approved by Director Studies, Security (2/23/2016)	provisioned access			CR000000347843	Jan 20 2015	Major, Charles (CTR)
Lyell, Brian "X", Brian Lyell	IGA	Roscoe Carter	Greg Frey	Demonstration			INC000002064309	INC00002051090	
(b)(6)	IGA	Meghar Ludtke	Mike Brown/Vince Micone	ILD job function & SCIF challenges	6/20/2014		INC000002042432		
(b)(6)	IGA	Meghar Ludtke	Mike Brown/Vince Micone	ILD job function & SCIF challenges	6/20/2014	Y	INC000002042432		
(b)(6)	IGA	Meghar Ludtke	Mike Brown/Vince Micone	ILD job function & SCIF challenges	6/20/2014		INC000002042432		
(b)(6)	IGA	Meghar Ludtke	Mike Brown/Vince Micone	ILD job function & SCIF challenges	6/20/2014	Y	INC000002042432		
(b)(6)	IGA	Meghar Ludtke	Mike Brown/Vince Micone	ILD job function & SCIF challenges	6/20/2014		INC000002042432		
(b)(6)	IGA	Savitha Manohar on behalf of IGA	Vince Micone	Reasonable accommodate	4/15/2014	Y	INC000002013580		
Amertson, James "James Anderson"	ASPD	James Anderson	Approved by Director Studies, Security (2/23/2016)	Access to FBI email (Special Agent)	4/15/2014	Y	INC000002013580	Apr 17 2014	Guerra, Lawrence (CTR)
Hains, Leigh "Leigh Haines"	OC/O	Leigh Haines	Approved by Director Studies, Security (2/23/2016)	Access to FBI email (Special Agent)	6/25/2014	Y	CR000000011767	Jun 25 2014	Major, Charles (CTR)
Benge, Leel "Leel Benge"	OC/O	Leel Benge	Approved by Director Studies, Security (2/23/2016)	Access to FBI email (Special Agent)	6/25/2014	Y	CR000000011767	Jun 25 2014	Major, Charles (CTR)
Benzel, Tom "Tom Benzel", Tom Benzel	OC/O	Tom Benzel	Approved by Director Studies, Security (2/23/2016)	Access to FBI email (Special Agent)	6/25/2014	Y	CR000000011767	Jun 25 2014	Major, Charles (CTR)
Carter, John "John Carter", John Carter	IG&A	John Carter	not approved - denied	Access to FBI email (Special Agent)	4/16/2014		INC000002011281	Apr 17 2014	Guerra, Lawrence (CTR)
Shankelam, David "David Shankelam"	OGC	Savitha Manohar on behalf of OGC	Vince Micone/Luxe McCormack/Mike Brown	No business reason - "routine"	7/20/2014	Y	INC000002057749		
Burne, Robert "Robert Burne"	OGC	Vince Micone	Vince Micone	Initial setup	4/14/2014	Y	INC000002057749		
Meyer, Jonathan "Jonathan Meyer"	OGC	Vince Micone	Vince Micone	Initial setup	4/14/2014		INC000002057749		
Kranich, Matthew "Matthew Kranich"	OGC	Meghar Ludtke	Mike Brown/Vince Micone	ILD job function & SCIF challenges	6/20/2014	Y	INC000002042432		
Walsh, Alexander "Alexander Walsh"	O/A	Clark Smith	Greg Frey	Job function	5/1/2014		INC00000211161		
Waters, Eric "Eric Waters"	OPA	Vince Micone	Vince Micone	Initial setup	4/14/2014		INC000002064309		
Chow, Richard "Richard Chow"	OPA	Roscoe Carter	Greg Frey	Demonstration	8/19/2014		INC000002064309		
Peralta, Paul "Paul Peralta"	PA/CS	Paul Peralta	ticket cancelled 2/2/15 / provisioned in error				CR000000035177	Feb 11 2015	Major, Charles (CTR)
Gutierrez, Jordan "Jordan Gutierrez"	PR/PA/CS	Jordan Gutierrez	Vince Micone	"Two week search"	4/30/2014		INC000002064309		
Brown, Paul "Paul Brown"	SC/CS/OGC	Roscoe Carter on behalf of Resen	Greg Frey	Business need	7/7/2014	Y	INC000002064309		
Mancini, Christian "Christian Mancini"	SC/CS/OGC	Roscoe Carter	Greg Frey	Demonstration	8/15/2014	Y	INC000002064309		
Albers, Robert "Robert Albers"	ASPD	Vince Micone via Roscoe Carter	Vince Micone	Initial setup	4/14/2014		INC000002064309		
Albers, "ANBS"	ASPD	Vince Micone via Roscoe Carter	Vince Micone	Initial setup	4/14/2014		INC000002064309		
Albers, "ANBS"	SEC	Vince Micone	Vince Micone	Initial setup	4/14/2014	Y	INC000002064309		
MRI (Ref. Assuring)	OC/O	Approved by Director Studies, Security (2/23/2016)						Jan 9 2015	Jeff Dorken

Call-Webmail-Exempt	Office	Requestor	Approver	Reason	Date	Seven Day Access	Remedy	Date Added	Changed By
(b)(6)	CS&C	No record					CRQ00000347843	Jan 20 2015	Major, Charles (CTR)
"Excel, Robert", "Robert Excel"	CS&C	No record					CRQ00000347850	Jan 20 2015	Major, Charles (CTR)
"Taylor, Francis S.", "Francis Taylor"	SA	Roscoe Carter	Greg Frey	Demonstration			INCO00002064309		
(b)(6)	SA	Meghan Ludtke	Mike Brown/Vince Micone	IID job function & SCIF challenge	6/20/2014		INCO00002042432		
	SA	Meghan Ludtke	Mike Brown/Vince Micone	IID job function & SCIF challenge	6/20/2014	Y	INCO00002042432		
	SA	Meghan Ludtke	Mike Brown/Vince Micone	IID job function & SCIF challenge	6/20/2014		INCO00002042432		
	SA	Meghan Ludtke	Mike Brown/Vince Micone	IID job function & SCIF challenge	6/20/2014	Y	INCO00002042432		
	SA	Meghan Ludtke	Mike Brown/Vince Micone	IID job function & SCIF challenge	6/20/2014		INCO00002042432		
"Savitha Manohar on behalf of IGA"	GA	Savitha Manohar on behalf of IGA	Vince Micone	Reasonable accommodate	4/15/2014	Y	INCO00002013580		
"Andersae, James", "James Andersae"	SPD	No record						April 21 2014	Guidry, Lawrence (CTR)
"Haines, Leigh", "Leigh Haines"	OC D	No record						Jun 25 2014	Major, Charles (CTR)
"Benge, Joe", "Joel Benge"	OC D	No record						Jun 25 2014	Major, Charles (CTR)
"Bonyan, Wendell", "Wendell Bonyan"	OC D	job function/IT security						March 13 2015	Major, Charles (CTR)
"Carter, John F.", "John F. Carter"	OC D	job function						April 21 2014	Guidry, Lawrence (CTR)
"Chaudhary, Baya", "Baya Chaudhary"	OCG	Savitha Manohar on behalf of IGA	Vince Micone/Luke McCormack/Mike Brown	No business reason - "routine initial setup"	7/20/2014	Y	INCO00002014284		
"Baird, Susan L.", "Susan Baird"	OCG	Vince Micone	Vince Micone		4/14/2014	Y	INCO00002057749		
"Meyer, Jonathan", "Jonathan Meyer"	OCG	Vince Micone	Vince Micone	Initial setup	4/14/2014				
"Kroesch, Matthew", "Matthew Kroesch"	OCG	Meghan Ludtke	Mike Brown/Vince Micone	IID job function & SCIF challenge	6/20/2014	Y	INCO00002042432		
"Votaw, Alexander", "Alexander Votaw"	GA	Clark Smith	Greg Frey	job function	5/1/2014		INCO00002111161		
"Waters, Erin", "Erin Waters"	GA	Vince Micone	Vince Micone	Initial setup	4/14/2014				
"Chavez, Richard", "Richard Chavez"	OPS	Roscoe Carter	Greg Frey	Demonstration	8/15/2014		INCO00002064309		
"Perales, Paul", "Paul Perales"	Policy	No record					CRQ00000352707		
"Gottfried, Jordan", "Jordan Gottfried"	PRIVACY	Jordan Gottfried	Vince Micone	"Two week search"	4/30/2014			Feb 11 2015	Major, Charles (CTR)
"Rosen, Paul", "Paul Rosen"	SLC/OC	Roscoe Carter on behalf of Rosen	Greg Frey	Business need	7/7/2014	Y	INCO00002064309		
"Marrone, Christian", "Christian Marrone"	SLC/OC	Roscoe Carter	Greg Frey	Demonstration	8/15/2014	Y	INCO00002064309		
"Stevens, Robert", "Robert Stevens"	SPC/OSPC	Vince Micone via Roscoe Carter	Vince Micone	Initial setup	4/14/2014		INCO00002064309		
"ANM52", "ANM52"	OSPC	Vince Micone via Roscoe Carter	Vince Micone	Initial setup	4/14/2014		INCO00002064309		
"st"	SFC	Vince Micone	Vince Micone	Initial setup	4/14/2014	Y	INCO00002064309		
"BB" (Xen) Assorted	OC D	job function						Jan 9 2015	Jeff Donkor