

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 1, 2017

VIA ELECTRONIC MAIL

U.S. Department of Homeland Security
The Privacy Office
ATTN: Mr. Jonathan Cantor, (Acting) Chief Privacy/FOIA Officer
245 Murray Lane, S.W., STOP-0655
Washington, D.C. 20528-0655
Email: foia@hq.dhs.gov

Re: Freedom of Information Act Request

Dear Mr. Cantor:

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. To that end, we have investigated instances where high-ranking government officials have used personal devices and email accounts to conduct official agency business.

Under the tenure of Secretary Jeh Johnson, the Department of Homeland Security (“DHS”) issued waivers from its Sensitive Systems Policy Directive 4300A to approximately twenty-nine (29) senior officials, including Secretary Johnson and then-Deputy Secretary Alejandro Mayorkas.² These waivers released their recipients from an agency-wide prohibition on the use of browser-based Internet Webmail, including personal email accounts hosted on Gmail, Yahoo, or AOL.³ To the extent that agency-related business was ever conducted on personal email, however, agency records and federal records were created and DHS was (and is) under an obligation to retain, retrieve, and recover such records in accordance with statutory and regulatory requirements.⁴

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

² See, e.g., Josh Rogin, *Homeland Security Leaders Bent Rules on Private E-mail*, BLOOMBERG VIEW (July 20, 2015), <https://bloom.bg/2rfAJ8g> (“[Secretary] Johnson and [] 28 other senior officials sought and received informal waivers at different times over the past year[.]”).

³ See U.S. DEP’T OF HOMELAND SEC., DHS SENSITIVE SYSTEMS POLICY DIRECTIVE 4300A at 17–18 (v. 11.0) (Apr. 30, 2014), available at <http://bit.ly/2qBWjrU>. Policy Directive 4300A “prohibit[s] activities including . . . Webmail, Instant Messaging (IM),” among other things. *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.

⁴ The Federal Record Act (“FRA”), for example, requires agency heads to “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,” 44 U.S.C. § 3102, and to establish “safeguards” against removal or loss of those records, including notifications that records may not be alienated or destroyed unless authorized and of “the penalties provided by law for the unlawful removal or destruction of records.” *Id.* § 3105. The FRA further requires an agency head to notify the Archivist of the United States “of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records[.]” *Id.* § 3106(a). Beyond initial remedial efforts to recover records, the FRA requires that an agency head, with

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records. The time period for all items of this request is April 1, 2014 to the present.⁵

1. All communications between DHS and the Attorney General of the United States concerning efforts to retrieve, recover, or retain records created or received by Secretary Johnson, Deputy Secretary Mayorkas, or any other webmail waiver recipient on a personal email account.
2. All records reflecting notification by DHS to the Archivist of the United States or the National Archives and Records Administration (“NARA”) pursuant to 44 U.S.C. § 3106 and/or 36 C.F.R. § 1230.14 concerning DHS records created or received by any webmail waiver recipient on any personal email account, as well as all communications between DHS and the Archivist or NARA concerning efforts to retrieve, recover, or retain those records.
3. To the extent not already covered by the above items of this request, all other records concerning agency efforts to retrieve, recover, or retain records created or received by any webmail waiver recipient on a personal email account, including all correspondence on this topic with the webmail recipients or their representatives after departure from DHS, if applicable.⁶ For example, responsive records would include, but are not limited to, any correspondence from a webmail recipient indicating that he or she no longer had possession of DHS records in a personal email account, or that he or she had forwarded them to a DHS-hosted email account, and any records evidencing agency efforts to confirm the truth of such representations.

Request for Expedited Processing

CoA Institute requests expedited processing of its request because (1) it is “primarily engaged in disseminating information” and (2) the requested records concern “actual or alleged Federal government activity” of which there is an “urgency to inform the public.”⁷

the assistance of the Archivist, “shall initiate action *through the Attorney General* for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency.” *Id.* (emphasis added).

⁵ For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677–78 (D.C. Cir. 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

⁶ The agency’s efforts to recover records created by four, now-former, DHS officials—Secretary Jeh Johnson, Deputy Secretary Alejandro Mayorkas, Chief of Staff Christian Marrone, and General Counsel Stevan Bunnell—is indirectly the subject of pending litigation. *See* Compl. ¶ 5, *Judicial Watch, Inc. v. Dep’t of Homeland Sec.*, No. 16-0967 (D.D.C. filed May 23, 2016). Although that case does not involve any claim under the FRA, counsel for DHS has provided a summary of the agency’s efforts to recover federal records maintained in the four officials’ personal email accounts. Trial Tr. 5:23–6:16, Feb. 17, 2017, *Judicial Watch, Inc. v. Dep’t of Homeland Security*, No. 16-0967 (D.D.C. filed May 23, 2016).

⁷ 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(c)(ii).

1. CoA Institute is primarily engaged in disseminating information as a representative of the news media.

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media requester.⁸ CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

2. There is an urgency to inform the public about actual Federal government activity.

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia Circuit established a multi-factor test to determine whether a requester properly satisfies the “urgency to inform” standard.⁹ Those factors include: (1) whether a request concerns a “matter of current exigency to the American public”; (2) whether the consequences of delaying a response would “compromise a significant recognized interest”; (3) whether the request concerns “federal government activity”; and, (4) whether the requester has proffered credible “allegations regarding governmental activity.”¹⁰

In this case, the requested records concern former high-ranking DHS officials possibly violating federal laws and agency rules and regulations. The issue has been covered by the news media and interest in the subject is naturally acute.¹¹ These records unquestionably concern the activity of the Federal government, insofar as they reflect communications between DHS, NARA, and the Department of Justice. The records also will reveal DHS efforts, or lack thereof, to recover the work-related email correspondence of Secretary Johnson, Deputy Secretary Mayorkas, and twenty-eight other officials. Importantly, other agencies have granted CoA Institute its requests for expedited processing of requests concerning the use of private email by agency heads and potential attendant FRA violations.¹²

Delay in the production of this request would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose

⁸ *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

⁹ 254 F.3d 300, 310–11 (D.C. Cir. 2001).

¹⁰ *Id.*

¹¹ See, e.g., *supra* note 2; see also Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials’ Private Email Docs*, DAILY CALLER (Nov. 18, 2015), <http://bit.ly/2rAepZS>; Rachel Witkin, *Sec. Jeb Johnson: ‘Whoops’ on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), <http://nbcnews.to/2qxlNRC>.

¹² See Letter from Requester Commc’ns Branch, Office of Info. Programs & Servs., Dep’t of State, to CoA Inst. (Oct 27, 2016) (granting expedited processing of request F-2016-13712) (on file with CoA Inst.); Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Jan. 28, 2016) (granting expedited processing of request NGC16-124) (on file with CoA Inst.); Email from Adrienne M. Santos, Gov’t Info. Specialist, OSD/JA FOIA Office, Dep’t of Def. (Dec. 24, 2015) (granting expedited processing of request 16-F-0338) (on file with CoA Inst.); Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Oct. 2, 2015) (granting expedited processing of request NGC15-648) (on file with CoA Inst.); Email from Joseph A. Scanlon, FOIA & Privacy Officer, Nat’l Archives & Records Admin., to CoA Inst. (Mar. 30, 2015) (granting expedited processing of request NGC15-159) (on file with CoA Inst.); Letter from Requester Commc’ns Branch, Office of Info. Programs & Servs., Dep’t of State, to CoA Inst. (Apr. 14, 2015) (granting expedited processing of request F-2015-4785) (on file with CoA Inst.).

of the FOIA” is to allow the American people access to information that might “contribute significantly to public understanding of the operations or activities of the government.”¹³ The ability of a “watchdog” group like CoA Institute to secure records such as those sought in this request for the purposes of government accountability,¹⁴ especially where a current exigency and unfolding story exists, weighs in favor of expedited processing.

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 DHS 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.”¹⁵

In this case, the requested records will shed light on the “operations or activities of the government,” namely, the extent to which DHS has attempted to retrieve and recover records for permanent preservation that evidence agency business and were created by high-ranking officials on personal email accounts. 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. Public interest in these matters is particularly acute in light of scandals surrounding the use of personal email by former Secretaries of State Hillary Clinton and Colin Powell, and Secretary of Defense Ashton Carter, as well as broader congressional efforts to prevent the use of personal email for government business.¹⁶

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.¹⁷ 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.

¹³ *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

¹⁴ See *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) (“[O]btaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”); *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

¹⁵ 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1); 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).

¹⁶ See Ethan Barton, *John Kerry And National Archives Sued For Colin Powell’s Emails*, DAILY CALLER (Oct. 26, 2016), <http://bit.ly/2qC4Vsb>; Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://bit.ly/2qxnzSJ>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://nyti.ms/2rQQrcM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton’s Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://on.wsj.com/2rAwpnc>.

¹⁷ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

Request To Be Classified as a Representative of the News Media

For fee purposes, CoA Institute qualifies as a “representative of the news media.”¹⁸ 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.¹⁹ 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. 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.²⁰ 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 email.

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.”²¹ In light of the foregoing, numerous federal agencies, including DHS, have appropriately recognized the Institute’s news media status in connection with its FOIA requests.²²

¹⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(b)(6).

¹⁹ See *Cause of Action*, 799 F.3d at 1121.

²⁰ See, 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/2apTwwP>; 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>.

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²² 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. 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, 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); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013).

Record Preservation Requirement

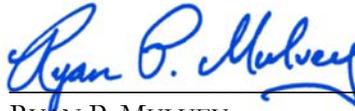
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.²³

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 email at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
COUNSEL

²³ See 6 C.F.R. § 5.9; 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).