

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

March 7, 2018

VIA CERTIFIED MAIL

U.S. Department of Homeland Security
The Privacy Office
ATTN: FOIA Appeals
245 Murray Lane, S.W., STOP-0655
Washington, D.C. 20528-0655

Re: Freedom of Information Act Appeal, Request No. 2017-HQFO-00882

Dear Appeals Officer:

This is a timely administrative appeal from the Department of Homeland Security's ("DHS") adverse determination on Cause of Action Institute's ("CoA Institute") Freedom of Information Act ("FOIA") request, no. 2017-HQFO-00882. Specifically, CoA Institute appeals the adequacy of the agency's search for responsive records.

I. Procedural Background

On June 1, 2017, CoA Institute submitted a FOIA request to DHS seeking various records concerning the recovery of federal records created or received by former Secretary Jeh Johnson and other high-ranking DHS officials on personal web-based email accounts.¹ Responsive records were expected to include, among other things, DHS correspondence with Secretary Johnson and other officials, as well as communications with the National Archives and Records Administration ("NARA").² CoA Institute also requested expedited processing, a public interest fee waiver, and categorization as a representative of the news media.³

By letter, dated June 8, 2017, DHS acknowledged receipt of CoA Institute's FOIA request, denied its request for expedited processing, and conditionally granted its request for a public interest fee waiver.⁴ DHS indicated that, "[i]n the event [CoA Institute's] fee waiver is denied [upon a sampling of responsive records]," the agency "shall charge [CoA Institute] for records in accordance with the DHS FOIA regulations as they apply to non-commercial requesters."⁵

¹ Letter from CoA Inst. to Jonathan Cantor, Acting Chief FOIA Officer, Dep't of Homeland Sec. at 2 (June 1, 2017) (attached as Exhibit 1).

² *See id.*

³ *Id.* at 2-5.

⁴ Letter from Maura Busch, FOIA Program Specialist, Dep't of Homeland Sec., to CoA Inst. (June 8, 2017) (on file with CoA Inst.).

⁵ *Id.* at 2. CoA Institute construed this language as a denial its fee category request and, accordingly, filed an administrative appeal. *See* Letter from CoA Inst. to FOIA Appeals Office, Dep't of Homeland Sec. (June 16, 2017) (on file with CoA Inst.). DHS acknowledged receipt of the appeal, assigning it tracking number 2017-HQAP-00232. *See* Letter from Kevin Tyrell, FOIA Appeals Office, Dep't of Homeland Sec., to CoA Inst. (July 5, 2017) (on file with CoA Inst.). To date, no appeal determination has been issued.

DHS issued its first interim response and production on December 22, 2017, indicating that it had conducted a search in the Office of the Undersecretary for Management and located one record, totaling two pages, responsive to Item 2.⁶ That single record, which was released without redaction, is a May 19, 2017 letter from DHS to NARA concerning the possible alienation of federal email records created or received by Secretary Johnson and others. At the insistence of CoA Institute, DHS subsequently referred an additional eight pages—namely, the February 22, 2017 NARA correspondence that solicited DHS’s May 19, 2017 letter—for processing and direct response by NARA.⁷ Those eight pages were disclosed in full on February 5, 2018.⁸

By letter, dated February 6, 2018, DHS issued its final determination, claiming that it had been “unable to locate or identify any [additional] responsive records.”⁹ DHS specified that it had attempted a “comprehensive search of files within the Electronic Correspondence Tracking (ECT) system.”¹⁰ Yet, beside the single record located in response to Item 2, DHS was unable to identify records responsive to Items 1 and 3. This timely appeal follows the final DHS determination.

II. DHS Failed to Conduct an Adequate Search for Responsive Records

The FOIA and applicable regulations require that DHS “conduct a search reasonably calculated to uncover all relevant documents.”¹¹ 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.”¹² 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.¹³

In this case, DHS’s search falls short of the required reasonableness because the agency failed to produce records that are known to exist based on DHS’s disclosures and representations in a pending FOIA lawsuit. In a series of hearings before the Honorable Randolph D. Moss of the U.S. District Court for the District of Columbia, counsel for DHS repeatedly described its communications with Secretary Johnson and other former DHS officials about the recovery of agency records from private email accounts.¹⁴ Records of such communications, and related

⁶ Letter from Maura Busch, Gov’t Info. Specialist, Dep’t of Homeland Sec., to CoA Inst. (Dec. 22, 2017) (attached as Exhibit 2).

⁷ Letter from Maura Busch, Gov’t Info. Specialist, Dep’t of Homeland Sec., to CoA Inst. (Jan. 25, 2018) (attached as Exhibit 3).

⁸ Letter from Matthew Heichelbech, Office of Gen. Counsel, Nat’l Archives & Records Admin., to CoA Inst. (Feb. 5, 2018) (on file with CoA Inst.).

⁹ Letter from Maura Busch, Gov’t Info. Specialist, Dep’t of Homeland Sec., to CoA Inst. at 2 (Feb. 6, 2018) (attached as Exhibit 4).

¹⁰ *Id.* at 1.

¹¹ *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks, alternations, and citation omitted).

¹² *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

¹³ *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495 at *2 (D.C. Cir. June 2, 2009).

¹⁴ *See, e.g.*, Status Conference Hr’g Tr. at 4:13–23, *Judicial Watch, Inc. v. Dep’t of Homeland Sec.* (No. 16-cv-00967) (D.D.C. Aug. 29, 2016) (“THE COURT: And have the four individuals whose personal accounts are at issue here, have they been contacted . . . for purposes of complying with the request? MR. HEAPS: They’re certainly aware of the requests,

correspondence, fall within the scope of Item Three of CoA Institute's FOIA request, which includes "any correspondence from a webmail recipient indicating that he or she no longer ha[s] possession of DHS records in a personal email account, or that he or she ha[s] forwarded them to a DHS-hosted email account, and any records evidencing agency efforts to confirm the truth of such representations."¹⁵

Again, the record in *Judicial Watch, Inc. v. Department of Homeland Security* is replete with DHS admissions concerning efforts to retrieve, recover, or retain records created or received by former DHS officials on their personal web-based email accounts. In one instance, counsel for DHS admitted that the agency had "been in discussions with the individuals named in [Judicial Watch's] request since very shortly after the request came in about the existence of the FOIA request,"¹⁶ and not merely to issue preservation notices,¹⁷ or to ensure compliance therewith,¹⁸ but also to initiate recovery efforts under the Federal Records Act. In another instance, DHS counsel explained how Secretary Johnson had been in contact with DHS concerning his efforts to locate and recover records stored on his personal account, as required under the Federal Records Act.¹⁹ Among other things, Secretary Johnson described how he "undertook a search [for records] using search terms and a painstaking manual review which took . . . many hours over a period of weeks."²⁰ Indeed, Secretary Johnson communicated to DHS that he had "jump[ed] off from the Federal Records Act definition of records" to employ a "overly broad" definition of "record . . . as sort of [a] starting point" for returning documents to the federal government.²¹ Finally, counsel for DHS conceded that the agency had been in communication with other former DHS officials—namely, Deputy Secretary Alejandro Mayorkas and General Counsel Stevan Bunnell—concerning their compliance with the Federal Records Act vis-à-vis the use of a private web-based email account.²²

and will return agency records in response to a properly stated FOIA request."); *id.* at 5:7–9 ("My client [DHS] is in the process of asking [former Chief of Staff Christian Marrone] that he return agency records[.]").

¹⁵ Ex. 1 at 2.

¹⁶ Status Conference Hr'g Tr. at 10:14–25, *Judicial Watch, Inc. v. Dep't of Homeland Sec.* (No. 16-cv-00967) (D.D.C. Jan. 5, 2017)

¹⁷ *See, e.g., id.* at 11:14–12:7.

¹⁸ *See, e.g.,* Status Conference Hr'g Tr. at 5:23–6:16, *Judicial Watch, Inc. v. Dep't of Homeland Sec.* (No. 16-cv-00967) (D.D.C. Feb. 17, 2017) (describing how former DHS officials "relayed" updates to agency with respect to preservation notices and recovery efforts); *id.* at 6:11–16 ("As for former Secretary Johnson, the Government is having conversations with him about how he ought to return any federal records that might reside in his personal account. Those discussions are ongoing and fruitful, so we're working to bring that to a close as expeditiously as possible.").

¹⁹ Mot. Hr'g Tr. at 3:13–24, *Judicial Watch, Inc. v. Dep't of Homeland Sec.* (No. 16-cv-00967) (D.D.C. May 1, 2017) ("[Secretary Johnson] conducted a review of his private-email account . . . for purposes of the Federal Records Act, and determined that he may have a certain number of federal records on that account. He expects to make a production to DHS very soon.[.]").

²⁰ *Id.* at 6:21–24; *see also id.* at 7:4–10.

²¹ *Id.* at 42:21 – 43:7.

²² *Id.* at 8:20 – 9:7 ("[THE COURT:] Where are we with respect to Mr. Mayorkas' and Mr. Bunnell's efforts? MR. POWERS: So no similar search to the type that Secretary Johnson undertook has occurred, because they've both represented that their practice was to [sic] any time official government business was conducted . . . on their private e-mail accounts, . . . they either copied a .gov e-mail address or forwarded it within the requisite time period in which case they would be in compliance with the Federal Records Act and any federal record would be captured on agency systems.").

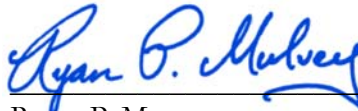
Yet one need not turn to the *Judicial Watch* docket to demonstrate the obvious inadequacy of DHS's search in this instance. In the May 19, 2017 letter disclosed by DHS in its interim response, the agency explained how it had communicated with former officials, including Secretary Johnson, who "reached out and advised that he reviewed his personal email and will be returning potential federal records to the Department."²³ All memorialization of DHS's communications with the four former officials who are the subject of Judicial Watch's FOIA request, as well as similar communications with the other DHS employees who received waivers for the use of personal web-based email accounts, should have been identified, processed, and disclosed in response to CoA Institute's request.²⁴ They were not.

III. Conclusion

For the foregoing reasons, DHS's final response to CoA Institute's June 1, 2017 FOIA request is plainly inadequate. The agency has failed to conduct adequate searches reasonably calculated to identify all responsive records. Supplemental searches should be undertaken.

Thank you for your immediate attention to this matter. If you have any questions, please contact me by telephone at (202) 499-4232 or by email at ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL

²³ Letter from Chip Fulman, Acting Under Sec'y for Mgmt., Dep't of Homeland Sec., to Lawrence Brewer, Chief Records Officer, Nat'l Archives & Records Admin. (May 19, 2017) (attached as Exhibit 5).

²⁴ Communications concerning the May 19, 2017 letter, including any email correspondence transmitting the letter from DHS to NARA, should also have been identified and disclosed in response to Item Two.

EXHIBIT

1

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. Jeh 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/2rAwpcnc>.

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

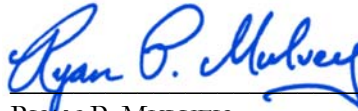
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and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

EXHIBIT

2



Homeland
Security

December 22, 2017

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

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

Re: **2017-HQFO-00882**

Dear Mr. Mulvey:

This is an interim response to item 2 of your June 1, 2017, Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS) for

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. This office received your request on June 2, 2017.

In responding to a FOIA request, DHS will search for responsive documents in its control on the date the search began. We began our search on June 9, 2017. A search of the Office of the Undersecretary for Management (USM) for documents responsive to item 2 of your request produced a total of 2 pages.

We are granting your request under FOIA, 5 U.S.C. § 552, and DHS FOIA regulations at 6 C.F.R. Part 5. After carefully reviewing the responsive correspondence, I determined that it appropriate for public release. The documents are enclosed in their entirety; DHS has claimed no deletions or exemptions.

We continue to process the remainder of your request. We appreciate your patience as we proceed with your request. If you need any further assistance or would like to discuss any aspect of your request, please contact the analyst below who processed your request and refer to **2017-HQFO-00882**. You may send an e-mail to foia@hq.dhs.gov, call 202-343-1743 or toll free 1-866-431-0486, or you may contact our FOIA Public Liaison in the same manner.

Sincerely,

Maura Busch

Maura Busch
Government Information Specialist

Enclosure(s): documents, 2 pages.

EXHIBIT

3



**Homeland
Security**

Privacy Office, Mail Stop 0655

January 25, 2018

SENT VIA EMAIL: foia@nara.gov

NARA FOIA OFFICE

Re: 2017-HQFO-00882

Dear FOIA Officer:

Our office received a Freedom of Information Act (FOIA) request that was submitted by Ryan P. Mulvey from Cause of Action seeking access to 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. This request on June 02, 2017.

While searching for responsive records, our office located 8 pages of records that originated from NARA and that the requester asked our office to process even though not clearly responsive per the request. As such, I am transferring the subject request and 8 pages of records to your office for processing and direct response to the requester. The requester has been notified of this transfer.

If you need to contact our office again about this matter, please refer to **2017-HQFO-00882**.
This office can be reached at 1-866-431-0486 or 202-343-1743.

Sincerely,
Maura Busch
/s/

FOIA Program Specialist

Cc: : Ryan Mulvey (Cause of Action)

EXHIBIT

4



**Homeland
Security**

Privacy Office, Mail Stop 0655

February 6, 2018

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

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

Re: **2017-HQFO-00882**

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 June 1, 2017, and received by this office on June 2, 2017. You are seeking

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.

On December 22, 2017, our office forwarded to you an interim response for item 2 of your request. As for items 1 and 3, we conducted a comprehensive search of files within the Electronic Correspondence Tracking (ECT) system for records that would be responsive to your

request. Unfortunately, we were unable to locate or identify any responsive records. Also, on January 25, 2018, our office referred two pages of records to NARA in connection with item 2 at your request as those records did not originate here at DHS.

While an adequate search was conducted, you have the right to appeal this determination that no records exist within ECT that would be responsive to your request. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter, to: Privacy Office, Attn: FOIA Appeals, U.S. Department of Homeland Security, 245 Murray Lane, SW, Mail Stop 0655, Washington, D.C. 20528-0655, following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS FOIA regulations are available at www.dhs.gov/foia.

If you need any further assistance or would like to discuss any aspect of your request, please contact the analyst below who processed your request and refer to **2017-HQFO-00882**. You may send an e-mail to foia@hq.dhs.gov, call 202-343-1743 or toll free 1-866-431-0486, or you may contact our FOIA Public Liaison in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Provisions of FOIA allow DHS to charge for processing fees, up to \$25, unless you seek a waiver of fees. In this instance, because the cost is below the \$25 minimum, there is no charge.

Sincerely,

Maura Busch

Maura Busch
FOIA Program Specialist

EXHIBIT

5



**Homeland
Security**

MAY 19 2017

Mr. Lawrence Brewer
Chief Records Officer for the U.S. Government
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Dear Mr. Brewer,

This is in response to your February 22, 2017 letter requesting further information concerning the potential alienation of federal email records created or received by former Secretary Jeh Johnson, former Deputy Secretary Alejandro Mayorkas, former Chief of Staff Christian Marrone, and former General Counsel Steven Bunnell, dating from December 23, 2013 to January 20, 2017.

- Former Secretary Johnson reached out and advised that he reviewed his personal email account and will be returning potential federal records to the Department. The Office of the General Counsel (OGC) is working to facilitate this process.
- Former Chief of Staff Marrone had previously reported that he did not use his personal email for business.
- Both former General Counsel Bunnell and former Deputy Secretary Mayorkas have advised that it was their regular practice to forward or cc their .gov accounts with any work related emails sent to or from their personal email accounts.

Department of Homeland Security (DHS) Directive 141-01 Records and Information Management instructs employees to preserve all records in accordance with applicable statutory requirements. DHS is updating its email usage policy to provide guidance that all official business correspondence is to be conducted via Government-provided email only. The use of Internet webmail (e.g., Gmail) or other personal email accounts is not authorized over DHS-furnished equipment or the Department's network connections. In cases where a non-DHS email account is used, the user must ensure the record is submitted to an official DHS email account within 20 days.

DHS Records and Information Management (RIM) will be submitting a Resource Allocation Plan (RAP) for Fiscal Year 2019 funding for an Electronic Records Management System (ERMS). In the interim, the Department has implemented a policy of journaling emails, which automatically captures all emails in an accessible electronic format. This is viewed as a short-term solution for reaching the retention and retrieval requirements under 36 CFR 1236.10 (a-g) as well as OMB M-12-18, goal 1.2.

The guidelines set in 44 U.S.C. 3102 and 36 CFR 1236 were not followed in all cases, but the alienated records have been identified and are in the process of being returned to the Department for preservation.

I hope this information aids in bringing a prompt resolution to this matter.

Sincerely,



Chip Fulghum
Acting Under Secretary for Management