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BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Hearing on The Freedom of Information Act: Examining the Administration's Progress on Reforms and Looking Ahead

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Written Testimony of John Vecchione

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Chairman Grassley, Ranking Member Feinstein, and Members of the Committee, thank you for the opportunity to submit this written testimony about the Freedom of Information Act (“FOIA”), the implementation of the FOIA Improvement Act of 2016, and other issues related to government transparency.

My name is John Vecchione and I am the president and CEO of Cause of Action Institute (“CoA Institute”). We are a nonpartisan, nonprofit government oversight organization committed to ensuring that government decision-making is open, honest, and fair. We use various communication, investigatory, and legal tools to pursue that mission. We believe deeply that in order for a government to be accountable to the people, it must be transparent. To that end, we use the FOIA to gather information and educate the public. But we also police agency behavior under the FOIA, submit regulatory comments on proposed FOIA regulations, and use strategic litigation to bring agencies into compliance with the FOIA and the Federal Records Act.¹

Today, I would like to address two important topics: the proposed policy of Release to One, Release to All and agencies updating their regulations to reflect statutory changes in the FOIA.

I. Release to One, Release to All

In July 2016, the country celebrated the 50th anniversary of the FOIA. Congress marked the occasion by passing the FOIA Improvement Act of 2016.² In conjunction with signing the bill into law, President Obama announced a series of

¹ See, e.g., *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016) (securing decision as co-plaintiff that agency Federal Records Act obligations are not moot so long as agency can still recover records that have been unlawfully removed from the government); *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108 (D.C. Cir. 2015) (securing decision on proper definition of a “representative of the news media” under FOIA’s fee provisions).

² FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

policies to implement the bill and build on the goal of increasing government transparency.³ One of those policy initiatives was to learn from the Department of Justice Office of Information Policy’s (“OIP”) Release to One, Release to All pilot program and to work toward all agencies posting their FOIA productions online.

President Obama wrote that this “concept would ensure that all citizens—not just those making a request—have access to information released under FOIA.”⁴

[The President then] direct[ed] the newly established Chief FOIA Officers Council to consider the lessons learned from the DOJ pilot program and work to develop a Federal Government policy establishing a “release to one is a release to all” presumptive standard for Federal agencies when releasing records under FOIA. The Chief FOIA Officers Council [was directed to] examine issues critical to this policy’s implementation, including assessing the impact on investigative journalism efforts, as well as how best to address technological and resource challenges.⁵

President Obama established a “January 1, 2017 [deadline for] the Chief FOIA Officers Council [to] work with the Office of Management and Budget (‘OMB’) to provide further guidance” on this policy.⁶

On August 10, 2016, in a round of pre-publication comments, CoA Institute submitted comments to OMB and OIP that broadly supported the Release to One, Release to All policy and identified areas where explicit guidance language was necessary to prevent abuse of discretion or agency-avoidance behavior.⁷ We support the policy “because when an agency produces records under FOIA, it has reviewed those records for release to the public and not just the requester. Proactive disclosure of records may reduce the need for use of FOIA to access information in the first place and thus lessen the burden on FOIA offices throughout the federal government.”⁸ Congress has long recognized that frequently requested records should be proactively disclosed by agencies. In the FOIA Improvement Act of 2016, Congress directed that once a record has been requested and released three times,

³ Press Release, The White House, Fact Sheet: New Steps Toward Ensuring Openness and Transparency in Government (June 30, 2016), *available at* <http://bit.ly/2xSReOa>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Letter from James Valvo, Cause of Action Inst., to Hon. Shaun L. S. Donovan, Dir., Office of Mgmt. & Budget, White House, & Melanie Ann Pustay, Dir., Office of Info. Policy, Dep’t of Justice (Aug. 10, 2016) [hereinafter CoA Institute Release to One, Release to All Comment], *available at* <http://coainst.org/2lej2GH>.

⁸ *Id.* at 2.

the agency must post the record in its electronic reading room.⁹ Release to One, Release to All simply takes this idea one step further and would have agencies release information to the public after the first FOIA request and production.

CoA Institute is concerned that too many exceptions to the Release to One, Release to All policy could undermine the policy's goal. Namely, in our comments, we highlighted that an exemption for content that is "inappropriate" could be abused "to protect the agency mission, agency head, administration generally, or the president from the political fallout of an embarrassing release."¹⁰ CoA Institute has been investigating the role political interference plays in the release of information through FOIA,¹¹ and we urged OIP not to allow such considerations to taint a Release to One, Release to All policy. As part of this project, we recently profiled the National Oceanic and Atmospheric Administration's practice of applying so-called "sensitive review" procedures to "high visibility" FOIA requests.¹²

We also commented on several others issues as well, including: agency compliance the readability requirements of Section 508 of the Rehabilitation Act, the posting of auxiliary information along with produced documents (such as final determination letters), and recognizing the need for a short delay between releasing information to the requester and making information publicly available in order to safeguard incentives for requesters—particularly news organizations—to make requests in the first place.

In December 2016, OIP issued a request for comment in the *Federal Register*, seeking input on its draft guidance.¹³ The comment period closed on December 23, 2016. President Obama's January 1, 2017 deadline has come and gone; and, more than a year later, neither OMB nor OIP has finalized the guidance or implemented the policy. OIP also has refused to respond to multiple requests for updates on its process of either finalizing or abandoning the policy. Frustrated by this lack of action, in October 2017, CoA Institute joined with the Sunlight Foundation and

⁹ FOIA Improvement Act of 2016 § 2(a); 5 U.S.C. § 552(a)(2)(D)(ii)(II).

¹⁰ CoA Institute Release to One, Release to All Comment at 2.

¹¹ See CAUSE OF ACTION INST., GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), *available at* <http://coainst.org/2FpsnBr>; Cause of Action Inst., White House FOIA Obstruction, <http://bit.ly/2r0hBub> (last visited Mar. 12, 2018).

¹² Ryan Mulvey, *NOAA Records Demonstrate Expansion of Sensitive Review FOIA Procedures*, CAUSE OF ACTION INST. (Mar. 12, 2018), <http://coainst.org/2tFnLp5>.

¹³ Dep't of Justice, Request for Public Comment on Draft "Release to One, Release to All" Presumption, 81 Fed. Reg. 89023 (Dec. 9, 2016); *see* Draft Mem. for the Heads of Departments & Agencies, "Release to One, Release to All" Presumption: Achieving Greater Transparency by Making More Information Available Online, from Office of Info. Policy, Dep't of Justice (undated).

filed a petition for rulemaking with OIP and OMB asking those agencies to finalize the Release to One, Release to All policy.¹⁴ We have not received a response.

Release to One, Release to All remains an important opportunity for the government to both increase the amount of government information in the public sphere and also potentially ease the burden on FOIA offices. It is both ironic and unfortunate that the agencies tasked with implementing a transparency policy are being opaque about their plans with regard to the policy. I urge this Committee to press OIP and OMB to finalize and implement Release to One, Release to All.

II. Agency FOIA Regulations

The FOIA Improvement Act of 2016 required agencies to update their FOIA regulations within 180 days of enactment to reflect the statutory changes.¹⁵ As often happens, most agencies missed this deadline but, as a whole, agencies have made moderate and steady progress in updating their regulations.

There are approximately 120 agencies subject to the FOIA.¹⁶ Although most agencies have their own regulations, some share regulations with another agency; and some entities within an agency, such as an office of inspector general, may have FOIA regulations separate from a parent agency.¹⁷ Therefore, there does not appear to be an exact count of how many FOIA regulations need to be updated with each statutory amendment. According to *FOIA Advisor*, a website that tracks FOIA news and regulatory developments, since the passage of the FOIA Improvement Act of 2016, approximately sixty-three agencies, or about half, have either proposed or finalized updates to their FOIA regulations.

CoA Institute has been paying particular attention to this process because many agencies still maintain an anachronistic definition of a “representative of the news media,” a category of FOIA requester that is able to access records at a reduced cost. Congress defined the term more than a decade ago in the Open Government Act of 2007.¹⁸ We were embroiled in litigation over this issue when the Federal Trade Commission used the outdated standard that an entity must be “organized and operated” to publish or broadcast news to deny CoA Institute access to records by claiming we did not qualify for reduced fees and demanding we pay a

¹⁴ See Letter from Alex Howard, Deputy Dir., Sunlight Found. & James Valvo, CoA Inst., to Hon. Mick Mulvaney, Dir., Office of Mgmt. & Budget, White House, & Melanie Ann Pustay, Dir., Office of Info. Policy, Dep’t of Justice (Oct. 31, 2017), *available at* <http://coainst.org/2I6Xkf6>.

¹⁵ FOIA Improvement Act of 2016 § 3(a).

¹⁶ See FOIA.gov, Where to Make a FOIA Request, Full List of Agencies, <https://www.foia.gov/report-makerequest.html> (last visited Mar. 12, 2018) (listing agency FOIA contacts).

¹⁷ See, e.g., 7 C.F.R. pt. 2620 (Department of Agriculture Office of Inspector General maintaining separate FOIA regulations).

¹⁸ See Openness Promotes Effectiveness in our National Government Act of 2007 § 3, Pub. L. No. 110-175, 121 Stat. 2524, 2525 (2007).

large sum in order to access records. Unfortunately, agencies sometimes try to use fees and fee definitions to deny requesters access to records. In 2015, CoA Institute secured an opinion from the U.S. Court of Appeals for the District of Columbia Circuit holding that the “organized and operated” standard has no place in FOIA administration and that agencies must use Congress’s statutory definition.¹⁹

Following that decision, CoA Institute has been submitting regulatory comments to agencies when they propose or finalize new FOIA regulations in an attempt to bring those agencies’ regulations in line with the 2007 Act and binding jurisprudence. Over the past few years, we have submitted twenty-four regulatory comments, many focused on agencies’ improper fee definitions.

Relatedly, OMB maintains a three-decades-old guidance document—which the FOIA requires agencies to follow—directing agencies to use the “organized and operated” standard.²⁰ CoA Institute is currently in litigation with OMB over a petition for rulemaking we submitted urging OMB to update its guidance and conform to the statute.²¹ When CoA Institute filed that petition, the improper “organized and operated” standard appeared in the Code of Federal Regulations more than seventy times, including in the FOIA regulations of eleven cabinet-level agencies.²² While we have been successful in convincing several agencies to conform to the statute,²³ the improper definition of a representative of the news media still appears in dozens of agency FOIA regulations and in OMB’s guidance.

CoA Institute will continue to monitor agency regulatory updates and urge them to bring their regulations into harmony with the FOIA statute. I urge you to raise this issue with OMB and encourage them to update their guidance document.

III. Conclusion

I want to thank you again for the opportunity to submit this written statement for the record. I look forward to continuing to work with you to secure the public’s right to access documents concerning the public’s business.

¹⁹ See *Cause of Action*, 799 F.3d at 1119.

²⁰ See Office of Mgmt. & Budget, Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987); 5 U.S.C. § 552(a)(4)(A)(i) (Agency fee schedules “shall conform to the guidelines which shall be promulgated . . . by the Director of [OMB] and which shall provide for a uniform schedule of fees for all agencies.”).

²¹ See *Cause of Action Inst. v. White House Office of Mgmt. & Budget*, No. 17-2310 (D.D.C. filed Nov. 2, 2017).

²² See Letter from James Valvo, CoA Inst. to, Hon. Shaun L.S. Donovan, Dir., Office of Mgmt. & Budget, at 4 (June 2, 2016) (listing agencies), available at <http://coainst.org/2D64Raw>.

²³ See Ryan Mulvey, *CoA Institute Criticizes the Presido Trust on Flawed FOIA Rule*, CAUSE OF ACTION INST., Mar. 6, 2018, <http://coainst.org/2FolU9M> (detailing successful regulatory comments to “among others, the Consumer Product Safety Commission, Office of the Special Counsel, Department of Defense, U.S. Agency for International Development, and Department of Homeland Security”).