

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

March 22, 2018

VIA CERTIFIED MAIL

U.S. General Services Administration
ATTN: Cynthia A. Metzler, Chief FOIA Officer
FOIA Requester Service Center (H1F)
1800 F Street, N.W., Room 7308
Washington, D.C. 20405-0001

Re: Freedom of Information Act Request

Dear Ms. Metzler:

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.

Over the past year, CoA Institute has been investigating rumors that the Trump Administration is directing federal agencies—including the General Services Administration (“GSA”)—to ignore congressional oversight requests from Democratic legislators and members of Congress in their individual capacity.² Indeed, while testifying before the U.S. House of Representatives Committee on Appropriations on May 24, 2017,³ Acting Administrator Timothy Horne stated that the GSA “has a new policy only to respond to Republican committee chairmen” when handling congressional inquiries.⁴ Mr. Horne also claimed that “[t]he administration has instituted a new policy that matters of oversight need to be requested by the committee chair.”⁵

In response to a previous CoA Institute FOIA request, the GSA released a limited number of records concerning its internal policies and procedures for responding to congressional disclosure requests.⁶ One of those records—ADM Order 1040.3—contradicts, in an important respect, the public representations of the White House.⁷ Now, with the public release of a GSA Inspector General Report on the GSA’s nondisclosure policies, further details have come to light that explain

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/ (last accessed June 8, 2017).

² See, e.g., CoA Inst., *Investigation Update: OPM Provides Deficient FOIA Response on Congressional Oversight Policy* (Feb. 22, 2018), <http://coainst.org/2DML5kK>; CoA Inst., *Is President Trump Directing Agencies To Ignore Democrats’ Oversight Requests?* (June 8, 2017), <http://coainst.org/2tjoiGo>.

³ *Hearing: Gen. Servs. Admin.*, U.S. H.R. COMM. ON APPROPRIATIONS, <http://bit.ly/2rZMaU9> (last visited Mar. 22, 2018).

⁴ Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>.

⁵ *Id.*

⁶ See Ryan P. Mulvey, *Is the White House misleading Congress over a contentious FOIA policy?*, THE HILL (Sept. 20, 2017), <http://bit.ly/2sCON04>; CoA Inst., *Senator Grassley Claims the Trump Administration is Rejecting the DOJ’s Opinion on Responding to Congressional Records Requests* (July 31, 2017), <http://coainst.org/2wkXziR>; CoA Inst., *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>.

⁷ See Mulvey, *supra* note 6.

the agency's deficient response to CoA Institute's previous FOIA request and expose the nature of the GSA's ever evolving "oral" policy for processing congressional oversight requests.⁸

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), CoA Institute hereby requests access to the following records:⁹

1. The May 19, 2017 "written guidance" for "responding to letters from Members of Congress" that was provided by the White House Office of Legislative Affairs to the GSA's Associate Administrator of Congressional and Intergovernmental Affairs, as well as all accompanying correspondence between the GSA and the White House.¹⁰
2. All records relating to the May 19, 2017 guidance, including internal agency communications pertaining to its interpretation or implementation.
3. All records reflecting guidance on the processing of congressional requests under the FOIA provided by the White House to the GSA in March 2017, including any records of communication between the GSA and the Executive Office of the President (*e.g.*, the Office of the White House Counsel or the Office of Legislative Affairs).¹¹
4. All records pertaining to the processing of (a) CoA Institute's June 8, 2017 FOIA request, No. GSA-2017-001433, and (b) CoA Institute's July 26, 2017 FOIA appeal, No. GSA-2017-001158.¹² This item includes, but is not limited to, agency processing notes, email communications (internal or with other government entities, including the White House), instant/text messages, sensitive case reports, or formal letter correspondence.
5. All records relating to CoA Institute's August 31, 2017 letter to Acting Administrator Horne, which sought public clarification of Order ADM 1040.3.¹³

⁸ U.S. GEN. SERVS. ADMIN., OFFICE OF INSPECTOR GEN., EVALUATION OF GSA NONDISCLOSURE POLICY, No. JE18-002 (Mar. 8, 2018) [hereinafter GSA IG REPORT], *available at* <http://bit.ly/2IHIDRr>.

⁹ 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 a 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 (D.C. Cir. July 29, 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").

¹⁰ *See* GSA IG REPORT at 8 & 8n.23.

¹¹ *Id.* at 6.

¹² *See* Letter from CoA Inst. to Audrey Corbett Brooks, FOIA Public Liaison, Gen. Servs. Admin. (June 8, 2017) (attached as Exhibit 1); Letter from CoA Inst. to Gen. Servs. Admin. (July 26, 2017) (attached as Exhibit 2); *see also* Letter from Cynthia A. Metzler, Chief FOIA Officer, Gen. Servs. Admin., to CoA Inst. (Aug. 17, 2017), *available at* <http://coainst.org/2gr2GbM>; Letter from Travis Lewis, FOIA Program Mgr., Gen. Servs. Admin., to CoA Inst. (July 19, 2017), *available at* <http://coainst.org/2ILRLmY>.

¹³ *See* Letter from CoA Inst. to Timothy O. Horne, Acting Adm'r, Gen. Servs. Admin. (Aug. 31, 2017) (attached as Exhibit 3).

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 the GSA 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.”¹⁴

In this case, the requested records will shed light on the “operations or activities of the government,” namely, the GSA’s procedures for handling congressional oversight requests or individual member’s requests for information. Such records will shed light on current and historical practices, particularly in light of verified claims that the Trump Administration has introduced a new policy.¹⁵ The records will therefore provide the public with insight into those matters and contribute to ongoing debate about the importance of transparency, especially at the GSA.¹⁶ 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. CoA Institute intends to educate the public about its findings and to draw upon its published coverage of similar topics.¹⁷

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.¹⁸ 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.

Request to Be Classified as a Representative of the News Media

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

¹⁴ 5 U.S.C. § 552(a)(4)(A)(iii); 41 C.F.R. § 105-60.305-13(a); 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).

¹⁵ See Everett & Josh Dawsey, *supra* note 4; see also, e.g. Andy Wright & Justin Florence, *Fight It with FOLA: How Congress Can Respond to White House Attempts to Block Congressional Oversight*, JUST SECURITY (June 5, 2017), <http://bit.ly/2sjc8m9>; Justin Rood, *White House Silence to Lawmakers’ Requests Raises Eyebrow, Questions*, PROJECT ON GOV’T OVERSIGHT (June 2, 2017), <http://bit.ly/2r9OmUR>.

¹⁶ See *supra* notes 2 & 6.

¹⁷ See, e.g., *White House FOLA Obstruction*, CAUSE OF ACTION INST., <http://bit.ly/2r0hBub> (last visited Mar. 22, 2018).

¹⁸ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 41 C.F.R. § 105-60.305-1(i).

²⁰ See *Cause of Action*, 799 F.3d at 1121.

distinct work, and distributes that work to an audience.²¹ 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.²² 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 e-mail.

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.”²³ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.²⁴

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

²¹ CoA Institute notes that the GSA's definition of “representative of the news media,” 41 C.F.R. § 105-60.305-1(i), is in conflict with the statutory definition and controlling case law. The GSA 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*, 799 F.3d at 1225 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [T]here is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, CoA Institute qualifies as a news media requester.

²² See CAUSE OF ACTION INST., *Blog*, <http://www.causeofaction.org/media/blog> (last visited Mar. 22, 2018); see also, 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/2apTwpP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

²³ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁴ See, e.g., FOIA Request 2016-11-008, Dep't of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep't of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Mgmt. (Oct. 21, 2016); FOIA Request 092320167031, Ctrs. for Medicare & Medicaid Servs. (Oct. 17, 2016); FOIA Request 17-00054-F, Dep't of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-09-101, Dep't of the Treasury (Sept. 21, 2016); FOIA Request DOC-OIG-2016-001732, Office of Inspector Gen., Dep't of Commerce (Sept. 15, 2016); FOIA Request OS-2016-00435, Dep't of the Interior (Aug. 31, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dep't of State (Aug. 11, 2016); FOIA Request 2016-08-070, Dep't of the Treasury (Aug. 10, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep't of the Interior (Aug. 10, 2016); 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).

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.²⁵

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 e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
COUNSEL

²⁵ See 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

1

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 8, 2017

VIA CERTIFIED MAIL

U.S. General Services Administration
ATTN: Audrey Corbett Brooks, FOIA Public Liaison
FOIA Requester Service Center (H1F)
1800 F Street, N.W., Room 7308
Washington, D.C. 20405-0001

Re: Freedom of Information Act Request

Dear Ms. Brooks:

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.

According to recent news reports, while testifying before the U.S. House of Representatives Committee on Appropriations on May 24, 2017,² Acting Administrator Timothy Horne stated that the General Services Administration (“GSA”) “has a new policy only to respond to Republican committee chairmen” when handling congressional inquiries.³ Mr. Horne also claimed that “[t]he administration has instituted a new policy that matters of oversight need to be requested by the committee chair.”⁴

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period of January 20, 2017 to the present:⁵

1. All records concerning the GSA’s policy or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests for the disclosure of agency documents, including any records describing or discussing the “new policy” referenced by Administrator Horne.

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/ (last accessed June 8, 2017).

² *Hearing: Gen. Servs. Admin.*, U.S. H.R. COMM. ON APPROPRIATIONS, <http://bit.ly/2rZMaU9> (last accessed June 8, 2017).

³ Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>.

⁴ *Id.*

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 a 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 (D.C. Cir. July 29, 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”).

2. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (*e.g.*, Office of the White House Counsel), concerning (a) White House review of congressional oversight or records requests or (b) any form of pre-production review of draft responses to any congressional requester (*i.e.*, Congressional committees, chairmen, or individual Members) by White House staff or GSA officials or employees.
3. All records reflecting memoranda, directives, or guidance from any component of the Executive Office of the President, including the White House Office (*e.g.*, Office of the White House Counsel), concerning (a) White House review of FOIA requests, including White House consultation on agency records containing “White House equities,” or (b) any form of pre-production review of draft responses to any FOIA requester by White House staff or GSA officials or employees.

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 the GSA 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 will shed light on the “operations or activities of the government,” namely, the GSA’s procedures for handling congressional oversight requests or individual Member’s requests for information. Such records may shed light on current and historical practices, particularly in light of allegations that the Trump Administration has introduced a new policy.⁷ The records would thus provide the public with insight into those matters and contribute to ongoing debate about the importance of transparency. 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. CoA Institute intends to educate the public about its findings and to draw upon its published coverage of similar topics.⁸

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.⁹ CoA

⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 41 C.F.R. § 105-60.305-13(a); *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).

⁷ *See* Everett & Josh Dawsey, *supra* note 3; *see also, e.g.* Andy Wright & Justin Florence, *Fight It with FOIA: How Congress Can Respond to White House Attempts to Block Congressional Oversight*, JUST SECURITY (June 5, 2017), <http://bit.ly/2sjc8m9>; Justin Rood, *White House Silence to Lawmakers’ Requests Raises Eyebrow, Questions*, PROJECT ON GOV’T OVERSIGHT (June 2, 2017), <http://bit.ly/2r9OmUR>.

⁸ *See, e.g., White House FOIA Obstruction*, CAUSE OF ACTION INST., <http://bit.ly/2r0hBub> (last accessed June 8, 2017).

⁹ *See Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

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.

Request To Be Classified as a Representative of the News Media

For fee purposes, CoA Institute qualifies as a “representative of the news media.”¹⁰ 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.¹¹ 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.¹² 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.¹³ 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 e-mail.

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.”¹⁴ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute’s news media status in connection with its FOIA requests.¹⁵

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 41 C.F.R. § 105-60.305-1(i).

¹¹ See *Cause of Action*, 799 F.3d at 1121.

¹² CoA Institute notes that the GSA’s definition of “representative of the news media,” 41 C.F.R. § 105-60.305-1(i), is in conflict with the statutory definition and controlling case law. The GSA 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*, 799 F.3d at 1225 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [T]here is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, CoA Institute qualifies as a news media requester.

¹³ See CAUSE OF ACTION INST., *Blog*, <http://www.causeofaction.org/media/blog> (last accessed June 6, 2016); see also, 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/2apTwpP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁵ 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.

Record Preservation Requirement

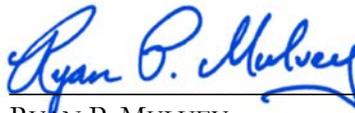
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.¹⁶

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 e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
COUNSEL

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).

¹⁶ See 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

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

July 26, 2017

VIA CERTIFIED MAIL

U.S. General Services Administration
FOIA Requester Service Center
ATTN: FOIA Appeals Officer
1800 F Street, N.W., Room 7308
Washington, D.C. 20405-0001

Re: Freedom of Information Act Appeal, Request No. 2017-001158

Dear FOIA Appeals Officer:

This is a timely administrative appeal of the General Services Administration's ("GSA") adverse determination on Cause of Action Institute's ("CoA Institute") June 8, 2017 Freedom of Information Act ("FOIA") request for records concerning policies and procedures for the processing of congressional oversight requests or individual Members' requests for information. Specifically, CoA Institute appeals the adequacy of the GSA's search efforts.

Procedural Background

On June 8, 2017, CoA Institute submitted a FOIA request to the GSA seeking access to three categories of records concerning the agency's policies or procedures for handling congressional oversight requests, congressional requests for information, or congressional requests from individual Members for the disclosure of agency documents.¹ CoA Institute also requested all records evidencing any White House directives on pre-production consultation or review of requests from Congress or under the FOIA.² Finally, CoA Institute requested a public interest fee waiver and categorization as a representative of the news media for fee purposes.³

By e-mail, dated June 13, 2017, the GSA acknowledged receipt of CoA Institute's FOIA request and assigned it tracking number 2017-001158.⁴ The next day, the agency determined that CoA Institute's fee waiver request was "not applicable as the request is not billable," but the GSA did not issue a determination on CoA Institute's fee category status.⁵

On July 19, 2017, the GSA issued its final determination.⁶ The agency indicated that it had found two (2) "documents [totaling five (5) pages] responsive to . . . Items #1 and #3."⁷ However,

¹ Letter from CoA Inst. to U.S. Gen. Servs. Admin. at 1 (June 8, 2017) (attached as Exhibit 1).

² *Id.* at 2.

³ *Id.* at 2-3.

⁴ E-mail via FOIAonline from gsa.foia@gsa.gov to CoA Inst. (June 13, 2017) (attached as Exhibit 2).

⁵ E-mail via FOIAonline from gsa.foia@gsa.gov to CoA Inst. (June 14, 2017) (attached as Exhibit 3).

⁶ Letter from U.S. Gen. Servs. Admin. to CoA Inst. (July 19, 2017) (attached as Exhibit 4).

⁷ *Id.* at 1.

“[i]n response to Item #2,” it alleged that “the Executive Office of the President . . . does not provide GSA any guidance concerning review of congressional oversight or records requests . . . [nor does the White House] review any draft responses[.]”⁸ The GSA failed to provide CoA Institute with notice of its appeal rights or its ability to seek dispute resolution services through the GSA’s FOIA Public Liaison or the Office of Government Information Services.⁹ This timely appeal follows the GSA’s final response.

Argument

The FOIA and applicable regulations require that the GSA “conduct a search reasonably calculated to uncover all relevant documents.”¹⁰ 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.”¹¹ The GSA 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.¹²

In this case, the GSA’s search falls short of the required reasonableness because the agency failed to produce records in response to Item One concerning its “new policy only to respond to Republican committee chairman” when handling congressional inquiries.¹³ Records concerning this “new policy” almost certainly exist.¹⁴ The GSA’s acting administrator, Timothy Horne, testified as much before the U.S. House of Representatives Committee on Appropriations on May 24, 2017.¹⁵ In response to a question from Representative Cartwright, Mr. Horne explicitly stated that “the [Trump] Administration has instituted a new policy that matters of oversight need to be requested by the Committee chair.”¹⁶ Although admitting that the White House itself had not provided a formal written version of the new policy, Mr. Horne clarified that the GSA was in the process of “formalizing” relevant guidance. At the least, records pertaining to agency efforts to implement the Administration’s directive should have been located, processed, and produced to CoA Institute.

Despite the publicly-recognized existence of a new policy for the handling of congressional record requests, the GSA only disclosed a copy of a February 20, 2015 order on congressional and intergovernmental inquiries.¹⁷ Yet that order was created long-before the beginning of the current

⁸ *Id.*

⁹ See 5 U.S.C. § 552(a)(6)(A)(i)(III).

¹⁰ *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks, alternations, and citation omitted).

¹¹ *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

¹² *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495 at *2 (D.C. Cir. June 2, 2009).

¹³ Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>.

¹⁴ *Cf. Boyd v. U.S. Marshal Serv.*, No. 99-2712, 2002 U.S. Dist. LEXIS 27734 at *4 (D.D.C. Mar. 15, 2002).

¹⁵ *Hearing: Gen. Servs. Admin.*, H.R. COMM. ON APPROPRIATIONS, <http://bit.ly/2rZMaU9> (last accessed July 26, 2017).

¹⁶ *Id.*; see Letter from Hon. Elijah E. Cummings, *et al.*, U.S. H.R. Comm. on Oversight & Gov’t Reform, to Timothy O. Horne, Acting Adm’r, Gen. Servs. Admin. at 4 (June 5, 2017) (“[Horne] also testified that [the GSA] would respond to Democratic requests by providing only public information with other information redacted[.]”) (attached as Exhibit 5).

¹⁷ U.S. Gen. Servs. Admin., GSA Order ADM 1040.2 (Feb. 20, 2015) (attached as Exhibit 6).

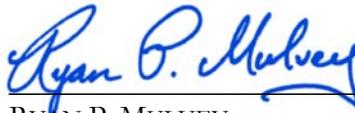
Administration.¹⁸ Furthermore, to the extent that Mr. Horne and other GSA officials have merely misspoken or mischaracterized the existence of a novel policy, the agency's final response is still inadequate because the record produced in response to Item One does not, in fact, contain any policies or procedures for responding to disclosure requests from Members of Congress *in their individual capacity*, that is, internal guidance for the treatment of non-oversight requests under the FOIA. The GSA should therefore conduct a supplemental search targeted to locate all records addressing the agency's *current* policies and procedures, its efforts to formalize relevant White House directives, or other records potentially responsive to the remaining items of CoA Institute's FOIA request.¹⁹

Conclusion

For the foregoing reasons, the GSA's final response to CoA Institute's June 8, 2017 FOIA request is inadequate. The agency has failed to conduct an adequate search.

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

Sincerely,



RYAN P. MULVEY

COUNSEL

¹⁸ See Ryan Mulvey, CAUSE OF ACTION INST., *Is President Trump Directing Agencies To Ignore Democrats' Oversight Requests?* (June 7, 2017), <http://coainst.org/2tjoiGo>; see also Everett & Josh Dawsey, *supra* note 13; Andy Wright & Justin Florence, *Fight It with FOIA: How Congress Can Respond to White House Attempts to Block Congressional Oversight*, JUST SECURITY (June 5, 2017), <http://bit.ly/2sjc8m9>; Justin Rood, *White House Silence to Lawmakers' Requests Raises Eyebrow, Questions*, PROJECT ON GOV'T OVERSIGHT (June 2, 2017), <http://bit.ly/2r9OmUR>; see generally U.S. Dep't of Justice, Office of Legal Counsel, Opinion Letter: Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch (May 1, 2017), available at <http://bit.ly/2uBkfcj>.

¹⁹ The GSA's failure to locate relevant records responsive to Item One casts significant doubt on the adequacy of its search with respect to Item Two. That doubt is increased in light of the White House memorandum disclosed in response to Item Three, which actually concerns "*all* types of document requests, *including Congressional committee requests, GAO requests, judicial subpoenas, and FOIA requests . . . whether in oral, paper, or electronic form[.]*" Memorandum from Gregory Craig, Counsel to the President, to All Executive Department and Agency General Counsels (April 15, 2009) (emphasis added) (attached as Exhibit 7).

EXHIBIT

3

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

August 31, 2017

VIA CERTIFIED MAIL

Acting Administrator Timothy O. Horne
U.S. General Services Administration
ATTN: Office of the Administrator
1800 F Street, N.W.
Washington, D.C. 20405

Re: GSA Order ADM 1040.3 (July 24, 2017)

Dear Acting Administrator Horne:

I write on behalf of Cause of Action Institute (“CoA Institute”)¹ to request clarification of the General Services Administration’s (“GSA”) procedures for handling congressional inquiries.

As you are likely aware, earlier this summer, the press reported that the White House was directing federal agencies to ignore “oversight requests” from Democrat legislators.² According to unnamed “Republican sources,” a White House lawyer instructed “agencies not to cooperate” with records requests from the minority.³ One news source described this as “amount[ing] to a new level of partisanship in Washington[.]”⁴ Congressional criticism of the Administration’s ostensibly novel policy followed, particularly after it became known that the Department of Justice’s Office of Legal Counsel had published an opinion letter also limiting the extent of the Executive Branch’s legal obligation to respond to congressional oversight requests.⁵

Following these reports, CoA Institute submitted a Freedom of Information Act request to the GSA seeking access to various records concerning the agency’s policies or procedures for handling congressional inquiries.⁶ The GSA only disclosed two records in response to that request, neither of which pertained to the new policy of responding only to Republican congressional leadership.

The GSA’s failure to locate relevant records was particularly surprising because, while testifying before the U.S. House of Representatives Committee on Appropriations, you explicitly

¹ CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability. See COA INST., *About*, www.causeofaction.org/about (last accessed Aug. 31, 2017).

² See, e.g., Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>; see also Ryan Mulvey, *Is President Trump Directing Agencies To Ignore Democrats’ Oversight Requests?*, COA INST. (June 8, 2017), <http://coainst.org/2tJoiGo>.

³ Everett & Dawsey, *supra* note 2.

⁴ *Id.*

⁵ U.S. Dep’t of Justice, Office of Legal Counsel, Opinion Letter: Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch (May 1, 2017), available at <http://bit.ly/2uBkfcj>; see John Bresnahan, *Democrats outraged by Trump ban on info requests*, POLITICO (June 2, 2017), <http://politi.co/2vIMrtw>; Laura Jarrett, *DOJ opens door for executive branch to ignore Dems’ requests*, CNN (June 2, 2017), <http://cnn.it/2xAuAWV>.

⁶ Letter from CoA Inst. to Gen. Servs. Admin. (June 8, 2017), available at <http://coainst.org/2wLFsUB>.

stated that “the [Trump] Administration has instituted a new policy that matters of oversight need to be requested by the Committee chair.”⁷ Moreover, while clarifying that the White House had not provided a formal written version of that policy, you explained that the GSA was in the process of “formalizing” relevant guidance.

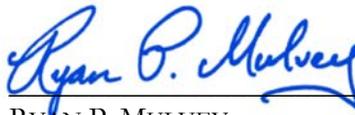
CoA Institute appealed the GSA’s initial determination and, in response, the agency disclosed two additional records.⁸ The first was a copy of the May 1, 2017 Office of Legal Counsel opinion letter. The second was GSA Order ADM 1040.3.⁹ The latter document expressly states that the GSA’s detailed procedures for responding to congressional requests are “consistent with the views of the Agency and the Administration as outlined in the Department of Justice Office of Legal Counsel opinion . . . dated May 1, 2017.” In other words, the Order claims that the opinion letter *is* the Administration’s official policy.

Yet, if the GSA’s July 24, 2017 Order is accurate, it contradicts the White House’s publicly-stated position, which was set forth in a July 20, 2017 letter from Director of Legislative Affairs Marc Short to Senator Charles Grassley.¹⁰ Mr. Short advised Senator Grassley that the Office of Legal Counsel opinion letter was merely advisory, did “not set forth Administration policy,” and only presented “legal advice consistent with the research of the Congressional Research Service.”¹¹

We respectfully request that you provide public clarification as to this apparent contradiction and, if necessary, rescind the GSA Order and issue revised guidance on the GSA’s procedures for handling congressional inquiries.

Thank you for your attention to this matter. Please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL

⁷ *Hearing: Gen. Servs. Admin.*, H.R. COMM. ON APPROPRIATIONS, <http://bit.ly/2rZMaU9> (last accessed Aug. 31, 2017); see Letter from Hon. Elijah E. Cummings, *et al.*, U.S. H.R. Comm. on Oversight & Gov’t Reform, to Timothy O. Horne, Acting Adm’r, Gen. Servs. Admin. at 4 (June 5, 2017) (“[Horne] also testified that [the GSA] would respond to Democratic requests by providing only public information with other information redacted[.]”), available at <http://politi.co/2grgNxR>; see also Ryan Mulvey, *The GSA Has No Records on its New Policy for Congressional Oversight Requests*, COA INST. (July 26, 2017), <http://coainst.org/2eHooVq>.

⁸ Letter from Gen. Servs. Admin. to CoA Inst. (Aug. 17, 2017), available at <http://coainst.org/2gr2GbM>.

⁹ Gen. Servs. Admin., Order ADM 1040.3 (July 24, 2017) (attached as Exhibit 1).

¹⁰ Letter from Marc Short, Dir. of Legislative Affairs, The White House, to Hon. Charles E. Grassley, Chairman, U.S. S. Comm. on the Judiciary (July 20, 2017) (attached as Exhibit 2).

¹¹ *Id.*; see generally Letter from Hon. Charles E. Grassley, Chairman, U.S. S. Comm. on the Judiciary, to Hon. Donald J. Trump, President, The White House (June 7, 2017), available at <http://bit.ly/2wLsGoN>; Ryan Mulvey, *Senator Grassley Claims the Trump Administration is Rejecting the DOJ’s Opinion on Responding to Congressional Records Requests*, COA INST. (July 31, 2017), <http://coainst.org/2wkXziR>.

Timothy O. Horne

August 31, 2017

Page 3

CC:

Hon. Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate

Hon. Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate

Mr. Marc Short
Director of Legislative Affairs
The White House