

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

March 28, 2018

VIA FOIAonline

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Silver Spring, MD 20910

Re: Freedom of Information Act Request

Dear FOIA Officer:

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 are examining the National Oceanic and Atmospheric Administration’s (“NOAA”) failure to retain electronic messages created or received through the “Google Chat” or “Google Hangouts” feature of the agency’s Unified Messaging System, a Google-based agency e-mail platform.² NOAA’s policy of treating all chat messages as categorically “off the record” may violate the Federal Records Act (“FRA”) and certainly deprives the public of access to agency records under the Freedom of Information Act (“FOIA”).³

Following media coverage of CoA Institute’s investigative efforts,⁴ the National Archives and Records Administration (“NARA”) wrote to NOAA concerning the alleged unauthorized disposition of electronic records. Specifically, by letter, dated July 17, 2017, NARA requested that NOAA “provide . . . a response within 30 calendar days indicating the specific actions NOAA will take to address [CoA Institute’s] allegations related to Google Chat and Skype messages.”⁵ NARA also indicated that NOAA could be required to file a report concerning an “unauthorized disposition” and to “indicate if [the records at issue] can be recreated or duplicated from other sources.”⁶ According to NARA, its inquiry into this matter remains open.⁷

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Mar. 28, 2018).

² See, e.g., CoA Inst., *Is NOAA deleting records? CoA Institute sues for important communications about fisheries regulation* (July 6, 2017), <http://coainst.org/2tQhsOt>; NAT’L OCEANIC & ATMOSPHERIC ADMIN., NOAA UNIFIED MESSAGING SERVICE OPERATIONAL PROCEDURES at ¶ 9 (Mar. 2012) (on file with CoA Inst.).

³ See, e.g., Press Release, CoA Inst., *CoAI Sues NOAA for G-Chat Records Surrounding Controversial Amendment to Expand Industry-Funded At-Sea Monitoring* (July 6, 2017), available at <http://coainst.org/2sQDf4d>; see also Kat Sieniuc, *Nonprofit Hits Ocean Agency With Suit Over Google Chats*, LAW360 (July 6, 2017), <http://bit.ly/2xr1vAu>.

⁴ See, e.g., Chris White, *NOAA Officials May Be Deleting Their G-Chats*, DAILY CALLER NEWS FOUND. (July 6, 2017), <http://bit.ly/2eYTFqn>.

⁵ Letter from Laurence Brewer, Chief Records Officer, Nat’l Archives & Records Admin., to Andre Sivels, Records Officer, Nat’l Oceanic & Atmospheric Admin. at 1 (July 17, 2017) (attached as Exhibit 1).

⁶ *Id.*

⁷ See *Unauthorized Disposition of Federal Records*, NAT’L ARCHIVES & RECORDS ADMIN., <http://bit.ly/2pKZjyq> (last visited Mar. 28, 2018).

Pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute hereby requests access to the following records. The time period for all items of this request is July 1, 2017 to the present.⁸

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

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."¹¹

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.¹² 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.

⁸ 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 (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").

⁹ See generally 44 U.S.C. § 3106(a).

¹⁰ *Cause of Action Inst. v. Nat'l Oceanic & Atmospheric Admin.*, No. 17-1329 (D.D.C. filed July 6, 2017).

¹¹ 5 U.S.C. § 552(a)(6)(E)(v)(II); 15 C.F.R. § 4.6(f)(iv).

¹² *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)).

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 satisfies the “urgency to inform” standard.¹³ 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.”¹⁴

In this case, the requested records concern NOAA’s possible violation of important federal laws governing transparency and open government. The FRA has been covered by the news media previously and interest in the subject is acute. The requested records unquestionably concern the activity of the Federal government, insofar as they reflect communications between NOAA, NARA, and the Attorney General. The records also will reveal NOAA’s efforts, or lack thereof, to investigate the agency’s policy for the retention of certain electronic messages, and to report to NARA on those records’ unauthorized destruction, if applicable. Importantly, other agencies have granted CoA Institute its requests for expedited processing of requests concerning the potential violation of the FRA.¹⁵

Delay in the processing of this request would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose of the FOIA” is to allow the American public access to information that might “contribute significantly to public understanding *of the operations or activities of the government.*”¹⁶ The ability of a “watchdog” group, such as CoA Institute, to secure records such as those sought here for the purposes of government accountability,¹⁷ 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 all applicable fees. The FOIA and applicable regulations provide that NOAA shall furnish requested records without or at reduced charge if “disclosure of the

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

¹⁴ *Id.*

¹⁵ See E-mail from Nat’l Archives & Records Admin. to CoA Inst. (via FOIAonline) (June 9, 2017) (granting expedited processing of request NARA-NGC-2017-000605) (on file with CoA Inst.); 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.).

¹⁶ *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

¹⁷ 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.”).

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.”¹⁸

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the extent to which NOAA has investigated its policy on the retention of Google or Skype messages, as well as the way it has communicated with NARA and other government entities on this subject. Responsive records could also reflect NOAA’s determination that federal records have, in fact, been unlawfully disposed or destroyed. Disclosure is likely to “contribute significantly” to public understanding because, to date, the requested records have not been made publicly available. Public interest in FRA matters is particularly acute considering scandals surrounding former Secretaries of State Hillary Clinton and Colin Powell, Secretary of Defense Ashton Carter, and Secretary of Homeland Security Jeh Johnson.¹⁹

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 considerable 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 through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.²⁰ In addition, CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, and 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 also qualifies as a “representative of the news media.”²¹ As the D.C. Circuit has held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.²² 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.²³ Although not required by the statute,

¹⁸ 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(a); *see Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015).

¹⁹ *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/2qxznzSJ>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://nyti.ms/2rQQrcM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton’s Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://on.wsj.com/2rAwpnc>; Josh Rogin, *Homeland Security Leaders Bent Rules on Private E-mail*, BLOOMBERG VIEW (July 20, 2015), <https://bloom.bg/2rfAJ8g>; 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>.

²⁰ *See Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(b)(6).

²² *See Cause of Action*, 799 F.3d at 1121.

²³ CoA Institute notes that the Department of Commerce’s definition of “representative of the news media” conflicts with the statutory definition and controlling case law. The agency has retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *Cause*

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.²⁴ 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.”²⁵ In light of the foregoing, numerous federal agencies—including the Department of Commerce—have appropriately recognized CoA Institute’s news media status in connection with its FOIA requests.²⁶

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.²⁷

Record Production and Contact Information

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.

of Action, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement[.]”).

²⁴ See generally CAUSE OF ACTION INST., *Media*, www.causeofaction.org/media (last visited Dec. 8, 2017).

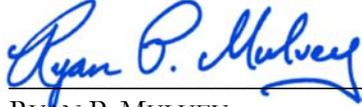
²⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁶ 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); 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).

²⁷ See 15 C.F.R. § 4.3(d) (“Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit[.]”); see also 36 C.F.R. § 1230.3(b); *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).

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

EXHIBIT

1



NATIONAL
ARCHIVES

July 17, 2017

Mr. Andre Sivels
Records Officer
National Oceanic and Atmospheric Administration
1315 East West Highway
Silver Spring, MD 20910

Dear Mr. Sivels:

The National Archives and Records Administration (NARA) is aware of an alleged unauthorized disposition of National Oceanic and Atmospheric Administration (NOAA) records based on a news article published in the Daily Caller News Foundation on July 6, 2017 (see attachment). The news article stated that the Cause of Action Institute (CoA) believes that “NOAA might illegally be destroying records of a recent Management Council meeting discussing new regulations against the fishing industry.” The discussed new rules, “compel fisherman to pay for supplemental at-sea monitoring services, which would have a disastrous effect on America’s fishing industry.”

In accordance with 36 CFR 1230.16(b), NARA is requesting that NOAA provide us with a response within 30 calendar days indicating the specific actions NOAA will take to address these allegations related to Google Chat and Skype messages. If NOAA determines that an unauthorized disposition has occurred, we will require a report as described in 36 CFR 1230.14. If a loss of records has occurred, please indicate if they can be recreated or duplicated from other sources.

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001
www.archives.gov

Thank you for your cooperation. If you have any questions, please contact Andrea Noel, Senior Records Analyst, at 301-837-3564 or by email at andrea.noel@nara.gov.

Sincerely,

A handwritten signature in blue ink that reads "Laurence Brewer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

LAURENCE BREWER
Chief Records Officer
for the U.S. Government