

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

July 19, 2018

VIA FOIAonline

U.S. Environmental Protection Agency
National Freedom of Information Office
ATTN: Mr. Steve Fine, Acting Chief Information Officer
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, D.C. 20460

Re: Freedom of Information Act Request

Dear Mr. Fine:

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.

Recent reports have revealed that the Environmental Protection Agency (“EPA”) maintains a so-called “sensitive review” process for “politically charged” Freedom of Information Act (“FOIA”) requests.² This particular type of FOIA politicization was the subject of a June 11, 2018 congressional records request from Ranking Member Elijah Cummings of the U.S. House of Representatives Committee on Oversight and Government Reform (“OGR”).³ It was also the impetus for Ranking Member Cummings’s subsequent request for OGR Chairman Trey Gowdy to issue a subpoena against the EPA to compel the disclosure of various records concerning the agency’s FOIA procedures.⁴ Although “sensitive review”—including the heightened scrutiny of FOIA requests from news media requesters and the pre-disclosure review of potentially embarrassing records by political appointees—are not new phenomena,⁵ these practices continue to raise questions of fundamental fairness and impartial administration of the FOIA.

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited July 19, 2018).

² See EPA Chief of Staff describes agency’s sensitive review process for “politically charged” FOIA requests, COA INST. (July 16, 2018), <https://coainst.org/2muw1BU>; see also Timothy Cama, *Top Dem: EPA slowed ‘politically charged’ FOIA requests*, THE HILL (July 13, 2018), <http://bit.ly/2zPry6A>; Alex Guillén, *EPA clamps down on document requests linked to Pruitt*, POLITICO (May 6, 2018); see generally *Politics Clouding Criticism of the EPA’s Heightened Sensitive Review FOIA Procedures*, COA INST. (May 14, 2018), <https://coainst.org/2l5zxlq>.

³ Letter from Hon. Elijah E. Cummings, Ranking Member, U.S. H.R. Oversight & Gov’t Reform Comm., to Hon. Scott Pruitt, Adm’r, Env’tl. Prot. Agency (June 11, 2018), available at <http://bit.ly/2L6lE61>.

⁴ Letter from Hon. Elijah E. Cummings, Ranking Member, U.S. H.R. Oversight & Gov’t Reform Comm., to Hon. Trey Gowdy, Chairman, U.S. H.R. Oversight & Gov’t Reform Comm. (July 13, 2018), available at <http://bit.ly/2Lodg17>.

⁵ See, e.g., Eliana Johnson, *The Obama Administration’s Newly Political Approach to FOIAs*, NAT’L REV. (June 9, 2015), <http://bit.ly/2Lz2Mcl>.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute requests access to following agency records⁶:

1. All records, including but not limited to communications, memoranda, guidelines, procedures, processing metrics, and tracking tables, concerning “sensitive review” FOIA processes, including any process for the handling of “politically charged” requests or those submitted by representatives of the news media. The scope of this item includes records defining or describing the sensitive review process. The time period for this item of the request is January 20, 2009 to the present.⁷
2. All records concerning the establishment of the EPA’s “FOIA Expert Assistance Team” (“FEAT”), including any internal directives or memoranda (including FEAT’s “Functional Statement”), and related inter-governmental communications.⁸ The time period for this item of the request is January 1, 2013 through December 31, 2013.
3. To the extent not already covered by Item One, all communications between any member of FEAT and any senior EPA official concerning an incoming FOIA request or the review of agency records responsive to a FOIA request. The time period for this item of the request is January 2013 to the present.
4. All communications between (i) the EPA’s Office of Environmental Information and/or Office of General Counsel, and (ii) the Office of the White House Counsel concerning the processing of FOIA requests containing “White House equities.”⁹ The time period for this item of the request is January 20, 2016 to the present. The scope of this item includes FEAT records concerning White House FOIA consultation.
5. All communications between (i) the EPA Office of Environmental Information and/or Office of General Counsel and (ii) the EPA Office of Inspector General concerning any audit, investigation, inspection, evaluation, or inquiry into the involvement of non-career officials in the FOIA process (*e.g.*, reviewing or approving proposed FOIA productions, *etc.*). The time period for this item of the request is September 1, 2015 to the present.

⁶ For purposes of this request, 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”).

⁷ The term “present” should be construed as the date on which the EPA begins its search for responsive records. *See Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

⁸ *See generally* Letter from Kevin S. Minoli, Principal Deputy Gen. Counsel, Env’tl. Prot. Agency, to Hon. Elijah E. Cummings, Ranking Member, U.S. H.R. Oversight & Gov’t Reform Comm. (July 15, 2018), *available at* <http://bit.ly/2LmANiR>.

⁹ *See White House FOIA Obstruction*, COA INST., <http://bit.ly/2r0hBub> (last visited July 19, 2018); *see also* Mem. from Gregory Craig, Counsel to the President, The White House, to All Exec. Dep’t & Agency Gen. Counsels regarding Document Requests (Apr. 15, 2009), *available at* <https://coainst.org/2uz2NWT>.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA requires the EPA to furnish the 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.”¹⁰

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the EPA’s policies for handling “sensitive” or “politically charged” FOIA requests. Such “sensitive review” FOIA processes have led to impermissible politicization at other agencies, and they have prompted multiple congressional investigations and FOIA lawsuits.¹¹ The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, the records have not been made publicly available. CoA Institute intends to educate the interested public about the processing of “sensitive” FOIA requests at the EPA.

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. CoA Institute staff has considerable experience and expertise in other areas of government oversight, investigative reporting, and federal public interest litigation. Its professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and intend to share the resulting analysis with the public, whether through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.¹² Additionally, 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 also qualifies as a “representative of the news media.”¹³ 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.¹⁴ 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

¹⁰ 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(1)(l); *see also 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).

¹¹ *See, e.g., Johnson, supra* note 5; COA INST., GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), *available at* <http://coainst.org/2AEWiE2>; *see also DHS Watchdog Claims Political Appointees No Longer Politicizing FOLA*, COA INST. (Oct. 20, 2017), <http://coainst.org/2j9dbT7>; *ClA too busy for transparency*, COA INST. (Aug. 11, 2016), <http://coainst.org/2iDH0qO>; *White House and Treasury Department Politicize FOLA*, COA INST. (June 24, 2013), <http://coainst.org/2A4igPr>; *FOLA Follies: HUD Flags Sensitive Freedom of Information Act Requests for Extra Scrutiny; Political Appointees Involved*, COA INST. (July 31, 2013), <http://coainst.org/2kbV4Ix>.

¹² *See Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹³ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(b)(6).

¹⁴ *See Cause of Action*, 799 F.3d at 1121.

by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. CoA Institute 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.¹⁵ These distinct works are distributed to the public through various media, including CoA 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."¹⁶ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.¹⁷

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.¹⁸

¹⁵ COA INST., *EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRM CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT* (2018), <http://coainst.org/2mgpYAu>; CoA Inst., *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Inst., *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; COA INST., *SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL* (2017), <http://coainst.org/2y0fbOH>; COA INST., *INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION* (2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; CoA Inst., *CLA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhhP>; *Hearing on Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 114th Cong. (June 3, 2015) (statement of Daniel Z. Epstein, Cause of Action Inst.), <http://coainst.org/2mrwHr1>; COA INST., *2015 GRADING THE GOVERNMENT REPORT CARD* (2015), <http://coainst.org/2as088a>; *Hearing on Potential Reforms to the Freedom of Information Act (FOIA) Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 27, 2015) (statement of Daniel Z. Epstein, Exec. Dir., Cause of Action Inst.), <http://coainst.org/2lLsph8>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), <http://coainst.org/2aj8sm5>; COA INST., *GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS* (2014), <http://coainst.org/2aFWxUZ>; see also CoA Institute, *Newsletters*, <http://causeofaction.org/media/news/newsletter/>.

¹⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁷ See, e.g., FOIA Request F-133-18, U.S. Agency for Int'l Dev. (Apr. 11, 2018); FOIA Request 18-HQ-F-487, Nat'l Aeronautics & Space Admin. (Apr. 11, 2018); FOIA Request 1403076-000, Fed. Bureau of Investigation (Apr. 11, 2018); FOIA Request 201800050F, Exp.-Imp. Bank (Apr. 11, 2018); 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 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dept. of State (Aug. 11, 2016).

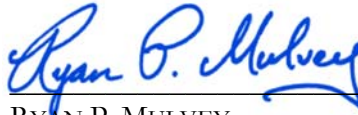
¹⁸ See 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.");

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