



1875 Eye Street, NW, Suite 800, Washington, DC 20006

March 2, 2017

VIA CERTIFIED MAIL

U.S. Department of Justice
Office of Information Policy
ATTN: Laurie Day, Chief, Initial Request Staff
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Re: Freedom of Information Act Request

Dear Ms. Day:

I write on behalf of the 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 various investigative and legal tools to educate the public about the importance of government transparency and accountability.

It has come to our attention that Sarah Isgur Flores, the Director of the Office of Public Affairs at the Department of Justice (“DOJ”), has used her personal email account to conduct official government business.² As you know, if Ms. Flores’s work-related emails are not copied to an official DOJ record-keeping system, this would be a violation of the Federal Records Act. Under the Federal Records Act, “[a]n officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee . . . copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record[.]”³ The National Archives and Records Administration has explained that “agency officials may create Federal records if they conduct agency business on their personal email accounts. Email sent on personal email accounts pertaining to agency business and meeting the definition of Federal records must be filed in an agency recordkeeping system.”⁴ In addition, the Court of Appeals for the District of Columbia Circuit has recently held that an agency may not

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about.

² See @IsaacDovere, TWITTER (Mar. 1, 2017 11:26 PM), <http://bit.ly/2lZa8eO> (“Sessions spox & now DOJ employee Sarah Isgur Flores is responding to Washington Post story w/pushback sent from her personal Gmail account”).

³ 44 U.S.C. § 2911(a).

⁴ NAT’L ARCHIVES & RECORDS ADMIN., Bulletin 2014-06 (Sept. 14, 2014), available at <http://bit.ly/2mQEzI5>.

refuse to conduct a search for records potentially responsive to a Freedom of Information Act request on the basis that those records are housed in a non-governmental email account.⁵

In light of the above, and pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to:

1. Any email,⁶ including attachments, sent by Sarah Isgur Flores on or about March 1, 2017 from a non-governmental email account, containing a statement in response to news reports that Attorney General Jeff Sessions met with the Russian Ambassador during the 2016 Presidential Election.
2. All other emails, including attachments, sent or received by Sarah Isgur Flores on a non-governmental email account that were for the purpose of conducting official government business. The time period for this item of the request is January 20, 2017 to the present.⁷

Request To Be Classified as a Representative of the News Media

For fee status purposes, CoA Institute qualifies as a “representative of the news media” under FOIA.⁸ As the D.C. Circuit held, the “representative of the news media” test focuses on the requestor, not the specific FOIA request at issue.⁹ 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 the statute does not require it, 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 products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.¹⁰ 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.

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 146 (D.C. Cir. 2016).

⁶ The term “email” for Items 1 and 2 of this request includes the entirety of any email chain, any portion of which contains an individual email message responsive to this request. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677–78 (D.C. Cir. 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

⁷ 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).

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(b)(6).

⁹ See *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1121 (D.C. Cir. 2015).

¹⁰ See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program*, CAUSE OF ACTION (May 19, 2015), available at <http://goo.gl/Byditl>; CAUSE OF ACTION, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://goo.gl/MqObwV>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com*, CAUSE OF ACTION (Sept. 8, 2014), available at <http://goo.gl/935qAi>; CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://goo.gl/BiaEaH>; CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://goo.gl/N0xSvs>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://goo.gl/GpP1wR>.

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.”¹¹ In light of the foregoing, numerous federal agencies—including the DOJ—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.¹²

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.¹³

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 james.valvo@causeofaction.org. Thank you for your attention to this matter.



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹² See, e.g., FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); see also 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 Management (Oct. 21, 2016); FOIA Request 092320167031, Centers for Medicare & Medicaid Services (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); 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 2016-HQFO-00502, Dept. of Homeland Security (Aug. 1, 2016); FOIA Request 796939, Dep’t of Labor (Mar.. 7, 2016); 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 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request F-2015-106, Fed. Commc’n Comm’n (Dec. 12, 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 GO-14-307, Dep’t of Energy (Nat’l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013).

¹³ See, e.g., 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).