

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

October 24, 2017

VIA FOIAonline

Ms. Laurie Day
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
1425 New York Ave., N.W., Ste. 11050
Washington, D.C. 20530-0001

Re: Freedom of Information Act Request

Dear Ms. Day:

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.

On June 29, 2016, CoA Institute called upon the Department of Justice Office of the Inspector General (“DOJ-OIG”) to examine whether employees of the DOJ Public Integrity Section and the Federal Bureau of Investigation (“FBI”) violated taxpayer confidentiality laws by inspecting 1.1 million pages of returns and return information disclosed by the Internal Revenue Service (“IRS”) on twenty-one compact disks (“CDs”).² By letter, dated October 12, 2016, DOJ-OIG confirmed that “some protected taxpayer information was included on” those CDs. DOJ-OIG also explained that “the Department” had “informed Congress” about this transmission of taxpayer information.³

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to all communications between DOJ and Congress concerning the IRS’s disclosure (and the DOJ’s inspection) of taxpayer information, as described in the DOJ-OIG’s October 12, 2016 letter.⁴ Responsive records may be in the custody of multiple DOJ components, including, but not limited to the Office of the Attorney General, the Office of Legislative Affairs, and the Office of Public Affairs.⁵

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Oct. 24, 2017).

² Letter from CoA Inst. to Michael E. Horowitz, Inspector Gen., Office of the Inspector Gen., Dep’t of Justice, & J. Russell George, Inspector Gen., Treasury Inspector Gen. for Tax Admin. (June 29, 2016) (attached as Exhibit 1).

³ *Id.*

⁴ For purposes of this request, 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*, No. 15-5201, 2016 WL 4056405, at *7–9 (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 the information from disclosure”).

⁵ To the extent any responsive records are controlled by a component whose FOIA management is not undertaken by the Office of Information Policy, CoA Institute respectfully requests that you refer the relevant portion of CoA Institute’s request to the proper DOJ component.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable agency regulations provide that DOJ 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 unquestionably shed light on the “operations or activities of the government” because they reveal the process by which the “Department” alerted Congress of the agency’s realization that the IRS had disclosed confidential taxpayer information without statutory authorization. The requested records could thus provide insight into the potential politicization of DOJ and, by extension, the IRS. Such issues are particularly relevant considering recent revelations about the breadth of the government’s examination of tax-exempt groups.⁷ None of the requested records have been made available to the public. Their disclosure and dissemination would contribute to public understanding of DOJ operations.

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 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 the regularly published CoA Institute online newsletter, memoranda, reports, or press releases.⁸ In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, 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.”⁹ 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.¹⁰ 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 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

⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1)–(2); *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).

⁷ *See, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF SELECTED CRITERIA USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, No. 2017-10-054 (Sept. 28, 2017), *available at* <http://bit.ly/2gCzDCH>; *see also* John McGlothlin, *The IRS scandal has not disappeared – it’s gotten worse*, THE HILL (Oct. 20, 2017), <http://bit.ly/2z1sELa>.

⁸ *See also Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(b)(6).

¹⁰ *See Cause of Action*, 799 F.3d at 1121.

for the record.¹¹ These distinct works are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. CoA Institute 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.”¹² In light of the foregoing, numerous federal agencies—including DOJ—have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹³

¹¹ See, e.g., 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* (Mar. 2017), <http://coainst.org/2y0fbOH>; CoA Inst., *Sec. Vilsack followed ethics guidelines when negotiating his future employment*, (Feb. 3, 2017), <http://coainst.org/2mJljJe>; COA INST., *INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION* (Oct. 2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; COA INST., *MEMORANDUM: LEGAL ANALYSIS OF FORMER SECRETARY OF STATE HILLARY CLINTON'S USE OF A PRIVATE SERVER TO STORE EMAIL RECORDS* (Aug. 24, 2015), <http://coainst.org/2eXhXe1>; CoA Inst., *ClA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhHP>; *Hearing on Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. (Aug. 5, 2015) (statement of Erica L. Marshall, Counsel, CoA Inst.), <http://coainst.org/2mJC8DH>; *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, Exec. Dir., CoA Inst.), <http://coainst.org/2mrwHr1>; *Hearing on Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program Before the H. Comm. on the Judiciary*, 114th Cong. (May 19, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2n7LxWG>; COA INST., *2015 GRADING THE GOVERNMENT REPORT CARD* (Mar. 16, 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., CoA Inst.), <http://coainst.org/2ILsph8>; *Hearing on IRS: TIGTA Update Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 26, 2015) (statement of Prashant K. Khetan, Chief Counsel, CoA Inst.), <http://coainst.org/2nn5iFJ>; *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 DOCUMENTS REQUESTERS* (Mar. 18, 2014), <http://coainst.org/2aFWxUZ>; COA INST., *GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM* (Sept. 23, 2013), <http://coainst.org/2apTwqP>; CoA Inst., *Political Profiteering: How Forest City Enterprises Makes Private Profits at the Expense of American Taxpayers Part I* (Aug. 2, 2013), <http://coainst.org/2aJh901>; CoA Inst., *Newsletters*, <http://causeofaction.org/media/news/newsletter/>.

¹² 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹³ 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. 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. Comm'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-

Record Preservation Requirement

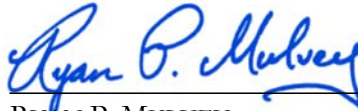
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.¹⁴

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

4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013).

¹⁴ 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



U.S. Department of Justice

Office of the Inspector General

October 12, 2016

Mr. Alfred J. Lechner, Jr.
President and Chief Executive Officer
Cause of Action Institute
1875 Eye Street
Suite 800
Washington, D.C. 20006

Dear Mr. Lechner:

I am writing in response to your letter to Inspector General Michael Horowitz dated June 29, 2016, regarding the alleged improper handling of confidential taxpayer information by the Department of Justice (Department) and the Internal Revenue Service (IRS).

Based upon our initial inquiries, it appears that some protected taxpayer information was included on compact discs (CDs) that the IRS provided to the Department in response to a Department request. It further appears that when the Department learned of this, it returned the CDs to the IRS and informed Congress about it. Given the absence of available information suggesting that Department employees over whom our Office has jurisdiction might have engaged in conduct that violates laws, regulations, or policy, we have determined that this matter does not warrant further investigation by the Department's Office of the Inspector General.

Thank you for bringing this matter to our attention. We understand that the Treasury Inspector General for Tax Administration will be responding separately to your letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. Beckhard", is written over a horizontal line.

Daniel C. Beckhard
Assistant Inspector General
Oversight and Review Division

cc: Hon. Jason Chaffetz, Chairman
Hon. Elijah Cummings, Ranking Member
U.S. House of Representatives Committee on Oversight
and Government Reform

Hon. Kevin Brady, Chairman
Hon. Sander Levin, Ranking Member
U.S. House of Representatives Committee on Ways and Means

Hon. Charles E. Grassley, Chairman
Hon. Patrick Leahy, Ranking Member
U.S. Senate Committee on the Judiciary

Hon. Orrin Hatch, Chairman
Hon. Ron Wyden, Ranking Member
U.S. Senate Committee on Finance

Hon. Channing D. Phillips
U.S. Attorney for the District of Columbia

Hon. J. Russell George
Treasury Inspector General for Tax Administration