

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

October 29, 2018

VIA CERTIFIED MAIL

Department of Defense
OSD/JS FOIA Requester Service Center
1155 Defense Pentagon
Washington, D.C. 20301-1155

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Cause of Action Institute (“CoA Institute”), a 501(c)(3) nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public about how government accountability, transparency, and the rule of law protect individual liberty and economic opportunity.⁵²

The Freedom of Information Act (“FOIA”) mandates that agency records be produced upon request unless they fall under a specifically enumerated statutory exemption. Yet, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant object of the Act[.]”⁵³ With the passage of the FOIA Improvement Act of 2016, Congress introduced significant amendments, including changes that raise the standard by which an agency must evaluate its withholding.⁵⁴ As the law stands now, an agency may only “withhold information” under the FOIA “if [it] *reasonably foresees* that disclosure would harm an interest protected by an exemption[.]”⁵⁵ Under this “foreseeable harm” standard, it is not enough that an agency make a case for the technical application of an exemption. It must instead articulate *precise* reasons why *specific* records, or portions of records, could be reasonably foreseen to harm a cognizable interest.⁵⁶ The unambiguous language of the “foreseeable harm” standard thus manifests Congress’s intent to require something more of an agency when it defends its withholdings.⁵⁷

⁵² See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Oct. 29, 2018).

⁵³ *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7–8 (2001) (internal citations omitted).

⁵⁴ Agencies previously were afforded some discretion in implementing the Obama Administration’s “presumption of openness.” See Dep’t of Justice, Att’y Gen. Mem. for Exec. Dep’ts. & Agencies Concerning the FOIA, 74 Fed. Reg. 51,879 (Oct. 8, 2009). But Congress explicitly sought to “[b]uild[] on the Administration’s efforts,” and turn the “presumption” into a “permanent requirement” that would “prohibit agencies from” technical application of exemptions. See H.R. Rep. No. 114-391 at 9 (2016); see also *id.* (“An inquiry into whether an agency has reasonably foreseen a specific, identifiable harm . . . require[s] the ability to articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld.”); S. Rep. No. 114-4 at 8 (2016) (“[M]ere ‘speculative or abstract fears,’ or fear of embarrassment, are an insufficient basis for withholding information.”).

⁵⁵ 5 U.S.C. § 552(a)(8)(A)(i)(I) (emphasis added).

⁵⁶ See 162 Cong. Rec. S1496 (daily ed. Mar. 15, 2016) (statement of Sen. Leahy) (“[C]odifying the presumption of openness will help reduce the perfunctory withholding of documents through the overuse of FOIA exemptions. It requires agencies to consider whether the release of particular documents will cause any foreseeable harm [.]”).

⁵⁷ *Cf. Mingo Logan Coal Co. v. Emtl. Prot. Agency*, 714 F.3d 608, 612–14 (D.C. Cir. 2013).

To date, the Department of Justice's Office of Information Policy has not published any guidance on its website concerning Section 552(a)(8)(A)(i)(I), and the public is unaware of the Administration's formal policy, if any, for implementing the "foreseeable harm" standard. Accordingly, pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute requests access to the following:

1. All records⁵⁸ reflecting Department of Defense ("DOD") procedures, policies, guidelines, or instructions concerning the proper interpretation and implementation of the "foreseeable harm" standard, 5 U.S.C. 552(a)(8)(A)(i)(I), both generally and with respect to each statutory exemption.
2. All communications between the DOD and (a) the Department of Justice Office of Information Policy, (b) the Executive Office of the President (including, but not limited to the Office of the White House Counsel), and/or (c) Congress (including, but not limited to, Members, Committees, or congressional staff) regarding the "foreseeable harm" standard, its interpretation, and/or its implementation.

The time period for both items of this request is June 30, 2016 to the present.⁵⁹

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA requires the DOD to furnish agency 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."⁶⁰

In this case, the requested records will unquestionably shed light on the "operations or activities of the government," namely, the DOD's efforts to give force to the "foreseeable harm" standard. This, in turn, will provide insight, more generally, into the agency's administration of the FOIA. To date, there is general confusion about the import of the "foreseeable harm" standard, and even the federal courts are only starting to interpret the provision and discern its impact on FOIA jurisprudence.⁶¹ The public has a right to view these records. Disclosure is likely to "contribute significantly" to public understanding because, to date, the requested records have not been made publicly available. CoA Institute intends to educate the interested public about the "foreseeable harm" standard and government-wide implementation of the FOIA Improvement Act of 2016.

⁵⁸ 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").

⁵⁹ 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).

⁶⁰ 5 U.S.C. § 552(a)(4)(A)(iii); 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).

⁶¹ See generally *Rosenberg v. Dep't of Def.*, No. 17-00437, slip op. (D.D.C. Sept. 27, 2018); *Edelman v. Sec. & Exch. Comm'n*, 239 F. Supp. 3d 45 (D.D.C. 2017); *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-05254, 2017 WL 5972702 (N.D. Cal. Nov. 30, 2017).

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.⁶² 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.”⁶³ 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.⁶⁴ 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. 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.⁶⁵ 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

⁶² See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

⁶³ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁶⁴ See *Cause of Action*, 799 F.3d at 1121.

⁶⁵ 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/>.

via “alternative media[,] shall be considered to be news-media entities.”⁶⁶ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute’s news media status in connection with its FOIA requests.⁶⁷

Record Preservation Requirement

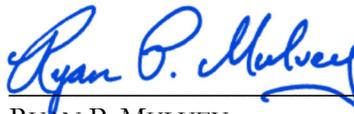
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.⁶⁸

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

⁶⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁶⁷ See, e.g., Fed. Trade Comm’n, FOIA Request No. FOIA-2018-01016 (July 26, 2018); FOIA Request No. 2018-HQFO-01215, Dep’t of Homeland Sec. (July 10, 2018); FOIA Request No. CFA2018-05, U.S. Comm’n for Fine Arts (June 25, 2018); 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).

⁶⁸ 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).