

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

July 2, 2018

### VIA ELECTRONIC MAIL

Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
E-mail: foia@ftc.gov

**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.<sup>1</sup>

On June 17, 2014, then-Chairman of the United States House of Representatives Committee on Oversight and Government Reform Darrell Issa wrote the Kelly Tshibaka, then-Acting Inspector General, Federal Trade Commission (“FTC”) requesting that the FTC’s Office of Inspector General (“OIG”) investigate the allegations that the FTC may have used inaccurate information in its enforcement actions against LabMD.<sup>2</sup> The FTC OIG Semiannual Report to Congress states that the investigation was completed and submitted to the Committee:<sup>3</sup>

Allegation that the FTC Disseminated False Data. The OIG received a letter from the chairman of the House of Representatives Committee on Oversight and Government Reform asking the OIG to investigate alleged collaboration between the FTC and a company suspected of disseminating false data about data security breaches. In particular, the Committee requested that the OIG investigate whether the FTC had used false data in an enforcement action against another company. The OIG did not substantiate the allegations and advised the Committee of its findings.

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<sup>1</sup> See CAUSE OF ACTION INSTITUTE, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/).

<sup>2</sup> Letter from Hon. Darrell Issa, Chairman, Committee on Oversight & Gov’t, U.S.H. Rep., to Kelly Tshibaka, Acting Inspector Gen., Fed. Trade Comm’n (June 17, 2014), *available at* <http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-17-DEI-to-Tshibaka-FTC-IG-LabMD-Tiversa.pdf> (last visited July 2, 2018).

<sup>3</sup> FED. TRADE COMM’N, OFFICE OF INSPECTOR GENERAL SEMIANNUAL REPORT TO CONGRESS: 04.01.15-09.30.15, at 10 (Oct. 31, 2015), *available at* [https://www.ftc.gov/system/files/documents/reports/fiscal-year-2015-second-half/semi1554\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/fiscal-year-2015-second-half/semi1554_0.pdf) (last visited July 2, 2018).

To our knowledge, this report has not been released publicly. Therefore, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period June 17, 2014 to the present:<sup>4</sup>

1. All OIG investigative reports relating to the “Allegation that the FTC Disseminated False Data,” as described in the FTC OIG Semiannual Report to Congress: 04.01.15-09.30.15.
2. All OIG investigative reports relating to the investigation requested in a letter from Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, to Kelly Tshibaka, Acting Inspector General, Federal Trade Commission (June 17, 2014.)
3. The transmittal e-mail or letter, with attachments, sent by the FTC OIG to the Committee on Oversight and Government Reform in response to the request for investigation.

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the agency 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.”<sup>5</sup> In this case, the requested records unquestionably shed light on the “operations or activities of the government,” as they relate to the FTC’s potential use of inaccurate information provided by Tiversa in pursuit of its enforcement actions against LabMD. And as the report has not yet been made public, its release will contribute significantly to the public’s understanding of both the FTC’s actions and the OIG’s investigation.

CoA Institute has both 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 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, whether through the Institute’s regularly published online newsletter, memoranda,

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<sup>4</sup> 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, 677-78 (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”).

<sup>5</sup> 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).

reports, or press releases.<sup>6</sup> 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 status purposes, CoA Institute also qualifies as a “representative of the news media” under FOIA.<sup>7</sup> As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>8</sup> 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 products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>9</sup> These distinct works

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<sup>6</sup> 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).

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>8</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>9</sup> See, e.g., CoA INSTITUTE, EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRM CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT (Jan. 2018), <http://coainst.org/2mgpYAu>; CoA Institute, *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Institute, *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; CoA INSTITUTE, SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL (Mar. 2017), <http://coainst.org/2y0fbOH>; CoA Institute, *Sec. Vilsack followed ethics guidelines when negotiating his future employment*, (Feb. 3, 2017), <http://coainst.org/2mJljJe>; CoA INSTITUTE, 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 INSTITUTE, 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 Institute, *CIA 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 INSTITUTE, 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/2lLsph8>; *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.),

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."<sup>10</sup> In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.<sup>11</sup>

### **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.<sup>12</sup>

### **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.

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<http://coainst.org/2nn5iFJ>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), <http://coainst.org/2aFWxUZ>.

<sup>10</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>11</sup> 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); FOIA Request 2016-00896, Bureau of Land Mgmt. (Aug. 10, 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 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 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015).

<sup>12</sup> 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).

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If you have any questions about this request, please contact me by telephone at (202) 499-2422 or by e-mail at [kevin.schmidt@causeofaction.org](mailto:kevin.schmidt@causeofaction.org). Thank you for your attention to this matter.

*Kevin Schmidt*

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KEVIN SCHMIDT  
DIRECTOR OF INVESTIGATIONS