VIA ELECTRONIC MAIL

Department of Health and Human Services
ATTN: Freedom of Information Officer
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, S.W.
Washington, D.C. 20201
E-mail: FOIAResquest@hhs.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.154

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[.]”155 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.156 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[.]”157 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.158

155 Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 7–8 (2001) (internal citations omitted).
156 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.”).
158 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[.]”).
manifests Congress’s intent to require something more of an agency when it defends its withholdings.\footnote{Cf. Mingo Logan Coal Co. v. Envtl. 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 records\footnote{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”).} reflecting Department of Health and Human Services (“HHS”) 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 HHS 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.\footnote{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).}

**Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA requires the HHS 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.”\footnote{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).}

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the HHS’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.\footnote{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).} 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.

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. 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.” 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. 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. These distinct works are distributed to the

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164 See Cause of Action, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).
166 See Cause of Action, 799 F.3d at 1121.
Department of Health and Human Services
October 29, 2018
Page 4

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.”168 In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.169

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.170

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,

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RYAN P. MULVEY
COUNSEL

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170 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).