

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

May 30, 2019

VIA CERTIFIED MAIL

U.S. General Services Administration
ATTN: Cynthia A. Metzler, Chief FOIA Officer
FOIA Requester Service Center (H1F)
1800 F Street, N.W., Room 7308
Washington, D.C. 20405-0001

Re: Freedom of Information Act Request

Dear Ms. Metzler:

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.

Over the past several years, reports have revealed that numerous federal agencies continue to maintain so-called “sensitive review” processes for “politically charged” or “high visibility” Freedom of Information Act (“FOIA”) requests. Although such review—including the special scrutiny afforded to requests from representatives of the news media and the pre-disclosure review of potentially embarrassing records by political appointees—are well-known phenomena,² these practices raise questions of fundamental fairness and impartial administration of the FOIA.³ Based on records recently disclosed by the General Services Administration (“GSA”), it appears that some species of sensitive review is in place at the agency, at least as it applies to news media requesters, and that CoA Institute has been subjected to it.⁴

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period of January 20, 2017 to the present:⁵

¹ See *About*, CAUSE OF ACTION INST., www.causeofaction.org/about/ (last accessed May 30, 2019).

² See, e.g., Eliana Johnson, *The Obama Administration’s Newly Political Approach to FOIAs*, NAT’L REV. (June 9, 2015), <http://bit.ly/2Lz2Mcl>.

³ See, e.g., Jacob Holzman & Benjamin J. Hulac, *Interior Department policy let political appointees review FOIA requests*, ROLL CALL (May 22, 2019), <http://bit.ly/2JVbMdG>.

⁴ See E-mail Duane Fulton, Gen. Servs. Admin., to Travis Lewis, Gen. Servs. Admin. (July 12, 2017) (“Since this is a Media request, please forward to Cynthia for her review and approval.”) (attached as Exhibit 1).

⁵ For purposes of this request, the term “present” should be construed as the date on which the GSA 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 a 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. 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 that information from disclosure”).

1. All records, including but not limited to communications, memoranda, guidelines, procedures, processing metrics, and tracking tables, concerning “sensitive review” FOIA processes, including any process for the handling of “politically charged” requests or those submitted by representatives of the news media. The scope of this item includes records defining or describing the sensitive review process. Further, to the extent any records created or obtained by GSA before January 20, 2017 reflect official agency policy or practice during the identified time period of this request, then they should be treated as responsive records and processed accordingly.
2. To the extent not covered by Item One, all communications between any GSA FOIA officer and a GSA political appointee (*i.e.*, non-career official or employee) concerning an incoming FOIA request, the review of agency records responsive to a FOIA request, or the final approval of an interim or final determination.
3. All communications between the GSA and the Office of the White House Counsel concerning the processing of FOIA requests containing “White House equities.”⁶
4. All communications between the GSA and the GSA Office of the Inspector General concerning any audit, investigation, inspection, evaluation, or inquiry into the involvement of political appointees (*i.e.*, non-career officials or employees) in the FOIA process (*e.g.*, reviewing or approving proposed FOIA productions, *etc.*). The time period for this item of the request is September 1, 2015 to the present.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA and relevant regulations provide that the GSA 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.”⁷

In this case, the requested records will shed light on the “operations or activities of the government,” namely, the GSA’s policies and procedures for handling “sensitive,” “politically charged,” or news-media-originated FOIA requests. “Sensitive review” FOIA processes have led to impermissible politicization at other agencies, and they have prompted multiple congressional investigations and FOIA lawsuits. The public has a right to view these records because they will provide insight into those matters and contribute to ongoing debate about the importance of transparency, especially at the GSA. Disclosure is likely to “contribute significantly” to public understanding of these matters as, to date, the records that CoA Institute seeks have not been made

⁶ See *White House FOIA Obstruction*, CAUSE OF ACTION INST., <http://bit.ly/2r0hBub> (last visited May 30, 2018); Mem. from Gregory Craig, Counsel to the President, The White House, to All Exec. Dep’t & Agency Gen. Counsels regarding Document Requests (Apr. 15, 2009), available at <https://coainst.org/2uz2NWT>.

⁷ 5 U.S.C. § 552(a)(4)(A)(iii); 41 C.F.R. § 105-60.305-13(a); see *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).

publicly available. CoA Institute intends to educate the public about its findings and to draw upon its published coverage of “sensitive review” at other agencies.⁸

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 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 a regularly published online newsletter, memoranda, reports, or press releases.⁹ 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 qualifies as a “representative of the news media.”¹⁰ As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.¹¹ 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.¹²

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 for the record.¹³ These distinct works are distributed to the

⁸ See, e.g., *Investigation Update: VA releases 2014 memo on “sensitive review,” but fails to conduct an adequate search for more recent FOIA guidance*, CoA Inst. (Dec. 12, 2018), <https://coainst.org/2JWV7Xi>; *Politics Clouding Criticism of the EPA’s Heightened Sensitive Review FOIA Procedures*, CoA Inst. (May 14, 2018), <https://coainst.org/2l5zxlq>; *NOAA Records Demonstrate Expansion of Sensitive Review FOIA Procedures*, CoA Inst. (Mar. 12, 2018), <http://coainst.org/2tFnLp5>.

⁹ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 41 C.F.R. § 105-60.305-1(i).

¹¹ See *Cause of Action*, 799 F.3d at 1121.

¹² CoA Institute notes that the GSA’s definition of “representative of the news media,” 41 C.F.R. § 105-60.305-1(i), is in conflict with the statutory definition and controlling case law. The GSA has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *Cause of Action*, 799 F.3d at 1225 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [I]here is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, CoA Institute qualifies as a news media requester.

¹³ See CAUSE OF ACTION INST., *Blog*, <http://www.causeofaction.org/media/blog> (last visited Mar. 22, 2018); see also, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwpP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

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."¹⁴ In light of the foregoing, numerous federal agencies—including the GSA—have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.¹⁵

Record Preservation Requirement

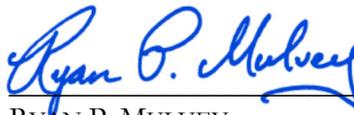
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.¹⁶

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 2018. 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

¹⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁵ See, e.g., FOIA Request No. HQ-2019-00123-F, Dep't of Energy (Nov. 26, 2018); FOIA Request No. OS-2019-00118, Dep't of the Interior (Oct. 31, 2018); 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).

¹⁶ 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



Duane Fulton - H1FA <duane.fulton@gsa.gov>

Fwd: GSA-2017-001158 (Ryan Mulvey - CoA Institute) - Ready for Legal Review

1 message

Duane Fulton - H1F <duane.fulton@gsa.gov>
To: Travis Lewis - H1C <travis.lewis@gsa.gov>

Wed, Jul 12, 2017 at 2:38 PM

Hi Travis - Hyacinth reviewed and concurred on this draft response. Please review the draft response letter and full release responsive documents (2-Congressional Inquires policy and Craig Memo). Legal's concurrence is below and attached. Since this is a Media request, please forward to Cynthia for her review and approval.

----- Forwarded message -----

From: **Hyacinth Perrault - H1F** <hyacinth.perrault@gsa.gov>
Date: Wed, Jul 12, 2017 at 2:19 PM
Subject: Fwd: GSA-2017-001158 (Ryan Mulvey - CoA Institute) - Ready for Legal Review
To: Duane Fulton <duane.fulton@gsa.gov>

Hi Duane,

I have reviewed this FOIA to Mr. Mulvey and it looks good with the concern we discussed about the omission of the Appeal Verbiage.

Kindly verify with Travis whether this is needed. Thanks.

Hyacinth Perrault
Lead Government Information Specialist
Freedom of Information Act (FOIA) Requester Service Center
Management & Oversight Division (H1F)
National Office | GSA | Office of Administrative Services (H)
1800 F St. NW, Washington, DC 20405
Cell: (b) (6)

----- Forwarded message -----

From: **Duane Fulton - H1F** <duane.fulton@gsa.gov>
Date: Wed, Jul 12, 2017 at 1:33 PM
Subject: Fwd: GSA-2017-001158 (Ryan Mulvey - CoA Institute) - Ready for Legal Review
To: Hyacinth Perrault <hyacinth.perrault@gsa.gov>

Hi Hyacinth - This draft response is ready for your review. This is a full release. Please review the draft response letter and full release responsive documents (2-Congressional Inquires policy and Craig Memo). Legal's concurrence is below and attached. Also, since this is a Media request, if you concur, please forward to Travis to coordinate for Cynthia's approval.

Let me know if you have any questions.

----- Forwarded message -----

From: **Duane Smith** <duane.smith@gsa.gov>
Date: Wed, Jul 12, 2017 at 11:35 AM
Subject: Re: GSA-2017-001158 (Ryan Mulvey - CoA Institute) - Ready for Legal Review
To: Duane Fulton - H1F <duane.fulton@gsa.gov>

I concur for release.

On Wed, Jul 12, 2017 at 8:56 AM, Duane Fulton - H1F <duane.fulton@gsa.gov> wrote:

Good morning D2 - This FOIA response is ready for your review and concurrence. This is a full release. Please review the draft response letter and full release responsive documents (2-Congressional Inquires policy and Craig Memo).

Let me know if you have any questions.

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Duane Fulton

Lead Government Information Specialist
Freedom of Information Act (FOIA) Branch (H1F)
Office of Administrative Services
U.S. General Services Administration
1800 F St. NW, Washington, DC 20405
(BB) (b) (6)

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Duane L. Smith
Assistant General Counsel
General Law Division, Office of General Counsel
U.S. General Services Administration
(b) (6)

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Duane Fulton

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Duane Fulton

Lead Government Information Specialist
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U.S. General Services Administration

4/11/2018

GSA.gov Mail - Fwd: GSA-2017-001158 (Ryan Mulvey - CoA Institute) - Ready for Legal Review

1800 F St. NW, Washington, DC 20405

(BB) (b) (6)

4 attachments



001158 - Mulvey - RD2 - WH Equities memo_UR.pdf

18K



001158 - Mulvey - RD1 - ADM 1040.2 Congressional Inquires.Relations Policy_2015-02-15.pdf

184K



001158 - Mulvey - Legal Concurrence.pdf

113K



001158 - Mulvey - Draft RL_2017-07-12.docx

55K