

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION INSTITUTE)
1875 Eye Street, N.W., Suite 800)
Washington, D.C. 20006,)

Plaintiff,)

v.)

Civil Action No. 19-1507

U.S. DEPARTMENT OF THE INTERIOR)
1849 C Street, N.W.)
Washington, D.C. 20240;)

U.S. DEPARTMENT OF AGRICULTURE)
1400 Independence Avenue, S.W.)
Washington, D.C. 20250;)

U.S. DEPARTMENT OF COMMERCE)
1401 Constitution Avenue, N.W.)
Washington, D.C. 20230;)

U.S. DEPARTMENT OF EDUCATION)
400 Maryland Avenue, S.W.)
Washington, D.C. 20202;)

U.S. DEPARTMENT OF HEALTH)
AND HUMAN SERVICES)
200 Independence Avenue, S.W.)
Washington, D.C. 20201;)

U.S. DEPARTMENT OF HOMELAND SECURITY)
245 Murray Lane, S.W.)
Washington, D.C. 20528;)

U.S. DEPARTMENT OF JUSTICE)
950 Pennsylvania Avenue, N.W.)
Washington, D.C. 20530;)

U.S. DEPARTMENT OF STATE)
2201 C Street, N.W.)
Washington, D.C. 20520;)

(continued on the next page))

U.S. DEPARTMENT OF THE TREASURY)
1500 Pennsylvania Avenue, N.W.)
Washington, D.C. 20220;)
))
U.S. DEPARTMENT OF TRANSPORTATION)
1200 New Jersey Avenue, S.E.)
Washington, D.C. 20590;)
))
ENVIRONMENTAL PROTECTION AGENCY)
1200 Pennsylvania Avenue, N.W.)
Washington, D.C. 20460;)
))
THE WHITE HOUSE OFFICE OF)
MANAGEMENT AND BUDGET)
725 17th Street, N.W.)
Washington, D.C. 20503;)
))
COUNCIL OF THE INSPECTORS GENERAL)
ON INTEGRITY AND EFFICIENCY)
1717 H Street, N.W., Suite 825)
Washington, D.C. 20006;)
))
and)
))
NATIONAL RAILROAD PASSENGER)
CORPORATION (d/b/a AMTRAK))
1 Massachusetts Avenue, N.W.)
Washington, D.C. 20001,)
))
Defendants.)
_____)

COMPLAINT

1. Plaintiff Cause of Action Institute (“CoA Institute”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to records maintained by the above-captioned fourteen (14) Defendant Federal Agencies, by and through their various components and offices.

2. All of the FOIA requests at issue in this case—none of which has received a timely final determination—seek records concerning government-wide implementation of the FOIA’s

“foreseeable harm” standard. *See CoA Institute opens government-wide investigation into agency implementation of the FOIA’s “foreseeable harm” standard*, Cause of Action Inst. (Nov. 14, 2018), <https://coainst.org/2w3QwKw>. The foreseeable harm standard, which was codified with passage of the FOIA Improvement Act of 2016, is designed to ensure that agencies only withhold requested records, or portions thereof, when they “reasonably foresee” that disclosure would harm an interest protected by a statutory exemption. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). The foreseeable harm standard builds upon the “presumption of openness” principle that was introduced on a discretionary basis by the Obama Administration. *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).

3. To date, records concerning how the foreseeable harm standard has been received, interpreted, and applied by agencies, including Defendants, remain undisclosed. The Department of Justice (“DOJ”) Office of Information Policy (“OIP”), which is tasked with providing guidance to the entire Executive Branch on proper administration of the FOIA, has not published any directives on the proper implementation of the foreseeable harm standard. Moreover, most agencies have failed to disclose any policies they may have developed, and federal courts have been slow to grapple substantively with the import of the new standard.

JURISDICTION AND VENUE

4. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

5. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

6. Plaintiff CoA Institute is a 501(c)(3) non-profit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance

of government transparency and accountability. CoA Institute regularly requests access under the FOIA to the public records of federal agencies, entities, and offices—including the instant Defendants—and it disseminates its findings, analysis, and commentary to the public.

7. Defendant Department of the Interior (“DOI”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOI, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

8. Defendant Department of Agriculture (“USDA”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). USDA, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

9. Defendant Department of Commerce (“DOC”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOC, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

10. Defendant Department of Education (“DOEd”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOEd, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

11. Defendant Department of Health and Human Services (“HHS”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). HHS, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

12. Defendant Department of Homeland Security (“DHS”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). DHS, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

13. Defendant DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOJ, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

14. Defendant Department of State (“State”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). State, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

15. Defendant Department of the Treasury (“Treasury”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). Treasury, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

16. Defendant Department of Transportation (“DOT”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOT, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

17. Defendant Environmental Protection Agency (“EPA”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). EPA, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

18. Defendant White House Office of Management and Budget (“OMB”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). OMB, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

19. Defendant Council of the Inspectors General on Integrity and Efficiency (“CIGIE”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). CIGIE, by and through its various

components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

20. Defendant National Railroad Passenger Corporation (“Amtrak”) is an agency within the meaning of 5 U.S.C. § 552(f)(1). Amtrak, by and through its various components, has possession, custody, or control of records to which CoA Institute seeks access and that are the subject of this Complaint.

FACTS

I. The FOIA’s Foreseeable Harm Standard

21. The FOIA mandates that agency records be produced 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[.]” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7–8 (2001) (internal citations omitted).

22. With the passage of the FOIA Improvement Act of 2016, Congress introduced significant amendments to the FOIA, including changes that raise the standard by which an agency must evaluate its withholdings. Congress sought to “[b]uild[] on the [Obama] Administration’s efforts” to introduce a “presumption of openness” by turning that “presumption” into a “permanent requirement” that would “prohibit agencies” from the technical application of exemptions. H.R. Rep. No. 114-391 at 9 (2016); *see 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.”); *see also* 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.”).

23. As the law now stands, an agency may only “withhold information” under the FOIA “if [it] *reasonably foresees* that disclosure would harm an interest protected by an exemption[.]” 5 U.S.C. § 552(a)(8)(A)(i)(I) (emphasis added). That is, an agency must articulate precise reasons why the disclosure of specific records, or portions of records, could be reasonably foreseen to harm a cognizable interest. *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[.]”). The foreseeable harm standard thus manifests Congress’s intent to require something more of an agency when it defends its withholdings. *Cf. Mingo Logan Coal Co. v. Envtl. Prot. Agency*, 714 F.3d 608, 612–14 (D.C. Cir. 2013).

II. CoA Institute’s Government-Wide Investigation and FOIA Requests

24. Despite the significance of the 2016 amendments and the introduction of the foreseeable harm standard, the public has not enjoyed widespread access to information about how the standard is being interpreted and implemented across the federal government. Although some agencies have disclosed relevant policies or procedures, most have not. Further, as previously indicated, OIP has not published guidance on the matter. CoA Institute therefore filed near-identical FOIA requests with twenty-five agencies, including Defendants, to investigate how the foreseeable harm standard was being administered at each respective agency. *See, e.g.*, Ex. 1 (FOIA request directed to HHS).

25. Specifically, by letter dated October 29, 2018, CoA Institute submitted a FOIA request to each Defendant seeking access to (1) all records concerning the agency’s “procedures, policies, guidelines, or instructions concerning the proper interpretation and implementation of the

[FOIA's] 'foreseeable harm' standard," as well as (2) all communications with DOJ, the Executive Office of the President, or Congress regarding the foreseeable harm standard.

26. CoA Institute identified the time period for each request as "June 30, 2016 to the present," and it defined the term "present" as "the date on which the agency begins its search for responsive records."

27. For purposes of each request, CoA Institute defined the term "record" as "the entirety of the record any portion of which contains responsive information."

28. CoA Institute requested a public interest fee waiver and classification as a representative of the news media for fee purposes in each of its requests.

29. Although Defendants have processed CoA Institute's requests to varying degrees, none of Defendants have issued a final determination. Consequently, CoA Institute must file this lawsuit to vindicate its rights under the FOIA and ensure the prompt production of agency records.

III. Defendants' Processing of CoA Institute's FOIA Requests

A. Department of the Interior (FOIA Request No. OS-2019-00118)

30. By letter, dated October 31, 2018, DOI acknowledged that it had received CoA Institute's FOIA request on October 29, 2018 and assigned it tracking number OS-2019-00118.

31. DOI provided a link to publicly available records that it considered responsive to Item One of the request, but it did not provide any determination on the remainder of the request.

32. DOI classified CoA Institute as a representative of the news media; the agency deferred its consideration of CoA Institute's request for a public interest fee waiver.

33. Citing the need to conduct intra-agency consultation, DOI extended its response deadline by ten working days.

34. DOI indicated that CoA Institute's FOIA request had been assigned to the "normal" processing queue.

35. To date, DOI has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any additional records.

B. Department of Agriculture (FOIA Request No. 2019-DA-00660-F)

36. By email, dated October 30, 2018, USDA acknowledged that it had received CoA Institute's FOIA request and assigned it tracking number 2019-DA-00660-F.

37. USDA classified CoA Institute as a representative of the news media; the agency deferred its consideration of CoA Institute's request for a public interest fee waiver.

38. To date, USDA has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

C. Department of Commerce (FOIA Request No. DOC-IOS-2019-000159)

39. By letter, dated November 30, 2018, DOC acknowledged that it had received CoA Institute's FOIA request and assigned it tracking number DOC-IOS-2019-000159.

40. DOC did not issue any determinations on CoA Institute's fee-related requests.

41. In its acknowledgement letter, DOC sought clarification as to the scope of CoA Institute's request and it requested consent to limit its search to "individuals at the Under Secretary or Assistant Secretary level and above only."

42. By email, dated December 3, 2018, CoA Institute declined to narrow its request as proposed by DOC. CoA Institute instead suggested that DOC narrow its search to certain component offices, including the "departmental FOIA office" and the "Office of General Counsel." CoA Institute also suggested that responsive records may be found in "components responsible for liaising with the White House, Congress, and other Executive Branch agencies."

Finally, CoA Institute recommended that DOC conduct “preliminary consultation[s] with knowledgeable officials . . . who work on FOIA matters” to design its search methodology.

43. To date, DOC has failed to provide any further update on the processing of CoA Institute’s request and it has not issued a final determination or produced any responsive records.

D. Department of Education (FOIA Request No. 19-00246-F)

44. By letter, dated October 30, 2018, DOEd acknowledged that it had received CoA Institute’s FOIA request and assigned it tracking number 19-00246-F.

45. On November 23, 2018, DOEd granted CoA Institute’s request for a public interest fee waiver.

46. To date, DOEd has failed to provide any further update on the processing of CoA Institute’s request and it has not issued a final determination or produced any responsive records.

E. Department of Health and Human Services

47. Although HHS received a copy of CoA Institute’s FOIA request by email, dated October 29, 2018, the agency has not formally acknowledged receipt, provided a tracking number, or otherwise responded to CoA Institute’s inquires. *See Ex. 2.*

48. On April 16, 2019, CoA Institute attempted to contact a responsible official at HHS to obtain tracking details and an update on the status of the request, but it was unable to do so.

49. HHS has not issued a final determination or produced any responsive records.

F. Department of Homeland Security (FOIA Request No. 2019-HQFO-00126)

50. By letter, dated April 4, 2019, DHS acknowledged that it had received CoA Institute’s FOIA request on October 30, 2018 and assigned it tracking number 2019-HQFO-00126.

51. DHS “conditionally” granted CoA Institute’s request for a public interest fee waiver and indicated that it would communicate its “final decision” upon review of a “sampling” of

responsive records. DHS did not explicitly deny CoA Institute's fee category request, but it described CoA Institute as a "non-commercial requester."

52. Citing the need to conduct a "thorough and wide-ranging search," DHS extended its response deadline by ten working days.

53. To date, DHS has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

G. Department of Justice (FOIA Request No. DOJ-2019-000658 (OIP))

54. By letter, dated November 27, 2018, DOJ acknowledged that it had received CoA Institute's FOIA request on November 2, 2018 and assigned it tracking number DOJ-2019-000658 (OIP).

55. Citing non-specific "unusual circumstances," DOJ extended its response deadline by ten working days.

56. DOJ indicated that CoA Institute's FOIA request had been assigned to the "complex" processing queue.

57. DOJ did not issue any determinations on CoA Institute's fee-related requests.

58. To date, DOJ has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

H. Department of State (FOIA Request No. F-2019-01044)

59. By letter, dated February 7, 2019, State acknowledged that it had received CoA Institute's FOIA request on November 5, 2018 and assigned it tracking number F-2019-01044.

60. State impliedly denied CoA Institute's fee category request by referring to it as an "other-use requester," but it granted CoA Institute's request for a public interest fee waiver.

61. Citing the need to conduct a search in multiple offices and intra-agency consultation, State extended its response deadline by ten working days.

62. State indicated that CoA Institute's FOIA request had been assigned to the "complex" processing queue.

63. To date, State has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

I. Department of the Treasury (FOIA Request No. 2018-11-162)

64. By letter, dated December 4, 2018, Treasury acknowledged that it had received CoA Institute's FOIA request and assigned it tracking number 2018-11-162.

65. Citing the need to conduct a search in multiple offices and intra-agency consultation, Treasury extended its responsive deadline by ten working days.

66. Treasury did not issue any determinations on CoA Institute's fee-related requests.

67. To date, Treasury has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

J. Department of Transportation (FOIA Request No. 2019-43)

68. By letter, dated October 29, 2018, DOT acknowledged that it had received CoA Institute's FOIA request and assigned it tracking number 2019-43.

69. DOT did not issue any determinations on CoA Institute's fee-related requests.

70. To date, DOT has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

K. Environmental Protection Agency (FOIA Request No. EPA-HQ-2019-001054)

71. By email, dated November 1, 2018, EPA acknowledged via FOIAonline that it had received CoA Institute's FOIA request and assigned it tracking number EPA-HQ-2019-001054.

72. On November 6, 2018, EPA responded to CoA Institute's fee-related requests and indicated that "the total fees that would be incurred in processing [CoA Institute's FOIA] request do not meet the cost threshold and therefore [the request is] not billable."

73. To date, EPA has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

L. White House Office of Management and Budget (FOIA Request No. 2019-041)

74. By email, dated October 29, 2018, OMB acknowledged that it had received CoA Institute's FOIA request and assigned it tracking number 2019-041.

75. OMB did not issue any determinations on CoA Institute's fee-related requests.

76. To date, OMB has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

M. Council of the Inspectors General on Integrity and Efficiency (FOIA Request No. 6330-2019-07)

77. By letter, dated November 9, 2018, CIGIE acknowledged that it had received CoA Institute's FOIA request on October 29, 2018 and assigned it tracking number 6330-2019-07.

78. CIGIE did not issue any determinations on CoA Institute's fee-related requests.

79. To date, CIGIE has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

N. National Railroad Passenger Corporation (FOIA Request No. 19-FOI-00015)

80. By letter, dated November 14, 2018, Amtrak acknowledged that it had received CoA Institute's FOIA request on November 2, 2018 and assigned it tracking number 19-FOI-00015.

81. Amtrak granted CoA Institute's request for a public interest fee waiver.

82. Amtrak estimated that it would finish processing CoA Institute's FOIA request by December 14, 2018.

83. To date, Amtrak has failed to provide any further update on the processing of CoA Institute's request and it has not issued a final determination or produced any responsive records.

COUNT I

Violation of the FOIA: Failure to Comply with Statutory Requirements

84. CoA Institute repeats all of the above paragraphs.

85. The FOIA requires an agency to accept and process any request for access to agency records that (a) "reasonably describes such records," and (b) "is made in accordance with published rules stating the time, place, fees, . . . and procedures to be followed[.]" 5 U.S.C. § 552(a)(3)(A).

86. The FOIA also requires an agency to respond to valid requests within twenty (20) business days or, in "unusual circumstances," within thirty (30) business days. *Id.* § 552(a)(6)(A)–(B). If an agency requires additional time to process a request, the FOIA mandates that the agency provide the requester "an opportunity to arrange with the agency an alternative time frame for processing the request[.]" *Id.* § 552(a)(6)(B)(ii).

87. All of the FOIA requests at issue in this case seek access to agency records maintained by Defendants, reasonably describe the records sought, and otherwise comply with the FOIA and Defendants' applicable regulations.

88. Defendants have failed to issue their final determinations on or to complete production of all records responsive to the FOIA requests at issue within the applicable time limits.

89. Defendants also have failed to comply with the FOIA in that they never "arrange[d] . . . alternative time frame[s]" for responding to CoA Institute's requests, have not provided revised estimated dates of completion, have not invited CoA Institute to negotiate "alternative" response deadlines, and have not sought further clarification on the scope of CoA Institute's FOIA requests.

90. CoA Institute has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) with respect to all of the FOIA requests at issue.

RELIEF REQUESTED

WHEREFORE, CoA Institute respectfully requests and prays that this Court:

- a. Order Defendants to process CoA Institute's FOIA requests and issue final determinations within twenty (20) business days of the date of the Order;
- b. Order Defendants to produce all responsive records promptly upon issuing their final determinations;
- c. Maintain jurisdiction over this case until Defendants comply with the Order and, if applicable, adequately justify their treatment of all responsive records;
- d. Award CoA Institute its costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant such other relief as the Court may deem just and proper.

Dated: May 23, 2019

Respectfully submitted,

/s/ Ryan P. Mulvey

Ryan P. Mulvey
D.C. Bar No. 1024362
Lee A. Steven
D.C. Bar No. 468543

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