

# Exhibit 11



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

1875 Eye Street NW, Suite 800 · Washington, D.C. 20006

July 7, 2016

**VIA CERTIFIED MAIL**

Ms. Rhonda O'Reilly  
Internal Revenue Service  
HQ Disclosure, Stop 211  
P.O. Box 621506  
Atlanta, GA 30362-3006

**Re: Freedom of Information Act Request No. F16146-0127**

Dear Ms. O'Reilly:

This letter is in response to the Internal Revenue Service ("IRS") rejection of the Cause of Action Institute ("CoA Institute") Freedom of Information Act ("FOIA") request F16146-0127, dated May 20, 2016. CoA Institute requests that the IRS re-open the request as it has been inappropriately closed and because its rejection as imperfect was not in compliance with applicable IRS rules.

**Background**

On May 20, 2016, CoA Institute submitted a FOIA request to the IRS seeking access to all records of communications between Douglas Shulman, Steven Miller, Daniel Werfel, or John Koskinen and Andrew C. Strelka, Danielle C. Gray, or Boris Bershteyn.<sup>1</sup> The request was limited to records created between January 2010 and June 2014.<sup>2</sup> CoA Institute also requested categorization as a representative of the news media for fee purposes, as well as a public interest fee waiver.<sup>3</sup>

On June 14, 2016, the IRS issued its "final response," summarily closing the request and indicating that the agency is "unable to process" the request "as it does not meet the requirements of the FOIA or the applicable [IRS] regulations."<sup>4</sup> The agency argued that the request was imperfect because it did not "reasonably describe" the records sought.<sup>5</sup> As set forth below, this is an improper determination. The IRS must re-open and process the CoA Institute request.

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<sup>1</sup> Letter from CoA Institute to Rhonda O'Reilly, Internal Revenue Serv. (May 20, 2016) (attached as Exhibit 1).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Letter from P. Sharrise Tompkins, Internal Revenue Serv., to CoA Institute (June 14, 2016) (attached as Exhibit 2).

<sup>5</sup> *Id.* (citing 5 U.S.C. § 552(a)(3)(A)).

July 7, 2016

Page 2

### Discussion

The FOIA requires that requests “reasonably describe” requested records and otherwise comply with published FOIA regulations.<sup>6</sup> The May 20, 2016 CoA Institute request meets these requirements. First, CoA Institute provided the IRS with a discrete and manageable list of likely records custodians when it identified by name four IRS employees who may have communicated with three named White House employees. Further, CoA Institute restricted the parameters of the requested search to a four-year period. This is hardly burdensome and the universe of potentially responsive records is unlikely to be voluminous. Additional search terms are unnecessary as the subject matter of the request is clearly stated; that is, CoA Institute seeks correspondence between the named IRS and White House officials.

Even if the IRS considers the CoA Institute request to be broad or wide-reaching, that does not justify the decision to treat the request as imperfect.<sup>7</sup> As the Department of Justice has explained, “[t]he sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records within the meaning of 5 U.S.C. § 552(a)(3)(A). That provision was intended to ensure that a request description ‘be sufficient [to enable] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.’”<sup>8</sup> To the extent the IRS required further explanation to process the instant request or sought a narrowed scope, it should have made an effort to contact CoA Institute and negotiate the relevant amendments. The IRS never did so.

The CoA Institute FOIA request conformed to all applicable IRS regulations: it cited the FOIA statute, provided a clear description of the requested records, contained the necessary citations and arguments for news media fee requester status and public interest fee waiver, and was properly addressed and submitted. The IRS has not asserted otherwise.

Even if the CoA Institute request were in some manner defective—which, as set forth above, it is not—the IRS response still deviates from IRS FOIA regulations and the Internal Revenue Manual, which states that “[c]aseworkers must . . . notify the requester that the [imperfect] request does not meet certain requirements of the FOIA[,] that more information is needed . . . and [they] must advise the requester that he/she has 35 calendar days to perfect the request.”<sup>9</sup> The IRS did not indicate how the CoA Institute request was “defective” or how it might be corrected prior to its “final response,” nor did the IRS indicate a 35-day period within which CoA Institute could attempt to perfect its request.

The improper closure of a proper FOIA request is concerning because it frustrates public access to government information and evidences the breach of the agency’s obligations under the

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<sup>6</sup> 5 U.S.C. § 552(a)(3)(A)(i)–(ii).

<sup>7</sup> See, e.g., *Ruotolo v. Dep’t of Justice*, 53 F.3d 4, 9–10 (2d Cir. 1995); *Pub. Citizen Health Research Group v. Food & Drug Admin.*, No. 90-0018, slip op. at 1–2 (D.D.C. Feb. 9, 1996).

<sup>8</sup> Office of Info. Policy, Dep’t of Justice, FOIA Update: FOIA Counselor: Questions & Answers, vol. IV, no. 3 (Jan. 1, 1983), available at <http://bit.ly/29hZ6N3> (quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974)).

<sup>9</sup> Internal Revenue Manual 11.3.13.5.5(2), available at <http://bit.ly/29yhhvR>; see also 26 C.F.R. § 601.702(c)(1)(i).

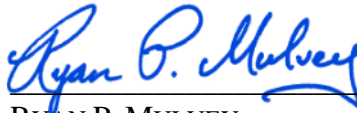
July 7, 2016

Page 3

FOIA.<sup>10</sup> Greater care must be taken to ensure that closure only happens when necessary and appropriate. Here, for the reasons stated, we expect that the CoA Institute FOIA request will be re-opened and the IRS will produce responsive documents without further delay.

Thank you for your immediate attention to this matter. If you have any questions, please contact me by e-mail at [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org) or by telephone at (202) 499-4232.

Sincerely,



RYAN P. MULVEY  
COUNSEL

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<sup>10</sup> See, e.g., Letter to Miriam Nisbet, Dir., Office of Gov't Info. Servs., Nat'l Archives & Records Admin., from CoA Institute, *et al.* (Oct. 30, 2014), available at <http://bit.ly/29wzZ9P>; see also CoA Institute, *Cause of Action Signs Coalition Letter Asking for OGIS Investigation of Administrative Closures* (Oct. 30, 2014), <http://bit.ly/29kqrKf>.

# EXHIBIT

1



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

1875 Eye Street, Ste. 800 · Washington, DC 20006

May 20, 2016

**VIA CERTIFIED MAIL**

Ms. Rhonda O'Reilly  
IRS FOIA Request  
HQ FOIA  
Stop 211  
P.O. Box 621506  
Atlanta, GA 30362-3006

**Re: Freedom of Information Act Request**

Dear Ms. O'Reilly:

I write on behalf of Cause of Action Institute, a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, Cause of Action Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Cause of Action Institute hereby requests access to all communications between Douglas Shulman, Steven Miller, Daniel Werfel, or John Koskinen, and Andrew C. Strelka, Danielle C. Gray, or Boris Bershteyn. The time period for this request is January 2010 to June 2014. The scope of this request includes, but is not limited to, correspondence via e-mail, instant/text message, and formal letter, as well as work calendar entries, visitor logs, and meeting notes.

**Request for a Public Interest Fee Waiver**

Cause of Action Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the IRS 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

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<sup>1</sup> See CAUSE OF ACTION INSTITUTE, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/) (last accessed Apr. 26, 2016).

primarily in the commercial interest of the requester.”<sup>2</sup> In this case, the requested records would disclose how the IRS interacted with the White House on matters pertaining to the processing of applications for tax-exempt status under Section 501(c)(4) of the Internal Revenue Code. These sorts of communications have not been widely distributed, and their disclosure and dissemination would contribute to public understanding of the nature of the relationship between White House officials and political appointees at the IRS.

Cause of Action 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 a wealth of 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, reports, or press releases.<sup>3</sup> In addition, as Cause of Action 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, Cause of Action Institute also qualifies as a “representative of the news media.”<sup>4</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>5</sup> Cause of Action 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.<sup>6</sup>

Although it is not required by the statute, Cause of Action 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>7</sup> These distinct works

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<sup>2</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 26 C.F.R. § 601.702(f)(2); *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).

<sup>3</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>4</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 26 C.F.R. § 601.702(f)(3)(ii)(B).

<sup>5</sup> *See Cause of Action*, 799 F.3d at 1121.

<sup>6</sup> Cause of Action Institute notes that the IRS definition of “representative of the news media,” 26 C.F.R. § 601.702(f)(3)(ii)(B), is in conflict with the statutory definition and controlling case law. The agency 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. *See Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Yet, under either definition, Cause of Action Institute qualifies as news media requester.

<sup>7</sup> *See, e.g., Cause of Action Testifies Before Congress on Questionable White House Detail Program*, CAUSE OF ACTION (May 19, 2015), available at <http://goo.gl/Byditl>; *CAUSE OF ACTION, 2015 GRADING THE GOVERNMENT REPORT CARD* (Mar. 16, 2015), available at <http://goo.gl/MqObwV>; *Cause of Action Launches*

are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. Cause of Action Institute also provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as Cause of Action Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>8</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>9</sup>

### **Record Preservation Requirement**

Cause of Action 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>10</sup>

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*Online Resource: ExecutiveBranchEarmarks.com, CAUSE OF ACTION (Sept. 8, 2014), available at <http://goo.gl/935qAi>; CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://goo.gl/BiaEaH>; CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://goo.gl/N0xSvs>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://goo.gl/GpP1wR>.*

<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>9</sup> *See, e.g.*, FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 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 F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 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 OS-2015-00419, Dep't of Interior (Aug. 3, 2015); FOIA Request 780831, Dep't of Labor (Jul 23, 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 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013).

<sup>10</sup> *See* 26 C.F.R. § 601.702(e)(14); 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).

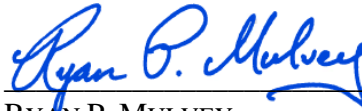


**Record Production and Contact Information**

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, Cause of Action 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](mailto:ryan.mulvey@causeofaction.org). Thank you for your assistance.

Sincerely,



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RYAN P. MULVEY  
COUNSEL

# EXHIBIT

2



PRIVACY, GOVERNMENTAL  
LIAISON AND DISCLOSURE

**DEPARTMENT OF THE TREASURY**  
**INTERNAL REVENUE SERVICE**  
**WASHINGTON, DC 20224**

June 14, 2016

Ryan Mulvey  
Cause of Action Institute  
1875 Eye Street, NW, Suite 800  
Washington, DC 20006

Dear Mr. Mulvey:

This is our final response to your Freedom of Information Act (FOIA) request dated May 20, 2016 that we received on May 25, 2016.

You requested all communications between Douglas Shulman, Steven Miller, Daniel Werfel, or John Koskinen, and Andrew C. Strelka, Danielle C. Gray, or Boris Bershteyn for the time period of January 2010 to June 2014.


Unfortunately, we are unable to process your request as it does not meet the requirements of the FOIA or the applicable agency regulations. The FOIA requires that requests (1) "reasonably describe" the records sought and (2) be made in accordance with published agency rules. 5 U.S.C § 552(a)(3)(A). IRS regulations at Treas. Reg. § 601.702(c)(5)(i), require that the request describe the documents in sufficient detail to enable us to locate the records "without placing an unreasonable burden upon the IRS." A request for all communications between Douglas Shulman, Steven Miller, Daniel Werfel, or John Koskinen, and Andrew C. Strelka, Danielle C. Gray, or Boris Bershteyn over a four year period would be unreasonably burdensome for the IRS to process, given the amount of data to be searched. A request of the type you have submitted seeking "any and all" records amongst those of IRS employees without reference to subject matter and over such an expansive time period is not valid. See, for example, *Dale v. IRS*, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002), where the court held that request seeking "any and all documents . . . that refer or relate in any way" to requester failed to reasonably describe records sought and "amounted to an all-encompassing fishing expedition of files at [agency's] offices across the country, at taxpayer expense."

We encourage you to consider revising your request, possibly by making it much more specific as to subject matter and specifying particular dates that might include the documents you are seeking.

If you have any questions, please call Tax Law Specialist A. Amparano, ID # 0220447, at (214) 413-5489, or write to: Internal Revenue Service, Disclosure Office 9, P.O. Box

621506, Stop 211, Atlanta, GA 30362-3006. Please refer to case number # F16146-0127.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Sharrise Tompkins". The signature is fluid and cursive, with a large initial "P" and a stylized "T".

**P. Sharrise Tompkins  
Disclosure Manager  
Disclosure Office 9**