

EXHIBIT

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Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

July 13, 2016

VIA CERTIFIED MAIL AND E-MAIL

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910
FOIA@noaa.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

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 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”), CoA Institute hereby requests access to records maintained by the National Oceanic and Atmospheric Administration (“NOAA”).

CoA Institute is investigating recent appointments to the New England Fishery Management Council, a regulatory body created by the Magnuson-Stevens Fishery Conservation and Management Act. *See* 16 U.S.C. § 1852. Voting members of the Council are appointed to staggered three-year terms by the Secretary of Commerce from lists of candidates submitted by the governors of States within the Council’s jurisdiction. *Id.* § 1852(b). To aid in its investigation, CoA Institute requests:

All documents related to the appointment or reappointment of members of the New England Fishery Management Council from November 1, 2015 to the present. This request includes all communications, both inside the government and with outside parties, including .gov e-mail, personal e-mail, text messaging, and any other methods of communication. This request specifically includes communications to or from the personal and official e-mail accounts of the following persons and entities:

¹ *See* CAUSE OF ACTION INSTITUTE, www.causeofaction.org.

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1. The Office of the Secretary of Commerce
2. The Office of Dr. Kathryn Sullivan, Administrator of NOAA and Under Secretary of Commerce for Oceans and Atmosphere
3. Lois J. Schiffer, NOAA General Counsel
4. Eileen Sobeck, Assistant Administrator for Fisheries
5. Samuel D. Rauch III, Deputy Assistant Administrator for Regulatory Programs
6. Dr. Alan D. Risenhoover, Director, Office of Sustainable Fisheries
7. John Bullard, Northeast Regional Administrator
8. Michael Pentony, Assistant Regional Administrator for Sustainable Fisheries
9. Dr. William A. Karp, Science and Research Director, Northeast Fisheries Science Center

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees.² FOIA and applicable regulations provide that agencies 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.”³ In this case, the requested records will shed light on “operations or activities of the government,” including potential abuses in determining the membership of the New England Council. Disclosure is likely to “contribute significantly” to public understanding of these matters because NOAA’s internal records and third-party communications on the subject have not been made publicly available. CoA Institute is interested in educating the public about NOAA’s decision-making, and the requested records are likely to contribute to that effort and attract public interest.

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. The CoA Institute 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 CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases. Further, CoA Institute, a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code, 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.⁴ 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.⁵ CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public,

² 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 15 C.F.R. § 4.11 (a).

³ 5 U.S.C. § 552(a)(4)(A)(iii); *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).

⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(b)(6).

⁵ *See Cause of Action*, 799 F.3d at 1121.

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uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.⁶ 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 products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.⁷ These distinct works are distributed to the 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."⁸ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute's news media status in connection with its FOIA requests.⁹

⁶ Cause of Action notes that the agency's definition of "representative of the news media" (15 C.F.R. § 4.11(b)(6)) 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. *Id.* 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."). Under either definition, Cause of Action qualifies as a representative of the news media.

⁷ *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 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>.

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁹ *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);

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CoA Institute has no commercial interest in the requested documents. CoA Institute, as a nonprofit organization, did not receive financial compensation in submitting this request, and it will not receive financial compensation from the intended use of the requested records. CoA Institute submits this requests on its own behalf and in pursuit of its government accountability mission, not on behalf of any other party, including any CoA Institute client. CoA Institute primarily intends to use the requested records for investigative and educational purposes.

CoA Institute represents the plaintiffs in *Goethel v. Pritzker*, No. 15-497 (D.N.H.), which involves various legal challenges to programs enacted by the New England Council. In addition, Ellen Goethel, the wife of plaintiff David Goethel, is now ended her term as a member of the New England Council. Participation in litigation, however, does not establish a commercial interest in requested documents,¹⁰ and as set forth above, CoA Institute is the relevant requester — not the *Goethel* plaintiffs. CoA Institute has ethical obligations to its clients that may require it to use the requested records in litigation, but that is not the primary purpose of the requests, which are instead sought for CoA Institute's investigative efforts and educational mission rather than for any party's personal use or commercial gain.¹¹ At any rate, the parties in *Goethel* case have completed summary judgment briefing based on the certified administrative record produced by the defendant agencies, and it is unlikely that the parties will seek to introduce additional information.

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 CoA Institute's request and any administrative remedies for appeal have been exhausted. It is unlawful for BOEM to destroy or dispose of any record subject to a FOIA request.¹²

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

FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

¹⁰ Cf. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987); *Muffoletto v. Sessions*, 760 F. Supp. 268, 277–78 (E.D.N.Y. 1991).

¹¹ See Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987).

¹² See 15 C.F.R. § 4.3(d) (“Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.”); see also 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means disposal of an unscheduled or permanent record; disposal prior to the end of the NARA-approved retention period of a temporary record . . . ; and 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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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 stephen.schwartz@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



STEPHEN S. SCHWARTZ
COUNSEL