

EXHIBIT

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1875 Eye Street, NW, Suite 800, Washington, DC 20006

September 27, 2016

VIA CERTIFIED MAIL

Melanie Pustay
Director
Office of Information Policy
United States Department of Justice
1425 New York Avenue, NW, Suite 11050
Washington, DC 20530-001

Re: Freedom of Information Act Appeal, FOIAPA/TAX #11018

Dear Ms. Pustay:

This is a timely administrative appeal of an adverse Freedom of Information Act (“FOIA”) determination by the Department of Justice Tax Division (“DOJ-Tax”) to FOIA request #11018. Cause of Action Institute (“CoA Institute”) appeals the agency’s improper definition of a “record,” its use of “nonresponsive” redactions to withhold information responsive to the request, its improper use of Exemptions 3 and 5, and its failure to conduct a segregability analysis.

Background

On July 15, 2016, CoA Institute sent a FOIA request to DOJ-Tax seeking two records related to the detailing of DOJ attorneys to the White House.¹ DOJ-Tax had previously produced the same two records to CoA Institute in response to a different FOIA request, but DOJ-Tax had redacted large amounts of information in those records as “nonresponsive.”² On August 9, 2016, DOJ-Tax acknowledged receipt of the request, assigned it the tracking number #11018, and requested a conference to clarify the scope of the request.³ On August 15, 2016, CoA Institute

¹ Letter from R. James Valvo, III, CoA Inst., to Tax Div., Dep’t of Justice (July 15, 2016) (Ex. 1). CoA Institute sought to be categorized as a representative of the news media. *Id.* at 2.

² See Exs. 2 & 3. These two records were produced in response to FOIA request #10874 through litigation in *Cause of Action Institute v. Internal Revenue Service*, No. 15-770 (D.D.C. documents produced Mar. 25, 2016) (Ex. 4).

³ See Letter from Carmen M. Banerjee, Div. Counsel, Tax Div., Dep’t of Justice, to R. James Valvo, III, CoA Inst. (Aug. 9, 2016) (Ex. 5).

and DOJ-Tax held a phone conference to discuss the scope of the request. CoA Institute summarized the call in a follow-up email, writing:

CoA Institute is seeking the entirety of the two records I sent you previous to the call. Those records are (1) an email chain on or about May 22, 2014 between, among others, Norah Bringer and Gretchen Wolfinger, and (2) a November 2011 report entitled Current Practices for Attorney Assignments, Transfers, and Details.

DOJ-Tax had previously released versions of these records to CoA Institute in response to a different FOIA request, but with significant information withheld as “non-responsive.” I explained to you that CoA Institute’s position is that these were improper uses of “non-responsive” as a withholding tool and that this current request, FOIA #11018, requested the entirety of these records. CoA Institute does not envision DOJ-Tax needing to conduct any additional searches for responsive records; we only seek the entirety of these two records.⁴

On September 20, 2016, DOJ-Tax issued its final determination on request #11018.⁵ DOJ-Tax stated that it found two records responsive to the request and that it was releasing one of the records in full. The second record, however, was withheld in its entirety based on Exemption 3 (in conjunction with 26 U.S.C. § 6103) and Exemption 5 (attorney-work product).⁶ In addition to those two records, DOJ-Tax produced redacted versions of what it claims are eight other records. It redacted those eight records in full as “non-responsive.”⁷

Discussion

I. Response to Item 1

Item 1 of FOIA request #11018 sought the “entirety of each record, any portion of which contains email communications between Norah E. Bringer and Gretchen M. Wolfinger discussing Ms. Bringer’s transition into a detail at the White House Counsel’s Office. This item also includes the entirety of each record that contains any email reply to the above-described records.”⁸ CoA Institute identified the specific record it sought in response to this item during its August 15, 2016 phone conference with DOJ-Tax and by sending to DOJ-Tax a copy of the redacted record, produced in response to a previous FOIA request, which it now sought without the redactions. CoA Institute explained that DOJ-Tax did not need to conduct an additional search for any other records responsive to Item 1 of the request.⁹ To avoid DOJ-Tax asserting that any information in that record was non-responsive, CoA Institute requested the “entirety of

⁴ Email chain between R. James Valvo, III, CoA Inst., & Carmen M. Banerjee, Div. Counsel, Tax Div., Dep’t of Justice (Aug. 15, 2016) (Ex. 6). DOJ-Tax acknowledged receipt of this summary of the conversation. *Id.*

⁵ Final Determination Letter from Carmen M. Banerjee, Div. Counsel, Tax Div., Dep’t of Justice, to R. James Valvo, III, CoA Inst. (Sept. 20, 2016) (Ex. 7). DOJ-Tax did not respond to CoA Institute’s request to be categorized as a representative of the news media; it also did not assess any fees.

⁶ *Id.* at 1–2.

⁷ See Document Production from Tax Div., Dep’t of Justice to, CoA Inst. (Sept. 20, 2016) (Ex. 8).

⁸ Ex. 1 at 1.

⁹ See Ex. 6.

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[the] record.”¹⁰ By definition, no portion of the record can be deemed non-responsive to the request.

Instead of releasing the record in its entirety, DOJ-Tax segmented the record into nine distinct records and withheld all of them by asserting a combination of redactions under “non-responsive,” Exemption 3, and Exemption 5.¹¹ A comparison of the record as originally produced with the record as re-produced in response to request #11018 demonstrates that DOJ-Tax made several errors in its response.

1. *Improper Segmentation of a Record*

During the telephone conference clarifying FOIA request #11018, CoA Institute drew DOJ-Tax’s attention to a recent D.C. Circuit decision, *American Immigration Lawyers Association v. Executive Office for Immigration Review*, which held that it is improper for an agency to use “non-responsive” as a redaction to withhold information within a responsive record.¹² Instead of following the court’s ruling, DOJ-Tax segmented the record responsive to Item 1 of the request into nine records.¹³ It even went so far as to claim that email headers, containing such information as the email sender, recipient, date, and subject matter, were distinct records from the body of that same email.¹⁴ DOJ-Tax withheld eight of those “records” in full as non-responsive; the remaining “record” was withheld in full under Exemptions 3 and 5.¹⁵

FOIA provides access to records, not information.¹⁶ FOIA defines a record as, *inter alia*, “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format[.]”¹⁷ In *Department of Justice v. Tax Analysts*, the Supreme Court held that “materials . . . qualify as ‘agency records’” when an agency (1) creates or obtains the materials, and (2) the agency is “in control of the requested materials at the time the FOIA request is made.”¹⁸ Although it is possible for material to be a record but not an agency record subject to FOIA,¹⁹ that distinction is not at issue in this case because the requested material concerns an email conversation involving DOJ-Tax employees (and thus is material created by the agency) and the record of that email conversation is in DOJ-Tax control.

¹⁰ Ex. 1 at 1.

¹¹ Ex. 8 at 4–9.

¹² See Ex. 5; *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at *8 (D.C. Cir. July 29, 2016) (“The statute does not provide for . . . redacting nonexempt information within responsive records.”).

¹³ See Ex. 8 at 4–9.

¹⁴ Compare Ex. 2 at 1 with Ex. 7 at 4 (segmenting email header and email body into distinct records).

¹⁵ See Ex. 8 at 4–9.

¹⁶ See *Am. Immigration Lawyers Ass’n*, 2016 WL 4056405, at *8 (“FOIA calls for disclosure of a responsive record, not disclosure of responsive information within a record.”).

¹⁷ 5 U.S.C. § 552(f)(2)(A).

¹⁸ *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

¹⁹ See, e.g., *Goland v. Cent. Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978) (agency may possess “congressional records” not subject to FOIA); *Bureau of Nat’l Affairs, Inc. v. Dep’t of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (agency may possess “personal records” not subject to FOIA).

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In addition, the material responsive to Item 1 of the request constitutes a single record. In response to an earlier FOIA request from CoA Institute (FOIA request #10874), DOJ-Tax produced an agency record that was an email from Ms. Wolfinger to Ms. Bringer dated May 22, 2014 at 4:17 PM.²⁰ That record contained (1) Ms. Wolfinger's email response to an email written by Ms. Bringer,²¹ (2) Ms. Bringer's original email message,²² and (3) three additional pages that appear to be information included as part of Ms. Bringer's original email message.²³ When Ms. Wolfinger sent her reply email to Ms. Bringer she created an email chain that contained all three of those components in a single record. That record was created by the agency and it was in the agency's control when CoA Institute requested access to it, as evidenced by the fact that DOJ-Tax produced the entire email chain (albeit mostly redacted) in response to CoA Institute FOIA request #10874.

In FOIA request #11018, CoA Institute requested the entirety of that record, not just the portion of the record that DOJ-Tax redacted under Exemptions 3 and 5. Item 1 of the request sought the entirety of any May 2014 "email communications between Norah E. Bringer and Gretchen M. Wolfinger discussing Ms. Bringer's transition into a detail at the White House Counsel's Office. This item also includes the entirety of each record that contains any email reply to the above-described records."²⁴ Ms. Bringer's email of May 22, 2014 at 3:49 PM discusses her transition to the White House and Ms. Wolfinger's email of May 22, 2014 at 4:17 PM is an email reply to Ms. Bringer's email.²⁵ To help clarify the scope of its request, CoA Institute provided the previously-received copy of the record and explained that it wished to receive the entirety of that record with all "non-responsive" redactions eliminated. The entirety of the record, including Ms. Wolfinger's email response to Ms. Bringer, Ms. Bringer's original email, and the additional pages of information, is responsive to the request.

DOJ-Tax's attempt to avoid releasing the entirety of a responsive record by dividing it into nine distinct records is improper and belied by its own prior actions. DOJ-Tax already conceded that the email chain is a single record when it produced that record in response to FOIA request #10874. If DOJ-Tax did not consider the email chain to be a single record in response to Request #10874, there is no reason it would have produced the multiple pages of the record redacted as non-responsive. Instead, it would have disregarded those pages and not produced them to CoA Institute at all. That is, the portions of the email chain that DOJ-Tax now claims are records 1, 2, 3, 4, 5, 8, and 9 would not have been included in the original production, if those portions were truly distinct records.

Finally, the DOJ-Tax position that an email header is a distinct record from the body of the same email is foreclosed by judicial precedent. In the Federal Records Act context, the D.C.

²⁰ See Ex. 2.

²¹ *Id.* at 1-3

²² *Id.* at 3 (note "-----Original Message-----").

²³ *Id.* at 4-6.

²⁴ Ex. 1 at 1.

²⁵ To the extent that DOJ-Tax misinterpreted CoA Institute's use of the word "reply" to mean a substantive reply to the issue of Ms. Bringer's detail and that the substance of Ms. Wolfinger's email does not discuss that issue, CoA Institute hereby clarifies that by the use of the phrase "email reply" it means any email sent in response to the receipt of Ms. Bringer's email regardless of the substance of that response.

Circuit in *Armstrong v. Executive Office of the President* held that without the associated metadata — such as sender, recipient, date, and time — emails amount to little more than “dismembered documents[.]”²⁶ The same reasoning applies in the FOIA context because the statute “compels disclosure of the responsive record . . . as a unit[.]”²⁷

2. *Improper Use of “Nonresponsive” to Redact Responsive Information*

Item 1 of the request sought not only the entirety of the email chain between Ms. Bringer and Ms. Wolfinger but also the “entirety of each record that contains any email reply to the above-described records.”²⁸ Other than what it now designates as Record 7, DOJ-Tax marked the rest of the email chain between Ms. Wolfinger and Ms. Bringer as non-responsive to FOIA request #11018. An examination of the record as originally produced to CoA Institute, however, reveals that Ms. Wolfinger replied to Ms. Bringer’s email about her detail at the White House. Ms. Bringer sent an email at 3:49 PM on May 22, 2014 in which she revealed she was transitioning into a detail at the White House.²⁹ Ms. Wolfinger replied to Ms. Bringer’s email the same day at 4:17 PM.³⁰ Ms. Wolfinger’s reply in its entirety is thus responsive to the request because CoA Institute requested email replies to any emails discussing Ms. Bringer’s detail at the White House.³¹ Even if DOJ-Tax claims that the email chain is nine distinct records, all of the records that comprise an email response to Ms. Bringer’s original message are responsive to FOIA request #11018 and should not have been withheld as non-responsive.

3. *Improper Use of Exemptions 3 and 5 and Failure to Segregate*

DOJ-Tax withheld the entirety of what it now designates as Record 7 by asserting Exemption 3 (in conjunction with 28 U.S.C. § 6103) and Exemption 5.³² Examining this assertion in light of the record as originally produced shows that DOJ-Tax has been overbroad in its application of the claimed exemptions. Record 7 contains, *inter alia*, a salutation, a phrase about Ms. Bringer “transition[ing] into a detail at the White House,” and a signature block.³³ None of the information in those sections is protected by either 28 U.S.C. § 6103 or the attorney-work product privilege and thus should not have been redacted.

In addition to those sections, DOJ-Tax originally redacted four other sections of Ms. Bringer’s email as non-responsive.³⁴ Request #11018 sought the entirety of the record and therefore, by definition, any redaction as non-responsive would no longer be appropriate. It appears that DOJ-Tax is now taking the position that the portions of the email originally redacted as non-responsive are now being withheld under Exemptions 3 and 5. Even if that were a proper assertion of those exemptions, DOJ-Tax is required to undertake a segregability analysis and

²⁶ *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1284–85 (D.C. Cir. 1993).

²⁷ *Am. Immigration Lawyers Ass’n*, 2016 WL 4056405, at *8.

²⁸ Ex. 1 at 1.

²⁹ Ex. 2 at 3. This email appears to be what DOJ-Tax termed Record 7 in its response to Request #11018. Compare Ex. 2 at 3 with Ex. 8 at 6.

³⁰ Ex. 2 at 1.

³¹ Ex. 1 at 1.

³² Ex. 8 at 6.

³³ Ex. 2 at 3.

³⁴ *See id.*

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only withhold information that falls within those exemptions.³⁵ There is no evidence that DOJ-Tax made such an analysis.

II. Response to Item 2

Item 2 of the request sought the entirety of a report entitled “Current Practices for Attorney Assignments, Transfers, and Details to the White House.”³⁶ DOJ-Tax had previously produced this record to CoA Institute but with several sections within the record redacted as non-responsive.³⁷ In response to Request #11018, DOJ-Tax released the record in full.³⁸ There is no adverse determination on this item of the request, and CoA Institute therefore does not appeal this aspect of the DOJ-Tax response.

Conclusion

Thank you for your attention to this matter. If you have any questions about this appeal, you may contact me by email at james.valvo@causeofaction.org.

Sincerely,



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

³⁵ See 5 U.S.C. § 552(b); *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (when conducting segregability analysis, “FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information.”).

³⁶ Ex. 1 at 1.

³⁷ Ex. 3.

³⁸ Ex. 8 at 1–3.