

September 6, 2016

**VIA CERTIFIED MAIL**

IRS Appeals  
ATTN: FOIA Appeals  
M/Stop 55202  
5045 E. Butler Avenue  
Fresno, CA 93727-5136

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

**Re: Freedom of Information Act Appeal — Nos. F16180-0047 & F16180-0049**

Dear Appeals Officer:

This is a timely administrative appeal from the final determination of the Internal Revenue Service (“IRS”) on two (2) Cause of Action Institute (“CoA Institute”) Freedom of Information Act (“FOIA”) requests, both dated June 22, 2016, which have been assigned case numbers F16180-0047 and F16180-0049. Specifically, CoA Institute appeals the adverse IRS determination that the records sought by CoA Institute are non-agency Congressional records that are not subject to the FOIA. Additionally, CoA Institute challenges the IRS claim that these requests are imperfect and do not reasonably describe the records sought.

**Procedural History**

On June 22, 2016, CoA Institute submitted two FOIA requests to the IRS. The first request sought various records related to IRS operations vis-à-vis the Joint Committee on Taxation (“JCT”) for the time period of “January 21, 2009 to the present,” including:

1. All records transmitted between the IRS and the JCT, and all communications concerning such transmissions, which do not contain a legend restricting their use of dissemination[;]
2. All communications between IRS Privacy, Governmental Liaison, and Disclosure (“PGLD”) personnel, as well as other affected IRS functions or components, and the JCT concerning any determination to disclose or withhold IRS records that were the subject of a JCT oversight inquiry[;]
3. All records generated or maintained by the IRS in the normal course of its operations that were subsequently provided to the JCT in response to a general oversight inquiry[;]
4. All records generated or maintained by the IRS in the normal course of its operations that were subsequently provided to the JCT as part of IRS

general oversight responsibilities, but which were not provided in response to a JCT inquiry[; and,]

5. All records created by or originating at the JCT but which were provided to the IRS and are maintained by the IRS in any agency records system, including but not limited to the E-trak Communications and Correspondence tracking system.<sup>1</sup>

The second CoA Institute FOIA request sought “[a]ll communications between the IRS and the JCT” containing any number of identified search terms during “the time period of January 21, 2009 to the present.”<sup>2</sup> In each instance, CoA Institute requested a public interest fee waiver and treatment as a representative of the news media for fee purposes.<sup>3</sup>

The IRS acknowledged receipt of the FOIA requests on July 26, 2016 and assigned them tracking numbers F16180-0047 and F16180-0049.<sup>4</sup> After invoking an automatic extension of its deadlines in light of unusual circumstances, the agency indicated that it required additional time to identify and process responsive records.<sup>5</sup> The IRS did not issue any fee determinations.<sup>6</sup>

By letter, dated August 8, 2016, the IRS issued a final determination on the CoA Institute FOIA requests.<sup>7</sup> The agency indicated that “[a]ny records responsive to either of these requests, to the extent they exist, are non-agency Congressional records that are not subject to the FOIA.”<sup>8</sup> The IRS further indicated that even if the records sought by CoA Institute were subject to the FOIA, the requests were imperfect because they did not “(1) ‘reasonably describe’ the records sought and (2) [were not] made in accordance with published agency rules,” which require that requests not place “an unreasonable burden upon the IRS.”<sup>9</sup> As set forth below, there are improper determinations. The records sought by CoA Institute are agency records and the CoA Institute FOIA requests are valid. The IRS must re-open and process the requests at issue.

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<sup>1</sup> Letter from CoA Inst. to Internal Revenue Serv. (June 22, 2016) (attached as Exhibit 1). CoA Institute excluded from the scope of its request any records concerning 26 U.S.C. §§ 6045, 6405, 8022(2). *Id.*

<sup>2</sup> Letter from CoA Inst. to Internal Revenue Serv. (June 22, 2016) (attached as Exhibit 2). These search terms included the following: “@irs.counsel.treas.gov,” “@irs.gov,” “6103,” “6103(g),” “6103(c),” “6103(p),” “6103(h),” “6103(i),” “Cause of Action,” “detailee,” “DOJ,” “Justice,” “@usdoj.gov,” “@who.eop.gov,” “White House,” “tax checks,” “Julie Schwartz,” “A M Gulas,” “Norah Bringer,” “Andrew Strelka,” “equities,” “White House counsel,” “avoid,” “evade,” “301.6103(c)-1,” “information collection,” “Paperwork Reduction,” “Privacy Act,” “system of records,” “Federal Records Act,” “7805(c),” “602.101,” “11.3.31-1,” “Form 8821,” “Form 1040,” “Form 4416,” “Form 13362,” or “Form 13775.” *Id.* at 2. CoA Institute again excluded from the scope of this request any records concerning 26 U.S.C. §§ 6045, 6405, and 8022(2). *Id.*

<sup>3</sup> See Exs. 1–2, *supra* notes 1 & 2.

<sup>4</sup> Letter from Aaron B. Edelman, Internal Revenue Serv., to CoA Inst. (July 26, 2016) (F16180-0047) (attached as Exhibit 3); Letter from Aaron B. Edelman, Internal Revenue Serv., to CoA Inst. (July 26, 2016) (F16180-0049) (attached as Exhibit 4).

<sup>5</sup> Exs. 3–4, *supra* note 4.

<sup>6</sup> *Id.*

<sup>7</sup> Letter from Jeffrey V. Austin, Internal Revenue Serv., to CoA Inst. (Aug. 8, 2016) (attached as Exhibit 5).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (citing 5 U.S.C. § 552(a)(3)(A) and 26 C.F.R. § 601.702(c)(5)(i)).

## Argument

### **I. The Records Sought by CoA Institute are Agency Records Under the FOIA**

The FOIA provides a mechanism by which the public can request access to records of the administrative state.<sup>10</sup> An “agency record” is defined as “any information . . . maintained by an agency [or by a third-party entity under government contract] in any format, including an electronic format.”<sup>11</sup> There is a two-part test to determine whether a document qualifies as an agency record.<sup>12</sup> First, the agency must determine whether it created or obtained the record in question. Second, the agency must determine whether the record was under its control at the time the agency received the request to which the record is responsive. A separate test for “control”—the “*Burka* test”—has developed.<sup>13</sup> Under *Burka*, control is determined by (a) the intent of the creator to retain or relinquish control over the record; (b) the ability of the agency to use and dispose of the record as the agency sees fit; (c) the extent to which agency personnel have read or relied upon the record; and, (d) the degree to which the record was integrated into agency record systems or files.

In this case, CoA Institute seeks access to “agency records” of the IRS, namely, records of or about communications with the JCT, including records that reflect internal agency deliberations about agency transmissions to the JCT and IRS operational records provided to the JCT. The requested records would necessarily have been received or created by the IRS. Indeed, the CoA Institute FOIA requests only seeks records created by the IRS, or created by the JCT and subsequently obtained by the IRS.

There is also little reason to suspect that the records sought by CoA Institute are not under IRS control. The records would have been used by IRS employees in their work-related activities and uploaded or stored into IRS record systems, including e-mail or similar correspondence tracking databases (such as E-Trak). Items Three and Four of Request F16180-0049, for example, specifically seek “records generated or maintained by the IRS *in the normal course of its operations*[.]”<sup>14</sup> And Item One of the same request seeks records that do not contain a “legend restricting their use or dissemination” and are, therefore, not intended by the JCT to retain their character as congressional records.<sup>15</sup>

The determination whether a record in the possession of an agency is a congressional record—and outside the scope of FOIA—depends on whether “Congress has manifested its own intent to retain control” of such records and in what instances.<sup>16</sup> This intent must be evident

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<sup>10</sup> 5 U.S.C. § 552(a)(3).

<sup>11</sup> *Id.* § 552(f)(2).

<sup>12</sup> *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

<sup>13</sup> *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996).

<sup>14</sup> Ex. 1, *supra* note 1, at 2 (emphasis added).

<sup>15</sup> *Id.*

<sup>16</sup> *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 693 (D.C. Cir. 1983); *see also United We Stand Am. v. Internal Revenue Serv.*, 359 F.3d 595, 604 (D.D.C. 2004) (“[B]ecause Congress manifested its intent with respect to at most only part of the IRS response [to a congressional request], neither Congress nor the agency has exclusive control over the document. . . . We thus remain true to a definition of agency records that excludes congressional

from the circumstances surrounding the creation or transmission of the records.<sup>17</sup> It cannot be constructed on a “post hoc” basis “long after the original creation [or] transfer of the requested documents.”<sup>18</sup> Absent evidence of such intent, a record may not be found to be “congressional,” and it must be recognized as falling within the scope of the FOIA.<sup>19</sup>

Here, the IRS determined in conclusory fashion and without satisfactory explanation that the records sought did not fall under the purview of the FOIA. This is an insufficient response. The IRS provided no evidence for its interpretation of congressional intent to maintain control of the requested records. The plain language of the CoA Institute requests targets IRS records transmitted to or received by the JCT and which were not intended by the JCT to be congressional records. The FOIA requests should be re-opened or, in the alternative, the IRS should provide further details supporting its determination that none of the requested records are “agency records.”

## II. The June 22, 2016 CoA Institute Requests are Valid FOIA Requests

The FOIA requires requesters to “reasonably describe[]” records sought and otherwise comply with published regulations.<sup>20</sup> The key factor in determining whether records have been reasonably described is the ability of the agency to ascertain such records may be located.<sup>21</sup> IRS FOIA regulations require that requesters “describe the records [sought] in reasonably sufficient detail to enable the IRS employees who are familiar with the subject matter of the request to locate the records without placing an unreasonable burden upon the IRS.”<sup>22</sup> If a request lacks such detail, “the requester shall be afforded an opportunity to refine the request.”<sup>23</sup> In all cases, the IRS is under a “duty to construe a FOIA request liberally.”<sup>24</sup>

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material . . . but includes materials created and possessed by an agency ‘in the legitimate conduct of its official duties.’”) (citations omitted).

<sup>17</sup> See *United We Stand Am.*, 359 F.3d at 600 (examining “sufficient indicia of congressional intent to control”); *Paisley*, 712 F.2d at 694 (“[W]e find that neither the circumstances surrounding the creation of the documents nor the conditions under which they were transferred to the agencies manifests a clear congressional intent to maintain control.”). But see, e.g., *Ctr. for Nat. Sec. Studies v. Cent. Intelligence Agency*, 577 F. Supp. 584, 586–90 (D.D.C. 1983) (report prepared “at the direct request of Congress” with clear intent that it remain secret, and with congressionally-imposed “conditions” on its transmission, is not an “agency record”).

<sup>18</sup> *United We Stand Am.*, 359 F.3d at 602; see also *Holy Spirit Ass’n for the Unification of World Christianity v. Cent. Intelligence Agency*, 636 F.2d 838, 843 (D.C. Cir. 1980).

<sup>19</sup> *Paisley*, 712 F.2d at 692–93 (“In the absence of any manifest indications that Congress intended to exert control over documents in an agency’s possession, the court will conclude that such documents are not congressional records.”).

<sup>20</sup> 5 U.S.C. § 552(a)(3)(A)(i)–(ii).

<sup>21</sup> *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 (D.C. Cir. 1982) (“The linchpin inquiry is whether the agency is able to determine ‘precisely what records (are) being requested.’”) (citation omitted).

<sup>22</sup> 26 C.F.R. § 601.702(c)(5)(i).

<sup>23</sup> *Id.*; see also *id.* § 601.702(c)(5)(ii) (“In any situation in which it is determined that a request for voluminous records would unduly burden and interfere with the operations of the IRS, the person making the request shall be asked to be more specific and to narrow the request, or to agree on an orderly procedure for the production of the requested records, in order to satisfy the request without disproportionate adverse effect on IRS operations.”).

<sup>24</sup> *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing *Truitt v. Dep’t of State*, 897 F.2d 540, 544–45 (D.C. Cir. 1990)).

Not only do the June 22, 2016 FOIA requests seek “agency records,” as that phrase is understood in the FOIA context, they also meet the requirements for a valid request. CoA Institute identified the categories of records it seeks, namely, records reflecting IRS interaction with the JCT. There are a limited number of IRS components or employees which communicate or interact with the JCT; in this sense, the CoA Institute requests are manageable and, in any case, the IRS bears the initial burden of determining where or with whom to search.<sup>25</sup> With respect to e-mail correspondence, CoA Institute provided the IRS with a set of terms to delimit the scope of the required search. Further, CoA Institute restricted the parameters of the requested searches to the same four-year period. This is hardly burdensome, and there is reason to believe that the universe of potentially responsive records is unlikely to be voluminous given the subject of and limitations CoA Institute placed on each item of the requests.

Even if the IRS considers the CoA Institute FOIA requests to be broad or wide-reaching, that alone does not justify the decision to treat them as imperfect.<sup>26</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 ‘reasonable 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 records with a reasonable amount of effort.’”<sup>27</sup> The IRS never indicated that it was unable to locate records responsive to the request, nor did it suggest it required a narrowed scope or clarification as to the records sought.

To summarize, the CoA Institute FOIA requests conformed to all applicable IRS regulations because they 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 were properly addressed and submitted. The IRS has never asserted otherwise. If the CoA Institute requests were in some manner defective—which, as set forth above, they are not—the IRS determination 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>28</sup> The IRS never indicated how the CoA Institute requests were “defective” or how they 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 requests.

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<sup>25</sup> See, e.g., *Hall & Assocs. v. Env'tl. Prot. Agency*, 83 F. Supp. 3d 92, 98 (D.D.C. 2015). Considering the “asymmetrical distribution of knowledge” between a requester and an agency, it is unfair to require CoA Institute to specify individual employees within IRS components. *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (citation omitted).

<sup>26</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>27</sup> Office of Info. Pol'y, 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)).

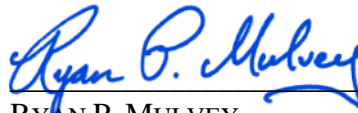
<sup>28</sup> Internal Revenue Manual 11.3.13.5.5(2), available at <http://bit.ly/29yhhvR>; see also 26 C.F.R. § 601.702(c)(1)(i).

The improper closure of a valid FOIA request is concerning because it frustrates public access to government information and breaches an agency's obligations under the FOIA.<sup>29</sup> Greater care must be taken to ensure that closure only happens when necessary and appropriate. CoA Institute expects that its FOIA requests will be re-opened and the IRS will conduct the necessary searches and review of potentially responsive records without further delay.

### **Conclusion**

For the foregoing reasons, the IRS response to the CoA Institute FOIA requests is inadequate. The agency has incorrectly determined that the records sought are non-agency Congressional records that are not subject to the FOIA. The IRS also has improperly determined that the requests are imperfect because they do not reasonably describe the records sought. This appeal should be granted and the June 22, 2016 FOIA requests remanded to the IRS Disclosure Office with direction that searches be initiated immediately.

Thank you for your attention to this matter. If you have any questions about this appeal or the underlying requests, please contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org.



RYAN P. MULVEY  
COUNSEL

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<sup>29</sup> See, e.g., Letter to Miriam Nisbet, Dir., Office of Gov't Info. Servs., Nat'l Archives & Records Admin., from Cause of Action Inst., *et al.* (Oct. 30, 2014), available at <http://bit.ly/29wZZ9P>; see also Cause of Action Inst., *Cause of Action Signs Coalition Letter Asking for OGIS Investigation of Administrative Closures* (Oct. 30, 2014), <http://bit.ly/29kqrKf>.

# EXHIBIT

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

June 22, 2016

**VIA CERTIFIED MAIL & EMAIL**

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

Ed Killen, Director  
Privacy, Governmental Liaison and Disclosure ("PGLD")  
ATTN: PGLD Office of Disclosure FOIA & Program Operations  
Internal Revenue Service, OS:P  
401 W. Peachtree Street  
Atlanta GA 30308-3510  
E-mail: edward.t.killen@irs.gov

**Re: Freedom of Information Act Request**

Dear Ms. O'Reilly and Mr. Killen:

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.<sup>1</sup> 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. To that end, we are examining IRS treatment of records relating to the Joint Committee on Taxation ("JCT") and IRS operations vis-à-vis inquiries from, and responses or reports to, the JCT.<sup>2</sup>

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about) (last visited June 21, 2016).

<sup>2</sup> See generally Dep't of the Treasury, Internal Revenue Serv., Chief Counsel Notice CC-2016-003: FOIA Requests for Joint Committee on Taxation Information (Dec. 18, 2015), *available at* <http://1.usa.gov/28LAUyF>.



Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period of January 21, 2009 to the present:<sup>3</sup>

1. All records transmitted between the IRS and the JCT, and all communications concerning such transmissions, which do not contain a legend restricting their use or dissemination.
2. All communications between IRS Privacy, Governmental Liaison, and Disclosure (“PGLD”) personnel, as well as other affected IRS functions or components, and the JCT concerning any determination to disclose or withhold IRS records that were the subject of a JCT oversight inquiry.
3. All records generated or maintained by the IRS in the normal course of its operations that were subsequently provided to the JCT in response to a general oversight inquiry.
4. All records generated or maintained by the IRS in the normal course of its operations that were subsequently provided to the JCT as part of IRS general oversight responsibilities, but which were not provided in response to a JCT inquiry.<sup>4</sup>
5. All records created by or originating at the JCT but which were provided to the IRS and are maintained by the IRS in any agency records system, including but not limited to the E-trak Communications and Correspondence tracking system.

Please exclude from the scope of the above requests any records concerning 26 U.S.C. §§ 6045, 6405, and 8022(2).

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable IRS 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 primarily in the commercial interest of the requester.”<sup>5</sup>

In this case, the requested records would unquestionably shed light on the “operations or activities of the government” by revealing how the IRS treats JCT records—or IRS records provided to the JCT—under FOIA. These sorts of records have not been widely distributed, and their disclosure and dissemination would contribute to public understanding about IRS FOIA operations and the impact of recent Chief Counsel guidance on the treatment of JCT-related records.<sup>6</sup> Indeed, there is significant public interest in understanding why the Chief Counsel issued this guidance without notice-and-comment rulemaking so as to designate certain agency records as “congressional records.” Further, there is public interest in learning more about the JCT and its role with regard to the IRS. This is particularly true when the IRS exercises its discretion to remove records from

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<sup>3</sup> For the purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

<sup>4</sup> For example, responsive records would include IRS reports under 26 U.S.C. §§ 6103(p)(3)(B) or 6103(p)(3)(C).

<sup>5</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>6</sup> *See supra* note 2.

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public access absent the JCT's clear instruction that such records are to be treated outside the scope of the FOIA. Finally, as a threshold matter, there is public interest in understanding whether the JCT has constitutional authority to direct the IRS to treat certain agency records as "legislative records" for the purposes of FOIA administration.

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. 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 the Institute's regularly published online newsletter, memoranda, reports, or press releases.<sup>7</sup> In addition, as CoA 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, CoA Institute also qualifies as a "representative of the news media" under FOIA.<sup>8</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>9</sup> 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.<sup>10</sup> 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 products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>11</sup> These distinct works are distributed to the 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."<sup>12</sup> In light of the foregoing,

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<sup>7</sup> See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 26 C.F.R. § 601.702(f)(3)(ii)(B).

<sup>9</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>10</sup> 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."). Under either definition, however, CoA Institute qualifies as a representative of the news media.

<sup>11</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 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>12</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.<sup>13</sup>

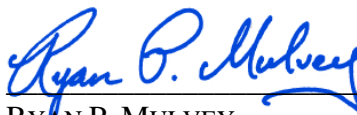
### **Record Preservation Requirement**

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.<sup>14</sup>

### **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 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.



RYAN P. MULVEY  
COUNSEL

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<sup>13</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. Comm'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); 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).

<sup>14</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).

# EXHIBIT

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

June 22, 2016

**VIA CERTIFIED MAIL & EMAIL**

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

Ed Killen, Director  
Privacy, Governmental Liaison and Disclosure ("PGLD")  
ATTN: PGLD Office of Disclosure FOIA & Program Operations  
Internal Revenue Service, OS:P  
401 W. Peachtree Street  
Atlanta GA 30308-3510  
E-mail: edward.t.killen@irs.gov

**Re: Freedom of Information Act Request**

Dear Ms. O'Reilly and Mr. Killen:

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.<sup>1</sup> 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. To that end, we are examining IRS treatment of records relating to the Joint Committee on Taxation ("JCT") and IRS operations vis-à-vis inquiries from, and responses or reports to, the JCT.<sup>2</sup>

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about) (last visited June 21, 2016).

<sup>2</sup> See generally Dep't of the Treasury, Internal Revenue Serv., Chief Counsel Notice CC-2016-003: FOIA Requests for Joint Committee on Taxation Information (Dec. 18, 2015), *available at* <http://1.usa.gov/28LAUyF>.

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period of January 21, 2009 to the present:<sup>3</sup>

1. All communications between the IRS and the JCT that contain the following terms: "@irs.counsel.treas.gov," "@irs.gov," "6103," "6103(g)," "6103(c)," "6103(p)," "6103(h)," "6103(i)," "Cause of Action," "detailee," "DOJ," "Justice," "@usdoj.gov," "@who.eop.gov," "White House," "tax checks," "Julie Schwartz," "A M Gulas," "Norah Bringer," "Andrew Strelka," "equities," "White House counsel," "avoid," "evade," "301.6103(c)-1," "information collection," "Paperwork Reduction," "Privacy Act," "system of records," "Federal Records Act," "7805(c)," "602.101," "11.3.31-1," "Form 8821," "Form 1040," "Form 4416," "Form 13362," or "Form 13775."

Please exclude from the scope of the above request any records concerning 26 U.S.C. §§ 6045, 6405, and 8022(2).

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable IRS 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 primarily in the commercial interest of the requester."<sup>4</sup>

In this case, the requested records would unquestionably shed light on the "operations or activities of the government" by revealing how the IRS treats JCT records—or IRS records provided to the JCT—under FOIA. These sorts of records have not been widely distributed, and their disclosure and dissemination would contribute to public understanding about IRS FOIA operations and the impact of recent Chief Counsel guidance on the treatment of JCT-related records.<sup>5</sup> Indeed, there is significant public interest in understanding why the Chief Counsel issued this guidance without notice-and-comment rulemaking so as to designate certain agency records as "congressional records." Further, there is public interest in learning more about the JCT and its role with regard to the IRS. This is particularly true when the IRS exercises its discretion to remove records from public access absent the JCT's clear instruction that such records are to be treated outside the scope of the FOIA. Finally, as a threshold matter, there is public interest in understanding whether the JCT has constitutional authority to direct the IRS to treat certain agency records as "legislative records" for the purposes of FOIA administration.

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. 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

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<sup>3</sup> For the purposes of this request, the term "present" should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002).

<sup>4</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>5</sup> *See supra* note 2.

through the Institute's regularly published online newsletter, memoranda, reports, or press releases.<sup>6</sup> In addition, as CoA 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, CoA Institute also qualifies as a "representative of the news media" under FOIA.<sup>7</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>8</sup> 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.<sup>9</sup> 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 products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>10</sup> These distinct works are distributed to the 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."<sup>11</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>12</sup>

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<sup>6</sup> See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 26 C.F.R. § 601.702(f)(3)(ii)(B).

<sup>8</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>9</sup> 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."). Under either definition, however, CoA Institute qualifies as a representative of the news media.

<sup>10</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 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>11</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>12</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);

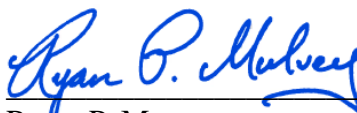
### **Record Preservation Requirement**

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.<sup>13</sup>

### **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 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.



RYAN P. MULVEY  
COUNSEL

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FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Comm'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); 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).

<sup>13</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).



# EXHIBIT

3



**PRIVACY, GOVERNMENTAL  
LIAISON AND DISCLOSURE**

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

July 26, 2016

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

Dear Mr. Mulvey:

I am responding to your Freedom of Information Act (FOIA) request dated June 22, 2016 that we received on June 28, 2016.

I am unable to send the information you requested by July 27, 2016, which is the 20 business-day period allowed by law. I apologize for any inconvenience this delay may cause.

**STATUTORY EXTENSION OF TIME FOR RESPONSE**

The FOIA allows an additional ten-day statutory extension in certain circumstances. To complete your request I need additional time to search for, collect, and review responsive records from other locations. We have extended the statutory response date to August 10, 2016, after which you can file suit. An administrative appeal is limited to a denial of records, so it does not apply in this situation.

**REQUEST FOR ADDITIONAL EXTENSION OF TIME**

Unfortunately, we will still be unable to locate and consider release of the requested records by August 10, 2016. We have extended the response date to November 8, 2016 when we believe we can provide a final response.

You do not need to reply to this letter if you agree to this extension. You may wish to consider limiting the scope of your request so that we can process it more quickly. If you want to limit your request, please contact the individual named below. If we subsequently deny your request, you still have the right to file an administrative appeal.

You may file suit if you do not agree to an extension beyond the statutory period. Your suit may be filed in the U.S. District Court:

- Where you reside or have your principal place of business
- Where the records are located, or

- In the District of Columbia

You may file suit after August 10, 2016. Your complaint will be treated according to the Federal Rules of Civil Procedure applicable to actions against an agency of the United States. These procedures require that the IRS be notified of the pending suit through service of process, which should be directed to:

Commissioner of Internal Revenue  
Attention: CC:PA: Br 6/7  
1111 Constitution Avenue, NW  
Washington, D.C. 20224

The FOIA provides access to existing records. Extending the time period for responding to your request will not delay or postpone any administrative, examination, investigation or collection action.

If you have any questions, please call Tax Law Specialist, Aaron Edelman, ID # 1001393988, at (267) 941-6315 or write to: Internal Revenue Service, Disclosure Office #2, P.O. Box 621506, Stop 211, Atlanta, GA 30362-3006. Please refer to case number F16180-0047.

Sincerely,



Aaron B Edelman  
Tax Law Specialist  
Disclosure Office 2

# EXHIBIT

4



**PRIVACY, GOVERNMENTAL  
LIAISON AND DISCLOSURE**

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

July 26, 2016

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

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**STATUTORY EXTENSION OF TIME FOR RESPONSE**

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You may file suit if you do not agree to an extension beyond the statutory period. Your suit may be filed in the U.S. District Court:

- Where you reside or have your principal place of business
- Where the records are located, or

- In the District of Columbia

You may file suit after August 10, 2016. Your complaint will be treated according to the Federal Rules of Civil Procedure applicable to actions against an agency of the United States. These procedures require that the IRS be notified of the pending suit through service of process, which should be directed to:

Commissioner of Internal Revenue  
Attention: CC:PA: Br 6/7  
1111 Constitution Avenue, NW  
Washington, D.C. 20224

The FOIA provides access to existing records. Extending the time period for responding to your request will not delay or postpone any administrative, examination, investigation or collection action.

If you have any questions, please call Tax Law Specialist, Aaron Edelman, ID # 1001393988, at (267) 941-6315 or write to: Internal Revenue Service, Disclosure Office #2, P.O. Box 621506, Stop 211, Atlanta, GA 30362-3006. Please refer to case number F16180-0049.

Sincerely,



Aaron B Edelman  
Tax Law Specialist  
Disclosure Office 2

# EXHIBIT

5



PRIVACY, GOVERNMENTAL  
LIAISON AND DISCLOSURE

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, DC 20224

August 8, 2016

Cause of Action Institute  
Ryan Mulvey  
1875 Eye Street, NW, Suite 800  
Washington, D.C. 20006

Dear Mr. Mulvey:

This is our final response to your two Freedom of Information Act requests dated June 22, 2016, both of which were received by our office on June 28, 2016. Both requests seek Joint Committee on Taxation (JCT) records.

Specifically, in the request to which our office assigned case number F16180-0047, for the time period of January 21, 2009 to the date of the request, you asked for all communications between the IRS and the JCT that contain certain terms, including “@irs.counsel.treas.gov”; “@irs.gov”; and “6103”, etc. In the request to which our office assigned case number F16180-0049, again for the time period January 21, 2009 to the date of the request, you asked for the following: (1) All records transmitted between the IRS and the JCT, and all communications concerning such transmissions, which do not contain a legend restricting their use or dissemination; (2) all communications between IRS PGLD personnel, as well as other effected IRS functions and components, and the JCT concerning any determinations to disclose or withhold IRS records that were the subject of a JCT oversight inquiry; (3) all records generated or maintained by the IRS in the normal course of its operations that were subsequently provided to the JCT in response to a general oversight inquiry; (4) all records generated or maintained by the IRS in the normal course of its operations that were subsequently provided to the JCT as part of IRS general oversight responsibilities, but which were not provided in response to a JCT inquiry; and (5) all records created by or originating at the JCT but which were provided to the IRS and are maintained by the IRS in any agency records system, including but not limited to the E-trak Communications and Correspondence tracking system.

Any records responsive to either of these requests, to the extent they exist, are non-agency Congressional records that are not subject to the FOIA.

Even if these records were subject to the FOIA, which they are not, 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 "any and all communications or documents" between the IRS and the JCT, or any other similarly broad request, would be unreasonably burdensome for the IRS to process, given the number of documents that might meet this description. Courts have agreed that requests seeking "any and all" records are 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 taxpayer expense."

If you have any questions, please call Tax Law Specialist, Aaron Edelman, ID # 1001393988, at (267) 941-6315 or write to: Internal Revenue Service, Disclosure Office #2, P.O. Box 621506, Stop 211, Atlanta, GA 30362-3006. Please refer to case numbers F16180-0047 & F16180-0049.

Sincerely,

A handwritten signature in cursive script that reads "Jeffrey V. Austin".

Jeffrey V. Austin  
Disclosure Manager  
Disclosure Office 2