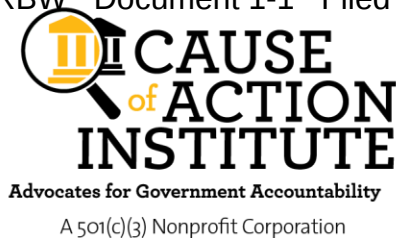


Exhibit 1



October 4, 2016

Via Certified Mail

IRS FOIA Request
HQ FOIA
Stop 211
PO Box 621506
Atlanta, GA 30362-3006

Re: Freedom of Information Act Request

Dear Internal Revenue Service:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring 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. We are examining the Internal Revenue Service’s (“IRS”) assertion that most of its rules are exempt from Executive Order 12866² and the Congressional Review Act³ because they do not meet the definition of “major rule.” Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute requests access to the following records:

1. Each prior final iteration of Internal Revenue Manual (“IRM”) Section 32.1.2.4, including the revision made on September 23, 2011. This request includes each prior final iteration of any section entitled “OMB Notice of Planned Regulatory Action,” or substantially similar title, regardless of whether that section was listed at its current location in the IRM at Section 32.1.2.4.
2. Each prior final iteration of IRM Exhibit 32.1.6-6, including the revision made on June 3, 2003. This request includes each prior final iteration of any section or exhibit entitled “Instructions for Completing Congressional Review Act Form,” or substantially similar

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/.

² Executive Order 12866 requires most Executive Branch agencies to, *inter alia*, submit their proposed major rulemakings to the White House Office of Information and Regulatory Affairs for pre-publication review. See Executive Order 12,866 (Sept. 30, 1993), 58 Fed. Reg. 51,735, *available at* <http://1.usa.gov/28YINQt>.

³ The Congressional Review Act provides fast-track procedures to expedite congressional review of major agency rulemakings. See Subtitle E (“Congressional Review”) of the Small Business Regulatory Enforcement Fairness Act of 1996, Title II of the Contract with America Advancement Act of 1996, Pub. L. 104-121, 101 Stat. 847 at 868-874 (codified at 5 U.S.C. §§ 801-808); see also RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001).

title, regardless of whether that section or exhibit was listed at its current location in the IRM at Exhibit 32.1.6-6.

3. Each prior final iteration of any portion, section, or exhibit of the IRM containing the phrase “because the effect of the rule is usually due to the underlying statute, rather than to the regulation” or substantially similar language.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. FOIA, and applicable regulations, provide that the agency 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.”⁴ In the majority of its rulemakings, the IRS has refused to submit its rules to the White House Office of Information and Regulatory Affairs under Executive Order 12866 and to Congress under the Congressional Review Act on the theory that its rules are not “major rules.” That asserted exemption denies the public the ability to scrutinize IRS rules as they move through the regulatory process. Uncovering the basis for the IRS’s asserted exemption from the regulatory review applicable to most other agencies will increase the public’s understanding of this issue. The IRS’s asserted exemption has sparked increased debate in academia as well.⁵ The previous versions of the IRM relate to the operations or activities of government.

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 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.⁶ 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 this request.

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

⁵ Andy Grewal, *Why Doesn’t the IRS Comply with the Congressional Review Act*, YALE NOTICE & COMMENT BLOG, June 28, 2016, <http://coainst.org/2bmowHH>; Dan Hemel, *Maybe the IRS Is Complying with the Congressional Review Act After All*, YALE NOTICE & COMMENT BLOG, June 30, 2016, <http://coainst.org/2b4hurg>; Andy Grewal, *More Thoughts on the IRS’s Failure to Comply with the Congressional Review Act*, YALE NOTICE & COMMENT BLOG, Aug. 11, 2016, <http://coainst.org/2aNDIRw>; *see also* Amicus Br. of CoA Inst., *Florida Bankers Ass’n v. Dep’t of the Treasury*, No. 15-969 (U.S. filed Feb. 26, 2016), *available at* <http://coainst.org/2aIaPVH>.

⁶ *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).

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.⁷ 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.⁸ 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.⁹ Although it is not required by the statute, CoA Institute gathers the information that it 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, press releases, and congressional testimony and statements for the record.¹⁰ These distinct works are distributed to the public through various media, including the Institute’s website, Twitter, and Facebook. CoA Institute also provides 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.”¹¹ In light of the foregoing, numerous federal agencies have appropriately recognized the Institute’s news media status in connection with its FOIA requests.¹²

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

⁸ See *Cause of Action*, 799 F.3d at 1121.

⁹ CoA Institute notes that the agency’s 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.

¹⁰ See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹² See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep’t of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 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 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request

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.¹³

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 at (202) 499-4232 or james.valvo@causeofaction.org. Thank you for your attention to this matter.



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

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 LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 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).

¹³ See 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).