

# EXHIBIT

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# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

May 1, 2017

### VIA ELECTRONIC MAIL

U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway (SSMC3)  
Silver Spring, MD 20910  
E-mail: 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.<sup>1</sup> In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability.

National Oceanic and Atmospheric Administration (“NOAA”) employees use a NOAA-branded “G-mail” interface, which includes Google Chat/Hangouts functionality.<sup>2</sup> This platform has been referred to as the NOAA Unified Messaging System, but is simply a Google-hosted e-mail platform. CoA Institute understands that NOAA employees were using this interface, including the Google Chat/Hangouts feature,<sup>3</sup> during the recent New England Fishery Management Council (“NEFMC”) meeting that took place April 18–20, 2017. Access to records of these Google Chat/Hangouts communications is essential to understanding the decision-making of NOAA employees and Council members regarding the operations and activities of the NEFMC.

Accordingly, CoA Institute is concerned that NOAA may be unlawfully destroying records of these communications. According to a March 2012 handbook, “[p]er the decision of NOAA General Counsel,” communications through Google Chat (or Google Hangouts) “will be considered ‘off the record’ and will not be recorded in anyway.”<sup>4</sup> This is contrary to established guidance and law. As is clear from the guidance of the National Archives and Records Administration (“NARA”), any records created on NOAA’s G-mail interface, including instant messaging chats, can qualify as

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/) (last accessed Apr. 26, 2017).

<sup>2</sup> See [mail.g.noaa.gov](http://mail.g.noaa.gov); Patrick Thibodeau, *NOAA Migrates to Google Apps, but Gives Users Options*, COMPUTERWORLD (Jan. 5, 2012), <http://bit.ly/2oACHSG>.

<sup>3</sup> A recent help post by a NOAA employee on the Google Hangouts Help Forum includes screenshots of the NOAA G-mail interface with Google Chat/Hangouts clearly visible and other users online. NOAA Affiliate, “No active status, when Gmail open & in foreground,” *Hangouts Help Forum*, GOOGLE (Mar. 28, 2017), <http://bit.ly/2qbML4k> (last accessed Apr. 27, 2017).

<sup>4</sup> NAT’L OCEANIC & ATMOSPHERIC ADMIN., NOAA UNIFIED MESSAGING SERVICE OPERATIONAL PROCEDURES at ¶ 9 (Mar. 2012) (attached as Exhibit 1).

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“federal records” under the Federal Records Act.<sup>5</sup> The law is clear: “Electronic messages created or received in the course of agency business are Federal records.”<sup>6</sup> Indeed, NARA’s 2015 Bulletin specifically references Google Chat as a type of agency record.<sup>7</sup> Such communications also clearly qualify as “agency records” for purposes of the FOIA.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to all communications—including, but not limited to, e-mail,<sup>8</sup> instant messaging, Google hangouts or Google chat messages, text messages, SMS messages, Blackberry messages, Skype messages, handwritten notes, or communications through any other media—sent or received by any and all NOAA employees who attended the April 18–20, 2017 NEFMC meetings in their official capacity. The time period for this request is April 17, 2017 through April 24, 2017. The list of individuals should include, but not be limited to:

- John Bullard
- Michael Pentony
- Elizabeth Chilton
- Amy Martins
- J. Michael Lanning
- Jon Hare
- Moira Kelly
- Carrie Nordeen

#### **Request for Expedited Processing**

CoA Institute hereby requests expedited processing of its request because (1) CoA Institute is “primarily engaged in disseminating information” and (2) the requested records pertain to “actual or alleged Federal government activity,” about which there exists an “urgency to inform the public.”<sup>9</sup>

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.<sup>10</sup> CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and

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<sup>5</sup> NAT’L ARCHIVES & RECORDS ADMIN., ELECTRONIC MESSAGES WHITE PAPER (Aug. 2016), available at <http://bit.ly/2qjtR7Y>.

<sup>6</sup> NAT’L ARCHIVES & RECORDS ADMIN., GUIDANCE ON MANAGING ELECTRONIC MESSAGES, Bulletin 2015-02 (Jul. 29, 2015), available at <http://coainst.org/2pq1vMu>; see 44 U.S.C. § 2911 (“The term ‘electronic messages’ means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.”).

<sup>7</sup> *Id.*

<sup>8</sup> This should include a search of both professional and personal e-mail accounts for any responsive records.

<sup>9</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 15 C.F.R. § 4.6(f)(1)(iv).

<sup>10</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info., Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

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distributes that work to an audience. The requested records reflect NOAA communications during the time period of the April 2017 NEFMC meeting. At this multi-day meeting, members of the NEFMC considered and approved the Industry-Funded Monitoring Omnibus Amendment (“Omnibus Amendment”).<sup>11</sup> The Omnibus Amendment would, among other things, compel fishermen to pay for supplemental at-sea monitoring services, which would have a disastrous effect on America’s fishing industry.<sup>12</sup> In order for this Amendment to be finalized, it must be accepted by the Secretary of Commerce.<sup>13</sup> It is essential that the public have full access to all of NOAA’s communications regarding this Amendment before it goes to the Secretary for his review. Both Congress and members of the public could, and likely will, contact the Secretary to ask him to disapprove this Amendment in light of any communications discovered through this FOIA request. As the Omnibus Amendment can be reviewed by the Secretary at any time, this FOIA request must be processed in an expedited manner.

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

CoA Institute requests a waiver of any and all applicable fees. The FOIA and relevant regulations provide that NOAA 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>14</sup> In this case, the requested records will shed light on the “operations or activities of the government,” namely, the communications sent or received by NOAA employees during the recent NEFMC meeting. The public has a right to view these records in order to discern what NOAA employees were communicating about as the NEFMC worked through its agenda. Disclosure is likely to “contribute significantly” to public understanding of these matters because, to date, the records that CoA Institute seeks have not been made publicly available. CoA Institute intends to educate the public about NOAA’s views on the NEFMC proceedings and, specifically, the Omnibus Amendment.

CoA Institute has 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 a regularly published online newsletter, memoranda, reports, or press releases.<sup>15</sup> CoA

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<sup>11</sup> New Eng. Fishery Mgmt. Council & Mid-Atl. Fishery Mgmt. Council, Industry-Funded Monitoring Omnibus Amend. (Sept. 2016) [hereinafter Omnibus Amend.], *available at* <http://bit.ly/2mQxrtn>.

<sup>12</sup> *See* Letter from Julie Smith, Vice President, CoA Institute, to Dr. John Quinn, Chairman, NEFMC (Apr. 12, 2017), *available at* <http://coainst.org/2pDsCnQ>.

<sup>13</sup> 16 U.S.C. § 1854.

<sup>14</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(a); *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).

<sup>15</sup> *See also Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

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Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and, accordingly, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee purposes, CoA Institute qualifies as a “representative of the news media.”<sup>16</sup> As the D.C. Circuit held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.<sup>17</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>18</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 product, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>19</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>20</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>21</sup>

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<sup>16</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(b)(6).

<sup>17</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>18</sup> CoA Institute notes that the Department of Commerce’s definition of “representative of the news media” is in conflict with the statutory definition and controlling case law. The agency has retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *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.”).

<sup>19</sup> 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/2ap1TwqP>; 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>.

<sup>20</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>21</sup> 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

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**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>22</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.

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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 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).

<sup>22</sup> 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."); 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).

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If you have any questions about this request, please contact me by telephone at (202) 470-2396 or by e-mail at [eric.bolinder@causeofaction.org](mailto:eric.bolinder@causeofaction.org). Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric R. Bolinder". The signature is fluid and cursive, with a long horizontal stroke at the end.

ERIC R. BOLINDER  
COUNSEL