IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE 1875 Eye Street, N.W., Suite 800 Washington, D.C. 20006, Plaintiff, v. THE WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET 725 17th Street, N.W. Washington, D.C. 20503 and UNITED STATES DEPARTMENT OF AGRICULTURE 1400 Independence Avenue, S.W. Washington, D.C. 20250, Defendants.	Civil Case No. 18-1508

EXHIBIT 1 TO COMPLAINT

CAUSE of ACTION
INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability℠

July 7, 2017

VIA ELECTRONIC MAIL

Office of Management and Budget
ATTN: Dionne Hardy, Chief FOIA Officer
725 17th Street, N.W., Suite 9204
Washington, D.C. 20503
E-mail: OMBFOIA@omb.eop.gov

Re: Freedom of Information Act Request

Dear Ms. Hardy:

I write on behalf of Cause of Action Institute ("CoA Institute"), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[1] In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), CoA Institute hereby requests access to copies of the Internet browsing histories of (1) the Office of Management and Budget ("OMB") Director John Michael Mulvaney and (2) the OMB Associate Director of Strategic Planning and Communications. Responsive records should reflect browsing activity on all government-issued, Internet-connected devices, including desktop and laptop computers, cellular telephones, and tablet devices. To the extent multiple Internet browsers are installed on each device (*e.g.*, Google Chrome, Internet Explorer, *etc.*), CoA Institute seeks access to records of the browsing activity on each application. The time period for this request is January 20, 2017 to the present,[2] or that period reflecting the entire browsing history retained for each of the above-mentioned OMB officials, as applicable.

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 OMB shall furnish requested records without or at reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[3] In this case, the requested records will shed light on the

[1] *See* CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/ (last accessed July 7, 2017).
[2] For the purpose 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). The term "record" means the entirety of a record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 677–78 (D.C. Cir. 2016) (admonishing agency for withholding information as "non-responsive" because "nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure").
[3] 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 1303.70; *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).

"operations or activities of the government," namely, the Internet activity of top-ranking OMB officials.

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 OMB officials' use of agency resources in accessing the Internet, as well as the potential on-line resources that might have influenced agency decision-making. Public interest in questionable or inappropriate Internet activity of government officials and agency employees has not been lacking in recent years.[4]

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.[5] CoA 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."[6] 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.[7] 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.[8] 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.[9] These

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[4] *See, e.g.*, *Dozens of Federal Employees Watched Abundance of Porn on the Job in Recent Years*, NBC 4 WASH. (Feb. 27, 2017), http://bit.ly/2tpHbMM; Charles Clark, *This May Be The Worst Abuse of Federal Telework Ever*, GOV'T EXEC. (Aug. 1, 2014), http://bit.ly/2uTd65Y; Stephen Braun, *U.S. intelligence officials to monitor federal employees with security clearances*, ASSOC. PRESS (Mar. 10, 2014), http://coainst.org/2tR5ofR; Eric Yoder, *Netiquette*, GOV'T EXEC. (May 1, 1999), http://bit.ly/2tR4cJg.

[5] *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).

[6] 5 U.S.C. § 552(a)(4)(A)(ii)(II); 5 C.F.R. § 1303.30(j).

[7] *See Cause of Action*, 799 F.3d at 1121.

[8] CoA Institute notes that OMB'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.").

[9] *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*

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."[10] In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.[11]

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.[12]

Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be 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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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.

[10] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

[11] *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 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).

[12] *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).

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.

Sincerely,

RYAN P. MULVEY
COUNSEL