

**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.)
))
U.S. DEPARTMENT OF JUSTICE,)
950 Pennsylvania Avenue, N.W.)
Washington, D.C. 20530-0001)
))
Defendant.)

Civil Case No. 18-1800

EXHIBIT 3 TO COMPLAINT

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 14, 2018

VIA eFOIA Portal

Federal Bureau of Investigation
935 Pennsylvania Ave, NW
Washington, DC 20535-001

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.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.

We are examining the use of a personal email account by former Federal Bureau of Investigation (“FBI”) Director James Comey for FBI business.² The Department of Justice Office of Inspector General found, “Comey’s use of a personal email account on multiple occasions for unclassified FBI business to be inconsistent with the DOJ Policy Statement.”³ Therefore, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period September 4, 2013 to the present:⁴

1. All emails sent or received by former FBI Director James Comey or former FBI Chief of Staff James Rybicki on a personal email account (such as Gmail or any other non-FBI account) conducting official government business.⁵

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited June 14, 2018).

² OVERSIGHT & REVIEW DIV., OFFICE OF INSPECTOR GEN., DEP’T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION, at 425 (June 2018), available at <https://www.justice.gov/file/1071991/>.

³ *Id* at 426.

⁴ For 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). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, N830 F.3d 667, 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”).

⁵ As it relates to all Items of this request, if the FBI’s search uncovers email records responsive to this request, CoA Institute’s request specifically seeks the entirety of any email chain, any portion of which contains an individual email message responsive to this request, *i.e.*, the entire email chain is responsive to the request.

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.”⁶

In this case, the requested records unquestionably shed light on the “operations or activities of the government,” as they relate to the FBI’s problematic use of personal email accounts at its highest levels of leadership. These records are not yet available to the public and will provide insight into the FBI’s handling of federal records that has been the subject of a great deal of media and public attention.⁷

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad 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.⁸ 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.⁹

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.¹⁰ 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.¹¹ 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

⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k); *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).

⁷ *See, e.g., Ken Bensinger, et al., These Reports Allege Trump Has Deep Ties To Russia*, BUZZFEED, Jan. 10, 2017, <http://bzfd.it/2mBrqzv>; *Evan Perez, et al., Intel chiefs presented Trump with claims of Russian efforts to compromise him*, CNN.COM, Jan. 12, 2017, <http://cnn.it/2IT8Pup>; *Scott Shane, et al., Trump Received Unsubstantiated Report That Russia Had Damaging Information About Him*, N.Y. TIMES, Jan. 10, 2017, <http://nyti.ms/2micZj6>.

⁸ *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).

⁹ Assuming, *arguendo*, that the FBI determines CoA Institute has a commercial interest that would be furthered by the requested disclosure—which interest it does not, in fact, have—the public interest in disclosure would still outweigh any such hypothetical commercial interest. *See* 16 C.F.R. § 4.8(e)(2)(ii)(B). §6.10(b)(6).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. §6.10(b)(6).

¹¹ *See Cause of Action*, 799 F.3d at 1121.

audience.¹² 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.¹³ 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

¹² CoA Institute notes that the agency's definition of "representative of the news media" (28 C.F.R. § 16.0(b)(6)) 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.

¹³ COA INSTITUTE, *EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRM CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT* (Jan. 2018), <http://coainst.org/2mgpYAU>; CoA Institute, *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Institute, *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; COA INSTITUTE, *SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL* (Mar. 2017), <http://coainst.org/2y0fbOH>; CoA Institute, *Sec. Vilsack followed ethics guidelines when negotiating his future employment*, (Feb. 3, 2017), <http://coainst.org/2mJlJJe>; COA INSTITUTE, *INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION* (Oct. 2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; COA INSTITUTE, *MEMORANDUM: LEGAL ANALYSIS OF FORMER SECRETARY OF STATE HILLARY CLINTON'S USE OF A PRIVATE SERVER TO STORE EMAIL RECORDS* (Aug. 24, 2015), <http://coainst.org/2eXhXe1>; CoA Institute, *CIA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhHP>; *Hearing on Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. (Aug. 5, 2015) (statement of Erica L. Marshall, Counsel, CoA Inst.), <http://coainst.org/2mJC8DH>; *Hearing on Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 114th Cong. (June 3, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2mrwHr1>; *Hearing on Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program Before the H. Comm. on the Judiciary*, 114th Cong. (May 19, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2n7LxWG>; COA INSTITUTE, *2015 GRADING THE GOVERNMENT REPORT CARD* (Mar. 16, 2015), <http://coainst.org/2as088a>; *Hearing on Potential Reforms to the Freedom of Information Act (FOIA) Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 27, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2lLsph8>; *Hearing on IRS: TIGTA Update Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 26, 2015) (statement of Prashant K. Khetan, Chief Counsel, CoA Inst.), <http://coainst.org/2nn5iFJ>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), <http://coainst.org/2aJ8sm5>; COA INSTITUTE, *GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS* (Mar. 18, 2014), <http://coainst.org/2aFWxUZ>; COA INSTITUTE, *GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM* (Sept. 23, 2013), <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), <http://coainst.org/2aJh901>; *see also* CoA Institute, *Newsletters*, <http://causeofaction.org/media/news/newsletter/>

publications via “alternative media[,] shall be considered to be news-media entities.”¹⁴ In light of the foregoing, numerous federal agencies—including the FBI—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.¹⁵

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.¹⁶

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) 499-2422 or by e-mail at kevin.schmidt@causeofaction.org. Thank you for your attention to this matter.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁵ See, e.g., FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); see also FOIA Request 2016-11-008, Dep’t of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep’t of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Management (Oct. 21, 2016); FOIA Request 092320167031, Centers for Medicare & Medicaid Services (Oct. 17, 2016); FOIA Request 17-00054-F, Dep’t of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dept. of State (Aug. 11, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep’t of the Interior (Aug. 10, 2016); FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep’t of Justice (Aug. 2, 2016); FOIA Request 2016-HQFO-00502, Dept. of Homeland Security (Aug. 1, 2016); FOIA Request 796939, Dep’t of Labor (Mar.. 7, 2016); 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 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request F-2015-106, Fed. Commc’n Comm’n (Dec. 12, 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 GO-14-307, Dep’t of Energy (Nat’l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013).

¹⁶ See 28 C.F.R. § 16.10; 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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