

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

August 8, 2018

VIA CERTIFIED MAIL

U.S. Department of Defense
Office of Freedom of Information
ATTN: OSD/JS FOIA Requester Service Center
1155 Defense Pentagon
Washington, D.C. 20301-1155

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Cause of Action Institute (“CoA Institute”), a 501(c)(3) nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public about how government accountability, transparency, and the rule of law protect individual liberty and economic opportunity.¹

Last week, the Department of Defense (“DOD”) Office of Inspector General (“OIG”) released its annual compendium of unimplemented recommendations given to various DOD military departments, combatant commands, and other components in past investigations, audits, and inspections.² In relevant part, the report detailed two outstanding recommendations concerning the Freedom of Information Act (“FOIA”) and, more specifically, DOD’s failure to formalize and publish its agency-wide procedures governing “situational awareness” notification for “significant” or “sensitive” FOIA requests.³ Those recommendations, in turn, originate with an August 2016 audit requested by Senator Ron Johnson, Chairman of the U.S. Senate Homeland Security and Governmental Affairs Committee.⁴

According to OIG, departmental procedures for the handling of “significant” FOIA requests, or those likely to “generate media interest and/or . . . be of interest or potential interest to DoD senior leadership,” the White House, or Congress, remain informal. These procedures have yet to be incorporated into DOD’s FOIA regulations, its FOIA Manual,⁵ or its FOIA Directive.⁶ Nevertheless, the public has long known of DOD’s sensitive review process,⁷ and copies of the

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Aug. 8, 2018).

² See OFFICE OF INSPECTOR GEN., DEP’T OF DEF., COMPENDIUM OF OPEN OFFICE OF INSPECTOR GENERAL RECOMMENDATIONS TO THE DEPARTMENT OF DEFENSE (Aug. 2018), *available at* <http://bit.ly/2KCufZk>.

³ See *id.* at 384 (discussing outstanding recommendations from “Report No. DODIG-2016-124”) (attached as Exhibit 1).

⁴ See OFFICE OF INSPECTOR GEN., DEP’T OF DEF., DOD FREEDOM OF INFORMATION ACT POLICIES NEED IMPROVEMENT (Aug. 16, 2016), *available at* <http://bit.ly/2nnLc0i>.

⁵ Dep’t of Def., DOD MANUAL 5400.07 – DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (ed. Jan. 25, 2017), *available at* <http://bit.ly/2tTjPiu>.

⁶ Dep’t of Def., Directive No. 5400.07 regarding DoD Freedom of Information Act (FOIA) Program (Jan. 2, 2008; certified through Jan. 2, 2015), *available at* <http://bit.ly/2OTp7OP>.

⁷ See, e.g., Eliana Johnson, *The Obama Administration’s Newly Political Approach to FOIAs*, NAT’L REV. (June 9, 2015), <http://bit.ly/2Lz2Mcl> (“Agency documents also indicated that the Department of Defense . . . ha[s] sensitive-review procedures, though it’s unclear whether political appointees are involved in the process.”).

“situational awareness” notification protocol are publicly available. CoA Institute has identified at least two different versions of that policy, one of which dates to December 2012.⁸ The exact scope of current sensitive review processes at DOD is unknown. Yet the recent OIG report suggests heightened scrutiny of certain categories of FOIA requests continues.

Although sensitive FOIA review is not a new phenomenon, that such a practice continues to exist at DOD and other agencies raises questions of fundamental fairness and impartial administration of the law. Accordingly, pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute requests access to following agency records⁹ for the period of January 20, 2017 to the present:¹⁰

1. All records, including but not limited to communications, memoranda, guidelines, procedures, processing metrics, and tracking tables, concerning “sensitive review” processes. The scope of this item includes records defining or describing the handling of “politically charged,” “high visibility,” or “significant” requests or those submitted by representatives of the news media. The scope of this item also includes records defining or describing DOD’s “situational awareness” notification procedures.¹¹
2. All communications between (i) the DOD departmental FOIA office (*i.e.*, WHS DFOIPO), the Office of Chief Information Officer, and/or Office of General Counsel, and (ii) the Office of the White House Counsel concerning the processing of FOIA requests containing “White House equities.”¹²
3. All communications between (i) the DOD departmental FOIA office, Office of Chief Information Officer, and/or Office of General Counsel, and (ii) the DOD Office of Inspector General concerning any audit, investigation, inspection, evaluation, or inquiry into the involvement of non-career or politically appointed officials in the FOIA process (*e.g.*, reviewing or approving proposed FOIA productions, *etc.*). The time period for this item of the request is September 1, 2015 to the present.

As set forth in DOD’s FOIA regulations, CoA Institute respectfully requests that portions of this request be referred to other components, including but limited to the Office of Inspector General and the Defense Information Systems Agency, as necessary.¹³

⁸ See Exhibits 2 & 3, attached hereto.

⁹ For purposes of this request, 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*, 830 F.3d 667, 677 (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”).

¹⁰ The term “present” should be construed as the date on which DOD begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

¹¹ To the extent any records created or obtained by DOD before January 20, 2017 reflect official agency policy or practice during the identified time period, then they should be treated as responsive to this request.

¹² On the term “White House equities,” see *White House FOIA Obstruction*, COA INST., <http://bit.ly/2r0hBub> (last visited Aug. 8, 2018); Mem. from Gregory Craig, Counsel to the President, The White House, to All Exec. Dep’t & Agency Gen. Counsels regarding Document Requests (Apr. 15, 2009), available at <https://coainst.org/2uz2NWT>.

¹³ See 32 C.F.R. § 286.7(c), (d)(2).

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA requires DOD to furnish the 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.”¹⁴

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, DOD’s policies for handling “sensitive,” “high visibility,” or “politically charged” FOIA requests. Such “sensitive review” FOIA processes, including “situational awareness” notification, have led to impermissible politicization at other agencies, and they have prompted multiple congressional investigations and FOIA lawsuits.¹⁵ The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, the records have not been made publicly available. CoA Institute intends to educate the interested public about the processing of “sensitive” FOIA requests at DOD.

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. CoA Institute’s staff has considerable experience and expertise in other areas of government oversight, investigative reporting, and federal public interest litigation. Its professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and intend to share the resulting analysis with the public, whether through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.¹⁶ Additionally, 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.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.12(l); *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).

¹⁵ *See, e.g., Johnson, supra* note 7; COA INST., GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), *available at* <http://coainst.org/2AEWiE2>; *see also Democratic Senators Seek Records about “Sensitive Review” from VA, Ask Inspector General to Open Investigation into FOLA Politicization*, COA INST. (Aug. 1, 2018), <https://coainst.org/2Mr4k8p>; *EPA responds to House OGR Democrats, arguing FOLA “sensitive review” originated with the Obama Administration*, COA INST. (July 19, 2018), <https://coainst.org/2O2NMUJ>; *EPA Chief of Staff describes agency’s sensitive review process for “politically charged” FOLA requests*, COA INST. (July 16, 2018), <https://coainst.org/2muw1BU>; *New Records Reveal the FAA Has Been Tracking FOLA Media Requesters*, COA INST. (May 16, 2018), <https://coainst.org/2mZ6aSO>; *NOAA Records Demonstrate Expansion of Sensitive Review FOLA Procedures*, COA INST. (Mar. 12, 2018), <http://coainst.org/2tFnLp5>; *Politicizing FOLA review at the EPA and Interior*, COA INST. (Dec. 19, 2017), <https://coainst.org/2O1MucF>; *DHS Watchdog Claims Political Appointees No Longer Politicizing FOLA*, COA INST. (Oct. 20, 2017), <http://coainst.org/2j9dbT7>; CoA Inst., Press Release, CoA Institute Sues Treasury for ‘Sensitive’ Records Concealed from Public Disclosure (Nov. 1, 2016), *available at* <https://coainst.org/2NZ598U>; *CLIA too busy for transparency*, COA INST. (Aug. 11, 2016), <http://coainst.org/2iDH0qO>; *White House and Treasury Department Politicize FOLA*, COA INST. (June 24, 2013), <http://coainst.org/2A4igPr>; *FOLA Follies: HUD Flags Sensitive Freedom of Information Act Requests for Extra Scrutiny; Political Appointees Involved*, COA INST. (July 31, 2013), <http://coainst.org/2kbV4Ix>.

¹⁶ *See 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 purposes, CoA Institute also qualifies as a “representative of the news media.”¹⁷ As the D.C. Circuit has held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.¹⁸ 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.

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. CoA Institute 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.¹⁹ These distinct works are distributed to the public through various media, including CoA 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.”²⁰ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute’s news media status in connection with its FOIA requests.²¹

¹⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.12(b)(6).

¹⁸ See *Cause of Action*, 799 F.3d at 1121.

¹⁹ COA INST., EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRM CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT (2018), <http://coainst.org/2mgpYAu>; CoA Inst., *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Inst., *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; COA INST., SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL (2017), <http://coainst.org/2y0fbOH>; COA INST., INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION (2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; CoA Inst., *CLA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhHP>; *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, Cause of Action Inst.), <http://coainst.org/2mrwHr1>; COA INST., 2015 GRADING THE GOVERNMENT REPORT CARD (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., Cause of Action Inst.), <http://coainst.org/2lLsph8>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), <http://coainst.org/2aJ8sm5>; COA INST., GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (2014), <http://coainst.org/2aFWxUZ>; see also CoA Inst., *Newsletters*, <http://causeofaction.org/media/news/newsletter/>.

²⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²¹ See, e.g., FOIA Request No. 2018-HQFO-01215, Dep’t of Homeland Sec. (July 10, 2018); FOIA Request No. CFA2018-05, U.S. Comm’n for Fine Arts (June 25, 2018); FOIA Request F-133-18, U.S. Agency for Int’l Dev. (Apr. 11, 2018); FOIA Request 18-HQ-F-487, Nat’l Aeronautics & Space Admin. (Apr. 11, 2018); FOIA Request 1403076-000, Fed. Bureau of Investigation (Apr. 11, 2018); FOIA Request 201800050F, Exp.-Imp. Bank (Apr. 11, 2018); 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 Mgmt. (Oct. 21, 2016); FOIA Request 092320167031, Ctrs. for Medicare & Medicaid Servs. (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).

Record Preservation Requirement

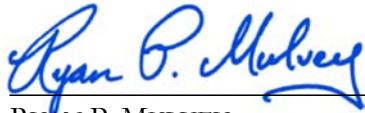
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and 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.²²

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.

Sincerely,



RYAN P. MULVEY
COUNSEL

²² 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).

EXHIBIT

1

APPENDIX A

Chief Management Officer

Report No. DODIG-2015-010, “Defense Logistics Agency Did Not Fully Implement the Enterprise Business System Procure-To-Pay Business Process in the Enterprise Business System,” October 28, 2014

Recommendation	Recommendation Text	Age of Recommendation on 3/31/18
4	The DoD OIG recommended that the Deputy Chief Management Officer conduct a comprehensive business process re-engineering assessment of the Defense Logistics Agency’s Procure-to-Pay phases affected by the Enterprise Business System and EProcurement.	3 years 5 months 3 days

Report No. DODIG-2016-124, “DoD Freedom of Information Act Policies Need Improvement,” August 16, 2016

Recommendation	Recommendation Text	Age of Recommendation on 3/31/18
1.a	The DoD OIG recommended that the Deputy Chief Management Officer update DoD Directive 5400.07 and DoD Regulation 5400.7-R, “DoD Freedom of Information Act Program,” to comply with DoD Instruction 5025.01 and include requirements of Executive Order 13392 and the “OPEN Government Act of 2007.”	1 year 7 months 13 days
1.b	The DoD OIG recommended that the Deputy Chief Management Officer incorporate the notification procedures for “significant” FOIA releases into DoD Regulation 5400.7-R.	1 year 7 months 13 days

EXHIBIT

2

Departmental Situational Awareness Process for Significant DoD FOIA Responses

Significant FOIA Requests

- A “significant” FOIA request is one where, in the Component’s judgment, the subject matter of the released documents may generate media interest and/or may be of interest or potential interest to DoD senior leadership. Any requests involving the current administration (including requests for information on Senator Obama), previous administrations, Members of Congress (correspondence, travel, or otherwise), or current or previous DoD leadership would be included.
- About a week or two before a FOIA response is made on a “significant” FOIA request, the Components will log the request into [INTELINK](#) and upload a copy of the request and the responsive documents, in their releasable form, into [INTELDOCS](#). If you determine that only some of the responsive pages are considered “significant” (i.e. 5 out of 100 pages are considered congressional correspondence), please only send those significant pages to us for review. The Component should include, in the “Comment” section, a short summary of the information being released and the estimated date of release.
- These responses will include initial requests, appeals, and litigation. Additionally, it is not necessary for a Component to be releasing any documents for a response to qualify as “significant.” A no record, Glomar (neither confirm nor deny) or a complete denial also may qualify as “significant.”
- The Component FOIA Office will not respond to the requester until DFOIPO clears the documents for release. If the Component does not hear from DFOIPO on whether the documents are cleared for release by the planned release date, they should contact DFOIPO for a status update. DFOIPO will make every effort to meet the Component’s planned release date; however, sometimes review will take longer when there are issues to be resolved (i.e. inconsistent redactions; ongoing litigation; missing coordination from a key player, etc.)

Weekly Updates

- DFOIPO will keep the Director of Administration and Management informed each week of the significant FOIA responses released to the public. DFOIPO will provide a copy of this weekly update to the DoD FOIA Public Liaisons every week.

Questions or Challenges

- Components should contact DFOIPO at DFOIPO@whs.mil if they have questions or encounter problems following this process.

EXHIBIT

3

Departmental Level Notification Process For
Significant DoD FOIA Requests and Responses

Significant FOIA Requests

- Components will send to DFOIPO (dfoipo@whs.mil) copies of significant FOIA requests and a short summary for each significant request. The subject of the email should be "Significant FOIA Request."
- A "significant" FOIA request is one where, in the Component's judgment, the subject matter of the released documents may generate media interest and/or may be of interest or potential interest to DoD senior leadership. Any requests involving the current administration (including requests for information on Senator Obama), previous administrations, or current or previous DoD leadership would be included. Requests involving Members of Congress should also be considered.
- If the request generates departmental level interest (DLI), the Component FOIA Office will be advised by DFOIPO. Components should assume that ALL FOIA requests that are White House or Congressionally related, such as requests for Congressional correspondence, correspondence logs, or travel, have DLI. The Component FOIA Office should advise its own chain of command of the departmental interest. The Component must also provide DFOIPO a weekly update on the processing of the request by Friday of each week on the requests that have departmental level interest.

Significant FOIA Responses

- About a week before a FOIA response is made on a request with DLI, the Components will send DFOIPO a short summary of the response containing as a minimum the name/organization of the requester, a summary of the information being released, and the estimated date of release. The responsive documents in their releasable form will be attached to the email. If the documents are too large to email, the Component should make arrangements with DFOIPO on transferring the documents via IntelDocs. The email should be sent to dfoipo@whs.mil, and the subject should be "Significant FOIA Response."
- These responses will include initial requests, appeals, and litigation. Additionally, it's not necessary for a Component to be releasing any documents for a response to qualify as "significant." A no record, Glomar (neither confirm nor deny), or a complete denial may qualify as "significant."
- If a Component FOIA Office has a significant FOIA response and they did not previously advise DFOIPO of the FOIA request, the process for advising DFOIPO of the response, two paragraphs above, should still be followed.
- If the significant FOIA response is White House or Congressionally related, then the Component FOIA Office will not respond to the requester until DFOIPO clears the documents for release. For all other responses, if the Component does not hear from

DFOIPO on whether the documents are cleared for release by the planned release date, they will contact DFOIPO for guidance on when they can be released.

Weekly Updates

- DFOIPO will keep the Director of Administration and Management informed each week of the status of significant FOIA requests and responses. DFOIPO will provide a copy of this weekly update to the DoD FOIA Public Liaisons every Tuesday.