

May 9, 2017

The Honorable Jeb Hensarling  
Chair, House Committee on Financial Services  
129 Cannon House Office Building  
Washington, DC 20515

Dear Chairman Hensarling:

On behalf of the undersigned groups, we urge you to reconsider and rescind your recent Freedom of Information Act (FOIA) guidance to the Department of the Treasury.<sup>1</sup>

In this letter, you advise Secretary Mnuchin that “the Committee intends to retain control of all [] communications [between the Committee and the agency], and will be entrusting them to [the] agency only for use in handling [matters in connection with the legislative, oversight, and investigative jurisdictions of the committee].” This retention of control was also applied to “any documents created or compiled” by the agency in response to such communications.

These assertions improperly restrict the ability of the public to use FOIA to access those documents. In 5 U.S.C. §552(b), Congress provided for narrow and specific exemptions to FOIA. Your letter purports to create a new category of exemption through a unilateral action by a single Member of Congress, a troubling precedent.

We respectfully remind you that FOIA requires agencies to release agency records upon request unless they fall within the scope of one of the nine exemptions provided in the law and the agency reasonably foresees that disclosure would harm an interest provided by that exemption.<sup>2</sup> As set forth in more detail below, the issue here is whether or not the two categories of information addressed by your letter are “agency records.”

In general, the Supreme Court uses a two-part test to determine what constitutes an agency record.<sup>3</sup> To satisfy the first prong, the requested documents must either have been “create[d] or obtain[ed]” by the agency.<sup>4</sup> To satisfy the second prong, the requested documents must be in the agency’s control when the request is made.<sup>5</sup> Courts have treated the two categories of records in your letter differently when adjudicating the boundaries of FOIA. Accordingly, our response will handle them separately.

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<sup>1</sup> Letter to Secretary Mnuchin from House Committee on Financial Services regarding Committee Intend to Control Congressional Records, April 3, 2017. <https://www.documentcloud.org/documents/3700409-Treas-Letter.html> (Downloaded May 5, 2017)

<sup>2</sup> 5 U.S.C. §§ 552(b) & 552(a)(8).

<sup>3</sup> *DOJ v. Tax Analysts*, 492 U.S. 136, 144-146. (1989)

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

First, you contend that communications between Members and staff of your Committee and the Department of the Treasury are congressional records and therefore cannot be released in response to a FOIA request. Case law, however, makes clear that congressionally generated documents can become agency records and under other circumstances can be deemed congressional records.<sup>6</sup> Courts have not, however, provided a bright line rule. To accept those assertions would unilaterally create a new FOIA exemption not provided for in the law, exempting agency communications with Congress as a category. At the very least, should some communications or portions thereof ultimately be deemed congressional records, agencies are still required to segregate and release agency records, as required by the statute.<sup>7</sup>

Second, you further contend that Congress also controls the documents created and compiled by the agency in connection to communications with your Committee. In defending your letter, a Committee spokesperson stated that “the D.C. Circuit has long recognized that Congress’s constitutional oversight role may be threatened if agencies do not maintain the confidentiality of congressional records.”<sup>8</sup> However, this is an incorrect application of a narrow principal, and does not apply to records created or compiled by the agency, as the Committee is now asserting it should.

The narrow principal cited by your spokesperson applies when an agency creates a record in direct response to a formal congressional request and *only* exempts the portions of the responsive record that would disclose the congressional request.<sup>9</sup> This is not one of those situations.

A more applicable principal articulated by the D.C. Circuit is that it is “untenable” for a Committee to claim retention over documents created by an agency, even when in response to a congressional inquiry.<sup>10</sup> While the D.C. Circuit narrowed this principal in later cases, as explained above, that decision justifies only a targeted withholding of information,<sup>11</sup> not a categorical exemption.

There is no question that records created or compiled by the Department of the Treasury in response to your committee’s communications and inquiries are agency records, and therefore your blanket assertion of control is immaterial to the agency’s handling of these records under

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<sup>6</sup> *Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir., 1983) (explaining “Whether a congressionally generated document has become an agency record depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.”)

<sup>7</sup> 5 USC § 552(a)(8)(A)(ii)(II).

<sup>8</sup> Hensarling Calls on Treasury to Deny FOIA Requests, *Politico Pro*, May 5, 2017.

<sup>9</sup> *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 603 (D.C. Cir., 2004).

<sup>10</sup> *Paisley v. CIA*, 712 F.2d 686, 696 (D.C. Cir., 1983).

<sup>11</sup> *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 603 (D.C. Cir., 2004) (stating “we conclude that the Joint Committee’s directive and expectation of confidentiality extend only to its April 28 request and to those portions of the IRS response that would effectively disclose that request. Put in terms of *Burka*’s second factor, the IRS retains the “ability to use and dispose of” any portions of its response that would not reveal the Joint Committee’s request.”)

FOIA. The agency must release these records if requested, subject to legislated FOIA exemptions.

If you have any questions or would like to discuss this further, please contact Elizabeth Hempowicz, POGO's Policy Counsel, and [ehempowicz@pogo.org](mailto:ehempowicz@pogo.org) or (202) 347-1122.

Sincerely,

American Civil Liberties Union  
American Oversight  
American Society of News Editors  
Campaign Legal Center  
Cause of Action Institute  
Center for Media and Democracy  
Citizens for Responsibility and Ethics in Washington  
Center for Responsive Politics  
Common Cause  
Demand Progress  
Democracy 21  
Electronic Privacy Information Center (EPIC)  
Every Voice  
Issue One  
Liberty Coalition  
National Press Club  
National Press Club Journalism Institute  
OpenTheGovernment  
Project On Government Oversight (POGO)  
Revolving Door Project  
Sunlight Foundation

cc: Secretary Mnuchin  
Ranking Member Maxine Waters  
Members of the Committee