By email March 11, 2021

The Honorable Merrick B. Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Commitment to Transparency and the Freedom of Information Act

Dear Attorney General Garland,

Our organizations share a deep commitment to the transparency necessary for effective self-government, and, for that reason, support a well-functioning Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"). Attorneys at the Reporters Committee for Freedom of the Press and the Knight First Amendment Institute at Columbia University frequently litigate cases under the Act and are involved in the development and reform of FOIA policy. The Reporters Committee also trains journalists on how to effectively request records. Through this work, both organizations have seen time and time again the indispensable role that the statute can play in holding the government accountable to the public.

On January 20, 2021, President Biden's Administration committed to "bring transparency and truth back to government."[1] He has since reaffirmed this goal, declaring that "[t]he revitalization of our national security and foreign policy workforce requires a recommitment to the highest standards of transparency."[2] During your confirmation hearing, you reiterated the importance of reaffirming the norm that FOIA should be read "generously" to "ensure that the Department adheres to the Rule of Law."[3] You also stated in your written responses to questions for the record that you "strongly believe in transparency," and that "FOIA is a critically important tool for government accountability."[4]

In the spirit of these pledges, we write to urge the Department of Justice ("DOJ") to take swift and decisive action to ensure compliance with FOIA, both in DOJ's own administration of the Act and through the important role DOJ plays in fostering compliance with the Act across the federal government.

FOIA has not operated as it should, plagued by high rates of withholding,[5] increased

[1] Press Briefing by Press Secretary Jen Psaki (Jan. 20, 2021), https://perma.cc/TE6J-TVKG.
[2] Presidential Memorandum on Revitalizing America's Foreign Policy and National Security Workforce, Institutions, and Partnerships (Feb. 4, 2021), https://perma.cc/YBJ7-VD3A.
[3] *Attorney General Confirmation Hearing, Day 1*, CSPAN, at 36:10–36:59 (Feb. 22, 2021), https://bit.ly/3aEaEbk.
[4] *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General* at 18, United States Senate Committee on the Judiciary, https://perma.cc/9CTY-PFWA.
[5] *See, e.g.*, Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2019* at 7, https://perma.cc/UGL2-D2SJ (showing that 63.5% of requests processed for exemption applicability resulted in full or partial withholding of records).

delays in responding to requests,[6] and, consequently, a significant increase in the number of lawsuits against federal agencies.[7] This has undermined understanding of government by cutting off reporters, civil society, and, ultimately, the public, all of whom rely on FOIA to stay informed about the workings of their government.

The Department of Justice now has the opportunity to reverse these damaging practices and trends. As a first step, we ask you to issue a memorandum to the heads of all executive departments and agencies reminding them that timely and faithful compliance with FOIA is crucial to our nation's democracy and should be a priority for this administration. Attorneys General Janet Reno and Eric Holder took this initiative at the outset of President Clinton's and President Obama's administrations, emphasizing that agencies should approach disclosure decisions with a presumption of openness.[8] Reaffirming that principle is crucial for setting the tone of the next four years. But more is needed to realize the transparency that the American public deserves. Accordingly, we also ask you to: (1) set out new, more stringent standards specifying when DOJ will defend agencies in FOIA litigation, (2) encourage proactive disclosure of high-value and frequently requested records, and (3) encourage agencies to update and improve processes and procedures to more fully comply with FOIA's mandate.

I. Adopt More Stringent Standards for DOJ's Defense of Agency FOIA Decisions

As the supervisor of all FOIA litigation, the Attorney General has the responsibility of ensuring that executive branch agencies are complying with FOIA's requirements. DOJ should inform the heads of executive departments and agencies that it will not defend FOIA withholdings that are inconsistent with the letter or spirit of FOIA or with the presumption of openness that should govern all FOIA withholding decisions.

For example, DOJ should reverse its position on the foreseeable harm standard in 5 U.S.C. § 552(a)(8) and announce that it will not defend withholding decisions that do not give this provision the full effect intended by Congress. Although Congress added this provision to FOIA in 2016,[9] DOJ has yet to publish guidance on it.[10] In fact, DOJ has taken the position in litigation that the foreseeable harm standard does not substantively alter the authority of agencies to withhold information from the public.[11] That position is incorrect, and we urge you to make clear to agencies that the foreseeable harm standard imposes an independent burden that means what it says: it requires an agency to disclose records, even if they technically fall within the

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[6] *See, e.g.*, *id.* at 12 (showing the average processing time for simple track requests increased from 28 days in FY2016 to more than 39 days in FY2019).

[7] The FOIA Project, *FOIA Lawsuits*, http://foiaproject.org/lawsuit/ (last accessed Mar. 1, 2021) (showing that more than 3,200 federal FOIA lawsuits were filed during FY 2017–2020, an approximately sixty-seven percent increase over the previous four years).

[8] Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies ("Reno Memorandum") 1 (Oct. 4, 1993), https://perma.cc/AGD9-6489; Memorandum from Eric Holder, Attorney General, to Heads of Executive Departments and Agencies ("Holder Memorandum") 1–2 (Mar. 19, 2009), https://perma.cc/SVM9-DHY6.

[9] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

[10] *See* OIP Guidance, Department of Justice, https://perma.cc/R962-6VJ7 (last accessed Mar. 1, 2021).

[11] *See, e.g.*, Br. for Appellees at 43, *Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, No. 20-5091 (D.C. Cir. Oct. 7, 2020), ECF No. 1865331; Dep't of Justice Reply Br. at 51–52, *EPIC v. DOJ*, No. 19-cv-810 (D.D.C. Jul. 12, 2019), ECF No. 80.

scope of an exemption, unless the agency reasonably foresees that disclosure would actually cause real harm. Satisfying this burden requires more than a perfunctory or boilerplate explanation, and instead requires the agency to meaningfully connect that harm to the specific information withheld. In addition, DOJ should ensure that agencies do not withhold information simply to prevent embarrassment, to hide "errors and failures," or to "protect the personal interests of Government officials at the expense of those they are supposed to serve."[12] And specific categories of records, such as records twelve years or older withheld under the deliberative process privilege, should receive additional scrutiny to evaluate whether disclosure to the public would in fact cause real harm.[13]

Furthermore, in keeping with the recognition that FOIA's overall purpose is to promote government transparency, DOJ should interpret FOIA exemptions narrowly and take into account the public's interest in disclosure of the information, even if a broader interpretation of the exemption might be upheld by a court. Although there are many ways in which DOJ could put this recommendation into action, to take just two of many possible examples: DOJ should not defend the withholding under the presidential communications privilege of *final* presidential directives or decisions, or of other records analogous to those identified in 5 U.S.C. § 552(a). Nor should DOJ defend the withholding of government employee names under Exemptions 6 and 7(C), absent a showing that disclosure would result in an invasion of personal privacy that goes beyond revealing that an individual was engaged in the routine work of a government employee.

DOJ should apply these principles to pending FOIA cases as well as to FOIA requests and cases filed in the future. DOJ attorneys handling FOIA matters should review all pending FOIA litigation within three months to determine whether DOJ's current positions are consistent with President Biden's commitment to transparency, and whether additional material can be released to the requester.

II. Disclose Documents Proactively

In keeping with President Biden's commitment to transparency, the Justice Department should also ensure that agencies publish certain categories of records proactively.

DOJ should begin by ensuring that agencies comply with FOIA's affirmative disclosure provisions. The Act requires agencies to make available broad categories of records through the "reading room" provision, including final opinions made in the adjudication of cases, statements of policy, and instructions to staff that affect a member of the public. *See* 5 U.S.C. § 552(a)(2). Yet many agencies interpret this requirement too narrowly, or comply with it only inconsistently. We thus ask that you require DOJ to give FOIA's affirmative disclosure provisions full effect and also issue guidance to all agencies strongly encouraging them to do so. And following the example set by Attorneys General Reno and Holder,[14] DOJ should encourage agencies to make

[12] S. Rep. 114-4 at 8 (quoting President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act (Jan. 21, 2009)).
[13] Notably, under the Presidential Records Act, certain restrictions on access to presidential records expire after twelve years. *See* 44 U.S.C. § 2204(a).
[14] Reno Memorandum, *supra* note 8, at 1–2; Holder Memorandum, *supra* note 8, at 1.

regular discretionary releases whenever possible, particularly of categories of records likely to be of significant public interest.

These steps would not only improve public understanding of our government's functions and promote accountability, but also relieve pressure on an under-resourced FOIA system. To guide agencies as they comply with the letter and spirit of the law, the Attorney General should designate certain categories of significant records for proactive disclosure. At a minimum, this list should include the following categories, several of which the FOIA Federal Advisory Committee has also said should be designated for proactive disclosure:[15]

- **Agency visitor logs and agency head calendars**. President Biden has committed to releasing White House visitor logs in the interest of transparency. All executive branch agencies should follow this example and post such records monthly;

- **Unclassified reports and testimony submitted to Congress**. Such records are often the subject of multiple requests;

- **Formal Office of Legal Counsel opinions**. OLC's formal written opinions bind the executive branch and establish a system of legal precedent. FOIA requires OLC to disclose these memos except in narrow circumstances, and DOJ should proactively release them so the public has access to the executive branch's authoritative interpretations of law; and

- **Each agency's ten largest contracts, task orders, and grants by dollar value.** Releasing such records would allow the public to see how its money is being spent and what programs agencies are prioritizing.

We ask you to commit to and support the routine disclosure of these records.

III. Improve FOIA Processes and Procedures

Finally, the Justice Department should work to improve agency processes and procedures for the handling of FOIA requests. These improvements could benefit the public and government alike. Among other things, DOJ should:

- Instruct agencies that FOIA determination letters should articulate the agency's view as to why the foreseeable harm standard is satisfied when withholding material, in addition to explaining its reliance on the relevant exemption(s);[16]

[15] Freedom of Information Act Federal Advisory Committee, Final Report and Recommendations, 2016–2018 Committee Term 18–20 (2018), https://perma.cc/5C8U-E8VA.
[16] *Cf., e.g.*, *Implementation Checklist and Sample Language for OIP Guidance on New Requirements for FOIA Response Letters and Notices Extending the FOIA's Time Limits Due to Unusual Circumstances*, Dep't of Justice, https://perma.cc/37ZM-ZST8 (last accessed Mar. 1, 2021).

- Complete and update the FOIA.gov portal, including by mandating interoperability among agencies' FOIA management systems,[17] *see* 5 U.S.C. § 552(m), and building out mechanisms for agencies to respond to requesters through the portal. DOJ should also encourage all agencies to establish email addresses for requesters to submit requests;

- Encourage agencies to engage with mediation and reviews conducted by the Office of Government Information Services, *see* 5 U.S.C. § 552(h); and

- In addition to the specific directions regarding proactive disclosures discussed above, encourage agencies to adopt more robust processes for identifying and releasing records requested three or more times, *see* 5 U.S.C. § 552(a)(2)(D).

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The new administration has a historic opportunity to restore transparency and trust in government. By adopting litigation standards consistent with a presumption of openness, promoting proactive disclosure, and improving agency FOIA processes, you can take meaningful steps to ensure that this opportunity is realized. We would welcome the chance to work with you on fulfilling the commitment to openness President Biden and you have championed in these early days of the administration.

Sincerely,

The Reporters Committee
for Freedom of the Press

Knight First Amendment Institute
at Columbia University

cc: Anthony Coley
Matt Klapper

[17] For example, the FBI's FOIA intake system is not linked to foia.gov. *See* FOIA.gov, https://www.foia.gov/?id=e366935f-20e1-4404-ac40-ed5518a5ce5a&type=component (last accessed Mar. 1, 2021).