

January 31st, 2022

The Honorable Merrick B. Garland
Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C., 20530

Dear Attorney General Garland,

As non-profit organizations dedicated to a transparent and accountable government, we call on your office to reinvigorate its efforts to provide oversight on executive branch agencies' compliance with the Freedom of Information Act (FOIA). Last year, many of our organizations wrote to your office to offer recommendations for how the Department of Justice (DOJ) could implement a "generous" reading of FOIA as you testified it would during your confirmation hearing. However, in the nine months since then, your office has neither responded to the letter nor published any significant guidance for agency compliance with the FOIA.

Our hope was that the DOJ would address the government's troubling tendency toward less disclosure and the increasing challenges requesters are facing during the FOIA process. By one measure of agency noncompliance with the FOIA, the number of active FOIA litigation cases, noncompliance is at a decade-long high even while requesters are waiting longer than ever to initiate litigation.¹ We once again appeal to you to act on this critical matter.

As the previous letter urged, a sensible and overdue reform would be for your office to issue a government-wide memorandum on agency obligations when interpreting and applying the FOIA.^{2,3} Specifically, the memorandum should include:

- A presumption that agencies will not rely on discretionary exemptions to withhold requested information, reinforced by updated guidance from the Office of Information Policy
- An interpretation of the FOIA's "foreseeable harm" standard that matches congressional intent behind the statutory provision, as added by the 2016 FOIA amendments
- A requirement that agencies, if sued, certify they have applied the appropriate foreseeable harm standard
- A requirement that for documents older than a specified time limit, of no more than 10 years, agencies cannot assert Exemption 5 to withhold information⁴
- Higher standards for defending agencies sued under the FOIA
- A directive that all agencies maximize proactive disclosures

¹ Transactional Records Access Clearing at Syracuse University. (2021). *FOIA Project*.

<http://foiaproject.org/2019/12/15/foia-suits-rise-because-agencies-dont-respond-even-as-requesters-wait-longer-to-file-suit/>

² Weismann, Anne. (2021, April 19th). *Letter to the Attorney General on FOIA*. <https://www.openthegovernment.org/wp-content/uploads/2021/04/Letter-to-the-Attorney-General-on-FOIA-final.pdf>

³ Open The Government. (2022, January 20th). *Blueprint for Accountability*. <https://blueprintforaccountability.us/recommendations/>

⁴ Open The Government. (2020, October 29th). *Accountability 2021: Recommendations for accountability in the federal government*. <https://www.openthegovernment.org/wp-content/uploads/2020/11/Accountability-2021-Agenda.pdf>

- A requirement that agencies use pre-litigation processes, including the Office of Government Information Services, and other alternative dispute resolution processes to the fullest extent possible to promote timely public access
- A directive that agency FOIA personnel be given direct access to agency electronic records

As you noted during last year’s Sunshine Week, FOIA ensures that “the principles of open government and democratic accountability are at the heart of who we are as public servants and as Americans.”⁵ We could not agree more. At the same time, we believe that, without an updated memorandum on interpreting the FOIA, the DOJ is skirting its “special responsibility to ensure [FOIA’s] faithful and effective administration.”⁶ We also note that we are entering the second year of the Biden administration and that updated guidance to agencies is long overdue.

Finally, we urge you to support legislative reforms to the FOIA that will reaffirm the true purpose of FOIA which is to “ensure an informed citizenry” that is “vital to the functioning of a democratic society”.⁷ Unfortunately, the DOJ has historically been an obstacle to reform efforts and often resists the release of records in courts.⁸ We urge you to take up this historic opportunity to realign the Department’s approach to the FOIA, beginning with implementing a generous reading of the statute.

Thank you for your consideration of this matter. Please contact Freddy Martinez at fmartinez@openthegovernment.org for more information.

Sincerely,

American-Arab Anti-Discrimination
Committee (ADC)
American Civil Liberties Union (ACLU)
Anne Weismann
Citizens for Responsibility and Ethics in
Washington (CREW)
Demand Progress Education Fund
The Digital Democracy Project
Electronic Frontier Foundation (EFF)
Electronic Privacy Information Center (EPIC)
Fund for Constitutional Government
Government Accountability Project
Government Information Watch
Human Rights Watch
National Coalition Against Censorship
National Freedom of Information Coalition

National Immigration Project (NIPNLG)
National Security Archive
National Security Counselors
Open The Government
Project On Government Oversight (POGO)
Public Citizen
Public Employees for Environmental
Responsibility (PEER)
Society of Professional Journalists (SPJ)
TRAC FOIA Project
Transparency International — U.S. Office
Union of Concerned Scientists
Washington Coalition for Open Government

⁵ The Justice Department. (2021, March 15th). *Attorney General Garland Delivers Remarks at Department of Justice Sunshine Week Celebration*. <https://www.youtube.com/watch?v=OGRB22TZGbY>

⁶ *Id.*

⁷ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)

⁸ VICE News. (March 9th, 2016). *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform.* <https://www.vice.com/en/article/7xamnz/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform>