

April XX,2021

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 groups dedicated to a transparent and accountable government, we write to offer our support and suggestions for how the Department of Justice can use its resources and expertise to breathe life back into the “principles of open government and democratic accountability” that you recognized during this year’s Sunshine Week “are at the heart of who we are as public servants and as Americans.” Those efforts must begin with a major reset on how the federal government interprets and administers the Freedom of Information Act (FOIA) and DOJ’s support for fundamental legislative reform.

We have observed a disturbing trend toward significantly less disclosure and increased obstacles that agencies impose on FOIA requesters in the administrative process. The last four years in particular have brought us to a high-water mark for government secrecy as reflected in the ever increasing volume of FOIA litigation, much of it designed to uncover the rationale for actions of the previous administration that threatened to undermine the pillars of our democracy. We urge you to take steps to address these growing problems.

First, following the precedent of many former Attorneys General, we ask that you issue a memorandum to all government offices setting forth how they are to interpret and apply the FOIA. The memorandum should include specific recommendations for restoring accountability in the federal government, as outlined in the Accountability 2021 agenda created by nearly two dozen organizations.<sup>1</sup> 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 certify they have applied the appropriate foreseeable harm standard if sued
- A directive that for certain categories of records there is a presumption of no harm that an agency must overcome to withhold information; failure to do so should mean that DOJ will not defend the agency if sued

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<sup>1</sup> That agenda can be found at <https://www.openthegovernment.org/wp-content/uploads/2020/10/Accountability-2021-Agenda-1.pdf>.

- A requirement that for documents older than a specified time limit of no more than 20 years, agencies cannot assert Exemption 5 to withhold information
- Higher standards for defending agencies sued under the FOIA
- A directive that all agencies maximize proactive disclosures
- 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
- A directive that agency FOIA personnel be given direct access to agency electronic records

Second, you should direct the Civil Division to undertake a review of all pending FOIA litigation, to be completed within two months, to identify those cases in which the agency's position fails to meet either the letter or the spirit of the FOIA and the foreseeable harm standard as imposed by the 2016 FOIA Improvement Act. Too many agencies have used the FOIA as a shield from public accountability, particularly during the Trump administration. To assist in that review, you should provide a set of criteria for when DOJ will and will not continue to defend agencies in ongoing litigation. That criteria should include, *inter alia*, the age of the requested documents, the extent to which they would reveal evidence of wrongdoing or misconduct, and the extent to which disclosure would significantly aid the public's understanding of a controversial policy or practice or one of questionable legality.

There is historical precedence for such a litigation review. In 1993, then-Attorney General Janet Reno ordered the Civil Division to conduct a formal FOIA litigation review.<sup>2</sup> In the press release announcing this review, Attorney General Reno stressed, "The American public's understanding of the workings of its government is a cornerstone of our democracy." *Id.* In at least eight cases that review motivated the discretionary disclosure of a substantial portion of the requested records. In other Exemption 5 cases the review resulted in discretionary disclosures and complete disposition of the case. *See, e.g., Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993).

No other Attorney General has taken such an important step and, not unsurprisingly, FOIA litigation continues to increase. According to the Office of Information Policy's summary of FY2019 Annual FOIA reports, FOIA litigation cost taxpayers \$38,700,000.<sup>3</sup> At the same time, agencies collected \$2,547,638 in FOIA fees – totaling less than .5% of total FOIA costs. These statistics illustrate that not only does a litigation review comport with the letter and spirit of the FOIA, but also it makes good fiscal sense.

Finally, we urge you to support legislative reforms that restore the FOIA to its intended use—revealing what our government is up to and why. For too long the

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<sup>2</sup> *See* DOJ Press Release, "Government Adopts New Standard for Openness," Oct. 4, 1993, <https://www.openthegovernment.org/wp-content/uploads/2020/10/Accountability-2021-Agenda-1.pdf>.

<sup>3</sup> That report is available at <https://www.justice.gov/oip/page/file/1282001/download>.

Department of Justice has been an obstacle to transparency, fighting FOIA reforms that would require more disclosure and urging courts to adopt the narrowest view of FOIA provisions, like the foreseeable harm standard, that Congress imposed to increase disclosure. The time is past due for DOJ, under your leadership, to embrace changes that will ensure that the federal government adheres to what you described in your Sunshine Week remarks as “principles that have become core to our D.N.A.”