

October 23, 2014

The Honorable Barack Obama
President of the United States
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Obama:

As transparency and open government advocates, our organizations applauded your memorandum, issued on the first full day of your presidency, directing agencies to adopt a presumption in favor of disclosure under the Freedom of Information Act (FOIA). We were thrilled when you pledged that your administration would be the most transparent in modern history.

Today, more than five years later, we face many challenges in fulfilling your day-one commitment. The FOIA remains one of the most effective tools for the public to know what its government is up to, but changing agency practices under that statute to meet your transparency goals has been especially challenging. Accordingly, we have identified six core components we believe at a minimum must be legislatively mandated in order to achieve your FOIA agenda.

First, the presumption of disclosure must be codified if your commitment to an open government is to survive your presidency. Without this legislative mandate, the FOIA will continue to be subject to the political whims of whoever occupies the White House. Past administrations have reversed this presumption, yielding directives like that issued by former Attorney General John Ashcroft that set the default on withholding, with the promise the Department of Justice would vigorously defend agencies that refused to comply with FOIA requests.

Second, the foreseeable harm standard mandated by Attorney General Eric Holder's March 19, 2009 memorandum to heads of all executive departments and agencies also must be codified. As with the presumption of openness, different administrations have either implemented or rescinded the requirement that material only be withheld where disclosure would cause a foreseeable harm to government interests. The FOIA is a statutory mandate that can be fulfilled only by codifying these essential elements.

Third, exemption 5 of the FOIA – which authorizes agencies to withhold inter- and intra-agency memoranda that fall within civil discovery privileges – must be amended to add a public interest balancing test, at least for material protected by the deliberative process privilege. As then-White House Special Assistant Steve Croley wrote in March 2011, reducing agency reliance on exemption 5 to withhold information from the public is part of the administration's efforts to promote greater openness in government. Unfortunately, despite the strong FOIA policies you have mandated, the deliberative process privilege continues to be significantly overused, disserving the very interests your memorandum commits to advance. Adding a balancing test will mirror how the deliberative process privilege is treated for discovery purposes, where courts

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weigh the government's interest in secrecy against the stated need for disclosure by the party seeking discovery. Unless the FOIA incorporates a similar balancing test, the public will continue to be denied access to information of critical public importance, even where secrecy serves at best only a very limited governmental interest.

Fourth, information created 25 or more years before the date of any FOIA request should not be subject to withholding under FOIA exemption 5. The FOIA should not be used to bar the public's access to our nation's history where the passage of time has significantly eroded, if not eliminated altogether, any valid governmental interest served by secrecy. Even for classified information your policy, reflected in E.O. 13526, recognizes no document should remain classified indefinitely. Further, a 25-year period far exceeds the 12 years of non-disclosure afforded the records of former presidents under the Presidential Records Act.

Fifth, the FOIA must be amended to implement the clear congressional intent of the 2007 FOIA amendments that agencies that delay responding to FOIA requesters past the statutory deadlines cannot charge fees. Congress added this provision to encourage timely responses. Nevertheless, the Department of Justice has advised agencies they may continue to charge fees past the deadlines if they have made a reduction in their backlogs, even if that reduction is by only one request. Such a position directly conflicts with the clear legislative language and intent. Further clarifying language therefore is needed to stop agencies from undermining the will of Congress and ensure continued public access to government records.

Finally, legislation is needed to enhance and expand the role of the Office of Government Information Services (OGIS). OGIS's role as chair of the FOIA Modernization Federal Advisory Committee reflects the central role OGIS can play in streamlining the FOIA process and reducing litigation under the FOIA. Legislation is needed to ensure OGIS continues to play that role. All requesters must be made aware of the option to seek dispute resolution services from OGIS. Legislation also should clarify OGIS's authority to issue advisory opinions.

Each of these provisions is critical to achieving your stated goal of a more open and accountable government and would strengthen your legacy. We believe, working together, we can breathe new life into your commitments. But we need this legislative component to move forward.

Accordingly, we respectfully seek your position on the codification of each of these specific provisions through legislative means. Only statutory reform and your public commitment to that reform will ensure the commitments you have made last beyond your presidency. We look forward to that support and continuing to work with you to advance your transparency agenda.

Respectfully submitted,

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Access

American Civil Liberties Union – ACLU

American Library Association

American Society of News Editors

Article 19

Association of Alternative Newsmedia

Association of American Publishers

Brechner Center for Freedom of Information

Center for Effective Government

Citizens for Responsibility and Ethics in Washington – CREW

Coalition 4 Change, Inc.

Common Cause

Community Research

DownsizeDC.org, Inc.

Electronic Information Privacy Center – EPIC

Electronic Frontier Foundation

Essential Information

First Amendment Coalition

Food and Water Watch

Fund for Constitutional Government

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Greenpeace

Government Accountability Project – GAP

In The Public Interest

Iowa Freedom of Information Council

iSolon.org

James Madison Project

Liberty Coalition

Minnesota Coalition on Government Information

Mississippi Center for Freedom of Information

National Freedom of Information Coalition

National Security Archive

National Security Counselors

OpenTheGovernment.org

PEN American Center

People For the American Way

Project On Government Oversight – POGO

Public Citizen

Reporters Committee for Freedom of the Press

Savannah River Watch Site

Society of American Archivists

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Society of Professional Journalists

Student Press Law Center

Special Libraries Association

The Sunlight Foundation

Transactional Records Access Clearinghouse – TRAC

Tully Center for Free Speech

U.S. Public Interest Research Group –PIRG

Washington Civil Rights Council

Washington Coalition for Open Government

Whistlewatch.org