

February 22, 2021

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Re: Request for Swift Presidential Leadership to Make Transparency a Top Priority for the Biden Administration

Dear President Biden:

The undersigned civil society organizations write to urge you to take bold presidential action now to carry out your pledge to “bring transparency and truth back to government.”¹ We applaud your commitment to ensure “the highest standards of transparency” in government² and agree with you about the preeminent importance of transparency, oversight, and accountability to the American public. Restoring the public’s trust in our government depends on it.

Below, we write to propose specific steps that we hope you will take in service of that goal. In particular, we ask that you direct White House staff and federal agencies to update and improve their implementation of agency policies and public records statutes governing the release of information to the public, particularly the Freedom of Information Act (FOIA), the Federal Records Act (FRA), and the Presidential Records Act (PRA). Although the White House resuming the public release of visitor logs is a welcome step,³ much more remains to be done. Specifically, we ask that in the coming weeks you take the following non-exhaustive list of actions⁴:

¹ Press Briefing by Press Secretary Jen Psaki (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/01/20/press-briefing-by-press-secretary-jen-psaki-january-20-2021/>.

² Presidential Memorandum on Revitalizing America’s Foreign Policy and National Security Workforce, Institutions, and Partnerships (Feb. 4, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-revitalizing-americas-foreign-policy-and-national-security-workforce-institutions-and-partnerships>.

³ Matthew Choi, *Psaki: Biden White House will make visitor logs public*, Politico, Jan. 15, 2021, <https://politi.co/2YHolj1>.

⁴ Additional background and ideas to promote transparency in government can be found in this “Accountability 2021” coalition agenda: <https://www.accountability2021.org/open-government/>. See also the Knight First Amendment Institute at Columbia University’s *A First Amendment Agenda for the New Administration*, available at <https://knightcolumbia.org/content/a-first-amendment-agenda-for-the-new-administration>.

Emphasize to All Federal Employees the Obligation to Give Full Effect to Federal Transparency Laws. Via executive order or presidential memorandum,⁵ transparency should be affirmed as a pillar of democratic governance and the responsibility of all federal employees, particularly agency heads. The need to maximize public access and oversight in the spirit of the public records laws should also be affirmed as a core governing principle. Government officials must implement the public records statutes in a good faith manner in accordance with the law, with no role for partisan motivations or political considerations such as a desire to shield agencies or their employees from public criticism of their official activities.

Direct Agencies to Adopt New FOIA Guidelines That Prioritize Transparency and the Public Interest. Agencies should be directed to update their FOIA guidelines to ensure they are maximizing transparency and minimizing government abuses of discretionary statutory exemptions. Disclosure, candor, and accessibility should be the default operating mode of our government. In particular, you should:

- ***Require Agencies to Prioritize the Public Interest.*** Agencies should be required to consider the public’s interest in disclosure of the information and weigh it against any perceived need for withholding. Agencies should not reflexively invoke a discretionary exemption under FOIA simply because they can.
- ***Direct Agencies to Proactively Disclose Records.*** Rather than waiting for FOIA requests or litigation, agencies should be directed to give broad effect to FOIA’s affirmative disclosure obligations, which require the affirmative disclosure of all “final opinions . . . made in the adjudication of cases,” “statements of policy and interpretations which have been adopted by the agency,” and “instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2).

In particular, DOJ should publish all final legal opinions by the Office of Legal Counsel (OLC), which are authoritative interpretations of law binding on the executive branch, except to the extent those memoranda fall within an exemption other than Exemption 5. If the OLC memoranda are properly classified and cannot be fully released to the public, the OLC should release an unclassified

⁵ The memorandum on FOIA that President Barack Obama issued to heads of executive departments and agencies on January 21, 2009 is a prominent example. See Presidential Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act (Jan. 21, 2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>. A potential “Day 1” presidential memorandum that President Biden could issue is also discussed in the “Accountability 2021” report.

version or summary to the public. The OLC should also publish an index of all opinions, so that in the rare event that an opinion must be withheld in full, the public is aware of that fact.

Agencies should also exercise their discretion to proactively disclose additional types of records that may not fall within FOIA's reading room provisions, taking public interest in those records into account. In releasing government information, including data sets, agencies should also ensure that it is easily accessible and machine-readable, *i.e.*, available electronically and in a structured and open format.⁶

- ***Ensure Compliance with the Foreseeable Harm Standard.*** Each agency should ensure that it is fully complying with the FOIA's "foreseeable harm" standard codified in the FOIA Improvement Act of 2016 (Public Law 114-185).⁷ With this amendment, Congress strengthened FOIA's presumption of openness by requiring the government to disclose information unless it reasonably foresees that disclosure would actually cause harm to an interest protected by the relevant FOIA exemption. *See* 5 U.S.C. § 552(a)(8)(A); *see also, e.g., Judicial Watch, Inc. v. U.S. Dep't of Justice*, No. 19-cv-800 (TSC), 2020 WL 5798442, at *3 (D.D.C. Sept. 29, 2020). This is an additional, independent burden requiring the government to meaningfully connect the harm to the specific information withheld. The government must do so in a particularized manner—that is, without relying on perfunctory or boilerplate explanations.
- ***Direct the Attorney General to Issue New FOIA Guidance.*** The Attorney General, once confirmed, should issue a government-wide update on FOIA implementation to all agencies to ensure compliance with the principles and requirements outlined above.

Direct DOJ to Fully Leverage its Central Role in Agencies' FOIA Implementation. The DOJ's Office of Information Policy (OIP) should be directed to

⁶ Relevant statutory obligations related to agencies' release of government information include the OPEN Government Data Act (Title II of Public Law 115-435). For background, *see, e.g.,* Tajha Chappellet-Lanier, *The OPEN Government Data Act is now law*, FedScoop, Jan. 15, 2019, <https://www.fedscoop.com/open-government-data-act-law/> and Alexander B. Howard, Governing Digital, Letter to Biden White House on open government (Feb. 9, 2021), <https://governing.digital/letters/letter-to-biden-white-house-on-open-government/>.

⁷ This amendment builds off of the presumption of openness previously articulated by the Clinton and Obama administrations. *See* Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies 1 (Oct. 4, 1993), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-reno-memo-foia.pdf>; Memorandum from Eric Holder, Attorney General, to Heads of Executive Departments and Agencies 1–2 (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

fully leverage its government-wide role and assume greater leadership over FOIA implementation, such as by surveying agencies to assess and disseminate best practices for integrating technology (such as e-discovery software) into their FOIA systems and ensuring compliance with the accessibility requirements of Section 508 of the Rehabilitation Act.⁸

DOJ should also be directed to review all pending FOIA lawsuits and ensure greater transparency during administrative proceedings and litigation. The Attorney General should be asked to conduct a comprehensive review of pending FOIA lawsuits to ensure that DOJ's defense of federal agencies in court against FOIA requesters is aligned with the Biden administration's commitment to the principles of transparency and accountability and consistent with the FOIA Improvement Act of 2016.⁹ Furthermore, DOJ should develop new FOIA litigation criteria governing which withholdings of information it will or will not defend in court. Because such criteria should be aimed at maximizing transparency and public access in the spirit of FOIA, DOJ should prioritize factors such as the public interest in releasing the records in question.

Finally, DOJ should take additional steps before and during FOIA litigation to further promote transparency, including by allowing FOIA requesters to obtain Vaughn indices of withheld documents during the administrative stage, and by proactively publishing all court-ordered document production schedules in its FOIA reading rooms.

Issue New FOIA Guidance by the Office of Management and Budget (OMB) and Update the National FOIA Portal. The White House OMB plays a unique role in setting government-wide FOIA policy due to its budgetary responsibilities and statutory obligations, including those under the FOIA Improvement Act of 2016 (Public Law 114-185) and the Freedom of Information Reform Act of 1986 (Public Law 99-570). Once its Director is confirmed by the Senate, OMB should be directed to issue new government-wide guidance on FOIA use and implementation to promote public access and openness. OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines is an obvious candidate for revision, as OMB reissued it on December 17, 2020 with few substantive modifications,¹⁰ despite the fact that the outdated fee guidance it was seeking to improve was published in 1987. Since that date, American society has experienced enormous changes in journalism and civil society interest in government affairs, as well as technological advancements that have dramatically

⁸ 29 U.S.C. § 794d.

⁹ For additional background, *see, e.g.*, Lauren Harper, National Security Archive, *How President-Elect Biden Can Improve FOIA and Bolster the Presidential Records Act Against Future Abuse* (Nov. 17, 2020), <https://nsarchive.gwu.edu/news/foia/2020-11-17/how-president-elect-biden-can-improve-foia-bolster-presidential-records-act-against-future-abuse>.

¹⁰ Final Revisions to Uniform Freedom of Information Act Fee Schedule and Guidelines, 85 Fed. Reg. 81,955 (Dec. 17, 2020).

lowered the cost of storing, retrieving, and transmitting information.

OMB, along with DOJ, should also complete and update the FOIA.gov portal, *see* 5 U.S.C. § 552(m), including by building out mechanisms for agencies to respond to requesters through the portal. Although the 2016 revisions to the FOIA require the Director of the OMB and the Attorney General to “ensure the operation of a consolidated online request portal,” *id.*, nearly five years later, such a portal is not fully operational. OMB and DOJ should take special care to ensure that FOIA.gov truly functions as the FOIA Improvement Act of 2016 intended and that agencies’ individual FOIA systems are interoperable and compatible with the national FOIA portal, especially as the government makes technological upgrades.

Assess, Preserve, and Disclose the Key Records of the Previous Administration. Federal agencies should be directed to determine the status of key records of the Trump administration, ensure their proper preservation, and disclose them (or the status of any damaged or manipulated records) to the fullest extent possible, including the executive branch records sought by the 115th and 116th Congresses through oversight requests or legislative mandates. Both the executive and legislative branches should also seek to make the government records available to the public to the greatest extent possible. Evidence of federal officials’ malfeasance or incompetence and records that are slated for scheduled destruction despite stakeholder objections, such as detention and civil rights complaints held by Immigration and Customs Enforcement,¹¹ should be given special attention.

Champion Funding Increases for the Public Records Laws. In the White House’s first budget submission to Congress, funding boosts should be prioritized for agencies’ FOIA implementation and recordkeeping activities, as well as for the National Archives and Records Administration (NARA). Across federal agencies, FOIA offices and activities are underfunded, under-resourced, and beleaguered by enormous backlogs of records requests. Some FOIA requests languish for years, if not decades.¹² Likewise, NARA faces enormous capacity and funding challenges, just as the volume and complexity of government records it is tasked to collect, process, and make accessible to the public are exploding.

As you have remarked, “Don’t tell me what you value. Show me your budget, and I’ll tell you what you value.”¹³ The White House should seek substantial funding increases for

¹¹ Kate Oh & Eunice Cho, *ICE’s Destruction of Records Must Be Stopped*, ACLU Blog (Feb. 18, 2020), <https://www.aclu.org/news/immigrants-rights/ices-destruction-of-records-must-be-stopped/>.

¹² Nate Jones, *How to ensure we have a more open, accountable government*, Wash. Post, Mar. 13, 2019, <https://wapo.st/2MYTk7G>.

¹³ *Biden’s Remarks on McCain’s Policies*, N.Y. Times, Sept. 15, 2008, <https://nyti.ms/2My8kJG>.

records preservation and public access to records—including funding for more FOIA officers within agencies—in its budget request to Congress and elevate those priorities during negotiations with Congress.

Endorse Legislative Improvements for the Public Records Laws. Your public support for legislative reforms of the public records laws, particularly FOIA, the FRA, and the PRA, would be a powerful catalyst. Given the strong bipartisan support in Congress for these reforms, we urge you to signal your support for robust improvements. The need for Congress to legislatively update FOIA is especially acute given the damaging impact of recent court rulings, including the Supreme Court’s *Food Marketing Institute v. Argus Leader Media* decision that expanded the government’s power to refuse public access to certain commercial information¹⁴ and rulings by the D.C. Circuit and Second Circuit¹⁵ that threaten a resurgence of “secret law” that binds the people but cannot be viewed or supervised.

Embrace Major Reforms of Classification and Declassification. Our government routinely classifies vast quantities of information beyond what needs to be legitimately kept secret. Indeed, classification is often used to protect the bureaucratic interests of particular agencies and particular administrations rather than to protect our national interests, with poisonous effects on our democracy. The continued classification of large swaths of information concerning the Central Intelligence Agency’s post-9/11 torture, detention, and rendition programs, even though the rationale for classification no longer exists (or did not exist to begin with), is illustrative.¹⁶

While Congress ultimately shares the responsibility to rein in over-classification of government information,¹⁷ presidential leadership and partnership are essential. As such, we urge you to publicly embrace sweeping reforms of the nation’s classification and declassification programs. A comprehensive review should be initiated to examine current policies and procedures for classifying and declassifying national security information and to engage with classifying agencies, Congress, and civil society stakeholders with the intent to reform the government’s classification system. As the

¹⁴ ACLU, *ACLU Joins 34 Other Organizations To Endorse The Open And Responsive Government Act (S. 2220)* (Sept. 19, 2019), <https://www.aclu.org/letter/aclu-joins-34-other-organizations-endorse-open-and-responsive-government-act-s-2220>.

¹⁵ Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, 126 Yale L.J. F. 242 (2016), www.yalelawjournal.com/forum/a-resurgence-of-secret-law.

¹⁶ Andrea Prasow, *Declassify the post-9/11 torture program*, The Hill, Jan. 25, 2021, <https://thehill.com/opinion/national-security/535086-declassify-the-post-9-11-torture-program>.

¹⁷ Mike German & Jay Stanley, ACLU, *Drastic Measures Required: Congress Needs To Overhaul U.S. Secrecy Laws And Increase Oversight Of The Secret Security Establishment* (July 2011), https://www.aclu.org/sites/default/files/field_document/secrecyreport_20110727.pdf.

comprehensive review unfolds, you should immediately commence the declassification of key government records for release to the public, including and not limited to all currently classified OLC opinions, information regarding the government’s use of lethal force overseas, and all records regarding the CIA’s post-9/11 torture program (including the investigative report produced by the Senate Select Committee on Intelligence).

Issue an Executive Order Reforming the Prepublication Review System.

Intelligence agencies all have prepublication review systems that require many of their former employees to seek government approval before writing or speaking about their government service, ostensibly to protect classified information. Though once modest in scope, these systems are now expansive and dysfunctional. Submission requirements and review standards are vague and overbroad, and the process can involve delays of weeks or months.¹⁸ And when the agency does issue its decisions, they often appear arbitrary or motivated by political concerns, rather than national security.¹⁹ Although the House and Senate Intelligence Committees instructed the Director of National Intelligence to develop a new prepublication review policy by October 2018 that would apply to all agencies and “yield timely, reasoned, and impartial decisions that are subject to appeal,” no new policy has been produced.

An executive order should reform the prepublication review system in three ways. First, it should narrow the scope of the system, shrinking the universe of former employees who are subject to these obligations and limiting review to manuscripts reasonably likely to contain or be derived from classified information obtained during government service. Second, the executive order should establish new procedural safeguards, including clear deadlines for review, explanations of the reasons for agencies’ censorial decisions, and an effective administrative appeals process. Finally, the executive order should require transparency in the process, including by requiring agencies to publish their policies and instituting an audit process.

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Transparency is foundational to a government of the people, by the people, for the people. The right to know what our government is up to is also one of the most fundamental checks and balances in our system of government—one that depends on

¹⁸ Alex Abdo, Jameel Jaffer, Meenakshi Krishnan & Ramya Krishnan, *How a New Administration—and a New Congress—Can Fix Prepublication Review: A Roadmap for Reform*, Just Security (Nov. 24, 2020), <https://www.justsecurity.org/73531/how-a-new-administration-and-a-new-congress-can-fix-prepublication-review-a-roadmap-for-reform>.

¹⁹ Vera Eidelman & Ramya Krishnan, *The Government’s System of Censoring Its Former Employees Is Unconstitutional*, ACLU Speak Freely Blog (Apr. 2, 2019), <https://www.aclu.org/blog/free-speech/employee-speech-and-whistleblowers/governments-system-censoring-its-former>.

the preservation of relevant information and public access to it. As our country's history has shown us time and time again, when government secrecy proliferates, so do civil liberties violations and obstacles to democratic accountability. That is why we call on you to embrace open government as one of your administration's most important priorities and one of the most consequential legacies that your presidency could bequeath to future generations.

Thank you for your consideration of our request. As you engage in this effort, the undersigned organizations stand ready to assist you.

Sincerely,

American Civil Liberties Union
Knight First Amendment Institute at Columbia University

American Immigration Council
American Oversight
Brooklyn Law Incubator & Policy Clinic
Campaign Legal Center
Center for Constitutional Rights
Center for Media and Democracy
Center for Responsive Politics
Civil Rights and Transparency Clinic, University at Buffalo School of Law
Common Cause
Cornell Law School First Amendment Clinic
Defending Rights & Dissent
Demand Progress
Digital Democracy Project
Electronic Frontier Foundation
Electronic Privacy Information Center
Essential Information
Good Government Now
Good Jobs First
Government Accountability Project
Immigrant Legal Resource Center
International Documentary Association
International Refugee Assistance Project
Issue One
Jacobs Institute of Women's Health
Mainers for Accountable Leadership
Media Freedom & Information Access Clinic

Michigan State University First Amendment Law Clinic
National Coalition Against Censorship
National Freedom of Information Coalition
National Immigration Law Center
National Immigration Litigation Alliance
National Security Archive
New Media Rights
Open The Government
PEN America
Project On Government Oversight
Reporters Committee for Freedom of the Press
Society of Professional Journalists
TechFreedom
The FOIA Project
Union of Concerned Scientists