

# Congress of the United States

Washington, DC 20515

February 23, 2022

The Honorable Merrick Garland  
Attorney General  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Garland:

We write to urge you to issue a memorandum to all agencies encouraging the implementation of the Freedom of Information Act (FOIA) in a manner that emphasizes openness and transparency. Congress enacted FOIA so the American people could better understand the decisions being made by their government. FOIA requires that agencies respond to requests for information with a presumption of openness and without unnecessary withholdings, redactions, or delays.<sup>1</sup> A clear message from you that transparency is a priority would encourage agencies to fully comply with the law.

The Department of Justice (DOJ) is responsible for encouraging agency compliance with FOIA.<sup>2</sup> The Attorney General has historically issued FOIA standards before the end of October during the first year of a new administration.<sup>3</sup> As the Biden Administration begins its second year, the need for guidance becomes increasingly urgent. We therefore urge the Department to issue FOIA guidance that emphasizes a presumption of openness and transparency. Additionally, the Department's guidance should reiterate and underscore that FOIA "is not authority to withhold information from Congress."<sup>4</sup> It is also important to ensure that agencies are properly training employees on compliance with FOIA.

In January 2021, the Government Accountability Office (GAO) released a report finding that from 2012 to 2019, agencies' increased use of statutory exemptions outpaced the growth in FOIA requests overall. GAO found that agencies' use of (b)(3) exemptions grew by 135%, more than doubling during this period. Full denials of FOIA requests increased by 10% between 2012 and 2019, and partial denials increased by 76% during the same period.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 5 U.S.C. § 552(e)(3).

<sup>3</sup> Attorney General Reno issued a memorandum for a agency heads on October 4, 1993; Attorney General Ashcroft issued a memorandum on October 12, 2001; and Attorney General Holder issued a memorandum on March 19, 2009.

<sup>4</sup> 5 U.S.C. § 552(d).

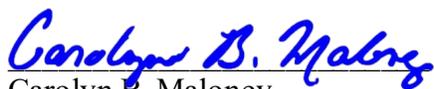
<sup>5</sup> Government Accountability Office, *Freedom of Information Act: Update on Federal Agencies' Use of Exemption Statutes* (Jan. 12, 2021) (GAO-21-148) (online at [www.gao.gov/assets/gao-21-148.pdf](http://www.gao.gov/assets/gao-21-148.pdf)).

Under the FOIA Improvement Act of 2016, agencies are required to have procedures for proactively disclosing records in a publicly accessible format.<sup>6</sup> The purposes of this requirement are to increase transparency to the public and to reduce the burden on agencies and requesters by eliminating unnecessary FOIA requests. In another report issued in 2021, GAO found that 25 agencies reported zero proactive disclosures in 2018 and 2019. DOJ's Office of Information Policy (OIP), which is responsible for facilitating agencies' compliance with FOIA, did not follow up or investigate why these agencies reported zero proactive disclosures.<sup>7</sup> We urge you to swiftly implement GAO's recommendation that OIP follow up with agencies that report zero proactive disclosures and encourage them to comply with the law.

Last month, GAO released another report finding that in the first year of the pandemic, agencies processed 12% fewer requests than in the previous year. The report also found that the request backlog increased 97% from 2012 to 2020 and was up 18% from 2019 to 2020. The use of unusual-circumstances designations and litigation impacted agencies' ability to effectively manage their FOIA programs.<sup>8</sup> We urge you to also implement GAO's recommendation that OIP identify ways that reporting requirements can inform current and emerging FOIA challenges and risks, including those related to unusual-circumstances designations and litigation.

A clear message from you that transparency is a priority would encourage agencies to improve FOIA implementation. We request that you respond in writing by March 9, 2022, to inform our Committees when the Department plans to issue a FOIA memorandum and of any new steps that OIP is taking to implement GAO's recommendations in order to ensure that agencies are complying with FOIA's proactive disclosure requirement and that reporting requirements are effectively updated. Thank you for your attention to this important issue.

Sincerely,



Carolyn B. Maloney

Chairwoman

House Committee on Oversight and Reform



Richard J. Durbin

Chair

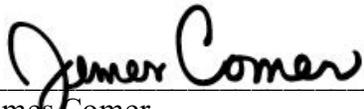
Senate Committee on the Judiciary

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<sup>6</sup> FOIA Improvement Act of 2016, Pub. L. No. 114-185.

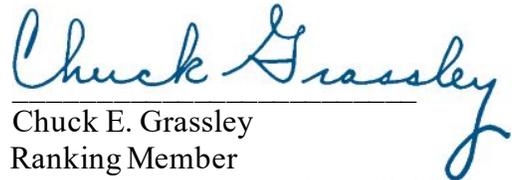
<sup>7</sup> Government Accountability Office, *Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements* (Mar. 2021) (GAO-21-254) (online at [www.gao.gov/assets/gao-21-254.pdf](http://www.gao.gov/assets/gao-21-254.pdf)).

<sup>8</sup> Government Accountability Office, *Freedom of Information Act: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs* (Jan. 2022) (GAO-22-105040) (online at [www.gao.gov/assets/gao-22-105040.pdf](http://www.gao.gov/assets/gao-22-105040.pdf)).



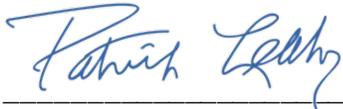
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James Comer  
Ranking Member  
House Committee on Oversight and Reform



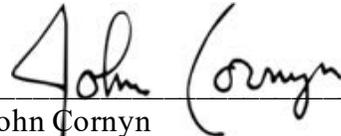
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Chuck E. Grassley  
Ranking Member  
Senate Committee on the Judiciary



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Patrick Leahy  
United States Senator



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John Cornyn  
United States Senator