

January 25, 2010

By Fax 202-514-0238 and E-mail Thomas.J.Perrelli@usdoj.gov

The Honorable Thomas J. Perrelli
Associate Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Associate Attorney General Perrelli:

We write to thank you and the other Department of Justice officials and staff who met with us on December 9, 2009.

As an initial matter, we appreciate your willingness to engage in a discussion concerning open government issues. We view the Freedom of Information Act (FOIA) as a critical component of our political system. It enables the public to become informed and provides an essential check against federal agency overreaching and inefficiency. The Federal Records Act, which we also discussed, ensures that our national experience is documented, that access is provided to the essential documentation of the rights of American citizens and the actions of their government, and that our historical memory is complete. These laws help strengthen our democracy.

The Attorney General's March 19, 2009 FOIA Memorandum and implementing guidance set the stage for transforming how the government implements the FOIA as directed by President Obama in his January 21, 2009 FOIA Memorandum. The Department has set a positive and encouraging tone in its outreach to federal agencies. Nonetheless, changing culture takes hard and sustained work. Accordingly, we write to reiterate specific suggestions we raised during our meeting and to recommend that Attorney General Holder consider using the upcoming Sunshine Week, scheduled for March 14-21, 2010, as an opportunity to reinforce the messages contained in his FOIA Memorandum.

With respect to litigation or anticipated litigation, we urge you to commit the Department of Justice to participating in good faith in mediation of all disputes and to direct federal agencies to agree to participate in mediation either through the Office of Government Information Services or through court-sponsored programs when litigation has commenced. The Department should also engage with FOIA plaintiffs at an earlier stage in litigation to narrow the issues in dispute and, in appropriate circumstances, provide an early "Vaughn" index of records so that the parties are not using resources litigating matters not in serious dispute. Although both mediation and early meetings between parties are the norm in civil litigation, they are not generally the practice in FOIA lawsuits. If this Administration and the Justice Department are truly committed to the presumption of disclosure, then the time and effort dedicated to pre-motion discussion

and negotiation will yield a payoff in terms of disclosure and reduced expenditure on litigation.

Moreover, the Attorney General's FOIA Memorandum indicates that the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. Further, the Memorandum requires this guidance to be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information. Accordingly, we reiterate our request that the Department periodically report on cases it has declined to defend.

With respect to implementing the presumption in favor of disclosure, we urge the Department to be a model among Executive Branch agencies by updating its component web sites and improving its own proactive disclosure of records. At the time of our meeting last month there were several DOJ component FOIA electronic reading rooms that had not been updated in many months. In addition, we urge you to issue new guidance concerning the identification of "frequently requested records" that recommends a broader approach than the so-called "rule of three" described in the Department's FOIA Guide for determining which records must be included in agency electronic reading rooms.

On the broader issue of FOIA processing, DOJ should urge agencies to issue updated regulations implementing the OPEN Government Act of 2007 and the new policy concerning discretionary releases of information. To date, only a small percentage of agencies have revised their regulations to reflect recent changes in law and policy. Thus, important matters such as new timing and fee provisions, tracking requirements, a new definition of a representative of the news media, a new definition of "primarily engaged in dissemination of information," and new reporting requirements are not spelled out in most agencies' implementing regulations.

Further, there are best practices and poor practices apparent in agencies' FOIA regulations and practices that the Department of Justice should highlight in its guidance role. These include good examples, such as the Department's own policy (which is also legally compelled) that records will not be disposed of while a FOIA request or lawsuit for the records is still pending, and bad examples, such as policies not to determine fee waivers until after fees have been incurred. The Department should also issue guidance that addresses the widely diverging practices among agencies for receiving and responding to FOIA requests, which directly impact the ease of public access to the requested records.

In addition, we recommend that the Department play a more proactive role in addressing the problem of FOIA backlogs by analyzing the causes of delay, identifying practical solutions, and convening an inter-agency effort to better coordinate the FOIA referrals and consultations that often account for long periods of delay.

We also wish to raise another issue that we did not discuss last month. Pursuant to the Open Government Directive issued by Peter Orszag, the Director of the Office of Management and Budget, on December 8, 2009, the federal Chief Technology Officer and the federal Chief Information Officer are developing an Open Government Dashboard that will assess the impact and progress of implementation of the Open Government Directive. We urge the Department of Justice to develop its own cross-agency FOIA Dashboard that incorporates detailed data from all of the agencies. In order to do this, of course, agency FOIA reporting must be improved and standardized. We are happy to work with you on such a project and to provide detailed recommendations based on our own experiences as consumers of agency annual FOIA reports. If a FOIA Dashboard works properly, it will permit agencies to assess how they are doing among their peer agencies and incentivize the high performers to continue their good work and the poor performers to search for new ways to improve their work.

Finally, we would appreciate the opportunity to meet with you again on a periodic basis to discuss the Department of Justice's ongoing progress on open government issues. As was clear to us from our last meeting, the input you receive internally does not always mirror our experiences. We believe you can only truly understand how the Department is doing by also hearing from those groups and individuals within the access community who have regular contact with Department of Justice attorneys and FOIA officials.

Thank you again for your time and for consideration of these recommendations.

Sincerely,

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