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February 23, 2009

The Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Holder:

I congratulate you on your recent confirmation. I was pleased that during your confirmation hearing, you pledged to review the Department of Justice's policies and practices related to the Freedom of Information Act (FOIA), and that you were committed to restoring openness to the FOIA process. I write to share my views on several important matters that I hope you will consider as you implement President Obama's directive to issue new FOIA guidelines that reaffirm the commitment to accountability and transparency.

## The Office of Government Information Services

A key component of the *Leahy-Cornyn OPEN Government Act*, which enacted the first major reforms to FOIA in more than a decade, was the creation of the Office of Government Information Services (OGIS) to mediate FOIA disputes, review agency compliance with FOIA and house the newly-created FOIA ombudsman. The work of OGIS will be essential to reversing the trend toward excessive FOIA processing delays, and this office will serve as a meaningful alternative to costly litigation. The success of this new office will depend on close cooperation between OGIS, the Department of Justice's Office of Information Policy (OIP), and executive branch agencies. To that end, I urge you to direct the OIP and all Federal departments and agencies subject to FOIA to cooperate fully and promptly with OGIS, once it is operational by: (1) making every effort to formally or informally resolve FOIA disputes in good faith; (2) routinely informing FOIA requesters that they may appeal decisions to OGIS upon denial of a request, or when 20 days have passed without a response; (3) directing Federal departments and agencies not to toll a FOIA request because the request is pending OGIS review or in mediation; and (4) providing information about OGIS services to requesters through the FOIA-related websites maintained by Federal departments and agencies.

The FOIA reforms contained in the OPEN Government Act also include several other critical changes to improve the timeliness of FOIA responses, track outstanding FOIA requests and increase accountability. I urge you to direct all Federal agencies and departments to take immediate steps to fully implement these reforms.

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### Greater Transparency For FOIA Exemption 3

I also encourage you to bring greater transparency to the use of statutory exemptions to FOIA. Under FOIA Exemption 3, government records that are specifically exempt from FOIA by statute may be withheld from the public. While no one would reasonably quibble with the notion that some government information is appropriately kept from public view, there have been an alarming number of Exemption 3 provisions proposed in legislation in recent years. Often these statutory exemptions are written in very ambiguous terms, to the detriment of the American people's right to know.

I have worked with Senator Cornyn and others on legislation to make the process for creating new statutory exemptions to FOIA more transparent, and I will continue this work in the 111<sup>th</sup> Congress. The Department can also play an important role in promoting greater Exemption 3 transparency by adopting a FOIA policy that supports only those proposals to create new statutory exemptions under Exemption 3 that: (1) are necessary for an agency to achieve specific, articulated goals or objectives; (2) incorporate affirmative oversight on the use of the exemption; (3) include provisions for a built-in sunset and periodic review of the provision's necessity; and (4) are publicly identified at the time they are proposed. The Department can also promote greater transparency by working closely with the Office of Management and Budget to improve the transparency and accountability of Exemption 3 statutes and by having the OIP provide information to the public about legislation that contains a statutory exemption to FOIA *via* its website.

Lastly, we have witnessed an extraordinary and troubling expansion of government secrecy during the last eight years. The Department's new FOIA policy will not only provide an important opportunity to turn the page, but also to correct past errors that could do harm to our democracy. I am pleased that you recently announced that the Department will review its use of the state secrets privilege. Given the critical role that FOIA plays in protecting the public's right to know, I hope that you will undertake a similar review of the Department's pending FOIA cases.

I hope that you will carefully consider each of these proposals as you develop the Department's new FOIA policy. Again, thank you for your commitment to reinvigorating FOIA and to restoring openness and accountability to our government.

Sincerely,



PATRICK LEAHY  
Chairman