United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 28, 2011

**Via Electronic Transmission**

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

I write you today regarding the Department of Justice's proposal to amend the Freedom of Information Act Regulations.[1] Under the proposal, a new section 16.6(f)(2) would change existing FOIA regulations to allow agencies responding to a FOIA request to state that no records exist whenever they determine that the requested documents they possess fit within the exclusions under 5 U.S.C. § 552(c).

Institutional FOIA requesters with varying perspectives have expressed their opposition to section 16.6(f)(2). In sum, they oppose it because it is contrary to FOIA's purpose of ensuring government accountability by providing for public access to information and records. Requesters argue that section 16.6(f)(2) will interfere with the judicial review that guarantees that agencies are correctly interpreting and applying exemptions under FOIA. They further maintain that the provision will severely damage government integrity by allowing a law intended to facilitate access to information to be distorted to allow law enforcement agencies to "lie" to our citizens. In the opinion of requesters, section 16.6(f)(2) is not needed because answers to FOIA requests for documents that fall within § 552(c) exclusions can easily be framed in a manner that is truthful, while still not acknowledging whether any such documents exist.

Under normal circumstances, few requesters would litigate a denial where the FOIA request was denied on the basis that no records exist, because in that situation there should not be anything for a court to order the government to produce. However, requesters contend that the enactment of section 16.6(f)(2) could very likely result in an increase in FOIA litigation because as soon as requesters understand that a DOJ "no records" response does not necessarily mean that there are no records, they will be forced

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[1] See Docket No. OAG 140; AG Order No. 3259-2011, published in the Federal Register on March 21, 2011; Freedom of Information Act Regulations, 76 Fed. Reg. 15,236 (Mar. 21, 2011) (to be codified at 28 C.F.R. 16).

to sue to discover whether there are any records or whether the response was made under section 16.6(f)(2).

On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration, and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda written in grand language and purportedly designed to usher in a "new era of open government."[2] The President's memorandum on FOIA called on all government agencies to adopt a "presumption of disclosure" when administering the law. He directed agencies to be more proactive in their disclosure and to act cooperatively with the public. To further his goals, the President directed the Attorney General to issue new FOIA guidelines for agency heads.

Pursuant to the President's instructions, you issued FOIA guidelines in a memorandum dated March 19, 2009.[3] Your memorandum rescinded former Attorney General Ashcroft's 2001 pledge to defend agency FOIA withholdings unless they lacked a sound legal basis. Instead, you stated that the DOJ would now defend withholdings only if the law prohibited release of the information or if the release would result in foreseeable harm to a government interest protected by one of the exemptions in FOIA. Your memorandum used the same grand language as the President's memoranda. In relevant part, it reads:

> As President Obama instructed in his January 21 FOIA Memorandum, 'The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.' This presumption has two important implications.
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> First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter that the records fall within the scope of a FOIA exemption.
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> Second, ... [a]gencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information....
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> At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal

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[2] Memorandum from President Barak Obama Re: Freedom of Information Act (Jan. 21, 2009) (available at www.whitehouse.gov/the-press-office/freedom-information-act); Memorandum from President Barak Obama Re: Transparency and Open Government (Jan. 21, 2009) (available at www.whitehouse.gov/the-press-office/transparency-and-open-government).

[3] Memorandum from Attorney General Eric Holder Re: Freedom of Information Act (Mar. 21, 2009) (available at www.justice.gov/ag/foia-memo-march2009.pdf).

> privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, `The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.'...
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> ... Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.
>
> I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government.

Proposed section 16.6(f)(2) stands in stark contrast to both the President's and your prior statements about FOIA, transparency, and open government. In fact, this policy directly contradicts your many statements, to me and other members of the Judiciary Committee, as part of your nomination hearing, that you support transparency of the Executive Branch. Further, this proposal is alarming given my questions to you at the April 14, 2010 oversight hearing about the significant increase in the use of FOIA exemptions by federal agencies between FY2008 and FY2009. Although you responded that the significant increase in the use of exemptions was "troubling," your later written response indicated that the "increases demonstrate greater transparency."

I am concerned about your decision to propose section 16.6(f)(2) and share many of the concerns expressed by institutional FOIA requesters. Accordingly, please respond to the following requests for information:

- Has the DOJ instructed, or otherwise approved, an agency providing a knowingly false statement about the existence of documents in responding to a FOIA request or to a FOIA requester? If so, how often has this been done? Describe the circumstances surrounding each use of a knowingly false statement DOJ has approved as an appropriate response to a FOIA request.

- Identify the authority by which the DOJ can adopt proposed section 16.6(f)(2), in light of (a) the case law applying FOIA and (b) the legislative history behind FOIA, both as originally enacted and as subsequently amended.

- Is the DOJ currently using the procedure set forth in proposed section 16.6(f)(2)? If so, identify how long it has been used and the authority by which the DOJ is able to utilize the procedure absent a new regulation or statute.

- Given the many existing specific FOIA exemptions, such as the national security exemption in (b)(1) and the law enforcement exemption in (b)(7), along with the longstanding use of the "Glomar response," to protect national security and ongoing investigations, why does the DOJ maintain proposed section 16.6(f)(2) is needed?

- Did the DOJ consider less expansive options for reforming FOIA, such as merely codifying the "Glomar response" in regulations?

- What additional, less expansive alternatives were considered? For example, did the DOJ consider a more limited "national security only" option for cases with national security concerns instead of across the board recommendations for agencies to lie to FOIA requesters when a request includes something as innocuous as the existence of a privileged interagency memorandum? If so, provide a list of all other less expansive options considered.

- What is your response to the concern expressed by institutional requesters that section 16.6(f)(2) is contrary to FOIA's purpose of ensuring government accountability by providing for public access to information and records?

- What is your response to the concern expressed by institutional requesters that section 16.6(f)(2) will interfere with the judicial review that guarantees that agencies are correctly interpreting and applying exemptions under FOIA?

- What is your response to the concern expressed by institutional requesters that section 16.6(f)(2) will severely damage government integrity by allowing a law intended to facilitate access to information to be distorted to allow law enforcement agencies to "lie" to our citizens?

- What is your response to the argument by institutional requesters that section 16.6(f)(2) is not needed because answers to FOIA requests for documents that fall within § 552(c) exclusions can easily be framed in a manner that is truthful, while still not acknowledging whether any such documents exist?

- What is your response to the argument by institutional requesters that the enactment of section 16.6(f)(2) could result in an increase in FOIA litigation because as soon as requesters understand that a DOJ "no records" response does not necessarily mean that there are no records, they will be forced to sue to discover whether there are any records or whether the response was made under section 16.6(f)(2)?

- One set of comments[4] to section 16.6(f)(2) suggests that when DOJ "determines that a requester is trying to obtain information excluded from FOIA under [5 U.S.C.] section 552(c), the agency should simply respond that `we interpret all or part of your request as a request for records which, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request.'" What is your response to this suggestion?

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[4] October 19, 2011 Letter from the American Civil Liberties Union, Citizens for Responsibility and Ethics in Washington and OpenTheGovernment.org to the Department of Justice (available at www.openthegovernment.org/sites/default/files/FOIA%20552c%20Comment%20-%2010-19-11%20-%20FINAL.pdf).

- Do you agree that proposed section 16.6(f)(2) is inconsistent with the statements in the President's January 21, 2009 memorandum on FOIA? If you disagree, explain how you are able to reconcile the two.

- Do you agree that proposed section 16.6(f)(2) is inconsistent with the statements in your March 21, 2009 memorandum on FOIA? If you disagree, explain how you are able to reconcile the two.

- Does the DOJ intend to submit section 16.6(f)(2) to Congress and to proceed with its implementation?

These are basic questions, most of which should have been answered before you decided to seek comments on proposed section 16.6(f)(2). Therefore, I ask that you respond in writing no later than November 7, 2011.

Finally, if you intend to proceed with section 16.6(f)(2) as currently drafted, I ask you to confirm this intention in writing when you submit the new regulation to Congress. Based on the information that I have at this time, I will take all necessary action, including introducing legislation, to block section 16.6(f)(2) from ever taking effect.

Thank you for your attention to this matter.

Sincerely,

Chuck Grassley

Charles E. Grassley
Ranking Member

CC: Honorable Patrick J. Leahy, Chairman, Senate Judiciary Committee