

Collaboration on Government Secrecy
American University Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016

February 6, 2009

Hon. Eric H. Holder, Jr.
Attorney General
United States Department of Justice
RFK Main Justice Bldg. – Rm. 5111
Washington, D.C. 20530

INITIAL DELIVERY BY ELECTRONIC MEANS

Dear Mr. Attorney General:

This letter is written on behalf of the openness-in-government community and is based on the premise that while the Obama Administration surely is more willing than any presidential administration in history to do all that it can to promote transparency – as already demonstrated by President Obama through his stunning “Day One” statements and initial directives – it nevertheless must make hard choices among competing priorities in the weeks and months ahead. So the following was gathered for communication in explicit recognition of this, with the aim of providing a firm basis for choosing – on a “sooner-rather-than-later” basis – among the many recommendations that have been made in this vital area of public policy and law.

On January 29, 2009, as soon after the Inauguration as possible, American University’s Collaboration on Government Secrecy (CGS)¹ was able to gather together an assemblage of principal government openness advocates and most interested members of the public to review and discuss recommendations made for specific new policies on Freedom of Information Act (FOIA) disclosure, electronic information dissemination, underlying records management, and overall government transparency, among other related subjects. A primary purpose of this conference, entitled “Information Policy in the New Administration,” was to generate this very communication, which today is being sent also to other key officials in the White House, the Office of Management and Budget, the Department of Justice, the National Archives and Records Administration, and the General Services Administration (see Addressee List attached).

¹ The Collaboration on Government Secrecy was created at American University’s Washington College of Law in Fall 2007 to focus on the closely related subjects of openness in government, freedom of information, transparency, and “government secrecy” both in the United States and internationally. It serves as a center of expertise, scholarly research, and information resources in these academic fields, as well as a focal point for sound public policy development, and it now has conducted five successful transparency programs, with three more scheduled for March 16, April 28, and September 28 of this calendar year. Its conferences and Web site (listed below) have in a relatively short time become a major part of the openness-in-government community, especially as CGS strives to take a distinctly “collaborative” approach to its work.

Toward this end, more than 100 conference attendees (as well as those participating through a live Webcast of the event) considered the full range of recommendations that had been made by major government-openness organizations since the outset of the Transition in November -- literally dozens of competing proposals for government-wide reform. As can be seen from the program's agenda (<http://www.wcl.american.edu/secler/founders/2009/documents/FINAL-CGSJanuary29agendahandoutfinal.pdf?rd=1>), more than twenty speakers guided the thoughtful review of these recommendations by presenting their own views, and the views of their represented organizations, with audience interaction both during the panel sessions and during the conference luncheon and breaks.

Then, after hearing two keynote speakers and the presentations of three expert panels (the latter of which included experts on the exigencies of implementing policy changes at the outset of presidential administrations, such as Franklin S. Reeder of the Transition Team), the conference's concluding session proceeded to a survey of all attendees (speakers included) on the prioritization of transparency-related recommendations. In other words, the conference focused on which recommendations are most important *and* most urgent, with those two values combined.

The survey document, which was developed in collaboration with American University's School of Communication, phrased this as follows: "The purpose of this survey is to establish an openness-in-government community-wide consensus on *which* government information policies and proposals are most important for the Obama Administration to address, *sooner rather than later*, amid its many other competing priorities." It has been completed by scores of persons who are interested in its subject matter thus far, and it continues to be accessed through this link (<http://www.surveymonkey.com/s.aspx?sm=2bH6ztHuEYGy2Z8l2f936gsw3d3d>) on CGS's Web site for even further collection of such data. This electronic-form survey mechanism will remain open until shortly before CGS's next conference, its "Second Annual Freedom of Information Day Celebration," on March 16.

In the interests of both time and timeliness, CGS can report to you right now that the results of this survey have been quite striking. We asked all survey participants to first individually rate each of two dozen recommendations distilled from all of those made -- as presented in random order in the recommending organization's own words -- and then to choose from among those (using the initial rating pages as a "worksheet") the five recommendations that in their view were most important/most urgent. (Those two dozen recommendations are reproduced in their original random order in the attached Survey Items document, together with an additional dozen that were added based upon discussions held at the conference itself.) The survey also left room for additional "other" entries by survey respondents, as well as use of an "additional comments" section.²

² These "open-ended" segments of the survey afforded an opportunity to capture additional themes of concern to many respondents, the most prominent of which were: (1) the view that "congressional oversight and external pressure are critical to ensure that agencies implement FOIA provisions and reforms"; (2) as a whistleblower "counterpoint," there can be "a real problem" with "phony whistleblowers," including some who "disclose classified information"; and (3) that there is a "need to reform the Privacy Act" (and by logical extension the FOIA) also with respect to the balancing of "the public interest."

The top five transparency measures that have been recommended for immediate attention through this survey,³ in prioritization order, are as follows:

1. “Restore the presumption of disclosure across the executive branch.”
2. “The new President should issue an executive order to strengthen federal employee whistleblower protections, including strict administrative, civil, and criminal penalties for officials who retaliate against whistleblowers.”
3. “Ensure that necessary steps are taken as quickly as possible to achieve comprehensive TARP/bailout/financial stimulus transparency.”
4. “Administer the FOIA in a new spirit of responsiveness and openness, through very aggressive and comprehensive governmentwide implementation of the replacement to the Ashcroft FOIA Memorandum.”
5. “Ensure that all agencies maximize the making of ‘affirmative’ information disclosures, including as appropriate for FOIA purposes.”

It is fair to say that these five items represent a clear consensus on exactly which transparency-related measures and reforms you and this letter’s other recipients can best focus on within your respective areas of responsibility – particularly during the near term -- in the considered judgment of these most informed and interested members of the openness-in-government community.⁴ Most significantly, because the individual assessments from which these rankings were derived also could be corroborated by the “worksheet” entries that each respondent provided elsewhere on the survey document, CGS has a strong basis for confidence in the aggregate rankings that resulted.

Again, this information was gathered and is presented with the belief that it can be most useful to those like yourself who enter positions of responsibility at a time when especially hard choices have to be made. While this prioritization list should in no way be taken to suggest that the measures “further down the list” (so to speak) should not be acted upon -- far from it -- it is CGS’s goal that these most important and most urgent measures now be kept foremost in mind as the Obama Administration gears up for what doubtless will continue to be an extremely chal-

³ Although this number does correspond to the survey’s methodology of asking respondents to rank their first through fifth-most important/urgent recommended transparency measures, please know that the decision to present the “top five” in the body of this letter was not arbitrary. In fact, together with the sixth-ranked measure (“Review and reform government-wide records-management practices.”), which ranked markedly below them, these five measures predominated over all others in the judgment of survey respondents. Similarly, of the dozen items added based upon the conference’s discussions, one predominated by far: “All agencies should be required to receive and (wherever feasible) respond to FOIA requests electronically.”

⁴ All thirty-six surveyed measures are set out (in descending groups of five) in the attached Recommended Transparency Measures document, which specifies that they are listed “in prioritized order.”

lenging first year. Simply put, they warrant immediate attention, above and beyond the distinct scope of President Obama's "Day One" memoranda.

On behalf of CGS, I think I can speak for the entire openness-in-government community in pledging our commitment to continue to do all that we can to bring both the interest and in no small measure the expertise that we possess to bear on these matters.⁵ As was emphasized at last week's conference, this truly is a transformative moment for replacing an era of extreme government secrecy with one of transparency and accountability

Thank you in advance for your thoughtful consideration of this submission, and please do not hesitate to contact me – at (301) 509-2300 (c) – if I can provide any further elaboration or other related information in any form at any time.

Sincerely yours,

<signed>

Daniel J. Metcalfe

Executive Director

Collaboration on Government Secrecy

<http://www.wcl.american.edu/faculty/metcalfe/>

<http://www.wcl.american.edu/lawandgov/cgs/>

cc: See Addressee List

Attachments (3)

⁵ Almost all of the major media-related and public interest groups most active in this public policy area were able to participate in this CGS conference but due to ordinary program constraints some (such as Public Citizen, the Electronic Frontier Foundation, and the Electronic Privacy Information Center, to name three) were not, especially as emphasis was placed on organizations with considerable individual transition recommendations. As to all organizations within the broad confines of "the openness-in-government community," however, I daresay that they universally would welcome the opportunity to discuss these important matters in any meeting that you and your staff might agree to hold on the subject. In that event, I am certain that either CGS or some other interested organization -- such as OMB Watch, for example -- would be ready and willing to provide any coordination necessary for such an activity. In fact, CGS strongly urges this, in the spirit of President Obama's explicit call for agency policy-development processes to be both "participatory" and "collaborative."