

**August 21, 2020**

**Open Society**  
**Justice Initiative**  
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*Submitted via email<sup>1</sup>*

**DEPARTMENT OF STATE**

Appeals Officer  
Appeals Review Panel  
Office of Information Programs and Services  
2201 C Street, NW, Suite B266  
Washington, D.C. 20520

**Re: FOIA No. 2020-06716 Appeal of State's Denial of Expedited Processing**

We write to administratively appeal the denial of expedited processing by the Department of State ("State") of a Freedom of Information Act ("FOIA") request (**2020-06716**) submitted by the Open Society Justice Initiative ("Justice Initiative"), an operational program of the Open Society Institute ("OSI"), a New York State charitable trust and nonprofit organization.

On July 9, 2020, Justice Initiative submitted a FOIA request ("Request") to State seeking release of records concerning "events leading to the June 11, 2020 Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court ("ICC") and persons associated with it."<sup>2</sup> The Request described in detail the factual context for seeking these records under FOIA, as well as facts relevant for the Justice Initiative's grounds for seeking expedited processing. On July 13, 2020, State summarily denied the Justice Initiative's request for expedited processing.<sup>3</sup> This letter constitutes a timely administrative appeal of that denial under the FOIA, 5 U.S.C. § 552, and applicable regulations.

**State Erred in Denying Justice Initiative Expedited Processing**

The Justice Initiative requested expedited processing (1) pursuant to 5 U.S.C. § 552(a)(6)(E), as

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<sup>1</sup> On August 18, 2020, the FOIA Requester Service Center (FRSC) (foiastatus@state.gov) confirmed that an electronic submission could be made to FRSC who will forward the appeal to the Appeals Officer.

<sup>2</sup> Exhibit A: Open Society Justice Initiative FOIA Request, July 9, 2020.

<sup>3</sup> See Exhibit B: Email from Nicholas J. Cormier, Chief, Requester Communications Branch, Office of Information Programs and Services, Dep't of State, July 13, 2020.

the information and records requested are urgently needed to inform the public about actual or alleged government activity, *see* 5 U.S.C. § 552(a)(6)(E)(v)(II), and the Justice Initiative is an organization “primarily engaged in disseminating information . . . to inform the public concerning” that activity. In addition, the Justice Initiative requested expedition (2) on the grounds that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency’s regulations. *See* 22 CFR § 171.11(f)(3).

State summarily denied Justice Initiative expedited processing stating “[y]our request does not demonstrate a ‘compelling need’ for the requested information. Therefore, this Office denies your request for expedited processing,”<sup>4</sup> without further explanation. As such, it is impossible to assess on what grounds State denied Justice Initiative’s request.

State laid out the three categories it uses when assessing expedited processing, of which, the Justice Initiative cited two and provided demonstrated reasons why it fulfills both categories and expedited processing should be granted based on either category. To recite, State recounted that “requests shall receive expedited processing when a requester demonstrates a ‘compelling need’ for the information [] for one of the following reasons:”<sup>5</sup>

. . . (2) the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal government activity; or (3) failure to release the information would impair substantial due process rights or harm substantial humanitarian interests.

#### **Justice Initiative is an Organization “Primarily Engaged in Disseminating Information” to the Public**

The Request established that the Justice Initiative, a non-profit entity, did not seek disclosure of requested records for commercial gain and intends to disseminate the information disclosed to the public at no cost. As set forth in the Request, disseminating information is among the Justice Initiative’s core activities. It shares information with the public free of charge, through its websites,

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

newsletters, and other publications to promote public understanding and robust debate. Justice Initiative maintains a website, [www.justiceinitiative.org](http://www.justiceinitiative.org), through which it disseminates reports, briefing papers, fact sheets and other publications (<https://www.justiceinitiative.org/publications>), including those based on information received through FOIA requests,<sup>6</sup> as well as publication of records received through FOIA requests.<sup>7</sup> It also directly distributes hard copies of publications and disseminates information via quarterly email newsletters, blogs ([www.opensocietyfoundations.org/voices](http://www.opensocietyfoundations.org/voices)), Twitter ([www.twitter.com/OSFJustice](http://www.twitter.com/OSFJustice)) and Facebook ([www.facebook.com/OpenSocietyFoundations](http://www.facebook.com/OpenSocietyFoundations)).

As such, Justice Initiative is “primarily engaged in disseminating information” and a “representative of the news media” within the meaning of the FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *see also Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations); *cf. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding that the Electronic Privacy Information Center was a representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (National Security Archive deemed a representative of the news media after publishing one book and indicating its intention to publish a set of documents on national and international politics and nuclear policy).

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<sup>6</sup> *See e.g.*, Open Society Justice Initiative, *Unmaking Americans: Insecure Citizenship in the United States* (2019), 45-46, available at <https://www.justiceinitiative.org/publications/unmaking-americans>; Open Society Justice Initiative, *Unmaking Americans: Insecure Citizenship in the United States—Fact Sheet* (2019), 1, <https://www.justiceinitiative.org/publications/unmaking-americans-insecure-citizenship-in-the-united-states-fact-sheet>.

<sup>7</sup> *See e.g.*, *Open Society Justice Initiative v. Central Intelligence Agency (CIA) et al.*, 44795-Jamal-Khashoggi-FOIA, available at <https://www.documentcloud.org/public/search/projectid:44795-Jamal-Khashoggi-FOIA>; *Open Society Justice Initiative v. U.S. Department of Defense et al. and U.S. Department of Health and Human Services et al.*, COVID-19-FOIA, available at <https://www.documentcloud.org/public/search/Project:%20%22COVID-19%20FOIA%22>.

Justice Initiative clearly provided sufficient information in its Request to warrant designation under the FOIA as an organization “primarily engaged in disseminating information” to the public.<sup>8</sup>

**The Requested Information is Urgently Needed to Inform the Public Concerning Actual or Alleged Federal Government Activity and/or Failure to Release the Information Will Impair Substantial Due Process Rights**

To repeat from Justice Initiative’s FOIA request regarding why there is an “urgency to inform the public about an actual or alleged Federal Government activity” (category 2) and also why “substantial due process rights” are at risk (category 3):<sup>9</sup>

. . . it is unclear who and what activities are subject to punishment under the terms of the [Executive Order (“EO”)]. No further guidance on how the EO may be applied has been released, leaving individuals who are associated with the ICC uncertain about if they may be implicated and what activities they should or should not avoid. As described by a former Senior Advisor to the Director of the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), the lead agency charged with implementing and enforcing economic sanctions, the EO is a “naked EO” since no one is yet designated. He explained that this type of EO results in uncertainty for individuals regarding how to tailor their behavior so not to risk designation, leading him to conclude “that the goal is to chill current and future activities.”

The EO has become a source of considerable confusion given the breadth and ambiguity of its provisions. U.S. law professors, ICC supporters and non-government organizations have all publicly expressed concern that their and others’ activity appears to possibly fall

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<sup>8</sup> See also e.g., *Open Society Justice Initiative v. Dep’t of Homeland Security et al.*, 1:20-cv-05096 (S.D.N.Y, July 2, 2020) (Compl. Ex. O.) (recognizing Justice Initiative as “an entity primarily engaged in disseminating information”); *Open Society Justice Initiative v. Dep’t of Justice et al.*, 1:20-cv-00706 (S.D.N.Y, March 11, 2020) (Compl. Ex. D.) (granting Justice Initiative’s request for a fee waiver “because of your demonstrated ability to disseminate information to the Public”).

<sup>9</sup> Exhibit A: Open Society Justice Initiative FOIA Request, July 9, 2020 (internal citations omitted).

within the terms of the EO without more information. Laws that are overbroad or unclear can lead people to refrain from engaging in permissible actions because they are unsure whether they will be legally sanctioned, creating a “chill” under the “threat of enforcement.” Longstanding jurisprudence established that the terms of a law “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties...and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of *due process* of law.”

As written, the EO is open, giving officials broad leeway in its application. It implicates family members, academics, human rights advocates and nongovernmental organizations, given their connection to and regular work with the ICC and affected communities. It also affects Americans serving the ICC as judges, staff, interns, consultants, and visiting advisors, as well as businesses providing services to it. The day following the EO’s release, the *American Bar Association*, the largest association of lawyers in the world and “the national voice of the legal profession,” released a statement noting it was “deeply disturbed” by the EO. On June 26, a group of 174 American lawyers and legal scholars, working across 80 U.S. universities and including three former U.S. ambassadors, U.S. lawyers who participated in cross-jurisdictional war crimes cases, and the last surviving U.S. Nuremberg prosecutor, sent a letter to the White House asking the president to rescind the EO, citing that it is “wrong in principle,” “contrary to American values” and “mock[ed] our bipartisan commitment to human rights and the rule of law.”

U.S. sanctioning action usually involves accused terrorists, weapons proliferators or perpetrators of human rights violations. However, this EO is unprecedented because it targets and potentially violates the free speech and due process rights of law-abiding U.S. nationals and/or entities. The Supreme Court holds firm that the right of speech is a “transcendent value,” entitled to special protections as it is so “supremely precious.” This has resulted in robust jurisprudence barring activity that may “chill” protected speech, by recognizing, and guarding against, the myriad ways that government action can restrict it. As noted by legal experts, “the vaguely drafted Order is overbroad in many ways” “that

will cause, at a minimum, a chilling effect on NGO's, businesses, academics, and academic institutions, as well as others, who directly or indirectly do business, advise, or support the ICC in any manner." As such, it is urgent that the public have access to information that can inform it of the motivations behind, and specifics of, the EO so that they can engage in activities without fear.

Since the Justice Initiative's July 9 submission, there has been continued and considerable public interest in the parameters and implication of the Executive Order, especially as it concerns significant recognized interests. For instance, on July 29, the New York City Bar Association issued a statement, noting that "the Executive Order will improperly interfere with . . . the work of U.S. and foreign lawyers, academics, and NGOs" and is "likely to have a chilling effect on those who would otherwise have a legitimate interest in ensuring that genocide, crimes against humanity, and war crimes are properly investigated and prosecuted."<sup>10</sup> Likewise, numerous articles and letters were issued describing the lack of information and threat to constitutional rights by the Executive Order,<sup>11</sup> including an article written by law professors noting that the Executive Order "has extremely troubling consequences for the constitutional rights of US citizens to due process of law, free speech, and freedom of expression and association."<sup>12</sup>

Since the promulgation of Executive Order 13928 "*Blocking Property of Certain Persons Associated with the International Criminal Court*," the public has been deprived of any and all information pertaining to the Order's formation, intention and implementation. This has resulted in the compromise of significant recognized interests, including, as recited above, the public's right to know, of speech and due process. The public's need to have the requested documents is

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<sup>10</sup> New York Bar Ass'n, *Statement Opposing U.S. Sanctions on Persons Working with or for the International Criminal Court*, July 29, 2020, available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/executive-order-authorizing-international-criminal-court-icc-sanctions>.

<sup>11</sup> See, e.g., Benjamin B. Ferencz, *Nuremberg Trial Prosecutor's Warning About Trump's War on the Rule of Law*, Moyers, July 20, 2020, <https://billmoyers.com/story/nuremberg-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>; David Luban, *America the Unaccountable*, The N.Y. Review of Books, August 20, 2020, <https://www.nybooks.com/articles/2020/08/20/icc-justice-america-unaccountable/>; Emilia Currey, *Trump administration attack on International Criminal Court dangerous and counterproductive*, ASPI Strategist, July 22, 2020, <https://www.aspistrategist.org.au/trump-administration-attack-on-international-criminal-court-dangerous-and-counterproductive/>.

<sup>12</sup> Susan Akram & Gabor Rona, *Why the Executive Order on the ICC is Unconstitutional and Self-Defeating*, *Opinio Juris*, August 13, 2020, <https://opiniojuris.org/2020/08/13/why-the-executive-order-on-the-icc-is-unconstitutional-and-self-defeating/>.

urgent because only with the requested documents can the public know what the Executive Order prohibits, and only with this knowledge can the public's constitutionally protected interests be realized.

The U.S. Supreme Court has made clear that the “public awareness of the government's actions is ‘a structural necessity in a real democracy.’” *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)); *see also*, *Protect Democracy Project, Inc. v. DOD*, 263 F. Supp. 3d 293, 300 (D.D.C. 2017) (granting motion for preliminary injunction directing expedited processing regarding request for records based in part on idea that “[b]eing closed off from . . . debate is itself a harm in an open democracy”). Not only is public awareness a necessity, but so too is *timely* public awareness. *Id.*

For the foregoing reasons, State erred in denying the Justice Initiative expedited processing.

Thank you for your prompt attention to this Appeal. Please **send all correspondence by email** to Natasha Arnpriester at [Natasha.Arnpriester@opensocietyfoundations.org](mailto:Natasha.Arnpriester@opensocietyfoundations.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Arnpriester', with a stylized, flowing script.

Natasha Arnpriester  
Betsy Apple  
Christian De Vos  
James A. Goldston  
Open Society Justice Initiative

# **EXHIBIT A**



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**July 9, 2020**

*Via email*

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FOIARequest@state.gov

**DEPARTMENT OF JUSTICE**  
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MRUFOIA.Requests@usdoj.gov

**DEPARTMENT OF TREASURY**  
FOIA and Transparency  
Washington, DC 20220  
treasfoia@treasury.gov

**Re: Freedom of Information Act Request**  
**Expedited Processing and Fee Waiver Requested**

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of your agency, submitted on behalf of the Open Society Justice Initiative (“Justice Initiative”), an operational program of the Open Society Institute (“OSI”), a New York State charitable trust and nonprofit organization. We request records concerning events leading to the June 11, 2020 Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court (“ICC” or “Court”) and persons associated with it. We respectfully ask that this request is forwarded to any other component agency as appropriate. Expedited processing is requested pursuant to 5 U.S.C. § 552(a)(6)(E), as is a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

#### **A. BACKGROUND**

On November 3, 2017, the ICC Presidency assigned to a Pre-Trial Chamber of the Court a request from the ICC Prosecutor, Fatou Bensouda, for judicial authorization of an investigation into alleged crimes committed in connection with the armed conflict in Afghanistan.<sup>1</sup> The request sought an investigation focused “solely upon war crimes and crimes against humanity allegedly committed since 1 May 2003 on the territory of Afghanistan as well as war crimes closely linked to the situation in Afghanistan allegedly committed since 1 July 2002 on the territory of other States Parties to the Rome Statute,”<sup>2</sup> the treaty that established the ICC.

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<sup>1</sup> International Criminal Court (The Presidency), *Decision assigning the situation in the Islamic Republic of Afghanistan*, No. ICC-01/17, Nov. 3, 2017, available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06574.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06574.PDF).

<sup>2</sup> *Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan*, ICC, Nov. 3, 2017, [https://www.icc-cpi.int/Pages/item.aspx?name=171103\\_OTP\\_Statement](https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement).

As noted by the White House, the “Prosecutor indicated this investigation would focus on Afghan National Security Forces, the Taliban, and the Haqqani network, alongside war crimes allegedly committed by United States service members and intelligence professionals during the war in Afghanistan.”<sup>3</sup> On September 10, 2018, the White House issued a release warning that should the ICC proceed with an investigation, the Administration “will consider...ban[ning] ICC judges and prosecutors from entering the United States, sanction their funds in the United States financial system, and, prosecute them in the United States criminal system.”<sup>4</sup>

On March 15, 2019, Secretary of State Mike Pompeo announced that the U.S. would impose visa restrictions on “individuals directly responsible for any [ICC] investigation of U.S. personnel.”<sup>5</sup> On April 3, the Office of the Prosecutor of the ICC (“OTP”) confirmed that the Prosecutor’s visa was revoked.<sup>6</sup> On April 12, the ICC Pre-Trial Chamber rejected the Prosecutor’s request to investigate the situation in Afghanistan.<sup>7</sup> On June 7, the Prosecutor sought leave to appeal the decision.<sup>8</sup> On September 17, the Chamber partially granted the Prosecutor’s request, allowing a limited appeal to proceed.<sup>9</sup> On October 9, Secretary Pompeo issued a restatement noting that the U.S. policy on the ICC remained unchanged.<sup>10</sup>

On March 5, 2020, the Appeals Chamber of the ICC decided unanimously to authorize the Prosecutor’s investigation into the situation in Afghanistan, amending the original Pre-Trial Chamber’s April 12 decision.<sup>11</sup> On March 17, Secretary Pompeo announced that the U.S. would seek to sanction OTP staff members Sam Shoamanesh (*chef de cabinet*) and Phakiso Mochochoko (Head of Jurisdiction, Complementarity, and Cooperation), along with their families, for assisting the Prosecutor’s efforts to pursue an investigation into the situation in Afghanistan.<sup>12</sup>

On May 29, Secretary Pompeo stated that the public would soon see “a series of announcements from not just the State Department, [but] from all across the United States government that attempt to push back against what the ICC is up to.”<sup>13</sup> On June 11, President Trump issued Executive Order 13928, *Blocking Property Of Certain Persons Associated With The International Criminal Court* (“EO”) that outlined a prospective framework to impose economic and travel sanctions on persons associated with or supporting the ICC. The EO invokes four laws: the National Emergencies Act (50 U.S.C. 1601 et seq.) (“NEA”), which enables the president to declare a national emergency; the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (“IEEPA”), a sanctions regime; the Immigration and Nationality Act

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<sup>3</sup> *Protecting American Constitutionalism and Sovereignty from the International Criminal Court*, White House, Sept. 10, 2018, <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/>.

<sup>4</sup> *Id.*

<sup>5</sup> Lesley Wroughton, *U.S. imposes visa bans on International Criminal Court investigators*, Reuters, Mar. 15, 2019, <https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH>.

<sup>6</sup> Stephanie van den Berg & Leslie Wroughton, *U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation*, Reuters, Apr. 4, 2019, <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP>.

<sup>7</sup> Situation in the Islamic Republic of Afghanistan, Investigation, ICC-02/17, ICC, <https://www.icc-cpi.int/afghanistan>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *U.S. Policy on the International Criminal Court Remains Unchanged*, U.S. Dep’t of State, Oct. 9, 2019, <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/>.

<sup>11</sup> Situation in the Islamic Republic of Afghanistan, Investigation, ICC-02/17, ICC, <https://www.icc-cpi.int/afghanistan>.

<sup>12</sup> *Secretary Michael R. Pompeo's Remarks to the Press*, Dep’t of State, Mar. 17, 2020, <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6>.

<sup>13</sup> *Secretary Michael R. Pompeo With Marc Thiessen and Danielle Pletka of AEI's 'What The Hell Is Going On' Podcast*, U.S. Dep’t of State, May 29, 2020, <https://www.state.gov/secretary-michael-r-pompeo-with-marc-thiessen-and-danielle-pletka-of-aeis-what-the-hell-is-going-on-podcast/>.

of 1952 (8 U.S.C. 1182(f)) (“INA”), which permits the exclusion of foreign nationals from entering the United States; and section 301 of title 3, United States Code, which authorizes the president to delegate powers to executive agencies. The EO describes the ICC’s investigation of U.S. personnel and personnel of U.S. allies that have not consented to ICC jurisdiction as “an unusual and extraordinary threat to the national security and foreign policy of the United States” and as such, the President must declare “a national emergency to deal with that threat.”<sup>14</sup>

As written, the EO does not result in the automatic designation of any person or entity. Instead, it lists the categories of persons and entities that can be sanctioned, as to be determined by the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General. Those impacted by the EO include U.S. persons, including U.S. entities, as well as foreign persons and foreign entities, along with property inside and outside the United States.

## **B. RECORDS REQUESTED**

The Justice Initiative requests expedited disclosure of records,<sup>15</sup> including communications,<sup>16</sup> created on or after November 3, 2017,<sup>17</sup> including:

1. All records that include the following terms:
  - a. “Int! Crim! Court”, ICC or “Rome Statute” AND:
    - i. “Ex! Or!” or “EO”
    - ii. “National Emergencies Act” or NEA
    - iii. “International Emergency Economic Powers Act” or IEEPA
    - iv. sanction! or designat!
    - v. “First Am!”, “1<sup>st</sup> Am!” or “1A” (as it pertains to the “First Amendment”)
    - vi. defer! or “art! 16”
  - b. “Fatou Bensouda”, Bensouda, “ICC Prosecutor”, or OTP
  - c. “Sam Shoamanesh” or Shoamanesh
  - d. “Phakiso Mochochoko” or Mochochoko
  - e. “ICC judg!”
2. Cables and other communications to and from U.S. embassies regarding policy positions, requests and queries, to and from their host government(s) pertaining to the ICC.

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<sup>14</sup> Executive Order 13928, *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, Jun. 11, 2020.

<sup>15</sup> For the purpose of this request, the term “records” includes, but is not limited to, any and all agendas; agreements; analyses; calendars; correspondence; data; databases; directives; documents; e-mails and e-mail attachments, including those sent through personal email accounts (e.g., Gmail); reports; rules; schedules; studies; tables of contents and contents of binders; talking points; technical specifications; training materials; examinations; faxes; files; guidance; guidelines; evaluations; instructions; letters; manifests; manuals; memoranda; notes; orders; prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; policies; procedures; protocols; text messages and messages sent or received through other messaging applications (e.g., WhatsApp, iMessage, Signal); voicemails; and any other materials. In the event that such records once existed but have now been destroyed, please disclose any records that are integrally related to, summarize, or are interchangeable with said records. *Press clippings and news articles that are unaccompanied by any commentary need not be produced.*

<sup>16</sup> For the purpose of this request, the term “communications” includes, but is not limited to, directives, cables, memoranda; correspondence; briefings; e-mails and e-mail attachments, including sent through personal email accounts (e.g., Gmail); faxes; instructions; letters; text messages and messages sent or received through other messaging applications (e.g., WhatsApp, iMessage, Signal); and voicemails. In the event that such communications once existed but are no longer available, please disclose any records that are integrally related to, summarize, or are interchangeable with said records.

<sup>17</sup> The date the ICC Presidency assigned the Afghanistan situation to a Pre-Trial Chamber in anticipation of the Prosecutor’s request for authorization to investigate. International Criminal Court (The Presidency), *Decision assigning the situation in the Islamic Republic of Afghanistan*, No. ICC-01/17, Nov. 3, 2017, available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06574.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06574.PDF).

### C. APPLICATION FOR EXPEDITED PROCESSING

The Justice Initiative requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), as the records requested are urgently needed to inform the public about actual or alleged government activity, *see* 5 U.S.C. § 552(a)(6)(E)(v)(II), and the Justice Initiative is an organization “primarily engaged in disseminating information...to inform the public concerning” that activity. 5 U.S.C. § 552(a)(6)(E)(v)(I-II). While meeting the FOIA’s expedition requirements, the Justice Initiative also requests expedition on the grounds that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency’s regulations. *See* 28 CFR § 16.5(e)(iii); 31 CFR § 1.4(e)(iii); 22 CFR § 171.11(f)(3). **We affirm that the following information and statements concerning the need for expedited processing are true and correct to the best of our knowledge and belief.**

The Justice Initiative is “primarily engaged in disseminating information” within the meaning of the FOIA.<sup>18</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations); *cf. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding that the Electronic Privacy Information Center was a representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (National Security Archive deemed a representative of the news media after publishing one book and indicating its intention to publish a set of documents on national and international politics and nuclear policy).

The Justice Initiative is an operating public interest law center dedicated to upholding human rights and the rule of law through litigation, advocacy, research, and technical assistance, with offices in New York, London and Berlin. It is part of the Open Society Institute (“OSI”), a tax-exempt, non-partisan, not-for-profit organization, headquartered in New York City. OSI believes that solutions to national, regional and global challenges require the free exchange of ideas and thought, and works to build vibrant and inclusive societies, grounded in respect for human rights and the rule of law, whose governments are accountable and open to the participation of all people. In support of their shared mission, OSI and the Justice Initiative share information with the public free of charge, through their websites, newsletters, and other publications to promote public understanding and robust debate. Disseminating information is among the Justice Initiative’s core activities. To accomplish its goals, the Justice Initiative maintains a website, [www.justiceinitiative.org](http://www.justiceinitiative.org), through which it disseminates reports, briefing papers, fact sheets and other publications ([www.justiceinitiative.org/publications](http://www.justiceinitiative.org/publications)) relating to its mission, as well as records produced through FOIA requests.<sup>19</sup> It also directly distributes hard copies of publications and disseminates information via quarterly email newsletters, blogs ([www.opensocietyfoundations.org/voices](http://www.opensocietyfoundations.org/voices)), Twitter ([www.twitter.com/OSFJustice](http://www.twitter.com/OSFJustice)) and Facebook ([www.facebook.com/OpenSocietyFoundations](http://www.facebook.com/OpenSocietyFoundations)).

At this moment, it is unclear who and what activities are subject to sanction or punishment under the terms of the EO. No further guidance on how the EO may be applied has been released, leaving individuals associated with the ICC and its work uncertain about whether they might be targets and whether they should avoid certain activities. As described by a former Senior Advisor to the Director of the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), the lead agency charged with

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<sup>18</sup> *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).

<sup>19</sup> *See e.g., Open Society Justice Initiative v. Central Intelligence Agency (CIA) et al.*, 44795-Jamal-Khashoggi-FOIA, available at <https://www.documentcloud.org/public/search/projectid:44795-Jamal-Khashoggi-FOIA>.

implementing and enforcing economic sanctions, the EO is a “naked EO” since no one is yet designated.<sup>20</sup> This type of EO results in uncertainty for individuals regarding how to tailor their behavior so not to risk designation, leading to the conclusion “that the goal is to chill current and future activities.”<sup>21</sup>

The EO has become a source of considerable confusion given the breadth and ambiguity of its provisions. Law professors, lawyers, advocates and non-governmental organizations have all publicly expressed concern that, without more information, their activities appear to possibly fall within the terms of the EO.<sup>22</sup> Laws that are overbroad or unclear can lead people to refrain from engaging in permissible actions because they are unsure whether they will be legally sanctioned, creating a “chill” under the “threat of enforcement.”<sup>23</sup> It is well-established under U.S. constitutional jurisprudence that the terms of a law “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties...and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of *due process* of law.”<sup>24</sup>

As written, the EO is open-ended, giving officials broad leeway in its application, implicating even family members of ICC personnel, academics, human rights advocates and nongovernmental organizations, who are connected to or work with the ICC. It also affects those U.S. persons serving the ICC in its three primary organs (i.e. OTP, Chambers, Registry), including staff, interns, consultants and advisors, as well as businesses providing services to the Court. The day following the EO’s release, the *American Bar Association*, the largest association of lawyers in the world and “the national voice of the legal profession,” released a statement noting it was “deeply disturbed” by the EO.<sup>25</sup> On June 26, a group of 174 U.S. lawyers and legal scholars, working across 80 U.S. universities and including three former U.S. ambassadors, U.S. lawyers who participated in cross-jurisdictional war crimes cases, and the last surviving U.S. Nuremberg prosecutor, sent a letter to the White House asking the president to rescind the EO, citing that it is “wrong in principle,” “contrary to American values” and “mock[ed] our bipartisan commitment to human rights and the rule of law.”<sup>26</sup>

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<sup>20</sup> Adam M. Smith, *Dissecting the Executive Order on Int’l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs*, Just Security, Jun. 15, 2020, <https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/>.

<sup>21</sup> *Id.*

<sup>22</sup> See e.g., Leila Sadat, *First They Came For Me and My Colleagues: The U.S. Attack on the Int’l Criminal Court*, Just Security, Jun. 29, 2020, <https://www.justsecurity.org/70996/first-they-came-for-me-and-my-colleagues-the-us-attack-on-the-intl-criminal-court/>; Diane Marie Amann, *I help children in armed conflict. The President is forcing me to stop*, Just Security, Jun. 29, 2020, <https://www.justsecurity.org/71048/i-help-children-in-armed-conflict-the-president-is-forcing-me-to-stop/>; Jennifer Trahan & Megan Fairlie, *The International Criminal Court is Hardly a Threat to US National Security*, *Opinio Juris*, Jun. 15, 2020; <http://opiniojuris.org/2020/06/15/the-international-criminal-court-is-hardly-a-threat-to-us-national-security/>; *Human Rights First Criticizes Trump Administration Executive Order On the ICC*, Human Rights First, Jun. 11, 2020, <https://www.humanrightsfirst.org/press-release/human-rights-first-criticizes-trump-administration-executive-order-icc/>; *Open Society Condemns Trump Administration for Undermining International Rule of Law*, Open Society Foundations, Jun. 11, 2020, <https://www.opensocietyfoundations.org/newsroom/open-society-condemns-trump-administration-for-undermining-international-rule-of-law>; Letter to President Donald Trump Against Sanctions on ICC Investigators of Atrocities, *available at* <https://www.scribd.com/document/467370291/Lawyers-statement-on-ICC-sanctions>.

<sup>23</sup> *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

<sup>24</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (emphasis added).

<sup>25</sup> ABA President Judy Perry Martinez statement *Re: U.S. sanctions of International Criminal Court personnel*, Am. Bar Ass’n., Jun. 12, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/>

<sup>26</sup> Letter to President Donald Trump Against Sanctions on ICC Investigators of Atrocities, *available at* <https://www.scribd.com/document/467370291/Lawyers-statement-on-ICC-sanctions>. See also, Gen. Wesley K. Clark, *The United States Has Nothing to Fear From the ICC*, *Foreign Policy*, Jul. 2, 2020, <https://foreignpolicy.com/2020/07/02/the-united-states-has-nothing-to-fear-from-the-icc/>.

U.S. sanctioning action usually involves accused terrorists, weapons proliferators or perpetrators of human rights violations.<sup>27</sup> However, this EO is unprecedented because it targets and potentially violates the free speech and due process rights of law-abiding U.S. nationals and/or entities.<sup>28</sup> The Supreme Court holds firm that the right of speech is a “transcendent value,”<sup>29</sup> entitled to special protections as it is so “supremely precious.”<sup>30</sup> This has resulted in robust jurisprudence barring activity that may “chill” protected speech, by recognizing, and guarding against, the myriad ways that government action can restrict it.<sup>31</sup> As noted by legal experts, “the vaguely drafted Order is overbroad in many ways”<sup>32</sup> “that will cause, at a minimum, a chilling effect on NGO’s, businesses, academics, and academic institutions, as well as others, who directly or indirectly do business, advise, or support the ICC in any manner.”<sup>33</sup> As such, it is urgent that the public have access to information that can inform it of the motivations behind, and specifics of, the EO so that they can engage in activities without fear.

Since the Justice Initiative is an organization “primarily engaged in disseminating information” and this Request seeks records to inform the public of urgently needed information regarding government activity, expedition must be granted.

#### **D. APPLICATION FOR FEE WAIVER**

We request a waiver of search, review and duplication fees on the grounds that disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth in the Section above, the information and records at issue will contribute significantly to the public understanding of the implications of the EO in question and its application. Furthermore, the Justice Initiative, a non-profit entity, does not seek disclosure of these records for commercial gain and intends to disseminate the information disclosed from this request to the public at no cost.

For the same reasons that render the Justice Initiative as “primarily engaged in disseminating information,” *see* Section C. *supra*, it is also a “representative of the news media” within the meaning of the FOIA. As such, it is entitled to a fee waiver. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also* *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (recognizing Congress’s intent that FOIA’s fee waiver provision is to be “liberally construed in favor of waivers for noncommercial requesters”).

\* \* \* \* \*

Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 5 U.S.C. § 552(a)(6)(A)(i), respectively, we look forward to your reply to the request for expedited processing within ten calendar days, and to the request for disclosure within twenty days.

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<sup>27</sup> Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use* (R45618) Cong. Research Serv., Mar. 20, 2019, available at <https://fas.org/sgp/crs/natsec/R45618.pdf>.

<sup>28</sup> For a discussion on how broad EO provisions can implication free speech and due process rights, *see* Andrew Boyle, *Recent North Korea Arrest Raises Questions About Free Speech Rights*, Brennan Center, Apr. 30, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/recent-north-korea-arrest-raises-questions-about-free-speech-rights>.

<sup>29</sup> *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

<sup>30</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>31</sup> *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1651 n.88. (2013).

<sup>32</sup> Jennifer Trahan & Megan Fairlie, *The International Criminal Court is Hardly a Threat to US National Security*, *Opinio Juris*, Jun. 15, 2020, <http://opiniojuris.org/2020/06/15/the-international-criminal-court-is-hardly-a-threat-to-us-national-security/>.

<sup>33</sup> David M. Crane, *The Wrong Side of History—The United States and the International Criminal Court*, *Jurist*, Jun. 13, 2020, <https://www.jurist.org/commentary/2020/06/david-crane-wrong-history-icc/>.

We request that responsive records are provided electronically in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records are provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files. Press clippings and news articles that are unaccompanied by any commentary need not be produced.

If this request is denied in whole or part, please justify all withholdings by reference to specific exemptions and statutes, as applicable. For each withholding, please also explain why your agency "reasonably foresees that disclosure would harm an interest protected by an exemption" or why "disclosure is prohibited by law[.]" 5 U.S.C. § 552(a)(8)(A)(i). We seek the release of all segregable portions of otherwise exempt material, *see* 5 U.S.C. § 552(b). We also reserve the right to appeal any decision in relation to this Request.

Thank you for your prompt attention to this Request. Please send all records and correspondence by email to Natasha Arnpriester at [Natasha.Arnpriester@opensocietyfoundations.org](mailto:Natasha.Arnpriester@opensocietyfoundations.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Arnpriester', with a stylized flourish at the end.

Natasha Arnpriester  
Betsy Apple  
Christian De Vos  
James A. Goldston  
Open Society Justice Initiative  
224 West 57th Street  
New York, New York 10019  
T: (212) 548 0600  
F: (212) 548 4662

# **EXHIBIT B**



## Natasha Arnpriester

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**From:** A\_FOIAacknowledgement@groups.state.gov  
**Sent:** Monday, July 13, 2020 9:49 AM  
**To:** Natasha Arnpriester  
**Subject:** Ref: F-2020-06716, Freedom of Information Act Acknowledgement

**\*\*THIS EMAIL BOX IS NOT MONITORED, PLEASE DO NOT REPLY TO THIS EMAIL.\*\***

Ms. Arnpriester:

This email acknowledges receipt of your July 9, 2020, Freedom of Information Act (FOIA) (5 U.S.C. § 552) request received by the U.S. Department of State, Office of Information Programs and Services on July 9, 2020, regarding events leading to the June 11, 2020, Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court and persons associated with it. Unless you advise otherwise, we will treat as non-responsive any compilations of publicly available news reports and any publicly available documents not created by the U.S. government, such as mass-distribution emails from news media. This Office assigned your request the subject reference number and placed it in the complex processing track where it will be processed as quickly as possible. See 22 CFR § 171.11(h).

You requested a waiver for all fees associated with the processing of your request. Please be advised this Office will make a determination regarding a fee waiver at a later date.

Also, you requested expedited processing of this request. According to 22 CFR § 171.11(f), requests shall receive expedited processing when a requester demonstrates a “compelling need” for the information exists for one of the following reasons: (1) failure to obtain the requested information on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (2) the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal government activity; or (3) failure to release the information would impair substantial due process rights or harm substantial humanitarian interests. Your request does not demonstrate a “compelling need” for the requested information. Therefore, this Office denies your request for expedited processing.

If you are not satisfied with this Office’s determination in response to your request for expedited processing, you may administratively appeal to: Appeals Officer, Appeals Review Panel, Office of Information Programs and Services, U.S. Department of State, 2201 C Street, NW, Suite B266, Washington, D.C. 20520; or facsimile at 202-485-1718. Your appeal must be postmarked or electronically transmitted within 90 days of the date of this email.

This Office will not be able to respond within the 20 days provided by the statute due to “unusual circumstances.” See 5 U.S.C. § 552(a)(6)(B)(i)-(iii). In this instance, the unusual circumstances include the need to search for and collect requested records from other Department offices or Foreign Service posts.

If you have any questions regarding your request, would like to narrow the scope or arrange an alternative time frame to speed its processing, or would like an estimated date of completion, please contact our FOIA Requester Service Center or our FOIA Public Liaison by email at FOIAstatus@state.gov or telephone at 202-261-8484. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The

contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

*/s/ Nicholas J. Cormier*

Nicholas J. Cormier

Chief, Requester Communications Branch

Office of Information Programs and Services

**\*\*THIS EMAIL BOX IS NOT MONITORED, PLEASE DO NOT REPLY TO THIS EMAIL.\*\***

**August 21, 2020**

**Open Society**  
**Justice Initiative**  
224 West 57th Street  
New York, NY 10019, USA

p. +1 212-548-0600  
f. +1 212-548-4608

***Submitted via portal and email<sup>1</sup>***

**DEPARTMENT OF JUSTICE**  
Director, Office of Information Policy  
Sixth Floor  
441 G Street, NW  
Washington, DC 20530-0001

**Re: FOIA No. 2020-01700 Appeal of the Department of Justice’s Denial of Expedited Processing**

We write to administratively appeal the denial of expedited processing by the Department of Justice (“DOJ”) of a Freedom of Information Act (“FOIA”) request (**2020-01700**) submitted by the Open Society Justice Initiative (“Justice Initiative”), an operational program of the Open Society Institute (“OSI”), a New York State charitable trust and nonprofit organization.

On July 9, 2020, Justice Initiative submitted a FOIA request (“Request”) to DOJ seeking release of records concerning “events leading to the June 11, 2020 Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court (“ICC”) and persons associated with it.”<sup>2</sup> The Request described in detail the factual context for seeking these records under FOIA, as well as facts relevant for the Justice Initiative’s grounds for seeking expedited processing. On July 31, 2020, DOJ summarily denied the Justice Initiative’s request for expedited processing.<sup>3</sup> This letter constitutes a timely administrative appeal of that denial under the FOIA, 5 U.S.C. § 552, and applicable regulations.

**DOJ Erred in Denying Justice Initiative Expedited Processing**

The Justice Initiative requested expedited processing (1) pursuant to 5 U.S.C. § 552(a)(6)(E), as

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<sup>1</sup> On August 21, 2020, this Appeal was transmitted via e-mail to Valeree Villanueva, FOIA Public Liaison, Office of Information Policy (OIP), Dep’t of Justice.

<sup>2</sup> Exhibit A: Open Society Justice Initiative FOIA Request, July 9, 2020.

<sup>3</sup> See Exhibit B: Letter from Douglas R. Hibbard, Chief, Initial Request Staff, Dep’t of Justice, July 31, 2020.

the information and records requested are urgently needed to inform the public about actual or alleged government activity, *see* 5 U.S.C. § 552(a)(6)(E)(v)(II), and the Justice Initiative is an organization “primarily engaged in disseminating information . . . to inform the public concerning” that activity. In addition, the Justice Initiative requested expedition (2) on the grounds that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency’s regulations. *See* 28 CFR § 16.5(e)(iii).

DOJ summarily denied the Justice Initiative expedited processing on both grounds. With regards to the first reason that the Justice Initiative’s request warrants expedited processing, DOJ stated that based on the information provided it “cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public’s right to know about government activities generally.”<sup>4</sup> With regards to the second reason that warrants expedited processing, DOJ stated that it was denying expedition on the claim that “[c]ourts are reluctant to grant expedited processing unless a requester can show (1) ‘that [he] is facing grave punishment [in a criminal proceeding], and (2) that there is reason to believe information will be produced to aid the individual’s defense.’ Neither of these circumstances is present here.”<sup>5</sup> We disagree for the following reasons.

### **The Requested Information is Urgently Needed to Inform the Public Concerning Actual or Alleged Federal Government Activity and/or Failure to Release the Information Will Impair Substantial Due Process Rights**

DOJ’s denial of expedited processing did not reject the Justice Initiative’s status as a person primarily engaged in the dissemination of information.<sup>6</sup> Rather, it found only that there was no urgency to inform the public about an actual or alleged federal governmental activity. As noted in the Request regarding (1) why there is an “urgency to inform the public about an actual or alleged

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<sup>4</sup> *Id.* at p. 1.

<sup>5</sup> *Id.* (internal citations omitted)

<sup>6</sup> *See also e.g., Open Society Justice Initiative v. Dep’t of Homeland Security et al.*, 1:20-cv-05096 (S.D.N.Y., July 2, 2020) (Compl. Ex. O.) (recognizing Justice Initiative as “an entity primarily engaged in disseminating information”); *Open Society Justice Initiative v. Dep’t of Justice et al.*, 1:20-cv-00706 (S.D.N.Y., March 11, 2020) (Compl. Ex. D.) (granting Justice Initiative’s request for a fee waiver “because of your demonstrated ability to disseminate information to the Public”).

Federal Government activity” and also (2) why “substantial due process rights” are at risk:<sup>7</sup>

. . . it is unclear who and what activities are subject to punishment under the terms of the [Executive Order (“EO”)]. No further guidance on how the EO may be applied has been released, leaving individuals who are associated with the ICC uncertain about if they may be implicated and what activities they should or should not avoid. As described by a former Senior Advisor to the Director of the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), the lead agency charged with implementing and enforcing economic sanctions, the EO is a “naked EO” since no one is yet designated. He explained that this type of EO results in uncertainty for individuals regarding how to tailor their behavior so not to risk designation, leading him to conclude “that the goal is to chill current and future activities.”

The EO has become a source of considerable confusion given the breadth and ambiguity of its provisions. U.S. law professors, ICC supporters and non-government organizations have all publicly expressed concern that their and others’ activity appears to possibly fall within the terms of the EO without more information. Laws that are overbroad or unclear can lead people to refrain from engaging in permissible actions because they are unsure whether they will be legally sanctioned, creating a “chill” under the “threat of enforcement.” Longstanding jurisprudence established that the terms of a law “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties...and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of *due process* of law.”

As written, the EO is open, giving officials broad leeway in its application. It implicates family members, academics, human rights advocates and nongovernmental organizations, given their connection to and regular work with the ICC and affected communities. It also affects Americans serving the ICC as judges, staff, interns, consultants, and visiting

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<sup>7</sup> Exhibit A: Open Society Justice Initiative FOIA Request, July 9, 2020 (internal citations omitted).

advisors, as well as businesses providing services to it. The day following the EO's release, the *American Bar Association*, the largest association of lawyers in the world and "the national voice of the legal profession," released a statement noting it was "deeply disturbed" by the EO. On June 26, a group of 174 American lawyers and legal scholars, working across 80 U.S. universities and including three former U.S. ambassadors, U.S. lawyers who participated in cross-jurisdictional war crimes cases, and the last surviving U.S. Nuremberg prosecutor, sent a letter to the White House asking the president to rescind the EO, citing that it is "wrong in principle," "contrary to American values" and "mock[ed] our bipartisan commitment to human rights and the rule of law."

U.S. sanctioning action usually involves accused terrorists, weapons proliferators or perpetrators of human rights violations. However, this EO is unprecedented because it targets and potentially violates the free speech and due process rights of law-abiding U.S. nationals and/or entities. The Supreme Court holds firm that the right of speech is a "transcendent value," entitled to special protections as it is so "supremely precious." This has resulted in robust jurisprudence barring activity that may "chill" protected speech, by recognizing, and guarding against, the myriad ways that government action can restrict it. As noted by legal experts, "the vaguely drafted Order is overbroad in many ways" "that will cause, at a minimum, a chilling effect on NGO's, businesses, academics, and academic institutions, as well as others, who directly or indirectly do business, advise, or support the ICC in any manner." As such, it is urgent that the public have access to information that can inform it of the motivations behind, and specifics of, the EO so that they can engage in activities without fear.

In determining whether requestors have demonstrated "urgency to inform," therefore necessitating a "compelling need" for the information requested, the Court of Appeals for the District of Columbia Circuit detailed the following three factors that courts must consider:

(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-*

*Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001) (internal quotation marks and citations omitted)

In this regard, as noted by DOJ’s FOIA Guidance, “courts have found a distinction between the general public interest in the overall subject matter of a FOIA request and the public interest that might be served by disclosure of the actual records sought or those responsive to a particular FOIA request.”<sup>8</sup> The Justice Initiative’s request falls in the latter.

Since the Justice Initiative’s July 9 submission, there has been continued and considerable public interest in the parameters and implication of the Executive Order, especially as it concerns significant recognized interests. For instance, on July 29, the New York City Bar Association issued a statement, noting that “the Executive Order will improperly interfere with . . . the work of U.S. and foreign lawyers, academics, and NGOs” and is “likely to have a chilling effect on those who would otherwise have a legitimate interest in ensuring that genocide, crimes against humanity, and war crimes are properly investigated and prosecuted.”<sup>9</sup> Likewise, numerous articles and letters were issued describing the lack of information and threat to constitutional rights by the Executive Order,<sup>10</sup> including an article written by law professors noting that the Executive Order “has extremely troubling consequences for the constitutional rights of US citizens to due process of law, free speech, and freedom of expression and association.”<sup>11</sup>

Since the promulgation of Executive Order 13928 “*Blocking Property of Certain Persons*

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<sup>8</sup> United States Department of Justice Guide to the Freedom of Information Act, Procedural Requirements (posted September 4, 2019), p. 39, available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

<sup>9</sup> New York Bar Ass’n, *Statement Opposing U.S. Sanctions on Persons Working with or for the International Criminal Court*, July 29, 2020, available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/executive-order-authorizing-international-criminal-court-icc-sanctions>.

<sup>10</sup> See, e.g., Benjamin B. Ferencz, *Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law*, Moyers, July 20, 2020, <https://billmoyers.com/story/nuremberg-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>; David Luban, *America the Unaccountable*, The N.Y. Review of Books, August 20, 2020, <https://www.nybooks.com/articles/2020/08/20/icc-justice-america-unaccountable/>; Emilia Currey, *Trump administration attack on International Criminal Court dangerous and counterproductive*, ASPI Strategist, July 22, 2020, <https://www.aspistrategist.org.au/trump-administration-attack-on-international-criminal-court-dangerous-and-counterproductive/>.

<sup>11</sup> Susan Akram & Gabor Rona, *Why the Executive Order on the ICC is Unconstitutional and Self-Defeating*, *Opinio Juris*, August 13, 2020, <https://opiniojuris.org/2020/08/13/why-the-executive-order-on-the-icc-is-unconstitutional-and-self-defeating/>.

*Associated with the International Criminal Court*,” the public has been deprived of any and all information pertaining to the Order’s formation, intention and implementation. This has resulted in the compromise of significant recognized interests, including, as recited above and in the Request, of speech and due process. The public’s need to have the requested documents is urgent because only with the requested documents can the public know what the Executive Order prohibits, and only with this knowledge can the public’s constitutionally protected interests be realized.

Again, in its denial of expedited processing, DOJ asserts that the information requested does not extend “beyond the public’s right to know about government activities generally” and that “[c]ourts are reluctant to grant expedited processing unless a requester can show (1) ‘that [he] is facing grave punishment [in a criminal proceeding], and (2) that there is reason to believe information will be produced to aid the individual’s defense.” (citing *Freeman v. United States Department of Justice*, No. 92-0557, slip op. at 4 (D.D.C. Oct. 2, 1992)).

While at least one court may be reluctant to grant expedition in a “criminal” proceeding unless the requester can demonstrate that the requested information will aid in the individual’s defense, it is not a persuasive holding to deny the Justice Initiative’s request for expedited processing. First, this is not a criminal case, but instead a matter of constitutional concerns and the obstruction of significant recognized interests. Nonetheless, if the consequences of punishment are what warrants expedition, as alluded to by *Freeman*, then the grave punishment that will flow from the Executive Order is analogous. Under the terms of the Order, persons who engage in the vaguely worded activities as listed, face a staggering range of economic actions and severe economic penalties per the law invoked—the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (“IEEPA”), a powerful executive sanctions regime. Persons who interact with those designated under the Order face civil penalties up to \$250,000 and criminal penalties of a fine of up to \$1,000,000 and imprisonment of up to 20 years.<sup>12</sup>

As laid out in *Al-Fayed*, and so illustrated both above and in the Request, the Request indeed

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<sup>12</sup> International Emergency Economic Powers Enhancement Act, Sec. 206; P.L. 110-96; 121 Stat. 1011.



concerns a federal government activity, the matter is of current exigency to the American public, and the consequences of delaying the release of relevant records will continue to compromise significant recognized interests—in this circumstance, e.g., constitutional rights, including free speech and due process; accountability of human rights violators; and the work of U.S. persons engaged with the ICC, including the Justice Initiative.

The U.S. Supreme Court has made clear that the “public awareness of the government's actions is ‘a structural necessity in a real democracy.’” *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)); *see also*, *Protect Democracy Project, Inc. v. DOD*, 263 F. Supp. 3d 293, 300 (D.D.C. 2017) (granting motion for preliminary injunction directing expedited processing regarding request for records based in part on idea that “[b]eing closed off from . . . debate is itself a harm in an open democracy”). Not only is public awareness a necessity, but so too is *timely* public awareness. *Id.*

For the foregoing reasons, DOJ erred in denying the Justice Initiative expedited processing.

Thank you for your prompt attention to this Appeal. Please **send all correspondence by email** to Natasha Arnpriester at [Natasha.Arnpriester@opensocietyfoundations.org](mailto:Natasha.Arnpriester@opensocietyfoundations.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Arnpriester', with a stylized flourish at the end.

Natasha Arnpriester  
Betsy Apple  
Christian De Vos  
James A. Goldston  
Open Society Justice Initiative

# **EXHIBIT A**

**Open Society**  
**Justice Initiative**  
224 West 57th Street  
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p. +1 212-548-0600  
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**July 9, 2020**

*Via email*

**DEPARTMENT OF STATE**  
Office of Information Programs &  
Services, A/GIS/IPS/RL  
SA-2, Suite 8100  
Washington, DC 20522-0208  
FOIARequest@state.gov

**DEPARTMENT OF JUSTICE**  
FOIA/PA Mail Referral Unit  
Room 115  
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Washington, DC 20530-0001  
MRUFOIA.Requests@usdoj.gov

**DEPARTMENT OF TREASURY**  
FOIA and Transparency  
Washington, DC 20220  
treasfoia@treasury.gov

**Re: Freedom of Information Act Request**  
**Expedited Processing and Fee Waiver Requested**

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of your agency, submitted on behalf of the Open Society Justice Initiative (“Justice Initiative”), an operational program of the Open Society Institute (“OSI”), a New York State charitable trust and nonprofit organization. We request records concerning events leading to the June 11, 2020 Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court (“ICC” or “Court”) and persons associated with it. We respectfully ask that this request is forwarded to any other component agency as appropriate. Expedited processing is requested pursuant to 5 U.S.C. § 552(a)(6)(E), as is a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

#### **A. BACKGROUND**

On November 3, 2017, the ICC Presidency assigned to a Pre-Trial Chamber of the Court a request from the ICC Prosecutor, Fatou Bensouda, for judicial authorization of an investigation into alleged crimes committed in connection with the armed conflict in Afghanistan.<sup>1</sup> The request sought an investigation focused “solely upon war crimes and crimes against humanity allegedly committed since 1 May 2003 on the territory of Afghanistan as well as war crimes closely linked to the situation in Afghanistan allegedly committed since 1 July 2002 on the territory of other States Parties to the Rome Statute,”<sup>2</sup> the treaty that established the ICC.

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<sup>1</sup> International Criminal Court (The Presidency), *Decision assigning the situation in the Islamic Republic of Afghanistan*, No. ICC-01/17, Nov. 3, 2017, available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06574.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06574.PDF).

<sup>2</sup> *Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan*, ICC, Nov. 3, 2017, [https://www.icc-cpi.int/Pages/item.aspx?name=171103\\_OTP\\_Statement](https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement).

As noted by the White House, the “Prosecutor indicated this investigation would focus on Afghan National Security Forces, the Taliban, and the Haqqani network, alongside war crimes allegedly committed by United States service members and intelligence professionals during the war in Afghanistan.”<sup>3</sup> On September 10, 2018, the White House issued a release warning that should the ICC proceed with an investigation, the Administration “will consider...ban[ning] ICC judges and prosecutors from entering the United States, sanction their funds in the United States financial system, and, prosecute them in the United States criminal system.”<sup>4</sup>

On March 15, 2019, Secretary of State Mike Pompeo announced that the U.S. would impose visa restrictions on “individuals directly responsible for any [ICC] investigation of U.S. personnel.”<sup>5</sup> On April 3, the Office of the Prosecutor of the ICC (“OTP”) confirmed that the Prosecutor’s visa was revoked.<sup>6</sup> On April 12, the ICC Pre-Trial Chamber rejected the Prosecutor’s request to investigate the situation in Afghanistan.<sup>7</sup> On June 7, the Prosecutor sought leave to appeal the decision.<sup>8</sup> On September 17, the Chamber partially granted the Prosecutor’s request, allowing a limited appeal to proceed.<sup>9</sup> On October 9, Secretary Pompeo issued a restatement noting that the U.S. policy on the ICC remained unchanged.<sup>10</sup>

On March 5, 2020, the Appeals Chamber of the ICC decided unanimously to authorize the Prosecutor’s investigation into the situation in Afghanistan, amending the original Pre-Trial Chamber’s April 12 decision.<sup>11</sup> On March 17, Secretary Pompeo announced that the U.S. would seek to sanction OTP staff members Sam Shoamanesh (*chef de cabinet*) and Phakiso Mochochoko (Head of Jurisdiction, Complementarity, and Cooperation), along with their families, for assisting the Prosecutor’s efforts to pursue an investigation into the situation in Afghanistan.<sup>12</sup>

On May 29, Secretary Pompeo stated that the public would soon see “a series of announcements from not just the State Department, [but] from all across the United States government that attempt to push back against what the ICC is up to.”<sup>13</sup> On June 11, President Trump issued Executive Order 13928, *Blocking Property Of Certain Persons Associated With The International Criminal Court* (“EO”) that outlined a prospective framework to impose economic and travel sanctions on persons associated with or supporting the ICC. The EO invokes four laws: the National Emergencies Act (50 U.S.C. 1601 et seq.) (“NEA”), which enables the president to declare a national emergency; the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (“IEEPA”), a sanctions regime; the Immigration and Nationality Act

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<sup>3</sup> *Protecting American Constitutionalism and Sovereignty from the International Criminal Court*, White House, Sept. 10, 2018, <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/>.

<sup>4</sup> *Id.*

<sup>5</sup> Lesley Wroughton, *U.S. imposes visa bans on International Criminal Court investigators*, Reuters, Mar. 15, 2019, <https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH>.

<sup>6</sup> Stephanie van den Berg & Leslie Wroughton, *U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation*, Reuters, Apr. 4, 2019, <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP>.

<sup>7</sup> Situation in the Islamic Republic of Afghanistan, Investigation, ICC-02/17, ICC, <https://www.icc-cpi.int/afghanistan>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *U.S. Policy on the International Criminal Court Remains Unchanged*, U.S. Dep’t of State, Oct. 9, 2019, <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/>.

<sup>11</sup> Situation in the Islamic Republic of Afghanistan, Investigation, ICC-02/17, ICC, <https://www.icc-cpi.int/afghanistan>.

<sup>12</sup> *Secretary Michael R. Pompeo's Remarks to the Press*, Dep’t of State, Mar. 17, 2020, <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6>.

<sup>13</sup> *Secretary Michael R. Pompeo With Marc Thiessen and Danielle Pletka of AEI's 'What The Hell Is Going On' Podcast*, U.S. Dep’t of State, May 29, 2020, <https://www.state.gov/secretary-michael-r-pompeo-with-marc-thiessen-and-danielle-pletka-of-aeis-what-the-hell-is-going-on-podcast/>.

of 1952 (8 U.S.C. 1182(f)) (“INA”), which permits the exclusion of foreign nationals from entering the United States; and section 301 of title 3, United States Code, which authorizes the president to delegate powers to executive agencies. The EO describes the ICC’s investigation of U.S. personnel and personnel of U.S. allies that have not consented to ICC jurisdiction as “an unusual and extraordinary threat to the national security and foreign policy of the United States” and as such, the President must declare “a national emergency to deal with that threat.”<sup>14</sup>

As written, the EO does not result in the automatic designation of any person or entity. Instead, it lists the categories of persons and entities that can be sanctioned, as to be determined by the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General. Those impacted by the EO include U.S. persons, including U.S. entities, as well as foreign persons and foreign entities, along with property inside and outside the United States.

## **B. RECORDS REQUESTED**

The Justice Initiative requests expedited disclosure of records,<sup>15</sup> including communications,<sup>16</sup> created on or after November 3, 2017,<sup>17</sup> including:

1. All records that include the following terms:
  - a. “Int! Crim! Court”, ICC or “Rome Statute” AND:
    - i. “Ex! Or!” or “EO”
    - ii. “National Emergencies Act” or NEA
    - iii. “International Emergency Economic Powers Act” or IEEPA
    - iv. sanction! or designat!
    - v. “First Am!”, “1<sup>st</sup> Am!” or “1A” (as it pertains to the “First Amendment”)
    - vi. defer! or “art! 16”
  - b. “Fatou Bensouda”, Bensouda, “ICC Prosecutor”, or OTP
  - c. “Sam Shoamanesh” or Shoamanesh
  - d. “Phakiso Mochochoko” or Mochochoko
  - e. “ICC judg!”
2. Cables and other communications to and from U.S. embassies regarding policy positions, requests and queries, to and from their host government(s) pertaining to the ICC.

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<sup>14</sup> Executive Order 13928, *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, Jun. 11, 2020.

<sup>15</sup> For the purpose of this request, the term “records” includes, but is not limited to, any and all agendas; agreements; analyses; calendars; correspondence; data; databases; directives; documents; e-mails and e-mail attachments, including those sent through personal email accounts (e.g., Gmail); reports; rules; schedules; studies; tables of contents and contents of binders; talking points; technical specifications; training materials; examinations; faxes; files; guidance; guidelines; evaluations; instructions; letters; manifests; manuals; memoranda; notes; orders; prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; policies; procedures; protocols; text messages and messages sent or received through other messaging applications (e.g., WhatsApp, iMessage, Signal); voicemails; and any other materials. In the event that such records once existed but have now been destroyed, please disclose any records that are integrally related to, summarize, or are interchangeable with said records. *Press clippings and news articles that are unaccompanied by any commentary need not be produced.*

<sup>16</sup> For the purpose of this request, the term “communications” includes, but is not limited to, directives, cables, memoranda; correspondence; briefings; e-mails and e-mail attachments, including sent through personal email accounts (e.g., Gmail); faxes; instructions; letters; text messages and messages sent or received through other messaging applications (e.g., WhatsApp, iMessage, Signal); and voicemails. In the event that such communications once existed but are no longer available, please disclose any records that are integrally related to, summarize, or are interchangeable with said records.

<sup>17</sup> The date the ICC Presidency assigned the Afghanistan situation to a Pre-Trial Chamber in anticipation of the Prosecutor’s request for authorization to investigate. International Criminal Court (The Presidency), *Decision assigning the situation in the Islamic Republic of Afghanistan*, No. ICC-01/17, Nov. 3, 2017, available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06574.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06574.PDF).

### C. APPLICATION FOR EXPEDITED PROCESSING

The Justice Initiative requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), as the records requested are urgently needed to inform the public about actual or alleged government activity, *see* 5 U.S.C. § 552(a)(6)(E)(v)(II), and the Justice Initiative is an organization “primarily engaged in disseminating information...to inform the public concerning” that activity. 5 U.S.C. § 552(a)(6)(E)(v)(I-II). While meeting the FOIA’s expedition requirements, the Justice Initiative also requests expedition on the grounds that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency’s regulations. *See* 28 CFR § 16.5(e)(iii); 31 CFR § 1.4(e)(iii); 22 CFR § 171.11(f)(3). **We affirm that the following information and statements concerning the need for expedited processing are true and correct to the best of our knowledge and belief.**

The Justice Initiative is “primarily engaged in disseminating information” within the meaning of the FOIA.<sup>18</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations); *cf. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding that the Electronic Privacy Information Center was a representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (National Security Archive deemed a representative of the news media after publishing one book and indicating its intention to publish a set of documents on national and international politics and nuclear policy).

The Justice Initiative is an operating public interest law center dedicated to upholding human rights and the rule of law through litigation, advocacy, research, and technical assistance, with offices in New York, London and Berlin. It is part of the Open Society Institute (“OSI”), a tax-exempt, non-partisan, not-for-profit organization, headquartered in New York City. OSI believes that solutions to national, regional and global challenges require the free exchange of ideas and thought, and works to build vibrant and inclusive societies, grounded in respect for human rights and the rule of law, whose governments are accountable and open to the participation of all people. In support of their shared mission, OSI and the Justice Initiative share information with the public free of charge, through their websites, newsletters, and other publications to promote public understanding and robust debate. Disseminating information is among the Justice Initiative’s core activities. To accomplish its goals, the Justice Initiative maintains a website, [www.justiceinitiative.org](http://www.justiceinitiative.org), through which it disseminates reports, briefing papers, fact sheets and other publications ([www.justiceinitiative.org/publications](http://www.justiceinitiative.org/publications)) relating to its mission, as well as records produced through FOIA requests.<sup>19</sup> It also directly distributes hard copies of publications and disseminates information via quarterly email newsletters, blogs ([www.opensocietyfoundations.org/voices](http://www.opensocietyfoundations.org/voices)), Twitter ([www.twitter.com/OSFJustice](http://www.twitter.com/OSFJustice)) and Facebook ([www.facebook.com/OpenSocietyFoundations](http://www.facebook.com/OpenSocietyFoundations)).

At this moment, it is unclear who and what activities are subject to sanction or punishment under the terms of the EO. No further guidance on how the EO may be applied has been released, leaving individuals associated with the ICC and its work uncertain about whether they might be targets and whether they should avoid certain activities. As described by a former Senior Advisor to the Director of the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), the lead agency charged with

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<sup>18</sup> *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).

<sup>19</sup> *See e.g., Open Society Justice Initiative v. Central Intelligence Agency (CIA) et al.*, 44795-Jamal-Khashoggi-FOIA, available at <https://www.documentcloud.org/public/search/projectid:44795-Jamal-Khashoggi-FOIA>.

implementing and enforcing economic sanctions, the EO is a “naked EO” since no one is yet designated.<sup>20</sup> This type of EO results in uncertainty for individuals regarding how to tailor their behavior so not to risk designation, leading to the conclusion “that the goal is to chill current and future activities.”<sup>21</sup>

The EO has become a source of considerable confusion given the breadth and ambiguity of its provisions. Law professors, lawyers, advocates and non-governmental organizations have all publicly expressed concern that, without more information, their activities appear to possibly fall within the terms of the EO.<sup>22</sup> Laws that are overbroad or unclear can lead people to refrain from engaging in permissible actions because they are unsure whether they will be legally sanctioned, creating a “chill” under the “threat of enforcement.”<sup>23</sup> It is well-established under U.S. constitutional jurisprudence that the terms of a law “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties...and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of *due process* of law.”<sup>24</sup>

As written, the EO is open-ended, giving officials broad leeway in its application, implicating even family members of ICC personnel, academics, human rights advocates and nongovernmental organizations, who are connected to or work with the ICC. It also affects those U.S. persons serving the ICC in its three primary organs (i.e. OTP, Chambers, Registry), including staff, interns, consultants and advisors, as well as businesses providing services to the Court. The day following the EO’s release, the *American Bar Association*, the largest association of lawyers in the world and “the national voice of the legal profession,” released a statement noting it was “deeply disturbed” by the EO.<sup>25</sup> On June 26, a group of 174 U.S. lawyers and legal scholars, working across 80 U.S. universities and including three former U.S. ambassadors, U.S. lawyers who participated in cross-jurisdictional war crimes cases, and the last surviving U.S. Nuremberg prosecutor, sent a letter to the White House asking the president to rescind the EO, citing that it is “wrong in principle,” “contrary to American values” and “mock[ed] our bipartisan commitment to human rights and the rule of law.”<sup>26</sup>

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<sup>20</sup> Adam M. Smith, *Dissecting the Executive Order on Int’l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs*, Just Security, Jun. 15, 2020, <https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/>.

<sup>21</sup> *Id.*

<sup>22</sup> See e.g., Leila Sadat, *First They Came For Me and My Colleagues: The U.S. Attack on the Int’l Criminal Court*, Just Security, Jun. 29, 2020, <https://www.justsecurity.org/70996/first-they-came-for-me-and-my-colleagues-the-us-attack-on-the-intl-criminal-court/>; Diane Marie Amann, *I help children in armed conflict. The President is forcing me to stop*, Just Security, Jun. 29, 2020, <https://www.justsecurity.org/71048/i-help-children-in-armed-conflict-the-president-is-forcing-me-to-stop/>; Jennifer Trahan & Megan Fairlie, *The International Criminal Court is Hardly a Threat to US National Security*, *Opinio Juris*, Jun. 15, 2020; <http://opiniojuris.org/2020/06/15/the-international-criminal-court-is-hardly-a-threat-to-us-national-security/>; *Human Rights First Criticizes Trump Administration Executive Order On the ICC*, Human Rights First, Jun. 11, 2020, <https://www.humanrightsfirst.org/press-release/human-rights-first-criticizes-trump-administration-executive-order-icc/>; *Open Society Condemns Trump Administration for Undermining International Rule of Law*, Open Society Foundations, Jun. 11, 2020, <https://www.opensocietyfoundations.org/newsroom/open-society-condemns-trump-administration-for-undermining-international-rule-of-law>; Letter to President Donald Trump Against Sanctions on ICC Investigators of Atrocities, *available at* <https://www.scribd.com/document/467370291/Lawyers-statement-on-ICC-sanctions>.

<sup>23</sup> *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

<sup>24</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (emphasis added).

<sup>25</sup> ABA President Judy Perry Martinez statement *Re: U.S. sanctions of International Criminal Court personnel*, Am. Bar Ass’n., Jun. 12, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/>

<sup>26</sup> Letter to President Donald Trump Against Sanctions on ICC Investigators of Atrocities, *available at* <https://www.scribd.com/document/467370291/Lawyers-statement-on-ICC-sanctions>. See also, Gen. Wesley K. Clark, *The United States Has Nothing to Fear From the ICC*, *Foreign Policy*, Jul. 2, 2020, <https://foreignpolicy.com/2020/07/02/the-united-states-has-nothing-to-fear-from-the-icc/>.

U.S. sanctioning action usually involves accused terrorists, weapons proliferators or perpetrators of human rights violations.<sup>27</sup> However, this EO is unprecedented because it targets and potentially violates the free speech and due process rights of law-abiding U.S. nationals and/or entities.<sup>28</sup> The Supreme Court holds firm that the right of speech is a “transcendent value,”<sup>29</sup> entitled to special protections as it is so “supremely precious.”<sup>30</sup> This has resulted in robust jurisprudence barring activity that may “chill” protected speech, by recognizing, and guarding against, the myriad ways that government action can restrict it.<sup>31</sup> As noted by legal experts, “the vaguely drafted Order is overbroad in many ways”<sup>32</sup> “that will cause, at a minimum, a chilling effect on NGO’s, businesses, academics, and academic institutions, as well as others, who directly or indirectly do business, advise, or support the ICC in any manner.”<sup>33</sup> As such, it is urgent that the public have access to information that can inform it of the motivations behind, and specifics of, the EO so that they can engage in activities without fear.

Since the Justice Initiative is an organization “primarily engaged in disseminating information” and this Request seeks records to inform the public of urgently needed information regarding government activity, expedition must be granted.

#### **D. APPLICATION FOR FEE WAIVER**

We request a waiver of search, review and duplication fees on the grounds that disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth in the Section above, the information and records at issue will contribute significantly to the public understanding of the implications of the EO in question and its application. Furthermore, the Justice Initiative, a non-profit entity, does not seek disclosure of these records for commercial gain and intends to disseminate the information disclosed from this request to the public at no cost.

For the same reasons that render the Justice Initiative as “primarily engaged in disseminating information,” *see* Section C. *supra*, it is also a “representative of the news media” within the meaning of the FOIA. As such, it is entitled to a fee waiver. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also* *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (recognizing Congress’s intent that FOIA’s fee waiver provision is to be “liberally construed in favor of waivers for noncommercial requesters”).

\* \* \* \* \*

Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 5 U.S.C. § 552(a)(6)(A)(i), respectively, we look forward to your reply to the request for expedited processing within ten calendar days, and to the request for disclosure within twenty days.

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<sup>27</sup> Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use* (R45618) Cong. Research Serv., Mar. 20, 2019, available at <https://fas.org/sgp/crs/natsec/R45618.pdf>.

<sup>28</sup> For a discussion on how broad EO provisions can implication free speech and due process rights, *see* Andrew Boyle, *Recent North Korea Arrest Raises Questions About Free Speech Rights*, Brennan Center, Apr. 30, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/recent-north-korea-arrest-raises-questions-about-free-speech-rights>.

<sup>29</sup> *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

<sup>30</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>31</sup> *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1651 n.88. (2013).

<sup>32</sup> Jennifer Trahan & Megan Fairlie, *The International Criminal Court is Hardly a Threat to US National Security*, *Opinio Juris*, Jun. 15, 2020, <http://opiniojuris.org/2020/06/15/the-international-criminal-court-is-hardly-a-threat-to-us-national-security/>.

<sup>33</sup> David M. Crane, *The Wrong Side of History—The United States and the International Criminal Court*, *Jurist*, Jun. 13, 2020, <https://www.jurist.org/commentary/2020/06/david-crane-wrong-history-icc/>.



We request that responsive records are provided electronically in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records are provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files. Press clippings and news articles that are unaccompanied by any commentary need not be produced.

If this request is denied in whole or part, please justify all withholdings by reference to specific exemptions and statutes, as applicable. For each withholding, please also explain why your agency "reasonably foresees that disclosure would harm an interest protected by an exemption" or why "disclosure is prohibited by law[.]" 5 U.S.C. § 552(a)(8)(A)(i). We seek the release of all segregable portions of otherwise exempt material, *see* 5 U.S.C. § 552(b). We also reserve the right to appeal any decision in relation to this Request.

Thank you for your prompt attention to this Request. Please send all records and correspondence by email to Natasha Arnpriester at [Natasha.Arnpiester@opensocietyfoundations.org](mailto:Natasha.Arnpiester@opensocietyfoundations.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Arnpriester', with a stylized flourish at the end.

Natasha Arnpriester  
Betsy Apple  
Christian De Vos  
James A. Goldston  
Open Society Justice Initiative  
224 West 57th Street  
New York, New York 10019  
T: (212) 548 0600  
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# **EXHIBIT B**



**U.S. Department of Justice**  
Office of Information Policy  
*Sixth Floor*  
441 G Street, NW  
Washington, DC 20530-0001

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Telephone: (202) 514-3642

July 31, 2020

Natasha Arnpriester  
Open Society Justice Initiative  
224 West 57<sup>th</sup> Street  
New York, NY 10019  
[natasha.arnpriester@opensocietyfoundations.org](mailto:natasha.arnpriester@opensocietyfoundations.org)

Re: FOIA-2020-01700  
DRH:VAV:MSH

Dear Natasha Arnpriester:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated July 9, 2020 and received in this Office on July 23, 2020, in which you requested various records pertaining to the International Criminal Court (ICC), dating from November 3, 2017.<sup>1</sup>

You have requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." See 28 C.F.R. § 16.5(e)(1)(ii) (2018). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. This Office cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activities generally.

You have also requested expedited processing of your request pursuant to the Department's standard involving the "loss of substantial due process rights." See 28 C.F.R. § 16.5(e)(1)(iii) (2018). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. Courts are reluctant to grant expedited processing unless a requester can show (1) "that [he] is facing grave punishment [in a criminal proceeding], and (2) that there is reason to believe information will be produced to aid the individual's defense." Freeman v. United States Department of Justice, No. 92-0557, slip op. at 4 (D.D.C. Oct. 2, 1992). Neither of these circumstances is present here. Please be advised that, although your request for expedited processing has been denied, it has been assigned to an analyst in this Office and our processing of it has been initiated.

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of

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<sup>1</sup> You directed your request to the Justice Management Division FOIA/PA Mail Referral Unit (MRU), who forwarded it to this Office for handling. The MRU tracking number associated with this request is EMRUFOIA072220-2.

material, your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options. Any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request.

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handling your request, Monique Hill, by telephone at the above number or you may write to her at the above address. You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request for expedited processing, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP’s FOIA STAR portal by creating an account following the instructions on OIP’s website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.”

Sincerely,

Douglas R. Hibbard  
Chief, Initial Request Staff

**August 21, 2020**

**Open Society**  
**Justice Initiative**  
224 West 57th Street  
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f. +1 212-548-4608

*Submitted via email<sup>1</sup>*

**DEPARTMENT OF TREASURY**  
Freedom of Information Act (FOIA)  
Appeal, FOIA and Transparency  
Privacy, Transparency, and Records  
1500 Pennsylvania Ave., NW  
Washington, DC 20220

**Re: FOIA No. 2020-07-056 Appeal of Treasury's Denial of Fee Waiver and Expedited Processing**

We write to administratively appeal the designation of the Justice Initiative as an “other” requester (i.e. denial of request to be considered a “media” requester) for the purpose of fees and denial of expedited processing by the Department of Treasury (“Treasury”) and its Office of Foreign Assets Control (OFAC) of a Freedom of Information Act (“FOIA”) request (**2020-07-056**) submitted by the Open Society Justice Initiative (“Justice Initiative”), an operational program of the Open Society Institute (“OSI”), a New York State charitable trust and nonprofit organization.

On July 9, 2020, Justice Initiative submitted a FOIA request (“Request”) to Treasury seeking release of records concerning “events leading to the June 11, 2020 Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court (“ICC”) and persons associated with it.”<sup>2</sup> The Request described in detail the factual context for seeking these records under FOIA, as well as facts relevant for the Justice Initiative’s grounds for seeking a fee waiver and expedited processing. On August 13, 2020, Treasury via OFAC summarily denied Justice Initiative’s request to be considered a “media” requester for the purpose of fees and expedited processing.<sup>3</sup> This letter constitutes a timely administrative appeal of that decision and denial under the FOIA, 5 U.S.C. § 552, and applicable

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<sup>1</sup> On August 21, 2020, the OFAC FOIA Office (OFACFOIAOffice@treasury.gov) confirmed that an electronic submission of this appeal could be sent to FOIA@Treasury.gov.

<sup>2</sup> Exhibit A: Open Society Justice Initiative FOIA Request, July 9, 2020.

<sup>3</sup> See Exhibit B: Letter from Stephanie Boucher, FOIA Chief, Information Disclosure and Records Management, August 13, 2020.

regulations.

## **I. Treasury via OFAC Erred in Denying the Justice Initiative’s Request to be Considered a “Media” Requester for the Purpose of Fees**

The Justice Initiative requested a waiver of search, review and duplication fees on the grounds that disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The Request made clear that the information and records at issue would contribute significantly to the public’s understanding of what led to the promulgation of the Executive Order 13928, *Blocking Property of Certain Persons Associated With the International Criminal Court*, targeting persons associated with or supporting the International Criminal Court (“ICC,” “Court”).<sup>4</sup> As such, the subject matter of the Justice Initiative’s Request, *viz*, targeting persons associated with or supporting the ICC, will reveal meaningful information about the government’s operations or activities that are not already public knowledge; and it will contribute significantly to public understanding of the operations or activities of the government in this regard.

The Request also established that the Justice Initiative, a non-profit entity, did not seek disclosure of these records for commercial gain and intends to disseminate the information disclosed from this Request to the public at no cost. In addition, and most importantly here, the Request established that Justice Initiative is “primarily engaged in disseminating information,” and a “representative of the news media,” within the meaning of the FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (recognizing Congress’s intent that the FOIA’s fee waiver provision is to be “**liberally construed in favor of waivers for noncommercial requesters**” (emphasis added)).

Treasury via OFAC summarily denied that the Justice Initiative was a “media” requester for the purpose of fees, and designated the Justice Initiative as “an ‘other’ requester,” without providing

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<sup>4</sup> Executive Order 13928, *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, June 11, 2020.

the grounds used to reach that decision. Treasury noted that as an “other” requester, Justice Initiative is “entitled to the first two hours of search time and the first 100 pages of duplication of responsive records without charge” and that the request for a fee waiver will be reviewed “once our office ascertains that the billable costs will exceed our \$25.00 billing threshold.”<sup>5</sup> Under Treasury’s regulations, *see* 31 CFR § 1.7 *et seq.*, “other” requesters are entitled to two hours of search time and the first 100 pages of responsive records without charge; however, when it is determined that the fees to be assessed in accordance with this section will exceed \$25.00, the requester should be notified.

Based on Treasury via OFAC’s claim that Justice Initiative is not a “media” requester for purposes of FOIA, the implication of Treasury’s statement that it will “review your request for a fee waiver once our office ascertains that the billable costs will exceed our \$25.00 billing threshold,”<sup>6</sup> in effect signals that once Treasury and/or OFAC reaches and/or assesses the billing threshold, it will be in a position to formally deny Justice Initiative’s fee waiver request. This determination is wholly without merit.

As set forth in the Request, disseminating information is among the Justice Initiative’s core activities. It shares information with the public free of charge, through its websites, newsletters, and other publications to promote public understanding and robust debate. The Justice Initiative maintains a website, [www.justiceinitiative.org](http://www.justiceinitiative.org), through which it disseminates reports, briefing papers, fact sheets and other publications (<https://www.justiceinitiative.org/publications>), including those created based on information received through FOIA requests,<sup>7</sup> as well as publication of records received through FOIA requests.<sup>8</sup> It also directly distributes hard copies of

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<sup>5</sup> Exhibit B: Letter from Stephanie Boucher, FOIA Chief, Information Disclosure and Records Management, August 13, 2020, p. 3.

<sup>6</sup> *Id.*

<sup>7</sup> *See e.g.*, Open Society Justice Initiative, *Unmaking Americans: Insecure Citizenship in the United States* (2019), 45-46, available at <https://www.justiceinitiative.org/publications/unmaking-americans>; Open Society Justice Initiative, *Unmaking Americans: Insecure Citizenship in the United States—Fact Sheet* (2019), 1, <https://www.justiceinitiative.org/publications/unmaking-americans-insecure-citizenship-in-the-united-states-fact-sheet>

<sup>8</sup> *See e.g.*, *Open Society Justice Initiative v. Central Intelligence Agency (CIA) et al.*, 44795-Jamal-Khashoggi-FOIA, available at <https://www.documentcloud.org/public/search/projectid:44795-Jamal-Khashoggi-FOIA>; *Open Society Justice Initiative v. U.S. Department of Defense et al. and U.S. Department of Health and Human Services et al.*, COVID-19-FOIA, available at <https://www.documentcloud.org/public/search/Project:%20%22COVID-19%20FOIA%22>.

publications and disseminates information via quarterly email newsletters, blogs ([www.opensocietyfoundations.org/voices](http://www.opensocietyfoundations.org/voices)), Twitter ([www.twitter.com/OSFJustice](http://www.twitter.com/OSFJustice)) and Facebook ([www.facebook.com/OpenSocietyFoundations](http://www.facebook.com/OpenSocietyFoundations)).

As such, the Justice Initiative is “primarily engaged in disseminating information” and a “representative of the news media” within the meaning of the FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). It is well-established, moreover, that Congress intended FOIA’s fee waiver provision to be “liberally construed in favor of waivers for noncommercial requesters.” *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); 8 *see also Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations); *cf. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding that the Electronic Privacy Information Center was a representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (National Security Archive deemed a representative of the news media after publishing one book and indicating its intention to publish a set of documents on national and international politics and nuclear policy).

Treasury via OFAC’s error in designating the Justice Initiative as an “other” requester is especially evident when compared to other agencies’ grant of fee waivers with respect to Justice Initiative’s recent FOIA requests. *See e.g.*, Letter from Mark Lilly, CIA Information and Privacy Coordinator, April 29, 2020, attached hereto as Exhibit C (recognizing that “the request is made by an entity primarily engaged in disseminating information”); Letter from Sally Nicholson, ODNI Chief, FOIA Branch, April 30, 2020, attached hereto as Exhibit D; Letter from Jill A. Eggleston, USCIS Director, FOIA Operation, December 31, 2018, attached hereto as Exhibit E (granting Justice Initiative’s request for a fee waiver “because of your demonstrated ability to disseminate information to the Public”).



Significantly, CIA, ODNI and USCIS received the same the factual information about Justice Initiative’s disseminating activities and “representative of the news media” status as did Treasury. Justice Initiative clearly provided sufficient information in its Request to warrant designation as a “media” requester, and thereby a grant of a fee waiver.

For the foregoing reasons, Treasury via OFAC erred in denying Justice Initiative “media” requester status.

## **II. Treasury via OFAC Erred in Denying the Justice Initiative Expedited Processing**

The Justice Initiative requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), as the information and records requested are urgently needed to inform the public about actual or alleged government activity, *see* 5 U.S.C. § 552(a)(6)(E)(v)(II), and as explained, the Justice Initiative is an organization “primarily engaged in disseminating information . . . to inform the public concerning” that activity. *See* Section I, *supra*, explaining that the Justice Initiative is primarily engaged in disseminating information, as recognized by other U.S. government agencies. In addition, the Justice Initiative requested expedition on the grounds that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency’s regulations. *See* 31 CFR § 1.4(e)(iii).

Treasury via OFAC summarily denied the Justice Initiative expedited processing stating that “[w]e have reviewed your request and determined that you have not met the requirements . . . for granting expedited processing” without further explanation. As such, it is impossible to assess on what grounds Treasury via OFAC denied the Justice Initiative’s request.

Treasury via OFAC laid out the three categories it uses when assessing expedited processing,<sup>9</sup> of which, Justice Initiative cited two and provided demonstrated reasons why it fulfills both categories and expedited processing should be granted based on either category. To recite,

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<sup>9</sup> *See* Exhibit B: Letter from Stephanie Boucher, FOIA Chief, Information Disclosure and Records Management, August 13, 2020, p. 2.

Treasury stated:<sup>10</sup>

Under the second category parameters, you must show that there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.” 31 C.F.R. § 1.4(e)(1)(ii). Under the third category, you must show that the request involves “[t]he loss of substantial due process rights.” 31 C.F.R. § 1.4(e)(1)(iii).

Again, Section I of this appeal reincorporates the reasons why Justice Initiative is “a person primarily engaged in disseminating information.” To repeat from Justice Initiative’s FOIA Request regarding why there is an “urgency to inform the public about an actual or alleged Federal Government activity” and also why “substantial due process rights” are at risk:<sup>11</sup>

. . . it is unclear who and what activities are subject to punishment under the terms of the [Executive Order (“EO”)]. No further guidance on how the EO may be applied has been released, leaving individuals who are associated with the ICC uncertain about if they may be implicated and what activities they should or should not avoid. As described by a former Senior Advisor to the Director of the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), the lead agency charged with implementing and enforcing economic sanctions, the EO is a “naked EO” since no one is yet designated. He explained that this type of EO results in uncertainty for individuals regarding how to tailor their behavior so not to risk designation, leading him to conclude “that the goal is to chill current and future activities.”

The EO has become a source of considerable confusion given the breadth and ambiguity of its provisions. U.S. law professors, ICC supporters and non-government organizations have all publicly expressed concern that their and others’ activity appears to possibly fall within the terms of the EO without more information. Laws that are overbroad or unclear can lead people to refrain from engaging in permissible actions because they are unsure

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<sup>10</sup> *Id.*

<sup>11</sup> Exhibit A: Open Society Justice Initiative FOIA Request, July 9, 2020 (internal citations omitted).

whether they will be legally sanctioned, creating a “chill” under the “threat of enforcement.” Longstanding jurisprudence established that the terms of a law “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties...and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of *due process* of law.”

As written, the EO is open, giving officials broad leeway in its application. It implicates family members, academics, human rights advocates and nongovernmental organizations, given their connection to and regular work with the ICC and affected communities. It also affects Americans serving the ICC as judges, staff, interns, consultants, and visiting advisors, as well as businesses providing services to it. The day following the EO’s release, the *American Bar Association*, the largest association of lawyers in the world and “the national voice of the legal profession,” released a statement noting it was “deeply disturbed” by the EO. On June 26, a group of 174 American lawyers and legal scholars, working across 80 U.S. universities and including three former U.S. ambassadors, U.S. lawyers who participated in cross-jurisdictional war crimes cases, and the last surviving U.S. Nuremberg prosecutor, sent a letter to the White House asking the president to rescind the EO, citing that it is “wrong in principle,” “contrary to American values” and “mock[ed] our bipartisan commitment to human rights and the rule of law.”

U.S. sanctioning action usually involves accused terrorists, weapons proliferators or perpetrators of human rights violations. However, this EO is unprecedented because it targets and potentially violates the free speech and due process rights of law-abiding U.S. nationals and/or entities. The Supreme Court holds firm that the right of speech is a “transcendent value,” entitled to special protections as it is so “supremely precious.” This has resulted in robust jurisprudence barring activity that may “chill” protected speech, by recognizing, and guarding against, the myriad ways that government action can restrict it. As noted by legal experts, “the vaguely drafted Order is overbroad in many ways” “that will cause, at a minimum, a chilling effect on NGO’s, businesses, academics, and academic institutions, as well as others, who directly or indirectly do business, advise, or support the

ICC in any manner.” As such, it is urgent that the public have access to information that can inform it of the motivations behind, and specifics of, the EO so that they can engage in activities without fear.

Since the Justice Initiative’s July 9 submission, there has been continued and considerable public interest in the parameters and implication of the Executive Order, especially as it concerns significant recognized interests. For instance, on July 29, the New York City Bar Association issued a statement, noting that “the Executive Order will improperly interfere with . . . the work of U.S. and foreign lawyers, academics, and NGOs” and is “likely to have a chilling effect on those who would otherwise have a legitimate interest in ensuring that genocide, crimes against humanity, and war crimes are properly investigated and prosecuted.”<sup>12</sup> Likewise, numerous articles and letters were issued describing the lack of information and threat to constitutional rights by the Executive Order,<sup>13</sup> including an article written by law professors noting that the Executive Order “has extremely troubling consequences for the constitutional rights of US citizens to due process of law, free speech, and freedom of expression and association.”<sup>14</sup>

Since the promulgation of Executive Order 13928 “*Blocking Property of Certain Persons Associated with the International Criminal Court*,” the public has been deprived of any and all information pertaining to the Order’s formation, intention and implementation. This has resulted in the compromise of significant recognized interests, including, as recited above, the public’s right to know, of speech and due process. The public’s need to have the requested documents is urgent because only with the requested documents can the public know what the Executive Order prohibits, and only with this knowledge can the public’s constitutionally protected interests be

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<sup>12</sup> New York Bar Ass’n, *Statement Opposing U.S. Sanctions on Persons Working with or for the International Criminal Court*, July 29, 2020, available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/executive-order-authorizing-international-criminal-court-icc-sanctions>.

<sup>13</sup> See, e.g., Benjamin B. Ferencz, *Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law*, Moyers, July 20, 2020, <https://billmoyers.com/story/nuremberg-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>; David Luban, *America the Unaccountable*, The N.Y. Review of Books, August 20, 2020, <https://www.nybooks.com/articles/2020/08/20/icc-justice-america-unaccountable/>; Emilia Currey, *Trump administration attack on International Criminal Court dangerous and counterproductive*, ASPI Strategist, July 22, 2020, <https://www.aspistrategist.org.au/trump-administration-attack-on-international-criminal-court-dangerous-and-counterproductive/>.

<sup>14</sup> Susan Akram & Gabor Rona, *Why the Executive Order on the ICC is Unconstitutional and Self-Defeating*, *Opinio Juris*, August 13, 2020, <https://opiniojuris.org/2020/08/13/why-the-executive-order-on-the-icc-is-unconstitutional-and-self-defeating/>.

realized.

The U.S. Supreme Court has made clear that the “public awareness of the government's actions is ‘a structural necessity in a real democracy.’” *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)); *see also*, *Protect Democracy Project, Inc. v. DOD*, 263 F. Supp. 3d 293, 300 (D.D.C. 2017) (granting motion for preliminary injunction directing expedited processing regarding request for records based in part on idea that “[b]eing closed off from . . . debate is itself a harm in an open democracy”). Not only is public awareness a necessity, but so too is *timely* public awareness. *Id.*

For the foregoing reasons, Treasury via OFAC erred in denying the Justice Initiative “media” requester status and expedited processing.

Thank you for your prompt attention to this Appeal. Please **send all correspondence by email** to Natasha Arnpriester at [Natasha.Arnpriester@opensocietyfoundations.org](mailto:Natasha.Arnpriester@opensocietyfoundations.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Arnpriester', with a stylized flourish at the end.

Natasha Arnpriester  
Betsy Apple  
Christian De Vos  
James A. Goldston  
Open Society Justice Initiative

# **EXHIBIT A**

**Open Society**  
**Justice Initiative**  
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f. +1 212-548-4608

**July 9, 2020**

*Via email*

**DEPARTMENT OF STATE**  
Office of Information Programs &  
Services, A/GIS/IPS/RL  
SA-2, Suite 8100  
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FOIARequest@state.gov

**DEPARTMENT OF JUSTICE**  
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MRUFOIA.Requests@usdoj.gov

**DEPARTMENT OF TREASURY**  
FOIA and Transparency  
Washington, DC 20220  
treasfoia@treasury.gov

**Re: Freedom of Information Act Request**  
**Expedited Processing and Fee Waiver Requested**

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of your agency, submitted on behalf of the Open Society Justice Initiative (“Justice Initiative”), an operational program of the Open Society Institute (“OSI”), a New York State charitable trust and nonprofit organization. We request records concerning events leading to the June 11, 2020 Executive Order issued by President Donald Trump relating to travel and economic sanctions against the International Criminal Court (“ICC” or “Court”) and persons associated with it. We respectfully ask that this request is forwarded to any other component agency as appropriate. Expedited processing is requested pursuant to 5 U.S.C. § 552(a)(6)(E), as is a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

#### **A. BACKGROUND**

On November 3, 2017, the ICC Presidency assigned to a Pre-Trial Chamber of the Court a request from the ICC Prosecutor, Fatou Bensouda, for judicial authorization of an investigation into alleged crimes committed in connection with the armed conflict in Afghanistan.<sup>1</sup> The request sought an investigation focused “solely upon war crimes and crimes against humanity allegedly committed since 1 May 2003 on the territory of Afghanistan as well as war crimes closely linked to the situation in Afghanistan allegedly committed since 1 July 2002 on the territory of other States Parties to the Rome Statute,”<sup>2</sup> the treaty that established the ICC.

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<sup>1</sup> International Criminal Court (The Presidency), *Decision assigning the situation in the Islamic Republic of Afghanistan*, No. ICC-01/17, Nov. 3, 2017, available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06574.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06574.PDF).

<sup>2</sup> *Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan*, ICC, Nov. 3, 2017, [https://www.icc-cpi.int/Pages/item.aspx?name=171103\\_OTP\\_Statement](https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement).

As noted by the White House, the “Prosecutor indicated this investigation would focus on Afghan National Security Forces, the Taliban, and the Haqqani network, alongside war crimes allegedly committed by United States service members and intelligence professionals during the war in Afghanistan.”<sup>3</sup> On September 10, 2018, the White House issued a release warning that should the ICC proceed with an investigation, the Administration “will consider...ban[ning] ICC judges and prosecutors from entering the United States, sanction their funds in the United States financial system, and, prosecute them in the United States criminal system.”<sup>4</sup>

On March 15, 2019, Secretary of State Mike Pompeo announced that the U.S. would impose visa restrictions on “individuals directly responsible for any [ICC] investigation of U.S. personnel.”<sup>5</sup> On April 3, the Office of the Prosecutor of the ICC (“OTP”) confirmed that the Prosecutor’s visa was revoked.<sup>6</sup> On April 12, the ICC Pre-Trial Chamber rejected the Prosecutor’s request to investigate the situation in Afghanistan.<sup>7</sup> On June 7, the Prosecutor sought leave to appeal the decision.<sup>8</sup> On September 17, the Chamber partially granted the Prosecutor’s request, allowing a limited appeal to proceed.<sup>9</sup> On October 9, Secretary Pompeo issued a restatement noting that the U.S. policy on the ICC remained unchanged.<sup>10</sup>

On March 5, 2020, the Appeals Chamber of the ICC decided unanimously to authorize the Prosecutor’s investigation into the situation in Afghanistan, amending the original Pre-Trial Chamber’s April 12 decision.<sup>11</sup> On March 17, Secretary Pompeo announced that the U.S. would seek to sanction OTP staff members Sam Shoamanesh (*chef de cabinet*) and Phakiso Mochochoko (Head of Jurisdiction, Complementarity, and Cooperation), along with their families, for assisting the Prosecutor’s efforts to pursue an investigation into the situation in Afghanistan.<sup>12</sup>

On May 29, Secretary Pompeo stated that the public would soon see “a series of announcements from not just the State Department, [but] from all across the United States government that attempt to push back against what the ICC is up to.”<sup>13</sup> On June 11, President Trump issued Executive Order 13928, *Blocking Property Of Certain Persons Associated With The International Criminal Court* (“EO”) that outlined a prospective framework to impose economic and travel sanctions on persons associated with or supporting the ICC. The EO invokes four laws: the National Emergencies Act (50 U.S.C. 1601 et seq.) (“NEA”), which enables the president to declare a national emergency; the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (“IEEPA”), a sanctions regime; the Immigration and Nationality Act

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<sup>3</sup> *Protecting American Constitutionalism and Sovereignty from the International Criminal Court*, White House, Sept. 10, 2018, <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/>.

<sup>4</sup> *Id.*

<sup>5</sup> Lesley Wroughton, *U.S. imposes visa bans on International Criminal Court investigators*, Reuters, Mar. 15, 2019, <https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH>.

<sup>6</sup> Stephanie van den Berg & Leslie Wroughton, *U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation*, Reuters, Apr. 4, 2019, <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP>.

<sup>7</sup> Situation in the Islamic Republic of Afghanistan, Investigation, ICC-02/17, ICC, <https://www.icc-cpi.int/afghanistan>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *U.S. Policy on the International Criminal Court Remains Unchanged*, U.S. Dep’t of State, Oct. 9, 2019, <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/>.

<sup>11</sup> Situation in the Islamic Republic of Afghanistan, Investigation, ICC-02/17, ICC, <https://www.icc-cpi.int/afghanistan>.

<sup>12</sup> *Secretary Michael R. Pompeo's Remarks to the Press*, Dep’t of State, Mar. 17, 2020, <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6>.

<sup>13</sup> *Secretary Michael R. Pompeo With Marc Thiessen and Danielle Pletka of AEI's 'What The Hell Is Going On' Podcast*, U.S. Dep’t of State, May 29, 2020, <https://www.state.gov/secretary-michael-r-pompeo-with-marc-thiessen-and-danielle-pletka-of-aeis-what-the-hell-is-going-on-podcast/>.



of 1952 (8 U.S.C. 1182(f)) (“INA”), which permits the exclusion of foreign nationals from entering the United States; and section 301 of title 3, United States Code, which authorizes the president to delegate powers to executive agencies. The EO describes the ICC’s investigation of U.S. personnel and personnel of U.S. allies that have not consented to ICC jurisdiction as “an unusual and extraordinary threat to the national security and foreign policy of the United States” and as such, the President must declare “a national emergency to deal with that threat.”<sup>14</sup>

As written, the EO does not result in the automatic designation of any person or entity. Instead, it lists the categories of persons and entities that can be sanctioned, as to be determined by the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General. Those impacted by the EO include U.S. persons, including U.S. entities, as well as foreign persons and foreign entities, along with property inside and outside the United States.

## B. RECORDS REQUESTED

The Justice Initiative requests expedited disclosure of records,<sup>15</sup> including communications,<sup>16</sup> created on or after November 3, 2017,<sup>17</sup> including:

1. All records that include the following terms:
  - a. “Int! Crim! Court”, ICC or “Rome Statute” AND:
    - i. “Ex! Or!” or “EO”
    - ii. “National Emergencies Act” or NEA
    - iii. “International Emergency Economic Powers Act” or IEEPA
    - iv. sanction! or designat!
    - v. “First Am!”, “1<sup>st</sup> Am!” or “1A” (as it pertains to the “First Amendment”)
    - vi. defer! or “art! 16”
  - b. “Fatou Bensouda”, Bensouda, “ICC Prosecutor”, or OTP
  - c. “Sam Shoamanesh” or Shoamanesh
  - d. “Phakiso Mochochoko” or Mochochoko
  - e. “ICC judg!”
2. Cables and other communications to and from U.S. embassies regarding policy positions, requests and queries, to and from their host government(s) pertaining to the ICC.

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<sup>14</sup> Executive Order 13928, *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, Jun. 11, 2020.

<sup>15</sup> For the purpose of this request, the term “records” includes, but is not limited to, any and all agendas; agreements; analyses; calendars; correspondence; data; databases; directives; documents; e-mails and e-mail attachments, including those sent through personal email accounts (e.g., Gmail); reports; rules; schedules; studies; tables of contents and contents of binders; talking points; technical specifications; training materials; examinations; faxes; files; guidance; guidelines; evaluations; instructions; letters; manifests; manuals; memoranda; notes; orders; prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; policies; procedures; protocols; text messages and messages sent or received through other messaging applications (e.g., WhatsApp, iMessage, Signal); voicemails; and any other materials. In the event that such records once existed but have now been destroyed, please disclose any records that are integrally related to, summarize, or are interchangeable with said records. *Press clippings and news articles that are unaccompanied by any commentary need not be produced.*

<sup>16</sup> For the purpose of this request, the term “communications” includes, but is not limited to, directives, cables, memoranda; correspondence; briefings; e-mails and e-mail attachments, including sent through personal email accounts (e.g., Gmail); faxes; instructions; letters; text messages and messages sent or received through other messaging applications (e.g., WhatsApp, iMessage, Signal); and voicemails. In the event that such communications once existed but are no longer available, please disclose any records that are integrally related to, summarize, or are interchangeable with said records.

<sup>17</sup> The date the ICC Presidency assigned the Afghanistan situation to a Pre-Trial Chamber in anticipation of the Prosecutor’s request for authorization to investigate. International Criminal Court (The Presidency), *Decision assigning the situation in the Islamic Republic of Afghanistan*, No. ICC-01/17, Nov. 3, 2017, available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_06574.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06574.PDF).

### C. APPLICATION FOR EXPEDITED PROCESSING

The Justice Initiative requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), as the records requested are urgently needed to inform the public about actual or alleged government activity, *see* 5 U.S.C. § 552(a)(6)(E)(v)(II), and the Justice Initiative is an organization “primarily engaged in disseminating information...to inform the public concerning” that activity. 5 U.S.C. § 552(a)(6)(E)(v)(I-II). While meeting the FOIA’s expedition requirements, the Justice Initiative also requests expedition on the grounds that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency’s regulations. *See* 28 CFR § 16.5(e)(iii); 31 CFR § 1.4(e)(iii); 22 CFR § 171.11(f)(3). **We affirm that the following information and statements concerning the need for expedited processing are true and correct to the best of our knowledge and belief.**

The Justice Initiative is “primarily engaged in disseminating information” within the meaning of the FOIA.<sup>18</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations); *cf. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding that the Electronic Privacy Information Center was a representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (National Security Archive deemed a representative of the news media after publishing one book and indicating its intention to publish a set of documents on national and international politics and nuclear policy).

The Justice Initiative is an operating public interest law center dedicated to upholding human rights and the rule of law through litigation, advocacy, research, and technical assistance, with offices in New York, London and Berlin. It is part of the Open Society Institute (“OSI”), a tax-exempt, non-partisan, not-for-profit organization, headquartered in New York City. OSI believes that solutions to national, regional and global challenges require the free exchange of ideas and thought, and works to build vibrant and inclusive societies, grounded in respect for human rights and the rule of law, whose governments are accountable and open to the participation of all people. In support of their shared mission, OSI and the Justice Initiative share information with the public free of charge, through their websites, newsletters, and other publications to promote public understanding and robust debate. Disseminating information is among the Justice Initiative’s core activities. To accomplish its goals, the Justice Initiative maintains a website, [www.justiceinitiative.org](http://www.justiceinitiative.org), through which it disseminates reports, briefing papers, fact sheets and other publications ([www.justiceinitiative.org/publications](http://www.justiceinitiative.org/publications)) relating to its mission, as well as records produced through FOIA requests.<sup>19</sup> It also directly distributes hard copies of publications and disseminates information via quarterly email newsletters, blogs ([www.opensocietyfoundations.org/voices](http://www.opensocietyfoundations.org/voices)), Twitter ([www.twitter.com/OSFJustice](http://www.twitter.com/OSFJustice)) and Facebook ([www.facebook.com/OpenSocietyFoundations](http://www.facebook.com/OpenSocietyFoundations)).

At this moment, it is unclear who and what activities are subject to sanction or punishment under the terms of the EO. No further guidance on how the EO may be applied has been released, leaving individuals associated with the ICC and its work uncertain about whether they might be targets and whether they should avoid certain activities. As described by a former Senior Advisor to the Director of the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), the lead agency charged with

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<sup>18</sup> *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).

<sup>19</sup> *See e.g., Open Society Justice Initiative v. Central Intelligence Agency (CIA) et al.*, 44795-Jamal-Khashoggi-FOIA, available at <https://www.documentcloud.org/public/search/projectid:44795-Jamal-Khashoggi-FOIA>.

implementing and enforcing economic sanctions, the EO is a “naked EO” since no one is yet designated.<sup>20</sup> This type of EO results in uncertainty for individuals regarding how to tailor their behavior so not to risk designation, leading to the conclusion “that the goal is to chill current and future activities.”<sup>21</sup>

The EO has become a source of considerable confusion given the breadth and ambiguity of its provisions. Law professors, lawyers, advocates and non-governmental organizations have all publicly expressed concern that, without more information, their activities appear to possibly fall within the terms of the EO.<sup>22</sup> Laws that are overbroad or unclear can lead people to refrain from engaging in permissible actions because they are unsure whether they will be legally sanctioned, creating a “chill” under the “threat of enforcement.”<sup>23</sup> It is well-established under U.S. constitutional jurisprudence that the terms of a law “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties...and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of *due process* of law.”<sup>24</sup>

As written, the EO is open-ended, giving officials broad leeway in its application, implicating even family members of ICC personnel, academics, human rights advocates and nongovernmental organizations, who are connected to or work with the ICC. It also affects those U.S. persons serving the ICC in its three primary organs (i.e. OTP, Chambers, Registry), including staff, interns, consultants and advisors, as well as businesses providing services to the Court. The day following the EO’s release, the *American Bar Association*, the largest association of lawyers in the world and “the national voice of the legal profession,” released a statement noting it was “deeply disturbed” by the EO.<sup>25</sup> On June 26, a group of 174 U.S. lawyers and legal scholars, working across 80 U.S. universities and including three former U.S. ambassadors, U.S. lawyers who participated in cross-jurisdictional war crimes cases, and the last surviving U.S. Nuremberg prosecutor, sent a letter to the White House asking the president to rescind the EO, citing that it is “wrong in principle,” “contrary to American values” and “mock[ed] our bipartisan commitment to human rights and the rule of law.”<sup>26</sup>

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<sup>20</sup> Adam M. Smith, *Dissecting the Executive Order on Int’l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs*, Just Security, Jun. 15, 2020, <https://www.justsecurity.org/70779/dissecting-the-executive-order-on-intl-criminal-court-sanctions-scope-effectiveness-and-tradeoffs/>.

<sup>21</sup> *Id.*

<sup>22</sup> See e.g., Leila Sadat, *First They Came For Me and My Colleagues: The U.S. Attack on the Int’l Criminal Court*, Just Security, Jun. 29, 2020, <https://www.justsecurity.org/70996/first-they-came-for-me-and-my-colleagues-the-us-attack-on-the-intl-criminal-court/>; Diane Marie Amann, *I help children in armed conflict. The President is forcing me to stop*, Just Security, Jun. 29, 2020, <https://www.justsecurity.org/71048/i-help-children-in-armed-conflict-the-president-is-forcing-me-to-stop/>; Jennifer Trahan & Megan Fairlie, *The International Criminal Court is Hardly a Threat to US National Security*, *Opinio Juris*, Jun. 15, 2020; <http://opiniojuris.org/2020/06/15/the-international-criminal-court-is-hardly-a-threat-to-us-national-security/>; *Human Rights First Criticizes Trump Administration Executive Order On the ICC*, Human Rights First, Jun. 11, 2020, <https://www.humanrightsfirst.org/press-release/human-rights-first-criticizes-trump-administration-executive-order-icc/>; *Open Society Condemns Trump Administration for Undermining International Rule of Law*, Open Society Foundations, Jun. 11, 2020, <https://www.opensocietyfoundations.org/newsroom/open-society-condemns-trump-administration-for-undermining-international-rule-of-law>; Letter to President Donald Trump Against Sanctions on ICC Investigators of Atrocities, *available at* <https://www.scribd.com/document/467370291/Lawyers-statement-on-ICC-sanctions>.

<sup>23</sup> *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

<sup>24</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (emphasis added).

<sup>25</sup> ABA President Judy Perry Martinez statement *Re: U.S. sanctions of International Criminal Court personnel*, Am. Bar Ass’n., Jun. 12, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/>

<sup>26</sup> Letter to President Donald Trump Against Sanctions on ICC Investigators of Atrocities, *available at* <https://www.scribd.com/document/467370291/Lawyers-statement-on-ICC-sanctions>. See also, Gen. Wesley K. Clark, *The United States Has Nothing to Fear From the ICC*, *Foreign Policy*, Jul. 2, 2020, <https://foreignpolicy.com/2020/07/02/the-united-states-has-nothing-to-fear-from-the-icc/>.

U.S. sanctioning action usually involves accused terrorists, weapons proliferators or perpetrators of human rights violations.<sup>27</sup> However, this EO is unprecedented because it targets and potentially violates the free speech and due process rights of law-abiding U.S. nationals and/or entities.<sup>28</sup> The Supreme Court holds firm that the right of speech is a “transcendent value,”<sup>29</sup> entitled to special protections as it is so “supremely precious.”<sup>30</sup> This has resulted in robust jurisprudence barring activity that may “chill” protected speech, by recognizing, and guarding against, the myriad ways that government action can restrict it.<sup>31</sup> As noted by legal experts, “the vaguely drafted Order is overbroad in many ways”<sup>32</sup> “that will cause, at a minimum, a chilling effect on NGO’s, businesses, academics, and academic institutions, as well as others, who directly or indirectly do business, advise, or support the ICC in any manner.”<sup>33</sup> As such, it is urgent that the public have access to information that can inform it of the motivations behind, and specifics of, the EO so that they can engage in activities without fear.

Since the Justice Initiative is an organization “primarily engaged in disseminating information” and this Request seeks records to inform the public of urgently needed information regarding government activity, expedition must be granted.

#### **D. APPLICATION FOR FEE WAIVER**

We request a waiver of search, review and duplication fees on the grounds that disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth in the Section above, the information and records at issue will contribute significantly to the public understanding of the implications of the EO in question and its application. Furthermore, the Justice Initiative, a non-profit entity, does not seek disclosure of these records for commercial gain and intends to disseminate the information disclosed from this request to the public at no cost.

For the same reasons that render the Justice Initiative as “primarily engaged in disseminating information,” *see* Section C. *supra*, it is also a “representative of the news media” within the meaning of the FOIA. As such, it is entitled to a fee waiver. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also* *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (recognizing Congress’s intent that FOIA’s fee waiver provision is to be “liberally construed in favor of waivers for noncommercial requesters”).

\* \* \* \* \*

Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 5 U.S.C. § 552(a)(6)(A)(i), respectively, we look forward to your reply to the request for expedited processing within ten calendar days, and to the request for disclosure within twenty days.

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<sup>27</sup> Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use* (R45618) Cong. Research Serv., Mar. 20, 2019, available at <https://fas.org/sgp/crs/natsec/R45618.pdf>.

<sup>28</sup> For a discussion on how broad EO provisions can implication free speech and due process rights, *see* Andrew Boyle, *Recent North Korea Arrest Raises Questions About Free Speech Rights*, Brennan Center, Apr. 30, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/recent-north-korea-arrest-raises-questions-about-free-speech-rights>.

<sup>29</sup> *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

<sup>30</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>31</sup> *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1651 n.88. (2013).

<sup>32</sup> Jennifer Trahan & Megan Fairlie, *The International Criminal Court is Hardly a Threat to US National Security*, *Opinio Juris*, Jun. 15, 2020, <http://opiniojuris.org/2020/06/15/the-international-criminal-court-is-hardly-a-threat-to-us-national-security/>.

<sup>33</sup> David M. Crane, *The Wrong Side of History—The United States and the International Criminal Court*, *Jurist*, Jun. 13, 2020, <https://www.jurist.org/commentary/2020/06/david-crane-wrong-history-icc/>.

We request that responsive records are provided electronically in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records are provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files. Press clippings and news articles that are unaccompanied by any commentary need not be produced.

If this request is denied in whole or part, please justify all withholdings by reference to specific exemptions and statutes, as applicable. For each withholding, please also explain why your agency "reasonably foresees that disclosure would harm an interest protected by an exemption" or why "disclosure is prohibited by law[.]" 5 U.S.C. § 552(a)(8)(A)(i). We seek the release of all segregable portions of otherwise exempt material, *see* 5 U.S.C. § 552(b). We also reserve the right to appeal any decision in relation to this Request.

Thank you for your prompt attention to this Request. Please send all records and correspondence by email to Natasha Arnpriester at [Natasha.Arnpriester@opensocietyfoundations.org](mailto:Natasha.Arnpriester@opensocietyfoundations.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Arnpriester', with a stylized flourish at the end.

Natasha Arnpriester  
Betsy Apple  
Christian De Vos  
James A. Goldston  
Open Society Justice Initiative  
224 West 57th Street  
New York, New York 10019  
T: (212) 548 0600  
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# **EXHIBIT B**



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

August 13, 2020

FOIA No.: 2020-07-056  
OASIS No.: 1135628

Ms. Natasha Arnpriester  
Open Society Justice Initiative  
224 West 57<sup>th</sup> Street  
New York, NY 10019

**VIA ELECTRONIC MAIL:** [Natasha.Arnpriester@opensocietyfoundations.org](mailto:Natasha.Arnpriester@opensocietyfoundations.org)

Dear Ms. Arnpriester:

This acknowledges receipt of your July 9, 2020 Freedom of Information Act (FOIA), 5 U.S.C. § 552, request to the Department of the Treasury (Treasury) seeking:

The Justice Initiative requests expedited disclosure of records, 15 including communications, 16 created on or after November 3, 2017, 17 including:

1. All records that include the following terms:
  - a. “Int! Crim! Court”, ICC or “Rome Statute” AND:
    - i. “Ex! Or!” or “EO”
    - ii. “National Emergencies Act” or NEA
    - iii. “International Emergency Economic Powers Act” or IEEPA
    - iv. sanction! or designat!
    - v. “First Am!”, “1st Am!” or “1A” (as it pertains to the “First Amendment”)
    - vi. defer! or “art! 16”
  - b. “Fatou Bensouda”, Bensouda, “ICC Prosecutor”, or OTP
  - c. “Sam Shoamanesh” or Shoamanesh
  - d. “Phakiso Mochochoko” or Mochochoko
  - e. “ICC judg!”
2. Cables and other communications to and from U.S. embassies regarding policy positions, requests and queries, to and from their host government(s) pertaining to the ICC.

In an email dated July 21, 2020, you clarified your request to seek the following:

“Expedited disclosure of records created on November 3, 2017 until the date of a genuine search that include those items in “REQUEST 1” and “REQUEST 2”.

REQUEST 1: We request records that include the terms:

1(a)(i): ["Int! Crim! Court" OR ICC OR "Rome Statute"] AND ["Ex! Or!" OR EO] (as it pertains to "executive order") 1(a)(ii): ["Int! Crim! Court" OR ICC OR "Rome Statute"] AND ["National Emergencies Act" OR NEA] 1(a)(iii): ["Int! Crim! Court" OR ICC OR "Rome Statute"] AND ["Int! Emer! Econ! Powers Act" OR IEEPA] 1(a)(iv): ["Int! Crim! Court" OR ICC OR "Rome Statute"] AND ["sanction! OR designat!"] 1(a)(v): ["Int! Crim! Court" OR ICC OR "Rome Statute"] AND ["First Am!" OR "1st Am!" OR "1A"] (as it pertains to the "First Amendment") 1(a)(vi): ["Int! Crim! Court" OR ICC OR "Rome Statute"] AND ["defer! OR "art! 16"] 1(b): "Fatou Bensouda" OR Bensouda OR "ICC Prosecutor" OR OTP (acronym for the "Office of the Prosecutor of the ICC") 1(c): "Sam Shoamanesh" OR Shoamanesh 1(d): "Phakiso Mochochoko" OR Mochochoko 1(e): "ICC judg!"

REQUEST 2: We seek cables or copies of cables in Treasury's possession that were sent to or received from embassies, regarding U.S. policy positions, requests and queries pertaining to the ICC.

OFFICES/INDIVIDUALS: Given the limited public information regarding Treasury's involvement in measures taken or threatened against the International Criminal Court, we are not in a position to know where in the Department of Treasury these records are held and we rely on your expertise. However, without prejudicing a search of all other Treasury offices, bureaus and individuals that might hold these records, we believe responsive records may be with: the Office of Foreign Assets Control (OFAC); Terrorism and Financial Intelligence (TFI); Financial Crimes Enforcement Network (FinCEN); Legislative Affairs; Public Affairs; as well as the Office of the Secretary; Office of the Deputy Secretary; and the Under Secretary for TFI."

Treasury referred this matter to its Office of Foreign Assets Control (OFAC) for processing on August 3, 2020.

You requested expedited process, explaining there is an urgency to inform the public concerning actual or alleged Federal Government activity and that failure to obtain requested records on an expedited basis could impair or result in the loss of substantial due process rights per agency's regulations.

The Treasury Department has established three categories for granting expedited processing. Expedited processing pursuant to the first category will be granted where not doing so "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." 31 C.F.R. § 1.4(e)(1)(i). Under the second category parameters, you must show that there is "[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information." 31 C.F.R. § 1.4(e)(1)(ii). Under the third category, you must show that the request involves "[t]he loss of substantial due process rights." See 31 C.F.R. § 1.4(e)(1)(iii).



Ms. Arnpriester  
Page 3

We have reviewed your request and determined that you have not met the requirements set out in any of the three categories established for granting expedited processing. Therefore, your request for expedited processing is denied. See 31 C.F.R. § 1.4(e).

OFAC generally processes its FOIA requests on a “first in, first out” basis. We may encounter some delay in processing your request since OFAC is experiencing a substantial backlog of FOIA requests that has adversely affected its response time. We will make every effort to comply with your request in a timely manner; however, there are currently 284 open requests ahead of yours.

For fee purposes, we have determined that you are an “other” requester. The FOIA, specifically 5 U.S.C. § 552(a)(4)(A), and Treasury FOIA regulations at 31 C.F.R. § 1.7, allow us to recover part of the cost of addressing your request. As an “other” requester, you are entitled to the first two hours of search time and the first 100 pages of duplication of responsive records without charge. Therefore, you will be charged the full direct cost of search beyond the first two hours [at the salary rate(s) (basic pay plus 16 percent) of the employee(s) making the search] and duplicating responsive records [15-cents per page], beyond the first 100 pages.

You requested a fee waiver. Please be advised that we will review your request for a fee waiver once our office ascertains that the billable costs will exceed our \$25.00 billing threshold.

We will query the appropriate OFAC components for responsive records. If responsive records are located, they will be reviewed for determination on release. One of our analysts will respond to your request. We appreciate your patience as we proceed.

Please be advised that OFAC will neither confirm nor deny the existence of investigative records, pursuant to exemption (b)(7)(A) of the FOIA, unless there was an actual investigation that resulted in a designation or enforcement action, or the investigation is publicized. The mere acknowledgement of an investigation could reveal classified information and thereby cause harm to our national security posture. Until an actual designation, enforcement action or public acknowledgement of an investigation by Treasury has occurred, release of any information confirming or denying the existence of an investigation could conceivably tip off the subjects of pending investigations. The mere acknowledgement of an OFAC investigation would allow the subject of the investigation the opportunity to engage in asset flight and change their habits and routines such that an enforcement action or designation would be impossible to obtain. Conversely, if OFAC were to acknowledge that it was not investigating an individual that was actually involved in criminal activity, that information alone may embolden the individual in their continued criminal activities.

Additionally, to the extent that your request seeks records which are subject to the Foreign Narcotics Kingpin Designation Act (Kingpin Act) [21 U.S.C. §§ 1901-08], please be aware that all records or information obtained or created pursuant to the Kingpin Act is exempt from the provisions of the FOIA (5 U.S.C. § 552(b)(3)) pursuant to 21 U.S.C. § 1904(e)(3).

Ms. Arnpriester  
Page 4

You may appeal our denial of your request for expedited processing and/or our denial of your request to be considered a “media” requester for the purpose of fees, in writing, within 90 days of the date of this letter to the Freedom of Information Act (FOIA) Appeal, FOIA and Transparency, Privacy, Transparency, and Records, Department of the Treasury, 1500 Pennsylvania Ave., NW, Washington, DC 20220. The deciding official for OFAC appeals is the Director, Office of Foreign Assets Control. Please include with your letter of appeal a copy of this response letter. Please reference FOIA case number 2020-07-056 in all future correspondence. Copies of the FOIA and Treasury regulations are available at <https://home.treasury.gov/footer/freedom-of-information-act>.

You may seek dispute resolution services from our Treasury FOIA Public Liaison by contacting Ryan Law, Acting Director, FOIA and Transparency at 202-622-8098 or [FOIAPL@treasury.gov](mailto:FOIAPL@treasury.gov).

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Enclosed is an information sheet pertaining to your right to administrative appeal and dispute resolution.

Your request has been assigned FOIA No. **2020-07-056**. Please reference this number in any future correspondence. If you have any questions regarding this matter, you may email [OFACFOIAOffice@treasury.gov](mailto:OFACFOIAOffice@treasury.gov) or contact the FOIA Requester Service Center at (202) 622-2500, option 3.

Sincerely,

Stephanie Boucher  
FOIA Chief  
Information Disclosure and Records Management  
Office of Sanctions Support and Operations  
Office of Foreign Assets Control

Enclosure: Administrative Appeal and Dispute Resolution Sheet

# **ADMINISTRATIVE APPEAL AND DISPUTE RESOLUTION SHEET**

## **ADMINISTRATIVE APPEAL RIGHTS**

You may file an appeal with the Department of the Treasury when an adverse determination related to your request has been made, under the below circumstances, see 31 C.F.R. § 1.4(h):

- The requested records have been denied in part or in whole;
- The request does not reasonably describe the records sought;
- The information requested is not a record subject to the FOIA;
- The requested record does not exist, cannot be located, has been destroyed;
- The requested record is not readily reproducible in the form or format sought by the requester;
- You have been denied a fee waiver or issue; and
- Your request for expedited processing has been denied.

Your appeal, other than an appeal of a denial for expedited processing, must be submitted in writing and, to be considered timely, it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the component's final response. An appeal of a denial for expedited processing must be submitted in writing within 90 days of the date of the initial determination to deny expedited processing. The appeal must be signed by you or your representative, and contain the following information:

- Your name and address;
- Date of your initial request;
- Date of the letter denying your request;
- Description of why you believe the initial determination was in error; and
- The FOIA/PA number assigned to your request.

Please mail your appeal to: FOIA Appeal  
FOIA and Transparency  
Privacy, Transparency, and Records  
Department of the Treasury  
1500 Pennsylvania Ave., N.W.  
Washington, D.C. 20220

The deciding official for OFAC appeals is the Director, Office of Foreign Assets Control.

## **Dispute Resolution Services**

Available through:

1. The Treasury FOIA Public Liaison by contacting Ryan Law, Acting Director, FOIA and Transparency at 202-622-8098 or [FOIAPL@treasury.gov](mailto:FOIAPL@treasury.gov).
2. The Office of Government Information Services (OGIS) by emailing them at [ogis@nara.gov](mailto:ogis@nara.gov) or calling them at 1-877-684-6448.

# **EXHIBIT C**



CENTRAL INTELLIGENCE AGENCY  
WASHINGTON, D.C. 20505

29 April 2020

Ms. Amrit Singh  
Director, Accountability, Liberty, and Transparency Division  
Open Society Justice Initiative  
224 West 57<sup>th</sup> Street  
New York, NY 10019

Reference: F-2020-01331

Dear Ms. Singh:

On 28 April 2020, the Office of the Information and Privacy Coordinator received your 27 April 2020 correspondence requesting records under the Freedom of Information Act (FOIA), specifically:

**I. Notice of SARS-CoV-2 and COVID-19**

- 1. Records indicating when the Executive Branch was first informed of what is now known as SARS-CoV-2 and/or COVID-19.**
- 2. Records indicating the Executive Branch's response when it was first informed of what is now known as SARS-CoV-2 and/or COVID-19.**
- 3. Records indicating when President Donald Trump was first informed of what is now known as SARS-CoV-2 and/or COVID-19.**
- 4. Records indicating President Trump's response when he was first informed of what is now known as SARS-CoV-2 and/or COVID-19.**
- 5. Records including and/or discussing communications (before March 1, 2020) to and from the National Center for Medical Intelligence ("NCMI") about what is now known as SARS-CoV-2 and/or COVID-19.**
- 6. Records including and/or discussing January 2020 communications to and from a State Department epidemiologist about what is now known as SARS-CoV-2 and/or COVID-19.**
- 7. Records including and/or discussing January 2020 communications between Robert Redfield, Director, Centers for Disease Control and Prevention, and Chinese officials about what is now known as SARS-CoV-2 and/or COVID-19.**
- 8. Records including and/or discussing communications (from January 1, 2020 to February 29, 2020) between Alex Azar, Secretary, Health and Human Services, and President Donald Trump about what is now known as SARS-CoV-2 and/or COVID-19.**

9. Records including and/or discussing communications (from January 1, 2020 to February 29, 2020) to and from Dr. Carter Mecher, senior medical advisor, Department of Veterans Affairs, about what is now known as SARS-CoV-2 and/or COVID-19.
10. Records including and/or discussing communications (from January 1, 2020 to March 31, 2020) to and from Robert Kadlec, Assistant Secretary for Preparedness and Response, about asymptomatic cases spreading what is now known as SARS-CoV-2 and/or COVID-19.
11. Records discussing communications (from January 1, 2020 to February 29, 2020) from Peter Navarro, President Trump's trade advisor, about what is now known as SARS-CoV-2 and/or COVID-19.

## **II. The Executive Branch's Efforts to Counter SARS-CoV-2 and COVID-19**

12. Records concerning extraordinary presidential authority, including but not limited to "presidential emergency actions" relating to what is now known as SARS-CoV-2 and/or COVID-19.
13. Records indicating dates and agendas for meetings and decisions of the official White House coronavirus task force during January and February 2020.
14. Records including and/or discussing "Four steps to mitigation," a February/March 2020 plan for addressing what is now known as SARS-CoV-2 and/or COVID-19.
15. Records including and/or discussing a February 2020 document titled "U.S. Government Response to the 2019 Novel Coronavirus."
16. Records discussing Remdesivir, Chloroquine, Hydroxychloroquine ("Plaquenil"), Azithromycin ("Zithromax") and/or other drugs or substances, such as disinfectants, for treating what is now known as SARS-CoV-2 and/or COVID-19.
17. Records including and/or discussing instructions to classify meetings and/or records relating to what is now known as SARS-CoV-2 and/or COVID-19.
18. Communications between your agency and the White House regarding what is now known as SARS-CoV-2 and/or COVID-19.
19. Communications between the Executive Branch and non-government entities (including but not limited to private-sector companies, academic institutions, and/or individuals) capable of developing tests, or assisting in testing, for what is now known as SARS-CoV-2 and/or COVID-19.

## **III. Executive Branch SARS-CoV-2 and COVID-19 Communications with Congress, State Governors, and the WHO**

20. Records including and/or discussing communications (before March 1, 2020) between any member of the Executive Branch and Congress regarding what is now known as SARS-CoV-2 and/or COVID-19, including but not limited to briefings to Congress, members of Congress, Congressional Committees or Subcommittees, and/or Congressional staff about what is now known as SARS-CoV-2 and/or COVID-19.



**21. Records including and/or discussing communications between the Executive Branch and the World Health Organization (“WHO”) about what is now known as SARS-CoV-2 and/or COVID-19.**

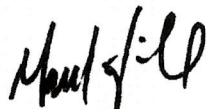
This letter serves to acknowledge that CIA has received your request, and to further let you know that CIA has assigned your request the reference number provided above. In future correspondence, please use this number to facilitate this office’s location of your case information.

We note that you have requested expedited processing of your case. Generally, CIA handles all requests in the order in which they are received, that is, “first in, first out.” When a requester can articulate a compelling need for the information they have requested, in accordance with CIA FOIA regulations as set forth at 32 C.F.R. 1900.34, CIA will make an occasional exception to its standard processing procedure. **With regard to your request, upon review, CIA determined that it meets the criteria for expedited processing.** Specifically, the request is made by an entity primarily engaged in disseminating information, and the request is for information relevant to a subject of public urgency concerning an actual or alleged federal activity. **Therefore, your request for expedited processing is hereby granted, in accordance with CIA FOIA regulations.**

Furthermore, we note that you have also requested a waiver of fees associated with this case. Please be advised that we are administratively waiving fees associated with this case.

In the event that the Office of the Information and Privacy Coordinator has questions or requires additional information or clarification from you to proceed with processing your request, a representative will contact you. Unless you object, we will search for CIA-originated records according to the timeframes you have provided. You may contact this office via telephone at (703) 613-1287, should you wish to withdraw your request. To check the status of your request, please visit [https://www.cia.gov/library/readingroom/foia\\_status/](https://www.cia.gov/library/readingroom/foia_status/) and input the reference number provided above.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Lilly' with a stylized flourish at the end.

Mark Lilly  
Information and Privacy Coordinator

# **EXHIBIT D**



OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
WASHINGTON, DC

Amrit Singh  
Open Society Justice Initiative  
224 W. 57<sup>th</sup> Street  
New York, NY 10019

April 30, 2020

Mr. Singh:

This letter acknowledges receipt of your Freedom of Information Act ("FOIA") request dated 28 April 2020, and received by the Information Management Division on 30 April 2020, in which you seek, "*records concerning the timing and substance of the Executive Branch's response to the novel coronavirus, now known as severe acute respiratory syndrome coronavirus 2 or "SARS-CoV-2," the virus that causes the disease known as coronavirus disease 2019 or "COVID-19."*"

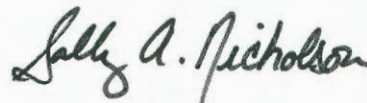
**Your request has been assigned ODNI tracking number DF-2020-00213.** We will begin to process your request and will contact you should we require clarification of your request. **Your request for a fee waiver has been granted.**

**Your request for expedited processing has been granted;** however, due to impacts caused by the COVID-19 virus, there may be delays in processing requests. We apologize for any inconvenience this may cause.

To assist you with any aspect of your request you may contact me, the FOIA Public Liaison, at my contact information below. You may also contact the Office of Government Information Services ("OGIS") of the National Archives and Records Administration to inquire about the mediation services they provide. OGIS can be reached by mail at 8601 Adelphi Road, Room 2510, College Park, MD 20740-6001; telephone (202) 741-5770; facsimile (202) 741-5769; Toll-free (877) 684-6448; or email at [ogis@nara.gov](mailto:ogis@nara.gov).

If you have any questions, please feel free to contact our Requester Service Center at [dni-foia@dni.gov](mailto:dni-foia@dni.gov) or (301) 243-1499. You may also reach out to me directly at [dni-foia-liaison@dni.gov](mailto:dni-foia-liaison@dni.gov) or (301) 243-2025.

Sincerely,



Sally A. Nicholson  
Chief, FOIA Branch  
FOIA Public Liaison  
Information Management Division

# **EXHIBIT E**



**U.S. Citizenship  
and Immigration  
Services**

December 31, 2018

**COW2018001377**

Natasha Arnpriester  
Open Society Justice Initiative  
224 West 57th St.  
New York, NY 10019

Dear Natasha Arnpriester:

Don't waste time waiting for the US Postal Service to deliver the information you requested. Go online, create an account, and receive the information electronically! Read the attached yellow flyer for more details.

We received your request for information on December 31, 2018, relating to the implementation of civil and criminal denaturalization procedures in the United States.

Your request is being handled under the provisions of the Freedom of Information Act (5 U.S.C. § 552). It has been assigned the following control number: COW2018001377. Please cite this number in all future correspondence about your request.

We respond to requests on a first-in, first-out basis and on a multi-track system. Your request has been placed in the complex track (Track 2). You specifically requested:

A. The Justice Initiative requests disclosure of the following information:

Criminal Denaturalization

1. The number of criminal denaturalization cases filed (see 18 U.S.C. § 1425) from 1948-2018, disaggregated by year, for individuals who had successfully procured citizenship for oneself (excluding attempt or procuring naturalization for another person);
  - a. The corresponding number that resulted in conviction;
  - b. The corresponding number that resulted in acquittal;
  - c. The corresponding number that were dismissed;
  - d. The corresponding number that resulted in denaturalization;
  - e. The corresponding number of convictions concluded by plea agreement or a plea bargain;
  - f. The corresponding number of prosecutions in which a Judicial Order of Removal was requested;
  - g. The corresponding number of convictions in which a Judicial Order of Removal was granted;
  - h. The corresponding number of individuals deported/removed following conviction, including voluntary removal;
2. The nationalities of origin for criminal denaturalization cases filed from 1948-2018, disaggregated by year, for individuals who had successfully procured citizenship for oneself (excluding attempt or procuring naturalization for another person), indicating by number where more than one person of the same nationality of origin was charged;

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- a. The corresponding information for cases that resulted in convictions;
- b. The corresponding information for cases that resulted in denaturalization;
- c. The corresponding information regarding individuals who were subsequently deported/removed, including voluntary removal, and destination of deportation;

#### Civil Denaturalization

3. The total number of civil denaturalization cases filed (see 8 U.S.C. § 1451) From 1948 to 2018, disaggregated by year;
  - a. The corresponding number found against the defendant;
  - b. The corresponding number found for the defendant;
  - c. The corresponding number that were dismissed;
  - d. The corresponding number that resulted in denaturalization;
  - e. The corresponding number decided in absentia;
  - f. The corresponding number decided on summary judgment;
  - g. The corresponding number concluded by consent judgment against the defendant/revoking naturalization or similar civil agreement;
  - h. The corresponding number of individuals deported/removed following judgment against the individual, including voluntary removal;
4. The nationalities of origin for civil denaturalization cases from .1948-2018, disaggregated by year, indicating by number where more than one person of the same nationality of origin was charged:
  - a. The corresponding information for cases found against the defendant;
  - b. The corresponding information for cases that resulted in denaturalization;
  - c. The corresponding information regarding individuals who were subsequently deported/removed, including voluntary removal, and destination of deportation;

#### Derivative Citizenship

5. The number of individuals whose citizenship has been revoked due to a spouse or parent's denaturalization from 1948-2018, disaggregated by year;
  - a. The corresponding information on the nationalities of origin of these individuals;
  - b. The corresponding information regarding the age of these individuals when citizenship was procured and the age when citizenship was revoked;
  - c. The corresponding number of individuals removed as a result of citizenship revocation and the destination of removal;

#### B. The Justice Initiative also requests disclosure of all records;

##### Civil and Criminal Denaturalization

6. Prepared, received, transmitted, collected and/or maintained on or after January 20, 2017 related to denaturalization proceedings under 8 U.S.C. § 1451, 18 U.S.C. § 1425;
7. Prepared, received, transmitted, collected and/or maintained on or after January 20, 2017 related to Judicial Orders of Removal;

#### Derivative Citizenship

8. All records pertaining to the practice of revoking citizenship of individuals whose spouse or parent was denaturalized.

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Statelessness

9. Prepared, received, transmitted, collected and/or maintained related to denaturalization that include the following terms:
  - a. "stateless"
  - b. "statelessness"
  - c. "unknown nationality"
10. Prepared, received, transmitted, collected and/or maintained related to the denaturalization of U.S. citizens where such person, if denaturalized, would become stateless.
11. Prepared, received, transmitted, collected and/or maintained related to the removal/deportation of stateless persons.

Consistent with 6 C.F.R. § 5.5(a) of the Department of Homeland Security (DHS) FOIA regulations, USCIS processes FOIA requests according to their order of receipt. Although USCIS' goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances. Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Additionally, due to the scope and nature of your request, USCIS will need to locate, compile, and review responsive records from multiple offices, both at headquarters and in the field. USCIS may also need to consult with another agency or other component of the Department of Homeland Security that have a substantial interest in the responsive information. Due to these unusual circumstances, USCIS will invoke a 10-day extension for your request pursuant to 5 U.S.C. § 552(a)(6)(B). Please contact our office if you would like to limit the scope of your request or to agree on a different timetable for the processing of your request. We will make every effort to comply with your request in a timely manner.

Because of the subject matter and because of your demonstrated ability to disseminate information to the public, USCIS will grant this request for fee waiver.

This office now offers an online delivery option. If you would like to receive the requested records online, you will need to register this request at <https://first.uscis.gov>. If you do not already have a MyUSCIS account you will be prompted to create one. Once logged on, click the "Register Request" link where you will be asked to enter your control number COW2018001377 and the following six digit PIN: 309999. If you do not wish to take advantage of this option, we will be providing your records on a Compact Disc (CD) for use on your personal computer. To request your responsive records on paper, please include your control number and write to the above address Attention: FOIA/PA Officer, or fax them to (816) 350-5785.

The National Records Center (NRC) has the responsibility to ensure that personally identifiable information (PII) pertaining to U.S. Citizenship and Immigration Services (USCIS) clients is protected. In our efforts to safeguard this information, we may request that additional information be provided to facilitate and correctly identify records responsive to your request. Though submission of this information is voluntary, without this information, your request may be delayed while additional steps are taken to ensure the correct responsive records are located and processed. Further, if we are unable to positively identify the subject of the record we may be unable to provide records responsive to your FOIA request.

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You may check the status of your FOIA request online, at [www.uscis.gov/FOIA](http://www.uscis.gov/FOIA). Click the "Check Status of Request" button in the middle of the web page or "FOIA Request Status Check & Average Processing Times" on the left side under "Freedom of Information and Privacy Act (FOIA)." Then click "FOIA Check Status of Request" at the bottom of the page and follow the instructions given. If you have any questions concerning your pending FOIA/PA request, or to check the status of a pending application or petition, please call The National Customer Service Center at 1-800-375-5283. Please be aware that the National Records Center no longer accepts FOIA/PA related questions directly by phone.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the Control Number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, emailed to [USCIS.FOIA@uscis.dhs.gov](mailto:USCIS.FOIA@uscis.dhs.gov), or sent by fax to (816) 350-5785. You may also submit FOIA/PA related questions to our email address at [FOIAPAQuestions@uscis.dhs.gov](mailto:FOIAPAQuestions@uscis.dhs.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "Jill A. Eggleston", is written over a faint, circular blue ink stamp.

Jill A. Eggleston  
Director, FOIA Operations