The following recommendations are submitted for inclusion in the Justice Department’s 2016 open government plan.

**Update Reporting Under the Foreign Agents Registration Act**
During the 2008 campaign, then-candidate Obama pledged to "create a centralized Internet database of lobbying reports … in a searchable, sortable, downloadable format."\(^1\) While persons who lobby on behalf of domestic entities have their information published in this way,\(^2\) reporting practices for lobbyists for foreign entities have not been similarly modernized. The FARA database\(^3\) still permits registrants to submit paper documents and it publishes those documents as PDFs. This is in tension with the President’s call for transparency and obscures the useful information contained in the reports. Transparency advocates spend an inordinate amount of effort trying to transform these paper files into a searchable, sortable, downloadable database.\(^4\)

As part of its third Open Government Plan, the Department of Justice committed:

> To review the FARA website and electronic filing system, while soliciting reasonable and concrete suggestions and feedback from the public, and will work to make feasible and appropriate modifications to the database. **Throughout this process, the Department will specifically investigate collecting and publishing registration information as structured data in a machine-readable format.**

(emphasis added.)

It is time to implement collection and publication of registration information as structured data. The Department of Justice should require all filings be made in an electronic format where the information can easily flow into a machine-processable digital format. In turn, that information should be released to the public in bulk as structured data so that the data it contains may be searched and sorted. To the extent the Justice Department has already transformed the information contained in the filings into an electronic database, that information should be published.

**Office of Legal Counsel Opinions**
In an Executive Order,\(^5\) President Obama wrote that "agencies should take affirmative steps to make information available to the public" and should "adopt a presumption in favor of disclosure." His first nominee to head the Office of Legal Counsel, Dawn Johnsen, joined by many others who served in the Justice Department, called on OLC to "publicly disclose its

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\(^1\) [http://change.gov/agenda/ethics_agenda/](http://change.gov/agenda/ethics_agenda/)
\(^2\) [https://www.senate.gov/legislative/Public_Disclosure/database_download.htm](https://www.senate.gov/legislative/Public_Disclosure/database_download.htm)
\(^3\) [http://www.fara.gov/search.html](http://www.fara.gov/search.html)
\(^4\) See [http://foreignlobbying.org/](http://foreignlobbying.org/)
written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."6 The Office itself, in its "best practices" memo, declares that "the Office operates under the presumption that it should make its significant opinions fully and promptly available to the public," including considering "disclosing documents even if they technically fall within the scope of a FOIA exemption."7 We have found that many reports are not available to the public.8

First, the Department of Justice should create a central site where all OLC opinions are published—currently some are available on its FOIA site, others on its official OLC site, and still others available as a result of litigation, newspaper stories, and the like.

Second, the Justice Department should amend its policy to require disclosure of all opinions by default, except in certain limited circumstances. A determination to withhold publication should be made at the highest levels within the DOJ and be based upon clearly articulated rules. To the extent a document is withheld in full or in substantial part, a detailed unclassified summary of the opinion should be made available to the public in a timely way that conveys the essence of the opinion. In addition, the OLC should publish a complete list of all final opinions and contemporaneously update the list.

Parallel Construction

The Executive Branch’s power to conduct surveillance related to foreign intelligence and national security is far greater than the Executive's legal authority to spy on Americans. This immense power has been contained throughout history by putting up certain checks that have changed over time. However, one of these critical safeguards appears susceptible to abuse: the right of defendants and courts to review evidence used to prosecute Americans. The tool that has created this problem is called Parallel Construction.

Parallel Construction is a broadly defined practice in which law enforcement conceals and/or recreates the origin of an investigation. The term is derived from government documents that reveal guidance on the deliberate masking and falsification of investigative history in order to erase investigations’ origins. According to Reuters, the Special Operations Division, a unit of the Drug Enforcement Administration, distributes information in partnership with two-dozen other agencies, including the Federal Bureau of Investigations, the Central Intelligence Agency, and the National Security Agency. Reports suggest that this surveillance has sparked domestic, non-national security related investigations. As Reuters describes, “Agents are instructed to then use ‘normal investigative techniques to recreate the information provided by SOD.’”9

This may allow the government to use evidence in court without facing legal scrutiny of its true sources and methods. Successful masking renders the collection, sharing, and basis of surveillance impossible to contest, even if it were in contravention of the Constitution. Little public information is available about how or even when parallel construction happens. The public does not know what rules govern information sharing, prosecutors do not always know if there is additional information collected by investigators, and judges have little ability to spot

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6 http://www.acslaw.org/files/Microsoft%20Word%20-%202011_Johnsen_OLC.pdf
9 http://www.reuters.com/article/us-dea-sod-idUSBRE97409R20130805
when an agent testifies misleadingly. Meanwhile, *The New York Times* reports that information sharing may be on the verge of dramatic expansion.\(^\text{10}\)

We request as part of its open government plan the Department of Justice provide regular public reporting on the following:

1) Its guidance on parallel construction and associated techniques;
2) Its guidance on when information should be considered “derived from” during an investigation;
3) It’s guidance on what information agents should provide to prosecutors about the origin of evidence;
4) Any Office of Legal Counsel opinions concerning parallel construction or information considered “derived from” during an investigation; and
5) All policies involving the use of cell site simulators, such as StingRays, including any restrictions it puts on its own agents and other federal and state agencies about the disclosure of cell site simulator use.

**Unified FOIA Regulations**

In the Second National Action Plan, the United States committed to developing common FOIA regulations and practices for federal agencies. The Justice Department recently announced it has completed the process, with the resulting issuance of guidance and a template for agency regulations,\(^\text{11}\) but not common regulations. In addition, it appears that the draft recommendations released by a coalition of organizations largely went unincorporated into the guidance, which instead closely mirrors DOJ’s own policies.\(^\text{12}\) We recommend the DOJ’s Office of Information Policy restart the process and issue common regulations in consultation with civil society.

**FOIA Spending at DOJ**

The Office of Information Policy at the Department of Justice responsible for coordinating government-wide FOIA policy as well as addressing DOJ-specific FOIA matters. Unfortunately, it is not possible to know how much money (and resources) OIP is putting towards its government-wide efforts versus internal-facing efforts. In each Congressional Budget Justification, or in some other easy-to-access way, OIP should report the amount of money spent processing FOIA requests for the seven senior management offices within DOJ; the amount of money spent on adjudicating administrative appeals for all units in DOJ; and the amount spent on FOIA policy and compliance.

**Tracking FOIA Fees**

As part of its annual report on FOIA, the Justice Department’s Office of Information Policy should request agencies report on the amount of FOIA fees collected broken down by the basis on which the fees are collected.

We welcome the opportunity to discuss this with you further. Please contact Daniel Schuman, policy director, Demand Progress, at daniel@demandprogress.org or 202-577-6100.

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\(^{12}\) [http://www.modelfoiaregs.org/](http://www.modelfoiaregs.org/)