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VIA ELECTRONIC MAIL

January 5, 2021

Freedom of Information Act Request

Valerie H. Yancey
FOIA Officer and Executive Officer
Office of the Solicitor General
Department of Justice
950 Pennsylvania Avenue, N.W., Room 6627
Washington, DC 20530-0001

**Re: Involvement of Solicitor General Elizabeth Prelogar in Matters
Involving Covered Persons**

Dear FOIA Officer,

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (FOIA), from the Protect the Public's Trust (PPT), which operates as a non-profit organization dedicated to promoting ethics in government and restoring the public's trust in government officials.

Records Requested

PPT requests the following records relating to Solicitor General Elizabeth Prelogar:

1. All records involving, discussing, referring to, or otherwise relating to an authorization under 5 C.F.R. § 2635.502 for Solicitor General Prelogar to participate in matters related to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, including, but not limited to, a final authorization and communications between Solicitor General Prelogar and the appropriate Ethics officials. If the Department determines that any portion of such records are exempt from disclosure, PPT requests that you segregate such portions and produce the rest of the record. PPT believes that the existence and timing of relevant records is potentially noteworthy in and of itself, therefore, we request the non-exempt portions of any responsive communications, even if the non-exempt portion is limited to the "To", "From", "RE", and "date" line of a responsive email. For purposes of this request, reference to "Solicitor General Prelogar" refers to Ms. Elizabeth Prelogar in any capacity, including as Solicitor General, Acting Solicitor General, assistant to the Solicitor General, and any other role in the Department of Justice. The use of the title "Solicitor



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General” is not meant to limit this request to solely records pertaining to Solicitor General Prelogar’s tenure as Solicitor General or Acting Solicitor General.

2. All records for meeting requests, meeting memos, briefing documents schedules, communications, and any other records related to the submission, consideration, approval, and scheduling of meeting requests for meetings with Solicitor General Prelogar from January 20, 2021 through the date the search begins. This should include but not be limited to records and communications relating to meeting approvals from the Department Ethics Office. For purposes of this request, reference to “Solicitor General Prelogar” refers to Ms. Elizabeth Prelogar in any capacity, including as Solicitor General, Acting Solicitor General, and any other role in the Department of Justice. The use of the title “Solicitor General” is not meant to limit this request to solely records pertaining to Solicitor General Prelogar’s tenure as Solicitor General or Acting Solicitor General.
3. All records of communications to or from Solicitor General Prelogar involving, discussing, referring to, or otherwise relating to the case *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. For purposes of this request, reference to “Solicitor General Prelogar” refers to Ms. Elizabeth Prelogar in any capacity, including as Solicitor General, Acting Solicitor General, assistant to the Solicitor General, and any other role in the Department of Justice. The use of the title “Solicitor General” is not meant to limit this request to solely records pertaining to Solicitor General Prelogar’s tenure as Solicitor General or Acting Solicitor General.

For this request, the term “all records” refers to, but is not limited to, any and all documents, correspondence, emails, text messages, letters, notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, schedules, telephone logs, digital logs such as those produced by Microsoft Teams, papers published, and/or unpublished, reports, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other request that, although not specifically requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA



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Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

PPT is willing to receive records on a rolling basis.

Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.



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Fee Waiver Request

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide organizations with non-profit purposes such as PPT access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. PPT Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Department of Justice FOIA regulations at 28 CFR § 16.10(k) establish a substantially similar standard.

Thus, the Department must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. *See* 28 CFR § 16.10(k). As shown below, PPT meets each of these factors.



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A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the Department. This request asks for records relating to the official acts of the Solicitor General, including records of her meetings and communications relating to a specific case in which she participated in her official capacity. It also relates to an ethics authorization issued by the Department’s ethics officials.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Government-wide ethics regulations generally limit the ability of public officials to participate in matters involving their former employer. *See* 5 C.F.R. §2635.502. This is based on the idea that officials may be partial to or perceived to be partial to the people they just worked with. However, the regulations also recognize that a one-size-fits-all approach may have unintended consequences, and allow officials to participate in certain matters after they have consulted with appropriate ethics officials and obtained authorization to do so.

This request concerns a situation where a senior government official appears to have obtained authorization to work on a specific party matter involving her former employer. The requested records will help the public understand when such an authorization was granted, including if it was granted before or after the relevant official began working on the matter at issue. They will help the public understand why such authorization was granted, including what factors offset the potential partiality or perceived partiality concerns. They will also inform the public of the nature of the official’s involvement in a matter involving their former employer, including showing how often they had meetings or other communications related to this matter relative to other issues.

After disclosing the requesting records, PPT will inform the public about their findings in order to ensure decisions are being made consistent with the law. Once the information is made available, PPT will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of the Department’s operations and activities.



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C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of the Attorney General's Conduct and Compliance with All Legal Obligations.

The requested records will contribute to public understanding of the official charged with managing America's public lands and natural resources. As explained above, the records will contribute to public understanding of this topic.

Ethics obligations exist to reduce the likelihood that senior government officials are making decisions in a biased or arbitrary manner or to benefit the interests of former employers, clients, or related parties. Ensuring the avoidance of conflicts of interest or the appearance of bias is of interest to a reasonably broad segment of the public. PPT will use the information it obtains from the disclosed records to educate the public at large about how the Solicitor General is applying her ethical obligations and what role she played in a matter affecting her former employer.

Through PPT's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of how the Solicitor General is conducting herself while in a senior position within a federal agency. The public is always well served when it knows how the government conducts its activities, particularly matters touching on ethics and potential misconduct questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about whether the Solicitor General is performing her Senate-confirmed duties within both the letter and the spirit of the ethics rules.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

PPT is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the potential conflicts of interest and likelihood of an appearance of bias in decision-making as compared to the level of public understanding that exists prior to the



disclosure. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on the Department's compliance with its own mission. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, PPT meets this factor as well.

II. PPT has the Ability to Disseminate the Requested Information Broadly.

PPT is an organization that informs, educates, and counsels the public about the importance of government officials acting consistently with their ethics obligations. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates what obligations exist for senior government officials. PPT intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms. PPT also has a robust network of reporters, bloggers, and media publications interested in its content and that have durable relationships with the organization. PPT intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Through these means, PPT will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that PPT possesses the expertise to explain the requested information to the public; (4) that PPT possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes PPT as a reliable source in the field of government ethics and conduct.

Public oversight and enhanced understanding of the Department's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). PPT need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for PPT to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to PPT.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to PPT's role of educating the general public. PPT operates as a non-profit organization with supporters who seek a transparent, ethical and impartial



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government that makes decisions in the best interests of all Americans, not former employers and special interests. PPT has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, PPT qualifies for a full fee waiver. We hope that the Department will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at foia@protectpublictrust.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Morgan Yardis
Research and Publication Associate
foia@protectpublictrust.org