



January 25, 2023

Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: The position of the US delegation to the Council of Europe, led by the Department of Justice, regarding the new Convention on Artificial Intelligence, and compliance with the federal Freedom of Information Act

Dear Mr. Attorney General,

We write to you regarding the position of the US Department of Justice on the negotiations for the first global convention on Artificial Intelligence now underway at the Council of Europe in Strasbourg. Our concern is that the US delegation is failing to accurately represent the position of the United States and is working at cross purposes to those nations and organizations that support democratic institutions, fundamental rights, and the rule of law.

By way of introduction, the Center for AI and Digital Policy is an independent, non-profit organization, based in Washington, DC. We train advocates, practitioners and researchers, and collaborate with AI policy experts in over 60 countries.¹ We publish *Artificial Intelligence and Democratic Values*, a comprehensive survey of AI policies and practices around the world.² We are seeking to promote a more fair, more just world where technology promotes broad social inclusion.

We have expressed strong support for the US *Blueprint for an AI Bill of Rights* as well President Biden's initiatives to promote algorithmic transparency and oppose algorithmic discrimination.³ We have also endorsed the statements made by Secretary Blinken and National Security Advisor Sullivan in support of democratic values.⁴ We believe there are vital

¹ Center for AI and Digital Policy (CAIDP), <https://www.caidp.org/>

² Center for AI & Digital Policy (CAIDP), *Report, Artificial Intelligence and Democratic Values (AIDV)*, (February 2022), ISBN 979-8-9857883-0-3, available online at: <https://caidp.org/reports/aidv-2021/>

³ Center for AI & Digital Policy (CAIDP), *Support the OSTP AI Bill of Rights*, available online at: <https://www.caidp.org/statements/ostp/>

⁴ Center for AI & Digital Policy (CAIDP), *US Secretary Blinken at OECD on AI and Democratic Values*, Update 2.38 (October 13, 2021), available online at: <https://www.caidp.org/app/download/8352772763/CAIDP-Update-2.38.pdf>

opportunities to carry forward these objectives with US allies and international organizations in the context of the rapidly evolving field of artificial intelligence.⁵

The reason we write to you now is to express concern about the position of the Department of Justice at the Council of Europe Committee on AI. We have worked for over two years, in Strasbourg, with the member state representatives and our colleagues in Europe to help draft the legal elements for the first international convention on AI. We participated actively and constructively in the drafting process, as we had in other similar efforts to create legal frameworks for the governance of AI.⁶ Our efforts contributed to the final report of the Council of Europe expert group on AI (the “CAHAI”) and provide the basis for the work of the Council of Europe going forward.⁷

We fully anticipated participating in the future work of the Committee of AI, as we were granted formal status to the Council of Europe Committee.⁸ But the decision has recently been taken, apparently at the instigation of the US delegation, led by the Department of Justice, to remove civil society from the Drafting Committee.⁹

Moreover, following a meeting last fall in Strasbourg, we became concerned about the views expressed by the US delegation and whether these statements were properly aligned with the position of the US government.¹⁰ We sent an urgent FOIA request to the Department of Justice FOIA office on December 4, 2022, seeking “all records concerning the Council of Europe undertaking to establish a Convention on Artificial Intelligence.”¹¹ Given the urgency of the

⁵ Marc Rotenberg and Merve Hickok, *Artificial Intelligence and Democratic Values: Next Steps for the United States*, Council on Foreign Relations, Blog Post, (August 22, 2022), <https://www.cfr.org/blog/artificial-intelligence-and-democratic-values-next-steps-united-states>

⁶ Council of Europe, Ad Hoc Committee on Artificial Intelligence (CAHAI), *Plenary Group-List of Participants*, <https://rm.coe.int/cahai-2021-lp3-fin-nov-dec-web-2778-2444-1349-v-1/1680a4d242>.

⁷ Council of Europe, Ad Hoc Committee on Artificial Intelligence (CAHAI), *Possible elements of a legal framework on artificial intelligence, based on the Council of Europe’s standards on human rights, democracy and the rule of law*, Council of Europe Report, CAHAI(2021)09rev (December 3, 2021 at Strasbourg), <https://rm.coe.int/cahai-2021-09rev-elements/1680a6d90d>

⁸ Extract from CM(2021)131-addfinal, Committee on Artificial Intelligence (CAI), *Terms of Reference, Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2021)3 on intergovernmental committees and subordinate bodies, their terms of reference and working method*, pg. 2, <https://rm.coe.int/terms-of-reference-of-the-committee-on-artificial-intelligence-for-202/1680a74d2f>

⁹ Luca Bertuzzi, *US obtains exclusion of NGOs from drafting AI treaty*, Euractiv, (January 17, 2023): <https://www.euractiv.com/section/digital/news/us-obtains-exclusion-of-ngos-from-drafting-ai-treaty/>

¹⁰ Council of Europe, Committee on AI, *List of Decisions* (Sept. 23, 2022) (*Agenda item 5. Working methods*), <https://rm.coe.int/cai-2022-10-list-of-decisions/1680a83eaa>

¹¹ Center for AI & Digital Policy (CAIDP), *Freedom of Information Act request to Department of Justice*, (December 4, 2022), <https://www.caidp.org/app/download/8428723563/CAIDP-DOJ-FOIrequest-12042022.pdf>

matter, we also requested expedited processing of our request.¹² We received an acknowledgement on December 6, 2022, which stated that we would receive a response from the agency within 20 business days. (Tracking Number, EMRUFOIA120422-B).¹³

Twenty business days have now passed and we have yet to receive a response regarding our request for records. At this time, it is impossible for us to assess the basis of the positions expressed by the US delegation on the draft Convention, though it appears that the US delegation is working at cross purposes to the views of others democratic states, civil society, and the express views of this administration.

The United States has a vital role to play at the Council of Europe (“COE”). Although the US is not a member state of the COE, Council of Europe conventions are open to ratification by both member states and non-member states.¹⁴ Indeed, the United States led the effort to establish the Council of Europe Cybercrime Convention, which was ratified by the Senate in 2006.¹⁵ We fully looked forward to the constructive participation of the US in this process of drafting the first global convention on Artificial Intelligence.

The United States contributed to similar undertakings at other international organizations. The United States delegation to the OECD worked in support drafting and adoption of the OECD AI Principles of 2019, the first global framework for AI.¹⁶ And all of the drafting sessions at the OECD were open and inclusive.¹⁷ More recently at the G7, the United States joined with leading democratic nations to address the specific problem of algorithmic bias in both the public and private sectors. As the G7 leaders explained:

We support the development of harmonised principles of data collection which encourage public and private organisations to act to address bias in their own

¹² 5 U.S.C § 552(a)(6)(E)(v)(II). *See also*, U.S. Department of Justice, *Guide to the Freedom of Information Act- Procedural Requirements, Expedited Processing*, (August 20, 2021), at pg. 39: <https://www.justice.gov/oip/page/file/1199421/download#page=39>

¹³U.S. Department of Justice, *Office of Information Policy Response*, available at: [https://www.caidp.org/app/download/8428723763/Rotenberg,%20Marc%20B7%20\(EMRUFOIA120422\)%20MRU%20Response.pdf](https://www.caidp.org/app/download/8428723763/Rotenberg,%20Marc%20B7%20(EMRUFOIA120422)%20MRU%20Response.pdf)

¹⁴ Council of Europe, Committee of Ministers, *Resolution (95) 37 on observer status for United States of America with the Council of Europe* (Adopted by the Committee of Ministers on 7 December 1995 at the 551st meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c8c35

¹⁵ Council of Europe, *Convention on Cybercrime, Senate Consideration of Treaty Document 108-11*, (Latest Senate Action on August 3, 2006), <https://www.congress.gov/treaty-document/108th-congress/11/document-text>

¹⁶ NTIA, *U.S. Joins with OECD in Adopting Global AI Principles* (May 19, 2019), <https://ntia.gov/blog/us-joins-oecd-adopting-global-ai-principles>

¹⁷ OECD, *Recommendation of the Council on Artificial Intelligence*, OECD Legal Instruments – Background Information (An inclusive and participatory process for developing the Recommendation), <https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449>

systems, noting new forms of decision-making have surfaced examples where algorithms have entrenched or amplified historic biases, or even created new forms of bias or unfairness.¹⁸

But the recent developments at the Council of Europe are troubling. The European news organization *Euractiv* reported recently:

At the Committee’s last plenary session in November, the United States proposed to delegate the work to a drafting group formed by all the countries that might sign the treaty, essentially a plenary without the civil society groups.

The American representative explicitly mentioned that it did not want to disclose its negotiating positions publicly to non-country representatives, referring to the Second Additional Protocol to the Cybercrime Convention as a precedent.¹⁹

The *Euractiv* article goes on to state:

One point Washington might not have an interest in publicising is that it has been pushing for limiting the scope of the AI treaty only to public bodies, carving out the private sector in which American companies play a world-leading role.

If this is indeed the basis of the US position, it would be inconsistent with the stated views of the President and the White House Science Advisor who have made clear the need to promote algorithmic transparency and to combat algorithmic bias in the private sector. As the President stated, “[w]e also need far more transparency about the algorithms Big Tech is using to stop them from discriminating, keeping opportunities away from equally qualified women and minorities, or pushing content to children that threatens their mental health and safety.”²⁰ Tools have been used to surveil workers in the workplace, in some cases restricting their ability to organize. Investigations have repeatedly found that big technology companies are deploying discriminatory algorithms and harming the public.²¹

¹⁸ OECD, *AI Principles*, <https://oecd.ai/en/ai-principles>; The White House, Statements and Releases, Carbis Bay G7 Summit Communique, (June 13, 2021), para. 32, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/13/carbis-bay-g7-summit-communique/>.

¹⁹ Luca Bertuzzi, *US obtains exclusion of NGOs from drafting AI treaty*, *Euractiv*, (January 17, 2023): <https://www.euractiv.com/section/digital/news/us-obtains-exclusion-of-ngos-from-drafting-ai-treaty/>

²⁰ Joe Biden, *Republicans and Democrats, Unite Against Big Tech Abuses*, Opinion|Commentary, *Wall Street Journal* (January 11, 2023): <https://www.wsj.com/articles/unite-against-big-tech-abuses-social-media-privacy-competition-antitrust-children-algorithm-11673439411>.

²¹ The White House, Press Release, FACT SHEET: Biden-Harris Administration Announces Key Actions to Advance Tech Accountability and Protect the Rights of the American Public, (October 4, 2022) <https://www.whitehouse.gov/ostp/news-updates/2022/10/04/fact-sheet-biden-harris-administration-announces-key-actions-to-advance-tech-accountability-and-protect-the-rights-of-the-american-public/>

Indeed, much of the important work underway now at the Department of Justice on Artificial Intelligence concern specifically the need to identify and correct amplified bias in such areas as housing, employment, and criminal justice. As Assistant Attorney General Kristen Clarke has explained:

In the fair housing and fair lending contexts, [...] financial institutions collect and use large amounts of consumer data to make predictions and decisions in the context of underwriting, pricing, and loan requirements, as well as advertising for all types of loans – including home loans, car loans and student loans. Academic studies and recent news reports tell us that purportedly neutral algorithms can end up amplifying or reinforcing unlawful biases that have long existed around race, homeownership and access to credit in the United States.²²

Instead of attempting to narrow the scope of the COE AI Convention, the US should be at the forefront of efforts to safeguard fundamental rights, democratic values, and the rule of law in this rapidly evolving field.²³ It is vitally important to support our democratic allies in this undertaking. It is even more crucial to defend the efforts now underway by President Biden to protect the rights of those in the United States.

First, we request that you instruct the DOJ officials in Strasbourg to align their remarks on behalf of the United States with the positions expressed by the United States government, particularly President Biden. The United States should strongly support an international convention on Artificial Intelligence that would carry forward the priorities of this Administration and build alliances with like-minded democratic nations.

Second, we ask you to instruct the DOJ delegation to make clear that the United States does not oppose the participation of civil society organizations in the drafting process. While we recognize that a drafting committee was created for the Cybercrime Convention, that moment presented unique circumstances that do not apply today. The Committee on AI is explicitly committed to strengthening the participation of civil society.²⁴ In recent years, governments on

²² United States Department of Justice, *Assistant Attorney General Kristen Clarke Delivers Keynote on AI and Civil Rights*, Justice News (published on December 14, 2021):<https://www.justice.gov/opa/speech/assistant-attorney-general-kristen-clarke-delivers-keynote-ai-and-civil-rights-department>

²³ Marc Rotenberg, Merve Hickok, Karine Caunes, *The Council of Europe Creates a Black Box for AI Policy*, Verfassungsblog- On Matters Constitutional, (January 24, 2023), <https://verfassungsblog.de/coe-black-box-ai/>

²⁴ *Supra* note. 8. The CAI is instructed to:

“(ii) establish an international negotiation process and conduct work to elaborate an appropriate legal framework on the development, design, and application of artificial intelligence, based on the Council of Europe’s standards on human rights, democracy and the rule of law, and conducive to innovation, which can be composed of a binding legal instrument of a transversal character, including notably general common principles, as well as additional binding or non-binding instruments to address challenges relating to the application of artificial intelligence in specific sectors, in accordance with the relevant decisions of

both sides of the Atlantic have repeatedly made clear the importance of open and transparent processes to safeguard democratic institutions.²⁵ And since the Cybercrime Convention drafted in 2003, the Council of Europe has established specific procedures to ensure transparency and public participation across all decision-making processes.²⁶

Third, we ask that you direct the DOJ FOIA office to expedite the processing of our FOIA request.²⁷ We simply do not have the means at this moment to pursue the legal claims that we could easily win to establish that the Department of Justice violated the relevant Freedom of Information provisions for the failure to make a timely determination on the expedited processing request,²⁸ the failure to make a timely determination on the fee waiver request,²⁹ and the failure to process the request in accordance with the statutory time limits.³⁰

We believe that transparency is central, not only to the operation of AI systems, but also to the functioning of democratic governments.³¹

the Committee of Ministers;” and “(vii) where relevant, contribute to building cohesive societies *and to strengthening the role and meaningful participation of civil society in its work*” (emphasis added).

See also, Council of Europe, Cybercrime Convention Committee (T-CY), *T-CY Rules of Procedure*, (Article 3) (As revised 16 October 2020), <https://rm.coe.int/t-cy-rules-of-procedure/1680a00f34>

²⁵ European Union, *A strong EU-US partnership is crucial to building a more democratic, secure, and prosperous world*, Delegation of the European Union to the United States of America Portal, (published on July 22, 2021), “*The EU and the United States share a global responsibility to promote common values, including democracy, peace, freedom, and the rule of law; support and protect human rights around the world; create conditions for harmonious economic development worldwide; strengthen the rules-based international system, and improve the economies of developing countries and those in transition.*”: https://www.ecas.europa.eu/united-states-america/european-union-and-united-states_en?s=253; See also, The White House, *A Declaration for the Future of the Internet*, (April 28, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/04/Declaration-for-the-Future-for-the-Internet_Launch-Event-Signing-Version_FINAL.pdf

²⁶ Council of Europe, *Civil Participation, Code of Good Practice for Civil Participation in the Decision-making Process*, (Revised version adopted by the Conference of INGOs on 30 October 2019): <https://rm.coe.int/code-of-good-practice-civil-participation-revised-301019-en/168098b0e2>

²⁷ 5 USC 552(a)(3)(A); 28 CFR § 16.1(a), 16.4(a). (“General provisions,” “Responsibility for responding to requests.”)

²⁸ 5 USC 552(a)(6)(E)(ii)(I); 28 CFR § 16.5(e)(4) (“Timing of responses to requests - Expedited processing”).

²⁹ 5 USC 552(a)(4)(A)(i),(ii), (iii); 28 CFR § 16.5(e)(4), § 16.10(a), (b)(6), (k) (“Timing of responses to request,” “Fees”)

³⁰ 5 USC 552(a)(6)(A)(i); 28 CFR § 16.5(a), (c), (e)(4) (“A matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.”)

³¹ Hickok, Merve, Rotenberg, Marc; Caunes, Karine, *The Council of Europe Creates a Black Box for AI Policy, VerfBlog*, (Jan, 24, 2022), <https://verfassungsblog.de/coe-black-box-ai/>, DOI: [10.17176/20230124-220003-0](https://doi.org/10.17176/20230124-220003-0). See also, Court of Justice of the European Union, Press Release, The Council must grant access to documents drawn up within its working groups relating to the legislative procedure concerning the amendment of the directive on the annual financial statements, Judgment of the General Court in Case T-163/21 | De Capitani v Council (Jan. 25, 2023), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-01/cp230015en.pdf>



Thank you for your attention to this matter.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Marc Rotenberg".

Marc Rotenberg
CAIDP President

A handwritten signature in blue ink, appearing to read "Merve Hickok".

Merve Hickok
CAIDP Research Director

A handwritten signature in blue ink, appearing to read "Karine Caunes".

Karine Caunes
CAIDP Program Director

A handwritten signature in blue ink, appearing to read "Christabel Randolph".

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Cc: Director of the Office of Science and Technology Policy

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