December 4, 2022

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy, Department of Justice
441 G Street, NW, 6th floor
Washington, DC 20530

Re: Council of Europe Convention on AI

Dear Mr. Hibbard:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a), and is submitted on behalf of the Center for AI and Digital Policy (“CAIDP”) to Department of Justice’s (DOJ) Office of Information Policy (“OIP”).

About CAIDP

The CAIDP is a non-profit, educational organization, incorporated in Washington, DC. The mission of the Center is “to promote a better society, more fair, more just — a world where technology promotes broad social inclusion based on fundamental rights, democratic institutions, and the rule of law.”

Documents Requested

The CAIDP requests all records concerning the Council of Europe undertaking to establish a Convention on Artificial Intelligence, and specifically the communications, reports, and memoranda sent to, received by, or copied to Kenneth Harris, head of the US mission to the European Union.

If the Office of Information Policy is not the correct DOJ component to process this request, please redirect this request to the proper DOJ FOIA office pursuant to 28 C.F.R. § 16.4(c).

Background

This FOIA request concerns the urgent effort to establish an international treaty on AI that will protect fundamental rights, the rule of law, and democratic institutions, and the role of the United States delegation to the Council of Europe in that process.

In December 2021, the Council of Europe’s Ad Hoc Committee on Artificial Intelligence (“CAHAI”) published “Possible elements of a legal framework on artificial intelligence based on the Council of Europe’s (“COE”) standards on human rights, democracy and the rule of law.”\(^2\) The Possible Elements Report established the need for an international, legally binding treaty on Artificial Intelligence. The Report laid the groundwork for the successive Committee on Artificial Intelligence (“CAI”). The CAI was to build on the CAHAI’s recommendations, leading to a transversal legally binding document by end of 2023.\(^3\)

The development of the COE Convention on AI is ongoing. The CAI held a meeting in Strasbourg, where the Committee “examined a first draft of a convention on artificial intelligence, human rights, democracy and the rule of law.”\(^4\) The focus in this meeting was on “developing common principles ensuring the continued seamless application and respect for human rights, democracy and the rule of law in a context where AI systems assist or replace human decision-making.”\(^5\)

It was at this meeting that the United States delegation to the Council of Europe proposed a drafting group to “prepare the draft [framework] convention. The drafting group shall be composed of potential Parties to the [framework] convention. The drafting group shall report to the Plenary.”\(^6\) This proposal appears to ignore the earlier work of the CAHAI, to diminish the participation of civil society,\(^7\) and to unnecessarily delay the development of the AI convention that is urgently needed.

The actions of the United States delegation to the Council of Europe are perplexing, The U.S. shares with the Council of Europe the same fundamental values of human rights, democracy, and the rule of law.\(^8\) As one of the Observer countries in the Council of Europe, the

\(^2\) The Council of Europe’s 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 (Dec. 3, 2021), https://rm.coe.int/cahai-2021-09rev-elements/1680a6d90d.

\(^3\) See the Committee on Artificial Intelligence (“CAI”), CAI’s Terms of Reference, https://rm.coe.int/terms-of-reference-of-the-committee-on-artificial-intelligence-for-202/1680a74d2f. (“…the CAI is instructed to complete the following deliverables, within the following deadlines: [a]ppropriate legal instrument on the development, design, and application of artificial intelligence systems based on the Council of Europe’s standards on human rights, democracy and the rule of law, and conducive to innovation, in accordance with the relevant decisions of the Committee of Ministers; Deadline: 15/11/2023.”)


\(^5\) Id.

\(^6\) 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/1680a83ea

\(^7\) Civil Society Statement on the Council of Europe Treaty on AI (Oct. 2022) (“It is vitally important to move forward the CoE work on Artificial Intelligence”), https://www.caidf.org/statements/civil-society-coe-and-eu/

U.S. “ha[s] the opportunity to cooperate with the Council, to accept its guiding principles of democracy, the rule of law, human rights and fundamental freedoms and to send observers to its expert committees and conferences of specialized ministers.”

More significantly, U.S. leaders have expressed strong support for AI rules that protect democratic values. Secretary Blinken explained last year, “More than anything else, our task is to put forth and carry out a compelling vision for how to use technology in a way that serves our people, protects our interests and upholds our democratic values.” The Blueprint for an AI, announced recently by the US Office of Science and Technology Policy, “support[s] the development of policies and practices that protect civil rights and promote democratic values in the building, deployment, and governance of automated systems.” The Blueprint is built on five key principles: (1) Safety and security, (2) Fairness and equity, (3) Data protection and privacy by design, (4) Transparency and explainability, and (5) Accountability and human decision-making.

US support for strong AI principles that safeguard democratic values and the close cooperation between the COE and the U.S is reasonably expected to extend to the development of the COE Convention on AI. The U.S. has also contributed to the development of OECD AI Principles with many member states of the Council of Europe. The OECD AI Principles aim to ensure AI systems are trustworthy and respect human rights and democratic values.

It is important to determine whether U.S. delegation to the Council of Europe fully conveys US support for fundamental rights, democratic institutions, and the rule of law. Further delay in the development of a Convention on AI could come at an enormous cost to democratic nations.

Request for Expedited Processing

CAIDP is entitled to expedited processing under FOIA because there is a “compelling need” for disclosure of the requested records. Specifically, this request warrants expedited processing because there is an “urgency to inform the public about an actual or alleged Federal Government activity,” and because the request is “made by a person who is primarily engaged in disseminating information.”

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9 COE, The United States was granted observer status on 7 December 1995, according to Resolution (95) 37, https://www.coe.int/en/web/portal/united-states.
First, the activities of DOJ are “actual . . . Federal Government activit[ies].” DOJ is a federal executive department tasked with enforcement of federal law and administration of justice in the United States.

Second, there is an “urgency to inform the public concerning [an] actual … Federal Government activity.” 5 U.S.C § 552(a)(6)(E)(v)(II). CAIDP has identified the Council of Europe as “a leader in the realm of international legal instruments and human rights.” The United States delegation to the Council of Europe is at this very moment seeking to influence the outcome of the COE Committee on AI. The US delegation intends to implement these recommendations at the upcoming meeting January 10–13, 2023. It is vitally important that the records sought in this request are made available to the public to determine whether the delegation is faithfully representing the views of the United States government.

Request for “News Media” Fee Status

CAIDP is a “representative of the news media” for fee classification purposes because CAIDP “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).

As explained above, the Center for AI and Digital Policy is a non-profit educational organization, incorporated in Washington, DC in 2021. CAIDP has received a 501(c)(3) determination. CAIDP maintains a public website—caidp.org—concerning AI policy which is one of the top-rated websites in the world for a search on “AI policy.” CAIDP also publishes annually Artificial Intelligence and Democratic Values, a comprehensive review of AI policies and practices of governments around the world. The Center also publishes the CAIDP Update.

As such, CAIDP is entitled to receive the requested record with only duplication fees assessed because the request “[is] not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Perhaps most significantly, CAIDP has established a web page to monitor the progress of the Council of Europe AI Treaty that is currently the top-ranked webpage for this topic, appearing above the Council of Europe’s own webpage:

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14 CAIDP, Council of Europe AI Treaty, https://www.caidp.org/resources/coe-ai-treaty/
15 CAIDP, Council of Europe Convention on AI, https://www.caidp.org/resources/coe-ai-treaty/
Request for Public Interest Fee Waiver

Further, any duplication fees should also be waived because (i) “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and (ii) “disclosure of the information is not primarily in the commercial interest” of CAIDP, the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

(i) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

Disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii). First, the subject of the request concerns “operations or activities of the federal government.” DOJ is a federal executive department tasked with enforcement of federal law and administration of justice in the United States. DOJ officials will comprise part of the leadership of the United States delegation to the Council of Europe.

Second, disclosure of the requested documents will contribute significantly to an increased understanding of government operations and activities. Specifically, disclosure will
educate the public about the activities of DOJ and the nature of its interest in the Council of Europe AI Treaty.

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

The disclosure is not “primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). CAIDP is a non-profit, educational organization that routinely publishes, without charge, news concerning AI policy.

For these reasons, CAIDP should be granted a public interest fee waiver.

Conclusion

CAIDP anticipates your response within ten (10) working days. 28 CFR § 16.6(b). Contact information for the requester: foia@caidp.org, (email).

Center for AI and Digital Policy
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Suite 800
Washington, DC 20005

Thank you for your assistance with the processing of this request.

Sincerely,

Marc Rotenberg, President
Center for AI and Digital Policy