



# DELIVERING ON OPEN GOVERNMENT

## *The Obama Administration's Unfinished Legacy*

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# EXECUTIVE SUMMARY

The Obama administration has dedicated more effort to strengthening government transparency than previous administrations. The president entered office offering a grand vision for more open and participatory government, and this administration used its first term to construct a policy foundation that can make that vision a reality, issuing an impressive number of directives, executive orders, plans, and other actions aimed at bolstering government openness. With the notable, glaring exception of national security, the open government policy platform the Obama administration built is strong. However, the actual implementation of open government policies within federal agencies has been inconsistent and, in some agencies, weak.

This report examines progress made during President Obama's first term toward open government goals outlined in a comprehensive set of recommendations that the open government community issued in November 2008, titled *Moving Toward a 21st Century Right-to-Know Agenda*.<sup>1</sup> We examine activity in the three main areas of the 2008 report: creating an environment within government that is supportive of transparency, improving public use of government information, and reducing the secrecy related to national security issues.

The administration's strongest performance was in its use of technology to make information more available to the public and more user-friendly. Officials encouraged agencies to use more social media, launched new websites, created mobile apps, and overhauled older online tools. More detailed information about federal spending was made available to the public. Agencies are now required to transition to electronic records management, although they have been given a long timeframe for the shift. Administration policy raised the bar for delivering information under the Freedom of Information Act (FOIA). These were long overdue steps that will modernize how government communicates to and shares information with the public.

However, despite policy guidance from the White House, the implementation of open government reforms at the agency level has been uneven, and few agencies appear to have embraced the practice of open government enthusiastically. Some agencies produced very vague open government plans for themselves. Many have not followed the White House's lead in making information about basic operations open to the public or even posting visitor logs. Several produced weak policies to protect the integrity of scientific information and the rights of government scientists to share their work. Protections for whistleblowers were strengthened, but the administration has also taken an aggressive approach to prosecuting leaks.

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<sup>1</sup> *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, November 2008. <http://www.foreffectivegov.org/files/21strtkrecs.pdf>.

The administration's most glaring open government shortcomings involve national security secrecy. The Obama administration has relied on state secrets or secret laws as heavily as the previous administration, to the disappointment of open government advocates and civil liberties defenders. Good policies were established on declassifying documents, but without changing the process for declassifying documents or significantly increasing staff, it will take years to get through the time-consuming process of reviewing all classified documents. The new framework for controlled unclassified information (CUI) contains critical reforms but remains at an early stage of implementation.

While the Obama administration deserves praise for the important work it has done to build a platform for open government in its first term, the job is unfinished.

To secure its legacy as "the most transparent administration in history," the Obama administration must encourage agencies to establish environments that embrace openness; improve the accessibility and reliability of public information; and dramatically transform its policies on national security secrecy. In each area, we offer detailed recommendations that build on the accomplishments and efforts of the first term and address the highest-priority issues for the second.

Specifically, we recommend that in its second term, the Obama administration:

### ***Create an environment that supports open government***

1. The administration should assign a senior official in the White House to oversee the implementation of open government policies and ensure that individual has the authority to carry out the attendant responsibilities of implementation.
2. Agency heads should develop and make public implementation plans for key open government policies and assign a senior official the responsibility for overseeing the implementation of the agency plan. Additionally, the interagency Open Government Working Group should serve as a central forum to explore ways to improve overall implementation of open government policies.
3. Congress should play a more active role in supporting open government practices by passing legislation to codify open government reforms, such as the DATA Act and reforms of FOIA and declassification. Relevant committees should improve oversight of current open government policies and implementation. Transparency needs to be established by law.

## ***Improve the accessibility and reliability of public information***

4. Agencies should modernize their IT systems to create and manage information digitally, and the administration should establish benchmark requirements for electronic records that all agencies must achieve over the next four years.
5. The administration should launch an aggressive effort to improve agency compliance with its guidance on fulfilling Freedom of Information Act (FOIA) requests – speeding up processing, reducing backlogs, and increasing disclosure. The Justice Department should work with agencies to avoid FOIA litigation whenever possible and argue positions that are consistent with the president's transparency principles when in court.
6. The administration should make proactive disclosure of public information the norm and establish minimum standards for disclosure that all agencies should adhere to, such as releasing communications with Congress and posting FOIA request logs. Additionally, agencies should continue to expand the datasets posted online and release inventories of data holdings.

## ***Reduce national security secrecy***

7. The administration should establish a White House steering committee on classification reform, initiate an oversight review of agency classification guides, and pursue policy and statutory reforms to streamline the declassification process.
8. The administration should revise its state secrets policy to require independent court reviews of secret evidence and work with Congress to permanently reform the state secrets privilege through legislation. Additionally, the Department of Justice should issue a public report on Inspector General investigations into complaints of wrongdoing that were dismissed because of state secrets claims.
9. The Justice Department should renounce the use of criminal prosecution for media leaks and protect the First Amendment rights of employees.
10. The administration should order an end to secret legal opinions, memos, and directives that are used to shield controversial decisions from oversight and legal challenge.



*“Transparency and the rule of law will be the touchstones of this presidency.”*

President Barack Obama, remarks, Jan. 21, 2009<sup>2</sup>

## INTRODUCTION

### *The First Term*

Four years ago, when Barack Obama assumed the office of the President of the United States, he signaled his commitment to make his administration “the most transparent in history.”<sup>3</sup> In his inaugural address, he pledged his administration would “do our business in the light of day – because only then can we restore the vital trust between a people and their government.”<sup>4</sup> On his first full day in office, the president issued a Presidential Memoranda calling for increased transparency throughout the federal government, another calling for greater disclosure under the Freedom of Information Act, and an executive order strengthening access to presidential records. Never before had an incoming president made open government such a high priority. Expectations for transparency in the new administration rose to greater heights.

To realize these commitments, White House officials and agency personnel have invested thousands of hours laying a policy framework for transparency. In the months following the inaugural address, the White House established new policies tightening the standards for

<sup>2</sup> “President Obama Delivers Remarks at Swearing-In Ceremony,” Jan. 21, 2009. <https://www.fas.org/sgp/news/2009/01/obama012109.html>.

<sup>3</sup> Macon Phillips, “Change has come to WhiteHouse.gov,” *The White House Blog*, Jan. 20, 2009. [http://www.whitehouse.gov/blog/change\\_has\\_come\\_to\\_whitehouse-gov](http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov).

<sup>4</sup> President Barack Obama’s Inaugural Address, The White House, Jan. 21, 2009. [http://www.whitehouse.gov/the\\_press\\_office/President\\_Barack\\_Obamas\\_Inaugural\\_Address](http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address).



classified information and speeding declassification, protecting the transparency and credibility of scientific information, and reforming the system of controlled unclassified information.

The White House sought to lead by example by putting its visitor logs online and making them searchable. The money spent under the Recovery Act was characterized by unprecedented transparency. The Obama administration aggressively adopted Internet technologies, launching new websites and redesigning others, engaging citizens on social media, and making public databases more accessible. As a result, cloud computing, social media tools, and “apps” are now common parlance and in common use throughout government. During the Hurricane Sandy crisis, agencies successfully used these new tools to push out storm warnings, updates on its predicted path, and instructions on how to prepare for its impact.

However, at the agency level, implementation of the policies that the president established has been uneven. In response to a White House mandate, some agencies developed detailed blueprints for strengthening open government, while others failed to make concrete commitments. Some have embraced a shift to electronic records and have plans on how to manage electronic information, while others lag. Some developed strong policies to protect scientific information from political interference, while others mustered only vague guidelines. But across-the-board improvements have been rare due to inconsistent enforcement, staff turnover, congressional inaction, and uncertain funding. We have not seen a new “culture of openness” firmly embedded in the executive branch.

In the national security arena, the open government community and civil liberties advocates have been especially disappointed. The White House adopted minor reforms on the state secrets privilege, which allows the government to seek dismissal of lawsuits that could reveal sensitive security information, and failed to include better court review of state secrets claims. The administration has continued to use secret “laws” to make controversial decisions without oversight, to disallow legal challenge, and to withhold key decisions and memoranda that have the force of law from public scrutiny.

To secure its legacy as a champion of transparency, the administration will need to do more to ensure that agencies actually implement the transparency policies it established, address gaps left in its policy reforms, and improve its record on national security-related secrecy.

## *The Challenge of Implementation*

Establishing open government policies takes work. While it may sound like a straightforward task to make more information available to the public, successful open government reforms require breaking long-ingrained habits and changing agency norms and practices. Open government requires a good policy foundation, active leadership, and staff engagement. New

technologies and operating practices may require new investments of resources, as well. Some of these reform elements may require the support of other agencies and branches of government. And, since every agency has its own discrete mission to carry out, open government reforms must be enacted as new leadership seeks to improve its performance overall.

In its first four years, the Obama administration provided a strong vision for open government and invested resources and staff to advance its goals. Specifically, the administration initiated a set of activities designed to shift the culture of the federal government. The Open Government Directive established a new requirement that every agency develop and maintain an Open Government Plan tailored to its mission and audience. An interagency working group has met regularly to discuss progress made and challenges encountered on open government issues. White House staff was assigned to shepherd the process. The White House issued executive orders on presidential records, classified information, and controlled unclassified information, as well as presidential memoranda on FOIA implementation, managing government records, and digital government. These actions signaled to individuals within federal agencies and to the public that transparency was a high priority for the administration.

But implementing reforms takes time, oversight, and effort. While we typically think of transparency as an element of effective government, it is clear that effective governance is required to achieve transparency. In fact, improvements in transparency depend on the same factors that effective public administration in any context requires: commitment from top leadership; responsive staff; incentives for performance; meaningful accountability measures; adequate resources; and an environment that supports ongoing experimentation and learning. Delays in confirming qualified agency leaders have slowed implementation of presidential directives in some agencies, and the budget uncertainty of the past two years has created an additional hurdle to the successful execution of open government reforms. The hyper-partisan character of political relations in Washington since the 2010 elections has also made it difficult to advance transparency legislation.

## *This Assessment*

This report assesses the progress made on the major open government recommendations collaboratively developed by transparency advocates and delivered to President-elect Barack Obama and Congress in November 2008. Those recommendations, compiled in a report titled *Moving Toward a 21st Century Right-to-Know Agenda*, were developed over a two-year period with input from more than 100 groups and individuals and were endorsed by more than 300 organizations and individuals from across the political spectrum.<sup>5</sup> A senior White House official called the recommendations an unofficial “blueprint for the Obama administration.”

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5 *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, November 2008. <http://www.foreffectivegov.org/files/21strtkrecs.pdf>.

The report organized most of the recommendations into three main areas:<sup>6</sup>

***Creating an Environment that Supports Open Government*** recommended policies and practices that would encourage a culture of openness within executive agencies and create incentives for agency staff to embrace transparency reforms.

***Improving the Accessibility and Reliability of Government Information*** focused on using interactive technologies to make information more easily accessible to the public and on using the best formats and tools to make data management more efficient and reliable.

***Reducing Secrecy in National Security*** outlined the need for more public oversight of defense and intelligence decisions, without undermining legitimate national security concerns.

This report examines activity in these three main areas, using the “bar” of the 2008 recommendations, without assessing specifics on every recommendation.<sup>7</sup> Interviews were conducted with various open government advocates (see list on page 50). However, those interviewed and quoted in the report have not endorsed the substance of this report; judgments are those of the staff at the Center for Effective Government.

## *Moving Forward in the Next Four Years*

As its second term begins, the Obama administration has the opportunity to re-commit itself to the vision the president offered when he took office in 2009. The administration has established a policy foundation for improved transparency and accountability. An update to guidance on implementing the Freedom of Information Act instructed agencies to disclose whenever possible to improve the processing of information requests. All agencies have developed formal scientific integrity policies to protect scientific information from political interference. Significant progress has been made to use websites, online tools, and social media to communicate with the public more effectively. And recently passed improvements to whistleblower protections will make it easier for federal employees to disclose problems without fear of retribution.

But actual implementation of many of the policies established has lagged in key agencies, so the final section of this report recommends ways the administration can build on the progress of the first four years and reclaim missed opportunities.

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6 An additional chapter laid out recommendations for the first 100 days of the administration, which were assessed separately. OMB Watch (now Center for Effective Government), *Obama at 100 Days – 21st Century Right-to-Know Agenda*, April 2009. <http://www.foreffectivegov.org/files/obamaat100daysrtk.pdf>.

7 A previous report assessed progress on each recommendation at the midpoint of President Obama’s first term. OMB Watch (now Center for Effective Government), *Assessing Progress Toward a 21st Century Right to Know*, March 2011. <http://www.foreffectivegov.org/21strtkreassessment>.

If these recommendations are put in place, we believe we will see a fundamental and lasting change in how government operates, ensuring the president's commitment to be "the most open and transparent administration in history" becomes a lasting legacy of his time in office.



## CREATE AN ENVIRONMENT THAT SUPPORTS OPEN GOVERNMENT

*Government leaders should foster a culture of openness, with the right incentives and sufficient resources to support transparency.*

Creating an environment in federal agencies that encourages openness is a tough goal. No one likes to have their work scrutinized by external parties, so it is not surprising that public officials do not naturally embrace openness and the resulting accountability it brings. Improvements in transparency depend on the same factors that any effective reform effort requires, including commitment from top leadership, responsive staff, incentives for performance and consequences for poor performance, adequate resources, and an environment that supports ongoing experimentation and learning.

While the president's commitment to open government has been unwavering, at the agency level, staff responsiveness, incentives, and resources have often been lacking.

## Leadership and Vision

President Obama brought together many of the necessary components for change. The president offered a powerful vision for open government and challenged agencies to think creatively, particularly about the use of technology. The administration also signaled its commitment to transparency by playing a leadership role in creating the international Open Government Partnership.

Strong policy improvements were put in place for FOIA, classification/declassification, scientific integrity, whistleblower protections, and general open government. The White House set an example with visitor logs. Rather than continue to fight a lawsuit started during the Bush administration around certain presidential records, Obama settled it and created a searchable website of logs of visitors to the White House – the first time the White House ever disclosed such information. In March 2011, the White House directed agencies to post staff directories, testimony, and reports to Congress.<sup>8</sup> However, a review of 29 agencies conducted in July 2011 found that only six were posting all the information required by the directive.<sup>9</sup>



*“We came to Washington to change the way business was done, and part of that was making ourselves accountable to the American people by opening up our government.”*

President Barack Obama, Statement on Sunshine Week, March 16, 2010<sup>10</sup>

During the first two years of the first term, several high-level White House staff were engaged on transparency reforms. For instance, Norman Eisen served as Special Counsel for Ethics and Government Reform and worked closely with transparency advocates to develop the administration's open government agenda. His senior position and his commitment of a significant amount of his time to government reform issues seem to have played a critical role in the policy successes evident during that period. However, subsequent staff departures from the White House have left no one clearly in charge of implementing the president's open government directives. Instead, a few staff have worked intermittently on open government while handling multiple other responsibilities. There appears to be no clear alignment of authority and responsibility for implementing open government reforms among White House staff.

8 Steve Croley, “The Freedom of Information Act: Building on Steady Progress,” *The White House Blog*, March 14, 2011. <http://www.whitehouse.gov/blog/2011/03/14/freedom-information-act-building-steady-progress>.

9 “Agencies Not Meeting Administration's Sunshine Week Commitments,” OpenTheGovernment.org, July 8, 2011. <http://www.openthegovernment.org/node/3161>.

10 “Statement from the President on Sunshine Week,” The White House, Office of the Press Secretary, March 16, 2010. <http://www.whitehouse.gov/the-press-office/statement-president-sunshine-week>.

Agencies also experienced confusion over leadership and authority on open government issues. Many agencies included some hierarchy of the officials responsible for transparency in their open government plans, but not all clarified staff responsibilities. Additionally, we have seen senior officials assign responsibility for open government issues to lower-level staff who do not always have the authority to establish strong agency-wide policies or force changes in the activities of agency divisions.

An interagency Open Government Working Group convened by the White House meets regularly, but there are no records of the issues addressed or the agencies and officials attending. While the need for some degree of non-public dialogue is understandable, it is disappointing that a working group on open government hasn't figured out a way to inform the public about its work and accomplishments.

## *Implementation Struggles*

There is a noticeable gap between the White House's policies and agencies' implementation thereof. Ultimately, the administration will be judged on the transparency it delivered, not the transparency it envisioned or promised – and there is widespread agreement that the delivery has lagged.

To its credit, the administration has taken some steps to ensure its transparency policies are enacted. The administration required agencies to create open government plans – encouraging them to take ownership of the openness initiative and to reflect critically on transparency in agency operations. To foster leadership, the administration directed each agency to appoint a senior-level representative to an interagency Open Government Working Group. To bolster accountability, Chief FOIA Officers in all the agencies were assigned new reporting requirements on agency implementation efforts. It isn't clear why these efforts proved insufficient to generate consistent implementation across the federal government.

“We are only seeing a few agencies enthusiastic about the Open Government Directive. Maybe it's because there aren't penalties for failure, nor rewards for initiative and excellence. Participation is voluntary, and there isn't a real infrastructure across the government to ensure openness is a priority,” commented Danielle Brian, executive director of the Project On Government Oversight (POGO).

Some agencies embraced the challenge of developing Open Government Plans and offered bold and innovative changes. For instance, the National Aeronautics and Space Administration's (NASA) plan scored the highest in a review by open government advocates and was noted as



“exceptional for its level of detail for each project and initiative.”<sup>11</sup> NASA’s open government plan included more than 80 specific milestones, with deadlines for three months, six months, one year, and two years

for most project areas. The plan also featured innovative projects such as an online status dashboard, increasing access to scientific data, and crowdsourcing greater public involvement in research.<sup>12</sup> Other agencies only scratched the surface with overly general terms and few details or timeframes. The Department of Justice’s plan, which scored lowest in the review, offered practically no significant expansions in transparency or innovative open government projects, instead focusing primarily on FOIA and preexisting public relations efforts.

NASA’s plan included more than 80 specific milestones for innovative projects.

Likewise, agency performance has been mixed on implementing the Obama administration’s FOIA policies. For instance, the 2009 Open Government Directive instructed agencies with a significant backlog of FOIA requests to reduce their backlogs by 10 percent each year. But of the 11 cabinet agencies with more than 500 backlogged requests in fiscal year (FY) 2009, only three met the 10 percent reduction goal each year: the Departments of Health and Human Services, the Interior, and the Treasury. Three other agencies met the goal in two years out of three, while the remaining five agencies met their goal in only one year. There was no year in which every agency met the assigned goal. As of the end of FY 2012, nearly 60,000 backlogged requests remained in these 11 agencies – a total reduction of 8.8 percent compared to FY 2009.<sup>13</sup>

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11 *Evaluating Open Government*, OpenTheGovernment.org. <https://sites.google.com/site/opengovtplans/home>.

12 “NASA Open Government Plan,” National Aeronautics and Space Administration. <http://www.nasa.gov/open/plan/>.

13 [Data](#) from agency annual FOIA reports. See <http://www.justice.gov/oip/reports.html>.



<b>Agency Progress in Reducing FOIA Backlogs</b>				
<i>Agency</i>	<i>FY 2010</i>	<i>FY 2011</i>	<i>FY 2012</i>	<i>Total</i>
<b><i>Agency reduced FOIA backlogs by 10 percent in all three years</i></b>				
Health and Human Services	Yes	Yes	Yes	3 / 3
Interior	Yes	Yes	Yes	3 / 3
Treasury	Yes	Yes	Yes	3 / 3
<b><i>Agency reduced FOIA backlogs by 10 percent in two years out of three</i></b>				
Defense	Yes	No	Yes	2 / 3
Homeland Security	Yes	No	Yes	2 / 3
Labor	Yes	No	Yes	2 / 3
<b><i>Agency reduced FOIA backlogs by 10 percent in one year out of three</i></b>				
Agriculture	Yes	No	No	1 / 3
Justice	No	Yes	No	1 / 3
State	No	Yes	No	1 / 3
Transportation	Yes	No	No	1 / 3
Veterans Affairs	No	No	Yes	1 / 3
<b>Total agencies that reduced FOIA backlogs</b>	<b>8 / 11</b>	<b>5 / 11</b>	<b>7 / 11</b>	

Resources were also a frequent problem for agency implementation of open government policies. Despite the fact that these efforts often result in saved money and were popular with the public, agencies typically have to invest some resources upfront. Tight and unpredictable budgets contributed to agency reluctance to make the investment in key open government activities. This has meant that bigger, broader reforms were scaled back or not considered.

## *Congressional Oversight*

The slow pace of secrecy reform within the executive branch has been aided and abetted by a lack of robust oversight from Congress. The legislative branch of government – co-equal under the Constitution – has largely failed to provide substantive oversight for openness efforts and to challenge secrecy claims.

Congress has numerous tools at its disposal that can help identify problems, improve agency implementation, and even highlight best practices. The most common tools used by Congress include committee hearings, formal letters of inquiry to agencies, and requests for the

Government Accountability Office to review policies and practices. Yet Congress has conducted little visible oversight in the past four years on a number of key transparency issues. The effects of several new administration policies – such as the Open Government Directive and subsequent open government plans by agencies, executive orders on classification and controlled unclassified information, the scientific integrity memo, and the state secrets policy – have gone largely unexamined. While there has been some oversight of FOIA implementation,<sup>14</sup> this has been the exception. Congress should do more to utilize the oversight tools at its disposal to determine how well these policies are serving the public's interests.

The lack of oversight is especially evident in areas of national security and secrecy. Instead of encouraging greater transparency and accountability, members of Congress have actually supported continued secrecy. For instance, in 2011, the Senate Intelligence Committee proposed punishing unauthorized disclosures of classified information by seizing any federal government pensions the individual may possess. Such a policy, which was

not requested by intelligence agencies, could have a tremendous chilling effect on potential whistleblowers. The provision was stripped out of the 2013 Intelligence Authorization Act before it was passed in December 2012.<sup>15</sup>

“Under those conditions, it was not totally realistic to expect the executive branch to restrain itself,” said Steven Aftergood, director of the Federation of American Scientists’ Project on Government Secrecy. “It’s hard for government agencies to be more transparent than Congress wants them to be.”

At the same time, the administration has not been fully welcoming of congressional oversight in the rare instances when it has occurred on open government issues. Congressional staff continue to complain about the difficulty of getting executive officials to testify before committees and that agencies are slow to respond to congressional requests for oversight information. The Justice Department’s testimony in a 2012 House hearing on using technology to improve FOIA implementation did as much to muddy the waters as it did to elucidate the issue. The department downplayed the accomplishment of other agencies in developing the FOIAOnline portal and claimed that because other agencies had FOIA webpages, there were already many such portals. When the House Judiciary Committee held hearings on the state secrets privilege in June 2009, the administration declined to provide witnesses despite the committee’s request. Rep. Jerrold Nadler (D-NY), then chair of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, expressed disappointment in the lack of administration participation and said, “It

14 See e.g. “Congress Asking the Right Questions on FOIA,” Center for Effective Government, Feb. 12, 2013. <http://www.foreffectivegov.org/congress-asking-right-questions-foia>.

15 Steven Aftergood, “Senate Passes Intelligence Bill Without Anti-Leak Measures,” *Secrecy News*, Dec. 31, 2012. [https://www.fas.org/blog/secrecy/2012/12/2013\\_intelauth.html](https://www.fas.org/blog/secrecy/2012/12/2013_intelauth.html).

should be possible to send someone to provide us with the Administration's views and to answer our questions to the extent that they are able.”<sup>16</sup>

## *Scientific Integrity and Media Access*

In contrast with the George W. Bush administration's political manipulation and suppression of science, President Obama issued a March 2009 memo embracing the principles of scientific integrity. Specifically, the memo directed officials not to suppress scientific findings and to adopt appropriate procedures to ensure scientific integrity. Advocates have not reported significant or consistent attempts to manipulate scientific findings in the Obama administration's first term. However, media access to government scientists remains an issue.

Despite presidential instructions to complete scientific integrity guidelines within three months, it took the Office of Science and Technology Policy (OSTP) more than 18 months to produce guidance for agencies. When it was released, the OSTP guidance was vague. OSTP's principles failed to specifically state scientists' rights to express personal views or to review the final version of scientific documents to which they contributed, did not require agencies to inform employees of their whistleblower rights or to post their communications policies online, and did not clearly define the role of public affairs officers. The OSTP memo also did little to improve the ability of journalists to speak with government experts, stating that “federal scientists may speak to the media ... with appropriate coordination with their immediate supervisor and their public affairs office.”<sup>17</sup>

Despite the new policy, journalists complain that in many agencies, access to government scientists is quite limited. Reporters are not allowed to talk to scientists without a public affairs officer in the agency being present. The result is continued or worsened delays and bureaucratic hurdles in getting access

“We continue to get calls from reporters on an ongoing basis, saying they can't get in,” said Francesca Grifo, senior scientist at the Union of Concerned Scientists.

to experts and documents, which makes uncovering stories more difficult. “This particular administration is very, very disciplined when it comes to information control,” said Lucy Dalglish, dean of journalism at the University of Maryland.

Agency policies on scientific integrity vary widely. The National Oceanic and Atmospheric Administration's (NOAA) draft policy stood out from other agencies with specific protections and

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16 “State Secret Protection Act of 2009,” Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, June 4, 2005. [http://judiciary.house.gov/hearings/printers/111th/111-14\\_50070.PDF](http://judiciary.house.gov/hearings/printers/111th/111-14_50070.PDF).

17 John P. Holdren, “Scientific Integrity,” memorandum, Office of Science and Technology Policy, Dec. 17, 2010. <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

detailed procedures for reporting and investigating possible instances of scientific interference. By contrast, the EPA's draft policy did not contain enforceable requirements to protect against scientific interference or detail any investigation procedures. The process for the development of agency scientific integrity policies was *ad hoc* and lacked a requirement to engage with the public.

## Whistleblower Protection

Whistleblowers make the public aware of lawbreaking, waste, or threats to health and safety. Protecting public servants who report problems from professional retribution helps establish a culture of transparency in government that places accountability and the public good above problem avoidance or image maintenance. However, despite the important role whistleblowers play in making sure that lawmakers and the public are informed of wrongdoing, the legal provisions put in place to protect them from retribution became riddled with loopholes from bad court rulings over the years.<sup>18</sup>

A recent survey by the Merit Systems Protection Board, an independent agency that reviews whistleblower appeals, suggests that while fewer federal employees are witnessing wrongdoing and many employees do report such problems, retribution against whistleblowers still occurs. The board surveyed more than 42,000 federal employees in 2010 and found that about 11 percent reported witnessing any “wasteful or illegal activities.” Of these, about two-thirds said they reported these activities, about one in five of whom said that they suffered some kind of reprisal from blowing the whistle. And a higher percentage of these reported being fired for whistleblowing in 2010 than in 1992.<sup>19</sup>

During its first term, the Obama administration worked regularly to support legislative efforts to improve whistleblower protections. The president signed into law various improvements in whistleblower protections that were included in several bills, ranging from the Recovery Act to the health care reform law.<sup>20</sup> Then in November 2012, after years of hard work by advocacy groups, Congress passed and President Obama signed the Whistleblower Protection Enhancement Act.<sup>21</sup> The new law made major upgrades to the protections for federal whistleblowers by closing loopholes, clarifying protections, and strengthening the agencies charged with protecting whistleblowers. Though intelligence and national security workers

18 Report on the Whistleblower Protection Enhancement Act (P.L. 112-199), Senate Committee on Homeland Security and Governmental Affairs, April 19, 2012. <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt155/pdf/CRPT-112srpt155.pdf>.

19 *Blowing The Whistle: Barriers to Federal Employees Making Disclosures*, U.S. Merit Systems Protection Board, November 2011. <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475&application=ACROBAT>.

20 Whistleblower protections were included in the American Recovery and Reinvestment Act (P.L. 111-5, Sec. 1553); Fraud Enforcement and Recovery Act of 2009 (P.L. 111-21, Sec. 4); Patient Protection and Affordable Care Act of 2010 (P.L. 111-148, Sec. 10104(j)(2)); and FDA Food Safety Modernization Act (P.L. 111-353, Sec. 402).

21 P.L. 112-199.

were excluded from the new law's protections, President Obama issued a directive in October to improve protections for these public employees.<sup>22</sup>

In addition, Congress extended whistleblower protections to an estimated 12 million private employees of federal contractors and grantees, ensuring that these companies and organizations cannot fire or punish private employees who report misconduct among businesses receiving

Laws signed in late 2012 and early 2013 upgraded the protections for federal whistleblowers and extended protections to 12 million private employees of federal contractors.

public funds. These provisions were included in the National Defense Authorization Act, which President Obama signed in early January 2013.<sup>23</sup> However, the president surprisingly issued a signing statement on the law that claimed the provisions could interfere with the executive branch's ability to manage officials and asserted that the administration would interpret the protections so that agencies could "supervise, control and correct employees' communications with Congress."<sup>24</sup> The practical effect of the signing statement is unclear, but whistleblower advocates took it as inauspicious.<sup>25</sup>

Another contradiction to the administration's efforts to improve whistleblower protections was the unprecedented number of investigations and excessive prosecutions of leaks, which could have a chilling effect on authorized disclosures. The administration has brought six cases against government (or military) employees for leaks under the Espionage Act, compared to only three known previous cases since its enactment in 1917.<sup>26</sup> For example, after telling a reporter about warrantless wiretaps by the National Security Agency, Thomas Drake, a former official at the agency, was charged under the Espionage Act. Drake faced up to 35 years in jail for possessing, but never sharing, a handful of classified documents – several of which were either marked declassified or had been declassified. After years of investigation and prosecution, the administration's case collapsed, and they instead struck a deal with Drake to plead guilty to a misdemeanor.

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22 Barack Obama, Presidential Policy Directive 19, "Protecting Whistleblowers with Access to Classified Information," The White House, Oct. 10, 2012. <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/10/11/National-Politics/Graphics/whistleblower1C.pdf>.

23 P.L. 112-239.

24 "Statement by the the President on H.R. 4310," The White House, Office of the Press Secretary, Jan. 3, 2013. <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>.

25 See e.g. Suzanne Dershowitz, "Lawmakers Sound Alarm on Obama's NDAA Signing Statement," Project On Government Oversight, Jan. 17, 2013. <http://www.pogo.org/blog/2013/01/20130117lawmakers-sound-alarm-on.html>.

26 Cora Currier, "Sealing Loose Lips: Charting Obama's Crackdown on Leaks," *ProPublica*, March 9, 2012. <https://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks>.

“It’s never appropriate to treat a whistleblower who is trying to perform a service to his country in the same way that you would treat a traitor,” said Elizabeth Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice.



## ACCESSIBLE, RELIABLE PUBLIC INFORMATION

*Public information should be accurate, timely, and easy to find, use, and understand.*

In its first term, the Obama administration has shown exceptional enthusiasm in using new technologies to communicate with the public. Agencies have unveiled user-friendly websites, broadened data availability, and grown significantly bolder in their use of social media. The administration has also taken steps to better manage technology in ways that improve the longer-term outlook for transparency. As a result of its reforms and commitments, the administration has considerably raised expectations for the usability of government information.

Openness can only be meaningfully judged against the standards of the day. The Internet revolution has made it easier than ever to access, analyze, and understand information. The public expects high standards of usability in technology, and intuitive tools like visualizations have become widespread. The benefits of these improvements for better dialog and decision making have become more evident.



## Websites and Data

In just four years, the online face of the U.S. government has undergone dramatic change. To some degree, this has been driven by broader social trends, as reliance on the Internet has become ubiquitous. However, the administration had options in how to respond to the technological shift, and it has clearly chosen to embrace it. On President Obama's first full day in office, he issued a memo directing agencies to "harness new technologies to put information about their operations and decisions online and readily available to the public."<sup>27</sup> The past four years have seen that rhetoric increasingly becoming reality.



*"Agencies should harness new technologies to put information about their operations and decisions online and readily available to the public."*

President Barack Obama, "Transparency and Open Government," Jan. 21, 2009<sup>28</sup>

To help transform government's use of technology, the administration created two new federal officers, a Chief Information Officer (CIO) and a Chief Technology Officer (CTO), both of whom have played important roles in driving transparency efforts forward. The administration also proposed increasing resources for IT (through growth in the Electronic Government Fund) while emphasizing the need to get more value out of technology spending – a necessary step in making transparency innovations fiscally feasible.

These investments yielded important benefits. An early project, the IT Dashboard, tracked underperforming and over-budget IT projects within agencies, which led to the cancellation of some \$3 billion in failing technology projects. PaymentAccuracy.gov identifies possibly improper federal payments that cost billions of dollars each year. Challenge.gov established a low-cost platform to help agencies bring the public into agencies' deliberations on how to solve government problems.

*"Thinking about information differently, as something that is not just the public's right to ask for, but that agencies have an obligation on their own to make it more accessible to the public – I think that is a huge step," said Anne Weismann, chief counsel for Citizens for Responsibility and Ethics in Washington (CREW).*

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<sup>27</sup> Barack Obama, "Transparency and Open Government," memorandum, The White House, Jan. 21, 2009. [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment).

<sup>28</sup> *Ibid.*



Improving access to government data has been a particular accomplishment of this administration. In May 2009, the administration launched Data.gov to provide a central repository for agencies to make data available to users and to facilitate interactions among data users

and providers.<sup>29</sup> The Data.gov program became the centerpiece of the administration's efforts to encourage agencies to make data more widely available to the public. The website now features more than 350,000 datasets, 1,200 data tools, and more than 130 mobile applications from agencies across the federal government. The website has organized data on different topics into 16 issue-area "communities," including ethics, health, law, and energy. But agencies have lagged at releasing inventories of their datasets, which prevents users from knowing what important datasets might still be missing from Data.gov.

The Data.gov website features more than 350,000 datasets, 1,200 data tools, and more than 130 mobile applications from agencies across the federal government.

There has also been progress on building a government-wide infrastructure for the Freedom of Information Act (FOIA) process. Several agencies collaborated to develop FOIAOnline, which launched in October 2012.<sup>30</sup> The multi-agency portal, long a goal of open government campaigners, allows the public to submit and track FOIA requests, receive responses, and search others' requests through a single website. The platform is also expected to improve the efficiency of agency processing of requests.

The administration has also improved the tracking of rulemaking within the executive branch that determines how laws are implemented. The Obama administration has improved Regulations.gov, the government-wide e-rulemaking portal, to make the site more user-friendly. The site received an aesthetic redesign, upgrades to its search capabilities, easier docket navigation, and better access to regulatory data. In addition, President Obama issued a memorandum directing agencies to publish more data about their regulatory enforcement activities.<sup>31</sup> Nevertheless, rulemaking dockets are still complex to navigate, and important information such as cost-benefit analyses can be difficult for even experienced users to find.<sup>32</sup>

Many agencies and the White House have begun to make wider use of social media, such as Twitter and Facebook. As Hurricane Sandy approached the East Coast, the Federal Emergency

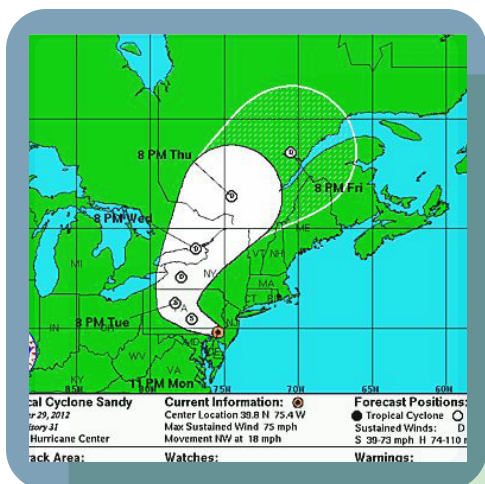
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29 "Data.gov to Bring Unprecedented Access to Government Information," press release, Office of Management and Budget, May 21, 2009. [http://www.whitehouse.gov/omb/news\\_052109\\_data](http://www.whitehouse.gov/omb/news_052109_data).

30 "National Archives Joins Federal Agencies to Launch New Freedom of Information Act (FOIA) Online System," press release, National Archives and Records Administration, Oct. 1, 2012. <http://www.archives.gov/press/press-releases/2013/nr13-01.html>.

31 Barack Obama, "Regulatory Compliance," memorandum, The White House, Jan. 18, 2011. <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance>.

32 "Highlighting the Benefits in Cost-Benefit Analysis," OMB Watch, Sept. 11, 2012. <http://www.foreffectivegov.org/highlighting-the-benefits-in-cost-benefit-analysis>.



Management Agency (FEMA), the National Weather Service, and other federal agencies used Facebook and Twitter feeds to keep the public informed and help them prepare for the storm.<sup>33</sup> The administration has taken several steps to facilitate the use of social media, including publishing guidance in several areas to facilitate agency adoption and signing government-wide contracts with several popular services.

One of the latest steps the administration took to improve government websites and online tools was the Digital Government Strategy, released in May 2012.<sup>34</sup> The document is an ambitious

and forward-looking plan with the potential to make government more transparent, efficient, and accessible. The strategy requires agencies “to adopt new standards for making applicable Government information open and machine-readable by default.” The strategy requires agencies to develop new mobile applications, to make high-value datasets easier for programmers to tap into for new uses, and to improve interoperability between agencies. In addition, the strategy created a new support office, the Digital Services Innovation Center, and an advisory group to assist and guide agencies’ modernization efforts.

## Records Management

Records management is an ongoing challenge for every administration due to the sheer amount of information collected and processed at the federal level. Dozens of federal agencies, comprised of an estimated 2.8 million federal employees, exist,<sup>35</sup> each generating information every day – reports, databases, e-mails, and so on. Add to that the tens of thousands of companies filing regulatory information, as well as communications with the public, and records management quickly becomes a daunting task. Properly implemented, electronic information collection and records management will make information more accurate, faster to find, and easier to share eventually. Yet despite the importance and benefits of modernizing records management,

33 Jacqueline Baylon, “Hurricane Sandy: Authorities use social media to keep people informed,” *Denver Post*, Oct. 29, 2012. [http://www.denverpost.com/digital-first-media/ci\\_21880815/hurricane-sandy-social-media](http://www.denverpost.com/digital-first-media/ci_21880815/hurricane-sandy-social-media). Also see “Hurricane Sandy Highlights Role of Government Information in Our Everyday Lives,” Center for Effective Government, Nov. 5, 2012. <http://www.foreffectivegov.org/sandy-highlights-role-of-gov-info-in-our-everyday-lives>.

34 Steven VanRoekel, “Roadmap for a Digital Government,” *Office of Management and Budget Blog*, May 23, 2012. <http://www.whitehouse.gov/blog/2012/05/23/roadmap-digital-government>. Also see “Obama Plans to Further Harness Technology for Transparency,” Center for Effective Government, May 30, 2012. <http://www.foreffectivegov.org/node/12089>.

35 Employment, Hours, and Earnings from the Current Employment Statistics survey (National), Bureau of Labor Statistics. Feb. 25, 2013. <http://data.bls.gov/timeseries/CES9091000001>.

agencies have struggled to shift from paper records or rudimentary electronic formats to modern records management.

To address this issue, the administration has made substantial progress in creating a plan and specific requirements that would move all agencies to modern and consistent management of records. In September 2011, the administration pledged to modernize the management of government records and move toward “a

digital era, government-wide records management framework that promotes accountability and performance.”<sup>36</sup> In November 2011, a presidential memorandum directed agencies to create and report their plans for improving records management and to identify any obstacles to effectively managing information.<sup>37</sup>

There has been “a sea change in the attention of the government ... to the problem of not just managing but preserving electronic records,” said Patrice McDermott, executive director of [OpenTheGovernment.org](http://OpenTheGovernment.org).

In August 2012, the administration issued the Managing Government Records directive, which requires agencies to shift to electronic record keeping and develop tools to manage and preserve e-mail records electronically. Unfortunately, the directive included long timeframes for change: agencies were given until the end of 2016 to manage e-mail records electronically and until the end of 2019 to manage key records in electronic format. Overall, the directive is expected to have a genuine positive impact on records management at agencies, but many would like to see implementation deadlines shortened.

Even with these policy improvements, records management problems continue to occur. The correspondence of public officials can reveal why decisions are made and how policies are refined, including the possibility of inappropriate dealings with special interests. Yet government officials have been criticized for using personal e-mail accounts for official matters. Though regulations allow such non-agency e-mail so long as records are preserved,<sup>38</sup> the concern remains that these records will not be tracked, searched, or retained. After a problem with personal e-mail accounts<sup>39</sup> in 2010, the Office of Science and Technology Policy (OSTP) issued a new policy requiring officials to conduct communications through government accounts and to forward

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36 The Open Government Partnership: National Action Plan for the United States Of America, The White House, Sept. 20, 2011. [http://www.whitehouse.gov/sites/default/files/us\\_national\\_action\\_plan\\_final\\_2.pdf](http://www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf).

37 Barack Obama, “Managing Government Records,” memorandum, The White House, Nov. 28, 2011. <http://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>. Also see “OMB Watch Praises Presidential Memo on Modernizing Records Management,” press release, OMB Watch, Nov. 28, 2011. <http://www.foreffectivegov.org/node/11924>.

38 36 CFR 1236.22.

39 David Perera, “Rep. Issa presses White House on Gmail,” *FierceGovernmentIT*, April 14, 2010. <http://www.fiercegovernmentit.com/story/rep-issa-presses-white-house-gmail/2010-04-14>.

work-related e-mails on personal accounts to government accounts.<sup>40</sup> Similarly, despite the White House blocking external e-mail systems,<sup>41</sup> a June 2010 *New York Times* article reported that “[s]ome lobbyists say that they routinely get e-mail messages from White House staff members’ personal accounts rather than from their official White House accounts.”<sup>42</sup> In November 2012, it was revealed that U.S. Environmental Protection Agency Administrator Lisa Jackson used an alias account under the name “Richard Windsor.” While the agency claims the use of such aliases is normal practice to allow for easier internal communications, it could impede complete and effective responses to requests for communication records. There have been several inquiries about this practice from Congress, and in December 2012, the EPA Inspector General launched an investigation.<sup>43</sup>

## Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) has long been considered one of the most fundamental tools to ensure open government at the federal level. Requesting government information through a FOIA request is the primary way the public accesses records that aren’t proactively made available through agency websites. However, long delays in agency responses (sometimes years) due to large backlogs of requests are common. There are also concerns that some agencies overuse exemptions from the law to excessively withhold documents from disclosure. These problems have led persistent requestors to pursue lawsuits to force disclosure. This can make obtaining government information more costly for both agencies and the public, and it means that when the requested information is finally released, it may no longer be timely.

In its first term, the Obama administration demanded faster FOIA processing and tried to improve the process for obtaining access to government records. “Agencies should act promptly and in a spirit of cooperation” when processing FOIA requests, according to a presidential memorandum issued on Obama’s first full day in office.<sup>44</sup> “Each agency must be fully accountable for its administration of the FOIA,” wrote Attorney General Eric Holder in his 2009 memo, which

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40 John P. Holdren, “Reminder: Compliance with the Federal Records Act and the President’s Ethics Pledge,” Office of Science and Technology Policy, May 10, 2010. <http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf>.

41 Brook Colangelo, “Letter to Meredith Fuchs and Anne Weismann,” Executive Office of the President, Jan. 15, 2010. [http://www.gwu.edu/~nsarchiv/news/20100115a/WH\\_letter.pdf](http://www.gwu.edu/~nsarchiv/news/20100115a/WH_letter.pdf).

42 Eric Lichtblau, “Across From White House, Coffee With Lobbyists,” *The New York Times*, June 24, 2010. <http://www.nytimes.com/2010/06/25/us/politics/25caribou.html>.

43 Based on a court order, the agency is releasing thousands of e-mails from the Richard Windsor account. See Juliet Eilperin, “EPA IG audits administrator’s private e-mail account,” *The Washington Post*, December 18, 2012. [http://articles.washingtonpost.com/2012-12-18/national/35908210\\_1\\_e-mail-account-audit-transparency](http://articles.washingtonpost.com/2012-12-18/national/35908210_1_e-mail-account-audit-transparency).

44 Barack Obama, “Freedom of Information Act,” memorandum, The White House, Jan. 21, 2009. [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

also established new reporting requirements about how agencies are implementing the law.<sup>45</sup> In 2009, the Open Government Directive tasked agencies with significant backlogs of FOIA requests to reduce them by 10 percent annually.<sup>46</sup> Another 2010 memo directed agencies to “assess whether you are devoting adequate resources to responding to FOIA requests.”<sup>47</sup>

Despite these admonitions, overall performance on FOIA in the first term was mixed. For instance, the Obama administration had processed more FOIA requests in fiscal year 2011 than in any year since 2005, and the use of exemptions to deny requests dropped, especially the discretionary exemptions. However, agencies’ combined backlog grew by 19 percent because of an even larger surge in FOIA requests.

The Justice Department’s approach to FOIA litigation has been problematic. For instance, in *Milner v. Department of the Navy*, Justice Department lawyers argued that information about the safety of explosives stored on a Navy base in Washington State could be withheld under FOIA’s Exemption 2, which covers information “related solely to the internal personnel rules and practices of an agency.” That “odd reading” of the law, wrote Justice Elena Kagan in 2011 in the U.S. Supreme Court’s 8-1 ruling against the government, “would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than ‘a withholding statute.’” In 2011 oral arguments before the Court in *Federal Communications Commission v. AT&T*, the government argued that it does “not embrace [the] principle” that FOIA exemptions should be narrowly construed – contrary to Supreme Court precedent and the longstanding view of open government experts.<sup>48</sup>

## Spending Transparency

The federal government spends over \$1 trillion each year on salaries, contracts, grants, rent, disaster assistance, and more. Transparency around this spending is essential to increased accountability. We need to ensure the federal government, and those chosen to perform work for it, are acting in the public interest and maximizing value. Although the administration has encouraged the use of new technologies to increase the transparency of federal spending, challenges with data quality and the scope of spending data disclosed remain.

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45 Eric Holder, “The Freedom of Information Act (FOIA),” memorandum, Office of the Attorney General, March 19, 2009. <http://www.justice.gov/ag/foia-memo-march2009.pdf>. In 2012, the Justice Department also directed agencies to begin reporting key data quarterly rather than annually; see Melanie Ann Pustay, “New Quarterly FOIA Reporting Beginning January 2013,” *The FOIA Post*, Dec. 4, 2012. <http://blogs.justice.gov/oip/archives/952>.

46 Peter R. Orszag, “Open Government Directive,” memorandum, Office of Management and Budget, Dec. 8, 2009. <http://www.whitehouse.gov/open/documents/open-government-directive>.

47 Rahm Emanuel and Bob Bauer, “Freedom of Information Act,” memorandum, The White House, March 16, 2010. <http://www.archives.gov/ogis/memos/foia-memo-03-16-10.pdf>.

48 *Federal Communications Commission, et al., v. AT&T, et al.*, Oral arguments before the U.S. Supreme Court, Jan. 19, 2011. <http://www.gwu.edu/~nsarchiv/news/20120214/FCC%20v%20ATT%2009-1279.pdf>.



One of President Obama's first tasks was developing and implementing the American Recovery and Reinvestment Act,<sup>49</sup> also known as the stimulus bill. The president promised that "every American will be able to go online and see where and how we're spending every dime" of stimulus money.<sup>50</sup> The law included requirements to post online more detailed information about grants and contracts. Within months, the administration set up Recovery.gov, an impressive website that contains information about who received stimulus funding and what they are doing with those funds. Interactive mapping, informative graphs, spending summaries, and agency profiles were added over time.

In 2010, the Obama administration upgraded USAspending.gov, the website for information about government-wide spending, with several new features that provided users with greater search capabilities, interactive summaries, and tools to analyze trends over time. However, many of the transparency innovations from the Recovery Act have not yet been applied to USAspending.gov. For example, USAspending.gov borrowed an idea from Recovery.gov and began posting information on sub-contractors and sub-grantees of federal spending, but failed to connect information about the sub-contractors and sub-grantees to data about the prime awards. USAspending.gov also has not yet replicated the usability and clarity of the Recovery.gov website.

There have been other notable attempts to improve spending data. The 2009 Open Government Directive established a process aimed at improving the accuracy of spending data.<sup>51</sup> President Obama established the Government Accountability and Transparency Board in June 2011 and called for recommendations on how to better collect and display government spending.<sup>52</sup> The board provided its recommendations in December 2011. While some suggestions are being explored, no plan to implement them government-wide has yet been proposed. Although significant problems with spending data quality remain, the administration announced in February 2013 that it would issue further guidance on improving the data.<sup>53</sup>

Additionally, other significant improvements in spending transparency have faltered when proposed. For instance, several agencies proposed the possibility of posting copies of federal

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49 P.L. 111-5.

50 "Opening Remarks of President Barack Obama-As Prepared For Delivery," The White House, Office of the Press Secretary, Feb. 9, 2009. <http://www.whitehouse.gov/the-press-office/opening-remarks-president-barack-obama-prepared-delivery>.

51 Peter R. Orszag, "Open Government Directive," memorandum, Office of Management and Budget, Dec. 8, 2009. <http://www.whitehouse.gov/open/documents/open-government-directive>.

52 Barack Obama, Executive Order 13576, "Delivering an Efficient, Effective, and Accountable Government," The White House, June 13, 2011. <http://www.whitehouse.gov/the-press-office/2011/06/13/executive-order-delivering-efficient-effective-and-accountable-governmen>.

53 Camille Tuutti, "OMB guidance promised to ensure USASpending accuracy," *Federal Computer Week*, Feb. 13, 2013. <http://fcw.com/articles/2013/02/13/omb-guidance-usaspending.aspx>.

contract documents online<sup>54</sup> but withdrew the idea a few months later.<sup>55</sup> The administration also never announced a position on the DATA Act, a bill designed to strengthen spending transparency, which passed the House in April 2012.<sup>56</sup>

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54 “Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency,” Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), May 13, 2010, 75 FR 26916. <https://federalregister.gov/a/2010-11381>.

55 “Federal Acquisition Regulation; Enhancing Contract Transparency,” Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), Feb. 10, 2011, 76 FR 7522. <https://federalregister.gov/a/2011-2900>.

56 H.R. 2146 in the 112<sup>th</sup> Congress.



## NATIONAL SECURITY AND SECRECY

*Claims of national security should not inhibit oversight or enable an atmosphere of impunity for executive actions.*

Despite significant progress toward greater openness in some areas, the Obama administration's commitment to transparency has been least evident in the national security arena. On some key matters of national security, the administration has taken action to reduce inappropriate secrecy. However, in several other areas, only minor reforms have been enacted. In a few aspects, questionable national security-related secrecy has even increased.

Excessive executive branch secrecy around national security concerns is a well established problem. For example, in 2004, Bush administration officials testifying before the House Subcommittee on National Security, Emerging Threats and International Relations admitted that half of what was being classified didn't merit such protection.<sup>57</sup>

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<sup>57</sup> "Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing," Hearing before the Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Government Reform, Aug. 24, 2004. <http://www.fas.org/sgp/congress/2004/082404transcript.html>.



Such secrecy comes with a number of problems. First, it costs a lot of money to protect secret documents for decades and even more money to review them all for potential declassification. Agencies spent an estimated \$11.4 billion on security classification costs in fiscal year 2011.<sup>58</sup> This is a significant waste of resources if the information never should have been considered secret.

Second, and probably most importantly, unnecessary secrecy around national security issues can often make the public less safe. The 9/11 Commission Report found that overclassification and excessive compartmentalization of information resulted in agencies not sharing key information sufficiently and contributed to our inability to prevent the terrorist attacks. In 2005, Lee Hamilton, Vice Chair of the 9/11 Commission, testified to the Committee on Homeland Security that “poor information sharing was the single greatest failure of our government in the lead-up to the 9/11 attacks.”<sup>59</sup>

Finally, keeping too much information secret prevents proper oversight and accountability of agencies and officials from taking place. Questionable claims of national security prevented a closer examination of the Bush administration’s claims about evidence on weapons of mass destruction in Iraq, which sent thousands of U.S. troops into combat. Similar assertions were used to avoid any oversight from Congress or the public on an extensive warrantless wiretapping program that monitored U.S. citizens’ communications, which many believe constitutes the largest violation of civil liberties in decades. Such excessive secrecy weakens the ability of the American public to democratically participate in national security policy and to see accountability for actions taken by the security apparatus.

“This president needs to think long and hard about his administration’s legacy in this area,” said Elizabeth Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice. “I think he wants to leave a legacy of leading an administration that was committed to transparency at an unprecedented level, and that legacy is threatened by the administration’s actions in the area of national security policy.”

The Obama administration has put a number of reforms in place to address concerns about national security secrecy, including issuing new executive orders reining in the systems of classified and controlled unclassified information, pledging constraints on claims of the state secrets privilege, and releasing some key security information that the Bush administration had withheld. While these reforms are a start toward restoring balance, important information

58 2011 Cost Report, Information Security Oversight Office, June 20, 2012. <http://www.archives.gov/isoo/reports/2011-cost-report.pdf>. Does not include costs for the Central Intelligence Agency, the Defense Intelligence Agency, the Office of the Director of National Intelligence, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and the National Security Agency, which are classified.

59 Lee Hamilton, “Federal Support for Homeland Security Information Sharing: The Role of the Information Sharing Program Manager,” Nov. 8, 2005. [https://www.fas.org/irp/congress/2005\\_hr/110805hamilton.pdf](https://www.fas.org/irp/congress/2005_hr/110805hamilton.pdf).

continues to be kept secret, even when its disclosure would not foreseeably threaten national security.

## Classified Information

When it comes to national security and secrecy, the first thing almost everyone thinks about is classification – the system

Agencies spent \$11.4 billion on security classification costs in 2011.

by which the federal government can withhold information from the public by stamping it “Secret,” “Top Secret,” or “Classified.” Experts inside and outside government have recognized for decades that we are massively overusing secrecy classifications, which wastes money and prevents information from being readily used, even across different security agencies. Soon after assuming office, President Obama took steps intended to address this issue, but only limited progress has been made in agencies.

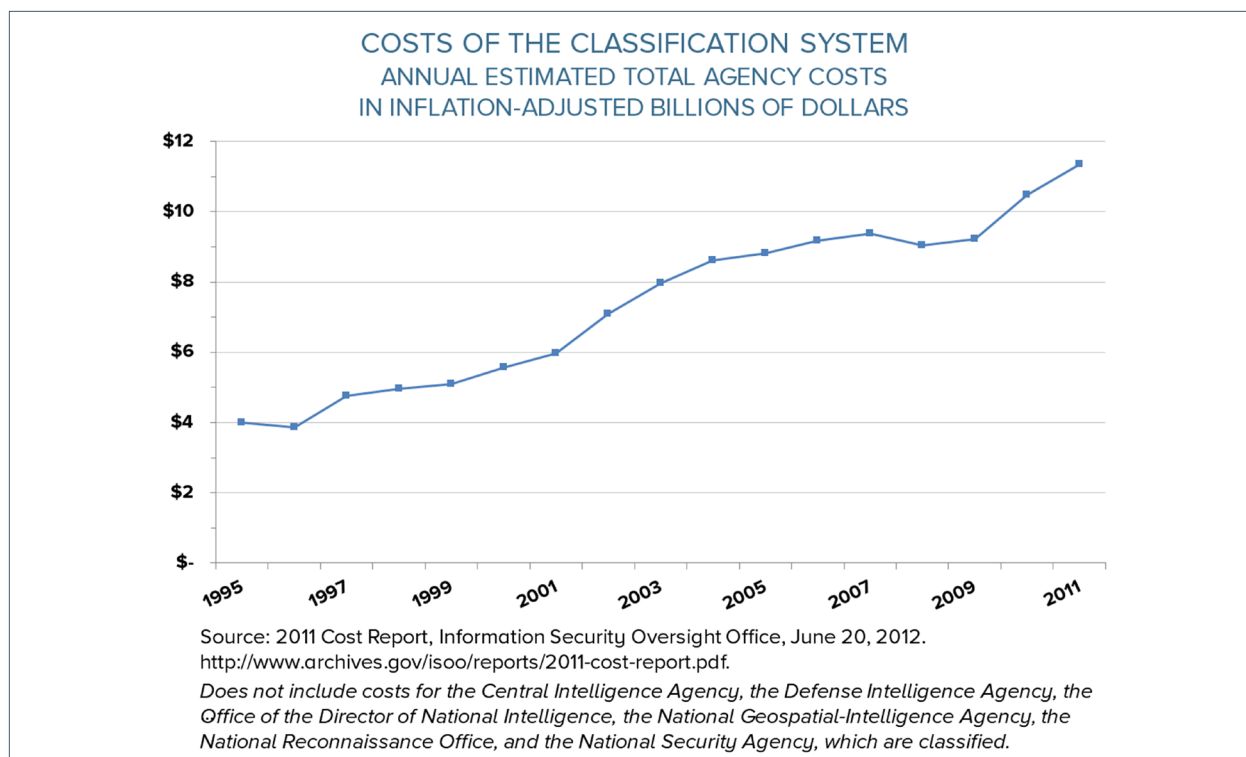
Undoubtedly, there are secrets that must be kept for a time in order to protect the security of the American public. However, recent declassifications have revealed that government agencies are spending time and money to keep a range of documents secret with little rational explanation. Examples include a 1962 telegram containing an English translation of a foreign newspaper article on China’s nuclear weapons program.<sup>60</sup> It is overkill to classify a public article as a secret, even one from another country. Another example: despite national media coverage of the incident in the U.S., the Air Force kept documents related to President Nixon ordering a DEFCON 3 alert during the 1973 Arab-Israeli war classified until 2009.<sup>61</sup> The Central Intelligence Agency did not declassify six documents describing the use of invisible ink in World War I until 2011.<sup>62</sup>

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60 Scott Shane, “U.S. Reclassifies Many Documents in Secret Review,” *The New York Times*, Feb. 21, 2006. <http://www.nytimes.com/2006/02/21/politics/21reclassify.html>.

61 William Burr, “More Dubious Secrets: Systematic Overclassification of Defense Information Poses Challenge for President Obama’s Secrecy Review,” The National Security Archive, July 17, 2009. <http://www.gwu.edu/~nsarchiv/nukevault/ebb281/index.htm>.

62 Steven Aftergood, “CIA Declassifies Documents from World War I,” *Secrecy News*, April 20, 2011. [http://www.fas.org/blog/secrecy/2011/04/cia\\_wwi.html](http://www.fas.org/blog/secrecy/2011/04/cia_wwi.html).



In recent years, the classification system has ballooned in size, scope, cost, and longevity. The federal government spent more than twice as much to protect classified information in 2011 than in 2001.<sup>63</sup>

The most significant portion of these costs is for protection of information systems that hold classified information; this includes approved computer hardware and software. Other significant costs are associated with physical security for classified facilities, security planning, and personnel security such as clearance reviews. Experts feared that important facts about government activities would be hidden in the secrecy landslide, depriving citizens of their right to exert democratic control and to demand accountability.

The Obama administration took quick action to try to reduce the improper and excessive classification of information. In May 2009, President Obama ordered a review of the existing executive order on classification.<sup>64</sup> In December 2009, the president replaced the executive order with one that tightened standards for classifying information. Most importantly, the new order directed agencies to review all classification guides – the documents that authorize certain subjects to be classified – and eliminate obsolete requirements.<sup>65</sup>

63 Patrice McDermott, 2012 Secrecy Report, OpenTheGovernment.org, Sept. 12, 1012. <http://www.openthegovernment.org/node/3578>.

64 Barack Obama, "Classified Information and Controlled Unclassified Information," memorandum, The White House, May 27, 2009. [http://www.whitehouse.gov/the\\_press\\_office/Presidential-Memorandum-Classified-Information-and-Controlled-Unclassified-Information](http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Classified-Information-and-Controlled-Unclassified-Information).

65 Barack Obama, Executive Order 13526, "Classified National Security Information," The White House, Dec. 29, 2009. <https://www.federalregister.gov/executive-order/13526>.

The two-year process was completed in June 2012 and resulted in some dramatic reductions in the number of classification instructions. For instance, the Department of Defense eliminated more than 400 of 2,000 classification guides.<sup>66</sup> However, it is unclear how much information was declassified as a result of the review or what reduction in overclassification will materialize from the updated guides.

“It is clear that there has been a net reduction in the scope of what is authorized for classification,” said Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists. “That’s movement in the right direction.”

Similarly, the effort to speed declassification has met with mixed results. The president’s executive order set up a new National Declassification Center (NDC) in January 2010 to centralize processing of the massive backlog of documents pending declassification. The Obama administration

**The National Declassification Center has reviewed 361 million pages of classified records over the past three years, but has completed processing of only 94 million pages.**

tasked the NDC with processing a backlog of almost 400 million pages by the end of 2013. As of January 2013, the NDC had reviewed 361 million pages of classified records but only completed processing on 94 million.<sup>67</sup> The slow progress has been attributed to the fact that under current law, nearly a third of the backlog requires some page-level review, and many records require multiple reviews by staff from various agencies. Without extensive interagency resources or some change in the legal requirements for reviews, the NDC is unlikely to completely process the full backlog by the end of 2013.

In addition, in October 2010, President Obama signed the Reducing Over-classification Act, which requires improved training for classifiers and new guidance to reduce overclassification.<sup>68</sup> However, the law’s impact is not yet clear.

Encouragingly, the administration left the door open to further reforms. The executive order called for recommendations for future reforms from the Public Interest Declassification Board, an advisory group appointed by the president and congressional leaders. The board delivered its recommendations in December 2012 and called for the White House to lead an effort to modernize the classification system.

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66 Timothy Davis, “Final Report: Department Of Defense Fundamental Classification Guidance Review (FCGR),” Department of Defense, June 27, 2012. <http://www.archives.gov/isoo/fcgr/dod.pdf>.

67 *Bi-annual Report on Operations of the National Declassification Center*, July 1, 2012 – December 31, 2012, National Archives and Records Administration, January 2013. <http://www.archives.gov/declassification/ndc/reports/2012-biannual-july-december.pdf>.

68 The Reducing Over-classification Act of 2010, P.L. 111-258. See <http://www.whitehouse.gov/blog/2010/10/07/president-signs-hr-553-reducing-over-classification-act>.

## Controlled Unclassified Information (CUI)

Problems with excessive secrecy and national security do not stop with classification. In fact, there are many categories of security or sensitive information that have been protected and withheld even though they do not qualify for classification. The lack of rules for labeling Controlled Unclassified Information (CUI) has resulted in widespread confusion. The administration took critical steps in its first term to reform the CUI system. However, agencies are only at the beginning stages of the implementation process, and the practical effect of the reforms remains to be seen.

Following the 9/11 terrorist attacks, agencies began locking down information – even though the failure of cross-agency information sharing was implicated in the security breaches on 9/11. Designations for CUI proliferated, eventually reaching more than 100 markings across the federal government, including such labels as For Official Use Only (FOUO), Security Sensitive Information (SSI), and Law Enforcement Sensitive (LES). The Government Accountability Office found that most designations didn't come with government-wide policies on proper use and that the lack of internal controls could result in designations being misapplied and unnecessary restrictions on sharing materials.<sup>69</sup> Efforts to reform the system began in 2005 under President George W. Bush, who issued a memorandum directing agencies to standardize procedures for safeguarding sensitive terrorism, homeland security, and law enforcement information in order to better facilitate the sharing of this information between different agencies. However, no significant policy overhaul resulted.

After ordering a review in May 2009,<sup>70</sup> President Obama issued an executive order in November 2010 establishing a new CUI system.<sup>71</sup> The order replaces the previous *ad hoc* outgrowths of pseudo-secrecy with a more predictable, transparent, and accountable system for controlling information that requires certain protections but is not classified. The new executive order clarifies that a CUI designation is not an exemption from FOIA review. Furthermore, the order requires an assumption of openness in designating information as CUI.

The executive order tasked the National Archives and Records Administration (NARA) with putting standards in place and overseeing agency implementation of the new system. In June 2011, NARA issued initial procedures for how agencies will implement the order. At the same time, agencies reviewed the categories in use and submitted proposals about which categories would be authorized under the new system. Agencies were required to cite a basis in law,

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69 Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information, Government Accountability Office, March 17, 2006. <http://www.gao.gov/products/GAO-06-385>.

70 Barack Obama, "Classified Information and Controlled Unclassified Information," memorandum, The White House, May 27, 2009. [http://www.whitehouse.gov/the\\_press\\_office/Presidential-Memorandum-Classified-Information-and-Controlled-Unclassified-Information](http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Classified-Information-and-Controlled-Unclassified-Information).

71 Barack Obama, Executive Order 13556, "Controlled Unclassified Information," The White House, Nov. 4, 2010. <https://www.federalregister.gov/executive-order/13556>.

regulation, or government-wide policy for each proposed category.

In November 2011, NARA published a public registry of the authorized categories, which should help the public understand the system, and discouraged agencies from overstepping a category's scope. Agencies no longer have the authority to create new information categories on their own; only those categories approved by NARA may be used. However, there are several guidance components still missing, such as how information is removed from protection or decontrolled. Without these components, agency implementation of the new system cannot begin. Advocates are concerned about the slow progress on these final guidance components after the administration made such strong progress establishing the framework for a new government-wide CUI system.

## State Secrets Privilege

The Obama administration initially adopted minor reforms on how it will assert claims of the state secrets privilege. The privilege allows the executive to withhold certain records related to national security from disclosure in court proceedings. However, the Bush and Obama administrations have used the state secrets privilege to dismiss entire cases against the U.S. government, claiming that entire topics are privileged, not just specific, discrete records.

The Obama administration was the first administration to publicly adopt a policy on use of the state secrets privilege.<sup>72</sup> The policy, issued in September 2009, established a review process that included detailed evidentiary submissions from agencies, with the final decision on use of the privilege to be made by the attorney general. Additionally, the policy offered limitations on the use of the privilege, including that it will not

*“This administration has endorsed in every respect all pending assertions of the state secrets privilege that were lodged by President Bush,” said Elizabeth Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice.*

be used to conceal violations of the law or to prevent embarrassment to the government. But the memo explicitly asserts that the Justice Department may seek dismissal of an entire case on the basis of the state secrets privilege and failed to require that department attorneys provide the evidence claimed to be privileged to the court for independent review. Consequently, the policy has resulted in little change in the use of the privilege. For instance, the Obama administration has regularly asserted the state secrets privilege in court to secure case dismissals.<sup>73</sup>

72 “Attorney General Establishes New State Secrets Policies and Procedures,” press release, Department of Justice, Sept. 23, 2009. <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>.

73 See e.g. Adam Serwer, “FBI Sting Lawsuit Blocked by ‘State Secrets’ Doctrine,” *Mother Jones*, Aug. 15, 2012. <http://www.motherjones.com/mojo/2012/08/fbi-sting-lawsuit-blocked-state-secrets-doctrine>. Also see Josh Gerstein, “Judge nixes ‘kill list’ suit,” *Politico*, Dec. 7, 2010. <http://www.politico.com/news/stories/1210/46079.html>.



For instance, the administration invoked the privilege in 2009 when seeking to dismiss *Shubert v. Obama*, a class-action lawsuit alleging the federal government (under the Bush administration) had engaged in wholesale surveillance of U.S. citizens.<sup>74</sup> In addition, the administration has made original assertions of the privilege. In 2010, the privilege was invoked to dismiss *Al-Aulaqi v. Obama*, a case regarding an American citizen allegedly targeted for killing by the government.<sup>75</sup> In both cases, the government stated that it had complied with the new policies to only use the state secrets privilege to seek dismissal in extraordinary cases. The court dismissed both cases but made no ruling on the government's state secrets claims.

"It's been hard to see the difference" in practice with the Obama administration's application of the new state secrets policy, said Sharon Bradford Franklin of The Constitution Project.

The continued use of the state secrets privilege to dismiss cases and the lack of improved judicial review have led several public interest groups to express concern that the policy is inadequate. But when Congress offered proposals for better oversight and limiting the use of the state secrets privilege, the Obama administration did little to engage or develop a legislative proposal it would support. The State Secrets Protection Act has been introduced during three congressional sessions.<sup>76</sup> The proposed legislation includes procedures for independent judicial review of state secrets claims, as well as congressional oversight and reporting requirements. The legislation has repeatedly failed to make it to the floor of either the House or Senate.

## Secret Law

Another secrecy issue related to national security claims is the persistence of "secret laws." Secret laws are regulations, operational legal interpretations, policies, or directives that have been kept hidden from the public and the persons to whom they apply. Examples include secret justifications for targeted killings and other secret opinions of the Office of Legal Counsel (OLC) at the Department of Justice, secret interpretations of law by the Foreign Intelligence Surveillance Court, secret presidential directives, and secret transportation security directives.

Rules and laws inaccessible to the public are inherently antithetical to democracy. While there are occasions when some government decisions should be classified and therefore issued in secret, even these exceptions should only remain classified for a reasonable time period.

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74 Lee Spiegel, "Obama Administration Invokes State Secrets Privilege...Again," ABC News, Oct. 30, 2009. <http://abcnews.go.com/blogs/politics/2009/10/obama-administration-invokes-state-secrets-privilegeagain/>.

75 "Al-Aulaqi v. Obama: Lawsuit Challenging Targeted Killings," American Civil Liberties Union, Oct. 19, 2011. <http://www.aclu.org/national-security/al-aulaqi-v-obama>.

76 H.R. 5956 in the 112<sup>th</sup> Congress.

In its first term, the Obama administration did not issue any directive or memo prohibiting the creation of secret “laws” or regulations. For instance, several Presidential Policy Directives have remained secret despite their focus on non-security issues such as international aid transparency. With the growing controversy around the use of drones to carry out targeted killings, and the administration’s refusal to release legal analysis explaining its authority to carry out such acts, the silence has become more troubling.

On the positive side, the administration has disclosed some of the secret legal opinions established under the Bush administration, including previously classified memoranda covering detainees, the use of military force against suspected terrorists, military detention of U.S. citizens, the power to transfer captured suspects to foreign custody, and broader interrogation policies. However, this disclosure has not translated into any improved policy of disclosure for this administration’s OLC memos or Presidential Policy Directives.

“The assumption was that [the release of Bush-era OLC memos] was an indication of a new approach to the secrecy and confidentiality of these OLC legal opinions,” said David Sobel of the Electronic Frontier Foundation. “But in fact, that proved to be the exception, and the Obama administration has consistently resisted the release of OLC legal opinions.”





## RECOMMENDATIONS FOR THE SECOND TERM

*To secure a lasting legacy of transparency and accountability, the administration needs to ratchet up agency implementation of the open government standards it established in the first term.*

To secure its legacy as “the most transparent administration in history,” the Obama administration has three major tasks. First, the administration must redouble its efforts to ensure that existing transparency policies are fully implemented within agencies. Second, the administration must address a few significant gaps in its policy framework to ensure that claims of national security do not trump the imperative of democratic accountability. Third, the administration needs to work with transparency champions in Congress to codify into law and even improve upon the open government policies initiated through executive actions.

We believe the following ten recommendations offer the administration the best opportunities to move forward on the major challenges facing open government. The recommendations are organized into the same three major themes – creating a government environment that supports transparency, improving the usability of public information, and reducing national security secrecy.

## Create an Environment that Supports Open Government

### Assign Clear Responsibility and Authority to Oversee Open Government Implementation

The open government community unanimously urges White House leadership to push for more uniform implementation of its open government policies at the agency level. Despite President Obama's clear commitment to open government and a litany of new policy directives, agencies seem to feel little pressure to follow through on the president's principles – and there seems to be little reward for doing so. White House staff have been working diligently on open government issues. However, transparency issues compete with numerous other priorities for the attention of senior staff, while those few staff with more dedicated responsibilities for openness don't appear to have sufficient authority to motivate action by lagging agencies. Going forward, the White House needs to assign responsibility for implementation and ensure a responsible shepherd has the authority required to direct the flock of agencies that constitute the executive branch.

*Empower staff to oversee implementation:* The White House should ensure there is a locus of authority and responsibility for each particular openness initiative and for transparency issues overall. This should include increased engagement from high-level generalists as well as strengthened authority for staff with dedicated responsibilities. A dedicated, high-level White House staff position could make a huge difference in what actions agencies take, what policies they produce, and how much they embed openness in their own governance.

### Clarify Agency Staff Responsible for Open Government Reforms

Many agencies engaged on open government issues during the Obama administration's first term, yet others lagged. It is not always the same agencies that fall behind: as the issues change, so do the laggards. If the administration wants to have significant success on open government in its second term, this implementation gap must be addressed.

*Establish compliance authority in agencies:* It will be critical for agencies to vest those officials overseeing open government efforts with sufficient authority to enforce compliance and make

clear to the public who holds that responsibility. Open government implementation efforts will not succeed if the responsible officials are constantly required to seek sign-off from busy agency heads or to cobble together buy-in from division leaders throughout the agency. Each agency should designate a senior official charged with implementation of and compliance with transparency policies.

*Strengthen the interagency working group:* The interagency Open Government Working Group was established to share best practices and coordinate implementation efforts. This working group should release basic information about its activities, such as meeting agendas and attendance. Agency participation should include senior officials responsible for open government, as well as program-level staff with implementation responsibilities. External stakeholders should be regularly invited to share their views and expertise.

*Go public with implementation:* Agencies should issue public implementation plans for key transparency and accountability policies, including whistleblower protections, scientific integrity, and controlled unclassified information. These plans should include information on training, employee awareness efforts, evaluations of performance, and other materials necessary to hold agencies accountable. Agencies should also announce staff assigned to oversee implementation and performance of these plans. Additionally, agencies should evaluate and publicly report on their current resource needs and allocations for open government efforts.

## **Oversee and Codify Open Government Reforms**

The administration made clear progress on some open government issues in its first term. But without legislative action, much of this progress could disappear the next time a president less interested in transparency assumes office. Congress should pursue legislation to secure open government improvements for the long term. In addition, Congress should more actively exercise its independent oversight role, which is critical to ensuring that open government policies are effectively implemented.

*Engage on openness legislation:* Congress and the administration should work together with stakeholders to advance open government legislation that locks into statute the improvements made to date. Legislators and the administration should also work to address problems and issues that eluded administrative solutions.

More progress is needed on spending transparency, which could be strengthened by passing legislation like the DATA Act.<sup>77</sup> Congress should also expand requirements for disclosing

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<sup>77</sup> In the 112<sup>th</sup> Congress, H.R. 2146, S. 1222, and S. 3600.

information about rulemaking and enforcement, reports and testimony to Congress,<sup>78</sup> and lobbying and special interest influence.

A FOIA update should begin by codifying the important advances of the Obama and Holder memos: the presumption of openness, withholding records only in the event of foreseeable harm, and an affirmative obligation to disclose.

Declassification legislation is also needed to reduce the complexity of and time spent on page-by-page reviews and repetitive reviews by multiple agencies. Congress should repeal or modify the 1999 Kyl-Lott Amendment, which required an additional level of burdensome review before a document could be declassified.

*Improve oversight:* Relevant committees should hold more regular hearings on open government programs and policies, with a special focus on exploring the implementation of new requirements. The goal of this oversight should not just be to uncover problems and make headlines but to discover best practices, improve on existing efforts, and develop open government legislation that requires agencies to adopt best practices. Congress should also address issues such as the roles and authorities of agency officials responsible for transparency, open government planning and performance, and the allocation and effective use of resources to support transparency.

*Administration staff should cooperate with oversight activities:* Robust and effective oversight depends, above all, on government officials who are willing to submit to external oversight – not as a necessary evil, but as a constructive contribution to the policy process. Moving forward, the administration should make it clear to all agencies that full, constructive cooperation will be given to all inquires on government transparency or accountability efforts.

## *Improve the Accessibility and Reliability of Public Information*

### **Fully Embrace Digital Information Management**

The digital information age has fundamentally changed the meaning of open government. Public officials once responded to requests for information with boxes of files. But now, if information isn't available online and easy to find and use, it isn't considered truly publicly available. This is only the third administration to have the Internet as a tool, and by far, the Obama administration has done far more with technology to improve public access to

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78 Such as the Access to Congressionally-Mandated Reports Act: in the 112<sup>th</sup> Congress, H.R. 1974 and S. 1411.

information than its predecessors. There are several notable accomplishments: Recovery.gov, Data.gov, the new digital strategy to increase the availability of mobile services, and efforts to incorporate the needs and satisfaction of website users. However, the administration has far more to do.

*Modernize information creation and management:* Agencies need to implement the new government-wide framework for managing electronic records. Modest, upfront investment in this area can pay significant long-term dividends in terms of efficiency and transparency. The administration should ensure that steady progress is made by setting milestones to be achieved during this term.

Agencies need clear, precise plans – with timetables – to transition to electronic data collection and processing systems. The government needs to move beyond such clumsy patches and create digital systems that create, receive, and manage information electronically from the start. To fully implement the new directive will require government agencies to create IT systems that have efficient information access built in to their design.

*Make information easy to use:* The volume of information that agencies now make available increases the need for intuitive tools to find and use the information. Individual agencies have created innovations to improve the usability of their own data during the first term of the Obama administration, such as the IT Dashboard and the Department of Labor’s Data Enforcement site.<sup>79</sup> Now, the administration needs a plan to ensure those innovations are deliberately disseminated across the executive branch and achieve scale.

## **Require Better Government-wide Compliance with the Freedom of Information Act (FOIA)**

The Freedom of Information Act (FOIA) has been a fundamental tool of open government for decades. Despite the Obama administration’s efforts to improve agency processing of requests, large backlogs continue to stack up and agencies continue to improperly claim exemptions. A renewed effort is needed to strengthen compliance with White House guidance and to modernize the FOIA system.

*Strengthen enforcement efforts:* The White House should launch a strong enforcement effort and task the Justice Department with overseeing full compliance by agencies. DOJ should meet with agencies regularly and aggressively identify FOIA implementation problems and solutions, with a particular emphasis on complying with deadlines for providing information. The new quarterly reporting requirements should be part of a robust effort to explain problems and develop fixes,

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79 Enforcement Data, U.S. Department of Labor. <http://ogesdw.dol.gov/index>.

not merely be a paperwork exercise. DOJ should develop new accountability mechanisms, as well as positive reinforcements for successes.

*Align the Justice Department's litigation stance with the president's transparency principles:*

The Justice Department should direct agencies to take all reasonable steps to avoid litigation, including resolving disputes without litigation and adopting best practices in working with requesters. When cases do come to court, agency lawyers should argue positions consistent with the president and attorney general's transparency principles.

*Leverage technology for faster processing:* The new interagency portal, FOIAonline, should be improved to add additional functions and a better user experience. Additional agencies should join the portal when possible, and the administration should begin planning to scale up the website to handle government-wide participation.

*Strengthen the ombudsman:* The Office of Government Information Services (OGIS) is already having a positive impact on FOIA, despite its limited budget and authority. The administration should explore options to expand and strengthen OGIS to get the full benefit of an independent ombudsman on FOIA.

## Make Proactive Disclosure of Public Information the Default

In an ideal world, the public would be able to easily find government information without needing to file a FOIA request. Robust proactive disclosure of information would save staff time and effort by reducing duplicative FOIA requests. The Obama administration made good progress during its first term with the development of Data.gov and new requirements to post information online, but more is needed.

*Establish minimum standards for disclosure:* All agencies should be required to post key data and records that shine a light on how agencies are operating. Specifically, the administration should establish minimum standards of categories of information that all agencies must proactively release, including communications with Congress, FOIA requests and released documents, visitor logs, employee directories, calendars of senior officials, and information about agency advisory panels.<sup>80</sup>

*Expand online dataset posting:* Agencies should also continue to expand the data published on Data.gov, which is largely information about missions – environment, transportation, and so on. Agencies should also publish their dataset inventories so the public can better assess if critical data remains unpublished.

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<sup>80</sup> "Minimum Standards of Open Government," <http://www.foreffectivegov.org/files/info/open-gov-min-standards-final.pdf>.



## *Reduce National Security Secrecy*

### **Stop the Inappropriate Classification of Public Documents as Secret/High Security**

The White House classification guidance review was a significant and useful step in combating the pervasive problem of overclassification. But more is needed. The White House should make it clear that the principles of openness and accountability apply to the issue of over-classification and declassification. The administration must also address major barriers to agencies achieving improvements in this area, especially any statutory requirements that block better performance.

*Lead a reform effort:* The White House should establish and lead a steering committee on classification reform, as recommended by the Public Interest Declassification Board. The steering committee should work to develop and coordinate a lean and focused classification program that minimizes inappropriate secrecy.

*Rein in over-classification:* The White House should direct the Information Security Oversight Office (ISOO) to devise and lead an initiative to curb over-classification. The fundamental classification review process should be restructured, with agencies instructed to provide their classification guidance to the Interagency Security Classification Appeals Panel (ISCAP) for review.

*Strengthen declassification:* The administration should make streamlining the declassification process a top priority. The experience of the National Declassification Center clearly indicates that only a simpler, faster review process will allow the federal government to keep up with declassification demands. The administration should expand the authority and resources of the National Declassification Center in order to more effectively declassify information that no longer warrants protection. Reviewers should have the authority to declassify most records based on one examination, rather than the multiple reviews by different reviewers from different agencies that currently occur.

### **Establish More Accountability in State Secrets Policy through Court Reviews**

The state secrets privilege continues to be a major concern for the open government community because of the perceived excessive use of an extreme and almost unchecked form of government secrecy. The Obama administration's policy on the privilege does not go far enough to establish meaningful checks and balances. Experts fear that the privilege



is still being misused, including to entirely dismiss court challenges to activities such as alleged illegal surveillance and extrajudicial killing. The role of courts in providing independent review must be restored.

*Let judges review state secrets claims:* The administration should strengthen its state secrets policy to better ensure oversight and accountability. Specifically, Justice Department attorneys should be directed to submit evidence claimed to be privileged to the court for *in camera* review. The Department of Justice should also renounce the practice of seeking dismissal of cases at the pleadings stage on the basis of state secrets claims and instead allow judges to assess if there is sufficient non-privileged information to proceed after discovery.

For instance, the current policy requires that agencies produce detailed evidentiary submissions to the Justice Department when seeking approval to make a state secrets claim. The Department of Justice should take the next step and issue a policy that would require providing these evidentiary submissions for judicial review, even when the administration holds that the specific records should not be publicly disclosed.

*Report on state secrets decisions:* The current policy also requires that, when cases involving credible allegations of wrongdoing are dismissed because of state secrets claims, those claims should be forwarded to relevant Inspectors General for investigation. The administration has not yet reported publicly on whether there have been any such referrals or the outcomes of any investigations. The administration should demonstrate that the policy is being enforced by publicly releasing the aggregate number of cases referred to IGs and some public version of IGs' findings.

*Work toward a legislative fix:* Many groups continue to believe the only effective long-term solution to potential abuses of the state secrets privilege is the enactment of legislation establishing checks and balances on invocation of the privilege. However, despite the introduction of such legislation, in its first term, the White House did not engage or comment on the bills. In the second term, the Obama administration should work with sponsors of such legislation to develop a balanced bill that will create more accountability and oversight without sacrificing the executive branch's authority to shield truly sensitive information from public disclosure.

## **Reform Leak Prosecutions**

Despite the numerous advances that have been made in protecting and encouraging whistleblowers, the Obama administration's reputation has been tarnished by its harsh and unprecedented prosecution of leak cases, which sends a troubling message. The administration should reform and narrowly tailor its approach to prosecutions, making sure to protect officials' First Amendment rights and the public's right to know.

*Set standards for investigations:* The Justice Department should develop public guidelines for the appropriate handling of leak allegations that emphasize proportionate response and aim to reassure whistleblowers that they will not be targeted. The guidelines should acknowledge the possibility of chilling freedom of speech if investigators do not handle cases with sensitivity.

*Renounce criminal prosecution for media leaks:* Unauthorized disclosures of restricted information to media should be handled through administrative channels, not criminal prosecution. Agencies have many powerful administrative options for enforcing workforce discipline, including suspension or revocation of security clearances or termination of employment. Prosecutors should reserve Espionage Act claims only for cases where an individual was demonstrably working for a foreign power, not just for making information available to the media and the public.

## **End Secret Laws**

Rules inaccessible to the public are inherently antithetical to democracy, yet their existence has continued during the Obama administration. Examples include secret justifications for targeted killings, secret interpretations of the Foreign Intelligence Surveillance Act, secret opinions of the Office of Legal Counsel (OLC), and secret presidential directives. While a few presidential decisions should legitimately be classified, even these exceptions should only remain secret for a reasonable time period.

*End secret law:* Starting from the principles behind the administration's release of key Bush-era OLC memos, the president should issue a policy directive prohibiting agencies from creating secret legal interpretations or rules or from using secret processes to prevent public input in the development of government rules. The president should require all agencies to publicly disclose all operative legal analyses, operational guidance, and rules currently in place and commit to a public process for all new regulations and directives. Additionally, all operative legal opinions from the Office of Legal Counsel should be made public.

# TIMELINE OF KEY OPEN GOVERNMENT ACTIONS

January 20, 2009	President Obama sworn into office; pledges transparency in inaugural address and on new White House website
January 21, 2009	Presidential Memorandum on Freedom of Information Act issued Presidential Memorandum on Transparency and Open Government issued Executive Order on Presidential Records issued
February 17, 2009	Recovery.gov launched
March 9, 2009	Presidential Memorandum on Scientific Integrity issued
March 19, 2009	Freedom of Information Act Memorandum issued by Attorney General
May 21, 2009	Data.gov launched
May 27, 2009	Presidential Memorandum on Classified Information and Controlled Unclassified Information issued
August 25, 2009	Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information issued
September 23, 2009	Policies and Procedures Governing Invocation of the State Secrets Privilege released by Justice Department
December 8, 2009	Open Government Directive issued by OMB
December 29, 2009	Executive Order on Classified National Security Information issued
March 16, 2010	Statement from the president on Sunshine Week Memorandum on FOIA implementation by White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer
April 7, 2010	Open Government Plans issued by agencies

September 23, 2010	President Obama delivers UN address calling for countries to make specific transparency commitments
October 7, 2010	President Obama signs the Reducing Over-Classification Act
November 4, 2010	Executive Order on Controlled Unclassified Information issued
December 17, 2010	Scientific Integrity Memorandum issued by Office of Science and Technology Policy
January 18, 2011	Presidential Memorandum on Regulatory Compliance
June 9, 2011	Guidance on Controlled Unclassified Information issued by National Archives and Records Administration
September 20, 2011	Open Government Partnership launched  U.S. National Action Plan for OGP issued
November 4, 2011	Registry of Controlled Unclassified Information categories issued by National Archives and Records Administration
November 28, 2011	Presidential Memorandum on Managing Government Records issued
April 4, 2012	President Obama signs the Stop Trading on Congressional Knowledge Act
May 23, 2012	Presidential Memorandum on Building a 21 <sup>st</sup> Century Digital Government issued  Digital Government: Building a 21st Century Platform to Better Serve the American People issued by Federal CIO
August 24, 2012	Managing Government Records Directive issued by OMB and NARA
October 10, 2012	Presidential Policy Directive on Protecting Whistleblowers with Access to Classified Information issued
November 27, 2012	President Obama signs Whistleblower Protection Enhancement Act
December 6, 2012	Public Interest Declassification Board Publically releases recommendations on Transforming the Security Classification System

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