

# MOVING TOWARD A 21ST CENTURY RIGHT-TO-KNOW AGENDA

Recommendations to President-elect Obama and Congress





# 21<sup>ST</sup> CENTURY RIGHT TO KNOW PROJECT REPORT

## SUPPORTERS

We, the undersigned, support the principles of government openness as articulated in the recommendations generated by the 21st Century Right to Know project, although not all of us agree on every recommendation. With a new presidential administration and a new Congress taking office in 2009, we believe there is a great opportunity, and great need, to increase government transparency. We hope these recommendations contribute to that important work.

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Government Accountability Project	Washington, DC	OMB Watch	Washington, DC
Greater Philadelphia Law Library Association	Philadelphia, PA	Open Society Policy Center	Washington, DC
Greenpeace	Washington, DC	OpenTheGovernment.org	Washington, DC
Hampshire Research Institute	Washington, DC	Positive Financial Advisors, Inc.	Annapolis, MD
Indian Point Safe Energy Coalition	Cortland Manor, NY	Privacy International	Washington, DC
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Lake Erie Region Conservancy	Erie, PA	Project On Government Oversight (POGO)	Washington, DC
Law Library of Louisiana	New Orleans, LA	Public Citizen	Washington, DC
Law Librarians of Puget Sound	Seattle, WA	Reporters Committee for Freedom of the Press	Arlington, VA
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Library Underground	Albuquerque, NM	San Diego Area Law Libraries (SANDALL)-AALL chapter	Chula Vista, CA
Lisa Thornton Consulting	Georgetown, KY	Society of Professional Journalists	Indianapolis, IN
Loyola Law School	Los Angeles, CA	South Florida Association of Law Libraries	Miami, FL
Maine Association of Broadcasters	Augusta, ME	Southern California Association of Law Libraries	Los Angeles, CA
Media Bloggers Association	New Rochelle, NY		

Southern New England Law Librarians' Association  
New York, NY

Special Libraries Association  
Alexandria, VA

TechRepublican.com  
Washington, DC

Texas Press Association  
Austin, TX

The Multiracial Activist  
Alexandria, VA

The National Security Archive  
Washington, DC

The Rutherford Institute  
Charlottesville, VA

The Sunlight Foundation  
Washington, DC

The Washington Examiner  
Washington, DC

Trimtab Management Systems  
New York, NY

Union of Concerned Scientists  
Washington, DC

University of Detroit Mercy  
Detroit, MI

University of Hawaii, Richardson School of Law  
Honolulu, HI

U.S. Bill of Rights Foundation  
Washington, DC

U.S. Transparency  
West Chatham, MA

Vanguard Environmental, Inc.  
Broken Arrow, OK

Velvet Revolution  
Washington, DC

Wasatch Clean Air Coalition  
Salt Lake City, UT

Washington Newspaper Publishers Association  
Seattle, WA

Washington State Archivist  
Olympia, WA

World Resources Institute  
Washington, DC

## **Individuals**

(Organizations listed for identification purposes only)

Errol Adams, Senior Law Librarian, New York City Civil Court, New York, NY

L.J. Adams, Teacher, Jackson, MI

John Adkins, Head of Public Services, SANDALL, San Diego, CA

David All, President, David All Group, Washington, DC

Alison Armstrong, Library Specialist, Blacksburg, VA

Anush Avejic, Citizen, Sunland, CA

Mary Alice Baish, Director of the Government Relations Office, American Association of Law Libraries, Washington, DC

Doug Bandow, Vice President for Policy, Citizen Outreach Project, Burke, VA

Anne Barker, Librarian, San Rafael, CA

Jereme Barnes, Citizen, Peoria, IL

Jill Barr, Citizen, Urbana-Champaign, IL

Charlie Barrett, Staff Representative (retired), Communications Workers of America, Washington, DC

Gary Bass, Executive Director, OMB Watch, Washington, DC

Sarah Bauer, Executive Director, Minnesota News Council, Minneapolis, MN

Barbara Bellows-TerraNova, Citizen, Salt Lake City, UT

Eric Bender, Law Librarian, LA Law Library, Los Angeles, CA

Rebecca Blakeley, Government Documents Librarian, McNeese State University, Lake Charles, LA

David Bodney, Partner/Attorney, Steptoe & Johnson LLP, Phoenix, AZ

George Boeck, Law Librarian, Sheppard Mullin, Los Angeles, CA

Rob Bowling, Citizen, Rolla, MO

Judy Braiman, President, Empire State Consumer Project, Rochester, NY

Robert Brannan, Infopreneur and Eldergeek, Elderbob.inc, Grand Prairie, TX

Steven Brant, Founder & Principal, Trimtab Management Systems, New York, NY

Danielle Brian, Executive Director, Project On Government Oversight, Washington, DC

Carmen Brigandi, Assistant Director for Technical & Administrative Services, California Western School of Law, San Diego, CA

Thomas Bruce, Director, Legal Information Institute, Cornell Law School, Ithaca, NY

Stephen Buckley, Government Consultant, U.S. Transparency, West Chatham, MA

Cindy Buhi, Librarian, Olympia, WA

Mike Burbach, St. Paul Pioneer Press, St. Paul, MN

Matthew Burton, Technology Advisor to the U.S. Intelligence Community, New York, NY

Michael Bushbaum, Law Librarian, Valparaiso University School of Law, Valparaiso, IN

Martha Campos, President, Colorado Association of Law Libraries, Denver, CO

Paula Casey, Executive Director, Arizona Newspapers Association, Phoenix, AZ

Gina Catalano, Head of Reference Services, San Diego County Public Law Library, San Diego, CA

Katherine Cater, Librarian, Schnader Harrison Segal & Lewis, Philadelphia, PA

Gary Chapman, Senior Lecturer, LBJ School of Public Affairs, University of Texas, Austin, TX

Jan Chapman, President, Positive Financial Advisors, Inc., Annapolis, MD

Lawrence Cheeseman, Law Librarian, SNELLA, Middletown, CT

John Chelen, President, Hampshire Research Institute, Washington, DC

Tina Ching, Reference Librarian, Seattle University School of Law, Seattle, WA

Esther Cho, Citizen, Los Angeles, CA

Steven Clift, E-Democracy.org, Minneapolis, MN

Mark Cohen, Executive Director, Government Accountability Project, Washington, DC

Bob Cooper, Managing Partner, Evergreen Public Affairs, Seattle, WA

Daniel Cornwall, Librarian, Douglas, AK

Kathryn Corrigan, Librarian, Tampa, FL

Marjorie Crawford, Head of Technical & Automated Services, Rutgers Law Library, Newark, NJ

Adam Davis, Citizen, Silver Spring, MD

Brad Davies, Citizen, Los Angeles, CA

Christina Delucia, Librarian, Quinnipiac University School of Law, Hamden, CT

Romualda Deksnys, Librarian, Loyola Law School, Los Angeles, CA

Lawrence Dennis, Dean, College of Information, Florida State University, Tallahassee, FL

Lori Dodds, Law Librarian, McKinney, TX

Richard Doherty, M.D., Seattle, WA

Paul Donovan, Law Librarian, State of Vermont, Montpelier, VT

Jeff Dowd, Law Librarian, Glastonbury, CT

Charles Dyer, Consultant, Charles R. Dyer Consulting, Bellingham, WA

Claudia Espana, Citizen Arlington, VA  
Carol Evans, Research Librarian, Walnut Creek, CA  
Jeff Fellows, Citizen, Minneapolis, MN  
Miles Fidelman, Citizen, Newton, MA  
Chris Finan, President, American Booksellers  
Foundation for Free Expression, New York, NY  
Ralph Fisher, Musician, Philadelphia, PA  
Greg Fite, Law Librarian, Alameda County Law  
Library, Castro Valley, CA  
Janice Flahiff, Librarian, Toledo, OH  
Jeffrey Flood, Citizen, Aspen, CO  
Charles Forrest, Librarian, Emory University, Atlanta,  
GA  
Terry Francke, Attorney, Carmicheal, CA  
Adelle Frank, Citizen, Clarkston, GA  
Mary Fuller, President, Southern New England Law  
Librarians' Association, Bristol, CT  
Holly Gale, Library Assistant, Law Librarians of Puget  
Sound, Seattle, WA  
Leann Genovese, Manager, Library Services, Husch  
Blackwell Sanders, St. Louis, MO  
Elena Gil, Legal Fellow, San Francisco, CA  
Larry Gilman, Engineer, Sharon, VT  
Diana Gleason, Librarian, OR  
Lynn Goldman, Professor, Johns Hopkins University,  
Bloomberg School of Public Health, Baltimore, MD  
Merrill Goozner, Director, Integrity in Science Project,  
Center for Science in the Public Interest, Washington,  
DC  
Kathryn Gordon, Reference Law Librarian, University  
of Detroit Mercy, Detroit, MI  
Anne Grady, Academic Library Technician, Natick, MA  
Andrea Guldalian, Librarian, Philadelphia, PA  
Melinda Guthrie, Librarian, Belton, TX  
Jeffery Hall, Lead Transportation Security Officer,  
Department of Homeland Security, Denver, CO  
Kendall Hallett, Citizen, Madison, WI  
James T. Hamilton, Director, DeWitt Wallace Center,  
Duke University, Durham, NC  
Jerry Handfield, State Archivist, Washington State,  
Olympia, WA  
James W. Harris Jr., Researcher, Parity Incorporated,  
Gary, IN  
Lynn Hartke, Reference/Educational Services  
Librarian, St. Louis, MO  
Michael Heiman, Professor of Environmental Studies,  
Dickenson, College, Carlisle, PA  
Stephanie Hess, Assistant Head of Technical Services,  
Acquisitions, Nova Southeastern University Law  
Library, Davie, FL

Rick Hind, Legislative Director, Greenpeace,  
Washington, DC  
Dwight Hines, Writer, IndyMedia, St. Augustine, FL  
Marcus Hochstetler, Law Librarian, King County Law  
Library, Seattle, WA  
Erin Hoffrance, Reference Assistant, Edmonds, WA  
Robert Horton, Director, Library, Publications and  
Collections, Minnesota Historical Society, St. Paul, MN  
Glee Hotchkin, Library Services Coordinator, Higgs,  
Fletcher & Mack LLP, San Diego, CA  
Karol Howard, Research Librarian, CA  
Chris Hudson, Assistant Law Librarian for Serials and  
Gov. Documents, Emory University Law Library,  
Atlanta, GA  
Brian Huffman, Law Librarian/Lawyer, Huffman  
Legal, Minneapolis, MN  
Susan Hutchison, Citizen  
Doug Irion, Citizen, Long Beach, CA  
Barbara Jacobs, Indian Point Safe Energy Coalition,  
Cortland Manor, NY  
Michael F. Jacobson, Executive Director, Center for  
Science in the Public Interest, Washington, DC  
Kathy Jadud, Art Educator, Columbia Station, OH  
Peter Jenkins, Law Librarian, New London, CT  
Faye Jones, Director and Professor, Florida State  
University College of Law, Tallahassee, FL  
Mary A. Johnson, Citizen, Oak Park, IL  
Sid Kaskey, Citizen, South Miami, FL  
Kelly Keach, Reference Librarian/Attorney, San Diego  
County Public Law Library, San Diego, CA  
Kevin Kemper, Educator/Writer/Consultant, Tucson,  
AZ  
Dennis Kim-Prieto, Reference Librarian, Rutgers Law  
School - Newark, Newark, NJ  
Jean Kincaid-Ross, Legislative Reference Technician,  
Connecticut State Library, Hartford, CT  
Laura Klotz, Library Tech, Connecticut State Library  
Nancy Kranich, Lecturer & Librarian, Rutgers  
University, Highland Park, NJ  
Madeline Kriescher, Law Librarian, U.S. Courts  
Library, 10th Circuit, Denver, CO  
Mary Ann Krivicky, Law Librarian, Stratford, CT  
Gayle Kuhlberg, Farmer, Oxford, NC  
Joel Kupferman, Executive Director, New York  
Environmental Law & Justice Project, New York, NY  
Mladen Kvaternik, Freelance Consultant, Zagreb,  
Croatia  
Brian Lackner, Citizen, Dallas, OR  
Catherine Lambe, Law Librarian  
James Landrith, Founder, The Multiracial Activist,  
Alexandria, VA

Karen Lasnick-McNeil, Manager of Library & Research Services, Bryan Cave LLP, Santa Monica, CA

Leslie Leach, Law Librarian, Hockessin, DE

Susanna Leers, Law Librarian, Pittsburgh, PA

Robert Leger, Assistant Editorial Page Editor, Arizona Republic, Phoenix, AZ

David LeGrande, Occupational Safety and Health Director, Communication Workers of America, Washington, DC

J. William Leonard, Former Director, Information Security Oversight Office, Leonardtown, MD

Cliff Li, CEO, CommerNet, Inc., Fort Lauderdale, FL

Rachel Lindstrom, Citizen, Glendale, AZ

Mary Ellen Lomax-Bellare, Serials Manager, Quinnipiac Univ. School of Law Library, Hamden, CT

Tara Lombardi, Librarian, Law Library of Louisiana, New Orleans, LA

Debra Martin, Law Librarian, San Francisco, CA

Meg Martin, Assistant Law Librarian, Wyoming State Law Library, Cheyenne, WY

Roxanne Martin, Citizen, Reseda, CA

Scott Matheson, Web Manager, Yale University Library, New Haven, CT

Rita McCarthy, Parent Educator, Pawtucket, RI

Charles R. McClure, Ph.D., Director, Information Use Management and Policy Institute, Tallahassee, FL

Stephen McDowell, Professor, Dept. of Communication, Florida State University, Tallahassee, FL

Jon McFarlane, Citizen, US Postal Service, Queens Village, NY

Jason Mercier, Treasurer, Washington Coalition for Open Government, Seattle, WA

Nate Merwin, Operations Specialist, Department of the Army, DuPont, WA

Mark Crispin Miller, Professor of Media, Culture and Communication, New York University, New York, NY

Suzanne Miller, State Librarian, Minnesota State Library Services, Roseville, MN

Tamara Minix, Teacher, Toronto, Ontario

Franklin E. Mirer, Professor, Environmental and Occupational Health, Hunter College, CUNY, New York, NY

Stella Mittelbach, Librarian, Los Angeles, CA

Sandee Molden, Librarian, Cohen and Wolf, Bridgeport, CT

Pamela Moore, Attorney, Philadelphia, PA

Sean Moulton, Director Federal Information Policy, OMB Watch, Washington, DC

John Necci, Librarian, Philadelphia, PA

Katie Nelson, Law Librarian, von Briesen & Roper s.c., Milwaukee, WI

Jeannette Neuschaefter, Librarian, Main Library, Fort Lauderdale, FL

Douglas Newcomb, Chief Policy Officer, Special Libraries Association, Washington, DC

Ulana Odezynsky, U.S. Citizen, Beaconsfield, Quebec

Michael Ostrolenk, Co-Founder/National Director, Liberty Coalition, Washington, DC

Kevin Park, Librarian, Paul Hastings, Janofsky & Walker LLP, San Diego, CA

Lettice Parker, Law Librarian, Everett, WA

Nora Paul, Director, Institute for New Media Studies, University of Minnesota - School of Journalism, Minneapolis, MN

Sara Paul, Law Librarian, Paul Hastings LLP, San Francisco, CA

Mary Alice Peeling, Head of Technical Services/CALR Librarian, Widener University School of Law Library, Wilmington, DE

Socorro Maria Pelayo, Reference & Research Librarian; Former Attorney, None, San Francisco, CA

Jason Phillips, Assistant Professor/Reference Librarian, Mississippi State University Libraries, Mississippi State, MS

Michael Piper, Librarian, Speedway, IN

Terry Pospischil, Law Library Assistant, Philadelphia, PA

Laura Punnett, Professor, University of Massachusetts Lowell, Medford, MA

Aimee Quinn, Librarian, University of New Mexico, Albuquerque, NM

James Quinn, Librarian, Albuquerque, NM

Amanda Quist, Law Librarian, San Diego, CA

Sarah Rankin, Law Librarian, Sherman & Howard, Denver, CO

Stephen Resnick, Law Librarian, Sonnenschein Nath & Rosenthal LLP, Los Angeles, CA

Nina Reznick, Attorney, New York City, NY

Robert Rich, Reference Librarian, LA Law Library, Los Angeles, CA

Isidoro Rodriguez, Esq., Senior Counsel, Law Offices of Isidoro Rodriguez, Annandale, VA

Phil Runkel, Archivist, Marquette University, Milwaukee, WI

Reece Rushing, Director, Regulatory and Information Policy, Center for American Progress, Washington, DC

Judith Russell, Dean of University Libraries, University of Florida, George A. Smathers Libraries, Gainesville, FL

Shohreh Saljooghi, Serials and Acquisition Librarian, Los Angeles County Law Library, Los Angeles, CA

Nancy Sansalone, Chief Operating Officer, Special Libraries Association, Alexandria, VA

Vicki Satta, Citizen, Denver, CO  
Christine Scherzinger, Law Librarian  
Ari Schwartz, Vice President, Center for Democracy and Technology, Washington, DC  
Patricia Schuman, Past President, American Library Association, President, Neal-Schuman Publishers, New York, NY  
Nancy Scibelli, Law Librarian, Milwaukee, WI  
Leinaala Seeger, Associate Professor of Law, Richardson School of Law, University of Hawaii, Honolulu, HI  
Judith Seraphin, CEO, Global Wrap LLC, St. Augustine, FL  
Suzie Shatarevyan, Citizen  
Benjamin Shute, Jr., Secretary & Program Director-Democratic Practice U.S., Rockefeller Brothers Fund New York, NY  
Larry Siegel, Citizen  
Ellen Simmons, Government Documents Librarian, Aspermont, TX  
Melissa Simon, Citizen  
Alexandra Simons, Reference Librarian, University of Houston, Houston, TX  
Barry Smith, Executive Director, Nevada Press Association, Carson City, NV  
Nicole Snyder, Law Library Manager, Wilmington, DE  
David L. Sobel, Senior Counsel, Electronic Frontier Foundation, Washington, DC  
Kenneth Sokolowski, DPM, Guardians of Old Wethersfield: GoWeth, Wethersfield, CT  
Maria Sosnowski, Clark County Law Librarian, Clark County Law Library, Vancouver, WA  
Jose A. Soto, Reference Librarian, St. Thomas University Law Library, Miami Gardens, FL  
Amy Spare, Law Librarian, Villanova University School of Law, Villanova, PA  
Elizabeth Stack, Law Librarian, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE  
Angela Stetler, Research Librarian, Greater Philadelphia Law Library Association, Philadelphia, PA  
Kate Stockert, Librarian & Information Scientist, Law Libraries of Puget Sound, Seattle, WA  
Leslie Street, Reference Librarian, Washington DC  
Priscilla Stultz, Law Librarian, Los Angeles, CA  
Peter Suber, Brooksville, ME  
David Swanson, Co-Founder, After Downing Street, Charlottesville, VA  
Ron Timmons, Librarian (student), University of Illinois, Urbana, IL  
Lisa Thornton, Member, Lisa Thornton Consulting, Georgetown, KY

James Thurow, Research Librarian, Bryan Cave LLP, St. Louis, MO  
Mary Treacy, Executive Director, Minnesota Coalition on Government Information, Minneapolis, MN  
Camilla Tubbs, Law Librarian, Yale Law School, New Haven, CT  
Sue Udry, Director, Defending Dissent Foundation, Silver Spring, MD  
Jeanne Underhill, Law Librarian  
Kathy Van Dame, Policy Coordinator, Wasatch Clean Air Coalition, Salt Lake City, UT  
Samuel W. Velsor, Citizen, Phoenix, AZ  
Martin Visnosky, Board Member, Erie County Environmental Coalition, Erie, PA  
Grace Viola, Law Librarian  
Dane vonBreichenruchardt, President, U.S. Bill of Rights Foundation, Washington, DC  
Nathalie Walker, Co-Director & Attorney, Advocates for Environmental Human Rights, New Orleans, LA  
Dr. G. William Walster, Mathematician, Cupertino, CA  
Ken Weiss, Publisher, New Rochelle, NY  
Amy West, Data Services Librarian, University of Minnesota, Minneapolis, MN  
Bruce Wheeler, Citizen, Pooler, GA  
Ronald Wheeler, Associate Director / Law Librarian, Georgia State University College of Law, Atlanta, GA  
Katherine White, Policy Analyst, Raleigh, NC  
John W. Whitehead, President, The Rutherford Institute, Charlottesville, VA  
Charlotte Wilson, Citizen, Bailey, CO  
Karen Yeltema, Law Librarian, New Haven, CT  
Barbara Zaha, Consultant, Saint Charles, IL  
Larry Zamora, Librarian, TroyGould, Los Angeles, CA  
Rosemary Zankiw, Legal Research Analyst, Philadelphia, PA  
Marcia Zubrow, Librarian, Eggertsville, NY

## FOREWORD AND ACKNOWLEDGEMENTS

At the beginning of 2007, the steering committee of OpenTheGovernment.org put a spotlight on the importance of developing recommendations for the next administration and Congress to strengthen government transparency. OMB Watch agreed to spearhead such a project and to work with the OpenTheGovernment.org coalition and others in fashioning recommendations.

With support from the Bauman Foundation, Carnegie Corporation, CS Fund, Ford Foundation, Open Society Institute, Rockefeller Brothers Fund, and the Sunlight Foundation, OMB Watch garnered the needed resources to undertake this initiative, the 21<sup>st</sup> Century Right to Know Project, in a comprehensive, inclusive manner. From the start – which was a retreat at the Pocantico Conference Center in New York – we involved a diverse cast of characters. We invited individuals representing good government groups, professional associations, the journalism community, unions, philanthropy, and academia. There were people from the left and right; activists and bloggers; and technology and policy experts.

That retreat demonstrated that although we may have differing views about the role of government or strikingly different perspectives on various public policy issues, we had one thing in common: we all strongly believed in the public's right to know.

As a result of this common ground – and a recognition that secrecy in government has grown to intolerable levels – this initiative became more than simply a project. It was really like a coalition of conservatives, libertarians, and progressives from around the country. There have been hundreds of people involved in developing these recommendations. This project is a testament to the fact that government openness is neither a left nor a right issue. It is an American issue.

Taken in total, the recommendations in this report propose a transformational role for government. It calls for reconnecting our government with all of us, “We,

the people.” It calls on government to move its methods for serving the public’s right to know into the 21<sup>st</sup> century; for adopting Web 2.0 thinking and strategies. And it calls on government to make itself more open than any past administration in order to rebuild trust and accountability in our government.

This project could not have been done without the hundreds of people who participated, many of whom are identified in the appendices. However, I want to call attention to the outstanding work of Sean Moulton, the director of information policy at OMB Watch, who led this project with grace, humor, and skill. Without Sean, none of this would have been possible. His staff, Mollie Churchill, Clayton Northouse, Roger Strother, and Brian Turnbaugh worked diligently to make each step of this project a success; each went beyond the call of duty because they believe in what they were doing. Brian Gumm, Barbara Western, and Jacqueline Mathis, all OMB Watch staff, also helped at various stages in this project – from editing documents to organizing events.

Meredith Fuchs, the general counsel at the National Security Archive; Patrice McDermott, the director of OpenTheGovernment.org; and Ari Schwartz, the vice president of Center for Democracy and Technology, each chaired panels that developed the initial round of recommendations and were core authors of various sections of the report. (The people serving on their panels are listed in an appendix. Many were also actively involved in writing this report.) James Benton provided the lead work on interviewing and collecting information from leaders on past recommendations to previous administrations for strengthening government transparency, and Steven Clift of Publicus.Net helped early in this project to explore online tools to foster collaboration.

I would also like to thank the leadership provided by Charles McClure of Florida State University; Robert Leger of the *Scottsdale Republic* and Mark Scarp of the *East Valley Tribune* (both of Arizona First Amendment Coalition); Jason Mercier of Washington Policy Center and the Washington Coalition for Open Government; and Mary Treacy and Helen Burke of the Minnesota Coalition on Government Information for hosting listening sessions in their states. Those

sessions provided invaluable input leading up to developing these recommendations.

As can be inferred from the above information, these recommendations were a collaborative effort. All of us deserve credit for working so hard for such an important cause. And now we stand ready to move into action to see these ideas implemented by the next president.

A handwritten signature in black ink that reads "Gary D. Bass". The signature is written in a cursive style with a large initial "G".

Gary D. Bass  
Executive Director, OMB Watch

November, 2008

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## EXECUTIVE SUMMARY

The growth in government secrecy has had profound and negative impacts on the United States. It makes the country less safe. It hinders self government. It contributes to near-record lows in trust of the executive branch. The growth in secrecy has reached untenable levels. We are rapidly shifting from a society based on the public's *right to know* to one premised on the *need to know*, where the government determines the need. This represents a fundamental shift in the precepts of our democratic institutions and policies, a shift which President Obama must act immediately to fix.

Even if secrecy were not on the rise, the new president would still face significant challenges in making government more transparent. The government is still grounded in a 20<sup>th</sup> century (some might even say 19<sup>th</sup> century) approach to communicating with the public. This must change. The 21<sup>st</sup> century offers new opportunities for re-establishing and improving the connection between “We, the people” and our government. President Obama will be the first to have the potential to capitalize on the interactive powers of the Internet.

Both the problems of secrecy and the new opportunities for strengthening openness brought us together under this 21<sup>st</sup> Century Right to Know Project to fashion recommendations to the new president. We represent conservative, libertarian, and progressive values and include good government groups, journalists, bloggers, professional associations, issue-based groups, technology experts, and more. Our diversity ensures we have many, many differences. Yet we were willing to set aside these differences in our common pursuit of building a government that is honest, open, and ethical, starting with recommendations to improve government transparency. Our objective is to ensure that government decisions are made in a manner that builds and honors the people's trust and confidence in their government and its ability to serve the people.

We envision a government where our primary vehicles for public access, such as the Freedom of Information Act and whistleblower laws, become vehicles of last resort. Instead, federal agencies proactively disseminate information to the

public in timely, easy-to-find, and searchable formats. President Obama and Congress must act decisively to achieve this vision.

People tend not to trust what is hidden. Transparency is a powerful tool to demonstrate to the public that the government is spending our money wisely, that politicians are not in the pocket of lobbyists and special interest groups, that government is operating in an accountable manner, and that decisions are made to ensure the safety and protection of all Americans. Effective transparency means that the public has access to accurate information in a timely manner. It also means such information can be available in searchable formats, making it easier for commercial or government search engines to sift through mountains of material.

No one policy change or action will suddenly make government completely transparent. The solution is not as simple as instituting guidance to agencies to disclose as much information as possible under Freedom of Information Act requests, although most certainly that must be done. Similarly, while we urge President Obama to order agency heads to better use interactive technologies, we understand the government must first be brought into the Web 2.0 world. Even if the next Congress enacts legislation expanding the presumption of openness, there will still be a need to change the culture of secrecy prevailing in many federal agencies. The solution is multi-dimensional: it requires changing the mindset and climate within government to emphasize transparency, as well as establishing the proper policy framework and building the technology capacity of government to seize the potential of the Internet.

Yet there is much President Obama and Congress can accomplish quickly to move closer to our vision of an open government. As a first step, we strongly urge the president to use the presidential bully pulpit to promote government openness. The first opportunity will be the inaugural address where he can promise the “most open, honest, and accountable government ever.” He can describe his values and announce steps he will take to make this happen.

The president has many models he can study. For example, immediately upon taking office in January 2007, Florida Governor Charlie Crist issued an executive

order on government ethics that created a new Office of Open Government; ordered training on public records, open meetings, and records retention; required comprehensive reviews of agencies' performance in providing the public access; and directed agencies to use plain language to make information more understandable.<sup>1</sup> The Crist order is a perfect example of laying out a policy vision for government transparency in a manner that conveys the importance of the issue.

Over the 18 months of this project, we identified several principles that may help guide the president's policy vision:

- An informed public is essential to democracy and can help create a more effective, accountable government;
- Government should commit to openness as a principle, complying not merely with the letter of openness laws but with the spirit of transparency;
- Information available to the public should be defined as broadly as possible, including multiple formats such as electronic communications, audio, photos, and video;
- Exemptions to disclosure should be as narrow and specific as possible – and the burden of proof should lie with the government when exemptions are used;
- Access to records or meetings should not require people to provide name, address, or purpose for seeking access except in specific and narrow circumstances;
- Government should make greater use of redaction to release partial documents when it cannot provide full disclosure, as opposed to withholding the entire record;
- Information should be made available in a timely manner and should be accurate, complete, and authentic;
- Interactive technologies can improve access and use of information while decreasing long-term costs; and

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<sup>1</sup> State of Florida Office Of The Governor Executive Order Number 07-01  
<http://www.flgov.com/pdfs/orders/07-01-outline.pdf>

- To the extent government outsources functions, contractors should comply with openness requirements

## **Organization of the Report**

Chapter A of this report provides more information on transparency problems and opportunities for addressing them, as well as our perspectives on why it is so important to reform the way government operates. Chapter B identifies five recommendations the president should undertake during the first 100 days; Chapter C addresses specific recommendations regarding national security and secrecy issues; Chapter D addresses usability of information; and Chapter E focuses on recommendations to create a government environment for transparency. The appendices provide information about how these 70 recommendations were developed and the people involved in putting the report together.

## **High-Priority Recommendations**

Beyond using the inaugural address to signal a new era of openness in government, the president should immediately instruct his agency heads to actively and affirmatively disseminate information. He should also instruct his attorney general to provide guidance on FOIA that urges disclosing information where possible.

The president should launch a new initiative as soon as possible to provide searchable data about government integrity, including information about lobbyists and others who wield influence. At a minimum, the data should include who is getting federal funding (both direct and indirect spending such as tax breaks), how the money is being spent, who is lobbying for money from the executive branch, and who is working for the executive branch and where they go after service in government.

The recommendations identified above and found in this report are heavily dependent on agencies having enough money to implement new policies and practices. For too long, government openness activities have been funded as an

afterthought. This approach ignores the improvements in program performance and efficiency that transparency brings to government. Despite the belt tightening that federal agencies are likely to undergo, increased investment in transparency will pay major dividends in trust, effectiveness, and efficiency.

During the transition, the president-elect should have the Office of Management and Budget ask agencies to assess the budget allocations necessary to implement an aggressive openness campaign. The agency reassessment should cover everything, including: addressing current and backlogged FOIA request; training on use of new right-to-know policies and technologies; implementing the new government integrity database described above; and permanently preserving information in a searchable format. For many e-government initiatives, such as e-rulemaking, the Office of Management and Budget has asked agencies to provide resources to make the projects occur, because they have not been directly funded. This way of funding projects must end: if it is essential to government operations, such as e-rulemaking, then Congress should fund it directly. The revised agency requests should be included in the current and next (FY 2010) fiscal year budget request to Congress, and Congress should appropriate the needed resources.

As the information age continues to progress, it has become woefully apparent how far behind the federal government lags in modern information management and disclosure. There are at least four interrelated problems. First, the formats in which some government information is stored often makes it difficult to access, search, and find. Second, there is a lack of leadership advocating cutting-edge technologies to foster interactions with the public. An inter-related problem is that, while most new government information is stored in electronic formats, the government lacks adequate procedures to preserve this information and ensure electronic public access to it. Finally, government agencies have placed restrictions on who can speak to the general public about what.

While each of these issues needs to be addressed, the top priority is bringing the government's use of the Internet into the Web 2.0 world, which would greatly improve the connection between government and the people. President Obama

should encourage agencies to recognize the public as partners in effective governance, setting up pilot projects in citizen participation and collaboration and urging a culture of transparency and disclosure. Wikis, comment sections, collaborative projects, public review of pending policies, and online dialogs are all relatively simple ways to start experimenting online. Additionally, the White House should instruct agencies to take advantage of the same open, free, commercial services that citizens use, with no need of a special government contract. Finally, agencies should be syndicating information through application programming interfaces, RSS or Atom feeds, syndicated search results, email notifications, and other tools, while honoring the privacy rights of individuals who use these tools.

In response to the Great Depression, President Franklin D. Roosevelt correctly noted that the public wanted "bold persistent experimentation" from its government.<sup>2</sup> That same bold experimentation is needed today in this new Internet age of openness. The president needs to encourage agencies to experiment with the "information infrastructure" so citizens can find information without knowing how government is structured. For instance, the public should be able to search by a name of a company and find all public interactions (e.g., funding, regulatory, legal actions) the government had with that company.

Though putting in place the 21<sup>st</sup> century information disclosure structure will be a strong step forward, the federal government must also make as much information available as possible, without unnecessarily hiding behind claims of national security. Since the 9/11 terrorist attacks, the government has implemented numerous controversial policies that threaten core constitutional values and upset established checks and balances that protect our nation from the exercise of unilateral executive authority. Critically important governmental actions have been largely shrouded from review by a mantle of national security secrecy. This secrecy has taken many forms, including the injudicious executive order on classification (E.O. 12958, as amended); the proliferation of scores of new, unregulated information control markings, sometimes referred to as "pseudo-secrecy" labels; the transformation of the common law state secrets

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<sup>2</sup> President Franklin D. Roosevelt, Oglethorpe University Commencement Address; May 22, 1932.

evidentiary privilege into a tool to dismiss lawsuits that allege serious constitutional and legal wrongdoing by the executive branch; and the imposition of federal secrecy on state and local governments.

While each of these issues should be addressed by the next president and Congress, we want to highlight that the widespread use of “sensitive but unclassified” labels has impeded interagency information-sharing and threatened the public disclosure of government activities. The president should replace the Controlled Unclassified Information (CUI) Memorandum issued by President Bush with an alternative that directs agencies to reduce use of information control markings and introduces a presumption that information not be labeled.<sup>3</sup> It should specify that success under the CUI Framework should be measured by how much new information is made available to the public and clarify that the purposes of control markings are: 1) to facilitate information-sharing so information can pass from an agency to another agency, state, local, or tribal authorities, or the public; and (2) in limited circumstances, to protect extremely sensitive information that agencies have been directed to safeguard by a statute or a presidential policy.

The president also must change the almost reflexive deference to secrecy by the executive branch when it comes to national security. We recognize there will always be a need for national secrets, which our classification system and exemptions under FOIA can adequately protect. However, the mindset that secrecy makes us safer must be challenged. Too many items are unnecessarily being withheld from public disclosure, yet access to information can make our communities and our nation as a whole safer.

We support the principles of government openness as articulated in the recommendations generated by this 21st Century Right to Know Project, although not all of us agree on every recommendation. With a new presidential administration and a new Congress taking office in 2009, we believe there is a

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<sup>3</sup> Memorandum for the Heads of Executive Departments and Agencies, available at <http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html>.

great opportunity, and great need, to increase government transparency. We hope these recommendations contribute to that important work.

## CHAPTER A

### INTRODUCTION

If information is the lifeblood of democracy, then public access to information would be the arteries that keep democracy healthy. We take pride in operating as a nation premised on the public's right to know, where the public has easy access to information to make informed decisions. Openness is an American bedrock principle, with secrecy being disdained except where absolutely necessary. As former Sen. Daniel Patrick Moynihan said, "Secrecy is for losers."<sup>4</sup>

With the growth of the Internet, it would seem a no-brainer that government transparency should be at its strongest point – and, accordingly, our democracy very healthy. Yet the opposite is happening; the public disclosure arteries are seriously clogged, jeopardizing our democratic health. A recent survey of American adults found 74 percent think the federal government is secretive, and 44 percent think state government is secretive.<sup>5</sup> The trend line is not good: two years ago, 62 percent thought the federal government was secretive.

Academics and practitioners alike complain about growing secrecy, often blaming George W. Bush or the post-September 11 environment for the problems.<sup>6</sup> While it is true that the Bush administration accelerated secrecy and hampered transparency, it is also true that past presidents and Congresses, going back to the founding of the country, have been resistant to a fully transparent government. For example, the Continental Congress and the Constitutional

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<sup>4</sup> Moynihan, Daniel Patrick, *Secrecy: The American Experience*, Yale University Press: 1999.

<sup>5</sup> Sunshine Week, "More People See Federal Government as Secretive; Nearly All Want to Know Where Candidates Stand on Transparency," March 15, 2008 at <http://www.sunshineweek.org/sunshineweek/secrecypoll08>. The poll was conducted by the Scripps Howard News Service and Ohio University in a study commissioned by the American Society of Newspaper Editors.

<sup>6</sup> See, for example: Gup, Ted, *Nation of Secrets: The Threat to Democracy and the American Way of Life*, Doubleday: 2007. Gup tracks the growing nature of secrecy in American society, and adds, "But nowhere is secrecy more rampant than in government." Schmitt, Christopher H. and Edward T. Pound, "Keeping Secrets: The Bush Administration is Doing the Public's Business out of the Public Eye," U.S. News and World Report, Dec. 22, 2003 at <http://www.usnews.com/usnews/news/articles/secrecy/22secrecy.htm>. This investigative report was done in association with a *NOW with Bill Moyers* report called "Veil of Secrecy." Roberts, Alasdair, *Blacked Out: Government Secrecy in the Information Age*, Cambridge University Press, 2006. Roberts traces several factors that undermine government transparency.

Convention operated behind closed doors. The Senate operated out of the sunlight until 1794. Talking about the Congress, James Madison wrote in 1788, “They held their consultations always under the veil of secrecy....”<sup>7</sup>

The tension between secrecy and openness has fluctuated throughout the course of our history. It appears that since World War II, however, government openness has become a more significant issue, with journalists advocating for freedom of information and politicians using the secrecy card as a political tool to attack the opposite party.<sup>8</sup> Starting in 1956, taking aim at the Eisenhower administration, the Democratic Party began to address the “massive wall of secrecy” and pledged to “reverse this tendency.” The Republican Party countered during the Vietnam War, complaining about “unjustifiable secrecy” in the Johnson administration. Democrats struck back and complained about secrecy in the Nixon administration. With the exception of congressional action in response to Watergate (and the initial passage of the Freedom of Information Act in 1966), most of the talk about ending secrecy never translated into action.<sup>9</sup>

As much as we see it as a common sense law today, President Lyndon Johnson strongly resisted signing the 1966 FOIA.<sup>10</sup> As Johnson’s White House press secretary Bill Moyers said years later, “LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government

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<sup>7</sup> Madison, James, *The Federalist*, No. 55, “The Total Number of the House of Representatives,” *Independent Journal*, February 13, 1788 at <http://www.constitution.org/fed/federa55.htm>.

<sup>8</sup> For journalists and other advocates, the freedom of information movement was given momentum with the publication of the 1953 *People’s Right to Know* by Harold L. Cross.

<sup>9</sup> See, for example, Theoharis, Athan G. (ed.), *A Culture of Secrecy: The Government Versus the People’s Right to Know*, University Press of Kansas: 1999. This series of articles, written prior to the Bush administration, demonstrates that secrecy overstepped legitimate national security needs to contribute to an imperial presidency at the expense of democratic government and describes absurd lengths taken to avoid disclosure. This is not to minimize the importance of congressional actions in the 1970s, which included amendments to FOIA, and creation of the Government in Sunshine Act, Federal Advisory Committee Act, and the Privacy Act, which remain four key government-wide public access laws.

<sup>10</sup> The National Security Archive provides a rich history of FOIA. Rep. John Moss (D-CA) deserved a lot of the credit for getting the landmark FOIA enacted. He started with hearings in 1955 and kept pursuing the open government legislation for more than a decade. Once Democrats took control of the presidency, he suddenly received support from Republican Congressman Donald Rumsfeld (IL), which gave the Moss bill bipartisan legitimacy. The law built off Section 3 of the 1946 Administrative Procedure Act, which addressed the regulation of government information.

closets; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House.”<sup>11</sup>

Things were even tougher when the 1974 FOIA amendments were sent to President Gerald Ford for his signature. Ford was counseled by White House Chief of Staff Donald Rumsfeld and his deputy Dick Cheney to veto the amendments. Others in the administration, including the head of the Justice Department's Office of Legal Counsel, Antonin Scalia, were also organizing opposition. In the end, Ford did veto the legislation, but Congress easily overrode his decision.

Beyond FOIA, there have been program-specific successes regarding public access. For example, the Toxics Release Inventory (TRI), passed as part of the 1986 reauthorization of Superfund, is one of the first laws to mandate online access to information.<sup>12</sup> The TRI initially required chemical companies to disclose annual estimates of toxic releases to the air, water, and land. The U.S. Environmental Protection Agency was required to make this information available through “computer telecommunications and other means.” The program has been highly successful and has been a model for making data available to the public in the Internet age.

Despite this context of ebbs and flows with government transparency, the growth in secrecy since 2001 is very troubling. Some have attributed this to a post-9/11 environment. Others have complained about an imperial presidency using secrecy as a tool to gain executive power. Whatever the reasons, most would agree that we are rapidly shifting from a society based on the public's *right to know* to one premised on the *need to know*, where the government determines the need.

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<sup>11</sup> Bill Moyers, *Bill Moyers on the Freedom of Information Act*, Now with Bill Moyers at <http://www.pbs.org/now/commentary/moyers4.html> (last visited September 6, 2008). Those with less knowledge of FOIA – or a more romanticized view – often assume Johnson signed FOIA on July 4, Independence Day, as a symbol that openness is part of the fabric that makes this country great. Unfortunately, the only reason the bill was signed on July 4 was that it was the tenth day after passage and any longer would result in a pocket veto. There was no signing ceremony.

<sup>12</sup> The TRI program was established by provisions of the Emergency Planning and Community Right to Know Act of 1986.

A core problem is a faulty assumption that secrecy makes us safer. Operating under this assumption, public access is often framed as a blueprint for terrorism, which naturally would lead some to argue for withholding information – it's better to be safe than sorry. Under this model, government has the responsibility to determine if the individuals merit access to the information and that such information cannot be used to cause harm.

The government has not considered the alternative argument that transparency can make us safer, although those of us in the right-to-know community know this to be true. When the public has the necessary information, dangers can be fixed or dealt with rather than hidden. Government secrecy, generally, has more costs – social, economic, and political – than does transparency. For example, access to information about dangerous chemicals being used in a chemical plant in a community can certainly be viewed as a blueprint for terrorists. But it also can be viewed as a tool to empower citizens to make informed decisions about their lives and their communities, including whether a daycare facility, for example, is too close to a potentially dangerous plant. Ultimately, such dangers can lead to using inherently safer technologies, thereby reducing or eradicating the problem in the first place. In other words, secrecy is often a palliative while transparency can address the root problem.

Secrecy is not only about hiding information from the public; it is also about the way a government operates. When the government misleads the public or Congress with faulty information, this too is a form of secrecy. When the government censors scientists or undermines whistleblowers, this too is a form of secrecy. And when the government uses secret evidence to make court arguments, invokes a state secrets claim to hide information from the courts, uses executive privilege to hide information from Congress related to government performance, or violates the Constitution with warrantless surveillance or detentions, this too is a form of secrecy.

This project, the 21<sup>st</sup> Century Right to Know Project, was organized during this heightened awareness of growing secrecy. Even without this crisis, there would still be a need to bring government transparency into the 21<sup>st</sup> century. As

Thomas Jefferson said, "...as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."<sup>13</sup> With the growth of the Internet and interactive technologies, there are now newer and more efficient ways of approaching the public's right to know.

The project participants, cutting across the ideological spectrum and involved in disparate types of work, ranging from journalism to advocacy, and from environmental work to librarians, see government transparency as a critical agenda that must be addressed by the next presidential administration. We understand that the growth in secrecy is not the result of a single policy change or governmental action; instead, it is a result of a combination of policy, attitude, and practice that has made public access more difficult. It is not enough that politicians talk about ending excessive secrecy; now is the time to act in a comprehensive manner to change the culture and practices of government.

## **Background**

On October 12, 2001, then-Attorney General John Ashcroft issued a memo to agency heads that overturned a policy of "presumption of disclosure" that was in place since 1993.<sup>14</sup> The 1993 policy, implemented by Clinton administration Attorney General Janet Reno, instructed agencies to use FOIA exemptions only where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."<sup>15</sup> In other words, the Clinton policy was to disclose information if there was no foreseeable harm, even if there might be an argument to be made that it could legally withhold disclosure under one of the FOIA exemptions. The Ashcroft memo flipped this, telling agencies that they should obstruct disclosure if they can make a sound legal argument; thus, the "foreseeable harm" standard set by Reno was replaced with a "sound legal basis"

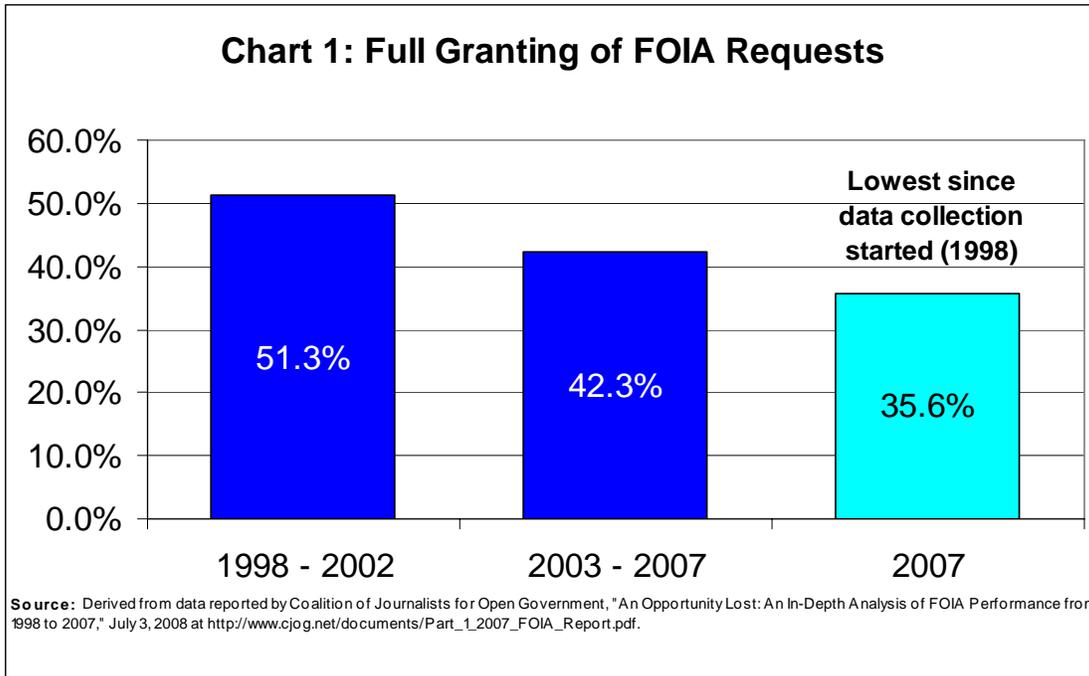
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<sup>13</sup> Letter to Samuel Kercheval, July 12, 1810.

<sup>14</sup> Ashcroft, John, "The Freedom of Information Act," Memorandum for Heads of all Federal Departments and Agencies, October 12, 2001 at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

<sup>15</sup> Reno, Janet, "The Freedom of Information Act," Memorandum for Heads of Departments and Agencies, October 4, 1993 at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm).

standard by Ashcroft. Ashcroft told agencies that the Justice Department “will defend your decisions” to withhold records, in whole or in part, under FOIA.

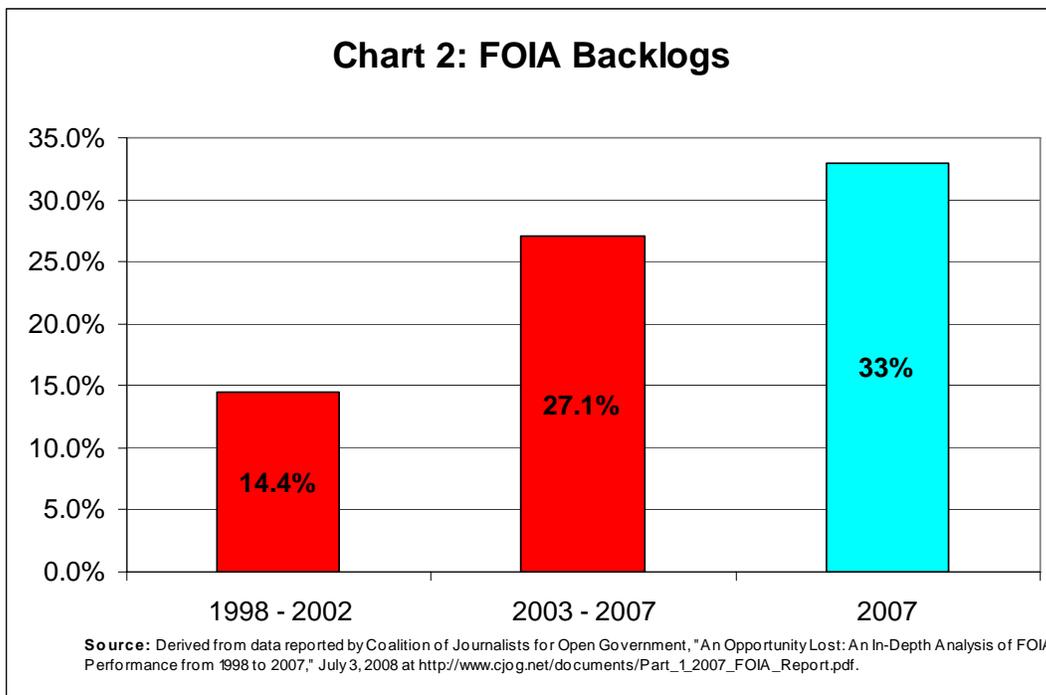


On the heels of the Ashcroft memo came a memo from then-White House Chief of Staff Andrew Card that directed federal agencies to implement accompanying guidance dealing with “sensitive but unclassified information” and “information that could be misused to harm the security of our nation and the safety of our people.”<sup>16</sup> The guidance encouraged agencies to reclassify information that is no longer classified and, along with the original Ashcroft memo, encouraged the use of various exemptions under FOIA to withhold disclosure of sensitive but unclassified information, which was not defined. The various memos urged using Exemptions 2, 4, and 5, which address internal personnel rules and practices of an agency (Internal Agency Rules), trade secrets and privileged or confidential commercial or financial information (Proprietary/Trade Secrets), and internal agency documents that would be exempt from discovery in litigation (Interagency Memoranda), respectively.

<sup>16</sup> Card, Andrew H., Jr., “Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security,” Memorandum for the Heads of Executive Departments and Agencies, March 19, 2002 at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>.

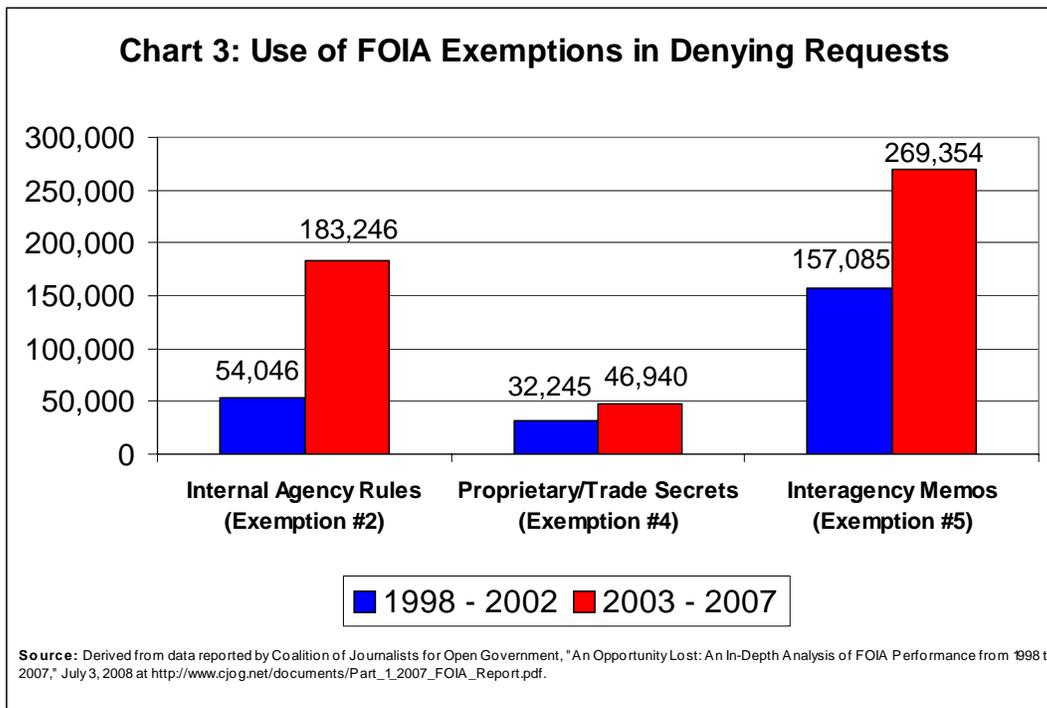
These policy positions have had significant impact on the way agencies disclose information. Information that was previously available by simply calling an agency suddenly required a FOIA request. Information that was previously made available under FOIA was now withheld by agencies and delayed if disclosed. As one might expect, the number of requests granted full FOIA disclosure dropped dramatically in the five years following the Ashcroft and Card memos when compared to the five years before that – by roughly 10 percent (see Chart 1). In fact, in 2007, only a little more than a third of all FOIA requests (35.6 percent) were granted full disclosure, the lowest level since 1998.

Moreover, the backlog on acting on FOIA requests nearly doubled when comparing the five-year spans pre- and post-Ashcroft/Card memos. In the five years prior to the memos, the backlog averaged 14.4 percent; in the five years



after the memos, the backlog jumped to 27.1 percent (see Chart 2). The good news is that the backlog dropped in 2007 compared to 2006, but that good news is diminished by the fact that at 33 percent, it is the second-highest backlog since 1998.

Also, as might be expected, the agencies affirmatively responded to the Ashcroft and Card memos' explicit reference to using the three FOIA exemptions mentioned above – #2 (Internal Agency Rules), #4 (Proprietary/Trade Secrets), and #5 (Interagency Memos). Use of Exemption 2 more than tripled during the post-memo period, rising 239 percent over the pre-memo period. Use of Exemption 4 increased by 46 percent and Exemption 5 by 72 percent (see Chart 3).



Publications chronicling the growth of secrecy since the 9/11 terrorist attacks paint a troubling picture that far exceeds the discussion above.<sup>17</sup> Using terrorist and national security threats to needlessly withhold information, scrubbing websites, limiting collection of information, manipulating information that is disclosed, undermining the integrity of science, limiting open meetings, stacking advisory committees with industry insiders and ideological cronies, impinging on

<sup>17</sup> See for example the annual release of the Secrecy Report Card by the OpenTheGovernment.org coalition. The latest version is available at <http://www.openthegovernment.org/otg/SecrecyReportCard08.pdf>. See also "Secrecy in the Bush Administration," prepared by the minority staff, Special Investigations Division of the U.S. House of Representatives Committee on Government Reform, September 14, 2004 at [http://oversight.house.gov/features/secrecy\\_report/pdf/pdf\\_secrecy\\_report.pdf](http://oversight.house.gov/features/secrecy_report/pdf/pdf_secrecy_report.pdf).

whistleblower protections, and contracting out work to avoid disclosure are just some of the many ways in which secrecy is growing. The Bush administration has needlessly classified far too much information, creating an overclassification problem; it has taken previously classified documents that have been made public and reclassified them; and it has not provided the necessary resources for implementing automatic declassification procedures. When the government withholds information in court actions concerning material support of terrorism, when it invokes state secrets in the courts, when it conducts warrantless surveillance, or when it secretly detains or deports people – these too are forms of secrecy that must be stopped. Many people regard government transparency and access to information as fundamental human rights that must be protected.<sup>18</sup>

Government secrecy also comes in the subtle and easy-to-overlook form of inaccessible data formats, blocked search engines, and un-navigable websites. As more and more of the public gets its information online, it becomes an even more critical problem when the access to or usability of online government information is limited. Electronic records can also be "lost" with a few carefully placed keystrokes or misplaced backup tapes. As technology makes it easier to create and share information, it also makes it easier to eliminate or manipulate those same records. The government can even seek to control the experts that create the government's data, scientists and researchers, by barring them from discussing their findings or forcing them to accept changes that bring research results more in line with political agendas.

Rather than list the many examples of secrecy, we have divided the problems into three categories: a cultural problem where secrecy is the preferred option within federal agencies; a policy problem that encourages withholding information from disclosure and is inadequate for a presumption of openness; and an operational problem where government's openness infrastructure is unfit and agency practices need to be brought forward to the 21<sup>st</sup> century.

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<sup>18</sup> This was one conclusion of an International Conference on the Right to Public Information, held by The Carter Center on Feb. 27-29, 2008. See [http://www.cartercenter.org/peace/americas/ati\\_conference/right\\_to\\_public\\_information\\_conf.html](http://www.cartercenter.org/peace/americas/ati_conference/right_to_public_information_conf.html).

This schema suggests that the problem is not as simple as undoing the Ashcroft and Card memos, although most certainly that must be done. Even if the next Congress enacts legislation to expand the presumption of openness, there will still be a need to change the culture of secrecy prevailing in most federal agencies. In his 1997 book covering the results of the Commission on Protecting and Reducing Government Secrecy, former Sen. Moynihan wrote, “Departments and agencies hoard information, and the government becomes a kind of market. Secrets become organizational assets, never to be shared save in exchange for another organization's assets.... The system costs can be enormous. In the void created by absent or withheld information, decisions are either made poorly or not at all.”<sup>19</sup> While Moynihan was discussing national security information, he could easily have been talking about almost any type of agency information. Agencies approach public access in an elegantly insouciant manner; with few incentives to advocate or promote openness, the path of least resistance is to let information sit behind closed doors. From an agency perspective, who would want to work in a fishbowl of transparency?

The president’s bully pulpit needs to be used to advocate for a new culture of transparency, a spirit of government openness. The president and Congress will need to find ways to encourage agency personnel to make public access a priority and provide incentives to promote the public’s right to know in their daily work.

Addressing the cultural and policy environment needs to be complemented with new ways of approaching public access, incorporating a “Web 2.0” mindset. Most agencies have lost the ability to build or modify their own websites without teams of consultants. In today’s Internet age, agencies must be able to flexibly use Web technology and web design that aim to enhance creativity, information sharing, and collaboration among users. A new infrastructure that allows commercial search engines to search all government information, whether in databases or not, is essential, just as is ensuring tools are available for linking information about companies and other entities housed in different agencies and departments. Government must provide the open programming interfaces to

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<sup>19</sup> Moynihan, 1999. Pg. 73.

data that allow the public to build upon government information in ways the government cannot do.

### **A Recent Example of Using Technology**

On Sept. 26, 2006, President Bush signed into law the Federal Funding Accountability and Transparency Act, which required the Office of Management and Budget to create a searchable website of nearly all government spending by Jan. 1, 2008.<sup>20</sup> The Transparency Act was the product of Sens. Tom Coburn and Barack Obama, joined by a bipartisan team including Hillary Clinton and John McCain. At the time the bill was introduced, the Bush administration and others indicated that such a website could not be created and, if it could, it would be very costly and take many years to put in place.

When Congress recessed for its 2006 summer break, the bill was blocked by an anonymous hold from at least one senator. This prevented the bill from being considered under unanimous consent rules on the Senate floor.<sup>21</sup> After some initial checking, it was unclear who put the hold on the bill. In response, a loose-knit coalition, led primarily by bloggers, went into action to unveil the “secret hold.”<sup>22</sup> By the end of August, Sen. Ted Stevens admitted he had a hold on the bill after first indicating he did not.<sup>23</sup> Once Stevens removed his hold, Sen. Robert Byrd then put another hold on the bill, only to quickly remove it after the

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<sup>20</sup> Public Law No. 109-282 at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ282.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ282.109.pdf).

<sup>21</sup> A right-left coalition was supporting the bill. The National Taxpayers Union coordinated a sign-on letter for conservatives ([http://www.ntu.org/main/letters\\_detail.php?letter\\_id=442](http://www.ntu.org/main/letters_detail.php?letter_id=442)), while OMB Watch did the same for progressives (<http://www.ombwatch.org/budget/transparencendorsements.pdf>).

<sup>22</sup> The left and right blogosphere became actively involved in searching out the anonymous hold. Porkbusters (see [http://porkbusters.org/secret\\_hold.php](http://porkbusters.org/secret_hold.php)) and GOPProgress (see <http://www.gopprogress.com/story/2006/8/25/9753/25337>), right-leaning efforts, worked closely with left-leaning Wonkette (see <http://wonkette.com/196454/help-catch-the-secret-pig-crook>) and TPMmuckraker (see [http://tpmmuckraker.talkingpointsmemo.com/secret\\_hold.php](http://tpmmuckraker.talkingpointsmemo.com/secret_hold.php)) in contacting every Senator to see if he or she was the anonymous hold. A host of other bloggers also got very involved. See for example <http://www.zefrank.com/theshow/archives/2006/08/083106.html>

<sup>23</sup> Koppel, Andrea, Ted Barrett and Abbi Tatton, “Sen. Stevens is the ‘Secret Senator’,” CNN.com, August 30, 2006 at <http://www.cnn.com/2006/POLITICS/08/30/secret.senators/>.

coalition publicized the move.<sup>24</sup> After the holds were removed, the bill quickly moved through the Senate and the House.

The government's website was launched in December 2007, ahead of the law's Jan. 1, 2008, deadline.<sup>25</sup> The website allows users to easily search for particular contracts or assistance recipients and see how much money they had received over the years, from which agency, and what the money was for. Additionally, the site allows users to get overviews of spending by agencies or geographic regions, with quickly viewed information on top recipients, products and services, level of competition, and much more. Users interested in greater detail can drill down into the data to see more specific information on each and every transaction. The government included an API interface for the data to allow programmers to pull spending information into other uses, such as the Sunlight Foundation's Lawmaker Profiler. The profiler presents information for each member of Congress on political contributions received, earmarks sponsored, personal assets held, and federal money spent in his or her congressional district.<sup>26</sup>

The Transparency Act has been an enormous success. To strengthen it, Obama and Coburn, along with McCain and Sen. Tom Carper, introduced legislation in the summer of 2008 that would expand the type of information available to the public, provide information about performance, and strive to improve the quality of the data. The Transparency Act has also become a model for states that wish to build similar websites. At least 11 states have created free, searchable websites that give access to state spending, and 24 other states are working toward such a goal.<sup>27</sup>

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<sup>24</sup> Carr, Rebecca, "Byrd Admits He Placed A Hold, Now Lifts It," August 31, 2006 at <http://www.coxwashington.com/blogs/content/shared-blogs/washington/washington/entries/2006/08/index.html>.

<sup>25</sup> Williamson, Elizabeth, "OMB Offers an Easy Way to Follow the Money," *Washington Post*, December 13, 2007 at [http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121202701.html?nav=rss\\_politics/fedpage](http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121202701.html?nav=rss_politics/fedpage).

<sup>26</sup> The Lawmaker Profiler at the New York Observer <http://www.observer.com/2008/lawmaker-profiler>.

<sup>27</sup> Groups such as Americans for Tax Reform and National Taxpayers Union have led advocacy for these state websites. ATR maintains information about state progress at [http://www.atr.org/content/pdf/2008/ot-trnsp\\_1pager.pdf](http://www.atr.org/content/pdf/2008/ot-trnsp_1pager.pdf).

The success of websites highlights new ways of promoting government openness. The Transparency Act starts with the assumption that government has an affirmative responsibility to disclose information in ways that are easy to find and obtain. It does not evaluate whether the public is smart enough to use the information or whether such information can be used to harm the policies of any one administration or Congress. It also operates on the principle that by making underlying information available, in this case about government spending, it will be used with other data to form new pictures about government spending.

At the same time, laws such as the Transparency Act lead to a cautionary note about public access. The websites are only as good as the information that is put into them. To the extent that the data are inaccurate or that the state and federal websites are not coordinated, it vitiates the full value of openness and leads to skepticism about the utility of transparency as an empowering tool.<sup>28</sup>

This report is premised on the belief that transparency can be a powerful tool in advancing government accountability. It may also be a means for strengthening public participation in government decision making, further enhancing accountability. While we each have different views about the role of government, we share a common belief that government needs to be more responsive to public needs and should involve the public in decisions. A more informed and engaged electorate also leads to more trust in our government.

### **This Project**

This project was created in the summer of 2007 when 31 people met for two days at the Pocantico Conference Center of the Rockefeller Brothers Fund.<sup>29</sup> The group, a diverse set of players all concerned about government transparency, decided it was important to develop a proactive agenda for improving public

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<sup>28</sup> See, for example, Fung, Archon, Mary Graham, and David Weil, *Full Disclosure: The Perils and Promise of Transparency*, Columbia University Press: 2008. Through a series of case examples, *Full Disclosure* shows that information is often incomplete, incomprehensible, or irrelevant to consumers, investors, workers, and community residents. To be successful, transparency policies must be accurate, keep ahead of disclosers' efforts to find loopholes, and, above all, focus on the needs of ordinary citizens.

<sup>29</sup> OMB Watch organized the event and ran this project. The idea for the project was initially suggested by the Steering Committee of the OpenTheGovernment.org coalition.

access to government information, thereby strengthening our democracy. We all agreed that too often, the government functions with 20<sup>th</sup> century (some might say 19<sup>th</sup> century) tools to provide public access.

The participants represented an unusual combination of people. The group included conservatives, libertarians, and progressives; and it included journalists, bloggers, librarians, advocates, and philanthropists. Most of the participants rarely, if ever, worked together. In fact, it may have been more common for some of the participants to sit across the table from one another on issues rather than sit on the same side of the table. But the two-day event demonstrated that indeed, we all sit on the same side.

We had a number of common beliefs about government information:

- An informed public is essential to democracy and can help create a more effective, accountable government
- Government should commit to openness as a principle, not simply complying with the letter of openness laws but with the spirit of transparency
- Information available to the public should be defined as broadly as possible, including in multiple formats such as e-mail, audio, photos, and video
- Exemptions to disclosure should be as narrow and specific as possible – and the burden of proof should lay with the withholder when exemptions are used
- Access to records or meetings should not require people to provide name, address, or purpose for seeking access except in specific and narrow circumstances
- Government should make greater use of redaction to release partial documents when it cannot provide full disclosure as opposed to withholding the entire record
- Information should be made available in a timely manner and should be accurate, complete, and authentic
- Interactive technologies can improve access and use of information while decreasing long-term costs

- To the extent government contracts out functions, contractors should comply with openness requirements

Since that two-day event, the number of people and organizations interested in this project has grown. Roughly 2,000 people took an online survey to identify the top government openness questions to ask candidates for national office in the 2008 election.<sup>30</sup> The OMB Watch staff surveyed and interviewed more than 100 people to obtain their past recommendations on strengthening government transparency.<sup>31</sup> This was followed by day-long sessions in four states to talk about the state of public access today and review ideas for improving openness.<sup>32</sup>

Using all of this information, three expert panels were convened to develop recommendations. The three panels covered security issues, incentives for disclosure, and strengthening usability of information. These panels were complemented with ideas for developing a long-range vision for government transparency. All of the ideas were vetted at a two-day retreat with roughly 70 people from around the country at the Maritime Institute of Technology and Graduate Studies. Shortly after the retreat, an online process to review the materials and provide feedback was launched to gather additional input from those interested but unable to attend the retreat.

This report is based on the above process. The people endorsing these recommendations do not necessarily agree with each specific recommendation. However, they do agree with the tenor of the report and the basic message that there is an urgent need to reduce government secrecy and bring government transparency initiatives into the 21<sup>st</sup> century.

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<sup>30</sup> <http://www.ombwatch.org/article/articleview/4202/1/192?TopicID=5>

<sup>31</sup> "Previous Proposals for Federal Government Transparency: A Preliminary Report," October 2007. <http://www.ombwatch.org/21stRTK/PastAccessProposals.pdf>

<sup>32</sup> The four locations were: Phoenix, Arizona; Tallahassee, Florida; Minneapolis, Minnesota; and Seattle, Washington. The reports for each event are at <http://www.ombwatch.org/info/21strtk.htm>

## **CHAPTER B**

### **THE FIRST 100 DAYS:**

#### **DEFINING A NEW ADMINISTRATION AND SETTING THE TONE FOR THE FUTURE**

This election was largely about the need for change: curtailing the influence of special interests; establishing greater controls and transparency in key markets to avoid the opaque decision-making that contributed to the current economic crisis; ensuring government provides public protections to those who cannot do so themselves; guaranteeing that governmental decisions are made with accurate information and adequate oversight; and making sure government works properly. It was a reminder that government is about “We the People...” and that it is time to make government more open, honest, and accountable. Secrecy is the cause of many problems and transparency needs to be built into the government's solutions.

To set the right tone, the president should emphasize the importance of government transparency in the first 100 days of his administration. The growth of secrecy must be quashed immediately as a signal that the new administration will bring change to the way Washington works. Decisive actions in the first 100 days will send a message to Congress, the media, and the public that government should operate in new ways where openness will prevail, ushering in an era of accountability.

#### **Recommendations:**

Here are five steps that should be taken:

- B.1. The president should clearly state in his inaugural address that he will oversee the “most open, honest, and accountable government ever” to improve trust in our government.** The president should note that the 21<sup>st</sup> century affords new opportunities to bring government closer to its people and that among his first actions will be to inform federal agencies to operate in new, open ways in order to

rebuild the public's trust in its government. He should indicate that his new administration will rely on interactive technologies that can make transparency achievable in ways never before imagined and create new approaches to make government accountable to its people. Finally, the president should announce he will immediately take action to launch a transparency initiative to ensure that government is running in an open, ethical, and accountable manner.

**B.2. The president should immediately instruct agencies to operate in a more open style, making information available to the public in a timely manner and in searchable formats except where prohibited by law.** On his first day in office, the president should send a memorandum to agency heads telling them he intends to issue an openness executive order and instructing them to begin implementing the elements of it. He should note that the order will instruct agencies to:

- (a) Actively and affirmatively disseminate information, not simply to wait for Freedom of Information Act requests. The president should note in the memorandum to agency heads that the Attorney General will be asked to provide guidance on FOIA that provides a defensible argument for disclosing information where possible;
- (b) Launch an Honest Government Initiative that shines a light on lobbyists and others who wield influence. The Honest Government Initiative will begin with the creation of an online searchable database that provides information about government integrity, starting with:
  - *Who is getting federal funding.* This includes information about spending in the form of grants, contracts, loans, and insurance, which is now done through USASpending.gov, as well as who is getting other forms of federal subsidy such as tax breaks and non-cash support.

- *How the money is being spent.* This includes information about the request for proposals, contracts, other governing documents describing the purposes of the funding, and information about how the money was spent.
- *Who is lobbying for money from the executive branch.* The Lobbying Disclosure Act (LDA) provides information about lobbyist activities targeting Congress and certain high-level executive branch officials. There is no collection of information about the influence-peddling to get funding from the executive branch, such as lobbying by contractors. Such information should be collected and disclosed.
- *Who is working for government in high-level positions, including where they have come from and where they go after working in government.* The revolving door is a public concern and should be documented and the information made publicly available.
- *Transactions involving government personnel.* This includes disclosure of gifts, meals, travel, etc.

Data about these activities should be tied together with other important lobbying and ethics databases, such as campaign contributions and lobbying under the LDA.

- (c) Evaluate agency practices for handling sensitive information to ensure that the presumption of openness prevails.

The president should also signify that the order will:

- (a) Indicate that the White House will reduce the use of executive privilege, invocation of state secrets, and use of signing statements to avoid statutory requirements;

- (b) Require the vice president to comply with presidential disclosure requirements; and
- (c) Create a Government Transparency Officer to oversee implementation of this order and other initiatives to make government more open and accountable. The memorandum should indicate that the Government Transparency Officer will issue further instructions to assist agency heads in implementing elements from the president's new transparency policies, including the importance of protecting whistleblower rights, preservation of information, and support for the spirit and intent of the Federal Advisory Committee Act in making government panels open and balanced.

Finally, the president should tell agency heads that in upcoming budget documents, including any that affect the current fiscal year, he will request funding to support this new openness initiative, including funding for the National Archives and Records Administration to house the Office of Government Information Service as authorized under the OPEN Government Act of 2007.

**B.3. Invite the public to identify top documents and databases to make publicly available.** The president should instruct his Government Transparency Officer to use interactive technologies, such as an online survey, to involve federal employees and the public to identify high-priority information needs. For immediate attention, the government should identify information it collects but is not accessible and should be as well as information that is accessible but difficult for the public to find and use. Additionally, the government needs to examine the longer term issue of identifying information that isn't collected but should be. Results of the online survey should be sent to agency heads within 60 days of completion, with instructions to provide plans within 30 days to address the top items in the survey or explain why the agency cannot do so.

- B.4. The president should rescind Executive Order 13233 to remove impediments to access to historical presidential records.** While Congress may need to take additional action to ensure access to past presidential records, the president can play a key role by immediately eliminating E.O. 13233, which limits access to records of former U.S. presidents. He should also instruct his Government Transparency Officer to identify additional steps beyond the first 100 days to strengthen access to past presidential records.
- B.5. Instruct the Attorney General to advise agencies how to increase the presumption of openness under the Freedom of Information Act consistent with the president’s executive order.** Former Attorney General John Ashcroft issued a memo on implementation of FOIA that has had an adverse impact on disclosure.<sup>33</sup> Ashcroft instructed agencies to withhold information under FOIA if they could make a legal argument to do so. This reversed former Attorney General Janet Reno’s approach, which was to encourage agencies to disclose records unless there was a “foreseeable harm,” even if there might be a legal argument for withholding information. Thus, the Reno memo has been characterized as a mandate to disclose where possible and the Ashcroft memo as a directive to withhold where possible.

The Attorney General should rescind the Ashcroft memo and replace it with a new memo on FOIA implementation that:

- (a) Provides a defensible argument for aggressively disclosing records requested under the Freedom of Information Act, even if it means only partial release of a record;
- (b) Emphasizes affirmative dissemination, even when a FOIA request has not been made

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<sup>33</sup> Ashcroft, John, “The Freedom of Information Act,” Memorandum for Heads of all Federal Departments and Agencies, October 12, 2001 at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

The Attorney General should also announce required training for government employees, such as online training, regarding transparency rules, policies, and practices.

## CHAPTER C

### NATIONAL SECURITY AND SECRECY

Since the terrorist attacks of Sept. 11, 2001, the George W. Bush administration has implemented numerous controversial policies that threaten core constitutional values and upset established checks and balances designed to protect our nation from the exercise of unilateral executive authority. Critically important governmental actions have been largely shrouded from review by a mantle of national security secrecy. This secrecy has taken many forms, including: improper reliance on the executive order on classification (E.O. 12958, as amended); the proliferation of scores of new, unregulated information control markings, sometimes referred to as “pseudo-secrecy” labels; the use of the common law state secrets evidentiary privilege into a tool to dismiss lawsuits that allege serious constitutional and legal wrongdoing by the executive branch; and the imposition of federal secrecy on state and local governments.

Lifting the shroud of secrecy has been challenging because of the executive branch’s robust assertion of its powers and the legislative branch’s unwillingness to confront and challenge those assertions. By creating a system of checks and balances, the Constitution’s framers sought to prevent the sort of open-ended, non-circumscribed executive authority exercised by the Bush administration. Nonetheless, the limits of the president’s authority to act unilaterally are defined by the willingness and ability of Congress and the courts to constrain it. Of course, before Congress or the courts can act to constrain presidential claims to inherent unilateral powers, they must first be aware of those claims. Yet, the co-equal legislative and judicial branches consistently undermine their own ability to fulfill their responsibility to preclude unchecked executive authority by displaying almost reflexive deference to executive assertions of the need for secrecy.

That unrestrained secrecy and deference does not serve our nation well. At a time when the perceived threats to our security are widely dispersed, the ability to rapidly share useful, validated information with appropriate authorities, while protecting other important sensitivities, is critical to national security. However, excessive secrecy reduces the government’s ability to alert the public to threats

and prevents federal, state, and local agencies from responding effectively. This was a central finding of the 9/11 Commission, which explained that publicity and information sharing “might have derailed the plot.” Nonetheless, the federal government consistently seeks to impose its reflexive embrace of secrecy on state and local governments rather than examining ways to share meaningful and actionable information free from dissemination restrictions.

The next administration and the new Congress will have an opportunity to restore appropriate checks and balances on the exercise of government power. In doing so, they can ensure that the most critical decisions of the government concerning our safety and security are backed by good analysis, are effective, are consistent with constitutional rights, and are subject to sufficient oversight to correct errors and to render our government truly accountable for its actions.

We must not sweep the abuses of the past under the rug, however. Those missteps and outrages should be revealed, and the nation should take responsibility for any injustices that took place. It is that sort of real accountability that will make our nation stronger, restore the public’s trust in their government and restore the world’s trust in the United States.

Recommendations in this section are divided as follows:

- **Overclassification:** Using National Security Secrecy as a Pretext to Shroud Controversial Policies
- **Pseudo-secrecy:** Controlling Unclassified Information to the Detriment of our Security and Public Accountability
- **State Secrets Privilege:** Using Secrecy to Thwart Justice and Accountability
- **Federal Secrecy Imposed on State and Local Officials:** Interfering with Safety, Security, and Accountability at Home
- **Failed Checks and Balances:** Unrestrained National Security Policy Run Amok
- **The Imperative of Real Accountability**

## Overclassification: Using National Security Secrecy as a Pretext to Shroud Controversial Policies

While classification of national security information is a critical tool at the disposal of the government to protect our nation, the recent past is replete with examples of classification being used to blunt potential opposition and oversight rather than for the intended purpose of denying information to our nation's adversaries. Rampant overclassification undermines the integrity of the very system we depend upon to ensure that our nation's adversaries cannot use national security-related information to harm us.

The unchecked secrecy of the last eight years has repeatedly corrupted the decision making process by allowing poor or inadequate analysis to prevail and by allowing objectionable policies to avoid scrutiny. For example, a March 14, 2003, Department of Justice (DOJ) legal opinion on interrogation of enemy combatants was recently "declassified" and a review of its content demonstrates that it provides no advantage to the enemy. Yet because it was classified as secret, it did not receive the dissemination and scrutiny that it should have received at the outset. Instead, nine months after it was issued, the DOJ had to advise the Department of Defense to cease relying on the legal reasoning.<sup>34</sup>

Abuses can thrive in a secret government that knows no checks on its conduct and operates without controls. For example, the National Security Agency's program to conduct warrantless surveillance of Americans without regard to the strictures of the Foreign Intelligence Surveillance Act and the Constitution operated illegally for years.<sup>35</sup> The administration's abusive interrogation and detention policies exercised in Iraq and Guantanamo Bay continued for years but have now been rejected by Congress and the courts and condemned by allied nations around the world.<sup>36</sup>

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<sup>34</sup> Jeffrey Rosen, "Conscience of a Conservative," New York Times Magazine, September 9, 2007.

<sup>35</sup> Al-Haramain Islamic Foundation v. Bush, 06-cv-01791, Slip Op. (N.D. Ca. Jul. 2, 2008)

<sup>36</sup> See, e.g., Rasul v. Bush, 542 U.S. 466 (2004); Hamdam v. Rumsfeld, 548 U.S. 547 (2006); Boumediene v. Bush, 553 U.S. (2008); The Detainee Treatment Act of 2005.

## **Short-Term Recommendations:**

C.1. **The president should immediately issue a presidential directive to the executive branch that tasks the Information Security Oversight Office with chairing an interagency taskforce to revise within six months the framework for designating information that requires classification in the interest of national security (Executive Order 12958, as amended), with the objective of reducing national security secrecy to the essential minimum, declassifying all information that has been classified without a valid national security justification, and considering the public interest in disclosure.** The directive should clearly repudiate the deliberate abuses of the classification system that have occurred in recent years and call for increased individual and organizational accountability with respect to the use of classification. It should direct consultation with the public in the development of the new executive order, as took place in the prior administration, and require publication of a proposed new executive order in the Federal Register before it is submitted to the president. The directive should instruct that the new executive order on classification:

- Include standards that must be satisfied before records can be classified, as well as prohibitions and limitations against abuse;
- Establish additional procedures to ensure that any decisions to reclassify previously declassified records are clearly justified in order to limit the amount of declassified information that is removed from the public sphere;
- Require agencies to consider the damage to national security and to the public interest from classifying information;
- Establish processes for the dissemination of substantive information to state and local authorities and, ultimately, the American people;
- Direct classifiers to use the lowest appropriate classification level and the shortest appropriate duration for classification; and

- Set up mechanisms for oversight within each agency, including independent declassification advisory boards, systems to track classification decisions, regular auditing and training, and remedies for improper classification decisions.

C.2. **The president should immediately task each federal agency or entity that classifies information to conduct a detailed public review of its classification practices, with the objective of reducing national security secrecy to the essential minimum and declassifying all information that has been classified without a valid national security justification or for which classification is no longer justified.** Patterned on the Fundamental Classification Policy Review that was performed by the Department of Energy in 1995, such reviews have the potential to dramatically reduce unnecessary secrecy while enhancing external oversight and bolstering public confidence.

### Long-Term Recommendations:

C.3. **The full Congress should exercise its authority to obtain classified materials concerning controversial and unauthorized intelligence programs in order to promote public oversight over the executive branch and restore accountability to intelligence programs.** Limiting classification abuses and overclassification is only part of what is needed to reduce the excessive secrecy that now pervades the executive branch. Congress should ensure that information regarding what has gone before is disclosed and continue to exercise its rights to access intelligence- and security-related information even in the face of executive claims of required secrecy. Too often, Congress and the courts accept a simple assertion by the executive that information is classified without first ensuring that the information has been subjected to the executive's own standards and procedures. Both Congress and the courts must replace this ready deference with robust scrutiny of claims of secrecy in the interest of national security.

**C.4. The president should work with Congress to accelerate declassification of historical records through passage of an omnibus Historical Records Act.** To facilitate sound decisions, it is critical that secrecy in decision making be applied only when necessary for national security purposes and that unnecessary constraints on coordination and consultation not be imposed for bureaucratic or political reasons. Furthermore, it is essential for accountability that government officials know that decision making that may be secret for a period will eventually be subject to analysis and review. Government activities in the national security and foreign relations areas are of tremendous interest to the public, both in terms of ensuring our actual security and because the records that chronicle the actions of government officials and document our national experience provide the transparency necessary for a healthy and vital democracy. The culture of information control at agencies will not change without a commitment from the president and support from Congress for a new approach, such as that generally embodied in the recent recommendations of the Public Interest Declassification Board. An omnibus Historical Records Act should be enacted in order to facilitate the declassification of historically significant information in a timely manner, bring greater consistency and efficiency to the declassification process, consider the significant public interest in the declassification of historical records, and reduce the burden and delay inherent in the current declassification process.

**Pseudo-secrecy: Controlling Unclassified Information to the Detriment of our Security and Public Accountability**

Although investigations of the 9/11 attacks found that the government too often controlled information to the detriment of effective security, agencies responded to those attacks by developing new forms of secrecy. One form this new secrecy has taken is the proliferation of labels for information that is deemed sensitive but does not meet the standards for classification. According to a 2007 statement by Ambassador Ted McNamara, the Program Manager for the Information

Sharing Environment, there are “107 unique markings and more than 131 different labeling or handling processes and procedures for SBU information.” Overall, the widespread use of labels to control information deemed sensitive but unclassified has impeded interagency information-sharing and threatened the public disclosure of government records. Moreover, these information control regimes have not adequately protected important sensitivities, such as the privacy interests of members of the public.

On May 9, 2008, the president issued a Memorandum for the Heads of Executive Departments and Agencies on the Sharing of Controlled Unclassified Information that sets forth uniform labels for sensitive but unclassified terrorism information, now known as “controlled unclassified information” (“CUI”).<sup>37</sup> If properly implemented, the framework created by the Memorandum (“CUI Framework”) should reduce the number of different control labels used throughout the federal government to three primary labels. But although the uniformity advanced by the CUI Framework is a welcome change that may assist in better information sharing, the framework perpetuates unnecessary secrecy. It does not prioritize reducing use of control labels, and it runs the risk of undermining the Freedom of Information Act (FOIA) and appropriate disclosure of information to Congress. True information-sharing is best accomplished by eliminating unnecessary information controls, and experience shows that when there are no incentives to reduce secrecy, too much information is kept hidden.

In addition, the CUI Framework is likely to undermine disclosure of records to the public. The president’s Memorandum states that a CUI label “may inform but do[es] not control” the decision on whether to disclose information under FOIA. Common sense tells us, however, that an agency employee who sees a CUI label on a record is likely to favor withholding that record. Moreover, whether a FOIA exemption applies to a particular record may change over time and CUI labels do not have expiration dates or take into account changed circumstances. In short, although the CUI Framework does not change any of FOIA’s requirements, there is a real risk that the Framework will reduce the disclosure of records under

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<sup>37</sup> Memorandum for the Heads of Executive Departments and Agencies, available at <http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html>.

FOIA, and just as importantly, will curtail informal public access to agency records outside of the FOIA process.

Moreover, pseudo-secrecy interferes with the important oversight work of Congress. Agencies typically take the position that congressional oversight is not official government use and use control labels to deny information to members of Congress and their staffs and to control how members of Congress may use the information. Thus, by labeling records as controlled, the agencies limit the use of the records in any public inquiry or hearing, thereby undermining Congress's primary means of conducting oversight.

### **Recommendations:**

- C.5. **The president should replace the CUI Memorandum with a memorandum that directs agencies to reduce use of information control markings unless there is a statute, regulation or policy directive that justifies the need for special handling safeguards or dissemination controls and that introduces a presumption that information not be labeled. It should specify that success under the CUI Framework should be measured by how much new information is made available to the public and clarify that the purposes of control markings are: (1) to facilitate information sharing so information can pass from an agency to another agency, state, local, or tribal authorities, or the public; and (2) in limited circumstances, to protect extremely sensitive information that agencies have been directed to safeguard by a statute or a presidential policy.** The new administration should also ensure that the implementation of the framework includes measures to reduce unnecessary control labels, such as encouraging employee challenges to improper labeling, appropriately protecting employees who make such challenges, instituting a system for the public to challenge improper labeling, implementing a system of internal audits and reviews with consequences for improper labeling, limiting the number of individuals with authority to use control

markings, and ensuring employees are properly trained in the appropriate use of such markings and the public interest in disclosure of CUI information.

- C.6. **The new memorandum should prohibit reliance on control labels in making FOIA determinations.** It should emphasize that the CUI Framework and FOIA are entirely separate and that CUI labels have no bearing on whether records are exempt from disclosure under FOIA.
- C.7. **The president should ensure that control labels do not interfere with the checks and balances provided by the judicial and legislative branches.** The new memorandum should specify that judicial deference not be given to control labels. It should also recognize that congressional activity constitutes “official use” and that a control label should not be used as justification for withholding information from Congress. For CUI categories created statutorily that include restrictions on government use, such as Critical Infrastructure Information, the president should seek revisions from Congress to allow maximum flexibility in the government’s ability to use and share such information.
- C.8. **The new memorandum should provide for adequate oversight of information control labeling practices.** It should direct that a separate office be created to implement the Framework rather than adding CUI to the responsibilities of the Information Security Oversight Office. It should also mandate transparency about how agencies implement information control marking policy. Any new directives, regulations, or guidance promulgated to implement the CUI framework should be made available to the public to increase understanding of what control labels indicate and to increase the likelihood that such measures are narrowly tailored. The president should also ensure adequate funding for the new office.

## State Secrets Privilege: Using Secrecy to Thwart Justice and Accountability

The government is increasingly using a common law rule of evidence to secure dismissal of litigation brought to protect important constitutional and statutory rights. In doing so, it is obscuring governmental policies that abridge those rights.

The government recently asserted the state secrets privilege in a case involving allegations that the government kidnapped a German citizen vacationing in Macedonia, beat him, drugged him, and flew him to secret CIA prison in Afghanistan for questioning, where it detained him in abusive conditions with the assistance of a foreign government and ultimately dropped him off five months later in an empty field in Albania from which he was allowed to return home.<sup>38</sup>

In another case, the government asserted the privilege in the face of claims that the National Security Agency had engaged in warrantless, unconstitutional, and illegal domestic wiretapping of Americans.<sup>39</sup> In yet another case, the privilege was asserted against Maher Arar, a Syrian-born, Canadian citizen was detained during a layover at J.F.K. Airport in September 2002 on his way home to his family in Canada. The government claimed that he was a member of Al Qaeda, and rendered him to Syrian intelligence authorities renowned for torture. He was never charged with any crime and eventually was released. In Mr. Arar's case, the Prime Minister of Canada offered an apology to Mr. Arar and provided him compensation for the unjustified treatment. Although at least one federal judge concluded that the U.S. government's actions subjected him to "the most appalling kind of 'gross physical abuse,'"<sup>40</sup> no court has ruled on his claims against the U.S. actors.

In each case, the government asserted the privilege before the discovery phase of the case, claiming that disclosure of information essential to the plaintiffs' cases would cause serious harm to national security. In each case, the court, reluctant

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<sup>38</sup> *El-Masri v. United States*, 479 F. 3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (U.S. 2007).

<sup>39</sup> *ACLU v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007), cert denied, 128 S.Ct. 373 (2007).

<sup>40</sup> *Arar v. Ashcroft*, F.2d (2d Cir. 2007) (Sack, J. dissenting)

to second-guess the executive on a national security matter, granted the government's request despite strong showings of wrongdoing by the government and dismissed the case before discovery was conducted. Courts have dismissed some cases based on the state secrets privilege without even examining the evidence alleged to be privileged.

As a result, important questions about the government's conduct in these cases and in many others have not been resolved. Did the government render Maher Arar to torture, and does it have a policy of doing so? Did it engage in illegal and unconstitutional wiretapping, and if so, how extensive was the program? The government has, in effect, used the state secrets privilege to shield its conduct not only from persons alleged to have been wronged by it, but also from the public, which has a strong interest in knowing the truth about these allegations. Legislation was introduced in 2008 in the House (H.R. 5607) and Senate (S. 2533) to require courts to conduct more rigorous scrutiny of invocations of the state secrets privilege, but neither bill has become law.

Invocation of the state secrets privilege is entirely in the hands of the executive branch. It decides whether to assert it in a particular case, the stage of the litigation in which the privilege will be asserted, and the facts that it will seek to shield from disclosure by invoking the privilege. It also decides whether to assert that a case must be dismissed in its entirety to protect the privileged information or whether to instead agree that the case can go forward without the privileged information or with substituted information.

### **Short-Term Recommendations:**

**C.9. The president should declare that it is the policy of his administration never to invoke the state secrets privilege to cover up illegal or unconstitutional governmental conduct and that the state secrets privilege will be invoked only as a last resort and only by the head of an agency who has determined that the public interest in disclosure of the information is outweighed by the risk to national security.** The president should

further declare that it is the policy of his administration to recognize that individuals must have a judicial remedy for violations of their constitutional rights and that invocations of the state secrets privilege must be consistent with that recognition. He should order the Attorney General to convene an interagency working group to implement the policy and direct the Department of Justice to report invocations of the state secrets privilege to Senate and House Committees on the Judiciary. The new policy on use of state secrets privilege should recognize that:

- Judges may review *in camera* and *ex parte* evidence claimed to be privileged;
- The privilege only extends to evidence when a judge has determined that there is a reasonable likelihood that disclosure would cause substantial harm to national defense or diplomatic relations;
- Discovery of non-privileged information is permitted in cases in which the privilege has been invoked;
- Special masters and/or technical experts may be used to assist with evaluating privilege claims; and
- Direct that agencies should cooperate in crafting substitutes for privileged information.

C.10. **The president should direct the Attorney General to review within 100 days each case in which the previous administration asserted the state secrets privilege.** The review should assess whether the previous assertions of the privilege can be withdrawn with respect to disclosure of particular pieces of evidence, as well as whether the case can move forward with unprivileged information that is substituted for the privileged information. Because closed cases cannot be reopened, consideration of withdrawing previous assertions should only apply to cases that are open at the time of the review. The results of this review should be reported both to Congress and to the public.

### **Long-Term Recommendation:**

- C.11. **The president should work with the relevant committees of Congress to redress improper invocations of the privilege by the previous administration and to ensure that future invocations of the state secrets privilege are properly limited.**

Many groups believe the only effective long term solution to stem abuses of the state secrets privilege is enactment of legislation establishing checks and balances on invocation of the privilege, such as Sen. Kennedy's State Secrets Protection Act (S. 2533) or Rep. Nadler's State Secret Protection Act (H.R. 5607). Other groups believe that as courts created the state secrets privilege, the responsibility to exercise oversight and establish boundaries for the privilege must also fall to the courts. Any state secrets legislation that is pursued should codify the new policy described in C.9, should be a collaborative effort between the president and Congress, should be informed the results of the interagency review called for in C.9, and should not preclude the courts from exercising their own responsibility to establish boundaries for the privilege.

### **Federal Secrecy Imposed on State and Local Officials: Interfering with Safety and Security at Home**

The federal government is increasingly incorporating state, local, and tribal government agencies into federal counterterrorism, homeland security, and domestic intelligence-gathering programs. As a result, documents and information produced by or for state, local, and tribal governments are increasingly being hidden from public view – often in contravention of state open government laws – as the federal government's umbrella of secrecy expands over state and local homeland security programs.

State, local, and tribal law enforcement officials have long complained that excessive classification of federal intelligence impedes their ability to protect their communities from terrorists and other criminal threats. The federal government's response was to establish multi-jurisdictional task forces, such as

the Federal Bureau of Investigation Joint Terrorism Task Forces (JTTF), wherein state, local, and tribal law enforcement officers would receive federal security clearances and become deputized as Special Federal Officers.

While these programs expanded the number of state, local, and tribal officials with access to classified information, they did little to solve the problem of overclassification or to reduce impediments to sharing terrorism-related information with local stakeholders. Cathy Lanier, Chief of Washington, D.C.'s Metropolitan Police Department, explained the impact: "It does a local police chief little good to receive information – including classified information – about a threat if she cannot use it to help prevent an attack."<sup>41</sup> But the process of deputizing state and local police as federal officers also meant documents produced by or for these state and local officials remained under federal control, shielded from state open government laws.

This circumvention of state open government laws is expanding as the federal government has adopted state, local, and regional fusion centers as its primary mechanism for collecting and disseminating domestic intelligence.<sup>42</sup> While the federal government often provides facilities and human and financial resources to support fusion centers, the fusion centers themselves operate under the authority and control of state and local governments. Yet the federal government is maneuvering to hide state and local fusion center activity from public scrutiny by entering into secret agreements with state and local officials and by encouraging states to weaken their public access laws.

The Electronic Information Privacy Center recently obtained a January 2008 Memorandum of Understanding between the Federal Bureau of Investigation and the Virginia Fusion Center.<sup>43</sup> The MOU, which governs how information

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<sup>41</sup> Cathy L. Lanier, Acting Police Chief, Metropolitan Police Department, testimony before the U.S. House of Representatives Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment, March 22, 2007, at 3, at: <http://fas.org/sgp/congress/2007/032207lanier.pdf>.

<sup>42</sup> The White House, National Strategy For Information Sharing: Successes And Challenges In Improving Terrorism-Related Information Sharing, (Oct. 2007), *available at* [http://www.whitehouse.gov/nsc/infosharing/NSIS\\_book.pdf](http://www.whitehouse.gov/nsc/infosharing/NSIS_book.pdf).

<sup>43</sup> See Electronic Privacy Information Center webpage, EPIC v. VIRGINIA DEPARTMENT OF STATE POLICE: FUSION CENTER SECRECY BILL, *available at*: [http://epic.org/privacy/virginia\\_fusion/](http://epic.org/privacy/virginia_fusion/).

would be shared within the Virginia Fusion Center, requires the state to refer Virginia Freedom of Information Act requests for state fusion center materials to the FBI for processing under federal FOIA rather than state law. This provision restricts the amount of information that would otherwise be available to Virginia residents about the activities of the Virginia fusion center and its state and local employees.

In April 2008, Virginia passed a law completely exempting the state's fusion center from the Virginia Freedom of Information Act.<sup>44</sup> It is the first state to limit its open government law in such a way. According to comments by the commander of the Virginia State Police Criminal Intelligence Division, the federal government pressured Virginia officials into limiting public access to fusion center materials by implying that access to federal anti-terrorism intelligence was contingent on such restrictions.<sup>45</sup>

The federal government is also enacting policies and amending regulations to expand the role of state and local law enforcement agencies in domestic intelligence-gathering activities.<sup>46</sup> Proposed amendments to federal regulations governing criminal intelligence systems would allow state and local police to share criminal intelligence with other state and federal entities, even where the dissemination serves no law enforcement purpose.<sup>47</sup>

Federal government officials should not be allowed to restrict the rights of state residents to obtain information regarding the activities of, or documents produced by or for, state, local, and tribal officials working in state or federal intelligence programs, either through MOUs, regulations, or legislative initiatives.

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<sup>44</sup> Code of Virginia, Chapter 11, Title 52, sections 52-48 and 52-49, *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0792>.

<sup>45</sup> Richard Quirin, *Secrecy Bill for State Anti-terror Agency has Some Crying Foul*, VIRGINIA PILOT, Feb. 18, 2008, *available at* <http://hamptonroads.com/2008/02/secracy-bill-state-antiterror-agency-has-some-crying-foul>.

<sup>46</sup> See, Mike German and Jay Stanley, Fusion Center Update, American Civil Liberties Union, (Jul. 2008), at: [http://www.aclu.org/pdfs/privacy/fusion\\_update\\_20080729.pdf](http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf)

<sup>47</sup> See, American Civil Liberties Union letter to Michael Deaver, Department of Justice Bureau of Justice, Comments on Proposed Rule to Amend 28 Code of Federal Regulations Part 23 (Aug. 29, 2008).

## Recommendations:

- C.12. **Federal task forces incorporating state and local law enforcement officials should declassify information to the greatest extent possible.** Documents and information created by or pertaining to the activities of state and local officials should be accessible under state and local open government laws.
- C.13. **State, local, and tribal government operations, including intelligence fusion centers, should be fully accountable to their respective government officials.** Documents and information produced by or regarding the activities of state, local, and tribal government officials should be accessible to the public pursuant to state open government and public accountability laws.
- C.14. **State, local, and tribal government officials' access to federal counterterrorism intelligence should never depend on weakening state or local sunshine laws.** Federal government agencies should be forbidden from using contracts or memoranda of understanding to limit the full exercise of state and local public access rights. The federal government should refrain from any efforts to encourage state legislatures to reduce public access to information regarding state and local intelligence activities.
- C.15. **The president should refrain from imposing undue restrictions on public access to information produced by or regarding the activities of state, local, or tribal government officials.** The federal government, working in tandem with state, local and tribal governments should clarify that information produced by or regarding the activities of state, local or tribal officials remain accessible through state sunshine laws. The president should refrain from using either non-disclosure agreements or Memorandum of Understanding to restrict access to records produced by non-federal government agencies and/or

officials. This policy should also apply to hybrid records produced cooperatively by federal agencies and state, local or tribal government offices. Such documents should remain managed by the access laws and regulations applicable to the agency or official that produced or assisted in producing the record.

### **Failed Checks and Balances:** **Unrestrained National Security Policy Run Amok**

In recent years, oversight of executive branch national security activities has been systematically undermined. Extensive executive branch secrecy coupled with Congressional reluctance to aggressively pursue effective oversight resulted in a lack of accountability for controversial and possibly illegal intelligence activity, even on a classified basis. Checks and balances have, in some contexts, virtually ceased to exist.

In 2003, for example, Sen. John D. Rockefeller, IV, then the Vice Chairman of the Senate Intelligence Committee, wrote to Vice President Dick Cheney to complain that secrecy precluded congressional oversight of the Bush Administration's warrantless surveillance program. "Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities," Rockefeller wrote. "Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received."<sup>48</sup>

This scenario has been replicated in numerous national security policy areas – from coercive interrogation and extraordinary rendition to unauthorized government surveillance of journalists – as information has been withheld from would-be overseers with detrimental public policy results. The same pattern of impeded oversight has also emerged on issues beyond national security issue including health and environment.

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<sup>48</sup> Available at <http://www.fas.org/irp/news/2005/12/rock121905.pdf>.

Independent oversight fulfills several important functions in a democracy. It ensures that policies are implemented and resources are utilized as intended by elected authorities. It serves to detect and deter deviations from law, regulation, or wise public policy. And it provides a framework for assuring government accountability and informing public deliberation. The possibility of restoring 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 – and on those who are willing and able to pursue the oversight task vigorously.

### **Recommendations:**

- C.16. **The president should require agency heads to task agency inspectors general to perform regular audits of agency compliance with executive order requirements on classification and declassification.** Thousands of executive branch personnel are authorized to create new classified information, but only a dozen or so individuals are authorized to perform independent oversight of such classification actions. Inspectors general, who are already in place at each agency, should be directed to perform periodic audits of classification and declassification activity to ensure that classification is properly applied and limited to the essential minimum.
- C.17. **The Government Accountability Office (GAO) should be enlisted to conduct regular intelligence oversight.** GAO is among the most effective and skillful instruments of government oversight available. It performs audits and investigations of programs and activities throughout the government, with the exception of the U.S. intelligence community. The intelligence community has traditionally declined to participate in GAO inquiries that “evaluate intelligence activities, programs, capability, and operations,” according to the Director of National Intelligence, because to do so, the DNI says, could compromise intelligence sources and methods. That is a pretext, not a legitimate argument. The GAO has 1,000 employees with Top Secret clearances,

including several dozen with Sensitive Compartmented Information (SCI) clearances for access to intelligence information. These employees oversee highly classified programs outside of the intelligence community. There has never been a compromise of classified information originating at GAO.<sup>49</sup>

**C.18. Congress should investigate national security policies and tactics that may violate individual rights under the law, including human rights, and take steps to remedy wrongdoing and prevent future administrations from overreaching.**

Members of Congress should understand and exercise their oversight and investigative authority in order to fulfill their responsibility to the American people. The Constitution does not require the people's representatives to supply steady deference to the executive. Congress must be active in this area regardless of whether the executive is cooperative or resistant, because the absence of oversight will allow executive abuses to take place. Congress should cut off funding for implementation of excessive executive assertions of power, and it should consider cutting funding for programs that are insufficiently disclosed to Congress or the public. It should also commence joint congressional inquiries – one on domestic surveillance and one on torture, interrogation, and rendition – to expose the breadth and nature of some of the most abusive governmental policies undertaken since 2001.

**C.19. The president should actively cooperate with congressional oversight and recognize that oversight is a healthy component of American government.** The executive branch should be responsive to requests for document production and make administration officials available to testify under oath before Congress. The president should order each agency to fully cooperate with any investigation or inquiry into the accountability of government activities related to national security and homeland security actions. This includes criminal investigation or

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<sup>49</sup> See "Government-Wide Intelligence Community Management Reforms," Senate Homeland Security and Governmental Affairs Committee, February 29, 2008, [http://www.fas.org/irp/congress/2008\\_hr/gao intel.html](http://www.fas.org/irp/congress/2008_hr/gao%20intel.html).

prosecution, congressional investigation or inquiry, appointed commission inquiry, or executive branch investigation or audit. Agencies should be instructed to provide relevant records, making personnel available to testify under oath, and declassifying records and information so that an accounting may be provided to the public. Such investigations could cover domestic surveillance, rendition, detention, or interrogation. Further, the president should minimize the assertion of executive or other privileges and invoke them only when essential.

- C.20. **Restore and strengthen the President’s Foreign Intelligence Advisory Board.** The President’s Foreign Intelligence Advisory Board (PFIAB) is unique among intelligence oversight entities in that it is composed of private citizens with a mandate to oversee intelligence agency compliance with the law. But in 2008, President Bush issued an executive order that diminished the Board’s authority and independence (and removed the word “Foreign” from its name).<sup>50</sup> The Board’s authority should be restored. Equally important, its membership should be composed of individuals who are distinguished by their commitment to upholding the law, including civil liberties, and the integrity of government operations.
- C.21. **The president should issue a policy directive prohibiting agencies from creating secret “laws” or regulations or from using secret processes to prevent public input in the development of government rules.** A secret law is a regulation, policy, or directive that, for one reason or another, has been kept secret from the persons to whom it applies. Secret law that is inaccessible to the public is inherently antithetical to democracy and foreign to the tradition of open publication that has characterized most of American legal history. Many consider such secret laws to be inherently illegal. Yet there has been a discernable increase in secret law and regulation in recent years. Among the examples of secret law are secret interpretations of the

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<sup>50</sup> Charlie Savage, “President weakens espionage oversight,” Boston Globe, Mar. 14, 2008, p. A1.

Foreign Intelligence Surveillance Act, secret opinions of the Office of Legal Counsel, secret presidential directives, and secret transportation security directives. While there are occasions when some presidential directives should legitimately be classified and therefore issued in secret, even these exceptions should only remain secret for a reasonable time period. The president should require all agencies to publicly disclose non-classified regulations and rules currently in place and commit to public process for all new regulations and directives. Additionally, all legal opinions from the Office of Legal Counsel should be made public.

### **The Imperative of Real Accountability**

Government power to protect the security of our nation must be exercised responsibly. In our democratic system, that means consistent with the laws: the Constitution, statutes passed by Congress and signed by the president, treaties ratified by the Senate, and binding decisions of the courts.

After the 9/11 terrorist attacks, the administration disregarded laws or rules it perceived to encumber its chosen policies under the guise of national security. The administration operated as if the tragedy created a *tabula rasa* on which it could elevate the powers in Article II of the Constitution above all others – over the guarantees of individual rights explicitly inscribed in America's founding document to prevent such usurpation, above the mandate of the first branch to write the law, and beyond the power of the third branch to interpret the law and insist on fidelity to it. Much of the legal framework upon which these new policies and tactics rest has been kept secret.

It is in the realm of national security policy that the next administration should first begin to shed light on the last administration's policy choices and on illegal or embarrassing actions that may have been improperly classified to evade accountability. Real accountability begins with sunshine: carefully exposing controversial national security policies and tactics to the light of day so they can be examined by experts, the public, the courts, and Congress.

There are many questions that must be answered in order for appropriate decisions to be made about the consequences for any improper or illegal conduct that took place. For instance, in the area of domestic surveillance, Sen. James Webb (D-VA) has explained, “This Administration may have enjoyed completely unrestrained access to the communications of virtually every American. Do we know this to be the case? I cannot be sure. One reason I cannot be sure is that I have been denied access to review the documents that may answer these questions about the process.”<sup>51</sup> Such uncertainty should be remedied once and for all by official disclosure.

For example, in the area of interrogation and torture, while the use of abusive techniques, such as waterboarding, has been acknowledged, that acknowledgment raises many questions that must be answered for true accountability. It is unclear on what authority interrogators engaged in what has long been considered a prosecutable action, and we need to know what other coercive interrogation techniques or torture methods have been adopted. Similarly, we know that the U.S. government has seized suspected terrorists and transported them without any semblance of judicial process to foreign countries where they have been tortured through a process known as “extraordinary rendition.”

First and foremost, accountability matters in a democracy that has prided itself on promoting the rule of law to its citizens and other nations. Without consequence and legal repudiation, the “precedents” of this administration will lie in wait for future presidents to the detriment of Americans and others. If there is to be accountability for abusive interrogation of prisoners in U.S. custody, the first step must be a forthright disclosure of what actually happened behind the closed doors of U.S. detention facilities.

The public trust that has been damaged cannot be restored without a thorough examination of the executive’s policies over the last eight years. Accountability will require not just the end of one administration, but also new rules. Meaningful reforms will require information about what happened, why, who did

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<sup>51</sup> Congressional Record, February 4, 2008, page S572.

what, how it was done, what the intended and unintended consequences were for the guilty and the innocent, what can be prevented in the future, and what can be done better to protect our nation and our liberty.

**Recommendation:**

**C.22. The president should direct each agency to compile its relevant records on the topics of domestic surveillance, rendition, detention, and interrogation and to provide unclassified reports to the president and to Congress concerning U.S. government actions in these areas.** The president has the authority to declassify and disclose any and all records that reflect the activities of executive branch agencies. Although some internal White House records of the outgoing president and his personal advisers will be exempt from disclosure for a dozen years, every Bush administration decision that translated into policy will have left a documentary trail in one or more of the agencies. Many of these records could be disclosed at the discretion of the president without any threat to national security.

## **CHAPTER D**

### **USABILITY OF INFORMATION**

Effective government transparency is contingent upon the tools and technologies that provide access: the type of technologies deployed by the government to disseminate information; the degree to which government employees and experts are at liberty to speak freely with the public; and the extent to which the general public can access and incorporate pertinent and accurate government information into their everyday decision making processes.

The usability of government information depends on several factors. Foremost is the ability of the public to find the information. Additionally, the ease with which the public can interpret the information and compare it to and combine it with other data affects the value of the information. The quality of the information is also a factor. Information is more useful when it is accurate, complete, and timely.

The current state of the usability of government information is plagued by fundamental problems. First, the form in which some government information is stored often makes it difficult to access, search, and find. Second, government agencies have placed restrictions on who can speak to the general public about what. Third, there is a lack of leadership regarding the implementation of cutting-edge technologies to foster interactions with the public. Fourth, most new government information is stored in electronic format, but the government lacks adequate procedures to 1) preserve this information and 2) ensure electronic public access to the preserved information.

The current challenges to public usability of information reduce the efficacy of government and, ultimately, threaten the interests and quality of life of Americans. These challenges may be summarized as problems of access to information, understanding the information, and quality of the information. By solving these problems of usability, many other benefits would result.

With easier access, there would be more public participation in civic life, which would ensure the interests of more people are considered. Government policymakers would benefit from the collective public scrutiny of data, providing analyses and perspectives unavailable to a government operating with limited resources. The additional knowledge and wisdom available from public use of government information could result in improved government decisions, greater efficiency, improved service, and, ultimately, improvements in the lives of citizens.

Recommendations in this section are organized into three main sections:

- **Using the Internet to Promote Interactivity**
- **Electronic Records Management**
- **Scientific Openness and the Media**

### **Using the Internet to Promote Interactivity**

The Internet, and specifically the Web, offers inexpensive yet efficient means to make more government information available to the public and to hold government more accountable. Yet multiple challenges to a Web-focused strategy to promote interactive governance and transparency exist. Agencies and government leaders are not used to the wide-ranging interactive discussions with multiple participants that many of the newer Web technologies and strategies offer. Frequently, federal government agencies do not have the expertise necessary to create user-friendly interfaces or simply do not make it a priority. Some federal government agencies also have too little interest in making sure that their target audiences can easily find the information that they make available.

### **Recommendations:**

- D.1. The president should appoint a Chief Technology Officer (CTO) and encourage Congress to put this position into law and make the appointment contingent upon Senate confirmation. A CTO**

will greatly improve the usability and currency of government information and increase the collaboration between agencies by using technology in creative ways. The CTO should lead efforts to standardize technology policy for public access across the government and within agencies.

Specifically the position should be tasked with the following goals

- Data standards for sharing information, interagency, reporting, open programming.
- Open programming/interface policy
- Transparency and dissemination
- Control privacy and identity theft
- Security of system
- Procurement (to have coherency)
- Contract review
- Technical capacity
- Interagency coordination (and intergovernmental)
- Data quality

The CTO would complement the existing E-Government Administrator (who is also the Chief Information Officer), who oversees e-government projects. The CTO should co-chair the Chief Information Officers (CIO) Council with the E-Government Administrator. This CTO should have a strong technology background and should work with the CIO Council to develop coherent technology and procurement strategies across the federal government for a wide range of purposes, including government openness.

**D.2. The E-Government Administrator should work more directly on developing and promoting cross-agency interactive and public-facing applications and services for citizens and businesses as originally conceived in the E-Government Act.**

This includes a focus on procurement, security, and privacy as it relates to using technology to create a more transparent and open government, with an emphasis on ease of use for the target audiences. Better efforts should also be made to ensure that federal websites comply with existing standards for usability, functionality, and accessibility. The E-

Government Administrator will work with the CIO Council to encourage agencies to think creatively in providing interactive services, disseminating information, working with other agencies, and creating pilot projects to better engage Americans through the Internet.

### **Government use of Interactive Technology**

While the federal government has clearly recognized the potential for improved technological systems, the interactive space between government and the public it serves has only just begun to develop. Government information is not easily used by the public under the government's current technologies and rules. The public cannot easily find information. Information that *is* located is too often in a format that is incomplete, difficult to understand, or outdated.

### **Recommendations:**

- D.3. The president, through his CTO and E-Government Administrator, should encourage agencies to implement interactive and transparent Web 2.0 technologies.** The government faces the same challenges and opportunities in online contexts as citizens do – that citizens and government can share ideas and information to create more effective governance, but only through proactive engagement in online projects and communities. Administrators should clearly encourage agencies to recognize the public as partners in effective governance, setting up pilot projects in citizen production and collaboration, and urging a culture of transparency and disclosure. Wikis, comment sections, collaborative projects, public review of pending policies, and online dialogs are all relatively simple ways to start experimenting online.
- D.4. The president should review and improve upon the existing e-rulemaking initiative, which needs dramatic change.** While regulations.gov has served as a first step in modernizing this process, it has not lived up to expectations for improving public interaction in the

rulemaking process. However, the public review and commentary process for federal rulemaking is ripe for e-rulemaking. Since regulatory procedure is designed as a publicly accountable process, electronic rulemaking initiatives could revolutionize the way citizens understand and interact with federal agencies. The American Bar Association is completing an 18-month review of the existing e-rulemaking system and making recommendations for improvements. The president should ask his CTO, E-Government Administrator, and the Office of Information and Regulatory Affairs Administrator (at OMB) to review these recommendations. A key element will be to incorporate open programming interfaces (such as application programming interfaces) in the system design and to ensure adequate funding is available to implement recommendations. The regulations.gov website needs to be overhauled to be consumer-friendly.

- D.5. The president should instruct the E-Government Administrator to implement a centralized digital system for Freedom of Information Act requests that interacts with each agency's FOIA office.** Such a system could find and manage requests more efficiently and reduce the duplication of requests, since many requests, as well as any released documents, could be made publicly available through each agency's online reading room. While not all requests are appropriate for publication, the default for a modern FOIA request should be both digital and public, with support for paper-based or non-public requests still available. The system might use a 30- or 60-day waiting period before making FOIA requests and the disclosed records more broadly available to requestors.
- D.6. The president should implement a process to better present information about the federal budget in an online format – tracking proposals and changes throughout the process – and should seek congressional cooperation to also present Congress's budget and spending information.** Facts on the government's spending of tax dollars are among the most demanded and

least understood information held by the federal government. While much data is made available on proposed budgets, appropriations legislation, and agency spending, the information fluctuates so greatly in format, scope, and level of detail between various government sources that it becomes impossible for average citizens to understand. The public wants simple answers to straightforward questions on government spending, and with new online tools, the answers should be easier than ever to provide. Unfortunately, the chaotic and inconsistent nature of the information means that even budget experts are often at a loss to understand or explain the current status of spending at any point but the most current. One problem is the highly segmented decision making process for budgets, with information, proposals, and decisions originating from the Office of Management and Budget, congressional appropriators, and agency administrators. Another problem is that each part of government uses different formats, numbers, and scope for organizing and presenting the spending information. Any system to give the public a better view into the spending decisions of the federal government would have to address these difficult inconsistencies.

**D.7. Agencies and government employees should be able to take advantage of the same open, free, commercial services that citizens use, without the necessity of a special government contract.** For instance, online tools that make presentation and collaboration on a document easier could be a boon for government interaction with citizens and could simplify intra-agency interactions. Additionally, agencies have been reluctant to make use of popular free Web services such as YouTube or Twitter for fear of being seen to favor one company or service; as a result, useful tools for reaching and interacting with public go unused. The same sort of community norms that govern Web use in other contexts should be considered for agency contexts, since the adoption of new and changing tools is essential to legitimate online engagement. It should be noted that a few agencies have taken some initial steps in Web 2.0 efforts, such as the National Aeronautics and Space Administration. But without policy guidance from

the White House, this will likely remain an effort that lags far behind its potential. As centralized standards would increase the confidence of government employees using the Internet, OMB should offer generalized guidance on acceptable Web use.

**D.8. The next administration should syndicate government information for the public.** Personalized, customized, or syndicated Web content extends government information's reach, usability, and timeliness. Web managers should encourage creative reuse and customized tracking of government data through systems such as application programming interfaces, RSS or Atom feeds, syndicated search results, e-mail notifications, and similar technologies.

### **Make Online Government Information Searchable, Shareable, and Usable**

Information is useless if the public cannot find it. In the 21<sup>st</sup> century, when Americans look for information, they generally start online by using a commercial Internet search engine. According to industry figures, Americans used commercial search engines approximately nine billion times a month to find information. Search engines are also the starting point for locating government information online, whether people are looking for information about the safety of drinking water, legislation on domestic spying, or the availability of government jobs. But very often, searches come up short. A considerable amount of government information is, for all practical purposes, invisible. Many federal agencies operate Web sites that are not configured to enable access through popular search engines. These Web sites don't allow search engines to "crawl" them, an industry term for indexing online content, and sometimes even block search engines from finding sites or specific pages.

Similarly, the immense body of government data can only be taken advantage of insofar as it is made usefully available, well managed, properly maintained, and contains meaningful metadata. Well-designed metadata standards bring interoperability to data sets, allowing for quick analysis and data combinations or

linkages that lead to new comparisons and discoveries. There are more and more programmers designing new tools and Web 2.0 applications across the country that rely on strong and consistent metadata standards for any information used. Unfortunately, there is great variation in the metadata standards currently being used by federal agencies. This severely limits the likelihood that programmers will include government data in their innovative development.

### **Recommendations:**

**D.9. The CTO should ensure that agencies create websites that use open source software and distribute data in open formats that are accessible to all search engines.** OMB should direct agencies to actively make all their online resources searchable by major public search engines and available in open formats. While online availability of data does not eliminate the need for more traditional methods of information dissemination, using open formats will ensure that online government data are accessible to the widest possible audience.

Similarly, agencies should have a policy to exercise a preference for open-source software for government activities as a means to improve stability, transparency, metadata quality, and cost-efficiency. Open formats for government information and open software applications will enable collaboration between agencies and will increase civilian oversight, participation, and use of taxpayer-funded resources.

Additionally, agencies should strongly consider supplementing increased searchability with proactive efforts to promote and advertise data to potential users who may not know the proper search terms to use to find the data. Agencies' responsibility does not end with making data easier to find. Agencies also need to ensure that the information inside these databases is presented in a simple, straightforward manner that allows average citizens to understand and use the data.

**D.10. OMB, the GSA, or another similar body should undertake a review of metadata standards throughout government (and Congress) and issue recommendations for standards development and coordination.** The key purpose of metadata is to facilitate and improve the retrieval of information, making it easier for the public to access the information. At a minimum, metadata should answer who, what, when, where, why, and how about every facet of the data that is being documented. The incoming administration needs to recognize the importance of developing metadata standards in order to add permanence and weight to the data already collected and to participate in and guarantee interoperability with other similar emergent metadata standards being created at both the state and international levels.

**D.11. The president should direct agencies to minimize the use of copyright claims on government-sponsored materials and include a statement on websites establishing that in the absence of expressed copyright agency-produced materials are copyright free.** While there is no legal obligation for a government agency to provide a notice that no legal copyright exists on its materials, such a statement would help clarify the ability of the public to freely share and reuse government provided information. In the U.S., most works of the federal government do not qualify for copyright protection, with a few exceptions for certain works from agencies such as National Institute for Standards and Technology (NIST) and the U.S. Postal Service.

However, not all government publications and government records are government works. Government works are those materials produced by employees of the federal government. Contractors, grantees, and other government consultants are not considered government employees for purposes of copyright. So when the government contracts with individuals and companies, those outside entities can, at times, claim copyright on materials produced, such as reports, analysis, website pages, etc., depending on the agreement with the government. When a copyrighted work is transferred to the U.S. government, the government

becomes the copyright owner, and the work retains its copyright protection. The government should minimize the copyright claims it allows for materials produced under contract with federal agencies. Each agency should include on its website a clear statement that in the absence of a clear copyright claim, all materials produced and available from the agency should be considered copyright free.

### **Electronic Records Management**

As our society continues to shift to a more electronic age, the proper management of electronic records becomes an increasingly important function of the government. Many of the laws and policies addressing electronic records, while often still on point for principles, are significantly out of date with current capabilities. The federal government has consistently failed to innovate in records management, but the current status of electronic records management lags far behind basic expectations.

A good example of this underperformance came to light as groups pressed to get access to White House e-mails. E-mail is one of the most common types of electronic documents in use today, with almost everyone being familiar with methods to organize and save messages. Thus, a fair degree of competency in archiving these records would not be an unreasonable expectation for the federal government. However, court filings eventually revealed that the White House had abandoned the previous administration's electronic recordkeeping system without implementing an adequate replacement for years, which may have resulted in the loss of approximately 10 million e-mail records as backup tapes were used and reused. These e-mails should have been saved for historic preservation and eventually made public, but because of mismanagement of the records, that information may now be permanently lost.

Under current law, federal agencies have broad discretion to determine how electronic records, such as e-mail, are preserved. This flexibility, while probably reasonable in the early days of electronic records when agencies were learning how to manage the information, has become a problem, as performance by some

agencies and offices fails to meet a minimum standard. The public cannot use information to protect its interests if that information has been permanently lost.

### **Recommendations:**

#### **D.12. The next administration should establish a Presidential Task Force on Implementation of Electronic Records Management.**

The recommendations from the task force should ensure that government meets its core responsibility to preserve the records of its operation.

Further, the recommendations should function to enhance usability of the records and reusability of the records by third parties.

#### **D.13. Records retention rules, digitization guidelines, and model contracts should be revised to ensure consistent access to both original and digital records in non-proprietary formats.**

Government needs to update a series of guidelines to firmly establish a stronger expectation of free public access to government records. Rules should explicitly mandate that the converted records remain the agency's property and be made freely available to the public without undue delay or charge. The National Archives and Records Administration (NARA) has promulgated guidelines that substantially meet these recommendations for its digitization projects, and these guidelines or similar ones should be applied across the executive branch.

In addition to the guidelines for legacy record conversion, agencies need to develop contracts for converting paper information to digital formats. Such model contracts should be developed with digitization partners and access partners that preclude private control of public information. These contracts should be similar to NARA's guidelines for conversion partnerships but should provide ready templates that agencies can use to enter into partnerships not just for digitization or conversion, but also to improve access and usability. These templates should allow flexibility and innovative partnerships while maintaining good stewardship of the public's records.

**D.14. Preservation of electronic records and converted records should be a priority for the task force, and conservation guidelines for electronic records should be produced.** As storage costs for electronic material decrease, there should be a presumption in favor of retention within agencies. Scheduling records, which is the process of standardizing appraisal process of the value of records and periods of preservation and disposal based on that value should continue as a function of NARA. However, individual agencies should retain all electronic records in a searchable form with version controls to ensure that they can be used by agency personnel when needed and are available for permanent public access until such curation is performed by NARA according to established records schedules. NARA has expertise on conservation to ensure electronic records are maintained in accessible formats – tapping this expertise and making it accessible to agency IT administrators should be a priority. Once records are consistently preserved and conserved, access and usability can be enhanced by establishing partnerships with third parties.

**D.15. Regulations should be promulgated to make it explicit that agency employees and officials – in compliance with the requirements of the Federal Records Act – may not conduct agency business through use of non-agency email or other messaging systems.** As e-mail has become a dominant form of communication within government, the importance of maintaining an accurate record of those communications has grown as well. Recent instances at both the federal and state levels have demonstrated that in addition to better archiving of government e-mail records, a stronger policy is needed on use of non-governmental e-mail accounts. Policies should strongly reinforce the Federal Regulations Act's restriction that communications on public/government matters should be conducted through official e-mail accounts.

However, given that the problem continues to arise despite the existing guidance, additional requirements should be established in the event that government matters are discussed through non-governmental or personal e-mail accounts. In such circumstances, officials should be required to preserve and make public these records, or at least the portion related to official business.

**D.16. The CIO Council should study and make recommendations for authentication of government documents and information submitted to the government.** To improve the usability of electronic government information, its authenticity must be assured. A CIO Council task force should develop standards for authenticating government documents for the public through an open process that includes review of past efforts. The task force should develop standards, best practices, and sample implementation plans for agencies to authenticate digital documents. The task force should tap government and private-sector experts for hard questions on topics such as granularity (how to authenticate small pieces of a document – e.g. one or two CFR sections, not an entire title). Best practices and implementation plans developed by the task force can help bring along other branches or levels of government, improving usability for citizens.

### **Scientific Openness and the Media**

The free exchange of ideas is a pillar of the scientific community. For robust scientific research programs to flourish at federal agencies, the government must allow its scientists and researchers to participate fully in the scientific community. Similarly, democratic governance also depends on ensuring that citizens have comprehensive and reliable information on their government's activities. For both reasons, government agencies must allow their scientists to communicate their findings in scientific publications, at scientific conferences, and to the media and the public. Yet too often, the desire to “control the message” has led federal agencies to suppress information and censor their own experts.

Recent actions by the federal government provide a clear example of this effort to exercise control over scientific information. The Bush administration's actions regarding scientific data on climate change have challenged the availability and quality of information on this important issue. Climate change has been the centerpiece of environmental concerns over the last few years, and increasingly, it is a concern for national and economic security. The White House has exercised a heavy hand in controlling access to government scientists and reports on any matters related to climate change. The White House has reportedly pressured EPA to remove conclusions that greenhouse gases endanger public health, information on how to regulate the gases, and an analysis of the cost of regulating greenhouse gases. These incidents indicate a behavior of censorship targeting the scientific community and the government's career staff. Rather than providing unadulterated scientific conclusions to the public and policymakers, the administration instead has hidden the information behind a cloak of secrecy, thus denying the public the information needed to effectively plan responses to the climate crisis.

### **Recommendations:**

**D.17. The president should develop guidelines and require agencies to adopt policies that ensure free and open communication between scientists and researchers, on the one hand, and the media, policymakers, and the public on the other.**

The President's Science Adviser should develop, in writing, minimum guidelines for scientific openness for agency policies to follow. The president should require agency heads to adopt policies (or modify existing policies) consistent with these guidelines that would include the following areas:

**D.17.a. Agency media policies should respect that scientists and researchers have a right to express their personal views.** Scientists and researchers, like any federal employees, have a right to express their personal views outside of a few

narrow restrictions. Provided that scientists make an explicit disclaimer that they are speaking as private citizens and are not seeking to represent official agency policy, they should be allowed to speak freely about their research and to offer their scientific opinions – even in situations where their research may be controversial or have implications for agency policy. Agency policies governing communication with the media should make this option clear and explicit to employees. Such a “personal views” disclaimer does not, of course, cover the release of information that would otherwise be illegal, such as classified or personal information. Additionally, agencies should be encouraged to create a mechanism to allow non-scientific employees to express their opinions on actions, research, or policy within their areas of experience.

**D.17.b. Scientists and researchers also have the right to review, approve and comment publicly on the final version of any document or publication that significantly relies on their research, identifies them as an author or contributor, or purports to represent their scientific opinion or relates to their field of expertise.** While editing by non-scientists is at times necessary and useful, final review by scientific experts is essential to ensure that accuracy has been maintained in the clearance process. In order to accomplish this and create broader public input on scientific materials, agencies should be required to make available for public review and comment all research and documents cited and/or used in a final decision or action.

**D.17.c. Agency policies should make clear that employees are responsible for the accuracy and integrity of their communications and should not represent the agency on issues of politics or policy without prior approval**

**from the Public Affairs Officer.** Employees are also responsible for working with public affairs to make significant research developments accessible and comprehensible to the public.

**D.17.d. Agency policies should spell out a clearly defined role for the PAOs, including timely response to media inquiries and providing journalists and agency staff with accurate information, but should also prevent them from being “gatekeepers of information.”**

Scientists should not be required to obtain pre-approval from public affairs before responding to a media request. However, requiring scientists and researchers to give public affairs prior notice of such interactions when possible, and to recap the interview afterwards, is appropriate.

**D.17.e. Agency communications policies should also inform employees of their rights under the Whistleblower Protection Act and the Lloyd-La Follette Act, which ensures unrestricted employee communication with Congress.** The policy should comply with the Anti-Gag Statute and should provide protections against overly broad non-disclosure policies. It should be clear that employees can go to their agency's Inspector General Office to get clarification on their whistleblower rights and options without any possibility of retaliation.

**D.17.f. The official agency communications policy should be publicly available on the agency's website.** Public affairs staff should have a plan for disseminating the policy to agency scientists and should conduct trainings in effective media communication that emphasize scientific openness.

## Publications and Presentations

Information sharing is an essential component of the scientific method. Federal scientists and researchers should be free to conduct research and publish findings without fear of retaliation. While federal agencies have a legitimate interest in the quality of scientific results published by staff, the appropriate standard for reviewing and approving publications is scientific peer review, not political or policy review.

The next administration should review agency policies on clearance of official and non-official publications and presentations. Scientific openness provisions involving publications and presentations should apply equally to regular agency staff, fellows, contractors, or other scientists.

### Recommendation:

**D.18. The President's Science Adviser should ensure that guidelines for the free flow of scientific information are implemented in a comprehensive and timely manner.** On the heels of repeated problems with the publication of important studies in various agencies, there has been some movement in the right direction on policies governing review and clearance of scientific materials. However, the manner in which agencies adopt these new policies along with proper oversight and enforcement will be critical to counteract the deep-seated practices of reviewing findings through a political lens and delaying or manipulating reports that conflict with agency policies. The practice of releasing early drafts of official agency scientific documents, before OMB or interagency review, should be considered. Such a practice would allow comparison of the scientists' version against whatever edits may come after and help minimize any political manipulation of science.

## CHAPTER E

### CREATING A GOVERNMENT ENVIRONMENT FOR TRANSPARENCY

Open government initiatives confront strong incentives in government to keep information secret and weak incentives to disclose. As one person involved in this project put it, no one in government ever got promoted for disclosing information. Instead, government employees have a strong incentive not to share or disclose information; for fear that such information will embarrass the agency or spur a controversy that may eventually result in reprimand, demotion, or discharge.

This is not a criticism of all civil service staff, many of whom support and work hard to promote government transparency. Rather, it is a statement that the culture of secrecy within government is a persistent problem that existed long before the 9/11 terrorist attacks and before the Bush administration policies that encourage withholding information from the public. There are at least three types of problems:

- **Working in a fishbowl.** A setting where many eyes are always watching you can lead to a tendency – even among workers who support government openness and would like to advance it – to be more cautious about disclosure when it applies to their work or their agency. This is heightened in a political “gotcha” environment, where employees risk being embarrassed or penalized if errors are exposed.
  
- **Political manipulation.** Presidents and their political appointees can greatly undermine public access with policy directives that encourage a culture of secrecy. The Ashcroft memo on FOIA (referred to in Chapter A) is an example of disincentives through policy directives. Even though the legal structure of FOIA creates a presumption of openness, manipulations of policy can vitiate the idea of transparency – and leave in their wake a

mindset that disclosure is dependent upon the policies of a given president, rather than a principle of government.

- **Resources.** Often, there are inadequate resources for disclosure, whether to implement FOIA or for tackling e-government initiatives. Sufficient money, staff, skills, or incentives are not provided to create and sustain a 21<sup>st</sup> century right-to-know environment. As an example, employee evaluations and other forms of financial reward and recognition rarely consider efforts to improve agency information dissemination. This failure can create a disincentive for disclosure.
- **Differences in Agency Cultures.** Different agency histories and leadership often result in a lack of consistency, even when information is released. Similar requests for information to different agencies or regional offices can garner significantly different results. Different federal agency websites present users with widely varying navigation, online tools, and format of available materials. Each agency is left to its own discretion to make decisions on information policies, disclosure of materials, website content, and allocation of personnel and funds for transparency activities with no review, feedback, or explanation. Of course, this inconsistency often discourages the public from pursuing the information it needs.

A high priority for the president is to create a new environment within federal agencies that puts a premium on disclosure and openness. This includes incentives for government employees and strong enforcement of open government legislation already on the books. This can be done through:

- **Policy Statements**
- **Resource Requirements**
- **Incentives to Promote Disclosure**
- **Improved Oversight and Enforcement**
- **Long-Term Vision for Government Transparency**

## Policy Statements

Internal executive branch policy statements, in all their various forms – from executive orders to directives to memos – can convey an administration’s tone and attitude on public access issues. The president will need to revise existing policies and set forth new ones to send a clear message to both government employees and the public that the administration intends to promote and ensure transparency.

### Recommendations:

**E.1. The president should issue executive orders and memoranda to agency heads to create an atmosphere within agencies that supports disclosure.** It is vital that the president quickly convey to agencies and the public the new goals for increased government transparency and layout the policy changes needed. The president should instruct his Attorney General to rescind the Ashcroft memorandum on the Freedom of Information Act and replace it with guidance that encourages disclosure unless there is foreseeable harm to an interest protected by a specified exemption from such disclosure. The Oct. 12, 2001, memo issued by former Attorney General John Ashcroft on FOIA (discussed in Chapter A) set a tone for federal agency employees that encouraged withholding public information under FOIA where legally possible.<sup>52</sup> Additionally, the Ashcroft memo encouraged the use of (a) claims of confidential/proprietary business information without any positive showing of some kind by businesses and agencies when secrecy is claimed on these grounds, and (b) privacy (and Privacy Act) claims to justify secrecy. This memo and other internal policies that promote non-disclosure must be curtailed and replaced with directives that set a new tone that encourages disclosure.

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<sup>52</sup> Ashcroft, John, “The Freedom of Information Act,” Memorandum for Heads of all Federal Departments and Agencies, October 12, 2001 at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

The president should also issue a memo to agency heads that affirms the presumption of openness and encourages agencies to proactively make information available through agency websites without forcing FOIA requests. To increase interest at agencies, the memo should clearly explain the ways that transparency makes government better – improved results, greater participation, and increased trust.

The president through his Chief Technology Officer and Government Transparency Officer (see below), should instruct agencies to identify, categorize, and make easily findable all releasable information holdings, as required by the E-Government Act of 2002. Agencies should also clearly identify, categorize, and make easily findable non-disclosed information, with justifications for withholding it, and priorities for making such information public accessible.

- E.2. The president should direct the Office of Management and Budget to identify the public’s transparency rights and require agencies to post these rights in government offices and use them in agency communications with the public (e.g., public meetings).** A simple straightforward notification of the public's right to know could have benefits for both public awareness and mindfulness of public officials. The list of rights compiled by OMB should include key rights afforded in statutes and the Constitution.
- E.3. The president should instruct agencies to request sufficient resources – funding, personnel, and technical capacity – in annual budget requests to implement the vision of a more transparent government through agency websites, the Freedom of Information Act, and other means – and the president should commit to budgeting sufficient funds.** One of the first tasks the president will need to do is prepare a budget request to Congress. The president should ask his Office of Management and Budget director to assess budgetary resources needed for expanded transparency. In subsequent years, each agency should provide OMB a clear assessment of

funding needs to meet the goal of a more open government. The model of funding “e-government” initiatives through pooled agency resources should be reassessed. If it is a government-wide initiative, then Congress should consider providing dedicated funding for it.

**E.4. Directives and legislation providing protection for whistleblowers who disclose waste, fraud, or abuse within an agency, and punitive processes for managers who retaliate against those whistleblowers in their performance reviews should be established.** Whistleblowers play a vital role in ensuring we have a functioning, effective, and accountable government. When governmental checks and balances fail to prevent waste, fraud, and abuse, the responsibility to call notice to a problem and hopefully bring about a resolution often falls to employees. Unfortunately, the Whistleblower Protection Act of 1989, which was enacted to protect federal employees against reprisals for the exposure of government inadequacies, has been rendered largely toothless by judicial decisions. Additionally, there have been recent administrative policies that seek to control and/or limit the speech of scientists, researchers, and policy personnel that might give voice to facts and opinions that differ from the current political agenda.

While new legislation is needed to permanently establish increased protections and new whistleblower rights, such as a right to jury trials, much can still be done administratively. Directives should clarify to all agencies, including law enforcement and intelligence agencies, the expectation that whistleblowers be robustly defended from reprisals and that whistleblower claims be dealt with quickly and fairly. Much of the mismanagement, unfair treatment, and limited enforcement of the protections could be rectified with new demands by the president that whistleblower protection be made a priority. The president should establish a culture that supports whistleblowers by rewarding disclosure and punishing retaliation in performance appraisals. The president must also work with Congress to enact comprehensive federal whistleblower

reform that extends meaningful protections to law enforcement and intelligence agency whistleblowers.

- E.5. The president should direct agencies that when they outsource any of their duties, not limited to records management duties, the contracts should contain provisions specifying that the records produced by the company in its function as a government surrogate belong to the agency and available, as agency records, under FOIA.** Government procurement is the fastest growing part of discretionary spending in the federal government, with roughly 41 cents of every dollar being spent on contracts. Along with this rapid growth in contracting, there has also been a rapid rise in sole-source contracts and contracts with full and open competition but only one bidder. Additionally, there is a concentration of contractors: of the more than 170,000 contractors receiving federal money, the top 20 account for 36 percent of all the money, and the top five account for 22 percent. Such numbers are a clarion call for reforming the procurement process to ensure more transparency.

Outsourcing of government's functions is a controversial activity, with both strong opponents and supporters. To the extent it continues, it will have an impact on transparency, as many of our openness laws (e.g., open meetings, FOIA) have not been seen to apply when government outsources its work. All federal contractors performing government functions should be subject to the same openness laws that apply to the federal agency that would otherwise be performing the service or function.

On Dec. 31, 2007, President Bush signed the OPEN Government Act of 2007 (S. 2488), which includes long-sought reforms of the Freedom of Information Act (FOIA). In response to the outsourcing of so many federal government functions, one provision of the OPEN Government Act extended FOIA to include any information that "would be an agency record" that is maintained by "an entity under Government contract, for

the purposes of record management." Currently, the breadth and implementation of this important provision remain untested. The president should clarify the records management responsibility that contractors must abide by and better establish the level of access agencies will provide to contractor produced records.

**E.6. Agencies' implementation of increased transparency and promotion of greater use of information should include strategic and aggressive use of existing library networks, including the Federal Depository Library Program (FDLP).** An important aspect of any effort to increase government transparency is to make sure the public is aware of and able to use the new information. For this, libraries across the nation – public, academic, legal, research, and many others – are perfectly positioned to help notify and explain the new access to the public. Many Americans look to libraries for assistance in finding or understanding information, especially for those members of the public with no or limited Internet access. Libraries provide a broad range of E-Government services and resources but these have not as yet been successfully coordinated with the various Federal agencies. Librarians, as managers of information, can be among the most knowledgeable and effective advocates. Greater public participation in government and expanded use of government information are the true goals of increased transparency, and the federal government should develop a clear plan to use libraries in completing that process to achieve those goals.

The president should direct heads of agencies to coordinate E-Government and other programs of information dissemination with libraries in general and with the FDLP more specifically. This program, created by Congress and administered by the Government Printing Office, provides no-fee permanent public access to a broad range of government information. The president should direct agencies to insure that their government information products are included in the FDLP and thus public access assured.

## Resource Requirements

Many administrations have chosen to cut resources as an expedient way of eliminating policies, programs and even agencies without having to publicly take a new, and potentially unpopular, policy position. This "governing by purse strings" demonstrates the power of resource allocation and its ability to communicate an administration's level of commitment to a program or goal. OMB should budget, and agencies should be required to dedicate, proper funding and resources to transparency efforts – FOIA, websites, and other means. While our focus here is on the executive branch, the other branches of the government should also have proper funding and resources dedicated to transparency efforts.

We focused on two specific areas of concern for resources: 1) FOIA offices and 2) technical capacities within agencies and government as a whole.

Recent years have seen improvements in FOIA policy but little direct help in terms of resources for agencies struggling to properly implement the law. In inflation-adjusted dollars, the amount of money spent in 2007 is less than what was spent in 1999. Yet in 2007, the number of FOIA requests was more than 10 times the number seen in 1999 (a number that is likely skewed by the Social Security Administration and Veterans Administration counting first-person requests for the person's Social Security account or veteran benefits information as FOIA requests). Yet, a 2008 study by the Coalition of Journalists for Open Government found, that, "In 2007, FOIA spending fell by \$7 million (3%) to \$233.8 million at the 25 agencies that handle the bulk of the third-party information requests over the last ten years, and the agencies put 209 (8%) fewer people to work processing FOIA requests."<sup>53</sup> Some of this decline may be attributable to the contracting out of basic FOIA processing by many agencies.

In an effort to reduce agency backlogs and improve FOIA procedures, President George W. Bush issued Executive Order 13392 on Dec. 14, 2005. The order required agencies to conduct improvements, as well as establish FOIA liaison

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<sup>53</sup> OpenTheGovernment.org, Secrecy Report Card: 2008, September, 2008 at <http://www.openthegovernment.org/otg/SecrecyReportCard08.pdf>.

positions in agencies. Two year later, on Dec. 31, 2007, Bush signed the OPEN Government Act, which increased reporting requirements, the scope of what entities are considered news media , and what entities (e.g., contractors) are covered by FOIA.

Without adequate resources, however, these changes are likely to have a limited impact on government's ability to meet FOIA requests. A 2007 Government Accountability Office (GAO) report on FOIA noted, "Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received." Neither the executive order nor the new law brought agencies any new resources or requirements on agency heads to increase the amounts allocated to FOIA implementation. Agency FOIA offices are left to figure out how to do more on the limited resources allocated to them.

Like FOIA, e-government initiatives are underfunded. OMB estimates that the government spends roughly seven times the amount Congress appropriates to the E-government Office for initiatives it spearheads. The money comes through pooled funds from the various agencies, which draw on general operating revenues within the agencies. This has several implications: it can reduce the resources available for agency transparency efforts; it can limit government-wide initiatives to e-services that reduce agency burdens rather than those that enhance transparency and dissemination; and it can reduce expenditures for technology capacity within agencies, leading to outsourcing for many functions that agencies should have the capacity to address internally.

### **Recommendations:**

**E.7. Implement a formula that establishes a minimum percentage of the agencies' Public Affairs Office (PAO) budgets to be spent on FOIA expenses.** Without adequate resources devoted to FOIA, agency morale and the ability to fully adhere to the requirements of the law will not likely improve. GAO should be asked to analyze the current funding for FOIA and assess funding sufficiency based on agency size, FOIA personnel, number of requests, and number of pages requested per year.

Then the Congressional Budget Office should be asked to generate a formula for appropriate funding of FOIA offices in agencies, which might include an optimum ratio between PAO and FOIA funding. This recommendation might result in the creation of specific line-item budgets for FOIA, rather than its incorporation in general agency funding. As FOIA studies are completed and offer a clearer picture of the problems and challenges being faced at each agency, the formula could be adjusted to specifically address each agency's FOIA needs.

- E.8. The President should instruct agency Chief Information Officers, working with the agency Transparency Officer, to build content management systems such that FOIA-able information can be identified and retrieved.** Currently, responding to FOIA requests is labor intensive and expensive for most agencies because their IT systems were not designed to enable the retrieval of older information and records.
- E.9. The president should instruct agency Chief Information Officers, and should task the CIO Council, to develop and publish for comment a strategic plan to rebuild government information dissemination capacity and move agencies into the Web 2.0 world.** The government needs to rebuild technical capacity for information dissemination in the agencies (and government-wide), because in recent years, most technical work regarding dissemination has been outsourced, and there is not sufficient capacity among governmental personnel to even oversee the work of contractors, much less develop technical dissemination initiatives within the government. This assessment should include resource needs for building agency technical capacity.
- E.10. OMB/the Office of Transparency (see below) should (re)issue guidance on information that must be on agency homepages and should require agency reports on compliance with the requirements of the E-Government Act, the E-FOIA**

**amendments of 1996, and recommendations of the Dissemination/Transparency Working Group (see below).**

Battles over website real estate often create disincentives to make information easily available. Decisions about what gets posted, and where, vary from agency to agency, and the criteria are at best unclear and generally not disclosed to the public. In recent years, for instance, despite the mandates of the E-Government Act and guidance from OMB that links to FOIA reading rooms be on the homepages of agency websites, these links have been removed from some websites because they are not heavily used or other agency concerns are given priority. Information disclosure links must be easily found and easily used.

- E.11. The next administration should create incentives to convert government documents to no-fee, electronic, publicly available documents.** Currently, private companies enter into non-competed agreements with agencies – often Memoranda of Understanding that are not public – and create subscription/charge-based access to public records that they have digitized at “no cost” to the government. There is little ability for alternative models, such as consortia of government entities, libraries, and others, to present themselves as options to maintain no-fee electronic public access in the face of such non-competed agreements.
- E.12. The president should establish incentives for agencies to clear up their backlogs.** One incentive would be establishing a technical assistance fund to provide additional support to agencies with significant backlog problems. Some agencies’ backlogs are the result of unique issues faced by the agency in responding to requests. Some agencies may handle requests with a greater emphasis on historical records, e-mail communications by officials, or records that require multiple reviews prior to disclosure. This fund would provide such agencies with an opportunity to receive assistance in addressing such challenges. The fund should be established at the Department of Justice or the Office of Government Information Services at the National Archives and Records

Administration. The fund would also function as a check on agencies' requests for additional time in responding to requests. In a FOIA lawsuit, an agency can seek an "Open America" stay from the court to grant the agency additional time in responding to a request because its existing backlog prevents that agency from responding until the requests received earlier are cleared.<sup>54</sup> Typically, to obtain such a "stay," an agency must show that it is overburdened by requests and is exercising "due diligence" to reduce its backlog of pending requests. Requesting assistance from this fund would be seen a requisite for "due diligence" in trying to reduce backlogs. Therefore, agencies not requesting assistance would be allowed to receive such stays.

Another incentive would be a commitment by OMB to allocate more funds to agencies that purchase electronic record and content management systems that meet standards for interoperability and include explicit provision for successfully responding to FOIA and E-discovery demands.

### **Incentives to Promote Disclosure**

Currently, there are no meaningful incentives within the federal government that promote transparency or disclosure. There are legal requirements and policies that instruct officials to disclose records and even to be more transparent. But without incentives to encourage government employees to actively strive for greater transparency, openness turns into an enforcement issue alone. While improved enforcement of existing and new requirements is certainly key, oversight personnel cannot be everywhere or review all actions. Incentives are the 'carrot' to the 'stick' of enforcement. Effective use of both is necessary to create faster changes in agencies. Most government employees are committed public servants who want to do the right thing.

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<sup>54</sup> *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615-16 (D.C. Cir. 1976)

## **Recommendations:**

- E.13. The president should make transparency a factor in federal employee performance evaluations where it is a part of the job description.** Changing the culture of government to be more transparent will require direct individual accountability for employees and supervisors and recognition of work to improve transparency. Too often in the past, information requests have been denied, new online tools delayed, and information removed without any specific official or employee being held responsible for the action – either internally or externally. As much as possible, this accountability should be structured as positive incentives for employees – better performance evaluations for those employees that make strong contributions to ensuring an agency or office is conducting business more transparently.
- E.14. The next administration should require an annual Transparency Scorecard (based on the metrics established by the Working Group) for each agency, with an overall report by OMB, which would be part of the E-Government Act report or a larger Management Reporting structure.** Competition is a great incentive when seeking fast changes in performance. Government should create such a competitive incentive by requiring publicly disclosed Transparency Scorecards covering a wide range of agency dissemination activities. Congress should receive the annual OMB report and could request a report from elsewhere, such as GAO, on a regular basis. The possibility of adapting the Program Assessment Rating Tool (PART) should be explored. A PART review helps identify a program’s strengths and weaknesses to inform funding and management decisions aimed at making the program more effective. The assessment would have to be adjusted to both catch transparency/dissemination program failures and analyze why a program falters, as well as what is necessary to strengthen it to accomplish the goals of transparency and dissemination.

**E.15. Transparency awards (Window on Government Award) should be created and regularly given to acknowledge agencies and civil servants that have made government more transparent.**

Awards are a simple but clear indication of the administration's approval for transparency efforts. Acknowledgement of the best new tools, highest performing offices, and most innovative efforts is one of the best ways to make other parts of government aware of these actions with the hope they will create similar changes elsewhere.

**Improved Oversight/Enforcement**

Compounding the failures of a culture of perverse incentives is the rise of a culture of lax enforcement of the openness laws and policies that already exist. The default condition for government employees is to presume that information should be withheld from the public.

The federal bureaucracy is repeatedly falling behind in meeting the requirements of open government legislation. For example, the Freedom of Information Act has long served as a bulwark against secrecy. The law gives members of the public the right to request records from agencies, which have to disclose the records unless certain exemptions are met. The state of disclosure under FOIA has changed, however, due to the Bush administration's response to the 9/11 terrorist attacks and the failure of agencies to keep the backlogs of requests down. The Coalition of Journalists for Open Government reported that the percentage of requesters who received all of their requested information in 2007 fell to an all-time low of 35 percent.

To aid government employees, another problem must be addressed: the lack of internal controls and enforcement of open government legislation. The inspectors general (IGs) of the various agencies serve as internal watchdogs to ensure the faithful execution of law and policy. IGs have served as a check against government's most significant recurring problems: excessive spending, abuse of power, and misleading the public. However, the government culture of secrecy and withholding information is so pervasive that poorly funded and

overstretched IG offices at agencies rarely have the opportunity to address the problems sufficiently. Additionally, because the IGs are agency-specific, when transparency problems are addressed by an IG office, it is actually only addressing a small piece of a much larger problem. A more comprehensive and coordinated approach to government transparency needs to occur to break the cycle of excessive restriction of information.

### **Recommendations:**

- E.16. The president should create a new central Office of Transparency (run by the Government Transparency Officer (GTO)) to oversee disclosure and dissemination practices, promote increased transparency throughout government, and address privacy rights.** The office would be responsible not just for transparency, but the plethora of regimes that restrict the dissemination of information as well. This individual and his or her agency would be in the best position to balance all the government's information and dissemination regimes, with a particular emphasis on transparency. This office must be given authority to disapprove programs and, working with the Chief Technology Officer, system acquisitions and the budgets for them.
- E.17. Each agency should establish a senior officer in charge of dissemination/transparency, tasked to balance information and dissemination regimes, with a particular emphasis on transparency.** This would be a new agency position, possibly within the office of the agency's Chief Information Officer. Additionally, as new CIOs are appointed, they should be required to have at least as much expertise in information policy areas as in technology areas. Working with the CIO, this officer should be able to approve and disapprove programs and system acquisitions.

- E.18. The president should create a Dissemination/Transparency Working Group made up of new agency Senior Dissemination/Transparency Officers and task it to establish metrics for outcome (not process) to assess agency transparency and use them to regularly evaluate and report on progress.** The group would be headed by the Government Transparency Officer. The working group must fully include outside participants. The Dissemination/Transparency Working Group should be subject to the Federal Advisory Committee Act.
- E.19. The president should create a public interest review board to advise the government on information dissemination and to provide advice when an agency refuses to disseminate information to the public.** Two potential models are administrative law judges and the Interagency Security Classification Appeals Panel (ISCAP).

Administrative law judges preside at an administrative trial-type hearing to resolve a dispute between a government agency and someone affected by a decision of that agency. In adjudicating cases before them, Administrative Law Judges conduct formal trial-type hearings, make findings of fact and law, apply agency regulations, and issue either initial or recommended decisions. Administrative Law Judges have complete decisional independence, and to protect that independence, have "tenure very similar to that provided for Federal judges under the Constitution."

The Interagency Security Classification Appeals Panel (ISCAP) provides the public and users of the classification system with a forum for further review of classification decisions. ISCAP's effectiveness as a model is in the disclosures it facilitates in the first place: agencies like to avoid the specter of being reversed on appeal, so they go ahead and release more information on their own than they would otherwise.

This board would be distinct from the Public Interest Declassification Board (PIDB), which is an advisory committee established by Congress in order to promote the fullest possible public access to a thorough, accurate, and reliable documentary record of significant U.S. national security decisions and activities.

**E.20. The president should establish mandatory training for agency officials on transparency requirements and policies to ensure better implementation, including specific trainings for employees and contractors with classification authority and responsibility for implementing the framework on Controlled Unclassified Information (CUI) (see C.5.).** Often, due to lack of training and inadequate guidance, officials and employees making disclosure decisions or classification determinations are not fully aware of all related policies and requirements. In some situations, poorly informed decisions can be corrected through appeals, but these cost time and money to pursue. The government needs to do a better job of getting the decision right the first time. Successful completion of training will be counted as a positive factor for employment, evaluation, and promotion decisions.

**E.21. The president should encourage Congress to establish a criminal penalty for willful concealment or destruction of non-exempt agency records requested under FOIA, as well as penalties for employees and contractors who repeatedly fail to comply with CUI policies and employees and contractors with original classification authority who repeatedly fail to comply with proper classification policies.** Such penalties would be the flip side of the criminal prohibition against unauthorized disclosure. Such penalties would occur after an employee or contractor has been notified of non-compliance and has gone through re-training.

Enhanced citizen suit power should be explored. A private citizen can bring a lawsuit against a government body for engaging in conduct

prohibited by statute. For example, a citizen can sue a corporation under the Clean Water Act for illegally polluting a waterway. A private citizen can also bring a lawsuit against a government body for failing to perform a nondiscretionary duty. For example, a private citizen could sue the Environmental Protection Agency for failing to promulgate regulations that the Clean Water Act required it to develop. The president should ask the Government Transparency Officer to advise him on options for citizen suit power outside of FOIA to encourage greater transparency.

### **Long-Term Vision Government Transparency**

Previous efforts to improve compliance with disclosure requirements and improve implementation of FOIA have met with limited success. Part of the problem has been the approach of trying to fix problems or make improvements in isolation. To really convey the importance of transparency, both to the public and across government, these efforts must be presented within a larger context. The president must lay out a long-term vision for what a transparent and responsive government would look like and the steps needed, both short and long term, to get us there.

Our national right-to-know policy framework is inadequate and outdated for the 21<sup>st</sup> century. On the surface, the policies provide a comprehensive approach to public access, with the backbone being the Freedom of Information Act (FOIA), complemented by classification, declassification, and reclassification policies, the Sunshine in Government Act, the Federal Advisory Committee Act, the Presidential Records Act, the Privacy Act, whistleblower protections, the Paperwork Reduction Act, and laws addressing specific programs. Notwithstanding these laws, there are still significant problems. Presidents can manipulate policy to permit greater secrecy (e.g., using national security or homeland security claims to exempt “sensitive” information). Courts tend to be deferential to the executive branch. Party politics are often more important than real disclosure, and agencies do not maximize today’s technologies for improving public access. While there is much that can be done in the short term with changes in policy, new requirements, and increased incentives, larger efforts

must be initiated. These may take much longer to bear fruit but will communicate the importance of the framework.

The 21<sup>st</sup> century framework for public access must start with a presumption of openness in government. All policies and practices derive from this initial principle. Ideally, in the 21<sup>st</sup> century right-to-know framework, FOIA would become the vehicle of last resort because the public would be less reliant on the law to obtain information. FOIA should be part of the public access safety net, teamed with whistleblower protections and open meeting laws.

These steps can create the beginning of a broader right-to-know framework. Unless Congress codifies the themes in this report, though, public access will fall prey to the interests (or disinterests) of future presidents.

### **Recommendations:**

**E.22. Government should have an affirmative legal obligation to disclose information to the public in a timely manner, thereby expanding the presumption of openness.** Our national public access laws are relatively recent in our history. Until 1966, with passage of FOIA, there really was no law giving the public any right to government information.<sup>55</sup> For all its usefulness, FOIA is not a true right-to-know law. FOIA puts government in a passive role; the law is not triggered unless there is a public request. Under a national right-to-know law, the approach would be reversed. Federal agencies would have an affirmative obligation to disclose information, the public a passive role to review and use it.<sup>56</sup>

Congress should pass a law that would require agencies to disclose newly collected electronic information holdings in a timely manner and justify in writing reasons for withholding information. Reasons for nondisclosure

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<sup>55</sup> Vladeck, David C., "Information Access – Surveying the Current Legal Landscape of Federal Right-to-Know Laws," *Texas Law Review*, 86:1787, 2008. In this article, Professor Vladeck summarizes the history of our right-to-know statutes. See pages 1795-1799.

<sup>56</sup> These recommendations assume the creation of a new Right to New law. However, the objectives can also be achieved by amending FOIA, the Paperwork Reduction Act, or other existing law.

should be no more numerous than the current FOIA exemptions or responsibilities for national security classification (which is addressed in Chapter C of this report).

While it can be argued that this will put federal agencies on an endless treadmill, spending all their time making information publicly accessible instead of doing the work of the people, the reality is that it is increasingly easy to make electronic information – in all its formats – publicly accessible. Moreover, as discussed throughout this report, a functioning democracy requires an informed and active citizenry, which can be accelerated through affirmative dissemination of government information. Thus, this law would cover all information holdings – from spending information to regulatory actions to enforcement actions to directories of federal employees to e-mails to audio and video collections.

**E.23. In developing the federal right-to-know law, the Congress should explore new ways to ensure this right is protected in the long term.** Congress should explore at least three ideas. First, it should identify new legal powers that could be granted to citizens to protect public access, such as power to sue government when an agency is not affirmatively making information available, or does not maintain an index of information that will not be disclosed. It might also provide rewards for whistleblowers. Second, it should identify new types of oversight controls, including a public review board that reports to Congress and assesses compliance with the law. Third, Congress should consider creating a commission to explore how, in a global society, information sharing can be improved, thereby participating in an international right to know movement that sees the right to information as a fundamental human right.

**E.24. Congress should institutionalize the regular authorization of experiments in the use of interactive technologies to strengthen democratic participation in government.** Congress might start by instituting or by the relevant committees authorizing up to five pilots to

test and evaluate different approaches. These might include: electronic town halls to discuss broad policy issues with policymakers and legislators; experiments involving the public in discussions about regulatory proposals, including working outside the normal public comment regime; and new ways of assessing federal programs with input from people who use the programs. However, even if these particular innovations are researched and implemented, other ideas will always be on the horizon. Congress, thus, should regularly institute, or the relevant committees authorize, pilots to continue exploring the adaptation of new technologies for government use. All pilots should conclude with a report out to all government agencies and the public on the successes and barriers experienced so that improvements will not simply occur in the pilot program but spread across government. In addition to the pilots, Congress should authorize financial innovation awards for those contributing news ideas, strategies, and techniques to strengthen government transparency.

**E.25. Congress should authorize and provide appropriations for a broad education program to encourage the public's understanding of government transparency and ways of using government information.** For example, there should be curricula for our public schools that teach how to access government data (including archived information), how to use FOIA, and what national security classification and declassification are. There should also be support for programs to teach people about government information and ways it can be used. To the extent we build this into the national education fabric, the public will be better equipped to use government information and understand the importance of protecting government transparency.

## **APPENDIX I - EXPERT PANELS**

*Note: Panel member affiliations are listed for identification purposes only and do not represent an endorsement of the report.*

### **National Security & Secrecy**

Meredith Fuchs, Chair  
National Security Archive

Lisa Graves  
Center for National Security Studies

Michael German  
American Civil Liberties Union

Steven Aftergood  
Federation of American Scientists

Greg Nojeim  
Center for Democracy & Technology

Adina Rosenbaum  
Public Citizen

J. William Leonard  
Former Director, Information Security  
Oversight Office

### **Usability of Information**

Ari Schwartz, Chair  
Center for Democracy and Technology

Francesca Grifo  
Union of Concerned Scientists

Scott Mattheson  
Yale University Library

Steven Clift  
Publicus.net

Timothy Donaghy  
Union of Concerned Scientists

John Wonderlich  
Sunlight Foundation

### **Creating a Government Environment for Transparency**

Patrice McDermott, Chair  
OpenTheGovernment.org

Jacque Simon  
American Federation of Government  
Employees

David Sobel  
Electronic Frontier Foundation

Danielle Brian  
Project on Government Oversight

Dan Chenok  
Pragmatics

## APPENDIX II - CONTRIBUTORS TO THIS PROJECT

*Note: Contributor affiliations are listed for identification purposes only and do not represent an endorsement of the report.*

Steve Aftergood, Federation of American Scientists	Tom Devine, Government Accountability Project
David All, The David All Group	Christy Diemond, Uninformed Consent
Bill Allison, Sunlight Foundation	Timothy Donaghy, Union of Concerned Scientists
Mark Anfinson, Attorney	Emily Feldman, American Association of Law Libraries
Blair Anundson, Washington Public Interest Research Group	Joe Ferris, Florida State University
Mary Alice Baish, American Association of Law Libraries	Alex Fidis, U.S. Public Interest Research Group
Gary Bass, OMB Watch	Tim Ford, Washington State Attorney General's Office
Sarah Bauer, SPJ/MN News Council	Martha Freeman, Citizen
Patricia Bauman, Bauman Foundation	Meredith Fuchs, National Security Archive, George Washington University
Emily Berman, Brennan Center	Amy Fuller, OpenTheGovernment.org
Rick Birmingham, MAP for Nonprofits	Holly Gale Keller, Rohrback LLP Law Library
Robert Bluey, Heritage Foundation	Rich Gause, Government Documents Library
David J. Bodney, Steptoe & Johnson LLP	Don Gemberling, Minnesota Coalition on Government Information
John Borger, Faegre and Benson	Mike German, American Civil Liberties Union
Lynn Bradley, American Library Association	Pat Gleason, Office for Open Government
Amy Brenengen, MN State Legislature Office on the Economic Status of Women	Lisa Graves, Center for National Security Studies
Danielle Brian, Project on Government Oversight	Francesca Grifo, Union of Concerned Scientists
Mike Burbach, <i>St. Paul Pioneer Press</i>	Allan Hancock, Green Party
Helen Burke, Minnesota Coalition on Government Information	Jerry Handfield, Washington State Archivist
Matthew Burton, Readablelaws.org	Kiku Hayashi, Citizen
Dan Chenok, Pragmatics	Herrick Heitman, Washington Library Association
Tina Ching, Seattle University Law Library	Rick Hind, Greenpeace
Steven Clift, Publicus.net	Marcus Hochester, King County Law Library
Ron Collins, First Amendment Center	Duskajoy Hoffman, Citizen
Perri Collins, ANA News	Bob Horton, Minnesota Historical Society
Bob Cooper, Government Accountability Project	Brant Houston, Investigative Reporters and Editors
Robert Cox, Media Bloggers Association	Naomi Jackson, Rockefeller Brothers Fund
David Cuillier, University of Arizona	
Lucy Dalglish, Reporters Committee for Freedom of the Press	

Paul Jacob, Sam Adams Alliance  
Jennifer Jones, MN Historical Society  
Fay Jones, Florida State University Law Library  
Grace Kelly, MN Blue  
Joseph Lazor, Florida State University Computing Services  
Robert Leger, Society of Professional Journalists  
Bill Leonard, The Leonard Group  
Patricia Lessard, Mills & Lessard Court Reporters  
Cliff Li, Commer.Net  
Nan Madden, MN Council of Nonprofits  
Conrad Martin, Fund for Constitutional Government  
Scott Matheson, Yale University Library  
Bill Maurer, Institute for Justice  
Charles McClure, Information Use Management and Policy Institute, Florida State University  
Mary McCormick, College of Law and Research Center, Florida State University  
Patrice McDermott, OpenTheGovernment.org  
Stephen McDowell, Communications, FSU  
Katherine McFate, Ford Foundation  
Lew McMurrin, Washington Technology Industry Association  
Kristin McMurray, Sam Adams Alliance  
Jason Mercier, Washington Policy Center  
Suzanne Miller, MN Dept of Education State Library Services  
Ellen Miller, Sunlight Foundation  
Frank Mirer, Hunter College  
Remi Moncel, World Resources Institute  
Sam Morley, Florida Press Association  
Sean Moulton, OMB Watch  
Greg Nojeim, Center for Democracy & Technology  
Clay Northouse, OMB Watch  
Jeff Nygaard, Nygaard Notes  
Tara Olivero, American Library Association

Michael Ostrolenk, Liberty Coalition  
Nora Paul, University of Minnesota  
Miguel Perez-Gibson, NACAN  
Barbara Peterson, First Amendment Foundation  
Laurie Roberts, *Arizona Republic*  
Adina Rosenbaum, Public Citizen  
Reece Rushing, Center for American Progress  
Judith Russell, Dean of University Libraries, University of Florida  
Mark Scarp, *East Valley Tribune*  
Ari Schwartz, Center for Democracy & Technology  
Pete Sepp, National Taxpayers Union  
David Sobel, Electronic Frontier Foundation  
Larry Spaulding, American Civil Liberties Union  
Roger Strother, OMB Watch  
Mark Tapscott, Washington DC *Examiner*  
Nancy Tate, League of Women Voters  
Le Templar, Citizen  
Margaret-Lee Thompson, ARC of King County, Washington State  
Mary Treacey, Minnesota Coalition on Government Information  
Brian Turnbaugh, OMB Watch  
Dane vonBreichenruchardt, U.S. Bill of Rights Foundation  
Leita Walker, Faeger and Benson  
Robert Way, Attorney  
Anne Weismann, Citizens for Responsibility and Ethics in Washington  
Amy West, University of Minnesota  
Heather West, Center for Democracy & Technology  
Ben Wilcox, Florida Common Cause  
Marilynn Wills, League of Women Voters  
Joslyn Wilson, Florida Attorney General  
John Wonderlich, Sunlight Foundation

## APPENDIX III - TIMELINE & METHODOLOGY

This report is the result of a two-year project that evolved over four phases: initial framework, outreach, expert panels, and final recommendations. The project started from the premise that freedom of information, sunshine, and whistleblower laws are cornerstones of a democratic society and that a proactive agenda for improving public access to government information would greatly strengthen our democracy. Working with the steering committee of the OpenTheGovernment.org coalition and other interested groups and individuals, the project set out to provide recommendations for the next U.S. president and Congress that can be immediately implemented, as well as pursued on a long-range basis.

### Initial Framework

*Pocantico Retreat: July 18-19, 2007*

The 21<sup>st</sup> Century Right to Know project kicked off with a retreat at the Rockefeller Brothers Fund's Pocantico Conference Center. The event was attended by approximately 30 individuals with diverse backgrounds and a wide range of perspectives. This group developed specific topics the project would target and used the meeting as an opportunity to create a sense of group ownership of the project. The attendees established how the recommended information and transparency policies should be divided (e.g., judicial transparency, FOIA, presidential records). As a result of this event, the project focused on transparency within the executive branch and aimed to develop policy solutions to improve the public's right to know, as well as new practices to make information easier to find and obtain. The event also began to establish common principles and identified the importance of injecting questions about candidate's views on government transparency in the presidential and congressional elections.

A description of the proceedings is available at  
<http://www.omwatch.org/21stRTK/Pocantico.pdf>.

## Outreach

### *Online Advisors*

E-Democracy.org hosted an initial private online group that used a new open source tool called GroupServer, which combines an e-mail list (default setting) and a web forum with file sharing. The purpose was to experiment with an interactive online vehicle that allowed project advisors to easily discuss transparency ideas and project strategies. The group started with just those who had attended the Pocantico Retreat but was expanded to include other groups and individuals as they became involved in the project.

### *Past Proposals Survey: October 2007*

In developing recommendations, the project obtained and cataloged from various organizations and leaders past recommendations for change. After focused outreach to 30 key groups, numerous interviews, and investigative research, OMB Watch produced a paper summarizing government transparency proposals over the past 10 to 15 years. The paper only covered proposals for significant changes in government transparency, ignoring minor recommendations to temper or modify transparency issues, including those proposals that were additions to other, broader ideas. The primary target of the paper was proposals that could be applied in some ways to upcoming opportunities.

A copy of the paper is available at

<http://www.ombwatch.org/21stRTK/PastProposals.pdf>.

### *Transparency Questions for Candidates: March 2008*

After numerous consultations building on the initial work done at the Pocantico retreat, OMB Watch developed an online survey to identify top government transparency questions that should be asked of congressional and presidential candidates. The survey was announced by many of the participants at the Pocantico retreat, and received more than 2,000 responses over a three-week period. The results were presented in a report highlighting the top five questions for candidates and discussing the different conclusions that could be reached from the overall results. The report was circulated to key groups that would be

most likely to have use for such questions, including editorial boards throughout the country, voter groups, and member organizations that engage in elections. The paper also served as one of the catalysts for eliciting comments and reaction from local stakeholders during our state and local outreach.

A copy of the report is available at

<http://www.ombwatch.org/21stRTK/CandidateQuestions.pdf>.

*State Meetings: April 2008*

OMB Watch coordinated with state groups to hold a series of regional meetings to reach state and local stakeholder groups and individuals. The purpose of these sessions was to gather information from various groups and individuals, which helped inform the policy recommendations that would be developed under this project. They were held in:

- Tallahassee, Florida; April 3, 2008 – hosted by Charles McClure of Florida State University
- Phoenix, Arizona: April 26, 2008 – hosted by Robert Leger of the *Scottsdale Republic* and Mark Scarp of the *East Valley Tribune* (both of Arizona First Amendment Coalition)
- Seattle, Washington: April 28, 2008 – hosted by Jason Mercier of Washington Policy Center and the Washington Coalition for Open Government
- Minneapolis, Minnesota: April 30, 2008 – hosted by Mary Treacy and Helen Burke of the Minnesota Coalition on Government Information

During each of the state meetings, OMB Watch gathered information on the following subjects:

- How information currently gathered from transparency and sunshine laws is obtained and used
- How information currently accessible can be better put to use and what role the federal government can play in improving use
- What changes in law and policy local groups would like to see to improve existing programs, laws, and policies

- What additional sources of information groups would want and what sort of policies should be put in place to achieve access to such information
- What questions the groups would like to raise for candidates for federal office

### **Expert Panels**

#### *June-August 2008*

Privacy and access experts were contacted and asked to review the gathered information and create draft recommendations for the next presidential administration in terms of both short- and long-range goals. These panels were grouped into three key areas based on the interests and concerns presented in the outreach sessions:

- National Security Secrecy
- Usability of Information
- Creating a Government Environment for Transparency

The composition of each expert panel is identified in Appendix I. Each of these panels engaged in a series discussions around government openness issues within the scope of its category. Collectively, the panels drafted and edited detailed recommendations on the most important issues to be reviewed at a final retreat. Their product, in revised form, is incorporated into this report.

### **Final Recommendations**

#### *Maritime Retreat: September 20-21, 2008*

A final retreat was held at the Maritime Institute Conference Center to provide an opportunity for groups that participated in earlier phases to react to the draft recommendations from the expert panels. Approximately 70 people came together to review and revise the draft recommendations, prioritize their importance, and give ideas for disseminating and advocating for the final recommendations.

The retreat involved participants from the regional strategy meetings, the expert panels, the Pocantico retreat, and other interested parties. Recommendations for the next U.S. president and Congress, received from the expert panels, were prioritized and clarified.

A description of the proceedings is available at <http://www.ombwatch.org/21stRTK/Maritime.pdf>.

*Group Edits: September-November 2008*

OMB Watch and the expert panel members came together again to revise the report to reflect consensus built during the final retreat. We utilized an online collaborative notation system called a.nnotate.com to collect feedback and comments on the reports that allowed individuals to give feedback on specific areas of the report. Respondents were also able to converse with other participants about any concerns related to the report.

*Support Sign-ons: October-November 2008*

While OMB Watch coordinated this project, the report is actually the result of a community effort in its structure, writing, and focus. OMB Watch utilized an online tool for individuals and organizations to sign on with their support for this project. The project is supported by activists, academics, journalists, and others.





**21st Century Right to Know Project  
c/o OMB Watch  
1742 Connecticut Ave, NW  
Washington, DC 20009  
(202) 234-8494  
ombwatch@ombwatch.org**

**This report is available online at  
<http://www.ombwatch.org/21strtkreecs.pdf>**