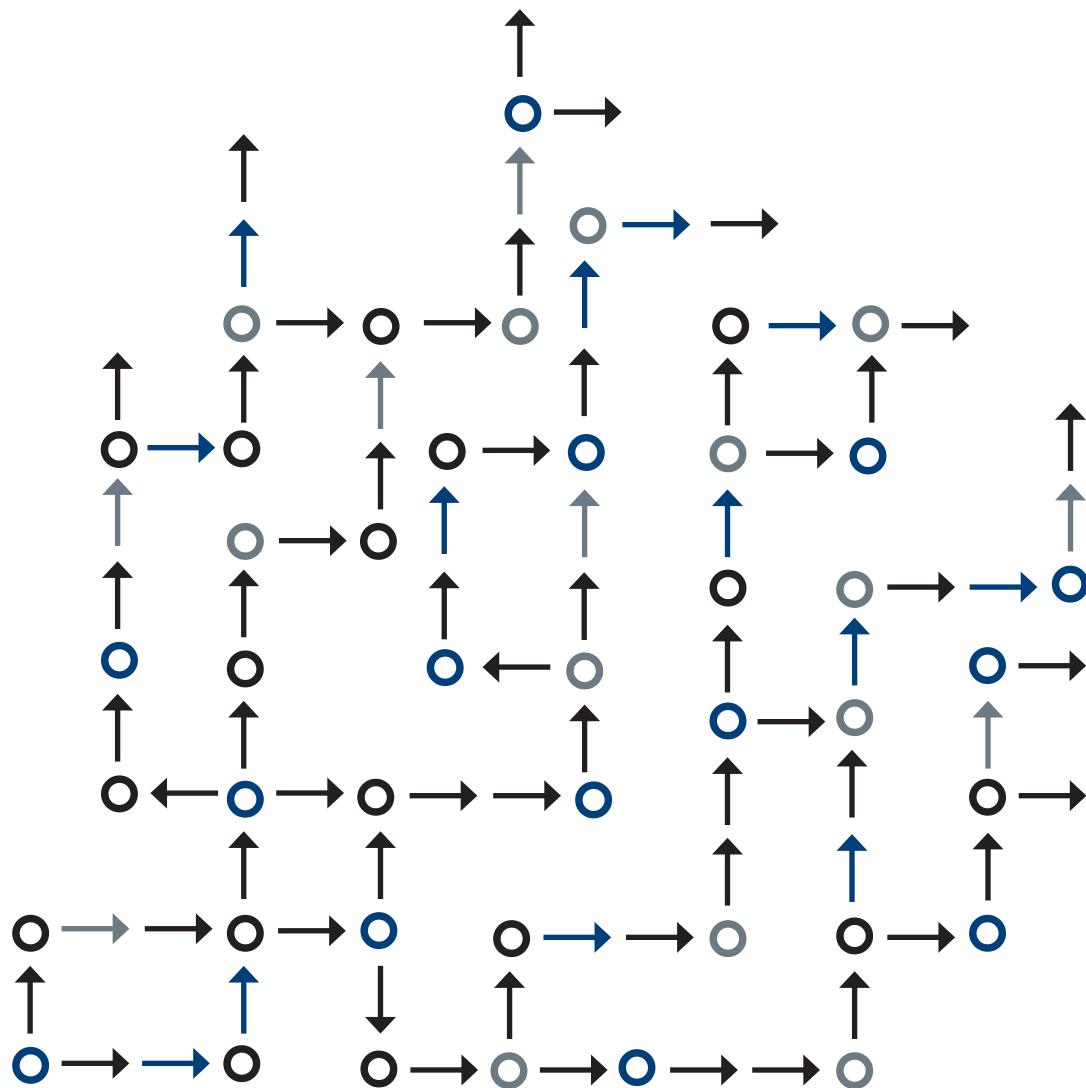


Assessing Progress

Toward a 21st Century Right to Know

March 2011



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Executive Summary

On Nov. 12, 2008, the right-to-know community published a set of detailed transparency recommendations for President-elect Barack Obama and Congress. Those recommendations, titled *Moving Toward a 21st Century Right-to-Know Agenda*, were developed over a two-year period with input from more than 100 groups and individuals. The seventy recommendations urged the new president and the incoming Congress to act quickly on a number of key government openness issues while also encouraging a more systematic, longer-term approach to a variety of other transparency problems that plague the federal government. The recommendations were endorsed by more than 300 organizations and individuals from across the political spectrum. A senior White House official privately called the recommendations a “blueprint for the Obama administration.”

The report organized the majority of the recommendations into three chapters.

- The National Security and Secrecy chapter provided specific recommendations to address the increase in government secrecy that has occurred due to professed national and homeland security concerns.
- The Usability of Government Information chapter focused on recommendations for how interactive technologies can make information more easily accessible and usable, including protecting the integrity of information and using the best formats and tools.
- The Creating a Government Environment for Transparency chapter addressed recommendations for creating incentives for openness and shifting government policies and mechanisms to encourage transparency.

An additional chapter laid out recommendations for the first 100 days of the administration; the implementation of those recommendations was assessed in an earlier OMB Watch report.¹

This report seeks to assess progress on each recommendation near the midpoint of the president’s term as part of Sunshine Week 2011. The many factors at play in each recommendation – vision, leadership, policy, implementation, etc. – make it difficult, if not impossible, to assign simple grades. Instead, we will explain the activities of the administration and Congress on the issues addressed in the recommendations and offer some insights on those actions.

It should be noted that no administration could be expected to complete all of the recommendations contained in the 2008 report in just two years’ time. There is a very real limit to resources and staff that can be brought to bear on the issue of government openness while still addressing the many other demands on government. Several of the recommendations were explicitly designed as long-term challenges that will take years of work to complete, and of course, the work of implementation is never done.

¹ OMB Watch, “Obama at 100 Days – 21st Century Right-to-Know Agenda,” April 2009. <http://www.ombwatch.org/files/obamaat100daysrtk.pdf>.

Conditions for Change

The 2008 report recognized that change would require strong leadership and vision on government transparency from the president, new policies to proactively disclose information where possible, modernization of the government's use of technology to manage and disclose information, and the building of a culture of openness in government.

Leadership: President Obama has shown strong leadership on creating an open and accountable government. At 12:01 p.m. on Jan. 20, 2009, after being sworn in as president, the very first item posted on the White House blog was a statement that said, "President Obama has committed to making his administration the most open and transparent in history." The next day, his first full day in office, President Obama sent a memo to agency heads saying that his administration will be guided by transparency, increased participation, and improved collaboration. The memo stated that the administration is "committed to creating an unprecedented level of openness in government," adding that greater openness "will strengthen our democracy and promote efficiency and effectiveness in government."

Policy: Policies are the DNA of government, telling agencies how to operate, what to work on, how to allocate resources, and more. If policies don't tell government agencies and officials to be open and transparent, then transparency won't happen. Unfortunately, history has shown us that weak and vague policies about transparency will be ignored and overrun by other priorities.

The Obama administration has made meaningful changes in transparency policy in various areas. On his first day, President Obama issued an executive order to improve access to past presidential records, a memo that later resulted in the Open Government Directive, and another memo that directed the attorney general to update FOIA guidance to be more open. Since then, the administration has put in place numerous other policies that set direction and reinforce the importance of government transparency: White House visitor logs, classification and declassification, scientific integrity, controlled unclassified information, regulatory compliance data, and more. Many of those policies are described within this report. Some, such as making White House visitor logs transparent, were not part of these recommendations but are consistent with the intent of the recommendations.

Technology: When pursuing open government, it isn't enough to fix policy. It is also necessary to make effective use of technology, leveraging new opportunities to expand access. Government must continually adapt, experimenting with new tools to help the public effectively search, analyze, and understand the information.

The Obama administration has aggressively adopted Internet technologies, launching new websites and redesigning others, engaging citizens on social media, and making databases more publicly accessible. The administration has also elevated technology staff in the White House and launched a broad overhaul of federal IT management practices. As a result, cloud computing, social media tools, and "apps" are now common parlance in government.

Culture: In addition to policy changes and newer interactive technologies, there is also a need to change the culture of secrecy that has been so prevalent in the federal government. In his 1997 book covering the results of the Commission on Protecting and Reducing Government Secrecy, former Sen. Daniel Patrick Moynihan wrote of the U.S. government, "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." While Moynihan was discussing national security information, he could have been talking about almost any agency. Agencies approach public access in an insouciant manner; with few incentives to advocate or promote openness, the path of least resistance is to let information sit behind closed doors.

While policy or technology changes are readily visible, assessing a new culture of transparency, or a spirit of government openness, is more difficult to do. Top officials must strive to establish a mindset that makes public access a priority within government. There must be incentives to encourage agency personnel to promote the public's right to know in their daily work. It is also important to create mechanisms that deliver clear benefits from transparency efforts to government officials and reinforce the new mindset.

The Obama administration has taken several steps to try to shift the culture of the U.S. government. The Dec. 8, 2009, Open Government Directive did an outstanding job laying out tasks for agencies to promote openness, with specific deadlines for each task. Each agency had to develop its own specialized open government plan in collaboration with the public and stakeholders. This process created a strong sense of ownership within the agencies. Additionally, the Obama administration created a team of White House staff that has government openness as part of its portfolio of responsibilities. Never before has there been a White House team working on government transparency. This has sent a signal to agency staff that government openness is a high priority for the administration.

High-Priority Recommendations

The 2008 right-to-know report identified a group of high-priority recommendations for the incoming administration. To date, the Obama administration has made strong progress on some high-priority recommendations but modest or little progress on others.

The first high-priority recommendation called for the president to "immediately instruct his agency heads to actively and affirmatively disseminate information" and direct the attorney general to issue guidance on the Freedom of Information Act (FOIA) "that urges disclosing information where possible." President Obama did this on his first full day in office, and the administration has repeatedly stressed the importance of proactive dissemination.

In addition, the high-priority recommendations proposed "bringing the government's use of the Internet into the Web 2.0 world" and for "bold experimentation." The Obama administration has shown exceptional enthusiasm for using Internet technologies and social media to communicate with the public, as well as an admirable willingness to experiment.

The high-priority recommendations also urged reforming the systems of classified and controlled unclassified information (CUI). The administration has initiated significant policy reforms on these issues, though implementation is only beginning.

However, on other high-priority recommendations, the administration's actions have been disappointing. With regard to the state secrets privilege, the Obama administration was the first

to adopt a formal policy describing how it will make decisions on using the privilege. However, the reforms are considered minor by transparency and civil liberties advocates. Furthermore, the administration has continued to assert the privilege as a reason to dismiss entire cases, as opposed to the narrow use described by the administration's policy.

In addition, despite the administration's embrace of technology, the administration has all but abdicated its leadership on the critical issues of electronic records management and preservation. Records management is the *sine qua non* of open and accountable government: If records are not adequately retained, managed, and preserved, they will be inaccessible to the public, whether through FOIA, discovery in legal claims, declassification, internal audits, or any other transparency or accountability mechanism. In several high-profile cases during recent administrations, important government information in electronic formats has been lost, due both to intentional evasion and deletion as well as simple neglect. Despite this, the Obama administration has taken only minor steps to address the challenges of electronic records.

On other high-priority recommendations, the administration has made little to moderate progress, as with the recommendations on disclosing more information on ethics and influence in government, ensuring adequate resources for transparency activities, improving the usability of information, and reducing restrictions on government experts communicating with the media and the public.

Other Important Considerations

While the remainder of this report largely addresses the original recommendations, a few issues not addressed in the 2008 report do warrant mention. The most significant is the question of implementation. While a slew of policy reforms have been introduced, some advocates question whether they are being fully implemented, such as the attorney general's FOIA memo and the administration's state secrets policy. Other policies were so recently minted that implementation has only begun. It's difficult to rapidly reorient the ship of state, and even with promising policies, in some cases, change has not come as quickly or as boldly as advocates hoped.

There have also been external events that have tested the administration's openness principles. For example, in the aftermath of the BP Deepwater Horizon disaster, the administration's openness did not pass the test. Inaccurate and misleading information was being released; agency data was not transparent, with accusations of White House interference. Similarly, in the wake of recent releases of information by WikiLeaks, the administration's actions have not been consistent with the spirit or intent of its openness policies. Restrictions on federal workers looking at information on public websites, political pressure against financial and technology services used by WikiLeaks, and aggressive prosecution of leakers are all antithetical to the openness policies embodied in our recommendations.

In a more positive light, the administration has launched major transparency initiatives on other issues not specifically contained in the original recommendations, but consistent with the spirit of the report. Possibly the largest transparency initiative undertaken by the administration was related to the American Recovery and Reinvestment Act, which provided stimulus during the economic downturn. Even before signing the Recovery Act into law, the president said, "...every

American will be able to go online and see where and how we're spending every dime.”² The Recovery and Accountability Board built the Recovery.gov site in a matter of months. More importantly, working with the Office of Management and Budget, the Board's actions have been a major advancement for federal spending disclosure. It required recipients of the Recovery Act funds, as well as their sub-recipients, to report quarterly online on how they were using the funds. Within 30 days of the reporting, the information was made available in a searchable format on Recovery.gov. That approach is now migrating to USA Spending.gov, which covers nearly all federal spending.

The administration also has gone far beyond the recommendations in improving public access to government data, including but not limited to the creation of Data.gov.

As you read this report, you will be amazed at how many of the 70 recommendations the administration has undertaken. It demonstrates a strong commitment to openness and a dedication of government resources to address the many items. Even so, the whole does not yet seem to be greater than the sum of its parts. Overall, government transparency still can be vastly improved. Too often, implementation lags behind the vision created by the policy. It is not easy to transform government from a culture of secrecy to one of openness, yet we are comforted by having an administration that is committed to strengthening government openness and will work collaboratively to try to deliver it.

While we're disappointed that the administration has underperformed on a few critical issues, its energy and hard work to improve transparency has been undeniable and has yielded real results on many important issues. While we cannot yet say that this administration is “the most open and transparent in history,” it may well be on the right path to ultimately making such a statement. But more progress will need to be made in the second half of the term, which includes reinvigorating its openness agenda, establishing common standards across the government, and emphasizing vigorous implementation of worthwhile policies already in place.

² Barack Obama, “The first press conference,” White House, Feb. 9, 2009, http://www.whitehouse.gov/blog_post/the_first_press_conference/.

Key Findings

National Security and Secrecy

Strengths:

- New executive order on classified information reduces over-classification and speeds declassification, but some aspects have not yet been fully implemented
- New executive order on controlled unclassified information improves transparency, predictability, and oversight, but implementation has not yet begun

Weaknesses:

- New state secrets policy represents minor reform, and administration is continuing to use the privilege broadly to dismiss entire cases
- Only minor steps taken to restore congressional oversight or to limit impact of federal secrecy policies on state and local entities

Usability of Government Information

Strengths:

- Strong utilization of e-government and Web 2.0 technologies, with concerted effort to engage the public
- New scientific integrity policies helpful, though not all agencies have begun implementation

Weaknesses:

- No high-level effort to improve electronic records management and preservation government-wide
- Despite the establishment of Data.gov, no steps have been taken to improve the use and consistency of metadata

Creating a Government Environment for Transparency

Strengths:

- Strong and consistent leadership on government openness from White House and other high offices that conveys the importance of the issue
- Open Government Directive launched a process that required each agency to work with public to develop openness plans specific to their mission and culture

Weaknesses:

- Implementation of improved FOIA policies has significantly lagged, and only minor investment in new technologies to improve FOIA processing
- Whistleblower protections have only seen minor improvements, while Congress narrowly failed to pass a major whistleblower protection bill

National Security and Secrecy Recommendations

The recommendations in Chapter C of the 2008 report sought to ensure that claims of national security did not inhibit oversight or enable an atmosphere of impunity for executive actions.

The Obama administration has initiated significant policy reforms on several issues of security secrecy, offered only minor or no reforms on other issues, and on a few issues has pursued even stricter secrecy than the Bush administration.

The administration deserves credit for taking quick and significant action to reduce over-classification and speed declassification. However, some concerns remain with implementation. The administration also began a process of significant reform for controlled unclassified information (CUI), improving the system's transparency, predictability, and oversight. However, agencies are only at the beginning stages of the implementation process, and whether the reforms will ultimately result in a reduction in the number of CUI categories or the amount of information subject to controls remains to be seen.

Transparency advocates' most significant disappointment on the recommendations in this chapter concerns the administration's actions on the state secrets privilege. The Obama administration was the first to publicly adopt a policy on how it will decide on use of the privilege. However, the new policies do not go as far in establishing checks and balances to the privilege as advocates had expected. Also, the administration has continued to assert the privilege broadly to secure case dismissals, as opposed to the narrow use that the administration's own policy stated would be the norm.

The administration has approved some steps to restore congressional oversight of federal security activities, albeit with some hesitation. Similarly, there have been minor steps to ensure that federal policies do not impose secrecy on state and local entities in contravention of their own laws. However, the administration has largely resisted calls to investigate the questionable practices of previous administrations, a necessary step to re-establishing accountability. In addition, the administration has fervently sought to prevent leaks, especially on national security issues, and has investigated unprecedented numbers of leaks.

In February 2010, for the first time ever, the administration released the intelligence budget request on the same day as the non-classified budget. Though the disclosure was required under a new law, but the administration could have avoided it with a simple waiver from the president. Though not specifically requested in the security recommendations, this type of disclosure is consistent with the changes sought by the original report.

Overclassification

C.1. Revision of Executive Order on Classification

Recommendation text: 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.

On May 27, 2009, President Obama issued a memorandum that directed heads of executive agencies and departments to review and recommend changes to Executive Order 12958 within 90 days. The areas to be reviewed mostly matched the focus areas presented in the Right-to-Know recommendations. In June 2009, the National Security Advisor also sought assistance from the Public Interest Declassification Board (PIDB) in reviewing current classification policies. This step was important because it increased the amount of public participation in the policymaking process on this issue. The PIDB hosted a policy discussion forum focused on gathering input in four areas: declassification policy, classification policy, the establishment of a national declassification center, and technology challenges/opportunities. The forum was held via a blog on the website of the Office of Science and Technology Policy. The resulting order reflects many of the recommendations the public submitted to the PIDB.

On Dec. 29, 2009, President Obama issued executive order (E.O.) 13526 to prescribe a uniform system of classifying and declassifying government information.³ This executive order replaces E.O. 12958, issued by President Bill Clinton in 1995 and amended by President George W. Bush in 2003. Among the changes the Obama executive order brings about are new declassification goals for historical records, the use of new technologies to expedite declassification, and a reduction in the number of original classification authorities. The order was followed by a memorandum to agency heads on implementation⁴ and a presidential order clarifying authority to label records “top secret” or “secret” under E.O. 13526.⁵

Obama’s new E.O. requires that new technologies be pursued to better deal with the volume and complexity of the review process and keep the public better informed of decisions. The order instructs agencies to reduce the number of people able to classify records in an effort to eliminate unnecessary classifications and reduce the total amount of information being classified. Eventually, such reductions should translate into smoother declassification reviews and fewer backlogs.

Additionally, the new order and the implementation memo establish:

- A policy that no document may remain classified indefinitely. The new order says records must be designated for declassification at 10 or 25 years unless they include certain types of confidential or intelligence information, which may be classified for up to 50 years. In extraordinary cases, the information may be classified for up to 75 years. The order adds higher standards for agencies to meet in order to exempt a record from declassification. It also creates enforceable deadlines for declassifying information exempted from automatic

³ “Executive Order – Classified National Security Information,” White House, Dec. 29, 2009, <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

⁴ “Implementation of the Executive Order, Classified National Security Information,” White House, Dec. 29, 2009, <http://edocket.access.gpo.gov/2010/pdf/E9-31424.pdf>.

⁵ “Original Classification Authority,” White House, Dec. 29, 2009, <http://edocket.access.gpo.gov/2010/pdf/E9-31425.pdf>.

declassification at 25 years. In no case can information be classified for more than 75 years.

- A new National Declassification Center, which has since been created within the National Archives and Records Administration. The new center will develop declassification priorities after seeking public input and taking into account researcher interest and impact of declassification.
- Elimination of a Central Intelligence Agency (CIA) veto of declassification decisions made by the Interagency Security Classification Appeals Panel that was established by the Bush administration.

C.2. Review of Classification Practices

Recommendation text: 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.

Under section 1.9 of E.O. 13526, every agency with original classification authority must conduct a comprehensive review of their classification guides to ensure the guidance complies with current policies and to eliminate obsolete classification requirements. The agencies have until June 2012 to complete the review.

The Information Security Oversight Office (ISOO) issued a memo entitled Fundamental Classification Guidance Review⁶ on Jan. 27, 2011, which explained to senior agency officials the scope of the reviews needed to satisfy the requirements of the order and to offer suggestions of additional issues agencies might consider. Specifically, the memo noted that “a review conducted only by the pertinent original classification authority is not sufficient,” and that agencies should conduct the review to “obtain the broadest possible range of perspectives.”

The guidance from ISOO may be an important factor, as some agencies are already demonstrating a disconnect with the review process. Reportedly, as of February 2011, the CIA had not begun its review as indicated by its response to a FOIA request that it had no records related to the review. Additionally, components of the Department of Defense, specifically the U.S. Transportation Command, reported the same month that they were unaware of the requirement to conduct the classification guidance review.⁷ Therefore, some agencies will need to redouble their efforts to complete a meaningful and comprehensive review by the June 2012 deadline.

⁶ William J. Bosanko, “Fundamental Classification Guidance Review,” Information Security Oversight Office, Jan. 27, 2011, <http://www.fas.org/sgp/isoo/fcgr.pdf>.

⁷ Steven Aftergood, “Secrecy Reform Stymied by the Pentagon,” Feb. 24, 2011, http://www.fas.org/blog/secrecy/2011/02/reform_stymied.html.

C.3. Congressional Access to Classified Materials

Recommendation text: 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.

There has been some effort from Congress to improve oversight of intelligence and security activities, including those seen as controversial or especially secret, despite some objections from the president. The Intelligence Authorization Act for Fiscal Year 2010 included provisions that expand the administration's notification requirements for covert actions.⁸ Previously, the executive branch had limited notification of covert actions to the Gang of Four – the chairmen and ranking members of the House and Senate Intelligence Committees – or the Gang of Eight, which includes intelligence committee leadership and the majority and minority leaders of the House and Senate. However, the new provisions require the president to notify the full intelligence committees in writing and include the legal basis under which an intelligence or security activity is being conducted. The bill also requires the president to report in writing the reasons for limiting access. Finally, the president must maintain a record of all notifications, including names of members briefed and dates of the briefings.

The Obama administration initially opposed these provisions and threatened to veto the legislation should they be included.⁹ However, the president signed the bill with the covert action notification provisions intact on Oct. 7, 2010.

C.4. Declassification of Historical Records

Recommendation text: The president should work with Congress to accelerate declassification of historical records through passage of an omnibus Historical Records Act.

While the administration has not worked with Congress to accelerate declassification of historical records through the passage of legislation, the president did include the issue in E.O. 13526. The administration intends to reduce the backlog of records with historical value by devising a system to permit public access to backlogged records by no later than Dec. 31, 2013. The current backlog of federal records consists of more than 400 million pages. This process would be expedited by limiting the number of referral reviews these records would need before declassification unless they contain intelligence sources or design concepts concerning weapons of mass destruction. Currently, the declassification of records often requires referrals to several agencies with interests in the subject material. To ensure compliance, the Archivist of the United States is required to publicly report on the status of the backlog every six months. The latest report indicates that the National Declassification Center had reviewed 83 million backlogged

⁸ P. L. 111-259, Sec. 331.

⁹ Statement of Administration Policy, H.R. 2701 – Intelligence Authorization Act for Fiscal Year 2010, The White House, July 8, 2009.

http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saphr2701r_20090708.pdf.

pages through Dec. 31, 2010, of which 12 million were released to the public, leaving 334 million pages still to be reviewed in the next two years.¹⁰

Pseudo-Secrecy

C.5. Purpose and Scope of CUI

Recommendation text: 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.

In addition to classification, President Obama's May 27, 2009, memo addresses the problem of "pseudo-secrecy," the use of control labels categorized as controlled unclassified information (CUI). The memo called for an interagency taskforce to compile a set of recommendations for the administration to use in creating a new CUI policy. The taskforce report was completed on Aug. 25, 2009, and offered a large number of recommendations for reforming CUI labeling.¹¹

On Nov. 4, 2010, President Obama issued executive order (E.O.) 13556, Controlled Unclassified Information,¹² directing a whole new system for CUI. The order assigned responsibility for administration and oversight of the new CUI system to the National Archives and Records Administration (NARA), providing a needed check on agencies and creating a pathway to standardize confusing and contradictory policies. NARA is tasked with developing government-wide procedures for implementing the order within six months. At the same time, agencies must review the categories they currently use and submit them to NARA, including definitions citing a basis in law, regulation, or government-wide policy. Once approved by NARA after a six-month review, the categories along with definition and justification will be published in a public registry, which should help the public to understand the system and to hold agencies accountable for overstepping a category's scope. Agencies no longer have the authority to create new information categories on their own; only those categories approved by NARA may be used.

C.6. CUI's Impact on FOIA

Recommendation text: The new memorandum should prohibit reliance on control labels in making FOIA determinations.

¹⁰ "Bi-annual Report on Operations of the National Declassification Center," National Archives and Records Administration, Dec. 31, 2010, <http://www.archives.gov/declassification/reports/2010-biannual-january1-december31.pdf>.

¹¹ "Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information," CUI Task Force, Aug. 25, 2009, http://www.dhs.gov/xlibrary/assets/cui_task_force_rpt.pdf.

¹² "Executive Order – Controlled Unclassified Information," White House, Nov. 4, 2010, <http://www.whitehouse.gov/the-press-office/2010/11/04/executive-order-controlled-unclassified-information>.

The interagency taskforce report on CUI recommended that as part of CUI reform, a statement should be issued that clarifies that CUI has no bearing on the application of FOIA. The new executive order on CUI makes clear that a CUI designation is not an exemption from FOIA review or any other disclosure decision, including discretionary disclosures, and requires an assumption of openness in designating information as CUI. Specifically, the order stated, “The mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion, including disclosures to the legislative or judicial branches.”

C.7. CUI Interference with Checks & Balances

Recommendation text: The president should ensure that control labels do not interfere with the checks and balances provided by the judicial and legislative branches.

As noted above, E.O. 13556 specifically states that the use of any CUI label shall not influence disclosure decisions, including to the legislative and judicial branches. Under the E.O., NARA will be issuing program guidance to agencies, expected around May 2011, which may include language that reinforces this point.

C.8. CUI Oversight

Recommendation text: The new memorandum should provide for adequate oversight of information control labeling practices.

The CUI taskforce made recommendations for each agency to improve oversight accountability with regard to CUI safeguards and dissemination, including baseline training for those using CUI markings. It is expected that NARA’s program guidelines will clarify the level and mechanisms for oversight that agencies will be expected to include in their efforts. Under the E.O., NARA must, within one year, publish a public registry of authorized categories, including their definitions and associated procedures. This public index of CUI categories will allow outside stakeholders to review categories, justification, and implementation.

The E.O. also requires that for the first five years, NARA must produce an annual report on implementation of the order. After five years, NARA will issue a report every other year. The order does not specify any particular metrics or framework for the reports. Disclosure to the public and information sharing with other agencies may be measures used to evaluate agency performance. The implementation guidance to the agencies will likely provide some indication by requiring the agencies to collect and report to NARA on certain aspects of implementation.

State Secrets

C.9. Limit State Secrets Claims

Recommendation text: 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 Obama administration issued new policies and procedures for invoking the privilege in September 2009.¹³ The new policy established a new review process within the Department of Justice (DOJ) that concludes with the attorney general (AG) making a personal recommendation on use of the privilege. The policy also requires agencies produce detailed evidentiary submissions to the DOJ when making a state secrets claim. Additionally, the policy creates limitations on the use of the privilege.

- First, there are some limits on the administration's ability to seek dismissal of an entire case based on the application of the privilege, narrowing nondisclosure to evidence of strict national security concern.
- Second, the policy includes a commitment to only use the privilege for legitimate national security reasons and not solely to conceal illegal activities, embarrassment, or to delay the release of information that would not reasonably be expected to cause significant harm to security.

Although Attorney General Eric Holder's press release on the policy discussed judicial review,¹⁴ the policy itself failed to address a court's ability to review evidence in a state secrets assertion, a key issue. While the administration's policy marked the first time a president has publicly clarified how it will exercise the authority established in the U.S. Supreme Court decision in *U.S. v. Reynolds* and set certain boundaries, several groups have indicated concern that the policy is incomplete and that it has resulted in little change in the use of the privilege. The lack of judicial reviewability or other forms of accountability are critical elements that fall short of our recommendation.

C.10. Retroactive Review of State Secrets

Recommendation text: The president should direct the Attorney General to review within 100 days each case in which the previous administration asserted the state secrets privilege.

In February 2009, Attorney General Eric Holder directed senior DOJ officials to review assertions of the state secrets privilege in existing cases to ensure that it was being properly invoked.¹⁵ The review did not change the application of the privilege in those cases but did contribute to the new policy released September 2009. The new policies only applied to future uses of the privilege.

However, the administration continued to assert the privilege in new cases. For instance, in September 2010, the administration invoked the privilege to dismiss *Al-Aulaqi v. Obama*,¹⁶ a case regarding an American citizen allegedly targeted for killing by the government. The government stated that it had complied with the new policies to limit the use of state secrets in seeking outright dismissal of cases; according to the policy, the government would do so only in

¹³ "Policies and Procedures Governing Invocation of the State Secrets Privilege," Department of Justice, Sept. 23, 2009, <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

¹⁴ "Attorney General Establishes New State Secrets Policies and Procedures," Department of Justice, Sept. 23, 2009, <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>.

¹⁵ James Vicini, "Justice Department to Review All State Secrets Claims," Feb. 9, 2009, <http://www.reuters.com/article/2009/02/09/us-usa-security-secrets-idUSTRE5187SK20090209>.

¹⁶ "Al-Aulaqi v. Obama: Lawsuit Challenging Targeted Killings," American Civil Liberties Union, Dec. 7, 2010, <http://www.aclu.org/national-security/al-aulaqi-v-obama>.

extraordinary cases. The court did dismiss the case in December 2010 but did not rule on the government's state secrets claim.

C.11. Statutory State Secrets Limits

Recommendation text: 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.

During the 111th Congress, the State Secrets Protection Act was reintroduced in both the House (H.R. 984) and Senate (S. 417). The bills sought to establish procedures for reviewing state secrets claims, as well as oversight and reporting requirements. The Obama administration never announced a position on the legislation, either in support or opposition. The legislation did not receive a vote in either the House or Senate, though the House bill was reported out of the House Judiciary Committee.

Federal Secrecy Imposed on State and Local Officials

C.12. Declassification of Joint Records

Recommendation text: Federal task forces incorporating state and local law enforcement officials should declassify information to the greatest extent possible.

The administration does not appear to have taken any steps on this specific recommendation. The president's executive order on classification does not specifically address state and local information.

C.13. Fusion Center Accountability

Recommendation text: State, local, and tribal government operations, including intelligence fusion centers, should be fully accountable to their respective government officials.

Minor steps have been taken to ensure that federal secrecy does not interfere with accountability to state, local, and tribal governments. For instance, grant application guidelines released in December 2009 by the Department of Homeland Security make clear that fusion centers must have in place a privacy policy at least as comprehensive as the Information Sharing Environment's (ISE) privacy guidelines.¹⁷ The guidelines require that agencies comply with "all applicable laws ... relating to protected information" and establish "procedures to address

¹⁷ "Fiscal Year 2010 Homeland Security Grant Program Guidance And Application Kit," Department of Homeland Security, Dec. 2009, http://www.fema.gov/pdf/government/grant/2010/fy10_hsgp_kit.pdf.

complaints from persons regarding protected information about them.”¹⁸ However, the sufficiency of these guidelines has been criticized.¹⁹

A fact sheet released in March 2010²⁰ makes clear that, as part of a “comprehensive framework for protecting privacy, civil rights, and civil liberties,” fusion centers’ policies must also meet the “requirements of state and local privacy and civil liberties laws, ordinances, and regulations.”

A template for developing these policies was released in April 2010.²¹ The template includes a series of questions for agencies to answer in the policy, such as:

- Under what circumstances will access to and disclosure of a record be provided to a member of the public in response to an information request?
- Under what circumstances and to whom will the center not disclose records and information?
- What are the categories of records that will ordinarily not be provided to the public pursuant to applicable legal authority?
- State the center’s policy on confirming the existence or nonexistence of information to persons or agencies that are not eligible to receive the information.
- If required by state statute, what are the conditions under which the center will disclose information to an individual about whom information has been gathered?
- What are the conditions under which the center will not disclose information to an individual about whom information has been gathered?
- Is your center’s privacy policy available to the public?
- Does your center have a point of contact for handling inquiries or complaints?

The template also includes sample policy language to address each question. However, this sample language may provide sufficient transparency. For instance, the sample language states, “Information gathered or collected and records retained by the [name of center] may be accessed or disclosed to a member of the public only if the information … is not exempt from disclosure by law.” However, this would seem to contravene the attorney general’s 2009 FOIA memorandum, which stated that “an agency should not withhold information simply because it may do so legally.”

¹⁸ “Guidelines to Ensure that the Information Privacy and Other Legal Rights of Americans are Protected in the Development and Use of the Information Sharing Environment,” Information Sharing Environment, http://www.ise.gov/sites/default/files/PrivacyGuidelines20061204_1.pdf.

¹⁹ Harley Geiger, “Fusion Centers Get New Privacy Orders Via DHS Grants,” Center for Democracy and Technology, Dec. 15, 2009, <http://www.cdt.org/blogs/harley-geiger/fusion-centers-get-new-privacy-orders-dhs-grants>.

²⁰ “Fact Sheet: Enhancing the Privacy, Civil Rights, and Civil Liberties Framework for State and Major Urban Area Fusion Centers,” DHS/DOJ Fusion Process Technical Assistance Program and Services, March 2010, http://www.ise.gov/sites/default/files/Fact_Sheet_Enhancing_the_Privacy_for_State_and_Major_Urban_Area_FCs.pdf.

²¹ “Fusion Center Privacy Policy Development: Privacy, Civil Rights, and Civil Liberties Policy Template,” DHS/DOJ Fusion Process Technical Assistance Program and Services, April 2010, http://www.ise.gov/sites/default/files/Fusion%20Center%20Privacy%20Policy%20Development_508compliant.pdf.

C.14. Weakening of State and Local Openness Laws

Recommendation text: State, local, and tribal government officials' access to federal counterterrorism intelligence should never depend on weakening state or local sunshine laws.

The administration does not appear to have done much to clarify that state, local, and tribal disclosure policies do not have to be weakened or bypassed in order for agencies and officials to gain access to federal information. As mentioned in the previous recommendation, the Departments of Homeland Security and Justice issued a fact sheet in March 2010 that clearly states that fusion centers' policies must meet the "requirements of state and local privacy and civil liberties laws, ordinances, and regulations." While the fact sheet is a positive step, it seems unlikely to be sufficient to address the concerns raised by the original recommendation.

C.15. Restrictions on State, Local, & Tribal Information

Recommendation text: 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.

Initial steps have been taken that could address the application of federal controlled unclassified information (CUI) policies. President Obama's November 2010 executive order on CUI sets in motion a process to codify, limit, and disclose federal CUI categories and to standardize and provide oversight of their implementation. The order explicitly indicates that CUI designations do not have bearing on disclosure decisions. The order requires the National Archives and Records Administration (NARA) to consult with state, local, and tribal partners in implementing the order. The executive order calls for implementation to begin by November 2011.

There do not appear to have been any actions to prevent non-disclosure agreements or memoranda of understanding from being used to unduly impose secrecy on state, local, or tribal partners.

Failed Checks & Balances

C.16. Inspector General Audits of Classification

Recommendation text: 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.

The administration does not appear to have made any effort to involve agency inspector general offices in audits of classification and declassification activities. It should be noted that due to the independence of the inspector general offices, it is difficult for any administration to require their involvement in any processes. Congress has the prerogative to do so, but it apparently has not. E.O. 13526 did task the Information Security Oversight Office in consultation with the National Security Advisor to issue directives for implementation and review of the classification order, including agency self-inspection programs.

C.17. Government Accountability Office Oversight

Recommendation text: The Government Accountability Office (GAO) should be enlisted to conduct regular intelligence oversight.

The administration has generally opposed congressional efforts to expand the Government Accountability Office's (GAO) authority to oversee intelligence agencies.

The Intelligence Authorization Act for Fiscal Year 2010 requires the Director of National Intelligence to prepare a directive on GAO access to intelligence community information.²² The administration opposed both provisions and threatened vetoes of the bill. However, the opposition was withdrawn once the Office of the Director of National Intelligence issued a letter noting that the new directive would not change any existing law or GAO authority.

The National Defense Authorization Act for Fiscal Year 2011 would have required that the Office of the Director of National Intelligence (DNI) cooperate with audits and investigations conducted by GAO.²³ The provision was part of the final authorization bill initially passed by the House, but the Senate was unable to pass it. After the elections, Congress continued to debate the authorization bill until a skeleton version, stripped of all controversial provisions, including the GAO audit provision, was passed in the final hours of the lame-duck session.²⁴

C.18. Congressional Investigations

Recommendation text: 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.

Congress has exercised limited oversight capabilities in the area of security tactics that might violate individual rights. In 2009, the Senate Judiciary Committee held a hearing²⁵ on the development and implementation of policies to allow use of torture, and in 2010, the committee held another hearing²⁶ on the investigation into the policies. However, these hearings never led to a commission, such the 9/11 commission, tasked with finding the full truth about the activities. While the Obama administration disclosed important documents detailing the questionable policies and actions that invited investigation,²⁷ it also seemed to support a limited investigation by Congress when it declared that the officials who carried out the interrogations and oversaw the torture would not face prosecution.

²² P. L. 111-259, Sec. 348.

²³ H.R. 5136, Sec. 923.

²⁴ P. L. 111-383.

²⁵ "What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration," Senate Committee on the Judiciary, May 13, 2009, Senate Committee on the Judiciary, <http://judiciary.senate.gov/hearings/hearing.cfm?id=3842>.

²⁶ "The Office of Professional Responsibility: Investigation into the Office of Legal Counsel Memoranda," Senate Committee on the Judiciary, Feb. 26, 2010, Senate Committee on the Judiciary, <http://judiciary.senate.gov/hearings/hearing.cfm?id=4431>.

²⁷ "Bush Torture Memos Released By Obama: See The Complete Documents," Huffington Post, April 16, 2009, http://www.huffingtonpost.com/2009/04/16/bush-torture-memos-releas_n_187867.html.

C.19. Presidential Cooperation with Congressional Investigations

Recommendation text: The president should actively cooperate with congressional oversight and recognize that oversight is a healthy component of American government.

Generally, the Obama administration has been cooperative with congressional inquiries and oversight. As noted above, there have been limited inquiries into the more controversial security policies and activities under the Bush administration, and the Obama administration has cooperated with information disclosure and witnesses.

In areas beyond security and intelligence oversight, the administration has also demonstrated an acceptance of congressional oversight. For example, agencies have been very responsive in disclosing to Congress details on financial spending under the Recovery Act. More recently, the House Oversight Committee Chair, Rep. Darrell Issa, requested extensive FOIA documentation from across the executive branch. Initial reports indicated that all agencies are moving to provide the requested information as quickly as possible.

There have been no reported instances of administration officials refusing to appear before congressional committees when requested, a problem that did occur during the Bush administration.

C.20. President's Intelligence Advisory Board

Recommendation text: Restore and strengthen the President's Foreign Intelligence Advisory Board.

Shortly after President Obama took office, the members of the President's Intelligence Advisory Board resigned as part of the transition to the new administration. In October 2009, the president issued Executive Order 13516,²⁸ which revised President Bush's previous E.O on the advisory board and oversight board. Obama's order strengthened the board's role in intelligence oversight by re-establishing a requirement that the board notify the attorney general of any intelligence activities that violate any laws. The order also directed the Director of National Intelligence and others to provide information that the board determines is needed to perform its functions. This is an improvement over the Bush policy of allowing the DNI to determine what information the board needed.

Also in October 2009, President Obama announced the appointment of Chuck Hagel and David Boren as co-chairmen of the intelligence advisory board.²⁹ Both Hagel and Boren are past U.S. senators. Boren was the longest-serving chairman of the Senate Select Committee on Intelligence, holding the position from 1987 to 1993. Hagel served on both the Senate Foreign

²⁸ "Executive Order 13516," White House, Nov. 2, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-26408.pdf>.

²⁹ Barack Obama, "Remarks by the President Before Meeting with the President's Intelligence Advisory Board Co-Chairmen and Senior Leadership of the Intelligence Community," White House, Oct. 28, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-meeting-with-presidents-intelligence-advisory-board-co-chairmen-a>.

Relations Committee and the Senate Select Committee on Intelligence. In December 2009, the president announced the appointment of seven people to the advisory board.³⁰

C.21. Secret Laws

Recommendation text: 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.

To date, the Obama administration has not issued any directive or memo prohibiting the creation of secret “laws” or regulations. However, the administration has disclosed information on some of the secret “laws” established under the Bush administration. In March 2009, the U.S. Department of Justice released a set of previously classified memoranda from the Office of Legal Counsel (OLC).³¹ The OLC issues legal opinions have the weight of law, as OLC’s decisions are binding on executive branch agencies. Some of the issues covered by the released memos included the president’s authority over detainees, the use of military force against terrorism, military detention of U.S. citizens, and the power to transfer captured suspects to foreign custody. Additionally, in April 2009, the administration released four key Bush administration memoranda that established broader interrogation policies.³² However, in some instances, Obama-era agencies have continued to block the disclosure of policies.³³

The Imperative of Real Accountability

C.22. Review of Security Policies

Recommendation text: 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.

President Obama’s focus on classification issues has largely been forward-looking toward improving future classification decisions and not retroactively addressing previous decisions. Although the Bush administration was widely suspected to have used overclassification to conceal misconduct, the Obama administration has been reluctant to use its authority to disclose that behavior, reflecting a general disinclination to relitigate the Bush years.³⁴ Some advocates have been concerned that not enough has been done to reverse an atmosphere of impunity.

³⁰ “President Obama Announces Members of the President’s Intelligence Advisory Board,” White House, Dec. 23, 2009, <http://www.whitehouse.gov/the-press-office/president-obama-announces-members-presidents-intelligence-advisory-board>.

³¹ Kurt Opsahl, “DOJ Releases Secret Bush Era OLC Memos,” Electronic Frontier Foundation, March 2, 2009, <http://www.eff.org/deeplinks/2009/03/doj-releases-bush-era-olc-memos>.

³² Steven Aftergood, “OLC Torture Memos Declassified,” Secrecy News, April 17, 2009, http://www.fas.org/blog/secrecy/2009/04/olc_torture_memos.html.

³³ “TSA releases list of SOPs – but says they’re all secret,” Identity Project, Dec. 7, 2010, <http://www.papersplease.org/wp/2010/12/07/tsa-releases-list-of-sops-but-says-theyre-all-secret/>.

³⁴ David Johnston, “Obama signals his reluctance to investigate Bush programs,” New York Times, Jan. 2, 2009. <http://www.nytimes.com/2009/01/12/world/americas/12iht-12inquire.19265701.html>.

The Obama administration did release a set of Bush-era DOJ memoranda providing legal justification for torture but only after intense public pressure. At the same time, it worked with Congress to continue exempting torture photographs from FOIA despite originally supporting their disclosure.³⁵

³⁵ "In reversal, Obama seeks to block abuse photos," May 13, 2009, MSNBC, http://www.msnbc.msn.com/id/30725189/ns/politics-white_house/.

Usability of Information Recommendations

The recommendations in Chapter D of the 2008 report focused on ensuring that Americans can access, understand, and reuse government information that is accurate, complete, and timely; that government information is adequately preserved; and that government employees and experts can speak freely with the public.

The Obama administration has shown exceptional enthusiasm in using Internet technologies to communicate with the public. The administration and agencies have unveiled myriad new or improved websites to expand access to government information, with more currently under development. These sites have emphasized engaging interfaces underpinned by open technologies. Agencies have expanded online opportunities for public participation and have grown significantly bolder in their use of social media such as Twitter and Facebook, buttressed by new policy guidance to clarify their responsibilities in online environments.

The administration has also taken steps to improve the longer-term outlook for open government online. It created a Chief Information Officer (CIO) to oversee the government's information systems and a Chief Technology Officer (CTO) to coordinate federal technology policy. The new CIO has acted aggressively to reform federal IT management practices so they deliver results sooner and at lower cost. Overall, the administration has embraced technology and considerably raised expectations. The once-common belief that government IT is forever outdated is on the retreat.

This is not to say that the Obama administration has fulfilled all of the open government community's hopes or expectations for online access to information. To the contrary, a number of recommendations have seen no significant movement. For instance, metadata is a key to getting information out of database spreadsheets and utilized by more cutting edge technologies, but the administration has made little progress improving the use and consistency of metadata. Similarly the administration has also shown little interest in tackling the challenges of electronic records management and preservation. The National Archives and Records Administration (NARA) has begun some reforms to address the issue, but there does not appear to have been much involvement at a high level inside the administration.

The administration has also struggled with data quality issues. For instance, while the administration was able to launch Recovery.gov and collect spending recipient reports in record time, the information has been riddled with data quality issues. Analysis has noted numerous instances of incorrect award identification and job data, as well as thousands of missing recipient reports.³⁶ A similar problem has dogged agency spending reports on USA Spending.gov.

Over its first two years, the administration saw a rollercoaster response to its work on scientific integrity, which was seen by many as an area in need of great repair after the actions of the Bush administration. President Obama's early memorandum on scientific integrity was hailed by many as a positive step. It was unfortunately followed by a year and a half of silence as the administration struggled to prepare implementing guidance. As time passed, many feared the

³⁶ "Recovery Act Data Quality: Errors In Recipients' Reports Obscure Transparency," Department of Transportation Office of Inspector General, Feb. 23, 2010, <http://www.recovery.gov/About/board/Documents/Data%20Quality%20Phase%20II%20Final%20Report%2002-23-2010%20508.pdf>.

new policies would be too little, too late. The guidelines were finally released in December 2010, and advocates were pleased to find the guidelines substantive; experts await an upcoming reporting deadline to assess progress on implementation.

Using the Internet to Promote Interactivity

D.1. CTO

Recommendation text: 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.

After pledging during the campaign to appoint a federal CTO if elected, President Obama appointed Aneesh Chopra to the position on April 18, 2009.³⁷ Chopra was formally located within the Office of Science and Technology Policy, and the Senate confirmed his nomination as Associate Director on May 21.³⁸

However, the CTO position has not been created by statute, and the administration apparently has not advocated that this be done. In addition, the particular duties suggested in the recommendation were divided between the CTO and the Chief Information Officer (CIO), Vivek Kundra; both offices have actively engaged with openness issues. The recommendation also suggested changes in the CIO Council, which have not been implemented.

D.2. E-Government

Recommendation text: 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.

Several cross-agency public-facing applications have been developed during the Obama administration, and Kundra (also serving as the E-Gov Administrator) has promoted and facilitated this. Such applications include:

- Recovery.gov³⁹ (launched Feb. 17, 2009), including data from several agencies, hosted by the Recovery Accountability and Transparency Board
- Data.gov⁴⁰ (launched May 21, 2009), including data from several agencies, developed as an interagency initiative by the CIO Council and hosted by the General Services Administration (GSA)
- IT Dashboard⁴¹ (launched June 30, 2009), including data from several agencies, developed by the Office of Management and Budget (OMB)

³⁷ “Weekly Address: President Obama Discusses Efforts to Reform Spending, Government Waste; Names Chief Performance Officer and Chief Technology Officer,” White House, April 18, 2009, <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-discusses-efforts-reform-spending-government-waste-n>.

³⁸ “Confirmations,” Congressional Record Volume 155, Number 79, May 21, 2009, <http://www.gpo.gov/fdsys/pkg/CREC-2009-05-21/html/CREC-2009-05-21-pt1-PgS5888-6.htm>.

³⁹ See <http://www.recovery.gov/>.

⁴⁰ See <http://www.data.gov/>.

- Open Government Dashboard⁴² (launched Feb. 9, 2010), including data from several agencies, developed by the CTO and CIO and hosted by the White House
- USA.gov⁴³ (redesign launched July 1, 2010), including information from across government. Upgrades included an “app store” cataloging mobile applications offered by various agencies, developed by GSA
- Foreign Assistance Dashboard⁴⁴ (launched December 2010), including data from several agencies, developed by the State Department and the U.S. Agency for International Development

Government Use of Interactive Technology

D.3. Web 2.0

Recommendation text: The president, through his CTO and E-Government Administrator, should encourage agencies to implement interactive and transparent Web 2.0 technologies.

The administration has encouraged agencies to implement new online technologies, most notably through the Open Government Directive process. Agencies have launched or announced a variety of such services as part of their Open Government Plans. For instance, the Department of Labor launched an Online Enforcement Database⁴⁵ that contains information on inspections the department conducts to ensure businesses are complying with the nation’s worker rights and safety laws and regulations. Also, the Department of Energy’s Open Energy Information⁴⁶ website uses an open source platform similar to that of Wikipedia to allow users to search, edit, add, and access energy-related data. The Department of Transportation’s Regulation Room,⁴⁷ a flagship initiative of the agency’s Open Government Plan, is a partnership with Cornell University⁴⁸ to explore new online methods to engage the public in the rulemaking process.

D.4. E-Rulemaking

Recommendation text: The president should review and improve upon the existing e-rulemaking initiative, which needs dramatic change.

Beginning in May 2009, the administration conducted the Regulations.gov Exchange⁴⁹ to solicit public comments on proposed features and improvements to Regulations.gov and the e-rulemaking program.

⁴¹ See <http://it.usaspending.gov/>.

⁴² See <http://www.whitehouse.gov/open/around>.

⁴³ See <http://www.usa.gov/>.

⁴⁴ See <http://www.foreignassistance.gov/>.

⁴⁵ See <http://ogesdw.dol.gov/>.

⁴⁶ See <http://www.openei.org/>.

⁴⁷ See <http://regulationroom.org/>.

⁴⁸ See <http://www.lawschool.cornell.edu/news-center/press-kits/regulation-room/index.cfm>.

⁴⁹ Matt Madia, “Obama Administration Accepting Ideas for Regulations.gov,” OMB Watch, May 26, 2009, <http://www.ombwatch.org/node/10040>.

The Obama administration has overseen improvements to Regulations.gov, the government-wide e-rulemaking portal, that have made the site more user-friendly. The site received an aesthetic redesign, as well as upgrades to its search capabilities. The most major revisions were implemented in July 2009.⁵⁰

Rulemaking agencies have also developed their own e-rulemaking initiatives tailored to their individual needs. The Department of Transportation, U.S. Environmental Protection Agency, and Department of Agriculture all highlighted new e-rulemaking websites in their Open Government Plans⁵¹. In July 2010, the National Archives and Records Administration launched FederalRegister.gov to provide improved access to rulemaking notices.⁵²

However, impediments to e-rulemaking reform remain, including a lack of dedicated funding and an inflexible systems architecture that limits the public's access to data and hinders interoperability between agency sites. The president has not articulated a philosophy or detailed a framework for e-rulemaking advancements and has not publicly instructed his staff to review or consider the American Bar Association's recommendations on the subject.

D.5. FOIA: Centralized Filing; Publish Requests and Released Documents

Recommendation text: 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.

No action has been taken toward implementing a centralized system for filing FOIA requests. However, the administration has made some effort to improve FOIA processing systems. The attorney general's March 2009 FOIA memo⁵³ reminded agencies of their obligations under the OPEN Government Act of 2007 to assign tracking numbers to FOIA requests and to provide a service where a requester can inquire about the status of his or her request by referencing that number. In addition, some agencies' Open Government Plans included developing, improving, or maintaining the agency's FOIA tracking system. These changes, though positive, have not been seen by transparency advocates as improving the FOIA process much.

Additionally, a chart released in November 2010 by the Office of Government Information Services (OGIS) reiterates the requirement to assign tracking numbers and encourages agencies to adopt other processing best practices, including to "develop an online or e-mail system for filing FOIA requests" and to "establish [an] online procedure for tracking appeal status."⁵⁴ Finally, in its guidelines for agencies' 2011 FOIA reports, the Department of Justice asked agencies to

⁵⁰ Matt Madia, "New Version of Regulations.gov Unveiled," OMB Watch, July 28, 2009, <http://www.ombwatch.org/node/10253>.

⁵¹ "At Agencies, Open Government and E-Rulemaking Go Hand in Hand," OMB Watch, April 20, 2010, <http://ombwatch.org/node/10935>.

⁵² David Ferriero, "Federal Register 2.0," White House, July 26, 2010, <http://www.whitehouse.gov/blog/2010/07/26/federal-register-20>.

⁵³ Eric Holder, "The Freedom of Information Act (FOIA)," Department of Justice, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁵⁴ "FOIA Requirements, Agency Best Practices, and OGIS Recommendations," Office of Government Information Services, <http://www.archives.gov/ogis/resources/bestpractices.pdf>.

specifically describe “steps taken to ensure that your agency has an effective system in place for responding to requests” and to describe how the agency is electronically receiving, tracking, and/or processing FOIA requests.⁵⁵

This recommendation also called for publishing online “many [FOIA] requests, as well as any released documents.” Some agencies do post logs of FOIA requests. For instance, predating the Obama administration, some parts of the Department of Defense (DOD) have posted their FOIA logs on an annual basis.⁵⁶ DOD has subsequently added these FOIA logs as datasets on Data.gov.⁵⁷ The Department of Homeland Security began posting its FOIA logs on a monthly basis during the Obama administration.⁵⁸ The November 2010 OGIS document encourages agencies to post weekly FOIA logs.

President Obama’s January 2009 FOIA memo, the attorney general’s March 2009 FOIA memo, and the Open Government Directive of December 2009 all instructed agencies to proactively disseminate information online to reduce the necessity of filing FOIA requests. DOJ’s guidance on the 2011 FOIA reports asked agencies to describe specifically how they are doing so. In addition, OGIS’s best practices document specifically encourages agencies to “post online significant documents that have been released under FOIA without waiting for a second FOIA request.” Some agencies frequently post requested documents online. For instance, the Department of Energy posted all its responses to FOIA requests from January to May 2009.⁵⁹ Other agencies reported using past FOIA requests as the means to identify their high-value datasets to be posted on Data.gov. In addition, the Federal Communications Commission’s National Broadband Plan, released in March 2010, recommended that agencies post online all responses to FOIA requests.⁶⁰

D.6. Budget Information

Recommendation text: 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.

The administration has not released additional information about proposals and changes, nor have there been efforts to connect the president’s budget with the congressional appropriations process or with agency spending receipts.

However, a few minor changes have been made to make the presentation of the president’s budget request more informative and comprehensive. The president’s budget for FY 2010 and FY 2011 included a map describing the budget’s impact on each state. In FY 2012, this was replaced by a

⁵⁵ “Guidelines for 2011 Chief FOIA Officer Reports to the Department of Justice Pursuant to Attorney General Holder’s FOIA Guidelines,” Department of Justice, Nov. 16, 2010, <http://www.justice.gov/oip/foiapost/2010foiapost29.htm>.

⁵⁶ See <http://www.dod.gov/pubs/foi/logs/>.

⁵⁷ See <http://open.dodlive.mil/data-gov/foia-data/>.

⁵⁸ See http://www.dhs.gov/xfoia/editorial_0424.shtm#6.

⁵⁹ “Frequently Requested Documents,” Department of Energy, http://management.energy.gov/FOIA/freq_req_docs.htm.

⁶⁰ “Connecting America: The National Broadband Plan,” March 2010, <http://www.broadband.gov/plan/>.

graphic demonstrating the breakdown of major budget categories. In addition, starting in FY 11, the budget included a spreadsheet of tax expenditures, which had previously only been available in PDF format. Finally, in FY 12, the budget included detailed budgets by agency in HTML and XML format, rather than only in PDF format.

Additionally, the content of President Obama's budget requests has become more comprehensive. Rather than budgeting for recurring war funding through separate supplemental requests, those operations are now listed in the annual budget.⁶¹ And for the first time, in FY 12, the administration released its aggregate intelligence budget request on the same day as the non-classified budget,⁶² as required by Sec. 364 of the Intelligence Authorization Act for Fiscal Year 2010.⁶³ The new requirement could be avoided if the president issued a waiver stating that the information could not be disclosed for national security reasons, but no waiver was used.

It should also be noted that the administration has not significantly expanded or improved online information about federal contracting, despite expressed interest. For instance, several agencies proposed the possibility of posting copies of federal contract documents online⁶⁴ but withdrew the idea a few months later concluding that existing acquisition systems already provide the public with access to information.⁶⁵

D.7. Use of Web Services

Recommendation text: 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.

Many agencies and the White House have begun to make wider use of common web services, and the administration has taken several steps to facilitate this.

Although the administration has not waived the requirement to secure contracts to use no-cost services, in March 2009, GSA announced that it had signed government-wide contracts with several popular Web 2.0 services, including YouTube and Flickr.⁶⁶ GSA announced a contract

⁶¹ Lukas Pleva, "Money in budgets, but supplementals aren't going away," PolitiFact, Sept. 16, 2010, <http://politifact.com/truth-o-meter/promises/obameter/promise/161/end-the-abuse-of-supplemental-budgets-for-war/>.

⁶² Steven Aftergood, "A New Milestone in Intelligence Budget Disclosure," Secrecy News, Feb. 15, 2010, http://www.fas.org/blog/secrecy/2011/02/intelbud_request.html.

⁶³ P.L. 111-259, Sec. 364, <http://www.gpo.gov/fdsys/pkg/PLAW-111publ259/html/PLAW-111publ259.htm>.

⁶⁴ "Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency – Advanced notice of proposed rulemaking," Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), May 13, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-11381.pdf>.

⁶⁵ "Federal Acquisition Regulation; Enhancing Contract Transparency – Advance notice of proposed rulemaking; withdrawal," Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), Feb. 10, 2011, <http://www.gpo.gov/fdsys/pkg/FR-2011-02-10/pdf/2011-2900.pdf>.

⁶⁶ Jill R. Aitoro, "GSA signs deals for agencies to use social networking sites," NextGov, March 25, 2009, http://www.nextgov.com/nextgov/ng_20090325_5490.php.

with Facebook in April 2009.⁶⁷ In May 2009, GSA announced it planned to sign contracts with additional services, including LinkedIn and Scribd.⁶⁸ In September 2009, GSA launched Apps.gov to provide one-stop shopping for agencies to adopt cost-free web services. In August 2010, GSA launched Apps.gov Now, a storefront for GSA-hosted policy-compliant citizen engagement tools.⁶⁹

In addition to negotiating government-wide contracts, the administration has published guidance in several areas to facilitate agency use of web services:

- “Guidelines for Secure Use of Social Media by Federal Departments and Agencies,” from the CIO Council (September 2009)⁷⁰
- “Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act,” a memo from the Office of Information and Regulatory Affairs (OIRA) (April 7, 2010)⁷¹
- “Guidance for Agency Use of Third-Party Websites and Applications,” an OMB memo (June 25, 2010)⁷²
- “Guidance on Managing Records in Cloud Computing Environments,” a NARA bulletin (Sept. 8, 2010)⁷³
- “Guidance on Managing Records in Web 2.0/Social Media Platforms,” a NARA bulletin (Oct. 20, 2010)⁷⁴

D.8. Syndication

Recommendation text: The next administration should syndicate government information for the public.

There does not appear to have been any public statement by the administration supporting increased syndication government-wide. However, some agencies described current or planned syndication efforts in their Open Government Plans. For instance, the Department of Education noted that its main blog offers RSS feeds and that shortly after the plan was published, the feature would be used for more of the website’s content, which was done.⁷⁵ In addition, some new websites make use of syndication, such as Data.gov and FederalRegister.gov. The White House website offers RSS feeds,⁷⁶ continuing a practice started in the Bush administration.⁷⁷

⁶⁷ Doug Beizer, “GSA signs agreement with Facebook,” Federal Computer Week, April 10, 2009, <http://fcw.com/articles/2009/04/10/web-facebook-gsa.aspx>.

⁶⁸ Gautham Nagesh, “As social media becomes a hit with agencies, GSA plans more offerings,” NextGov, May 22, 2009, http://www.nextgov.com/nextgov/ng_20090522_7519.php.

⁶⁹ David McClure, “No-Cost, Policy Compliant Social Media Tools! Where?” Dr. Dave’s Digital Doodle, Oct. 25, 2010, <http://blog.citizen.apps.gov/davedigitaldoodle/2010/10/25/no-cost-policy-compliant-social-media-tools-where/>.

⁷⁰ See http://www.cio.gov/Documents/Guidelines_for_Secure_Use_Social_Media_v01-0.pdf.

⁷¹ See http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

⁷² See http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf.

⁷³ See <http://www.archives.gov/records-mgmt/bulletins/2010/2010-05.html>.

⁷⁴ See <http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>.

⁷⁵ “Open Government Plan,” Department of Education, April 7, 2010, www2.ed.gov/about/plan.doc.

⁷⁶ See <http://www.whitehouse.gov/rss/>.

⁷⁷ See <http://georgewbush-whitehouse.archives.gov/rss/>.

Increased use of syndication may also be supported by the April 2010 OIRA memo, “Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act,” which states that electronic subscription to agency syndication is not subject to the requirements of the Paperwork Reduction Act, reducing compliance hurdles for agencies to offer such services.⁷⁸

Make Online Government Information Searchable, Shareable, and Usable

D.9. Open Source, Open Formats

Recommendation text: 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.

The Obama administration has adopted the use of open source software to an extent and made it clear that use of such platforms is not only acceptable but that it has several advantages. Most notably, the White House announced in Oct. 2009 that it had shifted the platform for its own website to Drupal, an open source content management system.⁷⁹ Other agencies have also migrated to Drupal, including the Federal Communications Commission⁸⁰, the Department of Energy⁸¹ and the Department of Education.⁸² In Oct. 2009, the DOD CIO released guidance on procuring open source software, noting that open source is eligible for procurement on the same terms as other commercially-available software and that “there are positive aspects of OSS that should be considered when conducting market research on software for DoD use.”⁸³

In addition to deployment, the Obama administration has actively supported development of open source software. In April 2010, the White House released as open source code which it had developed for custom use⁸⁴, with a second release in February 2011.⁸⁵ The White House received the 2010 Open Source Deployment in Government Award for its demonstrated commitment to open source from Open Source for America.⁸⁶ Also, the Department of Defense launched

⁷⁸ Cass R. Sunstein, “Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act,” Office of Management and Budget, April 7, 2010,

http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

⁷⁹ Philip Elliott, “White House opens Web site programming to public,” Huffington Post, Oct. 24, 2009,
<http://www.huffingtonpost.com/huff-wires/20091024/us-obama-web-site/>.

⁸⁰ Dave Cole, “FCC.gov Announces Open Source Redesign,” White House, Sept. 22, 2010,
<http://www.whitehouse.gov/blog/2010/09/22/fccgov-announces-open-source-redesign>.

⁸¹ Alex Howard, “Energy.gov to move to Drupal, Open source continues to play an important role in open government,” O’Reilly Radar, Dec. 17, 2010, <http://radar.oreilly.com/2010/12/dept-energy-drupal.html>.

⁸² “Open Government Plan,” Department of Education, April 7, 2010, www2.ed.gov/about/plan.doc.

⁸³ “Clarifying Guidance Regarding Open Source Software (OSS),” Department of Defense, Oct. 16, 2009, <http://cio-nii.defense.gov/sites/oss/2009OSS.pdf>.

⁸⁴ Dave Cole, “WhiteHouse.gov Releases Open Source Code,” White House, April 21, 2010,
<http://www.whitehouse.gov/blog/2010/04/21/whitehousegov-releases-open-source-code>.

⁸⁵ Rob Winikates, “WhiteHouse.gov Releases Second Set of Open Source Code,” White House, Feb. 11, 2011,
<http://www.whitehouse.gov/blog/2011/02/11/whitehousegov-releases-second-set-open-source-code>.

⁸⁶ “2010 Open Source Award Recipients,” Open Source for America, <http://opensourceforamerica.org/awards/2010-recipients>.

forge.mil, a project hosting site for open source development, in Jan. 2009⁸⁷. GSA has proposed to use DoD's site government-wide.⁸⁸ Additionally, open source software development was a flagship initiative of NASA's Open Government Plan.⁸⁹

The administration has also made progress on improving the federal government's use of open formats. The Open Government Directive states, "To the extent practicable and subject to valid restrictions, agencies should publish information online in an open format that can be retrieved, downloaded, indexed, and searched by commonly used web search applications. An open format is one that is platform independent, machine readable, and made available to the public without restrictions that would impede the re-use of that information." Some agencies have expanded their use of open formats. For instance, in September 2009, the National Archives and Records Administration and the Government Printing Office began publishing the *Federal Register* in the open format XML.⁹⁰⁹¹ The Code of Federal Regulations followed suit in December 2009.⁹²

D.10. Metadata

Recommendation text: 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.

No government-wide review of metadata appears to be underway, nor do any recommendations appear to be pending. As federal agencies release more and more datasets, metadata is critical to allow users to find and use the right data. However, the White House is planning to increase the use of RDFa to tag metadata on WhiteHouse.gov.⁹³ The administration's new central data site, Data.gov, encourages agencies to provide metadata. It should also be noted that in December 2010, the Library of Congress added enhanced metadata to THOMAS, the primary site for legislative information from the government.⁹⁴

⁸⁷ Doug Beizer, "DOD launches site to develop open-source software," Federal Computer Week, Jan. 30, 2009, <http://fcw.com/Articles/2009/01/30/DOD-launches-site-to-develop-open-source-software.aspx>.

⁸⁸ Amber Corrin, "Forge.mil could be replicated for civilian agencies," Federal Computer Week, June 24, 2010, <http://fcw.com/articles/2010/06/24/gsa-forge-project-and-cloud-computing.aspx>.

⁸⁹ "NASA Open Source Software Development," National Aeronautics and Space Administration, <http://www.nasa.gov/open/plan/open-source-development.html>.

⁹⁰ "Federal Register XML Rendition," Government Printing Office, Sept. 21, 2009, http://www.gpo.gov/fdsys/bulkdata/FR/resources/FDsys_OFR-XML_User-Guide-v1.pdf.

⁹¹ Ray Mosley, "Federal Register 2.0: Opening a Window onto the Inner Workings of Government," White House, Oct. 5, 2009, <http://www.whitehouse.gov/blog/Federal-Register-2.0-Opening-a-Window-onto-the-Inner-Workings-of-Government>.

⁹² "Code of Federal Regulations XML Rendition," Government Printing Office, Dec. 17, 2009, http://www.gpo.gov/fdsys/bulkdata/CFR/resources/CFR-XML_User-Guide_v1.pdf.

⁹³ J. Nicholas Hoover, "Obama Team Challenges Web Developers," InformationWeek, Nov. 19, 2009, <http://www.informationweek.com/news/government/info-management/showArticle.jhtml?articleID=221900361>.

⁹⁴ Andrew Weber, "THOMAS: The Last Update of the Year," Library of Congress, Dec. 13, 2010, <http://blogs.loc.gov/law/2010/12/thomas-the-last-update-of-the-year/>.

D.11. Copyright

Recommendation text: 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.

The administration has not issued any government-wide directive or policy discouraging the use of copyright claims. However, the Open Government Directive did state that “information created or commissioned by the Government for educational use by teachers or students and made available online should clearly demarcate the public’s right to use, modify, and distribute the information.”

Also, in early 2009, the White House began posting photos on the image-sharing website Flickr under a Creative Commons license, implying the photos were subject to copyright that could be licensed. Shortly thereafter, Flickr added a “U.S. Government Work” option, and the White House switched to this instead.⁹⁵ A U.S. Government Work is not subject to any copyright restrictions for reproduction, distribution, display, performance, or derivative works. A “Flickr Best Practices Guide for Government” produced by GSA now informs agencies of this option.⁹⁶ However, the White House continues to claim restrictions on its images.⁹⁷

Electronic Records Management

D.12. Electronic Records Management

Recommendation text: The next administration should establish a Presidential Task Force on Implementation of Electronic Records Management.

The administration has not taken any steps to establish a Presidential Task Force or any other investigative body tasked with developing recommendations for electronic records management. However, NARA did begin to review agencies’ electronic records practices. In April 2010, NARA released the results of a self assessment, which showed agencies struggling with electronic records issues and limited involvement of records officers with agency electronic systems.⁹⁸

D.13. Access to Original and Digital Records

Recommendation text: 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.

⁹⁵ Ryan Singel, “Flickr Creates New License for White House Photos,” Wired, May 11, 2009, <http://www.wired.com/epicenter/2009/05/flickr-creates-new-license-for-white-house-photos/>.

⁹⁶ “Flickr Best Practices Guide for Government,” General Services Administration, April 7, 2010, http://www.usa.gov/webcontent/documents/flickr_best_practices_guide_000.pdf.

⁹⁷ Aaron Williamson, “White House still confused about Flickr photo licensing,” Copiesofcopies, Oct. 2, 2009, <http://copiesofcopies.org/webl/2009/10/02/white-house-still-confused-about-photo-licensing/>.

⁹⁸ “Records Management Self-Assessment, 2009: An Assessment of Records Management Programs in the Federal Government,” National Archives and Records Administration, April 20, 2010, <http://www.archives.gov/records-mgmt/resources/self-assessment.pdf>.

NARA has released several bulletins on records management and scheduling during the first two years of the Obama administration, including a checklist in January 2010 detailing the bulletins and records management guidance currently in effect. Similarly, the Federal Agencies Digitization Guidelines Initiative, formed in 2007, has published several guidelines during the Obama administration.⁹⁹

In October 2009, NARA finalized revisions to the regulations on federal records management, which had been proposed in August 2008.¹⁰⁰ The revisions sought to clarify records management requirements by reorganizing the material into a plain-language question-and-answer format. The changes also sought to update the policies, which were originally drafted in the 1980s, to better cover electronic records. However, critics complained that records management problems are not due to a lack of policy but a lack of enforcement.¹⁰¹ The revisions also included details on NARA inspections to monitor compliance.

In addition, the Open Government Directive conveyed the importance of records management to government transparency by requiring agencies to link to their records management plans from their open government webpages.

The recommendation also urged the development of model contracts for converting paper records to digital formats. There do not appear to have been any such model contracts developed.

D.14. Preservation of Electronic Records

Recommendation text: Preservation of electronic records and converted records should be a priority for the task force, and conservation guidelines for electronic records should be produced.

There has not been any government-wide initiative to make preservation of electronic records a priority for agencies. The NARA records management assessment report noted that many of agencies' electronic systems, including their websites, have not been scheduled for preservation.¹⁰²

The Open Government Directive did instruct agencies to “respect the presumption of openness by … preserving and maintaining electronic information, consistent with the Federal Records Act and other applicable law and policy.” Several of NARA’s recent bulletins addressed electronic records and included guidance on preservation. For instance, the “Guidance on Managing Records in Web 2.0/Social Media Platforms” issued Oct. 20, 2010, discussed strategies for preserving records from social media platforms, such as web snapshots or other capture methods. The bulletin also advised agencies to consider if social media platforms could meet records management obligations including preservation. Another bulletin on managing records in cloud computing environments also raised the issue of preservation for agencies.

⁹⁹ See <http://www.digitizationguidelines.gov/>.

¹⁰⁰ “Federal Records Management; Revision – Final Rule,” National Archive and Records Administration, Oct. 2, 2009, <http://www.gpo.gov/fdsys/pkg/FR-2009-10-02/pdf/E9-23613.pdf>.

¹⁰¹ Aliya Sternstein, “Critics: National Archives lax in records management enforcement,” NextGov, Oct. 7, 2009, http://www.nextgov.com/nextgov/ng_20091007_6354.php.

¹⁰² “Records Management Self-Assessment, 2009: An Assessment of Records Management Programs in the Federal Government,” National Archives and Records Administration, April 20, 2010, <http://www.archives.gov/records-mgmt/resources/self-assessment.pdf>.

Also, the October 2009 revision to the regulations on federal records management included updating the guidance to better address electronic records.

D.15. Agency E-mail

Recommendation text: 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 e-mail or other messaging systems.

No government-wide action has been taken on the use of non-agency e-mail. Although the records management regulations were amended in November 2009, the regulations on managing e-mail records (36 CFR 1236.22) were not changed at that time. Per those regulations, “Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.” Therefore, non-agency email is still permissible if it is appropriately preserved.

However, there have continued to be concerns that use of non-agency email was not complying with preservation requirements. For instance, in response to a high-profile lapse at the Office of Science and Technology Policy (OSTP),¹⁰³ that office sent a memo to its employees in May 2010 stating, “To ensure that we comply with the FRA with respect to emails, all OSTP-related email communications should be conducted using your OSTP email accounts,” and, “If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account.”¹⁰⁴

Presidential records are subject to different requirements. Responding to questions about use of non-official email accounts a January 2010 letter from the Executive Office of the President’s CIO stated that White House “staff does not have the ability to access personal email accounts through the EOP network because the EOP network blocks all known web based external email systems.”¹⁰⁵

Concerns continued, however, when a June 2010 *New York Times* article reported that “[s]ome lobbyists say that they routinely get e-mail messages from White House staff members’ personal accounts rather than from their official White House accounts.”¹⁰⁶

¹⁰³ David Perera, “Rep. Issa presses White House on Gmail,” Fierce Government, April 14, 2010, <http://www.fiercegovernmentit.com/story/rep-issa-presses-white-house-gmail/2010-04-14>.

¹⁰⁴ John P. Holdren, “Reminder: Compliance with the Federal Records Act and the President’s Ethics Pledge,” Office of Science and Technology Policy, May 10, 2010, <http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf>.

¹⁰⁵ Brook Colangelo, “Letter to Meredith Fuchs and Anne Weismann,” Executive Office of the President, Jan. 15, 2010, http://www.gwu.edu/~nsarchiv/news/20100115a/WH_letter.pdf.

¹⁰⁶ Eric Lichtblau, “Across From White House, Coffee With Lobbyists,” New York Times, June 24, 2010, <http://www.nytimes.com/2010/06/25/us/politics/25caribou.html>.

D.16. Authentication of Government Documents

Recommendation text: The CIO Council should study and make recommendations for authentication of government documents and information submitted to the government.

There is no indication that the CIO Council has examined the issue of authentication or that any recommendations are being developed. However, GPO has taken some steps to expand and improve authentication of government records that it publishes. In February 2009, GPO launched its Federal Digital System (FDsys), which allows the agency to manage, authenticate, and preserve government publications from agencies and Congress.¹⁰⁷ FDsys is digitally signing the PDF versions of all its collections, whereas previously GPO had only signed some collections.¹⁰⁸

In May 2009, GPO also announced plans to authenticate electronic documents held by Federal Depository Libraries.¹⁰⁹ In June 2010, GPO held a workshop to discuss authentication of online government documents.¹¹⁰ In August 2010, GPO issued a request for information on technology to sign and validate XML files.¹¹¹ However, as of this writing GPO had not begun authenticating XML.

Scientific Openness and the Media

D.17. Free Flow of Scientific Information: Guidelines

Recommendation text: 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.

- a. Agency media policies should respect that scientists and researchers have a right to express their personal views.**
- 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.**

¹⁰⁷ “GPO’s Federal Digital System (FDsys) Operational,” Government Printing Office, Feb. 4, 2009, <http://www.gpo.gov/pdfs/news-media/press/09news02.pdf>.

¹⁰⁸ “Document Authentication Workshop” Government Printing Office, June 18, 2010, <http://www.gpo.gov/pdfs/authentication/authentication-workshop.pdf>.

¹⁰⁹ Rebecca Blakley, “Chat with GPO’ Session on Authentication,” Free Government Information, May 14, 2009, <http://freegovinfo.info/node/2587>.

¹¹⁰ “Document Authentication Workshop 06-18-2010,” Government Printing Office, June 18, 2010, <http://www.gpoaccess.gov/authentication/authnwrkshoptranscript0610.pdf>.

¹¹¹ “GPO Request For Information (RFI) – Document and Content Authentication,” Government Printing Office, <http://www.gpoaccess.gov/authentication/authentication-rfi.pdf>.

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.

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.”

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.

f. The official agency communications policy should be publicly available on the agency’s website.

The administration has released policies addressing many, although not all, aspects of this recommendation. President Obama’s March 2009 memorandum on scientific integrity¹¹² aimed to improve the transparency of federal scientific activities. Specifically, it directed political officials not to suppress scientific findings and directed agencies to adopt appropriate procedures, such as whistleblower protections, to ensure scientific integrity. The memo also called for agencies to make public scientific information developed by the government or used in policy decisions.

OSTP issued a subsequent memo in December 2010,¹¹³ which reiterated the need for appropriate whistleblower protections. The memo also described the benefits of open communication with federal scientists and directed agencies to “maximize, to the extent practicable, openness and transparency with the media and the American people.” It established that “federal scientists may speak to the media … with appropriate coordination with their immediate supervisor and their public affairs office.”

Some questioned the length of time that it took for OSTP to issue the December 2010 memo, especially since the president had requested the memo much earlier. Additionally, some noted that the OSTP memo offered little new content when compared with the president’s memo save a requirement that agencies prepare plans for developing their own science integrity policies by April, 2011. By the time OSTP had released its memo, the Department of Interior had already finalized an interactive process to finalize its scientific integrity policies.

Neither White House memo specifically stated scientists’ right to express personal views and to review the final version of scientific documents to which they contributed, clearly defined the role of public affairs officers, or required agencies to inform employees of their whistleblower rights or to post their communications policies online.

¹¹² “Scientific Integrity,” White House, March 9, 2009, http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/.

¹¹³ John Holdren, “Scientific Integrity,” Office of Science and Technology Policy, Dec. 17, 2010, <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

D.18. Free Flow of Scientific Information: Implementation

Recommendation text: The President's Science Adviser should ensure that guidelines for the free flow of scientific information are implemented in a comprehensive and timely manner.

Agencies are directed to report their compliance with the OSTP memo by April 2011. However, the memo otherwise does not detail OSTP's plans to ensure implementation.

Some agencies revised their policies prior to issuance of the OSTP memo. For instance, the U.S. Fish and Wildlife Service adopted a new publication policy in January 2010.¹¹⁴ The Department of the Interior adopted a scientific integrity policy in September 2010.¹¹⁵

¹¹⁴ "The Fish and Wildlife Service Manual: 117 FW 1 Policy Review Guidance for Scientific Publications," Fish and Wildlife Service, Jan. 26, 2010, <http://www.fws.gov/policy/117fw1.html>.

¹¹⁵ "Salazar Issues Secretarial Order to Ensure Integrity of Scientific Process in Departmental Decision-Making," Department of the Interior, Sept. 29, 2009, <http://www.doi.gov/news/pressreleases/Salazar-Issues-Secretarial-Order-to-Ensure-Integrity-of-Scientific-Process-in-Departmental-Decision-Making.cfm>.

Creating a Government Environment for Transparency Recommendations

The recommendations in Chapter E of the 2008 report sought to create a culture of openness within government, with sufficient resources and incentives to support transparency. Such a culture of openness would be a direct contrast to the environment of secrecy and withholding too often accepted as the norm for government.

Perhaps more than any previous administration, the Obama administration has repeatedly emphasized the imperative of government transparency and called upon top officials throughout the federal government to help make it a reality. That leadership began even prior to the inauguration. Although few promises have been fully realized, the administration has worked diligently to enact many of the transparency reforms it supported during the 2008 presidential campaign. Those promises set a tone for the administration and a high bar for delivering results.

More than just rhetoric, the administration has taken some concrete steps to improve the environment for transparency. The administration has challenged agencies to think creatively about open government and particularly about the use of technology. The White House itself has aggressively used the Internet to communicate with the public. The administration supported strong transparency mechanisms in its economic recovery activities. Moreover, a major overhaul of federal IT management practices is now underway, with the aim of increasing efficiency and effectiveness.

Some other actions by the administration have also been significant but more modest in their ambitions. The administration has taken some steps to ensure agencies are adequately resourced to fulfill FOIA requests in a timely fashion and to implement other open government initiatives. There have been some initial steps to improve how agencies' open government activities are evaluated. Minor changes in government positions and structures have been adopted, meant to clarify responsibilities for transparency work.

However, in some areas, work remains to be done. The attorney general's FOIA memo promised stricter standards for defending non-disclosure, which should be a strong incentive for greater transparency; however, advocates have called into question whether the new standards have been fully implemented. In addition, the administration has not significantly expanded the baseline of information that agencies government-wide are required to post online. To date, most information posted by agencies is focused on advancing the mission of the agency rather than the equally important information that could be used to hold the agency accountable. Neither has the administration implemented mandatory government-wide training on transparency requirements.

On certain issues, the administration could even be accused of sending mixed messages. In the wake of the WikiLeaks scandals, the administration issued information security guidance that contained potentially chilling recommendations. Similarly, while espousing whistleblower protections, the administration has launched an unprecedented number of leak investigations. Additionally, the accusations of delay and manipulation during the BP oil spill response suggest that during a crisis, transparency may still fall by the wayside.

Policy Statements

E.1. Atmosphere that Supports Disclosure

Recommendation text: The president should issue executive orders and memoranda to agency heads to create an atmosphere within agencies that supports disclosure.

The president has issued multiple policy documents designed to reinforce a culture of openness. As previously mentioned, on his first full day in office, President Obama issued two memoranda with the purpose of increasing government openness. One reinstated the presumption of openness under FOIA, including more proactive dissemination, while the other articulated general principles of open government and initiated the development of an Open Government Directive. The symbolic value of these two memos is significant because they suggest the president regarded openness as a major policy initiative.

OSTP oversaw a three-phase online dialogue during the spring of 2009 to publicly generate, discuss, and develop policy ideas for the Open Government Directive. On Dec. 8, 2009, OMB released the official Open Government Directive to all agency and department heads. The directive requires that all agencies develop and implement an Open Government Plan specific to each agency. The directive is comprised of four main components centered on simple but important themes – publishing information; creating a culture of openness; improving data quality of federal spending data; and updating policies to allow for greater openness. Each section tasks agencies and other key offices with specific goals, complete with deadlines and clear requirements that the public be informed and permitted to participate in almost every project.

As directed by the FOIA memo, guidelines issued in March 2009 by Attorney General Eric Holder reverse the previous administration’s approach, in which the Department of Justice would defend agency decisions to withhold information using any legal basis. The memo also instructs agencies to disseminate information more proactively. Further, the memo focuses on timeliness, declaring that “long delays should not be viewed as an inevitable and insurmountable consequence of high demand.”

Also in March 2009, Rahm Emanuel, White House Chief of Staff, and Bob Bauer, Counsel to the President, issued a memorandum to agency and department heads on FOIA that highlighted some of the early successes and requested that agencies follow through on implementing the president’s changes. Specifically, the memo urged agencies to update FOIA guidance and training materials and assess if adequate resources were being devoted to FOIA.

There have been a number of other orders, directives, and memos issued by the White House and related offices that addressed, in some part, creating a more open and accountable government. These include the executive orders on classification and on controlled unclassified information, presidential and OSTP memos on scientific integrity, the presidential memo on regulatory compliance, and OMB memos on fiscal transparency and online tools, among others. In addition, President Obama signed a proclamation recognizing Sunshine Week 2010, the first president to do so.

E.2. Notice of Transparency Rights

Recommendation text: 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).

The administration has not enumerated specific statutory or other entitlements upon which the public can rely when seeking information from the government. This may leave Americans unaware of their rights under law, confused by the laws' complex operations, or reluctant to assert their rights. However, in their Open Government Plans, several agencies articulate principles of transparency, participation, and collaboration and affirm their commitment to those principles.

Additionally, a chart of FOIA best practices released in November 2010 by OGIS encourages agencies to post more understandable information about FOIA.¹¹⁶

E.3. Adequate Resources for Transparency

Recommendation text: 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.

Some steps have been taken to ensure sufficient resourcing for open government activities. With regard to FOIA implementation, the attorney general's March 2009 FOIA memo directs agency Chief FOIA Officers to recommend "adjustments to agency practices, personnel, and funding as may be necessary" and to ensure their FOIA staff "have the tools they need to respond promptly and efficiently to FOIA requests."

In addition, the March 2010 memo by Emanuel and Bauer directed agencies to "assess whether you are devoting adequate resources to responding to FOIA requests."¹¹⁷

Additionally, the administration has moved to reform funding for e-government projects. In its instructions on preparing the FY 2012 budget, OMB directed agencies to ensure that estimates reflect contributions to interagency e-gov projects,¹¹⁸ which include e-rulemaking, GovBenefits.gov, RecData.gov, and the Office of Citizen Services, as well as non-public-facing services. The CIO's IT reform agenda aims to improve budgeting and increase efficiency for e-government work. The president's budget request for FY 2012 proposes a new \$60 million IT

¹¹⁶ "FOIA Requirement, Agency Best Practices, and OGIS Recommendations," Office of Government Information Services, <http://www.archives.gov/ogis/resources/bestpractices.pdf>.

¹¹⁷ Rahm Emanuel and Bob Bauer, "Memorandum for Agency And Department Heads – Freedom of Information Act," White House, March 16, 2010, <http://www.archives.gov/ogis/memos/foia-memo-03-16-10.pdf>.

¹¹⁸ "OMB Circular A-11, Section 31.9," Office of Management and Budget, July 21, 2010. http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s31.pdf.

fund to be managed by OMB, with the ability to transfer funds to agencies, some of which might support transparency projects.¹¹⁹

Other changes in the president's budget request for FY 2012 demonstrate increased resources for open government. For instance, DOJ's budget justification includes an additional \$467,000 to hire five new staff in its Office of Information Policy, in response to increased FOIA requests and the Open Government Directive.¹²⁰ However, the administration's FY 2012 budget request for the Office of Government Information Services¹²¹ was only half the amount recommended in a Senate appropriations report.¹²² Unfortunately, inconsistent reporting of information activities in the federal budget and agency justifications makes it challenging to evaluate the overall funding of government transparency with any accuracy.¹²³

E.4. Whistleblower Protection

Recommendation text: 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.

There has been a patchwork of changes to protections for federal whistleblowers during the first two years of the Obama administration. While the administration's efforts on whistleblower protections have been positive, the reality is that federal whistleblower protections are not significantly stronger or more reliable than when the recommendation was made.

The most significant change would have been the Whistleblower Protection Enhancement Act of 2009, which cleared both houses of Congress, but the House and Senate failed to agree on the language prior to the expiration of the 111th Congress. In a June 2009 Senate hearing, the Obama administration supported the bill¹²⁴ while also recommending changes. Furthermore, the White House was an extraordinarily active partner with open government advocates working to get that bill passed. As of this writing, the bill has not been reintroduced in the 112th Congress.

However, the American Recovery and Reinvestment Act of 2009, also known as the stimulus bill, included new protections for government contractors and municipal and state workers who blow the whistle on abuse related to the use of stimulus funds. Likewise, the Fraud Enforcement and

¹¹⁹ "Fiscal Year 2012 Congressional Budget Submission" Executive Office of the President, <http://www.whitehouse.gov/sites/default/files/2012-eop-budget.pdf>.

¹²⁰ "General Administration Budget Summary," Department of Justice, <http://www.justice.gov/jmd/2012summary/pdf/fy12-ga-bud-summary.pdf>.

¹²¹ "2012 Performance Budget – Congressional Justification," National Archives and Records Administration, <http://www.archives.gov/about/plans-reports/performance-budget/2011/2012-performance-budget.pdf>.

¹²² "Senate Report 111-238 – Financial Services and General Government Appropriations Bill, 2011," http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp1119Ziku&r_n=sr238.111&dbname=cp111&&sel=TOC_309267&.

¹²³ "What Does the President's Budget Mean for Transparency?," OMB Watch, Feb. 23, 2011, <http://www.ombwatch.org/node/11522>.

¹²⁴ Rajesh De, "S. 372 – The Whistleblower Protection Enhancement Act Of 2009," Department of Justice, Office of Legal Policy, June 11, 2009, http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=5a663d3a-fd47-482b-b404-c02934b98666.

Recovery Act of 2009 strengthens the False Claims Act, which allows private-sector whistleblowers with evidence of fraud by government contractors to file suit on behalf of the government to recover the stolen funds.

The president's March 2009 memorandum on scientific integrity, as well as the subsequent memorandum issued in December 2010 by OSTP, called on agencies to adopt appropriate whistleblower policies. However, they did not specify what policies would be "appropriate."

However, despite these steps towards whistleblower protections, DOJ has been selectively pursuing prosecutions of whistleblowers and leaks that embarrass the government far more aggressively than previous administrations.¹²⁵

E.5. Outsourcing of Agency Duties

Recommendation text: 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 are available, as agency records, under FOIA.

No steps have been taken toward implementing this recommendation.

E.6. Use of Existing Library Networks

Recommendation text: 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).

The administration does not appear to have engaged in any specific comprehensive outreach to engage and make use of libraries in their open government efforts. However, there have been a few individual open government projects with libraries. For instance, the Government Printing Office has partnered with Cornell University Law Library in a project to explore converting the Code of Federal Regulations into XML. The lessons learned from the effort will be shared with the FDLP.¹²⁶

In addition, the Federal Communication Commission's National Broadband Plan, released in March 2010, recognized the value of using broadband Internet to access government information, and called for closer cooperation between the federal government and libraries to improve provide public Internet access, and particularly access to e-government.¹²⁷ The Institute of Museum and Library Services has begun efforts to realize these recommendations.¹²⁸

¹²⁵ Mark Benjamin, "WikiLeakers and Whistle-Blowers: Obama's Hard Line," *Time*, March 11, 2011. <http://www.time.com/time/nation/article/0,8599,2058340,00.html>.

¹²⁶ "GPO and Cornell University Pilot Open Government Initiative," Government Printing Office. Feb. 22, 2010, <http://www.gpo.gov/pdfs/news-media/press/10news07.pdf>.

¹²⁷ "Connecting America: The National Broadband Plan," March 2010, <http://www.broadband.gov/plan/>.

¹²⁸ "Public Access Technology Needed to Build Strong Communities," Institute of Museum and Library Services, March 10, 2011, <http://www.imls.gov/news/2011/031011.shtm>.

Resource Requirements

E.7. Minimum FOIA Budgets

Recommendation text: Implement a formula that establishes a minimum percentage of the agencies' Public Affairs Office (PAO) budgets to be spent on FOIA expenses.

The administration has not adopted any such approach to determining FOIA funding as a percentage of the amount spent on public affairs or some other office. However, as previously noted, the administration has taken some steps to address FOIA resources. A March 2010 memo from Emanuel and Bauer directed agencies to "assess whether you are devoting adequate resources to responding to FOIA requests." The Justice Department's FY 2012 budget justification includes an almost \$500,000 increase to hire five new staff in its Office of Information Policy, in response to increased FOIA requests and the Open Government Directive.

E.8. Information Management for FOIA

Recommendation text: 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.

While the administration has engaged in other efforts to improve FOIA policy, oversight, and implementation, the development of content management systems has not been among the goals pursued.

E.9. Rebuild Government Information Dissemination Capacity

Recommendation text: 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 administration has placed a high priority on improving the federal government's use of technology to manage, disseminate, and explain government information, with a particular focus on data.

On June 28, 2010, OMB Director Peter Orszag and White House Chief of Staff Rahm Emanuel issued a memorandum¹²⁹ to all agencies detailing three steps to help reform government IT projects.

- First was a detailed review of highest-risk IT projects that would be conducted by Chief Information Officer Vivek Kundra.
- Second was a hold on awarding new task orders or contracts for financial system modernization projects.
- Third, OMB was tasked with developing recommendations for improving IT procurement and management. On Dec. 9, 2010, under the direction of OMB Deputy

¹²⁹ "Reforming the Federal Government's Effort to Manage Information Technology Projects," June 28, 2010, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m_10-25.pdf.

Director for Management Jeffrey Zients, Kundra issued a 25-point plan to reform the government's management of IT projects. The report included shifting to a "Cloud First" approach, as cloud computing allows for more consistent access and easier collaboration.¹³⁰

The administration has taken several steps to allow agencies to use various Web 2.0 services to communicate with the public, including executing several government-wide contracts with widely-used services.

The administration has also encouraged agencies to implement new online technologies, most notably through the Open Government Directive process. Agencies have launched or announced a variety of such services, including Web 2.0 projects, as part of their Open Government Plans. For example, the U.S. Environmental Protection Agency's plan details Web 2.0 projects underway, such as the AIRNow program that allows the public to receive air quality alerts through Facebook and Twitter.¹³¹

Although this recommendation specifically mentioned Web 2.0, its intent was to also include Web 3.0 functions, including the ability to mash-up data. A key factor in linking data sets is having the right set of identifiers to make sure the data from two separate sets are referring to the same thing. For example, without a parent company identifier, it is hard to link facilities together. The administration has acknowledged the importance of developing a set of identifiers, but has done little to move in this direction.

The General Services Administration renegotiated a contract with Dun & Bradstreet to allow disclosure of corporate IDs on OMB's USA Spending.gov website. Additionally, the a Jan. 18, 2011 presidential memo on regulatory compliance calls on the CTO and the CIO to help make compliance and enforcement data publicly searchable and create a means for "cross-agency comparisons" and for sharing "enforcement and compliance information across the Government."¹³² In order to achieve these outcomes, there will be a need to develop common identifiers across the government.

E.10. Required Information on Agency Websites

Recommendation text: 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).

The Obama administration has not issued any guidance to agencies on content of website homepages or compliance with various requirements for electronic dissemination of information. However, there have been efforts to make agency information posted online more

¹³⁰ Vivek Kundra, "25 Point Implementation Plan to Reform Federal Information Technology Management," Dec. 9, 2010, <http://www.cio.gov/documents/25-Point-Implementation-Plan-to-Reform-Federal%20IT.pdf>.

¹³¹ "U.S. Environmental Protection Agency Open Government Plan," Environmental Protection Agency, June 25, 2010, http://www.epa.gov/open/EPAOpenGovernmentPlan_11.pdf.

¹³² "Presidential Memoranda – Regulatory Compliance," White House, Jan. 18, 2011, <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance>.

complete and high-value. First, the Open Government Directive included a list of information that agencies must post on their Open Government Pages, including their FOIA reports and Open Government Plans. After public interest groups evaluated the content¹³³ of the Open Government webpages and identified best practices,¹³⁴ several agencies linked to more information, such as reports to Congress and inspector general reports, as well as better integrating the new pages into the agencies' sites with links from homepages and more. However, the open government community has continued to call for more consistent disclosure of information across agencies, particularly information relating to influence and decision-making.

E.11. Digitize Records

Recommendation text: The next administration should create incentives to convert government documents to no-fee, electronic, publicly available documents.

There have not been any government-wide policies or incentives specifically seeking to convert government documents to no-fee publicly available formats. However, the Open Government Directive is a government-wide policy that has required agencies to post more information online, and some agencies have posted data that had previously only been available for a fee. For instance, the Department of Health and Human Services made Medicare National Summary data downloadable for free, where previously, users had to pay \$100 per year to get the information on CD-ROM.¹³⁵ In another project, the Government Printing Office sought to digitize a legacy collection of records and opened the effort to competitive bids. The agency received a no-cost bid from a nonprofit consortium. However, in October 2009, GPO announced that no contract would be awarded.¹³⁶

E.12. Incentives to Reduce Backlogs

Recommendation text: The president should establish incentives for agencies to clear up their backlogs.

The Open Government Directive tasked agencies with significant Freedom of Information Act backlogs to reduce them by ten percent annually. The directive does not elaborate on what constitutes a significant backlog or include specific incentives, such as additional funding as called for in the recommendation. Several agencies discussed their plans to reduce FOIA backlogs in their Open Government Plans. For instance, the Department of Health and Human Services (HHS) acknowledged having a backlog of 17,000 requests and detailed a 16-week project to reduce it through improved process, proactive disclosures, and new technology.

¹³³ "Leaders and Laggards in Agency Open Government Webpages," OMB Watch, Feb. 23, 2010, <http://www.ombwatch.org/node/10785>.

¹³⁴ "13 Best Practices for Open Government Webpages," Project on Government Oversight, Feb. 12, 2010, <http://pogoblog.typepad.com/pogo/2010/02/13-best-practices-for-open-government-webpages.html>.

¹³⁵ "New High-Value Data Sets and Tools," Department of Health and Human Services, <http://www.hhs.gov/open/plan/opengovernmentplan/transparency/dataset.html>.

¹³⁶ "GPO's failed digitization project: what happened," Open Access News, Oct. 14, 2009, <http://www.earlham.edu/~peters/fos/2009/10/gpos-failed-digitization-project-what.html>.

DOJ, which oversees FOIA implementation throughout the federal government, plans to launch a FOIA dashboard that will allow the public to easily see agencies' performance on backlogs, response times, and other indicators. Part of the purpose of the FOIA Dashboard is to create some incentive for agencies to do better on FOIA.

Incentives to Promote Disclosure

E.13. Employee Performance Evaluations

Recommendation text: The president should make transparency a factor in federal employee performance evaluations where it is a part of the job description.

There has not been a move to incorporate transparency performance as part of federal employees' evaluations. Some officials have noted potential legal and policy difficulties to including transparency as an employee evaluation criterion. Specifically, as not all employees have an opportunity to engage in transparency activities, it may be unfair to include it as an evaluation factor that could unfairly penalize those employees whose duties do not allow them to perform well on the issue. Such an imbalance, they assert, could violate personnel guidelines and laws governing federal employment.

However, a number of agencies described in their Open Government Plans the steps being taken to institutionalize the principles of open government (transparency, participation, collaboration) by factoring performance on their plan into evaluations of the agency offices. For instance, the Department of Transportation outlined a plan to infuse performance review of the agency's open government goals into the ongoing assessments for the entire department, each operating administration level, and individual programs.¹³⁷

E.14. Agency Scorecards

Recommendation text: 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.

Thus far, the product most resembling a transparency scorecard is the White House's Open Government Dashboard, which provides simple indicators on agency performance on a handful of open government activities.¹³⁸ Many transparency advocates have complained that the dashboard is overly simplistic and offers no ability to drill down or evaluate the scores given. Specifically, the dashboard offers three scores regarding agency Open Government Plans – meets expectations (green), progress toward expectations (yellow), and fails to meet expectations (red). Each agency receives one of these grades on four specific activities – high-value data, data integrity, open webpage, and public consultation. Agencies also receive six separate grades for various aspects of their open government plans. Many agencies have released detailed self-evaluations of their open government plans, which are the underpinning process that produced

¹³⁷ "U.S. Department of Transportation Open Government Plan: April 2010 – 2012," pages 15-16, Department of Transportation, June 25, 2010, http://www.dot.gov/open/pdf/DOT_Open_Gov_Plan_V1.2_06252010.pdf.

¹³⁸ See <http://www.whitehouse.gov/open/around>.

the six plan scores on the dashboard. The self-evaluations contained dozens of criteria being evaluated, yet none of that is accessible through the dashboard.

Administration officials are currently contemplating how to move beyond evaluating accomplishing basic tasks and plans to assessing implementation and actual performance. The Interagency Working Group on Open Government is working with organizations led by OpenTheGovernment.org to develop a methodology to evaluate agencies across the government. It is unclear if the evaluations will become a part of the Open Government Dashboard or if detailed versions will be released to the public as many agencies did with the plan evaluations.

In addition, OpenTheGovernment.org conducted an audit of agencies' Open Government Plans and ranked them.¹³⁹ Afterwards, several agencies quickly amended their plans to improve their score¹⁴⁰, suggesting the potential value of the scorecards envisioned by this recommendation.

Also, the Department of Justice is launching a FOIA dashboard that will functionally operate like a scorecard on FOIA by allowing the public to easily see agencies' performance on backlogs, response times, and other indicators.¹⁴¹ Since FOIA is such an important part of government transparency, having a robust and detailed dashboard would be a significant step toward satisfying this recommendation.

E.15. Transparency Awards

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

While no official government-wide transparency awards have been established within the Obama administration, the White House website includes among its open government pages an innovations gallery that spotlights successful and creative open government tools.¹⁴² This high-level recognition could be seen as on par with a White House award. Currently, the gallery features 31 websites, tools, and widgets for open government from across the federal government.

Also, the Open Government Directive tasked the Deputy Director for Management at OMB to issue "a framework for how agencies can use challenges, prizes, and other incentive-backed strategies to find innovative or cost-effective solutions to improving open government." On March 8, 2010, Deputy Director Jeffrey Zients issued a memorandum¹⁴³ to the heads of

¹³⁹ "Audit Reveals Wide Variation in Agency Plans to Make Government More Open," OpenTheGovernment.org, April 29, 2010, <http://www.openthegovernment.org/node/445>.

¹⁴⁰ "Revised Plans Raise the Bar on Open Government: Agencies Respond to Feedback," OpenTheGovernment.org, July 20, 2010, <http://www.openthegovernment.org/node/448>.

¹⁴¹ "U.S. Department of Justice Open Government Plan," pages 4-6, Department of Justice, June 25, 2010, <http://www.justice.gov/open/doj-open-government-plan.pdf>.

¹⁴² "Open Government Featured Innovations," White House, <http://www.whitehouse.gov/open/innovations>.

¹⁴³ Jeffrey D. Zients, "Guidance on the Use of Challenges and Prizes to Promote Open Government," Office of Management and Budget, March 8, 2010, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-11.pdf.

departments and agencies extolling the numerous benefits of offering prizes as work incentives, such as paying only for results, increasing the diversity of participants, and stimulating private-sector investment. The memo also explored the policy issues agencies should consider when using challenges and prizes, such as choosing the right type of prize for the goal being pursued, and the legal authorities that allow different types of challenges. This authority was expanded¹⁴⁴ by the America COMPETES Reauthorization Act of 2010.¹⁴⁵

In addition, as one of the flagship initiatives in GSA's Open Government Plan, the agency committed to develop a web-based platform that any agency could use to manage contests and prize projects.¹⁴⁶

Improved Oversight/Enforcement

E.16. Create an Office of Transparency

Recommendation text: 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 administration has not created a central office or position responsible for transparency issues. Instead, the administration distributed responsibility for oversight and implementation of its open government efforts across numerous offices and senior officials. For instance, the Chief Information Officer and Chief Technology Officer were tasked with improving the use of technology. OMB was given responsibility for overseeing the Open Government Directive. Norm Eisen, former White House Special Counsel for Ethics and Government Reform, also played a pivotal leadership role on transparency issues.

E.17. Agency Senior Transparency Officers

Recommendation text: 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.

The administration has not created new positions responsible for oversight of transparency issues. However, the Open Government Directive did establish an Open Government Working Group composed of senior-level representatives of each agency.¹⁴⁷ These officials could be considered the de facto transparency leaders in the agencies.

¹⁴⁴ Tom Kalil and Robynn Sturm, "Congress Grants Broad Prize Authority to All Federal Agencies," Open Government Initiative Blog, Dec. 21, 2010, <http://www.whitehouse.gov/blog/2010/12/21/congress-grants-broad-prize-authority-all-federal-agencies>.

¹⁴⁵ P. L. 111-358, Sec. 105.

¹⁴⁶ "General Services Administration Open Government Plan," General Services Administration, April 7, 2010, <http://www.gsa.gov/graphics/admin/GSAOpenGov20100407.pdf>.

¹⁴⁷ See "Open Government Working Group," White House, <http://www.whitehouse.gov/open/documents/open-government-directive/working-group>.

The directive also required each agency to designate a high-level Senior Accountable Official responsible for the quality of spending data, which are made publicly available on USA Spending.gov.¹⁴⁸ Many agencies also described in their Open Government Plans the officials and staff responsible for overseeing the plans. Often, agencies created new workgroups or committees comprised of personnel from offices across the agency. For instance, the Department of Transportation details its Open Government Planning Structure with numerous new groups, starting with Champions/Executive Sponsors; an Open Government Executive Steering Group; four workgroups on issues such as technology, policy, culture; and Data.gov; and nine Open Government Sub-Groups. The membership of most groups is merely a list of the offices participating in the groups.

E.18. Transparency Metrics

Recommendation text: 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 Open Government Directive established an Interagency Open Government Working Group composed of senior-level representatives of each agency. The working group is currently contemplating how to move beyond evaluating accomplishing basic tasks and plans to assessing implementation and actual performance, but it has not developed specific metrics yet.

The Open Government Dashboard, mentioned previously, provides some simple metrics on open government performance, though some advocates have found the dashboard lacking.

E.19. Public Interest Review Board

Recommendation text: 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.

The administration has not created any official public interest review board to advise on open government issues. However, participation and collaboration have been key principles for every stage of the administration's efforts. Prior to developing the Open Government Directive, the administration opened the process to the public with a three-stage project to gather ideas, prioritize them, and draft potential proposals. The Open Government Directive required agencies to develop their plans collaboratively with the public and stakeholders. Also, the Interagency Open Government Workgroup has regularly invited representatives of public interest groups to discuss concerns, performance, and opportunities.

E.20. Mandatory Transparency Training

Recommendation text: The president should establish mandatory training for agency officials on transparency requirements and policies to ensure better implementation, including specific trainings

¹⁴⁸ See "Open Government Directive: Senior Accountable Officials (SAOs)," White House, <http://www.whitehouse.gov/open/documents/open-government-directive/officials>.

for employees and contractors with classification authority and responsibility for implementing the framework on Controlled Unclassified Information (CUI) (see C.5.).

There has not been any government-wide mandatory training on transparency requirements. However, there was an interagency collaborative effort, called the Open Government Directive Workshop, that explored the best ways to implement the Open Government Directive.¹⁴⁹ Hundreds of agency employees attended these events to listen to agency presentations and participate in small discussion groups. On controlled unclassified information, the program guidelines expected from NARA could likely include instructions to agencies on training requirements for personnel authorized to control information. Similarly, the classification guide review currently underway across government may result in clearer training requirements.

Additionally, voluntary training is offered by the Office of Information Policy (on FOIA), the Office of Government Information Services (on FOIA), and NARA (on records management). Also, a March 2010 memo by the White House counsel and chief of staff directed agencies to update their FOIA training to comply with the president's 2009 FOIA memo.

E.21. Criminal Penalty for Willful Concealment

Recommendation text: The president should encourage Congress to establish a criminal penalty for willful concealment or destruction of nonexempt 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.

No steps have been taken toward implementing this recommendation. Indeed, DOJ Special Prosecutor James Durham has declined to prosecute the CIA for the deliberate destruction of 92 videotaped recordings of enhanced interrogations at CIA black sites,¹⁵⁰ despite the fact that a court had ordered the tapes preserved and produced.

Long-Term Vision for Government Transparency

E.22. Right-to-Know Law

Recommendation text: Government should have an affirmative legal obligation to disclose information to the public in a timely manner, thereby expanding the presumption of openness.

No immediate steps have been taken to realize this long-term recommendation. However, the Obama administration has issued several policy statements without the force of law exhorting agencies to affirmatively disclose information; see E.1.

¹⁴⁹ See <http://opengov-workshop.eventbrite.com/>.

¹⁵⁰ Terry Frieden, "No prosecution for destruction of CIA tapes, Justice Department says," CNN, Nov. 9, 2010, http://articles.cnn.com/2010-11-09/us/cia.interrogation.tapes_1_interrogation-videotapes-destruction-of-cia-tapes-justice-department?_s=PM:US.

In addition, the Public Online Information Act,¹⁵¹ introduced in 2010 by Rep. Steve Israel (D-NY)¹⁵² in the House and Sen. Jon Tester (D-MT)¹⁵³ in the Senate, would have required agencies to publish all publicly available information online in a timely fashion with some limited exceptions. The bill did not pass either house during the 111th Congress and as of this writing has not been reintroduced in the 112th Congress. The bill has not been fully endorsed by the openness community.

E.23. Enforcement and Oversight of Right-to-Know Law

Recommendation text: In developing the federal right-to-know law, the Congress should explore new ways to ensure this right is protected in the long term.

No immediate steps have been taken to realize this long-term recommendation.

E.24. Experiment with New Technology

Recommendation text: Congress should institutionalize the regular authorization of experiments in the use of interactive technologies to strengthen democratic participation in government.

No immediate steps have been taken by Congress to realize this long-term recommendation. However, a December 2010 report by the President's Council of Advisors on Science and Technology (PCAST) recommended creating a multi-agency effort led by the National Science and Technology Council to "define infrastructure, tools, and best practices that will increase the opportunities for digital democracy at all levels of government," including to "create pathways for fundamental research to be explored and evaluated on national testbeds, and for high impact approaches to be translated into practice."¹⁵⁴

E.25. Public Awareness of Transparency Rights

Recommendation text: 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.

No immediate steps have been taken to realize this long-term recommendation.

¹⁵¹ See <http://sunlightfoundation.com/policy/poia/>.

¹⁵² "H.R. 4858 Public Online Information Act of 2010," <http://hdl.loc.gov/loc.uscongress/legislation.111hr4858>.

¹⁵³ "S. 3321 Public Online Information Act of 2010," <http://hdl.loc.gov/loc.uscongress/legislation.111s3321>.

¹⁵⁴ "Designing a Digital Future: Federally Funded Research and Development in Networking and Information Technology," President's Council of Advisors on Science and Technology, Dec. 2010, <http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-nitrd-report-2010.pdf>.

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