



Building open government

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ABSTRACT

On his first full day in office, President Obama issued a Memorandum on Transparency and Open Government calling on his administration to develop recommendations that would “establish a system of transparency, public participation, and collaboration.” Together, the recommendations would be used to create an “Open Government Directive” instructing agencies to transform themselves to become more transparent, collaborative, and participatory. The President also issued a Memorandum on the Freedom of Information Act (FOIA). These statements did not spring *ex nihilo* from President Obama and his aides (or even from the army of organizations and individuals who advised them or submitted recommendations during the transition). They have a basis in extant law and regulation, and it is on this basis at which this article looks.

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1. Introduction

On his first full day in office, President Obama issued a Memorandum on Transparency and Open Government (White House, 2009a) calling on his administration to develop recommendations that would “establish a system of transparency, public participation, and collaboration.” Together, the recommendations would be used to create an “Open Government Directive.” In that Memorandum, the President committed his Administration to

...creat[e] an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

1.1. Government should be transparent

Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.

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1.2. Government should be participatory

Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policy-making and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

1.3. Government should be collaborative

Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

A process¹ was implemented for soliciting ideas from the public on these concepts and how the Directive should address them. The Directive was issued on December 8, 2009 and will be discussed in more depth later.

¹ For one review of that process, see OpenTheGovernment.org's 2009 Secrecy Report Card. http://www.openthegovernment.org/otg/SecrecyRC_2009.pdf.

On January 21, 2009, the President also issued a Memorandum on the Freedom of Information Act, (White House, 2009b) which opens by noting

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike. (White House, 2009b)

These laws and regulations serve as a countervailing system of openness against the tendency of bureaucracies to operate in obscurity, if not secrecy. In 1997, Daniel Patrick Moynihan (Commission on Protecting and Reducing Government Secrecy, 1997) reviewed the brief history of visibility (what we would call transparency) as the countervailing force to bureaucratic regulation, including secrecy, in order to ensure accountability to the public. Moynihan noted that the arrival of the New Deal agencies in the 1930s made it clear that public regulation needed to be made more accessible to the public. In 1935, the Federal Register began publication and, thereafter, all public regulations were published and accessible; in 1946, the Administrative Procedure Act (APA) established procedures by which the citizen can question and even litigate regulation; and in 1966, the Freedom of Information Act, technically an amendment to the 1946 APA, provided citizens yet more access to government files.

Bureaucratic regulation was not the whole problem, though, or even the worst barrier facing the public. Moynihan went on in the report to talk about secrecy as a mode of regulation:

In truth, it is the ultimate mode, for the citizen does not even know that he or she is being regulated. Normal regulation concerns how citizens must behave, and so regulations are widely promulgated. Secrecy, by contrast, concerns what citizens may know; and the citizen is not told what may not be known.

...The culture of secrecy in place in the federal government will moderate only if there comes about a counterculture of openness; a climate which simply assumes that secrecy is not the starting place. (Commission on Protecting and Reducing Government Secrecy, 1997)

This article will look at these laws and regulations and the roles they have played in promoting a counterculture of openness over the last several decades. But, first, let us return to what President Obama and his administration's desire to create “an unprecedented level of openness in Government” and to fundamentally change the culture of government (at least in the executive branch).

2. Open Government directive and plans

The Open Government Directive (Office of Management and Budget, 2009) noted above was issued on December 8, 2009. The Directive is very far-reaching and requires agencies to take several steps that, if well-implemented, could embed a culture of transparency into the way agencies operate. These steps include:

By January 22, 2010 agencies were required to make three high value data sets² (OMB, 2009, p.2) available to the public via Data.gov.

² “High-value information is information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.” At the point of this writing, no one has done an overall assessment of the data sets—both because of the volume and because one needs to be an expert in the area to really say whether they are useful.

According to Administration officials, these first three data sets are just a “down payment,” or a minimum; agencies are expected to continually make new data sets available to the public.

The initial data set submissions were a mixed bag, especially in terms of their usefulness and the “high value” of them. By March 2010, agency submissions had increased from under 100 to over 100,000.³

By February 6, agencies were required to set up open government web pages located at www.agency/open.

By April 7, agencies were required to post their Open Government plans.

2.1. Open Government directive overview

The Directive requires executive departments and agencies to take the following steps toward the goal of creating a more open government. To give a sense of the reach of the Directive, here is an overview:

2.1.1. Publish government information online

To increase accountability, promote informed participation by the public, and create economic opportunity, each agency shall take prompt steps to expand access to information by making it available online in open formats. The presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions).

2.1.1.1. Agency responsibilities. Respect the presumption of openness by publishing information online (in addition to any other planned or mandated publication methods) and by preserving and maintaining electronic information. Timely publication of information is an essential component of transparency. Delays should not be viewed as an inevitable and insurmountable consequence of high demand.

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.

Proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.

Create an Open Government web page located at [http://www.\[agency\].gov/open](http://www.[agency].gov/open) to serve as the gateway for agency activities related to the Open Government Directive and shall maintain and update that web page in a timely fashion. Each Open Government web page shall incorporate a mechanism for the public to: give feedback on and assess the quality of published information; provide input about which information to prioritize for publication; and provide input on the agency's Open Government Plan.

Respond to public input received on its Open Government web page on a regular basis. Publish its annual Freedom of Information Act Report in an open format on its Open Government web page in addition to any other planned dissemination methods. Each agency with a significant pending backlog of outstanding Freedom of Information requests shall take steps to reduce any such backlog by ten percent each year.

Comply with guidance on implementing specific Presidential open government initiatives, such as Data.gov, eRulemaking, IT Dashboard, Recovery.gov, and USAspending.gov.

2.1.2. Improve the quality of government information

To improve the quality of government information available to the public, senior leaders should make certain that the information

³ At the point of this writing, no one has done an overall assessment of the data sets—both because of the volume and because one needs to be an expert in the area to really say whether they are useful.

conforms to OMB guidance on information quality⁴ and that adequate systems and processes are in place within the agencies.

2.1.2.1. Agency responsibilities. Designate a high-level senior official to be accountable for the quality and objectivity⁵ of, and internal controls over, the federal spending information publicly disseminated through such public venues as USAspending.gov or other similar web sites.

2.1.3. Create and institutionalize a culture of open government

To create an unprecedented and sustained level of openness and accountability in every agency, senior leaders should strive to incorporate the values of transparency, participation, and collaboration into the ongoing work of their agency. Achieving a more open government will require the various professional disciplines within the government—such as policy, legal, procurement, finance, and technology operations—to work together to define and to develop open government solutions. Integration of various disciplines facilitates organization-wide and lasting change in the way that government works.

2.1.3.1. Agency responsibilities. Develop and publish on its Open Government web page an Open Government Plan that will describe how it will improve transparency and integrate public participation and collaboration into its activities.

2.2. Required components of the open government plans developed by agencies

The Administration required that the Open Government Plans address *transparency, participation, collaboration*, describe a *flagship initiative*, and *opportunities for public and agency engagement* in the plan and beyond. The details are outlined below.

2.2.1. Transparency

The Open Government Plan should explain in detail how an agency will improve transparency. It should describe: steps the agency will take to conduct its work more openly and publish its information online, including any proposed changes to internal management and administrative policies to improve transparency; actions the agency is currently taking to meet its legal information dissemination obligations; and plans the agency has to improve its existing information dissemination practices by providing:

1. A strategic action plan for transparency that: (a) inventories agency high-value information currently available for download; (b) fosters the public's use of this information to increase public knowledge and promote public scrutiny of agency services; (c) identifies high value information not yet available; and (d) establishes a reasonable timeline for publication online in open formats with specific target dates. High-value information is information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission

of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.

2. A plan for timely publication of the underlying data (in cases where the agency provides public information maintained in electronic format) in an open format and as granular as possible, consistent with statutory responsibilities and subject to valid privacy, confidentiality, security, or other restrictions. The agency should also identify key audiences for its information and their needs, and endeavor to publish high-value information for each of those audiences in the most accessible forms and formats. In particular, 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.
3. Details as to how the agency is complying with transparency initiative guidance such as Data.gov, eRulemaking, IT Dashboard, Recovery.gov, and USAspending.gov. Where gaps exist, the agency should detail the steps the agency is taking and the timing needed to meet the requirements for each initiative.
4. Details of proposed actions to be taken, with clear milestones, to inform the public of significant actions and business of the agency, such as through agency public meetings, briefings, press conferences on the internet, and periodic national town hall meetings.
5. A link to a publicly available website that shows how the agency is meeting its existing records management requirements. These requirements serve as the foundation for the agency's records management program, which includes such activities as identifying and scheduling all electronic records and ensuring the timely transfer of all permanently valuable records to the National Archives.
6. A link to a website that includes (a) a description of the staffing, organizational structure, and process for analyzing and responding to FOIA requests; (b) an assessment of the agency's capacity to analyze, coordinate, and respond to such requests in a timely manner, together with proposed changes, technological resources, or reforms that the agency determines are needed to strengthen the response processes; and, if the agency has a significant backlog, (c) milestones that detail how the agency will reduce its pending backlog of outstanding FOIA requests by at least ten percent each year. Providing prompt responses to FOIA requests keeps the public apprised of specific informational matters they seek.
7. A description or link to a web page that describes the staffing, organizational structure, and process for analyzing and responding to Congressional requests for information.
8. A link to a publicly available web page where the public can learn about the agency's declassification programs, learn how to access declassified materials, and provide input about what types of information should be prioritized for declassification, as appropriate. Declassification of government information that no longer needs protection, in accordance with established procedures, is essential to the free flow of information.

2.2.2. Participation

To create more informed and effective policies, the federal government should promote opportunities for the public to participate throughout the decision-making process. The agency's Open Government Plan should explain in detail how the agency will improve participation, including steps the agency will take to revise its current practices to increase opportunities for public participation in and feedback on the agency's core mission activities. The specific details should include proposed changes to internal management and administrative policies to improve participation, including the following:

The Plan should include descriptions of and links to appropriate websites where the public can engage in existing participatory processes of the agency.

⁴ The Directive references the "Information Quality Act, Pub. L. No. 106-554 (Consolidated Appropriations Act, 2001), Section 515; and also Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" (67 FR 8452), (available: http://www.whitehouse.gov/omb/fedreg_final_information_quality_guidelines/) and "your agency's Information Quality Act guidelines."

⁵ The Directive references Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" (67 FR 8452): Quality is "...the encompassing term, of which 'utility,' 'objectivity,' and 'integrity' are the constituents." "Objectivity" focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased." Available: http://www.whitehouse.gov/omb/fedreg_final_information_quality_guidelines/.

The Plan should include proposals for new feedback mechanisms, including innovative tools and practices that create new and easier methods for public engagement.

2.2.3. Collaboration

The agency's Open Government Plan should explain in detail how the agency will improve collaboration, including steps the agency will take to revise its current practices to further cooperation with other federal and non-federal governmental agencies, the public, and non-profit and private entities in fulfilling the agency's core mission activities. The specific details should include proposed changes to internal management and administrative policies to improve collaboration. The Plan should include: (a) proposals to use technology platforms to improve collaboration among people within and outside the agency; (b) descriptions of and links to appropriate websites where the public can learn about existing collaboration efforts of the agency; and (c) innovative methods, such as prizes and competitions, to obtain ideas from and to increase collaboration with those in the private sector, non-profit, and academic communities.

2.2.4. Flagship initiative

Each agency's Open Government Plan should describe at least one specific, new transparency, participation, or collaboration initiative that the agency is currently implementing (or that will be implemented before the next update of the Open Government Plan). That description should include: (a) an overview of the initiative, how it addresses one or more of the three openness principles, and how it aims to improve agency operations; (b) an explanation of how the agency engages or plans to engage the public and maintain dialogue with interested parties who could contribute innovative ideas to the initiative; (c) if appropriate, identification of any partners external to the agency with whom you directly collaborate on the initiative; (d) an account of how the agency plans to measure improved transparency, participation, and/or collaboration through this initiative; and (e) an explanation of the steps the agency is taking to make the initiative sustainable and allow for continued improvement.

2.2.5. Public and agency involvement

Extensive public and employee engagement should take place during the formation of this plan, which should lead to the incorporation of relevant and useful ideas developed in that dialogue. Public engagement should continue to be part of the agency's periodic review and modification of its plan. The agency should respond to public feedback on a regular basis.

2.3. Outside evaluation of agency open government plans

In April 2010, a consortium of volunteers coordinated by OpenTheGovernment.org conducted an evaluation of how the plans submitted by a number⁶ of agencies met the requirements of the Directive. The evaluations revealed a wide variation in the quality of the plans—especially in terms of meeting the requirements for specificity. The results of those evaluations⁷ can be found on Google Sites, Evaluating Open Government.⁸

⁶ Agencies required by the White House, including those agencies with a Chief Financial Officer and entities within the Executive Office of the President.

⁷ OpenTheGovernment.org and volunteers will be evaluating the plans submitted by agencies that were not required by the White House, will be re-visiting the plans in July 2010, and during 2010 and 2011 will be working with university faculty, the White House and agencies, an our evaluators on evaluation of how the plans are being implemented in the agencies.

⁸ <http://sites.google.com/site/opengovtplans/home>.

3. Laws and Regulations Underpinning Open Government⁹

As noted previously, the Obama Administration built their initiatives on a base of existing law and regulation, much of which is little known to the general public—or even to advocates of openness in the federal government. This article reviews what Moynihan would call the counterculture to bureaucratic secrecy, which has been established for primarily non-national-security information: the statutory and regulatory frameworks that serve to make government processes somewhat more accountable, that regulate public access to government-held information.

3.1. Paperwork Reduction Act (PRA)

3.1.1. 1980 PRA

The Paperwork Reduction Act of 1980 (PRA, 1980), gave the Office of Management and Budget (OMB) the authority and responsibility for a broad range of responsibilities related to information management. The Act was one of the most far-reaching, and least known,¹⁰ federal information laws on the books.

The six primary purposes of the Act in 1980 were: (a) to minimize the federal paperwork burden for individuals, small businesses, state and local governments, and other persons; (b) to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information; (c) maximize the usefulness of information collected by the Federal Government; (d) to coordinate, integrate, and, to the extent practicable and appropriate, make uniform federal information policies and practices; (e) to ensure that automatic data processing and telecommunications technologies are acquired and used by the Federal Government in a manner that improves service delivery and program management, increases productivity, reduces waste and fraud, and, wherever practicable and appropriate, reduces information processing burden for the Federal Government and for persons who provide information to the Federal Government; and (f) to ensure that the collection, maintenance, use, and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality, including the Privacy Act (5 U.S.C. 552a) (PRA, 1980). The Act was first amended in 1986. The amendments added a seventh purpose to the Act: to maximize the usefulness of information collected and disseminated by the Federal Government.

Both the Reagan (1980 Act) and the G. W. H. Bush (1986 amendments) administrations and their congressional supporters viewed information an *economic* resource, rather than a public good. Thus, what those of us in the public access community would understand as “usefulness”—e.g., the ability of the government *and* the public to use the information—was here understood *only* in terms of whether the agency needed to *collect* the information (i.e., what agency function it fulfilled and what burden it constituted on those required to respond to the government's information collection requests).

The term “information resources management” was defined to include agency dissemination of information. In addition to the Director of OMB, agencies were made responsible for implementing government-wide and agency information policies, principles, standards, and guidelines, and for periodically evaluating and, as needed, improving the accuracy, completeness, and reliability of data and records contained within the federal information systems. (PRA, 1980).

3.1.2. 1995 PRA reauthorization

The 1995 revision (PRA, 1995) codification, and reauthorization (the latest to date) of the Paperwork Reduction Act made some refinements in the areas of information dissemination and of utility/

⁹ Much of this material appeared previously in McDermott, Patrice, “Who Needs to Know? The State of Public Access to Federal Government Information,” Bernan Press, 2007.

¹⁰ It has been replaced, in both of these categories, by the E-Government Act of, 2002.

quality. In terms of the latter, the revision says that each agency should “improve the integrity, quality, and utility¹¹ of information to all users within and outside the agency, including capabilities for ensuring dissemination of public information, public access to government information, and protections for privacy and security” (PRA, 1995, Section 3506 (C)).

The 1995 revision added several three new statements of purpose: (a) to improve the quality and use of federal information to strengthen decision-making, accountability, and openness in government and society; (b) to provide for the dissemination of public information in a manner that promotes the utility of the information to the public; and (c) to ensure the integrity, quality, and utility of the federal statistical system (PRA, 1995, Section 3501).

OMB’s responsibility to provide direction to all agencies on information dissemination policy was retained, but the language was revised slightly and reformatted. The reauthorized Paperwork Reduction Act (PRA) used the term “public information” meaning “any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public” (PRA, 1995, Section 3502).

An important new provision refers to agency responsibility to ensure that the public has “timely and equitable access to the agency’s public information.” The law spells out some of the mechanisms for ensuring that access, a key one being that any agency that “provides public information maintained in electronic format” is required to provide “timely and equitable access to the underlying data (in whole or in part).” (PRA, 1995, Section 3506) This language is important because it preserves the public’s ownership in at least the raw information and it should mean that, even when an agency makes data accessible through proprietary software,¹² anyone should be able to get the underlying data and make it available (or just make use of it). This language also provides a statutory underpinning¹³ for initiatives under the Open Government Directive, such as Data.gov.

In addition, to ensure meaningful public access, the law now requires that an agency “provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products.” (PRA, 1995, Section 3506) An information dissemination product, as defined by the 1994 Circular A-130 (see below) is “any book, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, disseminated by an agency to the public” (OMB, 1994).

One would think that this provision might have given the public a way of knowing when an agency removed information from its website, such as occurred after September 11, 2001. One would be wrong. Agencies felt no obligation—and even actively resisted—identifying information taken down, and, if the product was not actually “terminated,” there was no recourse anyway. So, while it is great that the Obama Administration has directed agencies to proactively disclose and disseminate information, there is, as yet, no assurance that the public’s ability to find that information will be protected over the long term.

The most contentious portion of the Act, from its inception, has to do with the “burden reduction” related to information collections, primarily regulatory, made to 10 or more persons.¹⁴ While this provision was aimed at restricting the ability of the Federal

Government to collect information from regulated industries and businesses and, to a lesser extent, from the public, it has created huge headaches for agencies as they attempt to survey users about agency websites and information services.

3.1.3. PRA and the Open Government Directive

As part of the Open Government Directive, OMB was directed to review this “information collection” section of the Act, as it could potentially allow for challenges to their efforts to make the executive branch more participatory. Specifically, Section 4 of the Directive instructs the Administrator of the Office of Information and Regulatory Affairs (OIRA) to “review existing OMB policies, such as Paperwork Reduction Act guidance and privacy guidance, to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government.” In a April 7, 2010 Memorandum, “Information Collection under the Paperwork Reduction Act,” (Office of Management and Budget, 2010a) the Administrator of the Office of Information and Regulatory Affairs (OIRA) at OMB notes that,

OMB regulations define “information” as “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media.” This category includes: (a) requests for information to be sent to the government, such as forms (e.g., the IRS 1040), written reports (e.g., grantee performance reports), and surveys (e.g., the Census); (b) recordkeeping requirements (e.g., OSHA requirements that employers maintain records of workplace accidents); and (c) third-party or public disclosures (e.g., nutrition labeling requirements for food).

The PRA applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, “ten or more persons.” (OMB, 2010a).

Of greater significance for the issues at hand for the Open Government initiative is what does *not* count as information (in terms of information collection) under the PRA. On this, the Memorandum notes,

OMB regulations specify a number of items that are generally not “information” under the PRA. Important examples are

- Affidavits, receipts, changes of address, or consents;
- Tests of the aptitude, abilities, or knowledge of persons; and
- Facts or opinions that are (a) submitted in response to general solicitations of public comments, (b) addressed to a single person, (c) obtained or solicited at or in connection with public hearings or meetings, (d) obtained through direct observation by the agency (e.g., through visual inspection to determine how long it takes for people to complete a specific transaction), or (e) obtained from participants in clinical trials (which typically do not involve answers to “identical questions”) (OMB, 2010a).

It is worth emphasizing that facts or opinions obtained in connection with public meetings do not count as “information.” This “public meeting” exception allows agencies to engage with the public on the internet so long as the engagement is the functional equivalent of a public meeting (i.e., not a survey). In addition, it is important to underline that general solicitations, such as *Federal Register* notices, do not trigger the PRA. It follows that agencies may offer the public opportunities to provide general comments on discussion topics through the internet. More generally, agencies may use social media and web-based technologies in a variety of specific ways without triggering the PRA.

¹¹ This benign language came back to bite us in what is known as the Data Quality Act <http://www.fws.gov/informationquality/section515.html>. To see how this provision was implemented by the Office of Management and Budget, go to http://www.whitehouse.gov/omb/fedreg_reproducible/.

¹² Something that the public access advocacy community tried – and failed – to get fixed in the E-Government Act of, 2002.

¹³ The White House can direct the executive branch to take actions without a statute.

¹⁴ For discussion of this issue from the regulatory aspect, I recommend OMB Watch <http://www.ombwatch.org/article/articleview/182/1/162?TopicID=2> and The Center for Regulatory Effectiveness (for an anti-regulatory view) <http://www.thecre.com/>.

In a second April 7, 2010 Memorandum, “Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act,” ([Office of Management and Budget, 2010b](#)) the Administrator directly applies the analysis above to the use of social media being encouraged—and utilized—by the Obama Administration, as “publishing” “general solicitations of public comments”:

OMB’s regulations implementing the PRA exclude facts or opinions provided in response to general solicitations published in the *Federal Register* or other publications. As agencies increasingly use web-based technologies as a means of “publishing” such solicitations, OMB believes that it is appropriate to exclude these activities as well. This Memorandum identifies a series of other activities that, consistent with the text and purposes of the PRA, OMB has determined may be excluded from its purview. Such activities include many uses of wikis, the posting of comments, the conduct of certain contests, and the rating and ranking of posts or comments by website users. ([OMB, 2010b](#))

This Memorandum applies whether agency interactions are occurring on a .gov website or on a third-party platform.

3.2. Circular A-130, implementing the Paperwork Reduction Act

3.2.1. 1985 Circular A-130

In December 1985, OMB published Circular A-130, “The Management of Federal Information Resources, implementing the Paperwork Reduction Act.” The 1985 A-130 Circular epitomized the Reagan-era OMB attitude that information held by the government was *government* information—and not information to which the public necessarily had a right (other than disclosure through the Freedom of Information Act).

First, the 1985 Circular distinguished “access to information” from “dissemination of information”—the former being the process of providing information upon request and the latter referring to the legally-mandated or government-initiated distribution of information to the public. In general, the Circular advocated that agencies wait for the public to approach agencies and request information.

Beyond that, the 1985 Circular required that agencies not “compete” with private sector opportunities to sell taxpayer-funded government information back to the public. It therefore discouraged the distribution of Executive Branch publications through the depository program of the Government Printing Office (GPO), and, in general, did not encourage openness in government.

Furthermore, the Circular offered an inauspicious standard for an agency to follow if it *disseminated* information (and did not merely wait for its request): whether the activity was necessary for the proper performance of agency functions. It was left to the agency head to make that call, a problematic authority if that head does not want agency performance open to public scrutiny.

Finally, the 1985 Circular used the term “government information,” rather than “public information.” This implied that government publications, previously considered public information and often freely available, were now government information distributed only on request or under legal entitlement. “Government information” was defined as “information created, collected, processed, disseminated, or disposed of by or for the Federal Government.”

3.2.2. 1994 Circular A-130

In 1993 and 1994, the Clinton Administration rewrote Circular A-130 ([OMB, 1994](#)) significantly changing information policy and practices across the Executive Branch. The rewrite occurred in advance of the final passage of the 1995 amendment to the PRA. They did such a good job that, although OMB has had to update the Circular several times to incorporate various laws, both the public

access community and the agencies have urged them not to change the fundamental principles. These principles include:

- (1) Because the public disclosure of government information is essential to the operation of a democracy, the management of federal information resources should protect the public’s right of access to government information.
- (2) Systematic attention to the management of government records is an essential component of sound public resources management which ensures public accountability. Together with records preservation, it protects the government’s historical record and guards the legal and financial rights of the government and the public.
- (3) The open and efficient exchange of scientific and technical government information, subject to applicable national security controls and the proprietary rights of others, fosters excellence in scientific research and effective use of federal research and development funds.
- (4) The availability of government information in diverse media, including electronic formats, permits agencies and the public greater flexibility in using the information.
- (5) Government information is a valuable national resource. It provides the public with knowledge of the government, society, and economy—past, present, and future. It is a means to ensure the accountability of government, to manage the government’s operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace.
- (6) The free flow of information between the government and the public is essential to a democratic society. It is also essential that the government minimize the Federal paperwork burden on the public, minimize the cost of its information activities, and maximize the usefulness of government information.
- (7) In order to minimize the cost and maximize the usefulness of government information, the expected public and private benefits derived from government information should exceed the public and private costs of the information, recognizing that the benefits to be derived from government information may not always be quantifiable.
- (8) The nation can benefit from government information disseminated both by federal agencies and by diverse nonfederal parties, including state and local government agencies, educational and other not-for-profit institutions, and for-profit organizations.
- (9) The individual’s right to privacy must be protected in federal government information activities involving personal information ([OMB, 1994](#)).

While these principles are occasionally honored more in the breach than in observance, they have served well—and the 1994 Circular is a sea-change from the 1985 Circular¹⁵ with one rather significant caveat. The 1994 Circular retains the definition of “government information” as meaning “information created, collected, processed, disseminated, or disposed of by or for the Federal Government.” It has never, to this day¹⁶, incorporated the term “public information,” used in both the PRA and, by reference, in the [E-Government Act of 2002](#), meaning “any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public.”

The term “public information” provides a statutory basis for the proactive posting of information—including information released pursuant to a FOIA request—on agency websites. One of the seemingly arcane arguments in which many of us engaged with OMB in the past had to do with the difference—and the asserted distinction—noted above between *disclosure*—understood as an agency response to a specific request—and *dissemination*—understood as an intention (or

¹⁵ Known colloquially (at least to those of us who have been around for a while) as the old, bad, Reagan-era A-130.

¹⁶ And in my memory no one has ever called them on it.

requirement) to make information available to the public. Just because something was disclosed, it did not entail (in their view) that it had been—or should be—disseminated. This is not a minor argument, and it has not gone away.

Another important distinction also involves the definitions of terms: is all “government information” also “public information”? Is all information collected by the government necessarily public information? We would say “No” for personally identifiable information, for instance, but what about information collected from regulated industries? For that, many in the public access community would say “certainly it is public,” but the industries from which it is collected generally do not see it that way.

When the *E-Government Act of 2002* was being drafted, the public access community successfully argued to retain the statutory emphasis on “public information”—and the public’s right to access that broad scope of information—embodied in the PRA definition. However, the words “public information” are not magic; in the drafting of the e-government Act, we were afraid that, because of the changed environment after September 11th, the word “public” would be read as only that information the government chooses to make public. And, as it happens, that is indeed the way that OMB interpreted it (although for reasons of cost effectiveness, which was not the reason we feared).

3.3. E-Government Act

The *E-Government Act of 2002* was seen as an opportunity to effect a real change in how government identifies and makes available information—and it started out with that vision in mind.

3.3.1. E-Government Act of 2001

U.S. Senator Joseph Lieberman unveiled his “*E-Government Act of 2001*” (S. 803, 2001) on May 1, 2001. The 90-page bill was the most comprehensive piece of legislation on e-government to date and the only piece of legislation that focused on the government’s management of its information content for access and accountability. The bill itself was developed through an innovative use of e-government. Through a special Governmental Affairs Committee web site,¹⁷ the public was able to identify issues, concerns, and recommendations for improving e-government, which Sen. Lieberman used in drafting the legislation.

What Senator Lieberman (and Senator Fred Thompson) learned from that experiment is the public expects ever better and more user-friendly access to its government, but this has not been fully possible because much of the infrastructure has not been universally in place. The legislation intended to set up a framework and a process for moving the executive branch forward. The bill also elevated the issue of information management and information policy.

A key component of the bill, from the public access community’s perspective, was Section 207 on “Accessibility, Usability, and Preservation of Government Information.” It was intended to create an open and consultative process, laying the groundwork for both government and the public to know what information the government creates and collects. It would also have begun the process of creating standards and guidelines for permanent public accessibility to government information created and disseminated digitally.¹⁸ These principles should sound very familiar to those who are paying attention to the open government initiatives of the Obama Administration.

A number of nonprofit public interest organizations, including the library community, had been raising these issues for many years. And, both historically and more recently, voices inside the government have focused on these concerns. A 2000 report, “Transforming Access

to Government through Information Technology” from President’s Information Technology Advisory Committee’s (*President’s Information Technology Advisory Committee, 2000*), noted that *finding* the important information stored in the government’s many databases is—in and of itself—difficult. They urged effort focused on “government-specific capabilities” such as “metadata creation, and comprehensive searchable catalogs of information and services.” (p. 2).

The *E-Government Act of 2001* (S. 803, 2001) laid the framework for such an effort. Both the section on “common protocols for geospatial information systems” and the section on “accessibility, usability, and preservation of government information” were intended to create a process for moving the federal agencies, and the federal executive branch overall, to common and open protocols and standards. The latter section was intended to move the government to establish basic knowledge and management of its own information, for both its own uses and for the public. Management is critical for access: the public cannot ask for and the government cannot disseminate what neither knows exists, or cannot find.

The process established in this bill was as fundamental as the end result. At every stage—from the process of identifying standards, to the process of identifying information to be inventoried (listed), to be cataloged, and to be disseminated—public participation was to be required and the results of the decisions to be posted online. An open process and public accountability were (and continue to be) essential because moving from the “silos of rotting information”¹⁹ that existed then—and continue to exist now with some notable exceptions—to real management of government information across its life-cycle (from creation/collection, through its retirement from current agency use, to archiving/disposition or permanent public accessibility through a repository) is not going to happen in a year or even two.

Key omissions in the bill were the failure to require the government to get control of and manage its electronic records, including its e-mail, an issue with which the government and the public continue to struggle. The Act does not include legislative branch information at all, which was a triumph of the political reality of congressional intransigence and protection of tradition and privilege. It was timid in its approach to the courts—a similar triumph. A final significant gap in the bill that is worth mentioning here is the lack of sustained funding for much of the information management work that was to be undertaken by the agencies.

3.3.2. E-Government Act of 2002

The Act that passed (*E-Government Act of 2002*), as rewritten by the Office of Management and Budget in 2002, included a number of provisions of interest to those working on openness. The Act codified the CIO Council, whose activities have largely been unaccountable to the public. The Act sought to change that, but it has not happened. The Council website does not contain much information about their actual operations and no indication on how the public might be involved in or comment on its activities.²⁰ Moreover, it is not without reason that the National Security Archive gave the CIO Council its 2010 Rosemary Award for Worst Open Government Performance²¹ for “lifetime failure” to address crisis in government e-mail preservation.

An annual survey of federal CIOs, “Transparency and Transformation Through Technology” (*Tech America, 2010*) found that federal agency chief information officers want to “concentrate on integrating

¹⁹ Vice-President Al Gore’s expression—and still applicable.

²⁰ The Council’s previous site, at GSA, contained an undated page on the “Minutes to meetings” link contains (30 Jul 06) this message: “Notice to Visitors: The Council site is experiencing limited access to services at this time. Please bear with us while we work to improve customer service. If you need immediate assistance, call the web team help line at 202-208-7420. We apologize for any inconvenience [sic] this may cause.” Their new site, on the White House complex of sites (<http://www.cio.gov/>), does not even bother to suggest they might post minutes.

²¹ <http://www.gwu.edu/~nsarchiv/news/20100312/index.htm>.

¹⁷ Which, quite unironically, has not been preserved and at last report could not be reliably located.

¹⁸ Problems that are still prevalent in what the Open Government Directive hopes to achieve.

information technology systems with business processes, not necessarily on transparency and performance management initiatives" (Tech America, 2010). Number one on their list of greatest value projects was "integrating systems and processes." In fifth, and last, place was "transparency and performance management initiatives" (p. 19).

3.3.2.1. Section 207. The stated purpose of this section was to improve the methods by which government information, including information on the internet, is organized, preserved, and made accessible to the public. If this section of the law had been fully implemented, we would have been in a much better place for the current Administration's open government initiatives.

3.3.2.1.1. Availability of government information on the internet.

The e-government Act requires each agency to (a) solicit public comment; (b) determine which Government information the agency intends to make available and accessible to the public on the internet and by other means; (c) develop priorities and schedules for making that Government information available and accessible; (d) make such final determinations, priorities, and schedules available for public comment; (e) post such final determinations, priorities, and schedules on the internet; and (f) submit such final determinations, priorities, and schedules to the Director, in the report established under Section 202(g).

Each agency is also required to update determinations, priorities, and schedules of the agency, as needed, after consulting with the Interagency Committee on Government Information (ICGI) and soliciting public comment, if appropriate.

The Interagency Committee on Government Information (ICGI) was required to make recommendations in four distinct areas: (1) a definition of which Government information should be categorized; (2) a standard for searchable and persistent identifiers to be applied to items of categorized government information; (3) a standard set of categories (i.e., "bibliographic attributes") for categorizing government information; and (4) an open standard for interoperable search of government information so categorized.

3.3.2.1.2. Public access to electronic information. The Archivist was required to issue guidance requiring the adoption by agencies of the policies and procedures to ensure that the relevant chapters²² of title 44, United States Code, are applied effectively and comprehensively to government information on the internet and to other electronic records, and imposing timetables for the implementation of the policies, procedures, and technologies by agencies.

3.3.2.2. Section 205—judicial information. The Act included a requirement that federal courts establish, maintain, and update websites containing (or linking to) the following information: (a) location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers; (b) local rules and standing or general orders of the court; (c) individual rules, if in existence, of each justice or judge in that court; (d) access to docket information for each case; (e) access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format; (f) access to all documents filed with the courthouse in electronic form; and (g) any other information (including forms in a downloadable format) that the court determines useful to the public. One exception to this was that documents that are filed but that are not otherwise available to the public, such as documents filed under seal, are not be made available online. Important privacy concerns are to be protected by the Judicial Conference.

The Act also permitted²³ the online PACER²⁴ docketing system to be made free to users. Unfortunately, the courts have chosen to keep public documents mostly locked behind a paywall, claiming that the fees it collects are necessary to cover the costs of running the system. In the 2006 annual report of the Judiciary's Information Technology Fund the courts note that the IT fund had retained \$32.2 million in 2006 due to "unanticipated revenue growth associated with public requests for case information," (Lee, 2009) although they reported spending just \$11.6 million on its Electronic Public Access program (which includes the public PACER website), and another \$16 million on court administration and case management, which includes the "CM/ECF" system used by lawyers to file documents with the court electronically.²⁵ (Lee, 2009).

3.3.3. Implementing the e-government Act

So, why, given all these requirements in the Act (even as rewritten by OMB), are we not a lot better off in 2010 than in 2002? Unfortunately, in its implementing guidance (Memorandum M-06-02), the OMB reverted to the old definition. The Memorandum (Office of Management and Budget, 2005) treats as presumptively available for public access only that information "disseminated by an agency to the public." It tells agencies, "When disseminating information to the public-at-large, publish your information directly to the internet. This procedure exposes information to freely available and other search functions and adequately organizes and categorizes your information," and "When interchanging data among *specific identifiable groups* or disseminating significant information dissemination products, advance preparation, such as using formal information models, may be necessary to ensure effective interchange or dissemination." It continues, "*Specific identifiable groups*, also known as user groups and "communities of interest," can include any combination of Federal agencies, State, local, and tribal governments, industry, scientific community, academia, and *specific interested members of the general public*" (Emphasis added, OMB, 2005).

The implementation of searchable identifiers, such as a facility or corporate identifier, could become the building blocks for searching across agencies or departments to obtain information; for example, to identify information across the government on a particular company and for companies to integrate their required reporting. This sort of linkage has been virtually impossible. Indeed, in another April 7, 2010 Memorandum (Office of Management and Budget, 2010c) responding to the requirements of Section 4 of the Open Government Directive, the Administrator of OIRA noted.

A regulatory docket includes different information at various stages of the rulemaking process. Currently, regulatory information online is unnecessarily difficult to navigate, and members of the public may have difficulty searching, sorting, finding, or

²³ The United States Congress gave the Judicial Conference of the United States, the judicial governing body of the U.S. Federal Courts, authority to impose user fees for electronic access to case information. The Committee Report indicates that the "Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible," and makes clear that the Committee did not intend that the deferral provision would allow courts to avoid their obligations under this section indefinitely. Report 107-174: Report of the Committee on Governmental Affairs, United States Senate, To Accompany S. 803. 107th Congress, 2d Session. [http://thomas.loc.gov/cgi-bin/cpquery/R?cp107:FLD010:@1\(sr174\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp107:FLD010:@1(sr174)).

²⁴ [http://thomas.loc.gov/cgi-bin/cpquery/R?cp107:FLD010:@1\(sr174\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp107:FLD010:@1(sr174)) Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet. Links to all courts are provided from this web site. Electronic access is available by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center. <http://pacer.psc.uscourts.gov/pacerdesc.html>.

²⁵ Timothy B. Lee, "The case against PACER: tearing down the courts' paywall," *ars technica*. <http://arstechnica.com/tech-policy/news/2009/04/case-against-pacer.ars>.

²² 21, 25, 27, 29, and 31.

viewing documents at each stage of the process. To increase the transparency of the rulemaking process, agencies should make it easier for members of the public to find and view this online information.

To that end, agencies should use the Regulation Identifier Number (RIN) on all relevant documents throughout the entire “lifecycle” of a rulemaking. In addition to increasing transparency and making it easier for members of the public to find and view all online information relevant to the regulatory docket, such an action will also help inform the public’s understanding of both the rulemaking process and the content of particular rules, thereby promoting public participation in the rulemaking process. (OMB, 2010c).

Though it happened 8 years late, maybe OMB is finally beginning to implement the e-government Act.

3.4. The Freedom of Information Act and Amendments

The FOIA, 1966, establishes the public’s right to obtain information from federal government agencies. Through this Act, every citizen of the United States gained the right to access and obtain reproductions of records created and maintained by federal government agencies. The Act was originally created to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption, and to hold the governors accountable to the governed.” (Committee on Government Reform, 2009, p. 9).

Prior to its passage, public access to records of federal agencies was governed by Section 3 of the Administrative Procedure Act, which had been interpreted as giving agencies unlimited discretion to withhold such records. Efforts to amend this system began as early as 1955 but were not successful until 1966 (Hammit, 2000).²⁶

Before enactment of the FOIA, the burden was on the individual to establish a right to examine records in the possession of agencies and departments of the executive branch of the U.S. Government and to prove s/he had a need to know. There were no statutory guidelines or procedures to help a person seeking information. There were no judicial remedies for those denied access (Committee on Government Reform, 2009, p. 9).

The FOIA establishes a presumption that these records are accessible to the people. With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the “need to know” standard has been replaced by a “right to know” doctrine. The government now has to justify the need for secrecy. The statute requires federal agencies to provide the fullest possible disclosure of information to the public. The history of the act reflects that it is a disclosure law: it presumes that requested records will be disclosed (Committee on Government Reform, 2009, p. 9).

Since 1966, the FOIA has been amended six times: in 1974, (with minor amendments in 1976, 1978, 1978, and 1984) in 1986, and, most recently, in 1996. In each instance, the original Act has been broadened to include more information deemed necessary to the public as well as to the oversight of the Federal Government.

In 1974, in reaction to the Nixon scandals, Congress moved to strengthen the FOIA. The change allowed courts to order the release of documents even when the President said they should not be released. The Ford Administration resisted. President Ford’s chief of staff at the time was Donald Rumsfeld; Rumsfeld’s deputy was Dick Cheney. Rumsfeld and Cheney advised Ford to veto the legislation: “President Ford vetoed the Freedom of Information Act as we know it today. And he vetoed it because, according to Tom Blanton, he, Rumsfeld, and Cheney believed that it took away too much presidential power”

(Strom, 2002).²⁷ Recently, Vice-President Cheney has indicated that this White House is determined to take back some of the executive’s control over information that had been “ceded to Congress” and has “eroded” over the last 30 years.

3.4.1. State of the FOIA process

The congressional finding accompanying the 1996 amendments (discussed below) noted that the FOIA has “led to disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government,” and has “led to identification of unsafe consumer products, harmful drugs, and serious health hazards.” It was also noted that, as of 1996, members of the public requested more than 600,000 records yearly from federal agencies, a volume that was seen as threatening to overwhelm some agencies (Congressional Record, 1996).

FOIA applies to all 15 departments (Education, Homeland Security, etc.) and 73 other federal agencies (e.g., Environmental Protection Agency, Federal Reserve System) in the executive branch of the U.S. Government. The executive branch includes cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other establishments in the executive branch. It does not apply to elected officials of the Federal Government, including the President, Vice President, Senators, and Representatives; to the federal judiciary; to parts of the Executive Office of the President that function solely to advise and assist the President; to private companies; to persons who receive federal contracts or grants (Committee on Government Reform, 2009, p.12); to private organizations; or to state or local governments.

The FOIA sets standards for determining which records must be disclosed and which records may be withheld. Each agency must make its case for withholding in terms of the Act’s exemptions to the rule of disclosure. The application of the exemptions is generally not mandatory; it is permissive—to be done if information in the requested records requires protection. Thus, when determining whether a document or set of documents should be withheld under one of the FOIA exemptions, an agency should withhold those documents only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by the exemption.²⁸

When a requestor asks for a set of documents, the FOIA indicates that the agency should release all documents, not a subset or selection. Although the FOIA occasionally uses terms other than “record,” (e.g. “information” and “matter”), a requester may only ask for records and an agency is only required to look for an *existing* record or document in response to a FOIA request. The FOIA also provides administrative and judicial remedies for those denied access to records.

All records of a covered federal agency may be requested under the FOIA. Records obtainable under the FOIA include all “agency records”—such as print documents, photographs, videos, maps, e-mail and electronic records—that were created or obtained by a federal agency and are, at the time the request is filed, in that agency’s possession and control.²⁹ The 1996 E-FOIA amendments to the Act require an agency, in most cases, to produce the record in the format sought by the requester, regardless of the form in which a record is maintained by the agency (Committee on Government Reform, 2009, p.14).

²⁷ Thomas Blanton, National Security Archive, as quoted by Strom. Other scholars of the FOIA disagree about the role that Cheney and Rumsfeld, as opposed to others, played in the veto.

²⁸ This “foreseeable harm” standard was changed by Attorney General John Ashcroft in 2001 – and restored by Attorney General Holder in 2009.

²⁹ As noted below, the OPEN Government Act clarifies that an agency “controls” information even if it is maintained for it by a contractor.

²⁶ Hammit provides an extensive and detailed history and analysis of the FOIA.

Of course, not all records that *can* be requested under the FOIA *must* be disclosed. There are nine exemptions to the FOIA:

Exemption (b)(1)—National Security Information

Exemption (b)(2)—Internal Personnel Rules and Practices

“High” (b)(2)—Substantial internal matters, disclosure would risk circumvention of a legal requirement

“Low” (b)(2)—Internal matters that are essentially trivial in nature.

Exemption (b)(3)—Information exempt under other laws

Exemption (b)(4)—Confidential Business Information

Exemption (b)(5)—Inter- or intra-agency communication that is subject to deliberative process, litigation, and other privileges

Exemption (b)(6)—Personal Privacy

Exemption (b)(7)—Law Enforcement Records that implicate one of six enumerated concerns

Exemption (b)(8)—Financial Institutions

Exemption (b)(9)—Geological Information ([Committee on Government Reform, 2009, p. 14](#))

The act also requires agencies to make available³⁰ for public inspection and copying: copies of records released in response to FOIA requests that an agency determines have been or will likely be the subject of additional requests, and a general index³¹ of released records determined to have been or likely to be the subject of additional requests. This latter requirement is the underpinning for the Administration's requirement that agencies not rely solely on FOIA requests, but also engage in proactive disclosures.

3.4.2. E-FOIA amendments

The Freedom of Information Act was amended in 1996 to allow for greater access to electronic information. Among other changes, the 1996 amendments provided that: electronic records were explicitly made subject to the FOIA; the deadline for responding to FOIA requests was expanded from ten days to twenty days; and agencies were required to provide FOIA reports to Congress.

The 1996 amendments also created a new set of agency requirements to aid the public in finding and obtaining federal government records. By March 31, 1997, each agency was required to provide, both in its reading room and through an electronic site, reference material or a guide on how to request records from the agency. The guide must include: an index of all major information systems of the agency; and a description of major information and record locator systems maintained by the agency.

Additionally, under the amendments agencies are also required to comply with other regulations such as OMB Circular A-130, which requires that agencies determine what records or information products are appropriate for an affirmative agency disclosure ([E-FOIA, 1996](#)).

OMB describes a “major information system” as “a system that requires special management attention because of its importance to an agency mission; its high development operating, or maintenance costs; or its significant role in the administration of agency programs, finances, property, or other resources.” This is distinct from “information system,” which is “a discrete set of information resources organized for the collection, processing, maintenance, transmission, and dissemination of information, in accordance with defined procedures, whether automated or manual ([OMB, 1994](#)).

A “locator” is described by OMB as “an information resource which identifies other information resources, describes the information

available in those resources, and provides assistance in how to obtain the information.” OMB Circular 95-01, “Establishment of Government Information Locator Service,” makes clear that the requirement for “description of... record locator systems” refers to agency records schedules. ([Office of Management and Budget \(OMB\), 1994b](#)) Try finding these in agencies' FOIA Reading Rooms.

Under the Open Government Directive, agencies are required to provide in their Open Government Plans,

... a link to a publicly available website that shows how your agency is meeting its existing records management requirements. These requirements serve as the foundation for your agency's records management program, which includes such activities as identifying and scheduling all electronic records,³² and ensuring the timely transfer of all permanently valuable records to the National Archives. ([OMB, 2009](#))

It is a start—toward meeting an obligation that goes back 14 years.

3.4.3. OPEN Government Act

For the first time in well over a decade, in December 2007, Congress enacted new amendments to the Freedom of Information Act—the OPEN Government Act of 2007 (OPEN Government Act, 2007). No changes to the Act's nine exemptions were made. Rather, the amendments address a range of procedural issues impacting FOIA administration, including the codification of several provisions of Executive Order 13392, “Improving Agency Disclosure of Information.” ([White House, 2005](#)).

Section 3 of the Open Government Act provides definitions of “representative of the news media” and “news,” for purposes of request processing fee. The term “news” is defined as information that is about current events, or that would be of current interest to the public. The “or” is important because not all news of current interest is about current events.

The term “a representative of the news media” is used to mean any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”), and non-profit organizations, who make their products available for purchase by or subscription by or free distribution to the general public. A freelance journalist is regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. This section also recognizes the evolution of “methods of news delivery” through, for example, “electronic dissemination.”

Section 4 of the Open Government Act provides that, for the purposes of awarding attorney fees and litigation costs, a FOIA complainant has *substantially prevailed* in a legal proceeding to compel disclosure if the complainant obtained relief through either: (1) a judicial order or an enforceable written agreement or consent decree; or (2) a voluntary or unilateral change in position by the agency provided that the complainant's claim is not insubstantial. It also requires fees and costs to be paid directly by the agency, rather than from the Claims and Judgment Fund of the United States Treasury.

For many years, most U.S. courts had applied an analysis called the “catalyst theory” to determine eligibility for attorneys' fees under civil rights laws and other federal statutes. The catalyst theory allows a plaintiff to recover costs and fees even if a matter is settled out of court or the lawsuit is dropped, so long as the defendant voluntarily

³⁰ The 1996 E-FOIA amendments require that these materials (created on or after November 1, 1996) must be made available by computer telecommunications and in hard copy.

³¹ The 1996 amendments to the FOIA require that this general index be made available by computer telecommunications. Since not all individuals have access to computer networks or are near agency public reading rooms, requesters would still be able to access previously released FOIA records through the normal FOIA process.

³² References [E-Government Act of, 2002, Pub L. No. 107-347, section 207\(e\)](#).

complies with some of the demands of the plaintiff's suit (the suit served as a catalyst to compliance with at least some of the demands).

In *Buckhannon Board and Care Home, Inc. v. W.Va. Department of Health and Human Res.*, 532 U.S. 598 (2001), the Supreme Court drastically reduced the availability of attorneys' fees and litigation expenses by rejecting the theory. The holding in *Buckhannon* had been extended to some FOIA cases (i.e., if the government gamed the system and released records before the court ruled, the plaintiffs were rendered unable to recover attorney fees from the government). Section 4 of the Act preserves the "catalyst theory" in FOIA litigation.

While the statute restored the full circumstances under which FOIA requesters may obtain attorneys' fees when forced to litigate for release of documents, a recent decision by the U.S. Court of Appeals for the D.C. Circuit,³³ made clear that the change in attorney's fees will not be applied retroactively.

Section 5 directs the Attorney General to: (1) notify the Special Counsel of civil actions taken for arbitrary and capricious rejections of requests for agency records; and (2) submit annual reports to Congress on the number of such civil actions in the preceding year. It also directs the Special Counsel to submit an annual report to Congress on investigations of agency rejections of FOIA requests. Previously, FOIA required that when a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding documents, the Office of Special Counsel was only required to determine whether disciplinary action against the involved personnel is warranted.

Section 6 requires that the 20-day period during which an agency must determine whether to comply with a FOIA request begin on the date on which the request is first received by the appropriate component of the agency, but in any event no later than 10 days after the request is first received by any component of the agency that is designated in the agency's FOIA regulations to receive FOIA requests. This section prohibits the tolling (suspending) of the 20-day period by the agency except: (1) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the FOIA requester; or (2) if necessary to clarify with the requester issues regarding fee assessment. The tolling period is ended on the agency's receipt of the requester's response to the agency's request for information or clarification. This section also requires each agency to make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.

Furthermore, Section 6 prohibits an agency from assessing search fees if it fails to comply with time limits provided that no unusual or exceptional circumstances apply to the processing of the request. The terms "unusual circumstances" and "exceptional circumstances" are existing terms in the FOIA. "Unusual circumstances" occur when: there is a need to search or collect records from field offices, or other establishments; there is a need to search for and examine a voluminous amount of records; or there is a need for consultation with another agency or with more than two components within the same agency. The FOIA does not affirmatively define "exceptional circumstances," but does make clear that they cannot include "a delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." (OPEN Government Act, 2007) In addition, the statute provides that the "[r]efusal by a person to reasonably modify the scope of a request, or arrange an alternative time frame for processing the request . . . shall be considered as a factor in determining whether exceptional circumstances exist." (OPEN Government Act, 2007).

Section 7 requires agencies to establish: (1) a system to assign an individualized tracking number for FOIA requests received that will take longer than 10 days to process and provide to each person making a request the tracking number assigned to the request; and

(2) a telephone line or internet service that provides information on the status of a request.

Section 8 revises annual agency reporting requirements on compliance with FOIA to require information on: (1) FOIA denials based upon particular statutes; (2) average agency response times (previous requirements mandated reporting on the *median* response time); (3) compliance of each principal component of an agency and for the agency overall; (4) disclosure of data on the 10 oldest active requests pending at each agency, including the amount of time elapsed since each request was originally filed, and additional breakdowns depending on the length of delay; and (5) the number of fee status requests that are granted and denied and the average number of days for adjudicating fee status determinations by individual agencies. This section also requires agencies to make the raw statistical data used in reports electronically available to the public upon request.

Section 9 redefines "record" under FOIA to include any information maintained by a contractor for a federal agency. This language clarifies that an agency "controls" information even if it is maintained for it by a contractor. Some agencies had attempted to circumvent the FOIA by giving their records to contractors and then claiming those records were not subject to a FOIA request.

Section 10 establishes an Office of Government Information Services within the National Archives and Records Administration (NARA) to: (1) review compliance with FOIA policies; (2) recommend policy changes to Congress and the President; and (3) offer mediation services between FOIA requesters and administrative agencies as a non-exclusive alternative to litigation. Section 10 authorizes the Office to issue advisory opinions if mediation has not resolved the dispute.

Furthermore, Section 10 also requires each agency to designate a Chief FOIA Officer, who shall: (1) have responsibility for compliance with the FOIA; (2) monitor FOIA implementation; (3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA; and (4) facilitate public understanding of the purposes of the FOIA's statutory exemptions.

And finally, Section 10 requires agencies to designate at least one FOIA Public Liaison appointed by the Chief FOIA Officer. It requires that the liaison: (1) serve as an official to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the FOIA Requester Center; and (2) be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

Section 11 requires the Office of Personnel Management (OPM) to report to Congress on personnel policies related to FOIA. The report issued by OPM at the close of the Bush Administration fell short of Congress' intentions and the expectations of both government FOIA professionals and members of the public who regularly file FOIA requests. The report fails to recommend any meaningful action by OPM, but rather suggests a continuation of the status quo, with individual agencies having sole responsibility for FOIA personnel policies.

Section 12 requires agencies, in addition to the existing provision requiring the listing of exemptions and generally requiring agencies to indicate directly "on the released portion of the record" the amount of information deleted, to also indicate "the exemption under which the deletion is made."

The Federal Government has slowly begun to implement many of the requirements of the OPEN Government Act, signed into law on December 31, 2007. NARA announced the appointment of Miriam Nisbet as the director of the newly established Office of Government Information Services (OGIS) on June 10, 2009; the office became functional in late September of that year. Congress has dedicated \$1.8 million (FY2010) in funding at NARA to stand up the new office.

3.4.4. State of FOIA access

Over the years, attorneys general have issued memoranda setting out policy on FOIA requests. During the Clinton Administration,

³³ *Summers v. Department of Justice*. <http://pacer.cad.uscourts.gov/common/opinions/200906/07-5315-1193373.pdf>.

Attorney General Reno's memorandum (Reno, 1993) indicated that the Department of Justice would only defend an agency's refusal to disclose information when it could be argued that releasing the information would result in "foreseeable harm." The presumption was disclosure and agencies were encouraged (at least rhetorically) to release information.

3.4.4.1. Bush Administration—Ashcroft Memorandum. Attorney General Ashcroft's memorandum (Ashcroft, 2001), however, encouraged presumptive *non*-disclosure. The memorandum changes the standard under which the Justice Department will defend a challenged refusal of release. Under the new standard the Department will defend an agency as long as the decision rests on a "sound legal basis," a much lower standard than "foreseeable harm." Although the memorandum acknowledges the importance of government accountability, it also actively encourages federal agencies to "fully consider" all potential reasons for non-disclosure and emphasizes national security considerations, effective law enforcement, and the protection of sensitive business information.

Speaking in 2006, Senator Patrick Leahy said of the Ashcroft Memo (and the Administration in general),

The Bush-Cheney Administration sent a powerful message government-wide with the Ashcroft FOIA policy in 2001. That shifted the upper hand in FOIA requests from the public to federal agencies. The new policy says, in effect, "When in doubt, don't disclose, and the Justice Department will support your denials in court." It undermines FOIA's purpose, which is to facilitate the public's right to know the facts, not the government's ability to hide them. (Quoted in Mendoza, 2006)

3.4.4.2. Obama Administration—Holder Memorandum. On his first full day in office, President Obama issued a Presidential Memorandum on the FOIA, which opens by noting,

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike. (White House, 2009b)

The Memorandum directs that the Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. Agencies are directed to adopt a presumption in favor of disclosure that should be applied to all decisions involving FOIA, and to take affirmative steps to make information public, without waiting for specific requests from the public.

Moreover, the government is directed to not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. The President ordered the Department of Justice to issue guidance within 90 days. To say that the openness community was elated by the language of the Memorandum would be a tremendous understatement.

3.4.4.3. The Department of Justice. On Friday, January 24, 2009, the Department of Justice sent an e-mail (Hodes, 2009) to all FOIA Officers that said, among other things, "[t]he President's memorandum was effective immediately and supersedes former Attorney General Ashcroft's Memorandum on the FOIA dated October 12, 2001. As a result, agency personnel should immediately begin to apply the presumption of disclosure to all decisions involving the FOIA, as the President has called for" (Quoted in Hodes, 2009).

3.4.4.4. Attorney General Holder. On March 19, 2009, Attorney General Eric Holder issued much-anticipated comprehensive new guidelines (Holder, 2009) to the heads of executive departments and agencies governing the FOIA, directing them to apply a presumption of openness when administering the FOIA. It expressly rescinded guidelines issued on Oct. 12, 2001, by former Attorney General John Ashcroft.

The memo directs that FOIA denials will only be defended if an agency "reasonably foresees that the disclosure would harm an interest" protected by one of the exemptions to release or if it is prohibited by law; agencies must be "fully accountable" for administering FOIA; agencies should "readily and systematically post information online in advance of any public request"; and FOIA professionals within the agencies are "equally important" to any other component of application and accountability to FOIA and should have "full support" from their agencies as well as "the tools they need to respond promptly and efficiently to FOIA requests."

Unlike Attorney General Reno, 1993 memo, which explicitly required a review of "all pending FOIA cases" to ensure that Justice's outstanding positions were in compliance with the new standard, the Holder memo creates no such requirement on the Justice Department. It directs the Department to take into account and apply the guidance to pending cases "if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information." This sentence contains no less than six hedges and a well-placed "and"—placing the decision not only with the Justice Department's litigators but also in the hands of the very agencies that made the initial decision to deny the request—that could allow the government to decide to skip reviewing its position on a case.

3.4.4.5. Office of Information Policy (OIP). The Attorney General Guidelines were followed on April 17 by guidance from the Office of Information Policy (Office of Information Policy (OIP), 2009) that begins the process of assisting agencies in the implementation of President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines.

3.4.4.6. Open Government Directive. As noted earlier, the Directive instructs agencies to include in their plans—and one would presume on their open pages—a link to a website that includes information about their FOIA processing and processes, including a description of the staffing, organizational structure; the agency's capacity to analyze, coordinate, and respond to such requests in a timely manner; and if the agency has a significant backlog, milestones that detail how the agency will reduce its pending backlog of outstanding FOIA requests by at least ten percent each year.

The responses of the agencies were, as with the rest of the requirements of the Directive, mixed.³⁴

3.4.4.7. The White House. On March 16, 2010, White House Chief of Staff, Rahm Emanuel, and Counsel to the President, Bob Bauer, issued a Memorandum for Agency and Department Heads requesting that they update all FOIA guidance and training materials to include the principles articulated in the President's Memorandum [of January 2009], and to assess whether they are "devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority." (Emanuel, & Bauer, 2010).

³⁴ <http://sites.google.com/site/opengovtplans/>.

4. Conclusion

Whether Barack Obama has a one- or two-term presidency, the opportunities exist for real change in how the federal executive branch works with the public. The Obama Administration is taking the building blocks of statute and regulation, many of which have been in existence for decades and have had varying levels of fealty to their requirements, to begin to construct a culture of openness in the federal executive branch. This deployment of these existing tools is, in itself, a major step forward. However, as the Administration is finding it more difficult to note, it is going to take a lot of effort and time to turn the government (an aircraft cruiser in their metaphor) around. The process has begun; many of the agencies have embraced openness and are working to figure out how to “bake it in” and sustain it as part of their missions and strategies. There is, however, much to do and the openness initiative will require continued attention and oversight.

This progress and enthusiasm (at least as made publicly known) is happening largely in relation to information and processes that are not related to national or homeland security. The counterculture that Patrick Moynihan was talking about—to counter the secrecy systems in the federal government—is also underway. That process is slower and much more difficult though. It is also the subject for a different article.

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