

Sunshine in Government Initiative

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Media Coalition Recommendations for Action by the Obama Administration to Strengthen Transparency and Integrity in Government

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The past several years have witnessed a broad expansion of government secrecy. Federal agencies take longer to respond to requests for information under the Freedom of Information Act (FOIA), even though incoming requests have dropped across the federal government. The current administration's policy regarding discretionary disclosure encourages agencies to withhold information whenever possible. The federal government has not set up an independent FOIA ombudsman to help requesters, even though Congress created the position last year. Agencies and Members of Congress propose loopholes to FOIA with little discussion or debate. And senior officials too often insist on anonymity when conveying official administration policies or reactions to events. These restrictive tendencies have spread by example to the states.

To counteract years of growing government secrecy in a climate in Washington increasingly hostile to the people's right to know, the administration of President-elect Barack Obama should take immediate, concrete steps to strengthen open government.

The Sunshine in Government Initiative (SGI) consists of nine media organizations that believe in open government. Members include: **American Society of Newspaper Editors, The Associated Press, Association of Alternative Newsweeklies, National Association of Broadcasters, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and Society of Professional Journalists.** SGI applauds the growing number of leaders who pledge their commitment to transparency, honesty and integrity in government. We urge the next president to turn commitment into clear action. We also recommend that the Obama administration use technology to strengthen openness in the federal government.

Specifically, early in his administration, President Obama should:

1. **Restore the presumption of disclosure across the executive branch.**
2. **Create an independent, online ombudsman to help citizens access their government.**
3. **Ban agencies from proposing or endorsing unnecessary statutory exemptions from disclosure. Any new statutory exemptions proposed or supported by the administration should be limited in scope and life and include oversight.**
4. **Speak on the record, and urge his senior deputies and aides to do the same, in all statements about policy and current news about public matters.**

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Action Item #1: Restore the Freedom of Information Act's presumption of disclosure

FOIA establishes a statutory presumption that information should be disclosed absent a compelling reason to withhold. FOIA specifies that agencies must withhold certain information, such as properly classified information or tax returns, and gives agencies discretion to withhold other information, such as to protect personal privacy. Enacted in 1966, it places the burden squarely on agencies to justify withholding information from the American public. FOIA plays a key role in helping Congress and citizens ensure public oversight of government activities.

Traditionally, each new attorney general of an incoming administration establishes the new president's policy on disclosure under FOIA. Under then-Attorney General John Ashcroft, the current administration told federal departments and agencies that the Justice Department would support an agency using its discretion to deny requests whenever the agency has a "sound legal basis" for doing so. The policy sent a signal to agencies: When given a choice, withhold information. By reversing the presumption of disclosure, that policy reaffirms the culture among many government employees that considers public information the property of government agencies, not American citizens. The policy undercut the vital role the public plays in preventing and removing waste, fraud and abuse in government.

Recommendation: The Obama administration should establish as policy that federal agencies should disclose information unless disclosure would create a "foreseeable harm" to an interest protected by the express exemptions in FOIA.

Action Item #2: Set up a government-wide ombudsman to help citizens access their government

Despite receiving fewer requests for information under FOIA, agencies are taking longer to respond, denying more requests and falling further behind in answering public requests for information. And while many U.S. states have established freedom-of-information ombudsman offices, federal law until recently offered no alternative to litigation to help resolve disputes between federal agencies and the public. Many requestors run into obstacles or disputes with agencies – or between one agency and another – and their requests languish. Their only recourse is litigation, and few requestors can afford legal bills ranging up to \$150,000 simply to track down a document.

Last year, Congress authorized the creation of an independent ombudsman to mediate disputes and recommend changes to increase the efficiency of federal agencies' FOIA operations. This innovative change was part of the most significant FOIA reforms that Congress had enacted in a decade. Lawmakers placed the Office of Government Information Services (OGIS) within the National Archives and Records Administration to insulate it from political influence and assure independence. However, the current administration has opposed this office's creation. It wants the functions transferred to the Department of Justice, which defends agencies in FOIA lawsuits. Such a transfer would create an inherent conflict of interest. Even if this transfer were appropriate, the administration included no resources for Justice to establish and operate the office.

The impasse has blocked progress on creating OGIS. This delay has added to the FOIA backlog and stalled a key element in the FOIA reform law.

Recommendation: To help the public resolve disputes with agencies over access to information, the Obama administration should set up and fully fund the statutorily-created Office of Government Information Services within the National Archives. As this important office is established, the OGIS should explore online access for our nation's citizens to facilitating mediation services.

Action Item #3: Stop undermining the Freedom of Information Act with new statutory exemptions

The federal government must take special care that its efforts to safeguard information do not deprive citizens of critical information that has long been a part of the public oversight process. Exemption 3 of the FOIA law (5 USC 552(b)(3)) allows Congress to enact legislation which specifically allows for the withholding of information, as long as the legislation leaves no discretion to the agency or provides specific criteria for the agency to withhold information. It recognizes that Congress, not the executive branch, decides the circumstances under which the executive branch may withhold information otherwise subject to disclosure under FOIA. According to government agencies themselves, every year federal departments and agencies use roughly 140 statutes to deny thousands of requests for information; many more are on the books. The agencies themselves are often the originators of these new legislative loopholes.

Exemption 3 has been used to dig a vast sink hole beneath the foundations of open government. While some of these statutes may be reasonable, others should be reviewed and discarded. The FOIA itself adequately protects interests such as national security and personal privacy with eight other categories of exemptions.

Each new duplicative or unnecessarily broad FOIA carve-out tucked inconspicuously into a new statute sends a harmful and inaccurate message that every piece of legislation should include a blanket confidentiality provision. Some are duplicative of existing exemptions. They are never reviewed formally to determine if they are still needed or used properly. Most stay on the books forever once enacted.

Too often Congress writes these provisions into law without adequate public debate or even review by the congressional committees experienced with FOIA. While Congress should formally refer all such provisions to congressional committees overseeing FOIA for review, the new administration can and should take proactive steps to prevent further erosions of our democratic process.

Recommendation: The Obama administration should prohibit agencies from proposing new Exemption 3 statutes unless agencies determine that:

- 1. Existing statutory protections and exemptions within FOIA are not adequate**
- 2. The interest in withholding is specific and articulated**
- 3. The interest in withholding clearly is greater than the public interest in disclosure**
- 4. The exemption is publicly disclosed at the time it is proposed**

Further, any new proposals that meet the above criteria should be crafted narrowly to limit harm to the free flow of information. Specifically, each new proposal under Exemption 3 should:

- Clearly state its purpose and explain why the existing exemptions are inadequate
- Be narrowly drafted so as not to exceed the specific non-disclosure needs compelling the exemption
- Provide for public reporting that measures the efficacy of the exemption in achieving its stated goals
- Offers alternative and equivalent means of public oversight
- Have a built-in sunset provision
- Clearly state in the text of the statute that the proposal is not intended to inhibit whistle blowing
- Ensure any penalties for improper decisions in carrying out the statute are themselves balanced and without favor to withholding or disclosure

Recommendation: Any new statutory exemptions proposed or supported by the Obama administration should be limited in scope and life and include oversight.

Action Item #4: Put administration policy statements on the record

If history is any guide, the new administration may insist that senior officials explain policy positions or react to news events through interviews and briefings that are "not for attribution," meaning what is said can be reported but those officials are not identified. While background briefings can be useful to provide context and a more in-depth picture of a news event or issue, the public should see and hear senior officials' own words when they convey official reactions or policy positions.

Recommendation: Whenever making public statements reflecting the administration's views on policy or news events, the new president should speak on the record and direct senior officials to do the same.



About Us

The **Sunshine in Government Initiative** is a coalition of media groups committed to promoting policies that ensure the government is accessible, accountable and open.

Public oversight is the ultimate safeguard of democracy. This is not an issue just for the media. It is the inalienable right of citizens to examine and judge their government; and that right is served when news media act on behalf of the public to gain access to information.

Our Principles

1. An informed public is the cornerstone of our democracy. Open government instills public trust. Policies preserving access to information are essential to our national well-being.
2. Americans depend on news media to inform them about governmental activities and to exercise the right of access to appropriate government information on the public's behalf.
3. In a democracy, government must function under a presumption of openness, balancing this as necessary with legitimate national security needs and the confidentiality concerns of individual privacy.

The Freedom of Information Act should be preserved and strengthened. Over-classification, unconstrained nondisclosure agreements, and indiscriminate use of "sensitive" designations to withhold information ill serve our nation's security interests and thwart the public's right to know.