

# Secrecy Secrecy report

INDICATORS OF SECRECY
IN THE FEDERAL GOVERNMENT

(formerly Secrecy Report Card)

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#### **About OpenTheGovernment.org**

OpenTheGovernment.org is a coalition of consumer, good government and limited-government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust through government accountability, and support our democratic principles. Our coalition transcends partisan lines and includes progressives, libertarians, and conservatives.

To join the coalition, individuals are invited to read and sign the Statement of Values. Organizations are welcome to visit our site, read the Statement of Values, and contact us if interested in becoming a coalition partner. <a href="https://www.OpenTheGovernment.org">www.OpenTheGovernment.org</a>.

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# **Secrecy Snapshot**

FIRST CONGRESSIONAL ASSERTION OF EXECUTIVE PRIVILEGE BY THE OBAMA ADMINISTRATION

AS FOIA REQUESTS INCREASED BY 5%, PROCESSING SPED UP, BUT BACKLOGS GREW BY 20%

FEDERAL CIRCUIT COURT WHISTLEBLOWER DECISIONS: 3-226 AGAINST WHISTLEBLOWERS

#### **CLASSIFIED INFORMATION**

- National/Military Intelligence Budgets Disclosed
- Security-Cleared Population Reaches New Reported High
- Original Classification Decisions Fall by 44%; Lowest Since 1996
- \$215 Spent Keeping Secrets for Every Dollar Spent on Declassification
- National Declassification Center—Progress Made, But Goal Not Reached
- Success of Mandatory Declassification Leads to 8% Growth in Requests, Continued Rise in Backlogs
- Classification Challenges Plummet by 90%
- State Secrets Privilege Policy: Impact Unclear, IG Referrals Unknown

**INVENTION SECRECY ORDERS IN EFFECT RISE BY 2%** 

**USE OF NATIONAL SECURITY LETTERS CONTINUES TO INCREASE** 

FOREIGN INTELLIGENCE SURVEILLANCE COURT (FISC) APPROVALS RISE 11%

# Measuring Secrecy in the Federal Government – What Do We Know?

In a famous musing, Donald Rumsfeld said, "There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know." His comment is a pretty accurate assessment of our problems in measuring, much less evaluating, the extent of secrecy and openness in the executive branch of the federal government. In this introduction to this year's Secrecy Report we look at our known -knowns and -unknowns.

Measuring what it is we actually know about the openness of the American government is not a straightforward endeavor. Information available to the public provides inconsistent and partial indicators about whether our government is becoming more, or less, open. In some areas, the information needed to know what the Executive Branch is doing and to hold it accountable to the public is not available at all. In two recent instances, information previously withheld (the national intelligence budget and the number of security-cleared personnel) has been made public. But in the former, it could be withheld in the future; in the latter, Congress may remove the requirement for the report. And then there are the unknown unknowns, which are immeasurable.

Any discussion of measuring executive branch secrecy must be carried out with a clear understanding, though, that having information about the quantity of secrets kept by the federal government tells us nothing about their quality. Thus, one of the most difficult issues for the public is knowing and assessing the relative importance of information held secret (or otherwise withheld) by the government. The government collects and creates a lot of information, some of which it has a legitimate interest in keeping secret for periods of time. Executive Orders on national security classification establish the standards for the proper classification, and thus protection, of information and implementing policies determine which and how many people may have access to a particular pieces of such information. In practice, though, we know that much more information is treated as needing the protection afforded to appropriately classified information than is warranted by the content.

Experts in the field of national security estimate that the amount of material that is over-classified by the federal government ranges from 50% – 90%. At least one existing data point—the success rate of federal employees who challenge the classification of a document—covered in this report and its predecessors, supports the argument that the quality of many of the secrets the US is keeping is low. Executive Order 13526, issued in December 2009, encourages authorized holders of classified information to challenge the classification status of information that they believe, in good faith, to be improperly classified. In 2011, the classification level was overturned in part or in full 48% of the time.<sup>3</sup>

<sup>1</sup> Statement by Secretary of Defense Donald Rumsfeld on February 12, 2002 at a press briefing where he addressed the absence of evidence linking the government of Iraq with the supply of weapons of mass destruction to terrorist groups. http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636

<sup>2</sup> Blanton, T. (2010) Statement of Thomas Blanton, Director, National Security Archive, George Washington University, Committee on the Judiciary U.S. House of Representatives Hearing on the Espionage Act and the Legal and Constitutional Implications of WikiLeaks Thursday, (111th Congress) December 16, 2010. Retrieved from http://judiciary.house.gov/hearings/pdf/Blanton101216.pdf.

<sup>3</sup> In an e-mail communication responding to a question if challenges always reduced or eliminated the level of classification,

Beyond the improper classification question is a more fundamental one: is the government's secrecy hindering the possibility for the public to engage in critical policy decisions and to hold the government accountable? Measuring this is impossible using known metrics, and this makes it difficult to weigh the import of one secret against another. It seems obvious, though, that the government's decision to finally release formulas for secret ink written in 1918 (and already available from other sources) should not be weighted equally against its decision to deny the public access to legal opinions from the Office of Legal Counsel (OLC) that justify the use of drones to kill American citizens and others.

#### **Other Information Not Currently Available**

The public can use some government statistics to see if the government is abiding by regulations, and meeting its own policy objectives. Such statistics can also be used to determine if a change in the government's policy translates into real world differences. For example, researchers and advocates use numbers from required annual reports by agencies on Freedom of Information Act (FOIA) processing to monitor whether the government is fulfilling FOIA requests with a presumption that the information should be released. Other indicators that would help the public understand the effect of the Administration's FOIA policy are not available, and—to our knowledge—are not even being tracked internally.

Statistics on FOIA cases DOJ has declined to defend based on Attorney General Holder's FOIA policy, if any, would be particularly helpful in monitoring the government's compliance with FOIA objectives.<sup>4</sup> Holder's policy rescinded the previous policy of the Bush Administration, explicitly providing that DOJ will defend an agency's denial of a FOIA request in only two instances: (1) the agency reasonably foresees harm to an interest protected by the FOIA's exemptions from disclosure; or (2) disclosure is prohibited by law. There are two major exceptions where President Obama seriously deviated from the previous administration: the White House e-mail case and the White House visitor log case. To date, though, DOJ has refused to release any statistics that would reveal the number and kind of any other cases where DOJ has refused to defend agency withholdings once in litigation. Anecdotal evidence from frequent FOIA litigators suggests the Obama Administration has not deviated much, if at all, from the FOIA litigation stances taken by the previous administration, but this cannot be confirmed without statistics on the current DOJ practice. Releasing at least aggregate data on the number of other cases DOJ has declined to defend would help the public determine whether DOJ is complying with the Attorney General's FOIA mandates.

A similar case can be made about cases closed off<sup>5</sup> by the state secrets privilege assertion: DOJ should begin to track and release information about its referrals to Inspectors General (IGs), as required by its own policy. In 2009, the Attorney General announced a generally-applauded new state secrets policy intended to set internal checks and balances on the use of the privilege. The new policy required DOJ to refer cases not allowed to go forward to trial to the relevant IG where there are credible allegations of government wrongdoing. The applause quickly ended and turned to skepticism, though, as the government continued to use the privilege in just the same way as prior to the policy and to not indicate if any referrals were actually made. Releasing at least the aggregate number of cases referred to IGs after they were ended by the asser-

officials at ISOO indicated that, "In our collective experience, the majority of challenges are seeking to reduce/eliminate classification."

<sup>4</sup> Commentary by Anne Weismann, Chief Counsel, Citizens for Responsibility and Ethics in Washington (CREW).

<sup>5</sup> In recent history, the government has expanded the use of state secrets from an evidentiary privilege – meaning it could be used only to exclude certain pieces of information from the evidence in a case – to an exclusionary reason to stop a case from coming to trial at all.

tion of the state secrets privilege would provide accountability that DOJ is following its policy and keeping its promises. To date, requests for this information have been denied.

#### **Known Knowns and Their Discontents**

#### **PUBLIC DATA**

Data that helps the public understand what the government is doing is a great tool for accountability. Access to meaningful, good quality, data is an essential tool for evaluating what the government is doing. This data can be used to determine if the government is making the best use of scarce resources, if its actions align with stated policy goals, if policies need to be changed to handle obstacles, what interests are influencing it, and more. If the data is not available, or misleading in some way, it throws off our overall assessment of the government and our trust in its actions.

Not all of the data the government makes available, however, is enlightening, either because the quality of the data is not very good, or because it is not providing a count of anything meaningful. Often, the available data is not reliable, or it is collected and presented in a way that is confusing or misleading. In other instances, the information available tells only part of the story about what is going on in the federal government, and what interests are influencing it.

#### **Quality Issues of Quantitative Data**

Low quality data hinders efforts to monitor the government's compliance with laws, policies, and regulations. For years, quality issues plagued efforts to measure the government's FOIA performance. Researchers and advocates who attempted to use agencies' annual FOIA reports noted year-to-year inconsistencies (for example, the agency would report beginning the fiscal year with a smaller or larger backlog than they reported ending with in the previous report), and what seemed to be basic math problems.

The data quality problems became more apparent to the general public in 2009 when DOJ began making the reports available in electronic formats and it launched a portal, FOIA.gov, to allow users to compare and combine the statistics. Since then, DOJ has taken steps to improve the quality of the data that agencies feed into the site. DOJ has also added granularity to some of the numbers by, for example, showing the breakdown between the cost of processing FOIA requests and the cost of FOIA litigation. The improvements to data driven by launch of FOIA.gov are a positive development. Unfortunately, though, DOJ's efforts to improve the data are limited to only the most current years.<sup>6</sup>

Similar problems with comparability have recently emerged<sup>7</sup> in the annual report on classification and declassification from the Information Security Oversight Office (ISOO). In one example the change, while making comparability over time impossible, is important because we have a more accurate reflection of the volume of material which will one day have to be declassified. Specifically, in 2009, ISOO decided to change its methodology to present a much more accurate picture of the size of the classified universe and expanded

<sup>6</sup> FOIA.gov can only be used to compare government-wide FOIA performance from fiscal year (FY) 2010 on. While some data is available for FY2008 and FY2009, numbers from several agencies are omitted for those years. Issues with the numbers agencies reported prior to 2008 are even more problematic because agencies were not all counting the same thing. For several years, several agencies (particularly the Department of Health and Human Services and the Department of Veterans Affairs that processed millions more PA requests than FOIA requests per year) included statistics on the number of Privacy Act (PA) requests processed in their annual FOIA report.

<sup>7</sup> On which we have reported in previous editions of the Secrecy Report.

its count of derivatively-classified information to include derivatively-classified e-mails, which caused an exponential increase in the numbers reported.

The completeness of some of the information ISOO receives from agencies to prepare its report is also the subject of concern. Most notably, reports of original classification activity<sup>8</sup> by some agencies seem artificially low: the Central Intelligence Agency (CIA) reported a mere 4 original classification decisions in FY2011—a number that puts it more in line with the Millennium Challenge Corporation, an independent foreign aid agency that fights global poverty—than with its companions in the field of intelligence collection. Overall and as would be expected, ISOO's aggregate count of original classification activity is dominated by the Department of Defense and Department of State, with sizable contributions from the Department of Justice, the Army, and the Executive Office of the President.

#### **Informational Value**

Some data points made available by the government do not tell the public much about the issue at hand. Government indicators are sometimes collected and presented in a way that is easiest or most informative for the government, but confusing for the public. In even more problematic cases, the flaws in the data point are a product of holes in the underlying policies.

A good example of government data that is simply confusing is the statistic on FOIA processing time. Currently, agencies report only on the average amount of time it takes to process "simple" (a term open to interpretation) and "complex" requests, including the time for the agency to search for and prepare government records, along with any delays created by the requester, or by another agency that reviews the document as a consult or on referral. The lack of granularity in the statistic makes it not very useful for the public, Congressional overseers, and federal managers interested in measuring the government's performance. A more informative set of data would list the number of hours in "Total Processing Time" (since the date the request is received), "User Delay" (while the case is closed while agency is waiting to hear from requester), "Consult delay" (while the agency waited to hear back from another agency on a consult), and "Referral Delay" (while an agency waited to hear back on a referral).

The flaws in the government's data on implementation of the Federal Advisory Committee Act (FACA) are on the more problematic side of the spectrum, and have led us to drop the statistic from this year's Secrecy Report. FACA is an open government law that is intended to help make advisory committees objective and open to the public. The General Services Administration (GSA) maintains a website that enables users to download basic information such as the number of federal advisory committees that are active and the cost of operating the committees. Information is also available that is supposed to let the public know the number of meeting each committee holds, and how many of those meetings are open to the public. These statistics are wildly misleading as to the extent of the exclusion of the public from the working of Advisory Committees, however, because meetings conducted by subcommittees and informal working groups are not subject? to the public participation and public notice requirements of the FACA.

<sup>8</sup> Original classification activity is defined as an initial determination, by a person who has original classification authority, that a piece of information requires protection because its unauthorized disclosure could reasonably expected to cause damage to national security.

<sup>9</sup> In passing FACA in 1972, Congress intended for the federal government to receive open scientific and technical advice, which is free from the undue influence of "any special interest." Congress allowed certain exceptions but wrote directly into the law its assumption that "(e) ach advisory committee meeting shall be open to the public."

#### **CAMPAIGN FINANCE AND EXPENDITURES**

Two of the most talked about transparency issues in the last few years are campaign finance and campaign expenditures. Though not covered in this report, we believe the issue deserves mentioning for its own issues of known-knowns and -unknowns, and also unknown unknowns. Federal rulings, including the Supreme Court's 2010 *Citizens United* decision, reshaped national campaign finance laws in recent years. None of these changes to the system directly affected the public's right to get information about campaign finance (in fact, the Supreme Court voted 8-1 to uphold current disclosure requirements), but they did help bring about an intense focus to the importance of transparency in campaign finance, and to the holes in our current disclosure regime.

One particular hole in that regime, written about by groups like the Center for Responsive Politics (opense-crets.org) and others, is the role of not-for-profit "social welfare organizations" in funding electioneering communications.¹º Unlike Super PACs and other political organizations, social welfare groups—commonly called 501(c)(4)s after their location in the IRS Code—are not required by law to disclose their donors. While such groups are legally constrained from heavy involvement in campaigns by the requirement that they limit their political activity to less than half of their operation, the definition of "social welfare" is loose and, to date, the IRS has not done much oversight to verify the expenditures of groups claiming this status. As a result, some of these groups have spent extraordinary amounts of money attacking or supporting candidates—and voters are left in the dark about the sources of their support.

In a new twist that shows just how effectively the lack of definitional clarity and of effective oversight of 501(c)(4)s can be manipulated to partisan political ends, a <u>report</u> by the Center for Responsive Politics shows many Super PACs funnel nearly all of their contributions to the social welfare organizations to avoid disclosure requirements, making it impossible for the public to know who is funding a campaign advertisement.

The DISCLOSE Act, Congress' effort to help close the abuse of 501(c)(4) status and to increase other disclosure requirements, has been blocked in the Senate. The bill would require any group—not just (c)(4)s—that spends more than \$10,000 on political advertisements to file a report each time it does so, and to disclose the names of donors of more than \$10,000. Donors who specify that their contributions are not to be used for political purposes would be exempt.

<sup>10</sup> The decision reached the Supreme Court on appeal from a July 2008 decision by the United States District Court for the District of Columbia. Section 203 of BCRA defined an "electioneering communication" as a broadcast, cable, or satellite communication that mentioned a candidate within 60 days of a general election or 30 days of a primary, and prohibited such expenditures by corporations and unions. The lower court held that §203 of BCRA applied and prohibited Citizens United from advertising the film Hillary: The Movie in broadcasts or paying to have it shown on television within 30 days of the 2008 Democratic primaries The Supreme Court reversed, striking down those provisions of BCRA that prohibited corporations (including nonprofit corporations) and unions from spending on "electioneering communications." Liptak, Adam (2010-01-21). "Justices, 5 – 4, Reject Corporate Spending Limit". New York Times.

Filling the gap in our knowledge as effectively as possible, several of our coalition partners and other allies have created tools that add context to what campaign finance information is available and make it more user-friendly. Below is a quick guide to resources our coalition partners and others have available on campaign finance transparency. If you want to:

- Get the story behind that super PAC/non-profit/big donor: <u>Center for Public Integrity</u>'s <u>Consider</u> the source
- Get the financial details for a PAC/Member of Congress/political race: <u>OpenSecrets.org</u> or <u>Sunlight</u> Foundation's Follow the Unlimited Money
- See who's funding your Representative, Senator, or Presidential candidate's campaign:
   OpenSecrets.org
- View Super PAC contributions by candidate: Follow the Unlimited Money
- Look up donors by location: OpenSecrets.org
- View events and invitations to fundraisers: Sunlight Foundation's Party Time
- Track Electioneering Expenditures: Follow the Unlimited Money
- Review the legal and political arguments surrounding corporate personhood and elections:
   SourceWatch.
- Research political time sold or given away by licensed broadcast television stations: https://stations.fcc.gov

**In sum,** data issues, including those discussed above, can be dealt with over time. We can push the federal government to improve their data collection. We also can begin to collect and look at data in more informative ways on our own. The known-unknowns, though, are likely to continue to hinder complete and meaningful assessments of the state of secrecy. What follows is our best effort to do so with the information at hand.

### 2012 Secrecy Report

This report on trends in secrecy and openness in Fiscal Year 2011 includes data from almost three years of the Obama Administration (January 2009 – October 2011). Creating and maintaining open and accountable government requires the committed focus of both the public and the government. What follows is a brief look at how the main indicators we examine have changed over time. Unless otherwise noted, all years are Fiscal Years (FY).

In this year's Report, we have invited analytic commentary on a number of indicators from members of the coalition's Steering Committee. We have noted where those occur and who provided them.

OpenTheGovernment.org issued the first Secrecy Report Card in 2004, chronicling the trends in secrecy and openness in 2003. As readers will recall, that was the year of the U.S. invasion and occupation of Iraq and the third year of the Bush-Cheney Administration. Over the course of that Administration, we charted a significant increase in secrecy which led to a decrease in accountability—to the public and to Congress.

Over the last few years, the reports have generally revealed a trend towards openness as indicators began to creep away from the high-water marks of the mid-2000's. Last year's report showed a continuing downward trend in secrecy in most areas except those within the national security bureaucracy.

#### A Note on the Indicators

OpenTheGovernment.org seeks to identify measurable indicators that can be used as benchmarks to evaluate openness and secrecy in government in the United States. We include data based on three criteria:

- data that show trends over time;
- data that have an impact across the federal government or the general public; and
- data that already exist and require little or no further analysis.

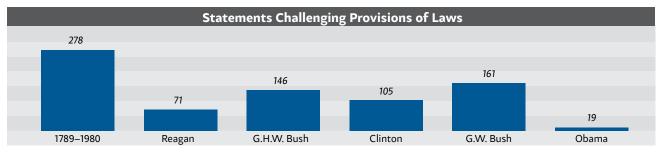
These indicators are not intended to be comprehensive; there are many indicators out there that could be included. We will continue to adjust the indicators as they fit the focus of this report.

## **2011 Trends in Secrecy and Openness**

#### **Presidential Signing Statements**

While President George W. Bush was not the first President to issue signing statements, he did receive a significant amount of attention and no small measure of criticism for making an unprecedented number of signing statements in conjunction with the enactment of bills passed by Congress. The controversy brought public attention to what was a generally obscure practice, but signing statements themselves, whatever the reasons asserted for their use by a president, remain hard for the public to find and track.

President Obama decried the use of signing statements and the lack of transparency around them as a candidate. However, he has continued to use them, albeit at a lower rate, and has not made them much more transparent. In order to find signing statements issued by President Obama on the White House's website, the public must sort through an ever-growing list of Presidential statements and releases. Surprisingly, they are not grouped together under "Legislation," or anywhere else on the site. Fortunately, a site maintained by Joyce Green, a private attorney, makes information about signing statements since 2001 easily available.



Source: Presidential Signing Statements, http://www.coherentbabble.com/signingstatements/signstateann.htm; Accessed June 28, 2012.

As noted by Kevin Goldberg<sup>11</sup> for this Report, today's signing statements are more akin to a press release commenting – usually negatively – on the bill before the President, with the most common complaint being the perceived unconstitutionality of one or more of the bill's provisions. In the extreme, the President may make an outright statement that he will not enforce those particular provisions. Opponents of the President's use of signing statements say that the Constitution is clear: if the President does not like a bill for any reason, his only option is to veto the bill. Supporters of the signing statement say that it is just one tool available to the President in his fulfillment of the Constitution's requirement to "take care that the laws be faithfully executed."

In total, President Obama has issued nineteen signing statements since taking office. Eleven of them challenge specific provisions, seven are ceremonial, and one discusses an inadvertent drafting error in the legislation. This number continues to be significantly lower than previous modern presidents.

<sup>11</sup> Legal Counsel, American Society of News Editors

In calendar year 2011, President Obama issued six signing statements.<sup>12</sup> Of the 2011 statements, only two were ceremonial.<sup>13</sup> Most of the signing statements during 2011 challenged specific provisions of the law; these include:

- A statement on provisions in the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (P.L. 111-383) that bar the use of funds to transfer prisoners at Guantanamo Bay into the United States or to foreign countries, respectively;
- A statement on similar provisions in the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (P.L. 112-10);
- A statement that several provisions of the Consolidated Appropriations Act, 2012 (P.L. 112-74) were unconstitutional restrictions on Executive Branch authority;<sup>14</sup> and
- The expression of "serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists" within the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81), a bill he supported on the whole.

#### **Executive Privilege**

Obama invoked the claim for the first time<sup>15</sup> in June 2012 in response to a subpoena issued by the House Committee on Oversight and Government Reform, chaired by Representative Darrell Issa (R-CA).<sup>16</sup> The White House instructed the Department of Justice to refuse to provide any more documents (beyond the several thousand pages of materials provided upon request from Chairman Issa). A letter from Deputy Attorney General James Cole asserted that the documents discussed "sensitive law enforcement activities, including ongoing criminal investigations and prosecutions." The Administration's invocation of the privilege led to a June 22 Committee recommendation that Attorney General Eric Holder be held in contempt of Congress, which the Republican-led House did just one week later—the first time a sitting Attorney General has been held in contempt of Congress.

In a commentary for this Report, Kevin Goldberg notes that the relationship between the legislative and executive branches has never been entirely friendly. Each branch views itself as the ultimate authority on the law and exerts its power in different ways: the Executive by putting its own twist on legislation via the regulations and enforcement actions it uses to implement laws; Congress by passing laws to reverse Executive actions with which it disagrees and by engaging in congressional oversight hearings. This latter action can, at times, lead to directly hostile interactions between the two.

<sup>12</sup> http://www.coherentbabble.com/listBHOall.htm

<sup>13</sup> http://www.coherentbabble.com/Statements/SShr847111th.pdf A statement of honor and remembrance in signing the James Zadroga 9/11 Health and Compensation Act (P.L. 111-347) which provides access to health care resources for those suffering health issues as a result of the attacks on the World Trade Center in 2001; and http://www.coherentbabble.com/Statements/SShr4-PL112-9.pdf A statement of happiness the relief offered to small business owners as he signed into law the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 (P.L. 112-9).

<sup>14</sup> Although the bill would have to be signed to keep the federal government operating in the face of a potential government shutdown.

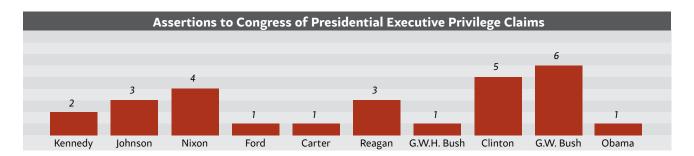
<sup>15</sup> Vis-à-vis Congress; in litigation, the Administration has relied on aspects of executive privilege.

<sup>16</sup> The subpoena sought documents relating to the Bureau of Alcohol, Tobacco and Firearms' "Fast and Furious" program that was designed to follow the travels of US-made weapons to Mexican drug cartels. Congressional inquiries began after 2500 such weapons went missing and two were found near the body of a slain US Border Patrol Agent. They escalated when an Assistant Attorney General told a Senate Committee that no such program even existed.

Congress may attempt to collect information from Executive Branch officials regarding regulatory policy and enforcement action by inviting those officials to testify before Congressional Committees, and it might request written testimony or reports or even the production of documents. The Executive, for its part, often complies, but not always. Resistance takes many forms, though it rarely entails the ultimate snub of refusing to comply altogether and, instead, invoking Executive Privilege.

The concept of Executive Privilege, while not explicitly mentioned in the Constitution, dates back to our very first President. George Washington initially refused (but later relented) to provide documents to Congress relating to military defeat in battle with American Indians at the Battle of Wabash in 1791. Washington insisted that the branches of government must be separately maintained.

Since then, several Presidents have asserted the privilege with perhaps the most famous assertions coming from Richard Nixon during the Watergate investigations in 1973 and 1974. But even Nixon only asserted the privilege four times, not completely out of line with his contemporaries, as you can see from this list:



#### The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) holds tremendous promise in terms of our ability to oversee the actions of government in several ways that serve the public interest. From combating government waste, fraud and abuse, to simply ensuring that our roads, bridges, highways and infrastructure remain safe, the FOIA statute is a key aspect of our democratic society.

However, as Goldberg comments for this Report, many sophisticated users of FOIA remain tremendously disappointed with the law's implementation, as the reality of using FOIA does not always match the promise of a law whose primary purpose was described by the United States Supreme Court as "disclosure, not secrecy." Long waits for responses and production of records, overly-broad invocation of exemptions, and inconsistent and over-application of processing fees are just a few of the hurdles faced by a requester who wants his or her records *now*.

The problem is partly cultural. Government officials like to control the flow of information; their default is generally toward withholding any information that might be used against them. But the scope of the problem is really much broader: the system often fails under its own weight. It is very easy to file a FOIA request; in fact, it gets easier every year, thanks to online "letter generators" which require a potential requester to do little more than select from several drop-down menus and fill in a few blanks before mailing—or even faxing or e-mailing—a request to the agency a requester believes has records that suit that requester's needs.

<sup>17</sup> Department of the Air Force v. Rose, 425 U.S. 352 (1976)

But what happens when anyone can file a request without any real idea of how to draft a good request, one that "reasonably describes such records"?¹8 Well, often people file very broad requests, and underfunded, understaffed, technology-deficient FOIA offices sometimes simply cannot keep up. Agencies are supposed to decide within 20 days of receiving a request "whether to comply with such request" and are required to "immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination."¹9 The agencies, however, often take much longer to provide that initial response, let alone produce the requested records. Delays can sometimes have to do with politics and substance. Taking these out of the equation, though, and looking objectively at the processing statistics alone, it is easy to see why many reporters, students, and others working within a stated deadline end up frustrated and turn to other sources for information about government activities.

The numbers we provide below give a sense of the process of FOIA, but not the substance. The completeness or usefulness of the information that requesters do receive, while essential and central to the intent of the Act, is beyond the scope of this report.

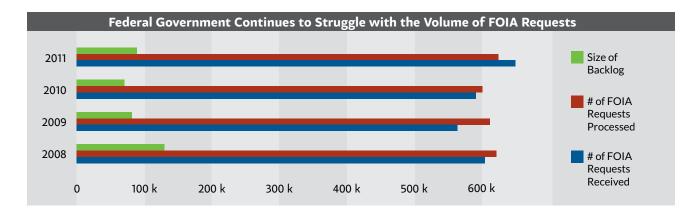
The Department of Justice launched FOIA.gov in March 2011. The site is intended to make it easier for the public to use and compare annual FOIA statistics. The site includes data from FY 2008<sup>20</sup> through FY 2011. The FOIA statistics reported below are a rough indicator of the federal government's compliance with the Act's requirements.

In FY 2011, the number of requests sent into the federal government grew by 5% from FY 2010 (600,849 to 631,424), and the federal government processed almost 8% more requests than the previous year (644,165 compared to 597,415). The increased processing marks a four year high and would have been sufficient to handle all requests received in any of the previous three years. However, because of the increase in requests, the gain in productivity did not translate into backlog reduction. Instead, the FY 2011 backlog grew by about 20% (from 69,526 to 83,490).

<sup>18 5</sup> U.S.C. 552(a)(3)(A)(i).

<sup>19 5</sup> U.S.C. 552(a)(6)(A)(i)

<sup>20</sup> FY 2008 and FY 2009 do not include statistics from all agencies.



The government-wide backlog rose in FY 2011 for the first time since FY 2008 (the first year where we have comparable numbers).

	Public Requests under the Freedom of Information Act <sup>22</sup>					
Fiscal Year	# of FOIA Requests Received	# of FOIA Requests Processed	Size of Backlog			
1999	1,908,083	1,939,668	156,429			
2000	2,174,570	2,214,402	169,180			
2001	2,188,799	2,236,796	177,969			
2002	2,429,980	2,428,496	148,599			
2003	3,266,394	3,260,694	155,343			
2004	4,080,737	4,057,739	178,809			
2005	19,950,547	19,908,571	220,097			
2006	21,412,736	213,844,435	247,867			
2007	21,758,628	21,792,896	217,237			
2008	605,471	623,186	133,295			
2009	557,825	612,893	77,377			
2010	597,415	600,849	69,526			
2011	644,165	631,424	83,490			

Source: Summary of Annual FOIA Reports; 2011 statistics accessed 6/28/12 from www.foia.fov

Since 2007, DOJ has directed<sup>22</sup> agencies to include a listing of the 10 oldest pending FOIA requests in their annual FOIA reports (this requirement was codified in the OPEN Government Act). For 2011, the ten oldest requests across the federal government are all at the National Archives and Records Administration (NARA), with the oldest having been filed on September 28, 1992. NARA's report notes that all of the oldest requests are "consultations" pending with other agencies for declassification review.<sup>23</sup>

<sup>21</sup> Numbers for requests received and processed, and the size of the backlog are not directly comparable across all years. Several agencies used to include first-person Privacy Act (PA) requests in their annual FOIA report totals. Beginning in FY 2008, under guidance from the Office of Information Policy (OIP), agencies stopped this practice resulting a significant shift in numbers.

<sup>22</sup> Department of Justice, Supplemental Guide for Preparation and Submission of Section XII of Agency Fiscal Year 2007 Annual FOIA Reports, FOIA Post, October 16, 2007. http://www.usdoj.gov/oip/foiapost17.htm

<sup>23</sup> Tom Blanton reports that "We understand from NARA that they have already completed 5 of those 10 just in the period between the February report and now—which certainly testifies to the value of flagging the 10 oldest, a metric the Archive invented with our FOIA audit back in 2003 (see http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm).

Prior to 2010, agencies reported only aggregate costs of FOIA that included both the cost of processing requests and the cost of related litigation. Statistics for 2010 and 2011 report the individual cost components. In 2011, the federal government spent almost 5% more processing FOIA requests than in 2010. The amount spent per request fell about \$2.50 per request.

Year	Cost of Processing FOIA Requests	# of Requests Processed	Cost / Request Processed
2010	\$394,222,134.00	600,849	\$656.11
2011	\$412,647,829.50	631,424	\$653.52

#### **Whistleblowers**

#### **OFFICE OF SPECIAL COUNSEL (OSC)**

The OSC, on which we are reporting for the first time this year—with assistance from The Project on Government Oversight (POGO)—is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting covered employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.

The agency also provides a secure channel for disclosures by covered federal employees and applicants of wrongdoing in government agencies. <sup>24</sup> Federal employees, former federal employees, or applicants for federal employment may disclose violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. Many disclosures involve complex and highly technical matters unique to an agency's or whistleblower's duties, such as disclosures about aviation safety, engineering issues, and impropriety in federal contracting.

According to Special Counsel Carolyn Lerner,<sup>25</sup> the OSC's FY 2012 caseload is currently 10% above the FY 2011 numbers, and in whistleblower disclosures of waste, fraud, and abuse, OSC's numbers are up 32% over last year's level.

Disclosure complaints received by OSC from federal whistleblowers—over 900 every year—can result in substantial financial benefit for the government. Three cases alone in recent years restored well over \$8 million to the government.

<sup>24</sup> Additionally, it enforces and provides advice on Hatch Act restrictions on political activity by government employees, and enforces employment rights secured by USERRA for federal employees who serve their nation in the uniformed services.

<sup>25</sup> Special Counsel Carolyn Lerner (U.S. Office of Special Counsel). "Testimony before the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia." (Date: 3/20/12). Accessed 8/17/12.

<sup>26</sup> Ibid. One recent disclosure identified a \$1.6 million reimbursement due to the Department of the Army as a result of contracting irregularities. Another whistleblower from the Department of Homeland Security informed OSC that employees were improperly paid Administratively Uncontrollable Overtime, and halting these improper payments saved the government about \$2 million. A U.S. Army whistleblower disclosed to OSC that an \$8 million (contact) was largely wasted, and that the Army had received almost no deliverables. The Army will recoup over \$4 million.

Summary of Whistleblower Disclosure Activity: Receipts and Dispositions						
Fiscal Year	2006	2007	2008	2009	2010	2011
Pending disclosures carried over	110	69	84	128	125	83
New disclosures received	435	482	530	724	961	928
Total disclosures	545	551	614	852	1086	1011
Disclosures referred to agency heads for investigation	24	42	40	46	24	47
and report						
Referrals to agency IGs	10	11	9	10	2	5
Agency head reports sent to President and Congress	24	20	25	34	67	22

Results of Agency Investigations and Reports						
Disclosures substantiated in whole or in part	21	19	22	30	62	21
Disclosures unsubstantiated	3	1	3	4	5	1
Disclosures processed and closed	478	467	488	727	1006	870

Key functions of the OSC are to investigate allegations of whistleblower reprisal, seek corrective action for whistleblowers who have suffered retaliation, and recommend disciplinary action against retaliators. Of the 4,027 new matters OSC received during FY 2011 (not including requests for advisory opinions on the Hatch Act), 2,583 or 64% were new Prohibited Personnel Practices<sup>27</sup> complaints. Allegations involving reprisal for whistleblowing accounted for the highest numbers of complaints resolved and favorable actions obtained by OSC during FY 2011.<sup>28</sup>

According to the OSC,<sup>29</sup> in FY 2012, the Office of Special Counsel is on pace to secure 156 favorable actions for federal employees who have been victims of reprisal for whistleblowing or other prohibited personnel practices—an 86% increase over FY2011 (83) and an all-time high for the agency. The previous high was 92 favorable actions in 2010.

Summary of All Prohibited Personnel Practice Complaints Received						
Fiscal Year	2006	2007	2008	2009	2010	2011
Pending Complaints-Carried over	521	386	358	474	769	863
New Complaints Received	1805	1970	2089	2463	2431	2583
Total Complaints	2326	2356	2447	2937	3200	3446

#### FEDERAL CIRCUIT COURT RULES AGAINST WHISTLEBLOWERS

Federal whistleblowers still face daunting odds, however, at the appeals court that has a monopoly on reviewing Whistleblower Protection Act cases, the Court of Appeals for the Federal Circuit. Since Congress passed amendments strengthening the Whistleblower Protection Act in October 1994, the track record of all Federal Circuit whistleblower decisions is 3-226 against whistleblowers. An overview of trends<sup>30</sup> in 171<sup>31</sup>

<sup>27</sup> http://www.osc.gov/pppwhatare.htm

<sup>28</sup> U.S. Office of Special Counsel Fiscal Year 2011 Annual Report, page 12. Favorable actions can include reinstatement, stays of pending personnel actions, restoring an employee's performance record, and also disciplinary actions against managers who retaliate. http://www.osc.gov/documents/reports/ar-2011.pdf

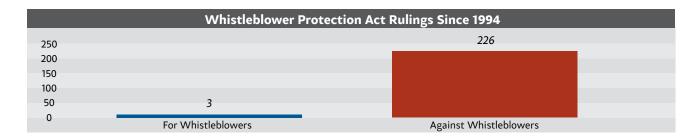
<sup>29</sup> U.S. Office of Special Counsel, "Fiscal Year 2013 Congressional Budget Justification and Performance Budget Goals." (pg. 10). Accessed 8/17/12.

<sup>30</sup> Tom Devine of the Government Accountability Project created this index on Federal Court rulings on whistleblower cases. His full work can be viewed here.

<sup>31</sup> For reported and unreported cases, with rulings sufficiently explained to identify the dispositive element.

of the 226 cases shows the numbers of times the court established rulings against whistleblowers and the elements on which the rulings were based:

- Protected speech (whether the employee is entitled to any reprisal protection for his or her disclosures) 89 cases;
- **Knowledge** (whether an official with responsibility to recommend or take a relevant personnel action knew or should have known of the whistleblowing disclosure) 15 cases;
- **Nexus** (whether the disclosure was a contributing factor to alleged discriminatory treatment the employee is challenging) 33 cases;
- **Clear and convincing evidence** (whether the disclosure was a contributing factor to alleged discriminatory treatment the employee was challenging) 34 cases.



#### **Classified Information**

The numbers we provide below give a sense of the process of government secrecy, but not necessarily the legitimacy of the asserted secrets. Classified records may be secrets in legitimate need of protection, frivolous, or—even though the Executive Order says it is impermissible—intended to cover wrongdoing or embarrassing information.

#### STATE SECRETS PRIVILEGE

In 2011, the Administration invoked the "state secrets" privilege once.<sup>32</sup> As far as we know, the 2009 policy for internal review process for asserting the state secrets privilege has yet to change the government's decision to invoke the privilege.

As noted for this Report by our colleague, Michael Ostrolenk,<sup>33</sup> the state secrets privilege is a creature of judge-made law under the Federal Rules of Evidence, lacks grounding in federal statutes and, many have argued, any grounding in the Constitution. Its use has frustrated judicial redress for constitutional wrongdoing, including government assassination, torture, kidnapping, illegal surveillance.<sup>34</sup> Congress is empowered to and should force the Executive Branch to choose in civil cases (as they are in criminal cases under the Classified Information Procedures Act) to either disclose relevant classified information necessary to litigate the case fairly or accept a default judgment as to liability (with damages to be proven).

http://www.openthegovernment.org/sites/default/files/Federal\_Circuit\_digest.pdf

<sup>32</sup> http://www.fas.org/sgp/jud/statesec/fazaga-holder.pdf

<sup>33</sup> Co-founder and National Director of the Liberty Coalition, with Bruce Fein.

<sup>34</sup> Ostrolenk and Fein note the Executive Branch also uses the terms "national security" and "state secrets" to justify withholding information either from Congress or the public out of concern for disclosing intelligence sources and methods.

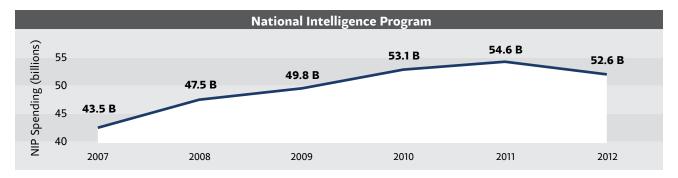
Years (inclusive)	1953 – 1976	1977 – 2000	2001-12/2008	2009-2011
Times Invoked in Cases	6	59	48	8
Period (in years)	24	24	8	3
Yearly Invocations (avg.)	0.25	2.46	6	2.67

Source: We search on the US Department of Justice site<sup>35</sup> and use news accounts to identify re-assertions and new assertions. Other, more exhaustive, methodologies<sup>36</sup> yield different results.<sup>37</sup> The counts indicate that the use of the state secrets privilege by the federal government rapidly accelerated in recent history, but have decelerated in the current Administration.

#### **INTELLIGENCE SPENDING**

The official disclosure of intelligence budget figures is among the outstanding success stories in the quest for open government, particularly because such disclosure was resisted by government officials for so long.

In 2012, more information about intelligence spending was made public than in any previous year. For the first time ever, the total amount of money requested for intelligence for the coming year was formally disclosed (\$71.8 billion for FY2013). This included the request both for the Military Intelligence Program (MIP), which was \$19.2 billion, and for the National Intelligence Program (NIP), which was \$52.6 billion.



While Congress had mandated disclosure of the NIP request, which was revealed for the first time in 2011, there was no legal requirement to release the MIP request. Nevertheless, the Secretary of Defense voluntarily disclosed the information this year anyway.

As Steven Aftergood<sup>38</sup> indicated for this Report, this trend towards growing disclosure is noteworthy for several reasons. "Publication of intelligence spending increases the integrity of the budgeting process. It brings the federal government into rough compliance with Article I of the US Constitution, which requires that "all" government receipts and expenditures of money be made public from time to time."

He continues, "Perhaps most important, it also demonstrates the feasibility of change—even a complete reversal—in government secrecy policy. Only a few years ago, senior intelligence agency officials declared under oath (in the course of FOIA litigation) that disclosure of intelligence budget totals and intelligence

<sup>35</sup> http://www.justice.gov

<sup>36</sup> http://www.law.georgetown.edu/cnsl/ssa/about.cfm

<sup>37</sup> According to statistics kept by the Georgetown Center on National Security and the Law at the Georgetown University Law Center, three cases in which the federal government invoked the "state secrets" privilege have a disposition date (meaning the case was somehow settled) in 2011. The available data does not tell us, though, when a re-assertion is made at a new stage (e.g., by the Obama Administration in a case begun in the G.W. Bush or the Clinton Administrations) nor in which year an assertion was made. The database is a very comprehensive research archive of cases.

<sup>38</sup> Director, Project on Government Secrecy for the Federation of American Scientists.

budget requests would damage national security and must be prevented. Now such disclosure has become the norm. It is a lesson that might usefully be learned in many other areas of government secrecy."

#### SECURITY-CLEARED POPULATION REACHES NEW REPORTED HIGH

A new intelligence community <u>report to Congress</u>, required by Congress in the FY2010 Intelligence Authorization Act, indicates the number of people who held security clearances for access to classified information increased last year to a new reported high of more than 4.8 million persons as of October 1, 2011, an increase of 3% over 2010.

Last year's annual report, the first official count of security cleared personnel, had indicated that there were over 4.2 million clearances in 2010. That number astonished observers because it surpassed previous estimates by more than a million.<sup>39</sup> That number, however, underreported the number of clearances, and the new report to Congress presents a revised<sup>40</sup> 2010 figure of 4.7 million.

The annual report on security clearances represents a new degree of transparency in national security classification policy. Until the first report was issued last year, only rough estimates of the size of the cleared population were available, and those estimates proved to be unreliable. The information is important because it gives a sense of the size of the national security world and of the potential numbers of creators of derivatively classified records.

The Senate-authored version of the Intelligence Authorization Act of 2013, as currently drafted,<sup>41</sup> removes the report requirement. If enacted, this would put Congress in the role of reducing transparency and accountability.

#### **SOURCE OF SECRETS CONTINUES TO SHRINK: 2,362 "ORIGINAL CLASSIFIERS"**

President Obama's December 29, 2009 Executive Order (EO) on Classified National Security Information directed all agencies to review their delegations of Original Classification Authority (OCA). This review was completed by all agencies in 2010. The number of OCAs, which dropped significantly in 2009, continued to drop in 2010 (2,378) and fell slightly again in 2011 (2,362).

An "original classification authority" delegation gives federal worked authorization to create a new memo, analysis, or report and to "originally" classify the information contained in the document as either "top secret," "secret" or "confidential." Original classification decisions are the "sole sources of newly classified information."

<sup>39 &</sup>quot;Number of Security Clearances Soars," Secrecy News, September 20, 2011 http://www.fas.org/blog/secrecy/2011/09/clearances.html

<sup>40</sup> The new report indicated "[Clarification added: Last year's report used a methodology that tallied access to classified information. The resulting figures are not directly comparable to the figures presented this year. The new report focuses on eligibility for access, which yields a higher number of clearances both for last year and this year.]" http://www.fas.org/sgp/othergov/intel/clear-2011.pdf

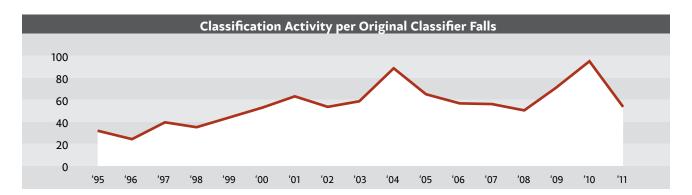
<sup>41</sup> In late August 2012.

#### **CLASSIFICATION DECISIONS**

#### **Original Classification Decisions**

Original classification decisions fell by almost 44% in 2011, to 127,072—the lowest number of decisions reported since 1996. ISOO also reports that, for the seventh year in a row, the majority (70%) of original classifications decisions have been assigned a declassification date of ten years or less.

The average number of original classifications per person with OC authority also fell in 2011 – from 95 in 2010 to 54 in 2011. This follows two years of significant increase in OC decisions that resulted in fifteen year high in 2010.



	Classification Activity in the Federal Government					
			Average Classification Activity per			
Year	Original Classifiers	Original Classification Decisions	Original Classifier			
1995	5379	167840	31			
1996	4420	105163	24			
1997	4010	158733	40			
1998	3903	137005	35			
1999	3846	169735	44			
2000	4130	220926	53			
2001	4132	260678	63			
2002	4006	217288	54			
2003	3978	234052	59			
2004	4007	351150	88			
2005	3959	258633	65			
2006	4042	231995	57			
2007	4182	233639	56			
2008	4109	203541	50			
2009	2557	183224	72			
2010	2378	224734	95			
2011	2362	127072	54			

Source: Information Security Oversight Office (ISOO). 2011 Report to the President.

#### **Derivative Classification**

In previous reports, we have included numbers on the escalation of derivative classification.<sup>42</sup> In 2009, ISOO expanded its count of derivatively classified information to include derivatively-classified e-mails. The number of reported derivative classifications continued to increase in 2010.

ISOO's Report on FY 2011, though, noted that "ISOO has begun to re-evaluate the elements of information that the executive branch agencies are asked to provide for this annual report. This re-evaluation covers most aspects of the reporting process, paying particular attention to the utility and efficacy of the derivative classification count. Recognizing that this count has become considerably more complex with the growth of electronic products and data of all types within the numerous classified environments, ISOO is working with its stakeholders, inside government and out, to optimize value of this annual exercise." In light of this, we have decided not to include the derivative classification numbers this year.

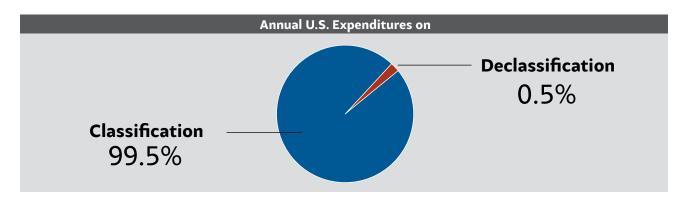
#### GOOD-FAITH CLASSIFICATION CHALLENGES PLUMMET

Executive Order 13526 (December 2009) encourages authorized holders of classified information to challenge the classification status of information that they believe, in good faith, to be improperly classified.

As a result of 38 challenges, the current classification status of information was overturned in part or in full in 2011. One challenge remains pending. After jumping 49% between 2009 and 2010 (from 365 challenges to 722), agencies reported only 79 formal challenges in 2011—a drop of almost 90% in one year.

#### RISE CONTINUES IN COSTS FOR SECRECY

Government agencies spent \$11.36 billion in 2011 to secure classified documents.<sup>44</sup> Of that, \$52.6 million was spent for declassification, an increase of just 4 percent over 2010. A more telling number: for every \$1 the government spent on declassifying documents in 2011, it spent \$215 maintaining the government secrets already on the books. In 2011, these government secrecy expenditures were up from \$201 in 2010, and from \$120 even in 2002.



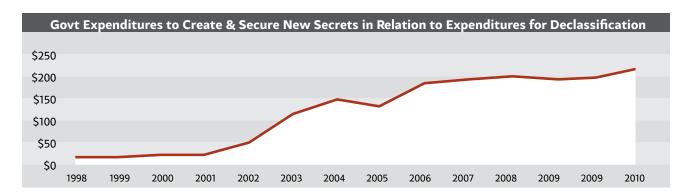
<sup>42</sup> Once information is designated as classified by an OCA, it can "derivatively classified" – used by an undisclosed number of people in government in a variety of ways, creating new and possibly multiple forms of the information. Individuals with security clearances may read classified information at the level of their clearance – and share it with others at that level or above.

<sup>43</sup> http://www.archives.gov/isoo/reports/2011-annual-report.pdf Page 1.

<sup>44</sup> http://www.archives.gov/isoo/reports/2011-cost-report.pdf

Federal Ex	Federal Expenditures on Classification and Declassification in Millions (excluding CIA, NGA, DIA, NSA and NRO)					
	Cost of Securing	Portion Spent on	Classification Costs Per \$1			
Fiscal Years	Classified Information	Declassifying Documents <sup>43</sup>	Spent on Declassification			
1997	\$3,380,631,170	\$150,244,561	\$22			
1998	3,580,026,033	200,000,000	17			
1999	3,797,520,901	233,000,000	15			
2000	4,270,120,244	230,903,374	17			
2001	4,710,778,688	231,884,250	19			
2002	5,688,385,711	112,964,750	49			
2003	6,531,005,615	53,770,375	120			
2004	7,200,000,000	48,300,000	148			
2005	7,700,000,000	57,000,000	134			
2006	8,200,000,000	44,000,000	185			
2007	8,650,000,000	44,000,000	195			
2008	8,640,000,000	43,000,000	200			
2009	8,813,475,271	44,650,000	196			
2010	10,169,149,557	50,442,266	201			
2011	11,360,000,000	52,760,000	215			

Source: OpenTheGovernment.org calculations based on data from the Information Security Oversight Office (ISOO). 2011 Cost Report to the President



#### **Declassification**

#### **NATIONAL DECLASSIFICATION CENTER**

The National Declassification Center (NDC) was established by Executive Order (E.O.) 13526, to coordinate the "timely and appropriate processing of referrals 25 years old and older of classified records of permanent historical value." In its fifth biannual Report,<sup>46</sup> covering the period of January 1 through June 30, 2012, the NDC reports that it has assessed 90% of the classified records backlog, with 55% cleared for final processing.

<sup>45</sup> The publicly reported numbers on the amount spent on declassification include, for the most part, only the cost of the people engaged and the equipment, not the cost of physical security and personnel security. These overhead costs are shared, and agencies are not required to separate their figures. While the dollars attributable to declassification costs may be under-reported, though, they would still be extremely small compared to the costs of maintaining secrets.

<sup>46</sup> http://www.archives.gov/declassification/

Of the records that have been fully processed, 82% have been approved for public release. These numbers are not included in ISOO's annual count.

While this is real progress, the fact remains that only around 50 million pages of the original 370 million page backlog have been fully processed in the past two and a half years. As analysts in the openness community note, the declassification program will almost certainly miss its presidentially-mandated goal of eliminating the backlog of 25 year old records awaiting declassification by December 2013.

Expressing the disappointment and dismay of many in the openness community, Tom Blanton<sup>47</sup> noted recently that even at the accelerated rates of processing newly achieved by the National Declassification Center—with the notable improvements in interagency collaboration in declassifying records, increased efficiency and steadily growing productivity reported by the NDC—the Center "will only be about a third of the way through the backlog by the end of 2013."

As Aftergood, has noted, "It is shocking—or it ought to be—that the classification system is not fully responsive to presidential authority. Beyond that, the impending failure to reach the assigned goal is an indication that current declassification procedures are inadequate to the task at hand."49

Above and beyond the inability of the NDC to meet the President's goal in the time allotted, several hundred million additional pages will have come (and will continue to come) into the system since the establishment of the Center and now await processing. Moreover, "a tsunami of classified electronic records looms." As many—including the President and his Public Information Declassification Board (PIDB)—know, without fundamental transformation of the classification and declassification systems, the backlogs will only grow. As will the costs to protect and maintain the secrets, and the threats to accountability to the public for the actions of the government.

#### **OVERALL DECLASSIFICATION EFFORTS DECLINE**

Overall, from 2010, the number of pages reviewed dropped slightly and the number of pages declassified decreased by 8%. The declassification rate in 2011 dropped slightly to 51% after holding steady at 55% in 2010 and 2009. The rate of declassification has fallen off significantly since hitting a peak in 2007, when 62% of pages reviewed were declassified.

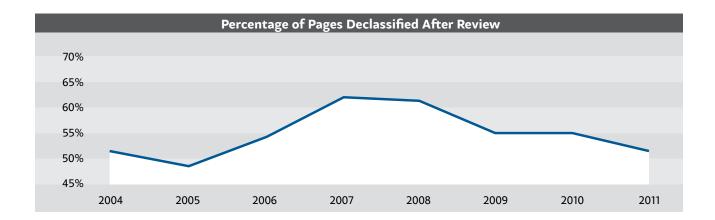
Of a total of 52,760,524 pages reviewed for declassification in FY 2011, 51% (26,720,121 pages) were declassified.

<sup>47</sup> Executive Director, National Security Archive

<sup>48</sup> According to a March 2012 estimate by Sheryl Shenberger, Director of the NDC, and William Bosanko.

<sup>49</sup> http://www.fas.org/blog/secrecy/2012/07/miss\_goal.html

<sup>50</sup> Tom Blanton, various communications.



Fiscal Year	Number of Pages Declassified	
1995	69,000,000	
1996	196,058,274	
1997	204,050,369	
1998	193,155,807	
1999	126,809,769	
2000	75,000,000	
2001	100,104,990	
2002	44,65,711	
2003	43,093,233	

Fiscal Year	Number of Pages Declassified
2004	28,413,690
2005	29,540,603
2006	37,647,993
2007	37,249,390
2008	31,443,552
2009	28,800,000
2010	29,050,290
2011	26,720,121

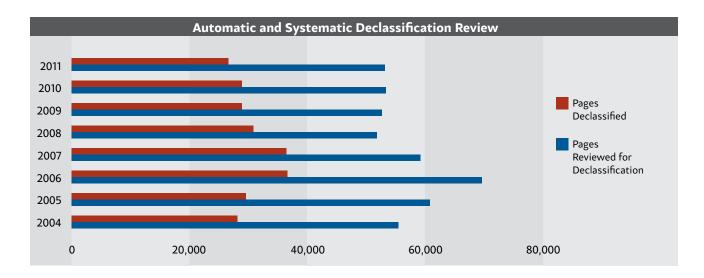
On a more positive note, with little fanfare the National Reconnaissance Office and the National Security Agency have been steadily declassifying and releasing historical intelligence records. <sup>51</sup>

#### **AUTOMATIC AND SYSTEMATIC DECLASSIFICATION REVIEW52**

Automatic declassification accounted for 86% (45.5 million pages) of the 52.8 million pages reviewed and 87% (23.3 million pages) of the 26.7 million pages declassified in 2011. Systematic declassification accounted for 7.1 million pages reviewed and 3.3 million pages declassified. Under discretionary declassification review, 446,202 pages were reviewed and 123,193 pages were declassified.

<sup>51</sup> Secrecy News, Volume 2012, Issue No. 81, August 8, 2012. http://www.fas.org/blog/secrecy As historian Dwayne Day wrote in an assessment of the latest NRO releases "This tremendous amount of information released in the past year is credit to an impressive declassification program within the intelligence services..."

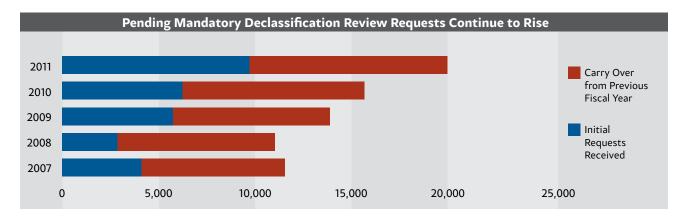
<sup>52</sup> E.O. 13526 continues the requirement that all agencies automatically declassify information that has "permanent historical value," unless the information falls under several limited exemptions allowing continued classification. After several deadline extensions, automatic declassification came into effect on December 31, 2009. The E.O. also requires agencies to create and maintain a viable systematic review of records less than 25 years old and those exempted from automatic declassification, and to prioritize review based on researcher interest and the likelihood of declassification. Automatic declassification review and systematic declassification review are combined in the data ISOO collected from 1996 through 2009. For 2010, ISOO provided separate numbers for automatic and for systematic declassification.



#### **MANDATORY DECLASSIFICATION REVIEW**

The Mandatory Declassification Review (MDR) process under E.O. 13526 permits individuals or agencies to require the review of specific classified national security information for declassification. MDR can be used in lieu of litigation of denials of requests under the FOIA, and to seek declassification of Presidential papers or records not subject to FOIA.

The process has become an increasingly useful—and popular—alternative to the Freedom of Information Act. In 2011, the number of new initial requests (10,493) increased by about 8% from 2010 (9,686). The number of carry-overs from the one year to the next also continues to grow.

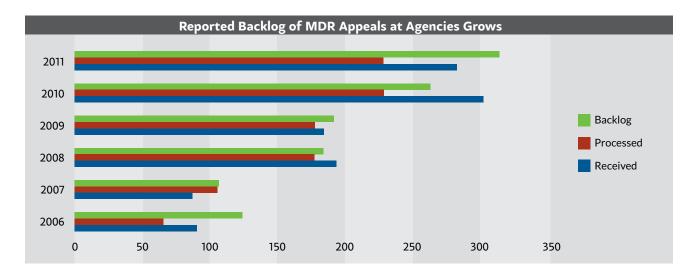


#### **MANDATORY DECLASSIFICATION REVIEW APPEALS**

Agency classification positions have been overturned with some frequency in the MDR appeals process, which is something that almost never happens in FOIA litigation.<sup>53</sup> In 2001, information in 73% (3,235 of 4,405) of the pages reviewed was declassified: 29% in their entirety; 44% in part. Agencies reviewed 32% more pages (4,405) in 2011 than in 2010 (3,330), a number well below the 6,333 pages reviewed in 2009.

<sup>53</sup> Steven Aftergood, http://www.fas.org/blog/secrecy/2012/02/cia\_mdr.html

As appeals of agency decisions to deny information under the MDR process have continued to grow, so have the backlog of these appeals. In 2011, agencies received 283 appeals, processed 229 and carried 317 over to 2012. The size of the backlog has grown almost 160% since 2006.



#### **INTERAGENCY SECURITY CLASSIFICATION APPEALS PANEL (ISCAP)**

A requester may appeal any final decision made by an agency, during an MDR appeal, to deny information during an MDR appeal directly to the ISCAP. The ISCAP exercises Presidential discretion in its decisions and it serves as the highest appellate authority for MDR appeals. Reflecting the sentiment of many in the openness community, Steven Aftergood has noted that "The Panel, which was established by executive order in 1995, has actually succeeded beyond all reasonable expectations, declassifying information in the majority of cases presented to it."<sup>54</sup> The panelists can determine which appeals to take based on topic, date, requester or other criteria. Requesters' success rates are high with ISCAP: Sixty percent of the time, additional information is declassified by ISCAP.<sup>55</sup>

Requests for review of MDR decisions to ISCAP have grown exponentially in recent years. More than 100 appeals come to ISCAP annually, up from about 20 per year in 1996. The panel, which currently meets every two weeks, adjudicates about 50 to 70 appeals per year. The backlog of appeals continues to grow.

In an important trend toward more openness, the ISCAP announced in July 2012 it is preparing to provide improved public notification of its declassification and disclosure decisions.<sup>56</sup>

#### **RECLASSIFICATION**

Starting in April 2006, NARA began <u>reporting</u> quarterly on withdrawals of previously declassified records. The reports provide information—including number of records and number of textual pages withdrawn—about records formally withdrawn in accordance with the <u>"Interim Guidelines Governing Re-review of Previously Declassified Records at the National Archives,"</u> issued by ISOO in April 2006. Through 2007,

<sup>54</sup> Steve Aftergood, July 16,2012: ISCAP to Provide Increased Disclosure of Its Decisions 55 http://blogs.archives.gov/foiablog/2012/08/03/more-on-declassification/ 56 lbid.

seven records and fifteen textual pages were formally withdrawn; there were no withdrawals in 2008; three documents were formally withdrawn in 2009, all by the Navy. Since then, no declassified records have been withdrawn.

As far as the materials removed by several agencies in 2006, ISOO previously noted that the agencies doing the bulk of the work (CIA and Air Force) on these materials had finished their work and returned their decisions to NARA, but that some "hard problem" adjudications awaited further processing by NARA and the agencies. ISOO reports<sup>57</sup> that there are no remaining adjudications as of the end of FY 2011. This is the last year we will report on the 2006 materials.

#### **Invention Secrecy**

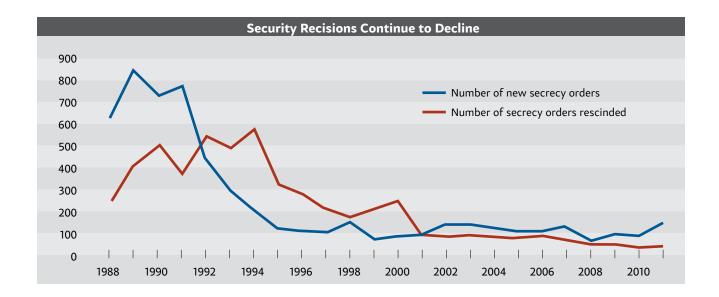
#### "SECRECY ORDERS" IN EFFECT CONTINUE TO CLIMB

The federal government can impose secrecy on any new patent by issuing a "secrecy order" (35 USC 181). The number of new orders in 2011 (143) is a 66.2% increase from 2010. The number of secrecy orders rescinded increased slightly. Since 9/11 the number of new secrecy orders per year has outstripped the number of orders rescinded; the number of secrecy orders in effect has continually climbed since 2001.

Fiscal Year	# of New Secrecy Orders	# of Secrecy Orders Rescinded	Total # of Secrecy Orders in Effect
1988	630	237	5,122
1989	847	413	5,556
1990	731	496	5,791
1991	774	372	6,193
1992	452	543	6,102
1993	297	490	5,909
1994	205	574	5,540
1995	124	324	5,340
1996	105	277	5,168
1997	102	210	5,060
1998	151	170	5,041
1999	72	210	4,903
2000	83	245	4,741
2001	83	88	4,736
2002	139	83	4,792
2003	136	87	4,841
2004	124	80	4,885
2005	106	76	4,915
2006	108	81	4,942
2007	128	68	5,002
2008	68	47	5,023
2009	103	45	5,081
2010	86	32	5,135
2011	143	37	5,241

Source: United States Patent and Trademark Office via Federation of American Scientists, www.fas.org/sgp/othergov/invention/stats.html; and USPTO accessed 7/12/2012

<sup>57</sup> E-mail communication with government official.



#### **Investigation secrecy**

#### **NATIONAL SECURITY LETTERS**

National security letters (NSLs)<sup>58</sup> are written demands from the FBI that compel internet service providers (ISPs), credit companies, financial institutions and others to hand over confidential records about their customers, such as subscriber information, phone numbers and e-mail addresses, websites visited and more. The letters, which date back to the 1980s, were originally for FBI investigations where there were "specific and articulable facts" indicating the information was related to a foreign agent. The USA PATRIOT Act eliminated the requirements for specific facts and a link to a foreign agent. As long as the head of an FBI field office certifies that the records would be relevant to a counterterrorism investigation, the bureau can send an NSL request without the backing of a judge or grand jury.

The public has been made aware of only a handful of NSLs handed out over the last decade, and only because they became public after the recipients launched legal battles opposing them. As a result of these battles, courts have chipped away at the gag order requirement as a violation of the First Amendment.

Before a federal appeals court struck down some of the gag provisions of NSLs, ISPs and other companies that wanted to challenge the orders had to file suit in secret in court – now companies can simply notify the FBI in writing that they oppose the gag order.

The first public legal challenge to national security letters came in 2004. Nicholas Merrill, founder of a small New York Internet service provider, disputed the law's constitutionality after receiving an NSL. That year, the U.S. District Court for the Southern District of New York found the law was unconstitutional in part because there was no clear way to challenge the letters.

In February 2005, the FBI used an NSL to demand reading material and Internet use records from the Library Connection, a consortium of 26 Connecticut libraries. In August 2005, the ACLU sought an emer-

<sup>58</sup> This discussion of NSLs and the challenges to them is compiled from "Few Companies Fight Patriot Act Gag Orders, FBI Admits." http://www.wired.com/threatlevel/2012/05/nsl-challenges/; "Covert FBI Power to Obtain Phone Data Faces Rare Test." http://online.wsj.com/article/SB10001424052702303567704577519213906388708.html; and ACLU materials.

gency court order to lift the gag so that representatives of Library Connection could participate in the Congressional PATRIOT Act reauthorization debate and disclose the fact that the FBI had used an NSL to demand library records. In September 2005, a district court judge in Connecticut ruled that the NSL gag order imposed on Library Connection was unconstitutional, but the government continued to enforce the gag on the librarians.

Ultimately, in April 2006, six weeks after the PATRIOT Act had been reauthorized by Congress and amended to explicitly allow challenges, the government dropped its legal battle to keep the gag intact, and then withdrew its demand for records altogether.

Such challenges appear to be unusual, however. A 2010 letter<sup>59</sup> from the Office of the Attorney General indicated that over nearly two years, there were only four challenges to a letter's gag order. Statistics on challenges to the letters themselves aren't available.<sup>60</sup>

In an April 30, 2012 letter report, the Justice Department indicated that the government made 16,511NSL requests in 2011 for information pertaining to 7,201 different United States persons. The total reported number of NSL requests dropped by 32% between 2010 (24,287) and 2011, perpetuating the number's volatile swings from year-to-year.

Total Requests				
2000*	8,500			
2003	39,346			
2004	56,507			
2005	47,221			
2006	49,425			
2007	16,804			
2008	24,744			
2009	14,788			
2010	24,287			
2011	16,511			

Percentage of NSL requests generated from investigations of U.S. Persons:			
2003	about 39%		
2004	about 51%		
2005	about 53%		
2006	about 57%		
2007	about 26%		
2008	about 30%		
2009	about 40%		
2010	about 58%		
2011	about 44%		

<sup>\*</sup> Total number in 2000 prior to passage of the USA PATRIOT Act

Source: http://www.justice.gov/nsd/foia/foia\_library/2011fisa-ltr.pdf

#### THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

The Foreign Intelligence Surveillance Court (FISC) is responsible for reviewing and approving government applications under the <u>Foreign Intelligence Surveillance Act</u> for domestic electronic surveillance and physical search of suspected foreign intelligence agents or terrorists.

In early 2012, the Obama Administration urged Congress to renew provisions of the Foreign Intelligence Surveillance Act (FISA) Amendments Act (FAA) that are set to expire at the end of this year. One of the key provisions proposed by the Administration would permit the electronic surveillance of entire categories— without the need for a court order for each individual target—of non-U.S. persons who are located abroad. Under this provision, instead of issuing individual court orders, the FISC [Foreign Intelligence Surveillance

<sup>59</sup> http://www.wired.com/images\_blogs/threatlevel/2012/05/letter\_to\_patrick\_leahy\_2010.12.09.pdf

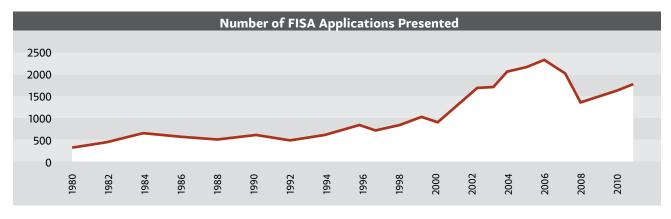
<sup>60</sup> http://www.wired.com/threatlevel/2012/05/nsl-challenges/

<sup>61</sup> http://www.fas.org/blog/secrecy/2012/05/fisa\_renewal.html

Court] approves annual certifications submitted by the Attorney General and the DNI that identify categories of foreign intelligence targets."<sup>62</sup> In most cases, an individualized court order, based on probable cause that the U.S. person target is a foreign power or an agent of a foreign power, is still required to conduct electronic surveillance of targets inside the United States.

A separate provision would require that surveillance directed at US persons overseas be approved by the FISC in each individual case, based on a finding that there is probable cause to believe that the target is a foreign power or an agent, officer, or employee of a foreign power. Before the enactment of the FAA, the Attorney General could authorize such collection without court approval.

Calendar year 2011 is the second consecutive year the number of applications rose, although it is still well below the high-water mark set in 2007 (2,371).<sup>63</sup> Similar to 2010 and 2009, a vast majority (96%) of the applications in 2011 included requests for authority to conduct electronic surveillance; two of these were withdrawn by the government.



Source:http://www.justice.gov/nsd/foia/foia\_library/2011fisa-ltr.pdf

During the calendar year 2011, the FISC approved almost 11% more applications (1, 745) for authority to conduct electronic surveillance and physical search than during 2010 (1,579). The FISC did not deny any applications in full or in part, but it modified 30 applications.

<sup>62</sup> Director of National Intelligence James Clapper and Attorney General Eric Holder in a February 8 letter to Congress. http://www.fas.org/irp/news/2012/02/dni020812.pdf

<sup>63</sup> http://www.justice.gov/nsd/foia/foia\_library/2011fisa-ltr.pdf

FISA Applications Presented and Approved			
Calendar Year	# of FISA Request Applications	Calendar Year	# of FISA Request Applications
1980	322	1996	839
1981	433	1997	748
1982	475	1998	796
1983	549	1999	880
1984	635	2000	1,012
1985	587	2001	934
1986	573	2002	1,228
1987	512	2003	1,724
1988	534	2004	1,754
1989	546	2005	2,072
1990	595	2006	2,176
1991	593	2007	2,371
1992	484	2008	2,083
1993	509	2009	1,376
1994	576	2010	1,579
1995	697	2011	1,745

Numbers Source: http://www.justice.gov/nsd/foia/foia\_library/2011fisa-ltr.pdf

#### A SECRET DOCKET-THE ECPA FILES

As secretive as the FISA Court is, it is not number one in the "secrecy parade," according to a 2012 article, <sup>64</sup> by Stephen W. Smith (United States Magistrate Judge, Southern District of Texas, Houston Division). His article discusses what he calls the ECPA Secret Docket, as it is regulated principally by the Electronic Communications Privacy Act of 1986 (ECPA). Smith points to a recent study <sup>65</sup> by the Federal Judicial Center indicating this docket handles tens of thousands of secret cases every year, and estimates that the number of ECPA cases filed <sup>66</sup> "in a single year surpasses the entire output of the FISA court since its inception in 1976" (since 1979, that court has processed over 28,000 warrant applications and renewals). Moreover, ECPA surveillance rulings are almost never challenged on appeal.

The docket is presided over by federal magistrate judges in United States district courts around the country. Most of its sealed cases are classified as "warrant-type applications," a category that includes not only routine search warrants but also various forms of electronic surveillance, such as the monitoring of electronic communications and data transmitted by the cell phones, personal computers, and other digital devices.

As with many aspects of information held secret by the government, temporary secrecy is reasonable and necessary; in this case, for electronic surveillance orders during a criminal investigation. As Smith points out, though, these surveillance orders remain secret long after the criminal investigation comes to an end. The result is that, "unless the investigation results in criminal charges, targets who are law-abiding citizens will never learn that the government has accessed their emails, text messages, twitter accounts, or cell

<sup>64</sup> Stephen W. Smith, "Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket," Harvard Law & Policy Review Vol. 6, 2012. https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\_ID2071399\_code585899.pdf

<sup>65</sup> http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/\$file/sealcafc.pdf

<sup>66</sup> Excluding state court surveillance orders, as no data is available regarding state use of pen/trap devices.

phone records. How often does this happen? No publicly available records answer the question, but information disclosed in a recent Freedom of Information Act case<sup>67</sup> suggests that it happens thousands of times every year."

Smith notes that, while there are pushes to update the ECPA, most deal with questions generated by new technology but significantly less attention has been given to "reforming more structural aspects." One of the most neglected topics, he says, "has been the regime of secrecy surrounding ECPA court orders. Through a potent mix of indefinite sealing, nondisclosure (i.e., gagging), and delayed-notice provisions, ECPA surveillance orders all but vanish into a legal void. It is as if they were written in invisible ink—legible to the phone companies and Internet service providers who execute them, yet imperceptible to unsuspecting targets, the general public, and even other arms of government, most notably Congress and the appellate courts."

#### **Closing Thoughts**

OpenTheGovernment.org released the first Secrecy Report (formerly called the Secrecy Report Card) in 2004 to give the public a quantitative assessment of the state of secrecy in the federal government. Since its launch, more than just the name of the report has changed: new measures were added as data sources became available; some indicators were dropped as the data proved to be unreliable or not meaningful. Throughout the George W. Bush Administration, the reports charted a general rise in secrecy indicators, hitting high-water marks in each year before beginning to generally recede in the 2009 report.

The 2011 report, which included the first full fiscal year of data from the Obama Administration, charted both further decreases in non-national security secrecy and a national security bureaucracy that continues to expand the size of the secret government. Trends covered in this 2012 report are consistent with results from last year.

When President Obama dedicated his Administration to creating an unprecedented level of transparency in the federal government and set out policies to do so, the openness community applauded. Some of these policies—such as the newly-announced records management policy<sup>68</sup>—are foundational blocks for openness in the federal government. Reports by NARA and others<sup>69</sup> have shown that the federal government's records management policies and practices have failed to keep up with the transition from a paper-based system. Minus the Obama Administration's steps, the federal government would continue to have a hard time preserving, finding, and sharing government information over time.

The Administration's strong commitment to restoring the presumption that a person who requests government records under the FOIA should get them, is an important message to agencies, and the Administration's emphasis on improving FOIA processing has resulted in real improvements at some agencies. The non-national security indicators for 2011, as we noted in the Report, are generally positive—although not as positive as one might have expected and hoped. It seems likely that it will still take many years, at best, before the Obama Administration's policies have a strong and lasting effect on the levels of measurable secrecy.

<sup>67</sup> See ACLU v. U.S. Dep't of Justice, 655 F.3d 1, 4 (D.C. Cir. 2011).

<sup>68</sup> http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf

<sup>69</sup> http://www.archives.gov/records-mgmt/resources/self-assessment-2011.pdf; Record Chaos, http://www.scribd.com/doc/49055979/Record-Chaos-Report

Anecdotal evidence tells us, moreover, that the public has not felt the difference: FOIA requesters continue to experience delays and other frustrations; the public continues to have a hard time finding basic information on agencies websites or good contact information for anyone that can help them.

In the national security realm, Obama Administration policies that have been welcomed by the openness community have been unable to fully stanch the bureaucracy's predisposition towards secrecy: the National Declassification Center will not meet its goal for declassifying old records on time, the government continues to use the state secrets privilege in the same way it did prior to DOJ's release of a new procedural policy, and the volume of documents marked "Classified" continues to grow, with little assurance or reason offered for the decision that the information properly needs such protection.

As we noted at the beginning of this report, there is much we do not know about the size and scope of the federal government's secrecy. The numbers included in this report are only rough indicators, and are not comprehensive. Each indicator acts as the proverbial blind man's hands on an elephant—giving us only partial understanding of the story. Efforts to gauge the size and scope of the secrecy beast are hindered by bad and misleading data. Efforts to understand the import of it are stymied by the government's unwillingness to give the public some basic facts about the effect of its policies in practice. Missing and misleading data are not just concerns for mathematicians and policy wonks, though. They have a very real effect on the public's ability to trust the government is making the best use of scarce resources, and that its actions align with stated policy goals. Good information is essential for the public to know what interests are influencing government policies, and more. Partial and mis- information, however, erode accountability and hinder public engagement in critical national issues.

Each year, we strive to understand and to convey a little more of the secrecy beast. We will continue to do so and appreciate your ongoing interest and work with us.