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Americans for Less Secrecy, More Democracy

2011

secrecy report

INDICATORS OF SECRECY

IN THE FEDERAL GOVERNMENT

(formerly Secrecy Report Card)

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About OpenTheGovernment.org

OpenTheGovernment.org is an unprecedented coalition of consumer and good government groups, librarians, environmentalists, labor, journalists, and others united to push back governmental secrecy and promote openness. We are focused on making the federal government a more open place to make us safer, strengthen public trust in government, and support our democratic principles.

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. www.OpenTheGovernment.org.

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By The Numbers

Freedom of Information Act (FOIA)

FOIA Requests Increase by 7%; Costs Increase by 9%

Public requests increased by 597, 415 governmentwide from 2009 to 2010 while the total spent processing those requests (\$416,408,917) rose by 9%.

FOIA Backlogs Reduced by 10%

The federal government processed 3,434 more FOIA requests than it received in 2010 and reduced backlogged pending requests by 7,851 (10%).

Whistleblowers Lawsuits Recover Billions for Taxpayers

In 2010, suits brought by whistleblowers accounted for 77% of the \$3.1 billion the United States obtained in settlements and judgments in cases involving fraud on the United States.

Federal Advisory Committee Act (FACA) Meetings Mostly Closed to Public

In 2010, 72% of FACA committee hearings governmentwide were closed to the public.

No Assertions of Executive Privilege

President Obama has not asserted Executive Privilege in response to congressional requests through 2010.

Classified Information

National/Military Intelligence Budgets Disclosed

The total intelligence budget for 2010, including budget figures for the National Intelligence Program (\$53.1 billion) and the Military Intelligence Program (\$27 billion) was disclosed in October—a new and unprecedented degree of transparency on intelligence spending.

Nuclear Posture Review & Nuclear Stockpile Declassified

In May 2010, the Administration released newly declassified details about the US nuclear stockpile. In April, the Nuclear Posture Review was released. This is the third such comprehensive study since the end of the Cold War; the other two were classified.

Still Only One-half Cent of Every Secrecy Dollar Spent on Declassification

Expenditures on declassifications in 2010 were .5% of all dollars spent on security classification. The government spent \$201 maintaining the secrets already on the books for every one dollar the government spent on declassifying documents in 2010 and declassified 1% more pages than were declassified in 2009. Overall, expenditures to maintain secrecy increased 14%.

State Secrets Privilege – Obama Newly Asserts & Reasserts Bush Invocations

In 2010, the federal government invoked the “state secrets” privilege twice. One was a case that began in the G.W. Bush administration, while the other was a new case.

Original Classifications Increase

In 2010, the number of original classification decisions increased by 22.6%, to 224,734.

Derivative Classifications Count Continues to Grow

In 2010, derivative classifications continued to increase, jumping 40%. The Information Security Oversight Office (ISOO) began counting derivatively-classified e-mails in 2009.

Mandatory Declassification Review Process Yields Information, But Backlogs Growing

In 2010, agencies received 9,686 new initial requests for Mandatory Declassification Review (MDR), which led to 64% of pages reviewed being declassified in full: 29% in part. More than 6,500 initial requests were carried over into 2010.

Percentage of DOD 2010 Acquisition Budget Classified or “Black” Rises

“Black” programs accounted for about \$35.8 billion or 17 percent of the 2010 Department of Defense estimated acquisition funding,

Invention Secrecy Rises

In 2010, the federal government imposed secrecy orders on 86 new patents, and lifted orders on only 32. Overall, the total number of inventions kept under “secrecy orders” is 5,135, continuing a yearly increase since 2000.

National Security Letters Dramatically Increase

The Department of Justice reports 24,287 requests pertaining to roughly 14,212 different U.S. persons were made in 2010—a 64% increase from 2009. This increase reversed a 40% drop in requests made between 2008 and 2009.

Foreign Intelligence Surveillance Court (FISC) Approvals Rise

During calendar year 2010, the FISC approved almost 15% more applications (1,579) for authority to conduct electronic surveillance and physical search than during 2009 (1,376), the first rise in applications made and approved since hitting the high-water mark in 2007 (2,371). The FISC did not deny any applications in full or in part, but modified 14 applications

Special Section–Progress Report on Openness & Secrecy in the Obama Administration

On his first day in office, President Obama committed himself to “creating an unprecedented level of openness in Government.” Since making that pledge, his administration has invested an unprecedented amount of energy to transparency issues. An overall assessment of the Administration is difficult, as there are commitments and developments in both promising and troubling directions.

Promising policies that could influence many of the trends we track include:

- the Open Government Initiative, a coordinated push by the Administration to get agencies to embed transparency, participation, and collaboration into the way they operate;
- a new [Executive Order \(E.O. 13526\) on Classified National Security Information](#), which mandates the creation of the [National Declassification Center](#) and directs classifying agencies to fundamentally review their classification guides;
- a new policy on asserting the state secrets privilege that makes the internal review process before the privilege is asserted more rigorous;
- an [Executive Order on Controlled Unclassified Information \(E.O.13556\)](#);
- new Attorney General Freedom of Information Act (FOIA) Guidelines that directs agency personnel to presume information should be released to the public; and
- the [March 2010 White House memorandum](#) from then–Chief of Staff Rahm Emanuel and then–White House Counsel Bob Bauer requesting agencies to update all FOIA guidance and training materials to include the principles articulated in the President’s Memorandum, and to assess adequate resources are devoted to responding to FOIA requests promptly and cooperatively, to ensure full implementation of the President’s Memorandum on FOIA.

There have also been trends in more troubling directions, such as the handling of alleged leaks of classified information. This non-quantitative Progress Report explores both the promising policies and the troubling trends.

Freedom of Information Act (FOIA)

FOIA ANALYSES

In March 2010, the National Security Archive issued its first report on the state of FOIA in the Obama Administration: *Sunshine and Shadows*¹. The audit found that, despite President Barack Obama’s and Attorney General Eric Holder’s 2009 memoranda calling for reform in government agencies’ administration

¹ <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm>

of the FOIA, several agencies had severe backlogs in processing FOIA requests; ancient requests persist in the FOIA system; a minority of agencies had responded to the Obama and Holder Memos with concrete changes in their FOIA practices; only four out of 28 agencies reporting—including Holder’s own Justice Department—showed their releases up and denials down under the FOIA.

In March 2011, the National Security Archive’s Knight Open Government Survey, *Glass Half Full*,² found that the Obama administration is about halfway³ toward its promise of improving Freedom of Information responsiveness among federal agencies. Several agencies demonstrated significant changes in their processes, major upgrades to their Web postings on FOIA, and improved responsiveness to requesters. The Archive found significant change among the responsive agencies especially in the area of discretionary releases of information, with agency reporting showing declining use of the “b-5” exemption. Before the Obama proclamations, agencies withheld most drafts of internal documents, and even staff-level reports, under the 5th exemption to the FOIA that applies to “pre-decisional” or “deliberative process” information.

An AP study⁴ found similar developments in the invocation of the “deliberative process” exemption. The number of cases had surged in 2009 to more than 71,000 but fell last year to 53,360. The study also found that the odds a government agency would search its filing cabinets and turn over requested materials depended mostly on which agency produced them—and on a person’s patience. Agencies refused more routinely in 2010 to quickly consider information requests deemed especially urgent or newsworthy, agreeing to conduct a speedy review about 1-in-5 times they were asked. AP found that the parts of the government that deal with sensitive matters, including the Central Intelligence Agency or Securities and Exchange Commission, entirely rejected information requests more than half the time during fiscal 2010. Agencies dealing with less-sensitive information, such as the Social Security Administration or Department of Agriculture, turned over at least some records nearly every time someone asked for them, often in just weeks.

A March 2011 OMB Watch analysis⁵ of data from 25 key agencies similarly shows FOIA performance slightly improved in FY 2010, the first full year reported for the Obama administration. The picture emerging on FOIA implementation under President Obama, according to the analysis, is one of rebuilding openness, not of an immediate turn-around. Several trends have improved from previous years—the first improvements in close to a decade, although most key indicators have not yet returned to their state in the pre-Bush era of openness.

In July 2011, the Office of Information Policy (OIP) at the Department of Justice (DOJ) released an assessment⁶ of the progress made by the Executive Departments in implementing the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines. The assessment covers 15 departments that process 80% of the incoming FOIA requests. All the findings of the DOJ’s assessment are based on the 2011 Chief FOIA Officer Reports⁷ that each agency is required to produce. As the National Security Archive notes⁸, in the two categories (updated internal guidance/training, effective systems for responding to requests) that did not rely on quantitative data, major discrepancies appear between their report and DOJ’s. In the Knight Survey, to receive a “passing grade” an agency had to provide evidence of updated internal guidance or assessment of systems. The DOJ [report](#), however, does not require evidence beyond what agencies claim in their FOIA Officer Reports.

2 <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/index.htm>

3 Agencies making concrete changes in their FOIA procedures went from 13 of 90 in 2010, to 49 of 90 in 2011.

4 <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/14/AR2011031400630.html>

5 <http://www.ombwatch.org/files/info/fy2010foiaanalysis.pdf>

6 <http://www.justice.gov/oip/2011-cfo-reports.pdf>

7 <http://www.justice.gov/oip/reports.html>

8 <http://nsarchive.wordpress.com/2011/07/28/doj-report-on-foia-positive-but-incomplete-development-for-open-government/>

FOIA.GOV

Until recently, the public only could obtain governmentwide information on Freedom of Information Act (FOIA) processing from the Department of Justice (DOJ) Office of Information Policy's (OIP) summary. Any data point not contained in the summary could only be obtained by manually pulling the data from each agency report. Similarly, it was difficult to note any trends as each report contains only one year's worth of data. [FOIA.gov](http://www.foia.gov), launched in March 2011, provides tools that should make it easy to accomplish both goals.

FOIA.gov will make it considerably easier for members of the public to monitor and understand how federal agencies are—or are not—living up to their obligations to provide the public with records. The site allows users to view and compare data culled from multiple years' worth of agency annual FOIA reports, with data from all agencies for 2010, and some agencies for 2008 and 2009. The data points included in these reports capture information about—among other things—requests, exemptions, appeals, processing time, consultations, and backlog that provide a snapshot of how the agency is doing and highlighting problem areas.

The site is not yet perfect: the DOJ needs to continue to identify and fix technical glitches and address some data quality issues. It does not include data from all agencies for 2008 and 2009, rendering it impossible to get a sense of governmentwide trends from the data.

CONTROLLED UNCLASSIFIED INFORMATION

On November 4, 2010 President Obama issued Executive Order (EO) 13556 on Controlled Unclassified Information. (CUI) In our [2007 report](#), we highlighted the fact that 81% of the more than 107 unique markings agencies place on “sensitive but unclassified” information (now called “Controlled Unclassified Information”) were based not on statute or approved regulations, but were the product of department and agency “policy” (i.e., created by them as needed or wanted). The EO establishes an open and uniform program for managing information that requires safeguarding or dissemination controls if the restrictions are based on law, regulations, or government-wide policies and states “The mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion, including disclosures to the legislative or judicial branches.”

OPEN GOVERNMENT

Proactive Disclosure

The Administration has urged agencies to release information proactively, without waiting for a FOIA request. Such releases are intended to make government more open and to alleviate the problems created by dependence on the FOIA as a means of providing the public with access to information. Some of the many examples of agencies making information, particularly data, easier to find and use can be found on the White House Open Government Highlights page.⁹

During Sunshine Week, OpenTheGovernment.org asked volunteers to see if specific types of accountability and ethics information are available on a selected number of agencies' websites. The agencies selected for evaluation were the ten large agencies rated¹⁰ as having the “strongest open government plans.” The results of this limited audit show the Administration has its work cut out for it to go meet the President's goal of “unprecedented transparency.” Even at the agencies perceived to be among the leaders in transparency, the

⁹ <http://www.whitehouse.gov/open/highlights>

¹⁰ <https://sites.google.com/site/opengovtplans/>

public has no consistent access to the type of information it needs to understand how and why public policy decisions are formed, and to hold decision makers accountable for their actions.

Also during [Sunshine Week](#) 2011, the White House said in a blog post that in the upcoming weeks, “agencies will proactively post on their Open Government web pages agency directories, so that citizens can more easily identify agency offices to meet their needs. In addition, agencies will also post official congressional testimony and agency reports to Congress required by statute, so that the public has better access to communications between agencies and the legislative branch.”

In July 2011, OpenTheGovernment.org did a quick [audit](#)¹¹ to see how agencies were complying with the March blog post from the White House. We found that many agencies apparently didn’t get the memo/blog post: of the [twenty-nine agencies who produced substantive open government plans](#) last year, only six are actually making all the specified information available. While almost eighty percent of the agencies we checked are making some effort to post the information, we found a great diversity in the quality and quantity of the information some agencies posted.

Open Government Directive

In December 2009, President Obama kicked off a bold experiment in making the federal government more open and participatory—an Open Government Directive requiring federal agencies to tell the public how they will become more transparent, participatory and collaborative. The administration required agencies to develop open government plans that laid out specific steps each agency will take to build openness and participation into standard operations. Most agencies updated and improved these plans within six months to reflect feedback from open government groups¹² coordinated by OpenTheGovernment.org, the public and their own self-assessments. Agencies have made significant progress toward these goals, but there is still a long road ahead. They continue to need additional support and direction from the administration to become more accountable to the public. The primary success of the Open Government Directive to date has been developing infrastructure that makes information more available to the public and that increases opportunities for people to provide agencies with input and feedback.

Data.Gov

The Administration is clear that one of the primary purposes of Data.gov is to enable the technology community and transparency advocates to most effectively use government data to make a direct impact on the daily lives of the American people. Many within the community of advocates who re-use and repackage government data have found¹³ problems with the content and the presentation of information on the site. The primary concern of openness and accountability advocates is that, while data that has an impact on daily lives or that furthers the mission of an agency is valuable, data that holds an agency accountable for its policy and spending decisions is equally important to make available to the public.

Spending Transparency

To deliver on the promise of unprecedented level of transparency for the Recovery Act spending, the administration accomplished what has been described as the IT equivalent of building a bicycle while riding it. Officials simultaneously established a new electronic reporting system (FederalReporting.gov) to collect never before submitted recipient reports and launched a site (Recovery.gov) to allow the public to not only review the data with interactive mapping interfaces, but also download the data.

11 <http://www.openthegovernment.org/node/3161>

12 <https://sites.google.com/site/opengovtplans/>

13 [http://www.openthegovernment.org/sites/default/files/otg/Kundra-HVD letterFinal.pdf](http://www.openthegovernment.org/sites/default/files/otg/Kundra-HVD%20letterFinal.pdf)

USAspending.gov, the government's main site for disclosing federal spending, also received major upgrades and a new interface in 2010. The new interface allows users to add and eliminate search criteria "on the fly" to immediately alter the presented results. In October, USAspending.gov also began providing information from grant and contract recipients and sub-recipients. This expansion of data had been a long time goal for the site but had proven too difficult to accomplish until the new reporting improvements established under the Recovery Act provided a successful model.

Overview

On March 18, 2011, OMB Watch released a [report](#)¹⁴ assessing, near the midpoint of the President's term, progress on each of the 70 recommendations laid out in the November 2008 [Moving Toward a 21st Century Right-to-Know Agenda](#). They note that no administration could be expected to complete all of the recommendations contained in the 2008 report in just two years' time due to a very real limit to resources and staff that can be brought to bear on the issue of government openness while still addressing the many other demands on government.

As the report notes, external events have tested the administration's openness principles. One example is the aftermath of the BP Deepwater Horizon disaster, when the administration's openness did not pass the test—inaccurate and misleading information was released; agency data lacked transparency, and the White House was accused of interference in the science reporting.

Counterbalancing some of these concerns, the report notes that the administration has launched major transparency initiatives on other issues not specifically contained in the original recommendations, but consistent with the spirit of the report, such as the spending transparency noted above.

NATIONAL SECURITY

National Intelligence Budget

The October 2010 disclosure of the total intelligence budget for 2010 included budget figures for the National Intelligence Program ([\\$53.1 billion](#)) and the Military Intelligence Program ([\\$27 billion](#)) and constituted a new and unprecedented degree of transparency on intelligence spending. The total amount of intelligence spending was last disclosed in [1997](#) and [1998](#) in response to a Freedom of Information Act (FOIA) lawsuit brought by the Federation of American Scientists, with the support of the Center for National Security Studies. At that time, the "national" and "military" components of the total budget were not disclosed.

Nuclear Policy & Stockpile

In May 2010, the Administration released newly declassified details about the US nuclear stockpile in an effort to promote transparency and help stem nuclear proliferation. The previous month, the Administration released its Nuclear Posture Review.¹⁵ This is the third such comprehensive study since the end of the Cold War. The first was completed by the Clinton administration in 1994 and the second by the George W. Bush administration in 2002; each of these were classified.¹⁶

14 Assessing Progress Toward a 21st Century Right to Know. <http://www.ombwatch.org/files/info/21strtkreccassessment.pdf>

15 <http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf>

16 http://armscontrolcenter.org/policy/nuclearweapons/articles/fact_sheet_2010_nuclear_posture_review/

In other cases, we have seen the government fail to implement new directions, or pursue policies that make it more secret and less accountable to the public.

STATE SECRETS PRIVILEGE

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. The Administration newly asserted the privilege for the first time (of which we are aware) in 2010.

CLASSIFICATION GUIDANCE REVIEW

As Steering Committee member Steven Aftergood has noted, the Fundamental Classification Guidance Review is the Obama Administration's most ambitious effort to confront the problem of overclassification. It requires each agency that classifies information to conduct a detailed review of all of its classification guides in order to identify obsolete classification requirements and to eliminate them. The deadline for completion of the Reviews is June 29, 2012, two years after the effective date of the executive order. However, a Secrecy News survey¹⁷ of dozens of federal agencies showed in late 2010 that only a few agencies are taking the process very seriously, others are ignoring or deferring it. Still others wrongly believe it does not apply to them at all. The Information Security Oversight Office (ISOO) is doing what it can to impress upon affected agencies that this is not a discretionary task,¹⁸ but getting the attention of the agencies may well require White House attention.

CLASSIFIED INFORMATION, LEAKS & WHISTLEBLOWERS

The Obama Justice Department has aggressively pursued prosecutions¹⁹ of two cases begun in the Bush Administration, and initiated three new prosecutions involving the alleged disclosure of classified information, with what has been described as more vigor and legal creativity than previous administrations. The Bush-era case against Thomas Tamm was dropped in April 2011. The espionage case against Thomas Drake ended in June 2011, after DOJ dropped ten felony counts against him and settled with a minor charge of misuse of a government computer.

WIKILEAKS RESPONSE

The Executive Branch reacted very strongly, especially initially, to the WikiLeaks disclosures. The government's position was (and remains) that the classified portions of the disclosures remain classified until properly declassified, even though the information was now widely in the public domain. The Office of Management and Budget (OMB) issued²⁰ stern warnings to federal employees to not view, and especially to not download, the documents on non-secure computers. In January 2001, OMB, the Information Security Oversight Office (ISOO), and the National Counterintelligence Executive within the Office of the Director of National Intelligence (ODNI) issued²¹ to each agency that handles classified information a "list of existing requirements and questions your department or agency assessment team should utilize, as an initial step, to

17 http://www.fas.org/blog/secrecy/2011/01/bumpy_fcgr.html and http://www.fas.org/blog/secrecy/2011/04/fcgr_stalled.html

18 <http://www.fas.org/sgp/isoo/fcgr.pdf>

19 <http://www.politico.com/news/stories/0311/50761.html>

20 <http://talkingpointsmemo.com/documents/2010/12/ombs-email-to-government-agencies-about-wikileaks-access.php> and <http://talkingpointsmemo.com/documents/2010/12/ombs-model-memo-to-federal-employees-banning-them-from-wikileaks-site.php>

21 M-11-08, Initial Assessments of Safeguarding and Counterintelligence Postures for Classified National Security Information in Automated Systems. <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-08.pdf>

assess the current state of your information systems security.” Some of the items are quite concerning, and suggest agencies monitor employees’ pre- and post-employment activities or participation in on-line media data mining sites like WikiLeaks or Open Leaks, and require employees to report all contact with the media. Other questions suggest agencies take steps to monitor employees’ relative happiness and grumpiness, which could become a basis for profiling of, and creating suspicious activity files on, employees who blow the whistle on waste, fraud and abuse. In private meetings, government parties have indicated that threatening employees’ protected constitutional rights and privacy interests was not the intent. We understand that an Executive Order—to address gaps in policy for information systems security, including characterization and detection of the insider threat to information security, but without imposing the security practices of intelligence agencies on other agencies—is due out in the next few months.²²

22 Executive Order Responding to WikiLeaks Due Shortly, August 12, 2011. http://www.fas.org/blog/secretcy/2011/08/eo_wikileaks.html, and e-mail communication with Director of ISOO.

2011 Secrecy Report

Introduction

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. As we gather more data from the Obama Administration, we will continue to look at how, and if, trends change. This report on trends in secrecy and openness in Fiscal Year 2010 includes data from almost two years of the Obama Administration (January 2009–October 2010). It also launches the new name of the report—Secrecy Report.

Our 2011 report takes on a new significance with the Administration’s new Open Government Partnership, an initiative that will bring together partners from many countries and sectors to support governments’ efforts to become more transparent, accountable, and participatory. Countries that elect to participate, including the US, must deliver a concrete action plan, developed with public consultation and feedback and commit to independent reporting on their progress going forward. In this Introduction, we have highlighted progress that we hope to see continued and strengthened as well as trends we would like to see reversed.

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).

2010 Highlights

- The government continued to spend on declassification only .5% of overall security classifications costs. Put differently, for every \$1 the government spent declassifying secrets it spent 2000% more (\$201) on protecting other secrets. While expenditures to maintain secrecy (10.17 billion) increased 13%, agencies declassified only 1% more pages than were declassified in 2009.
- FOIA backlogs were reduced by 8.1% governmentwide in 2010, with 6,000 more FOIA requests processed than received and backlogged pending requests reduced by 7,851 governmentwide.
- In 2010, while the number of original classification decisions increased to 224,734, a 22.6% increase from 2009 (183,224), the percentage of pages declassified governmentwide increased by only 1% (29.1 million). The declassification rate also showed very little change: 55.4% for 2010 as compared to 54.8% in 2009.
- The Nuclear Posture Review was declassified for the first time since the Cold War, and information about the U.S. nuclear stockpile was also declassified and released.
- Mandatory Declassification Review requests skyrocketed. Agencies received 9,686 new initial requests in 2010, after averaging 4,393 requests yearly since 1996. In 2010, 63% of reviewed pages were fully declassified; 29% were partially declassified. The backlog of requests continues to grow, with 9,542 initial requests carried over into 2011.

- The number of new invention secrecy orders in 2010 (86) decreased by 16.5% from 2009 (103). The number of secrecy orders rescinded continued to decrease to only 32 in 2010.
- In 2010, suits brought by whistleblowers accounted for 80% of the \$3.1 billion the United States obtained in settlements and judgments in cases involving fraud on the United States.

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:

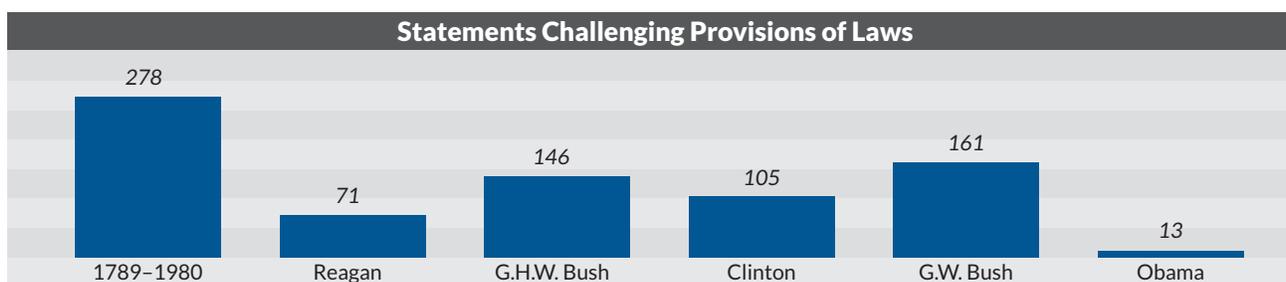
- data that show trends over time;
- data that have an impact across the federal government or the general public; and
- data that already exist and require little or no further analysis.

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.

2010 Trends in Secrecy and Openness

Presidential Signing Statements

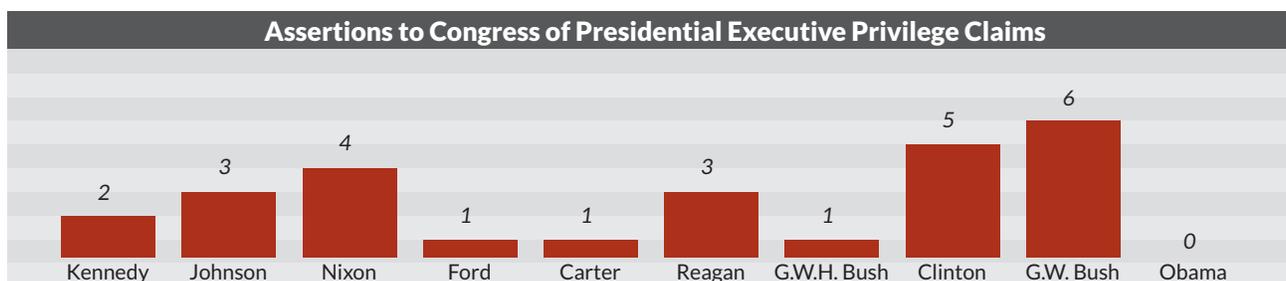
President Obama issued five signing statements during calendar year 2010,²³ bringing his total to thirteen. Unlike 2009, when most of the statements challenged specific provisions of the law, almost half of the statements during 2010 were merely ceremonial. Overall, seven of the thirteen signing statements challenged specific provisions, five are ceremonial, and one discusses an inadvertent drafting error in the legislation. This number is significantly lower than previous modern presidents.



Source: Presidential Signing Statements, <http://www.coherentbabble.com/signingstatements/signstateann.htm>; Accessed June 17, 2011.

Executive Privilege

President Obama has not asserted the privilege to Congress since taking office.²⁴ He is the only President on whom we have records to not do so.



The Freedom of Information Act (FOIA)

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.

²³ <http://www.coherentbabble.com/listBHOall.htm>

²⁴ According to congressional staff with access to updated information from CRS.

The Department of Justice launched FOIA.gov in March 2011. The data on the site is not yet totally reliable. For purposes of this report, we continue to use our historical data, and took additional steps to verify the 2010 totals pulled from the website.

The total number of public requests received by departments and agencies (597,415) increased by about 7% from 2009 to 2010.²⁵ The total spent processing those requests (\$416,408,917) increased by almost 9% in the same period.

Public Requests under the Freedom of Information Act ²⁴		
Fiscal Year	# of FOIA Requests Received	Total Cost of FOIA
1999	1,908,083	\$286,546,488
2000	2,174,570	\$253,049,516
2001	2,188,799	\$287,792,041
2002	2,429,980	\$300,105,324
2003	3,266,394	\$323,050,337
2004	4,080,737	\$336,763,628
2005	19,950,547	\$334,853,222
2006	21,412,736	\$304,280,766
2007	21,758,628	\$352,935,673
2008	605,471	\$338,677,544
2009	557,825	\$382,244,225
2010	597,415	\$416,408,917

Source: [Summary of Annual FOIA Reports for Fiscal Year 2009](#); 2010 statistics accessed 5/11/11 from [www.foia.gov](#)

BACKLOGS CONTINUE BE REDUCED

The federal government processed 600,849 FOIA requests during 2010, slightly fewer than the 612,893 processed in 2009. The size of the governmentwide backlog continued to decrease, with 3,434 more FOIA requests processed than received in 2010.

Overall, agency backlogs were reduced by nearly 8,000(10%) in 2010, to 69,526 FOIA requests pending as of the end of 2010. The reduction rate was greatly affected by the significant jump in the Department of State’s backlog. From 2009 (8,784) to 2010 (20,519), the department’s backlog increased by 133.5%.²⁷ The Departments of State, Homeland Security, and Health and Human Services (HHS) together account for

25 All years are Fiscal Years unless otherwise indicated or a specific date is given.

26 During several of the years covered in the chart, several agencies included first-person Privacy Act (PA) requests in their annual report totals. Under OIP guidance, agencies, beginning in FY 2008, these agencies stopped this practice. Thus, numbers from year to year in this chart are not fully comparable.

27 AP reported that the “Homeland Security Department cut its number of backlogged information requests by 40 percent last year, thanks mostly to work under a \$7.6 million federal contract with TDB Communications of Lenexa, Kan., which was approved during the Bush administration. The company accomplished its work partly by forwarding to the State Department tens of thousands of requests for immigration records from Homeland Security’s Citizenship and Immigration Services because the State Department makes visa determinations in immigration cases. At one point, as the Homeland Security Department was reducing its backlog, it was sending as many as 3,800 cases each month to the State Department, said Janice DeGarmo, a State Department spokeswoman.”

almost 60% of the total request backlog—but both Homeland Security and HHS decreased their backlogs in 2010.

Since 2007, the Department of Justice (DOJ) has [directed](#)²⁸ 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 2010, the National Archives and Records Administration (NARA) reported the oldest pending request as one which was filed on July 10, 1992. The 10 oldest pending requests across the entire government range from 1992 to 1993. Nine of these requests are at NARA, pending required referral made to the originating agencies; one is at the Department of Defense.

FOIA DELAYS

The gap in time between when a member of the public submits a FOIA request and when he or she receives a final response from the government is consistently one of the most frustrating—and confusing—parts of the FOIA process. The length of time requesters should expect to have to wait varies widely from agency to agency and can vary greatly between components of a single agency. The magnitude of an individual delay generally depends on several factors: the existing backlog, the number of people working to fulfill FOIA requests, the component’s efficiency at processing requests, the size and complexity of the request, whether or not the component must refer the request to another department that may have responsive records or consult with another agency that shares ownership of the responsive documents, etc.

Congress’ latest attempt to improve FOIA processing, the OPEN Government Act of 2007, requires that agencies grant or deny requests within 20 working days unless an “unusual circumstance” of a sort specifically described in the statute occurs. Few agencies actually meet the requirement, however, and requests for extensions are exceedingly common. The 2007 law also requires agencies to give FOIA requesters tracking numbers that, in theory, allow them to see where they are in the process; but even that reform does very little to help them figure out how much longer they will have to wait.

The annual FOIA reports submitted by agencies to and posted by the DOJ Office of Information Policy (OIP) on [FOIA.gov](#) provide the public with an overwhelming amount of data on median, average, shortest and longest waiting time for certain kinds of requests. The government splits up the data between “simple” and “complex” requests, and separate statistics are provided for requests where the user asks for “expedited processing.” Grants of “expedited processing” fall into two categories: 1) the requester must show a life-threatening need for the information; or 2) journalists, or persons who are otherwise “primarily engaged in disseminating information,” who show a “compelling need” for the information. While these different “tracks” may arguably achieve the intent of the Electronic FOIA Amendments of 1996 to make processing requests more efficient, they do not make it easier for a requester to know how long it will take to get a response.

To get a sense of how FOIA requesters actually experience this process, and to see how the government’s statistics stack up to that experience, we worked with [MuckRock](#), an online tool that makes it easier for a citizen to get government records by managing the entire process. As of this report’s writing, MuckRock has managed over 647 requests at the state, local and federal level, and, in the process, has built an impressive database capturing their users’ experiences trying to obtain government data.

28 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.justice.gov/archive/oip/foiapost/2007foiapost17.htm>

SIMPLE OR COMPLEX?

The general government understanding of a simple request is one that does not involve a significant volume of records or lengthy consultations with other entities. This standard is open to interpretation. MuckRock’s data, for instance, shows that a request that most would consider “simple” takes considerably longer to process than should be expected.

OpenTheGovernment.org and MuckRock decided to plot the average wait time from shortest to longest for a few select components of the federal government using the statistics on FOIA.gov and MuckRock’s data. (Figure A) We chose components that are of particular interest to the openness community and that have a relatively large sample size in MuckRock’s database: the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and the Department of State (State). We also opted to look at two components of the Department of Defense (DOD): the Defense Intelligence Agency (DIA) and the Office of the Secretary of Defense (OSD) to get a better view of the variation in processing within an agency.

Figure A shows the variation in the speed with which components of the government process different kinds of requests, and the experience of the MuckRock user.

Figure A. Shortest to longest average waiting time (in days)			
Simple*	Complex*	Expedited*	MuckRock User Experience
DIA (11)	CIA (109)	CIA (5)	DIA (26)
OSD (15)	FBI (225)	FBI (42)	FBI (37)
CIA (19)	State (284)	State (435)	CIA (59)
FBI (37)	OSD (467)	OSD (921)	State (73)
State (144)	DIA (1060)	DIA (n/a)	OSD (204)

*Source: www.foia.gov; accessed 8/5/2011

The difference in average waiting time for requesters at the CIA with simple or complex requests is one of the lowest: a simple request, on average, takes 59 fewer days to process than a complex request. As the government usually only counts working days, that translates to a little more than four and a half months additional waiting time for the requester with a complex request, on average. The range between average response times for simple and complex requests at the FBI is a little more than double the CIA’s difference—users with complex requests wait almost 9 and a half months more than users with simple requests. Requesters with complex requests at State wait about seven months longer than requesters with simple requests.

Breaking out the components of DOD from the group shows even wider variation (Figure B).

Figure B. Shortest to longest average waiting time (in days) for DOD components			
Simple*	Complex*	Expedited*	MuckRock User Experience
DIA (11)	OSD (467)	OSD (921)	DIA (26)
OSD (15)	DIA (1060)	DIA (n/a)	OSD (204)

*Source: www.foia.gov; accessed 8/5/2011

Because DIA's average response for simple requests is the fastest (11 days) and average response time for complex requests is the longest (1060), a user with a complex request can expect to wait nearly four and a half years longer than a user with a simple request. The range in average response times for OSD is a little more than ten months, reflecting OSD's relatively quick average response time for simple requests and marginally better average response time for complex requests (921 days).

As an example, a [Defense Intelligence Agency request for basic meeting minutes spanning a decade](#): First filed on Nov. 12, 2010, a confirmation sent about a month later telling the requester to expect a "substantial delay." It is now about 8 months after the statutory deadline without any indication of when, if ever, the request will be answered. A similar response was received for a request for [processing notes on the 5 oldest open FOIA requests](#), making it difficult to understand what is holding up such requests or how bad the worst cases are.

DENIALS AND DELAYS

MuckRock's data also allows a glimpse of other issues that continually complicate users' attempts to access government information. For example, a review of only those cases from the small subset of components we analyzed revealed that two MuckRock users filed similar requests with the FBI in regards to a widely publicized server seizure that [disrupted access to several popular, and apparently unrelated, web services](#). The first request was for the "[search warrant and supporting affidavit](#)" that supported the raid. In keeping with the statutory guidelines, a "[no responsive documents](#)" response came back about a month later. Another requester, however, was more persistent, as it was widely reported that such a raid *had* indeed taken place. So [after a similar rejection](#), the 2nd requester appealed. This time the FBI responded that the material was found, but entirely exempt as part of an ongoing investigation.

The material in question was of high public interest and widely sought, but the initial response to FOIA requests was a troubling one: denial that the documents exist. This response obfuscates, obstructs and delays public access to records while, for the agencies' FOIA statistics, shortening the time involved from the average initial request to response. Similar patterns of deny first, search later (maybe) are seen in the CIA [responses](#) and should be kept in mind when evaluating both MuckRock's and the government's timetables.

OPTIONS FOR REFORM

Thanks to one of the reforms of the OPEN Government Act of 2007, users who are frustrated by delays and other processing issues now have a place to turn for help (other than the courtroom), the [Office of Government Information Services \(OGIS\)](#). OGIS is tasked with mediating disputes between requesters and the government. OGIS does not have the authority to compel agencies to answer requesters or turn over records, but many users have found OGIS' services to be useful. According to the [FY 2011 Mid-Year Review](#), OGIS had received 631 cases and closed 563 as of March 31. The types of disputes regularly handled by OGIS include denials, delays, and fee disputes.

While clarity into expected processing times would be welcomed, ultimately we want to see a system where long delays do not continually impede the public's right to government records. One possible step in this direction would be for Congress to pass the [Faster FOIA Act](#), which would establish the Commission on FOIA Processing Delays. The Commission would include people from outside government who routinely use the FOIA process, and would be charged with an examination of agency backlogs, culminating in a recommendation to Congress and the President regarding steps that should be taken to reduce delays and make the administration of the FOIA equitable and efficient throughout the federal government.

Federal Advisory Committees: Information for the Public Closed Off

Openness of Federal advisory Committees is increasingly the exception to the rule according to statistics maintained by the General Services Administration (GSA). During 2010, 72% of the 7,254 meetings of the 993 active federal advisory committees that fall under the Federal Advisory Committee Act (FACA) were completely closed to the public. Moreover, meetings conducted by subcommittees and informal working groups are not subject²⁹ to the public participation and public notice requirements of the FACA, and the GSA FACA database does not track subcommittees and informal working groups. The numbers below, thus, do not fully reflect the exclusion of the public from the working of Advisory Committees.

While the percentage of meetings closed to the public fell slightly relative to 2009 (from 73% to 72%), the actual number of meetings closed rose very slightly (to 7,254 from 7,221). Since we began tracking this statistic in 1997, both the percentage and hard number of meetings closed to the public have maintained a fairly steady upward trajectory. The Department of Defense, Department of Health and Human Services and National Science Foundation historically account for majority of the closed committees. Even with these excluded, the percentage of meetings completely closed reached a new record high of almost 23% in 2010.

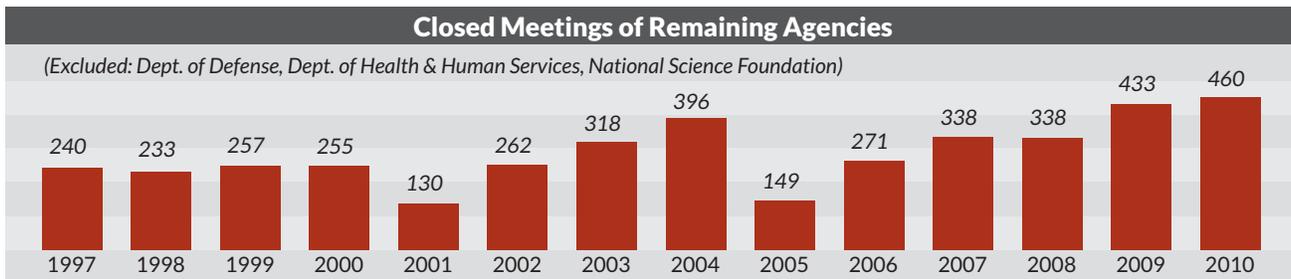
According to the GSA, 74,000 members of active Federal Advisory Committees provided advice and recommendations to 50 federal agencies. The total operating costs for these committees in 2010 was \$385.9 million.³⁰

Fiscal Year	Total # of Meetings	% of Meetings Closed
1997	5,698	51
1998	5,898	50
1999	6,256	53
2000	6,211	56
2001	5,872	58
2002	6,281	61
2003	6,799	61
2004	7,045	64
2005	7,449	61
2006	7,189	63
2007	7,067	64
2008	6,840	65
2009	7,221	73
2010	7,254	72

Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, www.fido.gov/facadatabase; accessed April 19, 2011

29 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.”

30 http://assets.opencrs.com/rpts/R40520_20110124.pdf



Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, www.fido.gov/facadatabase; accessed April 19, 2011

In April of 2011, the GSA launched a new website meant to increase transparency of the FACA system. Interestingly, the site, which can be found at www.gsa.gov/efaca, does not include any information on the number or percentage of FACA meetings that are open or closed.³¹ However, the site does make it much easier for the public to access basic information about the committees, including committee topics, contacts, and membership and the total amount of money spent on the committee.

Whistleblowers Recover \$2.3 Billion for Taxpayers

Suits brought by whistleblowers under the False Claims Act *qui tam*³² provisions accounted for almost 77% (more than \$2.3 billion) of the \$3 billion in settlements and judgments in 2010, in cases involving fraud on the federal government.

Since 1986, when Congress strengthened the civil False Claims Act, the federal government has recovered more than \$27 billion overall.

Year	Savings in \$	Year	Savings in \$
1989	15,111,719	2000	1,199,766,754
1990	40,558,367	2001	1,286,791,859
1991	69,775,271	2002	1,089,252,722
1992	135,093,903	2003	1,501,554,095
1993	177,416,383	2004	554,626,506
1994	381,468,397	2005	1,425,853,183
1995	247,276,827	2006	3,100,000,000
1996	138,598,636	2007	2,000,000,000
1997	629,882,525	2008	1,340,000,000
1998	462,038,795	2009	2,400,000,000
1999	516,778,031	2010	3,000,000,000

(Source: US DOJ Press Release, 22 Nov 10 <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html>)

31 This information can be found through www.fido.gov/facadatabase.

32 The False Claims Act allows a private individual or “whistleblower,” with knowledge of past or present fraud on the federal government, to sue on behalf of the government to recover stiff civil penalties and triple damages. A suit initially remains under seal for at least 60 days during which the Department of Justice can investigate and decide whether to join the action. <http://www.quitamonline.com/whatis.html>

Classified Information

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

STATE SECRETS PRIVILEGE

In 2010, the federal government invoked the “state secrets” privilege twice. In one instance, the assertion was in a case (*Jeppesen*) that began in the G.W. Bush administration. In the other, it was a new case, about Anwar al-Aulaqi.³³ To date, President Obama’s assertions, though troubling, return to a pre-2001 level.

Years (inclusive)	1953–1976	1977–2000	2001–12/2008	2009–2010
Times Invoked in Cases	6	59	48	6
Period	24 years	24 years	8 years	2 years
Yearly Invocations (average)	0.25	2.46	6	3

We search on the US Department of Justice site³⁴ and use news accounts to identify re-assertions and new assertions. Other, more exhaustive, methodologies³⁵ yield different results.³⁶ All the counts indicate that the use of the state secrets privilege by the federal government has rapidly accelerated in recent history.

NATIONAL INTELLIGENCE BUDGET

The National Intelligence Budget incorporates both the National Intelligence Program (NIP) and the Military Intelligence Program. In October 2010, the government announced that it had spent \$80.1 billion on intelligence activities over the past 12 months, disclosing for the first time not only the amount spent by civilian intelligence agencies (\$53.1 billion) but also by the military (\$27 billion).³⁷ The NIP budget is increased by almost 7% over 2009 (\$49.8 billion). The MIP budget increase is slightly more than 7% from estimated³⁸ 2009 numbers.

The NIP budget total has previously been disclosed each year since 2007, when Congress mandated its disclosure as part of the implementation of the recommendations of the 9/11 Commission. Disclosure of the MIP budget, and thus of the total level of intelligence spending, was not required by Congress.

33 Ryan Devereaux, “Is Obama’s Use of the State Secrets Privilege the New Normal?” *The Nation*, (Sept. 30, 2010), at: <http://www.thenation.com/article/155080/obamas-use-state-secrets-privilege-new-normal>

34 <http://www.justice.gov>

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

36 According to statistics kept by the [Georgetown Center on National Security and the Law](http://www.georgetown.edu/cnsl/) at the Georgetown University Law Center, six cases in which the federal government invoked the “state secrets” privilege have a disposition date (meaning the case was somehow settled) in 2010. 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.

37 http://www.fas.org/blog/secrecy/2010/11/new_milestone.html

38 On September 15, 2009, then-Director of National Intelligence Dennis C. Blair, told reporters that the new National Intelligence Strategy was “a blueprint to run this 200,000-person, \$75 billion national enterprise in intelligence.” The DNI was describing the consolidated National Intelligence Budget for both the National Intelligence Program (NIP), which supports national policymakers, and the Military Intelligence Program (MIP), which supports military operations and activities. On October 30, 2009, he released the FY 2009 aggregate amount appropriated to the National Intelligence Program (NIP): \$49.8 billion. From this, one could calculate that the 2009 MIP was likely \$25.2 billion.

The total amount of intelligence spending was last disclosed in 1997 and 1998 in response to a FOIA lawsuit brought by the Federation of American Scientists, with the support of the Center for National Security Studies. The total intelligence budget figure (which did not break out the two components) in those years was \$26.6 and \$26.7 billion, respectively, compared to 2010’s total of \$80.1 billion.

SOURCE OF SECRETS CONTINUES TO SHRINK: 2,378 “ORIGINAL CLASSIFIERS”

After hovering around 4,000 for more than a decade, the number of persons with Original Classification Authority (OCA) in the federal government plummeted from 4109 in 2008 to 2557 in 2009. The number of OCAs continued to drop in 2010 (2,378).

The Information Security Oversight Office (ISOO) attributed much of the 2009 drop to reductions implemented by the State Department in anticipation of President Obama’s December 29, 2009 [Executive Order \(EO\) on Classified National Security Information](#). This EO directed all agencies to review their delegations of OCA. According to ISOO’s 2010 Report to the President, all agencies have completed that review, which resulted in a reported further decrease of 179 OCAs.

An “original classification authority” delegation gives federal workers 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.”

Persons in Government with Original Classification Authority			
Fiscal Year	# of Persons	Fiscal Year	# of Persons
1993	5,661	2002	4,006
1994	5,461	2003	3,978
1995	5,379	2004	4,007
1996	4,420	2001	3,959
1997	4,010	2006	4,042
1998	3,903	2007	4,182
1999	3,846	2008	4,109
2000	4,130	2009	2,557
2001	4,132	2010	2,378

Source: Information Security Oversight Office (ISOO), [2010 Report to the President](#).

CLASSIFICATION DECISIONS

Original Classification Decisions

Original classification decisions increased by 22.6% in 2010, to an overall number of 224,734. This number, although a significant reduction from the peak year of 2004, remains well above the reported decisions made prior to 2000.

ISOO reports that, for the sixth year in a row, the majority (74%) of original classifications decisions have been assigned a declassification date of ten years or less.

Classification Activity		
Fiscal Year	Original Classification Decisions*	Number of Pages Declassified
1995	167,840	69,000,000
1996	105,163	196,058,274
1997	158,733	204,050,369
1998	137,005	193,155,807
1999	169,735	126,809,769
2000	220,926	75,000,000
2001	260,678	100,104,990
2002	217,288	44,65,711
2003	234,052	43,093,233
2004	351,150	28,413,690
2005	258,633	29,540,603
2006	231,995	37,647,993
2007	233,639	37,249,390
2008	203,541	31,443,552
2009	183,224	28,800,000
2010	224,734	29,050,290

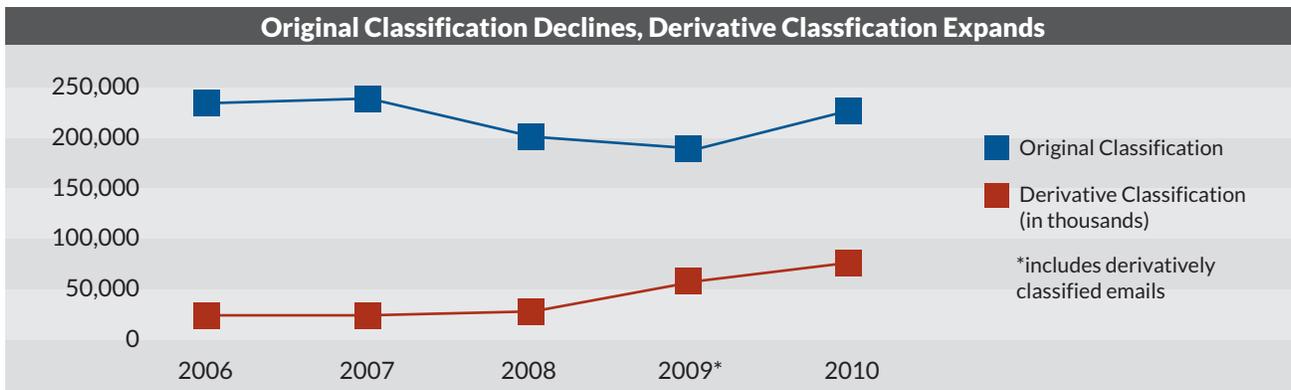
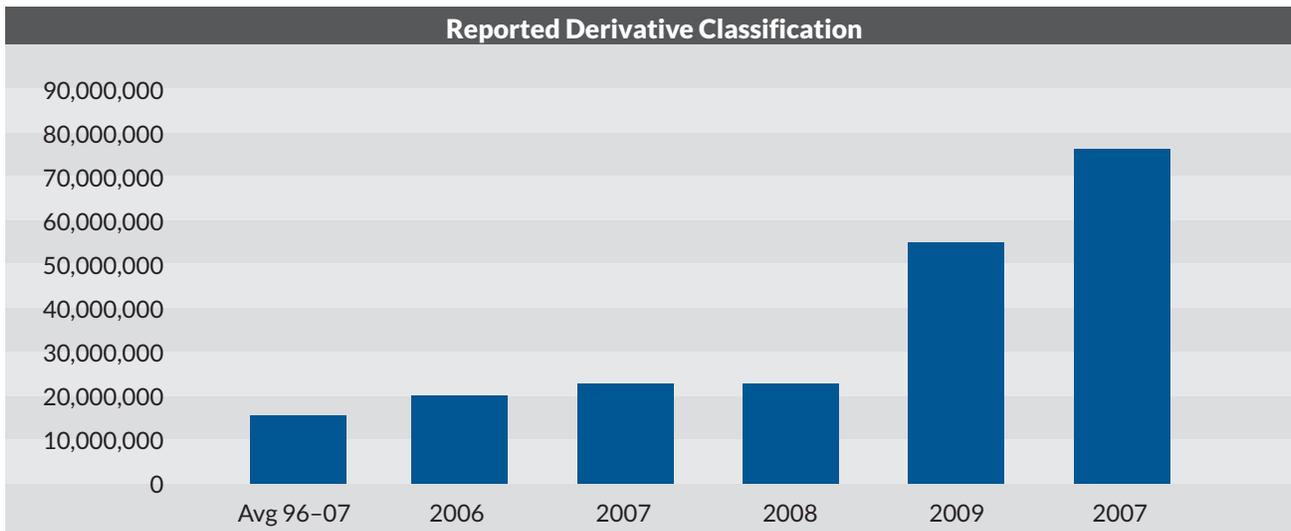
Derivative Classifications

Once information is designated as classified by an OCA, it can be “derivatively classified”—used by an undisclosed number of people³⁹ 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.

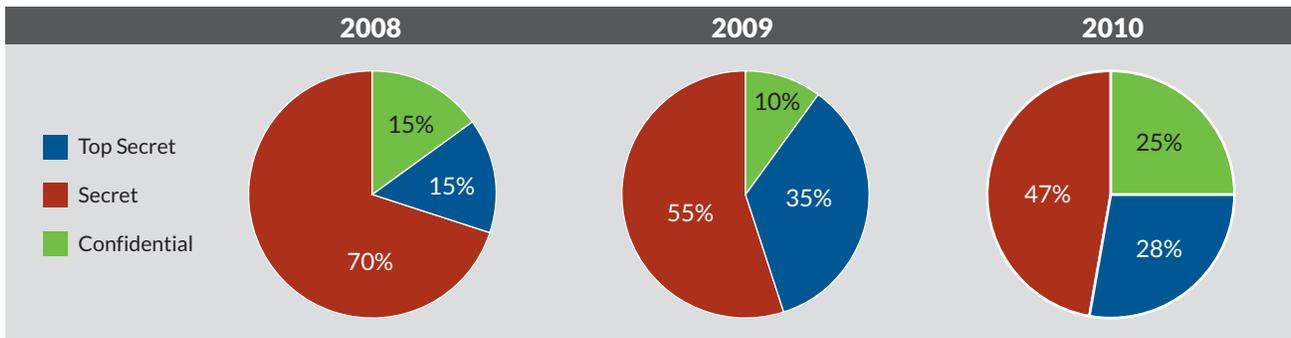
In 2009, ISOO expanded its count of derivatively classified information to include derivatively-classified e-mails. Although the change makes it impossible to accurately compare current numbers with those prior to 2009, it presents a much more accurate picture of the size of the classified universe, as well as the volume of material that will one day have to be declassified. The number of reported derivative classifications continued to increase in 2010.

Even taking into account the change in counting, a clear trend is evident: while the reported classification activity has declined over the past few years, reported derivative classification decisions have climbed.

³⁹ <http://www.federaltimes.com/article/20110531/AGENCY02/105310303/1001> As of May 31, 2011, the Office of the Director of National Intelligence had not released the number of government employees and contractors who hold security clearances, missing its self-imposed deadline. In 2009, it was estimated that about 3.4 million people—excluding some of those with clearances who work in areas of national intelligence—currently held or were eligible for security clearances. In FY 2008, the Office of Personnel Management (OPM) conducted about 750,000 national security background investigations for clearance.



As in years past, the majority of derivatively classified information is marked Secret. In 2010, the percentage of reported Top Secret derivative classification decisions declined by 7%.



CLASSIFICATION CHALLENGES

Executive Order 13526, issued in December 2009, continues to encourage authorized holders of classified information to challenge the classification status of information that they believe, in good faith, to be improperly classified. Classification challenges increased by 49% between 2009 and 2010, jumping from 365 to 722. Only 16% of the 772 challenged classifications were overturned either in whole or in part.

RECLASSIFICATION

In its 2007 report to the President, ISOO noted that at the end of FY 2007 “some agencies, including the Central Intelligence Agency (CIA) and the Air Force, had yet to complete their reviews and return their decisions [about materials removed by several agencies in 2006] to NARA.” At that point, more than 5,000 referrals had yet to be adjudicated. In discussions with ISOO, the agencies indicated that they hope to have finished this process by the end of FY 2008. In 2008, ISOO reported⁴⁰ that the agencies doing the bulk of the work (CIA and Air Force) had finished their work and returned their decisions. Approximately 500 “hard problem” adjudications awaited further processing by NARA and the agencies. By the end of FY 2009, forty-three adjudications were remaining. It appears⁴¹ that there are no remaining adjudications as of the end of FY 2010.

Starting in April 2006, National Archives and Records Administration (NARA) began [reporting](#) 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 “[Interim Guidelines Governing Re-review of Previously Declassified Records at the National Archives](#),” issued by ISOO in April 2006. Through 2007, 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. In the first three quarters of 2010, no declassified records were withdrawn. NARA has not posted the fourth quarter as of this report.⁴²

Declassification

AUTOMATIC AND SYSTEMATIC DECLASSIFICATION REVIEW

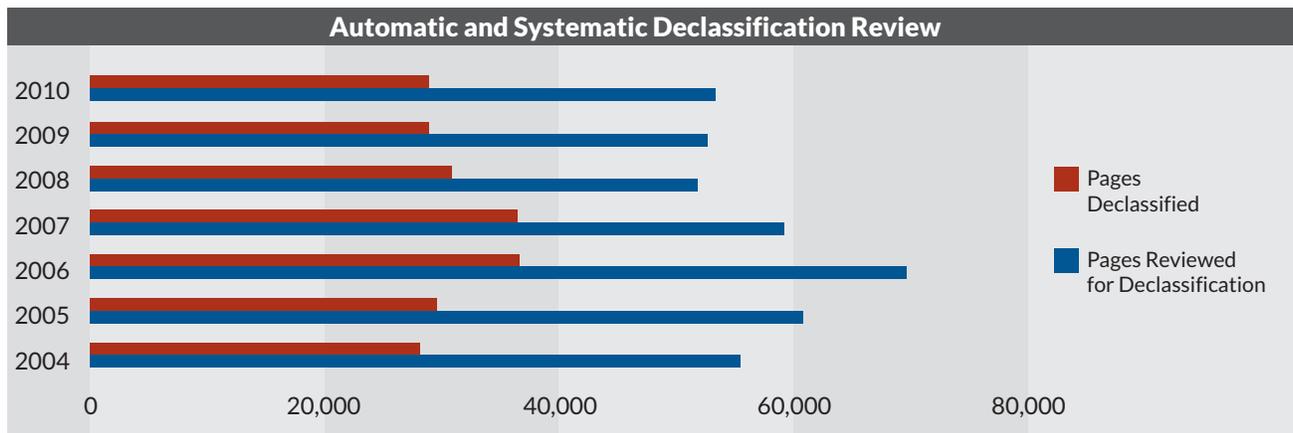
In 2010, agencies reviewed 53.1 million pages and declassified 29.1 million pages (55.4%). Of these, 45.4 million pages were reviewed and 24.2 million pages were declassified under automatic declassification; 5.8

40 Telephone conversation with William J. Bosanko, 28 July 2009.

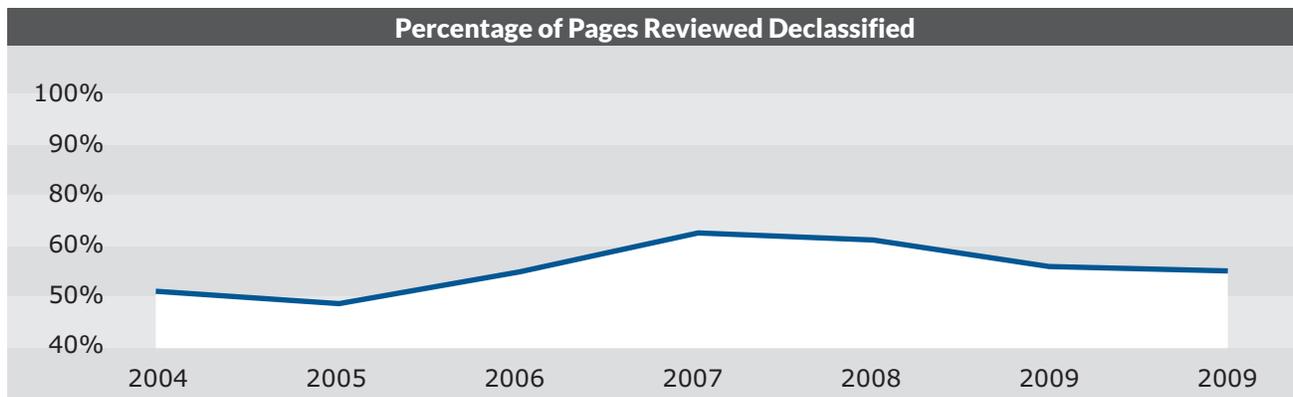
41 E-mail communication with government.official.

42 <http://www.archives.gov/about/plans-reports/withdrawn/2010withdrawals.pdf>

million pages were reviewed and 4.6 million pages declassified under systematic declassification⁴³; and 1.9 million pages were reviewed and 181,607 pages were declassified under discretionary declassification review. Overall, from 2009, the number of pages reviewed increased by 2% and the number of pages declassified increased by 1%.



The 55% declassification rate in 2010 matches the rate from 2009. The rate of declassification has fallen off significantly since hitting a peak in 2007, when 62% of pages reviewed were declassified.



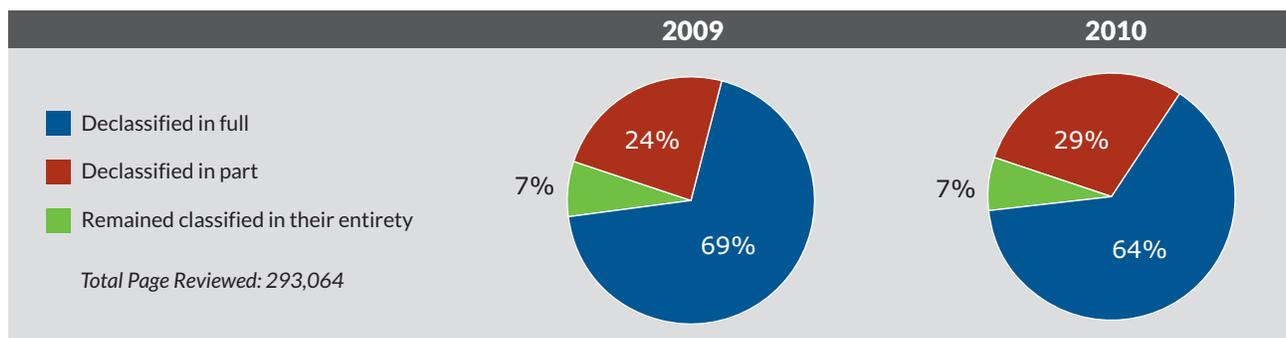
⁴³ E.O. 13526 continues the requirement that all agencies automatically declassify information that has “permanent historical value,” unless the information falls under several limited exemptions allowing continued classification. After several deadline extensions, automatic declassification came into 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. In 2010, the number of new initial requests (9,686) increased by 23.4% from 2009 (7,843). The number of carry-overs from the one year to the next also continues to grow.



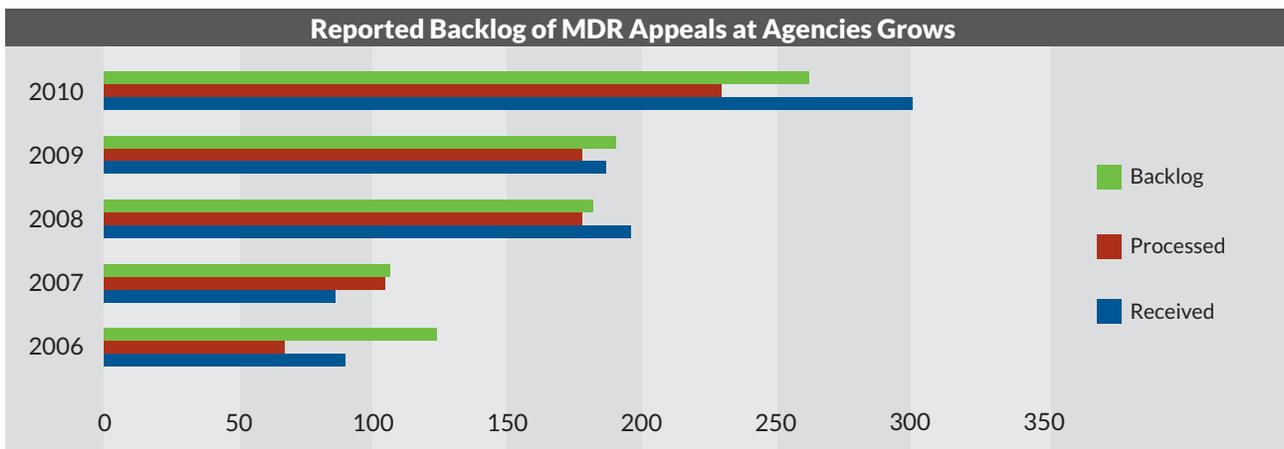
The percentage of pages declassified in full declined by 4%; pages declassified in part increased by 5%.



MANDATORY DECLASSIFICATION REVIEW APPEALS

Appeals of agency decisions to deny information under the MDR process have continued to grow, as has the backlog of appeals. In 2010, appeals received and processed reached record numbers: agencies received 302 appeals, processed 231 appeals and carried 263 over to 2011. This compares with 177 processed and 192 carried forward in 2009, and 178 processed and 183 carried forward in 2008.

Agencies reviewed 47% fewer pages (3,330) in 2010 than in 2009 (6,333). Information in 71% (2,365) of the pages was declassified: 39% in their entirety; 32% in part.

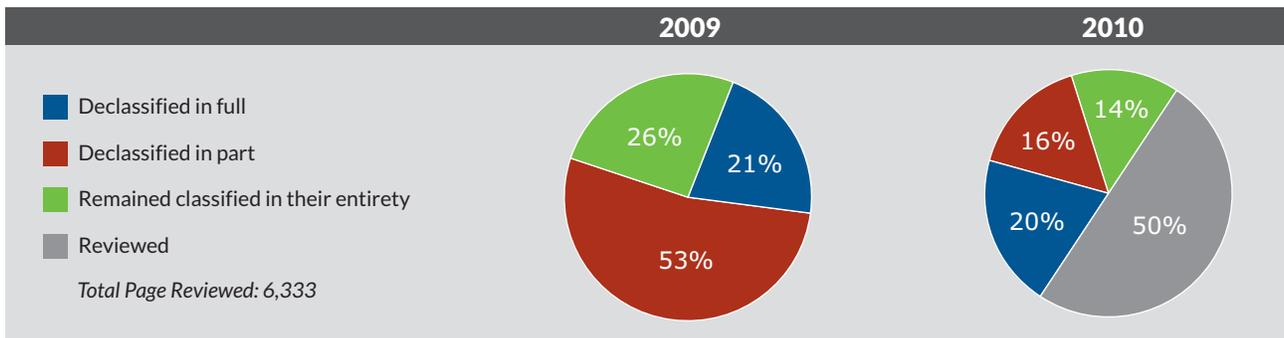


INTERAGENCY SECURITY CLASSIFICATION APPEALS PANEL (ISCAP)

A requester may appeal directly to the ISCAP any final decision made by an agency to deny information during an MDR appeal. The ISCAP exercises Presidential discretion in its decisions and it serves as the highest appellate authority for MDR appeals.

In 2010, ISCAP received 116 more appeals than it did in 2009, and the panel processed 54 more appeals than in the previous year. The reported backlog of appeals continues to grow—overall by 113% since 2006.

On appeal, ISCAP reviewed 3,330 pages in 2010, a decrease of 3,003 from 2009. In 2010, the panel declassified in full or in part about 71% of the pages reviewed, with 29% remaining classified in their entirety.

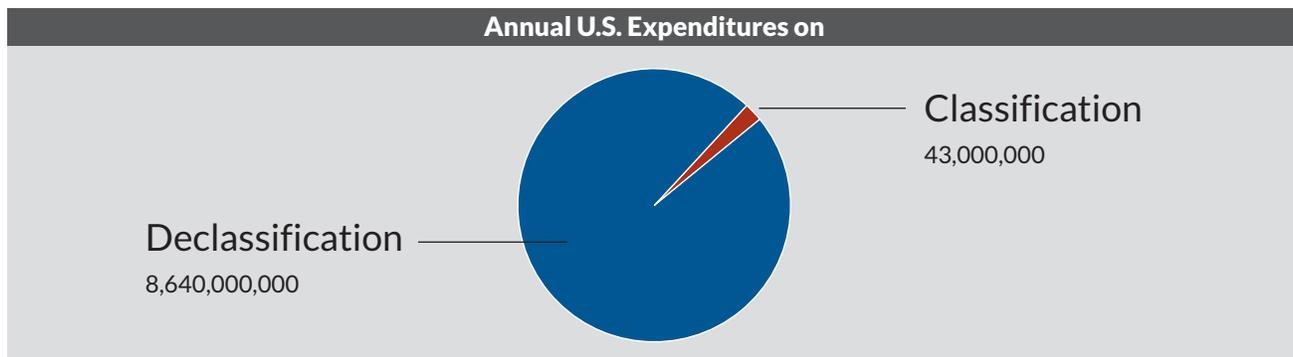


Classified Dollars

DOLLARS FOR SECRECY CONTINUE TO INCREASE/PERCENTAGE FOR DECLASSIFICATION DROPS

Government agencies spent \$10.1 billion in 2010 to secure classified documents.⁴⁴ Since 2006, declassification costs have accounted for the smallest, and largely declining, share of the amount spent on security classification. Of the \$10.1 billion, \$50.44 million was spent for declassification in 2010, an increase of 13 percent (\$5.94 million) over the previous year.

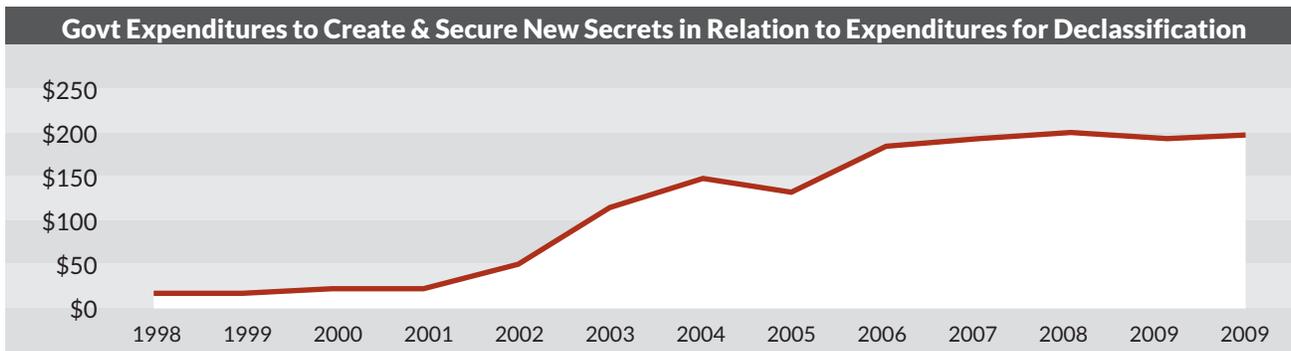
While more money was spent on declassification in 2010, declassification costs accounted for a slightly smaller percentage of overall spending on classification—from just over .5% in 2009 to just under .5% in 2010. This fact is indicative of the rate at which the costs of maintaining secrecy continue to rise.



\$201 SPENT CREATING AND SECURING OLD SECRETS FOR EVERY TAX DOLLAR SPENT DECLASSIFYING

For every \$1 the government spent on declassifying documents in 2010, the government spent approximately 2000% more—about \$201—maintaining the secrets already on the books than it spent in 2009. This increase completely wipes out the downward dip in the trend between 2008 and 2009, and re-establishes a steady upward rise.

⁴⁴ <http://www.archives.gov/isoo/reports/2010-cost-report.pdf>



Federal Expenditures on Classification and Declassification in Millions (excluding CIA, NGA, DIA, NSA and NRO)			
Fiscal Years	Cost of Securing Classified Information	Portion Spent on Declassifying Documents ⁴²	Classification Costs Per \$1 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

Source: OpenTheGovernment.org calculations based on data from the Information Security Oversight Office (ISOO). [2010 Cost Report to the President.](#)

CLASSIFIED PROCUREMENT AND R&D BUDGETS REMAIN SIGNIFICANT

Classified or “black” programs accounted for about \$35.8 billion or 17% of the acquisition funding by the Department of Defense (DOD) for its 2010 budget. Procurement funding accounted for \$18.1 billion of this total; research and development (R&D) funding for \$17.7 billion. These figures represent 14% and 22%, respectively, of the total funding requested for procurement and R&D.

45 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.

The percentage of weapons acquisition and procurement spending that is classified has held fairly steady since the [Center for Strategic and Budgetary Assessments](#) started collecting these numbers. The percentage of spending on research and development that is classified rose quickly between 1995 to the early 2000s; it has remained fairly steady since its peak in 2001.

None of these totals include war-related funding appropriated through emergency supplemental spending bills. The wars in Iraq and Afghanistan have been funded in large part through supplementals.

Department of Defense Classified "Black" Budgets									
Weapons Acquisition				Procurement			Research & Development		
FY	Total DoD	Classified	% Classified	Total DoD	Classified	% Classified	Total DoD	Classified	% Classified
1995	77.7	11.7	15	43.2	7.1	16	34.5	4.6	13
1996	77.4	12.6	16	42.4	7.3	17	35	5.3	15
1997	79.7	13.2	17	43.2	6.1	14	36.5	7.2	20
1998	82.1	14.9	18	44.9	6.8	15	37.2	8.1	22
1999	88.7	15.8	18	50.6	7.5	15	38.1	8.3	22
2000	93.2	15.4	15.4	54.9	7.5	14	38.3	7.9	21
2001	103.9	18.1	17	62.2	7.5	10	41.7	10.6	25
2002	110.9	18.2	16	62.2	8.9	10	48.6	9.3	19
2003	137.9	26.1	19	79.6	13.2	17	58.3	12.9	22
2004	147.5	27.6	19	83.2	14.5	17	64.4	13.2	20
2005	167.8	29.8	18	98.5	16.3	17	39.3	13.5	20
2006	178.0	31.5	18	105.3	16.6	16	72.7	14.8	20
2007	212.0	34.5	16	134.4	17.7	13	77.6	16.7	22
2008	244.1	33.8	14	164.7	17.1	10	79.4	16.6	22
2009	215.0	35.2	16	133.3	17.5	13	81.7	17.7	22
2010	210.0	35.8	17	131.1	18.1	14	78.9	17.7	22

*Numbers for 2008 and 2009 estimate funding appropriated, and exclude emergency supplemental funding for the Global War on Terror (GWOT) passed by Congress after June 2008. Source: http://www.csbaonline.org/4Publications/PubLibrary/U.20090812.Classified_Funding/U.20090812.Classified_Funding.pdf
<http://www.csbaonline.org/wp-content/uploads/2011/02/2009.08.12-Classified-Funding-In-The-FY-2010-Defense-Budget-Request.pdf>

Invention Secrecy

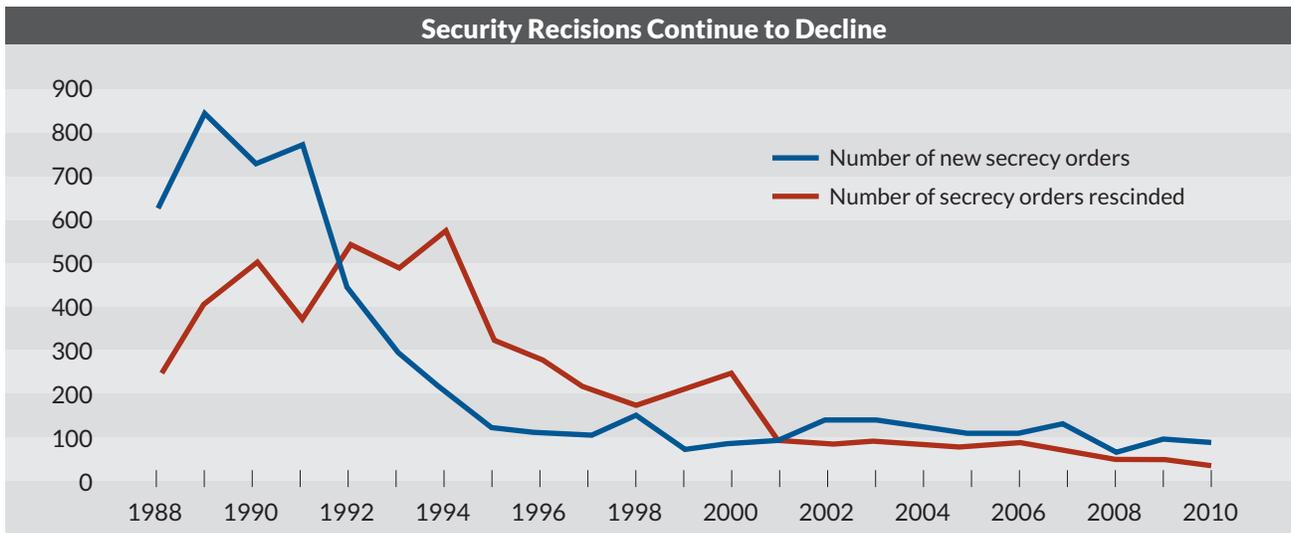
“SECURITY ORDERS” IN EFFECT CONTINUE TO CLIMB

The federal government can impose secrecy on any new patent by issuing a “secrecy order” (35 USC 181). The number of new orders in 2010 (86) is a 16.5% decrease from 2009, when new orders jumped 51%—to 103. The number of secrecy orders rescinded continued to decrease—to a historical low of 32 in 2010. 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

Source: United States Patent and Trademark Office via Federation of American Scientists, www.fas.org/sgp/othergov/invention/stats.html; and USPTO accessed 7/02/2009

Source: United States Patent and Trademark Office via Federation of American Scientists, <http://www.fas.org/sgp/othergov/invention/stats.html>; accessed 06/08/2011



National Security Letters (NSL)

In an April 29, 2011 letter report, the Justice Department indicated that the government made 24,287 NSL requests in 2010 for information pertaining to 14,212 different United States persons. The total reported number of NSL requests rose by 64% between 2009 (14,788) and 2010, reversing a 40% drop in requests between 2008 and 2009.

NSL 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

* Total number in 2000 prior to passage of the USA PATRIOT Act

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%

Source: http://www.justice.gov/nsd/foia/reading_room/2010fisa-ltr.pdf

The Foreign Intelligence Surveillance Court (FISC)

The FISC is responsible for reviewing and approving government applications under the [Foreign Intelligence Surveillance Act](#) for domestic electronic surveillance and physical search of suspected foreign intelligence agents or terrorists.

During the calendar year 2010, the FISC approved almost 15% more applications (1, 579) for authority to conduct electronic surveillance and physical search than during 2009 (1376). This is the first rise in applica-

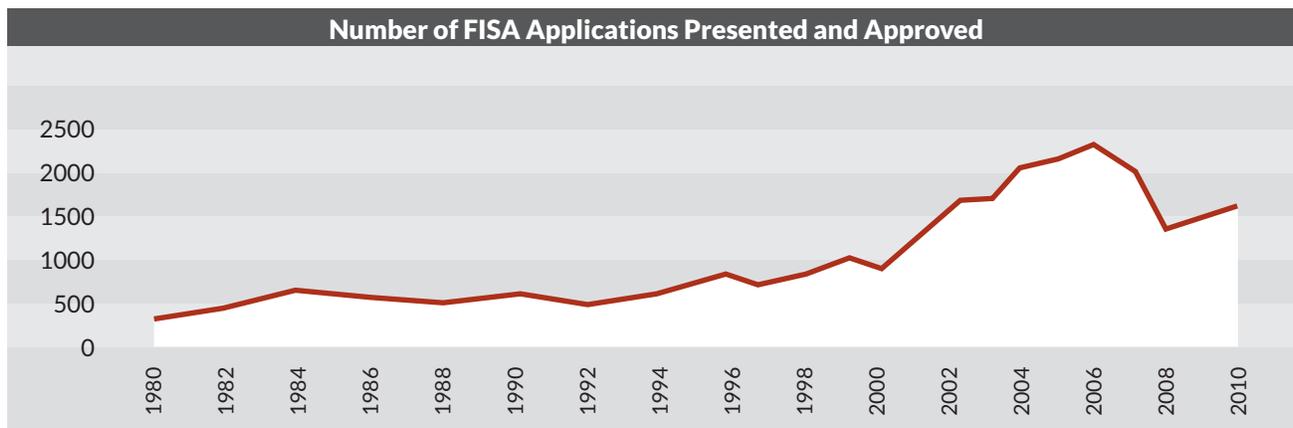
tions made and approved since hitting the high-water mark in 2007 (2,371).⁴⁶ The FISC did not deny any applications in full or in part, but it modified 14 applications

Similar to 2009, a vast majority of the applications in 2010 included requests for authority to conduct electronic surveillance (1,511 or 96%); five of these were withdrawn by the government. The FISC approved collection activity in the remaining 1,506 of these applications.

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		

Numbers Source: http://www.justice.gov/nsd/foia/reading_room/2010fisa-ltr.pdf

Numbers Sources: http://www.justice.gov/nsd/foia/reading_room/2009fisa-ltr.pdf



46 http://www.justice.gov/nsd/foia/reading_room/2010fisa-ltr.pdf

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