



Sick of Secrecy: Challenges to Transparency in the COVID-19 Era

A Report by
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I. INTRODUCTION

Silenced experts, secret policies, setbacks, delays and mismanagement have all defined the United States government's response to the ongoing coronavirus pandemic. Yet the full extent of the government's decision-making behind how we got here—from the chaotic roll out of travel bans and mask mandates to the distribution of vaccines and federal loans—remains unknown, thanks in large part to the government's failure to release information to the public.

Access to this kind of information is vital to an informed, healthy democracy. As James Madison, founding father and drafter of the Bill of Rights, once warned, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps, both."

Madison's warning was borne out over the past year, to devastating effect. One could fairly call the United States government's pandemic response a farce, with nepotism and self-interest driving decision-making rather than scientists and facts, and with ham-handed attempts to hide the devastating reality of the coronavirus. There has also been immense tragedy, with more than half a million lives lost and the nation now facing deep economic uncertainty. The public deserves to know exactly how and why we got here.



Over the past year, Open The Government, our coalition partners and other key stakeholders have filed hundreds of public records requests to shed light on government actions during these unprecedented times. We sought information about federal, state and local governments' decision-making during the pandemic—relating to both the coronavirus response and routine governmental operations.

Our experiences reveal deeply concerning trends in access to information that threaten to continue well beyond the pandemic. General obstruction, administrative failures, and avoidable lawsuits are inhibiting the public's ability to access information. Almost universally, agencies are failing to meet their requirements of producing records in a timely manner in response to public record requests. The pandemic has created new challenges, but many more existed prior to COVID-19's emergence and they will continue after the virus is controlled, unless there is serious reform. Empowering truth-tellers, implementing legislative fixes to the Freedom of Information Act (FOIA), and strong leadership by the executive branch are vital steps to reviving the public's faith in government.

II. THE POWER OF RECORDS REQUESTS

Records requests empower the public to access information about the government directly. The public can use records requests to obtain everything from emails, spreadsheets, and memos to expense reports, video and photos to bring transparency to government decision-making and provide the evidence necessary to hold government accountable.

The framework for requesting records from federal agencies is made possible in large part by the federal FOIA statute, which also serves as the basis for many state public records laws. Based on the premise that government records belong to the people, FOIA laws establish public access to government records, except for those protected by specific exemptions. Since the federal FOIA went into effect in 1967, concerned citizens, journalists, nonprofits and businesses have used the law to access records of all kinds and shine a light on government action.



FOIA requests have led to some revelatory insights on government activity in the past fifty years.

For example:

- FOIA requests filed by the Washington Post uncovered The Afghanistan Papers¹, which found that high-level government officials repeatedly and knowingly misled the American public about the ever-shrinking prospect of winning the war in Afghanistan.
- A federal public records request by Open The Government definitively proved² that DHS had a policy of family separation at the border, contrary to former Secretary Kirstjen Nielsen's testimony before Congress.
- As part of a FOIA lawsuit, the Knight First Amendment Institute and the Freedom of the Press Foundation uncovered the rules the Department of Justice's uses to target journalists under secret court orders³, exposing the Department's nefarious intent to circumnavigate the usual barriers protecting First Amendment activity.

Despite FOIA's presumption of openness, government agencies often spend their time and energies trying to prevent stories like these from reaching the public. That's why groups like Open The Government and our coalition partners dedicate our work to improving public access to information and ensuring that governments honor their transparency obligations.

1 <https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/documents-database/>

2 <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/>

3 <https://freedom.press/news/revealed-justice-depts-secret-rules-targeting-journalists-fisa-court-orders/>

III. ACCESS TO INFORMATION DURING THE PANDEMIC

The public's right to access to government information is particularly vital during times of crisis, and the coronavirus pandemic is no exception. During the pandemic, the government has spent more than \$3 trillion⁴ of taxpayer funds on its response efforts. The public has a right to know exactly how the government is using these funds, see who and what are guiding its decisions, and access accurate data on the virus' impact across the country. Any obstruction to the free flow of this information not only violates FOIA's presumption of openness, but also has the potential to sow mistrust and exacerbate the pandemic's devastating toll.

But from the early days of the coronavirus' spread, governments officials—from the White House in Washington, D.C. to town offices across the country—routinely inhibited public access to information at a time when the public desperately needed to know the truth. The government's actions to limit transparency, detailed below, reveal several alarming trends and underscore the urgent need for comprehensive reform to restore transparency in government.

A. Restricting the Free Flow of Information

The government's secrecy around its pandemic response began long before most Americans had even heard of COVID-19. Beginning in mid-January 2020, the Trump White House directed the Department of Health and Human Services (HHS) to conduct coronavirus-related meetings in HHS's high-security meeting room, thereby improperly making the meetings classified⁵ and preventing the participation of subject matter experts who did not have the necessary security clearance to participate. This breach of standard protocol delayed key experts from informing the government's response when the country was still in a position to contain and control the spread of the novel virus.



⁴ <http://www.crfb.org/blogs/breaking-down-3-4-trillion-covid-relief>

⁵ <https://www.reuters.com/article/us-health-coronavirus-secrecy-exclusive/exclusive-white-house-told-federal-health-agency-to-classify-coronavirus-deliberations-sources-idUSKBN20Y2LM>

The Trump administration's efforts to keep the public from knowing the dire reality of the pandemic intensified from there. The administration soon blocked public access⁶ to coronavirus taskforce meetings and required all coronavirus-related communications⁷ to go through the Vice President's press secretary, effectively allowing the Trump administration to prevent experts from speaking directly to the public. The administration sidelined experts⁸ and pushed others out of their positions entirely, as was the case with whistleblower Dr. Rick Bright. The Trump administration ousted⁹ Dr. Bright from his leadership role at HHS after he called for the government to prioritize a scientifically vetted response to the pandemic.

The government also went so far as to prevent the public from seeing the pandemic's impact at medical facilities across the country. In the spring of 2020, as the virus overwhelmed hospitals, the government relaxed a wide range of privacy restrictions on medical providers and facilities to streamline response efforts. Notably, however, it maintained restrictions¹⁰ that prevented members of the media from capturing images that reflected the raw, devastating impact the pandemic was having at the community level—images that contradicted the administration's posturing that everything was still under control.

B. Blocking the Right to Information

With media access limited, scientists muzzled, and government officials failing to provide accurate, timely information to the public, records requests became an even more essential avenue to shed light on government actions during the pandemic.

In March 2020, Open The Government, our coalition partners and other key stakeholders came together to provide oversight on the government's pandemic response. We found the government repeatedly ignored, undermined, and rejected requests for records—all while taking unprecedented measures mentioned earlier to prevent the public from knowing the virus' true impact.

1. Administrative failure. Many FOIA offices across the country began flouting disclosure requirements when the pandemic prompted non-essential employees to begin working from home. Rather than follow their commitment to the rule of law, agencies declared transparency as non-essential. At the federal level, for example, the State Department completely suspended FOIA operations¹¹ in mid-March. For American Oversight, that meant that document processing in its pending lawsuits against the Department of State screeched to a halt. Even in June and July 2020, when the federal government had begun a phased reopening, the majority of the State Department staff tasked with FOIA document review continued to work remotely, and so very little progress was made. It was not until in or around September 2020 that the State Department finally started to develop a plan to migrate non-classified records to a new document review platform that could be accessed remotely, but processing speed has still not recovered to pre-pandemic rates.



6 <https://www.cnn.com/2020/06/25/politics/white-house-coronavirus-task-force-meeting/index.html>

7 <https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html>

8 <https://www.washingtonpost.com/politics/2020/07/11/fauci-trump-coronavirus/>

9 <https://apnews.com/article/3bad7a218563f34a4ec04e79cc27096a>

10 <https://theintercept.com/2020/12/27/covid-photography-hospitals/>

11 <https://twitter.com/JasonLeopold/status/1241056468981272577>

Similarly, in May 2020, the Project on Government Oversight (POGO) filed a FOIA lawsuit over five different requests made to the Office of Legal Counsel (OLC) from October 2018 to January 2020. In January 2021, POGO was informed that the agency had completed the search for one of the five, but that because of COVID restrictions, it was not able to send anyone into the office to review the production and clear it for release. Two months later, POGO is still waiting for someone to put on a mask and clear the production for transmission, or for the OLC to modernize its records keeping so that staff can access records electronically.

State and local governments took a wide range of approaches to responding¹² to FOIA requests during the pandemic, but several refused to take new requests or halted the processing of records requests entirely. New Hampshire's Department of Health and Human Services initially said it would not process requests¹³ until the public health emergency ended. As reported by the New York Times, Washington, D.C.; Sonoma County, California; and Boise, Idaho were among state and local agencies across the country that stopped processing public records requests until offices could reopen¹⁴.

Among the FOIA offices that didn't entirely shut down, access issues have been rampant. When Public Citizen tried to submit a request in the early days of the pandemic through the Federal Bureau of Investigation's electronic portal, it was notified that the FBI had shut down the portal and all requests had to be sent by snail mail or fax. The switch to snail mail created new challenges for requesters who were now working remotely themselves, including staff at National Security Archive who repeatedly requested agencies send electronic correspondence while they were unable to access the office during stay-at-home orders. Agencies' refusal to switch to electronic correspondence was particularly problematic for time-sensitive responses, such as "still interested" and clarification inquiries, which require the requester to respond within a short time period or else the agency will close the request.

Agencies also have legal mandate to respond to requesters in a timely manner, but few agencies have consistently managed to meet this requirement. By federal law, requesters should expect records in response to their federal records requests within 20 business days, and many states require a similar response time. The routine delays or missed deadlines requesters experienced prior to the pandemic delays grew even more exacerbated after COVID-19 spread, as personnel struggled to run operations remotely.

For example, Open The Government opened a FOIA request with Customs and Border Protection (CBP) six months before COVID-19 hit and sent an appeal letter during the height of Washington, D.C.'s stay-at-home orders. It took CBP almost a full year to open, read and respond¹⁵ to the appeal letter. Similarly, POGO sent a FOIA request to the Small Business Association (SBA) in August 2020. In late February 2021, POGO finally got an official acknowledgement of the August request, and was told that the SBA estimated the request would be completed by March 2021.

When records are particularly time sensitive, requesters can ask for expedited processing by the FOIA office. This option to expedite is intended for instances when there is an exceptional need or urgency¹⁶ for the immediate release of information, such as when the lack of immediate release could pose an imminent threat to an individual's life. When the Union of Concerned Scientists (UCS) sought records in June 2020 regarding an emergency use authorization request for mask sterilization, UCS requested expedited processing due to the urgent need to know how and why the emergency use authorization was approved.

12 <https://docs.google.com/spreadsheets/d/e/2PACX-1vTyXoIXl2whyI9akO7WT5tL9dzUdwOfFJZC9K-DHu1C7JhmD-R5QM4EMe2k9gm-BrY5c3-P08qhs8ijW/pubhtml>

13 <https://www.nytimes.com/2020/05/12/opinion/coronavirus-freedom-of-information.html>

14 <https://dcogc.org/blog/open-government-in-a-time-of-pandemic-public-access-to-trials-and-foia-may-be-early-casualties/>

15 <https://www.muckrock.com/foi/united-states-of-america-10/facebook-groups-77222/#comm-1032338>

16 <https://www.justice.gov/oip/blog/foia-update-oip-guidance-when-expedite-foia-requests>

The Food and Drug Administration granted expedited processing, but UCS has still not received responsive records from the agency.

Even as the death rate soared, agencies failed to honor expedited processing for coronavirus-related requests. Public Citizen sought documents regarding COVID-19's spread in meatpacking plants, where the virus sickened more than 50,000 workers who are predominantly Black, Hispanic and/or from low-income households¹⁷, and was granted expedited processing by the Department of Agriculture. The documents were prepared by FOIA staff but were left waiting supervisor sign-off for three months. The documents were ultimately provided, but only after a threat of litigation.

These failures to meet FOIA requirements are preventing taxpayers from knowing how their government was using funds—to respond to the pandemic or otherwise—and leaving the public with no way of knowing if the government is being honest about its purported activities.

2. Abuse of agency administrative rights. Among the FOIA offices that stayed open and are processing requests, many have begun inappropriately rejecting standard FOIA requests, claiming the requests are too vague or too broad in scope.

Agencies are allowed to reject and close requests which don't adequately describe the records a person wants to inspect, but throughout the pandemic agencies have been abusing this administrative right. In particular, the Centers for Disease Control and Prevention (CDC), one of the agencies most involved in the government's response to the pandemic, has seemingly adopted a policy of denying requests on the basis of vagueness, abusing what should be a narrow rule to block access to information.

As alleged¹⁸ by American Oversight, the CDC engaged in an illegal practice of rejecting valid FOIA requests—including for documents related to the coronavirus pandemic—as “overly broad.” Specifically, upon receiving a FOIA request it believed could generate a high volume of records, CDC would respond by telling the requester that they needed to narrow the request, such as by adding key terms or other subject matter limitations, cutting custodians, or narrowing the date range of records sought. If the requester did not promptly respond—and, sometimes even if they did—CDC would close the request as “withdrawn.” This practice is unlawful. FOIA requires only that records requests be “reasonably described;” if a FOIA officer can grasp what the requester is seeking, they cannot reject the request as not reasonably described, regardless of the volume of records that may be at issue.

In one instance, Open The Government requested records¹⁹ related to CDC Director Robert Redfield's emails between December 2019 and April 2020. Despite the strong public interest in disclosure, the CDC has not prioritized releasing these records, which would show how Director Redfield was spending his time in the lead-up to the outbreak. The CDC denied our request for allegedly being overly broad and vague, as they did with many of our partners' requests. We have appealed but to date the CDC has yet to acknowledge the appeal.

¹⁷ <https://www.npr.org/sections/coronavirus-live-updates/2021/02/01/962877199/meatpacking-companies-osha-face-investigation-over-coronavirus-in-plants>

¹⁸ <https://www.americanoversight.org/document/complaint-american-oversight-v-cdc-and-hhs-foia-request-violations>

But concerningly, it's not just the CDC abusing administrative rights, and the abuse is not limited to records related to the pandemic. Denials and delays have become the rule, rather than the exception, across much of the federal government. Last summer, UCS had numerous longstanding FOIA requests open with the Environmental Protection Agency (EPA). Instead of completing 11 of UCS' FOIA requests, which were relatively narrow in scope, the EPA instead closed them all and pointed UCS to documents released months or years earlier to other organizations. After reviewing thousands of pages of documents, it became clear to UCS that the documents it requested would not be released and the EPA was simply closing their requests. UCS has appealed some of the closures but so far has not heard back from the EPA.



To bypass federal agencies' stonewalling, many requesters have requested documents from state and local agencies. For example, anticipating that federal agencies would likely be slow to respond, American Oversight sent a number of requests to state and local government agencies seeking information about their pandemic response efforts in coordination with federal agencies. American Oversight and others received new emails that showed senior federal health officials were increasingly alarmed about the rapidly spreading coronavirus in late February and early March—even as President Donald Trump and other top administration officials were publicly downplaying the threat and spreading false information²⁰.

Going directly to more responsive state agencies can help requesters access information sooner and skip costly litigation²¹ to pursue records, but this workaround is not a viable solution to federal agencies' rampant abuse of administrative rights. Without federal agency compliance, the public is still left without a full picture of the government's response to the ongoing pandemic. And, as mentioned earlier, pursuing non-federal records remains complicated by some state and local agencies suspending their processing of public records requests for the duration of the pandemic.

3. Litigation. Suing agencies has become one of the few ways to obtain records owed to the public. Litigation can force the release of records, but it is time-consuming (even before the pandemic forced many courts to shutter or operate with skeletal staff) and often prohibitively expensive, especially for members of the general public. For those who are able to dedicate their time and resources to litigation—including several of Open The Government's coalition partners, pro-bono attorneys and well-resourced media outlets—their efforts have led to some of the most impactful releases of records by the government in the last year.

19 https://www.documentcloud.org/documents/20512150-hq-ref-20-00023_admclosure

20 <https://www.americanoversight.org/we-are-flying-blind-health-officials-late-february-emails-show-rising-coronavirus-concerns>

21 <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>

For example, in the early months of the pandemic, it was apparent that the pandemic was disproportionately impacting Black, Latino and Tribal communities across the country, but the government refused to disclose national, disaggregated data that could validate this perceived trend. It wasn't until the New York Times successfully sued²² the CDC to release race and ethnicity data on confirmed COVID-19 cases that the public became fully aware of the virus' inequitable impact on these vulnerable populations, revealing that Black and Latino individuals were three times as likely to be infected by COVID-19 as their white peers and nearly twice as likely to die from it.

Litigation also enabled Open The Government to confirm rumors of censorship at HHS. Early on in the pandemic, it was widely believed that Michael Caputo, a fierce Trump ally, was muzzling scientists at HHS in an attempt to control messaging around the pandemic. These rumors were deeply troubling, as government agencies cannot limit their employee's communication



without advising them of their free speech and whistleblower rights²³. Open The Government and the Government Accountability Project sent requests to the CDC to learn more about their communication strategy and ultimately had to sue for the records. The documents confirmed much of the previous reporting and found that HHS was requiring its Office of the Assistant Secretary for Public Affairs to control all media requests with no exceptions and without reminding scientists about their rights. Open The Government and the Government Accountability Project subsequently filed²⁴ a complaint to the Office of Special Counsel to investigate these blatant abuses of worker rights by HHS²⁵.

For some requesters, agencies' obstructionist policies have even slowed litigation efforts. For the American Immigration Council, Immigration and Customs Enforcement (ICE) granted expedited processing to their FOIA for information about ICE's response to COVID for migrants held in detention during the pandemic. After ICE granted the expedited processing, acknowledging the compelling public interest in the documents, it failed to produce documents prompting the Immigration Council to file suit²⁶ against the agency. Bizarrely, ICE doubled down on its delay tactics and argued in court that while there was enough public interest in the documents to grant expedited processing, it wasn't required to release the documents quickly as the pandemic was ongoing. Judge Hogan of the D.C. Circuit was unmoved by ICE's novel interpretations of the law and granted a preliminary injunction against it, which is almost unheard of in FOIA cases. This litigation, and almost all of the Immigration Council's cases against ICE and CBP, would have been avoided if the agency has responded within the statutory timeframe.

22 <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>

23 <https://whistleblower.org/wp-content/uploads/2020/01/WhistleblowingScienceGuide.pdf>

24 <https://www.openthegovernment.org/wp-content/uploads/2021/02/020221-GAP-OTG-Letter-to-OSC-with-Exhibits-1.pdf>

25 <https://www.buzzfeednews.com/article/jasonleopold/trump-health-officials-gag-orders>

26 Suit: 20-cv-01196-TFH

IV. SOLUTIONS

The coronavirus pandemic has tested the government’s ability to respond to a global health crisis while continuing to uphold transparency—transparency that is vital for future oversight and accountability efforts as the country reckons with the fallout from our failed pandemic response.

The following reforms will help protect the public’s right to information from any future attempts by the government to act in secrecy.

A. Facilitate free flow of information.

Government officials and FOIA offices should commit to the presumption of openness and take the necessary measures to support the timely release of accurate information.

1. Empower truth-tellers. The government must build on past efforts to ensure that members of the public know how decisions are made, especially when it comes to decisions directly impacting their health and wellbeing.

- Pass the Scientific Integrity Act, which would ensure that scientists can carry out their research without fear of political pressure or retaliation
- Empower scientists, researchers, and medical experts to speak freely and directly to the public
- Proactively release disaggregated data to the public, including economic data and epidemiologic data related to the pandemic
- Restore and strengthen protections for government scientists and whistleblowers
- Rescind all rules that prohibit employees from speaking to the press

2. Improve disclosure practices. FOIA offices must update their policies and technology to ensure that future events that prevent personnel from being physically present in the office do not unduly impede the public’s access to information.

- Invest in common-sense technology modernization for electronic records preservation



- Embrace a “digital first” approach and use modern technology to maintain continuity of operations and transparency
- Ensure remote electronic access to records (including classified records), and give FOIA officers direct access to agency electronic records systems
- Develop a uniform data format for proactive disclosures that is searchable, sortable and downloadable
- Create multiple avenues for processing requests which are not primarily reliant on physical mail, and ensure all agencies accept requests by email
- Invest agency budgets in digital tools such as eDiscovery platforms and other software to improve FOIA office efficiency
- Improve the role of the Office of Information Policy in FOIA compliance, so that it assumes a role of leadership in ensuring FOIA is implemented in a manner that maximizes transparency and accountability
- Ensure public disclosure is the remedy in cases of failed proactive disclosure
- Establish standard procedures for agencies around the collection, disclosure, and maintenance of data related to the pandemic

B. Reform the FOIA. Congress must pass reforms to the FOIA to make the law a more effective, enforceable tool for the public to use when seeking information about federal agencies.

- Ensure the records of government contractors that receive COVID-19 stimulus funds or government contracts are subject to FOIA
- Require proactive disclosure of frequently requested records such as the calendars of high-level agency officials
- Strengthen the ‘foreseeable harm’ standard by adding a public interest balancing test
- Clarify the remedial power of a federal court to order an agency to comply with FOIA
- Expand FOIA officials’ access to electronic records across the government to minimize delays
- Reform FOIA’s b(4) exemption to ensure greater oversight on the government’s spending of stimulus funds with private businesses.



C. Champion transparency at the highest levels of government. The White House must use its authority to improve transparency throughout the executive branch.

- Direct all federal employees to embrace transparency and the presumption of openness
- Appoint a Chief Accountability Officer to set administration policy and coordinate interagency collaboration on records management, proactive disclosure, and FOIA
- Direct agencies and the White House Office of Science and Technology Policy to strengthen scientific integrity policies and the infrastructure to enforce them, including safeguards for whistleblowers, and improve the accessibility and visibility of key coronavirus information
- Disclose executive branch guidance, memoranda, legal opinions, and other policy documents related to the pandemic
- Declassify COVID-19 information and commit to keeping future meetings and documents related to the pandemic response unclassified
- Call for the Food and Drug Administration to release key data, including data on medications and vaccines related to the COVID-19 pandemic
- Require the Department of Health and Human Services to make publicly available all contracts, funding arrangements, and other agreements related to COVID-19 treatments and vaccines, and to subject future contracts and contract renewals to FOIA
- Call for quarterly reporting from key agencies and departments working to address the pandemic and its economic impact





V. CONCLUSION

The public's right to information is a necessary part of our response to combating an unprecedented global pandemic. But despite the continued loss of life and a deep economic recession induced by the coronavirus, federal agencies continue to clamp down on the freedom of information, suppressing effective oversight and transparency in the process. We have seen secrecy, misinformation and political spin plague the government's response, and systemic failures block access to information when the public needed it most.

Too much is at stake to let this continue. In the second year of a pandemic, the new Administration, has a meaningful opportunity to break these patterns and implement better policies. We will keep reminding our leaders of this and hold them accountable should they choose to ignore it.



VI. RELATED RESOURCES

- [Open The Government's FOIA training guide](#) - How to use public records requests to improve government transparency.
- [Accountability 2021](#) - Accountability 2021 is an agenda to repair critical gaps in transparency, ethics and oversight and to begin to forge a new path toward a long-lasting accountable government.