

# Priorities for Improving Openness and Accountability

## Recommendations to President Obama

Last Revised: December 2, 2012

More than 20 national organizations committed to improving openness and accountability have been meeting throughout 2012 to identify priorities for strengthening government openness. Among the many priorities, we have agreed on eight top level issues, most of which can be implemented through executive branch action.

We strongly urge President Obama to implement these policy priorities. We believe successful implementation of these policies, coupled with advances made during the President's first term, will help fulfill his goal of having the most open administration in history.

During President Obama's first term, there was a team of senior White House officials engaged in open government issues. To ensure the accomplishment of these priorities, it is essential that there be similar staffing and leadership. White House staff are needed to help develop policy documents, collaborate with agencies and nongovernmental entities, and otherwise oversee implementation of initiatives.

The nine top level issues in this document are:

1. Bring FOIA Performance In-line with Administration Goals.
2. Direct Agencies to Proactively Disseminate Accountability Information.
3. Transform National Security Classification.
4. Protect First Amendment Rights While Protecting Properly Classified National Security Information.
5. Ensure Responsible Use of the State Secrets Privilege.
6. Improve Ethics Disclosure.
7. Improve Disclosure of Government Regulatory Process.
8. Improve Disclosure of Information about Government Spending.
9. End Secret Law.

More detailed information is available for each topic than what is in this packet. The coalition, [OpenTheGovernment.org](http://OpenTheGovernment.org), is serving as the coordinator to connect to the organizations with more complete information.

## 1. Bring FOIA Performance In-line with Administration Goals

### Issue:

Improve Administration of the Freedom of Information Act

### Rationale:

The Freedom of Information Act ensures the public's right to know about its government's activities. FOIA helps the public uncover waste, fraud, abuse, and illegality. The federal government's FOIA process is failing to deliver timely access to requested information, and agency performance continues to not live up to the law's presumption of openness. Recent efforts to set high goals and standards for agency performance have not translated into real world improvements for most requesters. On the contrary, many agencies are setting up technical barriers that make it harder for requesters to successfully access information. Barriers to FOIA requesters have emerged with greater force.

### Policy Priority for the Administration:

In order to bring agencies' actions back in line with the Administration's FOIA goals in the short term, the next President should issue a FOIA memo that instructs:

- Agency heads to bring renewed attention to the presumption of disclosure and to persistent FOIA problems. It should send a strong message to agencies that the President will not tolerate barriers to FOIA requesters (including agencies' reliance on an overly narrow definition of perfected requests and the improper denial of fee waiver requests);
- The Attorney General to align DOJ's policies and procedures, including litigation strategy, with the president's FOIA policy on openness;
- The OMB Director to ensure that the Office of Government Information Services has sufficient resources and independence to both mediate FOIA disputes and to provide Congress and the President with recommendations for improving FOIA processing; and
- Agency heads to join as soon as possible FOIAOnline, a system developed by the Environmental Protection Agency (EPA), in partnership with the Commerce Department and the National Archives and Records Administration. The memo should require EPA or the agencies to solicit public input on ways to improve FOIAOnline.

## 2. Direct Agencies to Proactively Disseminate Accountability Information

**Issue:**

Proactively Disseminate Accountability Information

**Rationale:**

While the Freedom of Information Act, as noted previously, is a key tool to preserve the public’s right to know, making information about the government actions more readily available eases the burden on both the government and the public. Information that helps the public determine if the government is wisely using resources and representing the American people honestly restores trust in the government.

**Policy Priority for the Administration:**

The next President should issue a memo to agency heads instructing them to make available on agency websites key information that will help the public engage with and hold the agency accountable. In preparation for the presidential memo, to get buy-in from the key stakeholders, the White House should:

- Engage in regular discussions with government and non-government stakeholders to identify types of information needed for accountability, good disclosure practices, and structural or technological barriers that agencies may face.

[More detail is provided in “Minimum Standards of Open Government.”]

### 3. Transform National Security Classification

**Issue:**

Transform National Security Classification

**Rationale:**

Though national security and open government are often presented as competing ideals, the unnecessary- and over-classification of national security information actually makes the public less safe. Experts from the national security field estimate that from 50 to 90 percent of documents are over-classified. When information is needlessly protected, or subject to tighter controls than it needs to be, precious taxpayer resources are wasted and it is more difficult to protect our legitimate secrets—making potentially dangerous leaks all the more likely. A more effective classification system will help both protect the secrets that must be kept and keep the public more informed.

**Policy Priority for the Administration:**

In order to promote a classification process that is sharply reduced in scale, duration, and complexity, the next President should:

- Shorten the time period for which information must remain classified after an operation's completion and create sunset dates. This time period may be lengthened on a case by case basis as deemed necessary through thorough review of the operation and the potential short and long term ramifications of declassification at that time.
- Task the National Security Adviser to perform an assessment of the national security classification system, including its cost, efficacy, and the problem of over classification. Alternatives to long-term, open-ended classification should be considered along with measures to enhance the productivity of declassification programs
- The National Archives and Records Administration (NARA) should automatically assume ownership of classified material over 25 years old. If an agency wants to participate in declassification decisions regarding documents owned by NARA, it should contribute resources and staff.
- Expand the capacity of the Interagency Security Classification Appeals Panel (ISCAP) to respond to mandatory declassification appeals, to address classification challenges, and to perform other internal oversight functions. ISCAP should also be given the authority to adjudicate internal government classification challenges.
- Work with the Director of the Information Security Oversight Office (ISOO) to make sure the Annual Report to the President accurately represents the scope and extent of executive branch classification activity.
- Take steps to increase the output of the National Declassification Center (NDC). Direct the Departments of Energy and Defense to cooperate in removing information from the "Formerly Restricted Data" category to the fullest extent possible.

## 4. Protect First Amendment Rights While Protecting Properly-Classified National Security Information

### Issue:

Protect Whistleblowers

### Rationale:

Employees with the courage to report wrongdoing are a government's best defense against waste, fraud, abuse, and illegality. The public relies on brave and honest employees to blow the whistle on wasteful spending, lax oversight, corruption, and misconduct. Unfortunately, whistleblowers are far too often reprimanded, fired, or harassed, even if they have not "gone public" and even after their allegations are proven to be true. There has been excellent progress on this issue; however more is left to do.

In order to better protect whistleblowers who help make our government more effective and more accountable to taxpayers, the President should:

### Policy Priority for the Administration:

- On day one, order all government managers and supervisors to encourage, honor, and protect whistleblowing. The order should make clear that the President has a zero-tolerance policy for suppression and retaliation of whistleblowers. It should require training for both managers and employees on the new rights and remedies created by the Whistleblower Protection Enhancement Act, the Presidential Policy Directive, and other pre-existing whistleblower protections. The order also must direct the government to not sacrifice the rights of federal workers while protecting legitimate secrets to prevent harm to our national defense.
- Ensure the proper implementation of the Presidential Policy Directive Protecting Whistleblowers with Access to Classified Information. The policy must have strong due process procedures and enforcement. To ensure a robust implementation and the most effective policies, the administration should work closely with the whistleblower advocacy community.
- Make it a priority to address the impact of the recent Federal Circuit decision in *Berry v. Conyers and Northover*, which effectively removed hundreds of thousands of federal employees from the merit system. Federal workers whose positions are labeled "sensitive" are no longer guaranteed the protections explicitly afforded them under the Whistleblower Protection Act or have access to the Merit Systems Protection Board when they suffer from prohibited personnel practices (such as discrimination or retaliation). This action will have grave consequences for whistleblowers and taxpayers. The Administration should actively support efforts by Congress to restore the Civil Service Reform Act and should ensure the agencies are not using these arbitrary designations to strip federal workers of their rights.
- Conduct a serious and thorough review of the practice of marking positions as "sensitive" to determine its scope and impact. As with the former pseudo-classification markings for information, "sensitive" labels are being used by agencies like the Department of Defense

for a ridiculous range of positions that do not and should not require a security clearance or access to classified information, indicating that the position may be eligible for access to classified information.

- Support legislation to extend the extensive federal contractor whistleblower protections in the Recovery Act to cover employees of all federal fund recipients recently adopted as an amendment to the Senate version of the National Defense Authorization Act for Fiscal Year 2013. Other provisions notwithstanding, the American Recovery Act and Reinvestment Act of 2009 included excellent whistleblower protections for employees of entities funded by the Recovery Act, including contractors, subcontractors, and grantees. The law covered a wide range of disclosures of wrongdoing related to applicable federal funds and provides for reasonable time limits on the investigation, the agency order, and better access to court.
- Upgrade military whistleblower protections to strengthen due process rights for service members and create more independence in investigations and hearings. The men and women who serve in the military should have much stronger whistleblower protections. Today, the Active, Reserve, and National Guard uniformed personnel face a higher hurdle in proving claims of whistleblower retaliation than civil service employees.

## 5. Ensure Responsible Use of the State Secrets Privilege

### Issue:

Ensure Responsible Use of the State Secrets Privilege

### Rationale:

The lack of transparency surrounding the use of the state secrets privilege erodes public trust in the government and the justice system. The government has abused the state secrets privilege in order to deprive members of the public of his or her ability to have a fair hearing in a court of law. Reform of the policies for invoking the privilege is necessary to ensure that civil liberties are not threatened by overbroad claims of secrecy.

### Policy Priority for the Administration:

Recent Executive Branch reforms are a first step toward ensuring appropriate use of this privilege. The Attorney General still must:

- Recognize that the state secrets privilege is an evidentiary privilege, and instruct Justice Department attorneys not to seek dismissal of a case or claim on this basis at the pleadings stage;
- Direct Department attorneys to turn over **all** evidence claimed to be privileged to the judge for *in camera* review and an independent assessment as to whether the privilege properly applies. To the extent that DOJ asserts it already follows this procedure, the memorandum should be updated to reflect this policy;
- Develop a procedure through which the United States can compensate individuals who raise credible allegations of government wrongdoing but whose cases are dismissed on the basis of the state secrets privilege; and
- Disclose whether the DOJ has complied with the September 2009 policy by referring dismissed cases to the relevant inspectors general for investigation, and provide the number of cases that have been referred. For all such cases, the Inspector General should create an unclassified public version of the investigation report.

## 6. Improve Ethics Disclosure

### Issue:

Improve Ethics

### Rationale:

The federal government is more vulnerable than ever to the influence of powerful special interests. The basic obligations of public service are undermined when an official maintains a close relationship with an industry that he or she is overseeing or regulating. The integrity of government is further jeopardized by public officials who use the resources of their office for personal, professional, or financial gain. Improving ethics is important for restoring trust in government. Greater transparency allows the public to hold officials accountable if they prioritize private interests ahead of the public good.

### Policy Priority for the Administration:

Special interest influences have continued to grow, exacerbated by several court decisions. Disclosure is one key tool to keep special interests at bay. Top level items the next President should pursue include:

- Vigorous implementation of the disclosure requirements of the STOCK Act;
- Build on the success of restrictions placed on lobbyists by developing broader recommendations for lobbying reforms, including through the Lobbying Disclosure Act and through the 2-year ban on registered lobbyists working for the administration and the use of waivers;
- Implementation of Section 4(c)(4) of Executive Order 13490 (Ethics EO) that calls for steps to improve executive branch procurement lobbying disclosure;
- Disclosure of campaign contributions and independent expenditures made by government contractors;
- Disclosure by cabinet members and top officials of contributions to political action committees and participation in events held by PACs; and
- Continue improvements to Ethics.gov, including adding new data to the website such as lobbying data on TARP and ARRA, agency visitor logs, ethics program reviews, STOCK Act data, and conflicts of interest waivers.



## 7. Improve Disclosure of Government Regulatory Process

### Issue:

Improve Disclosure of Government Regulatory Process

### Rationale:

Transparency in rulemaking enables the public to hold government accountable and enhances public participation in our democratic system. The current Administration has promoted public participation in rulemaking, which covers such diverse subjects as energy, education, homeland security, agriculture, food safety, environmental protection, health care, and airline and automobile safety. In January 2010, President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review," which requires timely consultation with affected stakeholders and the use of Regulations.gov, an online portal to view and comment on pending regulations "in an open format that can be easily searched and downloaded."

### Policy Priority for the Administration:

The President can improve the public's involvement in and understanding of regulations through improved disclosure by requiring agencies to:

- Fulfill the promises of the January 18, 2011 Presidential Memorandum on Regulatory Compliance requiring agencies to make information about their regulatory compliance and enforcement activities accessible, downloadable, and searchable online;
- Establish clear standards across all agencies for rulemaking records, including the location and format of data about the positive and negative effects of regulations;
- Use simple to understand tables of costs and benefits, when such data is collected, in the summaries of major proposed and final regulations;
- Require all information submitted to the Office of Management and Budget related to a regulation under review, including from the rulemaking agency, other agencies, and the public, and all information transmitted to agencies from OMB throughout the review process be made public through the rulemaking agency's record and Regulations.gov once the agency publishes the proposed or final rule or announces it will not be publishing the rule; and
- Employ social media and other vehicles beyond the *Federal Register* for seeking public comments on proposed regulations.

## 8. Improve Disclosure of Information about Government Spending

### **Issue:**

Improve Disclosure of Information about Government Spending.

### **Rationale:**

Transparency in spending across the entire federal government is crucial for discovering and eliminating waste and rooting out fraud and corruption. The public deserves a comprehensive breakdown of how the government is spending taxpayer dollars, in real time. To date, the Administration has provided the public detailed information about stimulus spending (Recovery.gov), federal procurement and financial assistance spending (USAspending.gov), the accuracy of payments to non-federal recipients to reduce fraud, waste, and abuse (Paymentaccuracy.gov), and federal information-technology spending (it.usaspending.gov). Lessons learned from these initiatives should be translated broadly to improve transparency in government spending across the board.

### **Policy Priority for the Administration:**

The next President should build on the success of Recovery.gov and USAspending.gov by making the following changes to USAspending.gov:

- Provide unique identifiers for entity and parent entities to be used government-wide so that data about the entity from disparate government databases can be linked together;
- Provide information about recipients of federal funds including their compliance with major federal laws and regulations (including tax law), lobbying expenses and campaign contributions;
- Set consistent government-wide standards for financial data that includes online recipient reporting from the ultimate recipient, improves data quality, and ensures all reports are fully searchable, sortable, and downloadable;
- Add tax expenditure data; and
- Request the necessary funding to accomplish these reforms.

## 9. End Secret Law

### Issue:

End Secret Law

### Rationale:

The public must have access to controlling executive and judicial interpretations of the legal rules under which our government operates in order to have an informed debate about the government's legal authorities and policies, and to build a shared understanding of the rule of law. As then-Senator Russ Feingold said at a hearing in 2008 (as quoted in Secrecy News), "Secret law excludes the public from the deliberative process, promotes arbitrary and deviant government behavior, and shields official malefactors from accountability."

### Policy Priority for the Administration:

- The President should direct the Attorney General to make publicly available copies of documents setting forth the authoritative legal interpretations of the Executive Branch, including operative Office of Legal Counsel (OLC) memos, opinions, papers, etc., that show the extent of executive branch authorities and the rules governing executive branch actions. These documents will be made available with redactions for appropriately classified material as needed. If redacted versions of the documents cannot be made available, then unclassified summaries will be made available.
- The administration should make publicly available copies of existing Foreign Intelligence Surveillance Court (FISC) and other secret judicial decisions and opinions, with redactions for appropriately classified material as needed. If redacted versions of the opinions cannot be made available, the administration will urge the FISC to prepare and make available summaries of the opinions. Other judicial decisions or opinions that include or reflect significant interpretations of the law, such as Electronic Communications Privacy Act (ECPA), will also be unsealed and be made available with redactions as needed. If redacted versions of the documents cannot be made available, then unclassified summaries will be made available. The administration will also make unredacted versions of FISC and other secret judicial decisions opinions and pleadings available to all committees of jurisdiction in Congress. The administration will support legislation to require the Courts to prepare unclassified versions of their opinions on a going-forward basis.
- The administration should make publicly available unclassified Presidential Policy Directives (PPDs). The Administration will also make publicly available redacted or summarized versions of classified PPDs that set forth the operative rules and legal guidance for government programs. The administration also will promptly inform the public about, and make publicly available in unclassified or (where necessary) redacted/summarized form, any changes to previously published, PPDs. This should include any revocations or modifications, whether express or through practice, of an existing PPD.