

# Chapter 1: Open Government

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## Chapter Overview

The last four years have revealed that when the foundations of our democracy are under attack, an open government is more than an abstract principle—it is a structural necessity. The public needs complete, accurate, and timely information to hold government officials accountable and to enable the public's full participation. Yet too many of the systems established to bring transparency to government have proven to have serious, if not fatal, flaws. The COVID-19 pandemic and the failure of agencies across the government to respond to public records requests for key data and health and safety information exposed the degree to which the Freedom of Information Act is broken. Extreme government secrecy has put a wealth of data, documents, decisions, and essential government information beyond the public's reach, often putting civil rights and civil liberties at risk. Antiquated technology and the lack of uniform data protocols have left us in the dark. The occupant of the White House in January faces the daunting task of not only fixing all this, but also going further to make our government truly open and accountable to the public.

Toward that end, both the message and the medium are critical to restoring and reinforcing mechanisms for holding officials accountable. Most critically, the president must express a commitment to bringing the greatest level of transparency to all aspects of the government, and direct all federal employees to embrace transparency as a core value.

The president should follow up this message with a series of short- and long-term steps that place responsibility for bringing a new level of transparency in key agencies. Those steps must include mechanisms for the public to access information, including through the Freedom of Information Act and agency proactive disclosures. As part of an effort to address systemic racial inequality, the administration must bring a greater level of transparency to how law enforcement and immigration authorities function. To counter the problem of over-classification, the administration must review and revise its classification policies and procedures and open up to public scrutiny documents concerning a range of issues from the use of lethal force overseas to classified national security spending. The administration must improve data quality and usability. The administration must commit to adequately funding agency Freedom of Information Act processes and efforts to improve technology government-wide. Perhaps most essential to all these efforts, the administration must address recordkeeping problems at agencies and the White House to ensure full compliance with statutory obligations. This is not an exhaustive list, but it illustrates the depth of the problem and the need for a complete overhaul of the mechanisms for and policies governing an open government.

**Principle 1: The public has a right to complete, accurate, and timely information necessary to hold officials accountable and to participate fully in government.**

### The Problem

When political agendas dictate whether or what type of information is made public, when Congress' ability to conduct meaningful oversight is thwarted, and when there are no reliable records of what has been said or promised behind closed doors, we face a crisis in our democracy. Incidents that include making unrecorded promises to foreign leaders, conducting important government business over ephemeral off-the-books channels, and failing to adequately document government actions such as the separation of families at the border, have all created gaps in the record of our government's decision-making that prevent accountability, enable corruption, and leave an enormous hole in the historical record. Recent administrations have contributed to this significant problem, but the Trump administration has accelerated this trend, ushering the country into a new Dark Age of disinformation and secrecy.

### Recommendations for Action on Day One

**1. Appoint a Chief Accountability Officer.**

The president should appoint a Chief Accountability Officer, housed in the White House, to elevate transparency and ethics measures. The Chief Accountability Officer will set administration policy and coordinate interagency collaboration on records management, proactive disclosure, and the Freedom of Information Act. He or she will also direct the administration's ethics agenda, including the implementation of a new ethics executive order, issuing guidance for personnel hiring and appointments across the administration, and the dissemination of ethical principles and priorities to all agencies.

**2. Issue a Presidential Memorandum on Transparency.**

The president must start his administration or next term with a strong public commitment to transparency by issuing a day-one memorandum that affirms his administration's commitment to an open and accountable government. The memorandum should convey the importance of transparency in a democratic government and instruct all federal employees - and in particular agency leadership - to embrace it as a core value. The memorandum should also include tangible steps to promote transparency, starting with restoring and reforming the executive branch's commitment to public records and public meetings laws, especially the Freedom of Information Act. The Freedom of Information Act has been strained and under-resourced for years; however, the Trump administration's abuses and neglect of the Act have resulted in a Freedom of Information Act process that, in many respects, is broken. Therefore, while affirming his commitment to strengthening all available tools to increase transparency, the president should place particular emphasis on the Freedom of Information Act. Appendix 1.1, within the appendix to this chapter, lists detailed recommendations for the content of a presidential memorandum on transparency.

**3. Resume the release of White House visitor logs.**

On January 20, 2020, the president should resume the release of White House visitor logs, as well as proactively disclose the visitor logs of all executive branch agencies. For details, please see Appendix 1.2 at the end of this chapter.

**Recommendations for Short-term Action (First 100 Days)**

**1. Direct agencies to disclose important categories of records.**

The president should immediately instruct agencies, via a memorandum to the Office of Management and Budget, to require the executive branch to proactively release a broad set of documents to the public, including calendars for agency heads and Inspector General Reports. For a list of the basic categories of records that should be included, please see Appendix 1.3.

**2. Direct the attorney general to issue a Memorandum on Freedom of Information Act Implementation.**

Within a month of assuming office, the attorney general should issue a memorandum to all agencies updating its guidance on implementing the Freedom of Information Act to, for example, limit discretionary redactions and withholdings. See Appendix 1.4 for additional provisions to strengthen FOIA implementation.

**3. Review pending Freedom of Information Act litigation and set new litigation criteria.**

The number of Freedom of Information Act requests and lawsuits has increased exponentially under the Trump administration. This increase reflects a heightened level of concern by the public with the administration's controversial and, in many cases, legally suspect actions and policies. To address this backlog and the problem of any administration abusing the Freedom of Information Act to shield it from public accountability, the attorney general should commit to a review of all pending Freedom of Information Act litigation, to be completed within two months, with a set of criteria for when the Department of Justice will and will not continue defending agencies in ongoing litigation. The criteria should include, among other things, the age of the requested documents, the extent to which they reveal evidence of wrongdoing or misconduct, and the extent to which disclosure would significantly aid the public's understanding of a policy or practice of public interest or of questionable legality.

**4. Ensure Freedom of Information Act compliance is part of general counsel job descriptions.**

To reinforce the importance of Freedom of Information Act compliance in our democracy, agencies should work with the Office of Personnel Management to ensure that job descriptions for all agency general counsels include compliance with the Freedom of Information Act. Adherence to recordkeeping requirements, including electronic records preservation rules, and pro-transparency practices should also be a part of the job description and performance standards of all federal employees.

**5. Enforce compliance with the Freedom of Information Act’s “Rule of Three” and the required creation of a national Freedom of Information Act portal.**

The administration should direct the Department of Justice’s Office of Information Policy to reinforce the Freedom of Information Act’s “Rule of Three,” which requires agencies to proactively disclose documents that have been requested and released at least three times, as required by the 2016 FOIA Improvement Act. Additionally, the Office of Information Policy should produce a plan to comply with the FOIA Improvement Act by fulfilling its requirement to create within one year a single, consolidated online portal for Freedom of Information Act requests.

**6. Develop a uniform data format for proactive disclosures.**

Because of the inadequacies of digital disclosures, which have fallen far behind modern technological capabilities, the government must focus on solving this problem by developing a uniform data format for proactive disclosures. This standard should ensure functionality such as searchable, sortable, and downloadable formats, while protecting the rights of members of the public who are vision-impaired or have other accessibility challenges.

**7. Add line-item Freedom of Information Act budgets.**

To address the problem that scarce agency resources have posed for robust Freedom of Information Act compliance, every agency should be directed to assess its budgetary needs for Freedom of Information Act compliance that would, among other things, eliminate backlogs, and request a dedicated, line-item Freedom of Information Act budget commensurate with those needs.

**8. Invest in technology and common-sense electronic preservation.**

The government should have a uniform, modern, and integrated approach to recordkeeping and Freedom of Information Act processing that leverages modern technological tools. Instead, it has lurched into the digital era in fits and starts. While email and other electronic applications have proliferated the volume of government records, agencies’ archival practices have not kept pace, letting documents fall through the digital cracks and disappear. At the same time, individual bad actors within agencies and the executive branch are exploiting applications that prevent the preservation of records in the first place.

Addressing this multifaceted, systemic problem must be a top priority for the administration. Appendix 1.5 to this chapter specifies actions to modernize access to information.

**9. Demonstrate support for the National Archives and Records Administration.**

Many recordkeeping problems arise because the agency in charge of ensuring the government’s most important records are preserved for future generations, the National Archives and Records Administration, is understaffed and underfunded. If the status quo continues and National Archives and Records Administration’s budget does not increase, the agency will be unable to fulfill its mission. A presidential visit to the National

Archives and Records Administration expressing the Executive's support for the agency and its mission, as well as working with Congress to increase its budget, would signal that the agency's work is a priority for the administration.

#### **10. Modernize access to Alien Files outside of FOIA.**

Requests for Alien Files (or A-files) are by far the largest set of recurring requests processed under the Freedom of Information Act each year. In FY2018, the four immigration offices (three within the Department of Homeland Security and one within the Department of Justice) received more than 400,000 Freedom of Information Act requests, which represented more than 46% of all FOIA requests received by the entire federal government that year. The vast majority of these requests are from individuals, or their lawyers, seeking their own A-files.

Generally, processing of these requests remains slow and costly. The U.S. Citizenship and Immigration Services, which processes the most requests of the four immigration offices, averaged a processing time of just over 70 business days per request for the 178,502 requests it processed in 2018.

The administration, led by DHS, should initiate a major effort to modernize the creation and management of immigration records in digital format with all legitimately categorized law enforcement information either maintained in separate records or segregated into easily redacted fields. The process should involve chief technology officers and key personnel from other agencies that have developed systems to provide direct access to first party records. The Department of Veteran Affairs, which developed a system to grant veterans easier access to medical records, and the Internal Revenue Service, which developed a system to grant taxpayers easier access to their return information should be included in the effort to streamline access to information outside of the FOIA process.

#### **11. Preserve presidential records.**

The importance of the Presidential Records Act and preserving presidential records has never been clearer. From high-level meetings with foreign leaders, to presidential transition materials used after the inauguration by the administration, more needs to be done to preserve these documents. The administration should take the following steps toward that end:

- a. Direct the Archivist of the United States to monitor, review and report publicly on the Executive Office of the President's compliance with the Presidential Records Act, and commit to getting the Archivist of the United States to sign off on White House record keeping guidelines and practices.
- b. Require the White House Office of Administration to monitor and report on compliance with the Presidential Records Act by the Executive Office of the President.
- c. Commit to complying with congressional oversight requests that pertain to the Presidential Records Act.

## **12. Improve data quality and usability of USAspending.gov.**

The primary vehicle for federal government spending transparency is USAspending.gov. Despite years of work and improvements, the site does not deliver a full set of robust tools for accountability for federal spending. The next administration can take several steps to improve the quality of data and expand the level of detail for the information presented. These actions are detailed in Appendix 1.6.

Additionally, information the government already collects about recipients of financial awards should be linked to USAspending.gov to help the public understand how taxpayer dollars are being spent. Performance data on USAspending.gov should include data from the Federal Awardee Performance and Integrity Information System and the System for Award Management and its successor websites. Finally, the public is entitled to know how many full-time and part-time jobs are being created through these awards and whether personnel are receiving various types of benefits (e.g., health care, paid leave), along with other social equity information.

The president should also establish a task force composed of governmental and nongovernmental experts to identify additional data to be integrated into USAspending.gov. The task force's plan should be subject to public input and the final plan should require the Department of Treasury and Office of Management and Budget to propose annual goals for incorporating the new data sources.

## **13. Require unique recipient identifiers.**

Unique identifiers for entities doing business with the federal government are necessary to link data collected under different federal programs and requirements managed by various agencies. These unique identifiers need to allow all subsidiaries, mergers, partnerships, successor entities, and other relationships within a corporate "family" to be matched with the parent company entity, which, in turn, has unique identifiers. The ownership and control of these identifiers must be kept in the public domain and updated regularly. The administration should announce its intention to establish such a recipient identifier system within the first 100 days and commit to implementation within the first year.

## Recommendations for Long-term Action

### **1. Improve the role of the Office of Information Policy in Freedom of Information Act compliance.**

Any solution to the systemic problems with agency compliance with the Freedom of Information Act will require a level of leadership we have not yet seen from the Justice Department's Office of Information Policy, which, often, has been part of the problem, not the solution. The Office must assume a leadership role in ensuring the Freedom of Information Act is implemented in a manner that maximizes transparency and accountability, rather than an approach that too-heavily weighs an agency's political and parochial interests. Toward that end, the Office of Information Policy should do a survey of best technology practices across all agencies that includes remote search functionality, proactive disclosures, and Section 508 accessibility requirements. Based

on the results, the Office of Information Policy should develop a plan to integrate agency technology and data staff with agency Freedom of Information Act offices to ensure the use of best practices and all available tools.

To address the problem of agency Freedom of Information Act processes being politicized, the Office of Information Policy should develop guidance on communications between Offices of General Counsel and agency Freedom of Information Act offices. This guidance should also establish protocols for communicating with the White House about pending Freedom of Information Act requests.

**2. Ensure public disclosure is the remedy in cases of failed proactive disclosure.**

The attorney general should clarify for agencies that the remedy for failures of proactive disclosure must not be to simply give the information to the wronged requestor, but to ensure that the public has access to the information that should have been proactively disclosed in the first place.

**3. Improve compliance with federal accessibility standards.**

Agencies have claimed an inability to meet federal accessibility standards mandated by section 508 of the Rehabilitation Act of 1973 to justify their failure to provide wider access to an array of government documents, including those with historic significance. To begin addressing this problem, the executive branch, through the Chief FOIA Officers Council or another entity designated by the attorney general, should require agencies to identify on their websites all agency databases and technology that are not compliant with section 508 or that do not meet other governing standards and to produce a plan to come into compliance.

**4. Disclose all court-ordered production schedules.**

Freedom of Information Act requesters - and litigators - are frequently stymied by agency claims that the scope of litigation demands must take precedence over processing Freedom of Information Act requests. As a first step toward addressing this problem, agencies should be required to post in their Freedom of Information Act reading rooms all court-ordered production schedules.

**5. Promote historical preservation.**

The administration should refocus agency attention on the importance of preserving historical records. Toward that end, the administration should:

- a. Order the establishment of historical review boards for each agency that handles classified information.
- b. Delegate historical declassification authority and prioritization to the National Archives and Records Administration (with input from the Public Interest Declassification Board), and task the Public Interest Declassification Board to annually identify targets for declassification.

**6. Disclose beneficial owners.**

Beneficial owners are the natural persons who ultimately own or control a legal entity or arrangement, such as a company, a trust, a foundation, etc. The issue of ultimate beneficial owners or controllers plays a central role in transparency, the integrity of the financial sector, and law enforcement efforts. Companies with anonymous owners are easily formed in the United States and can be used to defraud businesses, taxpayers, and the government, and place national security at risk. Federal contracting regulations already require reporting of “highest-level” and “immediate” owners, and the Defense Department requires beneficial ownership information in certain real property leases.

The administration should require all entities that bid on federal contracts, sub-contracts, grants, subgrants, and loans to disclose their beneficial owner(s)—the true, natural persons who ultimately own and/or control such entity—and such beneficial ownership information should be posted on USAspending.gov for those provided financial awards.

**7. Improve accountability for spending of taxpayer dollars.**

Too often, federal agencies are able to bypass established regulations on how contracts and grants are awarded. Additionally, the public is best served when there is competition in bidding for contracts. Several steps that can be taken to level the playing field and improve the contracting process can be found in Appendix 1.7.

**8. Improve disclosures of tax expenditures.**

Tax expenditures were defined by the 1974 Budget and Impoundment Control Act as “revenue loss attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preference rate of tax, or a deferral of tax liability.” While both the President’s Budget Request and annual Joint Committee on Taxation’s documents include all individual and corporate income tax effects of tax expenditures, they do not reveal purpose, function or efficacy. The Department of the Treasury should develop a system to conduct a thorough analysis of several different tax expenditures annually on a rolling basis to give the public and policymakers a greater understanding of its purposes, use, and effectiveness.

## Recommendations for Legislative Action

**1. Support strengthening the Freedom of Information Act.**

The administration should pledge its support for the following amendments to the Freedom of Information Act:

- a. The addition of a balancing test that requires agencies and courts to weigh the need for withholding the requested information against the public’s interest in the information.
- b. Revision to Exemption 4 to state that it applies only where disclosure of the records would be likely to cause substantial competitive harm to the submitter.
- c. A provision that defines records pertaining to prisons or detention centers contracting with or receiving funding from federal agencies as under the control



of the contracting or funding agency, and therefore subject to the Freedom of Information Act.

- d. A clarification that the authority of federal courts to hear Freedom of Information Act cases includes the power to order an agency to make records publicly available, including on an ongoing basis, under Section (a)(1) and (a)(2), as well as the authority to provide any other equitable relief the court deems appropriate.

## 2. **Declassify historical records.**

The administration should work with Congress and agencies on an omnibus Historical Records Act mandating the declassification of historically significant information that also promotes consistency and efficiency in declassification as well as a reduction in agency backlogs.

## 3. **Disclose beneficial ownership.**

The administration should encourage Congress to require all persons who form corporations and limited liability companies in the United States to disclose the beneficial owner(s) of such entities to government authorities at the time of formation, and update such information upon any change unless such entity already discloses such information to authorities. Such beneficial ownership information should, at a minimum, be made available to law enforcement agencies at the federal, state, local and tribal levels, to law enforcement authorities of foreign countries through appropriate treaties, conventions, and agreements, and to those in the private sector with legally mandated anti-money laundering responsibilities

## 4. **Expand USAspending.gov.**

The Recovery Accountability and Transparency Board was created to stop fraud in spending the \$840 billion economic stimulus program from 2009. One lesson from its successful operation was that a greater level of spending transparency is a powerful tool in preventing waste, fraud, mismanagement, and corruption. Equally important is that the Board had dedicated funding to build Recovery.gov and related tools. The CARES Act provides similar transparency and accountability measures.

Congress should appropriate money for the improvements in the USAspending.gov described herein, including for the collection of additional information and linkage of new data about recipients and subrecipients of government funds to ensure that federal spending goes to programs rather than being siphoned off with little, to no, public benefit.

To make this spending through the tax code more transparent and accountable, the administration should work with Congress to direct the Internal Revenue Service and Treasury Department to work with appropriate agencies to provide the public increased information about each tax expenditure. This information should be made public on USAspending.gov and include:

- a. Purpose (description of public policy outcome to be achieved by the expenditure)
- b. Design (exclusion, exemption, deduction, credit, preferential rate, deferral)

- c. Restrictions (aggregate claim caps, eligibility restrictions)
  - d. Performance measure (if any) to monitor success in achieving purpose
  - e. Evaluating agency
  - f. Supporting or competing program goals in other funded programs
  - g. Date of enactment, expiration date or part of permanent law
  - h. Annual cost for each of previous ten-years (initially and then ongoing)
  - i. Usage (number of tax return, AGI (in bands), location (zip code), and taxpayer type)
5. **Improve the Federal Advisory Committee Act.**

The administration should work with Congress to close the FACA loophole that the federal government has relied on to allow subcommittees and working groups to escape disclosure requirements.

## Principle 2: Secrecy undermines democracy and paves the way for rights violations and abuses.

### The Problem

Excessive government secrecy paves the way for waste, malfeasance, and abuse, in part by impeding efforts at public oversight and accountability. Unnecessary secrecy has enabled government agencies to violate human rights and civil liberties, and even cover up or destroy evidence of government wrongdoing, such as the Central Intelligence Agency's illegal use of torture and destruction of tapes documenting it. Also troubling is the secrecy of formal written legal opinions issued by the Justice Department's Office of Legal Counsel, which are responsible for a growing body of secret law that binds the executive branch. The Office of Legal Counsel's opinions have been relied upon as the basis for many unaccountable and, in some cases, unlawful exercises of executive authority, including President Trump's barring the testimony of former White House counsel Donald McGahn before the House Judiciary Committee; the Bush administration's systematic policy of torture of detainees; and the Bush, Obama, and Trump administrations' extrajudicial lethal force policies that have caused an untold number of deaths of civilians, including U.S. citizens by drone strike. Administrations have fought tooth and nail to withhold legal memoranda justifying these and other rights-violating policies from the public, often successfully, even though secret law has no place in a democracy.

### Recommendations for Action on Day One

1. **Direct the Department of Justice's Office of Legal Counsel to release all final legal opinions to the public.**

Opinions of the Office of Legal Counsel set forth the authoritative legal interpretations of the executive branch, and the public and government should be on equal footing in their understanding of the law. On Day One, the president should direct the Office of Legal Counsel to publish all formal written legal opinions that are prepared pursuant to the procedures in Office of Legal Counsel's Best Practices Memorandum on an ongoing basis - and establish a process for doing so. The Office of Legal Counsel should immediately publish an index of all existing Office of Legal Counsel opinions, to be updated every time a new opinion is issued. Beginning on Day One and on an ongoing basis, all Office of Legal Counsel opinions, including those that are classified, should be submitted to Congress immediately.

**2. Initiate a declassification review of classified Office of Legal Counsel opinions.**

The administration should also initiate a declassification review of all classified Office of Legal Counsel opinions, and, where an opinion or portions of an opinion absolutely must be withheld, release all segregable portions and a detailed unclassified summary. This process should be completed within one year, and for future opinions, the full opinion (or an unclassified summary of a classified opinion) should be published within 30 days of the memoranda becoming final.

**3. Provide transparency around law enforcement and immigration authorities.**

The administration should make law enforcement and immigration authorities accountable to the public they serve. Data collection around police use of force and deaths in custody must improve, law enforcement agencies should be penalized when they fail to comply with reporting requirements, and immigration authorities must respect rights and submit to oversight. For a list of measures to improve transparency and accountability around law enforcement, please see Appendix 1.8.

Recommendations for Short-term Action (First 100 Days)

**1. Direct federal agencies to release all final legal memoranda.**

The president should require all federal agencies to release all final legal memoranda in full, or a detailed unclassified summary of any classified legal memoranda. Agencies should also commit to a prospective policy of releasing their final legal memoranda, or anything they consider to be "working law," going forward.

**2. Restrict the use of "national security agency" designations.**

The "national security agency" designation circumvents public records laws to exempt important information from disclosure, and is applied with little transparency or oversight. The Office of Personnel Management should review the agencies to which it has given the "national security agency" designation and, at minimum, rescind that authority specifically for Customs and Border Protection, Immigration and Customs Enforcement, and the Department of Homeland Security's Office of Intelligence and Analysis. The president should also set a policy narrowing the circumstances in which such designations are granted.

**3. Provide transparency around the use of lethal force overseas.**

In recent years, the White House, Pentagon, and intelligence agencies have reduced already severely limited transparency concerning the use of lethal force overseas. The president should reverse this trend and go much further than the Obama administration, releasing information that informs the public of past U.S. actions overseas. The minimum categories of information that should be declassified and released are listed in Appendix 1.9 at the end of this chapter.

**4. Publish presidential directives.**

The administration should make publicly available unclassified presidential directives (currently designated National Security Presidential Memorandums), as well as redacted (to segregate only legitimately classified information) or summarized versions of classified directives. The administration should also promptly inform the public about, and make publicly available in unclassified or (where necessary) redacted/summarized form, any changes to previous presidential directives.

**5. Initiate a “bottom up” review of national security classification policy.**

The administration should perform a fundamental review of the most basic premises of national security classification policy. It should consider questions such as: What is classification for? What are the unintended negative consequences of classification and how can they be mitigated? What types of information should be eligible for classification? What categories of information should be excluded from classification controls? How can the scope and duration of classification be kept to the minimum necessary?

For the first time in decades, such questions should be systematically addressed through a process that is open to all stakeholders, including representatives of classifying agencies as well as public interest organizations and others, in order to help define a new national security classification policy that will replace the dysfunctional and overly-secretive legacy system that currently exists.

**6. Promote responsible exercise of classification authority.**

The administration should make its national security information practices as rational, transparent, and minimally burdensome as possible. It should, at a minimum:

- a. Provide periodic reporting on the invocation of the state secrets privilege. Department of Justice policy already requires the administration to report to Congress periodically on the invocation of the state secrets privilege in litigation. But over the past decade only one such periodic report—in 2011—has ever been produced. Regular reporting on invocation of the state secrets privilege should immediately be resumed, annually at minimum.
- b. Institute a uniform prepublication review policy to clarify, narrow, and expedite the process. Millions of current and former government employees are obligated to submit their proposed publications to government censors, who review the proposed publications for classified information or other information the agencies deem sensitive. This process is overbroad, inconsistent across agencies, slow,

and often capricious. Prepublication review procedures should be standardized and revised to minimize and expedite review.

- c. Recognize and reward appropriately limited classification activity in employee performance assessments, with an emphasis on the necessity and importance of government transparency. The proper and limited use of classification authority should be included as a factor in assessing the performance of government employees. In order to promote sound classification practices, including the avoidance of over-classifying information by default, the exercise of good judgment in classification should be rewarded in a tangible way, and its opposite should be discouraged.
- 7. Provide for expedited declassification review on subjects of significant public interest.**

The Mandatory Declassification Review process should include an expedited review option similar to that found in Freedom of Information Act.<sup>1</sup> Additionally, in cases where there is a particularly compelling interest for disclosure, the administration should develop a process by which members of the public may nominate classified documents or topical areas for direct, expedited declassification review by the Interagency Security Classification Appeals Panel. The Interagency Security Classification Appeals Panel should conduct such direct, expedited review if it determines that the document or topical area, if declassified, would contribute significantly to an ongoing, important policy debate. In cases of topical reviews, the Interagency Security Classification Appeals Panel should evaluate and amend, as appropriate, the relevant agency classification guidance.

- 8. Operationalize the Public Interest Declassification Board to help resolve classification disputes.**

Many problems in classification policy naturally arise due to conflicting perspectives and assessments regarding the need for secrecy in a particular instance. Disagreements over the need for secrecy routinely occur between agencies, between Congress and the executive branch, and between government and the public. Currently, such disputes tend to linger for years and then to default to the status quo of secrecy.

The Public Interest Declassification Board was established by statute to advise the president and other executive branch officials as well as Congress on classification and declassification matters. Its members are appointed by officials at the highest levels of government, including the president and the majority and minority leaders of the House and Senate.

The Public Interest Declassification Board therefore has unique standing to provide an impartial forum for reconciling conflicts over classification and declassification. But it has never yet fulfilled its potential as an adjudicator of classification disputes, nor has it even been asked to do so. (Several Board positions are currently vacant and should be

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<sup>1</sup> 5 USC 552(a)(6)(E)

promptly filled.) The time has come to put this under-utilized entity to work in support of a public interest classification and declassification policy.

**9. Strengthen oversight of classification policy.**

The National Declassification Center, housed at the National Archives and Records Administration, should be given the authority to declassify the archival records within its purview, i.e. without requiring prior review by the agencies that originated the records. Only by doing so will the National Declassification Center begin to reach its potential as one of the most important transparency initiatives of the last three decades.

**10. Invest in technology modernization.**

The optimal implementation of changes to classification policy will require modernization of the existing classification and declassification infrastructure. In the majority of cases, human review of documents for declassification should no longer be necessary. The technology needed to update classification and declassification practices is well within reach. Some dedicated funding will be required to bring it to full maturity, and some skillful management will be needed to bring it into consistent and widespread use. But this is an investment that would quickly be recovered in increased productivity and efficiency.

Annual reports from the Information Security Oversight Office to the president previously provided, among other data points, the total cost of security classification activities, including costs of classification management and declassification. The Information Security Oversight Office no longer reports on these critical figures because of challenges in collecting and analyzing agency statistical data. Any modernization of classification practices should be coupled with a requirement that agencies' systems are able to accurately report the cost and size of their classification systems.

## Recommendations for Long-term Action

**1. Reduce secrecy in the Oval Office.**

The White House should resume the practice of releasing full, properly (for limited and legitimate reasons) redacted readouts of the president's conversations with foreign leaders, and release those of his predecessor. The president should also order both the Central Intelligence Agency and the Office of the Director of National Intelligence to produce unclassified versions of the President's Daily Brief for the public.

**2. Review and narrow executive branch privileges.**

The attorney general should conduct a comprehensive review of the executive branch's practices in asserting privileges, including executive privilege (such as the presidential communications privilege), the deliberative process privilege, and the state secrets privilege, and issue narrower standards. In particular, the administration should commit to only asserting the state secrets privilege as a last resort, and only when the head of an agency determines that the public interest in disclosure is outweighed by the risk to national security.

**3. Declassify the CIA torture program.**

The president should declassify and release all records related to the Central Intelligence Agency's torture, detention, and rendition programs, and current detainee treatment policies. The full Senate torture report should be among those records declassified and released to the public as a priority, and distributed throughout the executive branch.

**4. Establish an Open Source Intelligence Agency to produce intelligence products that are unclassified and publicly accessible.**

The Central Intelligence Agency's Foreign Broadcast Information Service once nurtured generations of scholars, journalists and public officials with its translations and analyses of foreign publications. But today, open source intelligence products generated by the US intelligence community are, with few exceptions, restricted from general distribution. This denial of access is particularly incongruous now, when the public itself faces direct threats from cybersecurity intrusions, foreign information operations, and a global pandemic. The administration should create a worthy successor to the Foreign Broadcast Information Service that will produce and provide public access to substantive open source intelligence products.

**5. Disclose top-line spending for each of the intelligence agencies.**

The "Black Budget" is an informal term that refers to classified national security spending. It includes spending for intelligence, classified operations, and classified military procurement.

Since 2007, a single aggregate budget figure for the National Intelligence Program, comprised of 17 intelligence agencies, has been published annually. But the total spending levels of each component agency remain classified. So does spending for classified operations and procurement.

Black Budget spending is not merely secret. It also produces a distorted public perception of the open budget. That is because secret spending is often appropriated for one agency and then secretly transferred to another. So, for example, the budget for the Air Force has sometimes been used to conceal funding for the Central Intelligence Agency, so that the Air Force budget appears to the public much larger than it actually is.

This kind of pass through arrangement undermines the integrity of the budgeting process and should be abandoned.

In 2018, a bicameral, bipartisan group in Congress called for disclosure of top-line spending levels for each of the intelligence agencies. (The group included Sens. Ron Wyden (D-OR) and Rand Paul (R-KY) and Reps. Jim Sensenbrenner (R-WI) and Peter Welch (D-VT).) This is a logical step that can be adopted without legislation. It will also make it possible to eliminate the deceptive budget pass through practice once and for all, since there will be no need to conceal any agency's funding in another agency's budget.

Additionally, every federal agency should annually disclose top-line appropriations for its Black Budget. In this way, the agency disclosure can be compared with the congressional appropriation figure (see legislative priorities).

## Recommendations for Legislative Action

### 1. **Codify disclosure of top-line Black Budget of each intelligence agency.**

The administration should work with Congress to require the president's annual budget request to identify the amount requested by each intelligence agency. Congress should also identify top-line appropriations for each agency. Finally, Congress should prohibit agencies from secretively transferring Black Budget appropriations from one agency to another.

## Appendix to Chapter 1: Open Government

### Appendix 1.1: Presidential Memorandum on Transparency

A presidential memorandum on transparency should, at a minimum, address longstanding problems with the federal Freedom of Information Act. Such a memorandum should:

1. Commit to seeking funds for Freedom of Information Act offices that match the demand for public records (taking into account backlogs *and* rising trendlines in annual requests);
2. Reiterate a steadfast commitment to the presumption of openness, as codified in the FOIA Improvement Act of 2016, and commit to releasing information through the Freedom of Information Act unless the harm to a government interest would outweigh the benefit conferred to the public by disclosure. Specifically, the memorandum should instruct agencies to minimize the use of discretionary exemptions (e.g., those covered by Exemption 5) to protect legal or significant policy deliberations;
3. Commit to ending political interference in agency Freedom of Information Act processing by requiring agency heads to refer final decision-making over redactions and withholdings to career officials;
4. Express support for all Freedom of Information Act personnel, including the Office of Government Information Services;
5. Express support for Presidential Records Act and Federal Records Act reform, to modernize the law, strengthen congressional oversight of records management, and give the National Archives and Records Administration greater authority to ensure adequate preservation.

### Appendix 1.2: Visitor Logs

The White House and executive branch agencies should proactively disclose their visitor logs: Not later than 30 days after Inauguration Day and updated every 30 days thereafter, the United States Secret Service should report to the Congress and make contemporaneously available



online a searchable, sortable, downloadable database of visitors to the White House and the Vice President's residence that includes the name of each visitor, the organizational affiliation of the visitor, the date of the visit, the name of the person being visited, the name of the individual who requested clearance for each visitor and a general description of the reason for the visit. The executive branch agencies should do the same with agency visitor records.

Agency visitor logs should include meeting attendees and meeting subject matter, for agency heads and deputy heads (and their direct reports) for all meetings and calls involving registered lobbyists and individuals or corporations seeking contracts from or subject to the regulation of the agency. Visitor logs should include all official meetings regardless of location, including virtual meetings.

Notwithstanding this requirement, the U.S. Secret Service, after consultation with the president or his designee, may exclude from the database any information that would 1) implicate personal privacy or law enforcement concerns or threaten national security, or 2) relate to a purely personal guest. In addition, with respect to a particular sensitive meeting, the Secret Service shall disclose each month the number of records withheld on this basis and post the applicable records no later than 360 days later.

### Appendix 1.3: Proactive Disclosure

Categories of records that should be proactively disclosed by all agencies, at minimum:

1. Agency organizational charts with contact information, an index of agency datasets, and calendars of agency heads and agency component heads;
2. The ten largest contracts, task orders and grants (by dollar value) made by the government agency as well as all contractors'/grantees' Disclosure of Lobbying Activity Forms (LLL forms);
3. Interagency or intergovernmental agreements or contracts;
4. Materials related to the operations and establishment of Federal Advisory Committee Act committees, including events, timelines, agendas, minutes, transcripts, recordings, committee member names and biographies, conflict of interest waivers, committee charters, and any other related materials;
5. A list and summary of all classified inspector general reports;
6. All unclassified reports, requests, and testimony provided to Congress; and
7. Proposed records retention schedules.

### Appendix 1.4: Attorney general memorandum on the Freedom of Information Act

An attorney general memorandum on the Freedom of Information Act should strengthen implementation of the Act in several ways. Specifically, the memorandum should include:

1. An interpretation of the Freedom of Information Act's "foreseeable harm" standard that matches congressional intent behind the statutory provision, added in the 2016 Freedom of Information Act amendments, and that adopts a presumption against the use of

discretionary redactions and withholdings unless a specific foreseeable harm is articulated contemporaneously to the withholding or redaction;

2. A requirement that agencies provide requesters with articulated and concrete foreseeable harm justifications in response to a Freedom of Information Act appeal or on the date on which the agency serves its Answer in litigation under the Act;
3. A directive that for certain categories of records there is a presumption of no harm that an agency must overcome to withhold information; failure to do so means the Department of Justice will not defend if the agency is sued;
4. A requirement that for all documents older than a specified time limit of no more than 10 years, agencies cannot assert The Freedom of Information Act's Exemption 5 (which incorporates discovery privileges such as the attorney client, work product, and deliberative process privileges) to withhold information unless the agency's Chief FOIA Officer certifies that disclosure would harm specific ongoing interests of the United States (such as ongoing litigation or investigations in which the privilege protected by the exemption is still at issue);
5. A commitment to defend agencies sued under the Freedom of Information Act only if they meet these directives;
6. A requirement that agencies use pre-litigation processes, including the Office of Government Information Services, and other alternative dispute resolution processes to the extent that such processes ensure fair and timely resolution of Freedom of Information Act requests;
7. A directive that agency Freedom of Information Act personnel be given direct access to agency electronic records for purposes of Freedom of Information Act searches and productions;
8. A requirement that agencies accept Freedom of Information Act requests and subsequent administrative correspondence electronically.

### Appendix 1.5: Technology to Improve Access

The administration should take the following actions to begin addressing problems with technology and common-sense electronic preservation:

1. Reform technology acquisition to make archiving and declassification considerations a core part of information technology requirements and procurements. Require all newly-purchased agency systems to produce permanent records in formats acceptable to the National Archives and Records Administration, including explicit metadata and standardized mechanisms for transferring permanent records to the National Archives and Records Administration. Coordination among agencies or adopting a system-of-systems approach under the direction of a designated agency or agent will be helpful when seeking these new technologies.

2. Mandate that an automatic declassification date be embedded in newly created electronic records. Doing so would save considerable time and resources and enable agencies to actually adhere to automatic declassification guidelines.
3. Direct the National Archives and Records Administration to 1) complete and issue guidance on web records and social media records and to 2) consult with outside subject-matter expertise regarding records retention schedule appraisals.
4. Ban the use of disappearing messaging applications for government business and mandate that messaging applications are only permissible for government business if the technology automatically captures communications used in official business for records management and archival purposes. Exceptions for whistleblowers, who are engaging in legally protected activity over these applications to prevent reprisal, should be made.
5. Direct every agency to issue an order in writing in the first 100 days outlining how the agency plans to enforce these requirements. The enforcement plan should include an annual agency-level assessment.

### Appendix 1.6: Data quality and usability of USAspending.gov

To improve data quality and usability of USAspending.gov administrators should be directed to:

1. Extend and expand inspector general audits of the data presented on USAspending.gov. The DATA Act mandates that every two years through 2021 the Inspectors General will the data quality and usability on USAspending.gov. To improve the data presented to the public, the audits should continue to occur every two years through the administration's term. The audits should also be expanded to include sub-recipient reporting.
2. Disclose award documents (e.g., contract and grant awards). Currently, scant summaries of financial awards, instead of copies of the awards themselves, are on USAspending.gov. These meager descriptions do not lead to meaningful accountability. Full copies of all award documents should be publicly available with the understanding that proprietary information will be redacted.
3. The administration should seek input from government accountability experts as well as business on how to define what should be redacted.
4. Disclose more information related to the financial awards tracked on USAspending.gov by fully integrating information available through the System for Award Management modernization site with the information on USAspending.gov. More precisely, the administration should include on USAspending.gov:
  - a. Needs assessment and acquisition planning records
  - b. The solicitation, including the solicitation number, the statement of work or performance Work Statement, the competition type, small business set aside information, offeror instructions, evaluation factors, and the award decision process

- c. Key elements of all bids and proposals or other submissions, including offeror identity, beneficial ownership information, subcontracting plans, subcontractor identity, and subcontractor beneficial ownership
  - d. Bid and/or proposal evaluation documents
  - e. The award decision and any justifications and approvals
  - f. Bid protest records
  - g. Performance records, including information on delivery or task order competitions and awards, exercised options, modifications and amendments, payments, and subcontractor payments
  - h. Performance dispute records, including termination and cost complaints and decisions
  - i. Past performance reviews
  - j. Oversight and accountability records, including investigative and audit reports
  - k. Subsequent close-out records
5. Improve the quality of data reported. The Office of Management and Budget should issue a directive setting higher standards requiring more consistent and detailed reporting for critical data elements such as award descriptions, place of performance, sub-recipient awards, executive compensation, and ownership/subsidiary relationships, as required by law. The directive should instruct agencies to develop policies to ensure procurement and grant officials, as well as award recipients, fully understand and meet the higher standards.
6. Better track spending on national emergencies. The Office of Management and Budget should establish unique coding to track financial awards distributed in response to natural disasters, health crises, or other unique events. This unique coding should be similar to the National Interest Action code currently used for contracts only. The new approach should also establish clear standards for the use of such codes, including specific reporting procedures for starting and stopping the use of the code. The code will help to assess whether funds are reaching the targeted locations and audiences and in a timely manner. USAspending.gov should update the advanced award search function to allow users to filter awards by new emergency code fields.
7. The administration should encourage agencies to adhere to the DATA Act Data Exchange Standards and prioritize timely, accurate reporting. The existing standards should be reviewed to verify whether they need to be updated.
8. The Office of Management and Budget and the Treasury Department should establish an interagency committee to recommend standards for ultimate recipient reporting. The Office of Management and Budget and Treasury Department should seek public input on the standards. Once these standards are established, The Office of Management and Budget should share the standards with agencies and establish an implementation schedule that agencies must follow when reporting data to USAspending.gov.

Simultaneous to these actions, the Treasury Department should seek public input on the best ways to provide subrecipient data on USA Spending.gov and implement the best approach.

### Appendix 1.7: Accountability for Spending Taxpayer Dollars

The following principles should be followed to strengthen accountability for spending of taxpayer dollars:

1. Recipient responsibility rule. The administration should reinstate a Federal Acquisition Regulation (FAR) that makes clear that in determining whether a prospective contractor has a satisfactory record of “integrity and business ethics,” contracting officers may consider compliance with the law, including labor laws, employment laws, tax requirements, environmental laws, antitrust laws, and consumer protection laws. The administration should also issue a similar rule for grants and other financial assistance awards going to non-individuals. These rules should include language that makes clear that recipients—prime contractors, state agencies, grant recipients, etc.—are expected to also consider responsibility performance when awarding subcontracts and sub-awards.
2. Open, transparent contracting process. The federal contracting process should be an open process. Contractors are often opposed to disclosure of contract information because they argue that sharing such information about their commercial contracting process would undermine their ability to compete against other companies. E.O. 12600, “Predisclosure Notification Procedures for Confidential Commercial Information,” allows entities to object to the release of certain information. The administration should amend Executive Order 12600 to inform Freedom of Information Act requesters when a 12600 review was conducted and to label as “12600” any information that was redacted subsequent to that review.
3. Certify costs for noncompetitive contracts or commercial items. While taking steps to increase competitive contracting, the administration should ensure that that prices are fair and reasonable for sole source contracts by requiring certified cost or pricing data to be submitted to contracting officers.
4. Restore the government’s ability to audit federal contract spending. The administration should restore the government’s ability to audit federal dollars by increasing forward pricing audits (pre-award audits to prevent wasteful spending) and by conducting contract close-out audits on flexibly priced contracts in a timely manner to ensure that cost-reimbursement contracts are not closed out prior to an actual examination of a contractor’s claimed costs.

### Appendix 1.8: Transparency and Accountability for Law Enforcement and Immigration Authorities

Transparency and accountability measures for law enforcement and immigration authorities:

1. Require the Department of Justice to establish a comprehensive federal database of use of force incidents involving police and civilians, and tie federal grant funding to compliance with reporting this data.
2. Require the Justice Department to begin full implementation of the Deaths in Custody Reporting Act of 2013, which has been inexplicably delayed since the bill's passage seven years ago, including by issuing funding penalties to states that do not comply with Deaths in Custody Reporting Act reporting requirements.
3. Create a national, public police misconduct database that includes the names of police officers who have been the subject of complaints, license revocation, or termination as a result of misconduct.
4. Increase transparency into the federal government's use of novel and invasive surveillance technologies, such as StingRay devices, including which federal agencies are using them, how frequently, and for what types of investigations; how agencies are using the data collected; and how that data is being shared among federal, state, and local law enforcement entities.
5. Require all agencies to publish their policies surrounding the collection, use, and retention of biometric data, as well as any memoranda of understanding regarding sharing of biometric data and/or the interoperability of databases containing biometric data.
6. Commit to disclosing policies and privacy and civil liberties safeguards governing Joint Terrorism Task Forces and intelligence fusion centers, including policies and agreements governing sharing of information with state, local, and tribal government entities and the use of investigative technologies.
7. Require the Department of Justice and Federal Bureau of Investigations to provide information regarding their use of resources to address white nationalist violence, including data regarding investigations, prosecutions, and convictions.
8. Require the Department of Justice to promulgate new pro-transparency rules governing the immigration court system, which is housed within the Justice Department's Executive Office for Immigration Review.
9. Require the Justice Department Executive Office for Immigration Review to proactively disclose immigration data to individuals in removal proceedings without the need to file a Freedom of Information Act or Privacy Act request.
10. Require Immigration and Customs Enforcement to report publicly on use of force incidents and deaths within detention facilities.
11. Require federal law enforcement employees, including contractors and subcontractors, to display clearly visible identifying information, including the federal agency and name or unique identifier of the officer, when engaged in crowd control, riot control, or the arrest or detainment of individuals engaged in protests, demonstrations, or riots

## Appendix 1.9: Use of Legal Force Overseas and Military/Contractor Deployment

Information to release regarding use of lethal force overseas and military/contractor deployment:

1. Declassify and publicly release information about lethal strikes by intelligence and military entities outside "areas of active hostilities," including the number and location of alleged combatants and civilians killed as a result of U.S. use of force.
2. Resume disclosing U.S. military personnel and contractor numbers in Afghanistan, Iraq, and Syria.
3. Provide meaningful public transparency into the Central Intelligence Agency and military agencies' use of lethal force abroad, including all legal interpretations and policies and legal and policy analyses on how the new and previous administrations interpret their authority to use force abroad, as well as full and timely compliance with mandatory reporting to Congress on civilian casualties and the legal and policy frameworks for use of force, maximizing the amount of information included in unclassified reporting.
4. Make public the total size and the annual and lifetime cost of the U.S. nuclear stockpile.
5. Require the Department of Defense to include in its annual budget documents how Overseas Contingency Operations funds were spent in the previous year and make any requests for reprogramming these accounts public.
6. Require the Department of Defense to produce, as the State Department does for foreign assistance, an annual budget justification document for all Department of Defense-funded military assistance that includes country-specific justifications and strategic objectives. Require the State, Defense, and Commerce Departments to publicly disclose the specific country recipient, type of weapon, and final dollar amount of security assistance delivered each year.
7. Disclose the status and results of investigations into civilian harm and credibly alleged wrongful killings abroad to the public and to affected civilians, including accountability measures taken, with appropriate privacy safeguards.
8. Publicly acknowledge any U.S. role in partnered operations that involve the use of force, including acknowledging reports of civilian harm or human rights violations.
9. Declassify and release publicly all previous 48-hour War Powers Resolution notifications to Congress, and commit to making future notifications in unclassified form or, at minimum, with an unclassified summary.