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Obama should quickly reverse the Bush legacy of too many secrets.

BY DANIEL J. METCALFE

There is little doubt that we are now concluding the most secretive presidential administration in American history. The old expression about something being “a tough act to follow” applies in the converse to the Bush administration, and in no area is that more true than government secrecy. Simply put, there is a long way to go, and much that can be done, to undo what President George W. Bush and Vice President Dick Cheney have done over the past eight years.

But given so much room for improvement, the incoming Obama administration must take care not to squander this relative advantage when implementing its change agenda in this area. There is an immediate need to restore public confidence in the federal government—one that actually rivals that of the early-1970s Watergate era—through many new transparency measures, both concrete and symbolic, undertaken sooner rather than later.

Unfortunately, this secrecy crisis coincides with an unprecedented confluence of much larger ones—multiple ongoing wars amid an unfolding global economic meltdown that, at best, will greatly constrain President Barack Obama’s ability to expend capital, both pecuniary and political, on the full range of his remedial agenda. That a lack of transparency was at the root of these epic disasters should not be overlooked, of course, but the fact remains that they dominate the landscape and threaten to eclipse all else.

Thus, for those in the “openness-in-government” community—public interest groups, media organizations, bloggers, concerned legislators, academics, and all others interested in maximum freedom of information and minimum government secrecy—Obama’s victory constitutes just a first step toward needed change. From them, much is expected as well. As this area of public policy competes for the incoming administra-

tion’s attention, they must now forcefully advocate for the making of very clear and specific anti-secrecy changes in a timely fashion.

SAY IT LOUD

So what exactly should the Obama transition team and incoming appointees be focusing on with respect to openness in government? The list is long and growing, but first and foremost it includes the following:

- **Inaugural Address.** No, there has never been a reference to freedom of information or transparency in any president’s inaugural address, but that ought to change now. It would not take much—just a clause, a sentence or two—for President Obama to make crystal clear at the outset that a new era of government openness has begun.

“And it is time for the excessive government secrecy of the past to give way to government transparency in the future—so that all Americans can learn what their government is doing in their name and participate fully in our great democracy. Let us shine a bright light on government, in a variety of ways, and make this the most transparent administration in history.” Any language along these lines, spoken on Day One of the Obama administration, would go a long, long way.

- **Presidential Memorandum.** Here, too, there is precious little precedent (just President Bill Clinton in October 1993) for a presidential memorandum on freedom of information that addresses a new administration’s overall disclosure policy and sets the tone for the next four or eight years. But a simple, one-page memorandum from President Obama, especially if issued early in his administration (i.e., within the first 100 days, if not on Day One), would send a powerful message to government employees and the public alike that he is very serious about reversing the engines of Bush administration secrecy without delay. And such a memorandum could mention more than just the Freedom

of Information Act. It could call for harnessing information technology to achieve greater transparency in broader areas of government information policy as well.

• **Attorney General's FOIA Memorandum.** Traditionally (i.e., for more than three decades now), the gold standard for changing the federal government's policy on secrecy versus transparency has been the FOIA policy memorandum issued by the attorney general pursuant to his or her statutory authority for guiding that act's governmentwide implementation. Four times—in May 1977, May 1981, October 1993, and October 2001—an incoming attorney general has pointedly changed the government's information disclosure policy from one of secrecy to one of openness, or back again, through a new articulation of the standard by which the Department of Justice will (or will not) defend agencies' FOIA denials when they are challenged in court.

This time, new Attorney General Eric Holder Jr. should promptly rescind the infamous FOIA memorandum that was issued by John Ashcroft. To FOIA requesters, the Ashcroft FOIA memo came to stand for a presumption in favor of nondisclosure—especially under his successor, Alberto Gonzales, who apparently never met a secret he didn't like to claim to have forgotten. That memo ought to be replaced with one much akin to the vibrant pro-disclosure policy directive that was issued by Janet Reno 15 years ago. As the principal author of both memorandums, I suggest making a swift return to Reno's "foreseeable harm" standard and its accompanying emphasis on the discretionary disclosure of FOIA-exempt information, which the Justice Department so vigorously implemented during the Clinton administration's final seven years.

• **Legislation.** Lastly, there is the question of whether Congress will assert itself on a range of transparency-related issues, which depends greatly on the posture of the new administration as it begins to work with a legislature boasting strong majorities of the same political party. After taking pains to restore its own reputation, President Obama's rebuilt Justice Department would do well to partner with Congress' longtime

FOIA champion, Sen. Patrick Leahy (D-Vt.), and to readily agree on a package of progressive FOIA amendments—such as one applying the act to the Smithsonian Institution. Most significantly, in doing this, Congress would break the mold of the "every 10 years" amendment cycle and set a new precedent for future FOIA reform. For the openness-in-government community, this alone would be very meaningful change indeed.

Such a FOIA amendment bill could even include a legislative remedy to the Bush administration's horribly failed policy of "safeguarding" federal records with a "Controlled Unclassified Information" document label. As things stand now, this recently attempted administrative solution to the post-9/11 expansion of "pseudosecrecy" overreaches so broadly in its definition of sensitive information that it has not even been implemented in the seven months since its issuance and cries out for legislative reform.

It remains to be seen whether the Obama administration will be able to meet the pent-up expectations of those who have closely watched government secrecy reach new depths over the past eight years, including times when secrecy was used as a pernicious means to unlawful ends. To be sure, expectations are commensurately high.

But by taking the above steps, and doing so as quickly as absolutely possible, the Obama administration can begin to turn the page on this sad chapter of our history. In so doing, it will renew the federal government's commitment to the American people, helping to revive our trust in government by signaling that the secrecy of the past is truly just that—past.

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