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Editorial

The nature of government secrecy☆

This is a good time to examine the subject of government information disclosure – or, to use the words that are on the other side of that coin, government secrecy[1] – and to look at the very nature of government secrecy, particularly as it seems to have such a strong hold on the executive branch of our federal government. Indeed, we are now concluding the eighth year of a presidential administration that, almost from its beginning,[2] has been widely described in the media as having a persistent "penchant for secrecy" – and that actually is one of the mildest of the phrases that have been used.[3]

We also now are a full seven years beyond the shock and horror of what in the public lexicon is referred to simply as "9/11" – with the fear and risk of future such attacks having been intense enough to literally transform our society yet abstract enough to now be perceptibly dissipating with the passage of time.[4] Or so it would seem.

And as for that most popular antidote to government secrecy, the Freedom of Information Act ("FOIA"), we are well into what can be thought of as its "middle age."[5] It is more than 40 years old now and is still rolling along, with millions of requests for access to federal records and information now made annually.[6] Yet the FOIA still is in need of some rejuvenation and revitalization in the coming year.[7] That is just part of secrecy's necessary deconstruction and eventual reconstruction.

1. Laws of secrecy

So what are the most basic laws of secrecy? Why do we need it? How much of it should we tolerate? And what are the forces that make this such a vital but so often highly controversial area of public policy?

☆ This editorial was adapted from a keynote address given at the Library of Congress at its 25th Annual Forum on Federal Information Policies on September 12, 2008.

[1] The words on the obverse side of this coin have variously been such phrases as "freedom of information," "openness in government," "government sunshine," "access to records," and the like over the years in the United States – "or 'transparency in government,' as it often is referred to overseas." FOIA Post, "OIP Gives Implementation Advice to Other Nations" (posted 12/12/02), available at http://www.usdoj.gov/oip/foiapost/2002foiapost30.htm. Indeed, over the past half-dozen years, the word "transparency" has inevitably migrated from overseas and proliferated within the U.S. to the point at which it now has a currency that most succinctly and comprehensively encompasses all that secrecy is not. See Justice Department Testimony Before House Comm. on Gov't Reform Subcomm. on Gov't Management, Finance, and Accountability (July 26, 2006), at 8 n.16, available at http://www.usdoj.gov/oip/metcalfe_foia_testimony07252006.pdf.

[2] Lest it be forgotten, the Bush Administration already was beginning to earn a well-deserved reputation for secrecy even before the events of September 11, 2001. See, e.g., Letter of Aug. 31, 2001 from White House Counsel Alberto R. Gonzales to Archivist of the United States John W. Carlin, at 1 (blocking public access to records of President Ronald Reagan and Vice President George H.W. Bush, as preliminary step to unprecedented degree of resistance to disclosure, under Presidential Records Act), available at http://www.fas.org/sgp/news/2001/09/presrecs.html; see also Associated Press, "U.S. More Tightlipped Since September 11" (Nov. 15, 2001) ("Historians are criticizing a Bush executive order [Executive Order 13,233], *in the works before Sept. 11*, which they say could hold up the release of presidential papers from Ronald Reagan on.") (emphasis added), available at http://www.fas.org/sgp/news/2001/11/ap111501.html; cf. Judicial Watch, Inc. v. U.S. Dep't of Energy, Civil No. 01-0981, slip op. at 1 (D.D.C. Mar. 5, 2002) (reflecting controversy over secretiveness of Vice President Cheney's "National Energy Policy Development Group" (established on Jan. 29, 2001), tracing back to Spring 2001), available at http://www.judicialwatch.org/cases/67/01-981.pdf. But see also Roberts, A., Blacked Out: Government Secrecy in the Information Age (Cambridge University Press 2006), at 36 (correctly noting that Bush Administration secrecy preceded 9/11 – but without good evidence (and contrary to much) claiming that "the process of rebuilding [U.S.] walls of secrecy had begun ... [i]n the early 1990s"), available at http://books.google.com/books?id=FtmydcQkMx0C&printsec=frontcover&dq=%22government+secrecy%22&source=gbs_summary_r&cad=0#PPA36,M1.

[3] Longtime secrecy puncturer and open-government advocate Steven Aftergood, of the Federation of American Scientists, observed this just a year after 9/11: "For good and sufficient reason, the coinage 'penchant for secrecy' is well on its way to becoming a cliché, having been used to describe the Bush Administration some 200 times in the past year." Aftergood, S., Secrecy News (Sept. 19, 2002), available at http://74.125.47.132/search?q=cache:z7F3hPvOtwMJ:www.fas.org/sgp/news/secrecy/2002/09/091902.html+%22penchant+for+secrecy%22&hl=en&ct=clnk&cd=19&gl=us; see also Aftergood, S., "Foreword" in Government Secrecy – Classic and Contemporary Readings (Libraries Unlimited 2008) (same); New York Times, "Exit, Stonewalling" (Jan. 4, 2009) (editorializing with preference for the phrase "mania for secrecy"); cf. USA Today, "Justice, 'Tied at Hip' to White House, Hurts Respect for Law" (May 30, 2007) (describing underlying Justice Department-White House relationship that facilitated secrecy during tenure of Attorney General Alberto R. Gonzales), available at http://blogs.usatoday.com/oped/2007/05/justice_tied_at.html.

[4] See, e.g., The Washington Post, "Terrorism Fades as Issue in 2008 Campaign" (Sept. 11, 2008) (reporting the increasingly common perspective that terrorism concerns have "lost prominence for American voters as the deadly attacks recede in the public memory"), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091003393.html.

[5] See Crawley, J., Media General News Serv., "Freedom of Information Law at 40" (July 2, 2006) ("As the law reaches middle age, it needs a celebration."), available at http://74.125.45.132/search?q=cache:8dNQXWuye-UJ:washdateline.mgnetwork.com/index.cfm%3FSiteID%3Dwsh%26PackageID%3D46%26fuseaction%3Darticle.main%26ArticleID%3D8611%26GroupID%3D214+foia+%22middle+age%22&hl=en&ct=clnk&cd=2&gl=us; see also Weitzel, P., Coalition of Journalists for Open Government, "Update" (May 12, 2005) ("My favorite line, from Justice: 'All in all, FOIA is working about as well as might be expected as it enters its middle age.'"), available at http://74.125.45.132/search?q=cache:1ainv7ihPP8J:www.cjog.net/update_update_51205.html+foia+%22middle+age%22&hl=en&ct=clnk&cd=8&gl=us.

[6] See, e.g., Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information" (Oct. 16, 2006), at 2 & n.3 (documenting that as of the FOIA's fourth decade it was drawing more than 2.5 million requests annually, apart from the more than 17 million distinctly different first-party record requests made to the Social Security Administration), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf.

[7] Beyond all necessary administrative reform – see notes 24–26 infra and accompanying text – it is time for Congress to "break the mold" of the FOIA's "every ten years" amendment cycle with further legislative reform atop the provisions of the 2007 FOIA Amendments. Bills carrying over from the 110th Congress – S. 2746, addressing new "Exemption 3 statutes," and S. 3276, establishing the "FOIA agency" status of the Smithsonian Institution – not to mention brand new transparency provisions now required for economic "bailout" remedies, stand as a sound starting point. See, e.g., Legal Times, "Tell Us More" (Dec. 8, 2008), available at http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1202426448664&hub=Commentary; see also Cox News Serv., "Former Justice Official Opens Up About FOIA" (June 12, 2007), available at http://www.statesman.com/blogs/content/shared-blogs/washington/washington/entries/2007/06/12/former_justice_l.html; cf. Marrs, J., Rule by Secrecy (Harper Collins Publishers, Inc. 2000), at 78 ("It is well enough that the people of the nation do not understand our banking and monetary system for, if they did, I believe there would be a revolution before tomorrow morning.") (quoting industrialist Henry Ford). And the prospect of legislation on the subject of "pseudosecrecy," as explained below, further enlarges the picture. See note 33 infra and accompanying text.

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Well, it most readily must be observed that they are, at bottom, firmly rooted in some very basic laws of human nature.

First, let's face it: Secrecy is inherently human. Put three people together and sooner or later, likely as not, two of them will be keeping some sort of secret from the third.[8] The reasons for this will vary, of course, but the process is basically the same: Two or more persons decide that some information known to them should not be shared with others, except perhaps under certain agreed-upon terms. And being likeminded, they adhere to this, concealing the information[9] – at least for some period of time.[10]

Family members do this all the time, of course, sometimes far more successfully than others. Parents will decide not to "tell the kids" something that might upset them, especially when they "don't yet need to know." Siblings will keep secrets from their parents, both when they're young and then again when they're old. And spouses will...well, this is not about the secret perturbations of President Bill Clinton.[11] Indeed, families can survive through, or can be seriously harmed through, secrecy; it depends.

So it should come as no surprise to anyone when governments almost universally engage in secrecy – or that they do so, in common parlance, "big-time." For what are governments, after all, other than large extensions of the nuclear family?[12] From one size to another, from ancient times to modern, governments are formed and then strive to survive as families do, one just a macrocosm of the other.

Likewise, governments generally exist to serve the interests of their constituents – protection from outside harm being chief among them. A government that cannot protect its people from others, especially foreign hordes, is one doomed to failure.

And that need for *protection* breeds secrecy. If, as is said, the first duty of a government is to protect its citizens, then the first price paid by the citizenry in the bargain – in a huge social compact, if you will[13] – is to forgo some individual liberty, including the right to know what is going on. At the most fundamental level, people say, "Okay, I'll go along, so long as you keep me safe."

The basic idea here is that a government can best keep its people safe and secure (or at least feeling secure) by not disclosing to them everything that is known. Simply put, if one tells something to all the "good guys" in a population, then it is awfully hard (if not impossible) to keep the "bad guys" from learning it, and perhaps then making bad use of it, too.[14] As a rule, nobody wants that.[15]

Then we return to that strong connection between secrecy and basic human nature. Surely government officials are not immune to the same paternalistic impulses that the heads of families have. They shoulder heavy responsibilities that, at least in democratic governments,[16] are entrusted to them based on the premise that they are best equipped to handle them on behalf of others. And they naturally tend to think that some information is so sensitive – sometimes even frighteningly so – as to best be known only to them, with "ordinary folks" best shielded from it. Such *paternalism* is inherently human.

What's more, it is only natural for government officials, especially long-term ones, to feel quite *proprietary* about much of the information that they receive, generate, and transmit in the course of what they do. Custodianship and familiarity leads to that, after a while, especially as to information deemed "highly sensitive." Implicit in this, of course, is the same idea that government officials are far better equipped, by dint of their government status and experience, to be "in the know" than the general populace they serve. All too often, they tend to think of such information as "their information," to be parted with only if, when, and where necessary – and perhaps not even then.[17]

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[8] As realistic an assessment as this is, no less a student of human nature than Benjamin Franklin took it to its next (albeit far more cynical) level: "Three may keep a secret, if two of them are dead." Poor Richard's Almanack (1735 ed.). Exactly forty years later, in the context of the Continental Congress's knowledge of gravely sensitive plans by France to send arms and ammunition in support of the Continental Army, Mr. Franklin joined with others to extend his observation as follows: "Congress consists of too many members to keep secrets." American Archives, Fifth Series, Vol. II, at 818-19 (P. Force, ed. 1851) (statement of Benjamin Franklin and Robert Morris, concurred in by Richard Henry Lee and William Hooper).

[9] Any discussion of secrecy's basic nature would be remiss if it did not recognize that the "information" protected through it is more than just, to put it conventionally, "the words on the page." In exceptional circumstances, it also includes the abstract fact that can inchoately surround that page, imbued by its very existence as described in a particular context. Hence the concept of "Glomarization," in which one responding to an information request refuses – categorically, as a matter of consistent principle – either to confirm or deny any responsive record's existence. For a seminal discussion of this, in relation to the even more sophisticated concept of record "exclusion," see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), at 27-30 & n.47, available at http://www.usdoj.gov/oip/86agmemo.htm.

[10] Secrecy almost always has a temporal quality, of course, though the occasional exception to the rule sometimes strongly suggests otherwise. See, e.g., The James Madison Project v. Nat'l Archives & Records Admin., Civil No. 98-2737 (D.D.C. Feb. 14, 2002) (ordering that records containing "the secret formulas to invisible ink," dating back to 1917–1918, be kept secret until the year 2020 – a year, it might be said, of "hindsight").

[11] The role of secrecy in the Clinton Administration is a subject for another day, but it reminds that, second only to wars (and perhaps the daily operations of truly totalitarian regimes), the best breeding ground for secrecy is scandal – all the better when a scandal's "cover-up" is then itself covered up. Suffice to say here that some secrecy professionals were kept quite busy during President Clinton's eight years in office, including on some matters that remarkably never saw the light of day.

[12] In the most recent Bush Administration, this concept barely survived its mal-allocution. But see also Nunburg, G., "Going Nucular" (Oct. 2, 2002), available at http://people.ischool.berkeley.edu/~nunberg/nucular.html.

[13] Although the term "social contract" was most commonly used by its progenitors Locke and Rousseau, the loftier term "social compact" was the term of choice for Founding Father James Madison, who coincidentally is regarded as "the father of freedom of information." See, e.g., Rosen, G., The American Compact: James Madison and the American Founding (Kansas University Press 2007).

[14] This is akin to how the "Moynihan Secrecy Commission" put it a decade ago: "The key element" of secrecy, it observed, is "the action by one or more 'insiders' of keeping something hidden and set apart from any 'outsiders.'" Report of the Commission on Protecting and Reducing Government Secrecy (1997), at 4, available at http://www.gpo.gov/congress/commissions/secrecy/index.html.

[15] There is a shortsighted counterargument here, one ironically taking the idealistic "long-run" view that publicly identifying and disclosing additional details of even the Nation's most vulnerable infrastructure assets (a strategically vulnerable chemical plant, for instance) would, by virtue of "an alert and informed American public," actually prove to be less "risky" than keeping them secret from those who might use those details in target selection and terrorist attack. This argument holds: "The risk is that by keeping information secret, we make ourselves vulnerable. The risk is that when we keep our vulnerabilities secret, we avoid fixing them. In an open society, it is only by exposure that problems get fixed." This view requires one to accept that such disclosure can be relied upon to "empower[] the public and thus mak[e] us more safe." Emerging Threats: Overclassification and Pseudo-classification, Hearing Before Subcomm. on National Security, Emerging Threats, and International Relations of House Comm. on Government Reform (Mar. 2, 2005) (statement of Thomas S. Blanton, Director, National Security Archive) (arguably overreacting, in no small part, to understandably troubling proliferation of "Sensitive But Unclassified" document designations), available at http://www.gwu.edu/%7Ensarchiv/news/20050302/.

[16] Then again, more than one Democratic president has freely espoused the ideal that "[s]ecrecy and a free, democratic government don't mix." See, e.g., Weinstein, A. (Archivist of the U.S.), "Progress Toward a Goal of Greater Access," Prologue, Vol. 39, No. 2 (Summer 2007) (quoting President Harry S. Truman), available at http://74.125.45.132/search?q=cache:twT6XpJR8f4J:www.archives.gov/publications/prologue/2007/summer/archivist.html+%22secrecy+and+a+free%22+%22harry+s.+truman%22&hl=en&ct=clnk&cd=10&gl=us; see also Kennedy, J.F., Presidential Address Before the American Newspaper Publishers Association, New York City, N.Y. (Apr. 27, 1961) ("The very word 'secrecy' is repugnant in a free and open society ... ."), available at http://74.125.45.132/search?q=cache:PF-SsClAEssJ:www.jfklibrary.org/Historical%2BResources/Archives/Reference%2BDesk/Speeches/JFK/003POF03NewspaperPublishers04271961.htm+%22john+F.+Kennedy%22+%22repugnant+in+a+free+and+open+society%22&hl=en&ct=clnk&cd=1&gl=us.

[17] An extreme (if not the most extreme) example of this arose with the resignation from the Justice Department of former Attorney General Edwin Meese III in 1988, after an embattled tenure that had included so many investigations of his conduct, both official and unofficial, that at times it was difficult to keep track of them all. This embarrassment was made even more acute when it was learned that upon his departure he had removed more than a dozen boxes of records that, to put it charitably, were not clearly his to take. So they were retrieved from his garage and returned to the Justice Department, where they were stored in excess space by the Department's Office of Information and Privacy for several months. This abuse ultimately led to the Justice Department's promulgation of an official order and implementing regulation designed to stand guard against it.

So, all told, what do we have here? Paternalism, proprietariness, and protectiveness[18] – these are secrecy's most basic elements, inherent in both human nature and the nature of governments most fundamentally. All governments have the makings of this, to one degree or another, as if it is part of their institutional DNA.

Then, as governments grow, as they become more mature, and as they develop their own "culture," as a macrocosm of individuality, secrecy inevitably becomes part of that culture, usually to no small degree. And as time goes by and circumstances become more and more complex, so too does a government's practice of secrecy – with what can seem like enough rules and exceptions to keep an army of lawyers busy throughout any war.[19]

Speaking of wars, they spawn secrecy every time. In this country, government secrecy traces back to the treaty relations of President Washington with the British in the wake of the Revolutionary War,[20] to the covert espionage contracts of President Lincoln during the Civil War,[21] and to the transcontinental military and espionage concerns of President Franklin D. Roosevelt during World War II.[22]

But it took the atomic bomb and the accompanying Cold War for government secrecy to fully take hold and accelerate.[23] And in just the last 60 years or so, we now have developed a giant patchwork quilt (or more like a tarpaulin) of different secrecy or openness regimes (depending upon your point of view) that sometimes can confuse even the professionals in this town, not to mention the average citizen. And it seems as if it is always changing, in one form or another, as times change and new circumstances (geopolitical and otherwise) arise. In short, government secrecy is inevitable – and it largely, but not entirely, is here to stay.

So what is most prominent on the secrecy landscape currently? What is likely to change for the better (ideally not worse) in the foreseeable future? The following areas stand out above all others.

2. The Freedom of Information Act

First and perhaps foremost, we have the Freedom of Information Act – "FOIA," for short, as in: "It's good FOIA." Only for many, the FOIA has not been so good lately – with agency backlogs of pending FOIA requests that continue to defy executive branch improvement efforts;[24] with remedial legislative amendments that still have not been properly implemented;[25] and with an Attorney General policy memorandum that stands, rightly or not, as a symbol of day-to-day agency secretiveness.[26]

As the principal author of that infamous "Ashcroft Memorandum," I will of course tread a bit lightly here. But not so much as to deny the same kinship with the more pro-disclosure predecessor memorandum issued by Attorney General Janet Reno in 1993,[27] as well as the more hortatory one issued by President Clinton at the same time.[28]

That Clinton FOIA Memorandum, by the way, remains in effect to this day; during the Bush Administration, I never suggested it be rescinded, and it never was. So now, I suggest, it should stand as the precedent for a broad statement of openness-in-government policy – one also calling for the harnessing of information technology toward that end – that should be issued by the next president. (Of course, a few well-chosen words on transparency in that president's Inaugural Address wouldn't hurt either, though the competition for that novel level of attention will be quite stiff.)

And this should be issued early in the new administration (i.e., sooner rather than later, if not on "Day One") and then quickly followed by a new Attorney General FOIA Memorandum that replaces the Ashcroft one and restores the readily foreseeable harm standard for FOIA exemption decisionmaking. This would not be difficult to do, especially as there is much relevant expertise available even outside the government upon which the next president can freely draw. Quick action along these lines would go a long way to assure the public that a new era of transparency has begun.

3. "Pseudosecrecy"

Another major part of the secrecy landscape can be found in the relatively recent proliferation of document "safeguarding labels" that are used by many federal agencies in a variety of different ways. Indeed, "For Official Use Only" ("FOUO"), "Law Enforcement Sensitive Information" ("LES"), and the more generically pervasive "Sensitive

[18] While apparently no one has ever deconstructed secrecy through this exact triad of terms, all alliterativeness aside, they do appear to encompass what animates the type of secrecy that governments generally practice. As for other, extra-legal institutions such as criminal syndicates, for instance, they operate according to anti-social, as opposed to presumably social, norms.

[19] As a basic reference point, one might be surprised to know that the number of "original classification authorities" (i.e., government employees legally empowered to classify information on national security grounds) exceeds 4000, see Information Security Oversight Office's 2007 Report to the President, available at **http://www.archives.gov/isoo/reports/2007-annual-report.pdf**, and that atop that the number of aggregate employee work-years that were devoted to the administration of the FOIA last year was estimated by the Department of Justice to be "[a] total of 5367.216," Office of Information and Privacy's Summary of Annual FOIA Reports for Fiscal Year 2007, available at **http://www.usdoj.gov/oip/foiapost/2008foiapost23.htm**. See also Note, Mechanisms of Secrecy, 121 Harv. L. Rev. 1556, 1559 (2008) (discussing "the agency costs of secrecy and transparency"); Moynihan Secrecy Commission Report, supra note 14, at 38 (recommending more than a decade ago that "the cost of protection" be factored into future national security classification decisions).

[20] See 5 Annals of Cong. 760-62 (Mar. 30, 1796) (Message of President George Washington to House of Representatives Regarding Documents Relative to Jay Treaty). But see also United States v. Nixon, 418 U.S. 683, 705 n.13 (1974) (observing that nearly a decade earlier most Framers of the Constitution acknowledged that they could not have designed it nearly as well without operating in strict secrecy); Halperin v. CIA, 629 F.2d 144, 157 (D.C. Cir. 1980) (noting that even a decade before that, in 1775, there was established a "Committee of Secret Correspondence of the Continental Congress" that "placed great importance upon...total secrecy in intelligence matters"); cf. Armand Jean du Plessis de Richelieu (Cardinal Richelieu) (1585-1643) ("Secrecy is the first essential in affairs of state.").

[21] For a 19th-century discussion of secrecy in this context that stands as a pillar of jurisprudence to this day, see Totten v. United States, 92 U.S. 105 (1875) (establishing foundation for both "state secrets" privilege and FOIA "Glomarization").

[22] See, e.g., Persico, J., Roosevelt's Secret War: FDR and WW II Espionage (Random House 2002); see also Justice Department Guide to the Freedom of Information Act (Mar. 2007 ed.), at 195 & nn.1-2 (tracing unbroken series of presidential executive orders on national security classification from issuance of Executive Order 10,290 by President Harry S. Truman on September 24, 1951), available at **http://www.usdoj.gov/oip/foia_guide07/exemption1.pdf**. But see also id. at 195 n.1 (recognizing Exec. Order No. 8381, 5 Fed. Reg. 114 (Mar. 22, 1940) (citing Act of January 12, 1938, 52 Stat. 3 (1938)), as "establishing initial classification structure *within military* to protect information related to 'vital military installations and equipment'") (emphasis added); Moynihan, D.P., Secrecy: The American Experience (Yale University Press 1998), at 84 (tracing "much of the structure of secrecy now in place in the U.S. government" to Congress's enactment of the Espionage Act, a criminal statute, during World War I).

[23] See, e.g., id. at 98 (emphasizing the significance of Congress's enactment of the Atomic Energy Act, another secrecy statute with criminal penalties, in 1954: "And so the modern age began.").

[24] See, e.g., Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information" (May 30, 2008) (straining badly to explain how, after more than two years of governmentwide focus on backlog reduction under an executive order issued in December 2005, more than a third of all federal agencies instead ended up with "an increase in the number of pending [FOIA] requests" over the previous year), available at **http://www.usdoj.gov/oip/ag-rpt08/ag-report-to-president06012008.htm**; see also Government Executive Magazine, "Balancing Openness and Privacy" (Mar. 1, 2007), available at **http://www.govexec.com/features/0307-01/0307-01na6.htm**.

[25] See Metcalfe, D., The Cycle Continues: Congress Amends the FOIA in 2007, 33 Admin. & Reg. L. News 11 (Spring 2008), available at **http://www.wcl.american.edu/lawandgov/cgs/documents/aba_arln_sp2008_cycle_continues.pdf?rd=1**.

[26] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the FOIA (Oct. 12, 2001), available at **http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm**.

[27] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the FOIA (Oct. 4, 1993), available at **http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm**.

[28] See President's Memorandum for Heads of Departments and Agencies Regarding the FOIA (Oct. 4, 1993), available at **http://www.usdoj.gov/oip/93_clintmem.htm**.

But Unclassified Information" ("SBU") labels are just three of literally dozens of such "alphabet soup" designations[29] that agencies apply to their records,[30] doing so so frequently nowadays that they all too often are equated with formal legal grounds for keeping those records from the public – "secrecy," in short. Yet they are not.

In point of fact, agencies may properly use these restrictive designations as a means of safeguarding certain records within their four walls, or even in special information-sharing agreements with state and local governments, but they *cannot* use them, or their underlying rationales, as the sole legal basis for refusing to make such records public.[31] Briefly stated, only the legislature (with some aid from the courts) can create such legal prohibitions on public disclosure (usually in the form of FOIA exemptions), all perceptions to the contrary notwithstanding.

Here on Capitol Hill, there has been increased attention to this problem of "pseudosecrecy" (as I call it)[32] during the past year, led by Congresswoman Jane Harmon, with the prospect of a legislative solution. In fact, several bills were introduced in both the Senate and the House of Representatives toward that end, with two of them even passing the House near the end of the 110th Congress.[33]

At the other end of Pennsylvania Avenue, however, the Bush Administration decided instead to simplistically rename the problem – transforming "SBU" into "CUI," or "Controlled Unclassified Information."[34] But months later, in the absence of any serious follow-up to this, people are wondering whether such a thing could ever have taken hold before the end of the Bush Administration in any event.[35]

Moreover – and I suppose I say this with a bit of my own proprietariness, as I am the one you can blame for SBU's ubiquity since I used that phrase in preparing what became a seminal White House policy memorandum in 2002[36] – there is the overwhelming fact that the Bush Administration's definition of "CUI" is extremely, unworkably broad. In fact, it is so broad that it is almost harder to think of information that does not fall within its scope than information that does. So look for a better, more realistic solution to that growing problem area down the road.

4. Automatic declassification

A third major part of the secrecy landscape has to do with a deadline that finally came due. Those who follow matters of national security classification know that when the current executive order governing that (Executive Order 12,958) was issued by President Clinton in 1995 it provided for a process of "automatic declassification" that soon would begin to apply to records that were more than 25 years old. But as such things often go, the initial deadline for that was pushed back, more than once, including by the Bush Administration's own classification executive order in 2003.[37]

This deadline finally became firm only as of the beginning of 2007, on its face requiring federal agencies to undertake massive declassification activities. But for a number of reasons – including agency resistance, resource constraints, and questionable efforts to claim categorical exemptions from this process – it has not yet proven to be what was so long awaited. Far from it, in fact.[38] At the FBI alone, I know, there is much room for further compliance with this unprecedented openness requirement. So look for further attention to this area, too, in the coming year.

5. "Affirmative disclosure"

Fourth, there is the realm of what I refer to as "affirmative disclosure."[39] Years ago, this area consisted of little more than the dry press releases, speeches, and related public statements that emanated from agencies and public officials. But nowadays, of course, such information regularly is posted online rather than handed out in paper form, to both widespread and immediate effect, and an agency's website is a primary means by which its progressive openness is judged both by the media and by the public at large.

So immediately after 9/11, and since, many agencies have been removing information from their websites – or, in many instances, no longer posting types of information that previously were there – to enormous public outcry.[40] Some of this criticism has been entirely valid. I need only think back to one agency that completely shut its website down, ostensibly on "orders" from the Department of Defense, immediately after 9/11. It was my responsibility to tell that agency – which shall remain nameless here but its initials are "NRC" – that it had badly overreacted and that it was legally required to re-post at least the FOIA-required content of its website, without delay, regardless of what it thought the Defense Department had in mind. It

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[29] Exactly thirty years ago, the Supreme Court used the phrase "alphabet soup" in a Freedom of Information Act case, one that actually was a "reverse" FOIA case decided under the Administrative Procedure Act as well. Writing for the Court in Chrysler Corp. v. Brown, 441 U.S. 281, 286 n.4 (1979), then-Associate Justice William H. Rehnquist observed: "The term 'alphabet soup' gained currency in the early days of the New Deal as a description of the proliferation of new agencies such as WPA and PWA. The terminology required to describe the present controversy suggests that the 'alphabet soup' of the New Deal era was, by comparison, a clear broth." So what now should be said of the more than 120 such "pseudosecrecy" labels identified by the Collaboration on Government Secrecy as currently in use at one federal agency or another?

[30] See, e.g., WashingtonPost.com., "Gov't Secrecy and the Mysterious Cyber Initiative" (May 15, 2008) (citing Collaboration on Government Secrecy website at http://www.wcl.american.edu/lawandgov/cgs/pseudosecrecy.cfm#labels); see also notes 33-35 infra.

[31] See Justice Department Guide to the Freedom of Information Act (Mar. 2007 ed.), at 305, available at http://www.usdoj.gov/oip/foia_guide07/exemption2.pdf.

[32] See, e.g., Collaboration on Government Secrecy, "Frequently Asked Questions," available at http://www.wcl.american.edu/lawandgov/cgs/faq.cfm.

[33] See id. at "Pseudosecrecy," available at http://www.wcl.american.edu/lawandgov/cgs/about.cfm.

[34] Memorandum for the Heads of Executive Departments and Agencies Regarding Designation and Sharing of Controlled Unclassified Information (CUI) (May 9, 2008), available at http://www.whitehouse.gov/news/releases/2008/05/print/20080509-6.html. More than one cynical observer, noting that this "solution" was delayed by the Bush Administration for several years and then issued by it only as it was nearing its end, has remarked that "CUI" seems more like "See you later." Amid a larger pattern of "run-out-the-clock" approaches, it thus is truly transparent in its own right.

[35] For an updated assessment, see Legal Times, "Tell Us More" (Dec. 8, 2008), available at http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1202426448664&hub=Commentary.

[36] See White House Memorandum for Heads of Executive Departments of Agencies on Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), available at http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm; see also Over-classification and Pseudo-classification: The Impact of Information Sharing, Hearing Before Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of House Comm. on Homeland Security (Mar. 22, 2007) (statement of Meredith Fuchs, General Counsel, National Security Archive) (explaining that after "White House Chief of Staff Andrew H. Card issued a directive to federal agencies requesting a review of all records and policies concerning the protection of 'sensitive but unclassified' information," many agencies augmented their controls over different types of what they began referring to as "Sensitive But Unclassified" information), available at http://homeland.house.gov/hearings/index.asp?ID=27&subcommittee=11.

[37] See Exec. Order No. 13,292, § 3.3 (Mar. 25, 2003) (amending Exec. Order No. 12,958, § 3.4 (Apr. 17, 1995)), available at http://www.whitehouse.gov/news/releases/2003/03/20030325-11.html.

[38] See, e.g., Aftergood, S., "Automatic Declassification: Did Anything Happen?," Secrecy News (Jan. 9, 2007), available at http://www.fas.org/sgp/news/secrecy/2007/01/010907.html#1; Wiener, J., "Declassified in Name Only," L.A. Times (Jan. 4, 2007).

[39] See, e.g., FOIA Post, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Area #1), available at http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm.

[40] See, e.g., Reporters Committee for Freedom of the Press, "Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know" (6th ed. Sept. 2005), at 67-68 (questioning, under heading of "Taking Down Web Sites," whether "the information [that] had been removed" from agency websites "is lawfully exempt under the FOI Act"), available at http://www.rcfp.org/homefrontconfidential/Homefront_Confidential_6th.pdf; OMB Watch, "EPA Turns Over Documents on Information Removal, Yet Questions Remain" (May 15, 2002) (regarding "any decision to remove or limit information" on an agency's website as the same as "withholding" it), available at http://www.ombwatch.org/article/articleview/738/1/253?TopicID=1.

had been an honest mistake, under unprecedented circumstances, and it was rectified responsibly.

But there is an important distinction between what is lawful and what is unlawful in this regard – and it has to do with whether the agency was required by law to have the information in question posted *in the first place*, or whether it was up there purely as matter of the agency's administrative discretion. More information falls within that latter category than the average person, journalist, or even otherwise-knowledgeable public interest group spokesperson truly understands.[41] And this itself leads to charges of "unlawful secrecy" all too often.

The primary legal requirement for website availability is the FOIA, specifically subsection (a)(2) of that law, 5 U.S.C. § 552(a)(2), which used to be known as the "reading room" part of it.[42] Now, in what are known as "electronic reading rooms" – where such things as basic agency policy documents, decisions in the adjudication of cases, and frequently requested records are *required* to be made affirmatively available (i.e., without request) – it is unlawful to take them down from a website or to not have them posted in the first place. But otherwise, an agency's failure to post, re-post, or continue to post something on its website simply is not that; it might be seen as "secrecy," perhaps, but it is not unlawful secrecy – and that is a distinction worth remembering.

This mention of unlawful secrecy reminds me of my "Law of Secrecy" seminar, which I teach together with a brilliant young academic, Stephen I. Vladeck, who is prone to ask our students: "Is there any significant difference between lawful secrecy that has the effect of covering up unlawful acts, and unlawful secrecy that covers up things that might be lawful, but you don't really know?" And: "What of secrecy that is plainly designed to cover up, and thus perpetuate, underlying government wrongdoing?"

Right now, I find myself in the midst of the latter, as I am representing several young attorneys who, we recently learned, were "screened out" from the Attorney General's Honors Program for entry-level career positions at the Justice Department based upon their "liberal affiliations." Yes, some political appointees operating under the authority of Attorney General Alberto R. Gonzales[43] in 2006 actually used ideological and political affiliations to reject these applicants for career attorney positions. And to do so, they actually went onto the internet, using such means as Google, Facebook, and MySpace, and printed out records reflecting the exercise of such First Amendment-protected activity.[44]

These are not just allegations: The Justice Department's Inspector General found them as fact.[45] And, it turns out, this sort of thing actually happened before, in 2002 – but it was successfully *kept secret*, so it was able to recur, in an even more blatant and "successful" form, in 2006.

Yet still, with hundreds of attorneys wrongfully treated in violation of basic civil service laws, of the Justice Department's reputation for integrity, and of more than a half-dozen provisions of the Privacy Act of 1974,[46] this almost certainly would not have come to light without Attorney General Gonzales's high-visibility problems with his treatment of his own United States Attorneys – problems that burst into public view in early 2007 only due to his own glaring incompetence in dealing with them.

In other words, it otherwise would have remained entirely secret, shrouded in the dense fog that to this day surrounds how that particular Attorney General managed to operate, had it not been for a collateral scandal. Well, one of the purposes of this class action lawsuit, *Gerlich v. Department of Justice*,[47] is to pierce that secrecy shroud, with a deposition of former Attorney General Gonzales that yields more information, more accountability, and certainly more deterrence of future such misconduct than Congress thus far has been able to achieve.

So I daresay that this case can yield the most important lesson of all here:

Yes, access to government information, government transparency, freedom of information, openness in government, and even "anti-secrecy," by whatever name, can effectively prevent government wrongdoing from ever occurring in the first place. "Sunlight is said to be the greatest of disinfectants," Justice Louis D. Brandeis famously opined.[48] But where you have government wrongdoing that *has* occurred (and as in the *Gerlich* case already has *re*curred) it is especially important that the secrecy that enabled it to begin with be peeled away, with the wrongdoing laid bare, as a deterrent against any future such conduct, else it be allowed to recur.[49]

In other words – indeed, to liberally paraphrase the words of George Santayana that are engraved in the National Archives Building just a few blocks away[50] – if we cannot learn what has been covered up in the past (and how), then we are condemned to repeat it.

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[41] See, e.g., The Constitution Project, "Liberty and Security: Recommendations for the Next Administration and Congress" (Nov. 18, 2008), at 200-04 (implying incorrectly that all "information remov[al] from Government Websites" is contrary to and violative of "laws"), available at http://www.constitutionproject.org/pdf/Liberty%20and%20Security%20Transition%20Report.pdf.

[42] See, e.g., FOIA Update, Vol. XIII, No. 3, at 3–4 (1992) (explicating the longstanding "reading room" requirements of the Act), available at http://www.usdoj.gov/oip/foia_updates/Vol_XIII_3/page_2.htm; see also id., Vol. XVIII, No. 1, at 3–6 (1997) (updating requirements in light of Electronic FOIA Amendments of 1996), available at http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_1/page3.htm.

[43] From the files of the arcanae or lucanae of secrecy: According to one source, "Alberto's middle initial is R, but the initial doesn't stand for anything." McElroy, L.T., Alberto Gonzales, Attorney General (Millbrook Press 2006), at 7, available at http://books.google.com/books?id=sE6TvV8TvmsC&pg=PA7-IA2&lpg=PA7-IA2&dq=%22alberto+gonzales%22+%22middle+initial%22&source=bl&ots=B0Hut12XWt&sig=wipqqHqSTpsc3miG6USERyPnEgA&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PPA7-IA2,M1. Compare McCullough, D., Truman (Simon & Schuster 1992), at 19 (reporting that Harry S. Truman and his middle initial certainly stood for something).

[44] See, e.g., Legal Times, "Lawsuit on Politicized Justice Department Hiring Expands" (Aug. 18, 2008), available at http://legaltimes.typepad.com/blt/2008/08/lawsuit-on-poli.html; see also id., "Conyers, Leahy Want Details on Gonzales' Legal Fees" (Nov. 24, 2008), available at http://legaltimes.typepad.com/blt/2008/11/conyers-leahy-want-details-on-gonzales-legal-expenses.html.

[45] See "An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program" (June 24, 2008), passim, available at http://www.usdoj.gov/opa/pr/2008/June/08-opa-563.html.

[46] See 5 U.S.C. § 552a(e)(1)–(2), (5)–(7), (9)–(10).

[47] See Sean M. Gerlich, et al. v. United States Department of Justice, et al., Civil No. 08-1134 (JDB) (D.D.C.); see also, e.g., ABC News, "Lawsuit Filed Against Gonzales, DOJ" (Aug. 15, 2008), available at http://abclocal.go.com/kgo/story?section=news/national_world&id=6330968.

[48] Brandeis, L., Other People's Money, and How the Bankers Use It (1914). The full quotation is: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the greatest of disinfectants; electric light the most efficient policeman." Fifty years earlier, when the technological basis for such allusions had not (metaphorically speaking) yet seen the light of day, American philosopher-poet and government critic Ralph Waldo Emerson expressed the thought in the terms of his times: "As gas-light is found to be the best nocturnal police, so the universe protects itself by pitiless publicity." The Conduct of Life – "Worship" (Houghton, Mifflin & Co. 1860), at 176.

[49] Such was the lesson of the "Watergate Era" of our Nation's recent history, the last time at which the operations of the United States Department of Justice were likewise corrupted. See Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Apr. 26, 1976) ("Church Committee"), passim, available at http://74.125.47.132/search?q=cache:Nd-fbQA2yZoJ:www.bibliotecapleyades.net/sociopolitica/esp_sociopol_mj12_22.htm+%22church+committee%22+recur&hl=en&ct=clnk&cd=1&gl=us; see also Interim Report of the Select Committee to Study Governmental Preparations with Respect to Intelligence Activities, S. Rep. No. 94-465, at 285 (1975) ("We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but if we do, our future will be worthy of the best of our past."). This perspective is born also of the author's own experience as the junior-most member of the Office of the Attorney General's professional staff during 1973-1974. See Legal Times, "Justice Department Independence 'Shattered'" (Apr. 16, 2007) (comparing Gonzales's tenure as Attorney General to time of Justice Department's "Saturday Night Massacre" during Watergate Era), available at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1176455062969.

[50] Santayana, G., Reason in Common Sense (1905) ("Those who cannot remember the past are condemned to repeat it").

And when it comes to secrecy, among other things, I do not think any of us really wants to repeat the past eight years.

Daniel J. Metcalfe*
E-mail address: metcalfe@wcl.american.edu.

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Daniel J. Metcalfe is a 1976 graduate of the National Law Center at George Washington University, where he was a law review editor and attended on a full academic scholarship. After a judicial clerkship, he served as a trial attorney in the Department of Justice's Civil Division for four years, specializing in Freedom of Information Act ("FOIA") and Privacy Act litigation. In 1981, he was appointed as a founding director of the Justice Department's Office of Information and Privacy, which discharges the Attorney General's administrative and governmentwide policy responsibilities under the FOIA, and he served as the government's principal FOIA expert until his retirement from federal service in January of 2007. In that capacity, he advised all federal agencies on all aspects of FOIA administration, directly supervised the defense of more than 500 FOIA lawsuits in district and appellate courts, testified before Congress on prospective FOIA amendment legislation, and over the course of more than twenty-five years met with representatives of nearly 100 nations and international governing bodies as they considered the development and implementation of their own freedom of information laws. During recent years, he also served as a principal advisor to the Department of Homeland Security on matters of post-9/11 information policy and likewise advised the Office of the Director of National Intelligence and senior staff of the National Security Council. Most recently, he held primary responsibility within the executive branch for guiding the governmentwide implementation of Executive Order 13,392, the first executive order ever issued on the FOIA. He became a career member of the Senior Executive Service in 1984, the youngest Department of Justice attorney then and since to hold such a position. Upon the announcement of his retirement from the Justice Department, Dan was named an Honorary Senior Research Fellow at University College London, and in 2007 he joined the faculty at American University's Washington College of Law as a Faculty Fellow in Law and Government as well as Executive Director of its newly established Collaboration on Government Secrecy ("CGS").

* Adjunct professor at the Washington College of Law of American University and executive director of that school's Collaboration on Government Secrecy ("CGS") (http://www.wcl.american.edu/lawandgov/cgs/), the first such academic center established at any law school in the country. Professor Metcalfe served as founding director of the United States Department of Justice's Office of Information and Privacy from 1981 to 2007 and holds the distinction of having been the youngest person ever appointed to the career Senior Executive Service, a record that still stands.