



Obama at 100 Days – 21st Century Right-to-Know Agenda

April 2009

In the months preceding the 2008 presidential election, the right-to-know community worked together to collaboratively develop a set of government transparency recommendations for what was to be the next administration and Congress. The seventy recommendations were published in a report, titled *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, which was endorsed by more than 300 individuals and organizations. The recommendations urged the new president and Congress to act quickly on a number of key government openness issues while encouraging a more systemic, longer-term approach to a variety of other transparency problems that plague the federal government. Included in the report were five specific recommendations the right-to-know community wanted action on within the first 100 days of the new administration.

For better or for worse, the first 100 days has become a significant marker in the life of the presidency, with everyone, including the administration itself, eager to evaluate performance. Most incoming administrations have sought to use their first 100 days in power to achieve major policy goals and quickly enact the changes on which they campaigned. Likewise, the public and media have used the actions during the first 100 days as a touchstone to judge the new administration.¹

Therefore, with public expectations high and the momentum of a successful campaign still strong, the actions of the new administration during the first 100 days take on a disproportionately large amount of significance. Actions undertaken during the first 100 days serve to quickly set the tone and priorities of an administration and provide guidance to executive agencies and Congress. The president need not depend on the will of Congress to make progress on many of his goals. Executive orders, appointments, rulemakings, and even the reversal of prior executive orders are tools

¹ The concept of the first 100 days as a marker dates back at least as far as Franklin Delano Roosevelt's administration. The direness of the crippling 1932 economic crisis created an urgency to act quickly. Roosevelt's inaugural address emphasized this urgency: "This nation asks for action, and action now." Thus, the first 100 days of the Roosevelt administration saw the introduction of momentous legislation, major executive orders, and fundamental changes to the federal system.

available to make big changes quickly. Modern presidents are judged for their ability to set the agenda.

There are many open government issues against which the Obama administration's first 100 days could be judged – actions taken, opportunities missed, policies issued, etc. This assessment only focuses on the five recommendations from the *Moving Toward a 21st Century Right-to-Know Agenda* report specifically directed at the first 100 days. The assessment reviews each recommendation, discusses relevant government actions, and attempts to evaluate how much progress those actions constitute.

1) The president should clearly state in his inaugural address that he will oversee the "most open, honest, and accountable government ever."

Status: Completed

On the campaign trail, then-Sen. Obama made repeated comments about the need for government to be open and accountable. In a speech in Green Bay, WI, on Sept. 22, 2008, Obama promised, "I'll make our government open and transparent so that anyone can ensure that our business is the people's business ... As President, I will make it impossible for Congressmen or lobbyists to slip pork-barrel projects or corporate welfare into laws when no one is looking because when I am president, meetings where laws are written will be more open to the public. No more secrecy." Explaining the need and importance of the change, Obama stated, "As Justice Louis Brandeis once said, sunlight is the greatest disinfectant." But campaign speeches and promises can be forgotten if an administration does not reinforce its commitment quickly after taking office. It was with this concern in mind that the right-to-know community chose to recommend the inclusion of an open government statement in the president's inaugural address.

During his inauguration on Jan. 20, 2009, President Barack Obama fulfilled this first recommendation by signaling a commitment to transparency and accountability as part of his first speech in office. Obama stated that "those of us who manage the public's dollars will be held to account – to spend wisely, reform bad habits, and do our business in the light of day – because only then can we restore the vital trust between a people and their government." While the comment was made during a discussion about federal spending, many in the right-to-know community considered the statement a major victory for the acknowledgement of the importance of open government. Indeed, the new White House website that went live at 12:01 p.m. that day included a commitment to openness and accountability. Specifically, the website

read, "President Obama has committed to making his administration the most open and transparent in history..."

2) Instruct the agencies to operate in a more open style, making information available to the public in a timely manner and in searchable formats except where prohibited by law.

Status: Significant Progress, But Implementation Incomplete

The 21st Century Right-to-Know report called on the Obama administration to take steps within the first 100 days to:

- Proactively disseminate information
- Launch an honest government initiative to better track government-related financial transactions and other forms of lobbying
- Evaluate handling of sensitive information process to ensure maximum openness
- Commit to vice presidential compliance with presidential disclosure requirements
- Create a government transparency officer position
- Reduce the use of the state secrets privilege and signing statements

Proactively Disseminate Information

During his first full day in office, Obama successfully communicated the importance of transparency to agencies and the public by issuing memorandums on the Freedom of Information Act (FOIA) and on transparency and open government. The FOIA memo gave instructions and guidance to the attorney general on issuing new policies on the implementation of FOIA. The transparency memo directed agencies to harness new technologies to make information available to the public and for top officials to draft a blueprint Open Government Directive. These immediate actions were followed by steps to bring greater transparency to the regulatory process and to how scientific actions in government are handled.

The FOIA memo was very direct: "In the face of doubt, openness prevails ... The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public" under FOIA. The presidential memo went on to say that agencies "should use modern technology to inform citizens about what is known and done by their Government" and that this should be done in a timely manner. (More on the FOIA changes below under recommendation 5.)

The transparency and open government memo identified three principles for "creating an unprecedented level of openness in Government": government should be transparent, participatory, and collaborative. Obama further pledged that he would "hold [himself], as president, to a new standard of openness." This met and exceeded the expectations of the 21st Century recommendations.

At the same time, implementation of the transparency and open government memo has raised concerns. The president asked for recommendations from the Chief Technology Officer, in consultation with the Office of Management and Budget and the General Services Administration, by mid-May on developing an Open Government Directive. On Feb. 24, the heads of the Office of Management and Budget, the Office of Science and Technology Policy, and the General Services Administration sent a memo to agency heads announcing that there would be an online discussion for 10 days, until March 6, for federal employees to identify topics for the directive. If that internal process generated topics for the directive, it has never been announced publicly. In fact, there has been no formal public process to discuss the directive, creating concern that public access topics might be developed without public input, defying the very principles that the Obama memo called for.

Overall, the Obama administration has set a strong tone on transparency, but a true assessment cannot occur until the development of agency-wide policies are put in place and fully implemented.

Honest Government Initiative

While the administration has not launched an Honest Government Initiative connecting various spending databases, the administration has made progress on tracking who receives Recovery Act funding. In a little over two months, the administration has made significant progress: each agency has a web page devoted to the Recovery Act; OMB has provided two sets of guidance to agencies on implementing the new law; and the plans for using Web 2.0 technologies are evident. The Recovery Act website, Recovery.gov, holds great promise for allowing the public to access and use data on stimulus projects easily and promptly. However, the website is not all that many in the right-to-know community have demanded.

The administration should eventually expand its effort into other types of financial transactions, such as tax breaks and non-cash support beyond Recovery Act spending. Obama has also taken a controversial step toward increased lobbying disclosure by requiring lobbyists who wish to speak about Recovery Act projects to submit their thoughts in writing. Obama's lobbying policy also requires that agencies post such correspondence on the Internet.

Sensitive Information

Obama has not made clear progress on the subtopic recommendation for reviewing the handling of sensitive information. Though there has not been direct, specific action on this subject, there are some changes that indicate that progress is possible. The National Archives and Records Administration, charged with overseeing the development of policies and handling guidance for Controlled Unclassified Information (CUI), a major category of sensitive information, has met with public access advocates to discuss the progress made thus far and has committed to a series of meetings to get input on key issues. It must be noted that various types of sensitive information in addition to CUI should also be reviewed to ensure that agencies are not over-applying protections for these information categories and preventing documents that should be made public from being released.

Vice Presidential Disclosure

The administration also has not yet made a statement that the Office of the Vice President is required to comply with presidential disclosure requirements. However, the administration's executive order on the Presidential Records Act (discussed below in response to recommendation 4) makes clear that vice presidential records are covered by the Presidential Records Act. This would imply that the administration does consider the vice president's office a part of the executive branch and, therefore, likely subject to the same disclosure requirements.

Government Transparency Officer

Although the administration has not created a government transparency officer position, it has increased the number of top positions with transparency responsibilities. Chief Technology Officer, Aneesh Chopra, the Director of the Office of Management and Budget (OMB), Peter Orszag, and the Administrator of the General Services Administration (not yet nominated) have been charged with transparency tasks (see "Proactively Disseminate Information" above). Additionally, the administration has made it clear that the Chief Information Officer, Vivek Kundra, will have significant responsibilities "in making sure our government is running in the most secure, open, and efficient way possible."

State Secrets and Signing Statements

The administration has not met the standards called for in the 21st Century recommendations regarding the use of signing statements and the state secrets privilege. Many groups considered Obama's signing statement on the 2009 omnibus appropriations bill to be an affront to whistleblower protections. These groups have interpreted Obama's signing statement as impeding the ability of government

employees to communicate with Congress. Further, in repeated court cases, Obama administration officials have insisted on maintaining the Bush administration's broad interpretation of executive branch power on the issue of state secrets. There has been no public discussion of reviewing these policies for possible revision.

3) Identify top documents and top databases to make publicly available.

Status: Some Progress

There has been some action by the administration related to this recommendation, though it is probably the one with the least actual progress. On March 5, Obama named Vivek Kundra as the Chief Information Officer (CIO) for the federal government. As the Federal CIO, Kundra directs the strategic planning of federal information technology investments and establishes enterprise architecture to ensure system interoperability and information sharing. In his first remarks as CIO, Kundra announced plans to launch a new website called Data.gov that would produce data feeds from databases held throughout the federal government. Kundra explained, "We need to make sure that all that data that is not private[,] that is not restricted for national security reasons can be made public." This statement appears to be a clear commitment to make public *all* databases as long as there are not clear reasons for withholding the data.

While the goal of a site like Data.gov is promising, the new site has not yet been launched. There have been no further clarifications or details on precisely which databases will be made available or what functionality the site will have at its launch. At this time, it is impossible to evaluate the government's efforts. Currently, the address resolves to a simple homepage that announces that the site is "Coming Soon." Originally, the site was scheduled to launch by late May, but the vague "coming soon" message may indicate that the site's launch date could be further off.

Of course, there is plenty of important federal information that does not come in database formats, as recognized in the recommendation's call for top documents as well. While there have been significant improvements to the FOIA policy (discussed below in response to the fifth recommendation), there has been no announcement of a process to identify the documents, reports, or other records in greatest demand for release and to review them for possible disclosure. Despite a fierce internal debate, the Obama administration *has* released four Bush-era "torture memos" from the Department of Justice, which would have been high on any list of non-public documents. However, it remains to be seen if the administration will adopt a systematic approach to releasing other important documents that have been withheld from the public.

4) Rescind Executive Order 13233 to remove impediments to access to historical presidential records.

Status: Completed

Obama satisfied this when he revoked Bush E.O. 13233 on his first day in office by signing Executive Order 13489, President Records. By doing so, he rescinded an executive privilege that had been extended to heirs of a deceased former president, which allowed the heirs to withhold presidential records from the public. Further, the order clarifies that vice presidential records are included under the category of presidential records. Obama's order also reestablished the Archivist of the United States as an independent arbiter of initial claims of executive privilege by former presidents. Obama's order mostly restored the handling of presidential records to policies enacted by President Ronald Reagan's 1989 Executive Order 12667. This was a critical but easy way in which to increase public access to past presidential records. We still hope that Obama will identify additional steps to strengthen access to such materials.

Inside his first 100 days, Obama also authorized the release of over 250,000 pages of previously sealed presidential records. On April 10, the president informed the National Archives to release the documents, the bulk of which are from the Reagan administration, which had previously been withheld under the George W. Bush administration, pending a page by page review that was never completed. The records included in this release are not expected to be controversial. The speed of the administration's decision bodes well for continued timely release of presidential records.

5) Instruct attorney general to issue a FOIA memo that increases the presumption of openness.

Status: Completed

The president completed this recommendation when, on his first day in office, he directed the attorney general to draft and issue a FOIA memo that would increase the presumption of openness within the federal government. Attorney General Eric Holder complied with impressive swiftness and issued the guidelines on March 19. Comparatively speaking, no FOIA memo was released within the first 100 days of either the Clinton or George W. Bush administrations.

Holder's FOIA memo effectively rescinded that of former Attorney General John Ashcroft, which was issued in October 2001. The Holder memo reflected but built upon an October 1993 memo from Clinton administration Attorney General Janet Reno.

The Reno memo that Ashcroft superseded with his directive called for the "presumption of disclosure." The objective Reno wanted to achieve was "a maximum responsible disclosure of government information – while preserving essential confidentiality." Reno also warned the agencies that the DOJ would only defend the withholding of information where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."

Holder brought back the foreseeable harm clause and also encouraged discretionary disclosure. Among other things, Holder's memo promises to defend agency decisions to withhold information only if the agency demonstrates a reasonably foreseeable risk of harm to an interest protected by FOIA exemptions or statutory law. Further, the memo focuses on timeliness, declaring that "long delays should not be viewed as an inevitable and insurmountable consequence of high demand."

The Holder memo also expanded on the earlier discretionary disclosure language. Holder encouraged agencies to not just make discretionary disclosures, but to do in so in anticipation of the public interest. In response to poor performance reviews on FOIA compliance, Holder mandated that agencies "must address the key roles played by a broad spectrum of agency personnel" in order to reduce "competing agency priorities and insufficient technological support." Moreover, he ordered that the chief FOIA officers of each agency recommend adjustments to agency practices, personnel, and funding as necessary. Thus, it appears the administration has recognized that the responsibility for public dissemination of information goes beyond the FOIA offices of each agency and that the chief FOIA officers have the responsibility to respond to inadequate resources. Holder also declared that "unnecessary bureaucratic hurdles have no place in the 'new era of open government' that the President has proclaimed."

The memo was followed on April 17 by guidance issued by the Office of Information Policy at the DOJ. The guidance referred to Holder's memo as a "sea change in the way transparency is viewed across the government" and elaborated on multiple points Holder made in the March document. The guidance acknowledged the strong cultural barrier to implementing the shift to greater transparency in offering recommendations to alter the governmental mindset to make the presumption of openness a reality. Specifically, the guidance instructs personnel to "view all FOIA decisions through the prism of openness." The guidance goes on to stress that document reviews are not for the purpose of maximizing withholding; that just because information can legally be

withheld doesn't mean that it should be; that partial disclosures should be pursued in cases where some information must be withheld; and that records cannot be withheld simply to avoid agency embarrassment.

Conclusions

In his first 100 days in office, President Obama has made transparency a high priority and has started significant efforts in what will be a long process of getting government to be more open. On the specific recommendations for the first 100 days from the *Moving Toward a 21st Century Right-to-Know Agenda* report, the administration has made tremendous progress. Three of the five recommendations have been fully satisfied. The remaining two have seen substantive progress; work continues on these recommendations, which likely means that greater progress will be made outside of the 100-day timeframe.

This assessment should not be interpreted to mean that the administration's transparency efforts are flawless or uncontested. Our assessment only focuses on the five recommendations for the first 100 days from the 21st Century Right-to-Know report. Concerns and complaints have been raised by right-to-know advocates about various activities of the administration, including the usability of the White House website, transparency of legislation before the president signs it, and more. Additionally, it is difficult to accomplish much substantive change in just 100 days; much of the real test for this administration's commitment to transparency lies ahead. However, when measured against the yardstick of the five recommendations described above, it is impossible to view the administration's accomplishments as anything other than a success.