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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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PRESIDENT OBAMA'S OPEN GOVERNMENT INITIATIVE

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When he was elected in 2008, President Barack Obama promised that his administration would be more open and transparent than any previous administration. His so-called "open government initiative" involved a pledge to develop better data release technology (to facilitate the communication of information), make more information available to the public through federal Freedom of Information Act[1] (FOIA), and create an enabling policy framework for open government[2].

Of course, the Obama open government initiative was not the government's first foray into the realm of openness or transparency. FOIA, enacted in 1966, the Federal Advisory Committee Act (FACA) enacted in 1972[3], and the Government in the Sunshine Act enacted in 1976, all involved governmental efforts at openness and transparency[4]. Throughout all of these reform efforts, there has been tension between the public' interest in obtaining information regarding the functioning of government, and the government's desire to preserve the secrecy of its operations[5]. Few doubt that the government has a legitimate interest in withholding certain types of information (*e.g.*, state secrets or information vital to foreign relations)[6]. Indeed, the United States Constitution explicitly protects certain types of information[7], and the United States Supreme Court has affirmed the need for secrecy and confidentiality in certain contexts[8]. On the other hand, in a democratic system, in which the people must vote on issues and candidates, openness and transparency help voters obtain the information necessary to make informed decisions[9].

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[1]. 5 U.S.C. § 552.

[2]. *See*

[3]. U.S.C. § (19).

[4]. U.S.C. § (19).

[5]. See William E. Funk, Sidney Shapiro & Russell L Weaver, Administrative Law 623 (West, 4th ed., 201) (hereafter Funk, Shaprio & Weaver).

[6]. *Id.*

[7]. *Id.*

[8]. Id. See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (ordering President Nixon to release information, but noting that confidentiality regarding the President's conversations and correspondence is generally privileged, and going on to note that this privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.").

[9]. *See* FUNK, SHAPIRO & WEAVER, *supra* note 5, at 623.

President Obama's initiative was premised on idea that prior statutes had not gone far enough towards openness or transparency, and sought to alter the balance away from secrecy and towards disclosure.

President Obama has now been in office for more than four years, and has now started his second and final term. As a result, it is an appropriate time to examine and assess the effect of his Transparency and Open Government Initiative. The results suggest that, while President Obama had made some efforts at openness, the results have not been as sweeping as his promises suggested.

§ 1 – FOIA, FACA AND GOVERNMENT IN SUNSHINE

FOIA was revolutionary because it gave citizens (corporations and non-citizens) the right to demand that government produce and reveal documents in its possession[10]. FOIA was a "disclosure" statute meaning that the statute assumed that government would disclose rather than conceal documents. However, FOIA's disclosure mandate came with a number of exceptions that allowed administrative agencies to withhold various types of information. The categories of exempted information included the following:

– Classified information;
– Internal agency rules and practices;
– Information specifically exempted from disclosure by statute;
– Private commercial or trade secret information;
– Inter-agency or intra-agency privileged communications;
– Personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy;
– Information compiled for law enforcement purposes;
– Information related to reports for or by an agency involved in regulating financial institutions;
– Geological information concerning wells[11].

In the ensuing years, courts have generally construed these exemptions narrowly[12]. In, addition, courts have required agencies to distinguish between segregable and non-segregable information found in a protected document. In other words, if a document contains both exempt and non-exempt information, and the non-exempt information is reasonably segregable, the agency is required to separate and disclose that information[13].

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[10]. 5 U.S.C. § 552.

[11]. 5 U.S.C. §552 (b).

[12]. *See* Funk, Shapiro & Weaver, supra note 5, at 623.

[13]. *Id.*

FACA[14] (the Federal Advisory Committee Act) was designed to create greater openness and transparency regarding the government's use of so-called "advisory committees" which include private persons[15]. Congress was concerned that these private individuals might collude with each other, or otherwise exercise undue influence over government action[16]. Congress was also concerned about governmental waste because a large number of committees existed, and these committees commonly produced reports that had little impact[17]. FACA requires, among other things, that advisory committee meetings be open to the public[18].

The Government in the Sunshine Act[19] has similar disclosure and transparency functions. That act is "founded on the proposition that the government should conduct its business in public[20]. However, the law does not apply to all governmental business. On the contrary, the law only applies to collegial bodies, composed of two or more members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision of such agency who is authorized to act on behalf of the agency[21]. In addition, the Act only applies when a quorum of the agency is present[22], and does not apply when the meeting involves certain types of issues[23].

§ 2 – THE OBAMA INITIATIVE

During his first presidential campaign, President Obama articulated several "openness" and "transparency" objectives that he wanted to achieve during his presidential term. These included the following: 1) The development of better data release technology in

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14. 5 U.S.C. §§ 1-5.

15. See Funk, Shapiro & Weaver, supra note 5, at 665.

16. *Id.*

17. *Id.*, at 666.

18. *Id.*, at 668.

19. 5 U.S.C. § 552b.

20. See Funk, Shapiro & Weaver, *supra* note 5, at 679.

21. *Id.*

22. *Id.*

23. *Id.*, at 679-680 ("These are the exemptions for national defense and classified information, for internal personnel rules, for matters specifically exempted by statute, for trade secrets and privileged or confidential commercial or financial information, for information that would unwarrantedly invade a person's privacy, for investigatory records compiled for law enforcement purposes, and for information related to reports prepared by or for an agency regulating financial institutions"). The Act provides additional exemptions for: "accusing any person of a crime, or formally censoring a person, […] in the case of agencies regulating currencies, securities, or commodities, information the disclosure of which would likely lead to significant financial speculation or significantly endanger the stability of any financial institution, or in the case of any agency, information the disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and […] information relating to an agency's issuance of a subpoena, participation in a civil action, or the conduct of a formal agency adjudication".

order to help facilitate the communication of information; 2) making more information available to the public through FOIA; & 3) establishing "a system of transparency, public participation, and collaboration"[24].

On his first day in office, President Obama moved to fulfill his campaign promises by signing a document entitled Memorandum on Transparency and Open Government[25]. That memorandum stated that President Obama was committed to "creating an unprecedented level of openness in Government" in order to "ensure the public trust and establish a system of transparency, public participation, and collaboration"[26]. He promised that his government would be "transparent" in promoting accountability and providing information about what government is doing[27]. He concluded by ordering the Chief Technology Officer, in coordination with the Office of Management and Budget (OMB), to "coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive, to be issued by the Director of OMB, that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum"[28].

President Obama's memorandum was followed by the issuance of the Open Government Directive that reiterated the administration's commitment to transparency, participation and collaboration[29]. The Directive detailed a number of action steps that administrative agencies were required to take as part of the open government initiative, and ordered agencies to do the following things:

- to respect the presumption of openness by publishing information online ;
- to the extent practicable, online information should be published in an open format that can be retrieved, downloaded, indexed and searched by commonly used web search applications ;
- to the extent practicable, agencies were required to use modern technology applications in order to improve communication ;
- within forty-five days, each agency was required to identify and to publish at least three high-value data sets not previously published;

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[24]. *Id.*

[25]. Barack Obama, Memorandum on Transparency and Open Government (Jan. 21, 2009).

[26]. *Id.*

[27]. *Id.*

[28]. Id.

[29]. Peter R. Orszag, Director, OMB, Open Government Directive (Dec. 8, 2009).

– within 60 days, each agency was required to create an open government webpage that includes a mechanism for the public to give feedback on the published information, provide input on which types of information to prioritize, or provide input on the administration's Open Government Plan ;

– to respond to information posted on their Open Government Webpages ;

– to publish their annual FOIA reports online ;

– to reduce its backlog of FOIA requests by ten percent per year (for any agency with a significant backlog of cases);

– comply with guidance on implementing the Open Government initiative[30].

The document also ordered agencies to take other Open Government steps[31].

President Obama also issued a memorandum directing agencies to handle FOIA requests in a way that promotes transparency[32]. In that memorandum, he directed agencies to respond to FOIA requests with a "clear presumption" that openness prevails[33]. As a result, "Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears"[34]. The memorandum also ordered the Attorney General to issue new guidelines to the heads of departments and agencies "reaffirming the commitment to accountability and transparency"[35].

President Obama's memoranda were followed by a directive from Attorney General Eric Holder provided agencies with specific direction regarding the use of FOIA exemptions[36]. Holder's guidance specifically admonished agencies not to withhold information simply because, as a technical matter, they can establish that it fits within a FOIA exemption[37]. In other words, agencies should generally opt for disclosure, rather than secrecy, even if they may have the legal right to refuse to disclose a particular document[38].

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[30]. *Id.*

[31]. *Id.*

[32]. Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009).

[33]. *Id.*

[34]. *Id.*

[35]. *Id.*

[36]. Office of the Attorney General, Freedom of Information Act (FOIA): Memorandum to the Heads of Executive Departments and Agencies (Mar. 19, 2009). http://www.justice.gov/ag/foia-memo-march2009.pdf.

[37]. *Id.*

[38]. *Id.*

§ 3 – THE OBAMA ADMINISTRATION'S SELF-EVALUATION OF THE INITIATIVE

The Obama administration's evaluation of its own efforts has largely been positive[39]. The Executive Summary to the administration's Status Report on the initiative stated as follows: "President Obama has committed his Administration to work towards new levels of openness in government. For over two and a half years, the Administration has done much to make information about how government works more accessible to the public, and to solicit citizens' participation in government decision-making. Federal agencies have undertaken to disclose more information under the Freedom of Information Act. They have devised ambitious Open Government plans designed to increase opportunities for public engagement. They have made voluminous information newly available on government websites. They have shined more light on federal spending. They have even taken steps to provide more disclosure of sensitive government information. Finally, and not least of all, agencies have used technology in many innovative ways that make information useful to citizens in their everyday lives[40]".
Nevertheless, the Status Report recognized that "much work remains", and set forth additional steps that the government needed to take[41].

§ 4 – EXTERNAL ASSESSMENTS OF PRESIDENT OBAMA'S INITIATIVE

In contrast to the Obama Administration's very positive self-assessment of the President's initiative, outside observers have generally been more critical. For example, in an editorial in the Washington Post, two commentators flatly asserted that President Obama has failed to fulfill his promise of a "new era of 'openness in government'"[42]. The editorial noted that, if anything, the Obama Administration "has gone in the opposite direction: imposing restrictions on reporters' news gathering that exceed even the constraints put in place by President George W. Bush"[43].
The Washington Post editorial offered specific examples of the Obama administration's approach. For example, the editorial claimed that "the Obama administration now muzzles scientists and experts within federal agencies," thereby preventing the public

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39. The Obama Administration's Commitment to Open Government: A Status Report (20).

40. *Id.* (Executive Summary).

41. *Id.*, at 4.

42. Charles Ornstein & Hagit Limor, *Where's the Openness,* Mr. President, Washington Post A15 (Apr. 1, 2011).

43. *Id.*

from knowing "whether decisions are science-based or politically motivated"[44]. Second, the editorial claims that, following the BP oil spill in the Gulf of Mexico, "scientists and environmental groups accused the administration of hiding or under reporting the extent of the spill and its impact on the environment[45], and "the government placed restrictions on airspace for weeks, keeping media photographers from seeing the scope of the spill"[46]. Third, the Food and Drug Administration asked reporters not to seek insights from outside experts when announcing changes to its medical device approval this year in exchange for receiving the information early[47]. Fourth, in response to more than a third of FOIA requests made for public records in a given year, the administration failed to provide any information at all[48]. Finally, the writers emphasized that many reporter questions for information go unanswered[49].

In an assessment in Slate.com, Mr. Fred Kaplan also offered a critical assessment of President Obama's initiative[50]. He claims that the Obama administration is doing better than previous administrations, but that its efforts must still be regarded as failing: "compared with his predecessor, George W. Bush, whose standing order was literally, 'When in doubt, classify,' things are going great. Compared with Obama's own standards and expectations, not so much"[51].

Kaplan goes on to note that federal agencies made 220,734 decisions to classify documents in 2010, "a 22.6% increase over the year before"[52]. In examining how seventeen major agencies had reacted under the Initiative, he expressed concern that agencies had used every one of the nine major exemptions to shield information[53]. Moreover, even though administration directives ordered agencies to issue implementing regulations for the initiative by the end of 2010, only nineteen out of forty-one agencies had done so[54]. Moreover, the National Declassification Center had a backlog of some four million documents[55].

Some assessments of President Obama's initiative have been more positive. For example, Professor Ronald Krotoszynski provides a

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[44]. *Id.*

[45]. *Id.*

[46]. *Id.*

[47]. *Id.*

[48]. *Id.*

[49]. *Id.*

[50]. Fred Kaplan, *File Under: Failure – Obama's Open Government Initiative: Why is it Failing?*, Slate.com (Apr. 26, 2011). Http://www.slate.com/articles/news_and_politics/war_stories/2011/04.

[51]. *Id.*

[52]. *Id.*

[53]. *Id.*

[54]. *Id.*

[55]. *Id.*

more mixed assessment[56]. Although candidate Obama repeatedly promised that negotiations regarding his proposed health care legislation would be televised on C-SPAN, they were not televised[57]. However, rather than take potshots at President Obama for failing to honor his campaign promise, Professor Krotoszynski suggests that Obama was simply dealing with the realities of effective governance: "It would be easy to take pot shots at the Obama administration for this about-face, but doing so would not advance our understanding of the relationship between transparency and governance very much, if at all. As a preliminary matter, however, it seems to me that one cannot, *ex ante*, know in a given circumstance whether transparency will advance or impede the goal of effective, competent government. I suspect that in some cases transparency might enhance the probability of a positive outcome, but that in other cases it might have an opposite effect. In any given case, then, it is impossible to know whether transparency, by itself, will enhance or impede the project of good governance"[58].

Nevertheless, Professor Krotoszynski concludes that the Obama administration's policies make clear that the "Administration possesses a strong commitment, in general, to openness, transparency, collaboration, and, in theory, accountability"[59]. He goes on to note that the "scope of the project is impressive, and the Obama administration has approached questions of transparency in a consistent fashion, articulating over and over again the linkage that exists between transparency, on the one hand, and the accountability of the government, on the other"[60].

Despite Professor Krotoszynski's praise, he does suggest that there have been serious deficiencies in the Obama Administration's efforts[61]. In this regard, he notes that President Obama broke his promises regarding the openness of health care negotiations[62]. Examining the Obama Administration's handling of the BP oil spill in the Gulf of Mexico, he articulates particular concerns, and concludes that "it is very easy to proclaim an absolute commitment to transparency and accountability, and another matter entirely to practice those virtues when doing so will cast the Administration in an unfavorable light"[63].

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[56]. Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. Miami L. Rev. 449 (2011).

[57]. *Id.*, at 452.

[58]. *Id.*

[59]. *Id.*, at 466.

[60]. *Id.*

[61]. *Id.*, at 467 ("Several important examples of the Administration resiling from its promise of transparency exist and merit ome consideration").

[62]. *Id.*, at 467-468.

[63]. *Id.*, at 467.

Harlan Yu and David G. Robinson also express a more positive assessment of President Obama's initiative[64]. Their overall assessment of the Obama initiative is positive: "President Obama and his team, both during the campaign and in government, have shown a major commitment to both open government and open data – and they have also been the leading force behind the conceptual merger of the two ideas"[65]. Nevertheless, Yu and Robinson suggest that the initiative has not been a complete success. They note that agencies have "tended to release data that helps them serve their existing goals without throwing open the doors for uncomfortable increases in public scrutiny"[66]. Indeed, in many instances, agencies have published data that was already available in other online locations[67]. Moreover, Yu and Robinson suggest that the Initiative was not directed towards "transparency" as much as it was directed at moving more information online. In this respect, the authors believe that the Initiative has inspired state and local governments to place more information online[68].

Politifact, an independent fact-checking organization, gives President Obama both praise and criticism for his open government and transparency efforts[69]. Noting that President Obama promised to hold himself to a "new standard of openness," the article gives him credit for "significant progress" on that front[70]. In particular, Politifact notes that Obama can take credit for posting hundreds of databases, creating an "ethics hub" for lobbying and ethics reports, releasing White House visitor logs, and creating a database on how economic stimulus funds were spent[71]. Nevertheless, Politifact concludes that President Obama has "succumbed to the gravitational pull of Washington to conduct business behind closed doors"[72].

Politifact also suggests that the Obama initiative has failed to produce changes in several significant areas, and openly raises the question of whether he "succeeded in changing Washington, or Washington changed him"[73]. For example, even though he promised to hold open meetings regarding his proposed health care legislation, he broke that promise and Politifact described his process as involving "business as usual"[74]. The article goes on to conclude that he broke his promise regarding a variety of issues

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[64]. Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government"*, 59 UCLA L. Rev. Discourse 178 (2012).

[65]. *Id..*, at 193.

[66]. *Id.*, at 193.

[67]. *Id.*

[68]. *Id.*, at 199.

[69]. See J.B. Woogan, *Transparency Proves Elusive*, Tampa Bay Times 1A (July 17, 2012).

[70]. *Id.*

[71]. *Id.*

[72]. *Id.*

[73]. *Id.*

[74]. *Id.*

(e.g., allowing five days for public comment before signing bills, negotiating health care reform in public in sessions televised on C-SPAN, creating a public contracts and influence database, exposing special interest tax breaks to public scrutiny, and seeking the establishment of an independent agency to investigate congressional ethics violations)[75]. In addition, Politifact suggests that he significantly compromised his positions on a number of other issues (e.g., conducting regulatory agency business in public, increasing protections for whistleblowers, making White House communications public, requiring more disclosure and a waiting period for earmarks, and establishing transparency standards for military contractors)[76].

CONCLUSION

During his campaign for the US presidency, President Barack Obama campaigned aggressively on themes involving governmental transparency and openness. Following his election, he moved quickly and aggressively to issue memorandum bringing these themes to fruition. He issued a memorandum on openness and transparency, and directed administrative agencies to be more open in their use of FOIA and that statute's exemptions. The President's memos were followed by Attorney General Eric Holder's memorandum on openness.

An overall assessment of President Obama's initiative produces mixed results. As noted earlier, the initiative has produced some positive results. However, few commentators are prepared to argue that the initiative produced a sea change in terms of the government's handling of openness and transparency issues. Rather, the overall assessment produces a mixed result with an overall increase in openness and transparency, as compared to prior administrations, but some notable failures as well.

[75]. *Id.*

[76]. *Id.*