Abstract
Towards a theory of transparency, we contrast formal (and legal) processes of release of official information with informal processes of the release of public records. We also contrast reactive processes (in response to requests) with active processes that are rapidly emerging (publication of data online, and the incipient e-government).

Secrecy and publicity are known as "dilemmas of democracy", and although the US was in some ways the second among many countries to adopt transparency, it has always preserved secrecy for its national security. To assess the US operation of official records, we divide the records into civilian and national security related. We contrast the US government's normally secure treatment of national security documents with the openness applied to the records of civil, domestic agencies.

We explore the exception represented by the classified diplomatic and defense data published in 2009-10 by Wikileaks, in the historical context of the development of open US public records since 1946.

We present evaluations of the progress on the Obama administration's early claims to transparency, in national security and in civilian records. We compare these outcomes with the administration of G.W. Bush, and apply them to the development of US official information policy across all three branches of government, and to the most similar, advanced liberal democracies.

Introduction
An analogy for the Obama administration's contrast between open government in civilian matters and pursuit of official secrecy in national security matters, is provided in Madrid by El Greco's emulation of the Italian painting masters' style of Chiaroscuro, light and shade. The administration came to office with more declarations of open government than any previous one, and has by some measures restored the processing of open government – but its behavior on national security matters has been consistent with the strategy of leaving no vulnerability to complaints of a weak defense of American interests.
A second theme of this paper is that official transparency, a newer and more ambiguous term for open government, and much broader than freedom of information, can be organized in an objective way that enhances discussion across multiple disciplines and cultures.

The two may be integrated this way: the Obama administration, having accepted during its transition the policy recommendations of the open government community, announced these in January 2009 – only to be confronted in 2010 with official information issues in the national security area, beyond the traditional process of formal release of records on request. A series of intelligence and diplomatic leaks produced an official reaction that contrasted strongly with those earlier declarations of openness.

The Concepts of Open Government and Transparency


Transparency is a broader term derived in part from economics, which asserts that political markets, like business markets, function efficiently when all players in the market have open information. Since there is global interest in transparency, but little consensus on definitions, perhaps we can attempt a typology. We will adopt the term "outward flows of official information" to signal objective consideration of any process of releasing of official information.

FOI borrows from several concepts from political theory or discourse, such as that Popular government needs popular Knowledge (James Madison); Official business is the public's business (from the congressional debates); Checks & balances include freedom of the press (from the US 1st amendment; and the Swedish constitution); official records are already paid for in taxes (from the congressional debates); sunshine is the best disinfectant (from Justice Louis Brandeis); and the Right to Know versus Right to Privacy (from liberal individual rights theory, and widely mentioned by the US press, though privacy has never been a strong feature of US policy).

Transparency also borrows from concepts from economics, such as economic transparency to prevent corruption (a focus of Transparency International), to ensure a competitive market (a focus of the Eurozone and the World Bank); and to prevent insider trading (an issue that has affected not only stock markets but also the leadership of the US congress, to whom laws for Wall Street did not apply).

Political transparency, by analogy, is called for, to permit competition of parties & interest groups (a concept laid out by both Schumpeter and Dahl); to prevent the elite holding a monopoly of information; and to enable criticism of government.

From jurisprudence, the concept of independent review of officialdom comes in various forms. *Quis custodiet ipsos custodes?* (comes from a classical Roman republican issue); the rule of law, meaning that everyone is subject to the laws, including the rulers (from English common law, developed since Elizabethan times). In more modern times, the marketplace of ideas (a liberal or utilitarian idea from JS Mill, *On Liberty*); "a
government of laws and not of men” (from Lincoln, 1864); and laws and regulations should be published (a principle from the US APA, 1946). Review by independent courts (from English common law and strengthened in the US) is a well established principle of constitutional democracy, supplemented in recent times by review by ombudsmen (from Sweden) or tribunals or commissioners (Canada, UK). We might add to these the registry of patents, copyrights & intellectual property (in which the US took an early lead, under Benjamin Franklin).

From public administration come these concepts. Bureaucracies depend on stored files, rules and records (Max Weber, from *Wirtschaft und Gesellschaft*, ca. 1910); “Secrecy is the specific invention of bureaucracy, and nothing is so fanatically defended” (Max Weber, ca. 1910). Since the second world war’s expansion of bureaucracies, we have added that there is a need to protect candid advice of career officials to political masters; learned professionals now lead bureaucracy (from Fred Mosher, 1965); and secrecy & publicity are dilemmas of democracy (from Francis E. Rourke, 1961).

**Marrying these concepts to outward flows of official information**

We might see a need for a typology then, to bridge the concepts from multiple disciplines in the developed world, which might also have application to the many newly developing democracies. We seek to provide a common framework, then, for diverse cultures, diverse disciplines, the traditional FOI/ATI and RTK concepts; and modern concepts for electronic era.

Elsewhere, we have written about electronic government and the social-political media. This paper will concentrate on outward flows rather than highly interactive, new media, which we have written about elsewhere.

First, let us consider modes of releasing official data. These may be:

- **Formal versus informal** (bound by rules, regulations, documents, and procedures)
- **Active versus reactive** (or even passive); releasing by proactive publishing versus responding (or not even responsive) to requests from the public
- **Mediated versus unmediated**; releasing raw versus interpreted data, in controlled versus uncontrolled ways

Now, let us consider these in turn

- **Formal**: by published rules (processes a modern Max Weber could recognize). This is a rational process, expert, but cumbersome; it is also limited by staff resources (e.g., in declassification of voluminous national security records)
- **Formal-active**: a positive *publication* duty. [This includes not only FOIA (a); but also EFOIA; datastores and online services].
- **Formal-reactive**: *documents* (by the process of Request, response, redact, release, appeal, adjudicate (i.e., FOI)).

- **Informal-active**: bypassing rule-based process. Briefing, leaking, bootlegging — and *data dump* (a characterization of the early WikiLeaks method)

- **Informal-reactive**: responding to information requests (typically numerous in US agencies’ public affairs offices, from both unsophisticated citizens and sophisticated industry lawyers)

An addition to this paper emerged from discussions with investigative journalists associated with WikiLeaks (WKL), in December 2011. Mediated versus unmediated releases need to be separated, just as WKL adapted to mediation and editing in order to work with journalists in 2010.

Examples of mediated flows include the following. Declassification, and “redaction” (editing or expurgating of exempt material) by officials; an appeal process adjudicated internally by officials, and externally by commissioners (e.g., in Canada) or the courts (e.g., the US); Interest groups (often with professionals and experts), and academics interpreting the data; and journalists and editors selecting and interpreting the data to fit their narratives. (Webloggers are probably most analogous here to data journalists). Context to data is provided from interviews with experts and officials.

Examples of Unmediated, automated flows include the following. “Bootlegging” of documents to the public, (e.g., Daniel Ellsberg’s release of 10,000 pages of the Pentagon Papers, 1970); social media (though these are rapidly evolving and it is hard to predict their eventual usage); WikiLeaks, pre 2010, which attempted to bypass all forms of mediation; a database depository, manipulated by applications provided by the public (e.g., EPA’s Toxic Resource Inventory; and London’s Datastore); and screen scraping bots, with hot linked data (though still in evolution for integrity and reliability).

This, then, gives us a three-dimensional typology of outward flows of official data:

*Table 1 about here*

**Whether WikiLeaks heralds a game-changing process**

A lively controversy arose in 2010-2011, about whether the massive publication of official and corporate records online, by WikiLeaks, represented a game-changing form of technology. It is our contention that, while it intensified some characteristics of existing processes, it can still be accommodated by our typology. For investigative journalists (Macleod et al, 2011), WKL represented more powerful tools of investigative journalism, to be incorporated into the same ethos of checking facts and protecting sources. Christopher Hood (2011) examined both the continuing and new characteristics. WKL was different in 4 ways: it used direct action, rather than proceeding through an official medium; it had published material that would normally be excluded from FOI processes; it rejected orthodox issues of privacy, security, and
confidentiality of individuals mentioned in records [though it did try to protect sources]; and it took a hard line on collateral damage of disclosure [though this, admittedly consistent with a comment by Julian Assange to his journalist collaborator, David Leigh – is not true of the period from summer 2010 onwards].

Hood (2011) then considered the vulnerabilities of WKL. These included internal dissent and defection [e.g., Assange’s collaborator, Daniel Domscheit-Berg]; denial of service attacks on servers [and counterattacks by the Anonymous network of young hackers, some of whom in 2012 were arrested]; blocking of the financial system [through credit corporations such as Visa and Mastercard, and the Swiss post bank]; and reluctance among the hosts of internet servers (e.g., Amazon stopped serving WikiLeaks). A quirk of this environment was personal vulnerabilities [both among leaders, e.g., Assange’s being indicted in Sweden for sexual offences; and sources, e.g., Pvt. Bradley Manning]. Most dangerous to WKL, was a (possibly unintended) bias against the US in material published (rather than against other nations with far worse human rights records and far less transparent). More intentionally was the little regard for privacy, that could lead to a backlash (rather like “gay outing”, Hood argued, though some objected that this did not involve the State).

These vulnerabilities the US administration (and its allies) had organizational routines for, since they were similar to those of the notorious NGO, Al Qaeda. WKL soon found itself starved of funding and needing replacement leadership. On the other hand, the technology would be fungible to other groups—and the counterattacks emulated by more authoritarian regimes.

We still need to consider the common characteristics of these post-FOIA modes of release: in what ways are they actually new, and how do they produce different outcomes? The EFOIA, from 1996, spread the best practices of government agencies, delivering records online, with a tracking system for requests. However, this is best seen as a transitional stage. EGovernment, with various forms of agency-public interaction, radically increased the volume, velocity, and engagement of official data flows with citizens. Datastores interpreted by private applications, were foreshadowed in 1986 by OMB’s circular A130, that wrestled with the issue of how government could release more data while leaving room for the private information industry. Collaboration within public agencies (notably in intelligence) -- and with the public -- intensified. Government to public services are gradually becoming more sophisticated

WikiLeaks achieved great volume, velocity, and substantial bypass of official review. However, it had a low impact till material was edited, and it soon learned to coexist with the press. Assange’s allegedly “anarchist” or perhaps more fairly, libertarian goal failed, and WKL coexists with States. Being fungible (like Napster), it will spread to other organizations and in new forms.

Might wikis be coopted, becoming ‘insiders’ and conventional forms of governance? There are plenty of openness NGOs that coexist with the US government. For examples, in national security affirs, the National Security Archive, the Federation of American Scientists (FAS), and OpenTheGov are all respected by officials. The Arab spring (moved by a moderate, mass public) overtook Al Qaeda in news coverage very
quickly, even though the medium term outcomes (e.g., in Egypt and Libya) are still in doubt.

The Bush (43) and Obama Administrations: civilian records

First, let us consider the outward flows of civilian – i.e., non national security – records. Both the Bush (43) and Obama administrations publicly supported transparency in domestic, civilian records. Although it emanated from the US Senate, Bush did sign the OPEN government act. The Obama transition in meetings, October 2008, accepted the open government community’s policy plan, and astonished them when President Obama initiated his presidency on 21 Jan. 2009 by signing policy memos, later released some of the previous administration’s so-called ‘torture memos’, and initiated reviews of FOI processing. There followed genuine attempts to reduce FOIA processing backlogs.

At the State department, long among the slowest of FOIA processing programs, information policy was rendered more interesting by the presence of Obama’s leading campaign rival, Secretary Hillary Clinton. In early 2010, she spoke publicly for internet freedom as a right of publics, during a period of uprisings against autocratic regimes. Only 13 months later, she gave a more balanced speech, post the WikiLeaks disclosures of 270,000 US cables. The phrase of her legal advisor, the “violation of law is ongoing”, in Harold Koh’s letter about WikiLeaks, applied considerable indirect pressure on ISPs and credit corporations, to discontinue collaboration with WKL.

National Security Declassification Processing

The national security classification system, set up by General Pershing during the Great War, 1914-19, was enshrined in presidential executive orders rather than statute. However, the first (and largest) exemption to the 1966 FOIA recognized it in statute. Two congressional commissions in 1957 (led by Loyd Wright) and 1997 (by Daniel Moynihan) heard testimony that the classification system had so multiplied as to be unwieldy and costly. Nonetheless, whereas the US courts are very active in hearing FOIA disputes generally, they have accorded the national security agencies almost total deference. Although they have criticized staff work on occasion, there is still no example of classified material being ordered released by a court. In 1995, President Clinton issued Executive Order 12958 which urged progress in declassification of documents over 25 years old. The declassification rate doubled during 1996-98, but then fell rapidly. President Bush (43)’s EO re-emphasized classification and extended the secret claw-back (reclassification) process which had been called for by the Reagan administration. By 2010 (ISOO), 400 million pages of classified holdings were over 25 years old, or 8 years’ worth at the then current rate of declassification.

President Obama’s Executive Order 13526 established the National Declassification Center, institutionalizing the process; the center was functional as of 2011, though it is too soon for any useful assessment. Overall, during an era of broad political support for the global war on terrorism (GWOT) and the USA PATRIOT ACT 2002 (modified subsequently by Congress), both administrations experienced an increased rate of
classification; Bush (and possibly Obama) experienced a decreased rate of declassification; and both supported increased secrecy in the counter-terrorism area.

If we take Obama’s optional actions in national security secrecy, they are considerable. Attorney-General Holder, himself under frequent pressures from the House republicans, prosecuted leakers aggressively, 2010-; he also pressured WikiLeaks after its US releases 2010. The leaker, Pvt. Bradley Manning, having serious psychological issues that had kept him out of the military in his first enlistment attempt, was kept in extended solitary confinement; and the administration encouraged a unique financial war, in the view of WikiLeaks-related journalists, blocking donations to WKL. Most strikingly, under pressure from House republicans, the president asserted executive privilege in 2012 for A-G Holder in the investigation of operation Fast & Furious (a gun release program run by a component of the US department of Justice, that had supplied rather than tracked Mexican drug-gang violence).

**Patterns of presidential-congressional relations in official information control**

To put this in comparative and historical context, how does this fit patterns of presidential-congressional relations in closely related, advanced liberal democracies? President Lyndon Johnson, who had opposed the 1966 FOIA, but was being criticized for his ‘credibility gap’ over the Vietnam war, signed it under pressure from both bicameral democrats and House republicans led by Donald Rumsfeld. PM Pierre Trudeau (Canada) passed the ATI Act in 1979 when he was outgoing, thereby affecting his successors; the narrow failure of the UK’s private member’s FOI bill in 1979, came despite a deal, as Labour fell by one vote in the Commons. President Clinton lost majority in 1995, before signing the EFOIA in 1996. President Bush (43) lost his House majority in 2005, before signing the OPEN government act in 2007. President Obama did lose his majority in 2010 … but, by contrast, transparency memos were his first work. PM Blair (UK) did, it is true, ensure passage of the FOIA of 2000, when he was enjoying a large majority in the Commons – but before passage, made it effective only in 2006, when his majority waned – and his memoirs complain about this mistake. There was bipartisan support for FOI in all 3 countries, even during Mrs. Thatcher’s administration, when an all-party committee kept the concept on life support.

The paper contrasts *formal* processes (FOIA, ATI, declassification and EFOIA) with *informal* processes (briefing, leaking, bootlegging—in Leon Sigal’s classic 1970 terms—and data dumping) for the release of public records. It further contrasts *passive* processes (request, review, redaction and release) with *active* processes that are rapidly emerging (positive official publication in print or online, interactive applications of data, and online delivery of services).

It distinguishes *top-down* public information service and information control from *bottom-up* processes such as Wikileaks and *sousveillance*.

There is another process at work in advanced democratic societies: the *interactive* model of e-governance. A more sophisticated set of services are being developed in interactive fashion online, which will enhance collaboration both among government officials, and between agencies and citizens as consumers.
First, let us take recent developments in the traditional, *formal-reactive* (request-redact-release-appeal) and *formal-active* models (positive online publication, and public data stores). In the (by now) traditional model of FOI: public records officers publish new regulations and data (this has been greatly expanded); they also respond to requests for records, redact material that is permitted to be withheld, then release the remaining portions. There is an administrative appeal process, followed by recourse either to a commissioner (in Canada) or the courts (the US). This is formal, but it is largely reactive or passive. In the US it has resulted in voluminous releases—but also thousands of lawsuits, of which two dozen have reached the Supreme Court. Overall, the monetary costs have been minor, though there is sometimes tension between FOI and the central missions of US agencies. Despite the progress of the newer active and informal model, it is still very much alive. In the US case, we need to survey both the administrative and the judicial branches.

The stages of conceptual development occurred in policy cycles of roughly a decade. The formal-reactive model (FOI) became well established in the 1980s, when it was enhanced by electronic means (EFOI) in the 1990s. In the 2000s, interactivity was applied with the concept of e-governance (EGOV). Social-political media arrived suddenly, becoming widely adopted by the end of the decade. Alongside this change, a cascade of public data combined with collaborative tools to form an informal-reactive model.

**Historical Roots**

Let us take a more historical approach, to find the roots of these current developments. Among a few commentators in the 1980s, and in the 2000s among many, questions were raised about whether the computers upon which bureaucracies had flourished, would in turn either improve or actually transform government services to citizens. A number of commentators began to notice that online service was more convenient to consumers, and this would apply also to the public sector.

Open government laws, most of them passed as post-Watergate reforms, had been based on the principles of disclosure of public records (the Freedom of Information Act, 1966 and 1974; the Presidential Records Act, 1978); public notice and comment before rule making (the Administrative Procedure Act, 1946) and open meetings (the Government in the Sunshine Act, 1976; the Federal Advisory Committee Act, 1972). The FOIA itself required (in section (a)) publication of regulations and release in response to request from any person of any records not subject to nine exemptions in section (b). (See Lewis, 1995, 2000a) The main exemptions are for properly classified national security material, specifically conflicting statutes, confidential commercial material, some internal memos, personal privacy, and (under listed circumstances) law enforcement files.

The FOIA, which has spawned legislation in 50 US states and 80 foreign states, has proved to be the most effective (or burdensome) of these reforms, covering over 100 US agencies, and stimulating 400 lawsuits per year. While most agencies have minor FOIA programs, about fifteen have voluminous requests and backlogs of processing. In the 2000s, as requests declined, backlogs did not.
The request-and-release function of the Freedom of Information Act could be greatly improved online – but beyond simple serving of pre-packaged documents, e-government could deliver customized services to far more consumers based on dynamic information selected and sorted on demand. (See Lewis, 2000b) More powerful and sophisticated services would be demanded involving commercially valuable data for businesses, though this would raise the issue of charging fees for service.

Among the more attractive early uses of official websites are public relations, tourist booking or promotional services, investment promotional services, and citizen suggestion, comment or complaint services. Deeper services take longer to develop, given not only tangible factors such as budget constraints, but also intangible factors such as a traditional culture in a bureaucracy. Interest group conflict is variable with the political system; the US enjoys luxuriant public interest group activity, pressing for open release of official information; however, in other countries such as the UK before Mrs. Thatcher, or Austria’s corporatist polity, interest groups may function better behind the scenes, and consequently have less interest in public delivery of services.

US government is famously fragmented in its policymaking. Occasionally, comprehensive bureaucratic reorganizations have attempted to overcome this. (Examples are found in Lewis, 2010b). These have often been criticized for slow transformations which can retard policy development. A second form of reorganization, less comprehensive but also less cumbersome, has been the anointing of a “czar” (an overstated term for coordinator) for one subject over multiple agencies. For EFOIA purposes, the Justice Department’s Office of Information and Privacy (later … Policy) played a largely nominal role in giving advice to agencies from about 1976; the Office of Management and Budget (OMB) was allocated in 1986 a limited role in coordinating fees for service.

The US Electronic Freedom of Information Act Amendments of 1996

Public Law 104-231, 110 Stat. 3048, required that all materials required to be published by the FOIA’s section (a)(2) that were created after 1 November 1996 be made available to the public within one year, via computer telecommunications as well as hardcopy. Lacking an online presence, an agency was required to make them available in some electronic form. The amendments also spelled out reporting requirements for all agencies, to be compiled by the Department of Justice (DOJ). The EFOIA also specified processing of requests by determining outcomes within 20 days, and introducing multi-track processing so that many small requests would not be backed up for years behind a few, large requests. But these are less significant for the purposes of this chapter. (For a fuller account of the preparation, development and passage of the 1996 US EFOIA, see Lewis, 2010b, 53-54).

Given that courts had already begun to insist that agencies make records available in more convenient formats – even the CIA had agreed with the National Security Archive (Walters, 1988) that jumbled printouts of databases were insufficient -- Some of the longtime open government experts were not necessarily sure that EFOIA was necessary (Goldman, 1988; Gellman, 1996a, 1996b and 1997).
The General Accounting Office (GAO, later renamed Government Accountability Office) gave a five-year report to both House and Senate FOI subcommittees in 2001. The investigators interviewed headquarters officials at six agencies with large FOIA programs, and 2 with large backlogs; they also met with leading public interest group counsel. The 25 agencies in 1999 processed nearly 2 million requests, releasing records fully in 82 percent of cases. About 1.6 million were processed with a median time of 20 days, while ten percent of requests were processed in median times over 20 days. (They did not attempt to verify data, nor did they search agency components.)

All had a FOIA web page, a search feature, information on public services; and links to component units. However, only half had the ability to process FOIA requests online. In FOIA processing, 8 of the 25 agencies (or at least a component) had adopted FOIA application software for scanning and imaging, workflow tracking and documents management. Along these lines, the US Congress sought in 2002 to coordinate e-government services.

We have described EFOIA as a transitional concept, because it was focused on using technology to render more efficient the transitional processing of request-redact-and-release, the freedom of information model. But electronic governance (or EGOV) promised to provide greater benefits, provided new, more formalized structures could be developed. Its requirement for skill and sophistication, however, would require years of development.

**The Obama Administration’s Formal-reactive Initiatives**

The Obama administration, although it inherited a national security era (for a contrast between the Bush and Obama administrations, see Lewis, 2010a), committed several “firsts” on the transparency front: it sought proposals from the right-to-know community during the transition phase; it issued several early White House statements and memoranda to propel transparency initiatives—including a review of the (untouchable and rapidly multiplying) national security classification system—and in 2011 the President himself invited transparency activists to a brief encounter in the Oval Office. (One soon overcame being stunned, to complain that the meeting itself had not been publicized.)

A broad coalition of transparency activists, many groups and individuals, coordinated a set of recommendations for the Obama transition staff in November 2008. To highlight the need to reverse losses during the national security era of the G.W. Bush administrations, they opened the report with these claims: “The growth in government secrecy has had profound and negative impacts on the United States. It makes the country less safe. It hinders self government. It contributes to near-record lows in trust of the executive branch. The growth in secrecy has reached untenable levels. We are rapidly shifting from a society based on the public’s right to know to one premised on the need to know, where the government determines the need. This represents a fundamental shift in the precepts of our democratic institutions and policies, a shift which President Obama must act immediately to fix.” (Right to Know Community, 2008, 1)
The shared principles they urged (Right to Know Community, 2008, 3) upon the Obama transition team were:

• An informed public is essential to democracy and can help create a more effective, accountable government;
• Government should commit to openness as a principle, complying not merely with the letter of openness laws but with the spirit of transparency;
• Information available to the public should be defined as broadly as possible, including multiple formats such as electronic communications, audio, photos, and video;
• Exemptions to disclosure should be as narrow and specific as possible – and the burden of proof should lie with the government when exemptions are used;
• Access to records or meetings should not require people to provide name, address, or purpose for seeking access except in specific and narrow circumstances;
• Government should make greater use of redaction to release partial documents when it cannot provide full disclosure, as opposed to withholding the entire record;
• Information should be made available in a timely manner and should be accurate, complete, and authentic;
• Interactive technologies can improve access and use of information while decreasing long-term costs; and
• To the extent government outsources functions, contractors should comply with openness requirements

These principles generally seem an outgrowth of traditional freedom of information culture, though the last three are more consistent with the newer, internet-based e-government culture. There followed numerous action points for the new administration.

In line with his campaign rhetoric, that his administration would be the most transparent in American history, in his inaugural address, President Obama stated, “Transparency and the rule of law will be the touchstones of this presidency” (Obama 2009a). On his first full day in office, President Obama’s memorandum ordered all directors of departments and agencies, “All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government” (Obama 2009b), superseding Attorney General John Ashcroft’s 2001 guidance, “[W]hen you carefully consider FOIA requests and decide to withhold records ... you can be assured that the Justice Department will defend your decisions” (Nakashima 2002). Simultaneously, he issued Executive Order 13489, reversing a Bush (43) order that had countermanded the clear intent of the Presidential Records Act of 1978 and had permitted subsequent presidents to prevent the release of documents from previous administrations (including his father’s).

Assessments of the Formal-Reactive Model, 2010-2011

In March 2011, President Obama received (though in a brief, private encounter) an open government award from the Project on Government Oversight, the National Security Archive, OMB Watch, OpenTheGovernment.org and the Reporters Committee for Freedom of the Press. On the other hand, the heads of the Society of Professional
Journalists and the Association of Health Care Journalists asserted (Ellington, 2011) that they had found little openness since Obama took office” (Ornstein and Limor 2011).

Sunshine week, March 2011, produced two cautiously positive assessments by transparency advocates of the Obama administration’s first two years. The National Security Archive’s methodology was to seek factual changes made to agencies’ work resulting from the March 2010 memo from Chief of Staff Rahm Emanuel and Counsel Bob Bauer, ordering agencies to update FOIA guidance material consistent with the Presidential memoranda of 2009, and report any inadequacies in resources to respond to FOIA requests “promptly and cooperatively.” Each part of this was assessed. Whereas in the first year, only 14 of 90 agencies had revised training materials, after two years 50 provided materials or links, and 24 had revised their guides. Ironically, some agencies simply deferred to the Justice department, the lead training agency on FOIA, which did not respond within 117 days. 13 agencies fulfilled both parts of the memo, and 36 had complied with one part of the memo.

Surveying the 28 federal agencies responsible for 90 percent of FOIA requests, the National Security Archive report found a gradual trend towards discretionary releases, though with mixed results, and 12 agencies still had requests more than six years old.

OMBwatch found among overall agency reports, the number of outstanding requests at the end of the fiscal year had dropped by half since 2008. Requests fully granted had increased (after years of decline), and a smaller percentage of requests resulted in denials based on the section (b) exemptions—though the absolute number was higher. The decline in most (b) exemptions was offset by 39% growth in the use of the (b)(3) exemption for conflicting statutes.

Both interest groups’ reports suggested that the Obama administration had some effect in restoring FOIA processing that had declined in the eight years of the G.W. Bush administration. The emphasis on reducing backlogs in particular was successful. However, it would take years of administration to return to the figures of the Clinton administration.

The formal-active system of national security declassification can be tracked at macro level by the annual reports of the Information Security Oversight Office (ISOO) and the new OGIS, in the National Archives (NARA). After President Clinton issued Executive Order 12958, the rate of declassification doubled in 1996, though only for two years (Aftergood 2010b). By June 2010, a backlog of about 400 million pages of documents requiring review had built up (Aftergood 2010b), nearly eight years’ worth at the rate of 52 million pages reviewed in 2009 (Information Security Oversight Office 2010a) and a major factor in the continuing failure of the State Department to fulfill its legal obligation to publish volumes of Foreign Relations of the United States within 30 years of the documents’ generation (Aftergood 2009c).

There has, since the 1970s, been a pattern of democratic presidents issuing Executive Orders (EOs) to encourage avoiding overclassification – while republican presidents have encouraged classification. Obama’s Executive Order 13526, which superseded President George W. Bush’s executive order on classification, creates an assumption in favor of openness, saying specifically, “If there is significant doubt about the need to
classify information, it shall not be classified." The order does not eliminate reclassification, but it does narrowly circumscribe the conditions under which reclassification may take place. (In 2011, evidence surfaced that the claw-back technique had been greatly expanded under President Bush).

President Obama also signed the Reducing Over-Classification Act into law in October 2010, which required (Aftergood, 2010a) that classifying officers receive formal training in the proper use of classification; it made agency inspectors general responsibility to oversee the classification system; it encouraged the release of unclassified versions of certain intelligence; and created a new position at the Department of Homeland Security to assist state and local officials in accessing information. The statute however, lacked a definition of the problem.

President Obama’s Executive Order 13526 (Ellington, 2011) established the National Declassification Center, which became operational in 2011, intended to reduce the backlog of documents 25 years old and requiring systematic review, by 2013.

Ellington’s (2011, 5) compilation of ISOO reports to 2010 found a long-term trend in the reduction of original (as opposed to the more common, derivative) classification authorities (officials) from a peak of 7,149 in 1980, then level throughout George W. Bush’s presidency. For 2009, the only data available for the Obama presidency, the number of OCAs dropped to an all-time low of 2,557, a one-year decrease of 37.7 percent that the ISOO report (2010) attributes to the State Department’s anticipation of President Obama’s directive on classification. The actual classification decisions, from a low in 1996, increased steadily before the 9/11 attacks, and only steadily thereafter. The figures for total classifications were subject to a major change in definition which produced a large bump in 2008-09, but there was clearly a substantial increase in total classification actions during the Bush administration. The lesson is that attempts to limit the number of officials able to classify may not control the much larger number of derivative classifications conducted under set rules.

Costs of classification are almost impossible to measure publically, since the majority are not released by larger intelligence agencies, and many are borne by security contractors. However, the limited figures available indicate a large increase in the Bush (43) administration.

In 2006, a 1999 reclassification program was found (Shane 2006) to have clawed back 55,000 pages of previously declassified documents, including eight documents that had been published in Foreign Relations of the United States, based on a classified memo. The program increased under the Bush (43) administration.

The Formal-reactive Model Treated in US Supreme Court Opinions, 2011

In 2011, the US Supreme Court made delivered two substantial opinions on freedom of information activities. In both, the court displayed unusual wit and wordsmithery.

The first, FCC v. AT&T (2011), unanimously limited the scope of the FOIA’s exemption (b)(6) to its plain language on personal privacy, excluding corporations from privacy and distinguishing between legal “persons” and the adjective “personal.” In a coda described
as the “cutest turn of phrase,” Justice Roberts opinion noted, “We trust AT&T will not take it personally.”

The second, *Milner v. Navy* (2011), overturned the 30-year precedent of *Crooker v. BATF* (1981) and returned the standard of withholding under exemption (b)(2) to the early, narrow standard set in *Air Force v. Rose* (1976), for personnel files and internal housekeeping matters only. Especially following the 9/11 attacks in 2001, the government had tended to employ exemption (2) for materials where “disclosure may risk circumvention of agency regulation,” (Hammitt, 2011, 2) a doctrine known since *Crooker* as “High 2.” The Naval maps at issue portrayed visually the magnitude of detonations, hardly a personnel matter. Justice Kagan noted that the 1986 amendments to the law enforcement (b)(7) exemption to the FOIA were predicated upon disagreement with *Crooker*, and she indicated a desire to return to the plain language of the statute, and found, “High 2 is not 2 at all.”

The effect of these two opinions was to reduce some of the gains made over three decades by corporate and national security interests.

An alternative model of exposing public records is both informal and active. Although it is hardly new, it can be voluminous, rapid and indiscriminate. All three characteristics apply to WikiLeaks.

**The Informal-active Model: a spate of alleged national security leaks**

Donohue (2010) found 100 cases from the Bush (43) years of invoking the state secrets doctrine, for the federal government itself or on behalf of contractors. Attorney General Holder instituted a review of the state secrets privilege at the start of the Obama administration and subsequently revised Justice Department policy. However, the administration continued to use the privilege in the courts, where the US prosecuted an increased number of national security leakers. Obama’s Justice Department actively sought convictions (Froomkin, 2009) in five leak cases by 2011, including two carried over from the Bush administration (Gerstein 2011). One conviction resulted so far (Gerstein 2009).

In 2012, the re-election year, House republicans led by Rep. Darrell Issa’s investigations committee brought to a head their complaints that the administration, while aggressively prosecuting leakers who informed journalists, was a ship of state that leaked from the bridge. A number of assassinations of Al Qaeda leaders by unmanned aerial vehicles (drones) or by military teams had been publicized by the administration to strengthen its national security credentials. The republicans particularly took exception to the administration’s self publicity over the assassination of Osama bin Laden in 2011, at the expense of exposing the sources and methods of the Navy’s Seal Team 6, and of the intelligence services who had tracked OBL’s courier by surveillance. A Pakistani doctor, who had attempted to aid the US quest by collecting DNA samples from the village, was imprisoned.

**The Informal-active Model: the Case of WikiLeaks**

The loose but colorful group of anarchists, hackers and Internet activists known as WikiLeaks, exploited several technologies to publish large quantities of government and
business data from 2006. Encryption software and multiple, redundant servers (with numerous mirror sites collaborating) could provide protection both for bootleggers of official and corporate documents—and for their own publication service. Paradoxically, this highly public service was supplied surreptitiously by informants (or in the press term, “whistle-blowers”) who initially, WikiLeaks sought to protect.

Since 2006, WikiLeaks has exposed (but this is only the briefest summary): 6,500 Congressional Research Service Reports; Government corruption and abuses in Kenya; scandalous Icelandic bank records; operations of the Church of Scientology; a Guantanamo Bay prison procedures manual that the ACLU had been unable to obtain through the FOIA; a parliamentary question about Trafigura’s toxic dumping off Africa, which David Leigh revealed *The Guardian* newspaper was legally barred from reporting in the UK; and most famously, videos placed on CollateralMurder.com (since July 2007) of US Apache helicopter gunships’ killing of a dozen civilians in Iraq, including two employees of Reuters. (Sifry, 2011, 24-26)

A number of visionaries see this as symbolic of a transformation to bit just open government, but an open society. “WikiLeaks is just one piece of a much larger continuum of changes in how the people and the powerful relate to each other in this new time—changes that are fundamentally healthy for the growth and strength of an open society. Secrecy and the hoarding of information are ending; openness and the sharing of information are coming.” (Sifry, 2011, 19)

WikiLeaks on the other hand, like other international non-governmental organizations (NGOs) faced some weaknesses: the need for a physical footprint in at least one nation state; extensive fundraising which depended on transnational funding flows; the excessive volume of technical data to be analyzed and interpreted; and the paradox of needing leadership among anarchy.

Its public face, Julian Assange, was a nomadic Australian libertarian whose behavior became increasingly obnoxious to his collaborators and supporters (Leigh, 2010; Domscheit-Berg, 2011), even prior to his arrest and extradition on rape charges. “Most witnessed acts of injustice,” he declared, “are associated with bad governance, since when governance is good, unanswered injustice is rare…. Modern communications states through their scale, homogeneity and excesses provide their populace with an unprecedented deluge of witnessed, but seemingly unanswerable injustices.” (Assange, 2006, cited in Sifry, 2011, 21)

Assange varied in his pronouncements on the journalistic ethic of protecting sources. In 2006 he cited Daniel Ellsberg’s slogan about the path-breaking release of the Pentagon Papers, “courage is contagious” (Sifry, 2011, 25). To the comedian Stephen Colbert, he announced, “The promise we make to our sources, is that not only will we defend through every means that we have available, but we will try to get the maximum possible impact for the material they give us.” (Colbert Report, 2010, video). However, to the journalists of *The Guardian* (Leigh, 2010), he wondered why it mattered if some Afghan informants were exposed to assassination.

So, the WikiLeaks disclosure model, rather than traditional reporting and editing before publication (the press method) or request, redaction and release (the FOIA method)—
initially entailed something much more radical, more like the 1970 Pentagon Papers model pioneered by Daniel Ellsberg of RAND corporation: copying official reports and data wholesale for publication. Ellsberg, a hero to Julian Assange, was however, taken aback by the differences and (Cohen, 2010) had declined to assist WikiLeaks for fear that they would not be able to protect leakers from their governments. After a while (Macleod et al, 2011), he adapted to the WKI environment, and become supportive.

Not only would the WikiLeaks process be much more rapid (Ellsberg needed a year to copy and secure publication of the papers), and the papers more voluminous (the Pentagon Papers comprised only 10,000 pages of classified national security documents, though it seemed a large trove at the time), but they would consist most of raw cables from ambassadors, and were classified only as Secret or Confidential. Those processing them, although highly skilled with data systems, would lack understanding of the contents. Unlike the Pentagon Papers case, where Ellsberg revealed government data at odds with the Johnson and Nixon administrations’ public statements about the Vietnam War, the narrative of dishonest government was not there to stimulate the media. As reporters soon realized, while comments in the cables embarrassed US diplomats, they revealed, this time, government acting in private consistently with its public statements. Ambassadors had been candid about the shortcomings of US allies in developing states, and revealed corruption.

Whereas Ellsberg found difficulty in publishing—eventually Sen. Mike Gravel (D-AK) read the Papers into the Congressional Record, and the New York Times then published them in paperback format—the WikiLeaks network of hackers created a relatively secure, distributed, online system that could both anonymize releases and resist attempts to block publication. Whereas Ellsberg was supported widely by those opposed to the extension of the Vietnam War, and criticized by those who supported it, WikiLeaks evoked more mixed responses. Reporters (Leigh, 2011), based on their occupational culture, were cautious about the unedited publication and callous attitude to exposing sources, and as they became more involved—since WikiLeaks had been frustrated by a lack of publicity—the materials became more edited and sources were (though hastily and imperfectly) protected.

Whereas Ellsberg (ca. 1978) asserted that he was surprised to find there was no statute that he had broken in publishing classified documents, Pfc Bradley Manning, by downloading diplomatic cables in Iraq from November 2009 to April 2010, broke 18 USC 1030(a)(I) —which criminalizes unauthorized computer downloads. As transpired in the Watergate scandal of 1974, Ellsberg’s psychiatrist’s office was broken into by the Watergate plumbers’ team, and Ellsberg testified he was roughed up on the steps of the Capitol; Manning likewise suffered previously from psychiatric disorder (reportedly he flew into rages during any discussion of politics, and had been unable to enter the army until it relaxed its standards in wartime) though he endured more rough treatment in captivity, his lawyers claiming he had not only been kept in solitary confinement for weeks but had also been left naked at night. Clearly officials needed to discourage such radical leaks of national security material—and the open government community that had embraced the concept of transparency, responded with mixed feelings to the notion of data dump.
By June 2010, during the period of the US arrest of Private Bradley Manning, Assange declined to attend the PdF meeting. By Skype video he responded cagily to questions about exposures of whistle-blowers in the US, then asserted (Sifry, 2011, 33), “Remember, almost no one gets caught. We’re talking about five prosecutions in a country of three hundred million. Almost everyone who leaks material is successful…. It’s much safer than walking across the street.”

Private Bradley Manning’s trigger (Sifry, 2011, 35-37) to becoming a leaker was witnessing US assistance to the Iraqi police in detaining legitimate anti-corruption critics, then discovering a gunship video in a JAG officer’s directory and that the \textit{New Times} had reported a military spokesman’s ‘spin’ on the event as combat against a hostile force.

In July 2010, WikiLeaks published (with leading newspapers) 75,000 records of the Afghan war; in October 2010, 400,000 records of the Iraqi war; and in November (again with international newspapers) several thousand of the 250,000 confidential State Department diplomatic cables. (Sifry, 2011, 37). The documents embarrassed US diplomatic relations with allies in Africa, Europe, the Middle East and Asia.

The critical responses to Manning’s bootlegged documents labeled him “a high-tech terrorist” (Vice President Biden and Senate Minority Leader McConnell). Secretary of State Clinton described them as “sabotaging the peaceful relations between nations.” (Sifry, 2011, 39).

Commercial responses under pressure from the US government varied from ending cooperation with WikiLeaks from financial stakeholders (Amazon, PayPal, Visa, Mastercard and Bank of America), though not from communications stakeholders (Twitter and FaceBook). Others became instant communications stakeholders by hosting many mirror sites. A loose network of hackers called “Anonymous” organized widespread denial of service attacks against the financial stakeholders. Cyber-libertarian John Perry Barlow tweeted (Sifry, 2011, 40) “The first serious infowar is now engaged. The field of battle is WikiLeaks. You are the troops.”

Conclusions

Developments in US transparency in the twenty first century can usefully be categorized by the formal-reactive model and the informal-active model of public records. Additionally, mediation of information outflows, and national security versus ‘civilian’ materials, are both valuable dimensions for analysis. A third model covered in this author’s previous works, the social-political media, is beyond the scope of this particular paper.

The Obama administration’s official information policy can be summarized thus: several initiatives to reduce backlogs in formal-reactive processing; some speeding up of proactive publication and online systems; and an attempt to institutionalize improvement in declassification.

The administration’s reaction to the informal-active model of leaking has been at least as noticeable: active prosecution of leakers of national security material; more frequent use of the state secrets privilege in the courts; and the assertion of executive privilege
to protect the Attorney General from testifying before Congress (and to protect some of the records of the gun-running operation).

The formal-reactive model of transparency still is evolving in the US: the (generally conservative) Supreme Court in 2011 surprised many by asserting a traditional, plain language approach to enforcing a (generally liberal, if bipartisan) disclosure statute.

The Congress gradually adopted FOIA (1966, 1974, 1986), EFOIA (1996), EGOV (2002) and OPEN (2007) statutes, in decade-long policy cycles (see Lewis, 1995, 2000, and 2010b). By 1996, US executive branch agencies and circuit courts were in some respects ahead of the Congress. Some of them were already releasing documents in a few convenient formats, and some were releasing databases rather than fixed documents. Despite radically increased partisanship since 1995, the Congress continues its bipartisan tradition on FOI issues, as it has since the 1950s.

The formal-reactive model may be cumbersome (especially where businesses are litigious, as in the US) but it has the virtue of rational review by experts, unlike data dumping. Most agencies do not face voluminous requests from businesses, and requests are dealt with in a matter of weeks, not years – but there are a few agencies with numerous requests and substantial backlogs. Outside of the national security classified system (which in the US has always been the first exemption in the FOIA), transparency has increased on an incremental basis over four decades.

**The informal-active model returned in large scale, though the State still has powerful countermeasures:**

The Informal-active model clearly includes Wikileaks; and the countering of surveillance (including the ubiquitous security cameras above the streets) by *sousveillance* (citizens monitoring authorities, for example in demonstrations, by cellphone and YouTube videos). Social media demonstrated surprising utility, especially in countries where authoritarian countries had been opaque or even repressive.

Just as national security eras (the Eisenhower, Nixon, Johnson, and Reagan administrations) have consistently produced reactions among the FOI movement, the growth in the national security establishment after 2001 (the USA Patriot Act, the tripling of the intelligence budget, warrantless surveillance, two wars, and the expansion of the national security classification system) the G.W. Bush administration could be expected to produce a reaction in favor of transparency. There has been a pattern of Republican and democratic administrations alternating the tenor, if not necessarily much substance, of information policy. The Obama administration’s early 2009 announcements and direction of policy exceeded the expectations of the FOI community. However, the strength of protection of national security also surprised the community.

As for Wikileaks, its scale, aggression, and ingenuity, together with Assange’s radical libertarian rationale, came as surprises. While the US materials revealed by Wikileaks showed that private ambassadorial communications were similar to public pronouncements – a very positive outcome in itself – they did produce a reaction in the Obama administration to limit the sharing of national security databases and to severely
discourage further leaks. Journalists (Macleod et al., 2011) associated with WKL accepted that the State department had been obliged to rotate ambassadors from countries they had criticized in leaked cables, but pointed out that the administration’s claims of danger to foreign sources had never materialized in open records.

During the conference, there have been more indicators of ongoing concern of the Obama administration to protect national security records: In July 2012, the Director of National Intelligence announced (FAS.org) anti-leak procedures for intelligence community employees. Also, the retired former ISOO director, Bill Leonard, who testified in the Drake trial that documents leaked to a reporter had been wrongly classified, was denied access to them and told to try the FOIA.

References

Cases


Other sources


Ellsberg, Daniel. ca. 1978. Speech to the Milton S. Eisenhower Symposium, Johns Hopkins University, Baltimore, MD.


Gellman, Robert. 1996b. Testimony before the House Committee on Government Reform and Oversight, Subcommittee on Government Management, Information and Technology. Hearings on S. 1090, the Electronic Freedom of Information Improvement Act, as reported by the Senate Committee on the Judiciary, June 14, 1996. Washington DC: USGPO.


Hood, Christopher. 2011. Keynote speech to the first global conference on transparency, May 2011, at Rutgers University Newark, USA.


http://ombwatch.org/21strtkrecassessment; and


Ornstein, Charles and Hagit Limor. 2011. “Where’s the Transparency that Obama Promised?” The


Right to Know Community. 2008. Moving Toward A 21st Century Right-To-Know Agenda:
Recommendations to President-elect Obama and Congress. Washington DC: OMBwatch. Posted


Sprehe, Timothy. 1987. Interview with the author at the Office of Management and Budget, Washington
DC.

Democracy Forum.

from those published from Sunlight Foundation, Access-Info Europe, OpenGovData.org, and others.

Trippi, Joe. 2001. Presentation to the conference of the American Association of Political Consultants,

Information. Hearings on Electronic Collection and Dissemination of Information by Federal Agencies.
99th Congress, 1st Session. Washington, DC: USGPO.


Information. Electronic Collection and Dissemination of Information by Federal Agencies: A Policy


USA.gov. The US federal government consumer portal, offering 100 services in consumer-friendly
Table 1
Three-dimensional Typology of Outward Flows of Official Data
Three dimensional schema of outflows of official information, by Jeremy Lewis

<table>
<thead>
<tr>
<th></th>
<th>Passive (unresponsive)</th>
<th>Reactive (responding)</th>
<th>Active (publishing)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mediated</strong></td>
<td>Formal-Passive-Mediated: oversight body may inhibit request &amp; release; press or watchdog groups are weak</td>
<td>Formal-Reactive-Mediated: request, redaction &amp; release with review &amp; appeals systems; commissioners; courts. (But CIA database dump was scrambled for NS Archive)</td>
<td>Formal-Active-Mediated: review &amp; appeals systems; commissioners; courts</td>
</tr>
<tr>
<td><strong>Unmediated</strong></td>
<td>Formal-Passive-Unmediated: lacks oversight body; press or watchdog groups are weak</td>
<td>Formal-Reactive-Unmediated: entire requested documents or databases released without review, feasible in eGov, some via web apps where data are not protectible category. (e.g. London bicycle datastore)</td>
<td>Formal-Active-Unmediated: entire, unclassified documents and databases dumped to public servers</td>
</tr>
<tr>
<td><strong>Informal</strong></td>
<td>Informal-Passive: common even in developed democracies among law enforcement and security officials</td>
<td>Informal-Reactive: briefing, leaking &amp; bootlegging of documents in private meetings between reporters &amp; officials (Leon Sigal, 1970)</td>
<td>Informal-Active: bootlegging of documents; but traceable via forensics (Pentagon papers 1970; MI5 case in UK, 1980s; Pollard spy ring, US &amp; Israel)</td>
</tr>
<tr>
<td><strong>Mediated</strong></td>
<td>Informal-Passive-Mediated: monitoring of officials might inhibit discussion with reporters (e.g. public affairs officers escorting military analysts to media interviews; White House contacts in GW Bush administration)</td>
<td>Informal-Reactive-Mediated: public affairs offices routinely respond to requests for information that do not require formal documents</td>
<td>Informal-Active-Mediated: official selects data for release, withholds some sensitive data</td>
</tr>
</tbody>
</table>
**Unmediated**

**Informal-Passive-Unmediated:** authority of officials may be high; that of reporters low; contacts are rebuffed. Possibly in emerging democracies and authoritarian regimes.

**Informal-Reactive-Unmediated:** briefing and leaking; leading officials can use deep backgrounders, or ‘lobby’ system.

**Informal-Active-Unmediated:** raw ‘Data Dump’ (WikiLeaks 2009-10); but without mediation, public may pay little attention.