

TO: Transition Team

FROM: Attached List of Organizations

RE: The Freedom of Information Act

DATE: November 12, 2008

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The new President has an immediate opportunity to define the relationship between his administration and the public by issuing a presidential memorandum on Day One that makes clear that government information belongs to the people and that directs federal agencies to harness technology and personnel skills to ensure maximum accessibility of government records, consistent with law, regulation, and administrative orders.

Recognizing that our democratic form of government depends on an informed public, our laws guarantee the public's right to know what its government is doing. Over the last eight years, however, the executive branch has been transformed into a fortress with secrecy as the presumptive position throughout much of the federal government. This reversal of policy is apparent in responses to Freedom of Information Act ("FOIA") requests and in the proliferation of markings, such as "Sensitive But Unclassified," to control access to unclassified information.

In the 2006 elections, more than 40 percent of voters indicated in exit polls that corruption and scandals in government were very important in their voting decisions. The most recent Sunshine Week survey (March 2008) found that three-quarters of American adults view the federal government as secretive.

It is time to restore trust in government, and a key step in achieving this trust is making available all the information the public needs to hold its government accountable. Expanded transparency is a goal that transcends party lines and will allow the President to demonstrate his commitment to the change that the electorate has indicated it wants.

The new administration can take a number of steps to further government transparency. Some can be implemented immediately, while others will take a greater commitment of time and resources. Against this background, the new President can immediately change course with respect to the Freedom of Information Act.

A new administration traditionally defines its own FOIA policy through an official memorandum transmitted to all department and agency heads. A presidential memorandum setting forth the policy of the President on open government and containing administrative directions to agency heads can be issued on Day One with no requirement for public notice and comment. By defining his policy on the FOIA and by directing all agencies to comply with both the letter and the spirit of the law that establishes transparency as an essential feature of our democracy, the President can set a new direction toward openness.

The attached draft memorandum outlines priorities that should be addressed by the new administration, including:

- A clear policy statement favoring disclosure of government records to the public;
- A call to agencies to use technology to engage with and inform the public;
- A commitment to creating a more collaborative and less adversarial relationship with the public on issues involving access to information; and
- An effort to transform the Freedom of Information Act process into one that serves the public.

## **Signatories:**

AccessNorthwest  
American Association of Law Libraries  
American Booksellers Foundation for Free Expression  
American Political Science Association  
Animal Welfare Institute  
Association of American Publishers  
Association of Research Libraries  
Brechtner Center for Freedom of Information  
Brennan Center for Justice at New York University  
California First Amendment Coalition  
Center for National Security Studies (CNSS)  
Citizen Advocacy Center  
Citizens for Responsibility and Ethics in Washington (CREW)  
Citizen's Outreach Project  
The Constitution Project  
Defending Dissent Foundation  
DownsizeDC.org, Inc.  
Electronic Frontier Foundation  
Equal Justice Alliance  
Essential Information  
Federation of American Scientists  
First Amendment Coalition of Arizona  
Government Accountability Project (GAP)  
International Association of Whistleblowers  
International Center for Transitional Justice (ICTJ)  
James Madison Project  
Liberty Coalition  
Maine Freedom of Information Coalition  
Mississippi Center for Freedom of Information  
Muslim Advocates  
National Coalition for History  
National Freedom of Information Coalition (NFOIC)  
National Immigrant Justice Center  
National Security Archive  
National Whistleblowers Center  
Northern California Association of Law Libraries  
The Ohio Coalition for Open Government  
OMB Watch  
Open Society Policy Center  
OpenTheGovernment.org  
People For the American Way  
Physicians Committee for Responsible Medicine  
Political Research Associates  
Progressive Librarians Guild

Project on Government Oversight (POGO)  
Public Citizen  
Public Employees for Environmental Responsibility (PEER)  
Reporters Committee for Freedom of the Press  
The Rutherford Institute  
Society for Historians of American Foreign Relations  
The Sunlight Foundation  
Sunshine Center of the North Carolina Open Government Coalition  
Sunshine Week  
Transactional Records Access Clearinghouse  
Veterans for Common Sense  
VoterWatch  
Virginia Coalition for Open Government  
Washington Coalition for Open Government  
Western Environmental Law Center  
Wisconsin Freedom of Information Council

## MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to you today, the first day of my administration, on a subject of vital importance: the openness and accountability of the Executive Branch. To further government transparency, I direct Federal departments and agencies to renew their commitment to the Freedom of Information Act (“FOIA”), to its underlying principles of government openness, and to its sound administration.

Freedom of information is central to our system of government and a fundamental protection for our democracy. It promotes accountability and efficiency and, when effective, fosters trust between the public and the government. The FOIA should be administered to serve the public’s needs and should operate as a vehicle for open communication between executive branch agencies and the public. To meet these goals, my administration will work to improve the system for timely response to FOIA requests and will commit to a policy of affirmative disclosure, using technology to make available vital information to which the public is entitled.

One of the great strengths of the FOIA is its presumption that agency records are available to the public, a presumption that is overcome only in limited circumstances. I commit to making sure that this presumption of disclosure is embodied in how agencies respond to FOIA requests. Although there are governmental and private interests that should be safeguarded when information is released, a narrow construction of FOIA’s exemptions provides adequate protection for those interests. I charge the Attorney General to issue a memorandum to heads of departments and agencies reaffirming the Department of Justice’s commitment to government transparency and rescinding the memorandum circulated by Attorney General Ashcroft on October 12, 2001. The Attorney General’s memorandum shall set forth this administration’s policy that records should be released unless the withholding agency reasonably foresees that disclosure would harm an interest protected by an applicable exemption and there is a legal basis to withhold them.

To be more than an empty promise, government transparency requires a commitment of resources. I am committed to ensuring that agencies have sufficient resources to comply with the FOIA and reduce their backlogs. Each agency shall fully inform the Office of Management and Budget of its resource needs so that my administration can request sufficient resources from Congress to meet those needs.

In addition, I commit that this administration will not propose any new statute that specifically exempts records from disclosure under the FOIA unless such a statute is certified by the Attorney General as truly necessary and the statute expressly references FOIA Exemption 3, 5 U.S.C. § 552(b)(3), which is the part of the FOIA that incorporates exemptions from other laws.

Further, to underscore my administration’s commitment to transparency in government I hereby direct that the components of the Executive Office of the President that historically have

operated under the FOIA, including the offices that support those components, comply fully with the statute, whether or not a court has found that they are or are not Federal agencies.

To transform the way the government communicates with the public, I direct the Federal departments and agencies to take the following steps:

First, the fundamental principles that prompted the enactment of the FOIA also create a present-day imperative that all Federal departments and agencies take full advantage of technological advances in making their information available to the public. I hereby direct each agency and department to work in close consultation with the National Archives and Records Administration promptly to implement a system for the electronic capture, management, and preservation of electronic records in accordance with the records disposition requirements of the law. The Electronic Freedom of Information Act Amendments of 1996 represent only a first step in how agencies should incorporate emerging electronic record keeping technology. We must now go further and harness that technology to make federal records as widely and easily available as possible.

Second, it is my hope that more FOIA disputes between the executive branch and the public can be resolved without litigation. To that end, I will support the funding of the Office of Government Information Services established by the OPEN Government Act of 2007, and I direct the National Archives and Records Administration to establish such an Office. I further direct the Attorney General to consult with the National Archives and Records Administration to develop proposals for the more effective engagement of agency and department Chief Freedom of Information Act Officers in the administration of the FOIA and the resolution of disputes regarding FOIA requests.

Third, the commitment to government transparency embodied in the FOIA too often is undermined by the long periods requesters wait to receive records. Many times, requesters do not receive information until long after it could most effectively be used to inform the public about what its government is doing. Accordingly, I am directing the Attorney General and the Archivist of the United States to establish a federal advisory committee, subject to the requirements of the Federal Advisory Committee Act, to provide advice and recommendations on reducing delays in processing FOIA requests and on eliminating agencies' backlogs of unprocessed FOIA requests. The committee will be responsible for submitting a report within a year after its establishment that identifies methods that will reduce delays and backlogs and recommends actions to implement its conclusions.

The time has come to restore the American people's trust in government. I ask you to join me to lift the veil of secrecy that shrouds government activities and to show the public that we are accountable for our decisions and actions.

[signed]