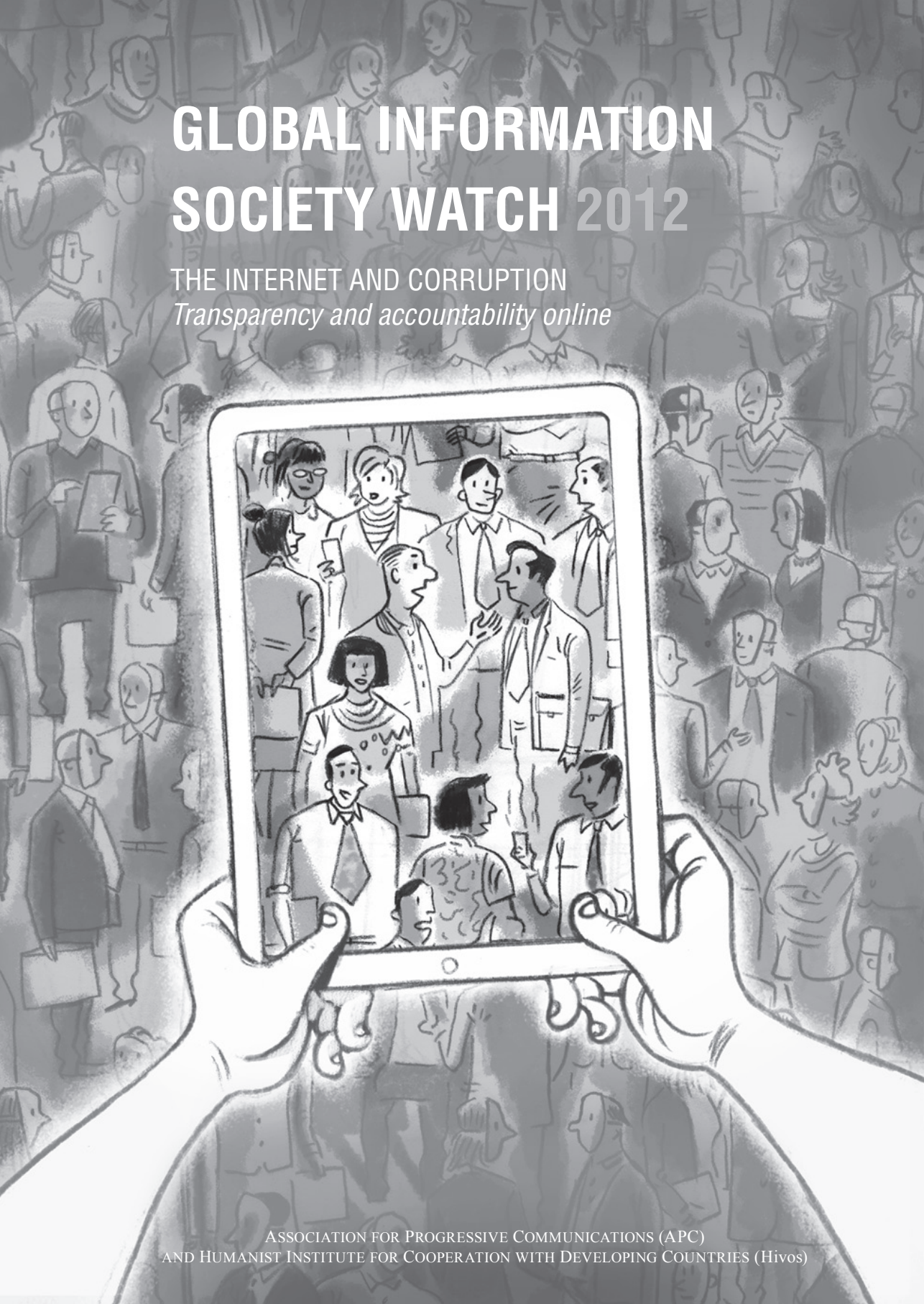
GLOBAL INFORMATION SOCIETY WATCH 2012

THE INTERNET AND CORRUPTION

Transparency and accountability online



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

Global Information Society Watch

2012

APC Hivos people unlimited

Steering committee
Anriette Esterhuysen (APC)
Loe Schout (Hivos)

Coordinating committee
Karen Banks (APC)
Monique Doppert (Hivos)
Valeria Betancourt (APC)

Project coordinator
Valeria Betancourt

Editor
Alan Finlay

Assistant editor
Lori Nordstrom

Publication production
Mallory Knodel

Proofreading
Valerie Dee
Lori Nordstrom

Graphic design
Monocromo
info@monocromo.com.uy
Phone: +598 2 400 1685

Cover illustration
Matías Bervejillo

Financial support provided by
Humanist Institute for Cooperation with Developing Countries (Hivos)
Swedish International Development Cooperation Agency (Sida)

Global Information Society Watch
Published by APC and Hivos
2012

Creative Commons Attribution 3.0 Licence
<creativecommons.org/licenses/by-nc-nd/3.0>
Some rights reserved.

ISSN: 2225-4625
ISBN: 978-92-95096-85-1
APC-201301-CIPP-R-EN-DIGITAL-176

UNITED STATES

TRANSPARENCY IN OBAMA'S FIRST TERM: FROM PROMISE TO FAILURE

Electronic Frontier Foundation
Trevor Timm
www.eff.org

Government transparency activists were heartened in January 2009 when President Barack Obama, on his first day in office, promised to overhaul the bloated and broken secrecy system that had engulfed the United States' sprawling national security apparatus and virtually all aspects of foreign policy for more than a decade – what the Washington Post has called[1] "Top Secret America".

The process by which Obama's White House would become "the most transparent administration in history", as he put it, would be multipronged: he wrote a memo promising to streamline[2] the Freedom of Information Act (FOIA) system, where FOIA requests would be answered expediently and the government would "adopt a presumption in favor" of requests. Attorney General Eric Holder followed this pronouncement up with a longer memo to all government agencies[3] in March of 2009, which mandated all agencies to comply with the overhaul post-haste and implement Obama's stated reforms.

President Obama then wrote guidelines on the classification[4] system, saying he would push for a host of reforms to reduce government secrets, perhaps even restoring the policy of "presumption against classification". In addition, as a presidential candidate Obama had previously promised[5] to stop using the "state secrets" privilege to shield the government from accountability in court and protect government whistleblowers[6] if they revealed acts of wrongdoing to the press.

Unfortunately, in the months and years that followed, the Obama administration has taken the complete opposite route, not only refusing to implement the reforms promised by the president during his first days in office, but increasing government secrecy through the courts.

Freedom of Information Act

Almost immediately, it emerged that Obama's policies would not live up to his promises. When a federal court ruled the government must release photos of torture at Abu Ghraib, the administration pushed Congress[7] to pass a law adding another exception to FOIA to keep the photos secret. In another case testing the administration's commitment to transparency, Obama's Justice Department continued a George W. Bush policy of arguing in court that White House visitor logs were not subject to FOIA, after previously saying they were.

A year into Obama's term, the Associated Press found that the administration was receiving less FOIA requests than Bush did in his final year, yet using *more* FOIA exemptions. Around the same time the National Security Archive found[8] "less than one-third of the 90 federal agencies that process such FOIA requests have made significant changes in their procedures."

Two years in, improvements were scant. In 2011, Citizens for Responsibility and Ethics in Washington (CREW) found the administration[9] was still withholding information, using nine of the most common exemptions, at a 33% higher rate than Bush's last full year in office – and the backlog of FOIA requests[10] continued to grow. Only 49 of the 90[11] federal agencies had followed *any* "specific tasks mandated by the White House to improve their FOIA performance."

While some in charge were intent on providing paths to transparency, the bureaucratic system itself seemed too massive to fix. Beth Noveck, Obama's first deputy technology officer who was in charge of implementing the open government initiative, said journalists should just skip[12] the "burdensome and egregious" process altogether, and email the open government advocate at the desired agency for better results.

1 projects.washingtonpost.com/top-secret-america
2 www.whitehouse.gov/the_press_office/Freedom_of_Information_Act
3 www.justice.gov/opa/pr/2009/March/09-ag-253.html
4 www.whitehouse.gov/the-press-office/presidential-memorandum-classified-information-and-controlled-unclassified-informat
5 www.salon.com/2009/02/10/obama_88
6 abcnews.go.com/Blotter/story?id=8241580&page=1
7 www.politico.com/blogs/joshgerstein/1011/Obama_administration_appeals_ruling_on_White_House_visitor_logs.html
8 articles.latimes.com/2010/mar/21/nation/la-na-ticket21-2010mar21
9 www.federaltimes.com/article/20111215/AGENCY04/112150302
10 www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB349/index.htm
11 www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB338/index.htm
12 www.nextgov.com/technology-news/2010/11/bypass-foia-and-seek-data-from-agencies-says-obama-official/47969

The reviews from transparency advocates, by 2012, had become scathing. "Obama is the sixth administration that's been in office since I've been doing Freedom of Information Act work. (...) It's kind of shocking to me to say this, but of the six, this administration is the worst on FOIA issues. The worst. There's just no question about it," Katherine Meyer, a Washington lawyer who had been filing FOIA cases since 1978, told Politico.[13]

While many agencies attempted to redesign their websites, and FOIA.gov was revamped to better track requests, there was barely an agency that had not received major complaints. The CIA, the State Department,[14] and the Department of Homeland Security[15] have frustrated reporters looking for even basic information. Even agencies dealing with health and scientific issues like the EPA and NASA[16] have not complied as promised. In a classic case, the Transportation Security Administration (TSA), which was put in charge of airport security after 9/11, recently returned a FOIA request[17] to *Pro Publica* four years after it was filed, along with an apology.

The worst transgressor has been the Justice Department (DOJ), which has been the defendant in 30% of FOIA lawsuits[18] during Obama's term, despite only receiving 10% of the requests. The National Security Archives, a non-profit civil society group, gave the Justice Department its "Rosemary Award"[19] – named after Richard Nixon's secretary who deleted the infamous eight and a half minutes missing from the Watergate tapes – for worst government performance. Among its transgressions: arguing before the Supreme Court against a presumption of openness and a narrowing of the "deliberative process" exemption to FOIA – the exemption Obama specifically mentioned in his initial memo as being out of control – and proposing that the Justice Department's FOIA rules should change so that they could tell journalists they do not have documents, when they do. Thankfully, after a public uproar – the Los Angeles Times called[20] it "a license to lie" – it was not implemented.

Classification

The main reason the FOIA system has not functioned properly in recent years is the overwhelming secrecy practiced by the US government. Simply put, classification is rampant and out of control. The government classified a whopping 77 million documents[21] in 2010, a 40% increase on the year before. For comparison, the government classified six million in 1991, when Senator Daniel Moynihan led a Congressional commission that found that overclassification was already an epidemic.

Some in government are trying to alleviate the problem. The National Archives has struggled mightily to reach its declassification goals by 2013 but is dealing with a backlog of over 400 million documents,[22] some dating back to World War I. The National Archives, underfunded and understaffed, has virtually no chance it will reach its goal. Unfortunately, in the face of this secrecy problem, the government has just gotten more secretive. Instead of spending money to declassify, in 2011, the government increased its budget for secrecy[23] by USD 1.2 billion dollars. All told the government spends USD 11.36 billion dollars to keep things classified, more than doubling spending on keeping government secrets since 9/11.[24]

We know the classification system has no rhyme or reason to it. Besides the embarrassing, corrupt or criminal information that is shielded, examples crop up that border on the farcical. For example, when a redacted and unredacted version of a book are put side to side, we see the government censoring mundane information that had been public for years.[25] Or when the government was shown to have classified an analogy[26] to the *Wizard of Oz* in a court decision about Guantanamo. Or when the National Security Agency (NSA) declassified a 200-year-old report[27] as proof of its "commitment to meeting the requirements" of President Obama's transparency agenda. This is why when the American Civil Liberties Union (ACLU), a non-profit organization committed to increasing government transparency, compared redacted State Department cables to the WikiLeaks

13 www.politico.com/news/stories/0312/73606.html
14 www.iwatchnews.org/2011/07/06/5123/state-department-foia-requests-unanswered-four-long-years-later
15 www.politico.com/news/stories/0311/52033.html
16 www.cjr.org/feature/transparency_watch_a_closed_door.php?page=all&print=true
17 www.propublica.org/article/tsa-reveals-passenger-complaints-four-years-later
18 foiaproject.org/2012/05/24/new-data-confirm-dojs-subpar-foia-performance
19 www.gwu.edu/~nsarchiv/news/20120214/index.htm
20 articles.latimes.com/2011/oct/31/opinion/la-ed-secrets-20111031
21 www.nytimes.com/2011/08/25/opinion/why-is-that-a-secret.html?_r=1
22 www.washingtonpost.com/national/national-security/national-archives-needs-to-declassify-a-backlog-of-nearly-400-million-pages/2011/11/29/gIQAMAYmPO_story.html
23 www.fas.org/blog/secrecy
24 www.nytimes.com/2012/07/03/us/politics/cost-to-protect-us-secrets-doubles-in-decade-to-11-billion.html
25 www.fas.org/blog/secrecy/2010/09/behind_the_censor.html
26 www.emptywheel.net/2012/04/30/janice-rogers-brown-sings-follow-the-yellow-brick-road-as-she-guts-habeas
27 www.fas.org/blog/secrecy/2011/06/nsa_200_years.html

versions,[28] they said it showed "the absurdity of the secrecy system."

But no anecdote sums up the whole situation better than William Leonard, who was the former director of the Information Security Oversight Office[29] under President Bush. Known as the classification czar, Leonard once had control of the nation's classification system and became so incensed with how it worked after he left office, he sued the NSA to have them declassify documents he said were classified in violation of national policy. He was recently rebuffed by a court, after fighting for over a year. They told him to go file[30] a Freedom of Information Act request – which he had done over a year prior.

Leakers and state secrets

The most visible stain on Obama's transparency record has been its prosecution of whistleblowers or leakers to the press under the Espionage Act. And all told, there are six people who were charged or are currently facing charges under the Espionage Act, all of whom were allegedly talking to the press in the interest of the public good. That is double the number of leak prosecutions carried out by all other administrations *combined*.

When a government increases classification to the absurd, ignores or impedes legitimate Freedom of Information Act requests, and uses secrecy as a shield from liability in court, often the only way for information to get out is through leaks.

But Obama's unprecedented prosecutions have had a chilling effect on transparency and the public's right to know, especially in a time where everything is secret and the government fights tooth and nail in court to keep in that way. *The New York Times* reported that the latest round of FBI leak investigations was "casting a distinct chill over press coverage of national security issues" and that "some government officials (...) say Americans are learning less about their government's actions."[31]

Unfortunately, technology has turned into a tool for the government to crack down on leakers. The proliferation of online and electronic communication that makes it easier for journalists to connect with government officials has also made it easier for the government to criminalize those relationships.

As *The New York Times* explained[32] in "A High Tech War on Leaks", in the past, physical communications were harder to intercept. In addition, if the government wanted to go after a source, it often had to subpoena a reporter for his or her sources, which often results in costly legal fights, as in most federal courts reporters have a privilege allowing them not to testify.

Now emails leave an electronic paper trail, and online communications generally have weaker Fourth Amendment protections than physical letters or phone calls. The government claims it does not need a warrant for "metadata" – the people you talk to, when you talk to them, and how frequently – and they can paint a startling picture of one's life. As an unnamed official remarked after saying[33] the government no longer needed to subpoena reporters to testify, "We don't need to ask who you're talking to. We know."

The cases of Thomas Drake and John Kirakou are particularly disconcerting. Thomas Drake was an NSA official who blew the whistle[34] on the NSA's warrantless wiretapping program. He only went to the press after bringing his complaints to superiors, the Inspector General, and Congress. He was described as "exactly the type of whistleblower Obama promised to protect," yet was charged under the Espionage Act and faced years in prison. In the end, his case fell apart[35] after public outcry and he would serve no jail time.

A similar situation is now occurring in the case of former CIA analyst John Kirakou. In 2007, during an interview with ABC News, he became the first official[36] to describe waterboarding as "torture" and allegedly named two of the CIA officers involved. Now he finds himself facing years in prison under the Espionage Act.

Unfortunately, the perpetrators of Bush-era crimes, some of which Drake and Kirakou exposed, face no such worry. The Obama administration steadfastly refused to bring criminal charges for warrantless wiretapping and torture, and perhaps worse, has been using secrecy as a shield to prevent any civil accountability for both.

28 www.aclu.org/wikileaks-diplomatic-cables-foia-documents

29 www.archives.gov/isoo/about/index.html

30 www.fas.org/blog/secrecy/2012/07/nsa_leonard_foia.html

31 www.nytimes.com/2012/08/02/us/national-security-leaks-lead-to-fbi-hunt-and-news-chill.html?_r=1&nl=todaysheadlines&emc=edit_th_20120802&pagewanted=all

32 www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html?pagewanted=all

33 www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html?pagewanted=all

34 www.thenation.com/article/161376/government-case-against-whistleblower-thomas-drake-collapses

35 www.thenation.com/article/161376/government-case-against-whistleblower-thomas-drake-collapses

36 www.huffingtonpost.com/2012/07/03/squelching-secrets-why-is_n_1628547.html

In a myriad of lawsuits filed by the ACLU,[37] the Center for Constitutional Rights[38] and the Electronic Frontier Foundation[39] (for whom I work), the administration has invoked the "state secrets" privilege, a controversial legal maneuver with which the government claims that *even if all the allegations are true,* lawsuits still should be dismissed entirely because they could harm national security. Even worse, these lawsuits are based on hundreds of pages of already public evidence and the plaintiffs are not demanding the government turn over any classified information.

The Obama administration also continued the Bush practice of invoking the "state secrets" privilege in court over torture lawsuits as well. After Bush had two lawsuits by innocent people alleging to be tortured dismissed via "state secrets", Obama invoked the privilege[40] in a third case known as *Mohamed v. Jeppesen*. Despite hundreds of documents in the public record – some of which were government investigations by allies – the administration successfully avoided having the case litigated by throwing up a wall of secrecy.

To this date, no government official has been held accountable for warrantless wiretapping or torture.

WikiLeaks

While his policy on whistleblowers and state secrets has been a dark mark on his presidency, another argument Obama's Justice Department is contemplating has the potential to forever alter press freedom and transparency in the US. While the government has punished leakers in its ranks, the *publishing* of such information once it is in the hands of private citizens and the press has traditionally been an activity protected by the First Amendment. For that reason, the government's potential prosecution of media organization WikiLeaks is the most dangerous policy choice towards secrecy the Obama administration has undertaken.

WikiLeaks, which has published hundreds of thousands of leaked classified documents from the Afghanistan and Iraq wars, along with US State Department cables, is under grand jury investigation for conspiracy to commit espionage. And while the government may see WikiLeaks as wholly different from a mainstream media organization, the law does not. If WikiLeaks is convicted under the theory the government has presented to the press – WikiLeaks talked to a source who gave it classified documents to publish – then no media organization would be safe.

The next time *The New York Times* has a story that is of vital public interest, but also happens to be stamped "Top Secret" – like its 2005 investigation into warrantless wiretapping or the *Washington Post'* s 2005 story on CIA torture prisons – the government could prosecute the newspaper under the same theory. Just the threat could keep newspapers from publishing a story, which, in earlier times, may have won the Pulitzer Prize.

With classification out of control and the Freedom of Information Act process slowing to a halt, leaks and the publication of so-called "secrets" can sometimes be the public's only chance to know what its government is up to. Now that both the leakers and the publishers face legal threats, the consequences could be devastating.

Action steps

- Call Congress and implore them not to implement any more anti-leak measures through legislation, as they are currently contemplating.
- Demand that President Obama implement the original promises he made in 2009 on reforming the classification and FOIA systems.
- Encourage constituents to ask candidates for office in the November 2012 elections about their views on transparency. With a court system tilting towards secrecy, accountability towards office holders provides the most effective option in stemming the tide of secrecy. ■

37 www.aclu.org/national-security/amnesty-et-al-v-clapper

38 ccrjustice.org/newsroom/press-releases/ccr-appeals-warrantless-wiretapping-ruling

39 www.eff.org/cases/jewel

40 www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc