



# The Obama Administration's Open Government Initiative: Issues for Congress

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## Summary

On his first full day in office (January 21, 2009), President Barack Obama issued two memoranda “for the Heads of Executive Departments and Agencies” that were related to transparency in government. One memorandum focused on the administration of the Freedom of Information Act (FOIA), and the other focused on transparency and open government. The transparency memorandum committed the administration to “an unprecedented level of openness” and to the establishment of “a system of transparency, public participation, and collaboration.” Some scholars argue that these memoranda were a significant break from the policies of the previous administration.

Over the next few months, the Office of Management and Budget (OMB)—a component of the Executive Office of the President—administered a series of online public feedback forums as part of a comprehensive Open Government Initiative (OGI). Through the forums, OMB sought input from federal employees and the public on ways to improve government transparency, increase public participation with the federal government, and encourage collaboration among federal government agencies, private citizens, and other entities.

On December 8, 2009, the Obama Administration released a third memorandum, an Open Government Directive (OGD), that included more detailed instructions for departments and agencies on how they are to “implement the principles of transparency, participation, and collaboration.” Among other policy initiatives, the memorandum required all federal agencies to release three “high-value” datasets that were previously unpublished. In addition, the memorandum required each agency to designate a “high-level senior official to be accountable for the quality and objectivity of, and internal controls over, the Federal spending information” that agencies currently provide to government websites like *USAspending.gov* and *Recovery.gov*. Each agency was also required to create an “open government plan ... that will describe how it will improve transparency and integrate public participation and collaboration into its activities.” The presidential memorandum included a series of staggered deadlines for implementing each part of the directive.

Both the Administration and private organizations have examined federal agency efforts to meet the OGD’s requirements. These examinations have found that agencies met the requirements, but with varying results. Some agencies completed the OGD requirements by setting up required websites, but providing limited information or public participation. Other agencies explored methods of integrating their newly released datasets into their open government websites and providing forums for the public to offer thoughts on ways to improve the sites further.

This report reviews and discusses President Obama’s Open Government Initiative and the Open Government Directive. The report then analyzes both agency response to the OGI and the OGD, and examines whether the OGD’s requirements can meet the stated goals of the Administration. The report discusses the three central tenets of the Administration’s OGD—transparency, public participation, and collaboration—and analyzes each one individually to determine whether agencies are meeting these requirements and whether the requirements may improve the effectiveness of the federal government.

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## Introduction

Many Presidents have adopted policies to address the tension between government transparency and protection of sensitive information. Sometimes these policies are more restrictive and protective of institutional, commercial, and individual privacy as well as security concerns. Other times, however, policies have encouraged a presumption of disclosure of information.<sup>1</sup> An Administration can issue its information policies in a variety of ways. For example, some Presidents issue their transparency policies through the Department of Justice (DOJ), as was done during the presidency of George W. Bush.<sup>2</sup> In contrast, President Barack Obama issued three memoranda related to federal transparency from the Executive Office of the President during his first year in office. In addition, the Office of Management and Budget (OMB), under the direction of the Obama Administration, underwent three phases of public information collection that presumably helped shape the Administration's transparency initiatives.

On his first full day in office (January 21, 2009), President Barack Obama issued two memoranda "for the Heads of Executive Departments and Agencies" that were related to transparency in government.<sup>3</sup> One memorandum focused on the administration of the Freedom of Information Act (FOIA), and the other focused on transparency and open government. On December 6, 2009, OMB issued a third memorandum seeking to operationalize the concepts of transparency, public participation, and collaboration.<sup>4</sup>

Although each executive-branch agency met the deadlines set out in the December 6, 2009, memorandum, the Administration and some observers outside of government noted that the agency responses varied in quality. This report reviews the objectives delineated in President Obama's Open Government Initiative (OGI) and examines the expectations placed on agencies to meet these objectives. This report reviews department and agency attempts to implement Obama Administration initiatives that seek to make the federal government more transparent, participatory, and collaborative. The report then analyzes options for congressional action in this area.

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<sup>1</sup> The Administration of former President George W. Bush, for example, adopted a policy of "full and deliberate consideration" of any requests for federal government information made by the public. See Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies, October 12, 2001, <http://www.doi.gov/foia/foia.pdf>. The Administration of President Barack Obama, on the other hand, has stated its intention to adopt a policy of presumptive disclosure that will be described in greater detail later in this report. See Memorandum from President Barack Obama For Heads of Executive Departments and Agencies, January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

<sup>2</sup> John Ashcroft, Attorney General, *Memorandum to the Heads of Federal Departments and Agencies: The Freedom of Information Act*, Department of Justice, Washington, DC, October 12, 2001, <http://www.doi.gov/foia/foia.pdf>.

<sup>3</sup> Executive Office of the President, "Freedom of Information Act," 74 *Federal Register* 4693, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/). Executive Office of the President, "Transparency and Open Government," 74 *Federal Register* 4685, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/); and Executive Office of the President, "Transparency and Open Government," 74 *Federal Register* 4685, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/).

<sup>4</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

## The Three Memoranda

Since entering office, President Obama and his Administration have issued three memoranda directly related to transparency and open government issues. Two of those memoranda were released on the President's first full day in office. The third memorandum, which requires agencies to implement certain open government ideas, was issued in December 2009.

One of the two January 21, 2009, memoranda, the "Transparency and Open Government" memorandum, said that the new Administration was "committed to creating an unprecedented level of openness in government."<sup>5</sup> The memorandum focused on fostering a more open government based on three principles: transparency, public participation, and collaboration.

The memorandum required the chief technology officer and the director of OMB to issue, within 120 days, recommendations for the Open Government Directive "that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum."<sup>6</sup>

The second January 21, 2009, memorandum, the "Freedom of Information Act" memorandum, said that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."<sup>7</sup> The memorandum said that under the new administration "[a]ll 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. The presumption of disclosure should be applied to all decisions involving FOIA."<sup>8</sup>

The memorandum then directed the attorney general to "issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*."<sup>9</sup>

In addition to the two memoranda, the Administration conducted a series of online public input forums between January and July 2009, seeking feedback and ideas from federal employees, the public, and industry representatives on ways to make the federal government more transparent, collaborative, and participatory.

On December 8, 2009, Peter R. Orszag, the director of OMB, released a third open-government-related memorandum, the "Open Government Directive" memorandum, that included more detailed instructions for departments and agencies on how to "implement the principles of transparency, participation, and collaboration."<sup>10</sup> Among the initiatives in the memorandum was a

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<sup>5</sup> Executive Office of the President, "Transparency and Open Government," 74 *Federal Register* 4685, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/).

<sup>6</sup> *Ibid.*

<sup>7</sup> Executive Office of the President, "Freedom of Information Act," 74 *Federal Register* 4693, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* The memorandum did not include a deadline by which such guidelines must be published.

<sup>10</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, (continued...)

requirement to give the public access to “high-value” datasets that were previously unpublished. In addition, the memorandum required each agency to designate a “high-level senior official to be accountable for the quality and objectivity of, and internal controls over, the Federal spending information” that agencies currently provide to government websites like *USAspending.gov* and *Recovery.gov*.<sup>11</sup> Each agency was also required to create an “open government plan ... that will describe how it will improve transparency and integrate public participation and collaboration into its activities.”<sup>12</sup> The memorandum set a series of staggered deadlines for each department and agency to comply with the new requirements.

This report examines the Obama Administration’s Open Government Initiative. It reviews the Administration’s requirements for each executive-branch department and agency, and it examines department and agency results in increasing transparency, public participation, and collaboration. This report also analyzes options for congressional oversight and possible legislative and oversight actions in these areas.

## Government Transparency

The tension between a transparent government and the maintenance of proper levels of secrecy has existed throughout the nation’s history. Sometimes Congress or the President may choose to keep information secret, arguing that it serves to protect national security or an individual’s privacy. Other times the federal government may make information public in an attempt to increase public trust in the deliberative democratic process. Scholars Sidney A. Shapiro and Rena I. Steinzor wrote in a 2006 article on executive branch secrecy and accountability that

[c]laims that the executive branch needs extensive secrecy to operate effectively are troublesome because of the important role transparency plays in the American constitutional system of checks and balances. When secrecy becomes sufficiently pervasive, it becomes difficult, even impossible, for Congress and the public to determine what is going on in the executive branch. Government failures are hidden and the public interest suffers. Indeed, it is not an exaggeration to say that pervasive secrecy can fatally undermine the structure of our constitutional government by allowing the executive branch to withhold crucial information from the other two branches and, as important, a free press.

Nevertheless, absolute transparency is neither a realistic nor an appropriate goal. The release of some types of information can do more harm than good. ... The difficult public policy issue, of course, is striking an appropriate balance between openness and secrecy.<sup>13</sup>

This section offers a brief overview of some critical documents and events that shaped government transparency and information secrecy in the U.S. federal government.

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(...continued)

[http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf). It is unclear how much influence the online forums influenced the December 8, 2009, memorandum.

<sup>11</sup> *Ibid.*, p. 3.

<sup>12</sup> *Ibid.*, p. 4.

<sup>13</sup> Sydney A. Shapiro and Rena I. Steinzor, “The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism,” *Law and Contemporary Problems*, vol. 69, no. 99 (Summer 2006).

## The Constitution and Transparency

The United States Constitution contains some of the same conflicts between transparency and secrecy that continue to inspire debates in all three co-equal branches of the federal government. In Article I, Section 5, for example, the Constitution states that

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Pursuant to the Constitution, therefore, Congress is required to keep a publicly accessible record of its actions, but is also given the authority to keep certain topics secret. The Constitution makes no specific reference to what subject matter could be kept secret by Congress, and leaves that question to be answered by each chamber individually.

The only explicit reference to the executive branch's responsibilities to share government information is in Article II, Section 3, of the Constitution, which requires the President "from time to time" to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." In modern times, this constitutional requirement has been filled by the annual State of the Union Address presented to a joint session of Congress.<sup>14</sup>

In addition to explicit constitutional requirements, implicit responsibilities and powers may be found in the Constitution. Oversight, for example, is an implicit constitutional power and obligation of the Congress.<sup>15</sup> According to historian Arthur Schlesinger, Jr., "it was not considered necessary to make an explicit grant of such [oversight] authority," wrote Schlesinger. "The power to make laws implied the power to see whether they were faithfully executed."<sup>16</sup> The Constitution also granted Congress an array of formal powers—the purse strings, lawmaking, impeachment, among others—to hold the president and the administration accountable for their actions or inactions. In short, oversight plays a key role in our system of checks and balances.

Among the various methods Congress may use to conduct its oversight duties is creating and enforcing agency reporting requirements. Numerous laws require executive agencies to submit reports periodically, and as required by specific events or certain conditions, to Congress and its committees. As one scholar explained:

Reporting requirements are provisions in laws requiring the executive branch to submit specified information to Congress or committees of Congress. Their basic purpose is to provide data and analysis Congress needs to oversee the implementation of legislation and foreign policy by the executive branch.<sup>17</sup>

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<sup>14</sup> For more information about the State of the Union Address, see CRS Report R40132, *The President's State of the Union Address: Tradition, Function, and Policy Implications*, by Colleen J. Shogan and Thomas H. Neale.

<sup>15</sup> For more information on congressional oversight see CRS Report R41079, *Congressional Oversight: An Overview*, by Walter J. Oleszek.

<sup>16</sup> Arthur M. Schlesinger, Jr. and Roger Burns, eds., *Congress Investigates: A Documented History, 1792-1974*, vol. 1 (New York: Chelsea House, 1975), p. xix.

<sup>17</sup> Ellen C. Collier, "Foreign Policy by Reporting Requirement," *Washington Quarterly*, Winter 1988, p. 75.

Generally, reporting requirements encourage self-evaluation by the executive branch and promote agency accountability to Congress. Reporting requirements involve weighing Congress's need for information and analysis to conduct evaluations of agencies and programs against the imposition of burdensome or unnecessary obligations on executive-branch entities.

The executive branch has explicit statutory authorities and may claim additional implied powers to withhold certain documents or information from release. Most records of recent former Presidents and former Vice Presidents, for example, are required by statute to be turned over to the National Archives and Records Administration at the end of each administration, pursuant to the Presidential Records Act.<sup>18</sup> A series of executive orders,<sup>19</sup> however, have modified how much time a former or incumbent president or vice president has to decide whether to block certain presidential records from release. The Constitution makes no explicit reference to retaining presidential records, nor does the Constitution explicitly authorize presidents to issue executive orders. Both of these actions stem from implied presidential powers in the Constitution.

## **The Freedom of Information Act**

It was not until the 1966 enactment of the Freedom of Information Act (FOIA; 5 U.S.C. § 552) that individuals, corporations, and other entities were given “presumptive access to unpublished, existing and identifiable records of the agencies of the Federal executive branch without having to demonstrate a need or reason for such request.”<sup>20</sup>

Although the original FOIA and its subsequent amendments make executive-branch documents more accessible to the public, the act includes nine exemptions that permit agencies to decline requests for information:

1. Information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order;
2. Information relating solely to agency internal personnel rules and practices;
3. Data specifically excepted from disclosure by a statute which either requires that matters be withheld in a non-discretionary manner or which establishes particular criteria for withholding or refers to particular types of matters to be withheld;
4. Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
5. Inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation;

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<sup>18</sup> For more information on the Presidential Records Act and the preservation of presidential records, see CRS Report R40238, *Presidential Records: Issues for the 111<sup>th</sup> Congress*, by Wendy R. Ginsberg.

<sup>19</sup> For more information on executive orders, see CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by Vanessa K. Burrows.

<sup>20</sup> Harold C. Relyea, “Federal Freedom of Information Policy: Highlights of Recent Developments,” in *Government Information Quarterly*, vol. 26 (2009), p. 314. For more information on FOIA, see CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111<sup>th</sup> Congress*, by Wendy R. Ginsberg.

6. Personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy;
7. Certain kinds of investigatory records compiled for law enforcement purposes;
8. Certain information relating to the regulation of financial institutions; and
9. Geological and geophysical information and data. (5 U.S.C. § 552(b)).

If a requester seeks information in one of the preceding nine categories, he or she is to be notified that the request may not be filled. The agency is required to cite the exemption it is using to refuse the information request.

A requester who is dissatisfied with an agency response to his or her request may pursue a remedy in the courts or seek arbitration at the Office of Government Information Services, which is located in the National Archives and Records Administration.<sup>21</sup>

## **Significant Events May Affect Transparency Policies**

Attitudes toward transparency can change over time, often affected by the political climate of the country or by significant events that may change opinions on what and how much information should be publicly available.

For example, terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, DC, on September 11, 2001, prompted the George W. Bush Administration to adopt new policies on accessing federal government information.

One month after the September 11 attacks, for example, then-Attorney General John Ashcroft issued a memorandum redefining how FOIA was to be applied, saying agency and department heads should release documents “only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.”<sup>22</sup> The memorandum continued:

When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.<sup>23</sup>

Because the transparency policies of each Administration frequently are not codified, they can be modified at any time. Each President has the opportunity to determine how to apply and administer existing transparency statutes, as is evidenced by the changes adopted the Obama Administration, which will be described in the next section of this report.

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<sup>21</sup> The National Archives, “The Office of Government Information Services,” <http://www.archives.gov/ogis/>.

<sup>22</sup> Attorney General John Ashcroft, *Memorandum For the Heads of All Federal Departments and Agencies*, Department of Justice, The Freedom of Information Act, Washington, DC, October 12, 2001, <http://www.doi.gov/foia/foia.pdf>.

<sup>23</sup> *Ibid.*

## The Obama Administration

### The January 2009 Memoranda

As noted earlier in this report, on his first full day in office, President Barack Obama issued two memoranda for the heads of executive departments and agencies:

- The “Freedom of Information Act” memorandum<sup>24</sup>; and
- The “Transparency and Open Government” memorandum.<sup>25</sup>

### FOIA

The memorandum that addressed FOIA, required, among other things, the executive branch to adopt “a presumption in favor of disclosure” of federal records.<sup>26</sup> The memorandum directed the attorney general to “issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*.”<sup>27</sup>

On March 19, 2009, Attorney General Eric Holder issued a memorandum in which he required “A Presumption of Openness” in relation to federal records and the application of FOIA.<sup>28</sup> The memorandum explicitly rescinded former Attorney General John Ashcroft’s October 12, 2001, memorandum. Mr. Holder’s memorandum read as follows:

First, an agency should not withhold information simply because it may do so legally.... An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute....

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<sup>24</sup> Executive Office of the President, “Freedom of Information Act,” 74 *Federal Register* 4693, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

<sup>25</sup> The White House, *Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government*, Office of the Press Secretary, Washington, DC, January 21, 2009, [http://www.gwu.edu/~nsarchiv/news/20090121/2009\\_transparency\\_memo.pdf](http://www.gwu.edu/~nsarchiv/news/20090121/2009_transparency_memo.pdf).

<sup>26</sup> President Barack Obama, *Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies*, The White House, Washington, DC, January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/). For more information on this memorandum, see CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111<sup>th</sup> Congress*, by Wendy R. Ginsberg.

<sup>27</sup> *Ibid.* The memorandum did not include a deadline by which such guidelines must be published.

<sup>28</sup> Attorney General Eric Holder, *Memorandum For the Heads of Executive Departments and Agencies*, U.S. Department of Justice, Washington, DC, March 19, 2009, pp. 1-2, <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

[T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.<sup>29</sup>

### *Transparency and Open Government*

The other January 21, 2010, memorandum on “Transparency and Open Government,” said that the new administration “is committed to creating and unprecedented level of openness in Government.”<sup>30</sup> It stressed three principles that the administration believed would strengthen the country’s democracy and “promote efficiency and effectiveness in Government:” transparency, public participation, and collaboration.

- **Transparency**—The memorandum said that “[t]ransparency promotes accountability and provides information for citizens about what their Government is doing,”<sup>31</sup> adding that the administration “will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.”<sup>32</sup> Agencies were instructed to find ways to use new technologies to make public available information on agency operations and decisions. Agencies were also directed to “solicit public feedback to identify information of greatest use to the public.”<sup>33</sup>
- **Public Participation**—The memorandum said that public engagement in government can improve “the quality of its decisions,” and public participation allows government to access knowledge that is “widely dispersed in society.”<sup>34</sup> Departments and agencies were directed to increase opportunities for public participation in government, and to “solicit public input” on ways to increase civic engagement in the deliberative process.<sup>35</sup>
- **Collaboration**—The memorandum defined collaboration as actively engaging “Americans in the work of their Government.”<sup>36</sup> Agencies were encouraged to “use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector.”<sup>37</sup> The administration directed agencies to find new ways to get the public and private organizations involved in collaborative and cooperative government efforts.

Pursuant to the transparency and open government memorandum, within 120 days of the memorandum’s release, the new federal chief technology officer (CTO), the director of OMB,

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<sup>29</sup> Ibid.

<sup>30</sup> The White House, *Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government*, Office of the Press Secretary, Washington, DC, January 21, 2009, [http://www.gwu.edu/~nsarchiv/news/20090121/2009\\_transparency\\_memo.pdf](http://www.gwu.edu/~nsarchiv/news/20090121/2009_transparency_memo.pdf).

<sup>31</sup> Ibid., p. 1.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., p. 2.

and the administrator of General Services were to coordinate and draft recommendations for an Open Government Directive (OGD). The directive was to prescribe methods to implement the three principles outlined in the memorandum. Some newspapers and open government advocates argued that the Obama memorandum on transparency and participation marked a significant break with the policies of the previous administration, whereas others stated the initiative would not effect great changes.<sup>38</sup>

## Starting the Open Government Initiative

In the months following the transparency and open government memorandum's release, the Obama Administration sought to solicit information and ideas from the public on how to make the federal government more transparent. In May, the Administration announced a three-phase Open Government Initiative (OGI) aimed at collecting ideas from the public on how to make government more transparent, participatory, and collaborative. From May 21 through June 3, 2009, the Obama Administration's Office of Science & Technology Policy (OSTP) entered the first phase of the directive by tapping the National Academy of Public Administration (NAPA) to host an online "brainstorming session."<sup>39</sup> The goal of the session was to collect public comments on "innovative approaches to policy, specific project suggestions, government-wide or agency-specific instructions, and any relevant examples and stories relating to law, policy, technology, culture, or practice."<sup>40</sup>

The brainstorming session garnered 4,205 suggestions and comments—with varying levels of utility and applicability.<sup>41</sup> Suggestions and comments were rated using a scale in which each entry could be given a "thumbs up" or "thumbs down" rating by all public users. The rating system permitted users to place a numeric value on suggestions by allocating a +1 for each thumbs up rating that an entry garnered and a -1 for each thumbs down rating. One entry suggested that agencies should be required to post documents online once they have been released in relation to a FOIA request. The suggestion stated that such action could reduce the number of duplicative FOIA requests. In a different example, it was suggested that the United States create "peace-officer ninjas." The "peace-officer ninjas" suggestion, for example, generated a rating of -19; posting FOIA documents online generated a score of 288. The rating system allowed OSTP officials to quickly separate the suggestions that receive higher ratings from lower ratings, creating a more efficient method of sorting through the suggestions.

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<sup>38</sup> For example, the Sunshine in Government Initiative said the memorandum demonstrated that transparency was a "wonderful" priority for the Obama Administration. "The Sunshine in Government Initiative," January 21, 2009, press release, at <http://www.sunshineingovernment.org/index.php?cat=31>. A *Washington Post* article reported that the Obama Administration faced more lawsuits seeking the release of federal records in its first year than President George W. Bush did in each of his last two years in office. Carol D. Leonnig, "More than 300 Public Records Lawsuits Filed in Obama's First Year," *Washington Post*, January 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012602048.html>.

<sup>39</sup> National Academy of Public Administration (NAPA), *Open Government Dialogue*, May 21, 2009, <http://opengov.ideascale.com/akira/panel.do?id=4049>. When the dialogue began, users could offer ideas without signing up for a log-on identity. On May 23, 2009, NAPA changed that policy and required all participants to log into the website before their comments could be posted.

<sup>40</sup> *Ibid.*

<sup>41</sup> Of the 4,205 comments, 1,614 were related to transparency issues, 722 were related to public participation, 294 were related to collaboration, 285 were classified as related to "capacity building," 635 were classified as related to legal or policy changes, and 655 were uncategorized.

From June 3 through June 26, 2009, OSTP began the second phase of its Open Government Initiative, which focused on some of the ideas that emerged from the brainstorming session forums. On June 10, 2009, Michael Fitzpatrick, associate administrator for the Office of Information and Regulatory Affairs (OIRA), posted some findings from the Phase I brainstorming session on OSTP's blog, and listed four "notable comments" that emerged from the exercise. The four recommendations said that the federal government should

- seek public input on data to be made transparent;
- identify candidate agencies or programs as pilots for transparency initiatives;
- post frequently requested categories of government information; and
- inventory and prioritize agency data for publication in open, downloadable formats.<sup>42</sup>

The blog then stated that OIRA, the office that Congress charged with overseeing the implementation of information resource management policies,<sup>43</sup> was seeking additional public feedback on ways to improve FOIA and OMB's Circular A-130.<sup>44</sup> Specifically, the blog asked for information on the "critical gaps or holes in Circular A-130 that "need to be addressed," for "recommendations ... for agencies to pro-actively post information on their websites to avoid a FOIA request from even occurring," and for "recommendations to make FOIA reading rooms more useful and information more easily searchable, as they are meant to be a mechanism for information dissemination to the public."<sup>45</sup>

The blog generated 58 responses, once again of varying utility. One contributor suggested that contractors performing federal duties should be required to maintain records the same way federal agencies do. Other suggestions reiterated that documents released as part of a FOIA request be published online, but added that they should be made text searchable.<sup>46</sup> Again, users could rate the suggestions, allowing the federal government and the public to see which suggestions were preferred by users.

From June 22 through July 6, 2009, OSTP conducted the third phase of the open government initiative: drafting policies. Using an online program, members of the public created documents that were specific policy recommendations. Participants critiqued, endorsed, and rated the policy recommendations.<sup>47</sup> OSTP said that the "recommendations will inform the drafting of an 'Open Government Directive' to executive branch agencies."<sup>48</sup> Among the policy recommendations

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<sup>42</sup> Michael Fitzpatrick, associate administrator for OIRA, *Transparency: Access to Information*, Executive Office of the President, Office of Science & Technology Policy, June 10, 2009, <http://blog.ostp.gov/2009/06/10/transparency-access-to-information/>.

<sup>43</sup> See the Paperwork Reduction Act (44 U.S.C. 3504(b)).

<sup>44</sup> OMB Circular A-130 "establishes policy for the management of Federal information resources." Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Management of Federal Information and Resources*, Washington, DC, [http://www.whitehouse.gov/omb/Circulars\\_a130\\_a130trans4/](http://www.whitehouse.gov/omb/Circulars_a130_a130trans4/).

<sup>45</sup> Michael Fitzpatrick, associate administrator for OIRA, *Transparency: Access to Information*, Executive Office of the President, Office of Science & Technology Policy, June 10, 2009, <http://blog.ostp.gov/2009/06/10/transparency-access-to-information/>.

<sup>46</sup> *Ibid.*

<sup>47</sup> For more information on MixedInk, see <http://www.vimeo.com/2674991>.

<sup>48</sup> U.S. Office of Science and Technology Policy, Executive Office of the President, *Open Government Directive, Phase 3: Drafting*, 2009.

posted was a suggestion to “rebuild technical capacity for information dissemination in the agencies (and government-wide)” so historical agency information can be stored electronically and be accessed more efficiently when it is requested by the public.<sup>49</sup> Another participant suggested creating a blue ribbon panel to generate best practices for running a federal agency website.<sup>50</sup>

## Open Government Directive

On December 8, 2009, more than six months past the 120-day deadline set in the January 21, 2009, memorandum, OMB Director Peter Orszag released a memorandum that required executive departments and agencies to implement specific actions aimed at increasing transparency, public participation, and collaboration. The memorandum, also known as the Open Government Directive, included a variety of initiatives and a series of deadlines. The memorandum encouraged agencies “to advance their open government initiatives well ahead of those deadlines,” and restated the administration’s commitment to the “principle that openness is the Federal Government’s default position for FOIA issues.”<sup>51</sup> The memorandum organized the implementation plan into four main categories of action:

- Publish Government Information Online;
- Improve the Quality of Government Information;
- Create and Institutionalize a Culture of Open Government; and
- Create an Enabling Policy Framework for Open Government.

Within each of these broad categories, the memorandum included a list of steps for agencies to take to reach the broad OGD goals. Pursuant to the memorandum, the directive was not to be “construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests.”<sup>52</sup>

The OGD did not explain the consequences for ignoring or disobeying the directive’s requirements. It is, therefore, unclear what may happen to agencies that did not to meet the requirements set out in the December 8, 2009, OGD or to an agency that did not complete the requirements in a manner that is consistent with the spirit of the memorandum. It is also unclear whether there will be consequences for agencies that do not maintain the OGD requirements or allow certain elements of the OGD to lapse.

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<sup>49</sup> MixedInk, Institutionalizing Transparency in Government, at <http://mixedink.com/OpenGov/InstitutionalizingTransparency>.

<sup>50</sup> Ibid.

<sup>51</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 1, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

<sup>52</sup> Ibid. It is unclear how much the three-phased online Open Government Initiative influenced the directive, but some of the suggestions discussed in the online forum also appeared in the memorandum.

## Administration Testimony on the OGD

On December 10, 2009, two days after the release of the OGD, federal CTO Aneesh Chopra and federal CIO Vivek Kundra testified at a hearing of the Senate Budget Committee's Task Force on Government Performance. At the hearing, Mr. Chopra said that "[t]he directive calls for each agency to develop its own unique roadmap, in consultation with the American people and tech-savvy open government experts, rather than prescribing a one-size-fits-all approach" to create an Open Government Plan and website.<sup>53</sup>

Mr. Kundra said the directive "demonstrates the Administration's commitment to hardwire accountability and drive performance to restore the American people's confidence in Government."<sup>54</sup> In the question and answer period after the submitted testimony, Mr. Chopra said that "philosophically [the White House] focus is mostly on producing the data out and encouraging those to consume it and then create this broader ecosystem, so that the American people can get that information in ways that they may not know came out of a website in Washington."<sup>55</sup>

## Publish Government Information Online

In general, the OGD charged agencies with expanding public access to information, adopting a presumption in favor of openness and access.<sup>56</sup> The OGD then offered methods of more effectively and efficiently releasing federal information. First, the memorandum stated that "[d]elays should not be viewed as an inevitable and insurmountable consequence of high demand"; instead "agencies should publish information online in an open format that can be retrieved, downloaded, indexed, and searched by commonly used applications."<sup>57</sup> The information, according to the memorandum, should be placed online even prior to a FOIA request, to pre-empt the need for such requests.<sup>58</sup>

## Datasets

The OGD gave agencies 45 days (until January 22, 2010) to "identify and publish online ... at least three high-value data sets and register those data sets at Data.gov."<sup>59</sup> According to the

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<sup>53</sup> U.S. Congress, Senate Committee on the Budget, Task Force on Government Performance, *Data-Driven Performance: Using Technology to Deliver Results*, prepared testimony of Aneesh Chopra, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, <http://www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=budget121009&st=1005>.

<sup>54</sup> *Ibid.*, prepared testimony of Vivek Kundra.

<sup>55</sup> *Ibid.*, 60:15.

<sup>56</sup> *Ibid.*, p. 2.

<sup>57</sup> *Ibid.* The term "open format" is further defined in the memorandum as information that is "platform independent, machine readable, and made available to the public without restrictions that would impede the re-use of that information."

<sup>58</sup> Publishing FOIA information online is one suggestion that was repeated by several members of the public who participated in the Open Government Initiative's online collaboration. On June 19, 2009, for example, a user identifying himself as Adam Rappaport from the Citizens for Responsibility and Ethics in Washington, wrote a blog comment suggesting that "agencies could pro-actively disclose information and records on their websites that would help avoid a FOIA request from even occurring." See Office of Science and Technology Policy, "OSTP Blog," <http://blog.ostp.gov/2009/06/10/transparency-access-to-information/comment-page-2/#comments>.

<sup>59</sup> Executive Office of the President, *Open Government Directive—Data.gov, Frequently Asked Questions for Agencies*, (continued...)

memorandum, the datasets could not have been “previously available in an online or downloadable format.”<sup>60</sup> An attachment to the memorandum provided a definition of what would qualify as a “high value data set,” stating “[h]igh value information is information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.”<sup>61</sup>

On January 23, 2010, federal CIO Vivek Kundra posted a blog on *Whitehouse.gov*'s Open Government Initiative website that said the datasets released will “increase agency accountability ... and change the default setting of Washington to be open, transparent and participatory.”<sup>62</sup>

Among the federal datasets released online, Mr. Kundra's blog posting specifically cited the National Highway Traffic Safety Administration's (NHTSA) release of “data rating child safety seats for ease of use, simplicity of instructions and vehicle installation features.”<sup>63</sup> He also featured the Department of Transportation's (DOT's) release of the “details behind automobile safety and crash ratings gathered during crash and rollover tests conducted at their research facilities.”<sup>64</sup> Finally, citing yet another dataset available online, Mr. Kundra noted that as part of the release of datasets, Medicare information, which formerly cost \$100 to access through alternative resources, was now available for free online at *Data.gov*.

*Nextgov.com* reported that on January 26, 2010, many of the datasets that agencies claim to have posted to the website on January 22, 2010, were not available on *Data.gov* on January 25, 2010. According to the report, OMB stated that the datasets that were not posted “raised security, privacy or other concerns.”<sup>65</sup>

OMB's rating system, which “tracks agency progress” on meeting the OGD's deadlines rated nearly every agency as “meets expectations” in providing the high-value data.<sup>66</sup> As of July 28, 2010, The Office of Personnel Management (OPM) and the Council on Environmental Quality (CEQ), however, were given ratings of “progress toward expectations.” It was not made clear on the website—or in other OGD-related information—why OPM and CEQ were given this lower rating. It is also uncertain what the agencies may do to challenge or change that rating.

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(...continued)

December 23, 2009, <http://archives.gov/ogis/news/agency-faqs.pdf>.

<sup>60</sup> Ibid. Agencies were not permitted to count a dataset that had previously been released on *Data.gov* as one of the three datasets required by the initiative.

<sup>61</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, Attachment, pp. 7-8.

<sup>62</sup> Vivek Kundra, federal CIO, *How “Open Gov” Datasets Affect Parents and Consumers*, Office of Management and Budget, January 23, 2010, <http://www.whitehouse.gov/blog/2010/01/23/why-open-gov-matters-you>.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Aliya Sternstein, “Data on *Data.gov* Disappears,” *NextGov.com*, January 26, 2010, [http://techinsider.nextgov.com/2010/01/datagov\\_reported\\_data\\_is\\_disappearing.php](http://techinsider.nextgov.com/2010/01/datagov_reported_data_is_disappearing.php).

<sup>66</sup> The White House, “Open Government Initiative: Around the Government,” <http://www.whitehouse.gov/open/around>.

## Web Page

Each agency was charged with creating an Open Government Web page “to serve as the gateway for agency activities related to the” directive.<sup>67</sup> Agencies were given 60 days from the December 8, 2009, release date of the memorandum, to create the Web page (until February 6, 2010). Agencies are required to “maintain and update that webpage in a timely fashion.”<sup>68</sup> The memorandum required that agency Web pages incorporate ways for the public to offer feedback on the quality of information, provide suggestions on which information should be a priority to put online, and offer suggestions on the agency’s “Open Government Plan” overall.<sup>69</sup> Agencies are required to respond to public input related to the website.

Using the same OMB rating scale applied to the datasets, as of July 29, 2010, OMB gave all federal agencies a “meets expectations” rating on the creation of an Open Government website.<sup>70</sup> Not every agency’s Web page, however, is identical. The Social Security Administration’s (SSA’s) Web page, for example, includes references to President Obama’s memoranda and states that the administration has “a goal ... to become more open and transparent” but remains “dedicated to protecting the personal information that the American public entrusts to SSA.”<sup>71</sup> The site also contains links to the SSA’s recently released datasets, links to other federal websites aimed at increasing transparency, and a link to allow visitors to provide the administration with feedback on SSA’s Open Government Plan.<sup>72</sup> The U.S. Department of Agriculture’s (USDA’s) Web page, on the other hand, is much different from SSA’s page. USDA requires online visitors to register with the website and then permits users to offer feedback on USDA’s performance or offer new ideas to the department.<sup>73</sup> It provides few other links or additional information.

The private, nonprofit organization OMB Watch, which performs research and advocacy to promote open government, accountability, and public participation, rated the Open Government Web pages from the various agencies.<sup>74</sup> According to their Web page, OMB Watch “identified several basic disclosure functions that would make agency open government pages more useful to the public,” and used this criteria to rate agencies’ Web pages.<sup>75</sup> The results put agencies like the National Aeronautics and Space Administration (NASA), the General Services Administration

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<sup>67</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 2. Each agency is required to use a specific URL address for the website, which follows this model: [http://www.\[AGENCYNAME\].gov/open](http://www.[AGENCYNAME].gov/open).

<sup>68</sup> Ibid.

<sup>69</sup> These plans will be discussed in greater detail later in this report.

<sup>70</sup> The White House, “Open Government Initiative: Around the Government,” <http://www.whitehouse.gov/open/around>.

<sup>71</sup> The Social Security Administration, “The Open Government Initiative,” <http://www.socialsecurity.gov/open/>.

<sup>72</sup> Details of an Open Government Plan will be described in the next section of this report.

<sup>73</sup> U.S. Department of Agriculture, “[usda.gov/open](http://www.usda.gov/open),” <http://www.usda.gov/open>.

<sup>74</sup> OMB Watch, “Leaders and Laggards in Agency Open Government Webpages,” February 23, 2010, <http://www.ombwatch.org/node/10785/>.

<sup>75</sup> Among the criteria used by OMB Watch was whether the agency’s website provided a link to *Data.gov* and whether the website provided a link to all the reports the agency provided to Congress. For a complete list of the criteria and the point value assigned to each criterion, see OMB Watch, “OMB Watch Federal Agency Open Government Webpage Review Criteria Points,” <http://www.ombwatch.org/files/info/criteria.pdf>.

(GSA), and the State Department at the top of the rating system.<sup>76</sup> OMB, USDA, and the Federal Deposit Insurance Corporation (FDIC) were among the lowest rated agency websites.<sup>77</sup>

On February 12, 2010, the Project on Government Oversight (POGO), a private, nonprofit investigative organization that seeks to foster “a more effective, accountable, open, and ethical federal government,” released a statement that offered the 13 best practices for agencies’ open government Web pages.<sup>78</sup> Among the recommended best practices were: including a link to the agency’s open government Web page on the agency’s homepage; designating an agency open government point of contact for the Web page and supplying his or her contact information on the Web page; justifying why each of the datasets on the website is useful; and offering e-mail subscriptions to notify users of open government updates.<sup>79</sup>

## **FOIA in the Open Government Directive**

Pursuant to the OGD, agencies were required to put their annual FOIA report<sup>80</sup> on the Open Government Web page in an open format.<sup>81</sup> Agencies with a backlog of FOIA requests were also required to reduce the number of outstanding requests by 10% per year.<sup>82</sup> Agencies will likely be evaluated on the first year of this requirement some time in 2011.<sup>83</sup>

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Project on Government Oversight, “13 Best Practices for Open Government Webpages,” <http://pogoblog.typepad.com/pogo/2010/02/13-best-practices-for-open-government-webpages.html>.

<sup>79</sup> Ibid.

<sup>80</sup> All federal agencies are statutorily required to prepare annual FOIA reports that include detailed statistics on the number and disposition of FOIA requests and appeals received, processed, and pending at each agency. Agencies must submit the FOIA reports to the Attorney General at the Department of Justice no later than February 1 of each year. See 5 U.S.C. § 552(e)(1) and the OPEN FOIA Act of 2009 (P.L. 111-83; 123 Stat. 2184).

<sup>81</sup> As noted earlier, open formats are “platform independent, machine readable, and made available to the public without restrictions that would impede the re-use of that information.” Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 1, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

<sup>82</sup> The OGD does not specify the first year that agencies will be held accountable to meet the FOIA backlog reduction requirement. Most agencies and watchdog organizations, however, cite 2010 as the first year of implementation of this requirement. See, for example, Sunlight Foundation, “Transparency in Government: Open Government Directive Timelines,” <http://blog.sunlightfoundation.com/2009/12/08/open-government-directive-timelines/>; and U.S. Department of Labor, “FY 2010 FOIA Initial Request Backlog Reduction Plan,” <http://www.dol.gov/sol/foia/10backlog.htm>.

<sup>83</sup> Although agencies have not yet been evaluated on their ability to reduce FOIA backlogs by 10% per year, OMB did require agencies to self-assess how they planned to execute their backlog reduction. As part of OMB’s evaluation of agency progress on OGD initiatives, agencies were required to answer a series of questions about actions taken on certain OGD requirements and plans for future action on other requirements. Among the questions asked in the self-evaluation was whether the agency could provide details on how they will reduce their FOIA backlog.

**Table I. Requirements for Agencies to Publish Government Information Online**  
Implementing the December 8, 2009, OGD

Requirements	Timeline	Deadline Date
Publish three high-value datasets online in an open format	45 days from December 8, 2009	January 22, 2010
Create an open government Web page	60 days from December 8, 2009	February 6, 2010
Reduce FOIA backlog if one exists	10% per year until eliminated	N/A

**Source:** Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

## Improve the Quality of Government Information

The OGD does not specifically define what it means by “improving the quality of government.” Instead, the OGD lists methods it believes will achieve this goal. Among the various methods the Administration chose to employ to improve the quality of government information, the OGD required agencies, in consultation with OMB, to designate, within 45 days of the directive’s release (by January 22, 2010), one “high-level senior official” to be in charge of all aspects of federal spending information that is shared with the public. Specifically, this senior official is to verify the objectivity and quality of datasets that the public will find on federally hosted websites like *USAspending.gov*.

### Quality Information Framework

Pursuant to the memorandum, within 60 days of the December 8, 2009, memorandum’s release (by February 6, 2010), the deputy director of OMB was to issue “a framework for the quality of Federal spending information publicly disseminated” through a variety of government websites, including *USAspending.gov*.<sup>84</sup> The framework was to require agencies to submit plans for controlling information quality, “including system and process changes, and the integration of these controls within the agency’s existing infrastructure.”

On February 8, 2010, two days after the February 6, 2010, deadline, Jeffrey D. Zients, deputy director for Management at OMB, fulfilled this OGD requirement by releasing a memorandum on the “Framework for the Quality of Federal Spending Information.”<sup>85</sup> In the memorandum, which was directed to “senior accountable officials,” agencies were instructed to implement “organizational structure, policies, processes and systems” that helped meet three objectives:

<sup>84</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 4.

<sup>85</sup> Jeffrey D. Zients, *Memorandum for Senior Accountable Officials Over the Quality of Federal Spending Information*, Executive Office of the President, Office of Management and Budget, Open Government Directive – Framework for the Quality of Federal Spending Information, Washington, DC, February 8, 2010, <http://www.whitehouse.gov/sites/default/files/microsites/20100206-open-government-framework-quality-federal-spending-information.pdf>.

- Effectiveness and efficiency of the operations producing and disseminating financial information;
- Reliability of the financial information reported; and
- Compliance with applicable laws and regulations.<sup>86</sup>

The seven-page memorandum also offered suggestions and ideas on how senior officials could best meet these goals. Included in these suggestions were completing an “agency risk assessment” on the release of information that would help “establish appropriate controls over the information, with greater controls over higher risk areas than lower risk areas.”<sup>87</sup>

## Federal Spending Transparency

The OGD required OMB’s deputy director, within 120 days (by April 7, 2010), to issue “a longer-term comprehensive strategy for Federal spending transparency.”<sup>88</sup> The guidance would determine how agencies will submit quarterly reports “on their progress toward improving their information quality.”<sup>89</sup>

On April 6, 2010, Mr. Zients released a memorandum to “senior accountable officials” on the quality of federal spending information.<sup>90</sup> The memorandum offered guidance on three primary areas:

- Implementation of a policy to collect and make public federal spending on awards or grants that may be sub-contracted. Previously only information on primary awards and grants were made public, but by October 1, 2010, agencies will be required to report all rewards, including sub-rewards;
- Improvement of the data quality on federal grants and awards that is available to the public on *USAspending.gov*. This includes the quarterly publication of metrics on the quality of the data provided on the website; and
- Enhancement of the technological abilities of *USAspending.gov*, including the launch of new tools that would allow users to better use and analyze the data on the site.<sup>91</sup>

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<sup>86</sup> Ibid., p. 2.

<sup>87</sup> Ibid., p. 3.

<sup>88</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 4.

<sup>89</sup> Ibid.

<sup>90</sup> Jeffrey D. Zients, *Memorandum for Senior Accountable Officials Over the Quality of Federal Spending Information: Open Government Directive—Federal Spending Transparency*, Executive Office of the President, Office of Management and Budget, Washington, DC, April 6, 2010, [http://www.whitehouse.gov/omb/assets/open\\_gov/OpenGovernmentDirective\\_04062010.pdf](http://www.whitehouse.gov/omb/assets/open_gov/OpenGovernmentDirective_04062010.pdf).

<sup>91</sup> Ibid, p. 3.

**Table 2. Requirements for the Individual Agencies and Deputy Director for Management at OMB to Improve the Quality of Government Information**

Implementing the December 8, 2009, OGD

Requirements	Timeline	Deadline Date
Each agency must appoint an official to perform quality control on public data	45 days from December 8, 2009	January 22, 2010
Issue a framework for the quality of federal spending information	60 days from December 8, 2009	February 6, 2010
Issue a longer-term comprehensive strategy for federal spending transparency	120 days from December 8, 2009	April 7, 2010

**Source:** Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

## Create and Institutionalize a Culture of Open Government

The third category of implementation in the OGD instructed agencies “[t]o create an unprecedented and sustained level of openness and accountability.”<sup>92</sup>

### The Open Government Dashboard

The OGD gave the federal CIO and CTO 60 days from December 8, 2009 (until February 6, 2010), to create an Open Government Dashboard. The online dashboard was required to include each agency’s Open Government Plan as well as OMB assessments of each agency’s implementation of the OGD.<sup>93</sup> The site was required to allow the public to see “the state of open government in the Executive Branch.”<sup>94</sup>

OMB launched an Open Government Dashboard on its Open Government Initiative website in late March 2010.<sup>95</sup> The site displays a list of departments, councils, and offices within the executive branch and then gives them a color-coded rating for each of the OGD actions it was meant to complete. The color coding ranges from red for departments and entities that are rated “Fails to Meet Expectations” to green for “Meets Expectations.” As of July 29, 2010, nearly every department and entity has been rated a green (Meets Expectations) for the categories of High Value Data, Data Integrity, Open Webpage, and Public Consultation.<sup>96</sup> The dashboard also rates the agencies’ Open Government Plans, which will be discussed later in this report. In the four categories noted, four yellow ratings, or “Progress Toward Expectations,” were assigned to two agencies at the time the dashboard went online in March: the Office of Personnel Management for its “High Value Data”; the Council on Environmental Quality for its “High Value Data” as well as for its “Data Integrity”; and the Office of the United States Trade Representative for its

<sup>92</sup> Ibid.

<sup>93</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 5.

<sup>94</sup> Ibid.

<sup>95</sup> The White House, “Open Government Initiative: Around the Government,” <http://www.whitehouse.gov/open/around>.

<sup>96</sup> Ibid.

“High Value Data.”<sup>97</sup> The ratings for both the Council on Environmental Quality’s Data Integrity and the United States Trade Representative’s “High Value Data” have since been upgraded to green, but it is not clear how or why those ratings were modified.

## **Open Government Plan**

The OGD gave each agency 120 days from December 8, 2009 (until April 7, 2010), to “develop and publish on its Open Government Webpage an Open Government Plan that will describe how it will improve transparency and integrate public participation and collaboration into its activities.”<sup>98</sup>

On April 8, 2010, Federal CTO Mr. Chopra published a blog posting on the OGI website<sup>99</sup> that said all cabinet agencies had submitted Open Government Plans.<sup>100</sup> In the blog posting, Mr. Chopra said that he and Federal CIO Mr. Kundra would “assess agency Open Government plans against the criteria contained within the Open Government Directive and will publish” their findings on an online dashboard by May 1, 2010.<sup>101</sup> Beth Noveck, the United States Deputy Chief Technology Officer and Director of the White House Open Government Initiative, detailed in an April 8, 2010, blog posting on the Open Government Initiative website, some of the ideas put in agencies’ Open Government Plans.<sup>102</sup> Ms. Noveck specifically cited the Department of Education’s plan included publishing Secretary Arne Duncan’s daily schedule online<sup>103</sup> and that the Department of Justice’s plan to build a Freedom of Information Act Dashboard to “promote transparency” and “encourage [d]epartments to compete to improve their FOIA compliance.”<sup>104</sup>

On April 7, 2010, OMB posted its review ratings for each agency’s Open Government Plan on the online Open Government Dashboard.<sup>105</sup> The grading system divided the Open Government Plans into six separate categories, each of which was given a rating of “Fails to Meet Expectations,” “Progress Toward Expectations,” or “Meets Expectations.” The six rated categories were as follows:

- Overall Plan;
- Formulating the Plan—“whether the plan was created with interdisciplinary collaboration and public participation”;
- Transparency—“whether the plan fulfills the requirements for opening the doors and data of the agency”;

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<sup>97</sup> Ibid. There is no definition provided for any of the rating categories. Nor is there any explanation of why agencies received such ratings.

<sup>98</sup> Ibid.

<sup>99</sup> See <http://www.whitehouse.gov/omb/open>.

<sup>100</sup> Aneesh Chopra, “Making Government Accountable for Openness,” The White House, Washington, DC, April 8, 2010, <http://www.whitehouse.gov/blog/2010/04/08/making-government-accountable-openness>.

<sup>101</sup> Ibid.

<sup>102</sup> Beth Noveck, “Open Government Plans: A Tour of the Horizon, The White House,” Washington, DC, April 8, 2010, <http://www.whitehouse.gov/blog/2010/04/08/open-government-plans-a-tour-horizon>.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> The White House, “Open Government Initiative: Around the Government,” <http://www.whitehouse.gov/open/around>.

- Participation—“whether the plan fulfills the requirements for improving public participation in agency policymaking”;
- Collaboration—“whether the plan fulfills the requirements for cooperation within the department, across agencies, and levels of government, and with the private sector”; and
- Flagship Initiative—“whether the plan fulfills describing at least one specific and ambitious open government project.”<sup>106</sup>

According to OMB’s Open Government Plan Evaluation Criteria website, 30 criteria—drawn from the OGD—were used to evaluate each agency’s overall Open Government Plan.<sup>107</sup> Prior to the April 7, 2010, release of the OMB ratings, each agency was asked to use the evaluation criteria to self-evaluate their plan. Among the self-evaluation criteria were questions, including the following:

- “Was public consultation involved in crafting the plan?”
- “Is there a plan to foster the public’s use of this information to increase public knowledge and promote public scrutiny of agency services?”
- “Does the [plan] description provide an overview of the initiative: how it addresses one or more of the three openness principles and how it aims to improve agency operations?”<sup>108</sup>

In the OMB rating system, no agencies received a rating of “Fails to Meet Expectations,” the lowest rating. Very few of the agencies received a “Meets Expectations” rating, the highest rating, for their overall plan. Agencies that did receive the “Meets Expectations” rating for their overall plan received that same rating in the other five categories as well. Among the government entities that received this highest rating were the Department of Health and Human Services, DOT, and NASA.<sup>109</sup> Several Agencies were rated as making “Progress Toward Expectations” in all but one category. For example, USDA was rated as making “Progress Toward Expectations” in five of the six categories. It was rated as “Meets Expectations” in the “Formulating the Plan” category. The Department of Education had an identical rating.<sup>110</sup>

In addition to OMB’s rating system, a collection of transparency watchdog organizations worked together to create their own evaluation of federal agencies’ Open Government Plans. *OpenTheGovernment.org*, a coalition of journalists, consumer and good government groups, environmentalists, library groups, labor, and others who seek a more open and transparent government, conducted an audit of the open government plans from April 12 through April 23. Using *OpenTheGovernment.org*’s methodology, NASA was given the highest agency rating, with the Department of Housing and Urban Development and the Environmental Protection Agency

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<sup>106</sup> Ibid.

<sup>107</sup> The White House, “Open Government Initiative: Open Government Plan Evaluation Criteria,” <http://www.whitehouse.gov/open/documents/evaluation>.

<sup>108</sup> Ibid..

<sup>109</sup> The White House, “Open Government Initiative: Around the Government,” <http://www.whitehouse.gov/open/around>.

<sup>110</sup> Ibid.

achieving the second and third highest ratings respectively.<sup>111</sup> Among the agencies with the lowest ratings were DOJ, the Department of Energy, and OMB.<sup>112</sup>

## Transparency Working Group

The OGD gave the deputy director for Management at OMB, the federal CIO, and the federal CTO 45 days (until January 22, 2010) to “establish a working group that focuses on transparency, accountability, participation, and collaboration within the Federal Government.”<sup>113</sup> The working group is to include “senior level representation from program and management offices throughout the government” as is to focus on “several critical functions.”<sup>114</sup> Among those functions are the following:

- Provide a forum to share best practices on innovative ideas to promote transparency, including system and process solutions for information collection, aggregation, validation, and dissemination;
- Coordinate efforts to implement existing mandates for federal spending transparency, including the Federal Funding Accountability Transparency Act and the American Reinvestment and Recovery Act; and
- Provide a forum to share best practices on innovative ideas to promote participation and collaboration, including how to experiment with new technologies, take advantage of the expertise and insight of people both inside and outside the federal government, and form high-impact collaborations with researchers, the private sector, and civil society.<sup>115</sup>

On February 5, 2010, Mr. Kundra and Mr. Chopra wrote a blog posting on the OGI website saying that on January 6, 2010, the White House created a working group “to focus on transparency, accountability, participation, and collaboration within the Federal Government.”<sup>116</sup> According to the blog posting, the group has two primary functions:

1. Develop and share the best practices and innovative ideas to promote transparency, encourage participation, and foster collaboration; and
2. Coordinate efforts to implement existing mandates for federal spending transparency.<sup>117</sup>

There are 34 members of the working group, including, among others, CIOs from USDA, the Department of State, and OPM.<sup>118</sup>

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<sup>111</sup> OpenTheGovernment.org, “Open Government Plans Audit: Final Rankings,” <https://sites.google.com/site/opengovtplans/home/about-this-project/final-rankings>. The website includes detailed information on the methodology used to generate the ranking system.

<sup>112</sup> Ibid.

<sup>113</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 5.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> The White House, “Open Government Initiative: Two New Groups Dedicated to Open Government,” <http://www.whitehouse.gov/blog/2010/02/05/two-new-groups-dedicated-open-government>.

<sup>117</sup> Ibid.

## Incentive Structures

The directive gave the deputy director for management at OMB 90 days (until March 8, 2010) to issue “a framework for how agencies can use challenges, prizes, and other incentive-backed strategies to find innovative or cost-effective solutions to improving open government.”<sup>119</sup>

On March 8, 2010, Jeffrey Zients, deputy director for management at OMB, released a “Memorandum for the Heads of Executive Departments and Agencies on Guidance on the Use of Challenges and Prizes to Promote Open Government.”<sup>120</sup> Within the document, Mr. Zients described the benefits of offering prizes as work incentives, analyzed different types of prizes that may lead to different outcomes, and listed existing statutory authorities that departments and agencies may use to administer prizes to their employees. The prizes, according to Zients, will incentivize federal employees to offer creative ways to make government more open and transparent.

**Table 3. Requirements for Agencies and Government Officials to Create and Institutionalize a Culture of Open Government**

Implementing the December 8, 2009, OMB Memorandum on Open Government

Requirements	Timeline	Deadline Date
Deputy Director of Management at OMB, Federal CIO and CTO establish working group to address transparency, accountability, and participation	45 days from December 8, 2009	January 22, 2010
Federal CIO and CTO create Open Government Dashboard	60 days from December 8, 2009	February 6, 2010
Deputy Director of OMB issues guidance on a framework on incentives to prompt new solutions to make government more open	90 days from December 8, 2009	March 8, 2010
Agencies publish an Open Government Plan	120 Days from December 8, 2009	April 7, 2010

**Source:** Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

(...continued)

<sup>118</sup> The White House, “Open Government Initiative: Open Government Working Group,” <http://www.whitehouse.gov/open/documents/open-government-directive/working-group>. As noted on the Open Government Working Group website, eleven of the agencies represented in the working group are not statutorily required to comply with the Chief Financial Officer Act (P.L. 101-576), which requires certain agencies to have Chief Financial Officer positions within their agencies. The eleven agencies that are not required to have CFOs are the Office of Management and Budget, the Office of Science and Technology Policy, the U.S. International Trade Commission, the National Archives and Records Administration, the National Traffic Safety Board, the Corporation for National and Community Service, the Pension and Benefit Guarantee Corporation, the Securities and Exchange Commission, the National Labor Relations Board, and the Peace Corps. The White House, “Open Government Initiative: Open Government Working Group,” <http://www.whitehouse.gov/open/documents/open-government-directive/working-group>.

<sup>119</sup> Ibid.

<sup>120</sup> Jeffrey D. Zients, *Memorandum for the Heads of Executive Departments and Agencies: Guidance on the Use of Challenges and Prizes to Promote Open Government*, The Office of Management and Budget, Washington, DC, March 8, 2010, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-11.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-11.pdf).

## Create an Enabling Policy Framework for Open Government

The directive also sought to make certain that federal open government policies are able to keep up with constantly changing technologies, to use “new forms of communication between a government and the people.”<sup>121</sup>

### Review of Existing Guidance

The OGD directed the administrator of OIRA, in consultation with the federal CIO and CTO, to review existing guidance on “existing OMB policies ... to identify impediments to open government and the use of new technologies.”<sup>122</sup> The initiative cited the Paperwork Reduction Act guidance as a place for the OIRA administrator to start a search for policies that may be a barrier to open government. The administrator was then instructed within 120 days of December 8, 2009 (April 7, 2010), to “issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government.”<sup>123</sup>

On April 7, 2010, Cass Sunstein, the administrator at OIRA, released a series of memoranda addressing new social media issues and how the Paperwork Reduction Act would affect new social media policies.<sup>124</sup> In one of the memoranda, Mr. Sunstein wrote that many of the federal government’s social media activities are exempted from compliance with the Paperwork Reduction Act. The act, which requires agencies and departments to acquire OMB clearance prior to soliciting feedback from the general public, has often been cited as over-burdensome and time-consuming for federal government entities seeking public input.<sup>125</sup> Mr. Sunstein’s memorandum, however, included the following:

The PRA does not expressly define “information.” OMB’s regulations implementing the PRA define “information” as “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media.” In defining “information,” OMB regulations specifically exclude several types of activities, three of which are especially relevant to agency uses of social media and web-based interactive technologies to promote the goals of open government:

- **General Solicitations.** 5 C.F.R. 1320.3(h)(4) excludes “facts or opinions submitted in response to general solicitations of comments from the public, published in the Federal Register or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that

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<sup>121</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 5.

<sup>122</sup> *Ibid.*, p. 6.

<sup>123</sup> *Ibid.*

<sup>124</sup> The memoranda included a Paperwork Reduction Act primer ([http://www.whitehouse.gov/omb/assets/inforeg/PRAPrimer\\_04072010.pdf](http://www.whitehouse.gov/omb/assets/inforeg/PRAPrimer_04072010.pdf)), guidelines to increase openness in the rulemaking process ([http://www.whitehouse.gov/omb/assets/inforeg/IncreasingOpenness\\_04072010.pdf](http://www.whitehouse.gov/omb/assets/inforeg/IncreasingOpenness_04072010.pdf)), and modification of social media policies ([http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance\\_04072010.pdf](http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf)).

<sup>125</sup> See, for example, Vivek Kundra and Michael Fitzpatrick, The White House Blog, “Open Government Initiative: Enhancing Online Citizen Participation Through Policy,” June 16, 2009, <http://www.whitehouse.gov/blog/2009/06/16/enhancing-online-citizen-participation-through-policy>.

necessary for self-identification, as a condition of the agency's full consideration of the comment."

- **Public Meetings.** 5 C.F.R. 1320.3(h)(8) excludes certain "facts or opinions obtained or solicited at or in connection with public hearings or meetings."
- **Like Items.** 5 C.F.R. 1320.3(h)(10) reserves general authority for OMB to identify other "like items" that are not "information."<sup>126</sup>

**Table 4. Requirements for the OIRA Administrator, and the Federal CIO and CTO to Review Existing Guidance**

Implementing the December 8, 2009, OGD

Requirements	Time Line	Deadline Date
Review guidance on existing OMB policies	120 days from December 8, 2010	April 7, 2010

**Source:** Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

## Analysis

The Obama Administration memoranda issued on January 21, 2009, and December 8, 2009, prompt a variety of policy questions, including whether greater transparency can lead to a more efficient and effective government in a milieu of post-September 11 national security concerns. Greater public transparency and participation may lead to new ideas on how departments and agencies can cut costs and operate more efficiently. Many of the public comments and suggestions offered to date, however, have not provided viable policy options. Moreover, increased transparency and mandatory public participation requirements can slow down government operations by elongating the deliberative process. Increased participation may increase trust in the federal government while concurrently reducing the speed of government action. Additionally, increased government transparency may prompt security and privacy concerns.

Since its first full day in office, the Obama Administration has declared itself dedicated to "ushering in a new era of open and accountable government meant to bridge the gap between the American people and their government."<sup>127</sup> To meet this goal, the administration created an Open Government Initiative. The initiative seeks to open the executive branch of the federal government in three main ways: increase government transparency, public participation, and collaboration. The Open Government Directive, a memorandum detailing how departments and

<sup>126</sup> Cass Sunstein, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Social Media, Web-based Interactive Technologies, and the Paperwork Reduction Act, The White House: Office of Information and Regulatory Affairs, Washington, DC, April 7, 2010, pp. 2-3, [http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance\\_04072010.pdf](http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf).

<sup>127</sup> Executive Office of the President, "Transparency and Open Government," 74 *Federal Register* 4685, January 26, 2009. The memorandum was released on January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/).

agencies are to implement these principles, is a key component of the larger Open Government Initiative.

The directive implements the initiative's core values through four strategies:

1. Publish Government Information Online;
2. Improve the Quality of Government Information;
3. Create and Institutionalize a Culture of Open Government; and
4. Create an Enabling Policy Framework for Open Government.<sup>128</sup>

Congress can decide whether to codify any of the new Obama Administration transparency policies. On the other hand, Congress can decide whether to enact a law prohibiting the implementation of any of the open government policies. Congress could also leave these policy decisions up to the executive branch. The Obama Administration's open government policies range from the creation of a working group that focuses on transparency, accountability, and participation issues to the drafting of new guidelines for FOIA. Congress may decide that some of the policies in President Obama's December 8, 2009, memorandum increase transparency, public participation, and collaboration in a way that improves the effectiveness of federal government. Conversely, Congress may find that increased transparency and public attention make the federal government more susceptible to information leaks of sensitive materials. Additionally, increased collaboration and participation may make the sometimes slow process of democratic deliberation even slower. Congress may also choose to evaluate the monetary costs associated with implementation of the open government policies.

The OGD did not explain the consequences for ignoring or disobeying the directive's requirements. It is, therefore, unclear what may happen to agencies that did not to meet the requirements set out in the December 8, 2009, OGD or to an agency that did not complete the requirements in a manner that is consistent with the spirit of the memorandum. It is also unclear whether there will be consequences for agencies that do not maintain the OGD requirements or allow certain elements of the OGD to lapse. If Congress chose to codify any elements of the OGD, it may consider including penalties for agencies that fail to comply with the requirements.

## Transparency

The OGD states that “[t]ransparency promotes accountability by providing the public with information about what the government is doing.”<sup>129</sup> In another examination of transparency, the administration added that “putting data online” is an essential component of transparency.<sup>130</sup> In its Open Government progress report, the Administration said “[d]emocratizing data reduces cost and eliminates waste, fraud, and abuse; creates new jobs and businesses, and improves people's daily lives.”<sup>131</sup>

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<sup>128</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009.

<sup>129</sup> *Ibid.*, p. 1.

<sup>130</sup> Executive Office of the President, *Open Government: A Progress Report to the American People*, December 2009, p. 2.

<sup>131</sup> *Ibid.* It is unclear from the progress report how transparency creates new jobs. It is also unclear whether such jobs would be public or private sector positions.

The OGD required agencies to release a variety of new datasets to the public.<sup>132</sup> The datasets released on January 22, 2010, have been made available on *Data.gov*. A listing of each department (sometimes by agency or subagency) and the number of datasets they have uploaded to the website, is also available at *Data.gov*.<sup>133</sup> The listing of datasets also includes a column of information offering the number of times a particular dataset has been downloaded from the website.

Although the datasets released to the public may be useful in many ways, it is unclear how some of them will increase the transparency of the operations and actions of the federal government. The dataset on child safety seats released by the National Traffic Highway Safety Administration (NHTSA), for example, increases public knowledge of child safety seats and may inform a consumer's future purchases, but it does not affect the general transparency of NHTSA operations. Like DOT's information on crash test results discussed earlier in this report, the dataset may increase public collaboration by encouraging public suggestions on more appropriate safety testing criteria to produce more helpful or accurate datasets in the future. It can also contribute to the public consumer's knowledge of child safety seats. Similarly, removing the \$100 fee for certain Medicare information, which was also discussed earlier in this report, does not make the Centers for Medicare and Medicaid Services more transparent. The move, however, may permit more members of the public to access the information because they will not have to pay for access to the dataset and they may find the data more easily. Jerry Brito, an adjunct law professor at George Mason University, said that transparency should be "government disclosing its own actions and not just information on those it regulates."<sup>134</sup> With a multitude of new datasets and other information available to the public, the Administration has stated it will be the duty of the public to keep agency performance in check.<sup>135</sup>

Releasing previously unavailable datasets to the public, however, also may be considered increased transparency. The new datasets offer the public more information than was previously available, making the particular issue area more transparent. But this type of transparency does not give Congress or the public much insight into how the federal government itself operates or executes policies. Releasing these types of datasets or making previously available datasets easier to find and use may be better characterized as increasing data accessibility and not as increasing government transparency.

Releasing these datasets to the public also assumes that the public will have the knowledge, capacity, and resources to evaluate the data, offer valid insights, and reach replicable results and verifiable conclusions. Irresponsible manipulation of the datasets may allow certain groups or individuals to present unclear or skewed interpretations of government datasets, or come to questionable conclusions. Congress may consider ways to ensure that the public has a means to

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<sup>132</sup> The three high value datasets that were to be published on January 22, 2009, were made available via *Data.gov*. The directive also discusses the use of other public venues for government data, including *USAspending.gov* and *Recovery.gov*.

<sup>133</sup> See *Data.gov*, "Participation to Data.gov by Agency," <http://www.data.gov/reports/agencyparticipants>.

<sup>134</sup> Jerry Brito, statement made at a public event for the Advisory Committee on Transparency, a private collection of transparency advocates that is supported by the Sunlight Foundation, April 29, 2010.

<sup>135</sup> At a December 10, 2009, Senate Budget Committee Task Force on Government Performance hearing, both the federal CIO (Vivek Kundra) and the federal CTO (Aneesh Chopra) said that watch dog groups and members of the public would enforce agency accountability. U.S. Congress, Senate Committee on the Budget, Task Force on Government Performance, *Data-Driven Performance: Using Technology to Deliver Results*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 10, 2009, <http://www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=budget121009&st=1005>.

determine the authenticity of the data provided to them. Congress may also decide it needs to codify ways to ensure that all members of the public have access to these authentic datasets as well as the tools necessary to engage with the data—regardless of an individual's level of expertise or financial support. In addition, Congress may want to create ways to make clear to the public when data analysis is performed by the federal government as opposed to when analysis is performed by a private group or individual with its own goals and mission. Congress may choose to require certain government agencies to perform reviews and analyses of the data that is released to the public. Congress may also decide to hold hearings in which Members themselves determine the value and validity of agencies' datasets and analysis.

Certain OGD requirements may increase government transparency. For example, the requirement that agencies publish online—in an open, text-searchable format—all information that is to be released pursuant to the Federal Records Act may allow for easier access and more rapid analysis of federal records.<sup>136</sup> In addition, agencies must reduce their FOIA request backlogs by 10% per year. These requirements may push agencies to make information available before a FOIA request would need to be filed to access it. In addition, FOIA requests may be answered more quickly than in the past. A March 2010 audit of FOIA implementation during the first year of the Obama Administration (2009) determined, however, that fewer than a third of executive-branch agencies made “concrete changes” to their internal FOIA policies after the release of both President Obama's and Attorney General Eric Holder's memorandums on the topic.<sup>137</sup> According to the George Washington University report, responses to FOIA requests varied greatly by agency.<sup>138</sup>

## Public Participation

In the December 8, 2009, directive, OMB said that “[p]articipation allows members of the public to contribute ideas and expertise [so] ... their government can make policies with the benefit of information that is widely dispersed in society.”<sup>139</sup> The Office of the President's Progress Report said that “[g]reater access to information about how the government does its work” would drive “greater citizen participation.”<sup>140</sup>

The OGD presumably was created, in part, using suggestions from the public. As noted earlier, these suggestions were of varied relevance and utility. One editorial on the use of public participation noted the need of well-informed public to make this directive successful.

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<sup>136</sup> 44 U.S.C. Chapter 31.

<sup>137</sup> The National Security Archive and The George Washington University, *Sunshine and Shadows: The Clear Obama Message for Freedom of Information Meets Mixed Results*, The National Security Archive FOIA Audit, Washington, DC, March 15, 2010, p. 3, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/2010FOIAAudit.pdf>.

<sup>138</sup> *Ibid.*

<sup>139</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, p. 1.

<sup>140</sup> Executive Office of the President, *Open Government: A Progress Report to the American People*, December 2009, p. 4. This assertion, however, is untested. Several studies have found that using the internet in other areas of federal governance as a way to increase public participation has not revolutionized how government interacts with the people. See, for example, Stuart W. Shulman, “The Internet Still might (but Probably Won't) Change Everything: Stakeholder Views on the Future of Electronic Rulemaking,” available at [http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking\\_final.pdf](http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf). In another example, Jeffrey Lubbers of American University argued that in certain circumstances, the internet may have the unintended consequence of giving industry groups and other vested interests even more power in the policy making process. See Ralph Lindeman, “Electronic Rulemaking Could Advantage Private Interest Groups, Top Expert Asserts,” *BNA Daily Report for Executives*, December 6, 2005, p. A-30.

The directive is also predicated on the existence of a significant number of citizens who are motivated to engage in public policy deliberations and who are capable of doing so. The quality of public comments on the development of the open government directive last summer, which sometimes suffered from digressions into extraneous matters, was not consistently encouraging on that score.<sup>141</sup>

The directive required that each agency establish an Open Government Web page on which the public can offer assessments and other feedback on the quality of published information. Agencies are also required to respond to this public input. It is unclear whether public comments will be useful to the federal government, or whether responding to public comments will cause delays in government action. It is also unclear how many dedicated employees and work hours may be needed to respond to these comments. Congress may find that using technology that allows the public to comment as well as to evaluate the public comments of others—similar to the technology used by OMB during the three-stage Open Government Initiative information gathering process—may help agencies sift through what may be voluminous public responses of varying utility. Such rating systems may also allow federal agencies to direct their attention to suggestions that offer greater utility and application to policy improvements.

Congress may also have concerns that most public participation may come from special interest groups that have the time, resources, and knowledge to engage with federal agencies. Using Web pages and other technology to solicit public opinion may, therefore, strengthen relationships between certain individuals or organizations and federal agencies—granting certain participants greater access to policymakers.

Given the wide disparity of approaches used by agencies to develop the Open Government Web pages, if Congress chose to statutorily require agencies to maintain Open Government Web pages, it may want to include more specific criteria to make agency websites more uniform. The OGD provides very little information as to what must be included on the Open Government Web pages. OGD instructions require agencies to put their annual FOIA report on the page as well to solicit and respond to public feedback through the Web page. Congress could statutorily require agencies to follow certain website protocols. Options for agency websites could include requirements to post all released datasets on their Open Government Web pages. Congress could also require agencies to put all documents released under FOIA on the agency websites in a text-searchable format. Congress could also choose not to act. Alternatively, it could wait for more public feedback on the utility of agencies' Open Government Web pages as well as judge for themselves whether these websites are helpful and necessary.

## **Collaboration**

Collaboration, according to OMB, “improves the effectiveness of Government by encouraging partnerships and cooperation within the Federal Government, across levels of government, and between the Government and private institutions.”<sup>142</sup> The Progress Report from the Office of the

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<sup>141</sup> Steven Aftergood, “New Directive Would Foster Open Government,” *Secrecy News*, December 8, 2009, [http://www.fas.org/blog/secrecy/2009/12/open\\_government.html](http://www.fas.org/blog/secrecy/2009/12/open_government.html).

<sup>142</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009.

President, adds that “collaboration focuses on finding innovative strategies for solving challenges.”<sup>143</sup>

The OGD required OMB’s deputy director for Management and other officials to create a working group focused on transparency, accountability, participation, and collaboration. The working group is charged with taking “advantage of the expertise and insight of people both inside and outside the Federal Government, and form high-impact collaborations with researchers, the private sector, and civil society.”<sup>144</sup> The working group, however, is not required to include members from the general public. The directive states that the group will include “senior level representation from program and management offices throughout the Government.” Congress may find that the design of the working group should remain as recommended by the administration. Conversely, Congress may decide to create in statute a similar working group or advisory body that requires some members to represent the general public or other areas of civil society that may have an interest in the group’s findings. The addition of such members may make the operations of the working group more transparent, as well as lead to more creative and effective recommendations.

The deputy director for OMB was required to issue additional guidance on how agencies can use “challenges, prizes, and other incentive-backed strategies to find innovative or cost-effective solutions to improving open government.”<sup>145</sup> Creating an incentive structure that prompts federal employees to offer creative policy ideas can be difficult. Congress may seek to codify the use of incentives and ensure that the prizes are of a value that would be of interest to federal employees. Congress may also seek to find additional methods to recognize federal employees who offer viable and effective policy solutions.

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<sup>143</sup> Executive Office of the President, *Open Government: A Progress Report to the American People*, December 2009, p. 5.

<sup>144</sup> Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009.

<sup>145</sup> *Ibid*, p. 5.