

A REPORT BY

OpenTheGovernment.org

Americans for Less Secrecy, More Democracy

secrecy

secrecy

report card

2008

INDICATORS OF SECRECY

IN THE FEDERAL GOVERNMENT

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ABOUT OPENTHEGOVERNMENT.ORG

OpenTheGovernment.org is an unprecedented coalition of consumer and good government groups, librarians, environmentalists, labor, journalists, and others united to push back governmental secrecy and promote openness. We are focused on making the federal government a more open place to make us safer, strengthen public trust in government, and support our democratic principles.

To join the coalition, individuals are invited to read and sign the Statement of Values. Organizations are welcome to visit our site, read the Statement of Values, and contact us if interested in becoming a coalition partner. The statement of values is available at www.OpenTheGovernment.org.

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BY THE NUMBERS

CLASSIFIED INFORMATION

- *Classification activity still remains significantly higher than before 2001.*
In 2006, the number of original classification decisions increased slightly to 233,639, after dropping two years in a row. The numbers remain significantly higher than before 2001.
- *\$195 Spent Creating and Securing Old Secrets for Every Tax Dollar Spent Declassifying*
The government spent \$195 maintaining the secrets already on the books for every one dollar the government spent declassifying documents in 2007, a 5% increase in one year. At the same time, fewer pages were declassified than in 2006.
- *18% OF DOD FY 2008 Acquisition Budget Is Classified or "Black"*
"Black" programs accounted for about \$31.9 billion, or 18 percent of the (FY) 2008 Department of Defense (DOD) acquisition funding requested in 2007. Classified acquisition funding has more than doubled in real terms since FY 1995.

FREEDOM OF INFORMATION ACT

- *FOIA Requests Continue to Rise; Backlogs Problems Persist*
Almost 22 million FOIA requests were received in 2007, an increase of almost 2% over last year. The 25 departments and agencies that handle the bulk of the third-party information requests, however, received 63,000 fewer requests than 2006 — but processed only 2,100 more.
- *Costs rise, but at 25 agencies expenditures fell*
In 2007, the total cost of FOIA implementation across the government increased 16%. But a 2008 study revealed that, in 2007, FOIA spending at 25 key agencies fell by \$7 million to \$233.8 million and the agencies put 209 fewer people to work processing FOIA requests.

INVENTION SECRECY

- *128 New Patents Kept Secret, 5,002 "Secrecy Orders" in Effect*
In 2007, the federal government closed the lid on 128 patents. Overall, that brings the total number of inventions kept under "secrecy orders" to 5,002.

THE COURTS

- *2,371 Orders of the Secretive Foreign Intelligence Surveillance Court*
While the Foreign Intelligence Surveillance Court does not reveal much about its activities, the Department of Justice reported that, in 2007, the FISC approved 2,371 orders — rejecting three and approving two left over from the previous year.

WHISTLEBLOWERS

- *Whistleblowers Lawsuits Recover Billions for Taxpayers; 900 Cases Wait DOJ Action*
In FY 2007, suits brought by whistleblowers accounted for \$1.45 billion of the \$2 billion the United States obtained in settlements and judgments concerning fraud on the United States. However, DOJ faces an ever-growing backlog of over 900 cases.

FEDERAL CONTRACT COMPETITION

- *More than 25% of all awards are not competed at all*

In 2007, 26.2 percent (\$114.2 billion) of federal contracts' dollars were completely uncompleted; only one-third of contracts dollars were subject to full and open competition. On average since 2000, more than 25% of all contract funding was not competed and fully and openly competed contracts have dropped by almost 25%

MANDATORY DECLASSIFICATION REVIEW

- *Review Process Yields Information, But Backlogs Significant*

In 2007, agencies received 7,827 new initial requests for Mandatory Declassification Review (MDR), of which 88% were processed, resulting in the declassification of information in 431,371 pages: 75% in full; 18% in part; 7% remained classified in their entirety after review. For 2007, almost 5,000 initial requests — 42% — were carried over into 2008.

FEDERAL ADVISORY COMMITTEE ACT (FACA) MEETINGS

- *Scientific and Technical Advice Increasingly Closed to Public*

In 2007, governmentwide 64% of FACA committee hearings were closed to the public. Excluding groups advising three agencies that historically have accounted for the majority of closed meetings, 15% of the remainder were closed — a 24% increase over the number closed in 2006. These numbers do not reflect closed meetings of subcommittees and taskforces.

PRESIDENTIAL SIGNING STATEMENTS

- *George W. Bush issues 156 Statements; Number Declines in 2nd Term*

In seven years, President Bush has issued at least 156 signing statements, challenging over 1000 provisions of laws. In 2007, 8 were issued.

"STATE SECRETS" PRIVILEGE

- *Reported Invocations Continue to Rise*

Invoked only 6 times between 1953 and 1976, the privilege has been used a reported 45 times — an average of 6.4 times per year in 7 years (through 2007) — more than double the average (2.46) in the previous 24 years.

ASSERTIONS OF EXECUTIVE PRIVILEGE

- *Since Kennedy, only Nixon and Clinton surpass President Bush*

President G.W. Bush has asserted Executive Privilege 3 times in response to congressional requests, as of June 28, 2007.

NATIONAL SECURITY LETTERS

- *National Security Letter Requests Continue to Rise; 2007 Numbers Still Classified*

The recently unclassified new number for 2006 shows a 4.7 percent increase in requests from 2005.

EXECUTIVE SUMMARY

OpenTheGovernment.org's fifth annual report, Secrecy Report Card 2008, shows both a continued expansion of government secrecy across a broad array of agencies and actions and some movement toward more openness and accountability, particularly in the Congress.

The public has a right to know what its government is doing to preserve health, safety, and the public weal. Information created by or for the federal government belongs to the American public and should be open (except in strictly limited and specified contexts). The administration of President George W. Bush has over its seven and one half years to date exercised unprecedented levels not only of restriction of access to information about federal government's policies and decisions, but also of suppression of discussion of those policies and their underpinnings and sources. It continues to refuse to be held accountable to the public through the oversight responsibilities of Congress. We have been made less secure as a result and the open society on which we pride ourselves has been undermined and will take hard work to repair.

HIGHLIGHTS

- The government spent \$195 maintaining the secrets already on the books for every one dollar the government spent declassifying documents in 2007, a 5% increase in one year. At the same time, fewer pages were declassified than in 2006, even though the government spent the same amount of money on declassification. The intelligence agencies, which account for a large segment of the declassification numbers, are excluded from the total reported figures.
- In 2007, the number of original classification decisions increased slightly to 233,639, after dropping two years in a row. The numbers remain significantly higher than before 2001. The number of derivative classifications also increased from 20,324,450 in 2006 to 22,868,618 in 2007 — an increase of almost 13%.
- The total cost of FOIA implementation in 2007 across the government increased 16%. But a 2008 study by the Coalition of Journalists for Open Government (CJOG) revealed that, in 2007, FOIA spending at the 25 agencies it examined fell by \$7 million to \$233.8 million and the agencies put 209 fewer people to work processing FOIA requests.
- Almost 22 million FOIA requests were received in 2007, an increase of almost 2% over last year. Agencies are not, however, taking advantage of significant opportunities to reduce their backlogs: the 25 departments and agencies that handle the bulk of the third-party information requests received the fewest requests since reporting began in 1998 — 63,000 fewer than 2006 — but they processed only 2,100 more requests than they did in 2006 (when the backlog soared to a record 39%).
- In the fiscal year ending September 30, 2007, the United States obtained over \$2 billion in settlements and judgments concerning fraud on the United States, \$1.45 billion as a result of whistleblower qui tam suits. However, DOJ faces an ever-growing backlog of over 900 cases. Since 1986, whistleblowers helped the federal government recover over \$20 billion according to the latest figures from the U.S. Department of Justice.
- On average since 2000, non-competed contract funding makes up more than 25 percent of all awards. In FY 2007, 26.15 percent (\$114.1 billion) of federal contract funding was given out without any competition; another 5 percent (\$22.9 billion) was awarded without competition because of specific requirements. In 2000, 45 percent of contract dollars were awarded under full and open competition; by 2007, only 33 percent followed such open procedures — a drop of almost 25%.

- With 2,371 secret surveillance orders approved in 2007, federal surveillance activity under the jurisdiction of the secretive Foreign Intelligence Surveillance Court has risen for the 9th year in a row — more than doubling since 2000.
- In 2007, agencies received 7,827 new initial requests for Mandatory Declassification Review (MDR), of which 88% (6,881) were processed, resulting in the declassification of information in 431,371 pages (93%): 75% (347,338) in full; 18% (84,033) in part. Seven percent (30,125 pages) remained classified in their entirety after review. A sizeable backlog of initial requests is carried forward each year, however. For 2007, almost 5,000 initial requests — 42% — were carried over into 2008.

INTRODUCTION

An open and accountable government is the foundation of our democratic republic. Transparency serves as a means to hold governments accountable — helping to root out abuse of power, bad decisions, illegal actions, or embarrassing facts that may put lives at risk. A [March 2008 Sunshine Week poll](#) found that three-quarters of American adults view the federal government as secretive, and nearly nine in 10 say it's important to know presidential and congressional candidates' positions on open government when deciding for whom to vote. The survey showed a significant increase over the past three years in the percentage of Americans who believe the federal government is very or somewhat secretive, from 62 percent of those surveyed in 2006 to 74 percent in 2008. This is terrible news for our country and our system of government. In exit polls during the 2006 Congressional elections, similarly, more than 40% of voters indicated that corruption and scandals in government were very important in their voting decisions. Sunshine on the workings of government is the first step toward winning back public trust.

Government secrecy, particularly in the executive branch, continued in 2007 to expand across a broad array of agencies and actions, including new classification decisions, secret Foreign Intelligence Surveillance Court orders, military procurement, new private inventions, and the scientific and technical advice that the government receives, and an ongoing drop in the percentage of fully and openly competed federal contracts. A further troubling trend is the inability of the Department of Justice to handle cases concerning fraud on the federal government, resulting in a backlog of over 900 cases.

Signs of progress exist in some areas toward more openness, the results of continued determination on the part of the public and its representatives. Even as more and more categories that exclude information from access are created by agencies, the public use of the Freedom of Information Act to obtain information from our government continues to rise, and Congress is working to rein in the use and abuse of such categories. Congress has also taken steps to counter the Administration in areas such as over-classification.

OpenTheGovernment.org issued the first edition of the Secrecy Report Card to call attention to the remarkable expansion of secrecy in the federal government. This year's expanded report seeks to provide a more complete picture of secrecy and openness in the federal government, expanding this year to cover Mandatory Declassification Review numbers and progress under the Automatic Declassification Review process.

This year's Report is divided into three parts: **Information Trends**, **Money Trends** and **Legislative Initiatives toward Executive Branch Openness**. Our intent is to make information easier to find.

A NOTE ON THE INDICATORS

OpenTheGovernment.org seeks to identify measurable indicators that can be used as benchmarks to evaluate openness and secrecy in government in the United States. We include data based on three criteria:

- data that show trends over time;
- data that have an impact across the federal government or the general public; and
- data that already exist and require little or no further analysis.

There are many indicators out there that could be included, and we will continue to add to the indicators. These indicators are not intended to be comprehensive.

What follows is a brief look at how the main indicators we examine have changed over time. We have also added two new indicators — progress under the *Automatic Declassification Review* process and *Mandatory Declassification Review* numbers.

INFORMATION TRENDS IN SECRECY AND OPENNESS

INFORMATION MOVING IN AND OUT OF THE CLASSIFICATION SYSTEM

In 2007,¹ the number of original classification decisions, the “sole sources of newly classified information,” increased to 233,639, up from 231,995 in 2006 — after dropping for two years in a row. While the Information Security Oversight Office (ISOO) reports² that, for the third year in a row, the majority of original classifications decisions have been assigned a declassification date of ten years or less, the percentage of original classification decisions assigned *automatic* declassification in ten years has continually declined over the same period — from 64% in 2005, to 61% in 2006, to 57% in 2007.

Classification Activity Remains High

Fiscal Year	Original Classification Decisions*	Number of Pages Declassified
1995	167,840	69,000,000
1996	105,163	196,058,274
1997	158,733	204,050,369
1998	137,005	193,155,807
1999	169,735	126,809,769
2000	220,926	75,000,000
2001	260,678	100,104,990
2002	217,288	44,365,711
2003	234,052	43,093,233
2004	351,150	28,413,690
2005	258,633	29,540,603
2006	231,995	37,647,993
2007	233,639	37,249,390

Tip of the Iceberg: 4,128 “original classifiers”

Several thousand federal workers have the authority to create a new memo, analysis, or report and to classify the information contained in the document as either “top secret,” “secret” or “confidential.” In government parlance, these people have “original classification authority (OCA).” In 2007, the number of OCAs climbed to 4,182 — a 2% increase over the number in 2006.

Once information is designated as classified by an OCA it can be used by many people in government in many different ways, creating new and possibly multiple forms of the information. This process is referred to as “derivative classification.” Derivatively classified information may potentially be generated by any of the more than 3 million persons who hold clearances for access to classified information.

1. All years are Fiscal Years unless otherwise indicated or a specific date is given.

2. Information Security Oversight Office. 2007 Report to the President. <http://www.archives.gov/isoo/reports/2007-annual-report.pdf> All information in this section is derived from this report.

Persons in Government with Original Classification Authority

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
# of Persons	5,661	5,461	5,379	4,420	4,010	3,903	3,846	4,130	4,132	4,006	3,978	4,007	3,959	4,042	4,182

Source: ISOO Information Security Oversight Office. [2007 Report to the President](#)

Derivative Classifications Skyrocket

The number of derivative classifications also increased from 20,324,450 in 2006 to 22,868,618 in 2007 — an increase of almost 13%. ISOO notes that this number has steadily increased, from 5,684,462 derivative actions in 1996 (the first full year following the issuance of Executive Order (E.O.) 12958). Derivative classifications replicate originally classified information in different ways and formats. The growing number of derivative classifications reflects the continuing increase in original classification and, according to ISOO, the use of classified e-mail, web pages, blogs, wikis, etc. Whatever the reasons, however, these actions indicate the workload that government declassifiers will face in the coming years.

AUTOMATIC AND SYSTEMATIC DECLASSIFICATION REVIEW

Last year, agencies reached a milestone with the arrival of the first 25-year automatic declassification date. E.O. 12958, issued in April 1995 and amended by President Bush in March of 2003,³ requires all agencies to automatically declassify information that has “permanent historical value,” unless the information falls under several limited exemptions allowing continued classification. After several deadline extensions, automatic declassification came into effect on December 31, 2006. According to ISOO, it appears that all agencies have met their automatic declassification obligations. It is worth noting that the data ISOO has collected during 1996–2007 combines automatic declassification review and systematic declassification review. The latter, also mandated by the E.O., requires agencies to create and maintain a viable systematic review of permanently valuable records previously exempted from declassification, and to prioritize review based on researcher interest and the likelihood of declassification.

In 2007, both pages reviewed and paged declassified declined slightly. Agencies reviewed 59,732,753 pages for declassification and declassified 37,249,390 pages in 2007; in comparison, agencies reviewed 68,745,748 pages and declassified 37,647,993 pages in 2006. The declassification rate increased in 2007, though. According to the ISOO report, agencies are now declassifying 62% of the materials they review, an increase over previous years.

Declassification increases, but public access remains a problem

As the 2006 ISOO Report noted, however, “declassification does not always equate to public access.” Declassified information must be reviewed for information not releasable to the public, and the declassified records need to be processed by the National Archives and Records Administration (NARA), which is under-resourced for this task.

Some Agency Numbers⁴

ISOO reports that the National Security Council declassified 595,000 pages in 2007 — a 1,044% increase from 2006. NARA had a 350% increase in the same period, declassifying 967,758 pages — a 48% declassification rate. The State Department reviewed 6,716,283 pages for automatic declassification, declassifying 5,767,385 pages — a rate of 86%.

The Central Intelligence Agency (CIA) reviewed 4,148,102 pages in 2007, a 138% increase from 2006 (1,744,315 pages). The increased review did not result in increased declassification: the declassification rate plummeted from 58% in 2006 (1,021,105 pages declassified out of 4,148,102 pages reviewed) to 35% in 2007 (1,451,239 pages declassified out of 6,716,283 pages reviewed). The Department of Justice, including the FBI, achieved a 2% rate of declassification — 19,548 pages of 947,101 reviewed for automatic declassification, a slight increase over their 2006 rate of 1.4% (153,333 pages out of 11,202,456 pages reviewed).

3. Hereafter, the E.O. or E.O. 12958.

4. Unless otherwise noted, the numbers are presumed to include both automatic and systematic declassification review.

Problems Loom

E.O. 12958 gave agencies a five-year delay in the automatic declassification of classified information contained in “special media” — microforms, motion pictures, audio tapes, videotapes, or “comparable media.” This delay expires on December 31, 2011. ISOO notes that, while some agencies are taking steps to consider their special media records, others are not. Nor have they focused on how to process referrals of special media referrals, as most of their attention is going to how to best review the massive number of textual referrals under a looming December 31, 2009 deadline.

Agencies also were granted a 3-year delay in the automatic declassification of records containing information from more than one agency; the initial delay ends on December 31, 2009. In order to qualify for the delay, agencies were required to have referred such records (to the other agencies) by December 31, 2006. ISOO notes, however, that the “agency-centric” approach used by agencies in conducting declassification reviews has resulted in “millions of records requiring referral” that must be adjudicated by the 2009 deadline. In many cases, “agencies have simply referred any and all information from other agencies to other agencies, without discrimination,” leading to a “mountain” of records requiring unnecessary review — as the information was either not sensitive in the first place, or is no longer sensitive.

On the other hand, ISOO notes, some agencies reviewing their own documents have failed to properly refer classified information, leading to other agencies designating records as being declassified improperly. As in the case exposed in 2006 at the National Archives, some of the agencies with “equities” in the records took steps to remove the records from public access, in effect reclassifying them.

Reclassification

Over two years ago, the ISOO conducted an audit based on suspicions that previously public documents had been removed from the shelves of the Archives. The audit, which examined all re-review efforts since 1995, found that ten unrelated efforts had resulted in the withdrawal of at least 25,315 publicly available records from the shelves of the Archives. At that time, the agencies were directed to work with the National Archives Record Administration (NARA) to restore the withdrawn materials to the shelves.

In its 2007 report to the President, ISOO notes that at the end of FY 2007 “some agencies, including the CIA and the Air Force, had yet to complete their reviews and return their decisions to NARA.” Additionally, over 5,000 referrals had yet to be adjudicated. In discussions with ISOO, the agencies indicated that they hope to have finished this process by the end of FY 2008.

Separately, under the 1998 Kyl-Lott amendments, DOE has spent over \$22 million while surveying more than 200 million pages of released documents. The unclassified report by DOE to Congress indicated that 6,640 pages have been withdrawn from public access (at a cost of \$3,313 per page). In 2006, an additional 175 pages were withdrawn from public access.⁵ The costs identified in 2005 are likely an additional cost of classification, separate from the ISOO count. We were unable to obtain final cost numbers for either 2006 or 2007 (and the review overall) from DOE for inclusion in this report. The DOE Office of Security Policy said the information on Kyl-Lott is not kept separately and they are not required to generate new information in response to a FOIA request they required us to make (although in the past they provided the information to William Burr at the National Security Archive after an e-mail request).

MANDATORY DECLASSIFICATION REVIEW

The Mandatory Declassification Review (MDR) process under E.O. 12958 permits individuals or agencies to require the review of specific classified national security information for declassification. MDR is used in lieu of litigation to denials of requests under the Freedom of Information Act (FOIA), and to seek declassification of Presidential papers or records not subject to FOIA.

In 2007, agencies received 7,827 new initial requests, processing 6881 (88%) — 461,496 pages. This resulted in the declassification of information in 431,371 pages (93%): 75% (347,338 pages) in full; 18% (84,033 pages) in part. Seven percent (30,125 pages) remained classified in their entirety after review.

5. Department of Energy, Office of Classification, Office of Health, Safety and Security. “Twenty-Fourth Report on Inadvertent Releases of Restricted Data and Formerly Restricted Data under Executive Order 12958 (U): Report to: The Committee on Armed Services of the Senate, The Committee on Armed Services of the House of Representatives, The Assistant to the President for National Security Affairs.” February 2007. <https://www.osti.gov/opennet/reports/twentyfourthrpt.pdf>

In 2006, agencies processed 3,378 of 3,769 requests but only 123,469 pages. Historically, since 1996, agencies have reviewed 2,547,524 pages overall and declassified 91% of the pages processed from 1996–2007, denying 9% in full.

While the increase in 2007 is significantly higher than in previous years (on average, agencies reviewed 189,680 pages each year 1996–2006), there is a sizeable backlog of initial requests carried forward each year. In this period, agencies carried over an average of 50% of their total case load from one fiscal year to the next; ISOO notes that, on average (1996–2006), agencies annually carried over 3,720 cases into the next fiscal. In 2007, the percentage was slightly lower — 42%, but this encompassed almost 5000 initial requests carried over into 2008.

MDR Appeals

In 2007, agencies processed 104 appeals of agency decisions to deny information under the MDR process. ISOO notes this represents a significant increase over 2006 — 67 appeals — but is slightly below the overall average (1996–2006) of 106 appeals processed annually. Agencies reviewed 8,122 pages in 2007, an increase of 46% over the 5,558 pages reviewed in 2006. The 2007 reviews resulted in the declassification of additional information in 66% (5,346) of the pages reviewed: 15% (1,285 pages) in full; 50% (4,067 pages) in part. Forty-five percent (2,776 pages) remained classified in their entirety after review.

As with initial requests, agencies face a continuing and growing backlog of MDR appeals: 105 appeals cases are being carried forward into 2008. Three agencies account for the vast majority of these: NARA (42); CIA (31); and DOD (20).

ISCAP Appeals

Any final decision made by an agency to deny information during an MDR appeal may be appealed by the requester directly to the Interagency Security Classification Appeals Panel (ISCAP). In 2007, the ISCAP decided on 24 documents that had remained fully or partially classified under MDR appeals. It declassified information in 17% of these documents, declassifying the entirety of the remaining classified information in one document (4%) and declassifying some portions and affirming the classification of other portions in 3 documents (13%). It fully affirmed the prior agency decisions in their entirety for 83% (20) of the documents.⁶ The ISCAP decisions are made at the discretion of the Panel, unless changed by the President. The original E.O. 12958 provided agency heads with the ability to appeal the ISCAP's decisions to the President through the Assistant to the President for National Security Affairs.^{Endnote A}

NATIONAL SECURITY LETTERS

As discussed in last year's Secrecy Report Card, in March 2007, the Inspector General (IG) of the Department of Justice (DOJ) announced that several factors concerning the way National Security Letters (NSLs) are tracked in the Federal Bureau of Investigation's database resulted in significantly understating the numbers reported to Congress in previous years. DOJ notified Congress that it would work to address these issues and provide Congress with updated statistics as soon as possible. A year later a second report, released in March 2008, confirmed the findings of the first and provided statistics for 2006.

The revised numbers released in the Inspector General's 2008 report indicate that the government made 49,425 NSL requests in 2006; these requests sought information pertaining to 4,790 different United States persons. The numbers for 2007 remain classified at this writing.

Specific numbers detailed in the Inspector General's 2008 reports include:⁷

2000*	8,500
2003	39,346
2004	56,507
2005	47,221
2006	49,425

* Total number in 2000 prior to passage of the USA PATRIOT Act

6. ISOO notes that these 20 documents had been previously reported as declassified in their entirety or in part in the ISCAP section of the 2005 ISOO Annual Report and data carried forward in the 2006 report. ISCAP decided to delay implementation of its decisions and in 2007 reversed itself.

7. A Review of the Federal Bureau of Investigation's Use of National Security Letters: Assessment of Corrective Actions and NSL Usage in 2006 (Unclassified), March 2008 <http://www.usdoj.gov/oig/special/s0803b/final.pdf>.

Percentage of NSL requests generated from investigations of U.S. Persons:

- 2003 about 39%
- 2004 about 51%
- 2005 about 53%
- 2006 about 57%

Notably, however, a letter to Vice President Cheney from the DOJ Office of Legislative Affairs written in April of 2008 indicated that numbers from 2006 “should be considered approximate,” and 2007 statistics will be released “as soon as they are available.”⁸

THE FREEDOM OF INFORMATION ACT (FOIA)

Use of Freedom of Information Act Grows; Costs Escalate

Public requests for information under the Freedom of Information Act continued to grow in 2007. Almost 22 million (21,758,628) FOIA requests were received governmentwide in 2007 — a nearly 2% increase over the total number of requests made in 2006 (21,412,736). As we previously noted, the massive increase in the number of requests reported after 2004 is due mostly to the fact that the Social Security Administration and the Veterans Administration inappropriately include first-person Privacy Act requests (such as requests for an individual’s social security information) as FOIA requests.

While the total number of FOIA requests received across the government increased almost 2%, the total cost of FOIA implementation increased 16%. Some of this is likely attributable to the inappropriate counts at SSA and VA, but it is unclear how much. Moreover, a 2008 [study](#)⁹ by the Coalition of Journalists for Open Government (CJOG) revealed that, in 2007, FOIA spending fell by \$7 million (3%) to \$233.8 million at the 25 agencies that handle the bulk of the third-party information requests over the last ten years, and the agencies put 209 (8%) fewer people to work processing FOIA requests.

Public Requests Under the Freedom of Information Act

Year	# of FOIA Requests Received	Total Cost of FOIA
1999	1,908,083	\$286,546,488
2000	2,174,570	\$253,049,516
2001	2,188,799	\$287,792,041
2002	2,429,980	\$300,105,324
2003	3,266,394	\$323,050,337
2004	4,080,737	\$336,763,628
2005	19,950,547	\$334,853,222
2006	21,412,736	\$304,280,766
2007	21,758,628	\$352,935,673

Calculated by OpenTheGovernment.org from individual agency Annual FOIA Reports

8. <http://epic.org/privacy/terrorism/2007fisa-ltr.pdf>

9. Coalition of Journalists for Open Government. “An Opportunity Lost: an in-depth analysis of FOIA performance from 1998 to 2007,” March 2008. <http://www.cjog.net/> The study looked at but did not incorporate a comparative analysis of the performance of four agencies, including the Department of Veterans Affairs and the Social Security Administration, that include large numbers of first person Privacy Act requests in their FOIA reporting.

Backlogs Still Significant Problem

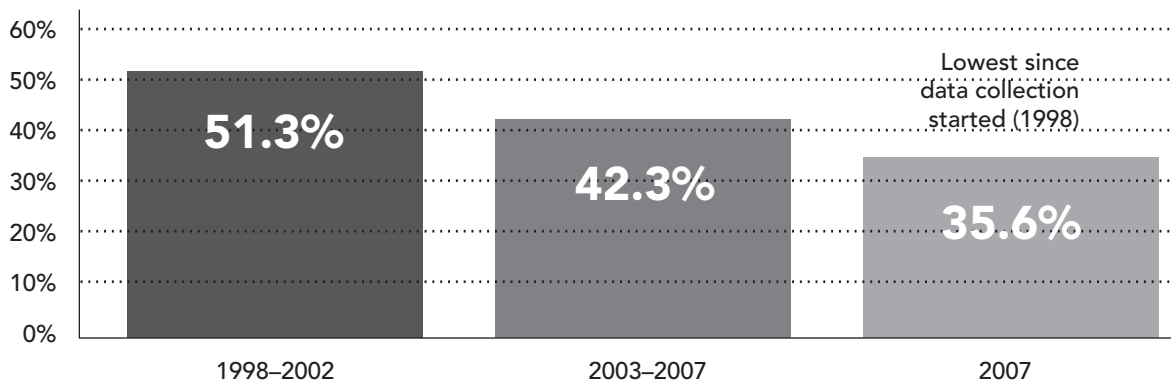
Last year the National Security Archive released an [audit](#) of pending FOIA requests that found some requests had not been answered for over 10 years.¹⁰ In 2007, the Department of Justice [directed](#)¹¹ the agencies to include a listing of the 10 oldest pending FOIA requests in their annual FOIA reports (this requirement was codified in the OPEN Government Act) — to focus agency attention on, “one aspect of FOIA backlogs that frequently receives a great deal of attention.”¹² According to review of the agencies’ FOIA reports by OpenTheGovernment.org, the oldest pending request is at the Department of Energy and has been pending since December 1991.

The Coalition of Journalists for Open Government (CJOG) report noted above found that the 25 agencies at which they looked failed to make significant dents in their FOIA backlogs despite receiving the fewest number of requests since reporting began in 1998. Further, those agencies reduced the number of FOIA personnel by 8% and reduced spending on FOIA by 3%.¹³

Specifically:

- The 25 agencies received the fewest requests since reporting began in 1998 — 63,000 fewer than 2006, but they processed only 2,100 more requests than they did in 2006 when the backlog soared to a record 39%.
- The backlog did fall to 33% of requests processed, primarily because of significant reductions at Homeland Security (97% to 62%), HUD (188% to 10%), and the Securities and Exchange Commission, (126 to 55%). Eleven agencies showed no improvement or greater backlogs.
- The percentage of requesters getting a full grant (35.6%) fell to a record low since agency reporting began in 1998. The percentage receiving either a full or partial grant also hit a record low 60%.

Full Granting of FOIA Requests



Source: OMB Watch based on Coalition of Journalist for Open Government, “An Opportunity Lost,” 7/3/08

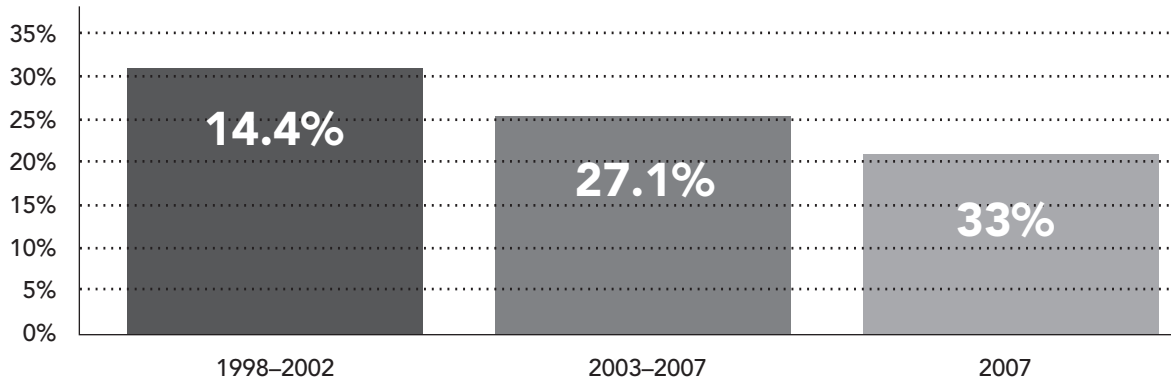
10. Catherine Nielsen, “40 Years of FOIA, 20 Years of Delay.” National Security Archive. July 2, 2007. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf

11. Department of Justice, Supplemental Guide for Preparation and Submission of Section XII of Agency Fiscal Year 2007 Annual FOIA Reports, FOIA Post, October 16, 2007. <http://www.usdoj.gov/oip/foiapost17.htm>

12. Department of Justice. “Attorney General’s Report to the President Pursuant to Executive Order 13,392, entitled ‘Improving Agency Disclosure of Information’” May 30, 2008.

13. Coalition of Journalists for Open Government. “An Opportunity Lost: an in-depth analysis of FOIA performance from 1998 to 2007” <http://www.cjog.net/>

FOIA Backlogs



Source: OMB Watch based on Coalition of Journalist for Open Government, "An Opportunity Lost," 7/3/08

PRESIDENTIAL SIGNING STATEMENTS

In the 211 years of our Republic to 2000, Presidents had issued fewer than 600 signing statements that took issue with the bills they signed. The real qualitative difference between the use of signing statements by the Bush Administration and previous administrations is in the number of constitutional objections cited in the statement: President Bush's signing statements are "typified by multiple constitutional and statutory objections, containing challenges to more than 1,000 distinct provisions of law."¹⁴

Years or Presidencies	Statements Challenging Provisions of Laws
1789-1980	278
Reagan	71
G.H.W. Bush	146
Clinton	105
G.W. Bush	156

Source: Joyce A. Green, <http://www.coherentbabble.com/signingstatements/signstateann.htm>; Accessed July 31, 2007.

President George W. Bush's use of signing statements decreased significantly in 2007. Over 71% of his signing statements to date were issued during his first term in office.

Year	Number of Signing Statements
2001	24
2002	34
2003	28
2004	25
<i>First Term Total</i>	<i>111</i>
2005	14
2006	23
2007	8
Total	156

14. Halstead, TJ "Presidential Signing Statements: Constitutional and Institutional Implications" Congressional Research Service. Updated September 17, 2007.

EXECUTIVE PRIVILEGE

Executive Privilege refers to the assertion made by the President or, sometimes, other executive branch officials when they refuse to give Congress, the courts, or private parties information or records which have been requested or subpoenaed, or when they order government witnesses not to testify before Congress.¹⁵

A CRS Report updated in April 2008¹⁶ provides a summary recounting of assertions of presidential claims of executive privilege from the Kennedy Administration through the G. W. Bush Administration. We have included here only those relating to congressional requests for purposes of comparability.

Assertions to Congress of Presidential Executive Privilege Claims

Kennedy	2
Johnson	3
Nixon	4
Ford	1
Carter	1
Reagan	3
G.W.H. Bush	1
Clinton	5
G.W. Bush	3

**Through April 16, 2007.

Source: Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments: Updated April 16, 2008," Congressional Research Service. <http://www.fas.org/sgp/crs/secretary/RL30319.pdf>

The Constitution does not expressly mention executive privilege, but presidents have long claimed that the constitutional principle of separation of powers implies that the Executive Branch has a privilege to resist disclosing information, such as presidential communications, advice, and national security information, in judicial proceedings, congressional investigations and other arenas.¹⁷ Presidents argue that some degree of confidentiality is necessary for the Executive Branch to function effectively: key advisers, they say, will hesitate to speak frankly if those advisers must worry that what they say will eventually become a matter of public record.¹⁸

As constitutional scholar Louis Fisher has noted, "Previous disputes over executive powers underscore the fundamental point that collisions between the executive and legislative branches are not likely to be resolved by broad constitutional claims or snippets taken from case law."¹⁹ Fisher has noted elsewhere that these disputes are only resolvable in the end by bare-knuckle politics.

In such collisions between the executive and legislative branches, it is the public's right to hold its government accountable that is at stake. When the executive branch decides to keep much of its policy activities obscured from the public, Congress is the only resource available to force the disclosure of such information.

15. C-SPAN Congressional Glossary <http://www.c-span.org/guide/congress/glossary/exprivilege.htm>

16. Morton Rosenberg, Specialist in American Public Law, American Law Division, "Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments: Updated April 16, 2008," Congressional Research Service. <http://www.fas.org/sgp/crs/secretary/RL30319.pdf>

17. Statement of Senator Patrick Leahy on the Committee Subpoena Resolution, Executive Business Meeting, September 23, 1999 <http://judiciary.senate.gov/oldsite/92399pl2.htm>

18. A Brief History of Executive Privilege, from George Washington Through Dick Cheney. By Michael C. Dorf FindLaw's Writ. <http://writ.news.findlaw.com/dorf/20020206.html>

19. Louis Fisher, "The politics of privilege." http://commentisfree.guardian.co.uk/louis_fisher/2007/03/exec_privilege.html

The Supreme Court considered the argument about confidentiality in the 1974 case of *United States v. Nixon*²⁰, and recognized “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.”^{Endnote B}

INVENTION SECURITY

Patent “Secrecy Orders”

The federal government can impose secrecy on any new patent by issuing a “secrecy order” under federal law (35 USC 181). After over a decade of fewer and fewer new secrecy orders imposed on new patents, the number of new secrecy orders jumped just after 9/11 from 83 in 2001 to 139 in 2002. It dropped from 2003 (136) to 2006 (108), and rose again (to 128) in 2007.

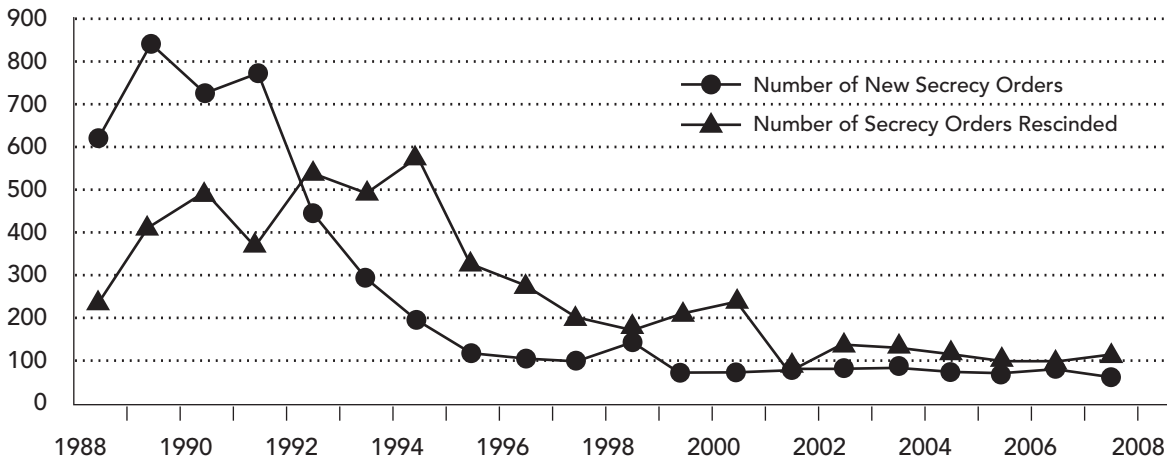
At the same time that issuance of new secrecy orders has remained somewhat steady in recent years, the number of secrecy orders *rescinded* has decreased dramatically in this decade — from 245 rescinded in 2000 to just 76 in 2005. After rising slightly to 81 in 2006, the number of rescissions dipped again in 2007 to 68. The result is a 5.6% increase in the total number of Invention Security Act orders in effect, from a low of 4,736 in 2001 to 5,002 in 2007. Over the same period, the number of newly issued patents per year has tended to rise.

Year	# of New Secrecy Orders	# of Secrecy Orders Rescinded	Total # of Secrecy Orders in Effect
1988	630	237	5,122
1989	847	413	5,556
1990	731	496	5,791
1991	774	372	6,193
1992	452	543	6,102
1993	297	490	5,909
1994	205	574	5,540
1995	124	324	5,340
1996	105	277	5,168
1997	102	210	5,060
1998	151	170	5,041
1999	72	210	4,903
2000	83	245	4,741
2001	83	88	4,736
2002	139	83	4,792
2003	136	87	4,841
2004	124	80	4,885
2005	106	76	4,915
2006	108	81	4,942
2007	128	68	5,002

Source: United States Patent and Trademark Office via Federation of American Scientists, www.fas.org/sqp/othergov/invention/stats.html; and USPTO accessed 7/09/2008

20. *United States v. Nixon*, 418 U.S. 683 (1974)

Patent Secrecy Orders, Rescissions Continue Decline



CLOSING OFF PUBLIC INFORMATION ABOUT SCIENTIFIC AND TECHNICAL ADVICE THROUGH FEDERAL ADVISORY COMMITTEES

Over 64% of the 7,067 meetings of federal advisory committees that fall under the Federal Advisory Committee Act (FACA) were completely closed to the public. In passing the Act in 1972, Congress intended for the federal government to receive open scientific and technical advice, which is free from the undue influence of “any special interest.”²¹ Congress allowed certain exceptions but wrote directly into the law its assumption that “(e)ach advisory committee meeting shall be open to the public.”²²

A separate but related issue has to do with the use of subcommittees and informal working groups. Such groups, while they are not to function as the de facto parent advisory committee, can make suggestions to the full Committee. Meetings conducted by subcommittees and informal working groups are not subject to public participation and public notice requirements of the FACA. The General Services Administration (GSA) FACA database does not track subcommittees and informal working groups, so the numbers below do not fully reflect the exclusion of the public from the working of Advisory Committees.

Year	Total # of Meetings	% of Meetings Closed
1997	5,698	51
1998	5,898	50
1999	6,256	53
2000	6,211	56
2001	5,872	58
2002	6,281	61
2003	6,799	61
2004	7,045	64
2005	7,449	61
2006	7,189	63
2007	7,067	64

Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, www.fido.gov/facadatabase; accessed July 11, 2008

21. 5 USC Sec. 5(b) (3)

22. 5 USC Sec. 10(a) (1)

The majority of the closed committee meetings have historically consisted of groups advising three agencies: Department of Defense, Department of Health and Human Services and National Science Foundation. The percentage of meetings completely closed (with the above three agencies excluded) has ranged from 6% in 2001 to a high 17% in 2004. In 2007, 15% of the remaining committee hearings were closed — a 24% increase over the number of remaining committee hearings closed in 2006.

Closed Meetings of Remaining Agencies

(Excluded: Dept. of Defense, Dept. of Health & Human Services, National Science Foundation)

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Meetings Completely Closed	240	233	257	255	130	262	318	396	149	271	338

Source: Compiled by OpenTheGovernment.org from Federal Advisory Committee Act Database, www.fido.gov/facadatabase ; accessed July 11, 2008.

“SENSITIVE BUT UNCLASSIFIED” CONTROLS ON INFORMATION

In last year’s report, we highlighted the fact that 81% of the over 107 unique markings agencies place on “sensitive but unclassified” information (now called by “Controlled Unclassified Information” by the executive branch) are based not on statute or approved regulations, but are the product of department and agency policies. As noted by the [Information Sharing Environment](#) Program Office, these policies were created “without attention to the overall Federal environment of CUI information sharing and protection.”²³ Further, while different agencies may use the same marking to denote information that is to be handled as SBU, a chosen category of information is often defined differently from agency to agency, and agencies may impose different handling requirements. Some of these marking and handling procedures are not only inconsistent, but are contradictory. Some protections are necessary for unclassified information, such as personal privacy information or trade secrets — which are protected by statutes and exemptions to the FOIA that openly cover them. Ultimately, these efforts to control and restrict information make it harder for authorities to inform the public about potential dangers in their own communities and block the free flow of information necessary in a democratic, open society. Since last year’s report, both the executive and legislative branches (see page 27) have addressed the issue.

In May 2008, President Bush issued a [Presidential Memorandum](#)²⁴ that creates a tiered system of designations that relate primarily to the allowable dissemination of documents and establishes a framework for designating, marking, safeguarding, and disseminating designated information. The stated intent of the Presidential Memorandum is to standardize control markings and handling procedures across the “information sharing environment,” a term codified in Intelligence Reform and Terrorism Prevention Act of 2004 to indicate the intelligence, law enforcement, defense, homeland security, and foreign affairs communities. Unfortunately, though, the memorandum does nothing to rein in the use of these markings; in fact, the memo allows agency’s to continue to make control determinations as a matter of department policy — meaning that the public is given no notice or chance to comment on the proposal. Further, under the President’s proposed framework, control designations could easily be treated as simply another level of classification — reducing the public’s access to critical information.

Additionally, the CUI Council called for in the Memorandum will be a subcommittee of the Information Sharing Council within the Office of the Director of National Intelligence and, therefore, entirely outside any public access or accountability. The Executive Agent for implement the Framework for unclassified information is the National Archives’ Information Security Oversight Office (ISOO), an office whose mission encompasses classified information.

23. “Background on the Controlled Unclassified Information Framework” May 20, 2008. <http://www.fas.org/sgp/cui/background.pdf>

24. “Designation and Sharing of Controlled Unclassified Information,” May 9, 2008. <http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html>

Some Controlled Unclassified Information Designations

Sensitive but Unclassified Designations in Use at Selected Federal Agencies in 2006²⁵

Designation	Agencies using designation
1 Applied Technology *Department of Energy	(DOE)
2 Attorney-Client Privilege Department of Commerce (Commerce),	DOE
3 Business Confidential	DOE
4 Budgetary Information Environmental Protection Agency	(EPA)
5 Census Confidential	Commerce
6 Confidential Information Protection and Statistical Efficiency Act Information (CIPSEA)	SSA (SSA)
7 Computer Security Act Sensitive Information (CSASI)	(HHS)
8 Confidential	Labor
9 Confidential Business Information (CBI)	Commerce, EPA
10 Contractor Access Restricted Information (CARI)	HHS
11 Copyrighted Information	DOE
12 Critical Energy Infrastructure Information (CEII) Fed'l Energy Regulatory Comm'n	(FERC)
13 Critical Infrastructure Information Office of Personnel Management	(OPM)
14 DEA Sensitive Department of Justice	(DOJ)
15 DOD Unclassified Controlled Nuclear Information Department of Defense	(DOD)
16 Draft	EPA
17 Export Controlled Information	DOE
18 For Official Use Only (FOUO)	Commerce, DOD, Department of Education, EPA, General Services Administration, HHS, DHS, Department of Housing and Urban Development (HUD), DOJ, Labor, OPM, SSA, and the Department of Transportation (DOT)
19 For Official Use Only/Law Enforcement Sensitive	DOD
20 Freedom of Information Act (FOIA)	EPA
21 Government Confidential Commercial Information	DOE
22 High-Temperature Superconductivity Pilot Center Information	DOE
23 In Confidence	DOE
24 Intellectual Property	DOE
25 Law Enforcement Sensitive	Commerce, EPA, DHS, DOJ, HHS, Labor, OPM
26 Law Enforcement Sensitive/Sensitive	DOJ
27 Limited Distribution Information	DOD
28 Limited Official Use (LOU)	DHS, DOJ, Department of Treasury
29 Medical records	EPA
30 Non-Public Information	FERC
31 Not Available National Technical Information Service	Commerce
32 Official Use Only (OOU)	DOE, SSA, Treasury
33 Operations Security Protected Information (OSPI)	HHS

25. GAO: March 2006: Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information: GAO-06-385 <http://www.gao.gov/new.items/d06385.pdf>

34 Patent Sensitive Information	DOE
35 Predecisional Draft	DOE
36 Privacy Act Information	DOE, EPA
37 Privacy Act Protected Information (PAPI)	HHS
38 Proprietary Information	DOE, DOJ
39 Protected Battery Information	DOE
40 Protected Critical Infrastructure Information (PCII)	DHS
41 Safeguards Information Nuclear Regulatory Commission	NRC
42 Select Agent Sensitive Information (SASI)	HHS
43 Sensitive But Unclassified (SBU)	Commerce, HHS, NASA, National Science Foundation (NSF), Department of State, U.S. Agency for International Development (USAID)
44 Sensitive Drinking Water Related Information (SDWRI)	EPA
45 Sensitive Information DOD, U.S. Postal Service	USPS
46 Sensitive Instruction	SSA
47 Sensitive Internal Use	DOE
48 Sensitive Unclassified Non-Safeguards Information	NRC
49 Sensitive Nuclear Technology	DOE
50 Sensitive Security Information (SSI)	DHS, DOT, U.S. Department of Agriculture (USDA)
51 Sensitive Water Vulnerability Assessment Information	EPA
52 Small Business Innovative Research Information	DOE
53 Technical Information	DOD
54 Trade Sensitive Information	Commerce
55 Unclassified Controlled Nuclear Information (UCNI)	DOE
56 Unclassified National Security-Related	DOE

Source: GAO analysis of agency responses. ²⁶

THE COURTS

The Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court does not reveal much about its activities while approving orders to conduct electronic surveillance and physical search of U.S. persons who are suspected of being agents of a foreign power. In 2007, the number of applications from the federal government to collect information grew almost 9% from last year's total — to 2,371 applications. The number of FISA applications presented has more than doubled since 2000. Three of the 2007 applications were withdrawn prior to the FISC and one application was denied in part; two held over from 2006 were approved in 2007. The FISC made “substantive modifications” to the government’s proposed orders in 86 of its applications. The Justice Department does not identify the activities investigated nor provide basic information about how the subpoenas are used.

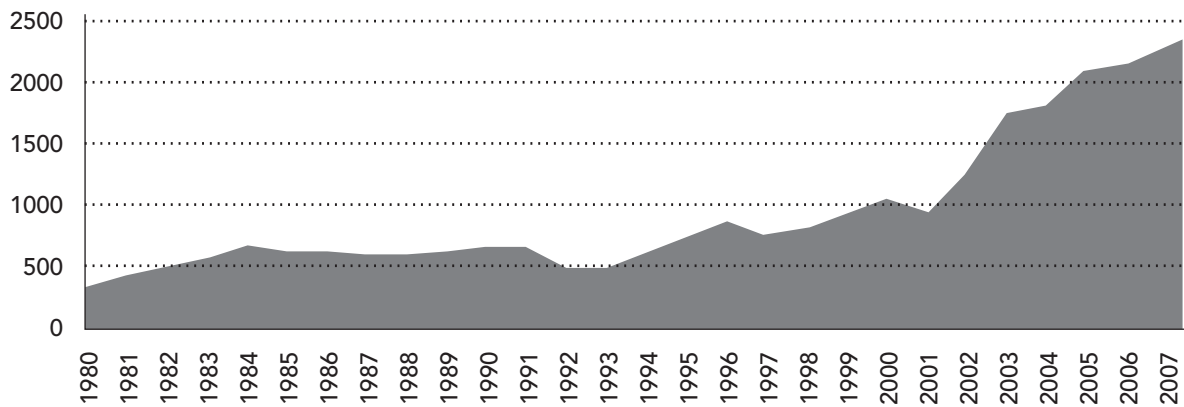
26. For information on the designations, see “Appendix II: Summary Information on Sensitive But Unclassified Designations by Agency” (pages 38–77), in the 2006 GAO Report.

FISA Applications Presented and Approved

Year	# of FISA Request Applications
1980	322
1981	433
1982	475
1983	549
1984	635
1985	587
1986	573
1987	512
1988	534
1989	546
1990	595
1991	593
1992	484
1993	509
1994	576
1995	697
1996	839
1997	748
1998	796
1999	880
2000	1,012
2002	1,228
2003	1,724
2004	1,754
2005	2,072
2006	2,176
2007	2,371

Numbers Source: Electronic Privacy Information Center

Secret FISA Court Orders (Approved)



Numbers Source: Electronic Privacy Information Center

State Secrecy: The Executive Branch’s Trump Card

The executive branch has broad, near unilateral authority to declare information a “state secret.” In 1953, the U.S. Supreme Court allowed the executive branch to keep secret, even from the Court, details about a military plane’s fatal crash. This ruling, *United States v. Reynolds*, gave the executive branch power to impose secrecy with little opportunity for appeal or judicial review when the information at issue would pose a “reasonable danger” to national security.

The privilege, which has its roots in common law, has become a popular tool for the executive branch to shield itself against inquiries and litigation. Moreover, the trend is toward the government claiming this privilege earlier in civil litigation, to block discovery. The end result is often the complete dismissal of cases, denying both judicial review of alternative methods of presenting the information needed by the litigants and the possibility of adjudication on issues not related to the claim of state secrets.

In what could be an important landmark for how state secrets cases are handled by the court, a June 29, 2007 [decision](#) by the D.C. Circuit Court of Appeals reinstated a lawsuit that had been dismissed because the government invoked the state secrets privilege. The court concluded that there was sufficient unprivileged evidence on the record to permit the plaintiff, former Drug Enforcement Administration official Richard Horn, to argue his case.

Between 1953 and 1976, the federal government invoked the “state secrets” privilege only six (6) times. Between 1977 and 2000, administrations invoked the privilege 59 reported times (a rate of 2.46 times per year). Since 2001, the state secrets privilege has been invoked at least 45 times,* a rate of 6.42 times each year.

Use of State Secrecy Privilege

(Years are inclusive)	1953 to 1976	1977 to 2000	2001 to 12/2007
Times Invoked in Reported Cases	6	59	45
Period (in years)	24	24	7
Yearly Invocations (avg.)	0.25	2.46	6.42

Source: National Security Archive and William Weaver, Senior Advisor, National Security Whistleblowers Coalition.

* Numbers of orders during the George W. Bush administration vary according to the counting methods used. We believe this number to be the most current count of invocations in reported cases, and invocations in cases on appeal. In some cases, the assertion in the reported case at trial and in a reported opinion on appeal, if there is one, for the same case are counted as two assertions.

MONEY TRENDS

EXPENDITURES ON THE CLASSIFICATION SYSTEM

Spending on Secrecy Continues to Rise; Spending on Declassification Stays Flat

The chart and the accompanying table show the amount of money spent on the entire classification system. These costs include the costs associated with training, technology investments and declassification efforts, as well as securing facilities and personnel in the United States and abroad that hold classified information. The total expenditure figure includes estimates from 41 federal agencies, including the Department of Defense. The Central Intelligence Agency (CIA), the National Geospatial Intelligence Agency (NGA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO) and the National Security Agency (NSA) are not included because their cost estimates are classified.

Legislation²⁷ signed by the President in August 2007 requires the president and Congress to disclose total spending requested and approved for the National Intelligence Program. A statement released by the Office of the Director of National Intelligence (ODNI) on October 30, 2007 indicates the U.S. spent \$43.5 billion on national intelligence programs in 2007²⁸ — a significant increase over the last officially disclosed intelligence budget of \$26.7 billion in 1998, which included national, joint military and tactical intelligence spending.

The amount of money government agencies spend to secure classified documents continues to rise, although the rate of increase has slowed in recent years. The 2007 estimate of \$8.65 billion is a 4.8 percent increase over the costs estimates reported in 2006. In 2007, the largest increase in spending came from the Physical Security category, which was up 22.7% from last year.²⁹ Spending on professional education, training, and awareness declined 12.2% in 2007.

\$195 Spent Creating and Securing Old Secrets for Every Tax Dollar Spent Declassifying³⁰

For every one dollar the government spent declassifying documents in 2006, the government spent \$195³¹ maintaining the secrets already on the books, a 4.8% increase from last year.

The amount spent on classification increased, slightly fewer documents were reviewed and declassified this year than in 2006, but the total publicly reported amount spent on declassification stayed level — at \$44 million. According to ISOO, the intelligence agencies, which account for a large segment of the declassification numbers, are excluded from the total reported figures (although they are reported to ISOO), perhaps accounting for this discrepancy.

27. Public Law 110-053, the "Implementing Recommendations of the 9/11 Commission Act of 2007," signed by President Bush on August 3, 2007.

28. "DNI Releases Budget Figure for National Intelligence Program: ODNI News Release No. 22-07." Office of the Director of National Intelligence homepage. 30 October 2007. (http://www.dni.gov/press_releases/20071030_release.pdf)

29. ISOO notes that many agencies are still developing Sensitive Compartmented Information Facilities (SCIFs), emergency operation control centers, and Continuity of Operations (COOP) sites; additionally, some facilities needed enhanced security to meet standards.

30. The data on expenditures does not include data from the Central Intelligence Agency (CIA), the National Geospatial Intelligence Agency (NGA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO) and the National Security Agency (NSA). Their expenditures are classified and not publicly reported.

31. Figure calculated by first subtracting declassification cost from total classification cost to arrive at the total cost of classification not related to declassification. Thus, we calculated for each year amount spent keeping and maintaining government secrets, then divide this figure by expenditures on declassification.

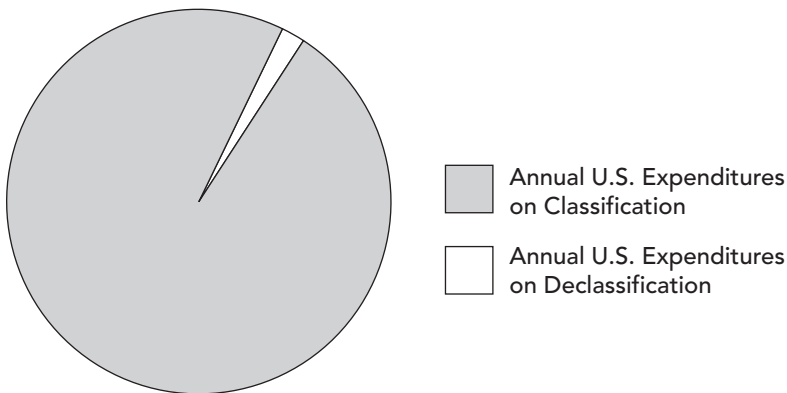
Federal Expenditures on Classification and Declassification (excluding CIA, NGA, DIA, NSA and NRO) in Millions

Fiscal Years	Cost of Securing Classified Information	Portion Spent on Declassifying Documents	Classification Costs Per \$1 Spent on Declassification
1997	\$3,380,631,170	\$150,244,561	\$22
1998	3,580,026,033	200,000,000	17
1999	3,797,520,901	233,000,000	15
2000	4,270,120,244	230,903,374	17
2001	4,710,778,688	231,884,250	19
2002	5,688,385,711	112,964,750	49
2003	6,531,005,615	53,770,375	120
2004	7,200,000,000	48,300,000	148
2005	7,700,000,000	57,000,000	134
2006	8,200,000,000	44,000,000	185
2007	8,650,000,000	44,000,000	195

Source: OpenTheGovernment.org calculations based on data from the Information Security Oversight Office (ISOO). [2007 Report to the President](#).

Even the publicly reported numbers may not give a complete picture: for the most part, the reported amount spent on declassification includes only the cost of the people engaged and the equipment, not the cost of physical security and personnel security. These overhead costs are shared, and agencies are not required to separate their figures. So, the dollars attributable to declassification costs may be under-reported.

Amount Spent on Classification and Declassification



BLACK BUDGET PROCUREMENT AND R&D

Classified Budgets Skyrocket

Classified or “black” programs account for about \$31.9 billion, or 18%, of the acquisition funding included in the FY 2008 Department of Defense (DOD) budget.

This total includes \$14.4 billion in procurement funding and \$17.5 billion in research and development (R&D) funding. These figures represent 14% and 23%, respectively, of the total funding requested for procurement and R&D.

According to the Center for Strategic and Budgetary Assessments³²:

- Classified acquisition funding has more than doubled in real terms since FY 1995, when funding for these programs reached its post-Cold War low.
- Since FY 1995, funding for classified acquisition programs has increased at a substantially faster rate — approximately 112% — than has funding for acquisition programs overall, which has grown by about 77 percent.
- Restrictions placed on access to classified program information have meant that DOD and Congress typically exercise less oversight over classified programs than unclassified ones.

FY	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
<i>Weapons Acquisition</i>														
Total DoD	77.7	77.4	79.7	82.1	88.7	93.2	103.9	110.9	137.9	147.5	167.8	178.0	179.8	176.8
Classified	11.7	12.6	13.2	14.9	15.8	15.4	18.1	18.2	26.1	27.6	29.8	31.5	31.5	31.9
% Classified	15	16	17	18	18	17	17	16	19	19	18	18	18	18
<i>Procurement</i>														
Total DoD	43.2	42.4	43.2	44.9	50.6	54.9	62.2	62.2	79.6	83.2	98.5	105.3	103.8	101.7
Classified	7.1	7.3	6.1	6.8	7.5	7.5	7.5	8.9	13.2	14.5	16.3	16.6	15.8	14.4
% Classified	16	17	14	15	15	14	10	10	17	17	17	16	15	14
<i>Research & Development</i>														
Total DoD	34.5	35.0	36.5	37.2	38.1	38.3	41.7	48.6	58.3	64.4	39.3	72.7	76.0	75.1
Classified	4.6	5.3	7.2	8.1	8.3	7.9	10.6	9.3	12.9	13.2	13.5	14.8	15.7	17.5
% Classified	13	15	20	22	22	21	25	19	22	20	20	20	21	23

*The 2006 numbers were changed by CSBA to include all war-related funding.

Source: http://www.csbaonline.org/4Publications/PubLibrary/U.20070725.Classified_Funding/U.20070725.Classified_Funding.pdf

WHISTLEBLOWERS RECOVER BILLIONS FOR TAXPAYERS

In 2007, suits brought by whistleblowers under the False Claims Act *qui tam*³³ provisions accounted for \$1.45 billion of the \$2 billion recovered from litigation concerning fraud on the federal government. Since 1986, whistleblowers helped the federal government recover over \$20 billion according to the latest figures from the U.S. Department of Justice.

The amount recovered is severely limited, however, by a lack of resources at the Department of Justice (DOJ). According to a report by the Washington Post, 200 to 300 civil cases per year have been filed by whistleblowers — many having to do with the wars in Iraq and Afghanistan, health care, and privatization of government functions; DOJ’s team of lawyers can only investigate about 100 cases per year. The backlog of cases is already over 900 cases and rising.³⁴

32. Steven Kosiak, "Classified Funding in the FY 2008 Defense Budget Request" The Center for Strategic and Budgetary Assessments (CSBA) <http://www.csbaonline.org/>

33. The False Claims Act allows a private individual or "whistleblower," with knowledge of past or present fraud on the federal government, to sue on behalf of the government to recover stiff civil penalties and triple damages. Qui Tam is shorthand for the Latin phrase "qui tam pro domino rege quam pro seipso", meaning "he who sues for the king as for himself." A suit initially remains under seal for at least 60 days during which the Department of Justice can investigate and decide whether to join the action. <http://www.quitamonline.com/whatis.html>

34. Johnson, Carrie, "A Backlog Of Cases Alleging Fraud: Whistle-Blower Suits Languish at Justice" 2 July 2008: A1. <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/01/AR2008070103071.html>

Whistleblowers Recover Billions for Taxpayers

Year	Savings in \$
1989	15,111,719
1990	40,558,367
1991	69,775,271
1992	135,093,903
1993	177,416,383
1994	381,468,397
1995	247,276,827
1996	138,598,636
1997	629,882,525
1998	462,038,795
1999	516,778,031
2000	1,199,766,754
2001	1,286,791,859
2002	1,089,252,722
2003	1,501,554,095
2004	554,626,506
2005	1,425,853,183
2006	3,100,000,000
2007	2,000,000,000

Source: US DOJ Press Release, 1 Nov 07

FEDERAL CONTRACTING

Over 25% of Federal Contracts Not Competed At All; Competition Rate Falls

The public has a right to know about the ways the government spends its money in order to keep the government accountable and help rout out corruption. Until 2006,³⁵ this information was difficult to find and more difficult to use to make comparisons. In December 2007, as required by the Federal Funding Accountability and Transparency Act, the White House Office of Management and Budget (OMB) launched USASpending.gov.

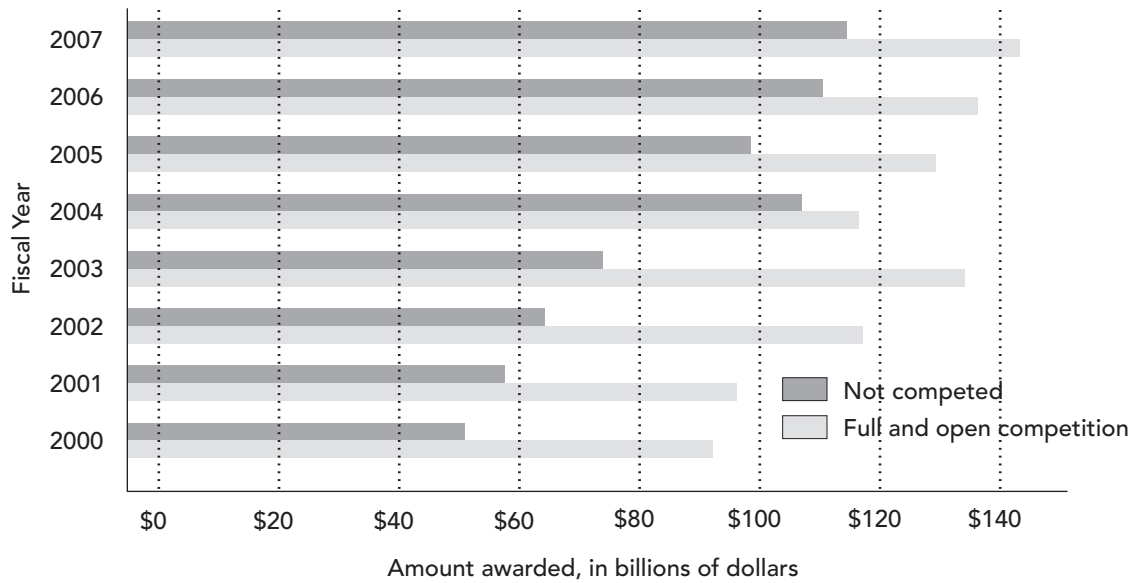
The accompanying charts show the continual growth in money going to contracts since 2000 — more than double in less than a decade. In FY 2000, the government spent \$208.8 billion on contracts. By FY 2007, it was spending \$436.4 billion.

During this same period of FY 2000 through FY 2007, the government spent \$1.6 trillion on contracts awarded with less than a full and open competition. In FY 2007, 26.15% of contract dollars were given out in no-bid, uncompleted deals. Another 5% were also no-bid deals because of various requirements.

Use of full and open competition has dropped almost 25% — from almost 45% of contract dollars in FY 2000 to 32 percent in FY 2007. Additionally, there has been an increase in one-bid full and open competition, raising questions of whether solicitations were structured to a particular contractor. One-bid “open” competition, went from 8.5% of contract funding in FY 2000 to 9.8% in FY 2007.

35. In October 2006, the nonprofit organization OMB Watch launched a website, FedSpending.org, which combines information collected from the Federal Assistance Awards Data System (FAADS) data for grants and the Federal Procurement Data System (FPDS) for contracts to allow the public to easily search for information on federal grants and contracts. OMB Watch continues to operate FedSpending.org, adding new features and data to provide a more powerful accountability tool for citizens.

Money Spent on Contracts (in billions)



Contract Competition Types by Year

in billions of dollars

Competition category	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2000–2007
Full and open competition	\$93.0	\$97.6	\$117.2	\$131.9	\$117.1	\$129.5	\$135.4	\$143.6	\$965.30
Not competed	\$48.7	\$57.3	\$64.7	\$75.6	\$106.3	\$98.9	\$110.9	\$114.1	\$676.50
Competed after exclusion of sources	\$20.4	\$24.7	\$29.3	\$35.4	\$48.8	\$65.8	\$76.5	\$79.4	\$380.30
Full and open competition, but only one bid	\$17.8	\$15.3	\$17.5	\$21.1	\$39.1	\$40.4	\$40.8	\$42.7	\$234.70
Not available for competition	\$17.6	\$15.7	\$24.1	\$19.7	\$15.5	\$20.1	\$22.9	\$22.0	\$158.50
Unknown	\$4.5	\$0.4	\$0.2	\$1.7	\$6.4	\$15.0	\$20.8	\$22.8	\$71.00
Follow-on to previous contract	\$6.9	\$8.9	\$6.6	\$12.9	\$8.7	\$12.4	\$12.6	\$11.8	\$80.80
Total	\$208.8	\$219.8	\$259.6	\$298.5	\$341.9	\$382.1	\$415.0	\$436.4	\$2,562.1

Source: USASpending.gov Accessed September 2, 2008.

* Numbers may differ than totals reported in past years due to updates and data quality adjustments.

Percentage of Contracts Completed by Type/Year

Competition category	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2000–2007
Full and open competition	44.52%	42.40%	45.18%	44.20%	34.25%	33.89%	32.26%	32.91%	37.68%
Not competed	23.30%	26.05%	24.92%	25.32%	31.10%	25.88%	26.42%	26.15%	26.40%
Competed after exclusion of sources	9.77%	11.21%	11.29%	11.87%	14.28%	17.23%	18.22%	18.19%	14.84%
Full and open competition, but only one bid	8.53%	6.96%	6.73%	7.08%	11.42%	10.56%	9.72%	9.79%	9.16%
Not available for competition	8.44%	7.13%	9.27%	6.61%	4.55%	5.25%	5.45%	5.04%	6.199%
Unknown	2.14%	0.19%	0.09%	0.58%	1.86%	3.93%	4.95%	5.22%	2.77%
Follow-on to previous contract	3.31%	4.06%	2.55%	4.33%	2.54%	3.25%	3.00%	2.70%	3.15%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%

Intelligence and Iraq Contracting

To meet increased intelligence and defense-related needs created by the war on terrorism and the war in Iraq, the federal government has increasingly turned to private contractors to fill critical, in many cases inherently governmental, functions. While the intelligence community will not disclose the total number of contractors it employs, it has released rough percentages of the jobs being done by “core contract personnel” (which does not include such workers as food-service employees or contract guards). According to a transcript of a conference call with Dr. Ronald Sanders, Associate Director of National Intelligence for Human Capital, on results of the “Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel”³⁶ (report not released as of this writing), about 27 percent of the contract workers were involved in intelligence collection and operations, and 19 percent support analysis and production; the proportion of contract workers engaged in particular functions were roughly the same in FY 06. These numbers indicate that private contractors are responsible for a significant amount of our government’s sensitive intelligence work — raising critical concerns about accountability and security.

Similarly, the government has turned to contractors to fill operational needs in Iraq. An August 2008 Congressional Budget Office report³⁷ indicates that “From 2003 through 2007, U.S. agencies awarded \$85 billion in contracts for work to be principally performed in the Iraq theater, accounting for almost 20 percent of funding for operations in Iraq.” Thus, one out of every five dollars spent on the war in Iraq has gone to contractors for the United States military and other government agencies, in a war zone where employees of private contractors now outnumber American troops.³⁸

While the contracting process is not indicated in the report, the dependence on private companies to support the war effort has led to questions about whether political favoritism has played a role in the awarding of multibillion-dollar contracts.

36. <http://cryptome.org/dni082708.htm> (accessed August 28, 2008)

37 Congressional Budget Office. “Contractors’ Support of U.S. Operations in Iraq,” August 2008. <http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>

38 James Risen, “Use of Iraq Contractors Costs Billions, Report Says,” New York Times, August 11, 2008. <http://www.nytimes.com/2008/08/12/washington/12contractors.html>

LEGISLATIVE INITIATIVES TOWARD EXECUTIVE BRANCH OPENNESS

LEGISLATION TO IMPROVE FOIA PASSES IN 110TH CONGRESS

The requirements of the [OPEN Government Act](#),³⁹ signed into law (without a signing statement) on 31 December 2007, include: the assigning of tracking numbers to FOIA requests that take longer than 10 days to process, and removal of the ability of agencies to charge requesters for research and copying costs, if the response deadlines in the statute are not met; more accurate reporting by agencies to Congress, with respect to FOIA compliance; the establishment of the Office of Government Information Services at the National Archives to mediate conflicts between FOIA requesters and agencies (which the Administration attempted to kill in its Budget); a broadened scope of information potentially available, pursuant to FOIA requests, by including government information maintained for agencies by government contractors.; and restoration of the full circumstances under which FOIA requesters may obtain attorneys' fees when forced to litigate for release of documents.

REINING IN CONTROLS ON INFORMATION DISCLOSURE (SBU)

In response to the May 2008 [Presidential Memorandum](#) on Controlled Unclassified Information, the House of Representatives passed two bills to limit and standardize the use of control markings CUI: [H.R. 6576](#), the Reducing Information Control Designations Act, and [H.R. 6193](#), the Improving Public Access to Documents Act of 2008.

H.R. 6576 responds on a government-wide basis to the White House CUI framework and to the proliferation of SBU-type markings within and beyond the Information Sharing Environment. The intent of the bill is both to reduce the number of control markings and the number of marked documents. The presumption established by the bill is that information control designations are not necessary. In addition to directing the Archivist of the United States to develop a policy that minimizes the use of control markings in a manner that is narrowly tailored to maximize public access to information, the bill requires the Archivist to address the duration of the markings and set up a process for removing them.

The bill requires the Archivist to:

- create a system for employees and contractors to challenge marking;
- establish random audits to ensure agencies are following the regulations;
- limit the number of people authorized to mark documents as controlled; and
- establish procedures for members of the public to challenge control markings.

Like the Presidential memo, H.R. 6193 applies the CUI framework only within the information sharing environment and the emphasis of the legislation is standardizing control markings. It's scope is limited to the Department of Homeland Security (DHS). Unlike the President's framework, H.R. 6193 takes the public's right to know into account and includes important provisions to improve public access and accountability. However, the definition of controlled unclassified information in the bill is overly broad, potentially encouraging agency heads to increase the use of markings on classes of information, such as "business prudence, legal privilege, and protection of commercial rights." This language, the bill's incorporation of the opaque definition of CUI contained in the Presidential Memorandum, and the inclusion of information that "is pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government," raise serious concerns about the bill's ability to limit the continued proliferation of such markings or to improve public access to information.

39. Public Law 110-75, signed by President Bush on 31 December 2007. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ175.110.pdf

Toward the end of improving public access, the bill requires the number of people authorized to mark documents as controlled to be limited to the greatest extent possible, and requires the Secretary of DHS to:

- create a system that rewards employees and contractors for challenging control markings and institutes a series of penalties for employees and contractors who, after re-training, fail to follow the policy;
- to maintain a publicly available list of all documents designated, in whole or in part, as controlled unclassified information by department employees or contractors that have been withheld in response to a request made under the Freedom of Information Act, and to include for each a summary of the request and a statement that identifies the FOIA exemption that justified the withholding; and
- allow the public to protest the policy by notifying the DHS Inspector General of any concerns regarding the implementation of the controlled unclassified information framework, including the withholding of controlled unclassified information under the FOIA.

FIXING ABUSE OF THE CLASSIFICATION SYSTEM

Overclassification

In its [Final Report of the National Commission on Terrorist Attacks Upon the United States](#),⁴⁰ the 9/11 Commission cited the necessity of preventing over-classification by the Federal Government. Over-classification hinders information sharing and causes the government to needlessly spend billions of taxpayer dollars protecting information that should never have been classified. Over-classification also leads to disrespect of the system and leaks to the press, public suspicion, and incidents such as the reclassification of public documents taken from the shelves of the Archives in April 2006.

During the 110th Congress, the House of Representatives took action on two bills addressing over-classification: [H.R. 6575](#), the Over-Classification Reduction Act, which applies across the federal government, and [H.R. 4806](#), the Reducing Over-Classification Act of 2008, which applies only to the Department of Homeland Security. H.R. 4806 was passed by the House of Representatives this year; H.R. 6576 was passed by the House Committee on Oversight and Government Reform and may be brought to the House floor in September 2008.

Both H.R. 6575 and H.R. 4801 create a system of sticks and carrots to encourage employees and contractors to avoid over-classification. In particular, they each require:

- an analysis of the benefits of the provision of an unclassified format of properly classified information;
- establishing a process that rewards employees and contractors for successfully challenging improper original classification decisions and institute a series of penalties for employees and contractors that fail to follow the policy, after the employee or contractor has been warned and gone through re-training;
- annual employee and contractor training for individuals with original classification authority; and
- a tracking system that will allow auditors to identify the person with original classification authority responsible for the decision to classify information.

H.R. 6576 also contains a provision that the system for employee challenges should also ensure no retribution for such challenges.

WHISTLEBLOWERS

Both the House and the Senate passed differing bills in 2007 to strengthen protections for public employees who speak out to protect against waste, fraud and abuse, [H.R. 985](#) and [S. 274](#). The House bill has two key provisions missing from the Senate legislation: jury trials in federal district court to enforce paper rights, and coverage for FBI and intelligence agency employees. As the end of the 110th Congress draws near, however, Conferees have not been able to reconcile the major differences between the two bills. If Congress fails to come to an agreement, both bills will have to be re-introduced during the next Congress.

40. Final Report of the National Commission on Terrorist Attacks Upon the United States, July 22, 2004. <http://govinfo.library.unt.edu/911/report/index.htm>

TRANSPARENCY AND ACCOUNTABILITY IN FEDERAL SPENDING

[S. 3077](#), the “Strengthening Transparency and Accountability in Federal Spending Act” was introduced in the Senate in June 2008. Two years ago, Federal Funding and Accountability Transparency Act of 2006 harnessed civic curiosity, technology, and raw government data, enabling people to see more clearly what the government does with their taxpayer dollars, on sites like [FedSpending.org](#) and [USASpending.gov](#). The new legislation includes several key upgrades to federal data processing: collecting a broader range of data about contract details, combining citizen access and government-based oversight, monitoring compliance with regulatory protections, and making a number of technical improvements. No companion legislation has been introduced in the House at this writing.

STATE SECRETS

The State Secrets Protection Act ([S. 2533](#) and H.R. 5607, State Secret Protection Act of 2008) provides guidance to the Federal courts in handling assertions of the privilege in civil cases, and it restores checks and balances to this crucial area of law by placing constraints on the application of state secrets doctrine. The Act enables the executive branch to avoid publicly revealing evidence if doing so might disclose a state secret. If a court finds that an item of evidence contains a state secret, or cannot be effectively separated from other evidence that contains a state secret, then the evidence is privileged and may not be released for any reason. At the same time, the State Secrets Protection Act would prevent the executive branch from using the privilege to deny parties their day in court or shield illegal activity that is not actually sensitive.

ENDNOTES

A. From May 1996 through the amendment by President Bush of the E.O. in 2003, no agency head exercised this authority. Nor did they exercise it during FY 2004–FY 2007. In 2003, however, the amendment authorized the Director of Central Intelligence (DCI) to block declassification by the ISCAP of certain information owned or controlled by the DCI. During FY 2003, the DCI blocked the declassification of two documents that the ISCAP had voted to declassify. Members of the Panel appealed the blockage to the President, as authorized by the Executive Order. One appeal was rendered moot in 2004, when the DCI declassified the document in its entirety; the second appeal remains pending — with the document still classified in its entirety. The authority to block such declassification now resides with the Director of National Intelligence (DNI).

B. It noted that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” The Justices concluded, however, that the executive privilege is not absolute: “where the President asserts only a generalized need for confidentiality, the privilege must yield to the interests of the government and defendants in a criminal prosecution. Accordingly, the Court ordered President Nixon to divulge the tapes and records. Two weeks after the Court’s decision, Nixon complied with the order.”

On August 1, 2008, U.S. District Judge John D. Bates wrote “The Executive cannot be the judge of its own privilege...” in a 93-page [opinion](#) for the U.S. District Court for the District of Columbia. Judge Bates said that while he is not ruling on the matter of “executive privilege,” if the Executive and Legislative Branches cannot resolve this matter, then the Judicial Branch can and will.