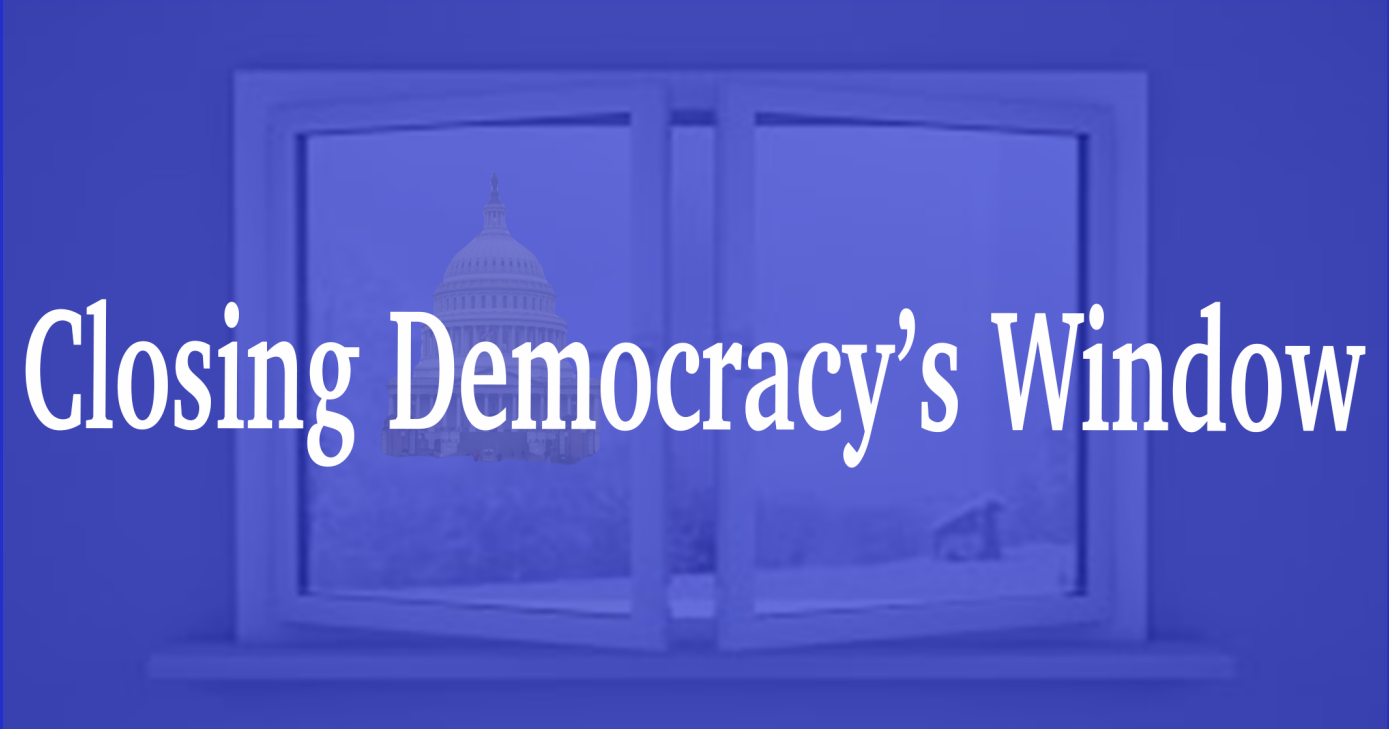




Closing Democracy's Window

The Growing Culture of **Secrecy** in Washington
and the Erosion of the Public's Right to Know

A Report by Open the Government

ABOUT OPEN THE GOVERNMENT (OTG)

Open the Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government.

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Open the Government also expresses appreciation for its incredible coalition partners who appeared in *Closing Democracy's Window*. They are central to our mission, add enormous value to our work, and are the core of what we do. Additionally, we recognize the important work of key stakeholders who fight to ensure America is more open and transparent, and we thank them for their work, which appears in our report.

American-Arab Anti-Discrimination Committee*
American Civil Liberties Union
American Oversight*
Cause of Action*
Center for Media and Democracy*
The Center for Media Justice
Citizens for Responsibility and Ethics in Washington*
Defending Rights and Dissent*
Detention Watch Network*
The Electronic Frontier Foundation*
The Electronic Privacy Information Center*
Environmental Defense Fund*
Food & Water Watch*
Georgetown Law Center on Privacy & Technology
Government Accountability Project*
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Public Citizen*
Public Employees for Environmental Responsibility*
Sunlight Foundation*
Texas Environmental Justice Advocacy Services
The Transactional Records Access Clearinghouse*
Union of Concerned Scientists*

*** Denotes Open the Government Partner Organization**

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I. EXECUTIVE SUMMARY

A May 2017 Pew Research Center poll shows that public trust in the government is near historic lows. Only 18% of Americans today say they can trust the government in Washington to do what is right.

The notable drop in faith coincides with an accelerating trend in which our leaders in the executive branch and Congress are increasing secrecy and dispensing with open government practices. By keeping more government information behind closed doors, they are, ironically, telling the public to “trust us,” rather than providing the very accountability people want from their public servants. Efforts to shroud information undermine the public’s right to know and put our nation’s future at risk, because a healthy democracy depends on informed citizens.

While every administration has erred on the side of secrecy, under the current administration we have witnessed a rapid erosion of openness, the crumbling of norms, frequent and ongoing disparagement of the media, as well as efforts to stonewall information requests, manipulate data, and suppress facts.

**Only 18-percent of
Americans say they can
trust the government to
do what is right.**

**- Pew Research Center,
May 2017**

To document the way transparency and openness developments unfolded during the first year of the Trump administration, *Closing Democracy’s Window* offers a snapshot of transparency and openness in the White House, the Environmental Protection Agency, the Department of Justice, and the Department of Homeland Security; agencies selected for their high profile and their impact on important public policies.

Closing Democracy’s Window reports on journalists’ experiences as they perform their jobs as our nation’s eyes and ears. It highlights advocates who represent people impacted by government secrecy and who describe the ways in which a lack of transparency causes harm. *Closing Democracy’s Window* also features Open the Government’s coalition partners’ efforts to demand access to information.

In the White House, there have been multiple efforts to keep the public from accessing information. The most noted example is candidate Trump breaking

with tradition and not releasing his tax returns, preventing the public from knowing about potential conflicts of interest resulting from the president's many business interests. There are also novel problems to grapple with, such as possible circumvention of the Presidential Records Act as a result of new, encrypted technology that can instantly erase correspondence that is supposed to be stored and eventually made available to the public. This struggle extends to preserving social media, such as tweets, when the president discusses government business or policy decisions.

"The Question is, is the White House being truthful?"

- David Nakamura, *The Washington Post*

Another issue is the nondisclosure of visitor logs, which keeps the American people from getting a complete picture of who has access to the White House. There are also mounting concerns that while journalists frequently interact with White House officials, the information they receive is often inaccurate and contradictory.

"The question is, is the White House being truthful?" asked David Nakamura, a journalist with *The Washington Post*.

The Environmental Protection Agency has seen a notable departure from the practices of the previous administration. EPA administrator Scott Pruitt has a penchant for secrecy that includes obstructing access to information as perfunctory as his calendar of scheduled appointments. Pruitt's reported efforts to obscure his daily activities by eschewing public records laws include giving oral directives to staff rather than formal, written orders and discouraging staff from taking notes and documenting meetings.

Additionally, the report shows that while Pruitt's EPA is ostensibly responsive to Freedom of Information Act (FOIA) requests, in many cases it appears to be stonewalling journalists and the public by choosing to first answer a backlog of FOIA requests left over from the Obama era, rather than addressing timely questions regarding the Trump Administration.

Sometimes, an absence of information has serious consequences. For instance, under Pruitt's EPA, Hurricane Harvey victims in Houston have been unable to obtain reliable information from the government on the toxicity of their air and water supply caused by damage to chemical plants that occurred during the

storm. According to local organizations, the EPA has gone so far as to deny that the toxic chemicals in the air and water have anything to do with leaks at these hobbled plants.

At the Department of Justice, there appears to be an increased tendency to neither confirm nor deny that requested documents exist. By answering information requests with so-called “Glomar responses,” officials are able to thwart FOIA requests without providing justification. The Department has also reversed course and is blocking access to information on investigations into police misconduct, closing down an important pathway for the public and local officials to demand accountability.

Another significant concern is the secret monitoring of civil rights advocates, including activists associated with protests opposed to the presidency of Donald Trump. Some social justice leaders fear that this activity is having a chilling effect on organizing and dissent.

“We are facing a situation where the government is increasingly using tactics, many of which are being carried out without our knowledge, to tear down social movements,” said Dylan Petrohilos, an organizer who was arrested months after the 2017 inauguration.

The Department of Homeland Security has seen notable transgressions, such as disappearing data fields and FOIA reading rooms going dark. There have also been problems with secrecy in immigration law enforcement, with the administration spreading disinformation and DHS wrongly identifying immigrants as members of the notorious MS-13 gang, and using secretly obtained misinformation as grounds for deportation.

The report also highlights increased antagonism at DHS towards reporters. Investigative journalist George Joseph attended a talk in which an Immigration and Customs Enforcement (ICE) official publicly impugned journalists for their reporting on the government’s immigration enforcement practices, calling their work misleading and parroting the president’s rhetoric about disseminating fake news.

“I had never been to an event where a high-level official attacked the media so openly.”

**- George Joseph,
Journalist**

"I had never been to an event where a high-level federal official attacked the media so openly," said Joseph.

Closing Democracy's Window draws attention to a growth in secrecy that hinders the peoples' right to know. By highlighting the problems, we can begin to work together in a nonpartisan way to find solutions that promote knowledge and provide access to as much information as possible. Decreasing secrecy and promoting transparency will advance accountability, preserving and fortifying our democracy.

II. INTRODUCTION

Government officials suppressing information and engaging in excessive secrecy is nothing new. To some degree, every administration has gone overboard and erred on the side of hiding information because it's convenient, rather than because it's truly necessary. Indeed, the desire to conceal unpleasant truths to avoid embarrassment is one of the few remaining bipartisan rituals in Washington.

Nonetheless, the growing culture of unwarranted secrecy is increasingly the rule, rather than the exception. At the White House and in many agencies, transparency seems to be perceived as an enemy, rather than an indispensable ally in the service of safeguarding our democracy.

During the first year of the current administration, we have witnessed a rapid erosion of openness, the crumbling of norms, frequent and ongoing disparagement of the media, efforts to stonewall information requests, manipulation of data, and outright suppression of facts.

Closing Democracy's Window reports on journalists' experiences as they perform their constitutionally protected jobs as our nation's eyes and ears. Journalists' institutional knowledge allows them to compare how different administrations handle issues of access and transparency. They are the quintessential canary in the coal mine. If these investigative experts, who have the time, resources, and training are stymied in their search for information, it gives little hope to average citizens to hold their government accountable.



The report also highlights advocates who represent people impacted by government secrecy and who describe the ways in which a lack of transparency causes harm. They demonstrate the real-world consequences of secrecy on the most vulnerable populations, or on those exercising their First Amendment freedoms.

Closing Democracy's Window offers a snapshot of transparency and openness in the White House, the Department of Justice, the Environmental Protection Agency, and the Department of Homeland Security. The agencies were selected for investigation because of their high profile and their impact on important public policies. Together, they offer a window into how the Trump administration handles access to information and the public's right to know.

III. THE WHITE HOUSE



To say the White House underwent a change in 2017 would be an understatement. The shift was seismic, and the dust is far from settled. The picture that has emerged thus far is one of a president who speaks freely on social media, a staff who follows up on his tweets with obfuscation, and a White House environment hostile to journalists and facts. Some argue that the president's social media habits make his the most transparent administration in history. While

his Twitter feed provides a window into the mind of the president at any given moment, when it comes to substantive policy-making and accountability, the White House has deliberately kept information secret, opting instead for misinformation and opacity.

Twitter, Messaging Apps Raise New Records Management Questions

As is the case with any administration, there are numerous records this White House would prefer to keep under wraps. Avenues exist, however, through which organizations may ultimately find success in making some information public. For example, because the president departed with tradition and refused to release his tax returns, the Electronic Privacy Information Center (EPIC) is suing the IRS¹ to obtain them so that the public can learn whether any conflicts of interest result from the president's many business holdings.



Public interest in the administration's ramped up military activity prompted demands for the release of the legal memo² the White House believes grants authority to use force against the Syrian regime as well as the reported changes to White House guidance³ on use of force outside active war zones.

Amid concerns about whether the administration's infrastructure policies favor private or public interests, Food & Water Watch filed a lawsuit⁴ against the president, the

Department of Transportation, and the Department of Commerce, alleging violations of the Federal Advisory Committee Act.

While success at obtaining information is far from certain, there are legal remedies that, at least in theory, may mandate disclosure. Presidential records, on the other hand, pose an even greater challenge, because the law does not provide any enforcement mechanism to ensure records are preserved or made public, and discretion lies completely with the White House.

The Presidential Records Act provides the framework for which records are to be preserved and made public. Although it was amended in 2014 to include electronic records, the law has failed to keep pace with rapid technological advancement in digital communications. President Trump's prolific use of Twitter, including his deletion of some posts, has raised serious questions about whether presidential records are being appropriately preserved. The National Archives and Records Administration (NARA) made clear in a 2015 memo⁵ to federal agencies that all social media communications concerning official government business should be preserved in the same manner as other electronic messages, whether they are made from official or personal social media accounts. In January 2017, NARA stated⁶ that the same applies to the president's use of social media, and Archivist of the United States David Ferriero wrote in a letter⁷ to Democratic senators that White House officials had consulted with NARA for guidance on preserving the president's social media posts. Still, Ferriero made clear that ultimate authority on what constitutes a presidential record rests with the White House, and NARA cannot ultimately do more than offer advice on records management practices.

Reported use of encrypted messaging applications⁸ is cause for another records headache. While the use of encrypted communications is not a problem in and of itself, (in fact, it's an important tool for government officials who want to blow the whistle on government wrongdoing) both the Federal Records Act and the Presidential Records Act require that private messages concerning official government business be preserved. Some of the apps in question are set to automatically delete messages after they are sent, likely meaning those messages are not being preserved in accordance with the law. Citizens for Responsibility and Ethics in Washington (CREW) and the National Security Archive filed a lawsuit⁹ arguing that use of such apps is a violation of the Presidential Records Act. Reportedly in response to the lawsuit, a White House

ethics training earlier this year warned staff not to use encrypted apps for government business, and reminded them of their obligation to preserve all communications regarding official business.

White House advisors Jared Kushner and Ivanka Trump earned the administration further scrutiny when reports emerged that they had set up a private email domain and account,¹⁰ which they used for official business. In a statement, Kushner's attorney stressed that all such emails had been forwarded to an official account and appropriately preserved. *Politico* later discovered that the family had set up a third private email account¹¹ to deal with scheduling and other daily matters. Lawyers again assured the public that all such emails are being appropriately preserved, but the public is left with questions about how presidential records are being handled by Kushner and Trump.

What Drives Decision-making? The Importance of Visitor Logs and Access to Ethics Information

White House visitor logs can be a window into who is influencing decision-making. The Obama administration, in response to several FOIA lawsuits from CREW, started releasing White House visitor logs in 2009. The Trump White House reversed the practice in April 2017, when it announced¹² that it would not release visitor logs out of concern for national security and privacy, despite the fact that the Obama administration faced no such problems during the seven years it released the logs. While the Freedom of Information Act (FOIA) does not apply to the White House, it does apply to the Secret Service, which maintains the logs and which ran afoul of FOIA when it refused to release them to FOIA requesters. Several Open the Government coalition partners, including CREW, the National Security Archive, and Public Citizen sued the Secret Service under FOIA for the release of visitor logs for the White House¹³ and President Trump's Mar-a-Lago¹⁴ estate.

The Secret Service refused to release the records, claiming that it had transferred custody of the logs to a White House office that is not subject to FOIA, resulting in another lawsuit¹⁵ filed by Public Citizen. In February, the administration settled the suit by agreeing to post¹⁶ visitor logs for some parts of

the White House, including the Office of Management and Budget and the Council on Environmental Quality.

Separately, CREW, the National Security Archive, and the Knight First Amendment Institute at Columbia University sued for visitor logs from Mar-a-Lago, and despite a court order to release the documents, the administration released only two pages¹⁷ of records, contradicting a previous assertion that a “substantial” number of records would be released. Finally, the Secret Service claimed that there simply is no system for keeping visitor logs¹⁸ at Mar-a-Lago, meaning that visitors can potentially gain access to the president without the public’s knowledge.

In an administration plagued by concerns about corruption,¹⁹ the financial interests of the First Family and other high-ranking officials may warrant particular scrutiny. Therefore, in addition to seeking visitor logs, efforts to obtain ethics information are intended to shed light on other potential administration influencers. For example, MuckRock is running a campaign²⁰ for FOIA requesters to collaborate and share information on the White House and the administration. To track potential conflicts, the Sunlight Foundation has created a database²¹ based upon the financial disclosures of the president and his children, as well as investigations published by other watchdogs and publishers. Numerous organizations filed FOIA requests for the Trump administration’s secret ethics waivers and “retroactive ethics waivers” — a construct that has no precedent in any White House — to better understand what influences may be driving public policy.

‘What Good Is Access If You’re Not Getting Reliable Answers?’

Reporter David Nakamura told Open the Government to look to the growth of the *Washington Post*’s team covering the White House as an indicator of the changing news cycle under the Trump administration. Nakamura, who has been covering the White House for the *Post* since August 2011, said the team included just four reporters when he started, but has now doubled in size. Some of that growth is due to changing resources at the news organization, but much of it, including the “hot seat,” a rotating

shift where a reporter monitors Twitter and other breaking stories starting at 5:00 in the morning, is due to the changing nature of reporting on the White House.

Still, the challenges to journalists covering the administration have been somewhat different from what many feared, particularly given President Trump's rhetoric on the campaign trail and his tendency to ban media outlets, including the *Post*, from his rallies. Right after the election, Nakamura said, "The biggest threat people thought we were facing was that he would physically bar reporters from the White House campus and Air Force One." It became clear shortly after Trump took office, however, that press access under the new administration would continue largely as it had under President Obama.

Is access enough? Fact checkers counted more than 2,000 false statements by President Donald Trump.

- David Nakamura, *The Washington Post*

Indeed, he said, *Post* reporters have the same amount of physical access to the White House as they did in the previous administration. Some even claim greater access²² under the new administration, including *New York Times* photographer Doug Mills, who was among those who complained about the Obama Administration's tight control²³ over photography of the president, frequently excluding media photographers in favor of then-official White House photographer Pete Souza.

Nakamura emphasized the difference between President Trump's language and the reality of his relationship with the press: "I think the general sense among the press corps is that his language makes us out to be the enemy of the people and suggests he might support more restrictive policies, such as harsher libel laws...but as many people pointed out, Trump does have a real need to have the press around him, and so in some ways access has been even greater."

Stylistic differences between the two administrations have also led to differences in access – in some cases more, and in some cases less. Nakamura said that the Obama White House controlled messages from the administration very carefully, so there was more accountability up the chain because the messages from the president and White House staffers were consistent. Under Trump, the significant increase in leaks from the White House as well as the president's prolific tweeting have arguably given the public more access than usual into the inner workings of the White House.

When traveling, Nakamura said, President Trump will often take extensive but impromptu time to answer reporters' questions aboard Air Force One, whereas President Obama would only occasionally speak on the tarmac and took few questions. However, Trump has neglected to do formal, solo press conferences as his predecessors have done. In fact, he has done only one²⁴ solo briefing in his entire time in office, just three weeks after his inauguration. In contrast to informal press access, formal briefings offer reporters the opportunity to prepare their questions in advance and directly engage the president without distractions.

Some of the differences from past administrations, however, go deeper than style.

The *Washington Post's* fact checker counted more than 2,000 false or misleading statements by President Trump in his first year in office, leading reporters like Nakamura to question whether access is enough.

"The question is, is the White House being truthful? What good is access if you're not getting reliable answers?"

In many cases, White House staffers have espoused one policy position at a press briefing, only to have the president publicly contradict it within a 24-hour period. Some media professionals have thus advocated skipping the White House press briefings all together, and media critic Jay Rosen has suggested outlets "send the interns"²⁵ because the briefings are largely useless for getting accurate information and answers to questions.

"I think it is honestly more difficult to get answers," said Nakamura, "and it's harder to get them to respond to specific questions... Sometimes we don't hear back at all, and while all administrations have had some of that, it's at a much higher rate. This is indicative of a problem we're having throughout the administration. I think you see Trump's language about the media reflected in some of the agencies where they've adopted a more hostile attitude toward the press. You can kind of see that rhetoric trickle down."

Nakamura also mentioned the Trump administration's refusal to release visitor logs, which he said may sound like a minor issue to the general public, but can actually be very important. He gave *Fire and Fury* author Michael Wolff as an example of someone who Nakamura himself had seen at the White House, as did several other reporters. The White House, however, downplayed Wolff's level of access, and President Trump

denied meeting with him. Nakamura said that visitor logs would have made it possible to check the White House's assertions.

Overall, he said, "it's not cut and dry." There are some kinds of stories that may be easier to write under the Trump administration, about how decisions are being made and the internal workings of the White House. Still, other stories about important policy decisions and implementation may be getting lost.

"I think the big question for reporters has been whether the coverage and the intense public interest in the daily operations of this White House have helped the public get a sense of how Trump is as a manager and how decisions are made...but are we getting fewer answers about those policy areas, you know, deregulation, diplomacy? Those things matter too."

Travel Ban Secrecy Leads to Confusion, Fear, and Agencies Adrift



Secrecy in the Trump administration goes beyond concerns about access, records and corruption. It extends to the creation and implementation of policies that touch the lives of immigrants, students, visitors to the U.S., and their families. When President Trump signed the executive order instituting the initial ban restricting travel from majority Muslim countries last

January, he skipped the typical interagency vetting processes and neglected to release full details to implementing agencies. The result was that even inside the government, few knew details of the new policy, and the Department of Homeland Security (DHS) was forced to conduct a legal analysis of the ban after it had already been enacted.²⁶ The public learned later that U.S. Customs and Border Patrol didn't receive a copy of the executive order until nearly two hours²⁷ after it had been signed.

This secretive process created chaos and confusion, leaving it to organizations like the American-Arab Anti-Discrimination Committee (ADC) to communicate²⁸ whatever accurate information it could find to the public, as well as try to alleviate fear and panic by those directly caught in the web of disarray.

After his office investigated the agency's rollout of the ban, former DHS Inspector General John Roth found that the confusion around the initial directive caused DHS officials to violate court orders.²⁹ The *New York Times* reported on internal agency documents showing officials struggling to obtain information³⁰ and deciding how to implement the new policy. Meanwhile, the public was left scrambling to figure out whether they or their friends and family would be affected.

Interview with Allegra Klein: The Human Toll of the Chaotic Travel Ban

Allegra Klein, a U.S. citizen, was on a flight to Iraq where she was working on a civil society project when she met the Iraqi man who would become her husband. Things flowed pretty smoothly from there – they got engaged and then married in Turkey, applied and were approved for a marriage visa, before moving back to the United States in December 2015. Klein went back to school, and her husband, an International Basketball Federation (FIBA) referee, worked at local high school and college games when he wasn't traveling all over the world for competitions.

It was while he was on one such trip to Thailand that President Trump signed the executive order blocking entry to the U.S. of people from predominantly Muslim countries. "It was almost a year ago now," Klein told OTG, "but it still feels very fresh sometimes."

"And I really had no idea this was coming, I don't think anyone did...When I heard about it, I was really worried, because I looked it up and I couldn't find much information online."

Klein's husband had a green card, but when the travel ban was first implemented the contradictory (or sometimes complete lack of) information caused confusion about whether it applied to green card holders.

She continued: "I don't usually do this, but I panicked. They said 120 days, and I just couldn't imagine him not being able to come home for four months...he literally had work the day after he was supposed to come back. Since I'm in school full time, we needed his income."

She felt powerless, and her husband was stranded in an unfamiliar country on the other side of the world. Klein reached out to journalist friends she knew from her time in Iraq,

who advised her to get in touch with local politicians and lawyers.

She tried reaching out to legal agencies in New York City, where her husband would be attempting to re-enter the country. Still, she said, nobody really knew what was going on or had any answers, and the information that reached the public changed constantly. They heard that visa holders were not exempt from the ban, but that they could return to the U.S. if they got special approval from the country they were in at the time, so her husband began the process of trying to seek help at the U.S. embassy in Bangkok.

"I really didn't know what to tell my husband. We felt terrorized in our own home."

- Allegra Klein

"I really didn't know what to tell my husband," she says, "We felt terrorized in our own home by our own government."

Klein said her husband was very encouraged by the videos of protests that broke out across the country, struck by the power of individual citizens who spontaneously went to the airport and rebelled against the ban.

Finally, someone from her college alumni network put her in touch with the ACLU, which had legal representatives at JFK airport as well as the federal courts. They eventually learned they didn't have to go through the Bangkok embassy, and although her husband was stopped at the airport while on a layover in Istanbul, he was ultimately allowed to return to the U.S. There, he was delayed for several hours and interrogated, and his phone was confiscated and he was asked for his social media passwords. At one point, he was even told that he wasn't entitled to a lawyer, but officials relented when Klein objected.

Klein said that they were very grateful for the help they received from friends, colleagues, and organizations. "I don't blame the representatives and even the agencies," she said, "because they were just as blindsided as we were." Still, she said, the lack of information and contradictory reports that emerged from the White House caused chaos and confusion, and there was no system set up to assist those affected by the ban.

IV. THE ENVIRONMENTAL PROTECTION AGENCY



Perhaps nowhere in the Trump administration has the shift toward a culture of secrecy been so evident as at the Environmental Protection Agency under Scott Pruitt. Pruitt has dragged the EPA backward by refusing³¹ to proactively release a comprehensive calendar of his appointments, instead forcing groups like American Oversight to use FOIA³² to obtain it. The Environmental Defense Fund also used FOIA to obtain emails showing that Pruitt was personally involved³³ in the removal of information about the EPA's Clean Power Plan from the agency's website.

Pruitt further demonstrated his commitment to secrecy by requesting a secure phone booth (a Sensitive Compartmented Information Facility, or SCIF) be built for his personal use – at a cost of nearly \$25,000 – even though the EPA already has a SCIF for dealing with classified information. An EPA spokesperson justified the expense by citing³⁴ “privacy” and “security” needs, but the shifting culture at the EPA suggests instead an attempt to avoid accountability.

Pruitt's history as Oklahoma Attorney General, where he reportedly used a private email address and multiple government email accounts in an attempt to evade records laws, is enough to cause concern about his disdain for government transparency. Last year, a judge ordered³⁵ the Oklahoma Attorney General's office to release Pruitt's emails with fossil fuel companies during his time in office in response to a lawsuit³⁶ from the Center for Media and Democracy.

Reports throughout Pruitt's first year at EPA detailed a cultural shift at the agency, raising concerns that EPA staff may be going out of their way to avoid not only releasing information to the public, but also creating federal records in the first place. Pruitt's reported efforts³⁷ to obscure his daily activities by eschewing public records laws include giving oral directives to staff rather than formal, written orders, and discouraging staff from taking notes or documenting meetings. In August, the *New York Times* reported that in an effort to reverse a regulation³⁸ protecting certain bodies of water in the U.S., Pruitt verbally ordered EPA scientists to produce a study that would show that the rule is economically costly rather than beneficial – all with a fraction of the amount of documentation and evidence typical of such a study and policy change.

A FOIA request filed by Public Employees for Environmental Responsibility (PEER) revealed further evidence that EPA is failing to keep adequate records of its operations and policy decisions. PEER requested records on the EPA's Superfund Task Force, which according to EPA's website³⁹ was created to "provide recommendations for improving and expediting site cleanups and promoting redevelopment." After a lawsuit by PEER, EPA responded that⁴⁰ there were "no responsive records" to the FOIA request, asserting that the task force had neglected to take any notes or meeting minutes, create an agenda for its meetings, or use any reference materials in its deliberations.

It appears that this behavior is a violation of the Federal Records Act, which requires⁴¹ federal agencies to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency."

Democratic senators on the Environment and Public Works Committee sent a letter⁴² in August demanding that Pruitt follow the Federal Records Act, and Citizens for Responsibility and Ethics in Washington (CREW) sent a letter⁴³ to the National Archives and Records Administration (NARA) in September requesting that NARA investigate. NARA responded, promising to schedule a meeting with EPA's Chief Records Officer to discuss the matter.

In response to these concerns, the Union of Concerned Scientists, the Project On Government Oversight, the Government Accountability Project, the Climate Science Legal Defense Fund, and PEER published a guide⁴⁴ for federal scientists, informing them of their rights and whistleblower protections and advising them to keep written records of their work.

While Clearing Backlog, EPA May Be Taking FOIA Politicization To New Heights

The EPA has touted its dedication to FOIA by announcing⁴⁵ an effort to focus on reducing the backlog of pre-2017 FOIA requests at the agency. While reducing FOIA backlogs is an admirable goal for any agency, the EPA's approach to FOIA in 2017 raises concerns that it will use this effort to subvert, rather than promote, transparency. Prioritizing backlog reduction seems, in effect, to be a de-prioritization of responding to new requests, meaning that the EPA can release documents from the previous administration while neglecting the timely release of current documents – avoiding accountability under the guise of transparency.

"When the Trump administration first started, I felt things were not that different," said E&E News reporter Kevin Bogardus about his own experience using FOIA to obtain documents from the EPA. "I was able to get Administrator Pruitt's recusal statement through FOIA, and we were the first to get his private calendar through a FOIA request. I file a FOIA each month for his calendar the preceding month, and I've been doing that since 2014 for whoever is the EPA administrator and deputy administrator at the time. To be fair, it took me a while to get those responses for [Obama EPA Administrator] Gina McCarthy⁴⁶ as well, but I did eventually get them. That copy of Pruitt's calendar I got last June is the only copy I've ever gotten through FOIA."

Bogardus added: "There's other low-hanging fruit I've nearly stopped getting from EPA – things like congressional correspondence logs, which I've FOIA-ed somewhat irregularly since 2006 and regularly since joining E&E [in 2014]. I got congressional logs from EPA last July and again last month, but I'm still waiting on several months of logs. I am still getting things through FOIA, so it's not a complete shutdown...it's just strange how some things have slowed down."

There is also concern that under Pruitt, FOIA requests may increasingly be subject to review by political appointees of the administration rather than exclusively career EPA staff.

"The Obama Administration did some politicization of the FOIA process as well," said journalist Jason Leopold, "so it's not totally new. At EPA, though, I do think the FOIA process has become a bit more politicized. It seems like you're seeing a higher level of review of FOIA requests to the level of political appointees."

"It seems like you're seeing a higher level of review of FOIA requests to the level of political appointees."

**- Jason Leopold,
BuzzFeed**

Cause of Action notes that under the Obama administration, federal agencies would sometimes subject FOIA requests to "sensitive review"⁴⁷ by political appointees. Still, the scale of potential politicization at EPA under this administration is cause for concern. The *Washington Post* reported that EPA is subjecting many FOIA requests for Pruitt's own documents to "senior management review,"⁴⁸ suggesting that Pruitt may be controlling the release of information about his own activities to the public. A recent POGO [analysis](#)⁴⁹ found that EPA has been particularly slow to respond to FOIA requests for documents from the Office of the Administrator.

American Oversight is also concerned about possible politicization of the EPA FOIA process, and they are focused on one case in particular. Last year, a lawyer affiliated with Republican campaign research group America Rising started submitting FOIA requests for information on EPA staffers who had expressed criticism⁵⁰ of the administration. EPA also hired⁵¹ a firm affiliated with America Rising to conduct “media monitoring” for the agency. The activities raise serious questions about abuse of the FOIA process – both because the lawyer, Allan Blutstein, appeared to receive documents in response to his many FOIA requests at a rate much faster than environmental groups or journalists, and also out of concern that the requests were targeting dissenting staff for retaliation. American Oversight filed a FOIA request for notes and communications surrounding Blutstein’s requests.⁵²

For Small Publications, EPA Secrecy Presents Serious Challenges

Corbin Hiar covers chemical safety and public health issues for *E&E News*, a trade publication covering environmental and energy issues, which brings him into frequent contact with the EPA. While he acknowledges that the FOIA process at EPA was also politicized under the Obama administration, “and presumably has been since the law was enacted,” he still suspects that the EPA under President Trump is more willing to hide politically damaging documents.

Hiar referred to an incident in which the EPA publicly targeted⁵³ AP reporter Michael Biesecker in a statement, after Biesecker wrote a story⁵⁴ critical of EPA’s response to Hurricane Harvey. Shortly after that, Hiar noticed that several conservative publications⁵⁵ almost simultaneously put up blog posts questioning the qualifications and background of some of the sources that were cited in Biesecker’s story. He filed a FOIA request for emails between a few EPA political appointees mentioning Biesecker from the day Hurricane Harvey hit to the day these pieces went up (a period of about a week), and was given a completion estimate of over a year.

“I have some sympathy for EPA,” Hiar told OTG, “in the sense that they are inundated with FOIAs like they’ve never been before. But at the same time, they’re putting their resources into clearing the Obama administration backlog, the majority of which is no longer newsworthy or interesting, instead of following the law as intended.”

Hiar said that making open records requests at the state level has been effective in some cases when the press office and EPA FOIA office aren’t willing or able to

provide clear answers. For example, EPA came under fire after *E&E News* revealed⁵⁶ that Michael Dourson, Trump's controversial chemical safety nominee, was working at the agency before he'd received Senate confirmation.

"...you have to think a little bit more creatively about how to use open records laws."

- Corbin Hiar, *E&E News*

With the press office unwilling to even confirm *E&E's* reporting,⁵⁷ much less provide additional information on Dourson's role at the agency, Hiar used Ohio's public records law to obtain emails⁵⁸ between Dourson's University of Cincinnati email address and EPA officials.

"I think the combination of the FOIA backlog, which is real and substantial, and the potential greater politicization of the FOIA process has made it so that you have to think a little bit more creatively about how to use open records laws, and

the federal FOIA isn't proving as useful as in previous administrations. Thankfully there are still some states that have good laws on the books, and you can think about the ways in which federal agencies interact with the states."

Hiar's colleague Kevin Bogardus also found success in using state open records laws⁵⁹ to reveal that the EPA pushed states to limit press access to Administrator Pruitt's visits during his "state action tour" to promote the repeal of the Waters of the United States rule.

Hiar also commented on the near-necessity of suing the government to obtain documents under FOIA: "It's good that our courts still work, but I don't think it should be necessary to pay for a lawyer just to have a law enforced."

He noted that *E&E News* is a small publication, and it's difficult to afford the legal fees associated with FOIA lawsuits. He acknowledged that there are many public interest groups that are willing and able to take the government to court over FOIA requests, but that since groups typically want to garner as much media and public attention as possible, they often take the documents they obtain to bigger publications. Hiar argued that more specialized publications like *E&E News* might be able to better report on the documents, because they have more expertise on the agency or subject matter.

Hiar echoed other journalists noting an apparent clampdown on information coming from the administration on basic things like calendars and personnel information, such as Michael Dourson's employment status⁶⁰ at the agency and Scott Pruitt's speaking engagements. When Pruitt was scheduled to address⁶¹ the American Chemistry Council at an event, Hiar reached out to the EPA public

affairs office to find out more about what Pruitt might say at this closed-door discussion. Hiar said other agencies, even under the Trump administration, are typically willing to give talking points or a summary, but that EPA told him that Pruitt doesn't use notes or talking points, so they couldn't give Hiar any information.

"That's possible, he's a very smart guy," said Hiar, "but it beggars belief."

Hiar said he believes the secrecy makes journalists' jobs harder. "I think it generates an unfortunate level of skepticism and mistrust."

He also said he doesn't know the reason for EPA secrecy under Pruitt, but that it ultimately harms both EPA and the public. "I don't think there's anything inherently wrong with the administrator of the EPA speaking with stakeholders, even behind closed doors, but there should be some record of that. The Pruitt EPA takes a lot of hits for its secrecy, and I don't know if that's because that's how they think government should be run, or if it's because they're concerned there would be more outrage if people knew what they were doing. I think that's unfortunate. I would much rather just say what's going on than write incredibly carefully about what may or may not be going on."

Hurricane Harvey: Non-Profits Pick Up Slack when Government Fails to Provide Information on Toxic Chemical Spills



Yvette Arellano conducts research and grassroots advocacy for the Texas Environmental Justice Advocacy Services (t.e.j.a.s.),⁶² which works to empower Texans to create sustainable and environmentally healthy communities. In the aftermath of Hurricane Harvey, t.e.j.a.s. provided communities in Houston with much-needed safety information about chemical spills in the absence of information from the government.

Arellano told Open the Government that there is a particular need for government funding, attention, and public health information in and around Houston because, "the communities lack resources like adequate food, proper education, healthcare....and we have shadow populations like immigrants who are afraid to come out of the woodwork." In spite of this need, she said, there was almost no

information provided by the EPA or the Texas Commission on Environmental Quality (TCEQ) before or after Harvey.

Arellano said that she hopes the media attention around Arkema, a chemical plant where explosions caused noxious fumes and smoke after flooding from Hurricane Harvey, would cause the public to consider the dangers around similar facilities across Texas and the country.

"I was hoping people would see, wow this is located right near a community."

When Harvey hit, local officials imposed a 1.5-mile radius around the plant based on their assessment of where the public would be at risk. Law enforcement officers who were maintaining that perimeter fell ill, as did many of the medical professionals who responded to police calls for assistance. Some of those first responders are currently suing Arkema,⁶³ accusing the company of negligence. Arellano also said that a t.e.j.a.s. intern could see smoke from the plant well outside the perimeter – four miles away.

Arellano said that without an updated EPA risk management plan in place, it was difficult for the public to know how to keep themselves safe, leaving t.e.j.a.s. to do their best to keep the affected community informed.⁶⁴ A new EPA Chemical Disaster Rule, which would have imposed new requirements on companies like Arkema to mitigate chemical safety risks and keep the public informed of safety procedures, should have gone into effect in early 2017. Instead, the EPA under Administrator Scott Pruitt delayed the rule until 2019 after industry groups complained. The Union of Concerned Scientists explains in a fact sheet⁶⁵ how the implementation of the new rule could have helped keep the public safe and mitigated the dangers of the Arkema disaster.

But Arkema wasn't the only plant affected by Hurricane Harvey. "There was an entire 16-mile stretch of plants that got a free pass," said Arellano, "and they knew exactly what was going to happen, they can anticipate."

When Harvey was approaching, Texas Governor Greg Abbott temporarily suspended the rules⁶⁶ requiring energy and chemical companies to report spills and emissions to the TCEQ, instead allowing them to submit voluntary reports (the TCEQ and EPA worked together⁶⁷ to monitor air and water safety after Harvey). Even the voluntary reports showed that more than two million pounds of chemicals were released into the atmosphere during and after the storm.

As Arellano said, “You had all these fugitive emissions without communities knowing.”

Arellano also noted that the reports TCEQ does have are “guesses at best,” because the air monitors that should have been tracking emissions were shut down during the storm for fear of damaging the equipment.

About a week after Hurricane Harvey, t.e.j.a.s. received a visit from the EPA, purportedly to check in with the group and ensure they had the resources they needed for their storm relief work. Arellano said that this visit occurred soon after the *AP* article criticizing⁶⁸ EPA’s lack of presence on the ground, casting doubt on the agency’s commitment to monitoring the situation.

“So we asked,” explained Arellano, “is the [flood] water toxic to humans and does it have toxic chemicals? And they said yes, they have no doubt the water is toxic. The follow up question was: Did any of those chemicals make their way from chemical companies into residential neighborhoods?”

To this, Arellano said, the EPA officials responded: “No.”

When Arellano and her colleagues followed up by asking where the officials thought the chemicals emanated from if not the plants, they responded they thought that individuals had somehow obtained the industrial chemicals on their own.

“At that point we realized that the EPA wasn’t going to be honest with us.”

“We asked about Arkema, and they said it was about as toxic as a campfire, because it was only wooden pallets burning that were causing problems, not the chemicals. They said the chemicals burned up immediately.”

When t.e.j.a.s. offered to take the visiting EPA officials out to see and test the water themselves, the officials declined, stating that the area remained impassible. Meanwhile, said Arellano, the Red Cross had been running shelters in those same areas, and ICE officers had been present in the “impassible” area as well – at one point even demanding that one t.e.j.a.s. organizer show her identification. “Small outfits did all the work” of monitoring environmental harm,

“Why is it that regulatory agencies are not stepping up and doing the work they’re supposed to be doing?”

- Yvette Arellano, t.e.j.a.s.

said Arellano. "It was a complete failure on the part of government structures, at both the federal and state levels, and it was extremely frustrating."

When asked about the follow-up from EPA now that it's been several months since Harvey hit, Arellano said she asked on a phone call with the EPA and TCEQ how the public could get more thorough updates on the recovery process. She said that EPA responded by saying that they had closed all of their work on Hurricane Harvey, and that TCEQ had done the same. Instead, Governor Abbott appointed Texas A&M University to take over recovery work.

"[Texas A&M] has been doing great work," Arellano said, "but why is it that regulatory agencies are not stepping up and doing the work they're supposed to be doing? A public university should not be responsible for all this. They're located way away from affected areas, as opposed to TCEQ which has offices here."

In fact, the *San Antonio Express-News* reported⁶⁹ in September that EPA has made the decision to shut down its regional lab in Houston in the coming years, despite the continued need for environmental monitoring in Houston. The next nearest EPA lab is 400 miles away in Oklahoma.

Interview with Wesley Lowery: Protecting Sources & Freedom of the Press

The Obama administration was widely criticized by media rights groups and whistleblower defenders for aggressively pursuing national security leaks and journalists' sources in high profile cases. However, Trump's pledge to more aggressively subpoena journalists as part of efforts to crack down on leaks of classified information, in addition to the White House posture towards the media, appears to be having a chilling effect on officials who might otherwise speak openly to journalists. "There's an increased awareness and enhanced effort to protect ourselves, as journalists, and greater care to ensure we're protecting our sources," according to Lowery.

In an antagonistic climate, where journalists are bullied and their work is referred to as "fake news," Lowery notes that journalists have to take greater precautions to protect themselves and their news organizations by meticulously documenting their reporting methods, including the reliability and veracity of their sources.

"Because things are so bitterly divided, and a huge part of society doesn't trust us, we need to be more specific about our sources, including details on how we located them. We also need to be clear about how we ended up on a story, and why we're reporting on it. In response to the fake news rhetoric, trust in media is extremely low."

Although the working environment for journalists has grown more difficult, Lowery says this is still an inspiring time to be a reporter.

"The number of people wanting more investigative reporting has grown, and they support good journalism and express gratitude for the reporting we do. Thankfully, there are more people out there supporting and defending the media now."

V. THE DEPARTMENT OF JUSTICE



The Department of Justice has always been a relative bastion of secrecy, regardless of the administration in power. However, early indications suggest further erosion of transparency, including limiting access to information, growing secret surveillance programs, and resistance to accommodating reporters' requests.

On access to information, FOIA requesters are facing new challenges when seeking records from various DOJ components. Seeking documentation about Attorney General Jeff Sessions' recusal from the DOJ's investigations into the 2016 presidential election, for example, Citizens for Responsibility and Ethics in Washington (CREW) is litigating in an effort to access the Attorney General's calendars from February-to-March 2017.⁷⁰

In response to CREW's initial FOIA request, the DOJ responded with eight pages of highly redacted documents withholding details about entire meetings between unknown individuals and Attorney General Sessions. The DOJ justified the redactions under Exemption 5 of the FOIA law, a wholly discretionary provision under which agencies should consider the public interest in disclosure when deciding whether or not to release material.

"The press conference where Sessions announced his recusal from the investigations of the Trump campaign, which was the subject of the initial request, is not included in the released calendars," according to Anne Weismann, Chief FOIA Counsel for CREW. "The missing entries, along with the redactions, raise concerns that the Justice Department is responding with incomplete data and withholding information in the public interest, in violation of the FOIA."

Without access to the calendars, the public is left in the dark to decipher a Cabinet member's true priorities and less able to detect potential conflicts of interest.

To circumvent and resist these Cabinet calendar blackouts, government groups are looking more to FOIA to demand openness. But increasingly, FOIA requests are subject to fierce opposition by DOJ. The aforementioned CREW case, for example, highlights challenges when it comes to timely FOIA processing of certain requests at the Justice Department. CREW petitioned for expedited processing and a fee waiver, arguing that the subject matter was of “widespread and exceptional media interest and the requested information involves possible questions about the government’s integrity that affect public confidence.”

The DOJ granted CREW’s request for expedited processing, but then claimed it had a substantial backlog of expedited requests, slowing down the processing of the release of the responsive documents. Once in litigation and in the face of a motion for a preliminary injunction, DOJ finally agreed to a processing schedule.

‘Neither Confirm nor Deny’: Using ‘Glomar’ to Gut Access to Information

Journalists have reported a worrisome spike in situations where agencies, including the Justice Department, are unwilling to even confirm or deny the existence of documents. Jason Leopold, an investigative reporter with *Buzzfeed*, reported that from January-to-April 2017 he received twelve so-called Glomar responses, more than he received in all of 2016.⁷¹ Two of those came from the FEC and CIA, while the other ten were from the DOJ, seven of which came from the FBI.

A Glomar response, often used by the CIA or NSA, is typically cited under the pretext that acknowledging or denying the existence of a clandestine intelligence program would harm national security.⁷² It is also sometimes invoked to protect an individual’s privacy to prevent stigmatization, such as a public official under investigation being identified in federal law enforcement documents.

The DOJ’s annual statistical FOIA reports do not track the number of times the agency uses the Glomar response, making it difficult to detect a trend. Nonetheless, there are indications that suggest potential misuse of the Glomar response by the Trump Justice Department to hide information where there is a strong public interest in disclosure.

For example, the DOJ thwarted a FOIA request that sought information on a potential conflict of interest at the Justice Department, after Makan Delrahim, a former lobbyist for health insurance giant Anthem, was hired to head the DOJ's

antitrust unit.⁷³ The FOIA petitioners sought to obtain communications between Delrahim and the DOJ covering the time period Delrahim lobbied for a failed \$54 billion merger deal between Anthem and Cigna Corporation. The Glomar responses cited privacy exemptions – rarely used as a justification for full denials of records – as the reason to withhold information.

In another case, the Department of Justice refused to confirm or deny the existence of records related to President Trump's tweets accusing President Obama of wiretapping Trump Tower during the 2016 campaign. American Oversight filed a lawsuit challenging the Glomar response and forced the DOJ to reverse its position and acknowledge that no documents of a wiretap existed.⁷⁴ American Oversight emphasized that the DOJ's Glomar came after FBI Director Comey said publicly that the Justice Department had no information that supported President Trump's claims, and after the president had publicly acknowledged the "wiretaps" in a series of tweets.⁷⁵ The courts tend to favor requesters in Glomar cases where the government has already acknowledged or denied the existence of the information in question.⁷⁶

"It's ludicrous for the Justice Department to claim it can't confirm or deny the existence of records after the president declared they exist and the FBI director denied it," said Austin Evers, Executive Director of American Oversight. "Well, which is it? While it's unfortunate that it's necessary to litigate to pierce preposterous positions, it's reassuring that independent courts remain a bulwark against the executive branch's Orwellian instincts."

The Washington Post's Wesley Lowery on DOJ Secrecy

The Washington Post's Wesley Lowery, a Pulitzer Prize winner who covers law enforcement, race, and justice, told us that noticeable changes have occurred in how the DOJ handles information related to its investigations of police. Lowery is well-versed on these issues and served as the lead journalist on the Post's "Fatal Force" project, a database that started tracking police shootings in 2015.

When it comes to transparency on policing, according to Lowery, federal agencies under prior administrations were, overall, not particularly transparent or

responsive. “We’re already starting from a place where these agencies are known for keeping information from the public,” said Lowery. He added, however, that the lack of transparency has become even more acute under this administration, notably when it comes to the shift in the Justice Department’s approach to making information available on its investigations of police misconduct.

As police shootings of civilians began to spark widespread media attention and protests starting in 2014 in cities such as Ferguson, Baltimore, and New York, the Justice Department under the Obama administration carried out investigations into discriminatory patterns and practices by police departments across the country. The resulting reports were disclosed to the public, providing important evidence of police abuses that often led to reforms and accountability measures.⁷⁷ This approach shifted significantly under the Trump administration, which is noticeably less transparent about such investigations.

For example, following the 2015 shooting death of Walter Scott in South Carolina, local officials requested a federal investigation into the North Charleston’s Police Department (NCPD) and potential discriminatory policies. The review was paid for by the federal government and completed last year by the DOJ Office of Community Oriented Policing Services (COPS). But in October 2017, the DOJ reversed course and refused to release the report to the public or to city officials.⁷⁸ The refusal to share the report followed Attorney General Sessions’ pledge to shift the DOJ focus away from such investigations.⁷⁹

Lowery pointed out that in a climate where you have less overall information being released by the Justice Department, investigative journalists need to consider alternative tactics. Like other reporters, Lowery is using local information laws to access information blocked by the federal government.

“In my work, I have been focusing more on filing public records requests at the local level, especially with states and municipalities that have good transparency laws, rather than trying to go through the front door of the DOJ.”

Interview With Dylan Petrohilos: DOJ Targeting Of Anti-Trump Protesters

Dylan Petrohilos is a 29-year-old graphic designer and D.C.-based activist whose house was raided months after Inauguration Day 2017. Information obtained by an undercover police officer who attended protest-planning meetings in the

weeks before the inauguration was used to justify the warrant.⁸⁰ Petrohilos described the case and how covert monitoring of protesters and sharing of information between the federal officials and police has impacted broader social movements and organizing.

"We are facing a situation where the government is increasingly using tactics, many of which are being carried out without our knowledge, to tear down social movements. If the pursuit of such cases continues, we could face a situation where the large part of protest organizing is effectively dismantled within a couple of years and dissent is completely silenced."

"The government is increasingly using tactics, many of which are being carried out without our knowledge, to tear down social movements."

- Dylan Petrohilos, D.C.

Igniting concerns that that there is an effort by the Trump administration to quell dissent, the government has increased not only monitoring meetings like the one Petrohilos attended, but also pursuing data about anyone associated with a website used for protest planning.

"There is a concerted effort to crack down on the rights of organizing and dissent in this country right now," said Petrohilos.

Federal indictments were initially brought against more than 200 people accused of conspiring to riot and inciting violence on Inauguration Day.⁸¹ The first six people to stand trial were found not guilty on all charges in December 2017, and the government has since dismissed the indictments for 129 of the remaining defendants.⁸²

During the criminal trials of those who were acquitted, a D.C. police officer testified about the law enforcement infiltration of several protest planning meetings. Defending Rights & Dissent is working to get more information about the infiltration of organizing meetings, coordinating with the National Lawyers Guild to file public records requests with the DC Metropolitan Police Department.⁸³ OTG also filed requests for information on the handling of the protests by police and federal law enforcement on the day of the inauguration and in response received heavily redacted documents with nearly all information related to pre-Inauguration Day surveillance withheld from disclosure.

“The...case is emblematic of the extensive secret monitoring and infiltration by the government and local police of protest organizing,” said Petrohilos. “This has a tangible chilling effect on free speech.”

The targeting has spread beyond investigations into those suspected of damaging property or acts of vandalism on Inauguration Day to those simply believed to be associated with the protests. In July 2017, the Justice Department’s broad warrant demanding information relating to a website associated with the protest planning, disruptj20.org, sparked widespread outcry over fears the DOJ was seeking to develop a list of people who had voiced opposition to the administration.⁸⁴ The website had been used as a platform to provide and exchange information on protest activities planned for the week leading up to Inauguration Day, such as a workshop on resistance strategies held on Martin Luther King Jr. Day. The website continued to provide descriptions and photographs of protest events, along with information about the mass arrests of hundreds of demonstrators on Inauguration Day.

In response to a legal challenge from the website provider DreamHost, and following widespread public pressure, the government significantly narrowed the scope of its warrant so that it no longer sought IP addresses of an estimated 1.3 million visitors who visited the site. However, the narrowed warrant still sought a broad range of information, including communication from individuals not suspected of any crime.

In August 2017, OTG and a coalition of over 70 public interest organizations sent a letter to the Attorney General expressing concern over the level of secrecy relating to potential executive branch overreach and government efforts to gather information on individuals engaged in political organizing.⁸⁵ The DOJ’s warrant gave the administration the ability to identify individuals engaged in constitutionally protected speech and dissent, the letter argued, and raised questions over whether the DOJ was seeking large amounts of data from similar websites in other cases.⁸⁶

Civil liberties and civil right groups have denounced the charges against the defendants, arguing that the government is pursuing a conspiracy case based on association; one that includes journalists and individuals such as Petrohilos who were not arrested the day of the protests, but were later arrested and charged with conspiracy to riot.

"You can see the impact this is having in D.C.," added Petrohilos. "People have to think much harder now before attending a meeting, taking part in a protest, or even emailing someone about an event. They have to consider the real possibility that the police could be monitoring and sharing information with the federal government — information that could be used against them in some way down the road."

The Resurgence of Secret FBI Spy Programs Aimed at Internal Dissent

The FBI has a long history of using surveillance programs intended to protect the country from crime, terrorism, and foreign adversaries, to target dissidents, social groups, and activists on the basis of race or political affiliation. Fears that the government was again engaging in such programs intensified in October 2017, after *Foreign Policy* reported on a leaked FBI counterterrorism assessment that characterizes a so-called "Black Identity Extremist" (BIE) movement as an emergent domestic terror threat that the FBI says endangers the lives of law enforcement officials.⁸⁷

The leaked document sparked widespread outcry from civil rights defenders, warning that FBI activities based on such a designation threaten the rights of protest groups, and compared the BIE designation to the FBI's past covert counterintelligence programs that targeted the civil rights movement. The Center for Media Justice (CMJ) and the ACLU filed a FOIA request in October 2017 for more information about the BIE program, arguing that the public had the right to know about how any FBI programs associated with the BIE label were being implemented.⁸⁸

"If we don't demand full transparency...we may very well see the rebirth of these secret domestic spying programs again."

-Malkia Cyril, Center for Media Justice

"In the 1960's and 70's, the FBI worked with local law enforcement to discredit or disrupt black dissidents and political organizations through a secret program that was only revealed through the theft of FBI papers on its counterintelligence program," according to Malkia Cyril, Center for Media Justice co-founder and executive director. "If we don't demand full transparency, real oversight, and rules that restrain the FBI, the NSA, Immigrations and Customs Enforcement,

and the Department of Homeland Security — we may very well see the rebirth of these secret domestic spying programs again.”

Open government experts and civil rights defenders have identified an urgent need for greater transparency regarding warrantless government surveillance and the FBI’s counterintelligence programs, in order to ensure accountability and shed light on the disproportionate impact that government monitoring programs have on communities of color, religious minorities, and activists. “We need to create a new Church Committee to investigate violations of constitutional rights associated with secret government monitoring and other government abuse taking place today,” said Nkechi Taifa, Advocacy Director for Criminal Justice at the Open Society Foundations during an OTG event to discuss the secrecy challenges associated with FBI monitoring programs.⁸⁹

The Center for Media Justice’s Cyril further warned: “The FBI’s Countering Violent Extremism program increasingly targets Muslim and Arab communities en masse, and its newly emerging Black Identity Extremism program targets legal Black activism against police violence and other forms of state repression.

Perhaps most horrifying isn’t just that these programs exist in a so-called democracy, but how little we know about these programs and how they work. In fact, it’s the secrecy of programs that target vulnerable groups that lead to the growth of mass surveillance that impacts us all.”

VI. THE DEPARTMENT OF HOMELAND SECURITY



The secrecy challenges within the Department of Homeland Security's (DHS) are exacerbated by the broad mandate the Department has over border and internal enforcement practices that span 22 agencies.⁹⁰ During the first year of the Trump Administration, some DHS divisions have slid further into the shadows, frequently opting for excessive secrecy at the expense of the public's right to know. The cases here identify emerging trends and highlight key areas where greater

transparency is needed to effectively monitor the government for potential overreach, waste, fraud and abuse.

A Biometric Black Hole of Secrecy at Airports

A billion dollar "biometrics exit" program is expected to be implemented in every airport in the U.S. over the next four years. Created under Obama in 2016, the facial screening programs are rapidly expanding without adequate disclosure of accuracy assessments, information sharing agreements with private contractors, memorandums of understanding with airlines, and other information needed to ensure effective oversight.⁹¹

In July 2017, The Electronic Privacy Information Center (EPIC) sued Customs and Border Enforcement (CBP) and in December received internal CPB reports revealing flaws in the facial recognition matching program, such as inaccurate and out-of-date information, unreliable matching techniques and a lack of proper privacy safeguards.⁹²

Moreover, the Electronic Frontier Foundation (EFF) and a number of privacy and civil liberty advocates warn that DHS may be sharing the unreliable biometrics data with other agencies, such as the FBI, which can then use the data in ways that are often kept hidden from the public and Congress.⁹³ The biometric exit face scanning system, for example, could lead to photographs of millions of

innocent travelers winding up in criminal justice databases without their knowledge.

In December 2017, the Georgetown Center on Privacy & Technology released a report on biometric exit, detailing a number of legal and technical problems, and calling attention to the secrecy challenges associated with the program.⁹⁴ The report indicates that the lack of transparency surrounding contracting with airlines and technology companies make it extremely difficult to ensure oversight over how the program is being implemented. For example, DHS disclosed that it has reached a memorandum of understanding with JetBlue on the airline's handling of biometric exit data; however, neither that MOU nor any other agreement governing private entities' use of biometric exit data has been made public.

"DHS has partnered with airlines to scan the faces of every traveler flying overseas, but has failed to disclose accuracy data, cybersecurity requirements, or its airline or vendor agreements," according to Harrison Rudolph, one of the lead authors of the Georgetown report. "Congress may be funding a billion-dollar bouncer that can't even spot a fake ID."

A Growing Wall of Secrecy on Immigration Enforcement

Growing secrecy in immigration enforcement prevents effective oversight and hinders the public's ability to accurately understand the impact that enforcement measures are having on local communities.

To be certain, past policies opened the door to the secrecy challenges faced today; notably, the expansion of a secretive government database that grew out of the fingerprinting and deportation program known as Secure Communities. The program, begun in 2008, required state and local law enforcement to forward to ICE the digital fingerprints of everyone they booked, regardless of citizenship. Rights groups litigated with ICE for years to force the disclosure of information about Secure Communities as it was being implemented, yet the information came only after the program already had a significant impact.⁹⁵ The FBI's massive biometrics database⁹⁶ grew dramatically as a result of the fingerprinting aspect of the program, and local law enforcement continues to share data about suspects in custody with federal agents.

"The secrecy surrounding immigration enforcement today is rooted in programs implemented under the last administration, which laid the groundwork for many of the challenges we currently face," according to Paromita Shah, Associate Director of the National Immigration Project of the National Lawyers Guild.

While local law enforcement shares fingerprint and other data with ICE, the Department of Homeland Security shares surveillance data with local law enforcement. The nearly impenetrable loop of secret data means there is little oversight and few accountability measures to address potential privacy violations and combat faulty systems that implicate innocent Americans.

"Surveillance has become an emerging centerpiece of DHS enforcement and becoming big business for private companies. From raids to visa vetting, DHS has invested in scanning technology, such as fingerprint, facial, and iris technology, to carry out such enforcement tactics," said Shah. "Much of this implementation has been carried out in secret, fueling a burgeoning surveillance state that poses serious threats to everyone's privacy, civil liberties, and civil rights."

"Surveillance has become an emerging centerpiece of DHS enforcement...a burgeoning surveillance state...poses serious threats to everyone's privacy, civil liberties and civil rights."

- Paromita Shah, National Immigration Project

Instead of advancing transparency, this administration tends to selectively release immigration information to advance a false narrative. For example, in February 2017, ICE began publishing cherry-picked data in weekly reports criticizing cities for not cooperating with federal authorities on requests to hold and turn over people to ICE for possible deportation. ICE suspended these reports in April 2017 after law enforcement officials in counties nationwide described the data as "unfair and misleading" and openly disputed ICE's claims.⁹⁷ The agency also started releasing lists of alleged crimes committed by immigrants,⁹⁸ and created the Victims of Immigration Crime Engagement (VOICE) hotline designed to collect selective data about accusations of offenses by "removable aliens," while omitting information on cases in which immigrants are the victims.⁹⁹

"As advocates and rights defenders, we are currently dealing with an administration that has doubled-down on an enforcement machine that acts with

Interview with Jason Leopold: The Trump Administration and 'Secrecy for Secrecy's Sake'

A prolific FOIA requester since the Bush administration, Jason Leopold can offer valuable insight on the state of media access to the administration in 2017. One of Leopold's top takeaways from last year was that a new culture of secrecy has taken hold in the federal government:

"It started to become more difficult to access agency officials during the Obama administration, I think out of a sense of loyalty to the president. You're not seeing that so much now, I think what you're seeing under Trump is more an attitude of secrecy for secrecy's sake."

He noted that many officials have just been less willing to speak on the record, but that there have also been significantly fewer proactive disclosures under the new administration – things like calendars and visitor logs. This not only makes it more difficult for journalists to write stories, Leopold says; it also hurts the credibility of the media with the public.

"There's not a lot of public trust right now with all the false information out there, and so I think having to use more anonymous sources cause the public to question my reporting more."

It's also a big part of why he relies so much on FOIA and documents for his reporting. When it comes to the FOIA process, Leopold says much remains the same. He says agencies have still failed to adopt the FOIA reforms that were part of the [2016 FOIA Improvement Act](#), and that the Office of Information Policy at the Department of Justice, which is responsible for "[promoting government-wide compliance](#)" with FOIA, is neglecting to hold the agencies accountable. He noted that the FBI in particular remains as committed to avoiding answering FOIA requests as it has always been.

Still, Leopold says he has noticed some changes. For example, he says there have been more and quicker responses to requests from many agencies, but that many times those responses contain little that's useful. He has noticed an uptick in the use of the so-called "Glomar" response to FOIA requests, in which agencies refuse even to acknowledge the existence of requested documents for the sake of national security or to protect an individual's privacy rights. He has also seen an increase in receiving documents that are completely or near-completely redacted.

little transparency and oversight, while heightening dangerous rhetoric and fueling misinformation about immigrants,” added Shah.

Interview with Maricelly Malave: Child Victims of Confusing and Abusive Policies



Maricelly Malave, Child Migration Specialist

The increase in ICE secrecy and misinformation is harming children, throwing their lives into desperation and disarray. “The amount of secrecy, particularly with regards to children who are being swept away and deported without representation, can be debilitating,” said Maricelly Malave, a child migration specialist who works with detained unaccompanied minors. “What’s especially concerning is the way DHS is conflating the threats posed by MS-13 gangs to intensify the targeting of children on the basis of suspected gang affiliation, using information pulled from questionable sources. There are police task force anti-gang units that collaborate directly

with ICE to pick up kids based on unreliable evidence, including the color of clothing or pictures pulled from social media.”

Immigration experts and defense attorneys have criticized the secrecy issues surrounding the use of gang databases in immigration enforcement, which often rely on loose criteria to identify potential members, leading to people with no gang affiliation being caught up in raids or pursued by ICE. There is little public knowledge about how gang databases are used, and immigration attorneys have trouble challenging evidence obtained through such databases in courts. Several lawsuits have been filed over the last year by immigrants who say they were wrongly identified as gang members and detained by ICE as a result.¹⁰⁰

“When unaccompanied minors are detained, they are supposed to be guaranteed legal services,” according to Malave. “But, when kids are swept up in opaque enforcement practices that target suspected gang members, they are often disappearing into a system without anyone being notified.”

Legal providers and rights advocates report increasing challenges when trying to get access to information that ICE shares with other agencies. The lack of transparency and reliance on secrecy can be detrimental to their clients and increases the likelihood they will be incarcerated for longer periods of time or face deportation without notice given to families or legal providers.¹⁰¹

"It is a constant struggle to get information that ICE uses in court as part of the deportation proceedings," said Malave. "Much of this information is contained in files held by the Office of Refugee Resettlement. These records contain information that ICE gets from Customs and Border Protection or from police who turn over children to federal agents. The government either denies access, heavily redacts these files, or we get the information after the case is over. There's information there that would help us build asylum cases, but we can't access it."

"There's information that would help us build asylum cases, but we can't access it."

- Maricelly Malave, Child Migration Specialist

Another policy change affecting children relates to the sharing of information on sponsors of unaccompanied minors between DHS offices that collect information on legal cases and agencies tasked with enforcement. "This wasn't happening before," according to Malave. "In one recent case in Maryland, a week after someone submitted a form to get a child out of detention, ICE followed her home, pulled her over, and arrested her. She had no criminal record, but had a deportation order from over 10 years ago that we assume was shared with enforcement agents, but have no way of knowing for certain. This all fuels a climate of uncertainty and fear that is very traumatizing."

The Foiling of FOIA Requests and Disappearing Data Fields

The growth in secrecy at ICE has extended to its FOIA practices, alarming open government and accountability groups.

"Without accurate and timely data about the immigration detention system, the public is left in the dark about what is happening to thousands of people who are torn from their families and communities across the country," according to Mary Small, Policy Director of the Detention Watch Network. "The lack of transparency is a challenge for advocates working to monitor government abuse. The public has an urgent right to know basic facts about policies and

operations of federal officials in our communities, and ICE is increasingly denying us of this right.”

The Transactional Records Access Clearinghouse (TRAC) has identified cases where data fields on immigration enforcement have mysteriously disappeared from documents released by ICE.¹⁰² In April 2017, OTG and more than 50 organizations called on ICE to disclose the data it had previously made public on immigration enforcement, emphasizing that the failure to comply with TRAC’s requests appeared to be a violation of ICE’s obligations under the FOIA.¹⁰³

TRAC relies on FOIA requests to regularly publish information to enhance public understanding about how local law enforcement is cooperating with federal authorities in their communities. By concealing data about its own immigration investigations and enforcement and refusing to release information previously disclosed in response to FOIA requests, ICE is denying the public’s right to know about relevant enforcement practices.¹⁰⁴

Over the last year, TRAC has been involved in litigation with ICE over its FOIA responses which range from ICE refusing to answer the requests to claiming the FOIA office could not locate the responsive information. In September 2017, TRAC released a report detailing examples of cases in which ICE has blocked access to information on immigration enforcement cooperation between federal and non-federal law enforcement agencies, and exposing possible violations of the FOIA.

ICE Shuts Down its FOIA Reading Room and Data is Disappearing

Mia Steinle, investigator with the Project on Government Oversight (POGO), told OTG that she has seen documents go missing from ICE’s FOIA reading room over the last year. “There are documents that are not there anymore, including reports on deaths that occur in ICE’s custody,” said Steinle. “ICE is not giving notice about the records they are taking away, so we can’t determine why they are choosing to remove this information or how much information that was once accessible is no longer available.”

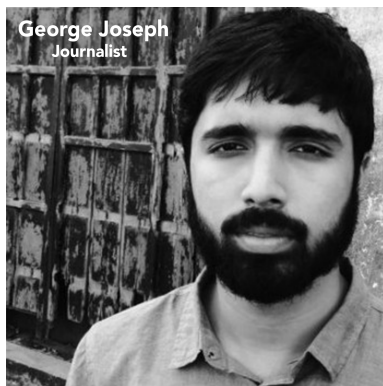
Agencies are required by law to proactively post information to their FOIA online reading rooms. Over the last year, however, there have been instances where ICE has shut down its online site and removed documents without explanation. On October 3, 2017, ICE’s electronic FOIA reading room went dark,

replaced with a notice saying, “The ICE FOIA library is temporarily unavailable while it undergoes review.”

The website shutdown came after reports that ICE’s FOIA section contained sensitive personal information, names and other data that is supposed to be redacted under FOIA’s privacy exemptions.¹⁰⁵ The sensitive information included data on people who had called ICE’s VOICE hotline, mentioned above, to report on offenses by immigrants.¹⁰⁶

When ICE put the FOIA reading room back online, certain sections of the site were missing. Using an Internet archiving site, researchers were able to identify 77 documents that were removed relating to Secure Communities, ICE’s fingerprinting and deportation program previously mentioned.¹⁰⁷ The documents removed do not contain any personally identifying information, raising questions as to why ICE chose to take down the records without any notice or explanation.

A Journalist Talks About Transparency and the Trump Administration



Reporters covering DHS are facing barriers to information access that present new challenges, and a culture of anti-media fervor that is heightening concern that First Amendment protections are under threat.

Over the last year, investigative journalist George Joseph, whose work has appeared in many publications, including ProPublica, The Guardian, The Atlantic, CityLab, and The Intercept, has observed an increase in hostile attitudes towards journalists among high-ranking officials, particularly within DHS.

In November 2017, Joseph attended a tech industry conference hosted by ICE. During his keynote remarks, ICE Acting Director Thomas Homan harshly criticized reporters, lambasting them for their reporting on the government’s immigration enforcement practices, calling the reporting misleading and repeating much of the president’s rhetoric about spreading fake news.

"I had never been to an event where a high-level federal official attacked the media so openly," said Joseph. "What is most concerning is that the people in attendance, which included industry representatives as well as government officials, were generally tolerant and accepting of the rhetoric aimed at discrediting the media."

On FOIA responsiveness, Joseph emphasized that there is a lot of variance between different DHS components.

"USCIS [U.S. Citizenship and Immigration Services] has been fairly slow in responding to requests for basic reports, for example, whereas the Science and Technology Directorate has been faster. CBP [U.S. Customs and Border Protection] has taken months just to respond to simple requests for information on contracts with private companies."

Joseph has also filed a number of requests on the monitoring of protests and involvement in local policing by DHS.

"In response to my requests on the monitoring of protests, most DHS subcomponents either didn't respond or responded with heavily redacted material," said Joseph. "It's worth noting, however, that this is one area where there seems to be continuity with the last administration, which also fought to keep information on DHS monitoring of protests withheld from public view."

VII. CONCLUSION

The White House and three crucial executive branch agencies are demonstrating a willingness to operate in the shadows. If the trend continues, there is a risk that journalists will struggle more to uncover the truth, a greater number of individuals will be harmed by secret decision-making, and our democracy, which relies on transparency for accountability, will be diminished.

A government that chooses excessive secrecy over healthy scrutiny engenders waste and corruption, damages the concept of checks and balances, and loses the trust of its citizens. *Closing Democracy's Window* offers a snapshot of how some leaders at key government agencies peddle "alternative facts," malign the media, hide inconvenient truths, impede the dissemination of documents, limit access, and stop truth tellers from speaking out. It should be a clarion call to redouble our efforts to preserve the public's right to know.

Those who seek out reasonable information about our government's decisions and actions should be confident that they will receive accurate, timely information without having to endure stonewalling or unnecessary censorship. It is imperative that we strengthen transparency in Washington, creating fully informed citizens who can hold leaders accountable to ensure they are fulfilling promises and working in the best interests of the American people.

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