THE URGE TO CLASSIFY

With the Obama administration failing to honour its commitment to openness, leaks are of the few means of holding government to account, says **David L Sobel**

WikiLeaks' publication of secret US information, culminating with the release of thousands of diplomatic cables late last year, resulted in a firestorm of official criticism and predictions of dire consequences – both for American interests and for those responsible for the breach of secrecy. Secretary of State Hillary Clinton said the disclosures 'tear at the fabric' of responsible government and wanted to 'make it clear to the American people and to our friends and partners that we are taking aggressive steps' to hold those who leaked the documents accountable. Attorney General Eric Holder announced without elaboration that the US government has initiated 'an active, ongoing, criminal investigation with regard to this matter'. While the dimensions of that investigation are not yet clear, the Justice Department sought records from Twitter, and reportedly other social media sites, in an effort to trace the communications of individuals affiliated with WikiLeaks.

The unauthorised disclosure of sensitive information raises a host of controversial policy issues, including the proper scope and reach of US espionage laws, the inadequacy of existing protections for whistleblowers

who seek to reveal improper or illegal government activities, and the sufficiency of security procedures employed by the diplomatic, intelligence and military communities. While all of these issues will be hotly debated over the coming months, the WikiLeaks disclosures highlight two longstanding and related problems that hinder the public's right to know about governmental activities – the overclassification of information and the failure of transparency laws to operate in an effective manner. Both contribute to an environment in which unauthorised disclosures are more likely to occur.

Excessive secrecy has long been a characteristic of bureaucracies, particularly those operating in the domain of 'national security'. But experience suggests that overuse of the 'secret' stamp can be counter-productive and actually weaken the protection of truly confidential information. As US Supreme Court Justice Potter Stewart famously observed in the Pentagon Papers case in 1971, 'when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion'. And while 'everything' might not yet be classified, a great deal of information is. Daniel Patrick Moyhihan, who chaired the Commission on Protecting and Reducing Government Secrecy in the mid-90s, noted that, in 1995 alone, US agencies created roughly 400,000 new secrets at the 'Top Secret' level (the highest of three), a designation premised on the claim that disclosure would cause 'exceptionally grave damage to the national security'. The Moyhihan commission found that unnecessary classification was rampant and concluded that, '[e]xcessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate'. The commission proposed a series of recommended reforms, including legislative actions, most of which were ignored.

More recently, the official US commission established to investigate the terrorist attacks of September 11 reiterated that overclassification of information remains a serious problem; as Thomas Kean, the commission chairman, noted, 'three-quarters of what I read that was classified shouldn't have been'. The vice chairman, Lee Hamilton, observed that some estimates of the number of classified documents reach into the trillions and, echoing Justice Stewart, warned that 'an abundance of secrecy diminishes the attention paid to safeguarding information that really does need to remain out of the public's view'. There is no question that the security

classification system is (to put it charitably) badly broken and that a vast amount of important, but innocuous, information is improperly withheld.

It is important to recognise that excessive classification on national security grounds is not the only impediment to official transparency. US agencies are also authorised under the law to resist disclosure of material for a wide variety of reasons. These include personal privacy, confidentiality of commercial data obtained by the government from private companies, protection of the government's 'deliberative process' and prevention of interference with law enforcement activities. Taken together, this panoply of rationales for official secrecy often frustrates the presumption of openness for which the US political system prides itself.

That presumption of transparency is embodied in the Freedom of Information Act (FOIA), which is premised, as the Supreme Court has recognised, on Congress's intent 'to permit access to official information long shielded unnecessarily from public view'. First enacted in 1966, the FOIA was strengthened in 1974 after the dangers of unchecked government power and secrecy were laid bare by the Watergate scandal. Despite its lofty objectives, the law has been plagued by administrative processing delays; while the statute requires agencies to respond to information requests within 20 days, such requests often languish in a bureaucratic limbo for months or years. FOIA implementation has also been impeded by a knee-jerk bureaucratic tendency to push the limits of the narrow statutory exceptions that permit the withholding of requested material, and reluctance on the part of the courts to hold government agencies to the law's strict disclosure requirements. In sum, the FOIA has not proven to be an effective antidote to overclassification and excessive secrecy. As history has shown, the absence of orderly and reliable procedures to ensure a free flow of important official information invites and encourages unauthorised leaks, whether the Pentagon Papers in 1971 or the WikiLeaks archive today.

When Barack Obama took office as president in January 2009, he identified transparency as one of the highest priorities on his agenda for change. On his first full day in office, Obama issued two sweeping proclamations concerning transparency. The first announced that the new administration 'is committed to creating an unprecedented level of openness in Government'. The second mandated that 'the Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails'. Lest there be any question about the manner in which his administration intended to operate, Obama directed that '[t]he government should not keep information confidential merely because public officials might be

President Barack Obama carries a classified intelligence summary, Washington DC, September 2009
Credit: Scott Applewhite/AP

embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears'.

As we enter the third year of the Obama administration, there is a consensus within the US transparency community that the president's early promises remain unfulfilled. One of the first tests of the highly touted commitment to openness came when Obama was urged to reverse a Bush administration decision to remove certain White House records from the reach of the FOIA. Despite the fact that several administrations, both Democratic and Republican, had entertained FOIA requests prior to the restrictive Bush policy, and in stark contrast to the promise of an 'unprecedented level of openness', the Obama White House refused to revert to the earlier, more transparent practice. While the administration has taken several steps to open some of its activities to greater scrutiny – disclosure of the names of official White House visitors being the most prominent

example – these initiatives have fallen short of the far-reaching promises Obama trumpeted as he came to office.

FOIA requesters and open government advocates have compiled a long list of cases in which efforts to use the legal disclosure process to pry loose official information have proved fruitless – even after the purported pro-transparency Obama policies were put in place. One recent case, in particular, illustrates how the improper withholding of requested information can encourage unauthorised leaks. In late 2009, a FOIA request was submitted to the Department of Justice for an internally-produced history of the department's Office of Special Investigations (OSI), the unit responsible for excluding or deporting Nazi collaborators who entered the United States illegally or fraudulently in the years following the Second World War. Preparation of this historical report was commissioned by former Attorney General Janet Reno in the late 1990s and was completed in 2006. The Justice Department withheld the 600-plus-page report in its entirety, asserting that the document was a 'draft' and that disclosure would harm the agency's 'deliberative process'.

After a court action was initiated to challenge the withholding decision, the department released a heavily redacted version of the report, in which roughly a quarter of the contents were blacked-out. The controversy caught the attention of the *New York Times*, which began investigating the matter. Ultimately, the full, uncensored text of the Nazi-hunting report was leaked to the *Times*, which published it on its website and featured some of its more notable revelations in a front-page article. While some of the officially withheld information was mildly embarrassing (the *Times* article was headlined, 'Nazis Were Given "Safe Haven" in US, Report Says'), most of it was innocuous and much of it was already in the public domain. A comparison of the leaked report with the censored version released under the FOIA revealed that the Justice Department sought to conceal large amounts of information that had previously been disclosed in congressional hearings, court proceedings and, ironically, articles published in the *New York Times* and other newspapers. Even after the leaked report became public, the department continued to withhold the 'official' version for two months, finally relenting and releasing the document, with very minor deletions, just days before it was scheduled to justify its actions in court.

One of the most troubling aspects of the OSI history episode is that the agency responsible for the improper withholding of information was the Justice Department, which was charged by President Obama with the responsibility of ensuring compliance with his directive that a

'presumption of openness' should govern all official disclosure decisions. Further evidence of the department's failure to embrace that presumption came during an oral argument before the Supreme Court in January. When asked by the justices whether the government agrees with longstanding Supreme Court precedent requiring that FOIA exemptions be 'narrowly construed' in order to advance the statute's presumption of full disclosure, the high-level Justice Department attorney arguing the case unequivocally rejected the notion. 'We do not embrace that principle,' he told the visibly bewildered justices.

The Obama administration's failure to act in a manner consistent with its pro-transparency rhetoric has dashed the hopes of many in the open government community and has done little to alter an environment in which unauthorised leaks of 'sensitive' information are often the only means of bringing sunshine to official activities. Excessive secrecy cannot be overcome by a FOIA process that all too often gets bogged down by bureaucratic delay and improper withholdings. As such, the climate in which the recent WikiLeaks disclosures have occurred is not very different than the one that prevailed in 1971 when Daniel Ellsberg felt compelled to disclose the secret history of the Vietnam War contained in the Pentagon Papers. In 1989, some 28 years after he presented the government's case for suppression of the Pentagon Papers before the Supreme Court (and predicted dire consequences if the material was disclosed), former Solicitor General Erwin Griswold wrote a confessional post-mortem for the *Washington Post:*

> I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat…. It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience, and it may be relevant now.

It is likely that a similar assessment will one day be made of the WikiLeaks revelations. In the meantime, Justice Stewart's prescient observation that when everything is stamped 'secret' no information can truly be protected continues to ring true. ❐

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