

Washington Brief
by Mary Alice Baish

2008 Government Secrecy Report Card

Government secrecy continues to rise overall although some data suggests more openness, reports OpenTheGovernment.org in its latest annual edition of the “Secrecy Report Card.” The major findings of the “Secrecy Report Card 2008” include many indicators of the growth of government secrecy, including escalating backlogs of *Freedom of Information Act (FOIA)* requests; high numbers of closed *Federal Advisory Committee Act (FACA)* meetings; and increasing usage of the “state secrets privilege” and “sensitive but unclassified” (SBU) control markings. In a sign that there is a need for more sunshine, the “Secrecy Report Card” also notes that several bills currently being considered by Congress would increase openness. The public is also playing an important role in countering government secrecy.

As the two-term Bush administration comes to a close, it is important to reflect on the acute rise in government secrecy and expansion of executive power during the last eight years. The terrorist attacks on September 11, 2001, understandably led to a heightened sense that certain information should be kept out of the public’s reach. However, the Bush administration’s extreme efforts to keep information secret and expand executive power contradict the basic tenets of our democracy.

Whether by the marked increase in classified information, the suppression of whistleblowers, the assertions of executive privilege, or the bold use of national security letters, this administration has shown a surprising lack of concern for public accountability and transparency. Here are four key findings of the “Secrecy Report Card 2008,” followed by a description of AALL’s actions to promote openness and transparency in government. The entire report, which includes many more indicators of government secrecy, was released in September and is available at www.openthegovernment.org/otg/SecrecyReportCard08.pdf.

Almost 22 million FOIA requests were received in 2007, an increase of almost 2 percent over last year. The 25 departments and agencies that handle the bulk of the third-party information requests, however, received 63,000 fewer requests than in 2006—but processed only 2,100 more.

Last December, AALL celebrated the enactment of the *OPEN Government Act* (P.L. 110-175) to reform the *Freedom of Information Act*. The *OPEN Government Act* strengthens the *FOIA* by clarifying the response time to requests, establishing reliable methods for checking the status of pending requests, and creating an Office of Government Information Services within the National Archives and Records Administration to review agency compliance with *FOIA* and offer mediation services to requestors.

In 2007, more than 64 percent of the 7,067 meetings of federal advisory committees that fall under the FACA were completely closed to the public.

In 2004, AALL and nine other organizations filed an amici curiae brief with the District of Columbia Circuit Court of Appeals to support public access to information about the makeup of the National Energy Policy Development Group, convened by Vice President Dick Cheney in 2001. We joined this brief because the case was vital to preserving public access to government

information under the *FACA*. Unfortunately, in 2005 an appeals court judge dismissed the lawsuit, ruling that the task force was not subject to the disclosure requirements of the *FACA*.

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

AALL supports two bills currently being considered by Congress, each of which would limit the use of the state secrets privilege. Sen. Edward M. Kennedy (D-Mass.) introduced S. 2533, the *State Secrets Protection Act*, which would create procedures for judicial review of the information that the government seeks to protect. On the House side, Rep. Jerrold Nadler (D-N.Y.) introduced H.R. 5607, the *State Secret Protection Act of 2008*, which declares that the government may assert the state secrets claim by refusing to give evidence *only if* the government shows that public disclosure of the evidence that the government seeks to protect would be reasonably likely to cause significant harm.

More than 80 percent of the 107 unique markings agencies place on “sensitive but unclassified” information (now called “Controlled Unclassified Information” or CUI by the executive branch) are based not on statute or approved regulations, but rather are the product of department and agency policies. In May 2008, President Bush issued a presidential memorandum that creates a tiered system of designations and establishes a framework for designating, marking, safeguarding, and disseminating designated information.

In April 2008, AALL signed onto a letter to the White House asking for a public review of proposed new rules governing the designation of controlled unclassified information, which open government groups had been promised for several years. Unfortunately, no public review occurred before the White House issued the memo. On July 30, the House passed two bills in reaction to the presidential memo, H.R. 6193 and H.R. 6576. These bills, which AALL strongly supports, would limit and standardize the use of control markings for CUI.

Conclusion

As you can see from these indicators, government secrecy has continued to rise at a sharp rate since September 11, 2001. However, despite this rise in secrecy, there have been some rays of sunlight in the last few years. During the 110th Congress, many bills have been introduced to curb secrecy, and the public continues to find ways to fight for access to information. The “Secrecy Report Card 2008” notes that even as agencies create more categories that exclude information from access, the use of the *FOIA* by the public to obtain information from the government continues to rise.

As we move forward into the next administration, AALL will continue to support policies that promote transparency and accountability at all levels of government. The AALL Washington Affairs Office, our members, and our chapters will continue to work together to advance policies that curb government secrecy and support government openness.

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