REPORT TO THE ARCHIVIST OF THE UNITED STATES

Freedom of Information Act Federal Advisory Committee

Final Report and Recommendations

2016-2018 Committee Term

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Chair

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
2016-2018 FREEDOM OF INFORMATION ACT (FOIA)
ADVISORY COMMITTEE
FINAL REPORT AND RECOMMENDATIONS

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Contents

EXECUTIVE SUMMARY

The National Archives and Records Administration (NARA) chartered the Freedom of Information Act (FOIA) Advisory Committee (Committee) to foster dialogue between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures. Committee members represent a wide variety of stakeholders in the FOIA community inside and outside of government, and the Committee serves as a deliberative body to advise the Archivist of the United States on improvements to FOIA administration.

In conjunction with the signing of the FOIA Improvement Act of 2016 on June 30, 2016, the Archivist announced the appointment of members to the Committee for its 2016-2018 term and asked the Committee to "look broadly at the challenges that agency FOIA programs will face in light of an ever-increasing volume of electronic records, and chart a course for how FOIA should operate in the future."

During the 2016-2018 term, the Committee formed three subcommittees to examine specific areas in which federal agencies could implement initiatives to improve proactive disclosures, FOIA searches, and the efficient use of agency FOIA resources.

The Committee has identified and unanimously[1] approved seven recommendations to the Archivist for actions to improve the implementation of FOIA, addressing search technology, FOIA and accessibility, and FOIA performance standards.

The Committee also recommends that the Archivist consider a number of best practices that can assist agencies in bolstering both their openness and the efficiency of their FOIA programs. Specifically, the Committee recommends that the Archivist direct the Office of Government Information Services (OGIS) to publish and promote these best practices as part of its statutory responsibility to review FOIA policies and procedures and identify procedures and methods to improve compliance.

Briefly, the Committee's recommendations and best practices that are discussed in this report include:

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[1] In order to avoid a potential conflict of interest, Committee member and Director of the U.S. Department of Justice's (DOJ) Office of Information Policy (OIP) abstained from voting on all of the recommendations, and Committee Chair and Director of the Office of Government and Information Services (OGIS) abstained from voting on specific recommendations related to OGIS and the Chief Freedom of Information Act (FOIA) Officers (CFO) Council, which is co-chaired by the Directors of OGIS and OIP.

- **Improving proactive disclosure.** The Committee recommends that the Archivist direct OGIS to publish as a best practice that agencies proactively post specific categories of records, including calendars of top agency officials, unclassified reports provided to Congress, FOIA logs, and other categories identified below. The best practice also offers methods to ensure FOIA logs are most useful, and provides considerations for agencies when identifying additional areas for proactive disclosure.
- **Balancing proactive disclosure and accessibility obligations.** The Committee recommends that the Archivist direct OGIS to publish a best practice encouraging agencies to avoid the removal of documents already posted on agency websites that are not currently compliant with Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d. Instead, the best practice would be to remediate such documents. When agencies are concerned about the practicality of remediation, the best practice would be to conduct an "undue burden" analysis by balancing Section 508 with their FOIA statutory obligations; the Rehabilitation Act allows agencies to release electronic documents that are not Section 508-compliant if rendering them compliant would "impose an undue burden" on the agency.
- **Improving FOIA Searches.** The Committee recommends that the Archivist address the lack of public information about current methods and technologies agencies use to search for responsive records by: (1) requesting that the U.S. Department of Justice's (DOJ) Office of Information Policy (OIP) affirmatively collect this type of information in next year's Chief FOIA Officer (CFO) Reports, and (2) recommending that the CFO Council work with the Chief Information Officers (CIO) Council to explore the technological issues related to searches and to promote best practices. The Committee further recommends that the Archivist suggest a modification to the Federal Acquisition Regulation (FAR) to ensure that all agencies consider FOIA obligations when acquiring electronic records management software and that the Archivist also direct OGIS to examine and report on the use of appropriate FOIA performance standards for federal employees.
- **Making efficient use of agency resources.** The Committee recommends that the Archivist direct OGIS to publish as best practices a number of identified strategies to ensure agencies maximize the use of available resources. These best practices address several issues, including staffing, career incentives, workflow, accountability, and technology.

The Committee strongly endorses these recommendations and best practices and is confident that agencies implementing them will see measurable improvements to the administration of FOIA, increasing proactive disclosures, and promoting transparency.

BACKGROUND

Authority: The Committee was established in accordance with the United States Second Open Government National Action Plan,[2] released on December 5, 2013, and the directive in the FOIA, 5 U.S.C. § 552(h)(2)(C), that OGIS within NARA "identify procedures and methods for improving compliance" with FOIA. The Committee is governed by the provisions of the Federal Advisory Committee Act (FACA), as amended, Pub. L. 92-463, 86 Stat. 770 (1972), 5 U.S.C. app. The Archivist of the United States renewed the Committee's Charter in July 2016.

Objectives and Scope of Activities: As described in the United States Second Open Government National Action Plan, NARA launched the Committee "to foster dialog between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures." In conjunction with the signing of the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (2016), the Archivist announced[3] the appointment of members to the Committee for its 2016-2018 Term and asked the FOIA Advisory Committee to "look broadly at the challenges that agency FOIA programs will face in light of an ever-increasing volume of electronic records, and chart a course for how FOIA should operate in the future." The Committee serves as a deliberative body to advise the Archivist on improvements to the administration of FOIA. Committee members represent a wide variety of stakeholders in the FOIA community, inside and outside of government, and have expertise concerning the administration of FOIA across the Executive Branch. The Committee may recommend legislative action, policy changes, or executive action, among other matters.

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[2] *See* https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf.

[3] *See* https://foia.blogs.archives.gov/2016/07/05/foia-advisory-committee-term-to-kick-off-on-july-21/.

RECOMMENDATIONS

The Committee identified and unanimously[4] approved seven recommendations to the Archivist for actions to improve the implementation of FOIA, addressing search technology, FOIA and accessibility, and FOIA performance standards.

The Committee also recommends that the Archivist consider a number of best practices that can assist agencies in bolstering both their openness and the efficiency of their FOIA programs. Specifically, the Committee recommends that the Archivist direct OGIS to publish and promote these best practices as part of its statutory responsibility to review FOIA policies and procedures and identify procedures and methods to improve compliance.

Specific Actions

The Committee recommends that the Archivist take the following actions:

Search Technology

1.   Propose that the CFO Council seek to establish a technology subcommittee, in partnership with the CIO Council, to study the utilization and deployment of FOIA technology across agencies and identify best practices and recommendations that can be implemented across agencies.

2.   Request that OIP collect detailed information, as part of each agency's CFO Report, regarding the specific methods and technologies agencies are using to search their electronic records, including email. Potential topics to be covered include agencies' procurement of technology, ability to search email, acquisition of e-discovery tools, and availability of information on agencies' websites that helps requesters understand the agencies' record keeping systems and be better able to submit targeted requests.

Comment: For the past six years (from 2012 through 2017), OIP has collected through CFO Reports information related to agency use of technology to facilitate processing of requests, including improved record searches. OIP summaries and assessments of those reports highlight examples of such efforts, such as agency use of e-discovery tools and platforms to facilitate email searches.[5] Nonetheless, there appear to be no comprehensive or uniform descriptions of how agencies conduct FOIA searches. The Committee's efforts to understand how searches are

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[4] In order to avoid a potential conflict of interest, Committee member and Director of OIP abstained from voting on all of the recommendations, and Committee Chair and Director of OGIS abstained from voting on specific recommendations related to OGIS and the CFO Council, which is co-chaired by the Directors of OGIS and OIP.

[5] OIP conducted a pilot demonstrating the advantages of leveraging digital tools for FOIA processing, including improved search times and decreased time spent on de-duplication. *See* FOIA Post, *Identifying Efficiencies When Leveraging Digital Tools for FOIA Processing* (March 14, 2013).

actually conducted included a review of *ad hoc* depositions in FOIA litigation, anecdotal examples presented at meetings of the Committee, and a survey conducted by nonprofit organizations. Requiring CFOs to include this additional information in their CFO Reports would enhance the ability of the government and the public to identify efficient search methods and to minimize inefficiency across the Executive Branch, beyond the best practices suggested elsewhere in the Committee's recommendations.

3.   Suggest a modification to the FAR to require all agencies, when acquiring electronic records management software, electronic mail software, and other records-related information technology (IT), to consider features that will help facilitate the agencies' responsibilities under FOIA to provide access to federal agency records.

Comment: Although the FAR, 48 C.F.R. Ch. 1, provides for the inclusion of a clause in solicitations and contracts for the design, development, or operation of a system of records to accomplish an agency function subject to the Privacy Act, 5 U.S.C. § 552a,[6] it appears that there is no comparable FAR provision addressing an agency's obligation under FOIA to provide access to federal agency records. As the federal government increases its reliance on electronic data systems, it is important to ensure that agencies have the means to effectively and efficiently pull information out of these systems in response to FOIA requests. One way to do that is to require federal agencies to consider their responsibilities under FOIA when they set out to acquire IT.

FOIA and Accessibility

1.   **Launch an interagency effort to develop standard requirements for FOIA processing tools, to ensure that both the tools and their outputs are Section 508-compliant.**

Comment: Since 1998, documents have been required to be "born 508 compliant"[7] so that government employees and other individuals with disabilities may access them. Often the procedures and tools used by agencies to process documents for public release strip away metadata and other features that made the documents accessible to ensure that sensitive information cannot be obtained by reverse-engineering. In FY 2016, agencies spent $478 million processing FOIA requests and appeals, including a sizable amount spent on FOIA processing software. Agencies should review their requirements and procurement strategies to ensure that compliance with Section 508 is a top priority.

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[6] *See* 48 C.F.R. §§ 24.104 and 52.224-1.

[7] "Section 508" refers to the Rehabilitation Act of 1973, 29 U.S.C. § 794d. As of January 18, 2018, Federal agencies must comply with the Revised 508 Standards, which were issued by the U.S. Access Board in January 2017, 36 C.F.R. § 1194.1 and Appendices A, C and D to Part 1194.

2.   **Request that OGIS conduct an assessment of the methods undertaken by agencies to prepare documents for posting on agency FOIA reading rooms.**

Comment: There are millions of pages of documents currently posted on agency FOIA reading rooms. OGIS should investigate the different methods and processes agencies use to prepare records for posting to FOIA reading rooms and identify possible best practices.

3.   **Encourage OGIS to highlight the issues with proactive disclosure and Section 508 compliance in its report to Congress by recommending that legislation be enacted to clarify agency requirements under the Rehabilitation Act, especially as they relate to proactive posting of large numbers of records.**

Comment: The Committee supports the goal of improving information access for everyone. However, too often agencies do not have the resources to remediate records released proactively or in response to FOIA requests, thus potentially preventing them from being able to post these records in their FOIA reading rooms. The Rehabilitation Act allows agencies to release electronic documents that are not Section 508-compliant if rendering them compliant would "impose an undue burden" on the agency. Congress should ensure that agencies have sufficient resources to meet both accessibility and proactive disclosure requirements.

FOIA Performance Standards

1.   **Direct OGIS to examine the use of appropriate performance standards in federal employee appraisal records and work plans to ensure compliance with the requirements of FOIA. The Committee further recommends that OGIS submit the results of its assessment and any recommendations to Congress and the President in accordance with 5 U.S.C. § 552 (h)(5).**

Comment: DOJ states that: "FOIA is everyone's responsibility."[8] This responsibility is extremely important because most agencies do not have centralized FOIA search capabilities and FOIA searches are very often not conducted by FOIA experts, which can lead to long delays.

In an attempt to address these problems, DOJ issued a memorandum[9] instructing the heads of its components to "incorporat[e] appropriate performance standards in employee appraisal records and work plans" and circulated model performance standards that included standards for conducting timely searches. The Committee believes that DOJ's approach of including

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[8] *See* https://www.justice.gov/oip/blog/new-suite-foia-training-resources-all-federal-employees.

[9] *See* https://www.justice.gov/jmd/file/789236/download.

performance standards in appraisal records and work plans regarding FOIA compliance should be replicated across the entire federal government.

To determine which agencies, if any, are appraising subject matter experts with FOIA responsibilities on how well they are fulfilling their FOIA duties, and the effectiveness of these measures on improving the administration of FOIA, the Committee recommends that the Archivist direct OGIS to examine their use and urge the Director of OGIS to submit its findings and potential recommendations to Congress and the President as additional information is determined to be appropriate under 5 U.S.C. § 552 (h)(5).

Best Practices

OGIS has the responsibility[10] to review FOIA policies and procedures, and identify procedures and methods to improve compliance.[11] The Committee recommends that the Archivist direct OGIS to publish and promote the following best practices for agencies to implement, in the interest of improving compliance and improving the overall administration of FOIA.

FOIA and Accessibility

RECOMMENDATIONS	BENEFITS
Avoid the removal of documents already posted on agency websites. Instead, remediate documents that are not currently Section 508 compliant.	• Preserves online access to information that is useful to the public. • Makes documents much easier for all individuals to search through and utilize by requiring that they have optical character recognition.
Conduct an "undue burden" analysis by balancing Section 508 and FOIA statutory obligations, while keeping in mind that the Rehabilitation Act allows agencies to release electronic documents that are not Section 508-	• Ensures public access to as many agency documents as possible, while maintaining compliance with all applicable federal statutes.

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[10] *See* 5 U.S.C. § 552 (h)(2).

[11] In addition, DOJ, through OIP, has statutory responsibility to encourage compliance with FOIA, and issues government-wide guidance on a range of topics related to the best practices discussed below. This material is available on OIP's website, https://www.justice.gov/oip.

compliant if rendering them compliant would "impose an undue burden" on the agency.[12]	
Ensure that FOIA websites and electronic reading rooms include accessible contact information that individuals with disabilities can use if they encounter inaccessible documents.	• Promotes accessibility of records and ensures people with disabilities can access agency documents.
Make an effort to provide a Section 508-compliant index or catalog of records and a simple and streamlined process for persons with disabilities to request the records in accessible formats.	• Improves understanding of agency documents and provides greater access to people with disabilities.

Management of the FOIA Process

Importance of working with requesters early in the process.

RECOMMENDATIONS	BENEFITS
Advise FOIA offices to proactively contact and work with requesters early on, when necessary, to clarify requests.	• Provides the opportunity to focus a requester's request. • Saves agency resources on processing and searching while allowing for quicker response times. • Proactively increases transparency for the requester, limits distrust of the government, and lessens the probability of an appeal of the search for responsive records.

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[12] *See* 29 U.S.C. § 794d (a)(1).

Develop and feature a version of the "Enterprise Data Inventories"[13] posting on every agency's website.	• Gives requesters an accurate understanding of the records available at the agency and the agency's method of organizing its records. • Increases the likelihood of specific, narrow, tailored requests.
Provide training for FOIA professionals on their agency's major record-keeping systems.	• Equips FOIA personnel with the knowledge necessary to provide requesters with good customer service. • Ensures that FOIA personnel are thoroughly aware of the types of records that exist in their program office(s).

Encourage teamwork.

RECOMMENDATIONS	BENEFITS
Promote collaboration among employees to ensure coverage of cases during periods of leave or peak times.	• Prevents requests assigned to an employee on leave from becoming overdue. • Ensures that employees who have a growing caseload are assisted if necessary. • Engenders knowledge-sharing in regard to FOIA processing techniques and strategies.

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[13] *See* https://project-open-data.cio.gov/implementation-guide/.

Form teams with common strengths to handle particular types of requests.	• Leverages experience and familiarity with requests of a certain type to more efficiently process requests. • Results in collaboration between FOIA experts, especially during the processing of challenging requests.

Accountability.

RECOMMENDATIONS	BENEFITS
Introduce case closures, pages reviewed, and quality requirements as part of FOIA employees' performance evaluation.	• Encourages employees to take ownership over their performance records in completing cases. • Leads to reductions in backlog. • Creates accountability for work product of FOIA employees.
Track status of requests for records; ensure visibility of overdue requests; and establish protocols to handle overdue requests.	• Promotes greater understanding of details of requests and reasons for cases becoming overdue. • Identifies FOIA processing bottlenecks and allows for the identification of areas in the FOIA process that are contributing to backlog of requests.

Expanded use of tracks.

RECOMMENDATIONS	BENEFITS
Prioritize requests using separate tracks (simple, complex, and expedited) and assign resources accordingly.	• Ensures quick turnaround of simple requests, leaving additional time to focus on complex and voluminous requests.
Encourage simultaneous processing of simple and complex requests.	• Ensures that both simple and complex requests are completed within a reasonable amount of time without unduly delaying processing of either category of requests.

Centralization, to the extent possible.

RECOMMENDATIONS	BENEFITS
Allocate resources for agency technology experts within IT to coordinate with and assist FOIA officials with email searches.	• Promotes more efficient search methodologies. • Improves the ease and breadth of email searches.
Require functionality that is compatible with FOIA compliance when purchasing future email systems.	• Provides FOIA personnel with more adept search and exporting functionality across the agency's email system. • Factors record retrieval and FOIA requirements into procurement considerations.

Centralize processing where appropriate.	• Decreases time spent coordinating between multiple teams. • Increases efficiency of scale in training. • Capitalizes upon common skills that can be applied across various types of requests. • Increases collaboration across offices, which results in expanded shared knowledge and processing techniques. • Enables overburdened offices to borrow resources to help with surges or backlogs.

Bringing in Talent

Building a career path.

RECOMMENDATIONS	BENEFITS
Consider creating rotational programs to expose inexperienced or entry-level employees to FOIA.	• Helps agencies identify talent and creates FOIA professionals who do not view FOIA processing as a stepping stone or temporary duty. • Expands the pool of experienced and qualified individuals for FOIA work.

Create career model for information management.	• Creates new FOIA/Information Management professionals who understand the lifecycle of information and support records management, privacy, and information governance. • Enables professionals to envision a classic federal career model around FOIA work, instead of a temporary duty. • Increases drive and incentive to be a standout performer in FOIA processing and FOIA work.

Interns, detailees and contractors.

RECOMMENDATIONS	BENEFITS
Assign interns or temporary staff to complete straightforward, time-consuming tasks such as data entry.	• Frees up time for more experienced personnel to focus on complex tasks by giving temporary staff work that requires limited training.
Contract surge support staff to increase responses rapidly and aid in routine review.	• Allows for short-term investment by agency to respond to FOIA surges, rather than hire long-term staff members. • Avoids lengthy hiring process and quickly adds personnel who require little training. • Eliminates the pressure placed on everyday FOIA employees by quickly reacting to surges and decreasing backlog.

Using Technology to Improve the Process

Records management/search.

RECOMMENDATIONS	BENEFITS
Create add-on to IT systems for exporting records.	• Ensures records will be exported as usable outputs. • Establishes an enhanced system of information management that will better streamline the FOIA search process. • Aids federal agencies in more efficiently conducting searches and tracking requests. • Lowers FOIA processing costs by reducing FOIA search times.
Designate a point of contact to approve search requests within records management systems.	• Improves quality of searches. • Decreases unnecessary time and labor searching and reviewing.
Make the end goal of responding to FOIA requests a major component when developing the agency's records management system and workflows.	• Increases communication and coordination between records management and FOIA offices and streamlines the process of responding to FOIA requests, especially under tight deadlines. • Lays the foundation for a better system of transparency and stronger capabilities in proactive release. • Impresses higher accountability upon subject matter experts to perform timely, thorough searches and avoids unacceptably long response times.

Tracking systems.

RECOMMENDATIONS	BENEFITS
Adopt a centralized, department-wide FOIA tracking platform or consolidate to fewer tracking systems. Where possible, leverage established commercial-off-the-shelf/government-off-the-shelf (COTS/GOTS) products across the organization.	• Standardizes the FOIA process from a technical perspective. • Simplifies the FOIA reporting requirements with a centralized FOIA database. • Establishes an auditable system that will enable a better appeal process. • Increases managerial oversight and accountability. • Addresses issues encountered in use by providing for continuous maintenance and access to technical support. • Increases transparency through the deployment of a FOIA portal.
Contract a developer to create an in-house system and have developer on standby for updates if a COTS/GOTS product does not meet the agency's needs.	• Creates a system that adapts to an agency's workflow, rather than an agency altering procedures to match a technologies workflow. • Leverages customized technologies to expand FOIA processing capabilities.
Regularly explore the application of e-discovery tools in FOIA searches and implement affordable, appropriate options.	• Replaces inefficient software with equally powerful and more cost-effective alternatives.

Proactive Disclosure

RECOMMENDATIONS	BENEFITS
Prioritize proactive disclosure for materials that are related to the operations and establishment of FACA committees (coming events, timelines, agendas, minutes, transcripts, recordings, FACA committee member names and biographies, conflict of interest waivers, and committee charters).	• Eliminates requests for committee information, which is already released upon request. • Creates a system where full transparency is ingrained in the standard FACA process.
Disclose all unclassified reports agencies provided to Congress, with any necessary privacy redactions, and all unclassified testimony submitted to Congress.	• Relieves pressure on the FOIA process by making a report (or at least the title if the report must be withheld because of classification or privacy interests) that is already the subject of many requests proactively available. • Streamlines processes by ensuring publication is not on a piecemeal basis.
Post an agency organization chart and a directory listing contact information for all offices.	• Ensures the public can identify and contact federal offices for assistance.

Proactively disclose proposed records schedules.	• Allows for informed public comment and facilitates understanding of the records scheduling process. There is already public interest in proposed records schedules as notices are published in the Federal Register.
Proactively post records frequently requested under FOIA.	• Ensures agency is meeting statutory requirements. • Saves agency resources.
Proactively disclose statements of administration policy and enrolled bill memoranda.	• Reduces the burden on the FOIA process by ensuring public access to records Office of Management and Budget produces in association with Congressional bills, which might be requested under FOIA.
Proactively release documentation of lobbying activities, such as the Disclosure of Lobbying Activities (form SF-LLL).	• Promotes good and open government by allowing the public to know who is influencing policymakers. • Reduces FOIA requests to agency ethics offices since these records are frequently requested.
Proactively post and periodically update agency FOIA logs.	• Allows requesters to make more targeted requests by giving the public a better understanding of what is requested and released under FOIA. The Committee includes as part of this best practice a detailed proposal regarding FOIA logs which is included below.

Publish the calendars of top officials (*e.g.*, Secretary, Deputy Secretary, Assistant Secretary, and other agency heads) within one month, subject to privacy and security redactions.	• Sheds light on who is meeting with these policymakers. • Provides journalists with a useful tool for covering the activities of top decision-makers, as well as for any citizens interested in the actions of our senior leaders.
Proactively disclose the top ten contracts, task orders, and grants, as measured by dollar value, and all contracts, task orders, and grants that are valued at more than $100 million.	• Promotes accountability by proactively publishing awards documents associated with largest expenditures. The public has an interest in and right to know how the government is spending its money. • Shifts the review of this information to the front end of the process instead of waiting for a request for the information to be submitted under FOIA.
Proactively release material that has been declassified, to the greatest extent possible.	• Improves public awareness that the information has been declassified. • Reduces FOIA requests for information that had already been reviewed by the agency.

Best Practices: Detailed FOIA Log Recommendation

To expand upon the above best practice that agencies post FOIA logs, the Committee offers the following specific recommendations:

1. Publish FOIA logs in the agency's electronic reading room (often referred to as FOIA Libraries) on an ongoing basis, at least monthly, unless the agency receives fewer than 100 requests per year, in which case annually or semi-annually would be appropriate.
2. To be most useful, agency FOIA logs should contain each of the following fields:
    a. Tracking number of the request.
    b. Date of the request.
    c. Name of the requester, provided it is not a first-party requester (*i.e.*, someone asking for records on himself or herself) – to be most useful, the agency should

publish the names of all third-party requesters; the agency should also alert requesters that they will publish the names of third-party requesters in their FOIA logs.

    d. Organizational affiliation of the requester, if identified in the request.

    e. Subject matter of the request.

    f. Status of the request (pending, closed, etc.).

    g. Date the request was perfected.

    h. The result of each FOIA request (granted, granted in part, denied, withdrawn, etc.).

    i. Exemptions cited, if any.

    j. Date on which the request was resolved.

    k. Fee category assigned to requester (commercial, educational, news media, other).

    l. Whether a fee waiver was requested.

    m. If a fee waiver was requested, whether it was granted.

    n. Fees charged to the requester, if any.

    o. Whether the request was processed under the Privacy Act as well.

3. The logs should be posted in Excel or CSV format, not in a PDF.

Best Practices: Identifying Categories of Records for Proactive Disclosure

In addition to the categories of records recommended for inclusion as part of the best practices for proactive disclosure discussed above, the Committee offers the following specific recommendation regarding strategies for identifying and prioritizing categories of records for proactive disclosure:

1. Records that memorialize agency actions, whether formal or informal, and with or without immediate legal effect, taken pursuant to the agency's statutory mandates.

    a. Consider whether their routine activities produce memorialization of agency actions, whether or not they are considered to have legal effect, and regardless of their formality. For example, this might include records regarding enforcement activities such as inspection reports, warning letters, citations, fines and penalties, or other actions.

    b. Consider whether the records can be released in full, or whether redactions are needed. Consider how burdensome any redactions would be. For example, if the redactions would always occur in a particular field of a form, whether the redaction could be routinized or the form could be designed not to include that field in the releasable version or, on the other hand, whether each record would need individualized review.

    c. Consider whether releasing the category of records as a proactive disclosure initiative would benefit the public interest in the following ways:

        i. Understanding the agency's enforcement activities, choices, policies, and decisions;

        ii. Exercising their consumer choices to make purchasing and patronage decisions at companies based on full information about the companies' activities; and/or

        iii. Enabling state and local governments to learn about activities within their jurisdictions.

    d. Weigh the benefits to the public against the burden of disclosure, including necessary review and redactions, and make those records available proactively when the public interest outweighs the burden to the agency.

2. Records that provide original government-collected or maintained data that aid in the public's understanding.

    a. Examine the categories of records routinely submitted to the agency by private parties. While recognizing that privacy interests and commercial interests pose larger barriers to disclosure of these types of records generally, look for opportunities where, by their nature, the category of records might pose less of these concerns and release could be made proactively.

    b. These sorts of records may include records routinely submitted to an agency regarding private parties' compliance with the law, such as routine reports, certifications, or compliance statements, or records concerning scientific data, research results, or academic findings.

    c. Endeavor to proactively disclose those categories of records, data, and other submissions that will help the public to understand, for example, the businesses operating in the public sphere, where the public benefit is likely to outweigh the burden on the agency.

3. Categories of records that are frequently requested by the public.

    a. Analyze agency FOIA logs at least annually to identify categories of records that are frequently requested. These might be, for example, certain regulatory records such as an inspection report.

    b. Attempt to quantify the percentage of the full number of such records in the category that are eventually requested under FOIA.

    c. Quantify the percentage of records in the category that are requested under FOIA and are released in full versus those released in part or denied.

    d. Consider whether, if a larger percentage of the records are released in full or in part, these records could be designed or created in such a way that they would be releasable upon completion.

    e. Undertake to publish the whole category of records when a relatively large portion of the category is eventually requested under FOIA and when either:

        i. Minimal redactions are necessary; or

        ii. When the agency can redesign the documents in the category on the front end so that they are immediately releasable upon creation.

SUBCOMMITTEE METHODOLOGY

Between July 21, 2016, and April 17, 2018, the full Committee met in a public forum eight times, in accordance with FACA. The agendas, minutes, transcripts, videos, documents discussed, and other information for each of these meetings can be found on the OGIS website.[14] At the Committee's second meeting, the members formed three subcommittees: Proactive Disclosure, Efficiency and Resources, and Searches. Below is a discussion of the methodologies reported by each of the subcommittees.

Proactive Disclosure

The Subcommittee on Proactive Disclosure submitted recommendations to the full Committee for its consideration in four categories: proactive disclosure and Section 508 of the Rehabilitation Act, agency proactive disclosure priorities, agency proactive disclosure criteria, and the publication of agency FOIA logs.

The Subcommittee's work included deliberations within the Subcommittee and with the full Committee, presentations at the Committee meetings by government accessibility experts from the General Services Administration (GSA) and the U.S. Access Board about their interpretations of the legal requirements of Section 508 compliance, and a presentation about the benefits of proactively posting FOIA logs and other FOIA data.

To develop its list of proactive disclosure priorities, the Subcommittee compiled two lists: a list of broad criteria government agencies should consider when prioritizing records for proactive disclosure; and a specific list of categories of records identified as potential targets for proactive disclosure.

In developing the categories of records identified as potential targets for proactive disclosure, the Subcommittee collected lists previously identified by civil society organizations and asked that OGIS solicit suggestions from the public. OGIS solicited this input via a blog post,[15] which was shared on social media and on various listservs. The Subcommittee then considered and ranked the ease of posting each category of records and the degree to which it improved the public's understanding of government actions. The Subcommittee also placed greater importance on proactive disclosure targets that would apply to agencies across the federal government.

During its discussions, the full Committee examined agency practices with respect to the release of employee contact information. While some agencies routinely publish contact data for all

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[14] *See* https://www.archives.gov/ogis/foia-advisory-committee/2016-2018-term/meetings.

[15] *See* https://foia.blogs.archives.gov/2017/07/26/help-the-foia-advisory-committee-improve-proactive-disclosure/.

employees, officials at several agencies identified concerns that make them unwilling to post contact information about their individual employees; thus the Committee decided not to include a recommendation on the treatment of contact information regarding individual employees.

Finally, the Subcommittee undertook a study of the value of FOIA logs. Based on this work, the Subcommittee developed and submitted a detailed recommendation that agencies periodically publish updated FOIA logs in their electronic reading rooms. The recommendation also specified information fields that should be included in these logs (see above).

Efficiency and Resources

The Efficiency and Resources Subcommittee submitted a list of recommendations to the Committee regarding three broad categories of reform: management of process, bringing in talent, and using technology to improve the process.

To make informed recommendations, the Subcommittee identified top-performing agencies – five large agencies (agencies which receive 10,000 or more requests annually) and five medium agencies (agencies which receive between 500 and 9,999 requests annually). These agencies were identified by analyzing the average number of days the agency required to complete processing for simple and complex requests, the number of requests processed per staff member, the cost expended per request, and an additional complexity ranking, which took into account agencies with a higher percentage of complex requests. The Subcommittee then assigned a weighted total to those agencies. Five top-performing large agencies and five top-performing medium agencies were identified. The Environmental Protection Agency, Department of Homeland Security (DHS), Department of the Treasury (Treasury), Department of Labor (DOL), and Office of Personnel Management were identified as top-performing large agencies. The Consumer Product Safety Commission, National Aeronautics and Space Administration, Department of the Interior, Federal Trade Commission, and Pension Benefit Guaranty Corporation were identified as top-performing medium agencies.

The Subcommittee drafted a survey letter, sent by email to contacts at the identified agencies. This letter informed the agency contacts of the Subcommittee's mission and strategy and included a list of questions to consider in advance of an interview. The questions addressed a range of topics, including use of technology, staffing, successful and unsuccessful strategies, best practice recommendations, and management strategies. The Subcommittee then scheduled meetings, via telephone or in-person, with these FOIA contacts to discuss their ideas for best practices and improvements and to assess what specific factors were facilitating their high performance. The Subcommittee also reviewed OGIS agency FOIA compliance assessment reports.

Based on the data obtained in the interviews and from OGIS FOIA compliance assessment reports, the Subcommittee formulated a list of recommendations addressing issues such as staffing, workflow, technology, and incentives.

FOIA Searches

The Subcommittee on FOIA Searches submitted recommendations based on the results of a survey of, and consultations with, government and nongovernment FOIA experts. The survey, conducted and published[16] by the National Security Archive and Project On Government Oversight (POGO), asked FOIA processors and requesters about their insights and opinions of the FOIA search process. The Subcommittee also consulted FOIA search experts at the Department of Health and Human Services (HHS) and OIP, who gave detailed presentations at Committee meetings on various aspects of FOIA searches. The topics covered in the presentations included proper management and delegation and the use of e-discovery and other electronic tools.

While conducting its research, the Subcommittee was unable to locate detailed data collected by the government regarding FOIA search methodologies or capabilities, apart from the data collected in agency CFO Reports on improvements made to search procedures and technology used to facilitate them. Therefore, the Subcommittee recommended the collection of such data, and other actions and best practices to improve the timeliness, thoroughness, and efficiency of federal agencies' FOIA searches.

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[16] *See* https://unredacted.com/2017/03/31/foia-search-survey-results-and-analysis/.

COMMITTEE MEMBERS

Current Members

Alina M. Semo, Chair; Director, OGIS, NARA

Michael Bekesha, Attorney, Judicial Watch

Michael Bell, Deputy Director of the FOI/PA Division, HHS

Stephanie Carr, Chief of the Office of Freedom of Information for the Office of Secretary of Defense and Joint Staff, Department of Defense

Mitra Ebadolahi, Border Litigation Project Staff Attorney, American Civil Liberties Union

Jill Eggleston, FOIA Officer, U.S. Citizenship and Immigration Services, DHS

James Hershberg, Professor of History and International Affairs, George Washington University

Nate Jones, FOIA Coordinator, National Security Archive

Chris Knox, Managing Director, Deloitte Risk & Financial Advisory

Sarah Kotler, Director of FOIA Division, Food and Drug Administration, HHS

Margaret Kwoka, Professor, University of Denver Sturm College of Law

Raynell Lazier, FOIA Manager, Consumer Financial Protection Bureau

Ginger McCall, Attorney Advisor, DOL

Sean Moulton, Open Government Program Manager, POGO

Logan Perel, Attorney Advisor, Office of the Chief Counsel, Foreign Assets Control, Treasury

David Pritzker, Deputy General Counsel, Administrative Conference of the United States

Melanie A. Pustay, Director, OIP, DOJ

Thomas Susman, Director of the Governmental Affairs Office, American Bar Association

James Valvo, Counsel and Senior Policy Advisor, Cause of Action Institute

Lynn Walsh, President, Society of Professional Journalists

Past Members (2016-2018 Term)

Nikki Gramian, Former Chair; Acting Director/Deputy Director, OGIS, NARA

Helen Goff Foster, Treasury

William Holzerland, Food and Drug Administration, HHS

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David S. Ferriero, Archivist of the United States, NARA

William J. Bosanko, Chief Operating Officer, NARA

Jay A. Trainer, Executive for Agency Services, NARA

Gary M. Stern, General Counsel, NARA

Jean Whyte, Assistant General Counsel, NARA

Patrice Murray, Committee Management Officer, NARA

The staff from the following NARA offices:

> OGIS

> Special Events and Scheduling Office

Speakers at Meetings During 2016-2018 Term

Phil Ashlock, GSA

Laurence Brewer, Chief Records Officer of the United States, NARA

Jason Baron, Drinker Biddle & Reath, LLC

David Capozzi, Executive Director, U.S. Access Board

Timothy Creagan, U.S. Access Board

Helen Chamberlain, GSA

Max Galka, FOIA Mapper

Douglas Hibbard, DOJ

Michael Marquis, HHS

GLOSSARY

COMMITTEE: The Freedom of Information Act Advisory Committee

COTS: Commercial Off-The-Shelf

CFO: Chief FOIA Officer(s)

CIO: Chief Information Officer(s)

DHS: Department of Homeland Security

DOJ: U.S. Department of Justice

DOL: U.S. Department of Labor

FACA: Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972), 5 U.S.C. app.

FAR: Federal Acquisition Regulation, 48 C.F.R. Ch. 1

FOIA: Freedom of Information Act, 5 U.S.C. § 552

GOTS: Government Off-The-Shelf

GSA: General Services Administration

HHS: U.S. Department of Health and Human Services

IT: Information Technology

NARA: National Archives and Records Administration

OGIS: Office of Government Information Services

OIP: Office of Information Policy

POGO: Project On Government Oversight

SECTION 508: Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d

TREASURY: U.S. Department of the Treasury

CHARTER

National Archives and Records Administration

Freedom of Information Act Advisory Committee Charter

1. Committee's Official Designation: The name of this advisory committee shall be the Freedom of Information Act Advisory Committee (Committee).

2. Authority: The Committee is established in accordance with the second United States Open Government National Action Plan released on December 5, 2013, and the directive in the Freedom of Information Act, 5 U.S.C. § 552(h)(1)(C), that the Office of Government Information Services within the National Archives and Records Administration (NARA) "recommend policy changes … to improve" the Freedom of Information Act (FOIA) administration. This Committee is governed by the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

3. Objectives and Scope of Activities: The Committee advises on improvements to the administration of FOIA. The objective of the Committee is to study the current FOIA landscape across the Executive Branch and to make recommendations to the Archivist of the United States.

4. Description of Duties: The Committee fosters dialogue between the Federal Government and the requester community, solicits public comments, and develops recommendations for improving FOIA administration and proactive disclosures. The Committee will be advisory only.

5. Official(s) to whom the Committee Reports: The committee shall report to the Archivist of the United States.

6. Support: NARA's Office of Government Information Services will provide funding and administrative support for the Committee to the extent permitted by law and within existing appropriations.

7. Estimated Annual Operating Costs and Staff Years: The annual operating cost for the Committee is estimated to be $90,000 and one full staff year. There will be no compensation for members of the Committee. Travel and/or per diem costs will not be provided by NARA.

8. Designated Federal Officer (DFO): The DFO is a full-time salaried employee of NARA and will perform the duties set forth in § 102-3.120 of the FACA Final Rule. The Archivist of the United States shall designate a DFO who shall manage the Committee and provide such clerical, administrative, and logistical support as necessary for the Committee to effectively conduct its business.

9. Estimated Number and Frequency of Meetings: In consultation with the Archivist of the United States, the DFO shall hold meetings up to four times per year and may call additional meetings as may be necessary.

10. Duration: The need for this Committee is continuing.

11. Termination: The Charter shall be eligible for renewal every two years.

12. Membership and Designation: The Committee will consist of no more than 20 individuals. Government members of the Committee should include, at a minimum, three FOIA professionals from Cabinet-level Departments; three FOIA professionals from non-Cabinet agencies; the Director of the Department of Justice, Office of Information Policy, or his/her designee; and the Director of the Office of Government Information Services, or his/her designee, who will chair

the committee. Non-governmental members of the advisory committee should include, at a minimum, two individuals representing the interests of non-governmental organizations that advocate on FOIA matters; one individual representing the interests of FOIA requesters who qualify for the "all other" FOIA requester fee category; one individual representing the interests of requesters who qualify for the "news media" FOIA requester fee category; one individual representing the interests of requesters who qualify for the "commercial" FOIA requester fee category; one individual representing the interests of historians and history-related organizations; and one individual representing the interests of academia. The Committee will be composed of Representative members and Regular Government Employees.
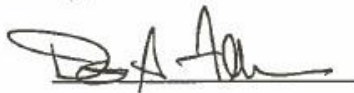
The Archivist of the United States shall appoint a Chairperson. If necessary, a Vice Chairperson may be designated annually by members of the Committee, in consultation with the Archivist of the United States. The Chairperson is the presiding officer of the Committee who guides its efforts to the effective completion of its assigned tasks. The Chairperson shall provide leadership and adhere to the Charter and such other rules of order and operating procedures as the Committee may adopt, maintain order, and conduct each meeting in accordance with FACA and the prescribed rules and procedures. The Chairperson is responsible for certifying the accuracy of Committee meeting minutes. The Vice Chairperson shall assume and perform the duties of the Chairperson in the event the Chairperson is absent or unavailable.

13. Subcommittees: NARA may create subcommittees as necessary to support the committee's work. The subcommittees report to the Committee. The subcommittee Chairperson shall be a Committee member.
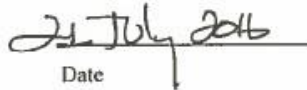
14. Recordkeeping: The records of the committee and any subcommittee(s) shall be handled in accordance with General Records Schedule 6.2, item 10and any approved agency records disposition schedule. These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. § 552.

15. Filing Date: _____

Approved:

DAVID S. FERRIERO
Archivist of the United States

21 July 2016
Date