

**REPORT TO THE ACTING ARCHIVIST  
OF THE UNITED STATES**

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**Freedom of Information Act Federal Advisory Committee**



**NATIONAL  
ARCHIVES**

**2020-2022 Committee Term  
Final Report and Recommendations**

**July 5, 2022**

A handwritten signature in black ink, appearing to read "Alina M. Semo".

**Alina M. Semo  
Chair**

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## 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. During the 2020-2022 term, the Committee formed four subcommittees to investigate the intersection between FOIA and classified records, study possible legislative changes, examine the FOIA process, and determine ways to use technology to advance FOIA's goals.

The Committee has identified and approved a total of 21 recommendations as mandated by the Committee's charter for actions to improve the implementation of FOIA. (One recommendation was approved by the Committee on June 10, 2021, and delivered to now-retired Archivist of the United States David S. Ferriero.)

Given the Archivist's broad charge to the Committee to chart a course for the future of FOIA, the Committee believes it is appropriate and within the scope of our charge to offer recommendations not only for components of NARA and the U.S. Department of Justice's Office of Information Policy (OIP) to implement, but also for all federal agencies, the Chief FOIA Officers (CFO) Council, and Congress as important actors in FOIA administration.

The Committee understands that the Archivist has the authority only to ensure implementation of those recommendations directed to components of NARA. However, the Director of the Office of Government Information Services (OGIS) commits to working with the Acting Archivist of the United States to convey the Committee's recommendations to the named components of government to which they are directed, including to OIP, federal agencies, the CFO Council, and Congress.

## BACKGROUND

**Authority:** The FOIA Advisory Committee was established in accordance with the second United States Open Government National Action Plan<sup>1</sup> released on December 5, 2013, and operates in accordance with the directive in the Freedom of Information Act, 5 U.S.C. § 552(h)(2)(C), that the Office of Government Information Services within the National Archives and Records Administration (NARA) “identify procedures and methods for improving compliance” with the Freedom of Information Act (FOIA). This Committee is governed by the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. The Archivist of the United States renewed the Committee’s Charter for the current 2020-2022 term in May 2020.

**Objectives and Scope of Activities:** As described in the United States’ Second Open Government National Action Plan, the National Archives and Records Administration launched the FOIA Advisory Committee “to foster dialog[ue] between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures.” The Advisory 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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<sup>1</sup> “The Open Government Partnership: Second Open Government National Action Plan for the United States of America (Dec. 5, 2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/us\\_national\\_action\\_plan\\_6p.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf).

## AT-A-GLANCE: SUMMARY OF RECOMMENDATIONS

### ***Glomar*/Neither Confirm Nor Deny Responses**

#### **Classification Subcommittee Recommendation No. 2022-01**

The Office of Information Policy should issue guidance to agencies that they use the internationally recognized “Neither Confirm Nor Deny” (NCND) instead of *Glomar*.

Responsible for Implementation: Office of Information Policy

#### **Classification Subcommittee Recommendation No. 2022-02**

Agencies should report annually on agency use of “Neither Confirm Nor Deny”/*Glomar*.

Responsible for Implementation: Federal Agencies

#### **Classification Subcommittee Recommendation No. 2022-03**

Agencies should post on their FOIA websites information about “Neither Confirm Nor Deny”/*Glomar* responses.

Responsible for Implementation: Federal Agencies

#### **Classification Subcommittee Recommendation No. 2022-04**

A relevant organization should study “Neither Confirm Nor Deny”/*Glomar* usage.

Responsible for Implementation: To be determined

### **Executive Order 13526: Classified National Security Information**

#### **Classification Subcommittee Recommendation No. 2022-05**

Executive Order 13526 should be amended to require that in cases where information withheld under FOIA or other requests for reviews does not contain the markings specified in the governing Executive Order, agencies must add these markings.

Responsible for Implementation: The White House

#### **Classification Subcommittee Recommendation No. 2022-06**

The Archivist of the United States should request that the Inspector General of the Intelligence Community conduct a review of agencies’ compliance with Executive Order 13526 §§ 1.6 and 2.1, particularly as it relates to initial marking of classified information; and how agencies handle classified information responsive to FOIA or other disclosure requests where markings are omitted.

Responsible for Implementation: The Archivist of the United States

## **Agency FOIA Website Content and Accessibility**

### **Technology Subcommittee Recommendation No. 2022-07**

The Office of Information Policy should encourage agencies to post on their FOIA websites certain information beyond what is required by law.

Responsible for Implementation: Office of Information Policy

### **Technology Subcommittee Recommendation No. 2022-08**

The Chief FOIA Officers Council should establish a working group within two years to determine best practices for release of records in native format, including metadata.

Responsible for Implementation: Office of Information Policy & Office of Government Information Services

### **Technology Subcommittee Recommendation No. 2022-09**

The Chief FOIA Officers Council working group should study and recommend resolutions to challenges between FOIA and 508 compliance.

Responsible for Implementation: Office of Information Policy & Office of Government Information Services

### **Technology Subcommittee Recommendation No. 2022-10**

Federal agencies should endeavor to provide regular and proactive online publication of searchable FOIA logs containing certain information in Excel/CSV format.

Responsible for Implementation: Federal Agencies

## **First-Person Requests**

### **Process Subcommittee Recommendation No. 2022-11**

Records relied on by any agency that affect eligibility for benefits or adversely affects an individual in proceedings should be made automatically available and not require first-person FOIA practice.

Responsible for Implementation: Federal Agencies

### **Process Subcommittee Recommendation No. 2022-12**

Agencies should amend any regulations, directives, policies, and guidance to provide individuals, regardless of whether they have legal representation in agency proceedings, access to records about themselves.

Responsible for Implementation: Federal Agencies

**Process Subcommittee Recommendation No. 2022-13**

Agencies that receive frequent first-person requests should identify the most commonly requested records and develop a plan for processing such records that leverages technology, promotes efficiency, and good customer service.

Responsible for Implementation: Federal Agencies

**Process Subcommittee Recommendation No. 2022-14**

A comprehensive assessment of the Department of Homeland Security (DHS) processes, workforce, and existing technology should be initiated as it relates to Alien files (A-Files) responsive to FOIA requests.

Responsible for Implementation: Department of Homeland Security

**Reimagining OGIS**

**Legislation Subcommittee Recommendation No. 2022-15**

Congress should give OGIS the authority to make binding decisions.

Responsible for Implementation: Congress

**Legislation Subcommittee Recommendation No. 2022-16**

Congress should give OGIS the authority to review records *in camera*.

Responsible for Implementation: Congress

**Legislation Subcommittee Recommendation No. 2022-17**

Congress should create a direct line-item appropriation for OGIS.

Responsible for Implementation: Congress

**Legislation Subcommittee Recommendation No. 2022-18**

Congress should increase OGIS's budget.

Responsible for Implementation: Congress

**Legislation Subcommittee Recommendation No. 2022-19**

The Archivist of the United States should commission a feasibility study, incorporating input from requesters and agencies, to more deeply explore the costs and benefits of these recommendations and refine the proposals to aid Congress in drafting legislation.

Responsible for Implementation: Archivist of the United States

**Legislation Subcommittee Recommendation No. 2022-20**

The Archivist of the United States should restore OGIS as a direct report.

Responsible for Implementation: Archivist of the United States

**Congressional Transparency**

**Legislation Subcommittee Recommendation No. 2021-01**

The Archivist of the United States should ask Congress to expand public access to federal records in congressional support offices by creating disclosure procedures modeled after FOIA.

Responsible for Implementation: Archivist of the United States & Congress



## DISCUSSION OF RECOMMENDATIONS

### *Glomar*/Neither Confirm Nor Deny Response

#### Classification Subcommittee

##### *Recommendation No. 2022-01*

**We recommend that the Office of Information Policy issue guidance to encourage agencies to use the internationally recognized nomenclature “Neither Confirm Nor Deny” to refer to “*Glomar*” responses.**

***Comment:*** FOIA’s purpose is to make the government more transparent and accountable to its people, and the use of terms of art or legal jargon can make this more difficult.<sup>2</sup> The use of the term “*Glomar*” to refer to “Neither Confirm Nor Deny” (NCND) responses is a good example of this issue. Not only does *Glomar* refer to the name of a specific ship involved in a court case,<sup>3</sup> but the case itself concerned only Exemption 1, whereas NCND responses are now used in conjunction with multiple FOIA exemptions.

It should be noted that the term “Neither Confirm Nor Deny” is used in several official sources instead of *Glomar*. Executive Order 13526, for example, authorizes agencies to “refuse to confirm or deny the existence or nonexistence of requested records” and does not mention *Glomar*.<sup>4</sup> Agency communications with requesters also generally use the term “Neither Confirm Nor Deny” instead of *Glomar*. We note that the term NCND is also used internationally, including in Australia, Canada, New Zealand, and the United Kingdom.<sup>5</sup>

Because the FOIA community has used the term *Glomar* for more than four decades, the Committee recommends that OIP issue guidance that encourages agencies to use “Neither Confirm Nor Deny” and *Glomar* together in official guidance during a transition period. The

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<sup>2</sup> Some scholars have noted that the use of jargon can make it more difficult for ordinary citizens to interact with and participate in government. See Hindy L. Schachter, *Reinventing Government Or Reinventing Ourselves: The Role of Citizen Owners in Making a Better Government*, SUNY Press (1997), pp. 74-75; Angela M. Evans and Adriana Campos, “Open Government Initiatives: Challenges of Citizen Participation,” *Journal of Policy Analysis and Management*, Vol. 32, No. 1 (Winter 2013), pp. 172-185.

<sup>3</sup> *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

<sup>4</sup> E.O. 13526 § 3.6(a). See also E.O. 12958 § 3.7 (same).

<sup>5</sup> “To ‘Neither Confirm Nor Deny’: Assessing the Response and its Impact on Access to Justice,” Oxford Pro Bono Publico (Feb. 2016), <https://files.justice.org.uk/wp-content/uploads/2017/12/06170608/OPBP-Annexes.pdf>.

Committee approved this recommendation by a vote of 13-4 with one abstention and two members absent.

***Recommendation No. 2022-02***

**We recommend that the Office of Information Policy require agencies to track and report on an annual basis: (a) the total number of “Neither Confirm Nor Deny” (NCND) responses issued; (b) whether NCND responses were applied in whole or in part; (c) the FOIA exemptions used in conjunction with NCND responses and the number of cases in which they were used; (d) the number of NCND responses on administrative appeal that were not affirmed; (e) the number of NCND responses in litigation that were not upheld. Additionally, the Office of Information Policy should aggregate and report agency data on NCND responses on an annual basis.**

***Comment:*** Agencies currently do not track and report NCND responses as an independent data category. Instead, these responses are tracked and reported as denials based on the exemptions invoked. For several reasons, agencies should be required to track and report NCND responses as a separate data category.

First and foremost, the total number of NCND responses issued would indicate the frequency of NCND use. Both the requester community and agencies have a strong interest in understanding trends related to the use of these responses. There is an impression among FOIA advocates of “*Glomar* creep,” or an increasing use of NCND responses throughout government — at the federal, state, and local levels.<sup>6</sup> Tracking data on the use of NCND responses would help the public better understand trends in this area and their underlying causes. In addition, agencies themselves will gain a better understanding of how they use NCND responses. Notably, the Classification Subcommittee attempted to gain additional insight into the scope and practice of NCND responses by sending a survey to nearly two dozen government offices, but the Subcommittee received only a few responses.<sup>7</sup> Certain agencies conceded that they were unable to respond because they did not have data readily available.

The Committee further suggests that OIP require standardized tracking and reporting of information related to NCND responses. Some agencies may include a partial NCND response in every response to a FOIA request; but counting this as a single NCND response would inflate the numbers used. Thus, agencies should report FOIA data segregated by category, such as whether

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<sup>6</sup> See, e.g., A.Jay Wagner, *Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response*, 21 COMM. L. & POL’Y 539 (2016).

<sup>7</sup> See Classification Subcommittee, Recommendations Regarding Glomar Responses, Mar. 1, 2022, pp. 10-11, <https://www.archives.gov/files/ogis/assets/22-03-03-draft-classification-subcommittee-glomar-recommendations-white-paper.pdf>.

or not the NCND response is full or partial. Agencies should also sort the NCND responses by exemption. In cases where NCND responses are based on more than one exemption, each exemption should be counted. If an agency issues an NCND response based on Exemptions 1 and 3, for example, the agency should account for two NCND responses.<sup>8</sup>

Agencies ideally would report NCND data in their Annual FOIA Reports, but the content of these reports is generally fixed by statute.<sup>9</sup> Until the law is changed,<sup>10</sup> the Committee suggests that OIP instruct agencies to report NCND data, as well as their tracking methodology, in their Chief FOIA Officer Reports. In addition, we recommend that OIP report aggregated NCND data in its annual summary of Annual FOIA Reports. This should include the number of NCND responses that have not been affirmed on administrative appeal or upheld by a court in litigation. The Committee approved this recommendation by a vote of 15-2 with one abstention and two members absent.

***Recommendation No. 2022-03***

**We recommend that agencies provide information to requesters on their websites about the circumstances that will likely result in a “Neither Confirm Nor Deny” response, and, when possible, include suggestions on how to avoid such a response.**

***Comment:*** Federal law obligates agencies to assist the public in making requests for agency records, including by providing “reference material or a guide for requesting records or information” in an electronic format.<sup>11</sup> OIP has advised agencies that such reference material, or accompanying text on their FOIA websites, should contain, among other things, a general description of the FOIA process, an explanation of what the requester can expect in response to

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<sup>8</sup> Tracking this data may require that agencies update the software used to manage FOIA requests. While the Committee recognizes that changes in procedures may be cumbersome, we believe that the interference will be minimal and ultimately worthwhile, both to the mission of the agencies and for public understanding of the inner workings of government.

<sup>9</sup> See 5 U.S.C. § 552(e)(1). The FOIA statute does afford the Attorney General some discretion: see 5 U.S.C. § 552(e)(5) (The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and *may establish additional requirements for such reports as the Attorney General determines may be useful.*) (emphasis added).

<sup>10</sup> Congress most recently added requirements for agency Annual FOIA Reports in 2016. See *FOIA Improvement Act of 2016*, <https://www.congress.gov/114/bills/s/337/BILLS-114s337enr.xml>.

<sup>11</sup> 5 U.S.C. § 552(g).

requests for certain information, and an explanation of FOIA’s exemptions and exclusions.<sup>12</sup> Agencies have not, however, been explicitly requested to address “Neither Confirm Nor Deny” (NCND) responses.<sup>13</sup> The Committee believes that providing such information on agency websites would assist requesters in making requests and, in turn, improve the efficiency of agency FOIA operations.

We therefore suggest that, to the extent possible, agencies identify all circumstances that will likely result in an NCND response and inform requesters how to avoid submitting a request that is likely to result in an NCND response. As illustration, agencies often refuse to confirm or deny the existence of records in response to requests about third parties, citing Exemptions 6 and/or 7(C), unless the requester submits proof of the third party’s death, submits a signed privacy waiver from the third party, or demonstrates an overriding public interest in disclosure. Agency FOIA websites should provide examples of the types of information sufficient to establish the third party’s death, such as news articles, death certificates, etc.

Further, for each exemption that the agency anticipates using in connection with an NCND response, the agency should provide a set of criteria that it uses to evaluate whether to issue an NCND response. The foregoing information should be clearly written in plain language understandable to the non-expert. An ideal place for such a discussion would be in an agency’s FOIA Reference Guide or Handbook. OIP or OGIS should provide agencies with resources on the information and advice that agencies can share with the public. The Committee approved this recommendation by a vote of 14-3 with one abstention and two members absent.

#### ***Recommendation No. 2022-04***

**We recommend that the Archivist direct the Office of Government Information Services or the Information Security Oversight Office to review the use and practice of “Neither Confirm Nor Deny” responses across agencies and to formulate a set of recommendations to ensure that these responses are being used appropriately. Alternatively, we recommend that the Archivist encourage a relevant organization outside of the National Archives and Records Administration to perform the same review.**

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<sup>12</sup> See, e.g., DOJ, “OIP Guidance: Agency FOIA Websites 2.0,” *FOIA Post*, Nov. 30, 2017, <https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20Websites%202.0>.

<sup>13</sup> We note that some agencies do address NCND responses on their FOIA websites. The Central Intelligence Agency, for example, notifies requesters that it will refuse to confirm or deny the existence of ten specific categories of records unless those records have been officially acknowledged or released. See <https://www.cia.gov/readingroom/frequently-asked-questions>. Other FOIA websites reviewed by the Classification Subcommittee, however, do not provide any information about NCND responses. See, e.g., <https://open.defense.gov/transparency/FOIA/FOIA-Handbook/> (DOD FOIA Handbook).

**Comment:** As noted earlier, the Classification Subcommittee attempted to solicit information from agencies about their use of NCND responses, but it received little feedback. For this reason, we believe that a thorough review of the use of NCND responses across government is necessary. For the review to be successful in eliciting the necessary information, agency participation should be mandatory.

The investigation should attempt to answer the following questions:

- What practices are currently in place across government for the use of NCND requests?
- Has the use of these responses expanded over time, and if so, are there any discernible causes for such expansion?
- What are the appropriate reporting practices regarding the use of these procedures? What categories should agencies use when reporting NCND responses? What data would agencies themselves find useful to collect?
- Under what circumstances do agencies issue NCND responses without conducting an initial search for records?
- Under what circumstances do agencies conduct an initial search for records before issuing an NCND response?

Based on the findings of the review, the investigatory body should make recommendations aimed at achieving the following goals:

- Ensuring that NCND responses are being used appropriately.
- Implementing reporting requirements regarding the use of NCND responses.
- Improving communication about NCND responses with the public.
- Reducing the unnecessary or inappropriate use of NCND responses.
- Ensuring that agencies only issue NCND responses without conducting an initial search for records when necessary.

The recommendations should be addressed to both Congress and the executive branch. An effective solution to any issues the review identifies may require action by both branches of government, each within their sphere of influence. The Committee approved this recommendation unanimously by a vote of 17-0 with one abstention and two members absent.

## Executive Order 13526

### Classification Subcommittee

Exemption 1 of FOIA, which became effective July 5, 1967, protects from disclosure records that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order,” 5 U.S.C. § 552(b)(1). Records are generally deemed classified when their release may harm national security. Executive Order (E.O.) 13526 governs classified national security information by “prescrib[ing] a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism.”<sup>14</sup>

#### *Recommendation No. 2022-05:*

**We recommend that § 1.6(f) of Executive Order 13526 be amended to require that whenever information is reviewed for possible release under the Freedom of Information Act, Presidential Records Act, or Privacy Act of 1974, agencies must add any omitted markings specified in the Executive Order.**

**Comment:** Section 1.6(f) of Executive Order 13526 provides that when improperly marked classified information is used “in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.” Given the importance of classification markings, the Committee believes that the scope of Section 1.6(f) should be expanded to include any information reviewed by agencies in response to a request under the Freedom of Information Act, Presidential Records Act, or Privacy Act of 1974. Applying Section 1.6(f) to this additional information will ultimately reduce the number of improperly marked documents, including electronic records.<sup>15</sup> The Committee approved this recommendation by a vote of 11-1 with five abstentions and three members absent.

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<sup>14</sup> The Freedom of Information Act (FOIA) & Classified Records at a Glance, <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/meetings/foiaac-mtg-handout-2020-12-10>.

<sup>15</sup> The marking of electronic records is covered in 32 C.F.R. § 2001.23.

***Recommendation No. 2022-06***

**We recommend that the Archivist request that the Inspector General of the Intelligence Community conduct a review of agencies' compliance with Sections 1.6 and 2.1 of Executive Order 13526, particularly as it relates to the initial marking of classified information and how agencies handle classified information responsive to FOIA or other disclosure requests when markings are omitted.**

***Comment:*** The classification and withholding of documents containing national security information requires adherence to a host of rules set forth in federal statutes and executive orders. Of relevance here, Sections 1.6 and 2.1 of Executive Order 13526 require classified information and derivatively classified information, respectively, to be appropriately marked as classified.<sup>16</sup>

Classification marking requirements allow other government officials who were not involved in the original classification decisions to understand them and to decide whether the information should continue to be protected. If the information is not properly marked, a future reviewer may make erroneous classification determinations and release information that should be withheld or withhold information that should be released.

Some in the requester community perceive that at least a few agencies routinely omit classification markings and/or do not correct those omissions when discovered in processing records in response to FOIA requests or otherwise. It is unclear whether this perception is accurate or how widespread it is. There is little dispute, however, that omitting markings or failing to correct omissions increases the risk of improper handling, which both endangers national security and heightens transparency concerns. Thus, it is critical to find out if and to what extent this problem exists.

Accordingly, we recommend that the Intelligence Community Inspector General (IC IG), a component of the Office of the Director of National Intelligence, perform an audit across the Intelligence Community. The IC IG conducts independent and objective audits, investigation, inspections, and reviews, and it is well-situated to perform such an audit. A review by the IC IG also would allow experts in classification across the Intelligence Community to weigh in on this complicated topic. We encourage the IC IG to release the results of its audit to the public to the greatest extent possible in order to facilitate an informed debate. The Committee approved this recommendation unanimously by a vote of 15-0 with two abstentions and three members absent.

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<sup>16</sup> E.O.13526, §§ 1.6, 2.1.

## Agency FOIA Website Content and Accessibility

### Technology Subcommittee

#### *Recommendation No. 2022-07*

We recommend that the Department of Justice’s Office of Information Policy encourage agencies to post a minimum level of information to their websites beyond what is required by the Freedom of Information Act (FOIA), such as the hosting of FOIA reading rooms or electronic libraries.<sup>17</sup> In addition to these pre-existing requirements, we recommend that agencies also include the following standardized elements, as delineated below:

1. Each agency website should link to their current FOIA regulations and include a FAQ section which provides this information in plain language.<sup>18</sup>
2. Link to a description of records maintained by the agency as well as a description of records that do not exist at the agency.
3. Link to agency records schedules.
4. Description of agency “Capstone” email policy, current list of Capstone officials, and agency’s email retention policy.<sup>19</sup>
5. Link to the electronic reading room.
6. FOIA request submission form (if requests can be made via a portal or online form). The agency should include guidance/tips on the best way to frame their request, such as a reminder to provide as much information as the requester may have.
7. Explanation of FOIA’s nine exemptions (if not already included elsewhere).
8. Contact information for the FOIA Officer(s).
9. Contact information for the “FOIA Public Liaison.”
10. Average processing times for requests, including for “simple” and “complex” requests.<sup>20</sup>

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<sup>17</sup> 5 USC § 552(a)(2).

<sup>18</sup> <https://www.foiaadvisor.com/foia-regs>.

<sup>19</sup> <https://www.archives.gov/records-mgmt/email-management/capstone-training-and-resources.html>.

<sup>20</sup> The DOJ Handbook for Agency Annual FOIA Reports defines simple and complex requests as (1) a simple FOIA request is one that “an agency using multi-track processing places in its fastest (non-expedited) track based on the low volume and/or simplicity of the records requested;” and (2) a complex request is one that “an agency using multi-track processing places in a slower track based on the high volume and/or complexity of the records requested.” Department of Justice Handbook for Agency Annual Freedom of Information Act Reports, Guidance for FOIA Professionals on Proper Tracking and Detailed Instructions for Preparing the Annual Report, Oct. 7, 2021, p. 22, <https://www.justice.gov/oip/page/file/1438431/download>.



11. Description of the types of requests that would likely be considered unduly burdensome by the agency.
12. Description of the type of request that would likely be considered not reasonably described.
13. Description of the administrative appeals process.
14. Accessible contact information for individuals with disabilities that they can use if they encounter inaccessible documents.
15. Best practices for writing your FOIA request, with examples.
16. A link to FOIA logs on the agency FOIA website.

The Frequently Asked Questions (FAQ) section should include the following:<sup>21</sup>

1. Instructions for obtaining the status of a request and requesting an estimated date of completion.
2. Training modules or graphics for requesters on how to craft a targeted FOIA request.<sup>22</sup>

We further recommend that agencies keep the user experience in mind when designing or updating their websites and meet any requirements set forth by the Federal Web Council.<sup>23</sup> Although we do not think that agency websites should be standardized, there should be certain information that is consistently found on agency FOIA websites.

*Comment:* The intent of this recommendation is to make agency websites user-friendly and reduce the necessity for FOIA requests for records that have already been released. This recommendation is also intended to improve agency efficiency by allowing FOIA officers to focus their limited resources on records that have not already been made available to the public. We believe that these improvements will help streamline and improve the release of records under FOIA. Although some of these recommendations may have already been listed in other forms, such as the “Essential Elements of FOIA Webpages” contained in DOJ’s FOIA Self-Assessment Toolkit<sup>24</sup> or already incorporated as part of FOIA.gov, we reiterate them here to

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<sup>21</sup> See <https://www.foia.gov/faq.html> for a representative FAQ page.

<sup>22</sup> Examples of training videos: <https://www.archives.gov/cui/training.html>.

<sup>23</sup> <https://digital.gov/resources/federal-web-council/>.

<sup>24</sup> <https://www.justice.gov/oip/foia-resources/foia-self-assessment-toolkit/download>.

stress their importance to improving the FOIA process. The Committee approved this recommendation unanimously by a vote of 17-0 with one abstention and two members absent.

***Recommendation No. 2022-08***

**We recommend that the Technology Committee of the Chief FOIA Officers Council establish a working group within two years to determine recommended best practices for the release of records in native format, including metadata. This working group should address how these protocols should work vis-à-vis current practices under 5 USC § 552(a)(3)(B) and align with NARA Bulletin 2015-04<sup>25</sup> and OIP’s guidance on metadata and FOIA.<sup>26</sup> As part of its research, we encourage the Technology Committee to consult with outside experts, including the requester community, as necessary.**

**As a starting point for the working group, our recommendation is that the following file elements should be released to all requesters, upon request, subject to other FOIA exemptions, and with the understanding that classified national security records may require special protocols:**

- 1. Identifier [File Name]. The complete name of the computer file including its extension (if present).**
- 2. Identifier [Record ID]. The unique identifier assigned by an agency or a records management system.**
- 3. Title. The name given to the record.**
- 4. Description. A narrative description of the content of the record, including abstracts for document-like objects or content descriptions for audio or video records.**
- 5. Creator. The agent primarily responsible for the creation of the record.**
- 6. Creation Date. The date that the file met the definition of a federal record.**
- 7. Rights. Information about any rights or restrictions held in and over the record including access rights such as national security classification, or personally**

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<sup>25</sup> NARA Bulletin 2015-04 provides guidance to federal agencies for the minimum set of metadata elements that must accompany transfers of permanent electronic records to the National Archives. See <https://www.archives.gov/records-mgmt/bulletins/2015/2015-04.html> (defining metadata as “elements of information that answer the questions ‘who, what, where, when, and why’ regarding electronic records”).

<sup>26</sup> Using Metadata in FOIA Documents Posted Online to Lay the Foundation for Building a Government-Wide FOIA Library. See <https://www.justice.gov/oip/blog/using-metadata-foia-documents-posted-online-lay-foundation-building-government-wide-foia>.

**identifiable information, Privacy Act, or Freedom of Information Act, or usage rights relating to copyright or trademark.**

**Comment:** We predict that metadata will emerge as a challenging issue for agencies subject to FOIA in the near term as the requester community increasingly seeks metadata and federal agencies transition to a fully electronic environment per NARA Bulletin 2015-04. Complicating this matter further, most common software programs used currently by FOIA offices do not allow for the processing of metadata. Other agencies typically release documents in “flattened” PDFs with nothing in native format.

Additionally, the Technology Subcommittee considered whether this recommendation should also include the option for the Archivist to establish an advisory committee. However, we determined that it would be more appropriate for the Technology Committee of the CFO Council to conduct this work in consultation with the requester community. The Committee approved this recommendation unanimously by a vote of 16-0 with two abstentions and two members absent.

**We believe that the following two (2) recommendations from the 2016-2018 FOIA Advisory Committee should be implemented, with the following revisions, within a two-year period following the release of this Report:**

***Recommendation No. 2022-09***

**1. We recommend that the 508 Compliance and Collaborative Tools Working Group of the Technology Committee of the Chief FOIA Officers Council continue to research and recommend options for agencies to resolve the inherent challenges that exist between FOIA's proactive disclosure requirements and Section 508 of the Rehabilitation Act, until a suitable legislative solution is enacted.**

***Recommendation No. 2022-10***

**2. We recommend that agencies proactively publish FOIA logs in the agency's electronic reading room (often referred to as FOIA Libraries) on an ongoing basis, at least quarterly. Agencies should allow for the full text searching of FOIA logs. To be most useful, agency FOIA logs should contain, at a minimum, each of the following fields in either Excel or CSV format, in preference to PDF:**

- 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) **Whether the request was processed under the Privacy Act as well.**
- f) **Subject matter of the request.**
- g) **Status of the request (pending, closed, etc.).**
- h) **For requests that have been closed, the date closed and the result of the FOIA request (granted, granted in part, denied, withdrawn, etc.).**
- i) **Fee Information**
  - a. **Fee category assigned to requester, if applicable (commercial, educational, news media, other).**
  - b. **Whether a fee waiver was requested.**
  - c. **If a fee waiver was requested, whether it was granted.**
  - d. **Amount of fees charged.**
  - e. **Amount of fees paid.**

**We acknowledge that the above elements should be included, subject to other FOIA exemptions and exclusions.**

***Comment:*** In line with the Charter for the FOIA Advisory Committee, we advocate continued pursuit of technological solutions within agencies, the requester community, and the tech community to address the proactive disclosures of government records and data.<sup>27</sup>

Regarding Section 508 compliance, the Technology Subcommittee has determined that this recommendation may be more effectively handled by the 508 Compliance and Collaborative Tools Working Group of the Technology Committee of the Chief FOIA Officers Council. We recognize that OGIS has already made this recommendation to Congress, as transmitted in three

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<sup>27</sup> FOIA Advisory Committee charter, under “Description of Duties” states: “The FOIA Advisory Committee fosters dialogue between the Federal Government and the requester community, solicits public comments, and develops recommendations for improving FOIA administration and proactive disclosures.” See <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term>.

annual reports,<sup>28</sup> and has discussed it in recent congressional testimony.<sup>29</sup> We believe that the 508 Working Group is better positioned to undertake additional research and data collection to enable the changes in legislation for additional resources to implement the first part of this recommendation.

We believe that the second part of this recommendation will benefit the requester community by streamlining access and allowing requesters to identify and obtain previously released records. In turn, this would result in more cost-effective and faster releases by agencies. Agencies already compile significant information on each request; by establishing standard expected categories, the FOIA logs become that much more useful for the public.

Requiring the regular — possibly real time — production of FOIA logs presents a low-cost mechanism that will both aid requesters and potentially reduce the burden on agencies. The public will have a clear view of what is being requested and what has been released. Production of the logs also may sync up with increased proactive disclosures. Released records could be conveniently appended to each log entry after they are produced. Furthermore, FOIA logs have become a tool for those requesters who are studying FOIA processes, and the standardization would benefit this community as well.

This recommendation is an extension of the Detailed FOIA Log Recommendation from the 2016-2018 Term of the FOIA Advisory Committee. Our recommendation differs from the earlier one in the following ways: we added that the logs should be text searchable; changed the frequency of proactive posting from monthly to “at least quarterly;” deleted the different treatment for agencies that receive fewer requests; added information about fees; and acknowledged that the release of this information is subject to the assertion of exemptions and exclusions. The Committee approved this recommendation unanimously by a vote of 16-0 with one abstention and three members absent.

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<sup>28</sup> See *The Freedom of Information Act Ombudsman- Past, Present & Future 2019 Report for Fiscal Year 2018*, <https://www.archives.gov/files/ogis/assets/ogis-2019-annual-report-for-fy-2018.pdf>; *The Freedom of Information Act Ombudsman 2021 Report for Fiscal Year 2020*, <https://www.archives.gov/files/ogis/assets/ogis-2021-annual-report-for-fy-2020.pdf>; and *The Freedom of Information Act Ombudsman 2022 Report for Fiscal Year 2021*, <https://www.archives.gov/files/ogis/reports/ogis-2022-annual-report-final.pdf>.

<sup>29</sup> See *Testimony of Alina M. Semo, Director of the Office of Government Information Services Before the Senate Committee on the Judiciary* (Mar. 29, 2022), <https://www.judiciary.senate.gov/imo/media/doc/Semo%20testimony.pdf>.

## First-Person Requests

### Process Subcommittee

#### *Recommendation No. 2022-11*

**We recommend that the Department of Justice’s Office of Information Policy urge agencies to identify records relied on by agencies that affect an individual’s eligibility for benefits or adversely affect an individual in proceedings, and establish non-FOIA and/or Privacy Act alternative processes for making the record automatically available to the individual.**

**Comment:** The Fifth Amendment guarantees that no person shall “be deprived of life, liberty, or property, without due process of law.” In addition to the Courts, the executive branch can provide persons with the due process of law guaranteed by the Fifth Amendment.<sup>30</sup> Moreover, Congress and executive branch agencies may furnish additional processes above and beyond what the U.S. Constitution requires. But when notice and a meaningful opportunity to be heard are “a person’s due process which is a mere gesture is not due process.”<sup>31</sup> Very often the meaningful exercise of the opportunity to be heard requires timely access to information in records about the party to the agency’s action. This evidence is found in records that only the agency holds. The inadequacy of other paths to disclosure often motivates parties to engage in “first-person” (or first-party) FOIA practice. Some agencies are still in their infancy in providing alternatives to first-person FOIA practices. However, other agencies, including the Internal Revenue Service (IRS) and the Social Security Administration (SSA), as discussed further below, have already taken steps to provide efficient alternatives to FOIA requests to facilitate prompt requester access to frequently requested records. The Committee approved this recommendation by a vote of 15-2 with one abstention and two members absent.

#### *Recommendation No. 2022-12*

**We recommend that agencies should amend any regulations, directives, policies, and guidance to provide individuals, regardless of whether they have legal representation in agency proceedings, access to records about themselves.**

**Comment:** When providing access to records, federal agencies receiving first-person FOIA requests should not differentiate between *pro se* parties (who do not have an attorney representing them) or parties represented by legal counsel. Within some federal agencies

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<sup>30</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>31</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

involving immigration first-person requests, record access variations do exist. For example, DOJ's Executive Office for Immigration Review (EOIR) receives a substantial volume of first-person FOIA requests in connection with immigration proceedings. DOJ's EOIR principally engages in executive branch adjudication of individual rights through three adjudicatory bodies: (1) the Office of the Chief Immigration Judge (OCIJ); (2) the Office of the Chief Administrative Hearing Officer (OCAHO); and (3) the Board of Immigration Appeals (BIA). Consequently, in connection with removal adjudication, EOIR receives 48,000 to 60,000 first-person FOIA requests seeking Records of Proceedings (ROP) of non-citizens before Immigration Judges.

Traditionally, parties to proceedings could obtain a paper copy of ROPs only by filing a FOIA request. This inefficient paper record system, which is being phased out, is being replaced by the roll out of the EOIR Courts and Appeal System (ECAS). Once installed, ECAS promises to remedy this inefficiency by offering timely processing of first-person FOIA requests only for DHS employees and aliens (non-citizens) represented by lawyers in proceedings before EOIR. However, almost half of the parties seeking ROPs are *pro se* individual aliens involved in the immigration process and they do not have legal representation or access to ECAS.

On March 8, 2022, to provide *pro se* aliens with access to ROPs, OCIJ and BIA instituted a new process to request an ROP outside FOIA. The new process allows parties to the proceedings, and their representatives, access to the ROP either by requesting in person at the window, or via email directly to the court or Board. Parties and their representatives may still file a FOIA request. FOIA also continues to handle all requests from non-parties and requests for documents not stored at the court or BIA.

EOIR's ECAS system is a large step in the right direction of providing timely access to electronic ROPs. But differential treatment between represented parties on the one hand and *pro se* immigrants on the other during the immigration process is a substantial problem. As previously noted, the number of *pro se* parties before EOIR is very large. ECAS provides a simple mechanism for efficiently and inexpensively distributing ROPs. Given that the technology is already in place to enable this disclosure, we specifically recommend that EOIR should change its policy to permit *pro se* immigrants access to the ECAS system. But our recommendation is still more general. Record access should not disfavor or discriminate against *pro se* parties. The Committee approved this recommendation unanimously by a vote of 13-0 with four abstentions and three members absent.

***Recommendation No. 2022-13***

**We recommend that agencies that receive frequent first-person requests should identify the most requested records and develop a plan for processing such records that leverages technology, and promotes efficiency and good customer service.**

***Comment:*** Most agencies are still in the developmental stage of first-person alternative practices that expand record access outside of the FOIA and Privacy Act arena. However, a handful of agencies identified as having large numbers of frequently requested first-party records have already taken steps to provide efficient alternatives to FOIA. One such agency, the IRS, implemented a process that allows an individual to access their own records.

The IRS has many records housed in over 60 different major databases that its employees have to consult to see the status of a taxpayer's return. As a FOIA alternative and in order to minimize response time, the IRS modified its process to provide first-party individuals with a tax transcript, a type of summary document of tax information relating to a taxpayer's tax filings. The IRS saw many efficiencies in offering a single document as a way of reducing requests made to the IRS, including those made under a tax-specific disclosure statute.<sup>32</sup>

Additionally, the SSA receives an influx of first-person FOIA requests for decedents' Forms SS-5 (Applications for Social Security Cards); claims files; and genealogical information. Although recently phased out, in order to reduce the FOIA footprint, SSA formerly utilized analysts from other components outside of the Central FOIA processing division to expeditiously process responses to simple requests. The Committee approved this recommendation unanimously by a vote of 17-0 with one abstention and two members absent.

***Recommendation No. 2022-14***

**We recommend that a comprehensive assessment of the Department of Homeland Security (DHS) processes, workforce, and existing technology be initiated as it relates to A-Files responsive to FOIA requests.**

***Comment:*** The Department of Homeland Security (DHS) accounts for approximately half of all FOIA requests received in the federal government. Most of those FOIA requests involve immigration records and are scattered within multiple component entities of DHS (*e.g.*, U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).) The largest category of first-person FOIA requests

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<sup>32</sup> 26 U.S.C. § 6110.



is Alien Files (A-Files).<sup>33</sup> A-Files may run approximately 200 pages with an average FOIA processing time of 68 days. Typically, A-Files are requested to (1) apply for immigration benefits and (2) support an alien in a pending immigration proceeding, such as removal proceedings, release from detention, or bond hearings. This use of FOIA for administrative discovery is a significant driver for the USCIS backlog. As a first-party alternative to the FOIA queue, we recommend that USCIS extract A-Files and establish a fast-track processing alternative to FOIA.

The Subcommittee recommended that an assessment be performed by a non-governmental entity with expertise in research and development, and directed to USCIS, the creator of the approximately 70 million A-Files and the system manager for the Alien File/Central Index System. Other DHS components like ICE and CBP that maintain equities in those same files and systems would also be assessed. Recommendations would focus on three dimensions — process, workforce, and technology — to reduce delays.

The Subcommittee acknowledges that — given the challenges USCIS is currently facing that include complying with stringent court orders, transitioning to a new access platform, and what appears to be another record-breaking year of new FOIA requests — the commissioning of an independent assessment by an outside entity will require supplemental funding. We therefore recommend that DHS seek and Congress provide specific funding to USCIS to support this assessment. The Committee approved this recommendation unanimously by a vote of 16-0 with two abstentions and two members absent.

## Reimagining OGIS

### Legislation Subcommittee

#### *Recommendation No. 2022-15*

**We recommend that Congress give the Office of Government Information Services the authority to make binding decisions.**

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<sup>33</sup> Created by the Immigration and Naturalization Service (INS) beginning in April 1944, A-Files contain all records of any active case of an alien not yet naturalized as they passed through the United States immigration and inspection process. An A-File might also be created without any action taken by the alien; for example, if the INS initiated a law enforcement action against or involving the alien. A rich source of biographical information, A-Files may include visas, photographs, affidavits, and correspondence leading up to an alien's naturalization, permanent residency, death, or deportation. See <https://www.archives.gov/research/immigration/aliens>.

**Comment:** OGIS has done an exemplary job since its launch in 2009, now handling more than 4,000 requests for assistance a year between requesters and agencies, as well as performing a host of other benefits to the nation.<sup>34</sup> Yet, requesters express growing discontent with the FOIA process, and they seek effective alternatives to mediation and litigation. According to a survey<sup>35</sup> conducted by two members of the Committee, 94% of requesters say that delays are a moderate, major, or extreme problem.<sup>36</sup> In that same survey, 95% of requesters who have used OGIS said the office has too little power, and 93% said OGIS should be granted the power to compel agencies to provide requesters records. Ultimately, the current system, relying on the courts to resolve disputes, is expensive and time-consuming, inadequately serving the average person, agencies, and the taxpayer. The current system disfavors those who are economically disadvantaged, since enforcement of FOIA is possible only through litigation. Currently, requesters may lodge requests for OGIS assistance for free, and without hiring an attorney, but the lack of a binding decision is a strong disincentive in filing such requests. Where requesters face significant resistance, they are more likely to default to costly litigation or, if they cannot afford it, give up on their request altogether.

Based on a review of dozens of studies and writings on this topic, as well as interviews with more than 40 experts within the United States and beyond, the Committee concluded that in addition to its mediation role, OGIS should be granted authority to issue binding decisions (*see* complete Reimagining OGIS report<sup>37</sup> summarizing the research findings). About 70 nations have provided such authority for their information commissions, as well as in the states of Connecticut, New Jersey, and Pennsylvania.

Discussion was robust and constructive throughout the process for these ideas of substantial consequence. Three Committee members voted against the recommendation and expressed concerns about unintended consequences from such a system. Feedback from OGIS staff cautioned that increased authority might “erode the trust and safe space for vital conversations

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<sup>34</sup> Freedom of Information Act Ombudsman 2021 Report for Fiscal Year 2020, <https://www.archives.gov/ogis/about-ogis/annual-reports/ogis-2021-annual-report-for-fy-2020>.

<sup>35</sup> See <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/survey-overview-05.04.2022-1.pdf>.

<sup>36</sup> A.Jay Wagner and David Cuillier, *FOI Requester Survey*, (2022), summary at the Federal FOIA Advisory Committee website, <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/survey-overview-05.04.2022-1.pdf>

<sup>37</sup> “OGIS 2.0: Reimagining FOIA Oversight,” May 4, 2022, by the Reimagining OGIS Working Group, David Cuillier, chair, and members Patricia Weth, Thomas M. Susman, and A.Jay Wagner. <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf>.

that OGIS has built over the years with both requesters and agencies.”<sup>38</sup> No doubt, questions, and issues specific to the federal FOIA process will need to be hammered out during any future drafting of legislation. For example, how do administrative appeals fit in? Should requesters be required to first submit an administrative appeal before approaching OGIS for mediation or binding adjudication, or would they be able to go directly to OGIS? If an agency challenges a decision in court, would the requester be required to respond (which might require hiring an attorney, at potential expense for the individual, significantly chilling requesters), or would the court be satisfied with the reasoning from the OGIS decision? Would a requester have to go through OGIS before filing a lawsuit, or go straight to litigation as many time-sensitive litigants (e.g., journalists, non-profit organizations) might prefer? Those are just some of the details that would need to be worked out, and no doubt, other questions would arise. Further study is needed to implement this recommendation. The Committee approved this recommendation by a vote of 12-3 with two abstentions and two members absent.

#### ***Recommendation No. 2022-16***

**We recommend that Congress give the Office of Government Information Services the authority to review records *in camera*.**

***Comment:*** If OGIS is to mediate or adjudicate disputes between requesters and agencies, then we believe it must have all the facts at hand. Currently, agencies are not required to show OGIS unredacted records involved in a dispute. That is unusual compared to the 75 nations that allow their ombuds agencies to view records *in camera*. The Office of Government Information Services Empowerment Act of 2018 (H.R. 5253),<sup>39</sup> had it passed, would have granted OGIS this power. Many of the other nations’ oversight agencies’ personnel are provided high-level security clearances to review classified documents. Currently, two out of 10 OGIS staffers possess such clearance. In addition, one possibility is the creation of a special team within OGIS that specializes in disputes involving classified records, providing more consistency and expertise than the current system of individual federal district courts.

Some expressed concerns that such authority would shift OGIS’ neutral position toward favoring requesters and create pushback from agencies. OGIS helps, on average, over 4,000 requesters annually who seek ombuds services and simply need help navigating various parts of the FOIA

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<sup>38</sup> *Id.*, p. 26. See also *Appendix D to OGIS 2.0: Reimagining FOIA Oversight, OGIS’s Feedback on Reimagining OGIS Working Group & Legislation Subcommittee Recommendations to the Federal FOIA Advisory Committee, May 4, 2022*, <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf>.

<sup>39</sup> <https://www.congress.gov/bill/115th-congress/house-bill/5253?r=15>.

administrative process. OGIS also helps agencies seeking counsel on how to best satisfy requesters' needs. OGIS expressed concern that shifting its role to an enforcement office would erode the trust and safe space for vital conversations that OGIS has built over the years with both requesters and agencies. From a practical perspective, such authority would require more resources for OGIS. Moreover, OGIS would have to expand and fundamentally restructure itself, including creating walls between different teams of people to work on the different responsibilities.<sup>40</sup>

Nevertheless, given that *in camera* review has worked in other mediation models, we believe that this is a fundamental requirement to ensure an accurate, credible resolution that requesters and agencies can trust. The Committee approved this recommendation by a vote of 10-3 with four abstentions and three members absent.

***Recommendation No. 2022-17***

**We recommend that Congress create a direct line-item appropriation for the Office of Government Information Services.**

***Comment:*** Congress should directly fund OGIS through a budget line item, as practiced in 66 other countries by their own legislative branches,<sup>41</sup> as well as in the state of Connecticut. This would insulate OGIS against retaliatory budget cuts by the executive branch. Congress has long supported the premise and importance of freedom of information. It passed FOIA in 1966, along with amendments in successive decades, such as the OPEN Government Act of 2007<sup>42</sup> that created OGIS. A direct line-item appropriation would send a message to the people of America that government transparency and accountability are fundamental to a democracy, and that Congress backs its commitment with direct funding.

One Committee member expressed concern that Congress can also change priorities and that it might create more pressure on OGIS staff to focus energies on educating lawmakers. Feedback

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<sup>40</sup> See Appendix D to *OGIS 2.0: Reimagining FOIA Oversight, OGIS's Feedback on Reimagining OGIS Working Group & Legislation Subcommittee Recommendations to the Federal FOIA Advisory Committee*, May 4, 2022, <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf>.

<sup>41</sup> Based on the Global Right to Information Ratings conducted by the Centre for Law and Democracy and Access Info, at <https://www.rti-rating.org/>. Examined countries identified as having independent budgets (indicator 39), at <https://www.rti-rating.org/country-data/by-indicator/>.

<sup>42</sup> See S. 2488 - 110th Congress (2007-2008): OPEN Government Act of 2007, <https://www.congress.gov/bill/110th-congress/senate-bill/2488>.

from OGIS staff noted that a line-item budget is a “double-edged sword” — although a direct line-item would bring focus to OGIS’s annual budget needs, that additional attention also means that it is a line-item that can be more readily cut.<sup>43</sup> But regardless of whether OGIS has a separate line-item or continues to draw its funding from the overall NARA-allocated budget, the Committee believes that OGIS has been underfunded since its creation.”<sup>44</sup> The Committee approved this recommendation by a vote of 13-1 with three abstentions and three members absent.

***Recommendation No. 2022-18***

**We recommend that Congress increases the Office of Government Information Services’ budget.**

***Comment:*** On a per-capita basis, OGIS is the least-staffed FOIA oversight agency in the world. That includes nations, states, territories, and cities.<sup>45</sup> To the National Archives and Records Administration’s credit, OGIS spending has outpaced inflation, from \$1.38 million in 2009 to \$1.71 million in 2021.<sup>46</sup> Yet, OGIS staffing levels are inadequate, and have been so since its inception. Having just 10 permanent employees (as of May 2022) puts OGIS on par with the Yukon Territory in Canada. Even the state of Connecticut has 16 staffers and Pennsylvania has 21. Mexico employs 696 people at its independent FOI oversight agency, and Brazil employs 2,200. Even when OGIS was proposed in the OPEN Government Act of 2007, the Congressional Budget Office estimated it would need at least \$5 million to get started and more than \$4 million per year for adequate staffing to handle the duties assigned, or a \$5.5 million annual budget in

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<sup>43</sup> See Appendix D to *OGIS 2.0: Reimagining FOIA Oversight, OGIS’s Feedback on Reimagining OGIS Working Group & Legislation Subcommittee Recommendations to the Federal FOIA Advisory Committee*, May 4, 2022, <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf>.

<sup>44</sup> “OGIS 2.0: Reimagining FOIA Oversight,” p. 26, <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf>.

<sup>45</sup> See Appendix B of the Reimagining OGIS report for a list of the jurisdictions, their staffing levels, and per-capita staffing, <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/reimagining-ogis-recommendations-05.04.2022.pdf>.

<sup>46</sup> Budget numbers provided by Alina Semo, Director of the Office of Government Information Services (Feb. 2, 2022). These numbers reflect actual spending, not the amount requested in the president’s budget.

today's dollars, accounting for inflation.<sup>47</sup> That did not happen. The United States, formerly a shining example of transparency, has fallen behind. It can do better.

Throughout the 2020-2022 Committee term, members raised innovative ideas for how OGIS could improve the system, but many of those ideas fell to the wayside because of the need for additional staffing and resources. Increased funding is particularly important if OGIS is given more authority to issue binding decisions. By some estimates, such authority could increase caseloads from 4,000 per year to 20,000 per year, perhaps even more. Therefore, at a minimum, the OGIS budget should be increased from \$1.7 million to \$18 million. Even at \$18 million, OGIS would employ just 120 total staff members, equivalent, roughly, to Canada (100 staffers), and still leaner than FOIA oversight offices in Brazil, Guatemala, and Mexico. It would, however, be a start, and in context is still a small price to pay for something as fundamental as government transparency. In comparison, one F-35 combat jet costs \$78 million to produce,<sup>48</sup> and billions of dollars are distributed in federal subsidies each year for such projects as the for-profit New Jersey Transit Corporation (\$2.8 billion), live streaming solar eclipses (\$3.7 million), and developing a smart toilet app (\$142,000).<sup>49</sup>

Additional analysis by the next Committee term could be used to evaluate whether a stronger OGIS-based adjudication system could actually save tax dollars — from reduced litigation and legal bills for agencies, not to mention substantial time and cost savings for requesters. Indeed, federal agencies spend more than \$43 million each year defending themselves in FOIA lawsuits.<sup>50</sup> Also, OGIS could investigate online systems for facilitating resolution through synchronous and asynchronous means, creating further efficiencies. The Committee approved this recommendation unanimously by a vote of 14-0 with three abstentions and three members absent.

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<sup>47</sup> The Congressional Budget Office Mar. 12, 2007, cost estimate for H.R. 1309 OPEN Government Act of 2007, estimated that the new provision to allow requesters to recover attorney fees upon prevailing in court would cost the government \$30 million over the 2008-2012 period; the new provision to waive copy fees if agencies fail to respond within the 20-day deadline would result in \$1 million in less copy fees collected, and that establishing OGIS would require \$5 million and then \$23 million over the 2008-2012 period. See <https://www.cbo.gov/publication/18425>.

<sup>48</sup> Valerie Insinna, *In Newly Inked Deal, F-35 Price Falls to \$78 Million a Copy*, DEFENSENEWS (Oct. 29, 2019), . <https://www.defensenews.com/air/2019/10/29/in-newly-inked-deal-f-35-prices-fall-to-78-million-a-copy/>.

<sup>49</sup> OpenTheBooks, *Where's the Pork?* (Sept. 30, 2020), <https://www.openthebooks.com/wheres-the-pork-mapping-23-trillion-in-federal-grants-fy2017fy2019--openthebooks-oversight-report>.

<sup>50</sup> Office of Information Policy Annual Report for FY20, at 20, <https://www.justice.gov/oip/page/file/1436261/download>. Related, for a detailed examination of most cabinet FOIA costs since 1975, see A.Jay Wagner, *Essential or Extravagant: Considering FOIA Budgets, Costs and Fees*, 34 GOV'T. INFO. Q. 388 (2017).

***Recommendation No. 2022-19***

**We recommend that the Archivist of the United States commission a feasibility study, incorporating input from requesters and agencies, to more deeply explore the costs and benefits of these recommendations and refine the proposals to aid Congress in drafting legislation.**

***Comment:*** Many questions arose from the preceding recommendations that require further inquiry to avoid unexpected negative consequences. We believe the Archivist should commission a special study to research these issues and recommend that the next term of the Committee continues examining the possibilities. Further research could include the following:

- A survey of requesters might more precisely predict the potential increase in complaints to OGIS under the proposed changes, to facilitate estimating potential staffing needs more accurately. Currently, about 15,000 requesters file administrative appeals each year to challenge denials (about 2% of FOIA requests each year), and about 4,200 seek help through OGIS. But perhaps many more would go to OGIS if they knew they could get a binding decision quickly. If only 21.6% of FOIA requests are granted records fully, then that leaves about 600,000 requesters potentially dissatisfied, and if even half of them appealed to OGIS then the caseload could reach 300,000, far more than the 20,000 estimated in this report.
- It is important to examine how such a system would be used — or abused. Some experts within the government told us that OGIS binding authority would primarily benefit seasoned requesters, such as those in large news or nonprofit organizations that regularly sue, and not the average person. Our discussions with those organizations indicate otherwise, that they would continue to litigate to overcome delays, and that a stronger OGIS would primarily help average requesters. More research is needed.
- A study could bring more clarity to defining OGIS' mission in statute, and how responsibilities should be divided among OGIS, the Department of Justice Office of Information Policy, the Chief FOIA Officers Council, and the courts.
- A study could examine whether FOIA litigation would decrease if requesters went to OGIS instead, potentially saving taxpayers millions of dollars (currently, federal agencies spend \$43 million annually in FOIA litigation). Potential savings could be calculated to mitigate the expense of OGIS, perhaps examining outcomes after resolution models were started in the states of Ohio, Pennsylvania, and New Jersey.
- Further exploration could examine resolution and enforcement agencies already employed within the federal government, such as the Armed Services Board of Contract

Appeals,<sup>51</sup> which was established in 1962 to mediate disputes between government contractors and the Department of Defense. Or, perhaps the Federal Trade Commission or Copyright Small Claims<sup>52</sup> could be examined as potential models.

- Research could examine whether OGIS decisions would lead to greater agency compliance with FOIA overall as more disputes are resolved quickly outside the courts.

Ultimately, we acknowledge that these recommendations require much deeper examination to avoid negative unintended consequences for requesters or agencies. Such a feasibility study would ensure continued discussion and development of solutions. The Committee approved this recommendation unanimously by a vote of 16-0 with one abstention and three members absent.

### ***Recommendation No. 2022-20***

**We recommend that the Archivist of the United States restore the Office of Government Information Services as a direct report.**

**Comment:** OGIS, at its inception, reported directly to the Archivist of the United States. In 2010, NARA announced its “Charter for Change,”<sup>53</sup> moving OGIS under the Agency Services division, two levels below<sup>54</sup> the Archivist and competing for attention and resources with four other departments — the Federal Records Centers (including the National Personnel Records Center), the National Declassification Center, the Information Security Oversight Office and the Chief Records Officer.<sup>55</sup> While the plan stated that OGIS’s “independent nature and authority, as well as access to the Archivist, will be preserved,”<sup>56</sup> and we have been told that access to Archivist David S. Ferriero was maintained (*see* OGIS staff feedback in the [Reimagining OGIS report](#), page 26), we recommend that NARA re-establishes OGIS’s direct report to the Archivist, reflecting its unique function to serve transparency for the entire executive branch and

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<sup>51</sup> <https://www.asbca.mil/>.

<sup>52</sup> <https://www.copyright.gov/docs/smallclaims/>.

<sup>53</sup> A Charter for Change: Archivist’s Task Force on Agency Transformation, National Archives and Records Administration (Oct. 2010), <https://aotus.blogs.archives.gov/wp-content/uploads/sites/11/2010/10/transformation-report-2010-10-12.pdf>.

<sup>54</sup> *See* <https://www.archives.gov/files/orgchart-a.pdf>.

<sup>55</sup> *See* National Archives and Records Administration organizational chart, <https://www.archives.gov/files/orgchart-a.pdf>.

<sup>56</sup> “Charter for Change,” p. 28.



understanding that organizational culture can change, including under the next Archivist.<sup>57</sup> The Committee approved this recommendation unanimously by a vote of 12-0 with five abstentions and three members absent.

## Congressional Transparency

### Legislation Subcommittee

#### *Recommendation No. 2021-01*

**We request that the Archivist of the United States propose that Congress adopts rules [or enacts legislation] to establish procedures for effecting public access to legislative branch records in the possession of congressional support offices and agencies modeled after those procedures contained in the Freedom of Information Act. These should include requirements for proactive disclosure of certain information, procedures governing public requests for records, time limits for responding to requests, exemptions to be narrowly applied, and an appeal from any initial decision to deny access.**

*Comment:* While Congress already proactively discloses some information to the public, such as bills, hearing transcripts, and legislative agendas, the Committee voted unanimously on June 10, 2021, to expand legislative transparency, at least among those agencies that serve as vital support structure for Congress. We do not recommend access to constituent communications, lobbyist communications, or records of individual member offices, but the Committee believes it would be appropriate to expand FOIA-like disclosure requirements to law enforcement (Capitol Police), buildings and grounds maintenance (Architect of the Capitol), inspections (Government Accountability Office), budgeting (Congressional Budget Office), publishing (Government Publishing Office), library services (Library of Congress), and research (Congressional Research Service). Further explanation is provided in the Legislation Subcommittee report, “Increasing Access to Information to the Legislative Branch.”<sup>58</sup>

Indeed, it is not unusual for legislative branches to be subject to disclosure requirements — the vast majority of states’ public record laws apply to the legislative branch (only 12 states exclude

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<sup>57</sup> Archivist David S. Ferriero announced his retirement January 13, 2022, effective April 30, 2022, after 12 years at the helm of the National Archives and Records Administration. His first day as Archivist was November 6, 2009, two months after OGIS opened its doors. See <https://www.archives.gov/press/press-releases/2022/nr22-17>.

<sup>58</sup> <https://www.archives.gov/files/ogis/assets/fac-rec-2021-01.pdf>.

legislatures from their FOI statutes).<sup>59</sup> Scores of other countries, from Afghanistan to Zimbabwe, apply their access-to-information laws to their legislative entities without special limitations.<sup>60</sup> Some legislative agencies in the federal government, such as the Library of Congress, already adhere to disclosure regulations that follow the spirit of FOIA. Following the events that transpired at the Capitol on January 6, 2021, pressure has mounted for greater transparency of the U.S. Capitol Police.

Some issues will need to be worked out, such as enforcement, procedures for accessing documents, and exemptions. We provided some recommendations for handling such details in the Legislation Subcommittee report.<sup>61</sup> The U.S. Congress has recognized in many ways the importance of access to government information as critical to maintaining an informed public and an accountable government. It has enacted a number of laws to provide transparency in the executive branch and has taken a number of steps to open its own proceedings and records to public access. Additional steps are needed, however, and the next one should be adoption by Congress of FOIA-like procedures to effect access by the public to information held by legislative branch support offices and agencies.

In separate letters dated May 15, 2022, OGIS formally transmitted this recommendation to both the Senate and House for further consideration and action.<sup>62</sup> Moreover, OGIS included this recommendation in its FY 2022 Annual Report for FY 2021.<sup>63</sup> The Committee approved this recommendation unanimously by a vote of 16-0 with two abstentions and two members absent.

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<sup>59</sup> Ryan Mulvey & James Valvo, *Opening the State House Doors: Examining Trends in Public Access to Legislative Records*, 1 J. Civic Info. (No. 2) 17, pp. 19, 24, 26 (Dec. 2019). This article presents the most comprehensive survey and analysis to date of applying open records laws to state legislatures and includes an appendix with each state's law categorized and cited.

<sup>60</sup> Centre for Law & Democracy, *Global Right to Information Rating*, lists countries where the right to information "applies to the legislature, including both administrative and other information, with no bodies excluded." <https://www.rti-rating.org/country-data/by-indicator/8/>.

<sup>61</sup> <https://www.archives.gov/files/ogis/assets/fac-rec-2021-01.pdf>.

<sup>62</sup> See Appendix C.

<sup>63</sup> See <https://www.archives.gov/files/ogis/reports/ogis-2022-annual-report-final.pdf> at 11-12.

## FINAL OBSERVATIONS

The Committee wishes to convey these additional observations for consideration by members of the succeeding 2022-2024 FOIA Advisory Committee. The Committee discussed a variety of issues during the two-year term — some of which did not result in a recommendation. Each Subcommittee has a final report posted on the OGIS website. A review of these Subcommittee reports for this term and — for previous terms — may provide suggestions for consideration. For example, in Recommendation 2022-19, the Committee recommends FOIA-like transparency for certain offices in the legislative branch. The next term may wish to take a step towards expanding some aspects of the FOIA to the judicial branch. The Committee members discussed the issue of vexatious requests and the use of electronic tools such as AI. Since 2014, there have been four terms of the FOIA Advisory Committee making recommendations. The next Committee may wish to assist with the implementation of these past recommendations. We believe whichever path the future Committee chooses to take, it will continue to improve the FOIA process.

In whatever ways future members of this Committee choose to proceed, we trust and expect that they will continue to make positive contributions in ensuring the continued importance of FOIA.

## SUBCOMMITTEE METHODOLOGIES

Between September 10, 2020, and June 9, 2022, the full Committee met publicly in accordance with the Federal Advisory Committee Act (FACA) a total of 10 times. The agendas, minutes, transcripts, videos, documents discussed, and other information for each of these meetings can be found on the OGIS website. At the Committee’s first meeting on September 10, 2020, the members formed four subcommittees: Classification, Legislation, Process, and Technology. Below is a discussion of the methodologies reported by each of the subcommittees.

### **Classification Subcommittee**

The Classification Subcommittee worked on two major issues during the 2020-22 term: 1) “Neither Confirm Nor Deny” (NCND) responses to FOIA requests, often referred to as “*Glomar* responses,” and 2) the relationship between the Executive Order on classification (E.O. 13526) and FOIA requests. On the first issue, we reviewed publicly available academic and news reports, distributed a questionnaire to FOIA offices deemed likely to issue NCND responses, and invited several guest speakers to speak to the Subcommittee. On the second issue, we reviewed available literature and court rulings on the subject and invited a guest speaker who previously

oversaw the processing of FOIA requests at the Central Intelligence Agency to discuss the issue with the Subcommittee.

### **Technology Subcommittee**

During this term, the Technology Subcommittee met approximately every two weeks. We began our work by surveying the current FOIA technology landscape, including those at the federal, state, local, and international levels. We also reviewed prior terms' recommendations related to technology. Our subcommittee spoke with others involved with FOIA technology matters, such as representatives of the U.S. General Services Administration's Technology Transformation Services (10X and 18F) and the Department of Justice's Office of Information Policy. We also investigated the current functionality of FOIA platforms that are available to federal agencies to address different aspects of the FOIA lifecycle, including intake, processing, redactions, and release. As part of this effort, we reviewed executive branch guidance on records management, including Capstone email retention, and metadata to determine if these aspects could be incorporated into future FOIA systems. Through this information-gathering stage, we determined that agencies have different FOIA needs based on the volume of requests, types of requests, staffing, and budget. Therefore, a one-size-fits-all approach for the federal FOIA ecosystem would not be practical as it would not provide the flexibility to meet each agency's specific needs. As a result, the Subcommittee focused its work on providing best practice recommendations that each agency could tailor to its specific needs.

### **Process Subcommittee**

The Process Subcommittee's First-Person FOIA (FPF) Working Group studied the existing implementation of the 2018-20 term's Recommendation 2020-14<sup>64</sup> and identified several agencies that offer low-hanging fruit for its implementation. To that end, the FPF Working Group heard from former FOIA Advisory Committee member (2016-2018 term) Professor Margaret Kwoka and reviewed her law journal article on the subject.<sup>65</sup> Based on her work and the idea of "expand access, shrink FOIA," we focused on a handful of agencies identified as having large numbers of first-person FOIA requests, such as the IRS; the SSA; entities within DHS, such as USCIS, ICE, and CBP; and, within DOJ, EOIR. We then engaged with agency representatives, as well as those who conduct business before those agencies, to identify those common categories of records frequently requested, budgetary, regulatory, technological, and other challenges preventing first-party access, and to discuss strategies for securing the timely release of frequently requested records. The FPF Working Group also reviewed a collection of

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<sup>64</sup> <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>.

<sup>65</sup> Margaret B. Kwoka, First-Person FOIA, 127 Yale L.J. 2204 (2018)

materials to include annual reporting metrics, operating procedures, record schedules, and court reports.

The Process Subcommittee also briefly examined sharp FOIA practices that prevent the timely release of records from agencies. To that end, the Subcommittee invited an investigative reporter to discuss his experiences and the challenges encountered in seeking access to a variety of documents using FOIA. The Subcommittee also interviewed two FOIA professionals about vexatious requests.

### **Legislation Subcommittee**

After reviewing and discussing the possible areas of focus, the Legislation Subcommittee created the following five working groups: Expanding the Scope of FOIA Working Group, FOIA Fees Working Group, FOIA Funding Working Group, Reimagining OGIS Working Group, and the First-Party Requester Working Group. The Legislation Subcommittee met twice a month to discuss the findings and potential recommendations of each working group. In an effort to better understand public opinion on FOIA's legislative matters and better recommendations, a survey of public records requesters was conducted. The questions focused on a wide range of freedom of information opinions and behaviors. The survey covered a number of general Freedom of Information subjects and more narrow topics (many of specific interest to the FOIA Advisory Committee), including common issues, opinions on fees, opinions on access to the legislative and the judiciary, experience with appeals and OGIS, as well as collecting data on their experiences. It should be noted that the survey sought not only federal FOIA requesters but those that submit local and/or state requests and sought their opinions on all requesting experiences.

Additionally, the Legislation Subcommittee interviewed subject matter experts, including representatives from the federal government, state government, requester community, and distinguished international freedom of information access professionals. The Subcommittee's work included substantial domestic and international research, and consultations within and among each Working Group and the Legislative Subcommittee and the full Committee. Each recommendation was reviewed by the Working Group and the Legislation Subcommittee prior to submitting the recommendation to the Full Committee for vote.

## COMMITTEE MEMBERS

### Current Members

**Alina M. Semo**, Chair, Office of Government Information Services, National Archives and Records Administration

**Roger Andoh**, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services

**Allan Blutstein**, America Rising Corporation

**David Cuillier**, University of Arizona

**Allyson Deitrick**, U.S. Department of Commerce

**Kristin Ellis**, Federal Bureau of Investigation, U.S. Department of Justice

**Linda Frye**, Social Security Administration

**Jason Gart**, History Associates Incorporated

**Alexis Graves**, U.S. Department of Agriculture

**Kel McClanahan**, National Security Counselors

**Michael Morisy**, MuckRock

**Alexandra Perloff-Giles**, Gibson, Dunn & Crutcher

**Tuan N. Samahon**, Villanova University

**Matthew Schwarz**, U.S. Environmental Protection Agency

**Dione Stearns**, Federal Trade Commission

**James R. Stocker**, Trinity Washington University

**Thomas M. Susman**, American Bar Association

**Bobak Talebian**, Office of Information Policy, U.S. Department of Justice

**A.Jay Wagner**, Marquette University

**Patricia A. Weth**, U.S. Environmental Protection Agency

### Designated Federal Officer

**Kirsten B. Mitchell**, Office of Government Information Services, National Archives and Records Administration

### Past Members (2020-2022 Term)

**Loubna Haddad**, Defense Intelligence Agency

## ACKNOWLEDGEMENTS

The Committee would like to acknowledge and thank many individuals for their contributions to and support of the work of the Committee. We are grateful to our colleagues, stakeholders, and the public who provided written and oral comments which were helpful in informing the topics researched by the Committee. We also appreciate the following individuals for helping with the Committee's creation, organization, guidance, and administrative management and support:

**David S. Ferriero**, Archivist of the United States (retired April 30, 2022)

**Debra Steidel Wall**, Acting Archivist of the United States

**William J. Bosanko**, Chief Operating Officer, NARA

**Jay A. Trainer**, Executive for Agency Services, NARA

**Gary M. Stern**, General Counsel, NARA

**Rana Khandekar**, Assistant General Counsel, NARA

**Christopher Runkel**, Senior Counsel, NARA

**Tasha Ford**, Committee Management Officer, NARA

**Jessie Kratz**, Historian, NARA

**Maureen MacDonald**, Special Assistant to the Archivist, NARA

**Kimberlee Ried**, Public Affairs Specialist, Museum Programs Division, NARA (joined the OGIS staff in April 2022)

**Sean Heyliger**, Archivist, the National Archives at San Francisco, NARA

**Jamie Atkinson**, Audio Visual Manager, LB&B Associates at NARA

### Speakers at Meetings During the 2020-2022 Term

**William P. Fischer**, Director, National Declassification Center, NARA

**Michael Lissner**, Executive Director, Free Law Project

**Emily Manna**, Policy Director, Open the Government

**Freddy Martinez**, Policy Analyst, Open The Government

**Richard Peltz-Steele**, Chancellor Professor, University of Massachusetts School of Law

**John Powers**, Associate Director of Classification Management, Information Security Oversight Office, NARA

**Daniel Schuman**, Policy Director, Demand Progress/ Demand Progress Education Fund

## GLOSSARY

**Capstone:** An approach to managing email in which the emails of senior officials are scheduled as permanent records, with email of other federal employees scheduled as temporary records in accordance with General Records Schedule 6.1

**CFO:** Chief FOIA Officer(s)

**CFO Council:** Chief FOIA Officers Council

**CSV:** Comma Separated Values

**DHS:** U.S. Department of Homeland Security

**DOJ:** U.S. Department of Justice

**E.O.:** Executive Order

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

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

**IC IG:** Inspector General of the Intelligence Community

**ISOO:** Information Security Oversight Office

**NARA:** National Archives and Records Administration

**NCND:** Neither Confirm Nor Deny

**OGIS:** Office of Government Information Services

**OIP:** Office of Information Policy, U.S. Department of Justice

**OPEN Government Data Act:** Open, Public, Electronic, and Necessary Government Data Act

**PDF:** Portable Document Format

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



# APPENDIX A

## National Archives and Records Administration Freedom of Information Act Advisory Committee Charter 2020-2022 Term

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1. **Committee's Official Designation:** The name of this advisory committee shall be the Freedom of Information Act Advisory Committee (FOIA Advisory Committee).
2. **Authority:** The FOIA Advisory Committee was first established in 2014 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 (OGIS) within the National Archives and Records Administration (NARA) "identify procedures and methods for improving compliance" with the Freedom of Information Act (FOIA). The FOIA Advisory 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 FOIA Advisory Committee advises on improvements to the administration of FOIA. The objective of the FOIA Advisory 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 FOIA Advisory 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 FOIA Advisory Committee is advisory only.
5. **Official(s) to whom the Committee Reports:** The FOIA Advisory Committee shall report to the Archivist of the United States.
6. **Support:** NARA's OGIS will provide funding and administrative support for the FOIA Advisory 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 FOIA Advisory Committee is estimated to be \$90,000 and one full staff year. There will

be no compensation for members of the FOIA Advisory Committee. Travel and/or per diem costs will not be provided by NARA.

8. **Designated Federal Officer (DFO):** The DFO (or designee) is a full-time or permanent part-time employee, appointed in accordance with agency procedures, 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 FOIA Advisory Committee and provide such clerical, administrative, and logistical support as necessary for the FOIA Advisory Committee to effectively conduct its business. The DFO will approve or call all of the advisory committee's and subcommittees' meetings, prepare and approve all meeting agendas, attend all committee and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the official to whom the advisory committee reports.
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 FOIA Advisory Committee is continuing.
11. **Termination:** The Charter shall be eligible for renewal every two years.
12. **Membership and Designation:** The FOIA Advisory Committee will consist of no more than 20 individuals. Government members of the FOIA Advisory 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 OGIS, or his/her designee, will chair the committee. Non-governmental members of the FOIA Advisory Committee will 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 FOIA Advisory 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 FOIA Advisory Committee,

in consultation with the Archivist of the United States. The Chairperson is the presiding officer of the FOIA Advisory 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 FOIA Advisory 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 FOIA Advisory 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 approve the creation of subcommittees by the FOIA Advisory Committee as necessary to support the committee's work. The subcommittees report to the full FOIA Advisory Committee. The subcommittee chairperson(s) shall be a Committee member(s).
  
14. **Recordkeeping:** The records of the FOIA Advisory Committee and any subcommittee(s) shall be handled in accordance with General Records Schedule 6.2, item 10, and 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.

File Date: May 7, 2020

/s/ David S. Ferriero

DAVID S. FERRIERO  
Archivist of the United States

# APPENDIX B

| <b>TOPIC</b>        | <b>SUBCOMMITTEE &amp; RECOMMENDATION NO.</b>                  | <b>RECOMMENDATION</b>   | <b>COMMITTEE VOTE</b>   | <b>RESPONSIBLE FOR IMPLEMENTING</b> |
|---------------------|---|---|---|-------------------------------------|
| <i>Glomar/ NCND</i> | <b>Classification Subcommittee Recommendation No. 2022-01</b> | <b>The Office of Information Policy should issue guidance to agencies that they use the internationally recognized “Neither Confirm Nor Deny” (NCND) instead of “Glomar.”</b> | <b>Passed March 10, 2022</b><br><i>(Vote: 13-4. The four “no” votes were Allan Blutstein, Allyson Deitrick, Alexis Graves &amp; Patricia Weth. Bobby Talebian abstained. Alina Semo &amp; Tuan Samahon absent.)</i> | <b>Office of Information Policy</b> |
| <i>Glomar/ NCND</i> | <b>Classification Subcommittee Recommendation No. 2022-02</b> | <b>Agencies should report annually on agency use of “Neither Confirm Nor Deny”/Glomar.</b>  | <b>Passed March 10, 2022 (Vote:15-2.</b><br><i>The two “no” votes were Matthew Schwarz &amp; Patricia Weth. Bobby Talebian abstained. Alina Semo &amp; Tuan Samahon absent.)</i>                                    | <b>Federal Agencies</b>             |
| <i>Glomar/ NCND</i> | <b>Classification Subcommittee Recommendation No. 2022-03</b> | <b>Agencies should post on their FOIA websites information about “Neither Confirm Nor Deny”/Glomar responses.</b>   | <b>Passed March 10, 2022</b><br><i>(Vote: 14-3. The three “no” votes were Matthew Schwarz, Alexis Graves &amp; Patricia Weth. Bobby Talebian abstained. Alina Semo &amp; Tuan Samahon absent.)</i>                  | <b>Federal Agencies</b>             |
| <i>Glomar/ NCND</i> | <b>Classification Subcommittee Recommendation No. 2022-04</b> | <b>A relevant organization should study “Neither Confirm Nor Deny”/Glomar usage.</b>  | <b>Passed March 10, 2022</b><br><i>(Vote: 17-0. Bobby Talebian abstained. Alina Semo &amp; Tuan Samahon absent.)</i>  | <b>Organization TBD</b>             |

| <b>TOPIC</b>                                  | <b>SUBCOMMITTEE &amp; RECOMMENDATION NO.</b>           | <b>RECOMMENDATION</b>   | <b>COMMITTEE VOTE</b>   | <b>RESPONSIBLE FOR IMPLEMENTING</b>                                      |
|---|--|---|---|--|
| E.O. 13526                                    | Classification Subcommittee Recommendation No. 2022-05 | Executive Order 13526 should be amended to require that in cases where information withheld under FOIA or other access requests for reviews does not contain the markings specified in the governing Executive Order, agencies must add these markings.   | Passed May 5, 2022<br>(Vote: 11-1. Patricia Weth voted no. Allan Blutstein, Allyson Deitrick, Kristin Ellis, Alina Semo & Bobby Talebian abstained. (Roger Andoh, Alexis Graves & A.Jay Wagner absent.) | The White House  |
| E.O. 13526                                    | Classification Subcommittee Recommendation No. 2022-06 | The Archivist of the United States should request that the Inspector General of the Intelligence Community conduct a review of agencies' compliance with Executive Order 13526, §§ 1.6 and 2.1, particularly as it relates to initial marking of classified information; and how agencies handle classified information responsive to FOIA or other disclosure requests where markings are omitted. | Passed May 5, 2022<br>(Vote: 15-0. Alina Semo & Bobby Talebian abstained. (Roger Andoh, Alexis Graves & A.Jay Wagner absent.)   | Archivist of the United States   |
| Agency FOIA website content and accessibility | Technology Subcommittee Recommendation No. 2022-07     | OIP should encourage agencies to post on their FOIA websites certain information online beyond what is required by law.   | Passed March 10, 2022<br>(Vote: 17-0. Bobby Talebian abstained. Alina Semo & Tuan Samahon absent.)  | Office of Information Policy   |
| Agency FOIA website content and accessibility | Technology Subcommittee Recommendation No. 2022-08     | The Chief FOIA Officers Council should establish a working group within two years to determine best practices for release of records in native format, including metadata.  | Passed April 7, 2022<br>(Vote: 16-0. Alina Semo & Bobby Talebian abstained. (Dione Stearns & A.Jay Wagner absent.)  | Office of Information Policy & Office of Government Information Services |

| <b>TOPIC</b>                                  | <b>SUBCOMMITTEE &amp; RECOMMENDATION NO.</b>       | <b>RECOMMENDATION</b>   | <b>COMMITTEE VOTE</b>   | <b>RESPONSIBLE FOR IMPLEMENTING</b>                                      |
|---|--|---|---|--|
| Agency FOIA website content and accessibility | Technology Subcommittee Recommendation No. 2022-09 | The Chief FOIA Officers Council working group should study and recommend resolutions to challenges between FOIA and 508 compliance.   | Passed May 5, 2022<br><i>(Vote: 16-0. Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>   | Office of Information Policy & Office of Government Information Services |
| Agency FOIA website content and accessibility | Technology Subcommittee Recommendation No. 2022-10 | Federal agencies should endeavor to provide regular and proactive online publication of searchable FOIA logs containing certain information in Excel/CSV format.  | Passed May 5, 2022<br><i>(Vote: 16-0. Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>   | Federal Agencies   |
| First-person requests                         | Process Subcommittee Recommendation No. 2022-11    | Records relied on by any agency that affect eligibility for benefits or adversely affects an individual in proceedings should be made automatically available and not require first-person FOIA practice.                         | Passed April 7, 2022<br><i>(Vote: 15-2 Allan Blutstein &amp; Kristin Ellis voted No. Bobby Talebian abstained. (Dione Stearns &amp; A.Jay Wagner absent.)</i>                 | Federal Agencies   |
| First-person requests                         | Process Subcommittee Recommendation No. 2022-12    | Agencies should amend any regulations, directives, policies, and guidance to provide individuals, regardless of whether they have legal representation in agency proceedings, access to records about themselves.                 | Passed May 5, 2022<br><i>(Vote: 13-0. Kristin Ellis, Matthew Schwarz, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A. Jay Wagner absent.)</i> | Federal Agencies   |
| First-person requests                         | Process Subcommittee Recommendation No. 2022-13    | Agencies that receive frequent first-person requests should identify the most commonly requested records and develop a plan for processing such records that leverages technology, promotes efficiency and good customer service. | Passed April 7, 2022<br><i>(Vote: 17-0. Bobby Talebian abstained. (Dione Stearns &amp; A.Jay Wagner absent.)</i>  | Federal Agencies   |

| <b>TOPIC</b>          | <b>SUBCOMMITTEE &amp; RECOMMENDATION NO.</b>        | <b>RECOMMENDATION</b>   | <b>COMMITTEE VOTE</b>   | <b>RESPONSIBLE FOR IMPLEMENTING</b>  |
|-----------------------|---|---|---|--------------------------------------|
| First-person requests | Process Subcommittee Recommendation No. 2022-14     | A comprehensive assessment of the Department of Homeland Security (DHS) processes, workforce, and existing technology should be initiated as it relates to Alien Files (A-Files) responsive to FOIA requests. | Passed April 7, 2022<br><i>(Vote:16-0 Alina Semo &amp; Bobby Talebian abstained. (Dione Stearns &amp; A.Jay Wagner absent.)</i>   | U.S. Department of Homeland Security |
| Reimagining OGIS      | Legislation Subcommittee Recommendation No. 2022-15 | Congress should give OGIS the authority to make binding decisions.  | Passed April 7, 2022<br><i>(Vote: 12-3 Allyson Deitrick, Kristin Ellis &amp; Matthew Schwarz voted No. Allan Blutstein, Alina Semo &amp; Bobby Talebian abstained. (Dione Stearns &amp; A.Jay Wagner absent.)</i> | Congress                             |
| Reimagining OGIS      | Legislation Subcommittee Recommendation No. 2022-16 | Congress should give OGIS the authority to review records <i>in camera</i> .  | Passed May 5, 2022<br><i>(Vote: 10-3. Allan Blutstein, Alina Semo, Bobby Talebian, &amp; Patricia Weth abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>                                     | Congress                             |
| Reimagining OGIS      | Legislation Subcommittee Recommendation No. 2022-17 | Congress should create a direct line-item budget for OGIS.  | Passed May 5, 2022<br><i>(Vote: 13-1. Tom Susman voted no. Allan Blutstein, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>                                | Congress                             |



| <b>TOPIC</b>               | <b>SUBCOMMITTEE &amp; RECOMMENDATION NO.</b>        | <b>RECOMMENDATION</b>  | <b>COMMITTEE VOTE</b>   | <b>RESPONSIBLE FOR IMPLEMENTING</b>         |
|----------------------------|---|--|---|---|
| Reimagining OGIS           | Legislation Subcommittee Recommendation No. 2022-18 | Congress should increase OGIS's budget.  | Passed May 5, 2022<br><i>(Vote: 14-0. Allan Blutstein, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>                             | Congress                                    |
| Reimagining OGIS           | Legislation Subcommittee Recommendation No. 2022-19 | The Archivist of the United States should commission a feasibility study, incorporating input from requesters and agencies, to more deeply explore the costs and benefits of these recommendations and refine the proposals to aid Congress in drafting legislation. | Passed May 5, 2022<br><i>(Vote: 16-0. Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>   | Archivist of the United States              |
| Reimagining OGIS           | Legislation Subcommittee Recommendation No. 2022-20 | The Archivist of the United States should return OGIS as a direct report.  | Passed May 5, 2022<br><i>(Vote: 12-0. Allan Blutstein, Allyson Deitrick, Kristin Ellis, Alina Semo, Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i> | Archivist of the United States              |
| Congressional transparency | Legislation Subcommittee Recommendation No. 2021-01 | The Archivist of the United States should ask Congress to expand public access to federal records in congressional support offices by creating disclosure procedures modeled after FOIA.   | Passed June 10, 2021<br><i>(Vote: 16-0. Alina Semo &amp; Bobby Talebian abstained. Linda Frye &amp; Alexandra Perloff-Giles absent.)</i>  | Archivist of the United States/<br>Congress |

| TOPIC            | SUBCOMMITTEE & RECOMMENDATION NO.              | RECOMMENDATION   | COMMITTEE VOTE  |  |
|------------------|--|--|---|--|
| Reimagining OGIS | Legislation Subcommittee Recommendation 7      | Congress directs the federal courts to give extra weight to OGIS decisions.  | <i>Failed May 5, 2022 (Vote: 3-10. David Cuillier, Michael Morisy &amp; Tom Susman voted yes. Allan Blutstein, Jason Gart, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i>   |  |
| E.O. 13526       | Classification Subcommittee Recommendation 5-1 | Either the FOIA statute or E.O. 13526, or both, be amended to clarify that information which does not comport with all of the requirements of the Executive Order is not properly classified for purposes of Exemption (b)(1). | <i>Failed May 5, 2022 (Vote: 4-7. Kel McClanahan, Michael Morisy, Tuan Samahon &amp; James Stocker voted yes. David Cuillier, Linda Frye, Jason Gart, Alexandra Perloff-Giles, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Alexis Graves &amp; A.Jay Wagner absent.)</i> |  |
| E.O. 13526       | Classification Subcommittee Recommendation 5-2 | Either the FOIA statute or E.O. 13526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if it does not contain complete declassification instructions.                               | <i>Failed May 5, 2022 (Vote: 3-7. Kel McClanahan, Tuan Samahon &amp; James Stocker voted yes. David Cuillier, Jason Gart, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Linda Frye, Alexis Graves, Michael Morisy, Alexandra Perloff-Giles &amp; A.Jay Wagner absent.)</i> |  |

| TOPIC      | SUBCOMMITTEE & RECOMMENDATION NO.              | RECOMMENDATION   | COMMITTEE VOTE  |  |
|------------|--|--|---|--|
| E.O. 13526 | Classification Subcommittee Recommendation 5-3 | Either the FOIA statute or E.O. 13526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if the markings specified in the governing Executive Order are not present in a manner that is immediately apparent. | <i><u>Failed May 5, 2022</u></i><br><i>(Vote: 3-7. Kel McClanahan, Tuan Samahon &amp; James Stocker voted yes. David Cullier, Jason Gart, Alina Semo &amp; Bobby Talebian abstained. (Roger Andoh, Linda Frye, Alexis Graves, Michael Morisy, Alexandra Perloff-Giles &amp; A.Jay Wagner absent.)</i> |  |

# APPENDIX C



NATIONAL ARCHIVES *and* RECORDS ADMINISTRATION  
8601 ADELPHI ROAD - OGIS | COLLEGE PARK, MD 20740-6001  
www.archives.gov/ogis | ogis@nara.gov | o: 202.741.5770 | f: 202.741.5769 | t: 877.684.6448

May 15, 2022

The Honorable Richard Durbin  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Charles Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman and Sen. Grassley:

I write in my role as Director of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA), as well as Chairperson of the Freedom of Information Act (FOIA) Advisory Committee, to transmit a recommendation that the FOIA Advisory Committee made to now-retired Archivist of the United States David S. Ferriero in June 2021. The FOIA statute provides the OGIS Director with the “authority to submit reports, recommendations, testimony or comments” to “Congress, or any committee or subcommittee thereof.” The views expressed in this letter are mine and do not necessarily represent the views of the President. 5 U.S.C. § 552(h)(2)(C).

As you may be aware, the Archivist established the FOIA Advisory Committee in 2014 to foster dialogue between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures. The Committee was established in accordance with the U.S. Second Open Government National Action Plan (Dec. 5, 2013,) and its work satisfies the directive in the FOIA, 5 U.S.C. § 552(h)(2)(C), that OGIS “identify procedures and methods for improving compliance” with FOIA. The Committee is governed by the Federal Advisory Committee Act (FACA). More information can be found on OGIS’s website [here](#).

To date, the FOIA Advisory Committee’s last three full terms (2014-2016, 2016-2018 and 2018-2022) have made a total of [30 recommendations](#) to the Archivist, all designed to improve the FOIA process overall. Now wrapping up its fourth term in June 2022, the FOIA Advisory Committee, comprised of 20 members from both inside and outside of government who were appointed by Archivist David Ferriero.

In its [Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee to the Archivist of the United States](#), the third term of the Committee proposed:

*In the spirit of expanding the reach of FOIA, we believe that the next term of the Committee should give due consideration to the possibility of extending some aspects of FOIA to parts of the legislative and judicial branches.*


The Legislation Subcommittee of the 2020-2022 term of the FOIA Advisory Committee carefully studied this issue and recommended that the Archivist should recommend to Congress the following:

*Congress should adopt rules or enact legislation to establish procedures for effecting public access to legislative branch records in the possession of congressional support offices and agencies modeled after those procedures contained in the Freedom of Information Act. These should include requirements for proactive disclosure of certain information, procedures governing public requests for records, time limits for responding to requests, exemptions to be narrowly applied, and an appeal from any initial decision to deny access.*

The full Committee passed the recommendation at its meeting on June 10, 2021. It is important to note that the FOIA Advisory Committee did not recommend that the records of Congress, its Committees, or individual member offices be covered by such disclosure procedures; rather, the recommendation applies only to the Legislative branch agencies, including GAO, GPO, and the Library of Congress. The Committee also recognized that in many ways, the Legislative branch has been among the most transparent of the three branches of government and in recent decades has taken additional steps to increase public access to its work.

Your consideration of this recommendation, which I will also be including in OGIS's 2022 Annual Report for Fiscal Year 2021 to Congress and the President, would be greatly appreciated. I am happy to answer any questions you may have.

Sincerely,



Alina M. Semo  
Director, Office of Government Information Services

Enclosure



NATIONAL ARCHIVES *and* RECORDS ADMINISTRATION  
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May 15, 2022

The Honorable Carolyn Maloney  
Chairwoman, Committee on Oversight and Reform  
U.S. House of Representatives  
Washington, DC 20515

The Honorable James Comer  
Ranking Member  
Committee on Oversight and Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Madam Chairwoman: and Mr. Comer:

I write in my role as Director of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA), as well as Chairperson of the Freedom of Information Act (FOIA) Advisory Committee, to transmit a recommendation that the FOIA Advisory Committee made to now-retired Archivist of the United States David S. Ferriero in June 2021. The FOIA statute provides the OGIS Director with the “authority to submit reports, recommendations, testimony or comments” to “Congress, or any committee or subcommittee thereof.” The views expressed in this letter are mine and do not necessarily represent the views of the President. 5 U.S.C. § 552(h)(2)(C).

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Your consideration of this recommendation, which I will also be including in OGIS's 2022 Annual Report for Fiscal Year 2021 to Congress and the President, would be greatly appreciated. I am happy to answer any questions you may have.

Sincerely,



Alina M. Semo  
Director, Office of Government Information Services

Enclosure