

Legislation Subcommittee Report

FOIA Advisory Committee 2020-2022 Term

June 28, 2022

Table of Contents

Vision Statement

Methodology

Members

Public Records Requester Survey

Expanding the Scope of FOIA Working Group

FOIA Fees Working Group

FOIA Funding Working Group

Reimaging OGIS Working Group

First-Party Requester Working Group

Legislation Subcommittee Vision Statement

The Legislation Subcommittee's mission is to focus on aspects of FOIA and government transparency that are most appropriate for action by Congress, whether through statutory changes, appropriations, or oversight. Those aspects include, but are not limited to, avenues for potential improvements in:

1. the transparency regimes of portions of the legislative and judicial branches;
2. the design and authority of OGIS;
3. the funding for and resource allocation of agency FOIA programs; and
4. the assessment of fees for FOIA services.

Due to the Subcommittee's greater focus on the form of solutions rather than any specific subject matter, the scope of matters reviewed by the Legislative Subcommittee will by necessity overlap with the areas of interest of other subcommittees. As a result, the Subcommittee will collaborate with other subcommittees of the 2020-22 FOIA Advisory Committee on these matters. The end goal of any Subcommittee inquiry is anticipated to be the proposal of specific legislative action (or inaction).

Legislation Subcommittee Methodology

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, Reimaging OGIS Working Group, and the First- Party Requester Working Group. The Legislation Subcommittee met bimonthly to discuss the findings and potential recommendations of each working group.

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 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.

This report contains a summary of the working groups' findings to help future FOIA Advisory Committees and to provide a helpful resource.

Legislation Subcommittee Members

Allan Blutstein, America Rising Corporation

David Cuillier, University of Arizona

Alexis Graves, U.S. Department of Agriculture

Kel McClanahan, National Security Counselors, Co-Chair

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Thomas M. Susman, American Bar Association

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Public Records Requester Survey

Lead: A.Jay Wagner and David Cuillier

In an effort to better understand public opinion on FOIA's legislative matters and better guide recommendations, a survey of public records requesters was conducted. The survey was conducted online through Qualtrics and comprised 53 items. The questions focused on a wide range of FOI opinions and behaviors. The first question provided an explanation of a public records request and asked whether the respondent had ever submitted a request, yes or no. Those that answered in the negative were brought to the end of the study, and no data was collected. The survey covered several general FOI 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. The survey also asked respondents about general demographics and frequency of requests submitted, types of requests submitted, experience and satisfaction across different FOI elements. 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.

It was a two-part survey effort with the first sample drawn from MuckRock, a popular request processing organization. MuckRock provided a list of 707 individuals who had both submitted a request and signed up for the MuckRock newsletter. This list was emailed the survey in October 2021 with a small incentive (whether the survey was completed or not) and multiple follow-up emails were sent as well. This produced 113 completed surveys. The second distribution of the survey was a broad-based recruitment strategy that used listservs and social media outreach. In November 2021, the survey was distributed to a range of FOI interested or affiliated listservs, as well as being posted to Twitter and LinkedIn. The second recruitment added 109 completed surveys. In total, there were 222 completed surveys. An overview of the preliminary results [can be found here](#).

Expanding the Scope of FOIA Working Group

Lead: Thomas Susman
Allan Blutstein
A.Jay Wagner

Increasing Access to Information in the Legislative Branch

Thomas M. Susman

*“When the FOIA was on the House floor, right before the vote, Members lined up before the bill’s manager, John Moss. Each in turn asked ‘John, is this going to apply to us?’ When Moss replied ‘Absolutely not,’ the Member responded: ‘Well, then I’ll vote for it.’”*¹

*“If it’s good for the Executive branch agencies, why isn’t it good enough for the Congress?”*²

By its express terms, the Freedom of Information Act (FOIA) applies only to “agencies,” defined in the Administrative Procedure Act as “each authority of the Government of the United States . . . but does not include—(A) the Congress.”³ The Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee’s Report to the Archivist of the United States 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.⁴

This memorandum reflects the conclusions following “due consideration” given to this issue, as to the legislative branch, by the Legislation Subcommittee of the 2020-2022 FOIA Advisory Committee. The Subcommittee’s consideration included a public presentation to the full Committee on March 3, 2021, from experts on access to both legislative and judicial branch

¹ As told by Rep. John Moss’s staff counsel, Bennie Kass, at the New York University program “FOIA @ 50,” available at <https://www.youtube.com/watch?app=desktop&v=71D6z2YQzIM> (panel presentation at 3:49).

² “Agency employees frustrated by oversight demands of lawmakers have often wondered why the public disclosure obligations under the 50-year-old Freedom of Information Act do not apply to Congress itself.” Charles Clark, “Why FOIA Obligations Don’t Apply to Congress,” Government Executive (Nov. 30, 2020). Even an Obama White House spokesperson asserted that Congress should subject itself to FOIA: “Those who are interested in advocating for transparency in government should advocate for Congress being subject to those kinds of transparency measures,” [White House Press Secretary Josh] Earnest told reporters.” Jordan Fabian, “White House: FOIA should apply to Congress,” The Hill (June 2, 2015).

³ 5 U.S.C. § 551(1); *see also* § 552(f); *ACLU v. CIA*, 823 F.3d655, 662 (D.C. Cir. 2016) (“because it is undisputed that Congress is not an agency, it is also undisputed that ‘congressional documents’ are not subject to FOIA’s disclosure requirements”).

⁴ [The Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee](#) at 36 (July 9, 2020).

records. Our proposal is that, pursuant to the previous Advisory Committee’s conclusion, the Archivist of the United States 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.

Political Considerations

The starting point for any consideration of applying any law to Congress is what the attitude of members of Congress would likely be to any proposal to increase transparency in the legislative branch. History, not just of the FOIA, but of efforts to apply other executive branch laws to Congress, demonstrates that Congress does not embrace applying executive branch legal requirements to its members or legislative branch entities.⁵ Although Congress begrudgingly applied principles of occupational safety and health statutes to itself, it did so with reservations and limitations. And experience does not suggest that these efforts were successful.⁶

At the same time, Congress has, in many ways, historically been the most transparent of the branches and in recent decades has taken additional steps to increase public access to its work. In addition to constitutional requirements that floor proceedings be published in a Journal of Proceedings,⁷ Congress enacted the 1976 Government in the Sunshine Act, one of the post-Watergate reforms, which required not only government agencies, but also congressional committees, to conduct their meetings in public.⁸ Shortly thereafter, televised floor debates were approved, and today most hearings and committee meetings, as well as House and Senate floor debates, are streamed by congressional websites and broadcast to the public live by such organizations as C-SPAN.⁹

⁵ See Theodor Meyer, “Do As We Say, Congress Says, Then Does What It Wants,” ProPublica (Jan. 31, 2013), available at <https://www.propublica.org/article/do-as-we-say-congress-says-then-does-what-it-wants> (listing, in addition to FOIA, whistleblower protections, subpoenas for health and safety probes, keeping workplace records, prosecution for retaliating against employees, posting notices of workers’ rights, and anti-discrimination and anti-retaliation training).

⁶ See, e.g., <https://firstbranchforecast.com/2020/11/30/why-isnt-the-office-of-congressional-workplace-rights-protecting-congress-during-the-pandemic/>.

⁷ U.S. Const. Art. I, § 5.

⁸ 5 U.S.C. § 552b.

⁹ www.c-span.org.

Every congressional committee has a website that contains bills and hearing transcripts, and every House and Senate member has a website replete with information about the member's positions, speeches, activities, and bills. Congressional leadership offices publish details of the legislative agendas, and Congress.gov provides online access to bills and legislative histories. Clearly Congress has in many ways taken steps to embrace transparency in recognition of its importance to the public.

Nonetheless, while application of FOIA disclosure principles to members and committees would undoubtedly yield additional useful information, it is unlikely that Congress would permit access to constituent communications, to communications with agencies or outside persons concerning nonlegislative matters, or to lobbyists' communications. Congress will undoubtedly take pains to preserve the constituent-elected official relationship from public scrutiny. And, while the public may have a legitimate interest in accessing communications among members once final legislation has been approved, again, it is improbable that members would want the curtain drawn back on what may be the kinds of political trade-offs that are the daily currency of congressional decision-making. As a practical matter, then, the issue of increasing legislative branch transparency should perforce focus on those congressional support agencies that perform functions quite similar to those performed by executive agencies.

Why Expand Access to Legislative Branch Records?

There is no principled reason why the public's *right* to know should stop at the Capitol's perimeter. If the focus is on support offices and agencies of the Congress, discussed in greater detail below, then the reasons for enhanced transparency take on greater salience. Most of those offices perform functions similar or even identical to those performed by executive branch entities that are fully covered by FOIA, such as law enforcement (Capitol Police); auditing, buildings and grounds maintenance (Architect of the Capitol); inspecting and adjudicating (Government Accountability Office); budgeting (Congressional Budget Office); publishing (Government Publishing Office); enforcing rights (Office of Congressional Workplace Rights); maintaining the library (Library of Congress); and performing research and drafting reports (Congressional Research Service).

It is not just their functions that these legislative branch entities have in common with their executive branch sisters and brothers. They are funded by the same taxpayer dollars that pay for executive agencies. They often have the same or greater impact on the lives of individuals, the viability and profitability of businesses, and the activities of all levels of government and all of the political subdivisions in our nation.

A rallying cry for enactment of FOIA was the need to increase accountability of unelected bureaucrats. Ditto for legislative branch offices and agencies – maybe more so, since the President is ultimately responsible for the actions of the executive branch, but no individual senator or congressperson is likely to be held responsible for the failing, inefficiency, waste, or mismanagement of a congressional support agency.

It is also worth noting that the Federal Records Act (FRA) includes within its definition of a “federal agency” any “executive agency or any establishment in the legislative branch,” except for the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the Architect’s direction.¹⁰ Legislative support offices therefore create federal records that are retained under records schedules authorized by the National Archives and Records Administration. Since all executive branch federal records are subject to the FOIA, it is anomalous that federal records created within legislative support offices are nevertheless categorically inaccessible to the public.¹¹

In short, most of the arguments for access to information in the executive branch apply with equal force to the First Branch. However, given the existing level of transparency of House and Senate floor and committee proceedings, it is doubtful that the “good for the goose” argument is going to persuade many members of Congress to give a minute’s thought to expanding access to records of the legislative branch. Bills have been introduced in the past to subject Congress to the FOIA, but serious consideration has been less than perfunctory.¹² However, a focus on expanding access to support offices and agencies rather than the entire Congress may well yield more positive results. What mechanisms there might be to afford and enforce that access is a different question that will be addressed below.

Application of Access Laws to Legislative Bodies in the States and Other Countries

The argument for broader application of FOIA to Congress often points to the vast majority of states¹³ whose right-to-information laws¹⁴ apply in some way (directly or indirectly) to the legislative branch. Many of these state laws are modeled after the federal FOIA. Ryan Mulvey and James Valvo concluded that “almost half of all states—or twenty-four—have FOI laws that cover the legislature in explicit terms; in four other states, “the relevant analysis turns on the type of record at issue, rather than the entities covered by the open records law.” And only 12 states “exclude their legislatures from their FOI statutes.”¹⁵

¹⁰ 44 U.S.C. § 2901(14).

¹¹ The same provision of the FRA (44 U.S.C. § 2901(14)) also includes certain components of the judicial branch, the records of which similarly are federal records not subject to FOIA. See Public Comments Submitted to the Advisory Committee on Sept. 13, 2020, available at <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/public-comments-2020-09-13-baron> (numbered par. 3).

¹² James T. O’Reilly, *Applying Federal Open Government Laws to Congress: An Explorative Analysis and Proposal*, 31 Harvard J. Legis. 415, 453-54 (1994) (hereafter O’Reilly).

¹³ According to a 2020 survey, MuckRock found that 46 states and the District of Columbia applied some form of public records law to their legislatures. See <https://www.muckrock.com/place/>.

¹⁴ Often called Freedom of Information, Open Records, Right to Know, Sunshine, or Access to Information laws.,

¹⁵ Ryan Mulvey & James Valvo, *Opening the State House Doors: Examining Trends in Public Access to Legislative Records*, 1 J. Civic Info. (No. 2) 17, at 19, 24, 26 (Dec. 2019). This article presents the most comprehensive survey

Internationally, scores of other countries – from Afghanistan to Zimbabwe – apply their access-to-information laws to their legislative entities without special limitations.¹⁶

With these precedents, it becomes more difficult to argue that applying some form of access requirement to some elements of the legislative branch is unworkable.

The Many Parts of the U.S. Congress

While many Americans see Congress as a bicameral branch consisting of the House of Representatives and the Senate, most probably do not realize the number and variety of components that make up the legislative branch of the U.S. government.

Members, Leadership Offices, and Committees. Three factors support nonapplication of FOIA or a FOIA-like process to individual Representatives and Senators and their offices, to Leadership offices, and to congressional committees.

The first harkens back to the Political Consideration section at the beginning of this paper. A proposal to apply FOIA to members, their staffs, and their committees would not just be a proposal dead on arrival, but it likely would poison the water against consideration of any access recommendations applicable to other components of the branch. Legislatures in the states and in other countries have, with some exceptions, swept themselves under their right-to-information laws with little controversy, but when Congress from time to time considered subjecting itself to FOIA, that consideration has been brief and fleeting.¹⁷

In the current climate of polarization, intense partisan bickering, and chronic gridlock, the climate for restraint and self-examination has not improved. Additionally, through the years Congress has “reformed” and “improved” the FOIA on a bipartisan basis when addressing amendments; it is easy to predict that this trend would be reversed were Congress deciding to impose more stringent access procedures, and even sanctions, that applied to itself.

The second factor is the likelihood that there is very little information that would be disclosed that is not already made public. Congressional debates and hearings and mark-ups are open and transcripts posted. Bills and amendments are available online. Exchanges between and among staff and members would almost always be exempt from disclosure as internal deliberative records. Lobbyists’ communications would mostly be protected as deliberative or containing confidential commercial information, and constituent emails and letters would likely be cloaked under a privacy exemption.

and analysis to date of applying open records laws to state legislatures and includes an appendix with each state’s law categorized and cited.

¹⁶ The Centre for Law & Democracy’s *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/>.

¹⁷ See O’Reilly, *supra* n.12, at 453-54.

Third, there would be constitutional thickets to navigate: the Speech or Debate Clause,¹⁸ the Arrest Immunity Clause,¹⁹ and the Presentment Clause.²⁰ These obstacles to applying open government laws to members were explored in detail in a 1994 *Harvard Journal of Legislation* article by James O'Reilly.²¹

Of course, there are many other components of the legislative branch where these threshold objections either do not apply or are only tangentially applicable.

Support Offices, Support Agencies, and Other Entities. Daniel Schuman has developed a topography of congressional components that illustrates their number and diversity.²² Specifically, the list includes:

Support Offices: Clerk of the House; Secretary of the Senate, Sergeant at Arms, Chaplain, House Office of Congressional Ethics, Senate Historian

Support Agencies: Library of Congress (including the Copyright Office and the Congressional Research Service), Government Publishing Office, Congressional Budget Office, Government Accountability Office, U.S. Capitol Police, Architect of the Capitol, Office of Congressional Workplace Rights, Open World Institute

Other Entities: House Democracy Partnership, Stennis Center, Commissions

Some Support Agencies Have Access Procedures, Others Do Not

Each entity within the legislative branch appears autonomous when it comes to disclosure regimes.

The congressional support agencies were surveyed in 2020 by Alex Howard at Demand Progress who asked, among other questions, whether there was “a formal process to request documents, records, data or other information from your agency” and, if so, how the process works.²³ In sum:

¹⁸ U.S. Const. art. I, § 6, cl. 1.

¹⁹ *Id.*

²⁰ U.S. Const. art. 1, § 7, cls. 2, 3.

²¹ O'Reilly, *supra* n. 12, at 423-29.

²² Daniel Schuman, “Transparency and the Legislative Branch,” presentation to the FOIA Advisory Committee March 3, 2021 (PowerPoint presentation available at <https://www.archives.gov/files/ogis/assets/foiaac-mtg-ppt-slides-2021-03-03.pdf> (starting at slide 7)).

²³ Alex Howard, “Exempt from FOIA, US legislative support agencies follow uneven transparency standards,” First Branch Forecast (Feb. 6, 2020), available at <https://firstbranchforecast.com/2020/02/06/foia-legislative-support-agencies-transparency/>. The full results of the survey are presented at <https://docs.google.com/spreadsheets/d/e/2PACX-1vSomXXmzwF5NP4ovDNx-waLgJZ4NbV01g4miGUrQWOOaInh9pnZLwJvTAv0AQua7aasOHG1v58LVVoB/pubhtml>.

At the top of the transparency gradient for congressional support agencies sits the U.S. Congressional Budget Office (CBO) and U.S. Government Accountability Office (GAO).

At the bottom of the gradient are the Library of Congress, the U.S. Capitol Police, and the Architect of the Capitol (AOC)

The [Government Accountability Office](#), although not legally subject to FOIA, has adopted “FOIA-like” regulations.²⁴ GAO acknowledges that “While GAO is not subject to the [FOIA] GAO’s disclosure policy follows the spirit of the act consistent with its duties and functions and responsibility to the Congress.”²⁵ GAO reports and an array of other GAO resources are available online.²⁶

The [Library of Congress](#) (LoC) has disclosure regulations that follow “the spirit of the FOIA,”²⁷ while one component of the LoC – the [U.S. Copyright Office](#) – is fully subject to the FOIA and has adopted regulations fully implementing the procedures for administering its requirements.²⁸

A call for greater transparency of the [U.S. Capitol Police](#) (USCP) began before the events that transpired at the Capitol on January 6, 2021. Congressional appropriators inserted in their report on the 2021 Legislative Branch Appropriations Bill language calling for USCP “Information Sharing” as follows:

While the USCP is not subject to the [FOIA] . . . the Committee encourages the USCP to develop a policy and procedure for the sharing of information that follows the spirit of the Freedom of Information Act. This policy should be consistent with, and not interfere with, USCP’s primary function of protecting the Congress.

After January 6, 2021, the calls for greater public access to USCP information increased; a Huffington Post Politics column headline read: “The Capitol Police Are Not Subject To Freedom Of Information Laws. Jan. 6 Could Change That.”²⁹

²⁴ 4 C.F.R part 81.

²⁵ *Id.* at § 81.1(a).

²⁶ <https://www.gao.gov/>.

²⁷ 36 C.F.R. § 703.1.

²⁸ 35 C.F.R. part 203. The Copyright Office characterizes itself as a “separate department of the Library” of Congress. 35 C.F.R. § 203.2. The FOIA applies to that office because Congress specified, in spelling out the responsibilities and organization of the Office, that it would be subject to the Administrative Procedure Act, in which the FOIA is lodged.

²⁹ Roque Planas (Jan. 12, 2021), available at https://www.huffpost.com/entry/the-capitol-police-is-not-subject-to-freedom-of-information-laws-jan-6-could-change-that_n_5ffddefbc5b63642b6ffa9c5.

Proactive Disclosure

While the discussion so far has focused on applying FOIA-like access procedures to the legislative branch, an important element of FOIA is its requirement for affirmative and mandatory disclosures.³⁰ As discussed above, Congress already goes quite far in making its activities and legislation publicly accessible; there is no reason why it could not and should not go farther.

House.gov and Senate.gov provide home bases for further exploration of the members, organizations, and activities of both bodies. Legislation and legislative action can be tracked on Congress.gov. GPO maintains a robust website, govinfo.gov, containing links to the *Congressional Record*, bills, hearings, reports, calendars, and other useful legislative information. And the House has a jam-packed repository of information about bills and committee proceedings at docs.house.gov. (There is no comparable site for the Senate.)

In addition, every member's office, committee, commission, and other congressional agency has websites chock full of data and information and links. GAO reports and testimonies can be found at gao.gov. CRS reports are available at crsreports.congress.gov. Plus, there is a plethora of information related to the output of Congress at usaspending.gov.

What more could we ask for? Congress has shown that it recognizes the importance of public access to information, as described above. How about expanding access to, and even mandatory proactive disclosure of:

- Legislative branch inspectors general's reports
- Historical CRS reports and current reports as data³¹
- Congressional serial set and enacted laws online and as data³²
- Reports to Congress from executive agencies (unless classified)

What About Enforcement?

Integral to any access regime is the concept of enforceability. *De novo* judicial review in the federal district courts of agency decisions to withhold requested information has been the enforcement mechanism of choice for FOIA³³ and the access laws of states and foreign countries. In some jurisdictions and countries, independent agencies are empowered to order government agencies to turn over requested records to requesters.³⁴ Elsewhere, the state Attorney

³⁰ 5 U.S.C. §§ 552(a)(1)-(3).

³¹ Many CRS reports are currently available online from CRS at <https://crsreports.congress.gov/>; other nongovernmental websites also post them. *E.g.*, <https://www.everycrsreport.com/>.

³² These first three items were recommended by Daniel Schuman, *supra* n. 19.

³³ 5 U.S.C. § 552(a)(3)(B).

³⁴ *E.g.*, Connecticut and Mexico.

General can bring a lawsuit against a recalcitrant agency or governmental subdivision to require disclosure.³⁵

Additionally, ombuds offices, independent information commissioners, and other entities external to the decisional agency process are in many jurisdictions empowered with various degrees of enforcement authority, ranging from opining on whether records should be disclosed to mandating release.

Since Congress has recognized the value of having an independent federal judge review agency decisions to withhold information under the FOIA, that approach would be equally valuable as applied to the legislative branch. However, it may be folly to think that Congress would vest jurisdiction in the federal judiciary to mandate public disclosure of legislative branch information.

Congress did create an Office of Congressional Workplace Rights (OCWR) to administer and enforce the Congressional Accountability Act,³⁶ which applied for the first time 13 civil rights, labor, and workplace safety statutes³⁷ to legislative branch employees, and the OCWR could be a model for a centralized Office of Congressional Information. It should be kept in mind that, while Congress oversees the support agencies and offices, Members of Congress do not personally head or work in those offices, so any order of enforcement would not be against a sitting member, avoiding both practical and constitutional, as well as political complications. At a minimum, there should be an opportunity for a requester to appeal any decision to withhold requested information, and that appeal might best go to a joint committee of the House and Senate.³⁸ Finally deadlines for responding to requests could be overseen, if not enforced, by such an entity.

Procedures for Accessing Congressional Information; Exemptions

Given the diversity of legislative branch offices – both form and function – ranging from the USCP to the LoC to the Open World Leadership Center – it would be tempting to conclude that the procedures and exemptions, crafted by Congress and amended multiple times over the past half-century in a FOIA applicable to the executive branch, might be ill-suited to application to Congress. But the hundreds of agencies and sub-agencies of the executive branch are even more

³⁵ Texas.

³⁶ 2 U.S.C. § 1301. *See generally* [Congressional Accountability Act of 1995](#).

³⁷ Including, *e.g.*, the Occupational Safety and Health Act of 1970, the Federal Labor Relations Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. *See* [Office of Congressional Workplace Rights | \(ocwr.gov\)](#).

³⁸ The Joint Committee on Printing at this time does not appear to be active. Its rules and membership online are from the previous Congress, *see* [Joint Committee on Printing \(116th Congress\) | Committee on House Administration](#), and there does not presently appear to be a full complement of members, *see* [Office of the Clerk, U.S. House of Representatives - Joint Committee on Printing](#).

diverse – from the Bureau of Prisons to the Nuclear Regulatory Commission, from the National Council on the Arts to the National Labor Relations Board.

Although the FOIA’s nine exemptions might well be transferrable to a congressional right-to-information regime, it is probable that there would need to be special exemptions (in an Exemption 3-type provision) for some legislative branch information. It is more likely, however, that Congress will want to, and should, craft its own procedures modeled after those in the FOIA, creating a “FOIA-like” regime for the legislative branch offices.

Conclusion

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.

FOIA Fees Working Group

Lead: Allan Blutstein
David Cuillier
Matthew Schwarz

**Freedom of Information Act Advisory Committee, 2020-2022 Term
Final Memorandum**

To: Legislative Subcommittee
From: Allan Blutstein, America Rising Corp.
David Cuillier, University of Arizona
Matthew Schwarz, Environmental Protection Agency
Date: May 20, 2022
Subject: Assessment of fees

The Fees Working Group was established by the Legislative Subcommittee to explore the assessment of FOIA fees. In carrying out its deliberations, the Fees Working Group was mindful of the work and recommendations of the Fees Subcommittee of the 2014-2016 Term.¹

Fee updates since 2016

Several noteworthy legal developments have occurred with respect to fees since the Fees Subcommittee concluded its work on April 19, 2016. First, on May 20, 2016, the U.S. Court of Appeals for the District of Columbia Circuit ruled that certain FOIA requests filed by students may qualify under the favored fee category of educational institutions.² In response, the Department of Justice revised its fee regulations and encouraged other agencies to follow suit.³ We are not aware of any other court decisions issued since 2016 that have significantly changed the fee landscape.⁴ The majority of fee-related disputes in litigation pertain to eligibility for and entitlement to attorney's fees,⁵ a topic we chose not to examine.

Further, the FOIA Improvement Act of 2016 was signed into law on June 30, 2016, revising the limitations on the assessment of fees when agencies do not meet statutory response deadlines. The Act clarified, for example, that agencies may not charge certain fees beyond the ten-day extension period allowed for "unusual circumstances" unless "more than 5,000 pages are necessary to respond to the request."⁶ The Act further provided that if a court determines that

¹ See <https://www.archives.gov/ogis/foia-advisory-committee/2014-2016-term/subcommittees-and-working-groups/fees>.

² *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016).

³ U.S. Dep't of Justice, "DOJ Publishes Updated FOIA Regulation," Jan. 4, 2017, <https://www.justice.gov/oip/blog/doj-publishes-updated-foia-regulation>; "Guidance for Agency FOIA Regulations," Sept. 8, 2016 (including template for agency FOIA regulations), <https://www.justice.gov/oip/oip-guidance/guidance-agency-foia-regulations>.

⁴ Post-2016 fee cases that nonetheless might be of interest include *Bartko v. DOJ*, 898 F.3d 51, 76 (D.C. Cir. 2018) (holding that requester's personal interest in records was irrelevant to fee waiver analysis as long as those interests were not commercial); and *Nat'l Sec. Counselors v. DOJ*, 848 F.3d 467 (D.C. Cir. 2017) (finding that it was reasonable for FBI to limit number of pages per CD to 500 pages and to charge \$15 per CD).

⁵ See, e.g., *Kwoka v. IRS*, 989 F.3d 1058 (D.C. Cir. 2021) (stating that case presented "a recurring question in our court: under what circumstances is a prevailing plaintiff in a Freedom of Information Act (FOIA) case . . . entitled to an award of attorney's fees?").

⁶ 5 U.S.C. § 552(a)(4)(A)(viii); see also U.S. Dep't of Justice, "Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met," Oct. 19, 2016, <https://www.justice.gov/oip/oip-guidance/prohibition-on-assessing-certain-fees-when-foia-time-limits-not-met> (summarizing statutory amendments).

“exceptional circumstances” exist, a dilatory agency may still assess fees for the period of time designated by the court.⁷

More recently, in December 2020, the Office of Management and Budget finalized updates to its 1987 Fee Guidelines.⁸ Among other changes, OMB clarified that “faculty, staff, or students” may qualify as “Educational and Non-commercial Scientific Institution Requesters,” and it added a subsection referencing the statutory limitations on fees that apply when agencies miss response deadlines.⁹ In doing so, the agency addressed some, but not all, of the fee recommendations proposed in 2016.¹⁰

Working Group Discussions

Agency use of FOIA fees

One of the more promising ideas discussed by the Working Group, in conjunction with the full Legislative Committee, concerns the use of FOIA fees charged to requesters. Agencies have collected in the range of \$2 million in FOA fees annually since fiscal year 2017.¹¹ However, nearly all agencies are required by law to forward these funds to the U.S. Treasury for Congress to allocate as it sees fit.¹² One option that was raised was to divert FOIA fees from the Treasury to the Office of Government Information Services, whose mediation and other services benefit agencies and requesters alike. Another proposal involved using the money for a shared FOIA technology fund to improve the capabilities of agencies to process requests. In our view, each of these proposals are meritorious and warrant additional study.

On the other hand, it is our sense that a future recommendation to permit all agencies to keep their FOIA fees would be difficult to pass. The requester community has voiced concern that agencies currently overestimate fees in order to minimize the scope of requests or to discourage them altogether.¹³ Allowing agencies to retain those fees, the argument follows, would further

⁷ 5 U.S.C. § 552(a)(4)(A)(viii)(II)(cc).

⁸ 85 Fed. Reg. 81955 (Dec. 17, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-17/pdf/2020-27707.pdf>.

⁹ *Id.*

¹⁰ See FOIA Advisory Committee Recommendations Dashboard, <https://www.archives.gov/ogis/foia-advisory-committee/dashboard>. OMB revised its FOIA fee guidance in the midst of a lawsuit seeking to compel the agency to update both its fee guidance and fee regulations. See “OMB Publishes Proposed Revisions to Outdated FOIA Fee Guidelines Following CoA Institute Lawsuit,” May 4, 2020, <https://causeofaction.org/omb-publishes-proposed-revisions-to-outdated-foia-fee-guidelines-following-coa-institute-lawsuit/>.

¹¹ The Office of Information Policy reported that agencies collected \$2.11 million in FOIA fees in fiscal year 2020; \$2.54 million in FY 2019; \$2.98 million in FY 2018; \$2.99 million in FY 2017; and \$3.87 million in FY 2016. See generally OIP Summaries of Agency Annual Reports, <https://www.justice.gov/oip/reports-1>. In FY 2008, the last full year before statutory fee limitations became effective, agencies collected \$11.6 million in fees. See U.S. Dep’t of Justice, “Summary of Annual FOIA Reports for Fiscal Year 2008,” Aug. 19, 2009, <https://www.justice.gov/oip/blog/foia-post-2009-summary-annual-foia-reports-fiscal-year-2008>.

¹² See Miscellaneous Receipts Act, 31 U.S.C. § 3302(b). The Food and Drug Administration is authorized by a separate statute to retain FOIA fees to fund its FOIA operations. See 21 U.S.C. § 379f.

¹³ STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 31-34 (2016) (providing examples of “outrageous fee estimates”), <https://republicans-oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf>.

incentivize agencies to engage in that practice, as well as to deny more fee waiver requests.¹⁴ But the notion of agency fee retention is not wholly devoid of support.¹⁵ Indeed, in 1996, Senator Patrick Leahy proposed that agencies be credited with one-half of collected FOIA fees to offset agency expenditures for FOIA resources, provided that the agency was in “substantial compliance” with statutory response deadlines.¹⁶

Fee thresholds

The FOIA statute stipulates that no fee may be charged if the government’s cost of collecting and processing the fee is “likely to equal or exceed, the amount of the fee” itself.¹⁷ Each agency establishes in its regulations the threshold amount for charging a fee. During its research, the Working Group learned that the Consumer Financial Protection Bureau had amended its FOIA regulations in 2018 to waive all search and review fees if “the total search and review fees are less than \$250.”¹⁸ The agency’s rationale for this amendment was to reduce the “need to contact a FOIA requester concerning processing fees . . . and provide information to these requesters more quickly.”¹⁹ Because the fee thresholds of most agencies are substantially lower than \$250,²⁰ the Working Group reached out to CFPB to learn more about the origin and impact of its fee reform.

In sum, CFPB informed us that its higher fee threshold had, in fact, reduced the amount of time spent on obtaining fee agreements, which were frequently needed from their numerous commercial use requesters. At the same time, the agency did not notice an increase in the number of FOIA requests received or an increase in request complexity. For future Committee members who believe that fees should be lower, asking agencies to reconsider their fee thresholds might be a worthwhile recommendation. Whether commercial requesters should benefit from higher fee thresholds (as they do at CFPB) is debatable, however, because commercial use requests typically do not advance public interests.

Elimination of fees

Following in the footsteps of the 2014-2016 Fee Subcommittee, the Working Group considered but did not reach a consensus about whether to recommend the elimination of review, search, and/or duplication fees for all or certain requesters. We will not attempt to rehash all the

¹⁴ Although OGIS makes fee determinations on its own FOIA requests and mediates fee disputes, we do not believe these conflicts would necessarily preclude OGIS from receiving FOIA fees collected by other agencies.

¹⁵ See Laurence Tai, *Fast Fixes for FOIA*, 52 HARVARD J. FOR LEGISLATION 455, 482-483 (2015), https://harvardjol.com/wp-content/uploads/sites/17/2015/10/HLL208_crop1.pdf; Charles J. Wichmann III, Note, “Ridding FOIA of Those ‘Unanticipated Consequences’: Repaving a Necessary Road to Freedom,” 47 DUKE L.J. 1213, 1253-1254 (1998), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1035&context=dlj>.

¹⁶ S. 1090, 104th Cong. § 6(a) (1996), <https://www.justice.gov/oip/blog/foia-update-text-senate-foia-amendment-bill-s-1090-proposed-legislation>.

¹⁷ 5 U.S.C. § 552(a)(4)(A)(iv)(I).

¹⁸ See 12 C.F.R. § 1070.22(d)(2).

¹⁹ Disclosure of Records and Information, 83 Fed. Reg. 46075, 46081 (Sept. 12, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-09-12/pdf/2018-19384.pdf>.

²⁰ The Department of the Justice, for example, has a fee threshold of \$25.00. See 28 C.F.R. § 16.10(e). This amount appears to be typical, but higher thresholds do exist. See 43 C.F.R. § 2.6(b) (\$50 threshold at Department of the Interior).

arguments for and against the elimination of fees. Broadly speaking, proponents of a free FOIA regime point out that agencies collect only a tiny fraction of their costs, calling into question whether imposing fees is a worthwhile or cost-effective pursuit.²¹ Additionally, even when agencies properly estimate fees, they are barriers to requesters who cannot afford to pay high hourly search fees. Defenders of fees, on the other hand, assert that agencies would be flooded with no-cost requests and that such requests would more frequently seek voluminous records.²² They further contend that taxpayers should not bear the costs generated by commercial use requests or from sprawling requests that serve little or no public interests.²³ Recent surveys predictably show that a greater percentage of requesters favor eliminating FOIA fees than agency FOIA personnel.²⁴

Vexatious requesters

Lastly, the Working Group also briefly discussed another issue that had been considered by the 2014-2016 Fee Subcommittee, namely “vexatious” requesters. Several states and foreign countries allow government agencies to disregard repeated filings of frivolous or abusive requests from the same requester.²⁵ These so-called vexatious requests may consume extensive agency resources, but the federal FOIA statute contains no special provisions that agencies can rely on to obtain relief.²⁶ We recognize that defining a vexatious request or requester would be a complex task, and that the requester community is likely to be especially wary of sanctions against requesters. Thus, if future Committee members take on this challenge, we suggest that requesters comprise the majority of the members of the relevant working group.

* * *

²¹ See, e.g., A.J Wagner, [Essential or extravagant: Considering FOIA budgets, costs and fees](#), Gov’t Info. Quarterly, Vol. 34, Issue 3, Sept. 2017.

²² Several federal judges in the District of Columbia, which handles more FOIA cases than any other district, have acknowledged the burdens imposed by non-paying requesters. See, e.g., [Harrington v. FDA](#), No. 20-1895 (D.D.C. Jan. 20, 2022) (noting that plaintiff had submitted “a staggering 2,200+ FOIA requests to FDA since 2018,” and suggesting that “Congress may wish to bear in mind how many hours of agency time a determined individual or entity can require”); [Am. Ctr. for Law & Justice v. DHS](#), No. 21-cv-01364, 2021 WL 5231939 (D.D.C. Nov. 10, 2021) (“With no fees forcing a nonprofit to internalize the cost of its request, it would have little reason not to request a broader universe of documents”).

²³ See, e.g., Margaret Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1421(2016) (“The subsidy of providing free or low-cost government records to businesses, however, is not justified in the large majority of cases. In fact, businesses’ use of the vast majority, if not all, of the records are by definition private uses”);

²⁴ Compare A.Jay Wagner & David Cuillier, Public Records Requester Survey, Jan. 11, 2022 (75 percent of 222 requesters would eliminate fees), <https://www.archives.gov/files/ogis/assets/public-records-requester-survey-wagner-cuillier.pdf>, with FOIA Advisory Committee, Fees Subcommittee, [Fee Survey Results](#), Question 6, July 23, 2015 (328 agency personnel explaining advantages and disadvantages of eliminating fees).

²⁵ Connecticut, Hawaii, and Maryland have enacted vexatious requester laws. Illinois, Pennsylvania, and Texas, at least, have considered legislation. Overseas, vexatious requester laws have been enacted by the United Kingdom, Canada, New Zealand, Ireland, Scotland, and the Philippines.

²⁶ Fees might discourage the volume or scope of “vexatious” requests to some extent, and agencies may deny requests that do not reasonably describe the records sought. See 5 U.S.C. § 552 (a)(3)(A).

FOIA Funding Working Group

Lead: Matthew Schwarz

Alexis Graves

Patricia Weth

FOIA Federal Advisory Committee
2020-2022 Term
FOIA Funding Working Group Final Report

To: Legislative Subcommittee
From: Matt Schwarz, Environmental Protection Agency
Patricia Weth, Environmental Protection Agency
Alexis Graves, U.S. Department of Agriculture
Date: May 26, 2022
Subject: FOIA Funding

The Legislative Subcommittee established the FOIA Funding Working Group (“Working Group”) in response to comments from both government and non-government committee members that FOIA programs are often underfunded, leaving many agencies unequipped to meet the response time requirements of the FOIA. The Working Group explored ideas to increase funding for federal agencies.

The Working Group engaged in significant research¹ of public records laws, appropriations bills, and National Defense Authorization Acts to determine where government entities had been successful in securing additional funding for FOIA. During the 2018-2020 term, the Advisory Committee recommended to Congress that it “could require that the cost of FOIA offices and administration, including financial support for improvements in agency FOIA training and technology, become a budget line-item for agencies.”² Absent Congressional action to require specific line items for FOIA, the Working Group’s research supports the recommendation to agencies that they should nevertheless consider separate line items for FOIA funding. Examples of agency line items include Department of State and US Agency for International Development funding to reduce FOIA backlogs³ and Department of the Interior for more general funding for FOIA compliance.⁴

¹ The working group wishes to express particular thanks to Kimberlee Reid, who conducted a very detailed review of appropriations bills and National Defense Authorization Act documents.

² See <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf> (Recommendation 20, page 33).

³ Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 1716(b)(4) (2021). Available at <https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf> (“substantially reduce, compared to the previous fiscal year, the response time for identifying and retrieving Federal records, including requests made pursuant to section 552 of title 5, United States Code”)

⁴ *Id.* at 316 (“ . . . of which no less than \$1,860,000 shall be to assist the Department with its compliance responsibilities under 5 U.S.C. 552.”)

FOIA Advisory Committee

2018-2020 Term

Recommendation 20

20. We recommend that Congress directly address the issue of funding for FOIA offices and ensure that agencies receive and commit sufficient dedicated resources to meet their legal obligations to respond to FOIA requests in a timely manner both today and in the future. Comment: The single most consistent challenge agencies encounter when attempting to properly implement FOIA derives from limited resources. Financial support for FOIA administration has not kept up with increasing demands. As a result, FOIA programs are chronically underfunded and short-staffed, leading to a failure to meet statutory deadlines. For those agencies with significant backlogs of requests the greatest need is for additional funds and staff to handle the large number of requests being received. However, because FOIA is often seen as a lower priority by agency leadership, the work often fails to receive sufficient budget allocations to meet their obligations.

As we continue into the age of digital government, agencies are generating a growing amount of born-digital records and data every year, and public interest in those records appears to be steadily rising. The only way to manage this dynamic will be through the consistent and significant investment in the technology, staff, and training necessary to readily manage the growing records ecosystem and to facilitate more efficient and effective searching and disclosure of responsive records.

Congress controls funding for the executive branch. We urge Congress to use that authority to ensure sufficient resources are committed to FOIA offices to handle current needs, as well as to invest in developing technology and tools that will allow the offices to keep pace with growing demands.

Congress has many methods available to ensure more robust funding for FOIA offices. Two that we would encourage Congress to consider as most expedient: first, Congress could require that the cost of FOIA offices and administration, including financial support for improvements in agency FOIA training and technology, become a budget line-item for agencies. This would allow Congress directly to appropriate greater FOIA funding to agencies with less chance of miscommunication or funding changes. Alternatively, Congress could consider using report language to make clear to agencies the levels of funding for FOIA offices that committees expect.

**Research on Federal Appropriations for FOIA for
Fiscal Years 2013-2021
Conducted for the Legislation Subcommittee of the
FOIA Advisory Committee
April 2021**

Funding Research for FAC

Keyword search terms (spelled out acronyms): FOIA, FACA, FAC, 5 U.S.C., 5 U.S.C. 552. Searched annual appropriations bills and National Defense Authorization Act (NDAA) documents from 2013-2021. A general note that throughout each of the appropriation bills there is a handful of exemption of information mentions in how to ensure protection of sensitive material related to 5 U.S. Code 552 in regard to FOIA.

2021

FY2021 – Appropriations <https://www.congress.gov/bill/116th-congress/house-bill/133/text>

Department of the Interior – “For necessary expenses for management of the Department of the Interior and for grants and cooperative agreements, as authorized by law, \$120,608,000, to remain available until September 30, 2022; of which no less than \$1,860,000 shall be to assist the Department with its compliance responsibilities under 5 U.S.C. 552” (pg. 315)

Centers for Disease Control and Prevention - Agency for Healthcare Research and Quality – mention of FOIA reimbursement fees applied/credited to \$338M appropriation (pg. 398)

Department of State/US Agency for International Development (USAID) – Records Management and Cybersecurity Protections – looks to give authorization to State to use appropriated funds to reduce backlog of FOIA requests. State received \$55.5 billion in total funds for agency. (pgs. 550 & 551)

FY2021 – NDAA <https://www.congress.gov/bill/116th-congress/house-bill/6395/text> - nothing found re: funding.

2020

FY2020 – Appropriations <https://www.congress.gov/bill/116th-congress/house-bill/1865/text>

Centers for Disease Control and Prevention- Agency for Healthcare Research and Quality – mention of FOIA reimbursement fees applied/credited to \$338M appropriation (pg. 36)

Department of State/USAID - Records Management and Cybersecurity Protections – states funding can be used to “improve the response time for identifying and retrieving Federal records, including requests made pursuant to section 552 of title 5, United States Code (commonly known as the “Freedom of Information Act”).” (pg. 322)

FY2020 – NDAA <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf> - nothing found re: funding.

**Research on Federal Appropriations for FOIA for
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FOIA Advisory Committee
April 2021**

2019

FY2019 – Appropriations <https://www.congress.gov/116/plaws/publ6/PLAW-116publ6.pdf>

Department of State/USAID - Records Management and Cybersecurity Protections – states funding can be used to “improve the response time for identifying and retrieving Federal records, including requests made pursuant to section 552 of title 5, United States Code (commonly known as the “Freedom of Information Act”).” (pg. 294)

FY2019 - NDAA <https://www.congress.gov/115/plaws/publ232/PLAW-115publ232.pdf> - nothing found re: funding.

2018

FY2018 – Appropriations <https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf> - there were five continuing resolution bills for FY2018.

Centers for Disease Control and Prevention - Agency for Healthcare Research and Quality – (\$334M) states “that in addition, amounts received from Freedom of Information Act fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2019.” (pg. 380)

Department of State/USAID – Reports and Records Management – states funding can be used to “significantly improve the response time for identifying and retrieving Federal records, including requests made pursuant to section 552 of title 5, United States Code (commonly known as the “Freedom of Information Act”); and states “reduce the backlog of Freedom of Information Act (FOIA) and Congressional oversight requests, and measurably improve the response time for answering such requests.” (pg. 612)

FY2018 – NDAA <https://www.congress.gov/115/plaws/publ91/PLAW-115publ91.pdf> - nothing found re: funding.

2017

FY2017 – Appropriations <https://www.congress.gov/115/plaws/publ31/PLAW-115publ31.pdf> - there were three additional continuing resolutions for FY2017.

Centers for Disease Control and Prevention - Agency for Healthcare Research and Quality (\$324M) – states “that in addition, amounts received from Freedom of Information Act fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2018.” (pg. 395)

**Research on Federal Appropriations for FOIA for
Fiscal Years 2013-2021
Conducted for the Legislation Subcommittee of the
FOIA Advisory Committee
April 2021**

Department of State/USAID – Reports and Records Management – states funding can be used to “significantly improve the response time for identifying and retrieving Federal records, including requests made pursuant to the Freedom of Information Act.” and states “reduce the backlog of Freedom of Information Act (FOIA) and Congressional oversight requests, and measurably improve the response time for answering such requests.” (pg. 578)

General Intelligence – comment on fee reproduction costs states “In reviewing and processing a request by a person for the mandatory declassification of information pursuant to Executive Order No. 13526, a successor executive order, or any provision of law, the head of an element of the intelligence community— (1) may not charge the person reproduction fees in excess of the amount of fees that the head would charge the person for reproduction required in the course of processing a request for information under section 552 of title 5, United States Code (commonly referred to as the “Freedom of Information Act”). (pg. 682)

FY2017 – NDAA <https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf> - nothing found re: funding.

2016

FY2016 – Appropriations <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf> - there were three continuing resolutions for FY2016.

Centers for Disease Control and Prevention- Agency for Healthcare Research and Quality (\$334M) – states “For carrying out titles III and IX of the PHS Act, part A of title XI of the Social Security Act, and section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, \$334,000,000: Provided, That section 947(c) of the PHS Act shall not apply in fiscal year 2016: Provided further, That in addition, amounts received from Freedom of Information Act fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2017.” (pg. 370)

Department of State/USAID – Reports and Records Management – This funding is tied to \$10M that can be withheld unless “Not later than 30 days after enactment of this Act, the Secretary of State and USAID Administrator shall each submit a report to the Committees on Appropriations and to the National Archives and Records Administration detailing, as appropriate and where applicable— the steps required, including steps already taken, and the associated costs, to— reduce the backlog of Freedom of Information Act and Congressional oversight requests, and measurably improve the response time for answering such requests.” (pgs. 578-579)

FY2016 – NDAA <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf> - nothing found re: funding.

**Research on Federal Appropriations for FOIA for
Fiscal Years 2013-2021
Conducted for the Legislation Subcommittee of the
FOIA Advisory Committee
April 2021**

2015

FY2015 – Appropriations <https://www.congress.gov/113/plaws/publ235/PLAW-113publ235.pdf>
- there were three continuing resolutions for FY2015.

Centers for Disease Control and Prevention - Agency for Healthcare Research and Quality (\$334M) – states “For carrying out titles III and IX of the PHS Act, part A of title XI of the Social Security Act, and section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, \$363,698,000: Provided, That section 947(c) of the PHS Act shall not apply in fiscal year 2015: Provided further, That in addition, amounts received from Freedom of Information Act fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2016.” (pg. 348)

FY2015 – NDAA <https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf> - nothing found re: funding.

2014

FY2014 – Appropriations <https://www.congress.gov/113/plaws/publ76/PLAW-113publ76.pdf> - there were two continuing resolutions for FY2014.

Centers for Disease Control and Prevention - Agency for Healthcare Research and Quality (\$364M) - states “For carrying out titles III and IX of the PHS Act, part A of title XI of the Social Security Act, and section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, \$364,008,000 shall be available from amounts available under section 241 of the PHS Act, notwithstanding subsection 947(c) of such Act: Provided, That in addition, amounts received from Freedom of Information Act fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2015.” (pg. 369)

FY2014 – NDAA <https://www.congress.gov/113/plaws/publ66/PLAW-113publ66.pdf> - nothing found re: funding.

2013

FY2013 - Appropriations <https://www.congress.gov/113/plaws/publ6/PLAW-113publ6.pdf> - nothing found re: funding.

Miscellaneous Sources:

List of all bills from 2018-2013 -

[https://en.wikipedia.org/wiki/Appropriations_bill_\(United_States\)](https://en.wikipedia.org/wiki/Appropriations_bill_(United_States))

**Research on Federal Appropriations for FOIA for
Fiscal Years 2013-2021
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Holder/Obama memo: <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia-memorandum.pdf>

Obama Memo from 2009:

<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>

OIP Guidance: <https://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government>

EO13392: <https://fas.org/irp/offdocs/eo/eo-13392.htm>

Reimaging OGIS Working Group

Lead: David Cuillier

Thomas Susman

A.Jay Wagner

Patricia Weth

OGIS 2.0: Reimagining FOIA Oversight

Reimagining OGIS Working Group and Legislation Subcommittee¹ Recommendations to the Federal FOIA Advisory Committee May 4, 2022

This memorandum provides recommendations to the Archivist of the United States from the Reimagining Office of Government Information Services (OGIS) Working Group of the Legislation Subcommittee of the 2020-2022 [Federal FOIA Advisory Committee](#). The recommendations are designed to improve oversight of the FOIA process and aid the average person in acquiring government records without the expense and delays of litigation. Actionable steps are described below, based on practices adopted in some states and more than 80 nations. On the following pages, this report summarizes the research, examination of models, and interviews with more than 40 experts in the United States and abroad.²

In summary, the Reimagining Office of Government Information Services (OGIS) Working Group of the Legislation Subcommittee recommends that:

1. Congress gives OGIS the authority to make binding decisions.
2. Congress gives OGIS the authority to review records *in camera*.
3. Congress directs the federal courts to give extra weight to OGIS decisions.
4. Congress creates a direct line-item budget for OGIS.
5. Congress increases OGIS' budget.
6. The Archivist of the United States commissions 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.
7. The Archivist of the United States returns OGIS as a direct report.

Background

In the fall of 2009, the [Office of Government Information Services](#) (OGIS) embarked on its mediation efforts to bridge the divide between requesters and government.³ In its first year, OGIS assisted 391 requesters, growing through the years to serve approximately 4,100

¹ Report researched and written by Reimagining OGIS Working Group Chair David Cuillier (Associate Professor, University of Arizona School of Journalism and National Freedom of Information Coalition Board President), and fellow Working Group members A.Jay Wagner (Assistant Professor, Marquette University Diederich College of Communication), Thomas M. Susman (American Bar Association and NFOIC Board member), and Patricia A. Weth (Assistant General Counsel, Environmental Protection Agency). The Legislation Subcommittee approved the recommendations March 18, 2022.

² See Appendix A for acknowledgment of the more than 40 experts who provided insights and suggestions through interviews and correspondence.

³ Founded in September 2009 through Congressional action in the OPEN Government Act of 2007, handling 391 cases in its first year under Executive Director Miriam Nisbet. See "The First Year: Building Bridges Between FOIA Requesters and Federal Agencies," <https://www.archives.gov/files/ogis/assets/website-assets/about-ogis/building-bridges-report.pdf>.

requesters in [Fiscal Year 2021](#),⁴ with nearly the same number of employees with which it started. Since 2009, the office has handled more than 30,000 requests for assistance with the FOIA process, providing an alternative to the historical solution of litigation to resolve FOIA disputes. Since it started its compliance program in FY 2015, OGIS has assessed 14 agency FOIA programs, authored nine FOIA issue assessments, and partnered with National Archives colleagues to include FOIA in five government-wide Records Management Self-Assessment surveys. OGIS also has led and managed four terms of the Federal FOIA Advisory Committee, bringing together FOIA requesters and agency FOIA professionals, and, since 2016, the OGIS director has co-chaired the [Chief FOIA Officers Council](#). Through its work, OGIS advocates for a fair process for requesters and agencies, and its neutral position as an ombudsman resolves a good proportion of disputes. The directors and staff members have done an exemplary job with the resources and powers afforded them. The recommendations in this report focus on the *structure* of the U.S. FOIA oversight system, not the individuals who have worked so hard to improve the process for requesters, agencies, and ultimately all Americans who rely on transparent and accountable government.

While the FOIA process aids society,⁵ it can be improved. About 800,000 FOIA requests are submitted each year, and of those, only 21.6% are granted fully to requesters.⁶ Backlogs continue to increase, from 120,436 in 2019 to 141,762 in 2020, and have worsened through the pandemic.⁷ Simple requests take an average 30 days to process, and complex requests can lag months, or years. About 15,000 administrative appeals are processed each year, and the backlog of appeals, for the most part, continues to increase.⁸ Agencies complain of requesters jumping quickly to litigation, having unrealistic expectations, increasingly complex requests,⁹ and inflicting unwarranted hostility through “predatory requests.”¹⁰ On the requester side, a

⁴ 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>.

⁵ For example, studies have shown that government transparency leads to cleaner drinking water, Lori S. Benneer and Sheila M. Olmstead, *The Impacts of the ‘Right to Know’: Information Disclosure and the Violation of Drinking Water Standards*, 56 J. ENVIRON. ECON. MANAGE. 117-30 (2008); to fewer food safety complaints, Barbara A. Almanza, Joseph Ismail, and Juline E. Mills, *The Impact of Publishing Foodservice Inspection Scores*, 5 J. FOODSERV. BUS. RES. 45-62 (2002); reduced corruption, Maria Cucciniello, Gregory A. Porumbescu, and Stephan Gimmelikhuisen, *25 Years of Transparency Research: Evidence and Future Directions*, 71 PUB. ADMIN. REV. 1, 32-44 (2017); and for every \$1 spent on public-records based journalism, society benefits \$287, JAMES HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* (2016).

⁶ Of all 772,869 FOIA requests processed in FY 2020 by the federal government, 42% are partially denied, 5% are denied fully, 16% are rejected because “no records responsive to the request,” 6% are deemed “improper,” and the rest withdrawn, duplicates or other reasons. See *Summary of Annual FOIA Reports for Fiscal Year 2020*, Office of Information Policy, U.S. Department of Justice, p. 6, <https://www.justice.gov/oip/page/file/1436261/download>.

⁷ *Id.*, p. 9. Also, see *Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs*, U.S. Government Accountability Office (January 2022), <https://www.gao.gov/products/gao-22-105040>.

⁸ *Id.*, p. 18.

⁹ A variety of agency constraints -- and requester complaints -- were discussed March 29, 2022, at a U.S. Senate Judiciary Committee hearing, “The Freedom of Information Act: Improving Transparency and the American public’s Right to Know for the 21st Century,” <https://www.judiciary.senate.gov/meetings/the-freedom-of-information-act-improving-transparency-and-the-american-publics-right-to-know-for-the-21st-century>.

¹⁰ See U.S. District Court Judge Trevor N. McFadden’s lamentations about the perverse incentives of the system that encourage requesters to automatically sue for records, leaving taxpayers to foot the bills, in the 2021 U.S. District Court for the District of Columbia ruling *American Center for Law and Justice v. U.S. Department of*

Reimagining OGIS Recommendations 05.04.2022

growing body of research indicates delays,¹¹ excessive redaction and use of exemptions,¹² favoritism toward some classes of requesters,¹³ failure to respond at all,¹⁴ deficiencies in proactive disclosure,¹⁵ and agencies increasingly saying that, “no responsive records exist” when they actually do.¹⁶ For example, according to one recent survey conducted by two members of this Subcommittee, 94% of requesters said that delays are a moderate, major, or extreme problem.¹⁷ In that same survey, 95% of requesters who have utilized OGIS said the agency has too little power, and 93% said OGIS should be granted the power to compel agencies to provide requesters records.¹⁸ Ultimately, the current system, relying on the courts

Homeland Security: “This is the system Congress hath wrought. And which this Court must dutifully implement.” See also reports regarding the administrative burden and agency challenges caused by FOIA, such as Antonin Scalia, *The FOIA Has no Clothes*, 6 REG. 2, 14-19 (1982); Florida TaxWatch, *Predatory Public Records Requests* (January 2016), <https://floridatxwatch.org/Research/Full-Library/ArtMID/34407/ArticleID/15695/Predatory-Public-Records-Requests>; William Gardner, *Compelled Disclosure of Scientific Research Data*, 20 THE INFO. SOC’Y 141-46 (2004); Michele Bush Kimball, *Shining the Light from the Inside: Access Professionals’ Perceptions of Government Transparency*, 17 COMM. L. & POL’Y 299-328 (2012); Michele Bush Kimball, *Public Records Professionals’ Perceptions of Nuisance Requests for Access*, 5 UB J. MEDIA L. & ETHICS 46-68 (2016); Brett G. Johnson, *Public Records Officers’ Perspectives on Transparency and Journalism*, 2 J. CIVIC INFO. 1, 1-22 (2020).

¹¹ David Cuillier, *Forecasting Freedom of Information: Why it Faces Problems – and How Experts Say They Could be Solved*, John S. and James L. Knight Foundation (March 12, 2017), <https://knightfoundation.org/reports/forecasting-freedom-of-information/>.

¹² Elizabeth Bluemink and Mark Brush, *A Flawed Tool: Environmental Reporters’ Experience with the Freedom of Information Act*, Society of Environmental Journalists, available via the Internet Archive at https://web.archive.org/web/20210211030121/http://www.sejarchive.org/foia/SEJ_FOIA_Report2005.pdf; *Supra* note 11, Cuillier, *Forecasting Freedom of Information*; See also, *Update on Federal Agencies’ Use of Exemption Statutes*, U.S. Government Accountability Office (January 2021), <https://www.gao.gov/products/gao-21-148>.

¹³ Helen Darbishire and Thomas Carson, *Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries*, Open Society Justice Initiative (2006), <https://www.issueab.org/resources/7736/7736.pdf>; Paul Lagunes and Oscar Pocasangre, *Dynamic Transparency: An Audit of Mexico’s Freedom of Information Act*, American Development Bank paper IDB-WP-836 (2017); Michele Bush Kimball, *Law Enforcement Records Custodian’s Decision-Making Behaviors in Response to Florida’s Public Records Law*, 8 COMM. L. & POL’Y 313-60 (2003).

¹⁴ See FOIA Project, *FOIA Suits Rise Because Agencies Don’t Respond Even as Requesters Wait Longer to File Suit*, Transactional Records Access Clearinghouse (December 15, 2019), <https://foiaproject.org/2019/12/15/foia-suits-rise-because-agencies-dont-respond-even-as-requesters-wait-longer-to-file-suit/>.

¹⁵ See *Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements*, U.S. Government Accountability Office (March 2021), <https://www.gao.gov/products/gao-21-254>.

¹⁶ See Ted Bridis, *US Sets New Record for Censoring, Withholding Gov’t Files*, THE ASSOCIATED PRESS (March 12, 2018), analysis of FOIA data indicating an increase in the “no-responsive records” response, <https://apnews.com/article/business-arts-and-entertainment-personal-taxes-only-on-ap-united-states-government-714791d91d7944e49a284a51fab65b85>; Also, requesters note the problem in the survey by Cuillier, *supra* note 11.

¹⁷ A.Jay Wagner and David Cuillier, *FOI Requester Survey*, (2022), summary available 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>

¹⁸ *Id.* See also a survey of requesters who used the ombudsman agency in Indiana to find that the most common complaint was that the agency did not have the authority to compel disclosure of records. The most popular response to “What, if anything, do you think could be done to improve the PAC Office,” was, according to 35% of the respondents, that the agency should have enforcement power (p. 16), Yunjuan Luo and Anthony L. Fargo, *Measuring Attitudes About the Indiana Public Access Counselor’s Office: An Empirical Study*, Indiana Coalition for Open Government (2007), <http://www.pfaw.nfoic.org/sites/default/files/ICOG-IU-2008-Survey.pdf>.

to resolve disputes, is expensive and time-consuming,¹⁹ 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. Even news organizations, particularly [local outlets with diminishing resources](#), are less likely to challenge public record denials in court because of the time and expense.²⁰

From its inception, there have been calls to strengthen OGIS, including increasing its budget and giving OGIS the authority to review documents.²¹ The Office of Government Information Services Empowerment Act of 2018²² would have given OGIS authority to review documents when mediating disputes, but it was not enacted. The 2018-20 term of the Federal FOIA Advisory Committee discussed legislative changes to OGIS to improve the process, [recommending](#) that Congress “... strengthen the Office of Government Information Services with clearer authority and expanded resources.”²³ This report builds on that recommendation with specific, actionable proposals.

Indeed, we cannot rely on FOIA law alone. The best statute in the world is meaningless without a system to promote effective implementation. Technically, Afghanistan, Russia, Uganda, and 70 other nations have [stronger FOIA laws](#) than the United States (on paper, Afghanistan has the strongest law in the world).²⁴ Yet, strong laws do not automatically equate with actual transparency.²⁵ The law is just the starting point – it must be supported, monitored,

¹⁹ Pending FOIA lawsuits have surged in the past five years, with about a third of the cases taking two years or longer to litigate, and the length of litigation increasing every year. See FOIA Project, *Justice Delayed is Justice Denied: Judges Fail to Rule in a Timely Manner on FOIA Cases*, Transactional Records Access Clearinghouse (February 3, 2021), <https://foiaproject.org/2021/02/03/justice-delayed-is-justice-denied/>.

²⁰ American Society of News Editors, *In Defense of the First Amendment: U.S. News Leaders Feel Less able to Confront Issues in Court in the Digital Age*, John S. and James L. Knight Foundation (2015). https://knightfoundation.org/wp-content/uploads/2020/03/KF-editors-survey-final_1.pdf.

²¹ See, for example, Office of Inspector General Audit Report No. 12-14, Sept. 11, 2012, <https://www.archives.gov/files/oig/pdf/2012/audit-report-12-14.pdf>.

²² H.R. 5253 in the 115th Congress (2017-2018), introduced by Rep. Blake Farenthold, R-Texas, and co-sponsored by Rep. Matt Cartwright, D-Penn., in the House Oversight and Government Reform Committee, <https://www.congress.gov/bill/115th-congress/house-bill/5253?r=15>.

²³ See *Report to the Archivist of the United States, Final Report and Recommendations* by the 2018-2020 term of the Federal FOIA Advisory Committee (July 9, 2020), <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf> at 32. The rationale of the recommendation was explained: “Congress should also strengthen the Office of Government Information Services (OGIS), which it created to provide administrative oversight to agencies and the FOIA process. In the years since OGIS was established, it has had significant and growing impact on FOIA implementation across the government. However, the office is vastly understaffed, underfunded, and under-authorized to effectively oversee FOIA across the entire Federal government. Therefore, we urge Congress to significantly expand the funding and staffing for this important office and to strengthen the office’s authority on FOIA matters.” During discussions of that Committee term (2018-2020), the Vision Subcommittee concluded that staffing of just eight people would not work for added responsibilities. Also, OGIS staff emphasized that the current model is one of advocating for the FOIA process as a neutral mediator, not taking sides with agencies or requesters.

²⁴ This, according to the Global Right to Information Ratings conducted by the Centre for Law and Democracy and Access Info Europe, at <https://www.rti-rating.org/>. They rate FOIA statutes for the 134 nations that have them based on 61 indicators. Overall, the U.S. FOIA rates 74th, the bottom half of the world.

²⁵ Studies of state public record laws indicate that legal provisions do not correlate with actual compliance to public record requests, except for states that include mandatory attorney fee-shifting in their laws. See A.Jay Wagner, *Inherent Frictions and Deliberate Frustrations: Examining the Legal Variables off State FOI Law*

and nurtured through a political culture of openness and accountability. Already, some entities are tasked with helping FOIA work better, such as the Department of Justice [Office of Information Policy](#), chief FOIA officers within agencies, and the [Chief FOIA Officers Council](#).²⁶ Additionally, some would say we already have an independent oversight model with teeth – the federal courts. While an important solution of last resort, the [courts are clogged](#) with FOIA litigation,²⁷ costing agencies and taxpayers more than \$43 million a year, and alienating average Americans who cannot afford to sue. These mechanisms are insufficient, and further legislative authority for OGIS is needed, guaranteeing affordable and effective aid for requesters yet still protective of national secrets, privacy, and other legitimate competing interests.

We have gleaned the transparency literature dating back to the 1950s, examined models in the states and other nations, and interviewed three dozen experts.²⁸ The result is a blueprint for what we view as moving toward a better system – bringing the best elements together to help FOIA work better for everyone. FOIA oversight is more important than ever, as foes abroad and within threaten the country. Transparency is the bulwark against the ocean of tyranny. It is the support beam for the Republic’s house. We invested, this past year, in bridges, roads, and other physical infrastructure.

It is time, now, to redouble our investment in *democracy’s* infrastructure.

A reimagined oversight model

More than 80 nations and more than two dozen states have created mechanisms, other than the courts, to aid the public records request process. Many of these are granted significant authority and independence to do their jobs without political interference. Some oversight agencies, particularly at the state level, are similar to OGIS, where they attempt to mediate disputes and offer suggestions to legislative bodies for improving the law. Following a review of previous research (annotated bibliography provided in Appendix E), other models, and suggestions from more than 40 experts, this Subcommittee identified six overarching principles that appear to be consistent across the most effective oversight regimes:²⁹

Administration, 3 J. CIVIC INFO. 2, 29-49 (2021); see also David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Record Statutes on Agency Transparency in the United States*, presented at the Global Conference on Transparency Research, Rio de Janeiro (June 26, 2019), <https://drive.google.com/file/d/1R9PBjRjTreetcD-epJEq-o8ZSWZPKRjv/view>.

²⁶ Four entities are tasked in statute with improving the FOIA process: 1) DOJ/OIP: “encourage agency compliance with” FOIA, 5 USC 552(e)(6)(A)(iii); 2) OGIS: “review compliance with” FOIA by administrative agencies (5 USC 552(h)(2)(B)) & “identify procedures and methods for improving compliance” with FOIA, (5 USC 552(h)(2)(C)); 3) Chief FOIA Officers: “have agency-wide responsibility for efficient and appropriate compliance with” FOIA (5 USC 552(j)(2)(A)) & “ensure compliance with requirements of” FOIA via CFO annual review, (5 USC 552(j)(3)); and 4) Chief FOIA Officers Council: <https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council> (see “Purpose,” language directly from 5 USC 552(k)(5)(A)).

²⁷ See rise in FOIA litigation, as monitored by the FOIA Project at the Transactional Records Access Clearinghouse at Syracuse University. While new lawsuits have declined during the past few years, the overall trend since 2001 is a significant rise, from 456 pending cases in FY2001 to 1,448 in FY2019, <https://foiaproject.org/2020/01/23/lawsuits-annual-2019/>.

²⁸ See list of those interviewed in Appendix A, page 18.

²⁹ These closely mirror the six key qualities laid out by Laura Neuman in her analysis of national records oversight models, in Laura Neuman (2009), *Enforcement Models: Content and Context*, Washington, World Bank, p. 2,

1. **Accessibility** to the average citizen, where requesters do not need to hire a lawyer and pay little or nothing to have disputes settled.
2. **Expedience** in making timely decisions without unnecessary delay.
3. **Authority** to settle disputes with the power to examine records and compel agencies to provide records to requesters, within the bounds of the law and balancing legitimate competing interests.
4. **Independence** from the executive branch or other agencies they oversee.
5. **Resources** to succeed, with protections against retaliation.
6. **Power to educate** and develop a culture of openness in government.

While the U.S. was once a model for transparency, following passage of FOIA in 1966, it has fallen behind, according to Helen Darbishire, director of [Access Info Europe](#). “If we really care about democracy,” she told us, “we should be making it much easier for people to get information so they can understand what is happening, increase legitimacy in decision-making, and increase trust in government.”³⁰ The Organization of American States, which includes the United States, adopted the Inter-American Model Law on Access to Public Information in 2010, recommending that each country creates an information commission office with the authority to issue binding decisions or conduct mediation. The model law was updated in 2020, based on a decade of observation and experience, to emphasize that such commissions should go beyond mediation to have the power to “issue binding decisions and orders.”³¹

Connecticut has long been a model for government transparency since creating its [Freedom of Information Commission](#) in 1975.³² The commission is funded through a direct line-item budget from the Legislature and has the authority to reach binding decisions and issue fines of up to \$1,000 per violation. It hears about 800 cases annually and they each take approximately 5-7 months to resolve, with some up to a year.³³ Pennsylvania and New Jersey have adopted independent oversight offices, as well. The [Pennsylvania Office of Open Records](#) differs in that it relies on staff experts, instead of a commission, to resolve matters, which allows for faster resolution, usually within 30 days. About two dozen states have employed other models, often advisory through attorneys general offices or ombudsman agencies.

Globally, dozens of nations, such as Canada, Ireland, and the United Kingdom, have created independent oversight models with the authority to issue binding decisions. Mexico, in 2002, created an independent agency that has authority over all agencies in the country,

<https://documents1.worldbank.org/curated/en/816891468149680314/pdf/479910WBWPOEnf10Box338877B01PUBLIC1.pdf>.

³⁰ Personal interview with working group chair David Cuillier via Zoom (October 5, 2021).

³¹ Organization of American States, *Inter-American Model Law 2.0 on Access to Public Information*, at 79, https://www.oas.org/en/sla/dil/publications_Inter-American_Model_Law_2_0_on_Access_to_Public_Information.asp.

³² E. Bartlett Barnes, *Connecticut and Its Right-to-Know Laws*, XLIII *NIEMAN REPORTS* 3, 30-35 (1989). http://niemanreports.org/wp-content/uploads/2014/04/Fall-1989_150.pdf.

³³ Based on information provided to the working group from Colleen Murphy, executive director of the Connecticut Freedom of Information Commission (August 2021). The commission model, as opposed to a staff-driven model, as in Pennsylvania, has been criticized for taking too long – see, for example, Jacqueline Rabe Thomas, Walter Smith Randolph, Jim Haddadin, and Maxwell Zeff, *Long Delays at Connecticut’s Freedom of Information Commission Leave Public in the Dark*, CONNECTICUT PUBLIC RADIO (March 16, 2022), <https://www.ctpublic.org/2022-03-16/long-delays-at-connecticuts-commission-leave-public-in-the-dark>.

including the legislative, executive, and judiciary, at the local, state, and federal levels. Mexico has been a global leader in FOIA, passing one of the strongest laws in the world³⁴ and seeking to help average people access their government for free, and anonymously, through an online portal. Recent studies indicate that the enthusiasm for transparency at the initial start of Mexico's FOIA has waned over the years, and while the system is still seen as a model, it has begun to fray at the edges through bureaucratic and political capture.³⁵

Based on the six overarching principles above, and what other jurisdictions have put into practice, we recommend Congress and the Archivist implement the following actions to increase the effectiveness of OGIS for generations to come:

Recommendation 1

Congress gives OGIS the authority to make binding decisions.

We recommend that Congress clearly defines OGIS' mandate by resolving disputes through a mediation arm while also empowering it to issue binding decisions through adjudication, if requested, with the authority to compel agencies to release records. Requesters or agencies could still challenge such decisions in court.

In all, 69 nations' FOIA laws establish an independent oversight body that is empowered to issue legally binding orders, along with Connecticut, New Jersey, and Pennsylvania, at the state level. 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, will give up on their request altogether.

The preferred model in this recommendation is that of Pennsylvania, where a requester can file a complaint³⁶ with the [Office of Open Records](#) within 15 business days of the denial. Mediation is offered, but only if both parties agree to it. If mediation does not settle the matter, then it may be handed to a different complaint officer for a binding decision. One of the office's 14 complaint officers, all lawyers trained in the public records law, then makes a determination, looping back to the parties for clarification, if needed. A decision is written, evaluated by two editors, and then sent to the executive director or deputy director for final approval. About 70% of complaints are decided within 30 days and the rest within another 30 days, typically because of delays caused by *in camera* review of documents, if necessary, by the complaints officer. The agency's decisions are binding, although either side may challenge the decision in court (about 3% of decisions are challenged in court). The office has no authority to levy fines or punishment

³⁴ *Supra* note 24, specifically <https://www.rti-rating.org/country-data/>.

³⁵ Zachary Bookman and Juan-Pablo Guerrero Amparan, *Two Steps Forward, One Step Back: Assessing the Implementation of Mexico's Freedom of Information Act*, 1 MEXICAN L. REV. 2 (2009); Adriana Garcia Garcia, *Transparency in Mexico: An Overview of Access to Information Regulations and their Effectiveness at the Federal and State Level*, WILSON CENTER (December 2016), <https://www.wilsoncenter.org/publication/transparency-mexico-overview-access-to-information-regulations-and-their-effectiveness>; Paul Lagunes and Oscar Pocasangre, *Dynamic Transparency: An Audit of Mexico's Freedom of Information Act*, Inter-American Development Bank (2017), <https://publications.iadb.org/en/dynamic-transparency-audit-mexicos-freedom-information-act>.

³⁶ In the Pennsylvania system, a complaint is called an "appeal," going to an "appeals officer." For the purposes of this report, we use the term "complaint" instead of "appeal" to avoid confusion with the "administrative appeal" process at the federal level, where a dissatisfied requester may file an appeal directly with an agency.

against agencies. The office handles about 3,000 complaints annually, in addition to responding to thousands of phone calls and emails, and developing guides and training. The office has a total of 21 employees and a \$3.6 million annual budget, double the size of OGIS. A requester must try to find resolution through the Office of Open Records before filing a lawsuit.

Alternately, some nations and states use a commission to resolve disputes. Like Connecticut, the state of New Jersey has created a council, the [Government Records Council](#). The five appointed members meet monthly to resolve disputes. Requesters must decide whether to utilize the commission or courts to challenge a public records request denial, but can't use both. They may enter into mediation if both parties agree. If mediation doesn't work, staff collect arguments from both sides and draft findings and recommendations – a two-part report providing the factual background and legal analysis. Once the council approves the recommendation, the decision is binding, although either side can challenge the decision in court. In New Jersey, individual public officials may be fined personally for violating the law, but in 6,000 complaints, only about 10 have been fined (one individual was fined three times). Almost all decisions are decided by the council without a hearing. The disadvantage of such a system is the length of time it takes the four staff members to handle the 300 annual complaints annually, on a budget of \$500,000. Most cases can take 14-16 months to resolve. Given the importance for many requesters for a timely resolution, this Subcommittee recommends a staff-driven model, such as Pennsylvania's.³⁷

In both models, decisions may be appealed in court, providing a safety valve where an agency might argue that OGIS is incorrect. In Connecticut, less than 3% of FOI Commission decisions are appealed in court.³⁸ Most of the appeals are submitted by agencies, not requesters, and most of the commission's decisions are upheld by the courts,³⁹ indicating that a well-funded oversight agency with expert staff members works efficiently, saving time and money for requesters and the government by resolving disputes before they enter litigation. Perhaps, the ideal model might combine both elements: Experienced staff to focus on cases that can be settled quickly, as well as a commission to hear more complex, sensitive matters requiring full adjudication.

No doubt, questions and issues specific to the federal FOIA process will need to be hammered out during the 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 let them 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, such as journalists, might prefer? Those are just some of the details that would need to be worked out, and no doubt, others would arise. It also should be noted that if

³⁷ *Supra* note 33, where Connecticut's commission model has been criticized for being too slow for requesters – up to a year or more for resolution compared to a turnaround of one to two months in the staff-based Pennsylvania model.

³⁸ Information provided by Colleen Murphy, executive director of the Connecticut Freedom of Information Commission, via email to working group chair David Cuillier (February 4, 2022).

³⁹ *Id.*

such a system is created for OGIS, that caseload would likely increase significantly as requesters learn of a new resolution system that does not require hiring an attorney – a system that serves the average person, not just corporations and large national media that can afford to sue.⁴⁰ Funding would need to be commensurate with demand. We address some of these considerations in our further recommendations.

Recommendation 2

Congress gives OGIS the authority to review records *in camera*.

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 do not have to show OGIS unredacted records in 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), had it passed, would have granted OGIS this power.⁴¹ Many of the other nations' oversight agencies are provided high-level security status to review classified documents. Two OGIS staffers possess such clearance. Perhaps a special unit could be created within OGIS that specializes in disputes involving classified records, providing more consistency and expertise than the current system of individual federal district courts. When approached with this idea, OGIS staff offered some reservations:

1. It would require more time to process cases, thereby increasing delays under current staffing levels. Counter: We agree, which is why we recommend increasing OGIS' budget.

⁴⁰ About two-thirds of FOIA requests are submitted by commercial interests, see Margaret Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 7, 1361-1437 (2016); FOIA lawsuits filed by news organizations has increased significantly, from 41 cases in 2016 to 122 in 2020. The dominant litigants are better funded than the average citizen or small local news organization, including, in order, starting with the most litigious, BuzzFeed Inc., The New York Times, Center for Investigative Reporting, National Public Radio, and Center for Public Integrity. See FOIA Project, *When FOIA Goes to Court: 20 Years of Freedom of Information Act Litigation by News Organizations and Reporters*, Transactional Records Access Clearinghouse (January 13, 2021), <https://foiaproject.org/2021/01/13/foialitigators2020/>.

⁴¹ During the 115th Congress, Rep. Blake Farenthold, R-Texas, introduced the OGIS Empowerment Act of 2018, H.R. 5253. The intent was to amend FOIA to require agencies to provide records to the director of OGIS, with proposed language very similar to the one currently being considered: "(7) Each agency shall make any record available to the Director of the Office of Government Information Services for purposes of carrying out this subsection, upon request of the Director." This bill was introduced on March 15, 2018, but it did not receive a vote. The original need that animated OGIS' suggestion for a possible legislative solution and the resulting proposed statutory language could not have been more different. The original impetus for H.R. 5253 was to alleviate the need for agencies to have a routine use in place in their Systems of Records Notices (SORNs) in order to share agency records with OGIS as it performs its statutory mission. While the intent of H.R. 5253 was to take the burden off agencies to publish either new or amended SORNs, and simultaneously alleviate the need for agencies to review and segregate their files prior to OGIS review, it morphed into the OGIS Empowerment Act of 2018 and raised a number of issues. The U.S. Department of Justice vigorously opposed the bill, arguing, inter alia, that the proposed amendment unacceptably placed national security, law enforcement, and other sensitive information at risk; raised constitutional concerns; promoted inefficient FOIA administration; and ultimately was contrary to the very cooperative spirit of FOIA administration that OGIS' work is premised upon. It is not clear whether the passage of time would modify DOJ's strong opposition.

2. Most disputes do not require examination of records – they tend to focus on procedural issues. Counter: That is fine, and records would not have to be produced in every case – only in those situations where OGIS needs the records to make an informed decision.
3. Instead of focusing on individual cases, OGIS has concentrated efforts on identifying common problems in the aggregate and recommending changes. Counter: We agree with this approach – to make the best use of current resources. However, we believe OGIS should do both, by pointing out big-picture trends and at the same time serving individual requesters.
4. Such authority would shift the agency’s neutral position toward favoring requesters and create pushback from agencies. Counter: Indeed, OGIS staff has built trust among agencies, and we believe that would continue, even if reviewing records *in camera*. Ultimately, we feel that *in camera* review is a fundamental requirement to ensure an accurate, credible resolution that requesters and agencies can trust.

Recommendation 3

Congress directs the courts to give extra weight to OGIS decisions.

If OGIS is given authority to issue binding decisions, those could be challenged by agencies or requesters in court, as they are in Connecticut, New Jersey, and Pennsylvania. If the case decisions are challenged in court, Congress should direct the courts, through explicit legislation, to give weight to OGIS decisions. Congress in the Administrative Procedure Act can dictate the standards for judicial review, and courts often give deference to attorneys general opinions.

Recommendation 4

Congress creates a direct line-item budget for OGIS.

Congress should directly fund OGIS through a budget line item, as practiced in 66 other countries by their own legislative branches,⁴² as well as in 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](#) that created OGIS. A direct line-item budget 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.

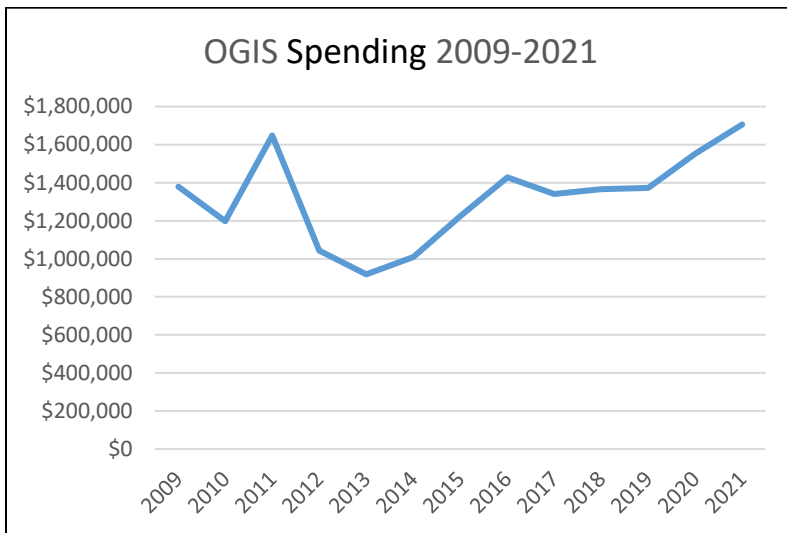
Recommendation 5

Congress increases OGIS’ budget to perform its duties.

On a per-capita basis, OGIS is the least-staffed FOIA oversight agency in the world. That includes nations, states, territories, and cities (See Appendix B for a list of the jurisdictions, their staffing levels, and per-capita staffing).

⁴² 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/>.

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 2021.⁴³ Yet, OGIS staffing levels are inadequate. Having just 10 employees (as of May 2022) puts OGIS on par with the Yukon Territory in Canada. Even 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 today’s dollars, accounting for inflation.⁴⁴ 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.⁴⁵ Increased funding is particularly important if OGIS is given more authority to issue binding decisions. While a more thorough analysis should be done to ascertain a prudent level of funding, we concluded the following:

1. Appeals are likely to increase significantly once requesters realize they can seek binding decisions without hiring an attorney. These could increase from 4,300 to 20,000 per year, one expert told us. More research could be conducted to survey requesters who were denied records to see if they would appeal to OGIS.

⁴³ Budget numbers provided by Alina Semo, director of the Office of Government Information Services (February 2, 2022). These numbers reflect actual spending, not the amount requested in the president’s budget.

⁴⁴ The Congressional Budget Office March 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>.

⁴⁵ An example of a recommendation not pursued because of staffing limitations included having OGIS staff critique and aid agencies in developing effective FOIA portals for requesters.

2. If 14 hearing officers can handle 3,000 appeals in Pennsylvania (about 200 per officer annually), we conclude that it would require 100 hearing officers within OGIS to resolve 20,000 appeals annually.
3. At \$150,000 per officer, including benefits, and 20 support staff members, we estimate the annual budget would total \$18 million.

Therefore, at 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 Guatemala, Brazil, 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,⁴⁶ 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), livestreaming solar eclipses (\$3.7 million), and developing a smart toilet app (\$142,000).⁴⁷ Further analysis could 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.⁴⁸ Also, OGIS could investigate online systems for facilitating resolution through synchronous and asynchronous means, creating further efficiencies.

Freedom of information is a congressional mandate to make democracy work.
It should not be an underfunded mandate.

Recommendation 6

The Archivist commissions a cost-benefit feasibility study.

We recommend that the Archivist of the United States studies the costs and benefits of the preceding recommendations, incorporating input from the requester community and agencies, to further refine a proposal(s) to aid Congress in drafting legislation. After we drafted our recommendations we ran them past the dozens of experts for feedback and received many thoughtful suggestions for further inquiry. For example:

- A survey of requesters might more precisely predict the potential increase in complaints to OGIS under the proposed changes, to more accurately estimate potential staffing needs. Currently, about 15,000 requesters file administrative appeals each year to challenge denials (about 2% of FOIA requests each year) and about 4,300 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 potential requesters dissatisfied, and if even half of them

⁴⁶ Valerie Insinna, *In Newly Inked Deal, F-35 Price Falls to \$78 Million a Copy*, DEFENSENEWS (October 29, 2019), <https://www.defensenews.com/air/2019/10/29/in-newly-inked-deal-f-35-prices-fall-to-78-million-a-copy/>.

⁴⁷ OpenTheBooks, *Where's the Pork?* (September 30, 2020), <https://www.openthebooks.com/wheres-the-pork-mapping-23-trillion-in-federal-grants-fy2017fy2019--openthebooks-oversight-report/>.

⁴⁸ Office of Information Policy annual report for FY20, at 20, <https://www.justice.gov/oip/page/file/1436261/download>. For a detailed examination of all FOIA costs since 1975, see A.Jay Wagner, *Essential or Extravagant: Considering FOIA Budgets, Costs and Fees*, 34 GOV'T. INFO. Q. 388 (2017).

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 the 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, though, 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 assigned among OGIS, the Department of Justice Office of Information Policy, 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 Ohio, Pennsylvania, and New Jersey.
- Further exploration could examine resolution agencies already employed within the federal government, such as the [Armed Services Board of Contract Appeals](#), 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](#) could be examined as potential models.
- Research could examine whether OGIS decisions would lead to greater agency compliance to FOIA overall as more disputes are resolved quickly rather than in the courts.
- An examination of whether other solutions, such as the ideas provided below and in Appendix C, would have greater impact.

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.

Recommendation 7

The Archivist returns OGIS as a direct report.

OGIS, at its inception, reported directly to the Archivist of the United States. In 2010, NARA announced its “Charter for Change,”⁴⁹ moving OGIS under the Agency Services division, [two levels below](#) 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.⁵⁰ While the plan stated that OGIS’ “independent nature and authority, as well

⁴⁹ A Charter for Change: Archivist’s Task Force on Agency Transformation, National Archives and Records Administration (October 2010), <https://aotus.blogs.archives.gov/wp-content/uploads/sites/11/2010/10/transformation-report-2010-10-12.pdf>.

⁵⁰ See National Archives and Records Administration organizational chart, <https://www.archives.gov/files/orgchart-a.pdf>.

as access to the Archivist, will be preserved,”⁵¹ and we have been told that access to Archivist David S. Ferriero was maintained, we recommend that NARA re-establishes OGIS’ direct report to the Archivist, reflecting its unique function to serve transparency for the entire executive branch and understanding that organizational culture can change, including under the next Archivist.⁵²

Other remedies for future consideration

Through our research, we learned of a variety of practices employed by oversight agencies in the states and other nations that illustrate the breadth of options available. We, however, could not reach consensus on whether to frame them as formal recommendations to Congress, at least at this time. It is worth highlighting some of the ideas so that they may be further examined in future Committee terms (additional boundary-pushing ideas, as well, are listed in Appendix C):

A. Fund OGIS well enough to issue advisory opinions on individual cases

If Congress does not give OGIS the authority to issue binding decisions, then at minimum, OGIS should issue advisory opinions for individual cases. Currently, OGIS has the statutory authority to issue advisory opinions for individual disputes between requesters and agencies, but it has not exercised this authority, even though urged to do so.⁵³ Many experts we talked to suggested that OGIS should make public its advisory opinions regarding individual disputes. However, OGIS has maintained that concerns regarding the confidentiality of the mediation process prohibits it from publicly issuing individual case advisory opinions.⁵⁴

B. Require agencies to participate in mediation, if requested by OGIS

⁵¹ *Supra* note 49, p. 28.

⁵² Archivist David S. Ferriero announced his retirement January 13, 2022, effective mid-April 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. <https://www.archives.gov/press/press-releases/2022/nr22-17>.

⁵³ See Mark H. Grunewald, *Resolving FOIA Disputes through Targeted ADR Strategies*, Administrative Conference of the United States (2014), which recommended OGIS use its statutory authority to issue individual advisory opinions for each dispute,

<https://www.acus.gov/sites/default/files/documents/FINAL%20ACUS%20Final%20FOIA%20Report%20-%20Grunewald%20-%2004-28-14.pdf>. However, the Conference chose not to include that point in their final recommendations:

<https://www.acus.gov/sites/default/files/documents/Recommendation%202014-1%20%28Resolving%20FOIA%20Disputes%29.pdf>.

⁵⁴ Prior to the passage of the FOIA Improvement Act of 2016, OGIS could issue advisory opinions for individual disputes, if mediation had not resolved the dispute. For several years OGIS struggled with how to reconcile its authority to issue advisory opinions with its ability to be an impartial party that facilitates the resolution of disputes between requesters and agencies in accordance with the confidentiality provisions of the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §§ 571-584. Issuing case-specific advisory opinions is inherently in conflict with ADRA’s confidentiality provisions, which prohibit a mediator from disclosing any details communicated during the dispute resolution process. With passage of the FOIA Improvement Act of 2016, Congress gave OGIS the power to issue advisory opinions at its discretion. OGIS has since used this now-modified advisory opinion authority to issue opinions that address the most common disputes, complaints, and trends that it uncovers through its dispute resolution practice that are mostly likely to lead to litigation.

Currently, OGIS focuses on dispute resolution, and mediation with both parties is critical to the process. Yet, such participation is voluntary, hindering the opportunity for resolution. Many courts, for example, require mediation before beginning adjudication.

C. Provide authority for OGIS to sue agencies to clarify the law

Sometimes areas of confusion and disagreement over FOIA statute result in ambiguity that requires clarity, yet requesters might not pursue that resolution in court. Congress could provide OGIS the authority to sue executive agencies to seek such clarity and establish case law that could provide direction for requesters and agencies. This has been practiced in Canada, for example, regarding fee practices.

D. Provide protections for the hiring/dismissal of OGIS directors

If OGIS is given authority to issue binding decisions, then political pressure might influence who and how directors are hired and removed. Congress could create laws to protect the OGIS director against political interference or retaliation in hiring and removal. In all, 73 nations provide such protections in their public record laws. Prohibitions also are put in place to prevent individuals with strong political connections from being appointed to OGIS.

E. Monitor and report to Congress agency compliance with FOIA

Congress could direct OGIS to examine and document, with sufficient trained staff to do so, specific agency compliance with FOIA, and provide reports directly to Congress and the public. Already, OGIS provides reports to Congress with general recommendations to improve the process, based on the totality of disputes it mediates each year. If given the authority to issue binding decisions, those could be disseminated to ensure executive agencies are held accountable publicly.

F. Provide mandatory online training for all federal executive branch employees

Every federal employee, or at least certain high-level employees handling federal records, could be required to complete training in FOIA law, and OGIS could be directed (and adequately funded) to carry out that training. Several states require public records law training of their employees. Such training can be created through streamlined and cost-efficient online modules for new government employees.

G. Direct OGIS to provide public education of FOIA

Task OGIS, accompanied with sufficient resources, to oversee public education on how to use FOIA, including public service announcements, online materials and videos, and curriculum development for schools. In all, 68 nations have some form of required public awareness-raising duties. This would empower people to engage with their government, and ultimately strengthen democracy.

H. Mandate agency improvements to records processes

Congress could empower OGIS, with accompanying resources, to evaluate agencies in their use of new technologies and proactive dissemination, providing guidance and tools for more streamlined processes, such as online request portals, document retrieval, shifting first-person requests to an automated process, and developing efficient redaction tools, all saving money for taxpayers and expediting requests.⁵⁵

⁵⁵ The access community has been more vocal in advocating for more proactive disclosure and utilization of technology to streamline the process. See, Daxton R. "Chip" Stewart and Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 4, 515-37 (2016); U.S. Government Accountability

I. Move OGIS outside of the executive branch

Place OGIS outside of the executive branch, either directly under Congress, the courts, or some other independent home, as it is in Connecticut, Mexico, the United Kingdom, Chile, and elsewhere. We believe that NARA has been an excellent home for OGIS during its initial first decade. Archivist David S. Ferriero values freedom of information. However, like any large executive agency, competing priorities prevent sufficient funding for OGIS, as we have witnessed. Structurally, its placement within the executive branch is a conflict of interest, even more so if OGIS is granted authority over executive agencies. Is it realistic to expect the executive branch to fund appropriately an entity that oversees internal operations, which may be viewed by some agencies in the branch as a hindrance, nuisance, or fundamental threat? It is akin to a one-legged hen guarding the fox house, with the pen gate left wide open. From the outset, structurally, it is destined to fail.⁵⁶

J. Establish resolution mechanisms in the judiciary to reduce FOIA litigation

In our research, we discovered models outside of the legislative and executive branches – that involve the judiciary to reduce public records litigation. For example, we were inspired by a relatively new [program](#) created by the Ohio Court of Claims, where an aggrieved requester may pay \$25 to have a judge with specialized expertise in public records law first attempt to mediate the dispute. If that does not resolve the matter, the judge may write a decision that is binding. No lawyers are required. The judge is allowed to see the unredacted records in rendering a position, and an agency may challenge the decision in court, but they rarely do. In the three years after the new Court of Claims option was established in Ohio, data shows that more than 95% of unsatisfied requesters chose the Court of Claims option rather than filing in common pleas courts. Of those in the Court of Claims, 60% were resolved in the mediation stage, and only a small number were appealed. Those we talked to in Ohio were very pleased with the system, finding it to be cheaper, faster, and satisfying for more parties. In Ohio, they have introduced legislation to provide a similar system for their open meetings law.

According to some experts we talked to, perhaps more than half of the FOIA cases that end up in federal court, most often in the District of Columbia, could be settled quickly without the need of lawyers, saving both requester and agency time and money. Often the cases focus on procedure that is relatively simple to resolve. That would leave the courts and agencies more time and resources to focus on the more complicated FOIA cases that require careful consideration of exemptions or clarify confusion in the law. This isn't an entirely new idea, as

Office, *Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements*, GAO-21-254 (March 2021); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PENN. L. REV. 1097-1158 (2017); Daniel Berliner, Alex Ingrams, and Suzanne J. Piotrowski, *The Future of FOIA in an Open Government World: Implications of the Open Government Agenda for Freedom of Information Policy and Implementation*, 63 VILL. L. REV. 867-894 (2019).

⁵⁶ Mark H. Grunewald in 1988 recommended an "Information Access Authority" be created to handle mediation and make binding decisions, with the head appointed by the president with Senate confirmation, and generally outside of the executive branch, similar to Canada's information commissioner, who reports directly to Parliament. He predicted such an entity could help resolve about 5,000 FOIA disputes per year (OGIS currently handles about 4,100 annually). See, Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN L. REV. 1, 1-66 (1988).

Ryan Mulvey and James Valvo [point out](#), since Congress has created courts that focus exclusively on international trade, patent disputes, and foreign intelligence surveillance.⁵⁷

See Appendix C for further ideas noted in other jurisdictions.

Thoughts from OGIS

During the research and drafting of this white paper and its recommendations, from August 2021 through April 2022, the working group discussed ideas with some OGIS staff members for feedback and response. Many of their thoughts were incorporated into these recommendations, but not all. On May 4, 2022, before the Committee meeting for final consideration of the recommendations, OGIS provided a three-page document with further feedback, added to this white paper as Appendix D. One particular concern expressed in the written feedback and previously verbally was that adding an enforcement function would potentially sour relations with federal agencies, and erode trust and credibility built painstakingly over time. We are confident, however, that those issues could be managed and that OGIS could maintain trust and credibility, based on our conversations with experts and information offices that have made the ombudsman and enforcement functions work in tandem. However, these questions and concerns illustrate the need to continue studying and exploring the ramifications and unintended consequences of the recommendations within this white paper.

Conclusion

We understand that implementing the ideal oversight model may require additional time to investigate projected expenses, possible unintended consequences, and the need to build bi-partisan support. Indeed, not every individual on the Committee agreed on every point – concessions were made, some wanted further powers included for OGIS and some wanted fewer.⁵⁸ A detailed feasibility study commissioned by the Archivist as suggested in Recommendation 6 of this report, would continue that discussion. Further consultation with the staff of other oversight models will prevent repeating their mistakes. Discussions with federal agencies, particularly in the national security sector, will be required to ensure the nation’s legitimate secrets are safe. Agencies should be given at least two years to adapt to these changes, as implementation takes time for training and new processes.

Will this “reimagining” require revamping OGIS, or scrapping it altogether and starting fresh? Toby Mendel, executive director of the Centre for Law and Democracy, told us: “How far can OGIS be realistically transformed? You don’t take a beat up car and turn it into a Cadillac. You buy a new Cadillac.”⁵⁹

Or perhaps an older model can indeed be restored, updated, and modified, resulting in something even better than a Cadillac.

⁵⁷ Ryan Mulvey and James Valvo, *Creating a Freedom of Information Court*, Americans for Prosperity (March 14, 2022), <https://americansforprosperity.org/creating-a-freedom-of-information-court/>.

⁵⁸ Some of the working group members wanted Congress to grant even more authority to OGIS, but were satisfied with the proposals as a starting point. One Legislation Subcommittee member opposed Recommendation 1, giving OGIS the authority to issue binding decisions. Two Subcommittee members expressed reservations about Recommendation 3, directing the courts to give deference to OGIS opinions.

⁵⁹ Interview with working group chair David Cuillier via Zoom (September 9, 2021).

Appendix A

Acknowledgements

We wish to thank the experts below for their valuable insights and contributions to this study, through interviews and email correspondence, and we know there are dozens more out there that we could have consulted. The people listed here do not necessarily agree with nor endorse the recommendations made in the report, but all of their input was taken into consideration and is appreciated.

1. **Amy Bennett**, Director of Communications, U.S. Department of Homeland Security and former President of the American Society of Access Professionals
2. **Eduardo Bertoni**, South American Representative of the Inter American Institute of Human Rights and former (and first) Director of the Argentina Access to Public Information Agency
3. **Thomas S. Blanton**, Director, National Security Archive
4. **Rick Blum**, Founder, Louder Voices, and former Director of News Media for Open Government and former Founding Director of OpenTheGovernment.org.
5. **Nathanael Byerly**, Deputy Director, Pennsylvania Office of Open Records
6. **Frank Caruso**, Executive Director, New Jersey Government Records Council
7. **Helen Darbishire**, Founder, Access Info Europe
8. **Lucy Dalglish**, Dean, Philip Merrill College of Journalism, University of Maryland, and former executive director of the Reporters Committee for Freedom of the Press
9. **Kristin Ellis**, Section Chief, Litigation and Technology Management Section, Federal Bureau of Investigation
10. **Robert Fisher**, Chief Circuit Mediator, U.S. Court of Appeals District of Columbia Circuit
11. **Mark H. Grunewald**, Professor of Law, Emeritus, Washington and Lee University
12. **Juan Pablo Guerrero**, Network Director, Global Initiative on Fiscal Transparency, and former (and one of the founding) Information Commissioner for Mexico's Federal Institute for Access to Public Information and Data Protection
13. **Harry Hammitt**, Editor and Publisher, *Access Reports*
14. **Robert (Bob) Hammond**, Citizen FOIA Advocate
15. **James Holzer**, Deputy Chief Privacy Officer, Department of Homeland Security and former Director of the Office of Government Information Services
16. **Alex Howard**, Director, Digital Democracy Project, Demand Progress
17. **Brian Hudak**, Acting Chief, Department of Justice U.S. Attorney's Office for the District of Columbia, Civil Division
18. **Nate Jones**, FOIA Director, The Washington Post, and former Director for the FOIA Project for the National Security Archive
19. **Michael Karanicolas**, Executive Director, University of California Los Angeles Institute for Technology, Law and Policy
20. **Margaret Kwoka**, Lawrence "Larry" Herman Professor in Law, The Ohio State University
21. **Royce C. Lamberth**, Senior Judge, U.S. District Court for the District of Columbia
22. **Suzanne Legault**, former Information Commissioner of Canada (2010-18)
23. **Jason Leopold**, Senior Investigative Reporter, BuzzFeed News

24. **Ronald Levin**, William R. Orthwein Distinguished Professor of Law, School of Law, Washington University in St. Louis
25. **Michael Linhorst**, Craig Newmark Fellow, Media Freedom and Information Access Clinic, Yale University
26. **Susan Long**, co-founder of Syracuse University's Transactional Records Access Clearinghouse and The FOIA Project
27. **Adam Marshall**, Senior Staff Attorney, Reporters Committee for Freedom of the Press
28. **Freddy Martinez**, Senior Policy Analyst, Open The Government
29. **David McCraw**, Vice President and Deputy General Counsel, *The New York Times*
30. **Toby Mendel**, Founder, Centre for Law and Democracy
31. **Kirsten B. Mitchell**, Compliance Team Lead, Office of Government Information Services, Designated Federal Officer for the FOIA Advisory Committee, and former President of the American Society of Access Professionals
32. **Colleen Murphy**, Executive Director, Connecticut Freedom of Information Commission
33. **Terry Mutchler**, former (and first) Director, Pennsylvania Office of Open Records
34. **Laura Neuman**, Director, Rule of Law Program, The Carter Center
35. **Miriam Nisbet**, former (and first) Director of the Office of Government Information Services
36. **James T. O'Reilly**, author of *Federal Information Disclosure*
37. **Alex Parsons**, Senior Researcher, mySociety
38. **Mitchell W. Pearlman**, former Connecticut Freedom of Information Commission Executive Director and General Counsel
39. **David Pozen**, Vice Dean for Intellectual Life and Charles Keller Beekman Professor of Law, Columbia Law School, Columbia University
40. **Michael Ravnitzky**, Attorney
41. **David A. Schulz**, Floyd Abrams Clinical Lecturer in Law and Senior Research Scholar, Yale Law School, Yale University
42. **Matthew Schwarz**, Attorney-Advisor, Office of General Counsel, Environmental Protection Agency
43. **Alina M. Semo**, Director, Office of Government Information Services
44. **Daxton "Chip" Stewart**, Professor, Bob Schieffer College of Communication, Texas Christian University
45. **Liz Wagenseller**, Executive Director, Pennsylvania Office of Open Records

Appendix B

Staff Rate for Access to Information Agencies (including states, territories, and nations)

Territory	Type	Population	Year established	Staff numbers	Staffing rate (per 1 million population)	Mission: ATI-Privacy
Gibraltar	Nation	33,701	2000	20	593.45	ATI/privacy
Cayman Islands	Nation	65,722	2017	15	228.23	ATI/privacy
Yukon	State	42,052	1996	9	214.02	ATI/privacy
Jersey	State	97,857	2018	14	143.07	ATI/privacy
Fribourg	City	38,829	2011	4	103.02	ATI/privacy
Isle of Man	Nation	85,033	1988	7	82.32	ATI/privacy
Guatemala	Nation	17,915,568	1987	750	41.86	ATI
Malta	Nation	502,653	2002	15	29.84	ATI/privacy
Peru	Nation	32,971,854	1995	782	23.72	ATI
Coahuila	State	3,147,000	2004	62	19.70	ATI/privacy
New Zealand	Nation	4,822,233	1962	93	19.29	ATI
Geneva	City	198,979	2010	3	15.08	ATI/privacy
Berlin	City	3,645,000	1999	51	13.99	ATI/privacy
Albania	Nation	2,877,797	2008	39	13.55	ATI/privacy
Mexico (State)	State	16,992,418	2004	222	13.06	ATI/privacy
United Kingdom	Nation	67,886,011	1984	856	12.61	ATI/privacy
Alberta	State	4,371,000	1995	47	10.75	ATI/privacy
Hungary	Nation	9,660,351	2012	103	10.66	ATI/privacy
Brazil	Nation	212,559,417	2003	2,200	10.35	ATI
Serbia	Nation	8,737,371	2004	89	10.19	ATI/privacy
Catalonia	City	7,566,000	1984	73	9.65	ATI
Nova Scotia	State	971,395	1994	8	8.24	ATI/privacy
Victoria	State	6,681,000	2017	55	8.23	ATI/privacy
Uruguay	Nation	3,473,730	2008	28	8.06	ATI
Queensland	State	5,185,000	1992	40	7.71	ATI/privacy
Chile	Nation	19,116,201	2009	140	7.32	ATI/privacy
Rhineland	State	4,005,000	2011	26	6.49	ATI/privacy
Mexico (Nation)	Nation	128,932,753	2002	696	5.40	ATI
Ireland	Nation	4,937,786	1998	24	4.86	ATI
Scotland	Nation	5,454,000	2003	26	4.77	ATI
Western Australia	State	2,667,000	1993	12	4.50	ATI
Connecticut	State	3,565,287	1975	16	4.49	ATI
Switzerland	Nation	8,654,622	1993	36	4.16	ATI/privacy
New South Wales	State	8,166,000	2011	30	3.67	ATI/privacy
Australia	Nation	25,499,884	2010	89	3.49	ATI/privacy

Reimagining OGIS Recommendations 05.04.2022

Tunisia	Nation	11,818,619	2017	40	3.38	ATI
Canada	Nation	37,742,154	1983	100	2.65	ATI
Sierra Leone	Nation	7,976,983	2013	21	2.63	ATI
Germany	Nation	83,783,942	1978	180	2.15	ATI/privacy
Pennsylvania	State	12,801,989	2008	21	1.56	ATI
Punjab	State	27,980,000	2014	43	1.54	ATI
Afghanistan	Nation	38,928,346	2014	51	1.31	ATI
Portugal	Nation	10,280,000	1993	11	1.07	ATI
Israel	Nation	8,655,535	2011	9	1.04	ATI/privacy
Argentina	Nation	45,195,774	2017	43	0.95	ATI/privacy
New Jersey	State	8,882,190	2002	6	0.68	ATI
Buenos Aires	City	15,257,673	2018	8	0.52	ATI
Spain	Nation	46,754,778	2014	22	0.47	ATI
Bangladesh	Nation	163,000,000	2009	76	0.47	ATI
Philippines	Nation	109,581,078	2017	41	0.37	ATI
Morocco	Nation	36,910,560	2019	10	0.27	ATI/privacy
Belgium	Nation	11,589,623	2007	1	0.09	ATI
United States	Nation	331,002,651	2009	10	0.03	ATI

Sources: Data from the International Conference of Information Commissioners (ICIC) membership list, <https://www.informationcommissioners.org/icic-members/>, and state numbers from Colleen Murphy, director of the Connecticut Freedom of Information Committee, gathered December 2021. Some national bodies handle both access to information and data privacy oversight, unlike OGIS, which focuses only on FOIA. This list does not encapsulate all ATI (“Access to Information”) offices in the world – many out there, no doubt, are funded more poorly, and not members of the ICIC. Further research should delve deeper into identifying and comparing oversight agencies in the states and globally.

Appendix C

Additional elements of FOIA oversight from other models in the world

Below are practices employed by jurisdictions that we noted in our research, some of which would face insurmountable odds to implement in the U.S. and some that we do not necessarily support, and many would require sufficient funding. But they do provide a variety of approaches and thoughts about what is possible.

1. **FOIA panel:** Create commissions assigned to hear disputes and make binding decisions. Or, create an administrative law system, like the Federal Trade Commission (FTC) or Federal Communications Commission (FCC) (or new copyright panel).
2. **Onus on the agency:** During the dispute resolution process, the burden is on the agency to demonstrate it did not violate procedures, or that information should be withheld from disclosure. The burden should not be on the requester to prove the information should be disclosed.
3. **Information and privacy:** Make OGIS, or some other FOIA agency, in charge of information and data privacy - all in one to address consumer concerns. A dominant world model, combining freedom of information and privacy oversight in one agency.
4. **Blacklist:** OGIS creates an online list that includes all agencies and individuals who refuse to comply with the law (Argentina's office publicizes such a list).
5. **Administrative punishment:** Empower OGIS to recommend to agency heads that they administratively punish employees for violating FOIA, as a violation of government ethics law, or other administrative regulation for lying or not upholding their duties. This could include mandating that every agency adopt FOIA performance standards in federal employee appraisals, as a previous Federal FOIA Advisory Committee term investigated. The 2016-18 Committee recommended that OGIS examine what employee appraisal standards are already in existence; OGIS found that nearly half of agencies do not have FOIA performance measures for non-FOIA professionals. See report: <https://www.archives.gov/files/ogis/assets/foia-perf-measures-for-nfp-assessment-29-sept-2020.pdf>.
6. **Requester appointees:** Require that the head of OGIS (and/or majority of the staff) be a former journalist, or from the requester community.
7. **FOIA legislative intent:** Congress approves clear mandate for FOIA to favor transparency - to promote that mission of transparency, erring on the side of transparency.
8. **Open through tardiness:** If an agency fails to meet response deadlines then the record is considered public and must be disclosed, or the matter heads directly to court.
9. **FOIA police:** Give enforcement powers (fines, jail) to OGIS. In Chile, the oversight agency can dock the pay of government employees who violate FOIA.⁶⁰ More than 90 nations

⁶⁰ Could be difficult, but sanctions are common at the state level. See Thomas M. Susman, Ashwini Jayaratnam, David C. Snowden, and Michael Vasquez, *Enforcing the Public's Right to Government Information: Can Sanctions Against Officials for Nondisclosure Work?* (2012) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295466.

have granted their oversight agencies some forms of punitive powers. Enforcement mechanisms in the states vary and generally lack teeth.⁶¹

10. **Triple oversight:** To address the separation of powers issue, create a separate oversight office over each branch of government, funded and appointed/fired by the other two branches (similar to Argentina, which has a separate office over each of its six branches of government). Disadvantage is each office might come up with different standards.
11. **Oversight branch:** Create a fourth independent branch that has oversight over the three other branches regarding ethics, FOIA, corruption, etc.
12. **U.S. FOIA Office:** Create a single independent agency that has oversight/enforcement power over all branches and forms of government – federal, state and local – creating consistent law, requesting/tracking/reporting procedures, education/training, online platforms, and enforcement.
13. **Constitutional right.** Make the right to information a constitutional right in the United States through a 28th constitutional amendment, as it is in about 60 other nations and in a half dozen state constitutions.⁶²
14. **Fundamental human right.** Some nations and international courts have declared the right to information a fundamental right, like the right to clean water or to be free from torture.⁶³

⁶¹ For a state-by-state breakdown of various penalties in state public record laws, see Daxton R. “Chip” Stewart, *Let the Sunshine In, or Else: An Examination of the ‘Teeth’ of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL’Y 265-310 (2010); Chad G. Marzen, *Public Records Denials*, 11 N.Y.U. J. L. & LIBERTY 966-1027 (2018).

⁶² See an analysis of constitutional right to know in the states, and arguments for a federal constitutional right to know, by Chad G. Marzen, *A Constitutional Right to Public Information*, 29 PUB. INT. L. J. 223-244 (2020).

⁶³ See the United Nations’ Universal Declaration of Human Rights, Article 19, adopted in 1948, where “Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; Also, see Maeve McDonagh, *The Right to Information in International Human Rights Law*, 31 HUM. RTS. L. REV. 1, 25-55 (2013), <http://www.corteidh.or.cr/tablas/r30698.pdf>.

Appendix D

OGIS’s Feedback on Reimagining OGIS Working Group & Legislation Subcommittee Recommendations to the Federal FOIA Advisory Committee May 4, 2022

As the Freedom of Information Act (FOIA) Ombudsman, the Office of Government Information Services (OGIS) has played an important and unique role in the FOIA process since it opened its doors in 2009. FOIA authorizes OGIS to review agencies’ policies, procedures, and compliance with the FOIA, and to offer mediation services to resolve disputes between FOIA requesters and agencies. OGIS uses these mandates, along with the ombuds standards of independence, impartiality, and confidentiality⁶⁴ to identify procedures and methods to improve overall compliance with the FOIA.

OGIS advocates for the FOIA process itself rather than individual FOIA stakeholders. OGIS’s unique position within the FOIA process allows it to hear from a variety of requesters, from the least experienced to the most experienced. OGIS also hears from agencies—in particular, the hardworking FOIA professionals who invite OGIS to help them improve the efficiency of their offices and the quality of their communications with requesters. OGIS engages with the U.S. Government Accountability Office (GAO)⁶⁵ and the U.S. Department of Justice Office of Information Policy (OIP), frequently sharing its observations regarding the FOIA landscape. By observing how FOIA functions across the government, OGIS is able to help identify best practices in FOIA and develop recommendations to improve FOIA overall.

OGIS’s work as the FOIA Ombudsman dovetails seamlessly with the FOIA statute and Congress’s vision for the office. By listening and observing the FOIA process in action, we help to “resolve disputes ... as a nonexclusive alternative to litigation.”⁶⁶ By allowing our dispute resolution work to serve as a FOIA barometer and assessment of a range of FOIA issues, OGIS fulfills Congress’s mandate to review FOIA policies, procedures and compliance, and identify procedures and methods for improving compliance with FOIA.⁶⁷ And by speaking about systemic change in a variety of ways, OGIS fulfills Congress’s mandate to “identify procedures and methods for improving compliance” with FOIA.⁶⁸

As the public’s trust in government institutions waxes and wanes, ombuds offices play an important role in bolstering public trust and confidence. OGIS’s role as the FOIA Ombudsman is

⁶⁴ See 2016 Administrative Conference of the United States (ACUS) Recommendation 2016-5, “[A Reappraisal – The Nature And Value Of Ombudsmen In Federal Agencies Part 2: Research Report.](#)”

⁶⁵ The FOIA statute tasks GAO with conducting FOIA audits. 5 U.S.C. § 552(i).

⁶⁶ 5 U.S.C. § 552(h)(3).

⁶⁷ 5 U.S.C. §§ 552(h)(2)(A)-(B).

⁶⁸ 5 U.S.C. § 552(h)(2)(C).

doubly important, considering that FOIA provides access to information that sheds light on the actions of government agencies. Although OGIS was created as an alternative to litigation, many of the conflicts and/or difficulties that requesters encounter during the FOIA process and bring to OGIS are not necessarily ripe for litigation—or even mediation. OGIS strives to meet requesters where they are in the process: whether it is explaining the FOIA process to a first-time requester or attempting to reopen communication between an experienced requester and an agency. OGIS also strives to meet agencies where they are in the process and help develop ways agencies can better communicate with requesters.

The thread that runs through all of OGIS’s work is building trust in the FOIA process by holding space for vital and sometimes difficult conversations to occur, and using what OGIS learns to raise awareness regarding broad, systemic issues ripe for attention and change. That is why it is vital for OGIS to retain its important role as the ombudsman rather than assume an adjudicatory function as contemplated by the Working Group’s Recommendation.

OGIS shares the Working Group’s desire to make the FOIA process fairer and more efficient so that it works for *all* stakeholders, as noted above. Indeed, that has been the goal of the FOIA Advisory Committee since its creation in 2014. NARA established the 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.

We support *Recommendation No. 6*, that (the Archivist of the United States commissions 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). In supporting Recommendation No. 6, OGIS suggests that a non-governmental organization or academic institution might be best suited to conduct such a study. Moreover, in implementing Recommendation No. 6, the study could also consider the “Other remedies for future consideration” that the Working Group includes in its white paper (A-J).

With regard to *Recommendation No. 1* (Congress gives OGIS the authority to make binding decisions), *Recommendation No. 2* (Congress gives OGIS the authority to review records in camera), and *Recommendation No. 3* (Congress directs the federal courts to give extra weight to OGIS decisions), OGIS has a number of concerns. As discussed earlier, OGIS’s approach from the beginning has been – and continues to be – that of the FOIA Ombudsman, consistent with what OGIS believes Congress envisioned.⁶⁹ These three recommendations, if enacted, would significantly shift OGIS away from what we have spent over 12 years building – including significant trust among a wide range of FOIA stakeholders. These new functions/duties would not only interfere with our current function and structure but would drastically change OGIS’s role from an ombudsman to an enforcer/adjudicator.

OGIS helps, on average, over 4,000 requesters annually (these include individuals, for-profit and nonprofit organizations, and journalists), who seek ombuds services. Although OGIS is unable to quantify how many requesters who have used our services decide not to file suit, we believe that

⁶⁹ See <https://www.leahy.senate.gov/press/leahy-cornyn-urge-doj-to-clarify-departments-position-on-foia-ombudsman>.

a vast majority never sue. Rather, these requesters need help navigating various parts of the FOIA administrative process. OGIS also helps agencies who come to us seeking our counsel on how to best satisfy requesters' needs. These voices are important and we must continue to hear from them. OGIS is concerned that shifting our role to an enforcement office (the "FOIA police") – as per Recommendations Nos. 1-3 – would erode the trust and safe space for vital conversations that OGIS has built over the years with both requesters and agencies. This construct would also run directly counter to commonly accepted ombuds standards.⁷⁰ Moreover, OGIS would have to expand and fundamentally restructure itself, including creating walls between different teams of people to work on the different responsibilities – some of which would be in direct conflict (negotiator versus enforcer).

Recommendation No. 4 (Congress creates a direct line-item budget for OGIS) 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. But regardless of whether OGIS has a separate line-item or continues to draw its funding from the overall NARA-allocated budget, OGIS agrees that it has been underfunded since its creation.

Recommendation No. 5 (Congress increases OGIS's budget). The talented, creative, and hard-working OGIS staff has consistently done more with less and has operated with a staff deficit for much of its 12-plus-year existence. Even a modest budget increase would permit expansion of the current Mediation Team, helping to reduce our complex cases backlog; and would also permit expansion of the Compliance Team, whose work fits squarely in the Ombudsman's role of identifying systemic issues and the opportunities for change that those issues bring. That said, it is not at all clear to us that funding OGIS on the scale being proposed in the Working Group's white paper would actually fix the intricate and complex FOIA ecosystem writ large.

Finally, with respect to *Recommendation No. 7* (the Archivist of the United States returns OGIS as a direct report), we understand the rationale for moving OGIS under the umbrella of Agency Services as part of the 2010 Archivist's Task Force on Transformation. That reorganization grouped NARA offices and programs into three primary customer groups: Agencies, Researchers, and Visitors – to allow NARA staff to provide better services to customers and make it easier for customers to interact with staff. The reorganization relieved the Archivist from having direct supervisory and day-to-day organizational oversight of OGIS – a substantial duty. The transformation, however, was not intended to affect OGIS's independent nature and authority, as well as access to the Archivist. Indeed, during the past 12 plus years, OGIS has enjoyed unfettered access to – and support from – now retired Archivist David S. Ferriero and former Deputy Archivist and now Acting Archivist Debra Steidel Wall. In terms of resources (and budget – addressed earlier), OGIS's placement in Agency Services has also resulted in competing with several other NARA offices for the same money allocated to the Agency Services division. As an ombuds office, OGIS is likely the only such office in the federal government that does not occupy an independent place in the agency's organizational chart, even though it serves the unique role of the federal FOIA Ombudsman for the entire federal government. Although organizational location does not necessarily equal importance or influence, OGIS's future under a newly appointed Archivist remains unwritten.

⁷⁰ See, e.g., USOA Standards, <http://www.usombudsman.org/wp-content/uploads/USOA-STANDARDS1.pdf>, Section II STANDARDS, A. Independence.

Appendix E

Annotated studies and reports on public records oversight models

Most recent at the top, descending by year.

1. **Michael Karanicolas and Margaret Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 3 (2022).** Early version: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927852
Compares OGIS to other nations' oversight models, concluding that the strongest models rely on an independent administrative body outside the executive branch with the power to compel agencies to disclose records.
2. **Toby Mendel, *Right to Information Oversight Bodies: Design Considerations*, Centre for Law and Democracy report to the World Bank (2017).**
One of the most detailed explanations of the various records oversight models, and the pros and cons of their specific elements, such as binding vs. non-binding powers, independence of funding, accountability, policy development, and educational mission.
3. **Toby Mendel, *The Fiftieth Anniversary of the Freedom of Information Act: How it Measures up Against International Standards and Other Laws*, 21 COMM. L. & POL'Y 4, 465-91 (2016).**
U.S. FOIA rates poorly compared to other countries' FOIA laws when it comes to oversight, particularly on sanctions. Bottom half of the world on appeals.
4. **Mark Fenster, *The Informational Ombudsman: Fixing Open Government by Institutional Design*, 6 INT'L J. OPEN GOV'T 275-96 (2015).**
Surveyed the landscape of U.S. oversight and ombuds systems, focusing on a number of interesting models, particularly those in Connecticut and New Jersey, as relatively successful in large part due to the statutory structure of the systems. Also, finds the Florida system effective due to a long-serving, well-respected attorney creating a culture of compliance.
5. **Toby Mendel, *Designing Right to Information Laws for Effective Implementation*, World Bank Right to Information Series (2015).**
<https://openknowledge.worldbank.org/bitstream/handle/10986/22507/DesigningRighttoInformationImplementation.pdf?sequence=1&isAllowed=y>
Notes that "Central Support Bodies" are critical to success of right-to-information laws, addressing complaints from requesters, providing training for employees, and educating the public to their rights. Ideally, an oversight body would be independent of the executive branch with binding powers, which increases compliance with the law significantly.

6. **Mark H. Grunewald, *Reducing FOIA Litigation Through Targeted ADR Strategies*, Administrative Conference of the United States (April 28, 2014).**
<https://www.acus.gov/sites/default/files/documents/FINAL%20ACUS%20Final%20FOIA%20Report%20-%20Grunewald%20-%202014-28-14.pdf>
Studied FOIA court cases from 2010 through 2013 to categorize most common types of FOIA lawsuits, finding wide variation and concluding that no simple formula for resolution is likely to be fruitful. For example, might target different resolution models to different exemption disputes or requester categories. Suggested OGIS continue to resolve “Quick Hit” disputes, which is effective, and also start using its authority to issue advisory opinions for individual cases. Also suggested that agencies fully cooperate and comply with OGIS’ recommendations. See final recommendations by the Administrative Conference of the United States, which did not include that OGIS use its power to issue advisory opinions on individual cases, contrary to Grunewald’s suggestion:
<https://www.acus.gov/sites/default/files/documents/Recommendation%202014-1%20%28Resolving%20FOIA%20Disputes%29.pdf>
7. **Jonathan Anderson, *Resolving Public Records Disputes in Wisconsin: The Role of the Attorney General’s Office*, Master’s Thesis, University of Wisconsin-Milwaukee (2013).**
<https://dc.uwm.edu/cgi/viewcontent.cgi?article=1661&context=etd>
Analyzed 304 cases over six years and interviewed 17 requesters to conclude that AG intervention can be useful at times but is still unsatisfactory for many requesters, particularly because of the lack of enforcement.
8. **Thomas M. Susman, Ashwini Jayaratnam, David C. Snowden, and Michael Vasquez, *Enforcing the Public’s Right to Government Information: Can Sanctions Against Officials for Nondisclosure Work?* (2012).**
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295466
Applying sanctions against officials for nondisclosure could be difficult, but they conclude that sanctions lead to better training of government employees and could increase compliance with FOIA.
9. **Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media’s Use of FOIA Laws*, MICH. ST. L. REV. 981-1055 (2012).**
<https://hcommons.org/deposits/item/hc:35837/>
Evaluates record appeals systems at the state and federal level, and provides suggestions. Recommends an independent commission with powers to compel agencies to release records, and for media requesters, where time is important, with mediation within a week of complaint and hearing within 45 days.
10. **Daxton R. “Chip” Stewart, *Evaluating Public Access Ombuds Programs: An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising under Open Government Laws*, 2 J. DISP. RESOL. 437-505 (2012).**
<https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1659&context=jdr>

A deep case study examination, based on Dispute Systems Design, at each of these three states to recommend six best practices for designing a records ombuds program: involve stakeholders, ensure impartiality, choose a strong leader, get stakeholders involved early, emphasize training and education, and periodically evaluate the program.

- 11. Sarah Holsen and Martial Pasquier, *Insight on Oversight: The Role of Information Commissioners in the Implementation of Access to Information Policies*, 2 J. INFO. POL'Y 214-41 (2012).**

https://www.jstor.org/stable/10.5325/jinfopoli.2.2012.0214#metadata_info_tab_contents

Examines information offices of 10 countries (not including the U.S.), concluding that key elements include independence, authority, resources, and leadership. They conclude that the benefits of such an office outweigh the disadvantages.

- 12. Margaret B. Kwoka and Melissa Davenport, *Good but Not Great: Improving Access to Public Records Under the D.C. Freedom of Information Act*, 13 D.C. L. REV. 359 (2010).**

<https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1031&context=facpubs>

Suggests establishing a FOIA oversight office for the District of Columbia, stating it should be independent and have authority, and create a system that avoids delays.

- 13. Daxton R. "Chip" Stewart, *Let the Sunshine In, or Else: An Examination of the 'Teeth' of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265-310 (2010).**

Examines the various enforcement mechanisms within public record laws at the state level, focusing on injunctions and mandamus, punitive damages, attorneys' fees, and civil and criminal sanctions. Recommends enhanced and uniform penalties, consistent enforcement, and alternatives to litigation.

- 14. MITCHELL W. PEARLMAN, *PIERCING THE VEIL OF SECRECY: LESSONS IN THE FIGHT FOR FREEDOM OF INFORMATION* (2010).**

Notes that a jurisdiction can have the best law in the world, but without effective enforcement it's meaningless: "... The most liberal disclosure laws are essentially useless if there's no practical means of enforcing them." (p. 130) He writes that courts are an insufficient remedy for the average person because of the time and expense.

Jurisdictions with a strong press and non-governmental organizations tend to have the best compliance with records laws. "Based on past experience, I predict that the battle to establish – and maintain – effective Freedom of Information enforcement authorities will be a long and difficult one. No government or official wants to cede its control over information to an independent third party. Yet, who would've believed that Mexico – a traditional oligarchy – would do just that?" (p. 131)

15. Daxton R. “Chip” Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, 1 J. MEDIA L. & ETHICS 2, 49-82 (2009).

Examined all 50 states and Washington, D.C., to identify the main mediation models in at least 32 states, including through attorneys general, administrative agencies, ombudsman offices, or a combination. Ultimately, does not say which is the most effective, but urges future research to see how the systems work in practice.

16. Laura Newman, *Enforcement Models: Content and Context*, Media, Information, and Governance Program at the World Bank Institute (2009).

<https://documents1.worldbank.org/curated/en/816891468149680314/pdf/479910WBWP0Enf10Box338877B01PUBLIC1.pdf>

Key elements of enforcement of an oversight body are: Independence from political influence, accessible to requesters without need of legal representation, simple, affordable, timely, and led by a specialist with knowledge of FOI laws. Reviews three models in the world, such as judicial review (expensive), ombudsman (no authority), and commissioner with authority (what she considered the best: affordable, easy, timely, independent). Ultimately, success depends on independence (appointment, removal, budget and placement), compliance/authority, resources, and character of the person in charge.

17. Kate Allan and Iain Currie, *Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa*, 23 S. AFR. J. HUM. RTS. 3, 563-79 (2007).

<https://www.tandfonline.com/doi/abs/10.1080/19962126.2007.11864933>

Examined proposals for South Africa to improve its FOIA law, including the concept of “Information Courts” to handle FOIA disputes, a “Public Protector” office to mediate and make recommendations to Parliament, and an “Information Protection Regulator” to enforce compliance.

18. Laura Neuman, and Richard Calland, *Making the Law Work: The Challenges of Implementation*, THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD, ed. A. FLORINI (2007).

Discusses the challenges of implementing and enforcing FOIA laws once they are adopted. Notes that focus on exemptions is shortsighted and even more important is serious attention to methods to ensure compliance with the law, such as building political will, effective processing systems, employee training, and oversight bodies.

19. Harry Hammitt, *Mediation Without Litigation*, 2 THE FOI REPORTS, 3 National Freedom of Information Coalition (2007). https://www.nfoic.org/wp-content/uploads/hammitt_mediation_without_litigation.pdf

Examines formal dispute resolutions in Connecticut, New Jersey, New York, Minnesota, Hawaii, Indiana, Illinois, Iowa, Florida, Maryland, Georgia, Washington state, Arizona, and Virginia. Also examines informal models and attorney general mediation. Predicted a FOIA ombudsman (OGIS) would be less well suited for the federal government.

- 20. Yunjuan Luo and Anthony L. Fargo, *Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study*, Indiana Coalition for Open Government (2007).** <http://www.pfaw.nfoic.org/sites/default/files/ICOG-IU-2008-Survey.pdf>
A survey of 120 requesters who had used the Indiana records ombudsman office found that two-thirds were generally satisfied with the decisions, but 91% said the office should have the authority to compel agencies to disclose records.
- 21. The Carter Center, *Mechanisms for Monitoring and Enforcing the Right to Information Around the World*, in *Access to Information: Building a Culture of Transparency*, 49-56 (2006).** www.cartercenter.org/documents/2364.pdf
Examines how access to information laws have worked around the world. Lays out five principles that every oversight agency should satisfy: Accessibility to average people, affordability, timeliness, independence and specialization (a specific body that has expertise in FOIA law). Reliance on the courts to resolve disputes is insufficient.
- 22. JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE (3rd ed. 2000).**
Perhaps the most detailed examination of FOIA in all respects, including discussion of FOIA's origins, each exemption, political aspects, how it is litigated, privacy rights, the Sunshine Act, Federal Advisory Committee Act, state access laws, and affirmative disclosure.
- 23. Charles N. Davis, Milagros Rivera-Sanchez, and Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 *Urb. Law.* 1, 41-64 (1996).**
The authors review appellate court interpretations of enforcement provisions for state open meeting laws, including a state-by-state listing of statutes, and offer a model enforcement statute. They note that statutes are usually vague and rarely enforced. They recommend amending statutes to make enforcement provisions mandatory, requiring that any action taken illegally be deemed void, and include criminal or civil penalties for willful and knowing violations. Recommend removal of officials from office on a third violation, following a jury trial.
- 24. E. Bartlett Barnes, *Connecticut and Its Right-to-Know Laws*, XLIII *NIEMAN REPORTS* 3, 30-35 (1989).** http://niemanreports.org/wp-content/uploads/2014/04/Fall-1989_150.pdf
Describes how motivated journalists started lobbying for a strong public records law in Connecticut in 1950, eventually getting one passed in 1957 and then pushed hard to get a stronger law passed in 1975, which created the world's first FOI commission with the power to issue binding decisions in public records disputes. Explains how the commission and law was working in the decade following the launch of the commission – in general it was perceived favorably by journalists.

25. Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 1-66 (1988).

Recommends an independent administrative tribunal model or an ombudsman-based structure to ease federal FOIA litigation. Estimated that about 5,000 cases could be resolved by such an agency (4,100 handled today by OGIS). Points to Connecticut (binding decisions), New York (advisory), and Canada (enforcer on behalf of Parliament) as good models. Recommends an ombudsman model or an “Information Access Authority” to handle mediation and make binding decisions, with the head appointed by the president with Senate confirmation. Cases would be handled by administrative law judges.

26. Mark H. Grunewald, *Administrative Mechanisms for Resolving Freedom of Information Act Disputes*, for the Administrative Conference of the United States (December 15, 1986). <https://www.acus.gov/sites/default/files/documents/1987-Statement%2312%20Administrative%20Mechanisms%20for%20Resolving%20FOIA%20Disputes.pdf>

An exhaustive 160-page report based on 27 interviews and examining FOIA court caseload, non-judicial compliance mechanisms, and dispute resolution applied in Connecticut, New York, and Canada. Concludes that an administrative resolution system would serve the system better than relying solely on the courts, providing greater consistency, greater expertise, and freeing up the court dockets. Lists 10 elements that such an “Information Access Agency” should possess, including independence and use of administrative law judges with authority to review records *in camera*. Also lays out the possibility of a FOIA Ombudsman office.

27. Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L. J. 185-214 (1984).

One of the first examinations of potential models for FOIA oversight. Recommended applying the New York model (no authority but persuasive) to federal FOIA (rather than Connecticut model with binding authority) because it would be easier to adapt and have limited cost.

28. Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. R. 4, 761-816 (1967).

Likely the first academic analysis of the newly passed amendments to the Administrative Procedure Act (now called FOIA), picking apart the language, exemptions, and the issues that might arise with enforcement through the courts (noting that it “... may be fewer than one per cent of parties who want information and are entitled to it will go to court to get it.” p. 806).

29. Harold L. Cross, *The People’s Right to Know: Second Supplement*, American Society of Newspaper Editors (1959).

In a follow-up to his book “The People’s Right to Know,” Harold Cross lays out more case law and statutory changes since 1953, noting how the system is stacked against the

average person, and how government officials prefer it that way: “The **people are still bereft generally of a simple, speedy means of enforcement** even of those rights conceded to them by legislatures and courts which is geared to cope with the enormous complexity, size and political incentives of government, and even more importantly, with the preponderant economic advantage enjoyed by bureaucracy in a litigated contest with the ordinary citizen... A more comprehensive set of ways to throw for a loss or bog down in delays and frustrations the citizen or taxpayer could hardly be desired by an official who is venal or jealous of his supposed prerogatives or just doesn’t want to be bothered.” (p. iv)

30. HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS (1953).

The seminal book examining access to public record laws in the United States, eventually contributing toward the adoption of FOIA. Much of the focus was on access through state statutes and in the courts, as well as excessive secrecy in federal government (note: Louisiana had, by far, the most complete and detailed public records law in the nation at the time, including exemptions, retention schedules, and punishment for agency violators including “imprisonment at hard labor in the penitentiary,” pp. 330-333). In the early 1900s, requesters (primarily newspapers) were suing for public records through writs of mandamus, and Cross noted the overall successes, yet limitations of that avenue: “... why should any newspaper, and still less the ordinary overburdened citizen or taxpayer, be subjected to any such obstacle race?” (p. 31). Also: “There is indeed room for improvement in the condition of the law in many states in the matters of definition of public records, declaration of the right of inspection thereof and the **application of the procedure for enforcement.**” (p. 32) No solutions, however, are offered, beyond continued litigation by newspapers. Cross ultimately argued for a First Amendment right to access, writing “The public business is the public’s business. The people have a right to know. Freedom of information about public records and proceedings is their just heritage. Citizens must have the legal right to investigate and examine the conduct of their affairs. **They must have a simple, speedy means of enforcement.** These rights must be raised to the highest sanction. The time is ripe. The First Amendment points the way. The function of the press is to carry the torch.” (p. 132)

First-Party Requester Working Group

Lead: Kel McClanahan

Dione Stearns

**FOIA Advisory Committee, 2020-22 Term
Legislation Subcommittee
First-Party Requester Working Group
Recommendations Regarding First-Party Requests (Draft)**

May 4, 2022

Background

On April 7, 2022, the Committee approved three recommendations of the Process Subcommittee regarding the potential establishment of an alternative process for individuals to request information about themselves for use in administrative proceedings or requests for benefits. The Committee approved a fourth recommendation “in principle” and deferred voting on exact language until the May 5, 2022, meeting.

The four Process Subcommittee recommendations were:

Recommendation #1: 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.

Recommendation #2 (approved in principle): To the extent feasible, agencies should amend any existing regulations, directives, policies, and guidance adversely impacting access for pro se parties.

Recommendation #3: 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 and promotes efficiency and good customer service.

Recommendation #4: A comprehensive assessment of the Department of Homeland Security (DHS) processes, workforce, and existing technology should be initiated as it relates to A-files responsive to FOIA requests.

The Legislative Subcommittee formed a working group to propose specific legislative language to implement the recommendations of the Process Subcommittee, as approved by the full Committee. We constructed the following proposal based on already existing statutory and regulatory language wherever possible, to minimize the difficulty of convincing policymakers to adopt it as written.

A BILL

To amend the Administrative Procedure Act to improve access to information in the executive branches of the Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1: SHORT TITLE.

This Act may be cited as the “Streamlining Access to Personal Information Act of 2022.”

SECTION 2: AMENDMENTS.

Section 555 of title 5, United States Code, is amended by adding at the end the following new subsections:

“(f) Individuals involved in any agency proceeding, as that term is defined in section 551(12) of this title, but not including section 551(5) of this title and not limited by any other provision of this title, shall be provided within 60 days, upon request and to the extent the information would be provided under sections 552 or 552a of this title, any information relevant to the agency proceeding.

“(g) Individuals attempting to establish entitlement to any government benefit shall be provided within 60 days, upon request and to the extent the information would be provided under sections 552 or 552a of this title, any information relevant to the benefits adjudication.

“(h) Upon request of an individual requesting information pursuant to paragraphs (f) or (g) of this section, any agency proceeding or benefits adjudication for which the information is sought shall be stayed until the requested information has been provided to the individual.”

SECTION 3: PROCESS

(a) Not later than 180 days after the date of the enactment of this Act, any agency affected by Section 2 of this Act shall develop and make publicly available a standardized process for implementing Section 2.

(b) Not later than 365 days after the date of the enactment of this Act, any agency affected by Section 2 of this Act shall promulgate a formal rule pursuant to section 553 of this title to implement all provisions of this Act.

(c) Any agency process, regulation, or policy promulgated pursuant to this Section shall ensure equal treatment of all individual requesters, regardless of whether the individual is represented by legal counsel.