

**National Archives and Records Administration (NARA)
Freedom of Information Act (FOIA) Advisory Committee Meeting**

Meeting Minutes – January 16, 2018

The FOIA Advisory Committee convened at 10:00 a.m. on Tuesday, January 16, 2018 in the William G. McGowan Theater at the National Archives Building, 700 Pennsylvania Avenue, N.W., Washington, D.C. 20408-0001.

In accordance with the provisions of Public Law 92-463, the meeting was open to the public from 10:00 a.m. to 1:00 p.m.

Meeting materials are available on the Committee's website at <https://ogis.archives.gov/foia-advisory-Committee/2016-2018-term/Meetings.htm>

Committee members present in the McGowan Theater:

- Alina Semo Chair, Office of Government Information Services, NARA
- David Pritzker, Administrative Conference of the United States
- Ginger McCall, Department of Labor
- Melanie A. Pustay, U.S. Department of Justice
- Nate Jones, National Security Archive
- Raynell Lazier, Consumer Financial Protection Bureau
- Stephanie Carr, Department of Defense
- Michael Bell, Department of Health and Human Services
- Jill Eggleston, U.S. Citizenship and Immigration Services
- Thomas Susman, American Bar Association

Committee members on the phone:

- Sarah Kotler, Food and Drug Administration
- Margaret Kwoka, University of Denver, Sturm College of Law
- Lynn Walsh, Society for Professional Journalists
- Chris Knox, Deloitte
- James Valvo, Cause of Action Institute
- Sean Moulton, Project on Government Oversight
- James Hershberg, George Washington University

Committee members absent from the meeting:

- Logan Perel, Department of the Treasury
- Michael Bekesha, Judicial Watch
- Mitra Ebadolahi, American Civil Liberties Union

Others present or participating in the meeting:

- David Ferriero, NARA
- Amy Bennett, Designated Federal Officer, NARA
- Alex Howard, Sunlight Foundation

Introduction and Announcements

Archivist of the United States David Ferriero offered opening remarks for the meeting. Mr. Ferriero welcomed those present to the first Committee meeting of 2018. He commented that the end of this Committee term is approaching, and he thanked the committee members for their time and expertise. He remarked that he is looking forward to receiving the Committee's final report. Mr. Ferriero also extended an invitation to Sunshine Week at the National Archives on Monday, March 12, and recognized and thanked Nikki Gramian for her service as the Deputy Director of OGIS. Mr. Ferriero noted that during her five years at NARA, Nikki served twice as Acting Director and as Acting Chair of the Committee.

Administration

Committee Chair Alina Semo thanked and welcomed attendees to the seventh Committee meeting. She remarked on the challenge undertaken by the Committee to develop recommendations on an aggressive schedule, and thanked the subcommittee chairs. Ms. Semo also thanked Nikki Gramian and acknowledged her hard work to make the Committee a success.

Ms. Semo explained how to provide feedback to the Committee, and where to find more information about its work. She also explained that NARA staff is monitoring the live feed, and that there would be time for public comments at the end of the meeting.

Ms. Semo remarked that the subcommittees provided a preview of their recommendations and gathered initial feedback during the last Committee meeting. Since that time, Ms. Semo explained, the subcommittees refined the recommendations and that during today's meeting the Committee would discuss, finalize, and vote on all of the recommendations. She explained that the subcommittee co-chairs would present the recommendations and that there would then be time for the Committee members to discuss and edit the proposals. She added that once the Committee had completed discussing and editing a proposal, the Committee would vote on its adoption.

Ms. Semo said that after this meeting, the passed recommendations and a summary of all of the work done by the subcommittees would be combined into a final report, which the Committee will be asked to approve during the final meeting in April. She asked for volunteers to form a small working group to draft the report--Ginger McCall, Michael Bell, David Pritzker, Nate Jones, and Chris Knox volunteered.

Ms. Semo then directed the Committee's attention to the minutes for the October 19, 2017 meeting. The Committee voted to adopt the minutes.

Ms. Semo then announced that Melanie Pustay had asked to address the Committee before they begin discussing subcommittee recommendations and invited Ms. Pustay to speak. Ms. Pustay explained that because the recommendations relate to activities undertaken by the Department of Justice Office of Information Policy (OIP), as the Director of that office, she will abstain from voting on any recommendations. She also commented that OIP believes that the work of the Committee is extremely important and that OIP is working on many of the same topics. Ms. Semo added that she also intended to abstain from voting on recommendations that directly impact OGIS or the Chief FOIA Officers Council, which is co-chaired by Ms. Semo and Ms. Pustay.

Proactive Disclosure Subcommittee Draft Recommendations, Discussion & Vote

Margaret Kwoka announced that she will discuss the recommendation related to the publication of FOIA logs and the recommendation that proposes criteria for records that should be proactively disclosed.

FOIA LOGS

Ms. Kwoka explained that the recommendation is supported on the Committee's research, her own published research, and Max Galka's presentation from the October meeting. She added that the proposal's key points are that: agencies should regularly publish FOIA logs to their reading rooms; in order to be useful, published FOIA logs should include standard fields (many of which are commonly kept by agencies or are required to be kept by law); and FOIA logs should be posted in an accessible format.

Ms. Kwoka noted that the subcommittee did not come to a final decision on whether all non-first party requesters' names should be included in the logs. She explained that there was general agreement among the subcommittee members that the names of those making first party requests should be withheld, but disagreement about whether all other names should be proactively disclosed.

Ms. Semo noted that the second set of recommendations also included a discussion of FOIA logs and wondered whether it should be combined. Ms. Kwoka responded that the subcommittee saw value in keeping a stand-alone recommendation.

Regarding the question of releasing requesters' names, Nate Jones commented at many agencies the status quo is that agencies publish requesters' names, and that he doesn't believe that the subcommittee should advocate for less transparency. He also commented that Mr. Galka's October presentation showed the value of releasing requesters' names.

Regarding the standard fields, Jill Eggleston inquired whether an agency that does not currently collect a certain category of information would be required to modify its system to collect that information. Ms. Kwoka clarified that the subcommittee intended that the agency should follow the guide to the best of its ability, but there is no requirement to modify its tracking system.

Ms. Semo called for edits, and DFO Amy Bennett pulled up the document for live editing. David Pritzker asked that the requester name category be edited to call for commercial requester names and names of those in preferred fee categories. Ms. Kwoka responded that she would prefer that it say "name of third party requester," since names can be very helpful in cases in which affiliations are not reported. Stephanie Carr commented that the recommendation should mirror current policy at most agencies, which is to release all third-party names. Tom Susman echoed the desire to see third party names released, and suggested that a phrase be added recommending that agencies notify requesters that their name will be released on the log. Mr. Pritzker also asked that the phrase "if pertinent to the request" be added to the bullet point suggesting that "organizational affiliation" be included in the log. Mr. Jones responded that the affiliation sometimes impacted the fee category. Jill Eggleston suggested the edit "if identified in the request."

The Committee voted unanimously to move forward on the recommendations. Ms. Pustay abstained from voting.

PROACTIVE DISCLOSURE CRITERIA

Ms. Kwoka explained that the purpose of the recommendation is to develop criteria to help an agency decide what records should be proactively disclosed. She added that the recommendation has two broad goals: one, to enable access to agency documents that memorialize actions that impact the public; and two, to preempt the need for FOIA requests to the extent possible. She also noted that the recommendation memo explains some ways that agencies are currently making these determinations.

Ms. Kwoka described the three broad categories of records for proactive disclosure identified in the recommendation. The categories she described were:

- Records that memorialize agency actions taken pursuant to their statutory mandate;
- Records that provide original government-collected and maintained data; and
- Frequently requested records.

Ms. Semo called for edits and comments; there were none.

The Committee voted unanimously to support the recommendations. Ms. Pustay abstained from voting.

PROACTIVE DISCLOSURE PRIORITIES

Ms. Kotler explained that the subcommittee brainstormed the types of records that could be proactively disclosed and then ranked them based on ease of posting and importance of record. She added that the subcommittee decided to focus on records that would be held by most agencies.

Ms. Kotler then briefly read the list of records that the subcommittee identified as potential proactive disclosure priorities. The list included:

- FACA committee materials (Ms. Kotler noted that some of this is required to be released under the law, but the recommendation suggests that additional material be posted);
- Unclassified reports provided to Congress;
- Employee directories;*
- Records schedules;
- Frequently requested records under FOIA;
- Statements of administrative policy ;
- Documents of lobbying activity;
- FOIA logs;
- Calendars for top officials;
- Contract information; and
- Declassified information.

After reading the list, Ms. Kotler noted that the subcommittee was still seeking additional input regarding posting contracts. Specifically, she noted that the subcommittee had discussed suggesting that agencies post the highest dollar value of a certain number of contracts as well as contracts that are valued at a variety of threshold minimum dollar amounts. Mr. Moulton added that the subcommittee had opted to suggest agencies post the ten contracts with the highest value and all contracts valued more than \$100 million.

Ms. Eggleston asked the subcommittee to clarify whether the recommendation would require an agency to create a record that does not currently exist; Ms. Kotler clarified that the recommendation applies only to existing agency records.

Stephanie Carr noted that the Department of Defense's policy would prohibit the agency from posting contract information for all employees, as suggested in the recommendation. Ginger McCall expressed significant reservations about posting all employee email addresses and suggested that it might be better to recommend that an agency release an organizational chart that includes office contact information rather than individual names and telephone numbers. The Committee members engaged in a discussion of the risks and potential burden of publishing agency employees' contact information and decided that more research needed to be done as to current agency policies and practices before a final decision could be made. The Committee decided to vote on supporting the other provisions of the recommendation, excluding the specific reference to employee contact information.

The Committee voted unanimously to support the recommendations. Ms. Pustay abstained from voting.

ACCESSIBILITY RECOMMENDATION

Ms. Kotler summarized the main points of recommendation, which includes that the Archivist:

- launch an interagency effort to develop standard requirements for FOIA processing tools to ensure both the tools and their outputs are Section 508 compliant;
- encourage agencies not to remove documents already posted on their websites;
- request that OGIS conduct an assessment of the methods undertaken by agencies to prepare documents to post on agency FOIA reading rooms;
- encourage OGIS to highlight the issues with proactive disclosure and 508 compliance in its report to Congress;
- and recommend that agencies conduct an "undue burden" analysis by balancing their Section 508 and FOIA statutory obligations.

Ms. Semo called for comments. Mr. Jones pointed out that accessibility experts from the General Services Administration and US Access Board invited to discuss Section 508 requirements with the Committee at its October 25, 2016 meeting seemed to disagree with each other about whether non-compliant documents should be removed from agency websites. Ms. McCall suggested that the recommendation be reworded to be mindful of agency obligations under the law and ensure that the recommendations do not open agencies up to potential litigation were they to implement them. The Committee discussed the risks and benefits of this and edited the recommendation to address this concern.

The Committee voted unanimously to move forward on the recommendations. Ms. Pustay abstained from voting. Ms. Semo abstained from voting on the recommendation since it includes references to OGIS, but noted her support for the rest of the provisions.

Efficiencies and Resources Subcommittee Draft Recommendations, Discussion & Vote

Ms. McCall reminded the Committee that the subcommittee developed best practice recommendations based on interviews with agencies and OGIS's FOIA compliance assessment reports. Ms. McCall then read through the subcommittee's recommendations, noting that the recommendation document included additional information on the subcommittee's observations and potential benefits of the recommendation.

Ms. McCall stated that the subcommittee identified the following best practices:

- Under the category of "Management of Process"
 - Advise FOIA offices through best practices to work with requesters early on to clarify requests when necessary
 - Promote collaboration between employees to ensure coverage of cases during periods of leave or peak times
 - Form teams with common strengths to handle particular types of requests
 - Introduce case closure, pages reviewed, and quality requirements as part of employee performance evaluations
 - Track status of requests for records; ensure visibility of overdue requests; and establish protocols to handle overdue requests
 - Prioritize requests using separate tracks (simple, complex, and expedited), and assign tracks accordingly
 - Encourage simultaneous processing of simple and complex requests so that processing of either category is not unduly delayed
 - Where appropriate, centralize processing
- Under the category of "Bringing in Talent"
 - Consider creating rotational programs to expose young employees to FOIA
 - Create Career Model for Information Management
 - Assign interns or temporary staff to complete straightforward, time-consuming tasks such as data entry
 - Contract surge support staff to increase speed of responses and aid in routine review
- Under the category of "Using Technology to Improve the Process"
 - Create add-on to IT systems for exporting records
 - Designate of point of contact to approve search requests within records management systems

- Make the end goal of responding to FOIA requests a major component when developing the records management systems of workflows
- Adopt a centralized, department-wide FOIA tracking platform or consolidate to fewer tracking systems. Where possible, leverage an established (commercial off-the-shelf) COTS/(government off-the-shelf) GOTS product across the organization
- If a COTS product does not meet the agency's needs, contract a developer to create an in-house system and have developer on standby for continuous updates.

Ms. McCall then asked Ms. Bennett to update the Committee on the subcommittee's recent discussions with the General Services Administration (GSA). Ms. Bennett said that following the discussion about the need for support for FOIA offices looking to bring on contractors to handle FOIA responsibilities, Logan Perel contacted GSA to discuss the issue. She reported that GSA is excited about working with agencies to contract FOIA support more efficiently and that GSA has identified vendors under a particular General Services schedule that are able to provide FOIA services. She added that the Subcommittee will continue to work with GSA to put this list and other useful material for FOIA officers on GSA's website.

Ms. Semo opened to the floor to comments. Hearing none, Ms. Semo opened the floor to edits.

Mr. Susman moved to adopt the recommendations. The Committee voted unanimously to support the recommendation. Ms. Pustay abstained from voting.

Search Subcommittee Draft Recommendations, Discussion & Vote

Mr. Jones noted that the Search subcommittee made a few additions and tweaks to its recommendations in response to the feedback from Committee members during its previous meeting in October 2017. He noted that the Subcommittee's research shows that searches are often a very large part of the reason for FOIA delays, and that the searches themselves are often inefficient. He added that the research also shows that FOIA professionals suffer because of poor searches conducted by non-FOIA personnel and that there is not a great deal of public information about how agencies conduct FOIA searches.

Mr. Jones explained that subcommittee's recommendation includes both specific actions for the Archivist and best practices. The recommendations to the Archivist are as follows:

- Request the Department of Justice, Office of Information Policy, collect detailed information as part of each agency's Chief FOIA Officer's Report regarding the specific

methods and technologies agencies are using to search their electronic records, including email.

- Direct OGIS to examine the use of appropriate performance standards in Federal employee appraisal records and work plans to ensure compliance with the requirements of FOIA, and submit their findings and recommendations to Congress and the President.
- Propose that the Chief FOIA Officers Council seek to establish a technology subcommittee, in partnership with the Federal Chief Information Officers Council, to study the utilization and deployment of FOIA technology across agencies and identify best practices and recommendations that can be implemented across agencies.
- Suggest a modification to the Federal Acquisition Regulation (FAR) to require all agencies, when acquiring electronic record management software, electronic mail software, and other records related information technology, to take into consideration features which will help facilitate the agencies responsibilities under FOIA to provide access to Federal agency records.
- Direct OGIS publish the following recommended agency best practices to improve the timeliness, thoroughness, and efficiency of agencies' FOIA searches:
 - Increase the ability for FOIA offices to procure technology to aid federal agencies in more efficiently conducting records searches to the greatest extent possible.
 - Ensure that agency emails can be efficiently and accurately searched electronically by FOIA offices.
 - In light of the potential legal costs of untimely or inadequate FOIA searches, agencies should explore the process of obtaining software and technology tools, including eDiscovery tools, to conduct more accurate and timely FOIA searches.
 - Effectively explain on agency websites how agency records are maintained and ensure that FOIA Public Liaisons and other FOIA personnel work with requesters to help submit well-targeted FOIA requests.

Ms. Semo opened the floor to comments; hearing none, she opened the floor to edits. Mr. Jones said he noticed some typos and suggested the document containing the recommendations be copy edited.

The Committee voted unanimously to move forward on the recommendations. Ms. Pustay abstained from voting. Ms. Semo abstained from voting on the recommendation since it includes references to OGIS and the Chief FOIA Officer Council, but noted her support for the rest of the provisions.

Ms. McCall noted that several of the subcommittees' recommendations substantially overlap with the Efficiencies and Resources Subcommittee's recommendations, and asked whether part of the Working Group's plan is to reconcile those. Ms. Semo said that that was the plan, and that to the extent that there is overlap, the group will bundle and address the recommendations. Ms.

McCall said she found it encouraging that there was so much overlap in recommendations which she said shows consensus.

Mr. Pritzker seconded Mr. Jones' observation about edits, and asked about how much of the subcommittees' work will be incorporated into the Committee's final report. Mr. Susman said that because of the incredible detail of the notes, research, etc. there is a rich legislative history to the Advisory Committee's work and that for the purposes of gaining readers' attention, less may be more. The final report, Mr. Susman suggested, should focus on the recommendations and the reasons, not the underlying research. Ms. Semo said that will be left up to the Working Group but is open to ideas and suggestions.

Mr. Jones said it would make sense to discuss the Committee's potential tweaks electronically in text and then circulate but he understands that Federal Advisory Committee Act (FACA) rules do not allow it. Ms. Bennett noted that all deliberations must be open to the public. Ms. Semo also said if really needed, an interim meeting could be held in March before the next regularly scheduled meeting in April.

Before moving to public comments, Ms. Semo once again turned the floor over to Ms. Pustay to update the Committee and public attendees on OIP initiatives of high interest to the FOIA community. Ms. Pustay reported that she has no substantive update on the "release-to-one-release-to-all" policy at this time, but OIP continues to work on the issue and noted that the Committee's discussions highlight the importance of the issue. Ms. Pustay also reported that the national FOIA portal is in the final testing and configuration stage, and is getting close to going live. Ms. Pustay said that once it goes live, it would be helpful to get feedback from both agencies and requesters.

Public Comments

OGIS Attorney Advisor Sheela Portonovo summarized online comments from the livestream of the meeting. She said that the topics that generated the most interest were:

- FOIA logs, noting that commenters think that as much information as possible in FOIA logs should be released;
- Government employee contact information, noting that commenters were divided with some saying that information should be freely available while others saying that cybersecurity concerns requires less openness.
- accessibility issues, noting that there was a lot of interest in the discussion surrounding accessibility and FOIA

Ms. Portonovo also noted that a lot of people enjoyed watching the meeting and wish to visit the National Archives.

Alex Howard of Sunlight Foundation noted that people who work for the public should have contact information that is available to the public. He noted that OGIS staff have their names, phone numbers and email addresses listed on the NARA website and asked if there have been negative consequences for posting that information? Ms. Semo said none that she knew of. With regard to computer security concerns, Mr. Howard said that Federal employees should be given better training and tools such as spam filters to avoid cyber attacks. He also noted that removing contact information is not something the Sunlight Foundation supports, explaining that the Department of Energy used to have an online directory of scientists that people could contact to discuss publicly produced research, but that directory no longer exists online.

With regard to the Committee's recommendations, Mr. Howard said he hopes they will be given due attention and consideration, and adopted.

Mr. Howard also expressed continued interest in the "release-to-one-release-to-all" policy. He noted that James Valvo with Cause of Action and the Sunlight Foundation petitioned the Office of Management Budget and OIP seeking release of the policy, but has not received an official response. He said it would be unfortunate if a FOIA request or litigation would be required to make the policy public.

Mr. Howard also said he is excited to see the government-wide FOIA portal go live and hopes that several Committee recommendations, including the posting of FOIA logs, are incorporated into the portal.

Mr. Howard added that he and other transparency advocates have observed that phone calls and emails to Federal employees regarding transparency along with requests for FOIA statistics are going unanswered. He called the situation either benign neglect or malignant intent.

Finally, Mr. Howard asked if it is appropriate to re-assign senior officials to do FOIA work as has happened at the State Department. He stated that he is concerned about the state of transparency in the Federal government, particularly if agencies re-assign senior officials to FOIA and asked the Committee to comment on the role of FOIA.

Ms. Pustay referenced awards presented by the Department of Justice during Sunshine Week to FOIA professionals who have made notable contributions to the field, noting that the intent is to give public recognition to FOIA professionals for their hard work of administering FOIA.

Mr. Jones said that he has read news reports about senior officials who view being assigned to the FOIA office as a negative experience, and said that the idea that FOIA is not important angers him. He said he would have liked OGIS or OIP to publicly address these reports and remind federal employees that FOIA is everyone's responsibility. He added that if OGIS or OIP cannot do such a thing, then maybe Congress can, and that he hopes FOIA offices will begin to regard themselves as enforcers of the law akin to Inspector General (IG) offices.

Ms. Semo thanked the attendees and the Committee, and noted that the final meeting of the 2016-18 Committee will be Tuesday, April 17, 2018 in the McGowan Theater. The meeting adjourned at 12:48 p.m.

DRAFT