

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

DRAFT

Meeting Minutes – January 27, 2015

The FOIA Advisory Committee convened at 10 a.m. on January 27, 2015, in the Archivist's Reception Room, Room 105, in the National Archives Building at 700 Pennsylvania Avenue, N.W. Washington, DC 20408-0001.

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

A transcript and videos of the meeting are available on the Committee's website at <https://ogis.archives.gov/foia-advisory-committee.htm>

Committee members present in the Archivist's Reception Room:

- Nikki Gramian, Acting Chair, Office of Government Information Services (OGIS), National Archives and Records Administration (NARA)
- Brentin V. Evitt, Defense Intelligence Agency
- Larry Gottesman, Environmental Protection Agency (EPA)
- Nate Jones, National Security Archive
- Ginger McCall, Electronic Privacy Information Center (EPIC)
- Martin Michalosky, Consumer Financial Protection Bureau (CFPB)
- David S. Reed, Federal Communications Commission (FCC)
- Anne Weismann, Citizens for Responsibility and Ethics in Washington (CREW)
- Mark S. Zaid, Law Office of Mark S. Zaid, P.C.

Committee members on the phone:

- Dave Bahr, Bahr Law Offices, P.C.
- Delores Barber, U.S. Department of Homeland Security (DHS)
- Karen Finnegan, U.S. Department of State
- Eric Gillespie, Govini
- Jim Hogan, U.S. Department of Defense (DOD)
- Ramona Branch Oliver, U.S. Department of Labor (DOL)
- Lee White, National Coalition for History (NCH)

Committee members absent from the meeting:

- Andrew Becker, The Center for Investigative Reporting
- Clay Johnson, The Department of Better Technology
- Maggie Mulvihill, Boston University

- Melanie A. Pustay, U.S. Department of Justice (DOJ)

Others present at or participating in the meeting:

- Amy Bennett, OGIS, NARA
- Diane Bridge
- Cindy Cafaro, Department of the Interior
- Katherine Hawkins, OpenTheGovernment.org
- Elizabeth Hempowicz, Project On Government Oversight
- Adam Marshall, Reporters Committee for Freedom of the Press
- Christa Lemelin, OGIS, NARA
- Don McIlwain, National Declassification Center, NARA
- Denise Meiners
- Abby Paulson, OpenTheGovernment.org
- Marta Poblete-Washington
- Michael Ravnitzky
- Jasamyn Roberts, General Services Administration
- Bobak Talebian, Department of Justice

Introductions and Announcements

The Acting Director of the Office of Government Information Services (OGIS), Nikki Gramian, briefly introduced herself and welcomed everybody to the meeting. She also explained that while the meeting was not live-streamed, the meeting was being recorded; in addition to the video, minutes and other material from the meeting would be posted on OGIS' website.

Administration

The Committee voted unanimously to approve the minutes of the October 21, 2014 meeting. The minutes are available online at <https://ogis.archives.gov/foia-advisory-committee/meetings.htm>.

Ms. Gramian noted that the Federal Advisory Committee Act (FACA) directs Federal Advisory Committees to develop operating procedures to govern Advisory Committee activities and meetings and to specify the relationship among the Advisory Committee members, the Committees' Designated Federal Officers and agency staff. After the October 21st meeting, a subcommittee met to discuss outstanding issues with the draft bylaws. The subcommittee updated the bylaws accordingly and the bylaws were circulated to Committee members prior to the meeting. The Committee voted to approve the bylaws. The bylaws are available online at <https://ogis.archives.gov/foia-advisory-committee/bylaws.htm>.

Subcommittee Reports

Similar to the October 21st Committee meeting, the majority of the agenda was devoted to updates from the Oversight and Accountability, Proactive Disclosures, and FOIA Fees subcommittees from the subcommittee co-chairs. Ms. Gramian explained that these updates are intended to ensure that the subcommittees have a clear path in the coming months to recommend improvements to FOIA.

Proactive Disclosures

Proactive Disclosures Subcommittee co-chair David Reed began the report by highlighting the two specific issues the subcommittee will be exploring: analyzing requests on FOIA requests to determine what information is of high value to the public; and looking into the relationship between the accessibility requirements of Section 508 of the Rehabilitation Act and proactive disclosures.

Mr. Reed described how the subcommittee had developed a methodology for analyzing what information that is of high value to the public. The work is informed by a report prepared by Reinvent Albany regarding information held by the New York Environmental Protection Agency and a similar study conducted by the General Services Administration that looked at the use of government data by people outside of the government.

Mr. Reed described the results of using the methodology to examine FOIA requests to the US Environmental Protection Agency available to the public on *FOIAOnline*. Mr. Reed explained that they used word density clouds to examine the occurrence of certain words. This analysis produced a number of primary categories and entities that seem to be of particular interest to EPA requesters. The data was also analyzed by searching for frequent word clustering, which is based on the proximity of words to each other, and for titles of FOIA requesters. Mr. Reed said that the analysis points to some themes, but the data pool is too shallow to draw any conclusions.

Mr. Reed asked Committee members from government agencies to provide the Subcommittee with access to more robust data sets.

On the issue of Section 508 compliance and proactive disclosures, Mr. Reed explained that the law requires people with disabilities to access all Federal documents. The Access Board sets standards that all Federal records must meet. The current standards are under review by the Access Board and will likely soon be updated to be closer to international standards. Under the law, most Federal records should already meet the standards because the records are required to be accessible by any Federal employee with a disability. However, there are still some paper-based work flows in the Federal government that are inherently not accessible. To make these records accessible, they must be tagged with appropriate metadata, including a description of all graphics.

Mr. Reed noted the challenge of creating Section 508 compliant redacted documents. To redact a document, an agency must convert the document to an image to remove the exempt information. At the same time, the agency must sanitize the document by stripping away any underlying bookmarks, layers and metadata. After redacting and sanitizing a document, an agency must remediate it to make it Section 508 compliant before posting it to the Web. This labor-intensive process involves recognizing the document's text with optimal character recognition (OCR) software, tagging the document to indicate its reading order and structure, and adding the metadata to make the document accessible to people with disabilities.

Mr. Reed asked that Committee members share examples with the subcommittee of instances where the requirements of Section 508 prevented an agency from making proactive disclosures. Mr. Reed also asked for examples of where an agency made a proactive disclosure before making the record Section 508-complaint (for example, posting the record while it was undergoing remediation).

Nate Jones noted that there are several agencies that are doing a great job of putting out Section 508-compliant proactive disclosures, including the Department of State, the National Archives and Records Administration, the Interagency Security Classification Appeals Board, and *FOIAOnline*. Mr. Reed agreed, and encouraged other agencies to meet the same level. Mr. Reed also encouraged agencies to improve the quality of information posted on their FOIA logs.

FOIA Fees

FOIA Fees Subcommittee Co-Chair Ginger McCall discussed the research that the subcommittee had already undertaken. The Subcommittee first looked at court precedents for any sort of clear guidance on how agencies should make determinations about fee categories. This research showed no clear pattern. The Subcommittee also examined fee practices in other countries, particularly with respect to how the entity handles high-volume requesters. This examination revealed a wide variety of practices, and the Subcommittee discussed the pros and cons of each of the approaches.

Ms. McCall said that one of the proposals examined by the Subcommittee was to do away with all fees for non-commercial requesters. This proposal would save agencies time deciding fee issues and non-commercial requesters wouldn't have to worry about the financial burden of making requests. On the other hand, Subcommittee members expressed a concern that agencies would experience a flood of voluminous requests. At many agencies there is a history of a small number of requests accounting for a disproportionate amount on an agency's time spent processing FOIA requests.

Ms. McCall noted how some countries handle volume by labeling certain requesters as "vexatious." There is a lack of global agreement, however, on how this system works. It is very hard to define what makes a requester vexatious and there were concerns about abusing the

designation. One proposal is to have an independent authority that makes these determinations, but that would add a new layer of bureaucracy to the system and might slow processing.

Ms. McCall said that the Subcommittee also discussed setting a low uniform fee for all requesters and providing free processing until the request crossed a certain page threshold.

In order to better understand the issues and make a recommendation, the Subcommittee decided that it needs more data. The Subcommittee is developing a survey for FOIA professionals to examine how great of an issue the current fee structure is and how burdensome requests are currently handled.

Mr. Jones noted that there was a vibrant discussion about the minutes from the Subcommittee's last report going on via an email list serv that includes people who care about FOIA from across the country. Mr. Jones encouraged Committee members to join the list serv and join in the discussion. Ms. McCall also encouraged list members to make formal comments to the Committee and Ms. Lemelin explained that the public can submit comments on the OGIS website.

Ms. Weismann said that this is an issue that creates problems for both requesters and agencies. Mr. Jones added that the lack of standards are particularly frustrating for both groups and added that the Subcommittee should explore alternative means of managing an agency's queue so that rather than first in, first out, frequent requesters can be moved back in the queue.

Committee members discussed the need for a uniform fee schedule and clear guidance. Mr. Michalosky noted that the current OMB guidelines are from the 1980's and that he looks forward to seeing them updated soon. He also noted that the current rules and guidelines make it difficult for agencies to try new approaches.

Committee members also further discussed the implications of labeling a requester as "vexatious." In particular, members noted a difference in the volume versus the frequency of the request and noted that any proposal must be very careful with respect to both items. Ms. Finnegan also noted that the amount of time it will take to process a request is a good incentive for agencies and requesters to narrow requests.

Oversight and Accountability Subcommittee

Oversight and Accountability Subcommittee Co-Chairs Martin Michalosky and Mark S. Zaid reported that the Subcommittee has begun compiling oversight reports from over the last several decades. They have collected 53 government reports on FOIA compliance, 24 of which are posted on the Committee's website. The Subcommittee asks that anyone who knows of a report that is not posted submit it to the Committee. The Subcommittee will review the reports to identify themes, including successes and consistent failures. The Subcommittee will also use this analysis to identify any gaps and areas for additional oversight.

Mr. Zaid said the Subcommittee also will assess the role of FOIA Public Liaisons at agencies to help determine what is working at certain agencies and how the roles differ between agencies. To complete this work, the Subcommittee will hold a roundtable with agency FOIA Public Liaisons and send a survey to FOIA Public Liaisons.

The subcommittee is also exploring how the 2007 change to the law directing any attorney's fees that are granted in the course of FOIA litigation to come from the agency's budget is (or is not) affecting agency behavior. Mr. Zaid pointed out that there are competing theories about how agencies are adapting to the new policy, but no data. The Subcommittee will meet with the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which gathers data on FOIA litigation and analyzes similar issues. The Subcommittee also will review methods to reduce litigation, further exploring the results of the FOIA litigation review undertaken by the Department of Justice (DOJ) under Attorney General Janet Reno, and examining the role of FOIA Ombuds offices in other countries.

The Subcommittee met with representatives of the Office of Information Policy (OIP) at DOJ to discuss the office's current oversight activities. In particular, the discussion focused on the relationship between OIP and OGIS, the creation of the FOIA Guide, a regularly updated compendium analysis of key judicial opinions, and OIP's authority.

Since the Subcommittee is planning to work with the Fees Subcommittee to develop the survey, some Committee members noted that they must be careful to not make the survey too long; if the survey has too many questions or takes too long to complete, there are less likely to be enough respondents to get a good sample of responses. Ms. McCall offered to discuss the issue with people who have expertise in designing surveys.

Public Comment

Michael Ravnitzky, a private citizen who is interested in open government, noted that agencies release between 70 percent and 80 percent of requested records in an electronic format. While this is a great trend for increasing the usability of released records, he noted that there is a great disparity in the quality and consistency of scanned releases. He also noted that many of scanned records cannot be searched for text or are locked or password protected, making them less usable. Mr. Ravnitzky also noted that some agencies will not disclose records in their native format or do not have the technical expertise to appropriately convert a record into a usable digital copy. Mr. Ravnitzky encouraged the government to issue guidelines that would improve the quality of these releases.

Mr. Ravnitzky also stated that the section of the proposed DOJ FOIA regulation on fees included several particularly good provisions that could be used as a model for other agencies and encouraged OMB to update its fee guidelines. He also stated that there needs to be more education regarding the distinction between fee category and fee waivers, and that there is a need for more training on how to apply the law. He further cautioned agencies against sending

requesters very large fee estimates before calling the requester to discuss potentially narrowing the request.

Ms. McCall responded that DOJ is currently leading a project to draft a common FOIA regulation for agencies and that several non-profit organizations had developed a model FOIA regulation. Ms. McCall encouraged others to look at the model regulation and to follow the DOJ process closely.

Jasamyn Roberts, who works on Data.gov at the General Services Administration, asked the Committee for their thoughts on how Data.gov might change FOIA and, in particular, the current fee structure. Mr. Jones responded that Data.gov could have an impact on FOIA because, in the long run, having more government information freely available would decrease the number of requests.

Mr. Jones also said that he would like to see documents that have been released under FOIA treated as data sets and available via Data.gov and Ms. Roberts asked the Committee if agencies could make released records available using the open standard format required to make data available through Data.gov. Mr. Reed responded that he could not speak to the cost of converting the records, but noted that under FOIA agencies are required to disclose records and to account for information that has not been released.

Before the meeting adjourned Mr. Jones encouraged Committee members and the public to read some of the comments posted on the OGIS site. In particular, he suggested that people read public comments filed on behalf of the Society for Historians of American Foreign Relations (SHAHR) by Kristen Lee Hoganson and Richard Immerman, available online at <https://ogis.archives.gov/Assets/hoganson-and-immerman-comments-2015-01-06.pdf?method=1>. He also thanked Ms. Gramian for her service as Acting Director of OGIS, but expressed concern that NARA had not advertised the director's job.

Ms. Gramian thanked those who contributed to the meeting and adjourned the meeting.

I certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.

Christa Lemelin
Designated Federal Officer

Nikki Gramian
Acting Chair

The Committee will formally consider these minutes at its April 21, 2015 meeting, and incorporate any corrections or notations in the minutes of that meeting.