

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

DRAFT

Meeting Minutes – October 20, 2015

The FOIA Advisory Committee convened at 10 a.m. on October 20, 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:

- Dr. James V.M.L. Holzer, Chair, Office of Government Information Services (OGIS), National Archives and Records Administration (NARA)
- Delores Barber, U.S. Department of Homeland Security (DHS)
- Brentin V. Evitt, Defense Intelligence Agency (DIA)
- Larry Gottesman, Environmental Protection Agency (EPA)
- James "Jim" Hogan, U.S. Department of Defense (DOD)
- Martin Michalosky, Consumer Financial Protection Bureau (CFPB)
- Sean Moulton, Project On Government Oversight (POGO)
- David Pritzker, Administrative Conference of the United States (ACUS)
- Lee White, National Coalition for History (NCH)
- Mark S. Zaid, Law Office of Mark S. Zaid, P.C.

Committee members on the phone:

- Dave Bahr, Bahr Law Offices, P.C.
- Andrew Becker, The Center for Investigative Reporting
- Karen Finnegan, Department of State
- Eric Gillespie, Govini
- Clay Johnson, Department of Better Technology

Committee members absent from the meeting:

- Maggie Mulvihill, Boston University
- Ramona Branch Oliver, U.S. Department of Labor (DOL)
- Anne Weismann, Campaign for Accountability

Others present at or participating in the meeting:

- David S. Ferriero, Archivist of the United States, NARA
- Amy Bennett, OGIS, NARA
- Teresa Brady, OGIS, NARA
- Patrick Eddington
- Jennifer Goode
- Christa Lemelin, OGIS, NARA
- Don McIlwain, National Declassification Center, NARA
- Ryan Mulvey
- Kay Reid
- Lubna Shirazi
- Karen Thornton
- Rawa Zerihun
- Angel Simmons, OGIS, NARA
- Alina Semo, Office of General Counsel, NARA

Introductions and Announcements

Archivist of the United States David Ferriero stated that the Committee has a unique opportunity to make recommendations that reflect the needs of the FOIA requester community and Federal agencies and improve the FOIA administration. He said that NARA is grateful for the opportunity to support the Committee's work, and looks forward to following the Committee's progress in the coming months.

Administration

Committee Chair Dr. James Holzer gave brief opening remarks, noting NARA's mission to drive openness, cultivate public participation, and strengthening democracy through public access to government records. Dr. Holzer said that he looks forward to working with the Committee to ensure that the Committee's efforts affect the Executive Branch and help improve the FOIA process for agencies and requesters alike.

Dr. Holzer noted that Committee members Maggie Mulvihill, Anne Weismann and Ramona Branch Oliver were unable to attend the meeting and reminded meeting attendees that Committee materials are available online at www.ogis.archives.gov.

Subcommittee Reports

The Committee devoted the majority of the meeting to status reports from the Proactive Disclosures, Oversight and Accountability, and FOIA Fees subcommittees.

Proactive Disclosures Subcommittee

Government Proactive Disclosures Subcommittee co-Chair Brent V. Evitt said that that Proactive Disclosures Subcommittee is examining the role of FOIA, regulations and procedures encouraging proactive releases and analyzing how technology affects proactive disclosures. Mr.

Evitt observed the natural tension felt by FOIA Officers who feel as if they must choose between reducing their FOIA backlogs and making proactive disclosures. Mr. Evitt explained that although there is no data demonstrating the proactive disclosures contribute to increasing or decreasing backlogs, Mr. Evitt views proactive disclosures as important further the goals of the FOIA.

Mr. Evitt cited his co-Chair Eric Gillespie's work on approaching proactive disclosures from a technological perspective. By analyzing the data in FOIA logs and determining what groups of requesters want what types of records; agencies can prioritize proactively releasing high-interest records. Mr. Evitt also mentioned the Department of Justice Office of Information Policy's (OIP's) "Release to One, Release to All" pilot project and proactive disclosure efforts by the Federal Drug Administration (FDA) and General Services Administration (GSA).

Dr. Holzer questioned whether agencies track data on the number of hits or downloads Federal agencies receive for documents they post online. Ms. Melanie Pustay said OIP's pilot project is tracking that type of data to get better metrics on whether the public, including FOIA requesters, actually looking at proactively posted records. The number of hits websites with posted documents receive s is one metric that the project is tracking. By using this type of data, Ms. Pustay said that agencies could do a cost-benefit analysis to determine what resources to put into posting records.

Mr. Sean Moulton cautioned that solely focusing on the number of hits a webpage with proactively posted records receives might not demonstrate the impact of proactive disclosures. Once Federal agencies post a document online, others may disseminate it on their own websites or media outlets, thus the impact of a release would be greater than individual users viewing a document on a webpage. Mr. Moulton highlighted the calendars and schedules of top agency officials as the types of records that agencies should proactively disclose on a regular basis.

Ms. Pustay highlighted the importance of making proactively disclosed records easy to find. The Committee briefly discussed agency FOIA websites, and how they differ throughout the Executive Branch.

Mr. Nate Jones said that technology companies can help Federal agencies come up with a solutions to the challenges of making it easier for agencies to proactively disclosure records and make those records searchable searchable from Google and other web browsers. Mr. Jones stated that each agency FOIA webpage should have a road map to make the agency's records easy to find, and provide indexes so requesters know what records exist and are available publicly and what records to request.

With regard to the question of Section 508 compliance, Mr. Evitt said that the Proactive Disclosures subcommittee had not made that issue the focus of its efforts.

Mr. Moulton commented that agencies should create records with disclosure in mind. He alluded

CFPB's policies and procedures for making the proactive disclosure of contract information possible.

Archivist of the United States, David S. Ferriero, noted that NARA is busy implementing the Directive on Managing Government Records. Implementing the Directive involves working with the industry and providing education on records management needs and the available records management tools. Mr. Ferriero said that an important piece of that is this FOIA responsibility and letting them know.

Mr. Evitt said that Subcommittee's next step is to draft a report for the full Committee's consideration.

Fees Subcommittee Report

Fees Subcommittee Co-Chair Nate Jones present a status update on the Fee Subcommittee's activities. Mr. Jones gave an overview of the Fees Poll sent to Federal FOIA processors. The poll had 407 respondents. Mr. Jones said that respondents estimated that 20% of all FOIA requests are charged fees. He noted that fees do not cover FOIA costs and go to the U.S. Treasury's General Fund rather than the agencies themselves. Mr. Jones also said that the majority of survey respondents said that fees never or rarely resulted in requesters narrowing their requests. Mr. Jones said that Committee member Maggie Mulvihill and graduate student Julia Mata analyzed much of the Fees poll data.

Mr. Jones said that the Fees Subcommittee seeks public feedback regarding requesters' experiences with FOIA fees. Mr. Jones said it would great if the Subcommittee received as many comments from the public as it had from FOIA professionals so the Subcommittee can use the input from FOIA processors and requesters to inform the Committee's efforts and improve FOIA administration, to reduce the acrimony, and improve efficiency.

Mr. Jones said that Fees Subcommittees would like the Office of Management and Budget (OMB) to update its 1986 FOIA Fees guidance to reflect changes – especially with regard to technology - that have occurred since OMB issued its guidance.

Mr. Pritzker asked the Committee about the legislative history as to what Congress considered regarding fees. Mr. Hogan said that Congress intended for agencies to recover the costs of FOIA administration is clear, but to what degree – some, most or all of the costs – is not clear.

Ms. Pustay said that she thought Congress's intent was for agencies to recoup its FOIA administration costs through fees. She noted that she was pleased to see that FOIA processors spend less time on fees issues than expected. She said that OIP is happy to work with the Committee with regard to the fees training that poll respondents said they would like.

Mr. Dave Bahr expressed frustration that the Fees Subcommittee cannot effectively poll the public regarding fee issues. He noted that although agencies may not spend much time on fee issues, requesters spend a significant amount of time on fee issues. From his experience, Mr. Bahr said that fees are a bureaucratic barrier. Due to fees, some requesters withdraw their requests or narrow the scope of their requests. Mr. Bahr said that some agencies may use fees to coerce requesters to seek less information than they are entitled to under FOIA.

Mr. Michalosky raised the issue of agencies' discretion to waive fees. He said that in his experience at CFPB, he would waive fees as a standard practice for non-commercial requesters. Mr. Jones mentioned that the Subcommittee is also looking at discretionary waiver issue and the issue of when agencies can charge fees and to whom if agencies does not meet the statutory deadline for processing requests.

With regard to next steps, Mr. Jones said the Fees Subcommittee recommends that OMB update its fee guidelines and was not sure how the Committee as a whole should move forward on the issue. Committee members cited other aspects of the guidelines they believe need updating.

Mr. Hogan cited the changes in the journalism profession over time with regard to OMB's news media requester guidance and who qualifies as a media requester. Mr. Gottesman commented on the challenges of defining who does and does not qualify as a media requester.

With regard to moving forward with the issue, Dr. Holzer said that Mr. Jones could bring a motion forward and make a recommendation, which the full Committee could then vote on or table the conversation until the Subcommittee drafted something more formal. Mr. Hogan said that the Subcommittee had yet to decide upon specific updates needed to improve FOIA administration. The Committee discussed what a recommendation to update the OMB guidelines would like – whether it would be a simple statement or a whether it would be more detailed document outlining the background, the changes in journalism, records management, and technology that have taken place since 1986, the limitations of the current guidelines and the updates needed.

The Committee took an informal poll to determine whether it is inclined to recommend that OMB update its guidelines and everyone agreed in favor of recommending updates.

The Committee took a 15-minute break before reconvening.

Oversight and Accountability Subcommittee Report

Government Oversight and Accountability Subcommittee co-Chair Martin Michalosky began his status update with an overview of the FOIA Public Liaison (FPL) poll that the Committee sent to Federal FPLs. The intent of the poll was to assess the FPL role and determine opportunities for improvement. Poll questions addressed aspects of the FPL role including the titles of individuals

holding the FPL position, their position series, how frequently they communicate with requesters, topics of discussion between FPLs and requesters, and the methods FPLs use to communicate with requesters.

Mr. Michalosky noted that Subcommittee member Delores Barber lead the effort in analyzing the raw data and drafting a white paper based on the data. Mr. Michalosky briefly covered some of the poll questions and the types of responses received.

Mr. Michalosky highlighted Subcommittee member Nate Jones's compilation of Federal audits, agency reports, and program reviews of FOIA programs throughout the Executive Branch. These reports are available on the OGIS website. The Subcommittee is reviewing and analyzing the reports to identify trends, draw conclusions, and identify areas for improvement and report their findings by drafting a white paper.

Regarding the Subcommittee's litigation review efforts, Mr. Michalosky did not have any updates. Mr. Michalosky explained that other general topics of discussion within the Subcommittee include the role of the Office of Government Information Services (OGIS) within the FOIA process and alternative dispute resolution (ADR).

In terms of next steps, Mr. Michalosky said the Subcommittee has considered soliciting public opinion on the role of FPLs in the FOIA process, meeting, and speaking with OGIS staff just as the Subcommittee met with OIP staff in January 2015.

Subcommittee Co-Chair Mark S. Zaid expressed disappointment that nearly 20% of poll respondents have not received training and said it would be interesting to know why more FPLs do not take training. Mr. Zaid said that it appeared that 1/3 – 45% of FPLs are very dissatisfied or neutral about their personnel, training, leadership support, and technology, and does not see that as a positive thing.

Ms. Barber noted that an the analysis of the poll data revealed themes and trends about agency leadership supporting FOIA efforts at departments and agencies, and the need for specific FPL training. Ms. Barber said that the data shows opportunities to strengthen the FPL role so those holding the position are aware of their responsibilities and receive support from leadership.

Mr. Michalosky observed the importance of ADR and customer service training. He said that it is important for FPLs to focus on FOIA *and* customers, in the case of FPLs and FOIA professionals, their customers are the agency personnel in program offices who work with the FOIA units and requesters.

Ms. Barber said it would be helpful to hear and learn more about FPLs from the requesters' perspectives and noted the challenges that FPLs who are often in the FPL role as a collateral duty and may not have the FOIA training.

Ms. Pustay highlighted the fact that 72% of survey respondents make the public aware of the FPLs and the satisfaction rate of FPLs as indicated in the poll. Ms. Pustay said that OIP could provide guidance, to FPLs and to FOIA Requester Service Centers and hold targeted training for the FPLs and the Service Centers in conjunction with the launch of guidance and education on the resources available to agency FOIA professionals.

Given that the number of responses the Subcommittee received to the poll, Mr. Zaid said that future Chief FOIA Officer Reports could include questions like the types that appeared in the Subcommittee's poll (ex. do you make requesters aware of the FPL role? How do you make requesters aware of FPLs?).

Mr. David Pritzker reminded the Committee ACUS's reports and recommendations regarding ADR and FPLs. He said that the Committee may wish to incorporate some of ACUS's recommendations into the Committee's recommendations.

Public Comment

Michael Ravnitzky, speaking on his own behalf, observed that agencies increasingly respond to records requests by providing requesters with electronic records in various formats including PDFs [Portable Document Files], and Microsoft Word and Excel files. Mr. Ravnitzky said that sometimes the released records are password protected or locked; meaning requesters may not be able to access, print, manipulate the data within the records, or post them online. The records requesters receive may not be useful for the purposes they requester wanted the documents.

Mr. Ravnitzky said that under the Electronic Freedom of Information Act amendments, agencies should release records in their native format if feasible and if it does not cause any exemption problems. Mr. Ravnitzky noted that agencies may lock or password protect electronic records for legitimate reasons (ex. version control, document security, document integrity); however, he said that from a requester's standpoint, agencies' practices present difficulties to requesters by impeding the use of the records. Mr. Ravnitzky finds the practice inconsistent with the intent of the law. Mr. Ravnitzky asked the Committee whether it could address the issue.

Mr. Larry Gottesman noted that the situation Mr. Ravnitzky described poses a challenge for FOIA units as well as requesters, because the units may receive locked files, which present problems when the FOIA units try to process the records. Mr. Gottesman was not sure where this topic would fit into issues the Committee is currently tackling.

Dr. Holzer explained that for some agencies build locking and securing documents into their procedures, especially with regard to agencies' handling of records containing personally identifiable information (PII). He said the Committee might be able to develop best practices around the topic.

Ms. Pustay noted that this issue is not specifically a FOIA issue and that given the recent government data breaches, agencies must take measures to safeguard the records in their custody.

Ms. Barber agreed with Ms. Pustay that the issue is bigger than FOIA and is one of many emerging IT issues agencies face with regard to electronic records management.

Following the Public Comments, Dr. Holzer said that the Committee, through its three subcommittees, is actively looking for ways to improve FOIA. At the next meeting, he said that the Committee looks forward to receiving the Subcommittees' work products or written reports 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

James V.M.L. Holzer

Chair

The Committee will formally consider these minutes at its January 19, 2016 meeting, and incorporate any corrections or notations in the minutes of that meeting.