

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

DRAFT

Meeting Minutes – January 19, 2016

The FOIA Advisory Committee convened at 10 a.m. on January 19, 2016, in Room 105 (Archivist's Reception Room) of 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.

Meeting materials 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, Committee Chair, Office of Government Information Services (OGIS), National Archives and Records Administration (NARA)
- Delores Barber, U.S. Department of Homeland Security (DHS)
- Andrew Becker, The Center for Investigative Reporting
- Larry Gottesman, Environmental Protection Agency (EPA)
- James Hogan, U.S. Department of Defense (DOD)
- Nate Jones, National Security Archive
- Martin Michalosky, Consumer Financial Protection Bureau (CFPB)
- Sean Moulton, Project On Government Oversight (POGO)
- David Pritzker, Administrative Conference of the United States (ACUS)
- Melanie Pustay, Department of Justice (DOJ)
- 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.
- Anne Weismann, Campaign for Accountability

Committee members absent from the meeting:

- Brentin V. Evitt, Defense Intelligence Agency (DIA)
- Karen Finnegan, Department of State
- Eric Gillespie, Govini
- Maggie Mulvihill, Boston University
- Ramona Branch Oliver, U.S. Department of Labor (DOL)
- Clay Johnson, Department of Better Technology

Others present at or participating in the meeting:

- David S. Ferriero, Archivist of the United States, NARA
- Amy Bennett, OGIS, NARA
- Christa Lemelin, OGIS, NARA
- Alina Semo, Office of General Counsel, NARA

Introductions and Announcements

Archivist of the United States David Ferriero welcomed the meeting attendees to the Committee's first meeting of 2016. He noted that the FOIA celebrates its 50th birthday this year and commented that there would be several opportunities throughout the year to recognize and celebrate FOIA's birthday in the coming months with much of that action taking place during Sunshine Week (March 13-19, 2016).

Mr. Ferriero said that 2016 is shaping up to be a notable year for FOIA, observing that recent reports from OGIS, agency inspectors general, and the U.S. Committee on Oversight and Government Reform have shined light on the importance of FOIA, highlighted areas for improvement, and demonstrated the need for the FOIA Committee's efforts to improve FOIA administration throughout the Federal government.

Mr. Ferriero announced that he is extending the Committee's charter for another two years and looks forward to seeing the results of the Committee's work.

Finally, Mr. Ferriero congratulated Delores Barber on her acceptance of the Director of Information Technology and Human Resource Management position at EPA's Office of Pesticides Programs. He acknowledged Ms. Barber's contributions to the Committee by presenting her with a letter thanking her for her service.

Dr. James Holzer reminded meeting attendees that the Committee brings together government and non-government FOIA experts to advise on and make recommendations to improve FOIA administration. The Committee also provides a forum for public discussion of FOIA issues, and offers the public the opportunity discuss and share ideas for improving the FOIA process.

Dr. Holzer encouraged members of the public to share their comments and suggestions for the Committee at <http://www.ogis.archives.gov> and reminded meeting attendees that Committee materials are available online at that address.

The Committee spent the next few minutes introducing themselves and their affiliations. Committee members Brentin V. Evitt, Karen Finnegan, Eric Gillespie, Clay Johnson, and Maggie Mulvihill were unable to attend or participate in the meeting.

Dr. Holzer outlined the meeting agenda and provided meeting attendees with information about the renewal of the Committee's charter.

Under the terms of the current charter, the Committee's last scheduled meeting is Tuesday, April 19, 2016. NARA will publish a notice of renewal in the Federal Register after the Archivist approves and signed the charter for renewal; this is required by the GSA final rule for Federal Advisory Committee.

Dr. Holzer reminded the Committee that the Archivist appointed members to serve two-year terms. The terms for Committee members who have served since the Committee's establishment expire on May 20, 2016. In April 2016, NARA will publish a notice on the OGIS blog and in the Federal Register to solicit nominations for Committee membership.

Anyone wishing to serve on the Committee, including any current members, may nominate him or herself. NARA will ask each nominee to provide a resume, or a CV, and a brief personal statement describing the contributions the nominee would make to the Committee. Potential nominees will be responsible for complying with any procedures, and/or receiving necessary approvals from his/her agency or organization prior to submitting his/her name and information for consideration.

The Committee's charter, bylaws, and membership balance plan, available online at OGIS's website, spell out the qualifications for membership. The Archivist of the United States will make the final selection of the Committee members based on these submissions.

The Committee voted to adopt the October 20, 2015 Committee meeting minutes.

Subcommittee Reports

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

Fees Subcommittee

Fees Subcommittee Co-Chairs Jim Hogan and Nate Jones presented a status update on the Subcommittee's activities.

Mr. Hogan stated that fee assessments, fee waivers, and fee requester categories create confusion for requesters and agencies, particularly since these fee determinations are often subjective. Mr. Hogan observed that this confusion causes tension between Federal agencies and FOIA requesters and creates a burden on agencies when it comes to adjudicating fee determinations.

Mr. Hogan explained that if the Office of Management Budget (OMB) revised its 1987 FOIA fees guidance, it could rectify or improve the current situation. Mr. Hogan observed that times have changed since OMB last issued fee guidance and that agencies may base fee determinations on the requester, what the requester can do with the information, and how the requester can disseminate it. He said that Congress and OMB might not have envisioned the changes in the environment when it put fee provisions in the FOIA and OMB guidance. The types of media outlets have changed and the ability to disseminate information has changed.

Mr. Hogan said that the Subcommittee proposes a memo from the Committee Chair to the Archivist recommending that the Director of OMB review and revise the fees guidance. The Subcommittee presented the draft memo to the Committee for comment and a decision as to whether and how the Committee wishes to move forward with it.

The draft memo presents three options for the Archivist,

Option 1: The Archivist asks OMB to revise its 1987 guidance.

Option 2: The Archivist makes a legislative proposal to Congress to amend the fee provisions of the FOIA by revising the various fee standards, thereby enabling agencies standardize fee determinations.

Option 3: Keep the status quo and not make any changes to the fee provisions.

Mr. Nate Jones said that OMB issued its fee guidance before the widespread use of the Internet and before it became easier to disseminate records electronically. He continued that the guidance needs updating in a way that follows the President's memorandum [[Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009)]. Mr. Jones stated that agencies should apply a presumption of disclosure to all decisions involving the FOIA, including fees.

Dr. Holzer thanked the Fees Subcommittee for its hard work and for drafting the memo. He asked if there was a motion to consider the Fees Subcommittee's recommendations and there were two motions. Dr. Holzer opened up the discussion to the rest of the Committee.

Ms. Delores Barber said that she agrees with Mr. Hogan and Mr. Jones's conclusions that fee guidance and regulations need updating. She supported the recommendation to ask the Archivist to have OMB consider updating its guidance.

Mark Zaid questioned whether there was a reason why the Committee could not recommend options one and two. He asked whether the memo the Archivist sends to OMB could include an alternative legislative proposal. Mr. Zaid expressed concern that a request from the Archivist to OMB that the agency update its fee guidance would may not result in action. If the Archivist recommends that OMB update its guidance and made a legislative proposal, Mr. Zaid noted that those who are not part of the Executive Branch could take the proposal to introduce it independently without going through OMB. Mr. Zaid said that he does not want to wait on OMB to make changes.

Mr. Hogan said that the Committee should present the Archivist with one option, and if the Archivist rejected it, he could then fall back to options two or three. He thought the purpose of the memo is to say, "Here's where we want you to go." Mr. Hogan expressed concern that if the memo included a legislative proposal, it could be time-consuming. Mr. Hogan said he thought it was fine if the public wished to pursue a legislative proposal independently. Mr. Hogan said that if the Committee goes to option two, then it could give proposed legislation to the Archivist.

Mr. Jones said that he thought option one, the memo encouraging OMB to update its guidance, had the greatest likelihood of success. Mr. Jones said that the Fees Subcommittee thought the

most fruitful choice would be for the Archivist to recommend that OMB update its guidance, rather than trying to get Congress to pass a FOIA bill with the desired language.

Mr. Larry Gottesman said that the legislation process can be lengthy, and that if the Committee could get OMB to update the fee guidance, that would be the most efficient positive outcome.

Ms. Melanie Pustay said that the rulemaking processes through which OMB would update the fee guidance would allow the FOIA requester community and Federal agencies to weigh in on updating the fee provisions. She pointed out that this could be more efficient than a legislative change and would be a way to make a concrete change and improvement of FOIA.

Ms. Barber questioned whether the Archivist has the authority to tell OMB to update its guidance. Mr. Hogan said that OGIS could recommend that OMB update its guidance. Dr. Holzer said that it would be more of a recommendation from the Archivist as the Archivist does not have the authority to tell OMB to update its guidance.

Mr. Zaid said the Committee should push as many options as it can with regard to asking OMB to review its guidance and legislative proposals. Mr. Zaid asked whether the Department of Justice Office of Information Policy (OIP), OGIS, or NARA has independent authority to issue its own type of fee guidance.

Ms. Pustay highlighted the distinction between fee waiver and fee guidance. Under the FOIA, ~~agency the~~ fee ~~regulations guidanee~~ (addressing the requester categories and charging of fees) ~~haves~~ to comply with OMB's fee guidelines. Those ~~Guidelines FOIA's provisions~~, Ms. Pustay said, ~~does~~ not directly affect fee waivers. She said that there is more room for flexibility with fee waiver guidance.

Mr. Lee White said, that although Congress may not pass legislation, it could holding a hearing on the topic of fees and OMB's guidance, noting that bringing visibility to the issue and marking the FOIA's 50th anniversary and the 30th anniversary of OMB's guidance could provide a bully pulpit for change.

Mr. David Pritzker expressed concern that the options, as written, state that OMB should update its guidance and/or a legislative proposal should address fees; however, neither option describes what to do or what changes are needed.

Mr. Pritzker said it would be good to circulate any Committee recommendations for informational purposes, with the hope that there would be interest in other quarters to support OMB's eventual interest in updating the fee guidance.

Mr. Sean Moulton agreed with Mr. Pritzker, stating that the Committee needs to make a substantive recommendation, not just recommend that OMB should update the fee guidance, and provide a sense of where the Committee wants to set the bar for new guidance. In the event that Congress starts moving with FOIA legislation, Mr. Moulton said the Congressional Committees drafting the legislation may be aware of the Committee's memo and could incorporate it into the legislation. Mr. Moulton supports a direct and specific recommendation to OMB, or to the Archivist, to contact OMB.

Mr. Hogan said that if the Archivist agrees with the memo, the Fees Subcommittee would be

responsible for creating the memo from the Archivist to OMB, with the data and specifics. The Subcommittee drafted the memo, in its current form, at a higher level. Because the Committee was created as a part of the U.S. Government's [2nd National Action Plan](#), Mr. Hogan thinks that the Committee's memo should carry weight.

Mr. Gottesman reminded the Committee that time is of the essence and if the Committee does not move quickly, the Committee may not have an impact until the next administration.

Dr. Holzer said the Fees Subcommittee could draft something more specific to circulate among the Committee with the goal of having a product for the Committee to vote on at its April 2016 meeting.

Mr. Zaid said he supports moving forward in a timely manner; however, he wants to ensure that the Committee does something that can make an impact.

From a process standpoint, Dr. Holzer stated that the Committee has to decide is whether to make a recommendation to the Archivist and if so, what that recommendation should be. How the Archivist decides to proceed after receiving anything from the Committee, Dr. Holzer noted, is up to the Archivist. He said that if the Archivist does not act, then the Committee would take another vote or chose another course of action.

Dr. Holzer said that what the Committee could discuss was this two-step process: whether the Committee has a preference on the options discussed and if so, what the Committee wants to do. The Committee can then vote as to how to proceed.

Mr. Andrew Becker asked how long it would take the Archivist to make a decision. Dr. Holzer said that he could not provide an exact timeline; however, he anticipated that it would take no more than 30-60 days at the most. He noted that the Archivist may want the background information the Committee discussed-- what fee provisions that the Committee wants updated and, and why.

Mr. Pritzker asked whether anyone has determined if the legislation and/or the OMB fee guidance cause problems. Mr. Jones said the Fees Subcommittee discussed the issue and said that fee categories tend to be the most contentious issue and updating the OMB guidance could go a long way in improving the problem. Ms. Pustay said that changes in technology and the ability to disseminate information by posting it online changes the analysis in determining whether a requester is a member of the news media. She said this could be a powerful example to include in the memo.

Mr. Pritzker suggested that the Committee's memo and recommendation specify what in the guidance needs revision. Mr. Hogan said that it makes sense for the Fees Subcommittee to examine the OMB guidance, review the sections, and to decide what sections and language require revision. He said that he is also not opposed to a general recommendation to OMB to update its guidance.

Delores Barber motioned for a vote that the Committee consider recommendation one as the option to go forward and that the Fees Subcommittee review OMB's fee guidance and update the

draft memo as appropriate. The motion was seconded and the Committee unanimously voted to adopt the motion.

Oversight and Accountability Report

Oversight and Accountability Subcommittee co-Chair Martin Michalosky provided an updated on two tasks on which the Oversight and Accountability Subcommittee has focused its efforts over the last 18 months: the assessment of the role of FOIA Public Liaisons (FPL) and the Subcommittee's work to determine opportunities for improvement.

Mr. Michalosky noted that the Subcommittee asked Federal FPLs for their feedback through the Subcommittee's FPL poll. The Subcommittee, Mr. Michalosky stated, would like to balance that perspective by asking for public comments on the FPL role. To that end, the Subcommittee drafted a Request for Public Comment document. The Subcommittee seeks feedback on the public's experience with FPLs in three specific areas: availability and responsiveness, assistance with the FOIA process, and timeliness and effectiveness.

Mr. Michalosky said the Subcommittee intends to post this on the Committee's website and begin collecting comments from the public. After reviewing the comments, the Subcommittee would like to draft a white paper, similar to the white paper the Subcommittee drafted after reviewing and analyzing the data from its FPL poll.

With regard to the Subcommittee's efforts to review agency audits, GAO audits, and agency-inspector general reports to identify current authorities for oversight and action, Mr. Michalosky reported that Nate Jones has led this effort and Nate and his colleagues have collected over 80 reports, which are available on the Committee's website. Nate drafted a white paper based on his analysis, which the Subcommittee will review and finalize before circulating to the full Committee for consideration.

Oversight and Accountability Co-Chair Mark Zaid thanked Mr. Michalosky and Mr. Jones for taking the lead with these tasks.

Dr. Holzer thanked the Committee for its efforts and asked whether the Subcommittee is asking the Committee to consider polling the public by posting the document to OGIS's website. Mr. Pritzker and Mr. Michalosky clarified that the Subcommittee used the words "request for public comments" rather than "polling."

Dr. Holzer noted that he understood the rationale for the Subcommittee's choice; however, he thought that the Subcommittee's approach was problematic because he thought that despite the wording it would still be considered a survey or poll. Dr. Holzer said he could check with NARA's OGC. He said an alternative would be to ask the National Security Archive and POGO to go out and survey the public.

Mr. Gottesman said that the Subcommittee's approach doesn't get into the information collection issue and Dr. Holzer's concerns because there is a distinction between asking the public "what's been your experience with A?" versus asking to answer specific questions which would be more like a survey.

Dr. Holzer said he would have to consult NARA's OGC. Mr. Pritzker suggested that Dr. Holzer follow up with OGC as soon as possible. Dr. Holzer said that he thought NARA's Office of the Chief Operating Officer (COO) would view the Subcommittee's request for public comments as a survey. Dr. Holzer said he is willing to consult the OGC, however, he thinks it would be most efficient for other organizations to seek public comments.

Mr. Pritzker said that the Subcommittee deliberately tried to seek public feedback in as mild a way as possible.

Dr. Holzer said that the Committee could take a two-pronged approach. If the Committee wants poll the public using the Oversight and Accountability Subcommittee's language, Dr. Holzer said that he could run this through NARA's OGC and leadership to ask how do it and if it can be done. Mr. Gottesman expressed concern about saying to a private group, "Do what we can't do as a group."

Mr. Michalosky said he would like NARA's OGC to provide guidance on the issue.

Ms. Pustay asked whether there is the possibility of designating time at a future meeting or holding a meeting specifically with the intent of gathering feedback from the public on these issues.

Mr. Jones proposed a motion to post the request for comments document that the Oversight and Accountability Subcommittee drafted to the OGIS website as-is. Ms. Pustay proposed a second motion that the Committee ask NARA's OGC to review the feasibility of posting the document on OGIS's website.

Dr. Holzer stated that the Committee had two motions: Mr. Jones's motion and Ms. Pustay's motion. Dr. Holzer said it was unlikely that NARA would post something that is inconsistent or incompatible with the law or the statute.

On Mr. Jones's motion, Dr. Holzer requested a hand count on all in favor of posting the document as-is. DFO Christa Lemelin requested that the Committee voice vote for the record.

Mr. Zaid said he thought the Committee was making the issue too complicated. The Committee would not do something inconsistent with the law or with the NARA's policies and regulations. At previous Committee meetings, the Committee asked for the OGC's feedback.

With regard to Committee decisions and voting, Dr. Holzer said that it is important to follow voting procedures and that it is up to the Committee to determine a path forward. As Committee Chair, Dr. Holzer said that his goal is to move the Committee forward.

Dr. Holzer said that if it is the Committee's will to post the request for public comment, he will consult the OGC expeditiously to determine whether we can post it as is or whether we need to change it.

Mr. Pritzker said that he hoped Dr. Holzer would follow up with the OGC and get a quick answer and suggested that the Committee authorize our the Committee Chairman to, if necessary, make minor changes in the wording.

Dr. Holzer proposed a motion to post the Oversight and Accountability Subcommittee's document contingent on OGC's approval, and any edits that that the Office proposes. The Committee unanimously adopted Dr. Holzer's motion.

The Committee took a 15-minute break before reconvening.

Proactive Disclosure Subcommittee Report

Proactive Disclosure Subcommittee Co-Chairs Eric Gillespie and Brent Evitt were unable to participate in the Committee's January 19, 2016 meeting. The Committee had discussed OIP's "release to one, release to all" pilot program at previous meetings, so Dr. Holzer invited OIP Director Melanie Pustay to open the discussion on proactive disclosures.

Ms. Pustay said that pilot project is in the last month and her office looks forward to compiling its report from the metrics provided by participating agencies. OIP asked pilot program participants to measure, to the best of their ability, the time and resources it takes to proactively post records, the challenges of posting, and whether time spend posting documents diverts from the processing of FOIA requests. Dr. Holzer asked if anyone had any questions.

Mr. Jones expressed concern that the Committee is not livestreaming its meetings and questioned whether NARA can livestream future Committee meetings to encourage more public participation in real-time. Dr. Holzer said NARA would address and resolve this issue during the Committee's next term.

Regarding the challenge agencies face in making FOIA-processed documents compliant with Section 508 and available online, Mr. Jones expressed the hope that the burden could be shifted from agencies to software that would simplify the process.

Mr. Hogan noted that no matter how good the software can be, agencies may still have to manually remediate some documents such as handwritten notes, blacked out areas, and graphs; he further noted that software that worked at Mr. Jones suggested would come at a cost. Mr. Hogan highlighted the challenges that agencies face in keeping resources for FOIA processing and the concern agencies may have that proactive disclosures do not necessarily reduce backlogs. Mr. Hogan said that he appreciated OIP's pilot project and that DOD understands the importance of proactive disclosures. He said it would be great if agencies could consider proactive disclosures when they are created and not at the end of the documents' lifecycles.

Dr. Holzer suggested that the Committee consider inviting Professor Margaret Kwoka to a future Committee meeting. Dr. Holzer said that Professor Kwoka recently published an article [Kwoka, Margaret B., FOIA, Inc. (November 2, 2015). Duke Law Journal, Forthcoming; U Denver Legal Studies Research Paper No. 15-57. Available on the Social Science Research Network (SSRN): <http://ssrn.com/abstract=2685402>] regarding her case studies of Federal agencies that have a high number of commercial requests and concluded that agencies should target certain set of records for proactive release.

Dr. Holzer thanked the Committee for its progress since the Committee's previous meeting in October. Before opening up the floor to comments, Dr. Holzer noted that the Archivist has recognized and reaffirmed the importance of this Committee and its efforts by renewing the

Committee's charter.

Mr. Zaid proposed that the Committee issue a resolution for the FOIA's 50th anniversary that addresses the issues explored by the Committee, what it has done and what it sees a vision going forward for the next Advisory Committee, and FOIA in general. Ms. Pustay supported Mr. Zaid's idea and said she is willing to work with him on it. Mr. Zaid invited other members of the Committee interested in working on the document to contact him.

Mr. Jones said that he is troubled that, because of a potential FOIA lawsuit, DOJ is arguing that the Committee Study of the Central Intelligence Agency's Detention and Interrogation Program is not a Federal record and NARA will not comment on whether the document is a Federal record. He said that the Presidential Records Act Amendment of 2014 gives the Archivist of the U.S. the authority to determine what is a Federal record. For the record, Mr. Jones said that he would like to say to the Archivist to call the report a Federal record that is subject to the FOIA and to any FOIA exemptions that would apply.

Mr. Zaid mentioned the FOIA lawsuits involving the Department of State. Mr. Zaid was concerned by the sentiment expressed in one of the emails released as the result of a FOIA suit that Federal employees deliberately tried to avoid having their communications subject to FOIA by using a non-.gov email address. Mr. Zaid said that perhaps the Committee could address this type of issue in its proclamation. Dr. Holzer thanked the Committee for its questions and comments.

Public Comments

Dr. Holzer opened the floor for comment; however, meeting attendees did not have any questions or comments.

Dr. Holzer said that he looks forward to continuing the Committee's work in the coming years. Dr. Holzer said that at the April meeting, the Committee can expect to formalize what has it discussed, and make and vote on any recommendations. Dr. Holzer announced March 14, 2016 Sunshine Week events sponsored by OGIS and OIP. Dr. Holzer thanked the meeting attendees for their attendance 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 April 19, 2016 meeting, and incorporate any corrections or notations in the minutes of that meeting.