

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

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Meeting Minutes – April 21, 2015

The FOIA Advisory Committee convened at 10 a.m. on April 21, 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)
- Dave Bahr, Bahr Law Offices, P.C.
- Delores Barber, U.S. Department of Homeland Security (DHS)
- Brentin V. Evitt, Defense Intelligence Agency
- Larry Gottesman, Environmental Protection Agency (EPA)
- Jim Hogan, U.S. Department of Defense (DOD)
- Nate Jones, National Security Archive
- Ginger McCall, Electronic Privacy Information Center (EPIC)
- Martin Michalosky, Consumer Financial Protection Bureau (CFPB)
- David Pritzker, Administrative Conference of the United States
- Melanie A. Pustay, U.S. Department of Justice (DOJ)
- Anne Weismann, Citizens for Responsibility and Ethics in Washington (CREW)
- Lee White, National Coalition for History (NCH)
- Mark S. Zaid, Law Office of Mark S. Zaid, P.C.

Committee members absent from the meeting:

- Andrew Becker, The Center for Investigative Reporting
- Ramona Branch Oliver, U.S. Department of Labor (DOL)
- Karen Finnegan, U.S. Department of State
- Eric Gillespie, Govini
- Clay Johnson, The Department of Better Technology
- Maggie Mulvihill, Boston University

Others present at or participating in the meeting:

- Amy Bennett, OGIS, NARA
- Michael Binder, Air Force Declassification Center
- Diane Bridge, National Labor Relations Board
- Cindy Cafaro, Department of the Interior
- Hirsh Kravitz, OGIS, NARA
- Christa Lemelin, OGIS, NARA
- Abby Paulson, OpenTheGovernment.org
- Angel Simmons, OGIS, NARA
- Gary M. Stern, NARA
- Bobak Talebian, Department of Justice
- Wanda Williams, NARA

Introductions and Announcements

Archivist of the United States David Ferriero opened the meeting and noted that the Committee is approaching its first anniversary and that the group’s work is gaining momentum. He also noted that he took the position as Archivist of the United States because of the important role the National Archives and Records Administration (NARA) has to play in open government. He promised the NARA’s support for the Committee and thanked them for their service.

Acting Director of the Office of Government Information Services (OGIS), Nikki Gramian, expressed thanks to the Archivist and NARA. She also explained that David Reed of the Federal Communications Commission had stepped down from the Committee and that the Archivist had appointed the Deputy General Counsel for the Administrative Conference of the United States, David Pritzker, to the Committee. She further noted that Mr. Pritzker has more than 40 years of experience in administrative law, including the FOIA. Ms. Gramian continued to state that the meeting was being recorded and that the video, minutes and other material from the meeting would be posted on OGIS’ website. The Oversight and Accountability, Fees, and Proactive Disclosures subcommittees do not have the same notice and open meeting requirements as the full Committee, as long as the subcommittees are reporting back to the full Committee. Subcommittee materials are also available on the Committee’s website.

Administration

Ms. Gramian said that Mr. Pritzker had alerted the staff to an error in the previous meeting’s minutes. She explained that OGIS would circulate the corrected minutes and the Committee would vote to approve the minutes at the next meeting.

Subcommittee Reports

Similar to the January 27th and 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.

Oversight and Accountability Subcommittee

Marty Michalosky noted that the subcommittee held two meetings in the last quarter. He also said that new oversight reports have been added to the OGIS website and that Nate Jones will be reviewing all of the reports to look for trends. Mr. Michalosky further noted that the subcommittee has crafted a poll that they intend to send out to agency FOIA Public Liaisons. FOIA Public Liaisons are intended to be a supervisory office that the public can contact to raise particular concerns and that plays a role in dispute resolution; the poll is intended to help the Committee better understand how the role is working in practice and the type of individuals serving in this role. Mr. Michalosky then briefly listed the questions that are included on the poll and said that the questions would be posted on the web with the Committee's materials.

Melanie Pustay questioned whether the poll should also be sent to agency FOIA Service Centers since at many agencies the centers handle the majority of issues. Ms. Pustay noted that, for example, FOIA Service Centers handle calls from requesters seeking an update on the status of their FOIA. Mr. Michalosky responded that the purpose of the survey is not to learn about the agency's customer services practices as a whole, but to learn more about the role of FOIA Public Liaisons. He continued by pointing out that the role of FOIA Public Liaison is ambiguous and there is no extant data on how it is functioning at agencies. Delores Barber pointed out that agencies have arranged their FOIA Customer Service Centers and FOIA Public Liaisons in a variety of ways.

Anne Weismann stated that from a requester's perspective it does not appear that FOIA Public Liaisons have been very useful, and that it would be good to have empirical data to either support or deny that perception. Mark Zaid added that it would be useful to know if FOIA Public Liaisons are responding to requesters, how FOIA Public Liaisons are responding, and whether they are dealing with substantive issues.

Ms. Pustay suggested that the subcommittee add a preamble to the poll that makes the purpose of the poll clear. She suggested that the preamble also indicate that the subcommittee understands that many issues are handled by service centers and that the FOIA Public Liaison generally handles a subset of issues that need greater attention.

Mr. Pritzker suggested that a question be added to the poll indicating the size of the agency. Mr. Michalosky responded that the results of the poll should be read as a complement the annual reports, which do collect this information. Ms. Barber suggested that poll respondents should be asked to identify their agency and component.

Mr. Zaid suggested that the subcommittee ask Mr. Pritzker to fill out the survey before it is sent out. He stated that since Mr. Pritzker is a FOIA Public Liaison, he should be able to offer advice on which questions are useful or which will not provide useful data.

Mr. Zaid then reported on the subcommittee's progress on completing a FOIA litigation review. He stated that the subcommittee has discovered the FOIA Project at the Transactional Records Access Clearinghouse (TRAC) is already doing similar work. The subcommittee has paused its inquiry so as to avoid duplicating efforts.

Before moving on to the next subcommittee's report, Mr. Pritzker asked how the poll will be distributed. Mr. Zaid responded that Ms. Pustay has agreed to provide a list of email addresses for agency FOIA Public Liaisons. Christa Lemelin added that NARA will administer the poll using QuestionPro or Survey Monkey. She further explained that as soon as the poll questions are finalized, OGIS will get approval to send out the survey from NARA's Chief Operating Officer.

FOIA Fees Subcommittee

James Hogan reported that the subcommittee's discussions have largely centered on the contentiousness of fees in the FOIA community. He noted that FOIA's fee provisions are not well known and grant a high amount of discretion to the agency; he also noted that the Office of Management and Budget (OMB) guidelines are quite old and that agency actions on fees can add delay into the process.

Mr. Hogan discussed the subcommittee's desire to gather more information regarding the issues surrounding FOIA fees. He explained that one option for gathering information is to add questions to the oversight and accountability subcommittee's survey of FOIA Public Liaisons; he added that FOIA Public Liaisons might not be the best targets, however. Ideally the subcommittee would like public input, but Mr. Hogan noted that the approval process for gathering information from the public can be burdensome and takes a while to complete. He encouraged the public to submit public comments about the issue.

Mr. Hogan explained that one of the goals of the survey is to understand more about the time and resources that agencies expend in assessing fees. He noted that fees only cover a very small part of the cost of the FOIA program and that fees generally do not go to the agency anyway. He added that the subcommittee understands though that fees can be useful in encouraging a requester to narrow the scope of a request. He noted that the subcommittee has discussed the pros and cons of eliminating all fees for non-commercial requesters and that it is not clear if it would be a more efficient system

Mr. Hogan stated that he had previously put together a legislative proposal to amend the federal FOIA fee process based on the UK model (which has a flat fee and a high threshold for fees). Mr. Hogan has circulated the legislative language to the subcommittee for comment and said that

they will work on further refining the proposal. He added that at this point it is unclear if the subcommittee will issue a definitive recommendation or if its main contribution in the short-term will be increasing understanding of the current process for both requesters and agency personnel.

Mr. Zaid brought up the issue of whether the government can currently track how much is owed to an agency by a requester who agreed to pay fees but never paid and asked if the government had ever brought suit against a requester for non-payment. Mr. Hogan said that the data could likely be tracked, but it is likely to be inaccurate. He also added that if a requester does not pay fees, the Department of Defense will not process new requests. Larry Gottesman added that the Department of Treasury will go after requesters for debt collection.

Ms. Barber encouraged the subcommittee to gather input from the public and noted that while the approval process to collect information from the public by OMB can be cumbersome, it is not insurmountable. She noted that having information from requesters will help the subcommittee drill down into the issues and figure out what is going on. She also noted that while comparisons with fee systems in other countries are interesting, the subcommittee should keep the scale of the US' system in mind. Ms. Lemelin responded that OGIS is happy to usher the subcommittee's request through the OMB process; she noted, though, that the approval process to gather information from other agencies is much less time consuming and that we would like to make sure that process begins as soon as possible. Anne Weismann added that the subcommittee might want to talk to TRAC to see if they are currently collecting any information on fees.

Dave Bahr stated that he has observed a great deal of confusion about the difference between fee categories and fee waivers among requesters. He noted that by the time a requester approaches him for legal representation, they will often have to restart the process because they have not been properly categorized or asked for a fee waiver correctly. He further added that a requester should not have to have legal advice in order to make a FOIA request.

Nate Jones questioned whether agencies currently have the authority to waive fee collection, and noted that some agencies do grant FOIA processors the discretion to waive fees in their regulations. He also encouraged the subcommittee to examine the change made to the law in 2007 with respect to agencies' ability to charge fees when they miss processing deadlines.

Mr. Pritzker noted that ACUS' recent report on targeted dispute resolution and FOIA might include information on FOIA fees. He also cautioned that OMB's approval process for gathering information requires no less than two public comment periods; he cautioned that if the subcommittee wants the information soon, a public survey might not be useful.

Mr. Jones also added that while he is glad the subcommittee is gathering information, they should remember that the goal of the Committee is to suggest reforms.

Mr. Michalosky shared that he had a very difficult time updating CFPB's practices with respect to fees because of the OMB guidelines and asked why they have not been updated.

Anne Weismann suggested adding a question to the survey that explores internal barriers to giving agencies discretion on fees issues and Mr. Zaid questioned whether FOIA Public Liaisons will be in the best position to answer the subcommittee's questions. Mr. Hogan responded to Mr. Zaid by saying the subcommittee has discussed the question and has decided that in some cases FOIA Public Liaisons will be able to give good answers, but that is not true in all instances. Mark Zaid asked who in the agency set fee policy. Melanie Pustay responded that the policy is set by the agency's regulation but that most fees decisions are actually made by FOIA processors. Ms. Pustay also noted that fees are only assessed in a small number of cases and suggested the subcommittee add a question that captures the percentage of FOIA requests that involve fees.

Ms. Gramian suggested asking agencies when they make fee determinations during the FOIA process and Ms. Pustay noted that DOJ encourages agencies not to deal with fee waivers until it is clear that there will be any fees associated with the request. Ms. Weismann responded that agency practices are inconsistent so it would be good to have data on the subject. Mr. Bahr also noted that some agencies toll the request while it decides on fees issues. Mark Zaid added that the subcommittee should look for information on how many agencies are completing the two hours of search and processing 100 pages before figuring out possible fees. Mr. Hogan responded that in his experience, whether the two hours and 100 pages are completed before fees are addressed is decided on a case-by-case basis; he noted that at the outset of a request it is often unclear how many records will turn up in two hours of search, but that agencies should complete the two hours of search and that the two hours of search should be where the processor thinks responsive documents are most likely to be. He further added that while some FOIA processors think that communicating with the requester can add delay (because it is time spent on something other than processing the request), it is generally a good practice.

Anne Weismann encouraged the subcommittee to break out its survey from the oversight and accountability subcommittee survey. Mark Zaid agreed with Ms. Weismann's suggestion and noted that combining the two surveys could make people less likely to respond. Ms. Barber suggested that the survey be sent to agency's Chief FOIA Officers with a request that the Chief FOIA Officer send it to the people in the agency that can best respond. Ms. Weismann noted that this would provide the subcommittee with more robust data. Mr. Hogan agreed that the surveys should be separate and cautioned that sending it to Chief FOIA Officers as suggested might lengthen the response time.

Mr. Gottesman added that receiving OMB approval to collect information from the public takes about 6 months and that the Committee only has one year left in its original charter. Ms. Weismann suggested that Committee members might be able to get input on the issue on their own. Ms. Barber suggested that the American Society of Access Professionals (ASAP) might be

a good partner and Ms. Weismann added that ASAP can send the survey to all of its membership, which includes requesters. Ms. Gramian and Ms. Lemelin let the Committee know that OGIS will look into any legal limitations to working with ASAP on this issue.

Proactive Disclosures Subcommittee

Ms. Gramian began the discussion by noting that David Reed, who stepped down from the Committee, was the government co-chair and asked for a volunteer to replace him on the subcommittee. Brent Evitt volunteered. Ms. Gramian thanked Mr. Evitt. She also noted that the non-government co-chair, Eric Gillespie, had discussed sending out survey questions and encouraged Mr. Evitt to reach out to Mr. Gillespie to discuss the possibility.

Ms. Lemelin stated that the change in leadership is an opportunity to reboot and refocus the subcommittee's work. She also added that the Committee was specifically instructed to explore proactive disclosures in the second National Action Plan and that DOJ had recently sent out new guidance on proactive disclosures. She encouraged Committee members to contact Mr. Evitt or Mr. Gillespie to join the subcommittee. Mr. Evitt responded that he would work with Mr. Gillespie to set up a subcommittee meeting as soon as possible.

Ms. Barber noted that there is no promise that the Committee will be renewed after its initial charter expires next year so the Committee needs to work hard to complete its work. She also noted that she hopes that the Committee is renewed.

Mr. Zaid asked for an update on the search for a new OGIS Director and for information on how the Committee can be renewed. Ms. Gramian responded that OGIS will look into these questions and will respond to the Committee. Mr. Pritzker noted that the lifespan of the Committee is up to NARA and that all federal advisory committees are initially chartered to run for two years. Ms. Lemelin noted that the Committee's charter does include language referring to extending the lifespan of the Committee. Mr. Zaid noted that it might be good to ask NARA General Counsel, Gary Stern, to address the lifespan of the Committee since Mr. Stern was in attendance. Mr. Stern said there are lots of options and ways to extend its charter.

Public Comment

Cindy Cafaro suggested that the oversight and accountability survey include a question regarding who in the agency could best answer questions about fees. She suggested that this might streamline the process.

Ms. Lemelin asked that Committee members please engage with the subcommittees and recommit to its work. She noted that many people applied to serve on the Committee and that the Archivist appointed each of the Members because they are experts in the FOIA process and can provide input that will improve the process.

Wanda Williams suggested that the Committee reach out to Public Affairs offices since they deal with similar requests for information. Mr. Zaid responded that it would be interesting to know if Public Affairs offices know that the agency has a FOIA Public Liaison that they can refer people to for assistance.