

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

DRAFT

Meeting Minutes – July 21, 2015

The FOIA Advisory Committee convened at 10 a.m. on July 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.

Meeting materials, including the transcript and video, 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), 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)
- Clay Johnson, The Department of Better Technology
- Martin Michalosky, Consumer Financial Protection Bureau (CFPB)
- Sean Moulton, Project On Government Oversight (POGO)
- Maggie Mulvihill, Boston University
- Ramona Branch Oliver, U.S. Department of Labor (DOL)
- David Pritzker, Administrative Conference of the United States (ACUS)
- Anne Weismann, Campaign for Accountability
- 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
- Nate Jones, National Security Archive
- Lee White, National Coalition for History

Committee members absent from the meeting:

- Karen Finnegan, U.S. Department of State
- Eric Gillespie, Govini

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

Others present at or participating in the meeting:

- Amy Bennett, OGIS, NARA
- Diane Bridge, National Labor Relations Board
- Cindy Cafaro, Department of the Interior
- Jill Eggleston, U.S. Citizenship and Immigration Services
- Linda Ferguson
- Jesse Franzblau
- Christa Lemelin, OGIS, NARA
- Don McIlwain, National Declassification Center (NDC), NARA
- Michael Rhodes, NDC, NARA
- Bobak “Bobby” Talebian, DOJ
- Alina Semo, Office of General Counsel (NGC), NARA
- Jean Whyte, NGC, NARA

Welcome, Introductions and Announcements

The Archivist of the United States, David S. Ferriero, opened the meeting and welcomed the Committee's newest Member, Sean Moulton, who works for POGO. The Archivist noted that the Committee was created to help meet the Administration's goal of modernizing the FOIA and encouraged the Committee to consider how it can further that effort. He also noted that he looks forward to hearing more about the subcommittees' work and next steps.

The Archivist also announced the appointment of Dr. James Holzer as the new OGIS Director. Dr. Holzer is currently at DHS and begins his new position effective August 9, 2015.

Committee Acting Chair and OGIS Acting Director Nikki Gramian, thanked the Archivist for opening the meeting, and the staff of NARA's Chief Information Officer for their assistance in with the Committee's intra-agency surveys. She also welcomed everybody to the meeting and announced that Fees Subcommittee co-chair Ginger McCall stepped down from the Committee as a representative of an organization that advocates on FOIA issues to take a position in the federal government. The Archivist appointed Mr. Moulton to fill the vacancy left by Ms. McCall. Ms. Gramian welcomed Mr. Moulton to the Committee and announced that Nate Jones of the National Security Archive volunteered to act as the new co-chair of the Fees Subcommittee.

Ms. Gramian explained the meeting was being recorded; in addition to the video, minutes and other meeting materials are or will be available on OGIS's website. She also noted that the subcommittees are not subject to the same constraints as the full Committee, but are expected to report back to the full Committee.

Administration

The Committee voted unanimously to approve the amended meeting minutes from the January 27, 2015 meeting; the Committee also approved the minutes of the April 21, 2015 meeting. The minutes are available online at <https://ogis.archives.gov/foia-advisory-committee/meetings.htm>.

Subcommittee Reports

The Committee devoted the majority of the meeting agenda to updates from the Oversight and Accountability, Proactive Disclosures, and FOIA Fees subcommittees. The subcommittees' co-chairs presented the updates. 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

Oversight and Accountability Subcommittee co-chair Martin Michalosky reported that the subcommittee is reviewing existing reports from Inspectors General (IG) and the Government Accountability Office on FOIA to identify themes and trends; the subcommittee also welcomes public input on this project. He added that Nate Jones identified about 30 new IG reports to add to the Committee's website and the subcommittee hopes to share its findings at the next Committee meeting.

Mr. Michalosky also reported that the subcommittee's litigation review is on hold because the Transactional Records Access Clearinghouse (TRAC) is undertaking a similar effort. He said that the subcommittee is tracking TRAC's effort.

Additionally, Mr. Michalosky reported that the subcommittee worked with OGIS and NARA to disseminate a survey for agency FOIA Public Liaisons; the survey consists of fifteen questions, all of which are available on the Committee's website. He noted that the survey closes on July 22, 2015 and at the time of the meeting the survey had 90 respondents; the subcommittee plans to review the results and share observations at the next Committee meeting.

FOIA Fees

FOIA Fees Subcommittee co-chair James Hogan noted that the perception that fees are a major issue between agencies and requesters. He added that one reason for this perception is that the law is complicated and there are numerous areas of disagreement. He also noted that there is a great deal of discretion involved and while it is not clear what the roots of the issues are, training seems to be a component.

Mr. Hogan reported that the subcommittee is considering at various objectives, including a possible legislative proposal, or a suggestion that the Office of Management and Budget (OMB) update its fees guidance.

Mr. Hogan also reported that the subcommittee has an open survey of agency FOIA professionals that closes on July 22, 2015. At the time of the meeting, the survey had 400 respondents. He said the subcommittee will meet the second week in August to discuss the results and hopes to have a preliminary report for the Committee at the next meeting.

Mr. Hogan further reported that the subcommittee is reviewing how agencies have differing policies and practices. He observed that one issue of interest is the amount of discretion that agency FOIA professionals have to waive fees, and how they use that discretion.

Additionally, Mr. Hogan said that the subcommittee is putting together a public survey. He explained that the survey will have to go through the OMB process under the Paperwork Reduction Act before it can be disseminated and the subcommittee hopes that the survey will go out within the next few months. He explained that one of the goals of the survey is to see how requesters outside of the D.C. area perceive fee issues.

Mr. Michalosky asked how many agencies currently have discretion to waive fees written into their regulations and Mr. Jones responded that the subcommittee has not completed its review, but he knows of at least three agencies.

Anne Weismann noted that the subcommittee should also follow up with agency FOIA professionals to see whether processors have a general understanding of their agencies' FOIA regulations.

Mr. Hogan noted that discretion is not in his agency's regulation and said that DOD's standard practice involves waiving fees discretionarily.

Larry Gottesman asked if the subcommittee had reached out to OMB for guidance; Mr. Hogan responded that the subcommittee has not talked to OMB yet.

Proactive Disclosures Subcommittee

Proactive Disclosures Subcommittee co-chair Brentin Evitt reported that he met with his fellow co-chair Eric Gillespie shortly after the April 21, 2015 Committee meeting to discuss the subcommittee's work. He noted that proactive disclosure is something that everyone is essentially in support of, but there are large questions of how.

Mr. Evitt reported that the subcommittee is looking at numerous factors, including: the role of the statute, regulations and policy; how agencies use technology; and prioritization. He also said

that the subcommittee plans to review the process at different agencies, beginning with the DIA, to test assumptions.

Ms. Gramian commented that agency FOIA professionals frequently say that they have to choose between processing requests and reducing the backlog, or proactively posting records online.

Mr. Evitt observed that the goal is to build proactive disclosure into the system so it does not impact FOIA processing; Mr. Hogan noted that agencies should consider release decisions as it creates records.

Mr. Evitt added that agencies have many records that agencies can easily release, but there is the question of whether the easily releasable records are the types of records of interest to the public. Clay Johnson responded that public interest is hard to measure because typically the public may not be interested in a particular record or types of records until something occurs that makes them care about the information. Mr. Johnson also encouraged the subcommittee to look at other agencies besides DIA, and to ask agencies about the kind of technology they are using and if they are satisfied with the technology.

Ms. Weismann noted that prioritization is a key factor and that it cannot be left solely to the agencies. She noted that a group of non-government organizations created a list of records that agencies should regularly release.

Delores Barber said that agencies should routinely release records like contracts; and questioned the belief that proactive disclosures reduce the number of requests that agencies receive. She also remarked that it is good to separate the issues of backlog reduction and proactive disclosures, and encouraged the Committee to look at the new DOJ pilot program on proactively posting released records.

Mark Zaid questioned if there is any concern that agencies might use proactive disclosures to deter requesters.

Ms. Weismann encouraged the subcommittee to talk to the Food and Drug Administration to discuss the agency's process for dealing with records about recalls.

Ms. Gramian noted that while she was employed by DHS, the department attempted to proactively release contracts, but the submitter notice process and internal agency issues made it too difficult. Mr. Hogan responded that some DOD components have a process so that as a condition of granting a contract, the contractor must give the government a redacted copy that is approved for release or all the confidential business information must be in one location.

Mr. Gottesman noted that the EPA does not have sufficient staff to release contracts proactively, and observed that once EPA releases a contract via *FOIAonline*, the agency does not get future

requests for the same contract. He also noted that amending the Executive Order governing the submitter notice process could improve the proactive disclosure process.

Mr. Michalosky noted that CFPB will begin posting all of its contracts soon. He said the agency added a transparency clause to its contracts requiring each contractor to submit a redacted copy of each contract within ten days; he further explained that on the eleventh day, CFPB sends a contractor a second notice to give the contractor another opportunity to respond; if the contractor still has not responded and CFPB receives a FOIA for the contract, the contractor has only twenty-four hours to respond. He said that one remaining issue is ensuring that a contractor has not tried to redact any public information. He also noted that another challenge is making the contracts compliant with Section 508 of the Rehabilitation Act of 1973, as amended. He explained the variety of record formats and the quality of the records themselves pose challenges to making records Section 508 compliant.

Mr. Jones stated that technology should allow agencies to publish Section 508 compliant records with the push of a button. He reasoned that if an agency spends a great deal of resources searching for and processing a record, the next logical step is for the agency to make the record publicly available.

Ms. Gramian stated that the subcommittee also needs to think about cost. Mr. Johnson responded that new technology is generally cheap, compared to the older systems that federal agencies currently use.

David Pritzker encouraged the subcommittee to look at the impact of any recommendations on large and small agencies, and to consider how the public can find the information that agencies release. Mr. Johnson pointed out that agencies can make use of the data.gov. Mr. Moulton added that data standards solve many of the findability issues and that it is important that agencies allow search engines to index the information. Mr. Moulton added that most people assume that if they cannot find information through a search engine, then it does not exist.

Ms. Weismann said that a huge aspect of the issue is the technology at agencies. She stated that agencies often say they do not have the money to purchase technology, but that the purchase of new technology may be cost-effective in the long run.

Mr. Michalosky stated that 18F, the General Service Administration's (GSA's) digital service development office, is working on searchability issues. He also highlighted the importance of communication and shared that CFPB will issue guidance so that contracts come into the program office in a shape that facilitates their release (i.e., at a certain resolution, in a certain format).

Maggie Mulvihill said that the notion that making information easily accessible should not be a factor; she pointed out that journalists and other FOIA requesters frequently know how to

continue looking for records by using resources such as records schedules; she also asked if any agencies had worked with technology companies to try to address these issues.

Ms. Gramian introduced Bobak Talebian of DOJ's Office of Information Policy (OIP) to present on the recently launched pilot program concerning proactive disclosures.

Mr. Talebian said that DOJ is leading a project to test out a "release to one is release to all" policy at seven agencies and components, meaning the pilot participants will post responses to all non-first party requests online. He said that OIP has emphasized proactive disclosures since 2009 and that this is the next step in that effort. He explained that the intent is to gather metrics so OIP, agencies, and the public can better understand the challenges, including the time and resources involved in proactively disclosing records. He also said that OIP has set up an email address, releasetoall@usdoj.gov, to gather feedback on the project.

Dave Bahr said that agencies can help requesters find records by pointing requesters to available documents. Mr. Moulton agreed and said that he has observed several agencies doing this and that it is one of the factors that the Center for Effective Government considered in its evaluation of agency FOIA programs.

Public Comment

Linda Ferguson said that agencies must link information to the appropriate metadata and that the quality of metadata depends on the employee who creates it or adds it to the record. She encouraged agency personnel to think like requesters when adding metadata to the records that agencies intend to post online.

Christa CLemelin, the Committee's Designated Federal Officer, said a lot of work goes into making sure that a record is accessible and that technology companies and others must be a part of the conversation about how to handle this in the future.

Ms. Gramian said that only a small percentage of the population needs documents to be Section 508 compliant yet the law requires agencies to make records Section 508 compliant before posting them online. She added that in a meeting she heard someone suggest changing the law so that agencies make records Section 508 compliant only if they receive requests from parties that need Section 508 compliant records to access the records.

Michael Rhodes, speaking on behalf of himself, asked if proactive disclosures change the nature of FOIA. He said that FOIA allows the agency to focus resources on certain information that the public wants. He also said that it would be troubling if agencies told requesters that they cannot submit FOIA requests because they are processing common records. Mr. Moulton responded that if disclosure is built into the creation of the record, it should not impact FOIA processing.

Ms. Lemelin asked Mr. Talebian what metrics OIP plans to track as part of the pilot program. Mr. Talebian responded that the metrics are under development and encouraged others to share ideas before the official launch in August. He also said that OIP looked for diversity in terms of size and mission for participants in the pilot.

Mark Zaid observed that FOIA's 50th anniversary is approaching, and encouraged Committee members to consider what they want to accomplish by the end of the Committee's charter and to create a schedule to meet those goals. He also said that he would appreciate guidance on what the Committee needs to do to ask for an extension of its charter. Ms. Lemelin responded that the NARA senior management and the Archivist are aware of the Committee's desire to be renewed.

Mr. Zaid said that the first thing Committee members should do is decide what they would like to produce and suggested that they consider creating a subcommittee to decide how to move forward.

Ms. Weismann said that the Committee should have a roadmap in place by the next Committee meeting.

Mr. Gottesman stated that one of the issues has been that the Committee keeps on moving the goals by deciding to launch new efforts to gather information.

Ms. Gramian suggested that the new OGIS Director should help move the planning process forward.

Ms. Mulvihill asked what would be the most effective product for the Committee to produce. Mr. Zaid said that the 50th anniversary is a great hook for any work product the Committee creates; he said that the Committee does not have to figure out its product today, but he hopes that the Committee knows by the next meeting. Ms. Weismann encouraged the Committee to think about something beyond a report. Ms. Mulvihill suggested that the Committee look at the work products that other federal advisory Committees produce. Ms. Weismann pointed out that the Committee is expected to report to the Archivist and that the Committee can submit recommendations.

Ms. Lemelin stated that under the Federal Advisory Committee Act (FACA) it might be possible to have an administrative meeting to discuss logistics. Cindy Cafaro encouraged the Committee to consult with NARA's counsel before holding such a meeting to ensure that the Committee complies with the FACA.

Mr. Pritzker noted that ACUS makes recommendations that are backed by research. He noted that some ACUS recommendations generate interest and are implemented, and other recommendations generate no interest. He advised that one strategy is to ensure people who can effect change are interested in the report or product. Mr. Pritzker also noted that ACUS has made a recommendation regarding how FACA Committees can hold meetings online in accordance

with the law. He also warned that group emails might run afoul of the law's transparency requirements.

Mr. Gottesman noted that legislative recommendations can be good, but that they can be difficult to enact. He encouraged the Committee to look at suggested administrative changes. Mr. Pritzker agreed and added that many ACUS recommendations involve agency policy.

Ms. Weismann encouraged the Committee to come to a solution in the short-term. Mr. Zaid added that the Committee will not be able to generate anything of substance unless it has goals and a timeline.

Ms. Gramian thanked those who contributed to the meeting and added that she looked forward to hearing the results of the subcommittees' surveys. She 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 October 20, 2015 meeting, and incorporate any corrections or notations in the minutes of that meeting.