

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

Meeting Minutes – April 19, 2016

The FOIA Advisory Committee convened at 10 a.m. on April 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 1:20 p.m.

Meeting materials are available on the Committee's website at <https://ogis.archives.gov/foia-advisory-committee.htm>

Committee members present in AOTUS's Reception Room:

- Dr. James V.M.L. Holzer, Committee Chair, Office of Government Information Services (OGIS), National Archives and Records Administration (NARA)
- Brentin V. Evitt, Defense Intelligence Agency (DIA)
- Larry Gottesman, Environmental Protection Agency (EPA)
- James Hogan, U.S. Department of Defense (DOD)
- Clay Johnson, Department of Better Technology
- Nate Jones, National Security Archive
- Martin Michalosky, Consumer Financial Protection Bureau (CFPB)
- Karen Finnegan Meyers, U.S. Department of Defense (DOD)
- Sean Moulton, Project On Government Oversight (POGO)
- Maggie Mulvihill, Boston University
- 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:

- Andrew Becker, The Center for Investigative Reporting
- Eric Gillespie, Govini
- Ramona Branch Oliver, U.S. Department of Labor (DOL)

Others present at or participating in the meeting:

- David S. Ferriero, Archivist of the United States, NARA
- Amy Bennett, OGIS/NARA
- Cindy Cafaro, Department of Interior (DOI)
- Sarah Kotler, Federal Drug Administration (FDA)
- Margaret B. Kwoka, University of Denver Sturm College of Law
- Christa Lemelin, OGIS/NARA
- Ginger McCall, former non-government Committee member, now with DOL
- Michael Ravnitzky
- Alina Semo, Office of General Counsel, NARA

Introductions and Announcements

Committee Chair Dr. James Holzer introduced Archivist of the United States (AOTUS) David Ferriero who offered opening remarks. AOTUS reminded meeting attendees that the Committee's establishment was one of the commitments set forth in the U.S. Government's second Open Government National Action Plan (NAP 2.0). Mr. Ferriero noted that the Committee's goal to increase access to our nation's records mirrors NARA's mission. He said that NARA is proud to serve as the Committee's home and thanked OGIS staff for supporting the Committee during the past two years.

Administration

Dr. Holzer thanked AOTUS for his leadership and commitment to open government, and for working to extend the Committee's charter for another two years. Dr. Holzer thanked Committee members for their time and service during the Committee's 2014-2016 term and for their efforts to improve FOIA administration across the executive branch.

The Committee spent the next few minutes introducing themselves and their affiliations. Committee members Andrew Becker, Eric Gillespie, Govini, and Ramona Branch Oliver 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. He noted that the Committee's April 19, 2016 meeting was the last meeting under the charter's terms and anticipated the charter's renewal in May. Dr. Holzer said that NARA published a Federal Register notice soliciting nominations for individuals interested in serving on the Committee and shared information on how to apply to serve on the Committee.

Dr. Holzer said that the 2016-2018 Committee will hold four meetings per year and NARA will make the meeting schedule and information available online. Dr. Holzer announced that OGIS Facilitator Kate Gastner will serve as the Committee's Designated Federal Officer for the 2016-2018 term.

The Committee voted to adopt the January 19, 2016 Committee meeting minutes.

FOIA, Inc. Presentation by Guest Speaker Professor Margaret B. Kwoka

Dr. Holzer introduced guest speaker, Margaret B. Kwoka, Assistant Professor at the University of Denver, Sturm College of Law. Professor Kwoka presented her study of the commercial use of FOIA and proactive disclosures as a public benefit and potential cost saving measure for agencies.

Professor Kwoka based her thesis on her study of original datasets from the Securities and Exchange Commission (SEC), FDA, EPA, the Defense Logistics Agency (DLA), the Federal Trade Commission (FTC), and the National Institutes of Health (NIH). Professor Kwoka explained the majority of FOIA requesters at SEC, FDA, EPA, and DLA are commercial requesters. She described the development of an industry of companies whose business model is to request federal records under FOIA and resell them for profit. This practice, Professor Kwoka asserted, potentially crowds out journalists and government watchdogs from using the FOIA for its intended purpose: government oversight. Professor Kwoka noted that the limiting the access of federal records to private markets presents the risk of privatizing some of the FOIA's transparency function

Professor Kwoka proposed mandating that government agencies affirmatively disclose sets of records that are the subject of routine FOIA requests and comprise a large number of the documents sought by commercial requesters. Professor Kwoka argues that this approach, while potentially costly, offers benefits. She said that it would save FOIA professionals from having to process multiple FOIA requests for the same records multiple times. In addition, she said that it could free up FOIA personnel at agencies to focus on FOIA requests from journalists or watchdog groups that may better serve the public interest.

FOIA, Inc. Presentation - Questions and Answers

Melanie Pustay thanked Professor Kwoka for her presentation, noting that DOJ's Office of Information Policy (OIP) issued guidance on proactive disclosures about a year ago. Ms. Pustay said that routinely requested documents are ideal candidates to proactively disclose. Ms. Pustay wondered how the submitter notification process and Exemption 4 considerations play into proactive disclosures and asked whether the FDA reports released in full, which Professor Kwoka cited, went through the submitter notification process. Professor Kwoka guessed that the answer to Ms. Pustay's question was yes, however she was not 100% sure.

Clay Johnson observed that government can only be as transparent as its technology vendors will allow for it to be. Professor Kwoka agreed that technological constraints and barriers play a role in the government's ability to proactively disclose records and noted that more government resources going into technology will be important going forward.

Nate Jones asked whether Professor Kwoka had come across the issue of FOIA and proactive disclosures with regard to compliance with Section 508 of the Rehabilitation Act and whether she had a solution to the challenges agencies face in posting 508 compliant records. Mr. Jones said that members of the FOIA requester community often hear from agencies that that Section

508 requirements make proactively posting records “too difficult.” Professor Kwoka did not offer a solution; however, she cited *FOIAOnline* and the State Department’s Virtual Reading Room as examples of agencies “getting it right.”

Larry Gottesman provided another example of agencies using technology to proactively release records. He said that most of the requests the EPA receives are site-specific; however EPA will soon launch work on My Property 2.0, to eliminate the need for the public to submit FOIA requests for site-specific records. By making EPA databases available online, the public will be able to search for specific properties, and get certificates of conformity or nonconformity.

Mark Zaid said that commercial requesters are exploiting the way the FOIA is written and it is the mission of anyone who wants to reform FOIA, not to punish or to influence how private companies conduct business, but to ensure that that the law itself is written in such a way that it works as intended.

Mr. Zaid said that it would be interesting to have data to see whether the rise in the number of commercial requesters is a new phenomenon, and if so, how to account for the shift.

Sean Moulton mentioned the importance of taking into account disclosure considerations at the time of record creation; although he commented that this may be outside the realm of FOIA offices’ responsibilities. He said that it’s important to identify the records that would benefit agencies and requesters by being proactively disclosed. Mr. Moulton said that the intersection of records management, technology, and section 508 compliance issues underscores how the FOIA requester community and FOIA offices have to advocate inside a broader process, inside agencies.

Dr. Holzer observed the connection between Professor Kwoka’s presentation the Proactive Disclosure Subcommittee’s previous work concerning the benefit for agencies to identify requester “personas” that generate a large number of FOIA requests and identify the records these personas want so agencies can identify the information needs of those parties and proactively meet those needs through affirmative disclosures. Dr. Holzer thanked Professor Kwoka for her presentation and offered meeting attendees the opportunity to ask questions or comment.

Public Comments

Sarah Kotler, FDA FOIA Program Director, said that it would probably not be the best use of FDA’s resources for FDA to proactively post all FDA Form 483s online. Ms. Kotler said that FDA has published every compounding Form 483 since the meningitis outbreak in 2012 on its website. This, she said, amounts to hundreds if not thousands, of 483s that FDA has proactively posted before receiving a single FOIA request. Considering that Form 483 requests are relatively simple requests, Ms. Kotler said that FDA can respond to most requests within 20 days or less anyway, without doing more affirmative posting.

Michael Ravnitzky, speaking as a private individual, cautioned against identifying some of the issues presented in Professor Kwoka’s paper as new phenomenon. He said Professor Kwoka understated the public value of commercial requesters in some of her conclusions, noting that commercial requesters perform valuable ancillary functions – breaking free valuable data for

public/private use, encouraging agencies to create more user friendly data sets, and improving government efficiency internally through frequent requests for data sets. Commercial requesters, Mr. Ravnitzky stated, help agencies identify which records are of the greatest interest and value to the public marketplace.

Mr. Ravnitzky said that it is not sufficient for agencies to just post records online. Agencies must provide a structure to the records they post and ensure the records are searchable, crawlable, and discoverable. Mr. Ravnitzky said that they should encourage the movement of routinizable requests from FOIA into the realm of proactively released records as Professor Kwoka discussed.

Professor Kwoka agreed with Mr. Ravnitzky's comments that commercial requesters add value in helping agencies determine what records to prioritize for proactive disclosure. She said that she does not think that commercial requesters are gaming the system; they are doing as the law prescribes. Her intent, she noted, was to highlight the importance of identifying the information needs of the public, and meeting those needs in a way that makes more sense than agencies processing individual FOIA requests. If agencies proactively disclose records, then there would not be a need for corporations to sell FOIA-released records, as these records would be available to everyone.

Following questions and comments on Professor Kwoka's presentation, the Committee took a short break.

Oversight and Accountability Subcommittee Report

Oversight and Accountability Subcommittee co-Chair Martin Michalosky presented on the Subcommittee's goals and accomplishments over the last two years.

At its inception, the Subcommittee intended to review authorities for FOIA oversight including General Accountability Office (GAO) and Inspectors General (IG) audits, reports, inspections over the last 10 years, to determine opportunities for additional oversight; examine the FOIA Public Liaison (FPL) role to identify areas for improvement, review past litigation, and consider additional matters for oversight.

The Subcommittee examined the FPL role by surveying FPLs throughout the executive branch. Over 90 FPLs responded to the survey. The Subcommittee analyzed the survey results and drafted a white paper documenting its findings. The Subcommittee requested public comments concerning the role of FPLs and received one comment. Mr. Michalosky encouraged the public to continue to comment on their experiences with FPLs.

Mr. Michalosky said that Subcommittee member Nate Jones and Mr. Jones's National Security Archive colleague Lauren Harper identified 80 reports, audits, and inspections of federal FOIA programs. Mr. Jones and Ms. Harper reviewed and analyzed the reports and based on their findings, the Subcommittee drafted a report identifying common oversight themes and challenges.

Nate Jones said that the FOIA reports, audits, and inspections he compiled with his National Security Archives colleagues are available on the National Security Archives and OGIS website. Mr. Jones highlighted the findings presented in the Subcommittee's FOIA Program Review

white paper. Positive practices implemented by agencies to improve FOIA administration include communicating with requesters, instituting technology, and proactively releasing high interest records rather than waiting to receive FOIA request for them. Negative practices identified include backlogs and inadequate searchers, agencies not making discretionary releases in accordance with the 2009 Presidential Memorandum, not reporting FOIA abuse, unclear fee waiver requirements, agencies not using technology to improve the FOIA training process, agencies not properly reviewing FOIA releases for segregability, and agencies not complying with the 1996 E-FOIA amendments which require agencies to provide online reading rooms for citizens to access records and post records to these reading rooms when the records have been the subject of three or more FOIA requests. The white paper concluded that current oversight approaches are insufficient and not improving FOIA programs throughout the federal government. Mr. Jones hopes the next Committee goes further in addressing the current oversight deficiencies.

Sean Moulton asked whether the reports that Mr. Jones, Ms. Harper, and the Subcommittee analyzed discussed best practices in terms of internal management in the FOIA offices. Mr. Jones said that the internal management of FOIA programs varies greatly. Dr. Holzer commented that there is a great difference between FOIA offices with one person and FOIA offices with thousands of staff, noting that one best practice might work for one FOIA office, but not for another. He said that a positive first step would be to identify good management practices that agencies can apply to their FOIA programs.

Melanie Pustay said the comments regarding best practices reminded her of OIP's best practices series, which were part of NAP 2.0 commitments. She noted that other FOIA oversight mechanisms to consider include Chief FOIA Officer reports, agency annual FOIA reports, FOIA assessments conducted by civil society groups, OIP's assessment, OGIS's mediation services, and the role of Chief FOIA Officers.

Dr. Holzer noted that some of the GAO and IG audits, inspections, and reports reviewed as part of the Oversight and Accountability Subcommittee's study were not written by FOIA subject matter experts. He observed that OGIS's FOIA expertise enhances the value of OGIS agency assessments. He said that agencies need further assistance in implementing the recommendations that OGIS provides in its agency assessments and said that some agencies may not have the knowledge or resources to implement these recommendations.

Karen Finnegan Meyers observed that the FOIA reports analyzed seem to focus on FOIA programs themselves; however, FOIA programs and rely on other offices within their respective agencies to conduct timely searches, provide documents and input on sensitive issues. She concluded that improving FOIA has to be a team effort by an entire department or agency.

Mr. Jones said that his analysis of FOIA reports demonstrated that the best FOIA programs have strong leadership from the top down, are well-supported, and well-funded. Mr. Jones said that oversight through reporting and statistics is not sufficient; he believes there should be a "FOIA watchdog" to improve oversight and accountability. Mr. Jones said that he did not think agency FPLs were in a position to provide the needed oversight but an externally situated ombudsman office could provide the needed compliance enforcement.

After the discussion of the Oversight and Accountability Subcommittee's work, Dr. Holzer offered meeting attendees the opportunity to provide feedback; however, no one commented.

Fees Subcommittee Report

At the Committee's January 19, 2016 meeting, Dr. Holzer noted, Fees Subcommittee co-chairs James Hogan and Nate Jones presented on the Subcommittee's proposed memo from the Committee Chair to AOTUS. The proposed memo recommended that AOTUS recommend that the Director of the Office of Management and Budget (OMB) review and revise OMB's FOIA Fee Guidance. The memo presented AOTUS with three options. 1. The Archivist asks OMB to revise its 1987 Guidance, 2. The Archivist make a legislative proposal to Congress to amend the fee provisions of the FOIA by revising the various fee standards, thereby enabling agencies to standardize fee determinations, or 3. Keep the status quo and not make any changes to the fee provisions.

Between the Committee's January and April 2016 meetings, Dr. Holzer explained that the Fee Subcommittee updated its draft memorandum and drafted specific recommendations concerning OMB's Fee guidance. Dr. Holzer asked the co-Chairs to report on the Subcommittee's efforts.

Mr. Hogan said that Subcommittee's updated memo recommends that AOTUS ask OMB's Director to update its fee guidance given that it has been almost 40 years since the fee guidelines were updated and a lot has changed. Mr. Hogan said that the Subcommittee circulated the updated memo and a list of six recommendations that OMB consider when updating the guidelines to the full Committee for consideration.

At Dr. Holzer's request, Mr. Hogan read the following proposed recommendations out loud:

The FOIA Advisory Committee's Fees Subcommittee recommends that the updated Office of Management and Budget fee guidance should:

1. Provide clarity by clearly differentiating between two separate yet related issues, fee waivers and requester fee category status. Agencies need unambiguous, uniform guidelines on the criteria that must be met for each fee category. These guidelines should reflect the President's and Attorney General's guidance on FOIA and relevant case law, including embracing members of the media who publish primarily through electronic means.
2. Provide agencies with additional guidance on what constitutes a "representative of the news media" that takes into account the changes in the journalism profession over the past 30 years due to technological advancements. These guidelines should be fair, balanced, and better enable agencies to make accurate fee category determinations. They should also clarify that fee categories are determined by the identity of the requester, not the particular request.
3. Incorporate statutory changes to the FOIA relating to when FOIA fees can be charged. This includes 5 U.S.C. § 552 4(A)(viii) [sic] , which states that certain fees cannot be charged when an agency fails to comply with any time limit, if no unusual or exceptional circumstances apply to the request. Clarification is also needed as to which fees may be

charged if the twenty working-day statutory time limit is not met, because “unusual or exceptional circumstances” exist.

4. Provide guidance on fees associated with reproduction costs, including providing electronic copies via email, CD, or DVD. The guidance should also clarify the costs that may be charged for reproducing documents that are transferred from classified to unclassified systems so that they may be released electronically.
5. Explain that agencies may use their administrative discretion (rather than a formal fee waiver) to decide not to charge FOIA fees when the interest of the United States Government would be served.
6. Recognize that FOIA fees cover a very small percentage of FOIA costs (in FY 2014 agencies processed 647,142 FOIA requests at a cost of \$462 million dollars and recouped just \$4.2 million dollars from FOIA fees, less than one percent of the reported cost). Moreover, these fees are paid to the General Fund of the Treasury, not to the agencies' FOIA offices. The current OMB guidelines appear to be missing a word in Section 8 which adds ambiguity to this expectation.

After Mr. Hogan read the proposed recommendations, the Committee discussed them.

Larry Gottesman cautioned against developing fee guidance based on the desires of an administration, president, or attorney general, and recommended basing fee guidance on case law and statutory guidelines. He noted the challenges that agencies face in determining what category into which to place some requesters and said guidance in that area would be helpful.

Mr. Gottesman, Ms. Pustay, and Dr. Holzer expressed concern about the language in recommendation 5. Reasons for concern included the ambiguous nature of the language, the potential that agencies would treat requesters unequally or inconsistently, whether administrative discretion would be subject to judicial review, and the concern that it would allow for discretion outside of the normal fee waiver process .

Mr. Bahr commented that Recommendation 5 was an innocuous provision that could help the agencies waive fees, especially when the costs are low, and avoid the hassle of arguing over fees is high.

Ms. Weismann agreed with Mr. Bahr's assessments. She said that from her perspective, there is no? statutory prohibition on an agency waiving fees, and noted the parts of the statute that require agencies to exercise discretion, and that has never been offered as a reason to get rid of those provisions all together.

Mr. Jones said that the FOIA regulations of at least four agencies, some of whom have staff serving on the FOIA Advisory Committee, permit the agencies to discretionarily waive fees.

After discussing the proposed recommendations, Dr. Holzer offered meeting attendees the opportunity to comment.

Cindy Cafaro of DOI, said that in certain circumstances, the Department's regulations permit it

to waive or reduce fees as its discretion. Ms. Cafaro explained that codifying how the Department may use its discretion will make it easier for requesters and agency FOIA professionals to better understand discretionary fee waivers or reductions because the regulations provide a clear delineation and are not open-ended.

Michael Ravnitzky, speaking as a privacy individual, proposed that the Committee suggest OMB examine discretionary fees, or inform agencies that they can incorporate discretionary fee waivers into their regulations. Mr. Ravnitzky suggested that the agencies determine the fee waiver or reduction criteria.

After the Public Comment, the Committee discussed the language of the six proposed recommendations, and agreed on revised language for item 5. Dr. Holzer proposed a motion to individually vote on the amended versions of the six recommendations discussed.

Due to a previous Commitment, Maggie Mulvihill left the Committee meeting before the voting took place and did not vote. The Committee members in attendance and participating by telephone unanimously voted to submit the following recommendations to AOTUS for consideration:

The Office of Management and Budget (OMB) revise its fee guidance to reflect technological changes in the public's ability to disseminate information. Revision would clarify fee issues for requesters and agencies, providing less subjective and more transparent fee assessment process and reduce the amount of time it takes agencies to assess fees.

1. Provide clarity by clearly differentiating between two separate yet related issues: fee waivers and requester fee category status. Agencies need unambiguous, uniform guidelines on the criteria that must be met for each fee category. These guidelines should reflect the FOIA and relevant case law, including embracing members of the media who publish primarily through electronic means.
2. Provide agencies with additional guidance on what constitutes a "representative of the news media" that takes into account the changes in the journalism profession over the past 30 years due to technological advancements. These guidelines should be fair, balanced, and better enable agencies to make accurate fee category determinations. They should also clarify that fee categories are determined by the identity of the requester, not the particular request.
3. Incorporate statutory changes to the FOIA relating to when FOIA fees can be charged. This includes 5 U.S.C. § 552(a)(4)(A)(viii), which states that certain fees cannot be charged when an agency fails to comply with any time limit, if no unusual or exceptional circumstances apply to the request. Clarification is also needed as to which fees may be charged if the 20 working-day statutory time limit is not met, because "unusual or exceptional circumstances" exist.
4. Provide guidance on fees associated with reproduction costs, including providing electronic copies via email, CD or DVD. The guidance should also clarify the costs that may be charged for reproducing documents that are transferred from classified to unclassified systems so that they may be released electronically.

5. Address how agencies may use their administrative discretion (rather than a formal fee waiver) to decide not to charge FOIA fees when the interest of the United States Government would be served and is clearly articulated.
6. Recognize that FOIA fees cover a very small percentage of FOIA costs (in FY 2014 agencies processed 647,142 FOIA requests at a cost of \$462 million dollars and recouped just \$4.2 million dollars from FOIA fees, less than 1 percent of the reported cost). Moreover, these fees are paid to the General Fund of the Treasury, not to the agencies' FOIA offices. The current OMB guidelines appear to be missing a word in Section 8 which adds ambiguity to this expectation.

The Committee unanimously voted to recommend that AOTUS ask OMB to revise its 1987 guidance to include the six recommendations the Committee had just unanimously agreed upon.

Dr. Holzer invited Committee members to finalize the memorandum for submission to AOTUS of the United States by signing it with their names and the date. With their permission, Dr. Holzer signed on behalf of Dave Bahr and Anne Weismann who participated on behalf of the meeting by telephone, and Karen Finnegan Meyers who had to leave the meeting after the voting took place due to a previous commitment.

Archivist of the United States Remarks and Presentation of Thank You Letters to Committee

Mr. Ferriero thanked Committee members for their service to the Committee and their respective subcommittees. He remarked that the Committee, comprised of government and non-governmental members of the FOIA community to foster dialogue between the administration and the requester community and develop recommendations for improving FOIA administration and proactive disclosure, demonstrated a wonderful ability to achieve consensus. He noted that the process of developing recommendations and achieving consensus reflects the Open Government Partnership's vision of genuine dialogue and collaboration between governments and civil society to improve the quality of governance.

Mr. Ferriero said that he expects to renew the Committee's charter as part of the National Archives' ongoing commitment to open government and encouraged meeting attendees to share their ideas and feedback on commitments that NARA can include in the next Open Government National Action Plan.

Mr. Ferriero presented Committee members who had served full two year terms with a letter of appreciation and Committee members had the opportunity to have their pictures taken with AOTUS.

Closing Remarks

Dr. Holzer thanked Committee members, present and past, for their efforts. He said that he was proud of what the Committee accomplished over the past two years and said that he hoped that the Committee members are proud of their accomplishments to improving the FOIA process.

Dr. Holzer noted that the Committee's final report is not an end product, it is a starting point for the Committee's 2016-2018 term and said that the Committee's accomplishments are proof of the benefits of an open and participatory and collaborative government.

Before adjourning the meeting, Dr. Holzer invited meeting attendees to visit the OGIS website and follow OGIS on social media for information about the Committee's activities, future meetings, and how to participate

I certify that, to the best of my knowledge, the foregoing minutes are accurate and complete on June 23, 2016.

_____/s/_____

CHRISTA LEMELIN

Designed Federal Officer, 2014-2016 Term

_____/s/_____

NIKKI GRAMIAN

Acting Chair