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

Meeting Minutes – September 6, 2018

The FOIA Advisory Committee convened at 10 a.m. on September 6, 2018, in the McGowan Theater of the National Archives Building at 700 Pennsylvania Avenue, N.W. Washington, DC 20408-0001.

In accordance with the provisions of the Federal Advisory Committee Act, 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://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings.

Committee members present in the McGowan Theater:

- Alina M. Semo, Committee Chair, Office of Government Information Services (OGIS), National Archives and Records Administration (NARA)
- Jason R. Baron, Drinker Biddle & Reath
- Emily Creighton, American Immigration Council
- Kevin Goldberg, American Society of News Editors
- James R. Jacobs, Stanford University Libraries
- Joan Kaminer, Environmental Protection Agency
- Sarah Kotler, U.S. Department of Health and Human Services, Food and Drug Administration
- Ryan Law, U.S. Department of the Treasury
- Michael Morisy, MuckRock
- Abioye Mosheim, U.S. Consumer Product Safety Commission
- Suzanne J. Piotrowski, Rutgers University School of Public Affairs and Administration
- Melanie Ann Pustay, U.S. Department of Justice, Office of Information Policy
- Thomas Susman, American Bar Association
- Patricia Weth, National Labor Relations Board
- Bradley White, Department of Homeland Security, Office for Civil Rights and Civil Liberties

Committee members on the phone:

- Andrew Johns, Brigham Young University History Department
- Lizzette Katilius, U.S. Securities and Exchange Commission
- Chris Knox, Deloitte
- Ginger McCall, State of Oregon

Committee members absent from the meeting:

- Lee Steven, Cause of Action Institute

Others present at or participating in the meeting:

- David S. Ferriero, Archivist of the United States, NARA
- Carrie McGuire, NARA
- Kirsten B. Mitchell, Designated Federal Officer, NARA
- Martha Murphy, NARA
- Sheela Portonovo, NARA
- Carrie Tallichet Smith, NARA

Welcome and Announcements

Archivist of the United States David S. Ferriero welcomed the attendees to the Committee's first meeting of 2018-2020 term and offered opening remarks. Mr. Ferriero reaffirmed NARA's commitment to improving the FOIA process, policy, and law for everyone. He reminded those present of the Committee's goal of identifying key challenges to FOIA implementation across the Federal Government and of providing recommendations and advice to address these obstacles. In response to the 2016-2018 FOIA Advisory Committee's final report, Mr. Ferriero directed OGIS to conduct two compliance assessments and to promote a number of best practices in the areas of search technology, accessibility, and performance standards.

Committee Chairperson Alina M. Semo welcomed everyone to the third term of the FOIA Advisory Committee. She expressed confidence that the Committee would explore issues in the FOIA arena and make recommendations for improving the FOIA process. Ms. Semo stated that the OGIS Director serves as the chair of the FOIA Advisory Committee and OGIS staff provides logistical and administrative support to the Committee. Ms. Semo then introduced Kirsten Mitchell, the Designated Federal Officer (DFO), to the Committee.

Ms. Semo reviewed some housekeeping items with the Committee and outlined the meeting agenda, emphasizing that the focus of this meeting is to brainstorm and identify the issues that will be addressed in this term.

Introduction to the FOIA Advisory Committee Bylaws and Responsibilities

Ms. Mitchell, the DFO, welcomed the Committee members and presented on the Committee's bylaws and responsibilities. Ms. Mitchell stated that the Committee was first established by the Open Government National Action Plan 2.0 in 2013 and is governed by the Federal Advisory Committee Act (FACA). Ms. Mitchell explained the Committee's structure, administration, and the specific responsibilities of the chairperson, DFO, and Committee members. She then reviewed the structure and responsibilities of the Committee's subcommittees and their co-chairs. Ms. Mitchell concluded with an overview of the Committee's bylaws and voting procedures.

Introduction of Committee Members

OGIS Mediation Team Lead Carrie McGuire, invited the Committee members to spend the next few minutes introducing themselves, their affiliations, how their work relates to FOIA, and explaining why they joined the FOIA Advisory Committee. Members on the phone introduced themselves first, then the members in the room did so. Committee member Lee Steven was unable to attend the meeting but provided Ms. Semo with his introduction, which she read out loud.

Facilitated Brainstorming Session

Ms. McGuire led the Committee in a two-part brainstorming session. In the first brainstorming session, Ms. McGuire asked Committee members to write their answers to the prompt "I want a FOIA policy/process/law that is _____" on sticky notes and then affix them to a white board. The goal of this exercise was to gauge the group's vision of an ideal FOIA. Members participating by phone and Mr. Steven, in absentia, emailed Ms. Mitchell their responses.

Ms. McGuire and Ms. Mitchell grouped the responses into overarching themes. Themes included efficiency, resources, fairness, an understandable FOIA, ideas relating to the law, consistency in FOIA implementation across agencies, records, a FOIA for everyone, increased transparency and public understanding, and processing and technology. *[See Attachment 1 for a complete list of responses.]*

Ms. McGuire asked the Committee for comments and questions on the thematic groupings. There were no comments at this time and the Committee took a 15- minute break.

In the second brainstorming session, Ms. McGuire instructed Committee members to address obstacles to the FOIA process by answering the prompt, "A challenge to FOIA is _____." Ms. McGuire informed members that they could bring up any topics they thought were unresolved from the previous term.

Ms. McGuire and Ms. Mitchell grouped the responses into the following themes: resources, time, agency leadership and vision, education, records management, communications and training, and technology. Ms. Semo offered the addition that Congress and the judiciary should also be subject to FOIA. In response to this comment, Ms. McGuire added the category that "FOIA should be free of political influence" to the list of themes. *[See Attachment 2 for a complete list of themes and responses.]*

Ms. Mitchell wrote overarching topics on sticky notes that corresponded to the themes that surfaced during the second brainstorming session. As she wrote, Ms. Semo noted that Committee member Andrew Johns had to leave and would not be rejoining the meeting.

An audience member raised the issue of standardizing how agencies release records on their FOIA websites. The Committee confirmed that agency FOIA websites had been raised in the brainstorming session.

A brief discussion on how to group the overarching topics ensued in which the Committee agreed to consolidate several topics. The grouping resulted in the following seven categories: Technology, Resources, Time/Volume, Agency Leadership/Vision/Political Influence, Records Management, Prior Recommendations, and Communications/Education/Training.

Each Committee member was given six stickers and was instructed to vote by placing them on the topics that best reflected the subcommittees they wished to form. Members were told they could spread out their votes across several topics or place all their stickers on one topic. Members on the phone emailed their votes to Ms. Mitchell who allocated their votes on their behalf.

Once the votes were tallied, "Technology" received 21 votes, "Records Management" received 17 votes, "Resources" received 15 votes, "Agency Leadership/Vision/Political Influence" received 15 votes, "Communications/Education/Training" received 15 votes, "Time/Volume" received 13 votes and "Prior Recommendations" received five votes.

Committee Discussion and Selection of Subcommittees and Chairs

Ms. McGuire turned the floor over to Ms. Semo who led the Committee in a discussion of the seven categories to develop consensus and form subcommittees.

Returning Committee member Thomas Susman began the conversation by discussing some topics he felt were left unresolved from the 2016-2018 FOIA Advisory Committee. He requested NARA and OGIS regularly update the Committee on the implementation of the prior terms' recommendations. Ms. Semo agreed to Mr. Susman's request.

Mr. Susman observed that "Technology," "Resources," and "Time/Volume" further deconstruct the prior term's Searches Subcommittee. He noted that there is no mechanism for holding agencies accountable for complying with the law or with implementing the Committee's recommendations. He suggested the Committee explore accountability measures under the "Agency Leadership/Vision/Political Influence" category. He also suggested the Committee examine OGIS and make recommendations to strengthen its activities. Lastly, he suggested the Committee examine FOIA Public Liaisons to clarify their roles and responsibilities.

Returning Committee member Melanie Pustay responded to Mr. Susman's comment on FOIA Public Liaisons by pointing out that a list of each agency's FOIA Public Liaison is available on the National FOIA Portal and that OIP has issued guidance on their duties and responsibilities. She also noted that metrics are collected on how frequently FOIA Public Liaison services are used.

Returning Committee member Sarah Kotler thanked Mr. Susman for his comments and agreed that several of last session's topics are present in these themes.

New Committee member Suzanne Piotrowski clarified that she had voted for "Prior Recommendations" not to recommend it as a standalone subcommittee but rather as a topic for the current Committee to keep in mind. She then suggested that the idea of examining OGIS and the FOIA law should go under the "Agency Leadership/Vision/Political Influence" category.

Returning Committee member Ginger McCall maintained that "Resources" directly impacts the other categories and was not thoroughly addressed in the previous term. Returning Committee member Chris Knox agreed. He added that the previous term made many recommendations relating to technology but not affordability, vision, or funding.

New Committee member Kevin Goldberg agreed that the prior recommendations require continued action. He then observed that the themes are not equivalents in that some are substantive and others procedural. He suggested that the Committee could create subcommittees that are either substantively focused or procedurally focused. New Committee member Emily Creighton asked him to clarify which topics he considered substantive and procedural. Mr. Goldberg suggested that "Records Management" is substantive and "Technology" is procedural. Ms. Semo commented that she did not completely agree but could make arguments for both sides. She went on to clarify that subcommittees can explore within their realm, and that the purpose of these conversations is not to limit the subcommittees.

New Committee member Joan Kaminer suggested that "Technology" and "Records Management" have significant overlap and requested that the Committee revisit the challenges associated with and grouped under the "Records Management" theme during the brainstorming session. Ms. McGuire read the challenges grouped under "Records Management." In response, Ms. Kaminer suggested that it may be duplicative to have separate subcommittees that address "Technology" and "Records Management."

Mr. Susman suggested that there may be two separate areas within "Technology:" records management and FOIA management. He suggested that if those two functions required substantively different software, combining "Records Management" and "Technology" may not be suitable.

New Committee member Patricia Weth responded with the observation that technology is a broad topic that fits into many of the other categories on the board. She suggested that each subcommittee should address technology in their work.

New Committee member Ryan Law agreed with Ms. Kaminer that technology overlaps with records management. He observed that as agencies begin implementing NARA's directive on managing records electronically, Committee recommendations could influence the decisions agencies make to meet NARA's goals.

Ms. Pustay agreed that technology is a natural subset of any topic the subcommittees address, and argued in favor of creating a "Records Management" subcommittee.

New Committee member Jason R. Baron affirmed the connection between "Records Management" and "Technology" and stated that there are several important record- keeping policies going into effect government-wide. In particular, he referenced the 2016 deadline in which agencies were required to manage email electronically. Mr. Baron said most agencies are implementing a Capstone approach to email management, and the Committee should examine how FOIA Officers can be made aware of these policies and the search tools that are already available via eDiscovery. Mr. Baron observed that a variety of electronic communication platforms apart from email pose another issue to records management. Lastly, he stated that there should be a conversation on how technology like artificial intelligence, machine learning, and advanced search methods can influence best practices in records management and FOIA.

New Committee member Abioye Mosheim advocated for training the public to reduce the impact that requests for large volumes records have on government resources. She said that if the

public was made aware of the types of records available, they would be better equipped to make FOIA requests. She suggested making records schedules available online.

The discussion turned to selecting subcommittees.

Ms. Kaminer moved to strike "Technology" as a separate category with the understanding that technology would be addressed within each subcommittee. The Committee took a voice vote and approved striking "Technology" as its own category.

Emily Creighton moved to create a "Records Management" subcommittee; the Committee voted by voice and approved creation of the "Records Management" as the first subcommittee of the 2018-2020 term.

Ms. Semo then directed the committee to the categories "Resources," "Agency Leadership/Vision/Political Influence," and "Education/Communications/Training," which received an equal number of votes. Ms. Semo asked the Committee how these topics should be addressed.

Mr. Susman expressed hesitation to address "Resources" since Congress would ultimately have the last word. Mr. Goldberg agreed and suggested that "Resources" is similar to "Technology" in that it is a factor in all other categories. Ms. Kotler also agreed and further elaborated upon the point that "Resources" directly relates to many of the other categories on the board. Mr. Susman moved to delete "Resources" from the list of topics.

Ms. McCall stressed the importance of "Resources" and maintained that it is within the Committee's purview to task Congress with adequately funding FOIA. She also noted that "Resources" should be folded into the other topics. She stressed that funding is an obstacle to implementing the Committee's recommendations, and it should be addressed directly.

Ms. Pustay moved to integrate "Resources" into each subcommittee. The Committee held a voice vote and approved the motion.

Ms. Semo suggested "Communications" could encompass "Agency Leadership, Training, and Education." Mr. Baron asked what recommendations could arise from the "Agency Leadership" topic. Ms. Piotrowski suggested that a recommendation could be to require agencies include FOIA performance measures in their agency performance plans to hold them accountable. A brief conversation ensued, and Ms. Piotrowski clarified that the recommendation's goal would be to elevate FOIA as an agency wide priority.

New Committee member Michael Morisy advocated for a subcommittee to cast a vision for the future of FOIA, particularly in light of current technology. Ms. Pustay affirmed and Ms. Creighton suggested the Committee develop a vision statement for the FOIA that could frame the recommendations they develop. Mr. Morisy suggested creating a subcommittee to develop a vision for the FOIA process.

Ms. Kaminer reminded the Committee that political influence and the interplay of Congress were included in the "Vision" category. She suggested that the Committee should keep those aspects in mind when considering the Vision topic.

Mr. Susman suggested "Political Accountability" should emphasize accountability and not "political" in the partisan sense. Ms. Semo suggested that political influences and political accountability be worked into a "Vision" subcommittee. Mr. Susman suggested that the "Vision" subcommittee may also examine the role of OGIS's leadership role in the future of FOIA. Mr. Law asked how the Committee should define leadership and how that definition could impact any recommendations the Committee makes. Ms. Semo spoke briefly to the long-term impact the Committee's prior recommendations are having. She then clarified that per the brainstorming session, leadership refers to agency leadership, but agreed that the subcommittee could refine that definition.

Mr. Morisy moved to create a subcommittee on the "Vision of the FOIA Process." The Committee voted by voice and approved "Vision" as the second subcommittee of the 2018-2020 term.

The Committee turned its attention to "Communication/Training/Education" and "Time/Volume." A brief conversation occurred over the number of subcommittees the Committee should form and if "Time/Volume" and/or "Communication/Training/Education" could be incorporated into other subcommittees. Ms. Kaminer noted the impact the volume of records requested has on the statutory time frame mandated by the law. Mr. Law added that the increased volume of records requested has also increased the amount of time needed to process requests, and the volume of FOIA requests should be a topic addressed by the Committee.

Ms. Kotler connected "Education" with "Time/Volume," suggesting that educating researchers in how to make a FOIA request could alleviate the "Time/Volume" issue. Mr. Goldberg drew a connection between "Time/Volume" and "Vision."

Ms. McCall said that "Time/Volume" is the most pressing issue faced by the FOIA community and Mr. Morisy agreed. New Committee member Bradley White suggested that "Time/Volume" should be its own subcommittee and that "Education/Communication/Training" should be folded into each subcommittee. Ms. McCall and Ms. Kotler agreed.

Ms. Creighton suggested that the subcommittees work together to form an overarching vision statement, possibly in lieu of a Vision Subcommittee. Mr. Morisy advocated for a Vision Subcommittee as its own subcommittee. A discussion ensued over the number of subcommittees that could be formed. Ms. Semo stated that there is not a restriction on the number of subcommittees so long as members are willing to put in the work.

Ms. Weth suggested that she would like to see "Communication/Training/Education" as a standalone subcommittee, but if the Committee preferred to limit the number of subcommittees to three, it could be added to the list of subtopics for each subcommittee to address. Mr. Susman agreed that "Communication/Training/Education" is important but argued there may not be enough recommendations to justify it as its own subcommittee. Ms. Pustay suggested "Communication/Training/Education" could be folded into the other subcommittees' work.

Ms. Mosheim made the distinction between "Education/Communication/Training" of the public and of agency staff. Mr. Baron suggested that education of the public be integrated with Time/Volume. Ms. Kaminer added that having a standalone "Education/Communication/Training" subcommittee could take away from the "Records

Management" and "Vision" subcommittees' needs to explore training within their subject areas. She argued for tasking the subcommittees with overarching themes of "Resources," "Technology," and "Education/Communication/Training." Mr. Goldberg agreed. The Committee voted by voice and approved integrating "Communication/Training/Education" into each subcommittee. The Committee then voted and approved by voice vote "Time/Volume" as the third subcommittee of the 2018-2020 term.

Ms. Semo asked for volunteers to co-chair each subcommittee, noting that in past terms, each committee was co-chaired by one government member and one non-government member. Mr. Baron and Mr. Law volunteered to co-chair the Records Management Subcommittee. Mr. Knox and Ms. Kaminer volunteered to co-chair the Vision Subcommittee. Ms. McCall and Ms. Creighton volunteered to co-chair the Time/Volume Subcommittee.

Public Comments

Ms. Semo opened the floor to public comment. There were no public comments from the audience. OGIS Attorney-Advisor Sheela Portonovo reported one online comment in which the author stressed the need to make sure prior recommendations are not overlooked.

Mr. Baron suggested that the Committee invite a representative from the Inspectors General community to speak at a future meeting. Ms. Semo agreed and a brief discussion ensued on possible future speakers.

Closing Remarks

Ms. Semo reminded the Committee that the next quarterly meeting will be November 29, 2018. She told the Committee that she and Ms. Mitchell will follow up with information on subcommittee membership. A brief conversation ensued over committee records management requirements, FACA requirements for deliberation, deadlines for joining subcommittees, and future meeting dates. Ms. Semo adjourned the meeting.

I certify that, to the best of my knowledge, the foregoing minutes are accurate and complete on November 29, 2018.

Kirsten B. Mitchell
Designated Federal Officer, 2018-2020 Term

Alina M. Semo
Chairperson, 2018-2020 Term

ATTACHMENT 1

Brainstorming Session 1:

Prompt: "I want a FOIA policy/process/law that is_____."

- Embraced by all employees in Federal government not just the FOIA staff
- Defines a "record" in a real-world consistent way rather than on current policy
- Adaptable to record-keeping (electronic)
- Not needed for many types of records, such as immigration records, that should be accessible through their own track
- Available to humans and machine readable
- Encourages use of modern process and technology (instead of continually adding staff)
- Provides needed technology for proactive disclosures and competing FOIA requests
- Efficient in responding to requesters through the use of advanced technology to find responsive documents in vast repositories of records
- Statute responses would help put more realistic timeframes into the minds of requests and give agencies room to do thorough searches, reviews & responses
- That structures governments data for proactive release and instant access before it is generated
- Consistent in responses through the administrative process (approaches to referrals; closing requests, etc.)
- Consistent among agencies in the filing process
- Increases the 20-day time limit for response
- Speeds up response times and helps avoid the need to sue for a response
- Gives agencies more than 20 working days to complete a FOIA request
- Staggered responses times built into the FOIA statutes for simple, complex and Exemption 3
- Fast and proactive
- Realistic based on government resources/capabilities
- Transparent throughout all facets and processes
- Transparent
- Transparent and efficient
- Easy to understand by non-lawyers
- Manageable for the average citizen
- Balanced and takes into account requester needs and agency resources
- Tilted toward disclosure as the default mode
- Responsive to the needs of the public
- Strikes the <u>correct</u> balance between protection of sensitive information and maximum disclosure

- Adequately resourced, efficient and balanced—taking into account both oversight and government accountability interests
- Helps the public understand the inner workings of their government
- Provides value to agencies and officials that embrace it as a way to start dialogue
- Collaborative between agencies and requesters rather than adversarial
- Designed to start a productive, meaningful dialogue between government and the people
- Provides education for federal employees and FOIA requesters
- Seamless (~ requesting, interacting, obtaining & understanding)
- Fair to both government agencies and the requester community
- Fair … fair to requesters and fair to agencies
- Released and available for the long-term
- Sustainable and supported
- Modernized and practical
- More efficient and more economical
- Efficiently administered and not influenced by political considerations
- Efficient, effective
- Efficient from intake to final response.
- It would be great for requesters to receive as much training as information to perform their role as FOIA [professionals]
- Funded
- Realistic with adequate funding to meet demand
- Well implemented
- More efficient in dealing with requests for historical documents > 30 years old

Themes

Theme 1: Efficiency

Theme 2: Resources

Theme 3: Fairness

Theme 4: An Understandable FOIA

Theme 5: Ideas Relating to the Law

Theme 6: Consistency in FOIA Implementation across Agencies

Theme 7: Records

Theme 8: FOIA for Everyone

Theme 9: Increased Transparency and Public Understanding

Theme 10: Processing and Technology

ATTACHMENT 2

Brainstorming Session 2

Prompt: "A challenge to FOIA is _____."

- To follow up on prior recommendation from this committee and others (*i.e.*, 18F)
- It is too easy to litigate and lawsuits are detrimental to other, more patient requesters
- Minimizing political influence in an era of absent leadership on open government issues
- Federal hiring process not well suited to quickly addressing surge capacity
- Transparency re: inter-agency communication
- Initial searches are not comprehensive
- Allegations FOIA requests are not sufficiently specific
- FOIA websites not well-organized
- Public belief that process is too slow, weighted against disclosure, or requires litigation
- Unrealistic/inaccurate expectations of what is expected/required/realistic under FOIA
- Unreasonable expectations both from requesters and internal management
- Congress and judiciary are not subject to FOIA
- How to education individuals on the power of FOIA and how to use it effectively
- There is nothing to stop vexatious requests
- "Kitchen sink" FOIA requests (any and all … <u>every</u> record …)
- Lack of common understanding of the process
- The asymmetric knowledge involved in the process
- Accessibility for the average citizen
- As expectations and usage increase, speed and resources have decreased
- Dealing with voluminous records and statutory deadlines
- Too many records requests, not enough time
- The proliferation of email is drowning the system
- Processing of emails, text messages, IMs & other social media
- Balancing the expectations of the public and the resources of the agency
- Huge FOIA requests involving large amounts of records
- Getting agencies to follow guidance and adopt best practices
- A lack of funding for staff and technology
- Resources + $$$$$
- $$ and staff dedicated only to FOIA
- Failure to make FOIA a priority from the top down
- Lack of resources, staff & technology
- Limited time, resources
- Agency unwillingness to move away from simply throwing staff at the problem
- Hiring and retaining staff
- Staffing + expertise + training

- Funding + executive visibility/priority
- Delays in adjudication
- How to hold agencies accountable for their FOIA performance
- Time
- Increasing volume, complexity of requests
- Communicating/educating requester community of agency specific process/records/functions
- Prioritizing FOIA with program staff whose primary responsibility is not FOIA
- Lack of knowledge [among] federal employees, political appointees, requesters
- Poor communication
- Over-classification
- Knowing what records are: 1) Collected 2) Available
- Finding and using information that has already been released
- Proactive disclosures: technology, post more records from just FOIA requests, breaches of PII
- Ensuring that electronic records are comprehensively and efficiently searched in response to FOIA request, due to either lack of awareness on the part of the FOIA staff and/or lack of access to available technology
- Limited search capabilities
- Collecting responsive records from program office custodians
- Getting staff to buy into the purpose and meaning of the FOIA

Themes

Theme 1: Resources

Theme 2: Time

Theme 3: Agency Leadership and Vision

Theme 4: Education

Theme 5: Records Management

Theme 6: Communications and Training

Theme 7: Technology.

Theme 8: FOIA should be free of political influence