

September 5, 2019

To: 2018-2020 FOIA Advisory Committee

From: Records Management Subcommittee of the 2018-2020 FOIA Advisory Committee

**Re: Outline of Proposed RM Subcommittee Report & Recommendations to the
FOIA Advisory Committee**

The following constitutes an outline of what our Subcommittee is proposing to present in a final report to the full FOIA Advisory Committee at a later date, along with our proposed recommendations. We wish to reserve the opportunity to revise or supplement the recommendations made here, in light of further feedback received.

I. Introduction & Context/Background

- A. Description of NARA's Strategic Plan (Goal 1: Make Access Happen)¹
- B. M-19-12, OMB/NARA Memo re "Transition to Electronic Records" (June 28, 2019)²
- C. Prior recommendations re "search" from the 2016-2018 FOIA Advisory Committee³

II. RM Subcommittee Methodology (research, activity and sourcing conducted)

Summary. In connection with its ongoing work, the RM subcommittee reviewed all available FOIA Chief Officer Reports submitted to DOJ's Office of Information Privacy at the Department of Justice (DOJ/OIP), as well as a sample of agency annual recordkeeping self-certification reports and Senior Agency Official for Records Management (SAORM) reports to NARA. The RM Subcommittee also informally pursued lines of questioning about records management training with a liaison from NARA's Office of the Chief Records Officer. The RM Subcommittee also met with representatives of the Federal Records Officer Network (FRON), and through them conducted an informal survey on various topics of interest including recommendations on how FOIA and Federal recordkeeping practices could better be integrated. Finally, the RM Subcommittee reached its conclusions based on one or more public presentations at FOIA Advisory Committee hearings held during this term.

III. Recommendations

Proposed Recommendation #1

We recommend that the Archivist of United States request that the Department of Justice, Office of Information Policy (DOJ/OIP), issue guidance to require agencies to include records management-related materials as part of agency websites and FOIA handbooks maintained pursuant to FOIA.

Section 552(g) of FOIA, 5 U.S.C. § 552(g), requires that

¹ <https://www.archives.gov/about/plans-reports/strategic-plan/strategic-plan-2018-2022>.

² <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf>.

³ <https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf>.

The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including –

- (1) An index of all major information systems of the agency
- (2) A description of major information and record locator systems maintained by the agency; and
- (3) A handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

The RM Subcommittee understands that agency FOIA handbooks or reference guides – which up until recently have been primarily available on agency websites -- are an important resource for FOIA requesters. The establishment of the National FOIA Portal at www.foia.gov has in turn centralized the public's access to and has increased the availability of agency reference guides. Indeed, when submitting a FOIA request on www.FOIA.gov, an agency's reference guide is prominently featured.⁴

The RM Subcommittee undertook to review samples of agency websites, as well as agency reference guides available via www.FOIA.gov, with an eye to how agencies provide information on their internal records management practices. Our review found a wide range of difference among websites and reference guides as to the level of detail provided that would enable FOIA requesters to determine what types of agency records exist, organized by records management category. In some cases, reference guides were out of date with respect to the actual known records management practices at the agency. We also would note that we failed to find any references to the fact that agencies have adopted a "Capstone" email policy requiring that all e-mail be preserved in accordance with General Record Schedule 6.1.⁵

To maximize utility for FOIA requesters, we believe agency FOIA reference guides should contain, or provide hyperlinks to agency webpages that contain information about:

- What records or information is publicly available without a FOIA request
- A list of major records and information systems maintained by the agency
- Descriptions of what records the agency maintains, particularly concerning frequently requested records
- Information about agency records systems and databases, not limited to Privacy Act Systems of Records
- Agency records schedules, records file plans, and agency records management guidance
- Information about agency e-mail systems, including information about Capstone e-mail archives and officials whose records have been designated as creating permanent records.

As part of the National FOIA Portal effort, OIP should require Federal agencies to undertake a review and update of agency FOIA reference guides to ensure that guides are incorporating records management-related information that might be useful to the public. In support of this effort, OIP should

⁴ In addition to supplying a FOIA reference guide, agencies typically include links to their FOIA Regulations, their agency's FOIA website, and their agency's FOIA Library. Some agencies have included information about average processing times.

⁵ We do note that NARA maintains an excellent FOIA reference guide that provides a link to records controls schedules for Executive branch agencies. See <https://www.archives.gov/foia/foia-guide>.

review FOIA website guidance, update the FOIA self-assessment toolkit, and require that agencies report on their efforts in their 2021 Chief FOIA Officer reports to make more transparent their internal records management categories and practices. NARA's Office of Government Information Services (OGIS) should support this effort by reviewing and suggesting improvements to agency websites and reference guides, by identifying and highlighting best practices in integrating records management features into FOIA guidance.

The RM Subcommittee notes that on August 8, 2019, the Administrative Conference of the U.S. adopted ACUS Recommendation 2019-3, on the "Public Availability of Agency Guidance Documents."⁶ The RM Subcommittee believes that Recommendation # 1 is wholly consistent with and otherwise enhances the ACUS recommendation, which states at § 7 that "[a]gencies should maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating to those documents."

When updating websites and FOIA reference guides, FOIA staff should ensure they collaborate with agency Records Management and Privacy professionals.

Proposed Recommendation # 2

We recommend that the Archivist of the United States direct NARA and request that DOJ/OIP offer targeted training in selected topics in Federal records management to FOIA officers and FOIA Public Liaisons in Federal agencies, and otherwise include a FOIA module in selected records management training courses open to all Federal employees.

As referenced, the RM Subcommittee undertook a review of all 2019 agency FOIA Chief Officer Reports submitted to DOJ/OIP posted as of August 2019. In section I of the reports, question 4 required agencies to provide a brief description of the type of training attended or conducted and the topics covered. As a general matter, we found that DOJ/OIP provides an extensive array of FOIA courses for FOIA access professionals, FOIA Public Liaisons, and FOIA Reference Services staff -- and it is clear that many agencies are taking advantage of the DOJ/OIP course offerings. Additionally, agencies conduct their own internal FOIA training and sometimes report using outside academic and commercial training offered by such organizations as the American Society of Access Professionals (ASAP) and Graduate School USA. Some of these courses may touch on records management issues in passing, but generally do not explore them in any depth.

With respect to Records Management courses offered by NARA, they are open to all Federal employees. NARA does not offer a specific course targeted to FOIA staff, nor have we been made aware of any available statistics indicating how many Federal employees engaged in FOIA-related functions have undertaken records management training.

From our review of agency reports into both DOJ/OIP and NARA, and from all information made available to the RM Subcommittee, we believe that FOIA officers would benefit from a more in-depth understanding of the current state of Federal recordkeeping within agencies, especially with respect to how agencies are managing records in electronic or digital form. Topics that we believe would be of interest to FOIA staff might include an overview of:

⁶ 84 Fed. Reg. 38927.

- (a) what consists of “adequate documentation” of agency activities under the Federal Records Act and NARA regulations;
- (b) the function of agency file plans and records schedules describing individual record series and their retention or disposition as temporary and permanent records of agencies;
- (c) recent initiatives involving the transition to electronic recordkeeping in government (e.g., OMB/NARA Memo M-19-21, dated July 28, 2019⁷);
- (d) NARA’s Capstone policy for email recordkeeping, including GRS 6.1; and
- (e) best practices in conducting electronic records searches to find responsive agency records.

The RM Subcommittee believes that FOIA officers handling requests that necessarily involve searches of e-mail records, as well as other structured and unstructured electronic records, should be aware of the overall approach taken by their agency to electronic records management. Armed with this knowledge, FOIA officers should have a greater appreciation for what constitutes an “adequate” search for agency records responsive to particular requests, and will be able to better execute their overall FOIA job responsibilities.

Records management training for FOIA staff could take the form of a separate module embedded within one or more current course offerings by NARA/OGIS and/or DOJ/OIP and could be developed as separate stand-alone training, to be conducted either in person or on-line. The RM Subcommittee anticipates that OGIS staff in particular would take the lead in continuing to work with DOJ/OIP in the latter providing an RM module as part of DOJ FOIA courses.

We further recommend as a best practice that agencies should encourage FOIA staff to attend records management training in whatever form offered, and to have FOIA staff report what records management-related course(s) they have attended in the cited section above of the annual Chief FOIA Officer reports.

Finally, we believe all Federal employees would benefit from understanding that managing Federal records includes providing for access to those records, including through FOIA.

Proposed Recommendation # 3

We recommend that the Archivist of the United States request that the Department of Justice, Office of Information Policy (DOJ/OIP), provide further best practice guidance on what constitutes for FOIA purposes an “adequate search” of agency records managed in electronic form, including but not limited to email in Capstone repositories.

The RM Subcommittee’s reviewed the set of agency 2019 Chief FOIA Officer Reports also with respect to agency responses to Section IV Question 1 (as added in response to a recommendation from the 2016-2018 FOIA Advisory Committee). Question 1 asked:

⁷ See <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf>

Is your agency leveraging technology to facilitate efficiency in conducting searches, including searches for email? If so, please describe the type of technology used. If not, please explain why and please describe the typical search process used instead.

Except for some of the smallest agencies, most agencies reported that they either have or considering using some form of technology to aid in the FOIA workflow process. This has included the use of forms of automated collection software (rather than relying on manual processes by individual employees), and of various forms of FOIA redaction software. Additionally, a modest number of agencies report using some form of e-discovery search tools to conduct searches of agency records. For the most part, the descriptions given in these reports of e-discovery search tools failed to reveal if advanced search tools utilizing software beyond relying on keyword searching were part of the software capabilities acquired.

No express mention by any agency in any of the Chief FOIA Officer reports of the use of “predictive coding” or “technology assisted review” was made.⁸ This technology, a form of artificial intelligence using machine learning, has been widely adopted in the private sector in connection with litigation involving e-discovery, for the purpose of accomplishing more accurate and efficient searches. The RM Subcommittee is otherwise aware based on anecdotal reporting that such technology is in use in various select components of government in connection with ongoing litigation as well as in processing data in connection with “second requests” filed in antitrust proceedings.

Based on the latest NARA Senior Agency Official for Records Management annual reports, on the order of 200 reporting components of the Executive branch have stated that they have adopted or are in the process of adopting NARA’s “Capstone” approach to managing email.⁹ An agency that adopts a Capstone policy necessarily commits to managing a substantial volume of email: programmatic email from all employees will be preserved for seven years under the GRS in some form of email repository, and a subset of that email from designated senior officials (Capstone account holders) will be deemed permanent and preserved in agency repositories until such time as it is transferred (i.e., accessioned) into the National Archives at a future date as agreed to by the agency and NARA.

The RM Subcommittee believes that agencies that adopt the Capstone approach for managing their email records necessarily will see the volume of email records grow to a substantial number, potentially in the hundreds of thousands to many millions depending on existing email volumes at the agency. This future circumstance will all but necessitate serious consideration of more advanced and more efficient ways in which to search through these large volumes of records to find responsive records. Although there is limited FOIA case law on point, the RM Subcommittee believes that courts will exhibit decreasing tolerance of agency arguments that because they are without the tools to perform efficient searches of email and other forms of electronic records, they should continue to be allowed to conduct searches at the pace of manual efforts from an earlier day. Regardless, however, of future case precedent, efficient government fairly demands that agencies consider a range of available tools to conduct faster and more efficient searches against the growing volumes of electronic records they manage, including but not limited to in Capstone repositories.

⁸ See, e.g., The Sedona Conference, Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery, 15 Sedona Conf. J. 217 (2014), www.thesedonaconference/publications.

⁹ <https://www.archives.gov/records-mgmt/resources/saorm-reports>.

The RM Subcommittee recommends that DOJ/OIP should issue guidance by way of a FOIA bulletin or otherwise that commends agency adoption of e-discovery tools and encourages agencies to become aware of advanced search methods that may enhance the ability to find responsive agency records on a more expedited basis.

The RM Subcommittee further recognizes that newer forms of electronic messaging available online are increasingly being used in the workplace as a means of conducting official government business. As part of any guidance DOJ/OIP may wish to issue regarding search technologies, DOJ/OIP should also consider reminding agencies of their obligations to conduct adequate searches of all records created using electronic messaging that relate to the conduct of government business. See 44 U.S.C. § 2911 (electronic messages sent on commercial servers constituting Federal records should be forwarded or copied to a “.gov” account).

In Appendix A to this Report, the RM Subcommittee provides a draft “best practices” set of specifications and requirements with respect to conducting searches for responsive records to FOIA requests, based on well-known e-discovery protocols developed over the past decade. We recommend that DOJ/OIP and NARA/OGIS consider adopting or further publicizing this set of specifications for use in the greater FOIA community of agencies. Agencies may also deem Appendix A useful in developing RFIs or RFPs, including under current and future GSA schedules. **[Appendix A to be drafted].**

The RM subcommittee understands that not all Federal agencies may desire or otherwise be in need of eDiscovery software to assist in conducting FOIA searches. In particular, smaller agencies may not yet be seeing a volume of electronic records that would justify the use of more automated methods. On the other hand, the RM subcommittee believes that larger Cabinet departments and agencies should be giving serious consideration to using advanced AI techniques to increase their efficiency and lower their overall cost burden in responding to large-volume FOIA requests.

Proposed Recommendation # 4

We recommend that as part of the Federal Electronic Records Modernization Initiative (FERMI), the Archivist of the United States direct NARA to incorporate and further develop the idea of public access to Federal records, including through FOIA.

In undertaking FERMI, NARA is attempting to provide the Executive branch with standardized and interoperable records management solutions and services to Federal agencies. NARA recognizes that agencies have common needs for managing their electronic records. The RM Subcommittee believes that a critical aspect of managing electronic records is providing for economical and efficient public access to those records. The RM Subcommittee further believes that incorporating the idea of public access more expressly into the FERMI’s baseline requirements may be one way in which the issue of access to a rapidly rising volume of agency records in electronic or digitized form can be addressed.

Within FERMI, the Universal Electronic Records Management (ERM) Requirements comprise six sections based on the lifecycle of electronic records management: capture, maintenance and use, disposal, transfer, metadata, and reporting. “Access,” while not expressly identified as a category, is implicitly subsumed within the second category, “Maintenance and Use.”¹⁰ Under this category, one of its

¹⁰ Accord, 44 U.S.C. § 3102(1) (each Federal agency head shall establish “effective controls over the creation and over the ***maintenance and use*** of records in the conduct of current business”) (emphasis added).

subcomponent requirements as detailed in an accompanying spreadsheet provides for the following specification:

2.01 Records of current and former employees must be managed in a manner that supports searching in response to information requests, including FOIA and agency business needs.¹¹

The RM Subcommittee believes NARA should consider further highlighting and developing what constitute “Access” requirements that are common to Federal agencies. One way of doing so is in the development of a FERMI “Use case” involving FOIA access, in order to make clear what additional functional requirements are necessary to efficiently process FOIA requests for responsive records found in large electronic or digital agency repositories. These requirements should include, but not be limited to, the use of efficient forms of search technologies of locating responsive records.

The RM Subcommittee believes that NARA should be open to considering additional ways in which access issues can be highlighted in connection with records management initiatives. For example, NARA may wish to consider asking agencies to assist in responding to informal supplemental questions to the annual Federal Email Management Reports,¹² Senior Agency Officials for Records Management Annual Reports,¹³ and Records Management Self-Assessment Reports,¹⁴ aimed at eliciting how electronic records are being accessed within agency repositories. For example, just with respect to Capstone email policies, NARA could ask agencies to report on (i) the estimated volume of email records being managed in a Capstone email repository, and to provide updates on (ii) how Capstone repositories are being searched and which types of software are being used for these searches. Through this process, NARA may be able to improve its own policy guidance on the available means for capture and management of email records via Capstone programs.

Proposed Recommendation # 5

We recommend that the Archivist of the United States make a formal request to the Chair of the Council of the Inspectors General on Integrity and Efficiency (CIGIE)¹⁵ that CIGIE consider designating as a cross-cutting project or priority area the issue of how agencies are doing in providing FOIA access to agency records in electronic or digital form.

Based on a set of presentations by representatives of the greater Inspector General (IG) community at the FOIA Advisory Committee meeting of November 29, 2018, and a further review of selected reports from agency IGs on the subject records management, the RM Subcommittee believes that CIGIE is well-positioned to serve in an oversight capacity to monitor how well agencies are doing in providing access to agency records, especially in electronic repositories. CIGIE is an independent entity established within the Executive branch that addresses integrity, economy, and effectiveness issues “that transcend individual Government agencies.”¹⁶

¹¹ <https://www.archives.gov/records-mgmt/policy/universalmrequirements> (see accompanying spreadsheet).

¹² See <https://www.archives.gov/records-mgmt/resources/email-mgmt-reports>.

¹³ See <https://www.archives.gov/records-mgmt/resources/saorm-reports>.

¹⁴ See <https://www.archives.gov/records-mgmt/resources/self-assessment.html>.

¹⁵ <https://ignet.gov/>.

¹⁶ Id.

The FOIA Advisory Committee heard several representatives of Inspector General offices provide updates on recent audits involving the controls agencies had put into place on the subject of electronic records management. In response to a question posed by the FOIA Advisory Committee, one of the IG representatives indicated that the areas of records management and FOIA were “potential area[s] for CIGIE to convene a group to do a cross-cutting project or compile FOIA and records management audit reports.”¹⁷ Archivist David Ferriero later indicated in the meeting that “for several years, NARA’s Inspector General has proposed that CIGIE take up records management as a cross-cutting project.”

The RM Subcommittee recommends that the Archivist of the United States, either on his own or in conjunction with NARA’s Inspector General, should formally request that CIGIE elevate the issue of how agencies are doing in providing access to records managed in electronic form. Initially, this could take the form of a review of how agencies are planning to meet the goals set out in M-19-12, including the 2022 deadline for ensuring that all permanently appraised records are accessioned into NARA in electronic or digitized form.

The RM Subcommittee further believes that Inspector General offices should consider establishing a point of contact within each office who will function as an in-house subject matter expert on records management and access issues, and who will keep track of any audits conducted with respect to records management and access issues.

Proposed Recommendation # 6

We recommend that the Archivist of the United States direct NARA and request that DOJ/OIP each establish a liaison with the newly created Chief Data Officer (CDO) Council, for the purpose of ensuring that CDO officials understand the importance of Federal recordkeeping and FOIA requirements and how such laws apply to the maintenance of data within agencies.

Under the Foundations in Evidence-Based Policymaking Act (Evidence Act), incorporating the OPEN Government Data Act, CDO positions at each agency will together comprise the CDO council. Each agency is to have a designated CDO by July 2018, who is expected to lead the creation of a new Data Governance Body at each agency. See OMB Memo M-19-23, dated July 10, 2019.¹⁸

Senior agency officials who are to serve on each agency’s Data Governance Body are expected to “set and enforce priorities for managing data as a strategic asset to support the agency in meeting its mission. . . .”¹⁹ Appendix C to the OMB Memo states that each agency’s Data Governance Body is to include the agency’s General Counsel, Chief Freedom of Information Officer, and Senior Agency Official for Records Management, among many others.

The RM Subcommittee notes that neither the Evidence Act itself, nor OMB Memo M-19-23 in providing implementing guidance, expressly reference the Federal Records Act (FRA) and FOIA, as existing statutory authorities that play important roles in the management of Federal data. In light of this fact, the RM Subcommittee believes an opportunity exists for NARA, through OGIS and other components, and for DOJ/OIP, to play an important, continuing role in educating the greater “open data” community regarding how Federal data assets are currently managed under the FRA and FOIA.

¹⁷ See Minutes of Meeting, at 4, <https://www.archives.gov/files/ogis/assets/foiaac-mtg-min-11-29-2018.pdf>.

¹⁸ <https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf>.

¹⁹ Id.

More generally, the RM Subcommittee recommends that both DOJ/OIP and NARA/OGIS should work to align FOIA policy and FERMI with the Administration's overall Federal data strategy, as set out in the President's Management Agenda²⁰ and Reform Plan.²¹ In particular, we believe it will be increasingly important that Federal staff close a potential gap in accounting for data in numeric form, including by bringing such federally created data into FOIA and Federal records management workflows. Aligning these policies will in our view facilitate the proactive release of Federal data, expand on the available catalog of data on data.gov, standardize the release of agency data in open standards and machine-readable formats, and enable better public use of agency-created data from across the Federal government.

Proposed Recommendation # 7

We recommend that the Archivist of the United States work with other governmental components and industry in promoting research into using artificial intelligence (AI), including machine learning technologies, to (i) improve the ability to search through government electronic record repositories for responsive records, and (ii) segregate sensitive material in government records, including but not limited to material otherwise within the scope of the nine FOIA exemptions.

The 2016-2018 FOIA Advisory Committee made two specific recommendations related to search technologies. The first recommendation resulted in the creation of a technology subcommittee of the Chief FOIA Officers Council, to study the utilization and deployment of FOIA technology across agencies and to identify best practices and recommendations that could be implemented. A technology subcommittee was formed and its initial report is expected in the near term. As referenced above in Recommendation # 3, a second recommendation resulted in OIP collecting detailed information, as part of each agency's CFO report, regarding specific methods and technologies agencies are using to search their electronic records, including email.

As discussed above, based on its review of the 2019 Chief FOIA Officer Reports the RM Subcommittee believes that Federal agency FOIA staff do not appear to be well-versed in how AI and machine learning technologies may improve the efficiency of FOIA searching in ever-growing digital repositories. Nevertheless, the RM Subcommittee understands that such advanced tools and technologies are readily available by solution providers, to assist in undertaking complex searches of large repositories of electronically stored information. This software has not, however, been generally deployed in the context of FOIA searching, nor has it been developed with an eye towards the types of sensitive records found within components of the Federal government.

The recommended initiative here would be focused on promoting the use of advanced search capabilities to help solve issues that Federal agencies are only now beginning to confront, including searching large repositories of preserved emails pursuant to NARA's Capstone policy, and filtering or segregating sensitive content -- including but not limited to FOIA-exempt materials -- so as to more timely and efficiently respond to access requests of all kinds. The RM subcommittee recommends that input be sought from a variety of governmental components, including research components of NARA, the General Services Administration, and the Networking and Information Technology Research and

²⁰ <https://www.whitehouse.gov/wp-content/uploads/2018/03/Presidents-Management-Agenda.pdf>.

²¹ <https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf>.

Development Program (NITRD). The initiative would be coordinated with OMB's CIO and CDO councils, OSTP's CTO, NIST, and designated Chief Privacy Officers from selected agencies. Consideration should also be given to establishing private-public partnerships to work with the commercial sector on this initiative.