

**Time/Volume Subcommittee Recommendations Nos. 1 – 5 to the  
2018-2020 Freedom of Information Act (FOIA) Advisory Committee  
April 29, 2020**

**Time/Volume Recommendation 1 [Committee agreed on March 5, 2020, that this be a Best Practice]:**

**“That the Archivist request that agencies conduct a comprehensive review of their technological and staffing capabilities and requirements within two years to identify the resources needed to respond to their current FOIA needs and the anticipated FOIA demands of the future. Further recommend that the Archivist request that agencies apply the results of their comprehensive reviews to create agency-specific strategic plans that address expected increases in the number of FOIA requests received, as well as high-volume e-discovery style document reviews.”**

**Goal:** To ensure that agencies are able to reduce or eliminate their current FOIA backlogs, while keeping up with expected increases in the volume of FOIA requests to decrease the likelihood of developing backlogs in the future.

**Rationale:** The Time/Volume Subcommittee, in conjunction with the Vision Subcommittee, surveyed agency FOIA personnel as well as the requester community to identify areas of concern. When requesters were asked to identify areas agencies could improve, 17.5% referenced improving efficiency. Agency FOIA professionals were even more specific. When asked about the greatest impediment to processing FOIA requests in a timely manner, over 50% referenced resources in their responses. Another 5% referenced technology. In response to a question about their greatest frustrations with FOIA processing, nearly 24% of respondents referenced resources, and another 11% referenced technology.

Similarly, discussions with committee members who are Federal employees identified those areas as sources of frustration and areas for improvement. The survey questions were focused on the current challenges and frustrations faced by agency FOIA offices, and while it is imperative that agencies take steps to identify and address their current needs or shortfalls, if agency efforts only focus on current problems, agencies will not be prepared to handle increases in FOIA requests or in FOIA litigation.

A data-driven comprehensive review would gather information on the number of FOIA requests received and processed over previous years, track increases between each of the reviewed years (with particular attention paid to any increases identified as a result of predictable or periodic events like Presidential elections), and identify the average number of FOIA requests or pages

the agency's FOIA analysts are able to process. Using that information, the agency should be able to predict with some accuracy the rate the volume of FOIA requests is likely to increase in years to come, along with the number of FOIA analysts required to process those requests in each of those years.

With regard to technological requirements, agencies will need to first determine what types of records are maintained within their current systems, whether any new systems are anticipated and the types of records those systems are likely to contain, and then identify what they will need to be able to process those records when they are requested under the FOIA.

For example, if an agency uses a system that creates or stores audio or video files, that agency's FOIA office should have the tools to redact and release those files as appropriate. An agency would also need to look into how it conducts its searches, whether that search mechanism is likely to change in the near future, and anticipate how technology can be used to assist with searching and processing records. For example, e-discovery tools are helpful when attempting to review large volumes of records, and machine learning can assist with applying standardized redactions to commonly requested forms, exempt personally identifiable information, or to fields within spreadsheets. Agencies should evaluate whether their systems, records, and trends would benefit from the use of these technologies.

**Time/Volume Recommendation 2 [As passed in spirit on March 5, 2020]:**

**“That the Archivist requests that DOJ/OIP collect information as part of each agency's Chief FOIA Officer (CFO) Report regarding 1) the Standard Operating Procedures (SOPs) for the processing of FOIA requests; and 2) the FOIA webpage.”**

**Time/Volume Recommendation 2 [As proposed for consideration on May 1, 2020]:**

**“That the Archivist requests that DOJ/OIP collect information as part of each agency's Chief FOIA Officer (CFO) Report regarding 1) the Standard Operating Procedures (SOPs) for the processing of FOIA requests; and 2) the FOIA webpage. Potential topics to be covered include the frequency of updates to the SOP and FOIA webpage, types of agency resources available on the FOIA webpage, such as the SOP and FOIA manual, and information available on the FOIA webpage to assist requesters in understanding the FOIA process.”**

**Goal:** To ensure that agencies are creating up to date streamlined processes in the handling of FOIA cases in order to provide records to the requesters and decrease agencies' FOIA backlogs and that agencies are providing clear information to requesters regarding the FOIA process.

**Rationale:** The Time/Volume Subcommittee and the Vision Subcommittee conducted a survey of FOIA agency personnel and the requester community to identify FOIA challenges. In the

survey, the requesters were asked “What are your biggest questions about the FOIA process?” The top three responses were:

- 31% identified the process,
- 27% identified accountability and transparency, and
- 15% identified the timeline.

Similarly, the FOIA agency personnel were asked to identify their perception of the areas of confusion among requesters. The top three responses were:

- 36% identified knowledge of the process,
- 22% identified overly broad requests, and
- 14% identified the scope of the requests.

Additionally, in the FOIA agency personnel survey, they were asked if they had a “magic wand to fix FOIA” what would they do. Their top four responses were the following:

- 20% fix internal processes,
- 17% allow more time process cases,
- 17% more automation, and
- 17% more funding.

The fact that 20% of FOIA agency personnel stated that fixing internal processes was their magic wand wish indicates that a review of an agency’s FOIA process and an effort to document and standardize procedures is something desired by agencies. Standardizing internal processes and creating guidance in the form of an SOP would benefit agencies, by streamlining processes and potentially reducing backlogs. The requester community also would benefit by better understanding the agency process and receiving their records in less time.

This survey result suggests that agencies should conduct self-assessments and draft FOIA process procedures. When drafting an SOP, an agency should thoroughly review each step in the FOIA process. During this review, the agency can identify suitable approaches, ensure compliance with their FOIA regulations, obtain feedback from staff, and implement best practices. In addition to creating a standard FOIA process, the SOP will be a useful tool in training new employees.

To assist in developing and standardizing the SOP, agencies should consult the 2017 Department of Justice (DOJ) Office of Information Policy (OIP) FOIA Self-Assessment Toolkit. The Toolkit was designed to provide “a resource for agencies to use when assessing their administration of the FOIA.” With the toolkit, OIP intended agencies to “conduct self-assessments to review and improve their FOIA program.” The Toolkit contains thirteen modules ranging from intake to FOIA reporting. The Toolkit is very useful to the agencies when they are creating and/or updating their SOP.

Module 13 of the Toolkit emphasizes the importance of sharing information on an agency’s website: “Agency FOIA websites serve two important functions in the FOIA process: (1) FOIA websites provide valuable information to the public about the Agency, including the type of records maintained, FOIA contact information, instructions for making a FOIA request, and a copy of the Agency’s FOIA regulations; and (2) FOIA websites contain proactively disclosed records.”

2017 DOJ OIP issued guidance entitled Agency FOIA Websites 2.0, further illustrating the importance of informative and user friendly FOIA homepage. This guidance encourages agencies to update their FOIA homepages and cover the areas of proactive disclosure, instructions for submitting a FOIA request, and the administration of FOIA.

After an agency creates an SOP, it should review it every two years and update it based on new law, best practices, and technology.

Providing clear information about the FOIA process to the requester community is one of the key components to alleviating conflicts and confusion among FOIA requesters. The best means for agencies to convey information about the FOIA process information is to post information such as an SOP on their FOIA homepage. The SOP will provide clarity and specific details to the requester community about an agency’s FOIA process.

**Time/Volume Recommendation 3 [As passed in spirit on March 5, 2020]:**

**“That the Archivist direct OGIS to undertake a study of agencies’ FOIA training requirements and content, including an evaluation of mandatory training, onboarding, or supplemental training, firstline supervisor training, and subject-specific training for subject matter experts and technology professionals. The study should also include an assessment of funding sources and allocations for the identified training. The committee further recommends that OGIS submit the results of its assessment and any recommendations to Congress and the President in accordance with 5 USC Section 552 (h) (5).”**

**Time/Volume Recommendation 3 [As proposed for consideration on May 1, 2020]:**

**“Request that OIP issue guidance requesting agencies to provide annual mandatory FOIA training to all agency employees, as well as provide FOIA training to all new agency employees and contractors onboarding with an agency, including program-specific training if applicable. Further, direct OGIS and request OIP to undertake a study of agencies’ current FOIA training requirements and content. [The study may include an evaluation of current agency requirements for mandatory training, onboarding and supplemental training, first-line supervisor training, and program-specific training for subject matter**

**experts and technology professionals.] Further request that OGIS ask Congress to support this recommendation by providing [a line-item] appropriation for agency FOIA training costs.”**

**Goal:** This study of training requirements and development of best practices will increase transparency and efficiency in FOIA responses and reduce FOIA backlogs and processing times.

**Rationale:** Existing Mandatory FOIA Training Requirements. There is no legally enforceable mandatory FOIA training requirement with which agencies must comply. The Chief FOIA Officer for each agency is required to “offer training to agency staff regarding their responsibilities under [the FOIA].” See 5 U.S.C. § 552(b)(2)(F).

While the FOIA itself provides no clear statement that FOIA training is mandatory, or standards for such training, the Department of Justice, Office of Information Policy issued a Memorandum to Agency General Counsels and Chief FOIA Offices of Executive Departments and Agencies on Freedom of Information Act Training on October 28, 2015. The Memorandum encouraged agencies to utilize OIP’s training resources “to ensure that all of your employees have a proper understanding of the FOIA and the important role they play in implementing this law.” (See OIP October 28, 2015 Memorandum.)

On March 19, 2009, the Attorney General issued a Memorandum for Heads of Executive Departments and Agencies on the Freedom of Information (FOIA) Act, which directed all Agency Chief FOIA Officers to “review all aspects of their agencies’ FOIA administration... and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies.” (See Attorney General’s March 19, 2009 Memorandum at 3.)

OIP’s 2015 Guidance for Further Improvement Based on 2015 Chief FOIA Officer Report Review and Assessment, stated that “[i]t is critical to any successful FOIA administration that the professionals responsible for implementing the law have adequate training resources available to them.” See OIP 2015 Guidance. Additionally, OIP requested that all agencies implement annual FOIA training for FOIA professionals.

OIP guidance on the Chief FOIA Officer Reports for 2020 highlights this request by including specific questions relating to FOIA training at agencies. Agencies must report:

3. Did your FOIA professionals or the personnel at your agency who have FOIA responsibilities attend any substantive FOIA training or conference during the reporting period such as that provided by the Department of Justice?
4. If yes, please provide a brief description of the type of training attended or conducted and the topics covered.

5. Provide an estimate of the percentage of your FOIA professionals and staff with FOIA responsibilities who attended substantive FOIA training during this reporting period.
6. OIP has directed agencies to “take steps to ensure that all of their FOIA professionals attend substantive FOIA training at least once throughout the year.”

If your response to the previous question is that less than 80% of your FOIA professionals attended training, please explain your agency’s plan to ensure that all FOIA professionals receive or attend substantive FOIA training during the next reporting year.

See Content of 2020 Chief FOIA Officer Reports Survey Results.

The FOIA Advisory Committee conducted a survey of FOIA professionals and requester communities. The results of these surveys support the inclusion of this recommendation. Specifically, the relevant survey results include:

- FOIA Professional Community Survey:
  - Results: 46.73% of responding agency staff reported that they do not receive adequate FOIA training, 13.08% do not receive any training, 14.02% thought their training needed more subject matter, 9.35% needed more detail, 10.28% needed refresher training, 4.67% more on policy, 5.6% national training and 3.74% training ineffective
  - Commentary: Key commentary on training included:
    - “I think there are great training opportunities once you are a FOIA professional as career development and for continuous training but entry level training is near non-existent. Individuals watch a video and are encouraged to ask their too busy supervisors for help. The result is that most analysts have long waiting curves and very divergent methods of doing what should be routine and standardized activities.”
    - “More training needed on how to conduct an adequate search and in negotiating with requesters”
    - “[N]eed a yearly national training with all FOIA Officers. New FOIA Officers need an assigned mentor to walk them through issues instead of sending e-mails to the field.”
    - “I feel I do not receive adequate training overall. Not enough FOIA training is available, and my agency has limited training dollars. My training is lacking in Exemptions 1 and 7, day-to-day techniques in managing a well-run FOIA program, conflict management/mediation, and substantive litigation training on how to write a defensible declaration (hands-on, not a lecture style like what's offered by OIP).”
    - “Most importantly have metrics which support appropriate staffing in the field and assure mandatory, annual, in-person FOIA training for all

officers. Probably would consider pluses and minuses of making sure legal support and access for more complex issues is guaranteed for all field officers.”

- FOIA Requester Community Survey:
  - Results: 13.51% of responding FOIA requesters indicated their biggest questions about FOIA are related to staffing and training; 22.5% of responding FOIA requesters think agencies could improve their FOIA process through training and capacity.
  - Commentary:
  - “Why agencies allow untrained, uninformed staff make decisions on search and redaction that are predictably ill-informed thus likely to generate appeals and litigation”
  - “Hire more folks. Train more folks. Give requesters more clarity on where their request is within the process. It’d be great if we had real-time access to most FOIA notes on our requests, since I frequently file for those anyway.”
  - “Have more resources. For some, the problem is that agency officials view disclosure as antithetical to an agency's interests so the FOIA office's mission is to limit public access. That requires a change in leadership and attitudes towards the role of transparency.”
  - “Order mandatory training for FOIA officers and agency FOIA attorneys with a focus on reducing delays, unwarranted redactions and other common

**Time/Volume Recommendation 4 [As passed on March 5, 2020 in spirit\* and proposed for consideration on May 1, 2020]:**

**“Recommend that the Archivist request that OGIS and OIP request that agencies identify common categories of documents requested frequently under the FOIA and/or Privacy Act by or on behalf of individuals seeking records about themselves, and seek to establish alternative processes for providing access to these documents to requesters in a more efficient manner than the FOIA.”**

*(\*the transcript of the March 5 meeting is unclear as to whether Committee members believed they voted for the recommendation in spirit.)*

**Goal:** This recommendation aims to ensure that the FOIA is primarily used to serve its original legislative intent of enhancing the transparency of government operations, while also meeting the needs of “first-person FOIA” requesters – individuals seeking information from the government about themselves.

**Rationale:** The Freedom of Information Act was originally intended as a measure to increase transparency of government operations by releasing information to the public, ultimately as a means of improving the public’s ability to govern.<sup>1</sup> The legislative intent is clear from the signing statement delivered by President Lyndon B. Johnson, in which he noted: “a democracy works best when the people have all the information that the security of the nation will permit.”<sup>2</sup> In recent years, the number of annual FOIA requests in the United States has ballooned to over 1,800,000, as has the cost of accommodating these requests – more than \$545 million in FY 2018.<sup>3</sup> In many cases, government agencies tout these figures as signs of success in ensuring transparency in government, as well as indications of the high price of doing so.<sup>4</sup>

In fact, many government agencies have come to rely on the Freedom of Information Act and the administrative procedures specified within to address other needs for access to information by the public beyond the worthy goals of transparency and accountability originally envisaged by the Congress. There are numerous legitimate reasons why citizens (and non-citizens) require access to government information and records other than to hold the government accountable. Many FOIA requests do not in fact respond to a public need for transparency in government, but rather are requests by “individuals seeking records about themselves: for example, their own medical files, immigration records, or investigation files” – often known as “first-person” FOIA requests.<sup>5</sup> The high number of FOIA requests therefore may say little about government transparency, and much more about the way in which government agencies interact with the public.

In our view, this overreliance on the FOIA has a number of negative effects. First, it distorts the public’s understanding of the true impact of the FOIA and the real state of government transparency. Not only does it artificially inflate the number of requests made in the public interest, but it can also result in misleading statistics regarding the expediency of responses to FOIA requests.

Second, the FOIA provides a set of specific administrative deadlines that may be adequate for ensuring transparency of government operations, but that are inadequate for other cases. For instance, the FOIA requires a response from government agencies within 20 business days, but

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<sup>1</sup> Fred H. Cate, D. Annette Fields, James K. McBain “The Right to Privacy and the Public's Right to Know: The ‘Central Purpose’ of the Freedom of Information Act”, *Administrative Law Review* 46:41 (1994), 42.

<sup>2</sup> National Security Archive, “Statement by the President”, no date, available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/Document%2031.pdf>.

<sup>3</sup> Amelia Brust, “2018 sees record number of FOIA requests, information seekers change”, *Federal News Network*, Jun. 7, 2019, available at <https://federalnewsnetwork.com/open-datatransparency/2019/06/2018-sees-recordnumber-of-foia-requests-information-seekers-change/>.

<sup>4</sup> The White House, Office of the Press Secretary, “Fact Sheet: New Steps Toward Ensuring Openness and Transparency in Government”, Jun. 30, 2016, available at <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-new-steps-toward-ensuring-openness-and-transparency>.

<sup>5</sup> Margaret B. Kwoka, “First-Person FOIA”, *Yale Law Journal* 127:8 (2018), 2204.



does not require that records be turned over within this time frame. This standard may be insufficient for individuals who need these records for legal or medical reasons.

Third, in some cases, requiring the use of FOIA for first-person requests leads to a duplication of work processes.<sup>6</sup> In the case of immigration files, even when information is consolidated from multiple government agencies in the hands of one agency, requesters must sometimes file requests with each agency individually.<sup>7</sup> Moreover, because FOIA requests are often not met within an adequate response time, attorneys often file requests with multiple agencies to see which one responds the fastest.<sup>8</sup> All of this leads to delays and extra work that is inefficient and costly.

There are a number of ways in which access to information can be provided in a more efficient way than through FOIA. These include the following:

1. Facilitating proactive administrative discovery in agency proceedings (such as immigration proceedings) that often require a FOIA request;
2. Eliminating “request and return” scenarios that require petitioners to file a FOIA request for records that are in an agency’s possession to demonstrate that they are eligible for a government benefit;
3. Making select records available to the public in online databases, such as the Veterans Benefits Management System;
4. Establishing other processes for requesting particular documents outside of the FOIA, as the FBI has done with its requests for criminal background checks.<sup>9</sup>

To meet the goals of this recommendation, agencies would do the following:

- Survey commonly requested categories of documents to see which count as “first-person” FOIA requests.
- Establish a set of procedures outside of the FOIA for requesters to access these types of documents.
- Ensure that these procedures guarantee access to the same amount of documentation, or more documentation, than is possible under the FOIA, and within a quicker time frame.

**Time/Volume Recommendation 5 [As passed in spirit on March 5, 2020, with subcommittee edits denoted by strikethrough and underline for consideration on May 1, 2020]:**

**“A. Recommend that the Archivist address agencies’ need to provide for the dissemination of information outside of the FOIA and ensure that the programs that provide such**

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<sup>6</sup> Kwoka, “First Person FOIA”, 2249-51.

<sup>7</sup> Kwoka, “First Person FOIA”, 2250.

<sup>8</sup> Kwoka, “First Person FOIA”, 2250.

<sup>9</sup> On these four, see Kwoka, “First Person FOIA”, 2255-2268.

information dissemination are robust.

~~B. Consistent with~~ In support of the National Archives and Records Administration’s M-19-21 Memorandum which directs agencies to ensure that all Federal records are created, retained and managed in electronic formats, with appropriate metadata, by December 31, 2022, recommend that ~~that~~ the Archivist address agencies’ need to provide these records electronically, developing online databases where members of the public may access commonly requested types of documents that go to the heart of the agency’s mission, and providing secure online databases where that information contains personally identifiable information or other sensitive information.”

**Goal:**

To allow members of the public seeking records that, by agency-specific statutes, should already be disseminated outside of the FOIA, to readily obtain those records online so that they do not resort, in the alternative, to submitting FOIA requests for these records.

**Rationale:**

A. *FOIA, Inc.*, 65 Duke Law Journal 1361, 1362 (2016), Margaret B. Kwoka (“By meeting information needs in a more efficient manner that is available equally to all, affirmative disclosure will enable federal agencies to reclaim public records from the private market and free up resources to better serve FOIA requests that advance its democratic purpose.”).

B. At least two federal agencies, the U.S. Copyright Office, and the U.S. Consumer Product Safety Commission, are already providing this type of public disclosure:

a. 17 U.S.C. § 707 requires the U.S. Copyright Office (Copyright Office) to maintain a public catalog of all copyright registrations, arguably the most sought after records that the Copyright Office maintains. The Copyright Office fulfills this statutory requirement by providing the records in an online database, <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>. As a result, the Copyright Office receives very few FOIA requests for records. In FY18 they received 44; in FY17, 43.

b. At the U.S. Consumer Product Safety Commission (Consumer Product Safety Commission), a 2008 amendment to the statute, 15 U.S.C. § 2055a, requires the agency to maintain a public database on the safety of consumer products “that is [] publicly available; [] searchable; and [] accessible through the Internet website of the Commission.” 15 U.S.C. § 2055a(a)(1). This database, [Saferproducts.gov](https://www.saferproducts.gov), allows members of the public to, *inter alia*, search consumer complaints on specific products, and review recall notices. The agency also provides national injury data online via its NEISS database, <https://www.cpsc.gov/Research--Statistics/NEISS-Injury-Data>. 15

U.S.C. § 2054. Accordingly, the number of FOIA requests at the agency is relatively low for an agency that “protects the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C. § 2051(b). In FY18 they received 554 FOIA; in FY17, 664.