

## **DRAFT VERSION 2/28/2020**

**March 5, 2020**

**To: 2018-2020 FOIA Advisory Committee**

**From: Vision Subcommittee of the 2018-2020 FOIA Advisory Committee**

**Re: Vision Subcommittee Recommendations to the FOIA Advisory Committee**

### **Mission**

The Vision Subcommittee's mission is to provide a strategic plan to achieve a shared vision of the Freedom of Information Act (FOIA) over the next 10 years. This strategic plan includes raising the priority of FOIA within the Executive Branch, reconsidering the model of the Office of Government Information Services (OGIS) within the FOIA community, increasing accountability for FOIA and transparency, managing expectations between agencies and the requester community, and stressing the need for increased and continued financial support for agency FOIA programs. Due to overlapping issues with other sub-committees, the following recommendation do not address all areas of the Vision Subcommittee's mission.

### **Recommendation 1: Stressing the need for increased and continued financial support for agency FOIA programs**

Recommendation: The Archivist directs OGIS:

- Establish a cross-agency grant program that encourages and invests in initiatives that show potential to reduce agency backlog, response times, or provide proactive disclosure of commonly requested categories of records. The grants should encourage cross-departmental and cross-agency collaboration to maximize the effectiveness and reproducibility of innovative ideas. The grant proposals be open to submissions in all three of the core areas — personnel, records management, and technology.
- To review and help set clear career trajectories for FOIA professionals, including opportunities to gather and implement future-facing skill sets, as well as ones that help connect FOIA professionals with the larger professional worlds of information and archive management. Both internal and external training opportunities should be encouraged and supported by agency leadership. This will help improve staff recruitment and retention while building a pathway towards FOIA offices having a stronger, independent influence on agency policy regarding records management and transparency.
- To explore models that help align agency resources with their commitment to transparency, including detailing the cost of unsuccessfully defended FOIA litigation, assessing utilization and impact of non-FOIA open data and proactive disclosure efforts

## DRAFT VERSION 2/28/2020

within FOIA annual reports, and helping agencies understand that FOIA is not a cost center to be contained but a crucial responsibility tied to public service.

Rationale:

The recommendations in this and prior FOIA Advisory Committee reports are crucial steps towards bringing FOIA into the 21<sup>st</sup> century, but adoption of proactive disclosure, advances in artificial intelligence, and other tactics won't solve a fundamental issue: Financial support hasn't kept up with increasing demands of FOIA requests — both in terms of number and increasing complexity. As a result, U.S. FOIA programs are chronically underfunded, short staffed, and failing to meet statutory deadlines. Our country needs a robust, well-funded and carefully considered FOIA program to deliver the transparency and accountability that the American people deserve and expect, including reliable financial support; investment in creative, strategic initiatives for improving records management, review and release; and career trajectories that emphasize the professionalism and independent FOIA offices rely on to maintain the trust of the American people in government.

This recommendation for increased resources for FOIA offices was one that was endorsed by both the agency and requester communities, and we believe is critical for delivering on other agenda items included in the FOIA Advisory Committee's recommendations.

Broadly, these investments need to be made in three core areas: Personnel, records management, and technology.

### **Recommendation 2: Raising Priority**

#### *A. Support from leadership.*

Recommendation: The Archivist encourages agency leadership to issue an annual memo reminding employees of their responsibility under the FOIA and encouraging employees to contact their FOIA Officer with questions to assist the FOIA process and show leadership support.

#### *B. FOIA and administrative transitions*

Recommendation: The Archivist directs OGIS to assist agencies in establishing briefings for senior leaders during transition to a new administration which provide a thorough understanding of FOIA obligations/expectations, agency FOIA process, FOIA resources etc. OGIS could provide a template with basic information on FOIA and resources, identifying topics to cover/information to include and curate speakers from the top performing offices and the requester community to participate in a roundtable.

#### *C. Inclusion in agency performance plans*

Recommendation: The Archivist encourages agencies to include FOIA performance measures in the Agency Performance Plans and Reports, requiring agency leadership, not just designated FOIA personnel, to track progress on FOIA implementation.

## DRAFT VERSION 2/28/2020

### Rationale:

The FOIA is absent from most federal agency performance plans (See Piotrowski and Rosenbloom 2002, and Piotrowski et al 2018). Federal agency performance plans are publicly available at Performance.gov. The 2016-18 Freedom of Information Act Federal Advisory Committee made recommendations in its [final report](#) regarding federal *employee* performance standards and FOIA. What we are addressing here is something different — not the performance of individual employees but of *agencies* as a whole.

Each agency could work with the Office of Management and Budget and the [Performance Improvement Council](#) to improve FOIA practices in ways which make sense for that specific agency's context. For example, the EPA's [FY 2018-2022 Strategic Plan](#) has a long-term performance goal that addresses FOIA implementation: "LTPG 2.2.1 By September 30, 2022, eliminate the backlog and meet statutory deadlines for responding to Freedom of Information Act (FOIA) requests." Other agencies could develop similar goals focusing on backlogs, or could address different FOIA issues such as training or technology improvements. For some agencies it may make sense to include FOIA in their mission or priority goals.

### Sources:

Piotrowski, S.J. and Rosenbloom, D.H. (2002), Nonmission-Based Values in Results-Oriented Public Management: The Case of Freedom of Information. *Public Administration Review*, 62: 643-657. doi:[10.1111/1540-6210.00247](#)

Piotrowski, S., Rosenbloom, D.H., Kang, S. and Ingrams, A. (2018), Levels of Value Integration in Federal Agencies' Mission and Value Statements: Is Open Government a Performance Target of U.S. Federal Agencies?. *Public Admin Rev*, 78: 705-716. doi:[10.1111/puar.12937](#)

## Recommendation 3: Legislative Action

The FOIA law is a linchpin for an open and accountable government in this country and Congress should launch a major legislative initiative to modernize and more fully empower the FOIA programs across government. Congress has periodically passed FOIA amendments that, while much needed and appreciated, addressed smaller distinct problems with the law and its implementation. However, the reality is that problems have plagued FOIA throughout its more than 50 years. We have long struggled with heavy request volumes, lengthy response time, inconsistent implementation, large backlogs, along with confusion and growing mistrust around the process. Certainly, there have been successes and millions have benefited from this simple but groundbreaking tool. But to realize the full potential of law, major legislative efforts are certainly necessary. For those issues where no clear solution exists, we encourage Congress to use pilot projects and taskforces to find the best path forward and then pursue it. Congress showed incredible commitment and leadership in 1966 when it established FOIA and we need that commitment and leadership again to overcome FOIA's biggest challenges.

Among the most important and substantive issues we recommend Congress pursue are:

- A. Expanding the scope of FOIA to include legislative and judicial branch –

## DRAFT VERSION 2/28/2020

We recommend Congress expand FOIA to include a statutory foundation for disclosure and access for the federal legislative and judicial branches. The law should establish clear proactive disclosure requirements for federal legislative and judicial bodies and detail a process for each branch by which individuals can request records from these federal bodies. This is not to suggest that the current system in place should simply be extended to each branch. This would require the establishment of new requirements crafted specifically to each branch in consideration of the types or records handled and addressing the concerns associated with their potential disclosure.

Currently, 46 states include the legislative branch in their open records process and 32 states include their judicial branch.<sup>1</sup> Internationally, at least 25 countries legally provide a legal right to legislative information and at least 10 countries do the same for judicial information, many through their main access to information law.<sup>2</sup> These examples establish that inclusion of the other branches is feasible and offer us a range of potential models to explore for possible emulation at the federal level.

These applications to the legislative and judicial bodies are often more restricted than the executive branch. Some states have limited access to administrative records or included broader categories of record exemptions. Congress would have to carefully consider how far new disclosure and access requirements should apply.

Both the judicial and legislative branches produce materials of interest and importance to the public. The legislative branch has bill markups, vote counts, hearing transcripts, officials' calendars, and text of speeches as well as a number of offices that are included in that branch such as the Capitol Police, Government Accountability Office, Congressional Research Service and the Architect of the Capitol.

Similarly, the federal judiciary has many records of public interest including spending records, court filings, and rulings. Currently, many federal court records can be found on the government run system Public Access to Court Electronic Records (PACER). However, PACER requires users to pay for access to these records. A legal requirement to proactively disclose these records would hopefully result in an expanded version of PACER that is free to the public.

While often these materials are made available to the public, that access is not universal. And when the public encounters barriers to access there is no official process for requests to be consistently processed. The FOIA statute should establish some baseline of disclosure and means for the public to seek a remedy when they believe that records are absent from that baseline.

B. Ensuring that agencies provide sufficient resources –

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<sup>1</sup> "How Open Is Your Government? Find Out" MuckRock, 2016. <https://www.muckrock.com/place/>

<sup>2</sup> Scope of Bodies Covered, Right 2 Info, 2013. <https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/legislative-branch> and <https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/judicial-branch>

## DRAFT VERSION 2/28/2020

The single most consistent challenge agencies encounter when attempting to properly implement FOIA derives from limited resources. For those agencies with significant backlogs of requests the greatest need is for additional funds and staff to handle the large number of requests being received. Because FOIA is often seen a lower priority, leadership at agencies are often reluctant to increase the budget for FOIA at the possible expense of other work. Since Congress established these FOIA requirements, we urge Congress to also establish statutory mechanisms to ensure that agencies with high volumes of request allocate sufficient funds to process them and meet their legal obligation. One option could be a mandatory budget and staff increase whenever an agency ends the year with a backlog over an identified threshold. For instance, a 10 percent increase in budget and staffing for agencies that end the year with a backlog greater than 10 percent of the number of requests received for the year.

### C. Strengthen independent oversight

Given the difficulty of the responsibilities laid out in FOIA, the rising volume of records requests and the challenges agencies have long faced implementing FOIA, independent oversight is an important component to ensure problems are identified and addressed so the system operates as effectively as possible. Congress should start by conducting more regular and robust oversight of FOIA and the long-standing problems with the process. Currently, hearings on FOIA performance are infrequent, often occurring once a year and offering only the broadest overview of agency performance. Hearings on specific issues would allow committees to drill down on problems and hopefully identify solutions. Congress can look to the recommendations of this advisory committee's various terms to identify issues that need to be addressed.

Congress should also strengthen the Office of Government Information Services, which it created to provide administrative oversight to agencies and the FOIA process. But the small office is vastly understaffed, underfunded, and under-authorized to effectively oversee FOIA across the entire federal government. The actions the office has undertaken so far have been positive but much more is needed. We urge Congress to significantly expand the funding and strengthen the office's authority on FOIA matters. Greater oversight should lead to more consistent implementation across agencies, greater efficiencies and savings in both funds and time, as well as fewer costly lawsuits.