

## Summary of FOIA Experiences and Reform Suggestions from Complex FOIA Requests and Litigation panel

### FOIA Advisory Committee Meeting December 1, 2022

- **Ryan Mulvey**, Policy Counsel, Americans for Prosperity Foundation
- **Katie Townsend**, Deputy Executive Director and Legal Director, Reporters Committee for Freedom of the Press
- **Anne Weismann**, formerly Chief Counsel, Citizens for Responsibility and Ethics in Washington (CREW)

#### Resources

Constant critical underfunding for FOIA = increased litigation (Anne Weismann)

Agencies facing significant backlogs do not have time to work with requesters on narrowing their requests (Katie Townsend)

FOIA non-compliance is driven largely by lack of funding. (Katie Townsend)

Agency FOIA programs should have access to e-discovery tools but often do not (Anne Weismann)

#### Process

Abuse of statutory tools (Anne Weismann)

- “Still interested” letters are still too common, despite DOJ guidance;
- Agencies overuse “unusual circumstances;”
- Agencies opaque in criteria for simple vs. complex requests; and
- Agencies often incorrectly claim that requests do not reasonably describe records.

Agencies conflate “unusual circumstances” and complex requests (Anne Weismann).

Agencies conflate voluminous requests with unreasonably described requests (Ryan Mulvey)

Communication often minimal after good initial acknowledgement letters (Anne Weismann)

Delay is the biggest issue (Katie Townsend)

- Systematic failure to comply with statutory deadlines

Foreseeable harm: despite standard in the statute, agencies are using discretionary exemptions to withhold information that should be public (Katie Townsend)

At some small agencies there is a conflict-of-interest when the same person is both the FOIA Officer and the FOIA Appeals Officer (Ryan Mulvey)

### **Litigation**

Rarely used as tool to examine legal merits such as exemption application (Anne Weismann)

- Litigation has become a routine part of the FOIA process, almost a housekeeping task.
- The courts issue an order for parties to issue a briefing schedule or production schedule.
- The courts function as a babysitter for the agencies.
- CREW does not routinely sue but does so when the agency fails to give a commitment and CREW concludes litigation is the only resort for getting a request processed.

Courts rarely order production schedules (Ryan Mulvey)

- When production schedules are in place, agencies often fail to meet the deadlines

The Department of Justice (DOJ) used to be a quality check on agencies' counsel but no longer (Ryan Mulvey)

Litigation does not cause backlogs; litigation is the result of backlogs. (Katie Townsend)

### **Reform Ideas**

All panelists agreed that at a minimum, portions of the statute need rewriting and it is not realistic to expect the entire statute to be rewritten

- Change how FOIA litigation works by expanding discovery and requiring agencies to submit administrative record to the judge; align FOIA litigation process with that of other civil litigation (Ryan Mulvey and Anne Weismann)
- Expand proactive disclosure provisions of FOIA (Ryan Mulvey)
- Make legislative and judicial branch agencies subject to FOIA (Ryan Mulvey)
- Create an Article III specialty court that solely deals with FOIA. (Ryan Mulvey)
- Expand and codify a balancing test between public interest and government interest (Anne Weismann)

- Strengthen foreseeable harm provision by including a public interest balancing test to strengthen a court's hand when the court believes release of information is in the public interest. (Katie Townsend)
- Expand and clarify the role of the courts so that relief is given less on an individual basis and more on a systematic basis (Anne Weismann)
- Give OGIS binding authority and enforcement role (Ryan Mulvey)
- Ensure agencies do a more accurate job of identifying responsive records up-front (Anne Weismann).
- Streamline process so that responsiveness and exemption reviews are not separate (Katie Townsend)
- Establish/strengthen agency FOIA guidelines around non-email electronic messaging (Ryan Mulvey)
- Require agencies to ask federal employees to search private email if used to conduct official business (Anne Weissman)

Cultural shift is needed (Katie Townsend, Anne Weismann, Ryan Mulvey)

- The foreseeable harm standard codified in the 2016 FOIA amendments has not changed agency behavior with regard to overuse of discretionary exemptions(Katie Townsend)
- Some judges have a stated (via dicta) that FOIA's problems rest with requesters; academia has rebutted that dicta (Ryan Mulvey)
- Agencies should change the culture so that FOIA professionals have the authority to make FOIA work well (Ryan Mulvey)
- Communication between requesters and agencies should be part of the culture (Ryan Mulvey)
- All government employees should be trained on the existence and importance of FOIA (Anne Weismann)
- Agency leadership should respect FOIA offices (Ryan Mulvey)
- More proactive disclosure = fewer FOIA requests (Anne Weismann)
- Resurrect provisions of the 1993 Attorney General Janet Reno memo and subsequent 1994 DOJ memo spelling out factors that should be considered under foreseeable harm, <https://www.justice.gov/oip/blog/foia-update-oip-guidance-applying-foreseeable-harm-standard-under-exemption-five> (Ryan Mulvey)