

# REPORT TO THE ARCHIVIST OF THE UNITED STATES

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**Freedom of Information Act Federal Advisory Committee**



## NATIONAL ARCHIVES

**2022-2024 Committee Term  
Final Report and Recommendations  
June 13, 2024**

A handwritten signature in dark ink, reading "Alina M. Semo". The signature is written in a cursive style with a long, sweeping underline.

**Alina M. Semo, Chair**

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## EXECUTIVE SUMMARY

The National Archives and Records Administration (NARA) chartered the Freedom of Information Act (FOIA) Advisory Committee (Committee) to foster dialogue between the administration and the requester community, solicit public comments, and develop recommendations for improving FOIA administration and proactive disclosures. Committee members represent a wide variety of stakeholders in the FOIA community, inside and outside of government, and the Committee serves as a deliberative body to advise the Archivist of the United States on improvements to FOIA administration.

During the 2022-2024 term, the Committee's fifth, it formed three subcommittees to:

- identify gaps in agency FOIA resources and ways to ensure that FOIA offices are resourced (**Resources**);
- explore ways in which interaction with the FOIA requester community can be improved including through the use of technology (**Modernization**); and
- review past recommendations of the four previous Committee terms and evaluate the current status of their implementation within agencies (**Implementation**).

The Committee has identified and approved 16 recommendations for delivery to the Archivist as mandated by the Committee's charter for actions to improve the implementation of FOIA. Given the Archivist's broad charge to the Committee to chart a course for the future of FOIA, the Committee believes it is appropriate and within the scope of our charge to offer recommendations not only for NARA and the U.S. Department of Justice's Office of Information Policy (OIP) to implement, but also for all federal agencies and the Chief FOIA Officers (CFO) Council as important actors in FOIA administration.

The Committee understands that the Archivist has the authority only to ensure implementation of those recommendations directed to NARA. However, the Director of the Office of Government Information Services (OGIS) commits to work with the Archivist to convey the Committee's recommendations to the named government entities to which they are directed.

## BACKGROUND

**Authority:** The National Archives and Records Administration (NARA) established the Freedom of Information Act (FOIA) Advisory Committee in 2014 in accordance with the second United States Open Government National Action Plan<sup>1</sup> released on December 5, 2013. The Committee operates under the directive in FOIA, 5 U.S.C. § 552(h)(2)(C), that the Office of Government Information Services within NARA "identify procedures and methods for improving compliance" with FOIA. This Committee is governed by the provisions of the Federal Advisory Committee Act, as amended, P.L. 92-463, 86 Stat. 770 (1972); 5 U.S.C. § 10. The

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<sup>1</sup> "The Open Government Partnership: Second Open Government National Action Plan for the United States of America" (Dec. 5, 2013), (NAP 2.0), [https://obamawhitehouse.archives.gov/sites/default/files/docs/us\\_national\\_action\\_plan\\_6p.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf).

Archivist of the United States renewed the Committee’s Charter in April 2022 for the 2022-2024 term.

**Objectives and Scope of Activities:** As described in the United States’ Second Open Government National Action Plan, NARA launched the FOIA Advisory Committee “to foster dialog[ue] between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures.” The Advisory Committee serves as a deliberative body to advise the Archivist on improvements to the administration of FOIA. Committee members represent a wide variety of stakeholders in the FOIA community inside and outside of government and have expertise concerning the administration of FOIA across the executive branch. The Committee may recommend legislative action, policy changes or executive action, among other matters.

## **AT-A-GLANCE RECOMMENDATIONS**

### **Recommendation 2023-01**

**OIP should issue guidance urging identification of corresponding privilege(s) invoked in redaction labels and model determination letters.**

Subcommittee: Modernization

Vote: 15-0, June 8, 2023

Responsible for Implementation: OIP

### **Recommendation 2024-01**

**OIP should publish the Committee’s Model Determination Letter as a best practices reference for agencies.**

Subcommittee: Modernization

Vote: 18-0, March 5, 2024

Responsible for Implementation: OIP

### **Recommendation 2024-02**

**OIP should issue guidance encouraging agencies to proactively offer requesters the opportunity to discuss their request with an agency representative.**

Subcommittee: Modernization

Vote: 18-0, April 4, 2024

Responsible for Implementation: OIP

### **Recommendation 2024-03**

**OIP should issue guidance encouraging agencies to provide requesters an interim response consisting of a small sample of documents.**

Subcommittee: Modernization

Vote: 18-0, April 4, 2024

Responsible for Implementation: OIP

### **Recommendation 2024-04**

**OIP should issue guidance to all Chief FOIA Officers outlining the minimum requirements for training to agency staff, including non-FOIA professionals.**

Subcommittee: Resources

Vote: 17-0, April 4, 2024

Responsible for Implementation: OIP

**Recommendation 2024-05**

**The Office of Personnel Management (OPM) should add the 0306 Government Information Specialist (GIS) Job Series to the direct hiring authority list.**

Subcommittee: Resources

Vote: 17-0, April 4, 2024

Responsible for Implementation: OPM

**Recommendation 2024-06**

**The Chief FOIA Officers Council, through its Committee on Cross-Agency Collaboration and Innovation (COCACI), should organize agencies to participate in a “talent pool” posting through OPM.**

Subcommittee: Resources

Vote: 17-0, April 4, 2024

Responsible for Implementation: CFO Council, OPM

**Recommendation 2024-07**

**The Chief FOIA Officers Council, through its Committee on Cross-Agency Collaboration and Innovation (COCACI), should create and maintain a database on its website of position descriptions in the Government Information Specialist (GIS) job series at various grades.**

Subcommittee: Resources

Vote: 17-0, April 4, 2024

Responsible for Implementation: CFO Council

**Recommendation 2024-08**

**The General Services Administration (GSA) should create a labor category on the GSA schedule specifically for FOIA contractors to facilitate efficient procurement if an agency determines it needs contractor support.**

Subcommittee: Resources

Vote: 17-0, April 4, 2024

Responsible for Implementation: General Services Administration

**Recommendation 2024-09**

**Federal agencies should expand public engagement activities focused on improving all aspects of their FOIA process.**

Subcommittee: Modernization

Vote: 18-0, April 4, 2024

Responsible for Implementation: Federal agencies

**Recommendation 2024-10**

**The Archivist of the United States should propose that the Office of Management and Budget, the Office of Information Policy, and other agency participants in future U.S. National Action Plans for Open Government include new and continuing commitments to improving FOIA administration.**

Subcommittee: Modernization

Vote: 18-0, April 4, 2024

Responsible for Implementation: NARA, OMB, OIP

**Recommendation 2024-11**

**The Chief FOIA Officers (CFO) Council should form a working group to analyze the interest in and the need for 1) a shared FOIA case management system and 2) a centralized**

**record repository for use by federal agencies and the public.**

Subcommittee: Resources

Vote: 17-0, April 4, 2024

Responsible for Implementation: CFO Council

**Recommendation 2024-12**

**The Chief FOIA Officers Council Technology Committee and interested agencies should publish requests for information (RFIs) on the subject of artificial intelligence (AI) tools and techniques as an aid to FOIA processing.**

Subcommittee: Modernization

Vote: 17-0, April 4, 2024

Responsible for Implementation: CFO Council and federal agencies

**Recommendation 2024-13**

**OGIS and OIP should follow up with selected agencies and other government entities in an effort to increase compliance with past recommendations of the FOIA Advisory Committee.**

Subcommittee: Implementation

Vote: 16-1, May 9, 2024

Responsible for Implementation: OGIS and OIP

**Recommendation 2024-14**

**OIP should include one or more specific questions in Chief FOIA Officer reports requesting agencies to report on activities that they have implemented consistent with selected FOIA Advisory Committee recommendations.**

Subcommittee: Implementation

Vote: 18-0, May 9, 2024

Responsible for Implementation: OIP

**Recommendation 2024-15**

**The FOIA Advisory Committee should create a working group to study the implementation of past recommendations.**

Subcommittee: Implementation Vote: 16-1, May 9, 2024

Responsible for Implementation: FOIA Advisory Committee

## **RECOMMENDATIONS**

### *Introduction*

The Freedom of Information Act (FOIA) is meant to play a critical role in providing citizens with transparency as to their government’s operations and allowing them to hold their government accountable. The Act’s “basic purpose . . . is to ensure an informed citizenry,” which is “vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed.”<sup>2</sup>

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<sup>2</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

To best ensure public access to government information in a timely, cost-effective, and user-friendly manner, it becomes every government agency's responsibility to renew efforts to improve its administration of the FOIA. Many agencies are, however, confronted with a growing backlog of FOIA requests. As detailed at greater length in our Resources Subcommittee Report, over the past decade the federal government has seen the number of backlogged FOIA requests increase almost threefold. In 2012, the total federal backlog as reported on FOIA.gov was 71,790 requests. In 2022, that number stood at 206,720.<sup>3</sup> Agency FOIA staff face the prospect of managing their current incoming workload, along with trying to reduce their current backlogs often without adequate resources to make significant reductions in the workload.

In making 16 new recommendations this term,<sup>4</sup> the Committee recognizes the practical realities agencies face. A number of our recommendations are directed at improvements in staffing, training, and technology. The Committee also has focused on best practices aimed at improving dialogue with individual FOIA requesters, as well as with the FOIA community and civil society at large. Greater public engagement is an indispensable avenue for ensuring a better operating FOIA experience with higher public satisfaction. Recognizing that one size will not fit all agencies, our recommendations this term leave open to agencies—large and small—a wide selection of ways to implement these recommendations.

During the current, fifth term of the Committee, an Implementation Subcommittee was formed to review the government's implementation of the cumulative 51 recommendations approved in the Committee's past four terms. Three of the new recommendations in this Report reflect the findings of the Implementation Subcommittee, and we make additional observations on the future of the Committee's work at the end of this Report.

The summaries of recommendations contained in this Report are based on the work of this term's Modernization, Resources, and Implementation Subcommittees, each of which has produced extensive reports that provide further background and findings in support of the Committee's recommendations. We invite a further close reading of these subcommittee reports for a fuller understanding of the Committee's overall work this term.<sup>5</sup>

### *Recommendation Category: Process Improvements*

#### **Recommendation 2023-01: We recommend that the Office of Information Policy issue guidance stating that whenever an agency withholds information pursuant to Exemption 5,**

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<sup>3</sup> See Resources Subcommittee Report to the 2022-2024 FOIA Advisory Committee (May 24, 2024) ("Resources Subcommittee Report"), <https://www.archives.gov/files/resources-subcommittee-report-5-23-2024-1.pdf>. Shortly before this Committee's last meeting of the 2022-2024 term, OIP reported in its annual summary of agency reports that the governmentwide request backlog was 200,843 at the end of FY 2023. See OIP Blog Post, *Summary of Fiscal Year 2023 Annual FOIA Reports* (published June 7, 2024).

<sup>4</sup> These consist of Recommendation 2023-01 (adopted in June 2023), and Recommendations 2024-01 through 2024-15 (adopted in April and May 2024).

<sup>5</sup> See Modernization Subcommittee Report and Recommendations to the 2022-2024 FOIA Advisory Committee (Mar. 18, 2024) ("Modernization Subcommittee Report"), [https://www.archives.gov/files/ogis/documents/modernization.subcommittee.report.final\\_.pdf](https://www.archives.gov/files/ogis/documents/modernization.subcommittee.report.final_.pdf); Implementation Subcommittee Recommendations to the 2022-2024 FOIA Advisory Committee (May 7, 2024) ("Implementation Subcommittee Report"), <https://www.archives.gov/files/ogis/documents/implementation-subcommittee-report-may-7-2024.pdf>; Resources Subcommittee Report, <https://www.archives.gov/files/resources-subcommittee-report-5-23-2024-1.pdf>.

**the agency should identify the corresponding privilege(s) invoked. If the withholding takes the form of a redaction, the identification of a privilege should be made part of the redaction label; if a record is withheld in full, the agency should identify privilege(s) in its determination letter.**

### **Comment**

FOIA Exemption 5 applies to “inter-agency or intra- agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,”<sup>6</sup> which has been interpreted to incorporate civil litigation privileges.<sup>7</sup> (A privilege is a legal rule that protects communications within certain relationships from compelled disclosure in a court proceeding.) The three most common privileges cited in connection with Exemption 5 are the deliberative process privilege, attorney-client privilege, and attorney work-product privilege.<sup>8</sup>

When redacting records, FOIA generally requires agencies to indicate “the exemption under which the deletion is made . . . at the place in the record where such deletion is made.”<sup>9</sup> Thus, for an Exemption 6 redaction, agencies will label the redaction “b6” or “(b)(6).” For redactions under Exemption 7, which has six sub-parts (A–F), agencies will also label redactions with the corresponding sub-paragraph (*e.g.*, “(b)(7)(C)”).

Although Exemption 5 incorporates numerous privileges, FOIA does not include subparts for Exemption 5 as it does for Exemption 7. Currently, most agencies will label Exemption 5 redactions simply as “b5” or “(b)(5).” But invoking Exemption 5 without identifying the underlying privilege does not afford a requester the information needed to evaluate a withholding, including for the purposes of an administrative appeal. The legal tests for the various privileges incorporated by Exemption 5 are distinct and fact-specific; knowing what standard applies is a necessary condition for evaluating an Exemption 5 withholding.

To provide greater clarity to requesters, whenever an agency identifies the withholding of information pursuant to Exemption 5, the agency should identify the corresponding privilege. If the withholding takes the form of a redaction, the identification of the privilege should be part of the redaction label.<sup>10</sup> If a record is withheld in full, the agency should identify the privilege in its determination letter.<sup>11</sup> For less-commonly cited privileges,<sup>12</sup> agencies should provide sufficient explanation in the determination letter for the requester to understand which privilege is being invoked under the label “Other.”

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<sup>6</sup> 5 U.S.C. § 552(b)(5).

<sup>7</sup> See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975).

<sup>8</sup> See *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). Other privileges, less commonly cited, have also been recognized. For a discussion of other Exemption 5 privileges, see Department of Justice Guide to the Freedom of Information Act, “Exemption 5,” at 72-83 (posted Mar. 13, 2023), <https://www.justice.gov/oip/page/file/1573681/dl?inline>. See, *e.g.*, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984) (recognizing privilege for “[c]onfidential statements made to air crash safety investigators”).

<sup>9</sup> 5 U.S.C. § 552(b).

<sup>10</sup> *Cf.* 5 U.S.C. § 552(b).

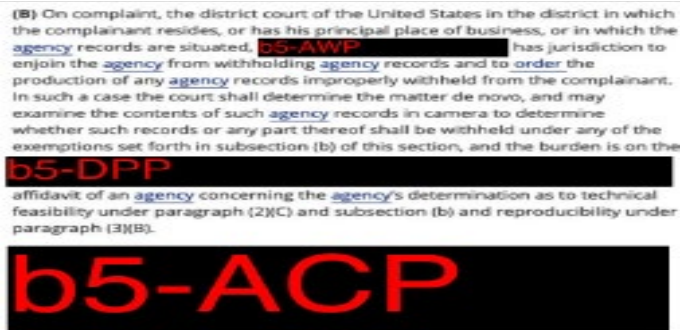
<sup>11</sup> *Cf.* 5 U.S.C. § 552(a)(6)(A)(i)(I).

<sup>12</sup> See, *e.g.*, *Weber Aircraft Corp.*, 465 U.S. at 7.



- Attorney-client privilege: b5-ACP
- Attorney work-product privilege: b5-AWP
- Deliberative process privilege: b5-DPP
- Other: b5-other

For example:



***Recommendation 2024-01:* We recommend that the Department of Justice’s Office of Information Policy publish the attached Model Determination Letter as a best practices reference for agencies.**

**COMMENT**

An agency’s substantive response to an initial FOIA request is called a “determination.”<sup>13</sup> Determination letters are issued in response to more than 1 million requests across the federal government each year. A determination letter has both substantive and procedural consequences under FOIA.<sup>14</sup> The Model Determination Letter helps standardize content and format of such letters, for the benefit of agencies and requesters alike. It is the result of collaboration between representatives of federal agencies and the requester community. The Model Determination Letter seeks to balance providing crucial information to requesters with the burden on agencies that are processing numerous requests. As its name suggests, this is a *model* letter: the Committee anticipates that actual determination letters using it as a template will vary depending on the facts of a specific case including the volume of records at issue. At its core, the Model Determination Letter aims to provide clarity in the FOIA process and improve communications between agencies and requesters.

The Model Determination Letter has been strengthened through public engagement. At the June 8, 2023, public meeting, the Chair of the FOIA Advisory Committee invited comments from agencies and members of the public on the draft letter. Civil society groups, professional organizations, and members of the public responded to the invitation. Many of the submissions

<sup>13</sup> 5 U.S.C. § 552(a)(6).

<sup>14</sup> See Summary of Annual FOIA Reports for Fiscal Year 2023, <https://www.justice.gov/oip/media/1354721/dl?inline>.

provided helpful feedback. All the public comments on the letter can be viewed online at the FOIA Advisory Committee’s web page.<sup>15</sup>

The need for a model determination letter stems from: (1) the lack of current standardization across the federal government, (2) changes in FOIA’s legal standards and guidance over the last decade, (3) the benefits to requesters from additional information in the administrative process, and (4) the benefits that both agencies and requesters stand to gain from improved communication in the FOIA context.

First, the federal government already provides a variety of cross-agency guidance and best practices for FOIA through OIP and OGIS. Such guidance can assist agencies in the administration of FOIA.<sup>16</sup> However, there is no standardization or government-wide template for a determination letter that agencies can consult. As a result, there is great variation across agencies, hardly surprising given their wide array of missions, personnel, and resources. Nonetheless, FOIA’s standards are the same across the federal government.<sup>17</sup> Providing a Model Determination Letter will help ensure that all agencies, regardless of their mission, experience or resources, have guidance they can consult for current best practices.

Second, over the last decade the standards that govern FOIA in general, and determination letters in particular, have changed due to case law,<sup>18</sup> amendments to the statute,<sup>19</sup> and guidance from the Attorney General.<sup>20</sup> The Model Determination Letter synthesizes these updated requirements and guidance in one place, promoting compliance and best practices across all agencies.

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<sup>15</sup> <https://www.archives.gov/ogis/foia-advisory-committee/public-comments>.

<sup>16</sup> See, e.g., OIP Guidance: *Standard Operating Procedures for FOIA Offices*, <https://www.justice.gov/oip/oip-guidance-standard-operating-procedures-foia-offices> (noting “Standardization of FOIA processing within the agency helps ensure that an agency’s handling of requests and appeals is consistent with the FOIA, agency regulations, policy guidance, best practices, and the agency’s institutional knowledge.”); OGIS, *Agency Best Practices: FOIA and Database Requests*, <https://www.archives.gov/ogis/resources/foia-and-database-requests-for-agencies>.

<sup>17</sup> *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001) (noting FOIA’s terms set forth “a government-wide rather than agency-specific standard”).

<sup>18</sup> In 2013, the D.C. Circuit held that to qualify as a determination, an agency communication must “at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

<sup>19</sup> The [FOIA Improvement Act of 2016](#), Pub. L. No. 114-185, 130 Stat. 538 (2016), enacted additional requirements, including that agencies must alert requesters in the case of adverse determinations as to their right to dispute resolution services from the agency FOIA Public Liaison (FPL) or OGIS. The FOIA Improvement Act also added the foreseeable harm standard, which limits the circumstances under which agencies can withhold records. 5 U.S.C. § 552(a)(8); see also *Rep. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) (“the foreseeable harm requirement imposes an independent and meaningful burden on agencies”) (cleaned up); OIP Guidance: *Applying a Presumption of Openness and the Foreseeable Harm* (updated Apr. 12, 2023), <https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard>.

<sup>20</sup> On March 15, 2022, the Attorney General issued a memorandum to the heads of all executive departments and agencies entitled “Freedom of Information Act Guidelines” (AG Guidelines), which includes a provision stating agencies should address the foreseeable harm standard in their determination letters: “To help ensure proper application of the foreseeable harm standard, agencies should confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.” See <https://www.justice.gov/media/1212566/dl?inline>.

Third, requesters often receive insufficient information in determination letters as to how agencies processed their request or why records are being withheld. A requester that does not know how an agency conducted a search, or has little information about a denial, cannot understand the basis for the result they received. This is particularly true for new or infrequent requesters who are not well-versed in the complexities of FOIA. For new and experienced requesters alike, a dearth of information in a determination letter inhibits their ability to evaluate whether to file an administrative appeal in the context of an adverse result, let alone what they should argue in an appeal. The Model Determination Letter aims to address these informational gaps by providing detail that will help a requester understand and evaluate an agency's response.

Fourth, improved communication can benefit both agencies and requesters in the FOIA process. For example, a requester who receives a "no records" response without any information about the steps an agency took to search for responsive records may assume that the search was deficient, leading them to file an administrative appeal even if the agency's search was actually comprehensive. The same is true of a requester who receives a full denial with only vague citations to exemptions: they may opt to file an administrative appeal as a matter of course, challenging everything because they cannot understand the agency's rationale. In these and similar situations, agencies may be required to process administrative appeals that would not have been filed (or would have been more limited) if the requester had been given more information in a determination letter. The Model Determination Letter aims to save resources of both agencies and requesters by including helpful information up front. By providing more detail about the substance of a determination, requesters can file more targeted and informed administrative appeals, or determine that they need not file an administrative appeal after all. Agencies, in turn, need not expend resources where they are not truly needed.

Finally, by providing clear, well-organized information about an agency's response to a FOIA request, the Model Determination Letter seeks to build trust between the federal government and members of the public. By setting forth what an agency did in response to a request, and why they did it, the letter seeks to demystify the FOIA process and avoid a result that seems arbitrary or erroneous from the perspective of the requester.<sup>21</sup> A response that follows the Model Determination Letter can thus improve not just the FOIA process; it can improve transparency and confidence in the work of agencies generally.

The Model Determination Letter can be found at Appendix B.

***Recommendation 2024-02: We recommend that OIP issue guidance to federal agencies stating that agencies should proactively offer requesters the opportunity to discuss their request with an agency representative.***

### **COMMENT**

The FOIA process at its core involves interactive engagement with individual requesters who, after an initial request has been made for agency records, expect that there will be more than a minimal level of engagement with individual agency personnel responsible for the handling of

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<sup>21</sup> See [AG Guidelines](#) ("Each agency should actively work with requesters to remove barriers to access and to help requesters understand the FOIA process and the nature and scope of the records the agency maintains.").

requests.<sup>22</sup> Recognizing the importance of dialogue, OIP and OGIS have made clear that agency staff should be proactive in communicating with requesters, especially on the matters of clarifying and, as appropriate, reaching agreement on narrowing requests.<sup>23</sup> And in their annual Chief FOIA Officer (CFO) Reports, virtually all agencies report that they work with requesters, particularly on complex requests, to clarify and narrow the scope of requests to be able to conduct a reasonable search for responsive documents. Numerous opportunities therefore exist for engagement with requesters throughout the FOIA administrative process.

In practical terms, the proposed recommendation is intended to be modest in scope, involving only one or two additional sentences in an outgoing communication to a requester that might change the entire tone of the agency's engagement. As OIP has said, "Often a simple change in language or the addition of a sentence or two of explanation in the agency's response can go a long way to improving understanding."<sup>24</sup> The form of the offer to discuss a request could be as simple as the following sentence added to an acknowledgement letter, or a later communication triggered by the agency identifying the request once it reaches the top of its search queue:

*A FOIA staff representative is willing to discuss your FOIA request with you, to assist you in understanding how we intend to process your request, and to give you the opportunity to provide additional information to clarify or narrow your request to assist us in making a further response to you as efficiently as possible.*

The spirit of this recommendation will not be served if the offer comes after FOIA staff already have invested time and attention in searching for relevant records. Indeed, the entire purpose of the "early outreach" option would be to obviate the need for extensive searches in connection with particular requests, especially in cases where the request contains ambiguous language or leaves certain parameters open.

We understand that some agencies may consider a best practices recommendation along these lines to constitute an unreasonable burden being imposed on already busy FOIA offices. We can imagine that in some cases, an agency's FOIA Service Center and the agency's FOIA Public Liaison (FPL) are already fielding miscellaneous requests from the public at large who do take the time to initiate calls or emails, making this generalized offer difficult to fulfill unless

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<sup>22</sup> The FOIA statute requires agencies to determine within 20 business days after the receipt of a FOIA request "whether to comply with such request" and "immediately notify" requesters of (i) the reasons for the determination, (ii) the right of requesters to seek assistance from the FOIA Public Liaison (FPL) of the agency; in the case of an adverse determination, (iii) their right to appeal and (iv) the right to seek dispute resolution services from the FPL or OGIS, 5 U.S.C. § 552(a)(6)(A). Specifically with respect to the position of FPL, the FOIA as amended in 2016 states that such officer is to be "responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes." *Id.* at § 552(l).

<sup>23</sup> See, e.g., OIP Blog Post, *The Importance of Good Communication with FOIA Requesters 2.0* (Nov. 22, 2013), <https://www.justice.gov/oip/blog/importance-good-communication-foia-requesters-20>; OIP Guidance, *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons* (June 12, 2018), <https://www.justice.gov/oip/importance-quality-requester-services-roles-and-responsibilities-foia-requester-service-centers>; OGIS Advisory Opinion No. 2020-01: *Agencies Must Provide Estimated Dates of Completion Upon Request* (Mar. 31, 2020) (FOIA requires agencies to provide estimated dates of completion upon request, offering opportunities for engagement with the requester), <https://www.archives.gov/ogis/advisory-opinions/2020-01-agencies-must-provide-edcs>.

<sup>24</sup> OIP Blog Post, *The Importance of Good Communication with FOIA Requesters 2.0*, <https://www.justice.gov/oip/blog/importance-good-communication-foia-requesters-20>.

additional resources are diverted to responding.<sup>25</sup> In other cases, FOIA staff may reasonably be concerned that there may be particular requesters who abuse the privilege being offered here, demanding inordinate time and attention be paid to their particular requests. One way of approaching this recommendation would be for an agency to institute a pilot program over the course of a given year, for the purpose of developing metrics on the increase in requester-initiated contacts received and any additional resources devoted to engaging in those communications.

In anticipation of these responses, we believe the following: first, fostering greater engagement with the requester community is a public good in itself, which serves to fulfill the highest purposes of the FOIA in its mandate to open records of the government to public scrutiny. Second, any short-term resource burden caused by implementing a policy of early engagement with requesters may be counterbalanced by considerable reductions in time and resources expenditures over the entire duration of responding to a request, including time and resources devoted to searching for responsive records and reviewing for exemptions.

Electronic record repositories are rapidly growing in size, in turn placing a greater strain on agency staff interpreting FOIA requests in ways that will lead to reasonable searches. Early engagement with a broader subset of requesters will, in our view, result in the saving of resources over time. For all the above reasons, we believe that the small amount of time spent with a willing requester would save potentially hundreds of hours of search and review time devoted to the request.

***Recommendation 2024-03: We recommend that OIP issue guidance to federal agencies encouraging the option of providing requesters an interim response consisting of a small sample of documents found as the result of searches conducted and subsequently reviewed for partial or full withholding.***

## **COMMENT**

Recent policy initiatives aimed at accelerating the transition to full electronic recordkeeping in federal agencies will continue to have an enormous impact on how agencies attempt to meet their FOIA obligations in conducting reasonable searches for responsive documents. On December 23, 2022, the Office of Management and Budget (OMB) and NARA jointly issued M-23-07, “[Update to Transition to Electronic Records](#),” directing that by June 30, 2024, all records (both temporary and permanent) are to be managed electronically to the fullest extent possible.<sup>26</sup> In particular, the widespread adoption of the “Capstone approach” to archiving email records,<sup>27</sup> will

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<sup>25</sup> We note, however, that the number of inquiries to FPLs varies widely. In its latest annual summary, OIP reports that of “sixty-five agencies receiving more than fifty requests, thirty-one received ten or fewer requester inquiries to their FOIA Public Liaison during the reporting period. Fourteen agencies received 11-100 inquiries, another fourteen agencies received 101-1,000 inquiries, and six agencies received over 1,000 inquiries.” See OIP, Summary of Agency Chief FOIA Officer Reports for 2023 and Assessment of Agency Progress in FOIA Administration with OIP Guidance for Further Improvement (“OIP CFO Report Summary 2023”) at 7, [https://www.justice.gov/d9/2023-09/final\\_2023\\_cfo\\_summary\\_approved\\_for\\_posting\\_full.pdf](https://www.justice.gov/d9/2023-09/final_2023_cfo_summary_approved_for_posting_full.pdf).

<sup>26</sup> [https://www.whitehouse.gov/wp-content/uploads/2022/12/M\\_23\\_07-M-Memo-Electronic-Records\\_final.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/12/M_23_07-M-Memo-Electronic-Records_final.pdf).

<sup>27</sup> See General Records Schedule 6.1, Email and Other Electronic Messages Managed under a Capstone Approach. <https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf>; see also <https://www.archives.gov/records-mgmt/rcs/schedules/capstone-forms> (NARA’s listing of agencies that have adopted Capstone archiving as their email policy). Under Capstone, the email accounts of designated senior officials are automatically deemed

result in tens or hundreds of millions of records in electronic form that are—or soon will be—subject to FOIA.<sup>28</sup>

Our Committee’s recommendation recognizes the reality of the present-day government search and review process, based on available technology, in suggesting a protocol for agencies to consider in cases where requesters express interest or are willing to engage in actively narrowing the scope of their request(s).<sup>29</sup> The volume of records in electronic form is the principal driver of the proposed protocol.<sup>30</sup> Where requesters are subject to fee regulations that take into account the cost of searching, the potential review burden is mitigated by the unwillingness of a requester to proceed with paying even nominal fees for an initial search. However, there are not insubstantial numbers of FOIA requests, including those from public interest organizations, journalists, historians, and members of the academic community, that are properly found to be subject to fee reductions or waivers. Especially in such cases, the potential for a substantial search and review burden remains present even for well-formulated requests.

The annual agency CFO reports from 2023 confirm that many agencies conduct forms of outreach to requesters for complex requests involving larger volumes of records.<sup>31</sup> However, even where agencies and requesters have collaborated in narrowing search terms, it is not unusual that a given keyword search request will result in many tens of thousands of documents that need to be reviewed for possible responsiveness. Moreover, notwithstanding OIP’s excellent guidance, it remains the case that agency staff unilaterally act on a given request by taking on the search and review burden without choosing to further interact with a requester. The resulting

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“permanent” records, with all other email program records to be held for seven or more years in agency electronic repositories. NARA recently issued guidance urging agencies to consider also captioning federal records in the form of electronic messages of all types in Capstone repositories. *See* NARA Bulletin 2023-02 (Jan. 5, 2023), <https://www.archives.gov/records-mgmt/bulletins/2023/2023-02>.

<sup>28</sup> Over 250 components of the executive branch have adopted the Capstone Approach to the management of email, resulting in current repositories of millions to tens of millions of email records alone in larger cabinet-level agencies. NARA has separately fulfilled the mandate in M-23-07 requiring NARA to “issue updated guidance clearly defining and expanding the Capstone Approach to include all types of electronic messaging in addition to email, including ephemeral and encrypted messages. *See* NARA Bulletin 2023-02, <https://www.archives.gov/records-mgmt/bulletins/2023/2023-02>.

<sup>29</sup> Agencies are presently still confronting the challenge of staggering volumes of electronic records to be searched by continued reliance on keyword searching. Searches are conducted by using search terms which FOIA staff believe to be the most responsive to a given request, with searches further limited to a set of likely custodians and bounded by time limitations. Once a search for potentially responsive documents is conducted, in the usual case agency staff will first follow up by undertaking a manual process of eliminating “false positives” from the universe of “hits” obtained through keyword searching. Thereafter, in a second pass staff will review documents for redactions of FOIA exempt material, subject to a “foreseeable harm” test, as applicable.

<sup>30</sup> In enacting the 2016 amendments to the FOIA, Congress itself recognized the problem of volume. As amended, the FOIA authorizes agencies to charge search fees for requests in which unusual circumstances apply and responsive records total over 5,000 pages, while at the same time requiring agencies to engage in discussions with requesters for the purpose of determining “how the requester could effectively limit the scope of the request.” *See* 5 U.S.C. § 552(a)(4)(A)(viii)(II)(bb).

<sup>31</sup> *See, e.g.*, U.S. Department of Education 2023 Chief FOIA Officer Report, at 5, <https://www2.ed.gov/policy/gen/leg/foia/2023-ed-cfo-report-doj.pdf> (ED providing the requester “targeted search terms resulted in reducing the potential responsive records from 100,000 to 5,000 emails”); Department of Homeland Security 2023 Chief FOIA Officer Report, at 17, <https://www.dhs.gov/sites/default/files/2023-06/Chief%20FOIA%20Officer%20Report%20for%202023.pdf> (USCIS personnel able to negotiate the terms of a request and reduce the scope of records from would have garnered records consisting of 11.5 GB of data (166,000 documents) to 1.7 GB (25,000 pages).

review process poses a substantial resource burden on agencies and can result in many months or even years passing before the agency sends a determination letter.<sup>32</sup>

Some agencies are willing to go further than simply discussing clarifying and narrowing requests in the abstract—they are open to providing an interim release of responsive documents after negotiating with a requester what search terms and search parameters will be used in conducting a reasonable search.<sup>33</sup> In cases where a large number of keyword “hits” have been identified representing potentially responsive documents, we believe that an agency can benefit from the requester reviewing a small sample of documents that have been subject to review to give the requester an opportunity to further narrow their request prior to a full search and review process being conducted over many months or years. Agencies should be open to seeking creative alternatives that will substantially reduce the costs and burdens of review.

To this end, we propose the following protocol to be employed where a requester exhibits a willingness to *engage in good faith* with an agency in working to further clarify and narrow a pending request.

- (1) In cases where it appears that a given FOIA request will result in the agency having to retrieve and review a large number of responsive records, agency staff should be open to having *requester-initiated* discussions with agency FOIA staff.
- (2) Alternatively, and consistent with existing OIP guidance, agency FOIA staff may initiate contact with a requester for the purpose of advising that the request as written will likely be voluminous. In doing so, staff shall invite a requester to narrow the request via an amendment that revises the temporal scope of the request, the number of component office(s) and/or staffer(s) identified in the request to search, or any other changes that both parties (agency and requester) would agree is likely to substantially reduce the expected volume of records.
- (3) In their initial discussion(s), the parties may explore any number of solutions to substantially narrow the volume of the records sought, including but not limited to (i) search terms used in conducting keyword searches; (ii) records custodians who may hold responsive records; (iii) specific locations (agency components, or specific repositories, *e.g.*, Capstone email repositories) where responsive records may be located; (iv) limitations on the time period governing records to be searched; and (v) any other issues that would be useful in narrowing a FOIA request and reducing the burden on an agency before a search and review process is undertaken.
- (4) Once a consensus is reached, the agency should search for responsive records.
- (5) After conducting the search, the agency shall disclose the number of “hits” it obtained for potentially responsive records. If the yield is still voluminous in the agency’s view, the agency shall contact the requester with the intent of furnishing sufficient information

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<sup>32</sup> One district court has held that a request calling for a search of approximately one million emails for three named staffers constituted an unreasonable burden. *Ctr. for Immigr. Stud. v. U.S. Citizenship and Immigr. Serv.*, 628 F.Supp.3d 266 (D.D.C. 2022).

<sup>33</sup> The U.S. Secret Service (USSS) “corresponded with requesters to clarify or narrow the scope of requests when an email search would yield over 50,000 possible hits. Additionally, USSS reaches out to anyone who submits a request that returns over 2,500 pages to negotiate an interim release schedule.” Department of Homeland Security 2023 Chief FOIA Officer Report, at 17, <https://www.dhs.gov/sites/default/files/202306/Chief%20FOIA%20Officer%20Report%20for%202023.pdf>.

concerning the scope of the search conducted to allow for a meaningful dialogue with respect to a further narrowing of the request.

- (6) To facilitate reaching consensus on the processing of a narrowed request, the agency may offer (or the requester can ask) to have FOIA staff select a sample of the potentially responsive records located for the purpose of further review and redaction as appropriate. The sample size should be of a modest nature, enabling the agency to conduct the review process in as timely a fashion as possible. (A suggested sample size: where a keyword search produces 5,000 or more “hits,” an agency would offer to review a sample on the order of 100 to 200 pages.)
- (7) The agency should next proceed to review the sample set to determine actual responsiveness and for possible withholding under applicable FOIA exemptions.
- (8) Production of the reviewed sample with redactions would be considered an interim response, not a final determination. Appeal rights would be provided per agency practice and OIP guidance.
- (9) The purpose of providing the sample is to provide a requester with an idea of what the potentially responsive records looks like (in redacted form if applicable), so that the requester can then make an informed decision whether and how to further narrow the request via an amendment.
- (10) If a requester chooses not to further amend their request, the agency need not provide further sampling but shall process the request in interim, monthly productions, if that is practicable for the agency, until the request is fully processed.

Carrying out this protocol in the form of OIP guidance would be subject to these further conditions and understandings:

- (A) Where an agency initiates contact with a requester for the purpose of seeking additional information that would be useful in clarifying or narrowing a request, doing so will stop the statutory 20-working-day clock, until a discussion with the requester is conducted, and an agreement amending the request is reached. This tolling would be expected to occur in those cases where contact is made within the initial 20-working-day provision for providing a response. Also, under the applicable tolling provision in the FOIA and OIP guidance, an agency would only be able to toll on a one-time basis for this type of discussion with a requester.<sup>34</sup>
- (B) At all times when an agency has requested information from a FOIA requester, the requester will have an affirmative duty to respond to the agency request, and failure to do so within a reasonable time period set by the agency (*e.g.*, 30 calendar days from the initial or subsequent contact date), may be construed by the agency to mean that the requester is no longer interested in pursuing their request. In such circumstances, the agency will close the FOIA request without further processing.

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<sup>34</sup> Pursuant to the [OPEN Government Act of 2007](#), Pub. L. No. 110-175, 121 Stat. 2524, the FOIA also contains a limited, express exception to the statutory 20-day period for responding to requests (with an additional 10 days if unusual circumstances apply), in cases where the agency makes “one request to the requester for information,” and is awaiting the receipt of “information that it has reasonably requested from the requester.” 5 U.S.C § 552(a)(6)(A)(ii)(I). *See generally*, OIP Blog Post, *New Limitations on Tolling the FOIA’s Response Time* (last updated Dec. 6, 2022), <https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-limitations-tolling-foias-response-time>.



(C) Nothing in this protocol is intended to suggest that FOIA staff should “research” requests or provide extraordinary assistance to individual requesters in the fashioning of narrowed requests through interim sampling. FOIA processors are professionals whose job it is to release records to the requester community provided that no FOIA exemption applies. At some point, it would not be an appropriate use of agency resources to expect that staff members conduct multiple interim searches for the purpose of narrowing requests. Agencies can, if asked, provide additional sampling, but they ought not be expected to do so.

The suggested search protocol is intended to provide a requester with an early look at how the agency intends to redact documents in the larger universe of potentially responsive records. Doing so may greatly inform requesters as to what to expect if they await further, full production, and therefore will give them options on whether and how to proceed. In some cases, requesters will, after reviewing a sample of documents, be satisfied that they have received a sufficient number of documents on the issue they care to know more about. In other cases, requesters will, through this protocol, have a substantial opportunity to narrow their request further in various ways, saving the agency the expense of reviewing all of the documents retrieved to date.

The Subcommittee is aware that agencies may have legitimate reasons not to wish to adopt this type of search protocol. Depending on the nature of the engagement with a requester, an agency may have reason to believe that little progress will be made in narrowing or resolving issues in contention through the offer of a sample set leading to an interim production. Moreover, the suggested protocol should not be interpreted as asking an agency to continue to engage in multiple interim releases for the purpose of satisfying requester demands for documents.

Nevertheless, this recommendation in many cases may substantially reduce the ultimate burden associated with reviewing and possibly making redactions with respect to a huge universe of documents, while at the same time enhancing government transparency and shortening delays in requesters receiving at least some responsive documents.

### *Training*

***Recommendation 2024-04:*** We recommend that the Department of Justice (DOJ) Office of Information Policy issue guidance to all Chief FOIA Officers outlining the minimum requirements for training to agency staff, including non-FOIA professionals, outlining the requirements of Section (j)(2)(F) of the FOIA, which states: “The Chief FOIA Officer shall offer training to agency staff regarding their responsibilities under this section.” For example, OIP, in its discretion, could consider issuing guidance concerning the following: (1) mandatory annual training for non-FOIA professionals in the federal government; and (2) mandatory FOIA training for all new employees, including non-FOIA professionals, within 60 days of onboarding.

### **COMMENT**

This recommendation is intended to build upon prior Committee recommendations regarding training. In particular, Recommendation 2020-05 recommended that OIP: “issue guidance requesting agencies to provide annual mandatory FOIA training to all new and current

employees and contractors. The Office of Government Information Services (OGIS) and OIP will review agencies' current FOIA training requirements and content." In response, OIP updated three e-Learning FOIA training modules for the federal workforce and issued guidance to agencies in August 2022 regarding those modules.<sup>35</sup>

The current recommendation is that OIP provide guidance to agency Chief FOIA Officers regarding FOIA training requirements for agency employees. Under the OPEN Government Act of 2007 amendments to the FOIA, each agency is required to designate a senior official as the Chief FOIA Officer (CFO), who has the agency-wide responsibility for efficient and appropriate compliance with FOIA.<sup>36</sup> Providing them with OIP guidance on training requirements would elevate the importance of FOIA training at the agency leadership level. Additionally, the recommendation suggests that OIP consider informing the CFOs that they can make FOIA training mandatory for agency employees at onboarding and annually. OIP does not currently have the authority to require agencies to make FOIA training mandatory. It is the Committee's hope that a strong endorsement of mandatory training coming from OIP aimed directly at the CFOs will encourage more agencies to require their agency staff, including non-FOIA professionals, to take FOIA training.

The benefit of providing training to FOIA professionals is well established. Training non-FOIA staff regarding FOIA also has several benefits. First, it helps ensure that federal workers who create, receive, access, or use federal records are well-educated about FOIA's importance and their roles and responsibilities in complying with the FOIA. These employees already receive mandatory annual records management training, but FOIA compliance is a key reason for properly managing records. Closing that gap would help improve their agency's FOIA response efforts. Second, effective training would be a "force multiplier." FOIA programs are understaffed and face tight deadlines. A federal workforce educated about FOIA would reduce the amount of time FOIA staff need to devote to educating workers on an ad hoc basis when collecting responsive materials and requesting consultations. This would make an agency's FOIA program more efficient and better able to meet its deadlines and lower the agency's potential litigation risk in the event that litigation ensues. As Associate Attorney General Vanita Gupta stated in the August 2022 memo to agencies, "[s]uccessful FOIA administration . . . requires proper training and a commitment to FOIA compliance by agency personnel."<sup>37</sup>

We understand that time spent taking mandatory training, especially for all employees at cabinet-level departments and independent agencies, does take staff away from fulfilling other duties. We believe, however, that the benefits of mandatory training far outweigh this developing training materials.<sup>38</sup> OIP already has completed much of the heavy lifting by developing three e-

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<sup>35</sup> See OIP, Digital FOIA Training Resources, <https://www.justice.gov/oip/training>.

<sup>36</sup> See [Pub. L. No. 110-175](#), § 10(a), *codified at* 5 U.S.C § 552(j).

<sup>37</sup> Assoc. Att'y General, "Freedom of Information Act Training" (Aug. 17, 2022), <https://www.justice.gov/media/1243896/dl?inline>.

<sup>38</sup> Notably, a number of states have enacted various forms of mandatory staff training on open government and public access issues for state agency employees. See, e.g., "Open Government Trainings Act," Revised Code of Washington, [RCW 42.30.205](#), <https://app.leg.wa.gov/rcw/default.aspx?cite=42.30.205>; Attorney General Guidance on Open Government Trainings Act, at § 6, [https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About the Office/Open Government/Open Government Training/QandA-Re-ESB-5964.pdf](https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About%20the%20Office/Open%20Government/Open%20Government%20Training/QandA-Re-ESB-5964.pdf); [Maine Revised Laws](#), Title 1, chap. 13, subchap. 1, § 412, <https://www.mainelegislature.org/LEGIS/STATUTES/1/title1sec412.html>. For a study of the benefits of mandatory training for staff handling public access requests filed at the state level, see Michele Bush Kimball, "[Mandated state-](#)

Learning modules: FOIA Training for Federal Employees, FOIA Training for FOIA Professionals, and FOIA Training for Executives. Agencies could certainly develop their own training, but these OIP modules can be incorporated into an agency's existing training system or accessed via a web browser at virtually no cost to the agency.<sup>39</sup>

## *Staffing*

***Recommendation 2024-05: We recommend that the Office of Personnel Management (OPM) add the 0306 Government Information Specialist (GIS) Job Series to the direct hiring authority list.***

### **COMMENT**

FOIA officials are experiencing difficulties in hiring staff, which is a significant contributing factor in the government wide FOIA backlog. At present, agencies may hire GS-0306 Government Information Specialists (GISs) only through the competitive hiring process. That process can be slow and cumbersome and, according to FOIA officials, has contributed to a shortage of GISs across the federal government.

Many agencies have fully funded full-time employees (FTEs), but are unable to fill even those positions. A key problem is that postings for these positions take too long to fill and often fail to result in qualified candidates because qualified candidates were blocked by candidates who have hiring preferences but may be less qualified for a given position.

OPM possesses the authority to remedy this issue under 5 U.S.C. § 3304. That statutory provision allows OPM to issue regulations granting agencies the authority to engage in direct hiring if it determines “that there exists a severe shortage of candidates . . . or that there is a critical hiring need.” 5 U.S.C. § 3304(a)(3)(B). OPM has exercised this authority with respect to a range of job series, including Nurses (GS-0610, GS-0620), Pharmacists (GS-0660), Fishery Biologists (GS-0482), and Data Scientists (GS-1560).<sup>40</sup>

Most recently, the President and OPM used Section 3304(a)(3) authority to provide agencies with direct hire authority for certain IT and cybersecurity positions. In 2018, the President issued Executive Order 13833, Enhancing the Effectiveness of Agency Chief Information Officers. Among other things, the Executive Order directed OPM to issue regulations delegating to agency heads the authority to determine if there was a severe shortage of candidates for IT positions or a critical hiring need. OPM ultimately adopted this regulation effective May 3, 2019. *See* 5 C.F.R. § 3304(d).

OPM should adopt a similar rule for GS-0306 GISs. Agency heads should be permitted to determine if it is experiencing a “severe shortage” of candidates for FOIA positions or “that there is a critical hiring need” for FOIA employees. Delegating this authority to agency heads would

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[level open government training programs](https://www.sciencedirect.com/science/article/abs/pii/S0740624X1100061X?via%3Dihub),” *Government Information Quarterly* 28:4 (2011), <https://www.sciencedirect.com/science/article/abs/pii/S0740624X1100061X?via%3Dihub>.

<sup>39</sup> *See* OIP, Digital FOIA Training Resources, <https://www.justice.gov/oip/training>.

<sup>40</sup> The full list along with citations to the operative documents can be found on OPM's website at: <https://www.opm.gov/policy-data-oversight/hiring-information/direct-hire-authority/#url=Governmentwide-Authority>.

allow those agencies experiencing hiring difficulties the flexibility to hire qualified candidates and begin attacking their FOIA backlogs more quickly.

***Recommendation 2024-06: We recommend that the Chief FOIA Officers Council, through its Committee on Cross-Agency Collaboration and Innovation (COCACI), organize agencies to participate in a “talent pool” posting through the Office of Personnel Management (OPM).***

#### **COMMENT**

OPM recently announced a new mechanism allowing agencies to pool hiring efforts for open positions. Specifically, OPM created a new feature on USAJOBS known as Talent Pools whereby agencies can participate in a shared job posting. Applicants who have been assessed as eligible are then available for consideration by any of the participating agencies.<sup>41</sup>

According to OPM, pooled hiring helps job seekers by allowing them to apply once and be considered for selection by multiple agencies. It also assists agencies by creating a pool of candidates who have already been assessed and found to be eligible. OPM will organize a pooled hiring effort, but to work, OPM needs at least five agencies to participate and commit to hiring eligible candidates. The agencies must also help by publicizing the shared posting. OPM stated in a discussion with Committee members that it has already conducted a pooled hiring effort of data scientists. This effort resulted in several hundred eligible candidates, all of whom were “scooped up” by the participating agencies.

Because pooled hiring will only work when a critical mass of agencies participates, the key will be to organize agency participation and monitor agency efforts to publicize the posting and hire eligible candidates. The entity in the best position to do this for FOIA positions is the CFO Council. The Council should also track the success of any pooled hiring effort to assess whether pooled hiring is effective at finding suitable FOIA staff and/or what improvements should be made.

***Recommendation 2024-07: We recommend that the Chief FOIA Officers Council, through its Committee on Cross-Agency Collaboration and Innovation (COCACI), create and maintain a database on its website of position descriptions in the Government Information Specialist (GIS) job series at various grades.***

#### **COMMENT**

FOIA officers also reported problems retaining staff members because their agencies do not have higher-graded FOIA positions in which to promote them. This limits employees’ ability to advance and causes them to seek employment at agencies that can offer higher pay. The root of the problem is that these FOIA officers are having difficulty convincing human resources departments to classify higher-graded FOIA position descriptions.

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<sup>41</sup> A detailed description of this process and the procedures for utilizing it can be found on OPM’s website: <https://www.chcoc.gov/content/newtalent-pools-shared-certs-feature-usajobs%E2%80%99-agency-talent-portal>.

A position's grade dictates the position's pay. A position's grade is assigned by each agency's human resources department, applying guidance from OPM.<sup>42</sup> While the general rule is that the more complex or difficult the duties, the higher the appropriate pay grade should be, there are often disagreements between the FOIA program office and human resources about whether duties are sufficiently complex to warrant a higher grade.

Having exemplars of position descriptions graded by other agencies at a particular grade level can be helpful to program offices. As federal human resource officers often say, the fact that one agency has classified a position at a certain grade is not binding on another agency. However, if numerous agencies have graded a position a certain way, then human resources departments are more comfortable following suit. If nothing else, a position description classified by another agency provides the program office with a starting point in drafting its own position description. Right now, there is no one spot to find FOIA position descriptions. OPM does not have a database. Searching USAJOBS.gov may yield an example or two, but the means most often used is contacting one's network of officials at other agencies. Having a database available would be of enormous assistance.

The most sensible location for this database would be the Chief FOIA Officers Council's web page on [www.foia.gov](http://www.foia.gov). We suggest that COCACI solicit members for copies of position descriptions used by their FOIA programs and make them available. COCACI could issue supplemental requests on a periodic basis.

***Recommendation 2024-08: We recommend that the General Services Administration (GSA) create a labor category on the GSA schedule specifically for FOIA contractors to facilitate efficient procurement if an agency determines it needs contractor support.***

### **COMMENT**

Given the difficulties and delays in federal hiring and fluctuations in FOIA workloads, some agencies need to procure contractor services to augment their FOIA staff. Federal procurements are labor intensive and time consuming, but GSA maintains a schedule of contract vehicles consisting of preselected vendors in certain categories to speed up an agency's procurement of goods or services that fall within those categories.

Currently, there is no GSA schedule that specifically targets the universe of FOIA performative tasks that could be completed by FOIA contractors. FOIA officers use a variety of codes or categories, but report that none of them fits the FOIA processing life cycle completely. Only one code, "Legal Support Solutions - Category 541611LIT," specifically references FOIA, but it is so broad that it sweeps in all sorts of IT products and contractor services that do not relate to FOIA, making it very difficult for a FOIA officer to locate a FOIA contractor amongst the dozens of vendors on this schedule. Many of those vendors only provide a very generic description of their services, making it nearly impossible to determine what they offer.<sup>43</sup> When agencies solicit

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<sup>42</sup> The guidance OPM has circulated with respect to classifying GIS positions can be found here: <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedulepositions/standards/0300/g0306.pdf>.

<sup>43</sup> A full list of the codes and detailed discussion can be found in the Resources Subcommittee Report at 19, <https://www.archives.gov/files/resources-subcommittee-report-5-23-2024-1.pdf>.

FOIA services under these schedules they receive few offerors, or perhaps worse, generic proposals from unqualified staffing firms with no expertise in FOIA work.

Because none of these categories completely focuses on the tasks required to timely and accurately process a FOIA request, FOIA professionals become responsible for juggling the FOIA's statutory time limits along with the associated procurement activities. The competing priority of administering the FOIA, coupled with developing the scope of work, completing an Independent Government Cost Estimate (IGCE), and other procurement requirements, limits the ability of FOIA offices to conduct adequate market research to find a suitable support vendor, leading to high turn-over of contract support. Creation of a FOIA Labor Category and a targeted GSA schedule could ease the effort required by agencies to procure FOIA contractor support and obtain much needed assistance with staffing gaps and FOIA backlogs.

With the advent of the internet and electronic submission of FOIA requests, including the centralized and requester-centric option to submit electronic requests to any federal government agency via foia.gov, the volume and complexity of FOIA requests has triggered the need for the creation of at least two separate labor categories to support FOIA programs. The two categories are staffing support and system(s) support, each of which would encompass all tasks necessary for processing a request from start to finish and support the technological tools necessary to bring efficiencies.<sup>44</sup>

## *Public Engagement*

***Recommendation 2024-09: We recommend that federal agencies expand public engagement activities focused on improving all aspects of their FOIA process.***

### **COMMENT**

On July 19, 2023, OMB issued a memorandum to executive departments and agencies on the subject of "Broadening Public Participation and Community Engagement in the Regulatory Process," noting that "[e]ffective and meaningful public engagement has long been one of the foundational principles of Federal regulatory development."<sup>45</sup> Recent open government legislation also underscores the importance of public engagement.<sup>46</sup> Expanding the public's

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<sup>44</sup> Possible language for each of these labor categories can be found in the Resources Subcommittee Report at 21, <https://www.archives.gov/files/resources-subcommittee-report-5-23-2024-1.pdf>.

<sup>45</sup> See Richard L. Revesz, OMB Office of Information and Regulatory Affairs, Memorandum re: Broadening Public Participation and Community Engagement in the Regulatory Process (July 19, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf>. The OMB Memorandum highlights several policy considerations with respect to the regulatory environment that, if applied specifically to FOIA, would provide further support to increasing agency engagement in obtaining public feedback on issues of importance the greater FOIA community.

<sup>46</sup> See [Open, Public, Electronic and Necessary Government Data Act of 2018](#) (OPEN Government Data Act), Title II of the Foundations for Evidence-Based Policymaking Act, Pub. L. No. 115-435, 132 Stat. 5534 (2019). The Open Government Data Act specifically requires that "with respect to information dissemination" agencies shall "regularly solicit and consider public input on the agency's information dissemination activities." 44 U.S.C. § 3506(d)(2); see also § 3506(d)(6).

engagement in agency FOIA processes is also in line with recent policy initiatives promoting enhancements to the federal customer experience (“CX”).<sup>47</sup>

In the specific context of FOIA, a number of agencies have reported to OIP that they have undertaken outreach efforts with individual requesters “that went beyond the regular communication that takes place within the FOIA request and appeal process.”<sup>48</sup> As provided in the 2023 OIP CFO Summary Report, examples of agencies doing so include:

- “Consumer Financial Protection Bureau (CFPB)’s FOIA Public Liaison reach[ing] out to frequent requesters to learn about their utilization of FOIA proactive disclosures during a ‘Design Sprint’ which sought to improve the submission of FOIA requests and navigation of the CFPB’s FOIA Library.”
- “Department of Commerce (DOC)/Bureau of Industry and Security (BIS) proactively engag[ing] with requesters by offering them information that is frequently requested such as aggregate export license reports which are fully releasable.”
- “Department of Health and Human Services (HHS)/Centers for Medicare and Medicaid Services (CMS) us[ing] a web conferencing platform to provide an overview of a new request portal with various requester groups. As part of the overview, CMS provided an online training demo to walk through the process for submitting requests. CMS also developed seven communication tools to explain how to access and submit requests through the National FOIA.gov portal, which interfaces with CMS’ internal request management system. CMS notes that the outreach efforts have improved FOIA administration and have been well received by the requester community.”<sup>49</sup>

OIP has noted additional examples where agencies have made efforts to engage with the public, including the FOIA requester community and civil society organizations. For example, “[The U.S. Postal Service] (USPS) hosted two conference calls with the public that included an introduction to the FOIA and instructions on how to submit a proper FOIA request. Additionally, members of the public had the opportunity to ask questions during the conference calls.”<sup>50</sup>

Most recently, the expectation that agencies should pay greater attention to what the FOIA community might have to say has been spotlighted in the updated and revised 2023 edition of the [FOIA Self-Assessment Toolkit](#) issued by OIP (“DOJ FOIA Toolkit”).<sup>51</sup> In its announcement of the revised edition, OIP stated “[t]his update fulfills one of the Department’s commitments from

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<sup>47</sup> See Executive Order 12862, 86 Fed. Reg. 71357 (Dec. 13, 2021), on Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/13/executive-order-on-transforming-federal-customer-experience-and-service-delivery-to-rebuild-trust-in-government/>.

<sup>48</sup> See [OIP CFO Report Summary 2023](#) at 6.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Another example of an agency soliciting public feedback involves FOIA staff at the Commodity Futures Trading Commission (CFTC) having “collaborated with its Office of Public Affairs on a new initiative called the ‘Knowledge Hub.’ The effort is intended to elicit feedback from the public that will allow CFTC to better anticipate the types of proactively disclosed information that would most benefit the public.” [OIP CFO Report Summary 2023](#) at 10.

<sup>51</sup> <https://www.justice.gov/oip/page/file/1574281/download>.

the Fifth U.S. Open Government National Action Plan to strengthen access to government information through the FOIA.”<sup>52</sup> OIP considers the toolkit as “a resource for agencies to use when assessing their administration of the FOIA” and has stated that “[b]y continuing to identify areas for improvement and implement changes, agencies can further refine their administration of the FOIA and enhance the services provided to the public.”<sup>53</sup> In particular, in Section B of Module 11 (Requester Services), the Toolkit guidance states: “One of the cornerstones to working in a spirit of cooperation is ensuring that FOIA Staff promptly respond to requester inquiries and maintain open communication throughout the request process,”<sup>54</sup> and in Milestone 8.A of the section OIP includes the following element:

Agency periodically reaches out to its requester community to facilitate open communication and feedback.<sup>55</sup>

The present recommendation dovetails with the OIP FOIA Toolkit’s best practice advice for conducting agency self-assessments and builds on the expectations for public outreach that OIP already has in place.

The following sections provide some practical general guidance on ways agencies might approach soliciting public input. There are undoubtedly others that agencies already use or could consider adopting.

#### *With Respect to Individual Requesters*

Agencies could consider asking requesters if they were satisfied with the *process* and if they were satisfied with the *results* of the request after each response. An agency could opt to do so either by including a sentence in communications with requesters that it welcomes them to contact the agency’s FOIA Public Liaison (or ombudsperson) to share feedback or, alternatively by directly surveying requesters by asking for feedback at the time of receipt of FOIA responses. (For example, the determination letter might provide an opportunity for the requester to go to a link to fill out a questionnaire about the agency’s processing of the request.)<sup>56</sup>

Attaining a high standard of requester satisfaction with the *results* of FOIA responses will always be challenging, but in choosing to seek requester feedback, agencies may find it useful as a resource in shaping and improving their processes. Moreover, over time, the responses to these questions may generate useful data that, especially if shared with the requester community,

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<sup>52</sup><https://www.justice.gov/oip/blog/updated-foia-self-assessment-toolkit-now-available#:~:text=The%202023%20update%20contains%20new,and%20guidance%20covering%20the%20topic.> The Fifth U.S. National Action Plan can be found at <https://open.usa.gov/national-action-plan/5/>.

<sup>53</sup><https://www.justice.gov/oip/blog/updated-foia-self-assessment-toolkit-now-available#:~:text=The%202023%20update%20contains%20new,and%20guidance%20covering%20the%20topic.>

<sup>54</sup> *Id.* at 60.

<sup>55</sup> *Id.* at 61. In a “Best Practices and Guidance” section following this Milestone, DOJ goes on to advise agencies to: “Periodically reach out to the requester community and civil society organizations to help requesters better understand the agency’s FOIA process and to provide [the] requester community with an opportunity to share tips on how to engage effectively with requesters throughout the FOIA process.” *Id.* at 63.

<sup>56</sup> Surveys created would need to be compliant with the requirements of the [Paperwork Reduction Act](#), 44 U.S.C. § 3501, to the extent applicable.



would provide a public benchmark on how well each agency is doing in fulfilling their general CX mandates as applied to the FOIA.

*With Respect to the FOIA Community & Civil Society Organizations*

- Agencies could hold virtual or in-person public meetings, modeled after the OGIS annual meeting. These meetings—bringing together members of the FOIA community, representatives of civil society organizations, and other public sector experts, researchers, technologists, and academics—would provide a forum for dialogue, compliments, complaints, concerns, and recommendations on the agency’s FOIA process. Subjects at a meeting may, for example, include recommendations for how the agency’s use of FOIA.gov and how its reading rooms can be improved, as well as a discussion of applicable commercial or public sector technologies that would make processing more efficient.
- Agencies could set up online public participation channels of communication centered on requester feedback. See <https://digital.gov/guides/public-participation/> One means of doing so would be to create an online FOIA customer experience survey. See, e.g., <https://data.ed.gov/pages/survey>.
- Agencies could develop FAQs to respond to common questions or complaints received from requesters.
- Agencies could adopt various types of platforms and channels of communication (e.g., blogs, short videos on leading social media sites) to promote their FOIA processing efforts and to announce changes in regulations or policies (with the opportunity to obtain comments before being made final). A mechanism could be provided for requesters to sign up for blog updates.
- Agencies could delegate to FPLs or other designated staff the task of curating blogs or the holding of virtual forums.
- Agencies could periodically reach out to the requester community and civil society organizations to help requesters better understand the agency’s FOIA process and to share tips to provide the requester community an enhanced opportunity to engage effectively with the agency.
- Agencies should review additional ideas on public engagement activities as set out in the President’s Management Agenda, including a focus on improving the FOIA CX, to see what other ideas the agency might wish to incorporate into their FOIA program.
- Specific agencies that participate in the development of future National Action Plans for Open Government (including GSA, OMB, and OIP) should engage the public in co-creating new commitments to improve the FOIA.<sup>57</sup>

As a general matter, agency FOIA officers would do well to reach out to colleagues responsible for CX, as well as CIOs, Chief Data Officers, Chief Privacy Officers, and staff in components of the agency focusing on innovation and in centers of excellence, to gather ideas and collaborate

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<sup>57</sup> Details of the past five U.S. National Action Plans for Open Government can be found at <https://open.usa.gov/>.

on cross-agency projects aimed at improving FOIA processes through greater public engagement.<sup>58</sup>

The Committee is keenly aware that agencies' commitment to public engagement by any of the means outlined above involves a diversion of resources without receiving additional specific appropriations. Moreover, doing so comes at a time when the overall number of FOIA requests government-wide are voluminous and ever-increasing, and where many agencies currently suffer from long backlogs in their FOIA queues. Nevertheless, the commitment to attempt to enhance public engagement has been expressly recognized by OIP as an important FOIA activity in connection with agency self-assessments.

## *Open Government*

***Recommendation 2024-10: We recommend that the Archivist propose to the Office of Management and Budget, the Office of Information Policy, and other agency participants taking a leading role in future U.S. National Action Plans for Open Government that they include new and continuing commitments to improving FOIA administration.***

### **COMMENT**

In 2011, the Open Government Partnership (OGP) was created as a “new multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.”<sup>59</sup> OGP states that “[a]ction plans are at the core of a member’s participation in OGP. They are the product of a co-creation process in which government and civil society define ambitious commitments to foster transparency, accountability, and inclusion.”<sup>60</sup> The U.S. was a founding member of OGP’s original consortium of eight member-nations; OGP currently includes 75 member nations and 104 local governments.<sup>61</sup>

Five U.S. National Action Plans have been published to date, displaying various degrees of commitment to including FOIA initiatives among the ideas presented. The first three National Action Plans, published in 2011, 2013, and 2015, cumulatively contained 11 separate commitments with respect to improving FOIA processes, one of which was the establishment of

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<sup>58</sup> One additional resource may be the U.S. Public Participation Playbook, “a resource for government managers to effectively evaluate and build better services through public participation using best practices and performance metrics.” See <https://digital.gov/guides/public-participation/>.

<sup>59</sup> U.S. Department of State, Open Government Partnership, <https://2009-2017.state.gov/j/ogp/#:~:text=It%20takes%20collaboration%20between%20government,new%20technologies%20o%20strengthen%20governance> (archived content).

<sup>60</sup> OGP, Action Plan Cycle, <https://www.opengovpartnership.org/process/action-plan-cycle/#:~:text=Action%20Plan%20Creation,foster%20transparency%2C%20accountability%20and%20inclusion>.

<sup>61</sup> OGP, About Open Government Partnership, [https://www.opengovpartnership.org/about/#:~:text=The%20Open%20Government%20Partnership%20\(OGP,thousands%20of%20civil%20society%20organizations](https://www.opengovpartnership.org/about/#:~:text=The%20Open%20Government%20Partnership%20(OGP,thousands%20of%20civil%20society%20organizations).

the present FOIA Advisory Committee.<sup>62</sup> The Fourth National Action Plan, issued in 2017, contained no further FOIA commitments.<sup>63</sup> The most recent Fifth National Action Plan, issued in 2022, contains three additional FOIA-related commitments.<sup>64</sup>

Centering the FOIA as a flagship national open government initiative and priority should not be controversial. In accord with the original OGP mandate, government representatives and civil society organizations should aspire to co-create new initiatives aimed at improving the administration of FOIA, as part of the planning process for future National Action Plans. It follows that U.S. National Action Plans should ideally build upon, rather than simply reiterate, existing commitments.

The immediate effect of this recommendation is intended to be modest: as worded it simply would commit the Archivist to communicate to leading government actors in the open government movement that they should include FOIA initiatives in the Sixth U.S. National Action Plan. The Sixth National Action Plan is expected to be co-created with the American people in the 2024-2025 timeframe, with an issuance date sometime between 2025 and 2027. To be optimally successful, the development of new FOIA initiatives will necessarily entail a government-wide effort, with coordination from the White House and the support from many stakeholders. These would be expected to include OIP at the Department of Justice; within the Executive Office of the President, the Office of Management and Budget, the Office of Science and Technology Policy, and the Office of Public Engagement; and the Open Government Secretariat at the General Services Administration.

A starting place for the Archivist to make recommendations would be a governmental review of recommendations of past and present terms of the FOIA Advisory Committee, along with a review of commitments drawn from the first five National Action Plans. The requester

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<sup>62</sup> The first U.S. National Action Plan included two commitments to “Continue to Improve Freedom of Information Act Administration,” namely, that the U.S. will “Professionalize FOIA Administration,” and “Harness the Power of Technology.” See [https://obamawhitehouse.archives.gov/sites/default/files/us\\_national\\_action\\_plan\\_final\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/us_national_action_plan_final_2.pdf). The Second Open Government National Action Plan in turn made five commitments to modernize the FOIA, including, in addition to the creation of this Committee, (i) improving the customer experience through a consolidated online FOIA service; (ii) developing common FOIA regulations and practices for federal agencies; (iii) improving internal agency FOIA processes; and (iv) improving FOIA training across government to improve efficiency. See NAP 2.0,

[https://obamawhitehouse.archives.gov/sites/default/files/docs/us\\_national\\_action\\_plan\\_6p.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf).

The Third Open Government National Action Plan contained an additional four commitments, including to (i) expand the services offered on foia.gov; (ii) improve agency proactive disclosures by posting FOIA-released records online; (iii) improve agency FOIA websites; (iv) increase understanding of FOIA through NARA developing tools to teach students about the statute; and (v) proactively release nonprofit tax filings.

<sup>63</sup> <https://open.usa.gov/assets/files/NAP4-fourth-open-government-national-action-plan.pdf>.

<sup>64</sup> The Fifth National Action Plan stated that the U.S. Department of Justice was committed to (i) issuing an updated FOIA Self-Assessment Toolkit; (ii) leading a CFO Council working group in collaboration with OGIS, GSA, and the Business Standards Council to develop shared FOIA business standards; and (iii) enhancement of the user experience on FOIA.gov. See <https://open.usa.gov/national-action-plan/5/>. Without taking a position on the matter, we note that one commentator criticized these commitments as insufficiently “new,” to the extent they arguably reflect actions previously committed to by the Department of Justice. Alex Howard, “Response to the proposed themes for a 5th U.S. National Action Plan on Open Government,” *Digital Government* (Dec. 9, 2022), <https://governing.digital/2022/12/09/response-to-the-proposed-themes-for-a-5th-u-s-national-action-plan-on-open-government/>.

community will have other suggestions that, if adopted and implemented, will help build trust in the process and in the U.S. government's commitment to uphold the public's right to know.

Our country's continuing, bipartisan commitment to the OGP, including through the issuance of U.S. National Action plans, demonstrates the interest the U.S. government has in upholding the open government principles of transparency, accountability, and inclusion. As part of the Sixth and future U.S. National Action Plans, our government should continue its commitment to funding open government policies, platforms, and programs that include express recognition of the enduring importance of the FOIA, and the Archivist can play a role in helping to ensure that this will happen.

## *Technology*

***Recommendation 2024-11: We recommend that the Chief FOIA Officers (CFO) Council form a working group to analyze the interest in and the need for (1) a shared FOIA case management system and (2) a centralized record repository for use by federal agencies and the public. This working group shall draft a white paper of its findings and present it to the CFO Council within two years of its formation.***

## **COMMENT**

During this term, the FOIA Advisory Committee had discussions with FOIA professionals in several federal agencies, all of whom expressed frustration with their respective FOIA case management systems. Agencies complained about system inefficiencies, system downtime, financial costs, the cost of agency labor hours to implement and maintain a system, and poor customer service. Federal agencies rely on FOIA case management systems to receive, manage, track, and respond to FOIA requests, generate OIP and custom reports, manage FOIA case files as electronic records, and publish responsive records in a central record repository. To obtain a FOIA case management system, a federal agency can build an internal system or purchase a system from a commercial vendor. In the recent past, agencies had the option to use a shared federal FOIA case management system, known as FOIAonline, which was decommissioned on September 30, 2023.

During discussions with the requester community, the Committee was informed of the need for a central FOIA records repository, where requesters could easily perform searches for and download previously released FOIA records. The Second Open U.S. Government National Action plan, released in December 2013, committed to improving customer experience through a consolidated online FOIA service.<sup>65</sup> In Recommendation 2020-03, the FOIA Advisory Committee addressed this need when it recommended “that agencies work toward the goal of collecting, describing, and giving access to FOIA released records in one or more central repositories in standardized ways, in addition to providing access on agency websites.”<sup>66</sup> The Committee report recognized FOIAonline as an example of a centralized FOIA records portal.<sup>67</sup>

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<sup>65</sup> NAP 2.0, [https://obamawhitehouse.archives.gov/sites/default/files/docs/us\\_national\\_action\\_plan\\_6p.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf).

<sup>66</sup> See 2018-2020 FOIA Advisory Committee Final Report and Recommendations, at <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>.

<sup>67</sup> *Id.* at 13.

At the time of its decommissioning, the FOIAonline record repository contained 18 federal agencies' previously released records dating back to 2012. This Committee term, the Implementation Subcommittee has selected Recommendation 2020-03 as a high priority recommendation requiring further review by agencies, OGIS, OIP, and future FOIA Advisory Committees.<sup>68</sup>

Under the FOIA Improvement Act of 2016, the CFO Council has the duty to develop recommendations for increasing compliance and efficiency, disseminate information about agency experiences, and identify, develop, and coordinate initiatives to increase transparency.<sup>69</sup> For these reasons, the Committee recommends that the CFO Council form a working group to analyze the interest in and the need for a shared FOIA case management system and a centralized record repository. The working group is tasked with drafting a white paper of its findings, to be presented to the CFO Council. The goal for the working group's white paper is to create a strong business case for initiating a shared federal agency FOIA case management system and centralized record repository and identify additional solutions.

We believe that the creation of a robust centralized FOIA repository would significantly advance FOIA administration throughout the executive branch. If the CFO Council working group also concludes that a strong justification for a centralized repository exists, we believe a further recommendation to the Director of the Office of Management and Budget (OMB) would be appropriate for the purpose of drafting a policy memorandum to the executive branch establishing the creation of and ensuring the operation of shared federal agency FOIA case management system and centralized record repository.

***Recommendation 2024-12: We recommend that the Chief FOIA Officers Council Technology Committee and interested agencies publish requests for information (RFIs) on the subject of artificial intelligence (AI) tools and techniques as an aid to FOIA processing.***

### **COMMENT**

During its 2018-2020 term, the FOIA Advisory Committee made two recommendations intended to advance agency use of artificial intelligence (AI) in the context of FOIA processing. First, the Committee recommended that the Archivist should work with government agencies and industry in promoting AI research applicable to the FOIA search and review process.<sup>70</sup> Second, the Committee recommended that OIP provide further guidance on the use of e-discovery tools to assist agencies in meeting their obligations to conduct adequate searches of electronic records, including but not limited to Capstone email repositories.<sup>71</sup>

Since the issuance of the Committee's 2018-2020 Final Report, OIP, working with the CFO Council's Technology Committee, has moved forward in embracing the subject of AI in the FOIA context. NARA's Chief Records Officer issued a white paper in 2020 that recognizes the

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<sup>68</sup> See [2022-2024 Implementation Subcommittee Report](#),

<sup>69</sup> 5 U.S.C. § 552(k).

<sup>70</sup> Recommendation 2020-22, [2018-2020 Final Report](#) at 35.

<sup>71</sup> Recommendation 2020-11, [2018-2020 Final Report](#), at 22.

importance of AI and machine learning in the field of records management generally.<sup>72</sup> The current OGIS dashboard, summarizing the status of FOIA Advisory Committee Recommendation 2020-11, notes a number of AI initiatives taken to date.<sup>73</sup>

A number of agencies are taking steps to incorporate AI in FOIA processes. As discussed in OIP's 2023 annual summary of agency CFO reports:

OIP also specifically asked whether agencies used any technology to automate record processing, such as machine learning, predictive coding, and technology assisted review. The use of Artificial Intelligence and machine learning is an emerging area that presents significant opportunities to make the search and review of records more efficient and accurate, but that still requires human monitoring and appropriate safeguards to ensure that it is consistent with the FOIA.<sup>74</sup>

OIP's summary lists examples of various ways in which agencies are using AI to improve FOIA workflows, including but not limited to search and review.<sup>75</sup> Of special interest is the work being conducted at the State Department, where efforts are underway to incorporate into FOIA search and review processes gains leveraged from using AI machine-learning tools for the purpose of declassifying a set of State Department historical cables.<sup>76</sup>

Specifically with respect to searching for responsive records, the legal e-discovery community has for over a decade embraced machine learning approaches, referred to as "technology assisted review" (TAR) and "predictive coding."<sup>77</sup> Many agencies do employ this type of software when

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<sup>72</sup> NARA, Cognitive Technologies White Paper Records Management Implications for Internet of Things, Robotic Process Automation, Machine Learning, and Artificial Intelligence (Oct. 2020), <https://www.archives.gov/files/records-mgmt/policy/nara-cognitive-technologies-whitepaper.pdf>.

<sup>73</sup> <https://www.archives.gov/ogis/foia-advisory-committee/dashboard>.

<sup>74</sup> [OIP CFO Report Summary 2023](#) at 11.

<sup>75</sup> It is worth noting, however, that we found that only a small percentage of agencies responded to OIP's annual CFO survey indicating use of or plans for using machine learning in connection with FOIA. See [Implementation Subcommittee Report](#) at 27.

<sup>76</sup> See Transcript of FOIA Advisory Committee Meeting (Sept. 7, 2023), <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term/foiaac-mtg-transcript-2023-09-0> (presentation of Eric Stein, Deputy Assistant Secretary for the Office of Global Information Services at the Department of State). Mr. Stein also made clear that the State Department had largely developed its own software in carrying out these projects. See also J. Heckman, "State Department looks to AI," *Federal News Network* (Mar. 25, 2024), <https://federalnewsnetwork.com/all-about-data/2024/03/state-dept-looking-at-ai-to-help-workforce-plan-next-career-steps/>.

<sup>77</sup> The first case recognizing TAR methods was *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. Feb. 24, 2012) (Peck, Mag. J.), *adopted sub nom. Moore v. Publicis Groupe*, 2012 WL 1446534 (S.D.N.Y. Apr. 25, 2012), *citing* M. Grossman & G. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, 17 RICHMOND J. LAW & TECHNOLOGY, art. 11 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf>. In the decade since, hundreds of reported decisions, legal commentaries, and further research has validated the efficiency of using machine learning tools in conducting searches for legal and investigatory purposes, and an entire legal e-discovery industry has grown in supporting the use of these methods. See, e.g., The Sedona Conference TAR Case Law Primer (2d ed. 2023), [https://thesedonaconference.org/publication/TAR\\_Case\\_Law\\_Primer](https://thesedonaconference.org/publication/TAR_Case_Law_Primer); The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval in E-Discovery, 15 SEDONA CONF. J. 217 (2014), <https://thesedonaconference.org/download-publication?fid=4346>; EDRM/Bolch Institute, Duke Law School, Technology Assisted Review Guidelines (rev. date 2021), <https://edrm.net/wp-content/uploads/2019/02/TAR-Guidelines-Final.pdf>.

they conduct searches in response to document productions in litigation. To the extent that larger federal agencies are now having to conduct searches over hundreds of thousands or millions of emails and other electronic records in response to FOIA requests, a growing need exists to apply similar advanced search methods in the latter context. As demonstrated in events such as in [NexGen FOIA Tech Showcases](#)<sup>78</sup> held in 2022 and 2024, there are commercial vendors who would be expected to respond to a request by agencies for more information on their products and services with respect to technology assisted review tools applied to FOIA searches.<sup>79</sup>

The FOIA process does, however, present additional challenges with respect to the efficacy of current AI tools to identify withholdable material under various of the nine FOIA exemptions. With respect to personally identifiable information (PII) in the form of Social Security numbers, telephone and passport numbers, and other forms of numerical information, a variety of commercial vendors offer products and services that assist agencies in carrying out redactions under FOIA Exemptions 6 and 7(C). With respect to other forms of exempt material, the Committee is aware of current research that shows the promise of machine learning applied to the task of reasonably segregating factual from deliberative material in documents to isolate portions of documents covered under the FOIA Exemption 5's "deliberative process privilege" in accord with FOIA standards.<sup>80</sup>

In furtherance of [Recommendations 2020-11](#) and [2020-22](#), we believe that agencies would benefit from proactively seeking industry input in the use of AI tools to improve FOIA processes. A long-adopted approach for doing so is proceeding with market research through the issuance of requests for information (RFIs), in conformance with GSA's [Federal Acquisition Regulation](#) (the "FAR").<sup>81</sup> A number of agencies have chosen to publish RFIs on the subject of e-discovery.<sup>82</sup> This recommendation would build upon these efforts to focus on how AI methods, including those used in e-discovery, would assist in the FOIA context.

OIP has singled out the CFO Council's Technology Committee as "continu[ing] to serve as a great resource for agencies exploring their FOIA technology needs."<sup>83</sup> As part of this recommendation, we would ask that OIP seek out the necessary expertise on the CFO Technology Committee to co-develop and have an RFI go forward with broad applicability to larger agencies represented on the CFO Council. In the alternative, OIP could directly work with chosen federal agencies to develop agency specific RFIs tailored to the FOIA processes

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<sup>78</sup> <https://www.foia.gov/chief-foia-officers-council/committee/technology-committee>.

<sup>79</sup> A Google search under "predictive coding," "TAR," or "TAR 2.0" (employing what is referred to as the latest "continuous active learning" tools) reveals scores of vendors offering such services in the e-discovery space.

<sup>80</sup> See Karl Branting, *et al.*, Automated Detection of Sensitive Content in Government Records, *ARTIFICIAL INTELLIGENCE AND LAW* (2023), <https://link.springer.com/content/pdf/10.1007/s10506-023-09383-6.pdf>; Jason R. Baron, *et al.*, Providing More Efficient Access to Government Records: A Use Case Involving Application of Machine Learning to Improve FOIA Review for the Deliberative Process Privilege, *JOURNAL ON COMPUTING AND CULTURAL HERITAGE*, 15:1, article 5: 1-19 (2022), <https://dl.acm.org/doi/full/10.1145/3481045>.

<sup>81</sup> See, e.g., FAR, § 15.201(c), Exchanges with industry before receipt of proposals ("Agencies are encouraged to promote early exchanges of information about future acquisitions"), [https://www.acquisition.gov/far/part-15#FAR\\_15\\_201](https://www.acquisition.gov/far/part-15#FAR_15_201).

<sup>82</sup> See, e.g., Defense Logistics Agency, E-discovery Platform: Request for Information, [https://imlive.s3.amazonaws.com/Federal%20Government/ID291571030166059685723364843163024305884/ESID\\_D\\_RFI\\_Redacted.pdf](https://imlive.s3.amazonaws.com/Federal%20Government/ID291571030166059685723364843163024305884/ESID_D_RFI_Redacted.pdf)

<sup>83</sup> <https://www.justice.gov/oip/blog/oip-hosts-artificial-intelligence-event-featuring-cfo-council-technology-committee-working>.

employed by a given agency. In moving forward this proposal, we recognize that there should be “safeguards” in place in any future uses of AI technologies.<sup>84</sup>

In sum, as OIP has recognized, AI “has great potential for reducing the search and review burden on agency FOIA offices.”<sup>85</sup> Given the reality of growing backlogs of FOIA requests at many agencies, coupled with rapidly accumulating volumes of electronic records (especially in Capstone email repositories), it makes eminent sense that agencies consider the use of AI tools and technologies by conducting outreach to private industry resources in the form of RFIs.

## *Implementation*

***Recommendation 2024-13: We recommend that OGIS and OIP follow up with selected agencies and other government entities in an effort to increase compliance with past recommendations of the FOIA Advisory Committee.***

### **COMMENT**

Despite their limited resources and budgets, the staffs of OGIS and OIP have done a remarkable job since 2016 (over the past four terms of the FOIA Advisory Committee) in marshaling their resources to implement as many of the Committee’s prior 51 recommendations as possible. In addition to completing what the Committee has asked them to do on 26 recommendations, OGIS and OIP staff are presently working on an additional 13 recommendations deemed “In Progress,” and remain committed to devoting time and resources to carry out an additional nine currently “Pending” recommendations. This is all highly commendable.

Notwithstanding these efforts, it appears that there are many instances of a somewhat lesser degree of agency compliance or implementation with particular Committee recommendations than one would ideally hope for. We understand that in a substantial percentage of these cases, our past recommendations have attempted to address facets of long-standing, systemic challenges that all agencies face. These include, but are not limited to, agencies keeping up with technological developments and having sufficient staffing and resources to address “improvements” along the lines of Committee recommendations in the face of growing FOIA backlogs and a variety of resource constraints. In such cases, it would be unfair to expect that OGIS or OIP can alone “solve” these issues. While acknowledging this, we nevertheless believe that attempting to make progress in certain key areas remains a worthy effort.

To that end, the Committee believes a subset of 17 past recommendations are of particular importance where compliance with the Committee’s past recommendations can be improved.

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<sup>84</sup> Adoption of AI methods in FOIA is not without its critics. As reported in *Forbes*, members of the public interest community (including a member of this term’s FOIA Advisory Committee) have expressed concerns about over-reliance on AI in FOIA decision making, calling for clear standards in the use of AI including procedures in place for challenging decisions made in AI. William Skipworth, “Federal Agencies Are Reportedly Using AI To Complete FOIA Requests, Sparking Concerns From Transparency Advocates,” *Forbes* (Aug. 1, 2023), (quoting Adam Marshall, Reporters Committee for Freedom of the Press). See also Lewis Kamb, “Some U.S. Agencies are testing out AI to help fulfill public records requests,” *NBC News*, Aug. 1, 2023, <https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313>.

<sup>85</sup> <https://www.justice.gov/oip/oip-guidance-further-improvement-based-2021-chief-foia-officer-report-review-and-assessment>.



These recommendations are discussed in Appendix B to the Implementation Subcommittee’s Report.<sup>86</sup> For these cases, we have attempted to provide concrete guidance to OGIS and OIP in the form of considering additional actions that could be taken. These include, for example, directly interacting with OMB to get “buy in” and assistance; following up with inquiries to specific agencies with respect to known compliance gaps; issuing further (reminder) guidance; and engaging in outreach to the FOIA community and civil society groups to make their views known. Moreover, for certain recommendations we have pointed to analogous policies implementing public disclosure laws at the state government level.

This recommendation is not intended to unduly burden OGIS and OIP staff in their continuing work to put into effect “Pending” recommendations of this Committee, or otherwise to interfere with the missions and operations of those offices. The wording of this recommendation urges OGIS and OIP to engage only in “follow up” with selected agencies and other government entities—no more and no less. We believe that making judicious inquiries focused on specific issues in designated agencies holds the potential to achieve progress towards greater FOIA compliance.

***Recommendation 2024-14: We recommend that OIP include one or more specific questions in annual Chief FOIA Officer (CFO) reports requesting agencies to report on activities that they have implemented consistent with selected FOIA Advisory Committee recommendations.***

## **COMMENT**

The annual CFO Reports OIP requires agencies to submit invaluable information on a wide variety of matters involving how agencies go about administering the FOIA. The Committee has previously recommended on two occasions that OIP collect specific types of information in the CFO report. [Recommendation 2018-02](#) requested that OIP add a question on search methods and technologies, and [Recommendation 2020-08](#) concerned adding a question on standard operating procedures. Additionally, we understand that either OGIS has informally asked OIP to consider including, or OIP itself decided to include, as many as eight additional questions in the CFO Reports in various years related to subjects covered in past recommendations.

As explained in further detail in the Implementation Subcommittee Report at Appendix D,<sup>87</sup> agencies have not been called upon to explicitly refer to our Committee’s recommendations, and for this and various other reasons there remains a measure of uncertainty as to how to interpret agency compliance in either implementing or mirroring our Committee’s recommendations. It would be useful, therefore, if the CFO Report expressly referenced the existence of FOIA Advisory Committee recommendations in one or more prompts. In doing so, agencies would be given the opportunity to explain how specific policies they have put into place correspond to best practices contained in Recommendations advanced by this Committee since its inception in 2014.

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<sup>86</sup> <https://www.archives.gov/files/ogis/documents/implementation-subcommittee-report-may-7-2024.pdf>.

<sup>87</sup> <https://www.archives.gov/files/ogis/documents/implementation-subcommittee-report-may-7-2024.pdf>.

The Committee leaves it to OIP's discretion how to best implement this recommendation. We can conceive of several ways in which OIP could go about doing so, including:

- (i) Adding a "Section VI," entitled "Implementing FOIA Advisory Committee Recommendations," where agencies are asked a general question as to how they have taken into account the Committee's recommendations, either through implementing them directly or creating initiatives that are consistent with one or more recommendations.
- (ii) Adding one or more questions in each section of the report (or designated sections) requesting a response as to how an agency implemented specifically identified recommendations.
- (iii) Same as (ii) above but limiting additions to one or more questions related to FOIA Advisory Committee recommendations from the most recent term.
- (iv) Embedding references to applicable FOIA Advisory Committee recommendations within the text of an existing question set in the CFO Report.

We understand that there is a trade-off in imposing additional reporting burdens on agencies, when doing so takes time and resources away from actual processing of FOIA requests. We believe, however, for all the reasons stated in this report, that it would greatly aid the work of this Committee to get a better read on ongoing implementation efforts.

***Recommendation 2024-15: We recommend that the FOIA Advisory Committee create an Implementation working group, to be charged with:***

- (1) providing a summary of previous recommendations to the Committee early in the term;**
- (2) coordinating with Subcommittees throughout the term to provide research and context from previous terms related to their work;**
- (3) conducting research throughout the term to assess progress on previous selected recommendations; and**
- (4) highlighting for the Committee recommendations that could use further attention including proposing ways to achieve greater implementation.**

## **COMMENT**

Prior to this term, four preceding FOIA Advisory Committees issued a total of 51 recommendations, with all but five accepted by the Archivist (one was rejected and four deferred). This term, the Committee has passed an additional 16 recommendations for the Archivist to consider. Altogether, these 67 recommendations have been the subject of Committee Final Reports and Subcommittee Reports, in some cases accompanied by appendices of various kinds, and all provide justifications for their adoption in great detail, formed through extensive research and discussion. This repository of accumulated documentation (institutional memory) can be of help to new, incoming Committee members; it will enable them to better understand what has been recommended in the past, and what remains to be done, to make their terms of service more efficient and effective. It is at the same time a somewhat daunting prospect to be asked to absorb this repository without further guidance.

A working group charged with the responsibilities set out in this recommendation can be of great assistance in acting as a clearinghouse for all members of the Committee to get up to speed on past recommendations and work accomplished. Working group members would in turn commit to continuing the work of the present Implementation Subcommittee in researching and analyzing how past recommendations can achieve greater implementation. We expect that the working group would be judicious in tackling only a select number of past recommendations over a given term. We also would expect that a report to the full Committee would be made at the end of term, with further observations and suggestions for future action.

This working group might include both members from previous terms for historical context and background, and new members for fresh perspective. The working group also might wish to organize a bootcamp provided especially for new Committee members at the beginning of a term for the purpose of recapping prior recommendations and reviewing suggestions by a prior implementation working group.

## FINAL OBSERVATIONS

The Final Reports of the 2018-2020 and 2020-2022 FOIA Advisory Committees contained final observations urging future committees to consider the matter of agency implementation of committee recommendations. As noted in the 2018-2020 final report, “[a]s challenging as it has been to fashion these recommendations, the more difficult part is in seeing through their effective implementation.”<sup>88</sup> In that report, the Committee went on to say that “rather than viewing [our] mission as one primarily involved in drafting many additional recommendations, members should spend a portion of their time devoted to publicizing past recommendations and “measuring/evaluating compliance with them throughout the executive branch.”<sup>89</sup>

As noted above, five terms of the FOIA Advisory Committee have now collectively approved 67 recommendations to date. Assuming this Committee continues to be chartered beyond 2026,<sup>90</sup> at the present rate of crafting new recommendations per term, by the year 2030 well over 100 recommendations for agencies and other government entities will require implementation. The prospect of continuing down this path and expecting that interested parties (OGIS, OIP, FOIA staff, and future members of this Committee) will be able to reasonably keep track of and absorb this cumulative number of “best practices” recommendations is unrealistic. Given this reality, a foundational question otherwise left unaddressed in this report is whether the FOIA Advisory Committee, in future terms, should continue to be in the business of crafting numerous new recommendations to add to the accumulated corpus of existing ones.

Taking up the charge from past Committees, the Implementation Subcommittee this term produced an extensive report with findings supporting the conclusion that, despite the best efforts of OIP and OGIS staff, there are observable gaps in compliance and implementation. We believe that the time has arrived when some measure of creativity is called for in thinking outside the “recommendations box” in making concrete and sustained progress in improving FOIA administration. To this end, we believe members on any future term of the Committee should

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<sup>88</sup> See [2018-2020 FOIA Advisory Committee Final Report](#) at 36.

<sup>89</sup> *Id.*

<sup>90</sup> A sixth term consisting of the 2024-2026 FOIA Advisory Committee was chartered by the Archivist on April 26, 2024. See <https://www.archives.gov/ogis/foia-advisory-committee/2024-2026-foia-advisory-committee-charter>.

consider employing reform strategies that do not necessarily or solely require implementation of a new batch of Committee “recommendations” as such.

Compliance with FOIA is certainly a subject worthy of White House attention. One strategy is making a more vigorous attempt to call upon staff in OMB’s Office of Information and Regulatory Affairs to consider the issuance of presidential-level guidance or the taking of other visible, government-wide actions that will be on the radar screens of senior officials across the government to a greater extent than our Committee’s recommendations. Such guidance could be in the form of an Executive Order or government-wide memorandum, of the type that President Obama issued on his first day in office.<sup>91</sup> OMB and the White House Office of Science and Technology Policy could also be called upon to embed FOIA access issues into Administration guidance implementing existing Executive Orders on AI and on Customer Experience. OMB could also be asked to spearhead some kind of presidential level advisory commission, devoted to improving the mission of FOIA through technology upgrades. Moreover, the guidance could recommend specific, concrete steps that might help agencies confront their backlogs rather than directing agencies to develop their own plans to reduce backlogs. Our Committee this term also has approved a recommendation that the Archivist engage with governmental actors involved in the development of the Sixth Open Government National Action Plan. We can envision ways in which agencies would benefit from greater interaction and engagement with open government advocates with both technological and policy expertise applicable to the hosting and processing of agency records in electronic form.

Several of our recommendations emphasize the importance of automated and AI tools and methods applicable to the FOIA. Most recently, generative AI, using large language models, has captured the attention of the public at large.<sup>92</sup> To jumpstart further consideration of the use of AI methods in FOIA administration, it may well be that OGIS and the Archivist should ensure that, in appointing members of this Committee, consideration be given to their having a heightened level of technical expertise, so as to be able to address state-of-the-art issues in applying new technologies in the FOIA space. The Modernization Subcommittee’s Report contains a discussion of various other strategies for enhancing awareness about AI, through the efforts of OIP, the Chief FOIA Officers Council, and other governmental actors.<sup>93</sup>

To fulfill the Committee’s charge embodied in the Second National Action Plan and in its subsequent charters, we believe that future FOIA Advisory Committees should endeavor to find ways to heighten its engagement with the public as a featured aspect of its ongoing activities. Surveys and interviews are excellent means of doing so. Additionally, there are a variety of outreach measures that the Committee may also wish to employ in the future, either as a Committee or through its subcommittees. These might include soliciting public input on draft recommendations;<sup>94</sup> continuing to invite representatives of the greater FOIA community and

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<sup>91</sup> <https://obamawhitehouse.archives.gov/the-press-office/freedom-information-act>.

<sup>92</sup> See Adam Zewe, “Explained: Generative AI,” *MIT News* (Nov. 9, 2023), <https://news.mit.edu/2023/explained-generative-ai-1109>; see generally “Generative Artificial Intelligence,” *Wikipedia*, [https://en.wikipedia.org/wiki/Generative\\_artificial\\_intelligence](https://en.wikipedia.org/wiki/Generative_artificial_intelligence). For a further discussion of emerging AI technologies relevant to FOIA processing, see the [Modernization Subcommittee Report](#), at 25-27.

<sup>93</sup> See [Modernization Subcommittee Report](#), at 25-27.

<sup>94</sup> We recognize from past experience that the majority of recommendations are finalized relatively late in the two-year term of the FOIA Advisory Committee. Nevertheless, there still may be candidate recommendations

civic society organizations to make presentations at public meetings; and, working through OGIS, consider beginning each term with an open letter to civil society institutions and the public at large soliciting public comments on issues of current interest and concern regarding FOIA administration.<sup>95</sup>

OGIS has pitched several Committee recommendations to Congress with the objective of obtaining relief in the form of greater funding, enhanced statutory direction, and more active engagement between the legislative and executive branches on FOIA issues. Although these entreaties have not borne fruit to date, OGIS should continue to exercise its statutory authority to advance legislative and regulatory recommendations to improve FOIA administration, continuing to enhance its connection with congressional actors, and should not hesitate to avail itself of opportunities to do so.

As has been pointed out elsewhere in this term's Subcommittee reports and in past terms' final reports, we are all living in an era of unprecedented growth in the volume and variety of records in electronic and digital formats. This may be the most significant access challenge facing the government over the next decade, starting with how to provide access to email records and other forms of electronic messaging given burgeoning amounts of records into the tens and hundreds of millions. Any recommendations that this Committee ends up adopting and any other actions that can be creatively made should all take into account this new reality.

Given the state of FOIA access, we urge the members of future terms of the Committee to seriously consider the observations we are making here. We support efforts to achieve greater compliance with—and implementation of—the entire corpus of past recommendations forthcoming from our Committee. Whether the path forward should include devoting the overwhelming amount of time of a future Committee to the business of making additional recommendations is a question that should be addressed in the next term and beyond.

For the past five terms, the members of successive FOIA Advisory Committees have endeavored to make a positive contribution in improving how agencies administer to the FOIA. We trust and expect that in future terms this Committee's members will not consider themselves solely wedded to past ways of doing business. Instead, they should consider employing strategies and creative thinking to magnify the Committee's voice to ensure that the mission of FOIA—to increase government transparency and accountability—is best accomplished through their efforts.

## **SUBCOMMITTEE METHODOLOGY**

### **Resources Subcommittee**

The Resources Subcommittee engaged in extensive fact-gathering through several means. First, members of the Subcommittee reviewed and analyzed agency FOIA reports. This included the Chief FOIA Officer reports and agencies' Annual FOIA reports. The Subcommittee also

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sufficiently developed during the first year of future Committees to facilitate solicitation of public comments earlier in the process.

<sup>95</sup> The [Implementation Subcommittee's Report](#) contains a more extensive discussion of these three types of outreach.

analyzed reports issued by groups that had attempted to tackle federal FOIA backlogs. This included prior reports of the Advisory Committee, but also included the many reports of the Government Accountability Office (GAO) and presidential memoranda on the subject.

Second, members of the Subcommittee interviewed or otherwise spoke with dozens of senior FOIA officials across the government on a variety of issues confronting their FOIA programs. Topics included staffing, contractor support, technology training, and others. The Subcommittee also spoke with representatives from OPM, GSA, DOJ, EPA, and other groups examining federal resources dedicated to FOIA, such as the Chief FOIA Officers Council's Technology Committee.

Third, during Spring 2023, the Resources Subcommittee developed a survey it administered to FOIA professionals that asked questions regarding issues of technology, training, financial and staff resources. In June 2023, the survey was administered at the American Society of Access Professionals (ASAP) training conference. After the meeting, the survey was emailed to the ASAP email list and posted on the official ASAP website. Approximately 150 respondents completed the survey. A majority of respondents (~53%) noted that staff was the greater resource need in their specific office (relative to FOIA technology and training).

### **Modernization Subcommittee**

The Modernization Subcommittee's recommendations were based primarily on the expertise and experience of the Subcommittee's individual members, supplemented by outreach to the Director of OIP, as well as presentations during public meetings of the Committee. The latter included remarks by a panel of public interest lawyers, as well as a presentation on AI and machine learning technologies by the Deputy Assistant Secretary for Global Information at the Department of State. Our own individual Subcommittee members included individuals with expertise in the processing of complex FOIA requests in government agencies, e-discovery, open government, FOIA litigation from the perspective of the public interest community, as well as members with experience in filing multiple FOIA requests with a wide variety of agencies.

### **Implementation Subcommittee**

The Implementation Subcommittee gathered information about the previous 51 recommendations through several means. The Subcommittee interviewed OGIS and OIP staff concerning the present status of their continuing efforts in furtherance of past recommendations. The Subcommittee reviewed previous reports compiled by OGIS, OIP and other sources relevant to previous recommendations. The Subcommittee also reviewed responses to this term's Resources Subcommittee June 2023 survey of agencies, as conducted through the American Society of Access Professionals.

Additionally, the Subcommittee conducted its own online survey in Fall 2023 of Chief FOIA Officers from selected agencies to gather information about previous recommendations not otherwise publicly available. Subcommittee members reviewed annual Chief FOIA Officer Reports from 2022 and 2023, which together contain information from federal agencies particularly relevant to nine of the Committee's past recommendations. Finally, Subcommittee members interviewed a select number of federal FOIA officials in early 2024 about their

agencies' implementation of specific recommendations, as well as to obtain their views on raising the visibility of the FOIA Advisory Committee and its recommendation in future terms.

## COMMITTEE MEMBERS

### Current Members

**Alina M. Semo**, Chair, Office of Government Information Services, National Archives and Records Administration

**Jason R. Baron**, University of Maryland

**Paul Chalmers**, Pension Benefit Guaranty Corporation

**Carmen A. Collins**, U.S. Department of Defense

**David Cuillier**, University of Florida

**Allyson Deitrick**, U.S. Department of Commerce

**Gorka Garcia-Malene**, U.S. Department of Health and Human Services

**Michael Heise**, U.S. Equal Employment Opportunity Commission

**Alexander Howard**, Digital Democracy Project

**Stefanie Jewett**, U.S. Department of Health and Human Services Office of Inspector General

**Gbemende Johnson**, University of Georgia

**Adam Marshall**, Reporters Committee for Freedom of the Press

**Luke Nichter**, Chapman University

**Catrina Pavlik-Keenan**, U.S. Department of Homeland Security

**Thomas Susman**, American Bar Association

**Bobak Talebian**, U.S. Department of Justice, Office of Information Policy

**Eira Tansey**, Memory Rising

**Benjamin Tingo**, OPEXUS

**Patricia A. Weth**, U.S. Environmental Protection Agency

### Designated Federal Officer

**Kirsten B. Mitchell**, Office of Government Information Services, National Archives and Records Administration

### Alternate Designated Federal Officers

**Daniel Levenson**, Office of Government Information Services, National Archives and Records Administration

**Kimberlee Ried**, Office of Government Information Services, National Archives and Records Administration



**Past Members (2022-2024 Term)**

**Lauren Harper**, National Security Archive (March 2023 - March 2024)

**Ginger Quintero-McCall**, Demand Progress (August 2022 - February 2023)

## ACKNOWLEDGEMENTS

The Freedom of Information Act (FOIA) Advisory Committee would like to acknowledge and thank many individuals for their invaluable contributions to the completion of this report. We are grateful to our colleagues, stakeholders, and the public who provided written and oral comments; they were helpful in informing the topics the Committee researched. We also appreciate the following individuals for helping with the Committee's creation, organization, guidance, and administrative management and support:

**Dr. Colleen J. Shogan**, Archivist of the United States, NARA (confirmed May 10, 2023)

**Debra Steidel Wall**, Acting Archivist of the United States, NARA (May 2022 - May 2023) and Deputy Archivist (retired December 2023)

**David S. Ferriero**, Archivist of the United States (retired April 2022)

**William J. Bosanko**, Deputy Archivist and former Chief Operating Officer, NARA

**Jay A. Trainer**, Acting Chief Operating Officer and Executive for Agency Services, NARA

**Gary M. Stern**, General Counsel, NARA

**Rana Khandekar**, Assistant General Counsel, NARA

**Tasha Ford**, Committee Management Officer, NARA (2022 - February 2024)

**Merrily Harris**, Committee Management Officer, NARA (February 2024 - present)

**John Hokenson**, Group Federal Officer, NARA (2022 - May 2024)

**Maureen MacDonald**, Special Assistant to the Archivist, NARA

The staff from the following NARA offices:

Audio/Visual Services Team

Office of Equal Employment Opportunity

Office of Government Information Services (OGIS)

### Speakers at Meetings During the 2022-2024 Term

**David Bloom**, Principal, Group Leader, Data Management, MITRE Corporation

**Jeff Edwards**, U.S. Environmental Protection Agency Office of Enterprise Information Programs, Office of Mission Support

**Brentin V. Evitt**, Director, Information Management and Compliance Office, Defense Intelligence Agency

**David Kirby**, IT Program Manager, Bureau of Information Resource Management, U.S. Department of State

**Laura Johnson**, U.S. Environmental Protection Agency, Office of Enterprise Information Programs, Office of Mission Support

**Ryan Mulvey**, Policy Counsel, Americans for Prosperity Foundation

**Giorleny Altamirano Rayo**, Chief Data Scientist, Center for Analytics, U.S. Department of State

**Eric F. Stein**, Deputy Assistant Secretary for Global Information Services, Bureau of Administration, U.S. Department of State

**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)

**Dr. Eliot G. Wilczek**, Records and Knowledge Management Engineer, Data Management Integration and Interoperability, MITRE Corporation

## **GLOSSARY**

**AI:** Artificial Intelligence

**ASAP:** American Society of Access Professionals

**CDO:** Chief Data Officer(s)

**CFO Council:** Chief FOIA Officers Council

**DOJ:** U.S. Department of Justice

**FACA:** Federal Advisory Committee Act, 5 U.S.C. § 10.

**FOIA:** Freedom of Information Act, 5 U.S.C. § 552

**FPL:** FOIA Public Liaison

**FY:** Fiscal Year

**GIS:** Government Information Specialist

**GSA:** General Services Administration

**M-23-7:** Joint OMB and NARA Memorandum “Update to Transition to Electronic Records”

**NARA:** National Archives and Records Administration

**OGIS:** Office of Government Information Services, National Archives and Records Administration

**OIP:** Office of Information Policy, U.S. Department of Justice

**OMB:** Office of Management and Budget

**OGP:** Open Government Partnership

**OPM:** Office of Personnel Management

**RFI:** Request for Information

## APPENDIX A

### 2022-2024 FOIA Advisory Committee Charter

1. Official Designation. The name of this advisory committee shall be the Freedom of Information Act Advisory Committee (FOIA Advisory Committee).
2. Authority. The National Archives and Records Administration (NARA) established the FOIA Advisory Committee in 2014 pursuant to the second United States Open Government National Action Plan released on December 5, 2013. The Committee operates under the directive in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(h)(2)(C), that NARA's Office of Government Information Services (OGIS) "identify procedures and methods for improving compliance" with the Freedom of Information Act (FOIA). The FOIA Advisory Committee is governed by the provisions of the Federal Advisory Committee Act, 5 U.S.C. App., as amended ("FACA").
3. Objectives and Scope of Activities. The FOIA Advisory Committee advises on improvements to the administration of FOIA. The objective of the FOIA Advisory Committee is to study the current FOIA landscape across the Executive branch and make recommendations to the Archivist of the United States.
4. Description of Duties. The FOIA Advisory Committee fosters dialogue between the Federal Government and the requester community, solicits public comments, and develops recommendations for improving FOIA administration and proactive disclosures. The Committee may recommend legislative action, policy changes, or executive action, among other matters. The FOIA Advisory Committee is advisory only.
5. Official(s) to Whom the Committee Reports. The FOIA Advisory Committee shall report to the Archivist of the United States.
6. Support. NARA's OGIS will provide funding and administrative support for the FOIA Advisory Committee to the extent permitted by law and within existing appropriations.
7. Estimated Annual Operating Costs and Staff Years. The annual operating cost for the FOIA Advisory Committee is estimated to be \$170,000 and one full staff year. There will be no compensation for members of the FOIA Advisory Committee. NARA will not provide travel and/or per diem costs.
8. Designated Federal Officer (DFO). The DFO (or designee) is a full-time or permanent part-time NARA employee, appointed in accordance with agency procedures, and will perform the duties set forth in § 102-3.120 of the FACA Final Rule. The Archivist of the United States shall designate a DFO who shall manage the FOIA Advisory Committee and provide such clerical, administrative, and logistical support as necessary for the FOIA Advisory Committee to effectively conduct its business. The DFO will approve or call all of the FOIA Advisory Committee's and subcommittees' meetings, prepare and approve all meeting agendas, attend all Committee and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the official to whom the advisory committee reports.

9. Estimated Number and Frequency of Meetings. In consultation with the Archivist of the United States, the DFO shall hold meetings up to four times per year and may call additional meetings as may be necessary.

10. Duration. The need for this FOIA Advisory Committee is continuing.

11. Termination. The Charter shall be eligible for renewal every two years.

12. Membership and Designation. The Committee will consist of no more than 20 individuals. Government members of the FOIA Advisory Committee should include, at a minimum, three FOIA professionals from Cabinet-level Departments; three FOIA professionals from non-Cabinet agencies; the Director of the Department of Justice, Office of Information Policy (OIP), or the OIP Director's designee; and the Director of OGIS, or the OGIS Director's designee, who will chair the committee. Non-governmental members of the FOIA Advisory Committee will include, at a minimum, two individuals representing the interests of non-governmental organizations that advocate on FOIA matters; one individual representing the interests of FOIA requesters who qualify for the "all other" FOIA requester fee category; one individual representing the interests of requesters who qualify for the "news media" FOIA requester fee category; one individual representing the interests of requesters who qualify for the "commercial" FOIA requester fee category; one individual representing the interests of historians and history-related organizations; and one individual representing the interests of academia. The FOIA Advisory Committee will be composed of Representative members and Regular Government Employees. The Archivist of the United States shall appoint as Chairperson the Director of OGIS or the Director's designee. If necessary, a Vice Chairperson may be designated annually by members of the FOIA Advisory Committee, in consultation with the Archivist of the United States. The Chairperson is the presiding officer of the FOIA Advisory Committee who guides its efforts to the effective completion of its assigned tasks. The Chairperson shall provide leadership and adhere to the Charter and such other rules of order and operating procedures as the FOIA Advisory Committee may adopt, maintain order, and conduct each meeting in accordance with FACA and the prescribed rules and procedures. The Chairperson is responsible for certifying the accuracy of FOIA Advisory Committee meeting minutes. The Vice Chairperson shall assume and perform the duties of the Chairperson in the event the Chairperson is absent or unavailable.

13. Subcommittees. NARA may approve the creation and operation of subcommittees by the FOIA Advisory Committee as necessary to support the Committee's work in accordance with FACA. The subcommittees must report to the full FOIA Advisory Committee. The subcommittee chairperson(s) shall be a Committee member(s).

14. Recordkeeping. The records of the FOIA Advisory Committee and any subcommittee(s) shall be handled in accordance with General Records Schedule 6.2, item 10, and any approved NARA agency records disposition schedule. These records shall be available for public inspection and copying, subject to the FOIA, 5 U.S.C. § 552.

FILE DATE: April 28, 2022

/s/ David S. Ferriero

DAVID S. FERRIERO

Archivist of the United States

## APPENDIX B

### Model FOIA Determination Letter

[Requester name]<sup>96</sup>  
[Requester Address]

[Date]

Re: [FOIA Request Tracking Number]

Dear [Requester],

This letter responds to your [/your client's/your organization's] Freedom of Information Act (FOIA) request, which was submitted to [agency], and assigned tracking number [tracking number]. For reference, this request sought: [insert verbatim description of requested records or a summary thereof, or attach copy of request].

This is a [final/interim] response to your request. [If interim response, note when the next and/or final response is expected.]

#### History of Request

This request was received by [agency] on [date] via [method of transmission, e.g., portal, email, fax, etc.].

A letter acknowledging the request was sent on [date].

[If applicable, note other information about administrative history of the request, including (but not limited to): (1) whether the request was narrowed/modified, (2) whether a "still interested" letter was issued/responded to; (3) whether there were prior consults/referrals to other agencies; (4) whether there was a request for/adjudication of fee category, fee waiver or expedited processing; (5) whether "unusual circumstances" were invoked and the basis therefore, (6) whether and when a third party notification was sent pursuant to E.O. 12600, (7) what fee category the requester was determined to fall into, any applicable fees (search, review, duplication), and any determination on a fee waiver request, if one was made].

[Optionally, attach copies of correspondence to/from requester].

#### [Agency's] Search for Responsive Records

A search for records responsive to this request was initiated on [date] and completed on [date]. [If applicable, note if different date cutoff(s) were used in conducting search.]

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<sup>96</sup> Bracketed information is either illustrative or is intended to provide guidance to agencies to fill out for individual requests as applicable

To locate responsive records, [agency] used the following methodology: [describe search keywords/terms, or other applicable search methodology].

The following locations or repositories were searched as they were determined to be reasonably likely to have records responsive to your request: [list search locations, databases, office names/divisions, custodians, etc.]

After completing its review, [agency] has identified a total of [###] pages [or documents/volume/other descriptor] as responsive to your request.

[If applicable, note limitations on search, including (1) whether records were accessioned to NARA, (2) whether records were destroyed in accordance with a federal records schedule, (3) whether there were other limitations on searching for records (*e.g.*, encrypted files).]

### **[Agency's] Determination**

Following [agency's] review of responsive records, [insert one of following based on whether full/partial grant/denial:]

[IF FULL GRANT]

[agency] has determined to grant your request in full. [number/volume of records/pages] are [will be] released. [If applicable, note when records will be released if not included with determination.]

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[IF PARTIAL GRANT/PARTIAL DENIAL]

[Agency] has determined to grant your request in part and deny your request in part. [number of pages/volume of records] are [will be] released in full, [number of pages/volume of records] are being withheld in part, and [number of pages/volume of records] are being withheld in full. [If applicable, note when records will be released if not included with determination]

FOIA allows agencies to withhold information that is covered by one of nine exemptions, set forth at 5 U.S.C. §§ 552(b)(1)-(9), but only if the withholding is also permissible under the foreseeable harm standard, 5 U.S.C. § 552(a)(8). The foreseeable harm standard prohibits agencies from withholding information unless they reasonably foresee that releasing it would harm an interest protected by one or more of the nine exemptions, or disclosure is prohibited by law.

Each redaction in the record(s) that have been partially released to you contains an annotation with a number that corresponds to the applicable FOIA exemption. For example, a redaction that states “(b)(6)” corresponds to FOIA Exemption 6, which protects information about individuals in “personnel or medical files and similar files”



when the disclosure “would constitute a clearly unwarranted invasion of personal privacy.”

The following information has been withheld from records responsive to your request:

[Note: the following are only examples of how an agency might describe withheld information and records. Agencies should aim to provide enough detail to afford a requester a meaningful opportunity to appeal. The level of detail provided will vary with regard to each request, type of information/record withheld, and the volume of withheld records. It is important to note that in instances where the agency withholds an entire record or records, the description below may be the only information the requester has upon which to file an administrative appeal. If Exemption 3 is cited, provide the corresponding statute.]

- EXAMPLE: Pursuant to Exemption 4, [agency] has withheld portions of pages consisting of testing data submitted by a third party. Information may be withheld pursuant to Exemption 4 if [ . . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 4 because [ . . .]
- EXAMPLE: Pursuant to Exemption 5 and the deliberative process privilege (noted as (b)(5)-DPP), [agency] has partially withheld internal emails regarding recommendations on a new agency policy. Information may be withheld pursuant to Exemption 5 if [ . . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by the deliberative process privilege because [ . . .]
- EXAMPLE: Pursuant to Exemption 6, [agency] has applied redactions to Social Security numbers and dates of birth. Information may be withheld pursuant to Exemption 6 if [ . . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 6 because [ . . .]
- EXAMPLE: Pursuant to Exemption 7(C), [agency] has redacted the phone numbers of third parties. Information may be withheld pursuant to Exemption 7(C) if [ . . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 7(C) because [ . . .].

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[IF FULL DENIAL]

[Agency] has determined to deny your request in full. [number of pages/volume of records] are being withheld.

FOIA allows agencies to withhold information that is covered by one of nine exemptions, set forth at 5 U.S.C. §§ 552(b)(1)–(9), but only if the withholding is also permissible under the foreseeable harm standard, 5 U.S.C. § 552(a)(8). The foreseeable

harm standard prohibits agencies from withholding information unless they reasonably foresee that releasing it would harm an interest protected by one or more of the nine exemptions, or disclosure is prohibited by law.

In response to your request, records have been withheld in full, as follows:

[Note: the following are only examples of how an agency might describe withheld information and records. Agencies should aim to provide enough detail to afford a requester a meaningful opportunity to appeal. The level of detail provided will vary with regard to each request, type of information/record withheld, and the volume of withheld records. It is important to note that in instances where the agency withholds an entire record or records, the description below may be the only information the requester has upon which to file an administrative appeal. If Exemption 3 is cited, provide the corresponding statute. The number of pages or documents withheld under each exemption should be provided, unless doing so would harm an interest protected by the exemption]

- EXAMPLE: Pursuant to Exemption 3 and the Internal Revenue Code (26 U.S.C. § 6103(a)), which prohibits the release of tax information by an IRS employee, 18 pages of tax returns have been withheld.
- EXAMPLE: Pursuant to Exemption 4, [agency] has withheld 18 pages of product schematics submitted by a third party. Information may be withheld pursuant to Exemption 4 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 4 because [. . .].
- EXAMPLE: Pursuant to Exemption 5 and the deliberative process privilege, [agency] has withheld 14 pages consisting of two memoranda: the first of which is an options paper on a new agency policy, and the second is a draft statement describing the options paper. Information may be withheld pursuant to Exemption 5 if [...]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 5 because [ . . .]
- EXAMPLE: Pursuant to Exemption 7(A), [agency] has withheld 18 documents that concern an ongoing law enforcement investigation. Information may be withheld pursuant to Exemption 7(A) if [...]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 7(A) because [ . . .]

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### Referrals

[If records have been referred to another agency, identify, if possible: (1) each agency to which records have been referred, (2) how many pages have been referred to which agency, (3) when the referral was made, (4) explain that the other agency(ies) will provide a direct response, (5) contact information for the agencies to which a referral has been made.]

### Your Rights

You have the right to appeal any adverse portions of this decision by writing to [agency] at the address below. Your appeal must be submitted within 90 calendar days from the date of this letter. Please submit your administrative appeal by [insert administrative appeal instructions/contact information]. [Insert additional administrative appeal requirements, if any.]

A failure to file a timely administrative appeal may affect your rights with respect to this request.

You also have the right to seek assistance and/or dispute resolution services from the [agency's] FOIA Public Liaison (FPL) or the Office of Government Information Services (OGIS) with respect to this request. The FPL is responsible, among other duties, for assisting in the resolution of FOIA disputes within [agency]. OGIS, which is outside [agency], offers ombuds services, including dispute resolution services between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Please note that OGIS's assistance does not replace the administrative appeals process. Please also note that contacting OGIS does not affect the deadline to submit an administrative appeal.

You may contact the FPL or OGIS at:

[FOIA Public Liaison Name]  
[Mailing address]  
[Telephone number]  
[Email address]  
[Fax number, if applicable]

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road - OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770; toll free at 1-877-684-6448

### Conclusion

If you have questions about this response, please contact [agency] at the following: [insert contact info].

Sincerely,  
[name]