

**Recommendation xx: Make the FOIA Advisory Committee a Non-Discretionary FAC**

Under the Federal Advisory Committee Act (“FACA”), 5 U.S.C. § 1001 *et seq.*, Congress has established a framework for the establishment and operation of “advisory committees.” Such committees are “a useful and beneficial means for furnishing expert advice, ideas, and diverse opinions” to the Executive Branch.<sup>1</sup> Specifically, advisory committees bring together federal employees with non-governmental experts, who together consider relevant issues and propose solutions for the improved implementation of federal law and, more generally, the efficient and effective operation of federal agencies.

Some advisory committees are *non-discretionary* or *mandatory*.<sup>2</sup> This usually means they exist by statutory directive.<sup>3</sup> A committee can also be mandatory when created by a presidential directive, such as an Executive Order. Other committees are *discretionary*. These discretionary committees are commonly established by an agency when the agency itself determines that advice from outside the government would strengthen its decision-making or aid in the administration of laws under its jurisdiction.<sup>4</sup> The distinction between mandatory and discretionary advisory committees is most significant in terms of procedural requirements: discretionary committees, for example, are more difficult to establish,<sup>5</sup> but they are relatively easy to disband, either through non-renewal or revocation of a charter.<sup>6</sup>

As it stands, the Federal Freedom of Information Act (FOIA) Advisory Committee (“Committee”) is discretionary. The Archivist of the United States, acting as head of the National Archives and Records Administration (“NARA”), first established the Committee in 2014, “in accordance with the U.S. Second Open Government National Action Plan.”<sup>7</sup> The Committee continues to help the Office of Information Services “fulfill the directive in the FOIA, 5 U.S.C. § 552(h)(2)(C), . . . [to] ‘identify procedures and methods for improving compliance’ with the FOIA” government wide.<sup>8</sup>

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<sup>1</sup> 5 U.S.C. § 1002(a).

<sup>2</sup> *Id.* § 1008(a)(1) (“specifically authorized by statute or by the President”).

<sup>3</sup> The FACA enumerates several considerations that proposed legislation establishing or authorizing an advisory committee must contain, including, among other things, whether the committee has a “clearly defined purpose,” would be “fairly balanced in terms of the points of view represented” among its membership, and provisions addressing staffing, funding, and the avoidance of any inappropriate influence over the agency. *See id.* § 1004(b).

<sup>4</sup> *Id.* § 1008(a)(2) (“determined as a matter of formal record, by the head of the agency . . . with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law”).

<sup>5</sup> *See id.* § 1008(c)(1)–(2).

<sup>6</sup> *See id.* § 1013(a)(2), (b).

<sup>7</sup> *Freedom of Information Act (FOIA) Advisory Committee*, NAT’L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/ogis/foia-advisory-committee> (last visited Aug. 28, 2025).

<sup>8</sup> *Id.*

The Committee's charter has been renewed for successive two-year periods through the present 2024–2026 Term.<sup>9</sup>

Although there is no indication that NARA intends to terminate or decline to renew the Committee's charter, the work and focus of the Committee is important enough to warrant Congress's codification of its existence and function into law. The FOIA, 5 U.S.C. § 552, is the natural home for such a statutory directive.

The Advisory Committee serves a necessary function in providing recommendations—and fostering dialogue between federal employees and the interested public, especially civil society organizations that regularly utilize the FOIA—for improved administration of a bedrock statute advancing open government and transparency. As the Supreme Court itself has explained, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>10</sup> The FOIA is vital mechanism for Americans to find out “what their government is up to,”<sup>11</sup> which is a “structural necessity in a real democracy.”<sup>12</sup>

Insofar as the FOIA is a government-wide statute, and agency FOIA obligations do not change from year-to-year, there are always new issues that require careful consideration by the Advisory Committee. In this sense, the Committee's stated objectives are never fully accomplished, but represent ongoing goals that animate and shape every two-year term's agenda. Similarly, because the need for addressing issues in FOIA administration is evergreen, the Advisory Committee can never be “obsolete.” In every term since its inception, it has sought to tackle important and sometimes novel issues. Finally, the Advisory Committee is a fine example of inter-agency cooperation, as it draws its agency membership from across the federal government. By bringing together different perspectives from various agencies, along with representatives of NARA and the Department of Justice's Office of Information Policy, as well as members of the public, the Advisory Committee is an excellent source for problem identification and the ideation of solutions that make FOIA more effective, efficient, and consistent with the statute's animating purpose.

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<sup>9</sup> See generally *2024–2026 FOIA Advisory Committee Charter*, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/ogis/foia-advisory-committee/2024-2026-foia-advisory-committee-charter> (last visited Aug. 27, 2025).

<sup>10</sup> *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>11</sup> *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (cleaned up).

<sup>12</sup> *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).