

PUBLIC DRAFT VERSION

To: 2022-2024 FOIA Advisory Committee

From: Implementation Subcommittee

Date: March 1, 2024

Re: Interim Report & Recommendations

A. Membership

Members of the Implementation Subcommittee for this term:

David Cuillier, University of Florida (Co-chair)
Catrina Pavlik-Keenan, Department of Homeland Security (Co-chair)
Jason R. Baron, University of Maryland
Lauren Harper, National Security Archive
Alex Howard, Digital Democracy Project
Michael Heise, Equal Employment Opportunity Commission
Luke A. Nichter, Chapman University
Thomas Susman, American Bar Association
Benjamin Tingo, OPEXUS
Patricia Weth, Environmental Protection Agency

B. Overview

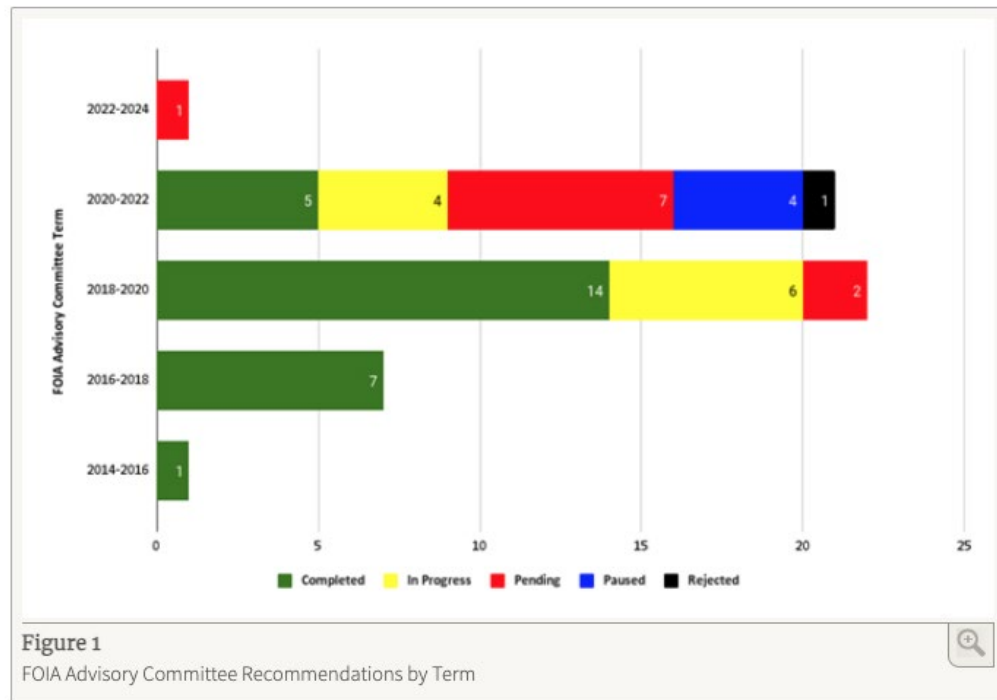
For purposes of providing the full Committee with an opportunity to review two proposed recommendations, this interim report consists of the data collection efforts our Subcommittee has undertaken, an abbreviated summary of the Subcommittee's findings, and the recommendations contained here for further consideration. A final report, including our complete findings with respect to all prior recommendations of the FOIA Advisory Committee, as well as our Subcommittee's final set of proposed recommendations, is currently in progress, with our intent to present to the Committee prior to the next public meeting scheduled for April 4, 2024.

The Implementation Subcommittee's mission for the 2022-2024 term was to review the 51 recommendations from the four previous terms of the FOIA Advisory Committee, from 2014 through 2022, to evaluate the current status of their implementation and what work is left to do. The Subcommittee was guided by the [Office of Government Information Services \(OGIS\) dashboard](#) to focus on particular recommendations with the greatest impact on improving the FOIA process. In undertaking its efforts, the Subcommittee implemented a variety of methodologies, including interviewing agency personnel, conducting surveys, examining previous data and Chief FOIA Officer reports, and inviting individuals to report to the FOIA Advisory Committee as a whole.

As referenced above, OGIS has created a dashboard which captures the progress made in implementation of the Committee’s full set of recommendations. See Figure 1 (current as of the date of this interim report).¹

The dashboard contains the following legend:

- **COMPLETED** means that we have fulfilled the recommendation although opportunities may exist for additional work.
- **IN PROGRESS** means work has begun on fulfilling the recommendation.
- **PENDING** means work has not yet started on the recommendation.
- **DEFERRED** means the recommendation is on hold pending the outcome of a feasibility study.
- **REJECTED** means the Acting Archivist of the United States did not accept the recommendation.



As detailed in our report, a principal focus of our efforts has been to determine as best we can the current status of those recommendations either “in progress” or “pending.” However, we also believed it to be within our charge to investigate the state of implementation of recommendations deemed to be “completed” on the dashboard, for the following reasons.

¹ <https://www.archives.gov/ogis/foia-advisory-committee/dashboard>.

Based on our combined data collection efforts, our understanding is that those recommendations that have been deemed to be “Completed” on the dashboard fall into two subcategories (“buckets”):

(a) Recommendations that by their own terms have been fully executed and complied with by one or more necessary components of government.

(b) Recommendations that have resulted in either the Archivist of the United States, OGIS, or the Department of Justice’s Office of Information Policy (“OIP”) issuing guidance or taking some other final action (*e.g.*, sending correspondence to another component of government, either in the Executive or Legislative branches).

Examples in the first subcategory would include: Recommendation 2018-01, which recommended that the Chief FOIA Officers Council create a standing Technology Committee, which came into existence in 2018; and Recommendation 2018-02, which recommended that OIP gather information on agency use of technology by means of an additional question asked in annual Chief FOIA Officers (CFO) reports submitted to OIP by all Executive branch agencies. This question has been included in the annual reports since 2019, and based on our survey of agency CFO reports is fully complied with in terms of generating responses in every agency annual report submission.

Category (b) contains numerous additional examples where the Archivist, OGIS, and/or OIP have issued either policy guidance or correspondence in response to a FOIA Advisory Committee recommendation. However, unlike category (a), there remains an open question as to the extent to which agencies have in place policies consistent with the spirit of the Committee’s recommendations – either through direct implementation or simply as the result of an agency’s own initiative. With this view in mind, a substantial number of the recommendations that OGIS has designated as “completed” in our view fall within the category of still “in progress,” and have been treated as such in our work this term.

C. Data Collection

In addition to reviewing the OGIS dashboard, the following steps were taken to examine the previous 51 recommendations:

1. Interviewing OGIS and OIP staff to get further details about the present status of their continuing efforts in furtherance of past recommendations.
2. Reviewing previous reports and data collection by OGIS, OIP and other sources relevant to previous recommendations. This effort also included questions from this term’s Resources Subcommittee survey of agencies conducted in Summer 2023 through the American Society of Access Professionals.
3. Reviewing annual Chief FOIA Officer Reports from FY 2022 and 2023, which contain information from federal agencies particularly relevant to nine of the Committee’s past recommendations.

4. Conducting an online survey of Chief FOIA Officers in Fall 2023 from selected agencies to gather information about previous recommendations not otherwise publicly available. [See Appendix A for the results of the Survey (to come).]
5. Interviews conducted virtually with approximately 15 federal FOIA officials to learn more about their agencies' implementation of specific recommendations, and their views on raising the visibility of the FOIA Advisory Committee and its recommendations in future terms.

D. Recommendations

Recommendation #1: We recommend that OGIS and OIP follow up with selected agencies and other government components in an effort to increase compliance with past recommendations of the FOIA Advisory Committee.

As our final Subcommittee Report will explain in greater detail, we categorized past recommendations of the Advisory Committee into the following categories:

GREEN: Recommendations that have been fully implemented by OGIS, OIP, or some other component of government. (Two examples given above in "Overview" section.)

BLUE: Where a substantial number of agencies and other components of government (hereinafter "agencies") have made progress in fulfilling the recommendations made by the advisory committee.

YELLOW: Where some but less than a majority of agencies have made progress in fulfilling the recommendations made by the Advisory Committee.

RED: Recommendations where it appears most agencies have made little or no progress in fulfilling the recommendations made by the Advisory Committee.²

For our purposes in this interim report, we are singling out a small sample of recommendations that we believe fall within the "red" or "yellow" category, and warrant special attention on the part of OGIS and OIP to investigate and take further actions on as appropriate due to their universal importance throughout the Executive branch. While a number of other recommendations also fall within these categories, we have chosen to highlight here ones where we see the greatest internal benefit both to agency staff and the requester community.

² One additional recommendation, 2022-20 concerning elevating OGIS' status to a direct report to the Archivist, has been rejected.

[Recommendation 2020-17](#)

We propose that the Chief FOIA Officers Council recommend that agency leadership annually issue a memorandum reminding the workforce of its responsibilities and obligations under FOIA and encouraging the workforce to contact the agency's FOIA officer for assistance with the FOIA process.

Comment: Our survey found that only two out of 21 agencies issue annual memoranda reminding employees of their FOIA responsibilities and obligations. The Subcommittee continues to believe that issuance of an annual agency-wide memorandum on FOIA by all federal agencies would publicly show continued support for FOIA on a government-wide basis. If OGIS and OIP are unable to convince the CFO Council that senior officials at each agency (including agency CFOs) issue an annual memorandum reminding the workforce of its responsibilities and obligations under FOIA, then we believe OIP should take on the responsibility for issuing guidance urging agencies to do so on their own accord.

[Recommendation 2020-03](#)

We recommend 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.

Comment

In the time since the issuance of this recommendation, agencies have confronted the need to meet a deadline of August 2023 set in a joint Justice Department and Office of Management and Budget Memorandum (M-19-10) requiring all agencies to have interoperability with FOIA.gov, the National FOIA Portal. In addition, the then-existing Foiaonline.gov portal used by approximately 22 agencies was decommissioned as of September 2023. On August 21, 2023, the Co-Chairs of the Chief FOIA Officers Council issued a memorandum for Chief FOIA Officers reminding them of the upcoming interoperability deadline, as well as the need to take appropriate steps for agencies using FOIAonline.gov to ensure the preservation of data when transitioning to a new system.

Our review of the latest round of CFO annual reports shows that a substantial number of agencies are reporting some measure of interoperability with FOIA.gov. However, from public reporting³⁴ and members of our Subcommittee's own anecdotal experience, we believe that there are ongoing gaps in agencies being fully compliant with the OMB

⁴ See, e.g., Rebecca Heilweil, "Some agencies fall behind on FOIA.gov interoperability requirements," FedScoop (Sept. 15, 2023), <https://fedscoop.com/some-agencies-fall-behind-on-foia-gov-interoperability-requirements/>.

deadline. We also have not had time to survey agencies with respect to their compliance in preserving records formerly residing in the foiaonline.gov repository.

We understand that OIP collects information on FOIA.gov interoperability in their annual CFO reports. The ongoing importance of ensuring that all agencies are compliant with interoperability requirements for the FOIA.gov portal supports a renewed examination on the part of OIP, OGIS, and a future term of the FOIA Advisory Committee, as to how agencies are complying with the Committee's recommendation. This could be accomplished in the form of surveys and interviews conducted under the auspices of this Committee during its next term.

Recommendations [No. 2020-22](#) & [2020-11](#)

22: The Archivist should work with other governmental components and industry in promoting research into using artificial intelligence, including machine learning technologies, to (i) improve the ability to search through government electronic record repositories for responsive records to FOIA requests and (ii) identify sensitive material for potential segregation in government records, including but not limited to material otherwise within the scope of existing FOIA exemptions and exclusions.

#11: We recommend that the Office of Information Policy provide further guidance on the use of e-discovery tools to assist agencies in meeting their obligations to conduct an adequate search of electronic records, including but not limited to email in Capstone repositories.

Our survey asked two questions of agencies applicable to these recommendations. In one question, only 23% of agencies (5 out of 22) stated that they employed some form of machine learning or artificial intelligence in the FOIA process. A second question asked whether agencies use e-discovery tools to search for records, and here 77% of agencies (17 out of 22) reported that they do in some form.

For reasons that have been discussed at greater length in these prior recommendations, as well as in a proposed recommendation of this term's Modernization Subcommittee regarding the issuance of one or more RFI's on the subject of AI and FOIA, we believe that the accelerating pace of electronic records being created and stored within agency repositories demands greater attention to how state of the art search methods can be used to make FOIA workflows more efficient. Moreover, it is not clear that the e-discovery tools agencies report to be using are sufficient to meet the challenge of unprecedented volumes of email preserved in Capstone repositories, and all other forms of electronic records found in networks, shared drives, and structured databases.

We believe OGIS and OIP should continue to work closely with the CFO Council's Technology Committee in furtherance of these twin recommendations.

[Recommendation No. 2022-10](#)

We recommend that agencies proactively publish FOIA logs in the agency's electronic reading room (often referred to as FOIA Libraries) on an ongoing basis, at least quarterly. Agencies should allow for the full text searching of FOIA logs. [See [link](#) for full description of recommendation.]

Comment: Our survey found that 52% of agencies fail to post FOIA logs in searchable structured data formats. On behalf of the greater FOIA requester community and civic society organizations, the non-governmental representatives on this term's Committee believe that greater implementation of this recommendation will be of substantial benefit to requesters being able to identify and obtain previously released records, including in the ways identified in the commentary to the recommendation. Additionally, with the increasing availability of automation tools, production of FOIA logs with the metadata elements identified in the recommendation will greatly aid in efficient searches of their contents.⁵

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As stated in the "Overview" section, the Subcommittee will be providing a full list of findings with respect to past recommendations in our final report.

Recommendation # 2: We recommend that OIP include one or more specific questions in annual CFO reports requesting agencies to report on activities that they have implemented consistent with selected FOIA Advisory Committee recommendations.

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 latest CFO report is divided into four sections:

- Section I: FOIA Leadership and Applying the Presumption of Openness;
- Section II: Ensuring Fair and Effective FOIA Administration;
- Section III: Proactive Disclosures
- Section IV: Steps Taken to Greater Utilize Technology; and
- Section V: Steps Taken to Remove Barriers to Access, Improve Timeliness In Responding to Requests, and Reduce Backlogs;

These sections cumulatively call upon agencies to respond to 54 questions.

As will be further detailed in our final report, we were able to track how agencies have implemented a select number of the FOIA Advisory Committee recommendations directly from the agency CFO reports themselves. We believe it would be useful, however, if the CFO report expressly referenced the existence of FOIA Advisory Committee recommendations, and contained one or more prompts where agencies could be given the opportunity to explain how

⁵ We are aware of commercial requesters' use of FOIA logs for their own purposes. See Margaret Kwoka, "FOIA, Inc.," 65 *Duke Law Journal* 1361-1437 (2016), <https://scholarship.law.duke.edu/dlj/vol65/iss7/2>.

specific policies they have put into place correspond to the best practices recommended by this Committee.

We leave 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 our Committee's recommendations, either through implementing them directly, or creating initiatives that are consistent with the 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) but limiting to one or more questions to FOIA Advisory Committee recommendations from the latest term.
- (iv) Embedding references to applicable FOIA Advisory Committee recommendations within the text of the existing question set in CFO reports.

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