

## I. STAFF/PERSONNEL RESOURCE RECOMMENDATIONS

1. **Recommendation 1:** We recommend that the Office of Personnel Management (OPM) add the 0306 Government Information Specialist (GIS) Job Series to the direct hiring authority list. If implemented, this recommendation could increase the speed with which agencies can fill vacant full-time equivalent (FTE) positions.
2. **Recommendation 2:** 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 OPM. This would allow interested applicants to be considered for selection across multiple agencies.
3. **Recommendation 3:** We recommend that 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.
4. **Recommendation 4:** 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. If implemented this recommendation would increase the rate of contractor hiring for those agencies that have determined a need for contractor support.

## II. RECOMMENDATION JUSTIFICATIONS

James Madison once noted, “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps, both.”<sup>1</sup> 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.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214,242 (1978). As President Obama stated when he signed the FOIA Improvement Act of 2016, “In our democracy, the FOIA serves as a vital tool to keep citizens informed about the operations of their government.”<sup>2</sup> As President George W Bush explained in Executive Order 13,392,

The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency,

---

<sup>1</sup> Letter from James Madison to W.T. Barry (August 4, 1822)

<sup>2</sup> Signing statement of the FOIA Improvement Act of 2016, June 30, 2016.

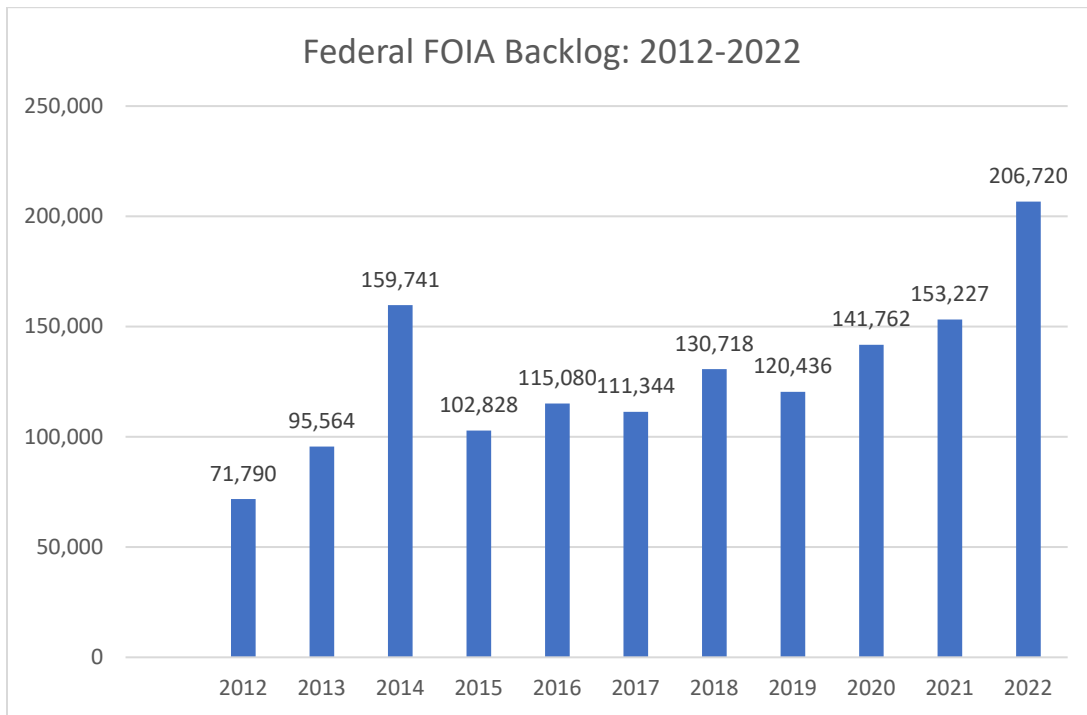
subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

However, FOIA's value is undermined when federal agencies are unable to respond to large numbers of FOIA requests for excessive periods of time.

### *FOIA Backlog & Previous Efforts and Backlog Reduction*

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. In 2022, that number stood at a staggering 206,720. The trend over that decade has been a steady increase in the number of backlogged requests (see Figure 1). The 2022 total backlog represents a 35% increase from 2011 and a 187% increase from 2012.

Figure 1



These increases have come despite efforts by administrations of both parties to reduce FOIA backlogs. Examples include:

- 2005: Executive Order 13392 (2005): President Bush ordered agencies to develop plans to reduce their FOIA backlogs.
- 2009: OMB Open Government Directive (2009): OMB required agencies with significant pending backlogs to reduce them by 10 percent each year.
- 2014: Guidance on Reducing Backlogs and Improving Timeliness (2014): The Office of Information Policy (OIP) held a best practices workshop on reducing backlogs and

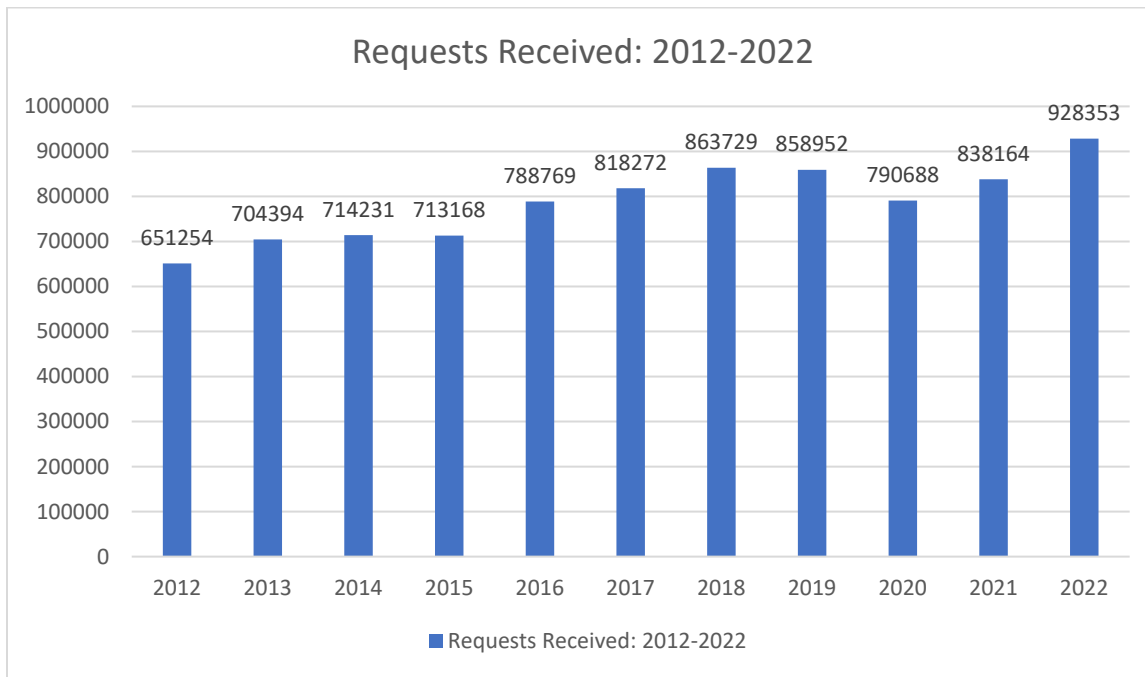
improving timeliness, then issued guidance highlighting four methods: (1) utilizing resources effectively, (2) routinely reviewing metrics, (3) emphasizing staff training, and (4) obtaining leadership support.

- 2016: FOIA Improvement Act of 2016: Among other things, it created the Chief FOIA Officer Council and vested it with the mission of finding ways to increase collaboration and explore innovative ways to improve efficiency in administering FOIA and increasing transparency.

Unfortunately, despite these bipartisan efforts, the data shows that backlogs continue to increase.

There is no one single cause for the increase in the backlog. As Figure 2 demonstrates, the number of FOIA requests received across the federal government has increased during this period.

Figure 2



However, this alone does not explain the backlog.<sup>3</sup> Among other investigators, GAO has undertaken several attempts to examine why backlogs have increased, and has identified a variety

<sup>3</sup> See, e.g., *Freedom of Information Act: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs*, GAO-22-105040 (Washington, D.C.: Jan. 26, 2022); *Freedom of Information Act: Federal Agencies' Recent Implementation Efforts*, GAO-20-406R (Washington, D.C.: Mar. 11, 2020); *Freedom of Information Act: Agencies Are Implementing Requirements, but Additional Actions Are Needed*, GAO-18-365 (Washington, D.C.: June 25, 2018); *Freedom of Information Act: Department of Labor Can Improve Management of Its Program*, GAO-16-248 (Washington, D.C.: June 2, 2016); *Freedom of Information Act: DHS Should Take Steps to Improve Cost Reporting and Eliminate Duplicate Processing*, GAO-15-82 (Washington, D.C.: Nov. 19, 2014); *Freedom of Information Act:*

of causes, such as an increase in the volume and complexity of request, the pandemic, obsolete technology, FOIA office structures and processes, increases in litigation, staffing concerns, and so on. Causes may vary between agencies. However, one issue arises again and again, both in GAO reports and otherwise that has not been addressed on a systematic basis: staffing.

Inadequate staffing has been repeatedly reported as a significant causal factor for the backlogs. In 2008, the Department of Justice submitted a report to the President regarding agency's efforts in implementing Executive Order 13,392. *Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information"* (May 30, 2008). DOJ noted that numerous agencies reported staffing challenges as a reason why they were unable to reduce their FOIA backlogs.

As reported last year, and again this year, difficulties encountered with staffing was a very common reason given for a deficiency. Indeed, thirteen agencies identified this as a reason for a deficiency. For example, a component of the Department of Justice was unable to meet a backlog reduction milestone and make improvements to its Website because of the loss of personnel during this reporting period. Also, the Executive Office of the President's Council on Environmental Quality was unable to meet its milestone of publishing new regulations and developing a new handbook, due to the loss of employees; as a result, the office was understaffed for the majority of this reporting period.

*Id.* at 17. DOJ thus recommended that agencies assess the adequacy of their FOIA staff as part of their backlog reduction plans.

The GAO reported in January 2022 that staffing issues are still a problem and contribute to FOIA backlogs.

Our selected agencies also cited staffing-related issues as limitations to addressing their backlogs. For example, USDA officials stated that the department lost staff to other agencies in part due to a 2018 agency policy that limited telework options. Officials said that it took time to hire and train new employees, which contributed to slower FOIA processing times in 2019 and 2020. FBI stated in its backlog reduction plan that current staffing levels of its FOIA program cannot keep pace with incoming demand and backlog reduction efforts, which were exacerbated by an increase in litigation workload.

GAO-22-105040 at p. 44.

Accordingly, the Resources Subcommittee examined whether agencies have adequate staffing to address their FOIA caseloads, and if not, what measures might be available to assist

---

*Additional Actions Can Strengthen Agency Efforts to Improve Management*, GAO-12-828 (Washington, D.C.: July 31, 2012).

them increase their staffing. Obviously, staffing is a function of budget, and the Resources Committee believes that Congress and the President should increase the budgetary resources developed to FOIA compliance. That is the subject of a separate paper, however. The discussion here will focus on ways to fill existing FOIA positions and supplement FOIA staff during workload surges.

***Agency Personnel Perspective on FOIA Staffing***

During Spring 2023, the Resources Sub-Committee developed a survey to administer to FOIA professionals that asked questions regarding issues of technology, training, financial and staff resources. In June 2023, the survey was administered at the 2023 meeting of American Society of Access Professionals (ASAP). 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).

**What do you believe is a greater need in your office?**

#	Answer	%	Count
1	The need for more staff	53.15%	76
2	The need for additional FOIA technology	20.98%	30
3	Training	16.08%	23
5	Other-Explain	9.79%	14
	Total	100%	

The survey also found that many professionals were considering changing jobs, and that the chief reasons motivating them to go were inadequacies in staffing at their current agency, either the total number of FOIA professionals or the grade levels.

**Why have you considered leaving your current position?**

#	Answer	%	Count
1	Higher Grade Opportunities	23.21%	39
2	Lack of Agency Resources to Effectively Perform in Current Tasks	22.62%	38
3	Retirement	8.93%	15
4	Non-Government Opportunities	5.95%	10
5	Move to Different Government Agency/Department	19.05%	32

6	Morale Concerns in Current Position	20.24%	34
	Total	100%	168

The subcommittee also interviewed dozens of senior FOIA officials across the government. The key theme was that nearly every interviewee stated that staffing was the largest concern their FOIA office confronted. This is consistent with and confirms the survey data. The concern took several forms.

### Staff Retention

First, agencies have difficulty retaining qualified staff. Many have career ladders that max out at the GS-12 or GS-13 level. Employees who are at or near the maximum level of their ladders seek out higher graded FOIA positions at other agencies. As one Cabinet agency FOIA official put it, “upward mobility is limited, and people will leave for higher-paying jobs.” An official at a mid-sized financial regulatory agency reported confronting a similar problem. The solution would be higher graded positions, but those are difficult to obtain, not just because they require additional funding, but also because the agency’s human resources department was reluctant to classify Government Information Specialists positions at higher grades. An official at a second Cabinet agency also described failed efforts to convince that agency’s human resources department to classify GIS positions at grades higher than GS-13, meaning both that there are inadequate opportunities to advance and that supervisory employees are not excerpt in FOIA.

### Filling Open Positions

Second, agencies have difficulty filling open positions. Partly, this is a function of GIS positions being graded too low, but it is often because the hiring process for GIS positions is slow and cumbersome. A FOIA official at a Cabinet agency stated that the agency had a “considerable number” of FOIA positions it had not been able to fill. That agency had put considerable effort into innovative ways to locate and recruit candidates from colleges, but the posting process simply took too long to reliably bring these candidates in. A FOIA official at a small financial regulatory agency reported the same problem. That agency had lost a number of qualified recruits because the process of posting the position took months. Another Cabinet level agency described difficulty in filling open positions due to the lengthy posting process.

### Employee Expertise

Third, some agencies are being forced to make do with employees who handle FOIA work on a part-time collateral duty basis. One Cabinet agency complained that its FOIA staff did not have the expertise needed to handle a large volume of matters. Although that official is trying to build a professional FOIA staff, the agency’s human resources department resists classifying GIS positions at higher grades.

### **III. RECOMMENDATIONS IN FULL**

**Recommendation 1: We recommend that the Office of Personnel Management (OPM) add the 0306 Government Information Specialist (GIS) Job Series to the direct hiring authority list.**

One of the key frustrations the Subcommittee heard from FOIA officials both in survey responses and during interviews was the difficulty in hiring FOIA staff. At present, agencies may hire GS-0306 Government Information Specialists (GIS's) only through the competitive hiring process. That process can be slow and cumbersome and, according to FOIA officials, has contributed to a shortage of qualified Government Information Specialists across the federal government.

Our interviews of FOIA employees and managers across the federal government revealed that one reason why a backlog in responding to FOIA and Privacy Act requests has grown is that managers are unable to find enough qualified Government Information Specialists to manage the caseload. Several FOIA managers mentioned that while they thought they had enough fully funded FTE's to handle their agencies' workload, they have been unable to fill those positions. A key problem is that postings for these positions take too long 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. Specifically, OPM has authority under 5 U.S.C. § 3304 to issue regulations granting agencies the authority to engage in direct hiring if there is a severe shortage of qualified candidates or a critical hiring need. Section 3304(a)(3) allows OPM to issue rules that “as nearly as conditions of good administration warrant, for . . .

(3) authority for agencies to appoint, without regard to the provision of sections 3309 through 3318, candidates directly to positions for which—

(A) public notice has been given; and

(B) the Office of Personnel Management has determined that there exists a severe shortage of candidates (or, with respect to the Department of Veterans Affairs, that there exists a severe shortage of highly qualified candidates) or that there is a critical hiring need.

The Office shall prescribe, by regulation, criteria for identifying such positions and may delegate authority to make determinations under such criteria[.]

5 U.S.C. § 3304(a)(3).

OPM has exercised this authority with respect to a range of job series. Examples include:

- Nurse, GS-0610, GS-0620
- Pharmacist, GS-0660
- Fishery Biologist, GS-0482
- Data Science, GS-1560

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

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

During its due diligence, the subcommittee identified a few potential considerations with direct hiring authority for 0306 Government Information Specialists. First, it may make an agency's ability to retain its own GIS's more difficult. If agencies can engage in direct hiring, they can more easily poach GIS's from other agencies. This may be true to an extent, but it isn't clear how much of a new problem direct hire authority would create. Federal employees tend to leave their agency for another federal job either when working conditions are poor or when they have reached the full promotion potential for their current position. This already happens with GIS's and will continue to occur regardless of whether direct hire authority exists.

Direct hire authority can help with bringing in candidates from the private sector at various levels of experience. For instance, agencies have many tools to reach and recruit college students and new graduates. In addition to on campus recruiting, there are software applications such as Handshake that allow for online meetings with college students or even virtual job fairs.<sup>4</sup> There also internships that can expose students to FOIA work. However, as a general matter, interested students and graduates must still compete for FOIA positions. One FOIA chief officer described her frustration at trying to recruit newly graduated college students only to have the posting and hiring process drag on so long that the students received another offer that they accepted.

Other sources of potential recruits in the private sector include paralegals who no longer wish to work for law firms or other private sector law firms and document reviewers or other employees at eDiscovery firms and temp agencies. Recruiting and hiring of such individuals is also hindered by the need for competitive hiring.

---

<sup>4</sup> One cabinet-level FOIA official touted Handshake as providing a very effective tool for recruiting college students.



Beyond this, direct hire authority may facilitate bringing federal employees into the FOIA realm from other job series. One subcommittee member reports that his FOIA office has successfully transitioned into FOIA former administrative and contracting officers who had maxed out their career ladders, IT specialists, and paralegals and attorneys. Talented individuals in each of these job series, and probably others, can make significant contributions to a well-run FOIA office. The utility of attorneys and paralegals is clear. As FOIA work becomes more dependent upon technology, employees with an IT background can be of considerable assistance. Employees who once worked as administrative or contract officers bring not only substantive knowledge useful for addressing FOIA requests in those areas, but also skills in drafting correspondence, interacting with people, and processing documents.

Another set of potential concerns relate to direct hire authority in the federal government generally. Specifically, some believe that direct hiring represents an attack on the veterans preference or may permit cronyism. Neither of these criticisms hold up. Both were raised by commentators when OPM proposed Section 3304(d). As OPM explained when it issued the final rule, it was taking steps to mitigate against both risks:

The use of the [direct hiring] authority is subject to Merit System Principles, which include requirements that selection and advancement be determined solely on the basis of relative ability, knowledge and skills, regardless of the hiring authority used to fill a position. . . . In addition, OPM will take the following steps to help ensure this DHA is used appropriately by Federal agencies: (1) OPM will update its guidance on DHA at <https://www.opm.gov/policy-data-oversight/hiring-information/direct-hire-authority/> with an emphasis to hiring managers and human resources personnel that when using DHA agencies are required to employ an objective selection process, such as selecting qualified candidates (including individuals entitled to veterans' preference) as they are found; (2) OPM will provide agencies with interactive sessions on how to use DHA, aimed at hiring managers and human resources personnel, through a variety of media; (3) OPM will review and monitor agencies' use of this authority, including hiring patterns, etc. Furthermore, the proposed regulation requires agencies to notify OPM when an agency head authorizes DHA and to provide to us the justification on which the approval was based. OPM is retaining this requirement in the final rule so that OPM will know which agencies are using this DHA, and can provide oversight to ensure that it is being used appropriately.

84 Federal Register 64 at 12873.

In addition, OPM will rely on a variety of data sources to monitor how DHA's under this authority are being utilized, to include the availability of qualified applicants as captured through USAJOBS and USASTAFFING data, nationwide labor trends on the availability of IT specialists in the general labor pool, the results of agencies' past attempts to fill IT jobs through other hiring mechanisms, the number of pass over request made for preference-eligible veterans initially deemed to be qualified for these DHA covered IT positions, and the number of selections of qualified

preference-eligible veterans hired under this authority. In addition OPM's Merit System Accountability and Compliance reports, which are periodic reviews of agency hiring practices, will also serve provide an objective basis on which to gauge how agencies are using this DHA.

*Id.* at 12874. OPM could take similar measures here to guard against those same risks.

One final point is that OPM should not impose a term limit on 0306 direct hires the way it has in other job series. In the context of IT professionals, OPM limited the term of employees hired pursuant to Section 3304(d) to eight years. OPM explained that this limit made sense given that IT professionals tend to move between jobs, whether in the public or private sectors, and it wished to “attune” its rule to this reality.

We are adopting the time limits on appointments as proposed. Our rationale for doing so is to attune these rules with the hiring patterns of the twenty first century, in particular those of the IT workforce. Agencies are making greater use of time-limited employees than in the past and are expected to continue to do so. Likewise, many individuals prefer Federal employment that is characterized by a time-limited or project nature, with movement in and out of public service, rather than the traditional 30-year career model.

84 Federal Register 64 at 12873. This rationale would make little sense with respect to FOIA employees where movement between the public and private sectors does not begin to approach that apparently seen among IT professionals. Indeed, a time limit would be counterproductive because there is greater need to build a qualified, stable FOIA workforce in order to ensure that the government is living up to its obligation of transparency as required in the FOIA.

**Recommendation 2: 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 OPM.**

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. The details on how the process works are described on OPM's website: <https://www.chcoc.gov/content/new-talent-pools-shared-certs-feature-usajobs%E2%80%99-agency-talent-portal>

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 Subcommittee representatives 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 participate, 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 in order to assess whether pooled hiring is effective at finding suitable FOIA staff and/or what improvements should be made.

**Recommendation 3: We recommend that 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.**

As discussed above, agencies reported to the Resources Subcommittee that they have been experiencing problems retaining FOIA staff. Employees have limited means of advancement and have been leaving for higher paying jobs at other agencies. These agencies also report that they are having difficulty in convincing their human resources departments to classify higher graded FOIA position descriptions.

Creating a new position in the federal government can be a difficult process. The agency must have the budget available to pay salary and benefits associated with the position, and it must have a position description classified at the appropriate grade.

As noted above, the Subcommittee is submitting recommendations that appropriations to FOIA programs be increased. The issue of classifying position descriptions is complex because classification is handled by each agency's human resources department. OPM issues guidance to agencies, but the final decision generally rests with the agencies.<sup>5</sup>

Classification entails determining the appropriate pay grade for the set of duties for a specific position. The more complex or difficult the duties, the higher the appropriate pay grade. For example, if the position involves managerial duties, it will be classified at a higher pay grade than one that does not.

During the classification process, there may be disagreements between a program office and the human resources department. The business unit may believe the position description deserves a higher pay grade than the human resources department does. Accordingly, the process often involves negotiation and debate over a position description, especially at higher grades, such as GS-14 and 15.

Another aspect of this issue is whether a position will be part of a career ladder. A career ladder allows employees to progress from one grade to the next higher after a certain period of time if employees demonstrate that they are able to perform at the next higher grade. In other words, a career ladder provides the employee with a path for advancement. Combined with progression through pay steps in each grade, a career ladder allows agencies a better chance of

---

<sup>5</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-schedule-positions/standards/0300/g0306.pdf>

retaining staff. Whether to put a position in a ladder is also determined by the human resources department and can also be a subject of disagreement between the program office and the human resources department.

Having exemplars of position descriptions graded by other agencies at a particular grade level can be helpful to the 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 other agencies. However, if numerous agencies have graded a position a certain way, then HR 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 may yield an example or two, but the means most often used is contacting one's network of contacts 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 website. We suggest that the Council solicit members for copies of PDs used by their FOIA programs and make them available. The Council could issue supplemental requests on a periodic basis.

**Recommendation 4: 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.**

Given the difficulties and delays in federal hiring and fluctuations in the volume and complexity of FOIA workloads, some agencies need to procure contractor services to augment their FOIA staff. Federal procurements are labor intensive and time consuming, but the 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 labor category, or GSA schedule that specifically targets the universe of FOIA performative tasks that could be completed by FOIA contractors. Creation of a FOIA Labor Category and/or 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/or FOIA backlogs.

Procurements by federal agencies are governed by the Federal Acquisition Regulation (the "FAR"). The FAR requires agencies to engage in numerous steps before conducting a procurement. For instance, the agency must conduct market research. *See, e.g.*, FAR Subpart 10.001(b)(2). In the context of contractor support, an agency must examine what services are available, how many potential bidders may exist, how much services typically cost, and so on. *Id.* at (b)(3).

Next, the agency must begin drafting the solicitation. *See* FAR Parts, 11, 16. The most important features of a solicitation are the requirements, i.e., what does the agency require? The requirements must be drafted with sufficient precision and clarity to provide adequate notice to potential offerors of what the agency expects so that the eventual awardee can be held accountable

for its performance. The agency must also decide on a contract type. Should the contract be one for a firm fixed price – one in which the price for the project/volume of work is preset? Or should it be for labor hour – one in which the vendor charges by the hour? Or should the agency utilize another structure altogether?

Drafting the solicitation can be an extremely time consuming and labor-intensive effort. Depending on the agency, drafting the document can involve multiple rounds of engagement, drafting, review, and negotiation between the agency’s business unit, procurement department, and lawyers. Ultimately, however, failure to properly draft the solicitation puts the procurement and potential success of the contract in jeopardy.

Once the solicitation is finalized, it is put on the street for bids. *See* FAR Part 5. The solicitation period must be long enough for potential bidders to notice and respond to the package – if vendors have been identified as potential bidders in market research the agency may send the solicitation directly to those vendors. Typically, there is a question-and-answer period with potential offerors.

The agency will form a technical evaluation panel (TEP) to consider which offer best meets the solicitation requirements, generally selecting vendors based on low price, technically acceptable, or a price/technical tradeoff. *See* FAR Subpart 15.3. Disappointed offerors might file protests which can be agency-level or with the GAO or the Court of Federal Claims. *See* FAR Subpart 33.1. A protest could be based on a variety of grounds. It can be based on the solicitation. Were the requirements unduly restrictive? On the other extreme, were they ambiguous? Does an offeror have an organizational conflict of interest?

The protestor could also protest the award, claiming that the offers were not evaluated in accordance with the solicitation, or that a particular vendor was improperly favored over another. Protests take months to resolve. If the protest goes to the GAO, a decision is supposed to be issued within 100 days. *See* FAR Subpart 33.104(f). If the agency loses, it might need to redo the procurement and pay the prevailing party’s attorneys’ fees.

This is a lot of text to say that federal procurements are lengthy, time and effort consuming, and bear some risk. Because of this, Subpart 8.4 of the FAR was created to allow the GSA to award umbrella contracts to vendors for a variety of goods and services. Agencies need only to write a task order solicitation against the relevant schedule. The task order still must reflect the terms of the contract, the exact goods or services required, pricing, and so on, but this is much simpler than solicitation for full and open competition under FAR Part 15. Agencies can also issue Blanket Purchase Agreements (BPAs) under GSA schedules, further simplifying their ability to place orders for services as agency needs arise. Among other things, GSA offers agencies free market research as a service (“MRAS”) to aid agencies in using their umbrella contracts.

Using the GSA schedule can save agencies months of effort and expense. GSA has already negotiated the contract clauses and general contract terms, meaning the agency should not have to. GSA has already deemed vendor pricing “fair and reasonable” meaning the agency need not address that analysis. There is also a higher GAO protest threshold, i.e., \$10 million for civilian agencies, greatly reducing the risk of procurement litigation.

At present, FOIA officers use a variety of codes from the GSA schedule to attempt to procure FOIA contractors. There is at least one category that includes FOIA support services, Legal Support Solutions, Category [541611LIT](#), but it is so broad that it sweeps in all sorts of products and services that do not relate to FOIA:

[i]ncludes a wide range of services and products that aid customers in searching and retrieving, obtaining, organizing, analyzing and presenting evidence or materials for legal matters. Services, products and solutions include, but are not limited to: eDiscovery, Freedom of Information Act (FOIA) request, legal hold, document acquisition, document preparation and organization, data extraction from forensic images, document analysis, technical support, and project management. Includes any supplies and/or services necessary to provide a total litigation support solution.

Legal Support Solutions is extremely broad, and FOIA staffing support is but one small component within this description. This labor category is primarily geared towards electronic discovery and discovery support. Not surprisingly, most of the vendors identified on GSA's website in connection with this category are discovery support vendors. Moreover, while the category includes staffing support, it also includes software vendors and system procurement.

#### **Finding vendors who provide FOIA staffing support in this category is not an easy task.**

At present, there are over 60 vendors listed on GSA's website under this schedule. Many are IT vendors. Many more provide discovery support in the context of litigation. For more than a few of the vendors, discerning exactly which services they provide by reviewing their registered websites is difficult. Only a handful even claim to provide FOIA staffing support. When agencies solicit FOIA services under these schedules they receive few offerors, or perhaps worse, generic proposals from unqualified staffing firms with no expertise in FOIA work.

FOIA officers also report using other GSA schedules to procure FOIA staffing support services, but that none of them fit the FOIA processing life cycle completely. These include:

1. Category 541611 – Management and Financial Consulting, Acquisition and Grants Management Support, and Business Program and Project Management Services: “Provide operating advice and assistance on administrative and management issues. Examples include: strategic and organizational planning, business process improvement, acquisition and grants management support, facilitation, surveys, assessment and improvement of financial management systems, financial reporting and analysis, due diligence in validating an agency's portfolio of assets and related support services, strategic financial planning, financial policy formulation and development, special cost studies, actuarial services, economic and regulatory analysis, benchmarking and program metrics, and business program and project management.”

2. Category 541110 – Professional Legal Services: “Assist agencies with the full spectrum of professional legal support required for the resolution, management and/or disposition of assets held by the Federal Government.”
3. Category 518210DC – Document Conversion and Digitization Services: “Includes scanning of the original document's text and images, converting the information to digital data, transferring the data to a new media file, and formatting the information for use in a document imaging and storage system. Customized coding and indexing options are also available as part of the document conversion process.”
4. Category 54151S – IT Professional Service: “Includes resources and facilities management, database planning and design, systems analysis and design, network services, programming, millennium conversion services, conversion and implementation support, network services project management, data/records management, subscriptions/publications (electronic media), and other services.”
5. Category 561439 – Document Production On-site and Off-site Services: “Includes the necessary equipment (e.g. high-volume digital color copiers, scanners) and personnel required for effective on-site/off-site document production. Also includes single or multiple shift production operations, consumable supplies (paper and transparencies are usually not included), on-going equipment maintenance, and customized agency reports.”
6. Category 561320SBSA – Office Management: “Temporary Staffing (SBSA) Includes temporary administrative and professional staffing.”

**Because none of these categories completely focus on the performative tasks that are 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.**

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 to 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, which would each encompass all tasks necessary for processing a request from start to finish and support the technological tools necessary to bring efficiencies. Possible language for each of these labor categories is described below:

Freedom of Information Act (FOIA) Support Services: Includes a wide range of staffing services that aid customers in responding to FOIA and Privacy Act (PA) requests, such as searching and retrieving, obtaining, organizing, scanning and/or copying documents, conversion of documents or data files to a specified format for use in a document imaging and storage system, analyzing documents or other materials for responsiveness and applicability of FOIA exemptions, preparing draft correspondence for review by federal staff, managing correspondence, and providing legal support. Includes any supplies, services, and/or necessary equipment (e.g. high-volume digital color copiers, scanners) to provide a total FOIA response support solution.

The other should be for electronic FOIA management systems and related software, which would provide an easier path for FOIA officials seeking FOIA related IT systems. Potential language could read as follows:

Freedom of Information Act (FOIA) IT Systems and Software: Includes a wide range of information technology services and products that aid Government Information Specialist and record originators in searching, retrieving, obtaining, organizing, de-duplicating, analyzing, redacting, and packaging documents, correspondence, or materials for delivery in response to FOIA and Privacy Act requests. Includes any supplies and/or services necessary to provide a total support solution.

Separating out these categories from other generic service categories would dramatically ease the burden for a FOIA official looking for an appropriate vendor. It would eliminate vendors whose services have nothing to do with the FOIA and make it easier to target the vendors with the most appropriate expertise and experience.

In our discussions with GSA, GSA expressed some reservations over this recommendation because creating a category in the GSA schedule is not an easy task. However, echoing the words of Madison at the beginning of this recommendation, transparency is essential for the maintenance of a functional republic. The Freedom of Information Act has served as a model of transparency legislation for states and countries across the globe. Given the dramatic increases in FOIA backlogs and requests over the past ten years, we aim to offer practical reforms that we believe will aid the FOIA fulfill its intended mission.