FOIA Advisory Committee
Statutory Reform Subcommittee
Transparency Obligations Working Group

FIRST DRAFT RECOMMENDATIONS

The Transparency Obligations Working Group is proposing statutory reforms to FOIA concerning the substantive obligations agencies have to release records with three goals in mind:

(1) to increase the ease of access to records that are often needed by the public as a means for improving transparency and creating efficiencies for agencies, primarily through affirmative (or proactive) disclosure;
(2) to ensure that FOIA covers all entities with administrative functions that affect the public by clarifying and expanding FOIA's definitional sections; and
(3) to propose targeted reforms to exemptions to reign in their overuse as well as make their application more administrable.

This first set of six recommendations addresses topic # 1 – affirmative disclosure.

Recommendation 1: Add Affirmative Disclosure Categories

FOIA should be amended to mandate proactive disclosure of a set of core documents that are essential to democratic accountability, oversight, and public participation. These include documents related to budget, contracting, governance, and interagency agreements, and should be explicitly included within the scope of 5 U.S.C. § 552(a)(2).

Explanation:

FOIA currently requires agencies to proactively disclose adjudicative opinions, policy statements, staff manuals, frequently requested records, and indexes. However, this framework does not reflect modern expectations around fiscal transparency, intergovernmental coordination, congressional oversight, or public participation. A new subparagraph (F) should be added to 5 U.S.C. § 552(a)(2) to require electronic disclosure of a defined set of additional records. These records are already generated by agencies and often used by the public, but inconsistently disclosed or accessible. In particular, agencies apply the 2016 amendments concerning frequently requested records differently or may not have systems to catch all records subject to them. In addition, the records specified below assist the public in understanding key government operations, formulating more specific and targeted FOIA requests, and encouraging agencies to consider these subject matters carefully prior to disclosure. Finally, consistency in disclosure across government of information essential to evaluating agency performance, spending, and oversight will enable better systematic public oversight.

Newly disclosed records under this subparagraph should be made accessible in compliance with Section 508 of the Rehabilitation Act. Agencies should not remove existing online records solely due to accessibility or space limitations. Where remediation would impose an undue burden, agencies should document that analysis and ensure accessible formats are made available on request.

This amendment is grounded in recommendations from Accountability 2021, the 2016–2018 FOIA Advisory Committee Report, and ACUS Recommendation 2023-1.

Recommended statutory changes:

Add a new subparagraph (F) to 5 U.S.C. § 552(a)(2) as follows:

(F) the following categories of records, which shall be made available for public inspection in an electronic format, subject to subsection (b) and paragraph (8)(A):

(i) the annual top-line budget of each agency within the Intelligence Community, disaggregated by agency;

(ii) organizational charts for each agency, updated at least quarterly;

(iii) complete copy of the contracts and grants awarded by the agency that exceed [a set amount, formulated either in dollars or percentage of agency spending, on which we seek the subcommittee's input];

(iv) all unclassified memoranda of understanding, memoranda of agreement, and interagency or intergovernmental agreements to which the agency is a party, that involve delegation of authority, joint operations, shared funding, or personnel assignments;

(v) an index and summary of all reports produced by an agency's Inspector General that are classified under Executive Order 13526 or successor orders, including the title, classification level, date, and general subject matter;

Each agency shall also maintain a searchable index of the records described in this subparagraph and ensure compliance with Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d), except where compliance would impose an undue burden as determined through analysis published by the agency.

Within six months of enactment, agencies shall be required to publish proactive disclosure plans detailing what records the agency maintains that will be published in the aforementioned categories as well as what additional categories of records agencies will voluntarily publish that are of particular interest to the public. Annually, agencies shall update their proactive disclosure plans and report on implementation progress. The Office of Management and Budget (OMB) shall issue updated guidance under the E-Government Act to standardize presentation, indexing, and cross-linking of (a)(2)(F) records.

Proposed definitions:

For purposes of the proposed amendment to 5 U.S.C. § 552(a)(2), the following definitions shall apply:

Top-line budget:
The term "top-line budget" means the total annual amount of funds appropriated, apportioned, reprogrammed, or otherwise made available for obligation or expenditure by an agency, disaggregated by agency, excluding program elements specifically exempted from disclosure by statute or Executive Order.

Organizational chart:
The term "organizational chart" means a current and complete depiction or listing of all major divisions, components, offices, or directorates of an agency, including the titles and functions of senior officials and their reporting relationships.

Contract, task order, and grant:
The terms "contract" and "grant" shall have the meanings given under the Federal Acquisition Regulation (FAR), the OMB 's Uniform Administrative Requirements for Federal Awards (2 C.F.R. Part 200), and any other applicable regulation or statute governing federal procurement and assistance, and includes recipient, dollar amount, purpose, and contract number

Memorandum of understanding and memorandum of agreement:
The terms "memorandum of understanding" and "memorandum of agreement" mean any formal written agreement entered into by an agency and one or more other governmental entities—whether federal, state, local, tribal, or foreign—concerning the sharing, delegation, or joint exercise of authority, personnel, resources, or functions.

Searchable index:
The term "searchable index" means a digital record listing that includes, at minimum, fields for record title, date, subject, and format, and is structured to support keyword and filtered field-based search functionality accessible to the public without specialized software.

Recommendation 2: Make FOIA Logs Affirmatively Available

FOIA's affirmative disclosure provisions should mandate the ongoing publication of agency FOIA logs on at least a quarterly monthly basis, unless the agency receives fewer than 100 requests per year in which case it could publish them semi-annually. The logs should contain: 1) the tracking number of the request, 2) the date of the request, 3) the name of the requester, unless the requester is a first-person requester seeking access to their own information, 4) the organizational affiliation of the requester, if identified in the request, 5) the subject matter of the request, 6) the status of the request, 7) the date the request was perfected, 8) the result of the request (if closed), 9) exemptions cited, if any, 10), the date on which the request was resolved, 11) the fee category assigned to the request, 12) whether a fee waiver was requested, 13) if a fee waiver was requested, whether it was granted, 14) fees charged to the requester, if any, and 15) whether the request was also processed under the Privacy Act. The logs should be posted in Excel or CSV format and transmitted to DOJ for additional posting on foia.gov.

Explanation:

FOIA logs have proven useful to government policymakers, reporters, and academics alike. Sometimes the use is one that promotes FOIA efficiency: searching the logs can help a requester make a more precise request or request records already produced that would be readily available to the FOIA office. In other instances, the logs have promoted improvements to FOIA administration. The logs are maintained by the agency as part of their responsibilities to track requests and meet statutory deadlines, as well as to report aggregate processing statistics to Congress and the DOJ each year. And most agencies post some form of the logs already, albeit not a standardized one.

On the basis of the prior research supporting these conclusions, it seems entirely feasible for agencies to publish logs on an ongoing basis in a standardized form. This recommendation was made by prior terms of the federal FOIA Advisory Committee and the details of the recommendation are drawn directly from that work. *See* Final Report and Recommendations, 2016-2018 FOIA Advisory Committee; Federal Advisory Committee Recommendation, 2022-10.

Recommendation 3: Ensure Judicial Review of Affirmative Disclosure

FOIA's judicial review provision, 5 U.S.C. § 552(a)(4), should be amended to clarify that district courts have the power to order compliance with agencies' affirmative disclosure obligations, including those under 5 U.S.C. § 552(a)(1) and 5 U.S.C. § 552(a)(2). The amendment should further provide that a requester must exhaust administrative remedies pursuant to FOIA before filing a complaint in district court to enforce (a)(1) or (a)(2).

Explanation:

FOIA's judicial review provision specifies that a district court has jurisdiction "to enjoin the agency from withholding agency records and to order production of any agency records improperly withheld from the complainant." The Ninth Circuit and Second Circuit of the U.S. Court of Appeals have held that this provision empowers a district court to order compliance with affirmative obligations listed in subsections (a)(1) and (a)(2) of the statute. *New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207 (2d Cir. 2021); *Animal Legal Def. Fund v. United States Dep't of Agric.*, 935 F.3d 858 (9th Cir. 2019). The D.C. Circuit has held that it does not. *Citizens for Resp. & Ethics in Washington v. United States Dep't of Just.*, 846 F.3d 1235 (D.C. Cir. 2017). The ongoing circuit split has created uncertainty in the enforceability of FOIA's affirmative disclosure obligations.

If the district courts lacked the power to order compliance with the affirmative disclosure obligations under FOIA, those obligations would become merely advisory. Indeed, other types of enforcement mechanisms, such as the inability of an agency to rely on a document not published as required, only work for a small fraction of records, namely those that are binding legal instruments. Sanctions against government officials that are theoretically available under FOIA are never invoked in reality. For affirmative disclosure obligations to be meaningful, judicial review is necessary. The Administrative Conference of the United States has made a similar

recommendation, ACUS Recommendation 2023-1(7), as has civil society, in a report titled Accountability 2021 authored by OpenTheGovernment.org.

Recommendation 4: Incentivize Alternatives to FOIA Requests

Congress should amend FOIA to require agencies to identify the top three categories of requested records at their agency in their Annual Chief FOIA Officer (CFO) Reports. Agencies should explain either what steps they are taking to create an alternative information delivery mechanism for this category of records or, in the alternative, to justify why an alternative mechanism is not feasible for that agency or desirable for the requester, including, but not limited to, affirmative disclosure (publication) on an ongoing basis, portal access for individual users, and redesign of agency processes to help eliminate the need for such requests.

Explanation:

Increased affirmative or proactive disclosure has long been a policy objective embraced by Congress and executive administrations alike. For example, the FOIA Improvement Act of 2016 amended the Federal Records Act to require agencies to have "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format." 44 U.S.C. § 3102. Similarly, the U.S. Department of Justice (DOJ) experimented with a "release-to-one-release-to-all" policy of publication of all records released under FOIA. DOJ, Proactive Disclosure Pilot Assessment (June 2016). One goal of these policies has been to reduce the need to rely on FOIA.

Similar focus has been brought on first-person requests and the various other delivery mechanisms—including portal access and administrative discovery, among others—that could better meet the needs of first-person requesters and, at the same time, relieve the pressure on FOIA offices to fulfill these requests. *See* Margaret B. Kwoka, Saving the Freedom of Information Act (2021). Some agencies have piloted such efforts, including, for example, the Internal Revenue Service for taxpayer information, the Veterans Health Administration for medical records, and the Executive Office for Immigration Review at DOJ for records of proceedings in immigration court.

This recommendation recognizes the variance between agencies as to the requester community and records that are most often subject to requests and incentivizes agencies to consider appropriate alternatives and justify any decision not to pursue them. This recommendation is based on a recommendation by a prior term of the federal FOIA Advisory Committee. *See* Final Report and Recommendations, 2016-2018 FOIA Advisory Committee.

Recommendation 5: Assist Agencies with 508 Compliance

Congress should amend FOIA to provide that, in lieu of proactively posting 508-compliant FOIA records, agencies may instead post a 508-compliant index of records. This would allow requesters to specifically seek access to 508-compliant copies of records listed in the index. Congress should also devote additional resources to agencies to develop artificial

intelligence tools and technology solutions to address the challenge of eventually making the full universe of records 508 compliant.

Explanation:

Section 508 of the Rehabilitation Act requires federal agencies to ensure members of the public with disabilities have comparable access to publicly available information unless doing so would impose an undue burden on the agency. Remediating documents to be fully accessible can, however, be a costly and time-consuming task for agencies and can be a barrier to agencies seeking to increase affirmative disclosure of records in FOIA reading rooms. Previous FOIA Advisory Committees have made recommendations seeking to accommodate this tension by both investing in greater technological solutions to 508 compliance and by allowing agencies to provide alternative methods for individuals with disabilities to access reading room records. This recommendation stems from that past work. *See* Federal Advisory Committee Recommendation, 2018-04 (recommending OGIS launch interagency efforts to address challenges with 508 compliance through technological solutions); Federal Advisory Committee Recommendation, 2018-06 (recommending that Congress pass legislation to provide additional resources for 508 compliance); Federal Advisory Committee Recommendation, 2022-09 (recommending that Chief FOIA Officers Council establish a working group to study challenges with 508 compliance). Relatedly, in OGIS's 2019 Annual Report for Fiscal Year (FY) 2018, OGIS recommended to Congress that it pass legislation to provide sufficient resources to comply with the requirements of both FOIA and Section 508. OGIS repeated the recommendation in its 2021 Annual Report for FY 2020, and its 2022 Annual Report for FY 2021.

Recommendation 6: Empower Agency Officials

Congress should amend the statute to mandate that the duty to post records to the Electronic Reading Rooms lies with the unit or office that serves as the record custodian for any record subject to FOIA's affirmative disclosure requirement, not solely with the FOIA office. Congress should make clear that it is the obligation of the unit or office responsible for each programming area to ensure that its documents are being gathered, maintained and produced – including in FOIA reading rooms – in accordance with the agency's legal obligations.

Explanation:

It has long been recognized, including in past Advisory Committee recommendations, that FOIA offices are overtaxed, leading directly to the persistent backlog problem that, as of FY 2024, had reached a record 267,056, a 33% increase from the number of backlogged requests reported at the end of FY 2023. *See* U.S. Dept. of Justice, 2024 Annual Report Summary at 11. Current efforts to shrink the size of the federal workforce have, in some instances, even further diminished the number of personnel dedicated to FOIA processing. It is essential to find new ways to expedite FOIA compliance and, where feasible, distribute the workload to relieve overburdened FOIA staff. This is especially true in the context of posting records to an agency's electronic reading room, where the additional requirement of Section 508 compliance applies. According to a National Archives and Records Administration assessment of federal records managers conducted in 2020,

nearly half of the respondents (49 percent) indicated that the agency FOIA office played some roles in ensuring Section 508 compliance, with that responsibility often being shared with agency IT offices or web managers (55 percent), public information offices (17 percent), general counsel offices (9 percent), or other component. Streamlining such processes as the posting of Section 508-compliant records into reading rooms—and, specifically, involving custodial offices—in that process could go a long way in relieve pressure on FOIA staff while enhancing FOIA compliance overall.

At the state level, FOIA statutes already recognize–some quite explicitly–that FOIA fulfillment is the responsibility of all government employees, not just those assigned to public-records offices. For example, the Wisconsin Open Records Law states: "[P]roviding persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information." Wis. Stat. § 19.31. Similarly, federal law and policy should recognize that being the custodian of a record carries with it the responsibility to ensure that the record is maintained and produced in accordance with law, including ensuring that eligible documents are posted to electronic reading rooms. *See also* March 19, 2009 AG Holder Memorandum, at 2 ("FOIA Is Everyone's Responsibility: I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government."