



**FOIA Line-Item Budgets, Now.**

**Let the citizens be heard!**

**Retire FOIA Bob**

**PUBLIC COMMENT**

**September 15, 2022**

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# Preface

## **You Tube September 14, 2022 FOIA Advisory Committee meeting video – No chat comments**

<https://www.youtube.com/watch?v=IF735Rdzcv0>

## **FOIA line-item budgets.**

- I believe every agency budget should contain a line item for FOIA supported by what they would do to improve FOIA – increase staff and grade levels, reduce backlogs, etc. Hard-working FOIA professionals are drowning
- Place the onus on OMB and Congress to provide funding. In my conversations with Senate and House staff, Congress is receptive to supporting agency line-item budgets.

## **Lack of OGIS mediation hurts us all.**

- OGIS mediation by statute is supposed to reduce litigation.
- Litigation is soaring, draining resources for processing requests and increasing backlogs.
- I do not believe that OGIS has done a single mediation case in years. OGIS owes that answer to this Committee.
- Closing 4,100 mediation cases with three people, if that can be believed, is one every hour and a half and that does not include bathroom breaks or a cup of coffee.

## **Let the citizens be heard!**

- As is always the case, Alina Semo filibustered the fifteen minutes for oral public comments taking the first call (mine) at 1:56:20 in a two-hour meeting.
- Then OGIS disconnected my call mid-sentence (See transcripts at page 65 and my prepared oral comments to see why).
- Worse yet, OGIS/DOJ OIP removed the already entered YouTube chat comments from the September 8, 2022 FOIA Advisory Committee meeting, which are Federal Advisory Committee Act (FACA) records that “shall be available for public inspection.” Alina, please put them back. Post my written comments to the September 8, 2022 meeting. Include them in your “complete and accurate” meeting minutes or the Committee should not vote to certify them.
- Alina also admonishes Committee members not to make substantive comments in the all-panelists chat which is wrong. Not everyone can talk during the presentations and these comments are germane – essential - to a FACA meeting.

## **Retire FOIA Bob.**

- At some point I may stop showing up at FOIA meetings and submitting public comments due to declining health. There are only so many good hours in a day, and this is not how I want to spend them.
- I hope this Committee will consider my many public comments recommendations to improve FOIA for everyone.

# Outline

- [Hammond Prepared Oral Comments](#)
- [Hammond Chat Comments](#)
- [A Sailor's Tribute to The American Soldier](#)
- [YouTube Raw Transcript](#)
- [Senate Hearing on FOIA. DOJ's Lack of Enforcement + Malfeasance + Open The Government Statement](#)
- [Senators Unite to Slam FOIA Compliance + POGO](#)

# Hammond Prepared Oral Comments

Good morning, everyone. Great stuff!

I need to get this into the record for Debra Wall and Vanita Gupta. It is deeply disturbing that NARA disabled the YouTube chat for the 8 September and today's meeting. My comments are professional and relevant. I had not planned to, but I placed them into the all-panelist chat to be part of the official record.

This is an advisory committee. We need to let members of the public participate. I have already submitted an OIG complaint and you may expect a congressional inquiry.

So, life as a grandpa is good. My nine-year-old grandson played in his third ever baseball game, got his first hit and scored a run.

Life in FOIA is not good, in fact it sucks, and things are going in the wrong direction. Which is why I am spending my precious time with you today. I would rather be playing tea party with my seven-year-old granddaughter.

When my time expires, I will be calling back in to use the full 15 minutes allotted for public comments if there are no other callers.

You have all heard me say I believe every agency budget should contain a line item for FOIA supported by what they would do to improve FOIA – increase staff and grade levels, reduce backlogs, etc.

Place the onus on OMB and Congress to provide funding. In my conversations with Senate and House staff, Congress is receptive to supporting agency line-item budgets. That is not direct FOIA funding from Congress, it is a specific line-item in every agency budget.

Those are line-items within an agency's budget, not direct FOIA funding from Congress.

Lack of funding is the greatest impediment to FOIA for OGIS, DOJ OIP and agencies.

When I talk to Chief FOIA Officers and FOIA professionals, the message is always the same, as they told GAO in its FOIA audit this year, litigation is skyrocketing draining resources to process FOIA requests and increasing backlogs, and everyone is underfunded.

OGIS mediation by statute is supposed to reduce litigation. I do not believe that OGIS has done a single mediation case in years. OGIS owes that answer to this Committee.

Closing 4,100 mediation cases with three people, if that can be believed, is one every hour and a half and that does not include bathroom breaks or a cup of coffee.

Then the DOJ data supporting the GAO findings is completely inaccurate and unusable for any purpose. Bobby and Alina had a tough time at the senate judiciary hearing regarding the utter lack of FOIA compliance and oversight mediation. Both are grossly underfunded. The problem lies with NARA's Acting Archivist, Deb Wall, and DOJ's Vanita Gupta.

Every meeting, I ask about OGIS and DOJ OIP budgets and funding levels, and I have sought records through countless aged expedited FOIA requests that remain open. If not to me and the American citizens, you owe the answers to this Committee.

Alina, I do not think it is a good idea to take agency processing fees they have collected to support your mediation mission. That is a NARA problem. If NARA refuses to immediately step up, this Committee should proceed with your draft recommendation for an OGIS line-item budget funded directly from Congress or move OGIS completely out of the Executive Branch, where there are inherent conflicts of interest.

We do not need another two-year study. The last committee plowed that ground. NARA needs to step up. DOJ needs to step up.

I am committed to helping the FOIA Advisory Committee in any way possible. I will prepare a summary of my prior recommendations

prefaced by a link to the most recent public comment briefing supporting my recommendations.

There is ample, easily executable low hanging fruit. I will accept taskings from any sub-committee to do research or draft documents for efficient coordination.

Thank you.



# Hammond Chat Comments

Chat Comments and Questions for OGIS and DOJ OIP	#
<b>I believe every agency budget should contain a line item for FOIA supported by what they would do to improve FOIA – increase staff and grade levels, reduce backlogs, etc.</b>	1.
Place the onus on OMB and Congress to provide funding. In my conversations with Senate and House staff, Congress is receptive to supporting agency line-item budgets.	2.
Lack of funding is the greatest impediment to FOIA for OGIS, DOJ OIP and agencies.	3.
Bobby and Alina had a tough time at the recent Senate Judiciary FOIA hearings regarding an utter lack of FOIA compliance oversight and mediation. Both are grossly underfunded.	4.
<b>? DOJ OIP.</b> Bobby, one word answer. No filibuster. What is the dollar funding level that DOJ OIP needs to effectively accomplish its statutory missions for FY 2023?	5.
<b>? DOJ OIP.</b> Bobby, one word answer. No filibuster. What is the dollar funding level that OIP sought from DOJ for FY 2023?	6.
<b>? DOJ OIP.</b> Bobby, one word answer. No filibuster. Will you provide the Committee the \$ funding level that OIP needs to effectively accomplish its statutory missions & what sought from DOJ for FY 2023?	7.
<b>? DOJ OIP.</b> I am prepared to provide you 1,000 – 2,000 compliance inquiries of incontrovertible false FOIA reporting and other potential malfeasance. Are you staffed and prepared?	8.
Getting DOJ OIP to respond to compliance inquiries ( <a href="mailto:OIP.ComplianceInquiry@usdoj.gov">OIP.ComplianceInquiry@usdoj.gov</a> ) and issue non-compliance	9.



determinations is <b><u>harder than finding toilet paper in a pandemic</u></b> . It never happens.	
<b><u>? OGIS.</u></b> Alina, one word answer. What is the dollar funding level that OGIS needs to accomplish its statutory FOIA compliance and mediation missions for FY 2023 (with full mediation when sought)?	10.
<b><u>? OGIS.</u></b> Alina, one word answer. No filibuster. What is the dollar funding level that OIP sought from NARA for FY 2023?	11.
<b><u>? OGIS.</u></b> Alina, one word answer. No filibuster. Will you provide the Committee the \$ funding level that OIP needs to effectively accomplish its statutory missions & what sought from DOJ for FY 2023?	12.
<b><u>? OGIS, ? DOJ OIP.</u></b> Questions <u>to be read aloud and answered</u> (not as part of oral public comments) are preceded by a question mark (e.g., <b><u>? OGIS, ? DOJ OIP.</u></b>	13.
OGIS is supposed to perform mediation to minimize litigation, yet OGIS does not do so at all. Litigation cases and costs are soaring. OGIS Mediation Team is three. junior people. Need 10x – 20x more.	14.
Two years ago, I emailed Alina offering to lobby Congress for additional OGIS funding, but NARA gets every dime it asks for in budget submissions while seeking grossly insufficient funds for OGIS.	15.
Alina asked the last term to find her funding sources, like taking funds from agencies' cost recovery. Money doesn't fall from the sky. NARA and DOJ must ask for OGIS and OIP funding in their budgets.	16.
Now I am asking Congress for GAO/OIG audits of OGIS & OIP funding and mission degradation. Well received. Multiple conference calls with Senate Judiciary staffers. I was asked to testify. Yes.	17.
An adverse audit finding is a blessing if the reason is insufficient funding. Attach the audit to the next budget and place the onus on OMB and Congress. Ms. Wall (NARA)? Ms. Gupta (DOJ)?	18.

OGIS Ombuds reports are inaccurate. OGIS does not perform mediation as required by statute. Impossible to mediate 4,600 cases in a year with three people. <i>See</i> OGIS Funding and Case Accountability Logs	19.
OGIS shirks compliance to NARA's Records Management unit due to inadequate OGIS Staffing.	20.
NARA (parent of OGIS) does not have any data in FOIA.gov for its FY 2022 Q1 and Q2 reports. See my public comment (NARA FY 22 FOIA Data Stripped from <a href="http://FOIA.gov">http://FOIA.gov</a> ? + NARA False FOIA Reporting?).	21.
<b>I am committed to helping the FOIA Advisory Committee in any way possible.</b>	22.
I ask that the Committee review and act on my public comment, 2022- 2024 FOIA Advisory Committee Bylaws - Recommended Changes containing common sense recommendations to improve the Committee.	23.
See public comments at <a href="https://www.documentcloud.org/app?q=%2Buser%3Arobert-hammond-106693%20">https://www.documentcloud.org/app?q=%2Buser%3Arobert-hammond-106693%20</a>	24.
FOIA AC. OGIS discontinued publishing ADR request case logs and ADR Final Response Letters in 2016. Committee should recommend restoring them <a href="https://www.archives.gov/ogis/mediation-program">https://www.archives.gov/ogis/mediation-program</a>	25.
FOIA AC. OGIS recently discontinued Alina's name in the signature block of OGIS response letters, instead citing "The OGIS Staff." Committee should recommend OGIS now provide the name or a real person?"	26.
FOIA AC. OGIS Alina, discontinued satisfaction surveys. Committee should recommend they be restored. How does OGIS now validate its suspect claims that requesters are satisfied?	27.

FOIA AC. OGIS states, “OGIS staff may need to ... consult with the Office of Information Policy at the Department of Justice, ..., before accepting the request for mediation?” Committee should address this.	28.
FOIA AC. OGIS has never engaged in mediation of my specific requests to do so. Committee should address upon what authority OGIS is refusing mediation.	29.
OGIS 2022 Ombuds report wrongly changed the statutory wording from “offer mediation services” to “help resolve disputes”? Per 5 USC § 552(h)(3) OGIS shall offer mediation services to resolve disputes.	30.
OGIS and Agency FOIA Public Liaisons routinely refuse to engage in ADR. OGIS incorrectly reports the # of OGIS cases and # times FPL assistance ADR sought in lieu of ENGAGED in ADR	31.
5 USC § 552(h)(4)(A)(ii)(II), OGIS report “number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison.”	32.
In my requests for MEDIATION, OGIS often says, file an appeal & the agency will address your issues. Not what Congress intended! How can OGIS count such actions in its ADR case closure figures?	33.
Recommendation No. 2020-19 “in the absence of oversight from Congress, FOIA otherwise lacks a sustaining enforcement mechanism.” OGIS non-concur with “additional hearings and inquiries?”	34.
NARA FY 2021 FOIA Requests that are not in FOIA annual raw data. ? False reporting: <b>NGC-675, NGC-698, NGC-744, NGC-764, NGC-779, NGC-822, NGC-824</b>	35.
DOJ OIP. I recently provided you a compliance inquiry that NARA did not include any open FOIA requests in its FY 2021 FOIA raw data, in apparent violation of law. DOJ OIP has taken no action.	36.

In violation of law, DOD has not released FY 2016 raw data & 2017 Defense Health Agency data does not contain any case numbers. DOJ OIP has taken no action.	37.
FOIA.gov does not contain any NARA FY 22 Q1 or Q2 data. DOJ OIP has taken no action.	38.
FOIA AC Recommendation 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.”	39.
The FOIA Advisory Committee dashboard citing The Attorney General’s March 15, 2022 FOIA guidelines are irrelevant. DOJ has done nothing on this specific recommendation? Bobby? Ms. Gupta?	40.
<b>I like Michael Heise’s idea of sub-elements to B5</b> to address specifically the reason for withholding. I will be preparing a public comment.	41.
Navy appellate authority withholds its appeals communications with the agency under B5 attorney client privilege where none exists at that juncture.	42.
<b>Sample Hammond public comments are below.</b>	43.
<b><u>Public Comments Submitted to the Chief FOIA Officers Council</u></b> <a href="https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council">https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council</a>	44.
<b><u>OGIS Annual Open Meeting Public comments</u></b> <a href="https://www.archives.gov/ogis/outreach-events/annual-open-meeting">https://www.archives.gov/ogis/outreach-events/annual-open-meeting</a>	45.
<b><u>General</u></b> <a href="https://www.documentcloud.org/app?q=%2Buser%3Arobert-hammond-106693%20">https://www.documentcloud.org/app?q=%2Buser%3Arobert-hammond-106693%20</a>	46.

1. All Panelist Chat to June 9, 2022 FOIA Advisory Committee Meeting. OGIS & DOJ Funding + Missing FOIA.gov Data.”	47.
2. NARA FY 22 FOIA Data Stripped from FOIA.gov?? + NARA False FOIA Reporting?”	48.
3. Failure - FOIA Compliance Oversight & Funding. Part 2. No Joking Matter	49.
4. Comments to Unlawful Chief FOIA Officers Meeting of November 17, 2021	50.
5. Mandatory Right to Dispute Resolution - OGIS Malfeasance??	51.
6. DOD Massive False FOIA Reporting. Part1. Letter to SECDEF Complaint to DOJ OIG +v3	52.
7. Sample FOIA Template With Recent Developments to Combat Agency Misconduct	53.
8. HOT! Semo OGIS. Budget Numbers do not Comport w. NARA Published Budgets!	54.
9. DOD MASSIVE FALSE REPORTING PART II + “Still Interested” Abuse	55.
10.NARA, PLEASE FUND OGIS!! (PART 1)	56.
11.NARA FOIA & Financial Malfeasance \$789,730 + Alteration of Records and Loss of Public Trust?	57.

12.Archivist of USA & OGIS Posting Policy Does Not Comport with Law	58.
13.QUESTIONS for June 29, 2022 OGIS Annual FOIA Meeting v2	59.
14.The Uncommon Man. Response to Hon. David S. Ferriero June 10, 2021 Comments to FOIA Advisory Committee.”	60.
15.DOD’ Cites Change to CFR 32 CFR Part 286.4 as Unlawful Basis for Omitting OGIS Mediation Rights	61.
16.Senate Hearing on FOIA. DOJ's Lack of Enforcement + Malfeasance + Open The Government Statement	62.
17.Senators Unite to Slam FOIA Compliance + POGO	63.
18.OGIS Negligence Generally & Improper June 29, 2022 FOIA Meeting	64.
19.FOIAonline - Recommended System Changes	65.
20.Violations of the ADA in FOIA Redactions, Simple Solution	66.
21.Hammond Planned Chat Comments to 4.7.2022 FOIA Advisory Committee Meeting	67.
22.DOD Massive False Reporting. 5 yr. Late Acknowledgements, Unusual Circumstances Abuse	68.

23.DOD MASSIVE FALSE REPORTING PART II + Still Interested Abuse. Updated July 27, 2022	69.
24.Doj OIP Compliance Inquiries	70.
25.2022- 2024 FOIA Advisory Committee Bylaws - Recommended Changes	71.
26.2022- 2024 FOIA Advisory Committee Inaugural Meeting DOJ OIP & OGIS Grossly Underfunded	72.
<b>EXCELLENT READS.</b> <u>Saving the Freedom of Information Act</u> by <b>Margaret Kwoka.</b>	73.
<u>The Art of Access. Strategies for Acquiring Public Records</u> by FOIA Advisory Committee member <b>David Cuillier</b> , University of Arizona, and co-author <b>Charles N. Davis</b> , University of Missouri-Colombia.	74.
<u>Bloomberg BNA Corporate Practice Portfolio Series No. 14-4th, Business Uses of the Freedom of Information Act</u> by Committee member Thomas M. Susman Esq. and Harry A. Hammitt,	75.
<b>? Tom Sussman &amp; David Cullier.</b> Love your books <u>Art of Access. Strategies for Acquiring Public Records</u> & <u>Business Uses of the Freedom of Information Act</u> , respectively. Anything recent or in the works?	76.
<b>Join the fight to improve FOIA. I will reply and be available for you.</b> FOIAcompliance@gmail.com or on Twitter @FOIAcompliance.	77.



# A Sailor's Tribute to The American Soldier

From an old sailor to my many Army Friends. You are awesome!

## A SOLDIER'S CREED

I am an American Soldier.

I am a Warrior and a member of a team.

I serve the people of the United States and live the Army Values.

I will always place the mission first.

I will never accept defeat.

I will never quit.

I will never leave a fallen comrade.

I am disciplined, physically and mentally tough, trained and proficient in my Warrior tasks and drills.

I always maintain my arms, my equipment and myself.

I am an expert and I am a professional.

I stand ready to deploy, engage, and destroy the enemies of the United States of America in close combat.

I am a guardian of freedom and the American way of life.

I am an American Soldier.

# YouTube Raw Transcript

>>> Welcome. And thank you for joining today's FOIA advisory committee meeting. Before we begin please ensure you have opened the Webex participants and chat panels by using the icons located at the bottom right of your screen. And please note that all audio connections are muted and this conference is recorded. To present a comment via audio please clicking the raise hand icon located right beneath your participant's panel to place yourself in to comment queue. If you're connected to today's Webinar via phone audio only please press pound on your telephone key pad. If you require technical assistance please send a chat to the event producer. I'll turn the event over to the committee's chair Alina Semo. Please go ahead.

>> I just want to welcome everyone. Good morning everyone.

As the director of the office of government information services, OGIS and this committee's chair person it is my pleasure to welcome you to our second meeting of the fifth term of the FOIA advisory committee. This meeting taking place so soon after our last week's meeting is a bit unusual. But it is our hope that last week's briefings from our committees designated federal officer DFO Kirsten Mitchell as well as returning members, Tom, Patricia and Dave help lay the foundation as we roll up our sleeves and get to work today.

Committee members, I look forward to a lively by orderly discussion today as we hone in on the three subcommittees this committee will form and I also want to welcome our colleagues and friends from the FOIA community and elsewhere watching us today.

Either via Webex or with a delay on the NARA YouTube channel.

Members' names and affiliations are posted on our website and member biographies will be posted soon. I have a few housekeeping matters to go through first. I am advised that committee member Michael Heiss is unable to join us but I'm going to turn it over to Kirsten to ask if she could confirm we have a quorum.

>> Indeed I can confirm that.

>> Thank you Kirsten.

>> You're welcome.

>> Thanks. Meeting materials are available on the web page. Click on the link for the 2022 to 2024 FOIA advisory committee on the OGIS website. We will upload a transcript and minutes as soon as they are ready in accordance with the federal advisory committee act. During the meeting I want to encourage members to use the all panelists option from the drop down menu in the chat function when you want to speak or ask a question and also I'll be looking at my little tiles that I have on my screen to see if anyone is raising their hand. But please also remember to keep the chat function to only administrative matters, nothing substantive in order for us to comply with the federal advisory committee act.

No substantive comments should be made in the chat function as they will not be recorded in the transcript of the meeting. If any of our committee members need a break any time, please do not disconnect from the Webex event, instead mute your microphone by using a microphone icon at the bottom of your screen. And turn off your camera by using the camera icon. Send a quit chat, me and Kirsten to let us know if you'll be gone for more than a few minutes and join as soon as you can. Today we have not planned to take a break as we do plan to wrap up by noon eastern time. So we're going to try to keep to our posted agenda. And a reminder to all committee members and also to myself because I'm guilty of this, please identify yourself each time you speak by name, affiliation. This helps us greatly down the road with both the transcript and the minutes both which are required by the federal advisory committee act.

Finally, I have a few other housekeeping issues to go through before we roll up our sleeves. For those watching us on the NARA YouTube channel, the chat is not on today but we do want to hear from you. If

you have questions and comments related to the agenda today's meeting or any comments or questions, please address them to FOIA dash advisory dash committee at NARA.gov. If you have questions on any other topic for the National Archives direct them to public.affairs@NARA.gov. I also want to note that we have received and posted several written comments in advance of today's meeting. We review all public comments and post them as soon as we are able and if they comply with our public comments posting policy. We have alerted committee members and invited them to view the public comments on our website. If anyone wishes to submit any additional written public comments regarding the committee's work, you may do so by e-mail FOIA-advisory-committee@NARA.gov and we will consider posting them to the OGIS website. In addition to the written public comments we have posted, we will invite oral public comments at the end of today's meeting as noted on our agenda. And as we noted in our August 22nd, 2022 federal register notice announcing this meeting, public comments will be limited to three minutes per individual.

Okay. With that, I am going to just ask if any of the members have any questions about housekeeping or administrative rules that I just went through?

No. Okay. All right. Life is good. All right. So I think we're ready to roll up our sleeves and again after Thursday's meeting, everyone knows on the committee that Kirsten e-mailed asking each one of you to provide your top two or three FOIA issues that you would like to see the committee focus on this term. And I want to thank everyone for everyone's robust responses. I definitely want to thank Kirsten publicly as I thanked her privately already for all the hard work she's put in to compiling everyone's fantastic ideas.

They're represented in a spreadsheet that we have posted on our website under the minutes for -- I'm sorry. Under the meeting rubric for today's meeting. And what Kirsten has done that I think is very helpful is to put the ideas into broad buckets to help start our

conversation today. It was interesting to me, I'm just going to comment that there's definitely a lot of overlap in members' ideas. There are a lot of folks thinking on the same page. And definitely seems to be some consensus around a number of the topics. But certainly the ideas center around four very broad areas that as Kirsten identified, the first one is review of past committee recommendations. So definitely seems to be a lot of interest in that. FOIA funding and fees was the second category Kirsten identified. FOIA process issues and the final one technology.

Can't seem to escape that anywhere we go. There's plenty to talk about. I look forward to our terrific discussion today.

As a reminder after we discussed priorities for the term, the goal is to form three subcommittees, please not four.

Four was too much last term. I'm here to say that again. And I just also want to add that does not preclude the formation of smaller working groups under one or all of the subcommittees.

That certainly happened in the last term. We found that quite productive. And I certainly want to encourage that again.

Everyone has heard last week much of the committee's work does get done at the subcommittee level in between the full committee meetings and I want to encourage all members to join one or more of the subcommittees. You are by no means precluded from joining more than one and I definitely want to encourage all of you to think about volunteering for a subcommittee co-chairmanship. We usually encourage one government member and one nongovernment member to even things out as cochairs. So hopefully you're thinking about that in the back of your minds. I've done a lot of talking. With that I am going to turn everything over to all of you and I want to invite all of you to what I hope is a terrific discussion and I'm going to pause. Who would like to go first?

>> Alina, this is Kirsten. Par the interruption but if we could ask our event producer to please advance the slide to number 3.

>> Thank you.

>> So we have the chat information out there and then as the committee begins its discussion, the ideas that you just summarized are on slide 4.

>> Terrific. Thank you. Okay.

All right. So I'm not seeing anyone waving at me frantically yet and I don't expect you all to jump in at once but does anyone care to go first? Adam, are you waving at me?

>> Yes, I am.

>> Great. Adam.

>> Adam Marshall from the reporters committee for freedom of the press. First of all, I really appreciate the efforts as noted by Kirsten to try categorize these in different ways. One of the categories is funding and fees, and I was wondering if some of the people who posted kind of shorter comments just on like FOIA fees or FOIA funding could speak more as to what they were interested in because it seems that some of those might be able to be combined with the process category or be a subworking group within the process category and that might be an easy way to get us down in terms of the subcommittees.

>> Yeah. I just -- process subcommittee was active in the last term to address Adam's point and fees were discussed and looked at. Nothing -- no recommendations came out of that last time but I see there's continued interest in that. So I definitely want to encourage that. Does anyone else want to take up Adam's invitation to speak to their fee comments?

Catrina.

>> Can you hear me?

>> Yes.



>> Okay. So when I put up there the FOIA funding, I was speaking of -- sorry about the barking in the background. The --

[ Indiscernible ]

Resources for the program for staffing, things like that. You know, the cost for fees, I guess I could be lumped into the processing side which I think Adam was eluding to. I wasn't looking at that because at the department, you know, most of DHS, we don't really collect fees. So that's not a huge issue for us. I'm sure it might be for others but mine was right-sizing offices, getting funding for the federal FOIA programs that are needed. That's where I was coming from.

>> Okay. Thanks, Catrina. Anyone else want to follow up on that?

>> Hi, Alina. This is Patricia from EPA. Regarding fees and FOIA funding, the legislation subcommittee last term which I do chaired, we had a working group for both. We had a working group for FOIA funding as well as for fees. We did prepare a subcommittee final report. And the two folks who led those working groups, Matt Schwartz and Alan Stein did a really nice paper on it and we didn't have any recommendations coming out of those working groups. If I remember correctly, I think Alan's paper really did a great job explaining why he didn't feel that it could go forward.

Also the 2014 to '16 committee I believe had a subcommittee just devoted to fees and I think I showed their subcommittee page.

You know, they have a lot of information there. So I just kind of throw that out to share for some help. For the FOIA funding, I don't think we in the legislation subcommittee had enough time to review it. And it was really to look at, you know, ways that agencies could get the resources that they needed to accomplish the mission. So I don't know. I hope that's helpful.

>> I think I saw in the chat that Ginger McCall wanted to weigh in. Ginger.



>> Yeah. This was on the more general issue. Not to answer Adam's question.

>> I'm sorry. I just saw it. So I apologize. Sorry. Should I come back to you?

>> Yeah. I don't have an answer to Adam's question because my response is to the request for comments were lengthy.

>> Okay. We'll come back to you.

>> Alina, this is Kirsten again.

I'm sorry to interrupt but I'm trying to get the attention of Chris, our event producer to please move the slides forward to slide 4 so that the committee can see these categories. And again, sorry for the interruption.

>> No problem. Gorka, I think I just saw you chatting.

>> Yeah. This is unrelated to the topic of fees. So as long as that is included then what I would like to do is get a sense just like the temperature on my phone numbers, interest in exploring --

[ Indiscernible ]

Requests. Because I think it's for work. I think one of our goals is to make FOIA more efficient and doesn't happen often but sometimes you'll get a request for that. You know, or some expedition, I think it would be helpful to explore that topic in order to facilitate FOIA for the rest of the world.

>> Thank you, Gorka. I know I saw several other people -- oh, people are waving at me. Okay.

Ginger, do you want to go first and then Catrina.

>> Sure. I'm probably going to get myself cast out of the request or community for saying I am interested in investigating that topic. I will also note that to my recollection in the very first iteration of this committee there was a bit of study we did on requesters and

provisions from governments around the world and I think maybe state governments. I recall working on that as part of whatever committee I was on.

So I think we have already sort of laid some groundwork for that and though that wasn't one of the three topics that I picked, I think it's a useful topic.

Because there are certain requesters who are taking up an out-size amount of government resources, it's clogging up the queue for everyone else.

Oftentimes the requests are not at all clear or narrow. And oftentimes it seems like they're submitted just to harass agencies or harass particular officials or gum up the works. I think it would be a useful thing to look at given that there are limited resources to process FOIA requests and when one person takes up all those resources or clogs up the queue, it does affect the rest of us requesting.

>> Katrina is next and then I see you waving so you'll go after that and Tom.

>> I like to look into this too and it's not for the purposes of -- one of the things that I try to do in the 27 years I've been doing FOIA is trying to be reasonable with requesters, you know, especially with people queueing us on the 21st day trying to give them something --

I can't sometimes give them everything. I just can't. I don't have enough resources. I never had enough resources. I've been doing this back in the day when we were using -- cutting holes in papers. So I've always tried to be accommodating to the point that let me give you something and sometimes there's requesters that just won't do that. And so, you know, and some of the requests that they write are very large, very voluminous.

We don't the resources -- I would love, love to accommodate people. I'm sure everybody else here feels the same way. I would love to be able to do them all.

But we have got to figure out some way to balance that better or come up with some kind of way to have a mutual agreement, you know, some kind of way to come together with that so if there was a way to talk about this topic and maybe find some approaches to address it I would be 100% supportive of that.

>> Okay. Thanks Catrina.

Appreciate it. I think Ben was going to go next and then Tom and I see Dave waving at me, too.

>> Yes. Thank you. This is Ben Tingo. I forth Gorka's recommendation. I do think that it's probably the first task in addressing this is defining what it means for a request to be --

whether that's a request submitted in bad faith or a voluminous request intended to gum up the works or a duplicative request. We have seen items about physical denial of service tax as they have been described in the media getting duplicative requests intended to take up resources in time and really not serving the purpose of FOIA of actually getting the information requested for transparency purposes and for helping with governance. But it seems like that is the first issue is defining what it means to be vexatious. Whether it's proactive disclosures, search, ability to toll the clock when you're crafting a request and getting to what the substance is and what you can do on a rolling basis help somebody understand what they're looking for, what they're going to be getting and what the timelines might be. And helping to limit some of that.

So I think that maybe for under a process framework that would be a sort of good start to then lead out of that into several other working groups but really lock down that definition in the beginning of the term in a way that you can then lead and define it a little bit more detail of then how do you address each category in a reasonable

way without sort of leaving it open to interpretation on a agency by agency basis of really saying well, this is vexatious to us so we're not going to respond but can be tailored in a meaningful way what might be categorized that way and leading to codification of that type of category or what the options available are to the agency and FOIA personnel as a whole across the board.

>> Thanks, Ben. I appreciate all that. I think Tom had been waving at me and then Dave. But Stefanie also wanted to chime in. Stefanie, I'm sorry if I skipped over you. Is there something you wanted to talk about with fees are on we on vexatious requests.

>> I just wanted to comment that I submitted the FOIA funding and it was mostly in the realm of technology. I think mine could be looped into technology. I was looking at what resources would be needed to fund the technology.

>> Okay. Thank you. I appreciate that.

>> Thank you.

>> All right. Tom.

>> Yeah. I had a chance to sort of look at David's having divided up the four general categories into three. It does seem to me that resources is a sort of good separate category both at the larger level and then going down into the more specifics. And implementation as you know, every time I talk about FOIA and the advisory committee I talk about implement TAGS going back to the fee recommendation of the first committee and -- I lost -- the dashboard is only halfway helpful because it says that yes the archivist made the recommendation, forwarded the recommendation to wherever but it doesn't say that the recipient or target has done anything with it. I feel strongly and that may well involve some working groups looking at very specific issues and coming up with strategies really to advance it. The bigger challenge in I guess David's third category process and technology together, there's a lot of sort of apples and oranges or apples and rocks, I'm not sure how -- the technology and

vexatious requests fit together in the same category but except for maybe there seems to be interest in I think technology covers most of the process issues. Where do we -- I guess I like to focus in on where we put the issue since there is interest in addressing burdensome, vexatious, where do we put that in a way that makes sense and I think we have got subcommittees that would be self evident at that point.

>> So Tom, just to summarize and I know Dave you want to go next, what I'm hearing you say is resources, implementation of past recommendations and I'm hearing process/technology.

>> Right.

>> As the third one.

>> Yes.

>> I just wanted to make sure I heard. Dave.

>> Yeah, thanks Alina and I wonder if I could be able to share real quick. I e-mailed Tom. I tried to clump all that stuff into three working groups of subcommittees that make sense and within those subcommittees could have any number of working groups and certainly vexatious request is going to come up. It came up last term. I'm happy to show what Tom was talking about to the group if I have the ability to share. Oh, thank you so much. So this is kind of what I was thinking about. Do you all see that?

>> Uh-huh.

>> Okay. So it seemed like -- I mean our objective right now first is to get the three subcommittees nailed down and then within those, you know, anybody could create working groups to kind of get specifics.

This isn't perfect. You know, I mean, things can float among different subcommittees. But it seemed clearly like some kind of follow-up subcommittee made sense to review all the previous work and

studies because there's been a lot of work already done on vexatious requests. Figure out what Tom said, what's been completed and what needs to still have work, there are recommendations that probably need more work and then the OGIS stuff and how we break down the other two subcommittees, you know, is up for debate. We could have a resources subcommittee, funding fee subcommittee talking about money stuff. I put vexatious under there mostly because last term that came out of our discussion of fees. We're finding out that, you know, fees I think are sometimes used as a way to get requesters to own their requests overly broad so they just throw out lots of fees and it's a tool to combat overburdensome or voluminous requests. Maybe it's under process. But we could clump process and tech under one subcommittee. I mean, if it makes sense, I mean, processing records through AI or machine learning could fit under process and I'm not sure we had enough subtopics to create a single tech subcommittee this term. I only saw a couple like truly tech topics in the spreadsheet.

So that's one way to approach it. Form three subcommittees like this and then from there we could discuss what working groups people want to do, start up. Certainly that probably doesn't have to be handled today. That could be done, you know, later once the subcommittee is going. But if that makes sense clumping these topics and there may be others that come up. Another approach is to instead go ahead and throw the funding stuff in the process and make tech separate, you know. But again, I don't know.

I'm kind of veering toward the first one. I think the process subcommittee under this scenario would be pretty huge. Boy, whoever would be on that and cochairing it -- well, it wouldn't be me.

>> Why not?

>> So that's just my thinking.



And I'll stop sharing but if anybody else would like to go another way, you know, it's not -- I'm not like tied to anything. I'm just trying to get the discussion going so we can form three subcommittees and then create working groups from there.

>> Great. Thank you, Dave.

>> Sure.

>> Anyone else inspired by Dave's presentation? Patricia was that you raising your hand or no? Gorka was raising his hand.

>> Yes. I was just thinking through this and I'll just say I'm new to the committee. Does it make sense because it seems like the process for example has a lot of topics and then, you know, this recommendation to review past work which I endorsed, right, it's really just one thing. Does it deserve an entire subcommittee when it's really one thing and then we have things like process which have a list of 17? Does that make sense? I mean can we make the review of sort of historical recommendations and their progress and their effect a topic for a working group?

>> Yes. It's always possible.

Jason and I see Ginger waving at me, too. Jason go ahead.

>> I had my hand up. Okay. As per a past committee recommendations committee, you know, we have had 51 recommendations and my view is that it's extremely important in this fifth term to look at compliance with those recommendations. OGIS has done a fantastic job with the dashboard. And in many respects OGIS and OIP have completed the first step in implementing past recommendations but there has been no survey of compliance and I suspect even though I've been out of government for a while that many, many agencies are either unaware of our recommendations or are not prioritizing them in a sense that they would be reporting to NARA or OIP about what they have done. So I think there is kind of an enlightenment factor I think we could -- it would do well and it's



extremely big effort to try to come up with strategies for finding out what is going on. We have a huge government. 300 reporting components to NARA. And it would take a tremendous amount of work. So I strongly have advocated, I wrote the paragraph in a prior final report that advocated that the committee to vote substantial time in a subcommittee to look at past recommendation. Let me also point out that I really appreciate David's work in clustering this. A number of the, you know, line items under process have been in the past considered and I think it would be -- we would do well to limit any kind of process/improvement/ implementation type committee to a limited set of topics for example records management, you know, we devoted substantial time and there's many recommendations that came out of two terms ago. There are ways to limit it to make it more even.

Lastly, as many of you know I have been on a soap box about technology and machine learning and there are other aspects of this including the growth of tech messaging that's been in the news and a number of ways to approach technology including kind of inadequacy of search that we could discuss in such a committee. So in sum, my recommendation is to balance what's going on in process but to have a past recommendation subcommittee. A committee either called under Tom's words implementation or process. My favorite would be FOIA improvement committee. I know that's everything we do. But I think we could use that as an umbrella term but whatever term you want, process has already been used in a prior iteration of this committee. And then advance technology or just technology which has also been a term used. But I think it's an extreme -- technology is extremely important issue to look at as we're looking forward. We had a vision committee a couple terms ago.

We're looking to 2030 and the growth of billions and billions of agency records that are going to be FOIA. I'm an advocate in that way to have three committees.

>> And Jason, thanks for your comments. I just want to be clear I understand your proposal. You want past recommendations, a FOIA improvement subcommittee and a technology subcommittee?

>> That's correct.

>> Okay. And you're volunteering to cochair all three of those subcommittees, correct?

>> No. I actually am volunteering a couple of others to cochair.

>> Okay.

>> But yes, I would take on the technology committee and I would be happy to serve on all three subcommittees.

>> Okay. You know, I was just kidding about that.

>> I understand.

>> I wanted to leave that floor open. Ginger has been waiting patiently and Mende would like to comment.

>> So I was going to suggest that we just kind of roll the review of past committee recommendations into each of the other committees but having heard Jason's comments I actually do think it's important. I'm swayed on the idea that perhaps we should include that as a separate committee on its own. But I don't think we should drop FOIA resources as a committee. I think that is the single most pressing issue and it's a place where our recommendations stand to actually make a difference.

You know, congress keeps passing bills with more reporting requirements with more changes to FOIA and at the end of every bill it says no additional resources are allocated. I think having a conversation about resources and the way that resources affect processing times and the efficiency and effectiveness of responses to FOIA requests is really important. I will note that both OGIS and congress have asked GAO to do an investigation into FOIA resources. I don't know if that's forthcoming but I think this is an area

where the committee could do some investigating, could look at some numbers, talk to some folks and make some real meaningful recommendations and I think under that umbrella technology fits really well. I will also note that I chaired -- I do chaired a subcommittee on technology I think two terms ago which made very robust recommendations. We have spent a lot of time talking about technology already. We've made a long list of recommendations which were specific to my recollection. So I think we have already done a lot of work on that. I will note I have not had time to go back and review all of the advisory committee's prior work and recommendations but I think that's something that would be a good investment of time on my part and everyone's part. I think that that's homework we should do before we do our next meeting is go back and look at all the recommendations that this committee has made in the past.

So we're not redoing work that has already been done and reinventing the wheel.

>> Okay. Thanks, Ginger. So instead of Jason's FOIA improvement subcommittee I'm hearing you say FOIA resources subcommittee?

>> I would have it be review past committee recommendations, process and resources. So basically what David did. And thank you, David, for putting that together. That's really helpful.

>> Alina, I would like to speak.

>> Yeah, but I promised Mende she could go next.

>> I actually had a comment that was going in the direction of Ginger's comment about the review and in terms of having the review of past recommendations being folded into three other categories because I wonder if you can have a situation where there's some review of past recommendations happening on that committee but in the other areas in looking at the new suggestions being put forth, that will also involve reviewing past recommendations.

So I wonder if you would have some duplication there. And one way to prevent that is by having say a funding subcommittee but having a working group that's focused on looking at their past recommendations in that area to perhaps reduce some duplication but if the review is a separate committee, I think making sure there's a way of communicating between the review committee and the other substantive committees about what's reviewed and what's being looked at towards going forward.

>> Okay. Thanks Gbemende. I do want to say I feel as though Kirsten and I do a fair amount of trying to promote continuity among all the subcommittees. And certainly when we hear topics raised in one subcommittee we make sure we bring it to the attention of the others and there's going to be overlap.

Unfortunately that's the nature of the beast. We try to coordinate as much as possible to make sure folks are talking to each other and I believe in the last term, maybe some of the folks could nod if they agree, working groups crossed over a couple of the subcommittees. And it seemed to work out very well.

Dave is like maybe not so sure.

But I think it worked out okay.

Certainly everyone was talking to each other and that's the most important thing. Alex would like to go next. Or not. Alex, are you there?

>> There we go.

>> We can hear you.

>> Just to circle back to something earlier. My primary concern with vexatious requests is whether that might lead to endorsing an unwritten exemption from FOIA. I can tell you that lots of public officials find the requests from journalists and watch dogs pretty vexatious.

Be mindful that the committee isn't essentially taking the position that I would think congress should. And I just would be careful about that from the requester's side because it's hard not to see how that might be abused and that aside, I wanted to suggest that there's an opportunity for the committee to meet its charter in a way that I think it hasn't fully done before. And that's the impending retirement of FOIA online.gov. Something that we talked about in the past at these meetings, certainly that's been in the public sphere because OGIS testified about it.

We had a FOIA hearing back in sunshine week in March. But it hasn't come up very much. And the administration is not to my observation engaging the public about this. It seems to me that if we're going to talk about committees that technology committee that is specifically looking at how the roughly two dozen agencies that we're using the EPAs FOIA online site, what they're transitioning to and how that transition is going and using that as a case study to understand what's happening and to really reach out to the requester community for each of those agencies and understand what's happening, that could really inform our recommendations. My sense is that there's a natural interest in using the expertise of the people on the committee to focus on making recommendations but the more that we can bring the public specifically the request community into those, I think it will strengthen them. It will certainly I think add to the legitimacy in terms of its perceived legitimacy if we are soliciting feedback from the people who are affected by that change. And then look at how each one of those agencies is approaching this in terms of a blank slate. If you're leaving this approach, what technology are you choosing, how does it affect your processes, are you putting up your FOIA liaison's number, are you asking for feedback from your requesters, if you're adopting a new platform, are you building it with the requesters or not? And I would love to see that that transition is something that the committee is actively monitoring and engaged in and that is providing recommendations and response to what I think we can expect will be some bumps along the way. I just wanted to

throw that out there and to -- and a lot of the other things that have been said about the other issues.

>> Okay. Thanks, Alex. Ben, did you have your hand up earlier and I missed you?

>> Yeah. I did. I was going to say basically just to I guess jump onboard with David's grouping. I think that makes a lot of sense the way he has it and I agree with you Alina and other people have said there's most certainly going to be overlap between prior recommendations and some of these other categories and we would obviously be remiss to not build off of what was done before and what was suggested before and that will come up particularly in technology and funding and resources and a lot of these other areas. But it probably does make sense to have it as a specific subcommittee so it gets the attention and focus it deserves which will really go also to the heart of what the committee is here for and measuring effectiveness without having it totally buried within a working group within a subcommittee but really elevating that impact. I would just note from Alex's comments recently, honestly from an industry perspective that a lot of this is moving forward is currently an activity of agencies transitioning from their FOIA online platform to other platforms. It looks like the experience is not so much process focused but really in a market research phase where each one is finding the tools that best meet their needs and I know from our experience that when agencies are going through this process of finding new technology in these areas, they are very influenced by making sure they're not leaving any technology behind and that they're not leaving anything on the table or any functionality behind. And so what they're trying to do best they can is match up current functionality, current process to a new tool, to a new adoption. It may not have so much requester input specific to it but to the extent that the requester community makes suggestions through these other committees like process suggestions, reporting suggestions, certainly resources and all that, those do filter into



these platforms and these tools that are then available in a commercial market to every agency to leverage as part of their FOIA process. I'm not so sure that FOIA online specifically deserves the subcommittee's attention but it will come in at the fringes of process, technology, resources, not just when you're looking at what's happening in 2023 from the transition on a case management perspective, but also pushing out to Jason's perspective view of 2030, we're sitting on top of a mountain only getting larger and larger and so it's one thing to say what's happening now which is in process and we might not have a lot of ability to sway that process from a committee perspective. But, you know, we may be best sort of being able to focus and keep our heads up a little bit above the fray and look a little bit forward to things that we actually can influence.

>> Okay. Thanks, Ben. I just want to repeat a comment that was made in the chat from Dave just clarifying to Alex that he is signaling follow-up process and tech as the three subcommittee recommendations as per Jason. Alex, does that sound right?

>> Yes. Sorry. I'm slow on the mute button today. That does sound right. One of my specific priorities is to Harmonize the data act with FOIA and proactive disclosure. These the thing I sent in. The extent to which the committee can I think promote and extend and defend those best practices around the default open both in format and in disclosure will be well served.

I certainly would like the committee not to just limit our influence so to speak to putting out a recommendation or reports.

I think that we can and should be using this platform as a way to actively encourage agencies to be embracing not just modern technology but a more forward stance with respect to the requester community than is currently the case. I think that the committee as chartered has that within its remit and it's up to us to decide how we want to approach that.



>> I know Gorka has been waiting patiently. Gorka, please. Thank you.

>> You know, one of the things -- I think my comment will touch on a few topics here.

Concerned about duplicative efforts. I think they're interested to see how much the recommendations from these committees are followed up on.

And one thing that strikes me is during the 2016 term this advisory committee recommended that the chief officers council form a technology subcommittee.

And they did. And I've been part of it for three years. And I've been cochairing, you know, some of these working groups that have been dealing with these issues for about three years.

Like FOIA online.

So obviously I think technology is important because I've been dedicating my time to it for three years. I'm a little -- I'm interested to see what you all think about the fact that we're proposing to start up a subcommittee on something that my subcommittee has been working on for three years already. Just to give you an idea of the topics we have been dealing with, AI, artificial intelligence, FOIA IP platforms to address FOIA online --

[ Indiscernible ]

We have a working group. We have an IT integration group. We have a compliance working group. We have a FOIA and classified records working group. We have a technology best practices working group. And we have a FOIA reference model working group. And these are just this year's working groups. We have been working on other topics over the past two years.

Obviously -- and by the way, everybody here is very close to the topics. People volunteered based upon their expertise. So I think

what we can add from our perspective is the fact we have members of the public that can contribute to these conversations which is something that isn't present in the council subcommittee but at the same time I wonder whether delving into these topics three years after the technology subcommittee started dealing with them is somewhat duplicative. I wonder whether there is space for maybe communication with that subcommittee. You know. And maybe I'm speaking out of line and I hope I'm not stepping on anybody's toes. I just wonder whether we can launch into a two-year term dealing or talking about artificial intelligence when we have been doing it on the other side for three years.

>> Dave, I saw that you were raising your hand and then Eira wants to go next.

>> I think you raised some good points Gorka and the last term we had working groups working on some of these issues and one was on AI I believe. And we had some recommendations specific to technology come out of all that.

But that's what they kind of discovered was -- and they started looking at FOIA online replacements and realized oh, wow, there's this other group working on this for some years.

What can we really add? And I think they, you know, for whatever reason didn't proceed probably because of that. But there's nothing to say that, you know, we can't have a working group looking into AI and FOIA online and other tech issues in tandem with the other group. I think perhaps that's what's going to happen with the OGIS recommendations. We might be working in tandem with the feasibility study that is commissioned perhaps. So yeah, I think you're right, Gorka, that it's useful to look and see how we can work and fit with that to be most effective. Like Alex is saying, it would be nice to have some impact and not just toss out recommendations to maybe follow it or not. So really to me it comes down to -- I mean, again I'm focused on just getting three subcommittees arranged and

then, you know, the working groups kind of fall into place. Certainly under the process whatever implementation FOIA subcommittee, it doesn't have to be 20 working groups. I just tossed everything that was mentioned. Some of those will collapse into some. Some we have to triage and go with priorities and won't really be handled or some will be picked up halfway through the term which happened in previous terms. And taken up later. So I guess to me the question is do we go follow up subcommittee. I think most people are onboard with that. I mean, really I think you're right, Jason, this is our taking stock term. I mean there's so many recommendations. We got to figure out what's happened and what needs more work. What hasn't moved forward. Maybe there's agreement on that. Then it comes down to the other two.

You know, do we do resources in process/tech or do we do process and tech? You know, I don't have strong feelings either way because either way the work is going to get done. Either way, working groups will be formed under one or the other and will get moving. But if people have strong feelings either way on those clumpings, probably now is the time to rest assure that up.

>> Ginger I see you. But I promised Eira, she would go next. Ben, did you also wave at me.

>> Yes.

>> Catrina is now waving at me.

Adam, are you waving at me or just sitting back? You're sitting back. I want to remind everyone please don't put substantive chats in the all panelists chat. I see a chat I'm going to read out loud. Note there are no deliverables for public engagement or feedback on FOIA online transitions for FOIA officers council. I assume that means FOIA chief officers council. No event for requisites about what platforms or tech agencies have chosen or why or cost. Eira, over to you.

>> Hi. Eira, university of Cincinnati. I'm a new member of the committee. I hope I'm not speaking out of turn or taking us on a detour that people --

members of the committee would wish we don't go down. I notice when I was looking at the spreadsheet there are a few of us interested in the legislative question of expansion of FOIA to congress and the judiciary. And I know that also thanks to Patricia who had mentioned in the chat that under the last term there was a legislation subcommittee and there was a recommendation about expanding FOIA to congress. I think my two-part question for my fellow members of the committee are is there appetite for engaging in some of these larger legislative questions of expansion of FOIA for this term? Because if I'm the only one, I'm happy to serve elsewhere. But the second is that where do we think since this is, you know, an -- the question of expansion to FOIA into places where it doesn't exist and a lot of the prior discussion has been about improvements to places where FOIA already exists, where do we think that fits into some of the subcommittee models that are under discussion? I just wanted to step back and listen. Thank you.

>> Okay. Thank you. I know I promised Ginger and Ben but Bobby I think wanted to speak earlier. So I apologize. I'm going to take everyone out of turn. Bobby, over to you.

>> Thank you Alina. Bobby, Department of Justice, OIP. I just wanted to chime in. I think -- I don't feel strongly about the three groupings because I think I agree with Dave that I think under any variation of how we categorize them we could put pretty much the working groups we want to prioritize. I would probably suggest that we do review resources and process because I think technology could fit under both process and funding. And also agree with Gorka that we want to be careful not to duplicate efforts and picking like what technology things we're going to look at, that's something we should consider.

The one thing I wanted to turn back to is there's a lot of discussion about vexatious requesters maybe it's -- I think it's an issue that should be looked into and important but we shouldn't characterize it as that. It's the impact of high volume requests and high volume records or substantially large requests and the reason I think it would be great for this committee to look at is because what I thought was successful and enjoyed in the last committee and some committees is the insight shared between what the requesters can see and what the agencies see and perceive and I think we learned a lot based off that. So I think there's an area here. I'm not saying this is something it should lead into and I don't think it should. Something that is a barrier to access because that's not what the mission of FOIA is. It's just an understanding and maybe exploring how we can help the system. You know, communication is something that's come up. But there may be other things. I think it's something worthy of one of the committee's working groups. But I thought maybe we shouldn't categorize it that way and look at it more positively because it's an issue and I think it's worth exploring and it could fit under funding or process.

>> Okay. Thanks, Bobby. I appreciate that. I just want to chime in taking off my chairperson hat and putting on my cochair hat of the chief FOIA officers council along with Bobby, it was definitely a challenge and maybe Allyson will speak to this when it's her turn but it was definitely a challenge to coordinate the discussions going on between the technology subcommittee of this committee and the technology committee of the chief FOIA officers council and Gorka was -- I just want to applaud him because he had graciously volunteered to be the conduit as well and keeping folks posted on what was happening at our committee meeting. But it was definitely a challenge. I'm a big fan of not reinventing the wheel or duply wheel. I hope we can avoid that.

I wrote Ginger, Ben, Tom, Allyson and I might have missed Catrina. Catrina can I add you at the end? Okay.

>> Also Luke. This is Kirsten.

There was also Luke.

>> Luke, I will add you to the list. So Ginger is first.

>> And Jason.

>> And Jason. Okay. Got it.

>> I had suggested technology as one of the three and I'm withdrawing that suggestion based on what Gorka said. I just think we have limited time and resources. There's no reason to duplicate what we have done on this committee. I would encourage to look at the prior recommendations we made on technology. They were fairly comprehensive. I think that technology can be folded under all three of the categories of reviewing past recommendations, resources and process issues. I think it slots into all of those categories. We have already done the work. As Gorka said, there's another committee doing the work on this. I don't want us to miss the focus on the resources issue. And resources isn't just about technology. It's about staffing. It's about agency investment in FOIA. Until we address the problem of agency investment in FOIA, I don't think that we can address any of the other problems with FOIA.

Yeah. Just withdrawing my initial suggestion for technology.

>> All right. Sounds good. Thank you. Ben.

>> I want to say I agree that Gorka raised some very valid points here and that it seems like not just that we want to not have duplicative but we also don't want to spin wheels that we have to bring resources that the chief FOIA committee engaged with and back over and doing that. It does sound like to Alex's point we have an opportunity that they don't necessarily have which is getting a lot of requester input and also educating the broader requester community and everybody about what is out there, what's possible and what activity is going on within our government to address these problems. Obviously at the forefront of everybody's minds.



I think there's two parts that will come up. One is reviewing prior recommendations regarding adoption of technology and the prior suggestions about adopting technology and checking on the status of that. Which will likely lead into the resources issues as well. And also maybe reviewing our engagement with the chief FOIA officers council and making some recommendations around transparency around their activities or suggestions to them about educating the general public about their activities and maybe doing -- I don't know exactly what's been happening necessarily. I understand what you said Gorka has been a conduit but maybe having a better outlet so people know this is something we're aware of, this is something we're on top of, being worked on and managed. So that might be something we would want to consider under a process or prior recommendations there, too. To Eira's point which branches off in a new area, I'm interested in exploring sort of expansions of FOIA. I do think that will come under maybe prior recommendations as to see what the sticking point was. I think there were some prior recommendations around that. And maybe also in a process and just as a general matter I think it may help. I know there's probably a lot of resistance in congress to making themselves subject to this which is something worth exploring. But if it happened, that might be what it takes to break the log jam in resources and funding frankly, if they're feeling the pain and seeing it from the inside of what the executive branch is currently experiencing. Just my two cents.

I think it's something worth exploring and at least getting to the heart of and publicizing what the difficulty is.

>> Great segue into Tom. Certain congressional offices making FOIA-like rules apply to them.

Tom.

>> Just quickly on that subject, I think that we have a foundation on legislative branch and we started work on judicial branch. We gathered information.



We had some data. We didn't want to move further without having some conversations with judicial branch representatives and so that didn't happen. So we sidetracked it. But it certainly is one that I think a few of us would like to build on. I want to come back to Eira's comment about legislative recommendations and expanding FOIA. Ginger will know well that there's been efforts for the last two years, biweekly meetings of civil society people working together with bipartisan groups on the Hill on some FOIA amendments and it never happened. I think there's a lesson there that if groups with access to the legislative process, lobbyists, political sways can't make progress with the chief FOIA proponents on the Hill, then advisory committee recommendation might be really interesting and useful from an academic perspective. But I certainly wouldn't put it up there as something that was likely to be implemented in -- I would say my lifetime.

>> Thanks, Tom. Ginger just commented that we still have hope. One can hope. I think over to Allyson next and Allyson, not to call out on you and put you in a difficult situation but I just want to say you did cochair the subcommittee on technology.

And perhaps you have thoughts on how technology fits into this term.

>> I do actually. Two things.

One, the earlier comments about FOIA online, the technology committee did have a working group with some of the process subcommittee's people about ways to go forward from the sunset of FOIA online. We weren't able to make recommendations during the last term but that was something we were aware of especially from commerce, we were one of the 20 or so affected agencies. In terms of input, there's a short time frame with the acquisition schedule. I'm not so sure how much work can be done in terms of the successor to FOIA online because agencies need to make their own choices about which software fits their needs going forward. So

I'm not sure how much we could do with that. But in terms of technology, I agree it probably could be looped into process or some of the other committees. But there is an advantage to having requester input as compared to just what the CFO council is doing and we did have some of the councils talk to us on the technology committee and trying to come up with ways we could build on the work they were doing and not step on toes and reinvent the wheel. That was something we were very aware of during the last term. And then thirdly, I'm not a big fan of the prior recommendations committee --

subcommittee but I know I'm very outnumbered in that regard. I think they could be looped into the other committees that we create and there's only so much that the --

[ Indiscernible ]

Can do in terms of how the agencies decide to implement the recommendations or not implement it. That's my two cents on that.

Thanks.

>> Okay. Then next after Allyson we have Catrina. Thank you for waiting so patiently. Catrina.

>> This is Kirsten. Catrina are you on mute?

>> Catrina, just make sure your phone isn't on mute either.

>> We'll come back to you. We'll circle back to you. Luke is up next. Thank you, Luke. We haven't heard from you yet.

Welcome.

>> Thank you. Luke, Chatman University. Tough to elbow my way in here. A couple quick comments. I'm not so concerned about what the committees are called. I think it's been said by others I think the working groups will do the work no matter what. I feel like most of my interest is on process. So I figure that's where I'll end up landing. But I do have a couple comments on that but also other subjects. I'm

interested in Eira's comment and others on expanding the reach of the FOIA.

And I would like to know more about past recommendations and work that's been done on that front because I wonder if the right criteria have been proposed or established that might make that a more welcoming idea and not itself a kind of vexatious request which is my second comment. But I'm interested in one of my comments was focused on certain categories of legislative records that might be the low hanging fruit based on the age of the records or the subject matter or something and make this I guess a friendlier conversation with the other branches of government is kind of my idea and I would like to know more about past activity.

And on vexatious requests, I don't know that I will be on that subcommittee if it's grouped out the way it is but I would make a suggestion that I was going to comment initially when Ben brought it up early in the meeting and it was overtaken by events but Alex brought it up again so I figured let me jump in before it moves on. I think how we define vexatious requests and requesters needs to be done.

I have submitted many FOIA requests. I have never submitted a request in a vexatious spirit.

I think the average age is at least 50 years old yet I have been routinely listed as a vexatious requester but a government agency and that's definitely not what I do. To be really careful that this concept is not used to deny requesters simply because the nature of the request happen to be complex or involve a lot of agency referrals or happen to be large volume high tier, whatever you want to call it types of requests. So something to be careful on that and we're not accidentally creating precedent that we don't end up wanting to live with. Otherwise, that's my piece. Thank you.

>> Okay. Thank you very much, Luke. So I promised Jason next.

Kirsten then wants to weigh in and Gbemende came back and Catrina, we'll circle back to you. Jason.

>> Can you hear me?

>> Yes.

>> So really good ideas on the committee structure from everyone. Let me say I was passionate about technology. Let me first say that it probably from an optics perspective naming committees that are the same names as a prior term is probably disfavor and process and technology are probably not the best terms to use for any subcommittee. I have my favorite which is Tom's idea about FOIA implementation rather than process and for technology I liked Alex's friendly amendment that it would be better served to call something modernization which is a broader term that in my mind. I liked Alex's point about FOIA online. I know what Ben said and others but there are lots of ways that we can think about modernizing FOIA and let me get on my soap box here again that I think this committee even if Gorka there is a FOIA chief council's committee working on many forward looking issues, this committee has a different charter and it is public facing with public members and input. It is the signal issue of our time if you ask anyone in the requester community and I have become one of those requesters, probably not vexatious but I only filed one request to 40 agencies and gotten little back. The fact is that the signal issue is that FOIA doesn't work very well for many requesters in the public interest community and the greater community at large. I think we have to acknowledge that. I think during this term I'm going to be suggesting that individuals that litigate against the government talk to us about what we can do as a committee. It is really important to think about modernizing FOIA for the future because ten years from now the government will be simply overwhelmed by the volume of electronic records that exist.

So I continue to lobby for that being a prime focus. Having said that, you know, I don't really care. As long as the ideas are part of some

subcommittee, it doesn't have to be that we're talking about machine learning as a prime subject of a modernization committee. It could fit into an improvement committee or process committee.

I echo what people have said which is that as long as good ideas are somewhere in the working group, it doesn't really matter. However, from past experience serving on this committee as a whole two terms ago, people tend to gravitate to committees they feel most comfortable with that are --

that have some wholistic view of what they're doing. So there is for me a modernization committee would be a place where those of us who are more inclined to think about technology and about the world of electronic records would gravitate and an improvement committee or an implementation committee would be a place where people who are passionate about resources and funding would be part of that.

And the last thing I say is about past recommendations and that committee, I conceive it as limited in scope. Not 51 recommendations with a survey necessarily. But triaging what is important in what the last, you know, terms, four terms of the committee have done and try to focus in areas that are of greatest interest. So it's not a boil the ocean subcommittee, not intended at least in my mind to be that way. That's it.

>> Okay. Thank you, Jason.

There's been a little activity on chat. Tom I guess chalking up another vote for modernization along with Alex and Jason now and it looks like modernization, implementation of past recommendations and resources seem to be the current. Tech would be subsumed to modernization. We have a few other people queued up and I want to circle back to Catrina who hopefully will be able to come on but Kirsten is next.

>> Kirsten Mitchell with the office of government information services. Alex Howard put a comment in the chat that I just want to

read into the record. It was 20 minutes ago so I just didn't want it to get lost.

Alex's comment is yes to the appetite to extending FOIA-like process to legislative and judicial branch. This came up last term and is worth recommending again especially support agencies U.S. capitol police and that sort of thing.

>> Okay. Thanks, Kirsten.

Gbemende you're next and then Catrina and then Stefanie.

>> Thank you Alina. Gbemende Johnson, University of Georgia.

Earlier we were talking about duplication. I had a bit of a question. One of the things I mentioned was a survey of FOIA professionals. Understand challenges, opportunities. You know, understand what makes the job great. They want to leave --

I also know from the chief FOIA council meeting in April there was discussion about a survey of FOIA professionals. I'm wondering if that's moving forward or if it's maybe been fielded because it seems like it's also an opportunity to get at this idea of challenging requests, trying to get away from the word vexatious asking which requests are the most difficult and seeing which key terms are perhaps repeated frequently to get an understanding of not necessarily vexatious but when we get requests of this nature we have a difficult time dealing with them because of X, Y and Z.

Maybe that's for you Alina and Bobby about the survey recommendation from the chief FOIA officers council and building in the question about the vexatious requests.

>> Bobby, I don't know if you want to comment. I'm just going to say that I think what you're referring to Gbemende is the cross agency committee on innovation and collaborations.

Collaboration and innovation.



I'm sorry. We just have labeled it. It was a committee formed as a result of another FOIA advisory committee recommendation from a past term.

They did launch a survey that closed August 31st to FOIA professionals. I don't remember and I don't think really burdensome requests was amongst the topic. Bobby is shaking his head no. Thank you for that recollection. Bobby, any other thoughts?

>> That's right. I'm going back to it being something under this committee term where this committee is bringing both sides to the table. I think it's a good fit.

>> Thank you so much. Catrina, hopefully this time it will work.

>> Yes. Okay. So one of the things I was going to say and I didn't think that I was going to go this route when I first originally asked for ideas and this is Catrina with department of homeland security. So I was actually going through the 51 recommendations while everybody was talking, just looking at them and I really think we need to go back and look at those because so far what I've looked at and like I said, I looked through probably about 215 while we were talking, every issue that we have, almost everything that's on this list for us to look at has been addressed somewhere in some form or fashion in these previous 51 recommendations and so I really think especially since if I'm not mistaken and correct me if I'm wrong, isn't this the first year this committee has been in existence? Okay. So five years, you need to really start making a bang for the buck and showing -- you know, making --

looking at 51 recommendations and some are repeated. When I looked at the recommendations some of the committee previous times have reiterated or restated maybe differently than a prior committee. I think we should focus on this and I know some people might not agree with me and that's fine. But in order for us -- everything seems to be linked together now. The past to the future. I think we need to focus on this because I don't want us to look at



anything and come up with an idea that was already thought of by someone else because this is going to continue to be a vicious cycle if we don't address what's been looked at in the past, see what progress we made and then what further work needs to be done.

I'm going to stop there and that's just my two cents worth.

And I did not think that was going to be something I was going to -- when I first was asked, I didn't think this was the way I was going to go but I started looking at this and I see a lot of value added from prior committees and councils that we could work from that and build off of that and some things have been done and we should recognize that they have in some areas.

>> Yes. Thanks, Catrina. This is exactly why we're having this dialogue, so we can learn from each other, too. Stefanie who has been very patient. Thank you.

>> Thank you. Stefanie, U.S.

department of the interior of the office of inspector general.

I wanted to bring up I had raised at looking at raising if FOIA profile within agencies and how we gain support from senior leaders. If we do not have any support from senior leaders and agency, then it's hard to do any of the things we are raising such as getting FOIA resources, funding for staff, funding for technology, electronic. The other thing that I had raised that we look at but I know it's not a popular topic is the --

which I think is one of the greatest issues facing the government right now is the increase of FOIA litigation. The issue with the FOIA litigation especially under the constructive denial litigations is that most of the time you're put on a FOIA production schedule and the ones addressing the 500 pages a month are the very people who are the FOIA processors who are supposed to be doing the FOIA requests. And what the requester community does not often know is that yes, there may only be like let's say 50 cases backlogged in

front of you but they don't know or realize that you also have to produce this 500. It doesn't get reported in the DOJ report. It's very difficult to let requesters know that you are stuck with these very burdensome production schedules which is fine. You missed your time frame. That's fair. But I just want to put another vote for FOIA resources.

I think if we can somehow get leadership in government to get the funding that is needed that would, you know, feed down for so many issues including the FOIA litigation. If there's enough staff then we wouldn't get sued so frequently for missing our time frames. So another plug here from me for the FOIA resources funding committee. I want to put in another vote that I would just say we still keep technology.

I've heard what everyone said and I think it's valuable but I still think technology like others have said is such a up and coming thing for FOIA like so many have said as well.

Electronic records is where we're at. There's so many agencies struggling, struggling processing requests with just Adobe. They haven't expanded their resources and they the only way we're going to be able to speed up in the trickling effect of avoiding litigation and avoiding all these other things is to get the proper technology, to get the resources into the agencies. Thank you.

>> Great. Thank you. Kirsten.

>> Yes. Hi. Kirsten Mitchell, the office of government information services. I am reading another comment into the record. This from Alex Howard at 11:12. Alex writes, I'm curious that the agencies are aware this committee exists much less if they have read any recommendations or adopted and implemented. I think then understanding if there's a missing feedback loop or communications channel could be valuable in terms of maximizing the committee's impact and influence past and present. So that might be a good comment for the follow-up committee or subcommittee.

>> Kirsten also just to piggy back on that Catrina, can you loop us back to what Stefanie --

which part of what Stefanie was saying?

>> The part about the raising the profile of FOIA within leadership. That was already mentioned in a previous --

actually several -- I think I read it three different times in some of the recommendations I was reading. So that is something that has been a recommendation all along. And so -- and then I wanted to say I agree with her about the constructive denial. I think that is an issue we probably should address if it falls underneath the processing section, too.

>> Okay. Thanks Catrina. David Collier wanted to share his screen again because he has been my de facto secretary which I am loving. So David, can I turn it over to you? You kind of reclused everything based on the dialogue we have been having.

>> Sure. Just to try to get our subcommittees nailed down, all these are great comments by the way. I love it. This is going to be a great term. If I could get the share screen thing, I could be God here for a second. So I've been listening. I think I've put down the three options that I've heard and correct me if I'm wrong. But basically the three options that have seemed to boil up, so either a follow-up committee, resources and implementation, follow-up implementation modernization or resources implementation and modernization, those are the three things I've heard and I apologize if I didn't get -- missed something that someone said. So you know, if you look at how it breaks out, and again, you know, we're not going to have all these many working groups probably. But it's kind of how that would follow-up in option one if we really believe follow-up is important and I added Tom, your comment, communicating, educating lawmakers on top priorities, how do we connect with the committee works to impact. I like that idea if we want to explore that.

Option two and I think this is what Jason and some others, Alex and others were talking about, follow-up implementation improvement process, et cetera.

Not including technology. And modernization. Technology is its own separate thing. Now I only found two items in the spreadsheet that kind of fit under technology modernization.

But I'm sure there are more. And I'm sure people could add more to this if they wanted and of course, you know, technology kind of fits across a lot of things. And then the third thing and this I think was Tom, I saw what he put in the chat.

Eliminate the follow-up subcommittee and just go with resources, implementation and modernization. So those are the three that I saw. And Jason, you made a good point I think. Yeah, I mean, the working groups, we can create any working group under anything. But it is worth figuring out early on what subcommittees we have because they can drive the train in topic areas. But anyway, those are the three kind of things I saw. I guess if I were to go with one, you know, and I could change my mind if I hear more, but I still kind of gravitate toward option one. I think it's follow-up on and examining while this is important and we will have to coordinate well, right, because imagine a subcommittee doing this research, looking at what's been done. They're going to have to communicate to the other subcommittees, hey, we found that on the issue of fees there's all this has been done, this is what's not been done, this has not been achieved. We encourage you to maybe take this out. You know, or what have you, technology. So it would be an interesting subcommittee, the follow-up and how it works for the other subcommittees but I think it's important. You know, resources seems to pop out and then implementation of course, I think that's a slam dunk. The question really is how much time and effort to spend on tech is really the question and of course, different people have different feelings on that. My feeling is it could be part of implementation because that's part of implementation, technology.

Certainly people may wish to break that out as a separate subcommittee instead of resources for a follow-up. But I guess if I were to vote right now I would go option one. Done.

But people the -- if people went the other way, I wouldn't be bent out of shape.

>> Could you leave your screen up. I had the same question that Ginger does. Ginger, go ahead.

>> My understanding of implementation and I'm sorry, I'm currently scrolling back up on the chat. So Tom's framing was modernization, implementation and resources. My understanding of implementation was that that meant the implementation of prior recommendations by this committee and investigating that.

>> Oh.

>> And in that framing, I absolutely think those three are the right subcommittees and would happily volunteer to cochair the resources subcommittee because I feel that strongly about it. But I think modernization, implementation and resources, I like that framing.

>> Oh. Okay. So Tom, make sure I understand. Ginger you're saying what three?

>> Modernization, implementation which includes implementation of the prior recommendations. And resources.

>> I threw those in there. And includes all the process stuff?

>> I mean I think the process stuff would probably get filed under modernization. That was sort of my thinking in it but I'm happy to yield to others on that. I'm happy to yield to Tom's interpretation of Tom's own words.

>> I mean the process stuff would come out under all of them. I would say probably three-quarters of the existing recommendations are process oriented and so implementation would be by definition covering most process issues and I think modernization because of

the technology implications for process may be the more cutting edge and significant ones. But I do think that most of what we want to do does fall under those groupings. I just didn't like the follow-up just seems kind of pedestrian. Implementation is more of a, you know, a big word.

A multi-word.

>> You and Jason are teaming up to come up new and creative names. I'm with you guys.

>> Tom, is that accurate on the screen there for what you're saying? By the way, I changed vexatious to voluminous. Just like last term recommended that no longer to we say Glomar. It's either confirm or deny. Maybe this term we say no more vexatious. Let's call it voluminous.

>> Alex is shaking his head no.

>> I'm joking. Tom, is that accurate?

>> Well, it's a little teeny tiny. The other thing is I'm not one to do committee drafting. So I think you generally got it and people can add to it and I would lead to Kirsten and Alina to finalize a proposal for the committee.

>> What's up on the screen at the moment is too ambitious for the modernization committee I think. And it slides into lots of different subjects. All I could say is that when we are finally ready to vote on this, I don't think we should in our minds be locked in that there are 14 working groups within modernization. I think these categories can be collapsed.

Some of them I don't believe should be. I am a big proponent of what Alex named as modernization. He gets the prize for being proactive and creative here.

>> What was his name, Jason?

>> Modernization.



>> Oh, modernization.

[ Overlapping speakers ]

>> Al, I'll call on you in one second. I wanted to add that working groups form and sometimes they devolve into other working groups because they find there's not enough traction gained on a particular subject. I don't think any one of us should be wetted to any of these topics. I thank Dave to grouping them. That's helpful.

But no one should feel like they're wetted to all subtopics any time. You know, a lot of them are very ambitious. We may end up only getting to a few of them. Ben, go ahead.

>> Thank you. Ben Tingo. If we were here voting on these subcommittees today I would agree with this formulation of implementation/follow-up, resources and modernization and leave the working group and nitty gritty of the identification of the subtopics to hash out and everything. I hope this isn't too much of a monkey wrench in the process which is to say that it seems like we are all in agreement that review of prior implementations is very important to make sure that we're an effective committee, it's a good time period to take stock and review and not only to make sure we're effective and see what the log jams are on prior recommendations and check on the status of those but also given the volume of prior recommendations and the breadth of prior recommendations, those prior recommendations are going to by necessity have an impact on each one of these other subcommittees' activities choices of topics, working groups and where their starting point is and how they engage with these issues. Maybe I'll throw out there and take the temperature on whether it makes sense for us to take another cycle to really take stock as a committee of what the prior recommendations are and then hash it out from there as to what the actual subcommittees would be which may be that we end up with two subcommittees at that point because we'll recognize that these follow-ups are going to be critical components of another



subcommittee's working group topic and then we can really have a better handle on what we're all going to be doing rather than maybe having an implementation follow-up subcommittee do three months, four months of work and identifying what they're working on only to find out that's going to have a dramatic impact on what the modernization or resources subcommittee working groups have been working on for the past three, four months which is going to potentially set them back or realize that we have been doing duplicative work all that time which will end up with us all being less effective.

>> So Ben, thanks for those comments. I just want to say I always encourage the subcommittees as they get started to review the prior recommendations. That's always a homework assignment I think everyone should have. So we're not duplicating efforts. I also think your concepts are not mutually exclusive. I think we can continue with these subcommittees and as we hone in our thoughts, perhaps, we end up only tackling a couple subjects under each one. I think they're all ambitious but I'm also hearing folks who are feeling strongly about the implementation follow-up that they not only want to study what's been implemented but they really want to take the pulse if you will of agencies. Our agency is implementing 2018-15. What have they done to implement?

How can they study that further?

What surveys might we affect in order to find out whether agencies are following a particular recommendation? I think what I've heard from folks is they envision pretty active engagement of trying to nail down exactly what's happening. I don't want to detract from those folks that feel strongly about that with that subcommittee.

>> I'm going to stop sharing the screen. Is everybody cool?

>> I really want to start wrapping up because gosh, can you guys believe it, we're almost at our bewitching hour of public comments and Alex, do you have one other comment you want to share?

>> Yes.

I do. I just want to reflect that the process is part of the product here. And I think we just need to be careful about not focusing on so much on committees and recommendation or a white paper that comes out of that but that the remit of this is to foster dialogue between administration and the requester community, solicit public comments and then make recommendations and the more that we can create I think architecture participation for that the better and as we talk about a lot of these different things it strikes me having the office of management and budget be involved in the committee would be relevant both with respect to a cap goal for FOIA which used to exist but disappeared in the last four days. Or four years rather. And the more that we can think about this committee as a vehicle for getting the requester community's concerns before the administration for the better. I don't want to just go down the rabbit hole of focusing only on committee assignments and think we're going to lose a lot of people that way. That's what I wanted to share.

>> Okay. Tom.

>> Yeah. This is just a one minute comment responding to Ben. Kirsten is our official officer sits in on the subcommittee meetings, and she is a good link to prevent what you have concern about happening which is one subcommittee going off and not knowing what anyone else is doing until they get to the end of the road. I found last year where we had way too many committees, too many sub subcommittee s, too many working groups, nonetheless we did know what was going on and as Alina said -- I guess Kirsten -- some would disappear, some would be folded into another. I think all in all, the coordination function that OGIS performs works quite well.

>> We're at 11:45. I would like to say that I think we have had a very, very robust discussion as I expected that we would. I want to thank everyone for their comments. I'm generally hearing and I'm going to exercise my chairperson rights at this point to the extent I do have

any, I'm definitely hearing a general consensus towards modernization, implementation of past recommendations and resources as the three subcommittees with lots of shifting around of working groups that can fall under each of those three. So I would like to ask if everyone is in favor of that, if I could get a voice vote or a hand vote.

Let's take a quick vote on that now. I want to hear if there are any nays. Can we vote on those three subcommittees. All in favor please say aye.

>> Aye.

>> Aye.

>> Aye.

>> Aye.

>> Aye.

>> All those opposing these three subcommittees? Okay. I hear silence. Okay. We have our three subcommittees set. Working groups TBD. I would like to now solicit subcommittee cochair volunteers. First for modernization.

>> I'll volunteer as a cochair.

It's Jason Baron.

>> Jason. I need a government person for modernization please.

>> I don't know whether it makes sense for me to participate as well in that regard given that I've been working the technology subcommittee.

>> Gorka?

>> Yeah, Gorka.

>> Gorka and Jason you have to promise to work nicely together.

>> I welcome Gorka to be a partner.

>> Okay. Implementation, past recommendations.

>> This is Dave. I'm interested in that if nobody else on the requester side.

>> I would but we can rock, paper scissor or you could have it.

[ Overlapping speakers ]

>> This is Catrina, I wouldn't mind doing it on the government side.

>> Catrina and Dave for implementation. Alex I saw you, too. I appreciate all the enthusiasm. And then resources.

I'm sorry, Dave. Go ahead.

>> Sorry. I was just going to say I certainly -- if someone really wants to do it, I'm happy to let them on the requester side for implementation.

>> Eira will serve on that subcommittee and she will work very hard.

>> Not sharing, sorry. I did not mean to put my hand up.

>> I was going to say alone, it's Jason Baron that David did Yeoman service in writing in the last term and he would serve as chair extremely well.

>> I think David will do a great job.

>> I will second that as well.

Ben, you're welcome to join all three subcommittees. So we really want your participation.

>> I was a member of three subcommittees last term. I encourage you to do it if you have nothing else going in your life. Otherwise --

>> Not on David's committee anymore.

>> Yeah. I would -- there's benefits but I would discourage more than two. One is probably fine. It's just my experience.

Others may have other thoughts.

>> Okay. All right. So resources is the last one. Do I have a volunteer.

>> I volunteer. I volunteer. I volunteer a million times over.

>> Ginger for nongovernment. Do I have a government volunteer for resources? C'mon guys.

>> I'll volunteer, Paul.

>> Paul. Thank you very much.

You have been silent the whole time. I've chatted you to make sure you didn't have anything to say but thank you for volunteering.

>> Sure.

>> Just to review, modernization, Jason and Gorka, implementation, Dave, Katrina, resources, Ginger and Paul. Do I have that right? Okay. Everyone should join all three subcommittees despite what Dave just said. Okay. Let me turn to our public comments part of our meeting. And I know that we look forward to hearing from non committee participants who have ideas to share. I want to remind everyone this is not the appropriate venue for concerns about individual FOIA requests or non-FOIA topics. If you need OGIS assistance, e-mail us at [OGIS@NARA.gov](mailto:OGIS@NARA.gov). All comments are captured in the transcript of the meeting which we will post as soon as it is available and just a reminder, public comments are limited to three minutes per person. As I turn over to this section I'm going to ask Kimberlee and Kirsten to let us know if there have been any relevant questions or comments through Webex chat. I'll give you a second to collect your thoughts. And Chris, I'm going to ask if you could give instructions on folks who could call in the through the telephone line.

>> Sure. As a reminder, if you would like to ask -- sorry. If you would like to make a comment on Webex you can press on the raise hand icon located at the bottom right of your participant's panel and if

you're dialed into the phone line, please press pound 2 on your telephone key pad and we will call on you.

>> Okay. Kirsten and Kimberlee, do we have any comments on chat?

>> Yes. So this is Kirsten Mitchell, office of government information services. Before we get to the public comment I just want to read one of Ginger's chats into the record. She was responding to an earlier chat and she says she thinks that most agencies are aware of the FOIA advisory committee but they are in triage mode just trying to keep up with requests when resources are this limited agencies are not able to address best practices. Just wanted to read that into the record. And before I turn it over to Kimberlee, we got quite a few comments about vexatious requests, comments such as why are you calling requesters vexatious. Please stop calling us this. It is inappropriate and disrespectful. I will say that we totally agree with that and Bobby addressed this in his comments earlier and another commenter noted the problem is resources, not requesters submitting complex requests. So I just wanted to get those thoughts into the record. And then I want to turn it over to Kimberlee because I think there are one or two more comments. So over to your, Kimberlee.

>> Thank you Kirsten. Kimberlee, National Archives. We do have one that I wanted to share from a commenter who something for -- this is a comment for the committee. Have we collectively considered limiting the scope of the focus of the subcommittee to facilitate taking one bite at a time versus trying to work on two broad of a topic. In other words, the old cliché about eating an elephant one bite at a time. So I think you all have kind of discussed a little of that already. But that was pointed out as you all were having your conversation. And that is all we have.

>> All right. Thanks, Kimberlee.

Chris, anyone waiting on our telephone line to make a comment?



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>> It looks like we have one caller in queue. Caller, your line is unmuted.

>> Yes. Hi. Good morning. This is **Bob Hammond**. Great stuff.

I need to get this into the record for Debra Wall and Vanita Gupta. It is deeply disturbing that NARA disabled the YouTube chat for the 8 September and today's meeting. My comments are professional and relevant. I had not planned to, but I placed them into the all-panelist chat to be part of the official record.

This is an advisory committee. We need to let members of the public participate. I have already submitted an OIG complaint and you may expect a congressional inquiry.

So, life as a grandpa is good. My nine-year-old grandson played in his third ever baseball game, got his first hit and scored a run.

Life in FOIA is not good, in fact it sucks, and things are going in the wrong direction. Which is why I am spending my precious time with you today. I would rather be playing tea party with my seven-year-old granddaughter.

When my time expires, I will be calling back in to use the full 15 minutes allotted for public comments if there are no other callers.

You have all heard me say I believe every agency budget should contain a line item for FOIA supported by what they would do to improve FOIA – increase staff and grade levels, reduce backlogs, etc.

Place the onus on OMB and Congress to provide funding. In my conversations with Senate and House staff, Congress is receptive to supporting agency line-item budgets. That is not direct FOIA funding from Congress, it is a specific line-item in every agency budget.

Those are line-items within an agency's budget, not direct FOIA funding from Congress.



Lack of funding is the greatest impediment to FOIA for OGIS, DOJ OIP and agencies.

When I talk to Chief FOIA Officers and FOIA professionals, the message is always the same, as they told GAO in its FOIA audit this year, litigation is skyrocketing draining resources to process FOIA requests and increasing backlogs, and everyone is underfunded.

OGIS mediation by statute is supposed to reduce litigation. I do not believe that OGIS has done a single mediation case in years. OGIS owes that answer to this Committee.

Closing 4,100 mediation cases with three people, if that can be believed, is one every hour and a half and that does not include bathroom breaks or a cup of coffee.

Then the DOJ data supporting the GAO findings is completely inaccurate and unusable for any purpose. Bobby and Alina had a tough time at the senate judiciary hearing regarding the utter lack of FOIA compliance and oversight mediation. Both are grossly underfunded.

The problem lies with NARA's Acting Archive of the United States, Deb Wall. Every meeting I ask about –

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>> We apologize. That is three minutes on the timer and at this time I do not see any more hands raised.

>> Okay. Chris, thank you very much. Out of respect for everyone's time, I want to just check in to see if there are any other public commenters.

Kimberlee, anyone else submitted any comments?

>> Not at this time.

>> Okay. All right. I just want to thank everyone today for the robust conversation that we have had. The hard work begins now.

Please roll up your sleeves, volunteer for subcommittees. You all know who the cochairs are.

We can take conversations among subcommittees and intra subcommittee conversations, so Kirsten and I are ready to help.

I want to thank everyone for joining us. I hope everyone continues to remain safe, healthy and resilient and will see each other at our next meeting Thursday, December 1st, 2022 from 10:00 to noon or possibly 10:00 to 1:00 p.m.

Usually our typical meetings go three hours. We typically take a 10 to 15 minute break. So that's what I expect. Any committee members have any questions or concerns before we adjourn?

>> Alina, it's Jason.

>> Yes.

>> Well, given the time period until the next public meeting, I would expect that you and Kirsten will be sending out messages to everyone to quickly make decisions with respect to subcommittees and then the subcommittee chairs to reach out to begin holding subcommittee meetings. Am I right?

>> Yes. And thanks for pointing that out. I think the success of the last two committee terms in particular were in no small part due to the chairs set regular meetings monthly or bimonthly, biweekly, whatever you would like. It's completely your call as to cadence. But I think having regular times is really important and if you can set it up so it works for most folks, that's ideal.

>> And for Kirsten.

>> Yes.

>> And for Kirsten, yes. We have to work around her schedule. She is the DFO. She has to attend all subcommittee meetings.

>> I will point out we have two alternate DFOs.

>> Yes.

>> So should I get hit by a bus or something, we will have continuity.

>> All right. Hopefully that will never happen. Okay. So we are at 11:59 a.m. I want to thank everyone again for your time and for your anticipated work. And we stand adjourned.

Thanks very much everyone.

>> That concludes our conference. You may now disconnect.

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**Senate March 29, 2022  
FOIA Hearings**

**“DOJ’s Lack of Enforcement”  
+  
Malfeasance  
+  
Open the Government  
Statement for the Record**

**PUBLIC COMMENT  
Revised**

**by Robert Hammond  
foiacompliance@gmail.com  
Whistleblower**

**Copy to: Senate Judiciary, House Oversight,  
Vanita Gupta (DOJ), Debra Wall (NARA)**

[whistleblower@judiciary-rep.senate.gov](mailto:whistleblower@judiciary-rep.senate.gov)

*Graphic by PoweredTemplate.com*

# Outline

## 1. Opening Comments

- [Hammond Recommendations to FOIA Advisory Committee & Chief FOIA Officers Council](#)
- [Acknowledgments](#)
  - FOIA Advisory Committee
  - "Saving FOIA" - Margaret Kwoka
  - Muckrock.com - Best FOIA Portal

## 2. [News Media Alliance - DOJ's Lack of Enforcement](#)

## 3. [Statement of Lisa Rosenberg @ Open The Government](#)

# Hammond Recommendations

## Recommendations to FOIA Advisory Committee & Chief FOIA Officers Council

### Related to All

1. Require contemporaneous posting of FOIA raw data logs.
  - a. Some entities seemingly lie, alter and destroy FOIA raw data records after annual FOIA reports, knowingly submit massively false reports, and their quarterly data does not match annual FOIA reports.
2. Require agencies to amend past quarterly and Annual FOIA Reports.
  - a. See [Hammond, Robert](#) **DOD Massive False FOIA Reporting. Part 1. Letter to SECDEF, Complaint to DOJ OIG**
  - b. They are grossly inaccurate every year; some FOIA requests and appeals will never be reported; FOIA.gov data is materially inaccurate (DOJ and OGIS own this mess).
3. Evaluate admitted, incontrovertible alteration and massive destruction of FOIA records, despite being advised countless times to preserve them. Evaluate the inadequacy of funding and mission accomplishment of



NARA's Unauthorized Dispositions (UD) unit wrt alteration and destruction of FOIA records.

- a. DOD admits to altering FOIA processing log raw data and routinely admits to destroying records despite being advised countless times to preserve them for judicial review.
  - b. DOD's position in litigation (supported by DOJ) is that "nothing in FOIA requires records to be preserved."
    - i. The Chief FOIA Officers Council & FOIA Advisory Committee must address preservation of FOIA records & relevant federal statutes.
  - c. DOJ OIP sends me correspondence wherein DOD admits to destroying FOIA records subject to NARA GRS retention and to specific notices to preserve them. Yet DOJ OIP is oblivious to what their own compliance inquiry responses say (copy & past from agency), and DOJ OIP has done nothing whatsoever about this.
4. Require all agencies participating in FOIAonline.gov to produce plans to preserve all FOIAonline records, which are unique and subject to FOIA.
  5. Issue guidance discouraging/preventing automated destruction of FOIA case processing records and seeking a change to NARA GRS to make FOIA case processing records permanent.
    - a. DOD admits to (errantly/unlawfully) destroying potentially hundreds of thousands of records over a short time (Navy records schedule).

- b. NARA GRS 4.2 requires that FOIA and Privacy Act case files be retained for 6 years after final agency action or 3 years after final adjudication by the courts, whichever is later.
  - i. But requesters, unsatisfied with a FOIA response, often seek case records of prior FOIA request extending retention further.
  - ii. FOIA Officer has no idea of when FOIA case records are eligible for destruction.
  - iii. NARA now requires all that records be submitted digitally.
  - iv. FOIA case records should be permanent. Virtually no cost.

### **Related to Office of Government Information Services (OGIS)**

- 6. Allow OGIS and DJO OIP to make referrals to Special Council in egregious compliance violations or willful withholding.
- 7. Allow OGIS to review records in camera and to release them.
- 8. Affirm that OGIS may use binding and non-binding arbitration as part of dispute resolution; else seek legislation to codify this.
- 9. Place OGIS under Congress with direct funding and reporting; eliminate Executive branch bias and OGIS conflict (particularly wrt NARA records).
- 10. Require OGIS to stipulate the annual funding it requires and study current OGIS funding shortfall and mission failure.

a. Robert Hammond - October 22, 2021 - NARA, Please Fund OGIS!!  
(PART 1)

11. Require OGIS to properly report the number of times agencies or the FOIA public liaisons engaged in dispute resolution (as required by law), and to report the number of times OGIS or the Agency refused to participate.
12. Review OGIS apparent unlawful Public Comments Posting Policy and amend it as recommended.
  - a. Robert Hammond - October 22, 2021 - OGIS Posting Policy for Public Comments
13. Issue guidance on unlawful violations of the Americans with Disabilities Act in FOIA redactions (e.g., illegible 6-point red font against a black background (DOJ does this)).
14. Require OGIS to post contemporaneous ADR logs and closure letters as they did in the past.
  - a. OGIS annual reports appear materially false.
15. Require OGIS to conduct a statistically a significant sample of Annual FOIA report raw data to FOIA portal data to source records every year; else get GAO to do it.
  - a. OGIS essentially uses NARA Records Management support to review procedures and audits only limited sub-component data, such that it would take OGIS 400+ years to do a single statistically significant sample of one year's FOIA data.

- b. [Robert Hammond](#) - January 16, 2022 - Failure - FOIA Compliance Oversight & Funding. Part 2. No Joking Matter.

16. Require OGIS to re-institute and post ADR satisfaction surveys.

### **Related to DOJ Office of Information Policy**

1. Allow OGIS and DJO OIP to make referrals to Special Council in egregious compliance violations or willful withholding.
2. Require DOJ OIP to post contemporaneous compliance inquiry logs with issues and resolution.
  - a. DOJ IOP's annual Litigation and Compliance Reports appear massively false.
3. Require DOJ OIP to stipulate the annual funding it requires, and study current DOJ OIP funding shortfall and mission failure.
  - a. [Robert Hammond](#) - October 28, 2021 - Failure: FOIA Compliance Oversight & Funding.
4. Stipulate what costs must be included in litigation costs and require agencies to preserve contemporaneous records (e.g., time sheets) for six years.

# Acknowledgements

For years I have been complaining about the complete lack of compliance oversight by Department of Justice Office of Information Policy (DOJ OIP) and the NARA Office of Government Information Services.

It is encouraging that so many FOIA advocacy groups are saying the same thing & that Congress strongly agrees. See related presentation, “Senators Unite to Slam FOIA Compliance.”

## FOIA Advisory Committee

The FOIA Advisory Committee has done fabulous work in its 2020 – 2022 term draft recommendations.

Wow! “**OGIS 2.0: Reimagining FOIA Oversight**” recommendations are the most consequential of any made by the Committee. Thank you, **David Cuillier, A.Jay Wagner, Thomas M. Susman, Patricia A. Weth!!!**

Direct funding from Congress (\$1.8M to start) and the ability for OGIS to review records in camera and release them would dramatically improve FOIA and save agencies and requesters time and money.

The FOIA Advisory Committee is the premier venue for making improvements.

Some of the smartest people on the planet! If you have a passion for FOIA or are just drowning at your agency and want to make things better, pls consider seeking appointment to next year's FOIA Advisory Committee.

The next FOIA Advisory Committee meeting is May 5, 2022.

### **Saving FOIA!**

Also, congratulations to author **Margaret Kwoka** on her book, "Saving the Freedom of Information Act." An engaged free press is vital to our Democracy. Margaret, you ROCK!

Looking forward to "Saving FOIA Part II" & happy to contribute.

### **Muckrock.com - Best FOIA Portal**

Best FOIA Portal is Muckrock.com. Correctly sends request to state & fed or you give address. Auto follow-up. File appeals. You can share request with the world or embargo until you are ready. Join others in "projects."

I hope Muckrock has someone on the FOIA Advisory Committee next year. Huge issue is replacement for FOIAonline and Muckrock has the expertise to help.





## Senate Holds FOIA Hearing

By Staff March 31, 2022

On March 29, the Senate Committee on the Judiciary [held a hearing](#) on the Freedom of Information Act (FOIA) and how to improve transparency in the 21st century. All of the Senators were in agreement that FOIA needs work. They discussed that despite a decrease in FOIA requests, there has been an increase in backlog, as well as the incredibly long agency response time. The Alliance's coalition partner Open the Government submitted a [statement for the record](#) that highlighted some of FOIA's serious issues and potential solutions, including providing agencies resources and maximizing affirmative disclosures. The statement also points out how the [DOJ's recent FOIA guidelines](#) do relatively little to help the issues FOIA requesters are facing, despite taking over a year to release the memo. The hearing also showed the DOJ's lack of enforcement mechanisms, as the DOJ witness could only point to training and guidance as ways to ensure compliance with FOIA guidelines. [Read more here.](#)

# Statement of Lisa Rosenberg @ Open The Government

Statement of Lisa Rosenberg  
Executive Director at Open The Government  
Before the Senate Judiciary Committee  
On “The Freedom of Information Act: Improving Transparency and the  
American Public’s  
Right to Know for the 21st Century”  
March 29, 2022

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding the Freedom of Information Act (FOIA). My name is Lisa Rosenberg and I serve as the Executive Director at Open The Government. Open The Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. Open The Government and many of our coalition partners have long worked with this Committee to monitor trends in government transparency and to respond to challenges with agency compliance with the FOIA statute.

We write you today to discuss three key issues for the Senate Judiciary Committee to investigate while providing oversight on the FOIA: Increasing agency resources to support FOIA operations; maximizing affirmative disclosure; and the Attorney General’s recent memo on FOIA.

## I. Increasing Agency Resources to Support FOIA Operations

A central obstacle that plagues FOIA offices across the federal government is a lack of dedicated funding and resources. Advocates—both inside and outside of government—have long cited deficient resources as the primary reason agencies are unable to meet FOIA’s statutory timelines for completing requests. The Department of Justice’s Office of Information Policy (OIP), which is required to monitor compliance with FOIA across the federal government, noted this concern over a dozen years ago and to date Congress has failed to address the issue.<sup>1</sup>

Congress must demonstrate its commitment to access to information by providing the necessary resources that will allow agencies to comply with the FOIA statute. First, rather than funding FOIA operations out of agencies’ general administrative budgets, Congress must provide specific “line-item” budgets for agencies’ FOIA operations, just as they do for Inspectors General offices. Second, Congress should ensure agencies are addressing their FOIA backlogs and increase funding if necessary to reduce the backlogs. When Congress increased funding to the Department of Interior to reduce its FOIA

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<sup>1</sup> Department of Justice. (1990, January 1). FOIA Update: FOIA Affected by Budget Restrains. <https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>

backlogs, it achieved an impressive 10% reduction in a single year. Similarly, the Appropriations Committee is working with the Department of Homeland Security to monitor its long-term compliance with a court-mandated requirement to keep its FOIA backlog clear and increase funding to the Department if needed.<sup>2</sup>

Finally, Congress should invest in new and emerging technology, such as e-discovery tools, to improve staff efficiencies and the public's user experience.<sup>3</sup> This recommendation has been endorsed by the FOIA Advisory Committee and accepted by the Archivist of the United States.

## **II. Maximizing Affirmative Disclosure**

In FY 2020, government agencies received nearly eight hundred thousand FOIA requests.<sup>4</sup> In order to return records to the public within the statutorily mandated twenty business days, Congress requires agencies maximize “affirmative disclosure”—mandating the release of specific documents without the need for a FOIA request. For example, when the Environmental Protection Agency unveiled its “MyProperty” tool, which allows the public to find commonly

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<sup>2</sup> Nightingale v USCIS, No. 19-03512, 2020 WL 7640547 (N.D. Cal. Dec. 17, 2020)

<sup>3</sup> National Archives. (2020, July 9). Report to the Archivist of the United States.

<https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>

<sup>4</sup> Department of Justice, Office of Information Policy. Summary of Annual FOIA Reports for Fiscal Year 2020

requested records on an online portal, its FOIA volume decreased by 33%.<sup>5</sup> Under the FOIA Improvement Act of 2016, Congress required agency officials to search their records and begin to proactively disclose large categories of records. Unfortunately, agencies have treated these new obligations as a mere recommendation instead of an actual obligation and as a consequence the volume of FOIA requests continues to increase.

Moreover, rather than shining a light on government actions, FOIA has instead become a tool for individuals seeking information about themselves which the government holds. For example, 81 percent of requests to the Department of Veterans Affairs come from veterans seeking their own medical records. Such “first-party” requests dominate the FOIA requests received by the majority of agencies which receive a high volume of FOIA requests. As Professor Margaret Kwoka wrote in her book, *Saving the Freedom of Information Act*, 67 percent of the FOIA requests reviewed across the federal government (387,625 of 577,982) were for persons seeking records for themselves and not for the purpose of government oversight.<sup>6</sup>

These statistics reveal that agencies are not taking seriously their obligations to find ways to proactively disclose records and are instead using FOIA for

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<sup>5</sup> Kwoka, M. *Saving the Freedom of Information Act*. Cambridge University Press, 2021 (page 181)

<sup>6</sup> Id.

purposes for which it was not designed. Further, the public commonly requests records such as visitor logs, calendars for agency heads, and reports submitted to Congress which are also not affirmatively disclosed by agencies. At the same time, the Department of Justice's Office of Information Policy provides agencies some training and guidance but does not have strong oversight on compliance. For example, when OIP found the Department of Housing and Urban Development (HUD) made zero proactive disclosures for two years, it only asked HUD if its numbers were accurate but didn't provide oversight on *why* HUD was not proactively disclosing documents.<sup>7</sup>

By all these measures, it is clear that FOIA's affirmative disclosure requirements are being ignored by agencies across the federal government.

### **III. The Attorney General's Recent Memo on FOIA**

For well over a year, members of civil society raised serious concerns about the slow pace at which the Department of Justice (DOJ) was issuing its FOIA guidelines. These concerns caused the Senate Judiciary Committee to send a bipartisan letter to the DOJ to inquire why the guidelines were so delayed.<sup>8</sup> It

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<sup>7</sup> Government Accountability Office. (2021). Freedom of Information: Actions Needed to Improve Agency Compliance with Proactive Disclosure. (GAO Publication No. 21-254). Washington, D.C.: U.S. Government Printing Office. <https://www.gao.gov/assets/gao-21-254.pdf>

<sup>8</sup> Mattela, T. (2022, February 23). Lawmakers Press Garland on Access to Documents for Public, Congress, Wall Street



was only after numerous inquiries by Congress that DOJ released the current guidelines which should be viewed with deep skepticism as there are few substantive changes from prior FOIA memos. The new guidelines are, at best, a mere recitation of what agencies should already be doing under existing legislation. For example, Attorney General Garland's guidelines state that agencies should apply a "presumption of openness" to records, which has been DOJ's FOIA policy since 1993.<sup>9</sup> Similarly, the FOIA memo states agencies should avoid using exemptions merely because information could *technically* be withheld. This position was articulated by Attorney General Holder in 2014 and has been largely unimplemented by agencies. Finally, the Garland memo directs agencies to maximize proactive disclosure, which, as noted above, is already mandated yet is not being implemented.

Another major deficiency of the Garland FOIA memo is its lack of any creative, new policy initiatives. Attorney General Janet Reno issued FOIA guidance that included a "presumption of openness," a novel approach by the Department of Justice that embraced the public's right-to-know. The Garland memo offers no new ways to improve agency compliance with FOIA and seems to have been an exercise in "checking the box" rather than a meaningful attempt to improve

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Journal. <https://www.wsj.com/articles/lawmakers-press-garland-on-access-to-documents-for-public-congress-11645649962>

<sup>9</sup> Department of Justice. (1993). FOIA Update: Attorney General Reno's FOIA Memorandum. <https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>

access to information.

When Congress enacted the Freedom of Information Act, it embarked on a bold experiment in government transparency and accountability. The statute has been effective in exposing malfeasance, waste, fraud, and abuse by bad actors. However, FOIA operations are strained due to neglect, particularly with funding and technology. Agencies are inundated with requests and struggle to process them because of a large volume of “first-party” requests which are not being affirmatively disclosed. And the Office of Information Policy, which ostensibly monitors compliance with FOIA, has abdicated its responsibilities with inaction.

Congress has the ability to address many of the obstacles to creating a more open government. We appreciate the commitment of this Committee to strengthening the public’s right to know and are committed to working with you to reform FOIA to fulfill its original mission.

We thank the Committee for allowing us the opportunity to provide this testimony.



# **Senators Unite to Slam FOIA Compliance**

+

## **POGO Statement for the Record**

**PUBLIC COMMENT**  
**March 31, 2022**

**by Robert Hammond**  
**[foiacompliance@gmail.com](mailto:foiacompliance@gmail.com)**

**Copy to: Senate Judiciary, Senator Patrick  
Leahy, House Oversight, Vanita Gupta**  
**[whistleblower@judiciary-rep.senate.gov](mailto:whistleblower@judiciary-rep.senate.gov)**

# Outline

1. [POLITICO, 'There is a big problem': Senators unite to slam FOIA compliance](#)
2. [Project for Government Oversight \(POGO\) Statement to Senate Judiciary](#)

## POLITICO

'There is a big problem': Senators unite to slam FOIA compliance

The premier transparency law is hobbled by backlogs and mountains of electronic data, lawmakers are told.



“My conclusion from this is: there is a big problem,” Sen. Dianne Feinstein (D-Calif.) said during an oversight hearing on the federal government’s ongoing struggle to implement the records-access law in a timely way. | Alex Wong/Getty Images

By JOSH GERSTEIN  
03/29/2022 02:22 PM EDT

The often bitterly divided Senate Judiciary Committee had little difficulty Tuesday finding consensus that the nation’s premier transparency law, the Freedom of Information Act, isn’t working well.

“My conclusion from this is: there is a big problem,” Sen. Dianne Feinstein (D-Calif.) said during an oversight hearing on the federal government’s ongoing struggle to implement the records-access law in a timely way.

Sen. Jon Ossoff (D-Ga.) said he believes the half-century-old statute allowing journalists, advocacy groups and members of the public to request federal agency records appears to be failing to live up to its original ambitions.

“My impression is the chasm is massive — it’s vast,” he said. “We’re talking about timelines that are worse than routinely unmet, but almost never met. We’re talking about massive backlogs.”



One particular focus Tuesday was on the impact of the coronavirus pandemic on federal agencies' compliance with FOIA.

Senators heard good and bad news on that front: As the pandemic spread, new requests were down, but agencies fell even further behind in processing them. During fiscal year 2020, which covered the first six months of the pandemic, agencies received 8 percent fewer requests but processed 12 percent fewer, according to the Government Accountability Office.

That caused a spike in the already substantial backlog of requests, which reached 142,000 at the end of September 2020, up 18 percent from a year earlier, GAO official James McTigue said.

McTigue said some agencies faced challenges getting FOIA processing staff set up to telework when the pandemic broke out and others had paper records stranded at offices workers weren't allowed to enter. Others, such as the FBI, would not authorize telework for FOIA processing due to security concerns and therefore had to establish protocols for workers to come into the office, which created a greater delay, he said.

A GAO report issued Tuesday found that agencies are not fully complying with a requirement to post certain types of records online. The panel's ranking member, Sen. Chuck Grassley (R-Iowa), pressed the Justice Department's top FOIA

official on what happened to a pledge President Barack Obama's administration made in 2016 to post most responses to FOIA requests on agency websites under a so-called "release to one, release to all" policy.

The DOJ official, Babak Talebian, declined to commit to broad implementation of such an approach but said officials are moving in that direction.

"We conducted a pilot....There were some challenges," Talebian said. "We are still encouraging agencies to make proactive disclosures, and some agencies are implementing that at a 'release to one, release to all' level....We want to continue working towards a time where agencies can have the capacities to get to a point where they can release more and more records on their websites, getting to a 'release to one, release to all.'"

The federal government's FOIA ombudsman, Alina Semo, said some agencies are still sluggish in posting completed requests online because of concerns they'll receive complaints that the records aren't accessible to the disabled.

"There's an inherent tension, and agencies are sometimes technologically hamstrung in posting large amounts of data," Semo said.

Grassley also pressed Talebian on why it took Attorney General Merrick Garland until earlier this month to issue written guidance urging agencies to lean in favor of disclosure when answering FOIA requests. There was no explicit discussion at

the hearing of how the Trump administration implemented the transparency law, but a similar memo from then-Attorney General Eric Holder during the Obama administration emerged in March 2009.

“Why did it take so long?” Grassley asked.

“In his first full day of his first full week in office, the attorney general joined us for Sunshine Week to provide public remarks to reinforce the importance of FOIA,” said Talebian, director of Justice’s Office of Information Policy. “Under his leadership, we continue to apply our guidance and our training.”

Judiciary Committee Chair Dick Durbin (D-Ill.) said one challenge with implementing FOIA is the volume of emails and other electronic records that have to be searched and processed — sometimes so many records that having a human apply each necessary redaction is all but impossible. Durbin pressed Talebian on whether officials are considering using artificial intelligence to make such requests more manageable.

“We’re seeing records in volumes in different forms that could not have been envisioned when FOIA was enacted,” Talebian said. “Certainly, we’re definitely looking at advanced technology, including artificial intelligence to help us with the search and maybe even the processing of records.”

“Is our federal government flirting with the idea or serious?” Durbin asked.

“I would say: serious. We want the best tools,” Talebian added.

Sen. Sheldon Whitehouse (D-R.I.) used the session to complain about the Justice Department’s ongoing resistance in court to a FOIA request for an Office of Legal Counsel opinion detailing DOJ’s legal rationale why sitting presidents cannot be criminally prosecuted. U.S. District Court Judge Amy Berman Jackson ordered the release of the opinion, prepared in connection with the release of Special Counsel Robert Mueller’s report. She rejected the department’s arguments that the memo was part of the deliberative process and found that it was an after-the-fact justification for the decision not to prosecute then-President Donald Trump.

The Justice Department appealed that ruling to the D.C. Circuit Court of Appeals, where the case remains pending.

“There was no decision to be made,” Whitehouse said, noting that he and other senators have filed an amicus brief urging the appeals court to force disclosure of the opinion. The Rhode Island Democrat said DOJ’s interpretation would allow the exemption for deliberative process “to just run wild through the agencies.”

Talebian acknowledged he was involved in decision-making in the case but declined to explain further, citing a need to protect the same type of deliberative process that Whitehouse criticized.



**Statement of Melissa Wasser, Policy Counsel  
Project On Government Oversight  
Before the Senate Judiciary Committee  
On “The Freedom of Information Act: Improving Transparency  
and the American Public’s Right to Know for the 21st Century”  
March 29, 2022**

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding problems with the Freedom of Information Act (FOIA). I am Melissa Wasser, a policy counsel at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Four years ago this month, this Committee held a similar hearing on FOIA reform with agency witnesses.<sup>1</sup> That hearing demonstrated a bipartisan interest in strengthening FOIA and increasing proactive disclosure of records. Unfortunately, not much has changed since 2018. It is time for Congress to act and realign agency FOIA implementation with the spirit of the law.

Despite the fact that FOIA is one of the most useful tools the public has to educate itself about what the federal government is doing — and hold the government accountable — the last round of substantive reforms to FOIA was passed back in 2016. Those reforms were a step in the right direction, but there are still numerous issues that impact the law’s effectiveness. Today, I will highlight those existing problems, explain why they deserve your attention, and discuss several recommendations to improve the system and promote greater access to information.

### **Departures From the Statute**

When agencies apply expansive redactions to requests for information and ignore statutory proactive disclosure guidelines, these problems complicate the FOIA implementation process. The overly expansive use of exemptions, combined with the avoidance of proactive disclosures, means that agencies continue to cause severe backlogs and delays for requesters seeking information from their own government. Congress should address these problems.

FOIA provides a statutory right of access to federal agency records.<sup>2</sup> Anyone can request information by submitting a request to a federal executive branch agency and asking for records. The law provides nine exemptions that allow an agency to withhold or redact records. When reasonable exemptions are applied

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<sup>1</sup> *The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead: Hearing before the Senate Committee on the Judiciary*, 115th Cong. (March 13, 2018), <https://www.judiciary.senate.gov/meetings/the-freedom-of-information-act-examining-the-administrations-progress-on-reforms-and-looking-ahead>.

<sup>2</sup> 5 U.S.C. § 552 (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

properly, government agencies strike a balance between protecting sensitive information and leaving large portions of information available to the public, adhering to the letter and the spirit of the law.

However, as POGO has previously reported, agencies often use FOIA exemptions improperly, withholding records simply because they may reveal problems at the agency or just “paint the agency in a bad light.”<sup>3</sup>

Reporting shows that requesters consistently receive large swaths of arbitrarily redacted information, including fully redacted pages, rather than substantive responses.<sup>4</sup> POGO has been on the receiving end of several requests with entire pages of text redacted. These redactions are obviously arbitrary, given that similar requests by other organizations resulted in the release of the same records with significantly less information withheld.<sup>5</sup>

The FOIA Improvement Act of 2016 codified a foreseeable harm provision that required agencies to withhold information only if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.”<sup>6</sup> Agencies are allowed this discretion, but they should balance the possibility of harm against public interest even when they can technically withhold the information, especially considering FOIA’s presumption of openness.

POGO therefore recommends that any future FOIA legislation include the addition of a public interest balancing test. Adding such a test to FOIA’s foreseeable harm standard would have agencies determine, before they decide not to release information, whether the harm of releasing agency information outweighs the public interest in accessing it. This fix could help prevent improper withholding of information and over-redaction when agencies respond to requests.

When requesters fail to receive information in a timely manner, they can ask a court to order the agency to respond on a specific timeline. However, it should not take costly FOIA litigation and appeals for agencies to comply with the law. At the 2018 hearing, Senator Grassley agreed, stating “instead of litigating over a FOIA request, agencies should proactively release that information now for all to see.”<sup>7</sup> It is not enough for agencies to promote compliance with FOIA: these agencies have a statutory duty to comply with the law, and they are failing to do so with impunity.

When Congress passed the FOIA Improvement Act of 2016, it required proactive disclosures intended to increase access to government information.<sup>8</sup> Agencies are now required to “make available for public

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<sup>3</sup> Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Project On Government Oversight, February 6, 2020, <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

<sup>4</sup> Sharon Lerner, “NIH Sent The Intercept 292 Fully Redacted Pages Related To Virus Research in Wuhan,” *The Intercept*, February 20, 2022, <https://theintercept.com/2022/02/20/nih-coronavirus-research-wuhan-redacted/>; see also Jason Leopold and Anthony Cormier, “A New Version of the Mueller Report Reveals That Mueller Declined to Charge Donald Trump Jr. And Roger Stone With Computer Crimes,” *Buzzfeed News*, February 11, 2022, <https://www.buzzfeednews.com/article/jasonleopold/robert-mueller-declined-charge-trump-jr-roger-stone>.

<sup>5</sup> Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Project On Government Oversight, February 6, 2020, <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

<sup>6</sup> 5 U.S.C. § 552(a)(8) (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

<sup>7</sup> Prepared Statement by Senator Chuck Grassley for Hearing on “The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead,” March 13, 2018, <https://www.judiciary.senate.gov/download/03-13-18-grassley-statement>.

<sup>8</sup> FOIA Improvement Act of 2016 (P.L. No. 114-185), <https://www.congress.gov/114/bills/s337/BILLS-114s337enr.xml>.



inspection in an electronic format,” records “that have been requested 3 or more times.”<sup>9</sup> However, only one of three agencies that the Government Accountability Office (GAO) reviewed in 2021 had policies in place to address and document compliance with proactive disclosure requirements.<sup>10</sup> Furthermore, none of the three agencies reviewed by GAO fully complied with requirements to track and report the number of records disclosed each year.<sup>11</sup>

POGO recommends that commonly requested records, like visitor logs, calendars for agency heads, reports, and testimony submitted to Congress should be proactively disclosed by agencies. These records hold significant importance to the public.

Congress should pay particular attention to proactively disclosing the work of one office. The Department of Justice’s Office of Legal Counsel (OLC) is responsible for advising executive branch agencies and the president on the legality of proposed actions. Its opinions are not consistently released to Congress or the public, who lose the opportunity to scrutinize and question the legal analysis of these opinions in real time. The opinions effectively become secret law, with no consistent way for Congress or the public to access them.

OLC has avoided complying with FOIA requests and takes the position that its opinions are exempt from open records laws,<sup>12</sup> even as a court held that some of these opinions should be proactively made available to the public.<sup>13</sup> This lack of transparency hinders this Committee’s and Congress’s ability to conduct robust congressional oversight and make legislative corrections to increase transparency when necessary.

POGO is recommending that Congress require the Justice Department to publicly post all final interpretations of law issued by OLC online within 30 days. This would allow Congress to take their power back and act as a check on this increasingly powerful office. Proactive disclosure of these records would free up capacity for FOIA offices to use resources elsewhere, help reduce FOIA backlogs, and lower litigation costs for both agencies and requesters. This necessary fix provides additional ways to streamline agency communication with other FOIA requests.

## **Unintended Interpretations**

When another branch of government interprets the language of FOIA in ways that decrease transparency and conflict with the spirit of the law, it is up to Congress to rectify these interpretations and clarify intent. Two such relatively recent interpretations have worked to limit the information the public and individual Members of Congress can receive.

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<sup>9</sup> Department of Justice, “OIP Summary of the FOIA Improvement Act of 2016,” <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

<sup>10</sup> U.S. Government Accountability Office, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (March 2021), 4, <https://www.gao.gov/assets/720/712947.pdf>.

<sup>11</sup> U.S. Government Accountability Office, Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements, GAO-21-254 (March 2021), 13, <https://www.gao.gov/assets/720/712947.pdf>.

<sup>12</sup> David Janovsky, “Rubber Stamp or Rule of Law?”, Project On Government Oversight, March 23, 2021, <https://www.pogo.org/analysis/2021/03/rubber-stamp-or-rule-of-law/>.

<sup>13</sup> Knight First Amendment Institute at Columbia University, “Office of Legal Counsel May Be Required to Release Many of Its Legal Opinions, Court Says,” September 12, 2020, <https://knightcolumbia.org/content/office-of-legal-counsel-may-be-required-to-release-many-of-its-legal-opinions-court-says>.



A 2019 Supreme Court decision made it significantly more difficult for the public to access certain types of corporate information about businesses that receive taxpayer money through government programs.<sup>14</sup> By adopting a broader reading of what can be deemed “confidential” under FOIA’s Exemption 4, the court made it easier for agencies to withhold more of the information submitted to the government by private businesses.

A standard more consistent with the goal of providing maximum transparency to the public is that business records should be considered confidential only if their release would likely result in substantial competitive harm to the business. POGO supports passage of the Open and Responsive Government Act of 2021, S. 742, which would restore a longstanding legal interpretation regarding confidential commercial information and limit the amount of information that could be considered confidential.<sup>15</sup> This fix would allow greater transparency into entities spending government funds.

Another unintended interpretation of FOIA prevents individual Members of Congress from receiving information vital to conducting oversight. Under current interpretation of the statute, the executive branch has used FOIA exemptions to justify withholding information from Members of Congress unless those Members request documents while acting in the capacity of committee or subcommittee chairs. The Justice Department’s Office of Information Policy issued guidance in 1984 allowing agencies to respond to all other congressional requests for information with documents that have been subject to FOIA redactions.<sup>16</sup>

Congress’s intent for the law is clear: The limits that FOIA establishes to protect sensitive information (such as classified documents or personal information) do not apply to Members of Congress. Applying FOIA redactions to congressional information requests severely limits Congress’s ability to conduct oversight and pass legislation to address issues facing the public. No Member of Congress should be denied access to the information they need to do their job simply because the law allows the agency to withhold those documents from release to the public under FOIA.

This is a simple fix. Adding the phrase “or any member thereof” after the word “Congress” in 5 U.S.C. § 552(d) would clarify that FOIA cannot be used to redact information from any Member of Congress, regardless of their status as a committee or subcommittee chair.<sup>17</sup>

## **Delays and Funding Issues**

Under FOIA, an agency must provide a response within 20 business days of receiving the request.<sup>18</sup> However, in fiscal year 2020, agencies took an average of 97 days to process requests, with responses to more complex requests averaging six months.<sup>19</sup> Budgetary issues and shortfalls regularly plague FOIA offices and often contribute to an agency’s failure to meet the 20 business-day deadline to respond.<sup>20</sup>

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<sup>14</sup> Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019).

<sup>15</sup> Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/742/text>.

<sup>16</sup> Department of Justice Office of Information Policy, “FOIA Update: OIP Guidance: Congressional Access Under FOIA,” January 1, 1984. <https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia>.

<sup>17</sup> This change passed the House of Representatives in December 2021 as Section 525 in H.R. 5314, the Protecting Our Democracy Act.

<sup>18</sup> 5 U.S.C. § 552(a)(6)(A) (2021), <https://www.law.cornell.edu/uscode/text/5/552>.

<sup>19</sup> Melissa Wasser, “Fact Sheet: Reforms to the Freedom of Information Act,” Project On Government Oversight, January 26, 2022, <https://www.pogo.org/resource/2022/01/fact-sheet-reforms-to-the-freedom-of-information-act/>.

<sup>20</sup> “The Increase in FOIA Lawsuits Isn’t the Problem – It’s Agencies Underfunding their Transparency Obligations,” American Oversight, March 17, 2020. <https://www.americanoversight.org/the-increase-in-foia-lawsuits-isnt-the->

When agencies fail to meet their obligations to make timely determinations on FOIA requests, they add to already significant backlogs.

Agencies determine how they allocate funding for administrative activities, including FOIA. To address a pattern of poor funding, each agency should be required to evaluate what it needs to comply with FOIA and communicate to Congress how much it will budget to meet its FOIA obligations. Then, Congress should appropriate a direct line item to agencies' FOIA offices, rather than including said funding in the overall category of general administrative activities. Dedicating adequate funding for FOIA offices would allow the offices to increase capacity where needed and respond to requests in a timely manner, while also reducing backlogs.

Congress should also address agency-specific fixes to FOIA in any future FOIA reform legislation, especially for agencies that handle a high volume of requests annually. Currently, there is a problem contributing to inefficiencies in FOIA processing at the Department of Homeland Security (DHS). If a person is looking for information on foreign-born individuals, they can request access to an alien file, or A-file, through a FOIA request. An A-file includes documents that DHS maintains on foreign-born individuals that document the person's immigration history.<sup>21</sup>

But because A-files are stored off-site, it takes DHS longer to retrieve them, slowing overall FOIA processing times.<sup>22</sup> It is predictable that there will be a significant demand for these records. But including these A-file requests in the same system as public FOIA requests creates greater inefficiency in DHS's FOIA process. In fact, a majority of the agency's backlog is held by agency components that "process records related to immigration."<sup>23</sup>

POGO therefore recommends that Congress direct the agency to create a separate system to respond to those specific A-file requests and ensure the agency has the resources to do so. Removing A-files from the FOIA process could help make the agency's FOIA office more effective and efficient in responding to its many requests.

## Recommendations

We at POGO are encouraged to see bipartisan conversations about necessary improvements to FOIA and hope to see further legislative action soon. Congress has an opportunity to maximize access to information and relieve agency FOIA burdens in the process. As such, POGO urges the Committee to prioritize the following issues when considering legislation to reform FOIA:

- Require agencies to weigh the public's interest in the release of information against the specific, identified foreseeable harm releasing information could bring.

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[problem-its-agencies-underfunding-their-transparency-obligations](#); Department of Justice Office of Information Policy, "FOIA Update: FOIA Affected By Budget Constraints," January 1, 1990.  
<https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>.

<sup>21</sup> U.S. Citizenship and Immigration Services, Policy Manual, Chapter 2 - Record of Proceeding,  
<https://www.uscis.gov/policy-manual/volume-1-part-c-chapter-2>.

<sup>22</sup> U.S. Citizenship and Immigration Services, "Avoiding Common Index and Records Request Issues with A-Files,"  
<https://www.uscis.gov/records/genealogy/historical-record-series/a-files-numbered-below-8-million>.

<sup>23</sup> "DHS increased the number of requests processed between FY 2014 and FY 2018 by 92 percent compared to the number processed between FY 2009 and FY 2013." U.S. Department of Homeland Security Departmental Freedom of Information Act (FOIA) Backlog Reduction Plan: 2020 - 2023, A Business Modernization Roadmap (March 2020), 7, [https://www.dhs.gov/sites/default/files/publications/final\\_dhs\\_backlog\\_reduction\\_plan\\_2020-2023\\_3.6.20.pdf](https://www.dhs.gov/sites/default/files/publications/final_dhs_backlog_reduction_plan_2020-2023_3.6.20.pdf).

- Require agencies to proactively disclose categories of commonly requested records, including visitor logs, calendars for agency heads, and reports and testimony submitted to Congress.
- Require the Department of Justice to publicly post Office of Legal Counsel opinions.
- Pass the Open and Responsive Government Act (S. 742) to re-establish public access to government information about businesses.<sup>24</sup>
- Close the loophole that allows agencies to treat requests for information from Members of Congress as Freedom of Information Act requests from the public.
- Designate a line item in each agency's budget for specific funding for FOIA offices.
- Direct and resource the Department of Homeland Security to create a system to respond to individual A-file requests outside of the FOIA process.

## **Conclusion**

POGO thanks the Committee for holding this important hearing, and we urge you to fix the broken FOIA system by implementing our recommendations. It is encouraging to see bipartisan legislative efforts to improve FOIA. POGO is here to be a resource as the Committee navigates potential legislative options to strengthen this critical law. We stand ready to assist you in these endeavors however we can.

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<sup>24</sup> Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/742/text>.