

## **Subcommittee on Freedom of Information Act (FOIA) Searches for the FOIA Advisory Committee**

Recommendations to the FOIA Advisory Committee on Improving FOIA Searches

January 16, 2018

The FOIA Advisory Committee and its Subcommittees were established by the United States Open Government National Action Plan and the directive in the FOIA, 5 U.S.C. § 552(h)(2)(C), stating that the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA) "identify procedures and methods for improving compliance" under the Freedom of Information Act.

After more than a year of fact-finding, consultations with government and non-government FOIA experts, and careful deliberation, the Subcommittee on FOIA Searches has concluded that the executive branch's processes for searching for responsive records for FOIA requests is an extremely time-consuming, complicated, and non-standardized aspect of the FOIA. We believe that almost every executive branch agency can improve the FOIA search process. The Subcommittee also identified key gaps in our understanding of agency search practices and employee performance policies that hindered our development of more robust recommendations. As such, the Subcommittee is submitting recommendations related to executive branch agency reporting on FOIA searches, as well recommendations related to best practices to improve the timeliness, thoroughness, and efficiency of federal agencies' FOIA searches.

In undertaking our work, the subcommittee was unable locate any data collected by the government regarding FOIA search methodologies or capabilities. As such we identified an important gap that serves as the basis of our first set of recommendations.

**To improve the understanding of agency search capabilities and efforts to promote accountability, we recommend that the Archivist of the United States:**

- **Request the Department of Justice, Office of Information Policy collect detailed information as part of each agency's Chief FOIA Officer Report regarding the specific methods and technologies agencies are using to search their electronic records, including email. Potential topics to that merit further attention include agencies' procurement of technology, ability to search email, acquisition of eDiscovery tools, and availability of information on an agency's website that helps requesters understand the agency's record keeping systems and submit targeted requests.**

This subcommittee found no official descriptions of how agencies conduct FOIA searches. To begin discerning how searches are conducted, the subcommittee relied upon ad hoc depositions in FOIA litigation, anecdotal examples presented at FOIA Advisory Committee meetings, and a survey conducted by nonprofit organizations. This dearth of knowledge about how precisely agency are conducting their FOIA searches made it difficult for the subcommittee to systematically identify efficient search methods to minimize inefficiencies across the executive branch. Requiring this data to be reported annually by the Chief FOIA Officer as part of each agency's Annual FOIA Report would greatly enhance both the governments and the public's ability to study how to improve FOIA searches.

- **Direct the Office of Government Information Services (OGIS) to examine the use of appropriate performance standards in federal employee appraisal records and work plans to ensure compliance with the requirements of FOIA. We further recommend that OGIS submit the results of its assessment and any recommendations to the President and Congress (5 USC 552 (h)(5)).**

The Department of Justice [states that](#), “FOIA is everyone’s responsibility.” As discussed above, this responsibility is extremely important because most agencies do not have centralized FOIA search capabilities and FOIA searches are very often not conducted by FOIA experts, which can lead to long delays.

In an attempt to address these problems, the Department of Justice issued a [memorandum](#) instructing heads of its components to “incorporate[e] appropriate performance standards in appraisal records and work plans” and circulated model performance standards that included standards for conducting timely searches. The subcommittee believes the Department of Justice’s approach to include performance standards in appraisal records and work plans regarding FOIA compliance should be replicated across the entire federal government. Unfortunately, this subcommittee could not determine the extent that components of the Department of Justice or other agencies have adopted these performance metrics.

To determine which, if any, agencies are appraising subject matter experts with FOIA responsibilities on how they are fulfilling their FOIA duties, and the effectiveness of these measures on improving the administration of FOIA, we recommend that the Archivist of the United States direct OGIS to examine their use. We further recommend that the Director of OGIS submit its findings and potential recommendations to the President and Congress as additional information determined to be appropriate under 5 USC 552 (h)(5).

- **Propose that the Chief FOIA Office Council seek to establish a technology subcommittee, in partnership with the federal CIO Council, to study the utilization and deployment of FOIA technology across agencies and identify best practices and recommendations that can be implemented across agencies.**
- **Suggest a modification to the Federal Acquisition Regulation (FAR) to require all agencies, when acquiring electronic record management software, electronic mail software, and other records related information technology, to take into consideration features which will help facilitate the agencies responsibilities under the Freedom of Information Act, 5 U.S.C. §552 to provide access to federal agency records.**

While other FAR provisions speak to requirements of the Privacy Act, 5 U.S.C. §552a, when acquiring contractor services or data systems, the subcommittee was unable to find a FAR provision which speaks to an agencies obligation under FOIA to provide access to federal agency records. As the Federal Government increases its reliance on electronic data systems it is important to insure that agencies have the means to effectively and efficiently pull information out of these systems in response to FOIA requests. One way to do that is to require federal agencies to consider their responsibilities under the FOIA when they set out to acquire information technology.

- **Direct OGIS to publish the following recommended agency practices to improve the timeliness, thoroughness, and efficiency of agencies' FOIA searches:**
- **Increase the ability for FOIA offices to procure technology to aid federal agencies in more efficiently conducting records searches to the greatest extent possible.**

Results from a [National Security Archive and Project on Government Oversight survey](#) of FOIA processors and FOIA requesters shows that many FOIA offices do not have access to large quantities of their agency's records or databases. Some FOIA professionals, including those at the Department of State, have centralized search capabilities, meaning that they have the ability to search large portions of their agency's records themselves. Because the primary mission of FOIA processors at agencies is to process FOIA requests as efficiently as possible, and because FOIA professionals are often well-trained at records management and retrieval, at certain agencies, centralized searches can be the quickest way to procure the documents requested.

From the limited information available to the subcommittee, most agencies appear to not have centralized FOIA search capabilities. This means that after the FOIA office receives a request, it "tasks it out" to the part of the agency that it believes is most likely to have responsive documents. Then, in addition to all of their other job obligations, these federal employees –sometimes termed "subject matter experts"– are tasked to retrieve the requested document and provide it to the FOIA office for review (often with suggestions on what should be withheld or released). Although the Department of Justice guidance states that, "FOIA is everyone's responsibility," often these "subject matter experts" perform slow, un-thorough, or otherwise imprecise searches for the requested records. This often leads to a "search black hole" –when "subject matter experts" do not quickly respond to search taskings by the FOIA department– that appears to be one of, if not the, primary causes for unacceptably long response times to FOIA requests.

At many agencies, the relevant employee must search his or her own records --including his or her own emails-- making it difficult to ensure standardized responses, and ensure full compliance and propriety. We have observed at certain agencies that centralizing the information or allowing the FOIA office to have direct access –knowing that privacy, classification, technological, and other concerns means that this may not always be possible-- can make the search process more accurate and timely.

- **Ensure that agency emails can be efficiently and accurately searched electronically by FOIA offices.**

Despite the [Managing Government Records Directive \(M-12-18\)](#) which required agencies "to manage both permanent and temporary email records in an accessible electronic format by December 31, 2016," there many agencies that still state that they do not have the ability to efficiently search their emails in response to FOIA requests, and many others state that they do not have the ability to search thoroughly.

Often agency FOIA officials can improve the ease and breadth of their email searches by meeting and working with agency technology experts to devise improved methods. Senior agency officials should support this allocation of IT resources to comply with the law.

To more fundamentally fix this problem, agencies must ensure that FOIA compliance is required when purchasing future email systems and consider the efficiency and ease of software's ability to search email in response to FOIA requests when making purchasing decisions. One positive example of this was presented by FOIA Advisory Committee Chair Alina Semo at the July 2017 meeting. She explained that the Office of Government Information Services and the US National Archives use the Gmail email service, "so for me when I have to do a search for FOIA, the search functionality in Gmail is great." Other agencies must follow NARA's example and adopt email platforms that take into account record retrieval and FOIA requirements when procuring email platforms.

Finally, agencies must recognize that allowing non-FOIA employees to search their own emails without supervision --and to possibly delete or simply not provide the requested information in response to FOIA officials-- is generally not a best practice and work to ensure that FOIA officials, not the owners of the email addresses, are searching for emails requested under FOIA. For agencies where records custodians are conducting searches, particularly for emails, we recommend that the agency puts in place strong accountability measures to ensure that searches are conducted in a timely and appropriate fashion.

- **In light of the potential legal costs of untimely or inadequate FOIA searches, agencies should explore the process of obtaining software and technology tools, including eDiscovery tools, to conduct more accurate and timely FOIA searches.**

At the April 2017 FOIA Advisory Committee Meeting, Doug Hibbard of the Department of Justice Office of Information Policy gave a presentation demonstrating the profound improvement the use of eDiscovery tools could have on FOIA searches, especially for requests involving emails. He explained that, frequently, he can use eDiscovery tools to "work with a requester to narrow the scope of responsive records to a request that is a much more manageable size."

The Search Subcommittee is also impressed by the power of eDiscovery searches and hopeful that their use increases, but we have found that there are often obstacles before their use by agencies. At the **January 2017 FOIA Advisory Committee Meeting**, James Valvo explained that in his experience, agencies were not willing to use eDiscovery tools (presumably due to their cost) until his organization files a FOIA lawsuit. He added, that this "creates an incentive for his organization to file a lawsuit as quickly as possible."

Agencies should increase as much as possible the use of eDiscovery tools to search for FOIA requests as much as appropriate and affordable. They should work with their legal and IT departments to understand how frequently these tools can currently be used for FOIA searches. Finally, they should continue to monitor and explore whether equally powerful and more cost effective alternatives to the current eDiscovery options exist.

- **Effectively explain on agency websites how agency records are maintained and ensure that FOIA Public Liaisons and other FOIA personnel work with requesters to help submit well-targeted FOIA requests.**

Specific, narrow, tailored requests benefit both requesters and processors by decreasing the amount of time needed to search for documents. To increase the likelihood that this is the type of request that is submitted, FOIA websites should prominently feature an accurate, understandable description of what their holdings of records include and how they are organized. A version and explanation of the [Enterprise Data Inventories](#) that many agencies have posted at data.gov would be a good place to begin.

After a request is made, FOIA officers, including liaisons, should not hesitate to attempt to proactively contact requesters and explain the types of searches that can be requested and work with the requester to find the way to search most efficiently for the records requested (i.e.: for emails with this key word in the subject sent from a specific email address). This outreach falls under the current mandate that FOIA liaisons must be “responsible for assisting in reducing delay,” but increasing this communication with requesters to conduct better FOIA searches would improve the FOIA process by increasing search precision and decreasing search volume. To ensure that agency FOIA personnel can provide requesters with good customer service, we further recommend that agencies ensure all FOIA professionals have training on the agency’s major record-keeping systems and are aware of the types of records that program office’s hold.