

To: 2018-2020 FOIA Advisory Committee
From: Vision Subcommittee of the 2018-2020 FOIA Advisory Committee
Date: May 29, 2020
Re: Vision Subcommittee Report & Recommendations to the FOIA Advisory Committee

I. Vision Subcommittee Mission Statement

The Vision Subcommittee’s mission is to provide a strategic plan to achieve a shared vision of the Freedom of Information Act (FOIA) over the next 10 years. The Vision Subcommittee recognizes the benefits and value of freedom of information and FOIA’s role as an essential part of a functioning democracy. This strategic plan includes raising the priority of FOIA within the Executive Branch, reconsidering the model of the Office of Government Information Services (OGIS) within the FOIA community, increasing accountability for FOIA and transparency, managing expectations between agencies and the requester community, and stressing the need for increased and continued financial support for agency FOIA programs.

II. Vision Subcommittee Methodology

The Vision Subcommittee focused its research on five subparts of the mission statement: (1) raising the priority of FOIA within the Executive branch; (2) reconsidering the model of OGIS within the FOIA community; (3) increasing accountability for FOIA and transparency; (4) managing expectations between agencies and the requester community; and (5) stressing the need for increased and continued financial support for agency FOIA programs. The Subcommittee’s work included discussions within the Subcommittee and with the full Committee, consultations with subject matter experts, and domestic and international research. The Subcommittee also determined that many agency performance plans included no mention of their FOIA programs. Additionally, the Subcommittee assisted with the organization and compilation of the Time Volume Subcommittee’s survey. At the conclusion of their collaboration, the Vision Subcommittee submitted recommendations to the full Committee for its consideration on the need for financial support for agency FOIA programs, raising the priority of agency FOIA programs, and a call for legislative action.

III. Vision Subcommittee Recommendations

Vision Subcommittee Recommendation 1: Stressing the Need for Increased and Continued Financial Support for Agency FOIA Programs

“The Archivist of United States requests that the Chief FOIA Officers (CFO) Council create a committee for cross-agency collaboration and innovation to:

- **Research and propose a cross-agency grant program and other revenue resources for FOIA programs;**
- **Review and promote initiatives for clear career trajectories for FOIA professionals, building on the Government Information Specialist (GIS) job series and in coordination with existing agency efforts; and**
- **Explore and recommend models to align agency resources with transparency commitment.”**

Goal: To ensure that FOIA programs are well-funded.

Rationale: The recommendations in this and prior FOIA Advisory Committee reports are crucial steps towards bringing FOIA into the 21st century, but adoption of proactive disclosure, advances in artificial intelligence, and other tactics won’t solve a fundamental issue: Financial support hasn’t kept up with increasing demands of FOIA requests — both in terms of number and increasing complexity. As a result, U.S. FOIA programs are chronically underfunded, short staffed, and failing to meet statutory deadlines. Our country needs a robust, well-funded and carefully considered FOIA program to deliver the transparency and accountability that the American people deserve and expect, including reliable financial support; investment in creative, strategic initiatives for improving records management, review and release; and career trajectories that emphasize the professionalism and independent FOIA offices rely on to maintain the trust of the American people in government.

This recommendation for increased resources for FOIA offices was one that was endorsed by both the agency and requester communities, and we believe is critical for delivering on other agenda items included in the FOIA Advisory Committee’s recommendations. Broadly, these investments need to be made in three core areas: personnel, records management, and technology.

Vision Subcommittee Recommendation 2: Raising the Priority of FOIA: Support from Leadership

“The Archivist of the United States proposes that the Chief FOIA Officers (CFO) Council recommend that agency leadership annually issue a memo reminding the workforce of its responsibilities and obligations under the FOIA and encouraging the workforce to contact the agency’s FOIA Officer for assistance with the FOIA process.”

Goal: To ensure that all federal employees understand their responsibilities and obligations under FOIA.

Rationale: In his 2009 FOIA Guidelines, Attorney General Eric Holder stated that “FOIA is everyone’s responsibility.” In the March 13, 2013 OGIS Policy Recommendations for Improving Freedom of Information Act Procedures,¹ OGIS recommended that agency leadership actively support FOIA programs and encouraged the issuance of memos by senior agency officials. To lead by example, in March 2013, the Archivist of the United States sent a memo advising NARA employees on the importance of FOIA. In the April 3, 2013 FOIA Ombudsman blog,² OGIS shared the Archivist’s memo and encouraged leadership at other agencies to issue similar memos to promote the importance of FOIA. The leadership at several agencies, including the Department of Transportation, Department of Energy, the Department of Agriculture, and the National Labor Relations Board, issued similar memos, which greatly increased the support for FOIA programs at these agencies. The issuance of an annual agency wide memo by leadership would publicly show their continued support for FOIA.

Vision Subcommittee Recommendation 2B: Raising the Priority of FOIA: FOIA and Administrative Transition

“The Archivist of the United States directs OGIS and requests that DOJ/OIP assist agencies in establishing briefings for senior leaders during transition to a new administration or any change in senior leadership, which provide a thorough understanding of FOIA obligations/expectations, agency FOIA process, agency FOIA resources, and records management. OGIS and DOJ/OIP may provide a senior leadership FOIA training module, provide a FOIA training template with basic information on the FOIA, including important topics to cover and/or host a FOIA roundtable for senior leadership with speakers from the top performing agencies and the requester community.”

Goal: To ensure that senior leadership understand their responsibilities and obligations under FOIA.

Rationale: There are FOIA trainings created for federal employees, but these trainings are not created specifically for agency leadership. For example, in 2015 DOJ/OIP released FOIA training tools³ including two training modules, which agencies were able to load onto their e-Learning platform and make available to their employees. The first FOIA training module was created for all federal government employees, which is a basic FOIA primer and provided suggestions on how employees can assist their agency in the administration of the FOIA. The second FOIA training module was designed for FOIA professionals and it contained the procedures and substantive requirements of the FOIA. When there is a change in administration

¹ <https://www.archives.gov/files/ogis/assets/ogis-2013-recommendations.pdf>

² <https://foia.blogs.archives.gov/2013/04/03/foia-spread-the-word/>

³ <https://www.justice.gov/oip/blog/new-doj-foia-training-resources-now-available-agencies>

and the new agency leaders are appointed, many leaders are not familiar with the FOIA and the process. The agency FOIA Officer must educate the new leadership. A FOIA training created specifically for senior leadership, prepared by OGIS and DOJ/OIP, would assist the agencies with the education of leadership and with the administration of the FOIA.

Vision Subcommittee Recommendation 2C: Raising the Priority of FOIA: Inclusion in Agency Performance Plans

“The Archivist of the United States directs NARA/OGIS and requests that DOJ/OIP examine the FOIA performance measures used in their Agency Performance Plans and Reports. The Subcommittee further recommends OGIS submit the results of its assessment and any recommendations to Congress and the President in accordance with 5 U.S.C. § 552 (h)(5).”

Goal: To ensure that agencies include FOIA in their performance plans.

Rationale: The FOIA is absent from many federal agency performance plans.⁴ The inclusion of FOIA performance measures in the Agency Performance Plans requires agency leadership, not just designated FOIA personnel, to track progress on FOIA implementation. Federal agency performance plans are publicly available at Performance.gov. The 2016-18 FOIA Advisory Committee made recommendations in its final report regarding federal employee performance standards and FOIA. What we are addressing here is something different — not the performance of individual employees but of agencies as a whole.

Each agency could work with the Office of Management and Budget and the Performance Improvement Council to improve FOIA practices in ways which make sense for that specific agency’s context. For example, the EPA’s FY 2018-2022 Strategic Plan has a long-term performance goal that addresses FOIA implementation: “LTPG 2.2.1 By September 30, 2022, eliminate the backlog and meet statutory deadlines for responding to Freedom of Information Act (FOIA) requests.” Other agencies could develop similar goals focusing on backlogs or could address different FOIA issues such as training or technology improvements. For some agencies, it may make sense to include FOIA in their mission or priority goals.

⁴ Piotrowski, S.J. and Rosenbloom, D.H. (2002), Nonmission–Based Values in Results–Oriented Public Management: The Case of Freedom of Information. *Public Administration Review*, 62: 643-657. <https://doi.org/10.1111/1540-6210.00247>

Piotrowski, S., Rosenbloom, D.H., Kang, S. and Ingrams, A. (2018), Levels of Value Integration in Federal Agencies' Mission and Value Statements: Is Open Government a Performance Target of U.S. Federal Agencies?. *Public Admin Rev*, 78: 705-716. <https://doi.org/10.1111/puar.12937>

Vision Subcommittee Recommendation 3 Subcommittee Statement

The FOIA law is a linchpin for an open and accountable government in this country and Congress should launch a major legislative initiative to modernize and more fully empower the FOIA programs across government. Congress has periodically passed FOIA amendments that, while much needed and appreciated, addressed smaller distinct problems with the law and its implementation. However, the reality is that problems have plagued FOIA throughout its more than 50 years. We have long struggled with heavy request volumes, lengthy response time, inconsistent implementation, large backlogs, along with confusion and growing mistrust around the process. Certainly, there have been successes and millions have benefited from this simple but groundbreaking tool. But to realize the full potential of law, major legislative efforts are certainly necessary. For those issues where no clear solution exists, we encourage Congress to use pilot projects and task forces to find the best path forward and then pursue it. Congress showed incredible commitment and leadership in 1966 when it established FOIA and we need that commitment and leadership again to overcome FOIA's biggest challenges.

Vision Subcommittee Recommendation 3A: FOIA Legislative Action: Strengthen Independent Oversight

“We recommend Congress engage in more regular and robust oversight of FOIA and the long-standing problems with its implementation. We encourage Congress to hold more hearings, establish a more regular stream of communication and inquiries to agencies around FOIA issues, and strengthen the Office of Government Information Services with clearer authority and expanded resources.”

Goal: To strengthen government oversight of FOIA administration.

Rationale: Given the difficulty of the responsibilities laid out in FOIA, the rising volume of records requests, and the challenges agencies have long faced implementing FOIA, independent oversight is an important component to ensure problems are identified and addressed so the system operates as effectively as possible. Effective oversight should lead to more consistent implementation across agencies, greater efficiencies and savings in both funds and time, as well as fewer costly lawsuits.

Unfortunately, hearings on FOIA performance are currently infrequent, often occurring once a year and offering only the broadest overview of agency performance. While we understand that Congress has many pressing issues competing for its committees' time and attention, the reality is that the nearly intractable problems will not be satisfactorily addressed without steady pressure and oversight from Congress. Hearings on specific issues would allow committees to drill down

on problems and hopefully identify solutions. Congress can look to the recommendations of this advisory committee's various terms to identify issues that need to be addressed.

Outside of hearings, we encourage Congress to engage agencies more regularly with inquiries about performance and status of previously discussed issues. Such activity will effectively communicate to agencies that strong FOIA performance is a clear expectation of Congress. Congress should also strengthen the Office of Government Information Services (OGIS), which it created to provide administrative oversight to agencies and the FOIA process. In the years since OGIS was established, it has had a significant and growing impact on FOIA implementation across the government. However, the office is vastly understaffed, underfunded, and under-authorized to effectively oversee FOIA across the entire federal government. Therefore, we urge Congress to significantly expand the funding and staffing for this important office and to strengthen the office's authority on FOIA matters.

Vision Subcommittee Recommendation 3B: FOIA Legislative Action: Ensuring that Agencies are Provided Sufficient Resources

“We recommend Congress directly address the issue of funding for FOIA offices and ensure that agencies receive and commit sufficient dedicated resources to meet their legal obligations to respond to FOIA requests in a timely manner both today and in the future.”

Goal: To ensure that FOIA programs are well-funded.

Rationale: The single most consistent challenge agencies encounter when attempting to properly implement FOIA derives from limited resources. For those agencies with significant backlogs of requests the greatest need is for additional funds and staff to handle the large number of requests being received. However, because FOIA is often seen as a lower priority for agency leadership, the work often fails to receive sufficient budget allocations to meet their obligations.

As we continue into an information age, agencies are generating more and more records every year and public interest in those records appears to be steadily rising. The only way to manage this dynamic will be through the consistent and significant investment in the technology, staff, and training necessary to readily manage the growing records system and facilitate quicker searching and disclosure of responsive records.

Congress controls funding for the executive branch and we urge them to use that authority to ensure sufficient resources are committed to FOIA offices to handle current needs and to invest in developing technology and tools that will allow the offices to keep pace with growing demands.

Congress has many methods available to them to ensure more robust funding for FOIA offices. To that end, we would encourage Congress to consider what would be the most expedient. First, Congress could require that FOIA offices become a budget line item for agencies. This would allow congress to directly appropriate greater FOIA funds to agencies with little chance of miscommunication or funding changes. Alternatively, Congress could consider using report language to make clear to agencies the levels of funding for FOIA offices that committees expect.

Vision Subcommittee Recommendation 3C: FOIA Legislative Action: Expanding the Scope of FOIA to Include to Legislative and Judicial Branches

“We recommend Congress expand the Freedom of Information Act law to include new statutory requirements for the federal legislative and judicial branches to establish processes through which individuals can officially request records. The new provisions should mirror those in place for the executive branch establishing clear proactive disclosure requirements, clear categories of covered and excluded records, exemptions for withholding, an appeals process, and the right to judicial review.”

Goal: To require that Congress and federal courts are subject to FOIA.

Rationale: The purpose and principles of FOIA are just as applicable to the legislative and judicial branches as the executive branch. The fundamental concept that federal records, with carefully considered exceptions, should be open to the public should certainly hold true for all three branches of government. The approach to achieve such openness, namely that government offices should have clear requirements to officially respond to requests, is as legitimate and appropriate for the legislative and judicial branches as it is for the executive.

In fact, 46 states include some portion of their legislative branch in their open records process and 32 states include their judicial branch.⁵ Internationally, at least 25 countries legally provide a legal right to legislative information and at least 10 countries do the same for judicial information, many through their main access to information law.⁶ These examples establish that inclusion of the other branches is feasible and offer us a range of potential models to explore for possible emulation at the federal level.

⁵ “How Open Is Your Government? Find Out” Muckrock, 2016. <https://www.muckrock.com/place/>

⁶ Scope of Bodies Covered, Right 2 Info, 2013. <https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/legislative-branch> and <https://www.right2info.org/scope-of-bodies-covered-by-access-to-information/judicial-branch>

This is not to suggest that the current executive FOIA system should simply be extended to each branch. This expansion would require the establishment of new requirements crafted specifically to each branch in consideration of the types of records handled and addressing the concerns associated with their potential disclosure.

Some states in applying their open records laws to the legislative or judicial branches have limited the application to administrative records or included broader categories of record exemptions. Congress would have to carefully consider how FOIA access would apply to the records from these branches.

Both the judicial and legislative branches produce materials of interest and importance to the public. While often these materials are made available to the public, that access is not universal or consistent. If the public encounters barriers to access, there is no legal process to file a request that would then have to be processed. The public also cannot appeal or have courts review any limitation in access.

The legislative branch has bill markups, vote counts, hearing transcripts, officials' calendars, and text of speeches. Additionally, there are several offices beyond the members and committees of Congress that are included in the legislative branch such as the Capitol Police, Government Accountability Office, Congressional Research Service, and Architect of the Capitol. Currently, there is no legally enforceable process to request records from these offices and the access they do provide can be easily changed with little or no recourse available to the public.

Similarly, the federal judiciary has many records of public interest including spending records, court filings, spending records, and rulings. Currently, many federal court records can be found on the government run system Public Access to Court Electronic Records (PACER). However, PACER requires users to pay for access to these records and does not offer fee waivers for media or public interest. And unlike under FOIA, there is no process within PACER to request fee waivers for media or public interest purposes. In fact, PACER specifically urges courts not to grant members of the media fee waivers as they are considered an entity that has the ability to pay.

Extending some version of the FOIA provisions to the legislative and judicial branches could address the inconsistency of access and establish a rigorous and fair process to review and respond to requests.

Vision Subcommittee Recommendation 4: A Look to the Future

“The Archivist of the United States should continue to take a leadership role in ensuring that ongoing and future federal data strategies incorporate existing FOIA access and federal recordkeeping policies.”

Rationale: When the FOIA was originally enacted in 1966, the government’s records were primarily in hard-copy or paper form. Over the past several decades, federal agencies increasingly have been creating and receiving records in electronic form, leading to the need for updated laws, regulations, and policies aimed at managing and preserving new forms of electronic records, and providing access to them. To this end, in June 2019 the National Archives and Records Administration (NARA) and the Office of Management and Budget (OMB) issued a joint memorandum, “Transition to Electronic Records,”⁷ that sets a December 31, 2022 deadline both for agencies to manage all records (both permanent and temporary), and for NARA to end its acceptance of paper records.

At the same time, the Administration is implementing a Federal Data Strategy intended as a “framework of operational principles and best practices that help agencies deliver on the promise of data in the 21st century.”⁸ In providing for “a common set of data principles and best practices in implementing data innovations,” the Federal Data Strategy “complements statutory requirements and OMB information policy and guidance,” and explicitly cites to the Freedom of Information Act and the Federal Records Act among other statutes.⁹ Additional OMB guidance has created the new position of Chief Data Officer (CDO) in each federal agency as well as a government-wide CDO council.

The Archivist has the opportunity to play an important role in reminding members of the open government and federal data strategy communities that a substantial amount of “data” and “information” created or used by federal agencies also satisfies the definitions of what constitute “agency records” under the Freedom of Information Act¹⁰ and federal “records” under the Federal Records Act.¹¹ The challenge will be for NARA to insist on “having a seat at the table” in high-level policymaking discussions involving federal data, including those arising out of newly enacted legislation involving the Foundations for Evidence-Based Policymaking Act¹²

⁷ See <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf>

⁸ See M-19-18, “Federal Data Strategy – A Framework for Consistency” (June 10, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-18.pdf>

⁹ *Id.* at 1 n.2.

¹⁰ See <https://www.justice.gov/oip/blog/foia-update-foia-counselor-what-agency-record>.

¹¹ See 44 U.S.C. 3301.

¹² Pub. L. No. 115-435, 132 Stat. 5529.

(incorporating the OPEN Government Data Act.)¹³ The importance of the Archivist taking on a leadership role in highlighting issues involved in managing and providing access to government records in the form of data will only grow over time, given the enormous and ever-increasing volumes of government data that are being created throughout the Executive branch with each passing year.

(This recommendation was submitted by Committee Member Jason R. Baron.)

IV. Vision Subcommittee Members

Joan Kaminer, U.S. Environmental Protection Agency, Co-Chair

Chris Knox, Deloitte, Co-Chair

Kevin M. Goldberg, Digital Media Association (DiMA)

Lizzette Katilius, U.S. Securities and Exchange Commission

Ginger McCall, State of Oregon (September 2018 - December 2019)

Michael Morisy, MuckRock

Sean Moulton, Project On Government Oversight (POGO) (December 2019-June 2020)

Suzanne J. Piotrowski, Rutgers University School of Public Affairs and Administration

James R. Stocker, Trinity Washington University

Thomas Susman, American Bar Association

Patricia Weth, National Labor Relations Board

¹³ *Id.*, 132 Stat. 5534.