DRAFT REPORT TO THE ARCHIVIST OF THE UNITED STATES

Freedom of Information Act Federal Advisory Committee

NATIONAL ARCHIVES

DRAFT Report and Recommendations

2018-2020 Committee Term

MAY 20, 2020

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EXECUTIVE SUMMARY

The National Archives and Records Administration (NARA) chartered the Freedom of Information Act (FOIA) Advisory Committee (Committee) to foster dialogue between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures. Committee members represent a wide variety of stakeholders in the FOIA community inside and outside of government, and the Committee serves as a deliberative body to advise the Archivist of the United States on improvements to FOIA administration.

During the 2018-2020 term, the Committee formed three subcommittees to examine specific areas in which federal agencies could implement initiatives to improve records management practices, tackle time and volume issues, and adopt a vision of FOIA for the future.

The Committee has identified and approved 22 recommendations for delivery to the Archivist as mandated by the Committee's charter for actions to improve the implementation of FOIA.[1] Given the Archivist's broad charge to the Committee to chart a course for the future of FOIA, the Committee believes it is appropriate and within the scope of our charge to offer recommendations not only for components of NARA and the U.S. Department of Justice (DOJ) Office of Information Policy (OIP) to implement, but also for all federal agencies and Congress as important actors in the administration of FOIA.

The Committee understands that the Archivist has the authority only to ensure implementation of those recommendations directed to components of NARA. However, the Director of the Office of Government Information Services (OGIS) commits to work with the Archivist to convey the Committee's recommendations to the named components of government to which they are directed, including to OIP, federal agencies, the Chief FOIA Officers (CFO) Council, the Council of Inspectors General on Integrity and Efficiency (CIGIE), and Congress.

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[1] In order to avoid a potential conflict of interest, Committee member and Director of the U.S. Department of Justice's (DOJ) Office of Information Policy (OIP) abstained from voting on all of the recommendations, and Committee Chair and Director of the Office of Government and Information Services (OGIS) abstained from voting on specific recommendations related to OGIS and the Chief FOIA Officers Council, which is co-chaired by the Directors of OGIS and OIP.

AT-A-GLANCE RECOMMENDATIONS

The Committee's 22 recommendations discussed in this Report are as follows:

Recommendations for the National Archives and Records Administration (NARA), Office of Government Information Services (OGIS), U.S. Department of Justice's Office of Information Policy (OIP), and federal agencies.

Enhancing Online Access

1. We recommend that OGIS undertake an assessment of the information agencies make publicly available on their FOIA websites to facilitate the FOIA filing process for the purpose of OGIS and OIP providing further guidance on how agencies may improve online descriptions of the process. [Time/Volume 6]

2. We recommend that OIP issue guidance to require agencies to include records management-related materials as part of agency websites and FOIA handbooks maintained pursuant to FOIA. [Records Management 1]

3. We recommend that OGIS work together with OIP to encourage agencies to work towards the goal of collecting, describing, and giving access to FOIA-released records in one or more central repositories in standardized ways, in addition to providing access on agency websites. [Records Management 8]

Improving Training

4. We recommend that NARA and OIP offer targeted training in selected topics in federal records management to FOIA officers and FOIA Public Liaisons in federal agencies, and otherwise include a FOIA module in selected records management training courses open to all federal employees. [Records Management 2]

5. We recommend that OIP issue guidance requesting agencies to provide annual mandatory FOIA training to all agency employees, as well as provide FOIA training to all new agency employees and contractors onboarding with an agency, including program-specific training if applicable. We further recommend that OGIS and OIP undertake a study of agencies' current FOIA training requirements and content. [Time/Volume 3]

6. We recommend that OGIS and OIP assist agencies in establishing briefings for senior leaders during transition to a new administration or any change in senior leadership, for the purpose of providing a thorough understanding of their agency's FOIA resources, obligations, expectations during the FOIA process, as well as on matters of records management. [Vision 2B]

Raising the Profile of FOIA within Agencies

7. We recommend that OGIS and OIP examine the FOIA performance measures used in Agency Performance Plans and Reports to encourage agencies to include FOIA in their performance plans. We further recommend that 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). [Vision 2C]

8. We recommend that OIP collect information as part of each agency's Chief FOIA Officer Report regarding Standard Operating Procedures for the processing of FOIA requests, to encourage agencies to improve their internal processes. [Time/Volume 2]

9. We recommend that NARA incorporate and further develop the idea of public access to federal records, including through FOIA, as part of the NARA's Federal Electronic Records Modernization Initiative (FERMI). [Records Management 4]

10. We recommend that NARA and OIP each establish a liaison with the newly created Chief Data Officer Council, for the purpose of ensuring that CDO officials understand the importance of federal recordkeeping and FOIA requirements and how such laws apply to the maintenance of data within agencies. [Records Management 6]

Embracing New Technologies

11. We recommend that OIP provide further guidance on the use of e- discovery tools to assist agencies in meeting their obligations to conduct an adequate search of electronic records, including but not limited to email in Capstone repositories. [Records Management 3]

12. We recommend that OGIS work together with OIP to encourage agencies to release FOIA documents to the public on their FOIA websites and in FOIA portals in open, legible, machine-readable and machine-actionable formats, to the extent feasible. [Records Management 9]

13. We recommend that agencies conduct a comprehensive review of their technological and staffing capabilities within two years to identify the resources needed to respond to current and anticipated future FOIA demands. [Time/Volume 1]

Providing Alternatives to FOIA Access

14. We recommend that OGIS and OIP have agencies identify common categories of records requested frequently under the FOIA and/or Privacy Act by or on behalf of individuals seeking records about themselves, for the purpose of establishing alternative processes for providing access to these records to requesters in a more efficient manner than the FOIA. [Time/Volume 4]

15. We recommend that agencies provide for the dissemination of information outside of the FOIA, including in online databases where members of the public may access commonly requested types of documents. [Time/Volume 5]

Recommendations for the Chief Freedom of Information Act Officers Council

16. We recommend that the Chief FOIA Officers 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 a commitment to agency transparency. [Vision 1]

17. We propose that the Chief FOIA Officers Council recommend that agency leadership annually issue a memorandum 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. [Vision 2A]

Recommendation for Council of Inspectors General on Integrity and Efficiency

18. We recommend that the Chair of the Council of the Inspectors General on Integrity and Efficiency consider designating as a cross-cutting project or priority area the issue of how agencies are doing in providing FOIA access to agency records in electronic or digital form. [Records Management 5]

Recommendations for Congress

19. We recommend that Congress engage in more regular and robust oversight of FOIA and the long-standing problems with its implementation; encourage Congress to hold more hearings, establish a more regular and coordinated stream of communication and inquiries to agencies around FOIA issues; and strengthen the Office of Government Information Services with clearer authority and expanded resources. [Vision 3A]

20. We recommend that 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. [Vision 3B]

Additional Recommendations Looking to the Future

21. The Archivist should continue to take a leadership role in ensuring that ongoing and future federal data strategies incorporate existing FOIA access and federal recordkeeping policies. [Vision 4]

22. The Archivist should work with other governmental components and industry in promoting research into using artificial intelligence, including machine learning technologies, to (i) improve the ability to search through government electronic record repositories for responsive records, and (ii) identify sensitive material for potential segregation in government records, including but not limited to material otherwise within the scope of existing FOIA exemptions and exclusions. [Records Management 7]

BACKGROUND

Authority: The Committee was established in accordance with the United States Second Open Government National Action Plan,[2] released on December 5, 2013. Pursuant to the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (2016), amending section 552(h)(2)(c) of the FOIA, 5 U.S.C. § 552(h)(2)(C), the Office of Government Information Services (OGIS) is directed to "identify procedures and methods for improving compliance" with FOIA. The Committee is governed by the provisions of the Federal Advisory Committee Act (FACA), as amended, Pub. L. 92-463, 86 Stat. 770 (1972), 5 U.S.C. app. The Archivist of the United States renewed the Committee's Charter on May 15, 2018.

Objectives and Scope of Activities: NARA launched the Committee "to foster dialogue between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures,"[3] as described in the United States Second Open Government National Action Plan. The Committee serves as a deliberative body to advise the Archivist on potential improvements to the administration of FOIA. Committee members represent a wide variety of stakeholders in the FOIA community, inside and outside of government, and have expertise concerning the administration of FOIA across the Executive branch. The Committee may recommend legislative action, policy changes, or executive action, among other matters.

During the 2018-2020 term, the Committee formed three subcommittees to examine specific areas in which federal agencies could implement initiatives to improve records management practices, tackle time and volume issues, and adopt a vision of FOIA for the future. Reports of the Records Management, Time/Volume, and Vision Subcommittees, are available on the 2018-2020 FOIA Advisory Committee's website.[4]

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[2] *See* https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf.

[3] *See* https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term.

[4] Note: the final Subcommittee reports will be posted under the "Meetings" tab for the June 4, 2020 public meeting, https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings; prior versions are available under the "Meetings" tab for earlier public meetings of the Committee: https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings.

RECOMMENDATIONS

The Committee approved the 22 recommendations to the Archivist contained in this Report for actions to improve the implementation of FOIA, including through enhancing online access, improving training, raising the profile of FOIA in government reports, embracing new technologies, and providing alternatives to FOIA access.[5] Our recommendations reflect the Committee's view that providing FOIA access to government records should be more closely tied with federal records management policies, and that a need exists to improve the timeliness of FOIA processing given increasing volumes of FOIA requests. Several of the proposed recommendations represent how evolving FOIA policies should be incorporated into ongoing digital government initiatives. Two recommendations are directed to Congress for improving FOIA administration throughout the Executive branch.

We have categorized the recommendations in this report by the components of government with the lead for implementation, if adopted, consisting of:

- The National Archives and Records Administration and the Office of Government Information Services, U.S. Department of Justice' Office of Information Policy, and federal agencies;
- The Chief Freedom of Information Act Officers Council;
- The Council of Inspectors General on Integrity and Efficiency; and
- Congress.

The Committee recommends that the Archivist take the following actions:

Recommendations for the National Archives and Records Administration (NARA), Office of Government Information Services (OGIS), U.S. Department of Justice's Office of Information Policy (OIP), and federal agencies.

Enhancing FOIA Online Access

1. **We recommend that OGIS undertake an assessment of the information agencies make publicly available on their FOIA websites to facilitate the FOIA filing process, for the purpose of OGIS and OIP providing further guidance on how agencies may improve online descriptions of the process.**

Comment: There is an overarching need for streamlining the FOIA process. The number of FOIA requests filed annually across all agencies generally increased every year during the past decade, reaching a record 863,729 requests filed in Fiscal Year 2018.[6] Requests are expected to

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[5] In order to avoid a potential conflict of interest, Committee member and Director of OIP abstained from voting on all of the recommendations, and Committee Chair and Director of OGIS abstained from voting on specific recommendations related to OGIS and the Chief FOIA Officers Council, which is co-chaired by the Directors of OGIS and OIP.

[6] *See* Summary of Annual FOIA Reports for Fiscal Year 2018, Office of Information Policy, U.S. Department of Justice (OIP Summary FOIA Report 2018), https://www.justice.gov/oip/blog/new-annual-foia-report-data-available-foiagov-oip-publishes-its-summary-annual-foia-report.

continue to increase in the foreseeable future. Moreover, agency resources have largely remained stagnant during that time, leaving FOIA offices and officers feeling overburdened.

The FOIA Advisory Committee's Time/Volume Subcommittee conducted voluntary surveys of FOIA Officers and requesters in conjunction with the annual training conference of the American Society of Access Professionals (ASAP) in July 2019. Subcommittee members also distributed the surveys to their networks. More than half of all FOIA officers who responded said that agency capacity to handle FOIA requests is the single greatest impediment within the agency's control to processing FOIA requests on time.[7]

FOIA requesters appear to share these concerns and seem willing to take steps to hasten the FOIA process. A common theme among the surveyed FOIA requester community indicated a willingness by requesters to modify their requests if given better tools to do so.[8] In other words, communication does not need to only take the form of direct interaction with FOIA offices. The survey indicated that simply providing more useful tools to requesters would produce results, and the overwhelming majority of those surveyed said they either do – or would be willing to do – some research prior to filing a request.

DOJ has issued past guidance on improving websites.[9] Nevertheless, Committee members have observed that in many instances FOIA information on agency websites remains incomplete, inconsistent, and out of date. Although many agencies provide a basic overview of the filing process, agencies should consistently provide a straightforward and detailed step-by-step process for filing a FOIA request on their website. The information should include the requirements for a FOIA request, including a clear explanation of what constitutes an "agency record;" the type of response a requester should expect from an agency; the process the agency uses for handling FOIA requests; the estimated wait time for requests; a description of the administrative appeal process; and links to relevant statutory and regulatory provisions governing the FOIA process.

The information provided on agency websites also should clearly define "simple" and "complex" requests to facilitate requesters narrowing requests for the purpose of obtaining records more quickly. Agencies should provide estimated processing times for simple and complex requests so requesters understand the time it will take to process their requests.[10] Although such average

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[7] *See* Time/Volume section under "Subcommittee Methodology" later in this Report.

[8] *Id.*

[9] *See* DOJ/OIP FOIA Self-Assessment Toolkit (2017), https://www.justice.gov/oip/foia-resources/ foia-self-assessment-toolkit/download. Module 13 of the Toolkit emphasizes the importance of sharing information on an agency's website. In 2017, OIP issued further guidance titled "Agency FOIA Websites 2.0," emphasizing the importance of creating informative and user-friendly FOIA homepages. *See* https://www.justice.gov/oip/oip-guidance/ OIP%20Guidance%3A%20%20Agency%20FOIA%20 Websites%202.0.

[10] *See, e.g.,* U.S. Citizenship and Immigration Services, "Check Status of Request," https://first.uscis.gov/#/check-status (providing average processing times for different "tracks" of FOIAs including simple, complex and those for noncitizens in removal proceedings).

processing times are provided in agencies' FOIA Annual Reports,[11]highlighting this information on FOIA web pages would provide requesters with a better understanding of the "real" time frames involved for receiving responses, which in turn may help lessen the time agencies themselves spend in responding to requester inquiries about the status of their requests. Realistic processing timeframes also will help manage requester expectations and improve agency accountability regarding processing delays.

Agencies should describe requests that would be considered overly burdensome by the agency or not sufficiently specific and should provide other tips for narrowing requests on their websites. Finally, agencies should provide contact information for an agency representative who will be available to requesters preparing their FOIA requests for submission. Although agencies are now required to provide general contact information for their FOIA Public Liaison (FPL) in their initial responses to requesters,[12]agency FOIA web pages often fail to identify the FPL or similar contact person available to requesters.

In its second term, the 2016-2018 FOIA Advisory Committee recommended that agencies adopt the best practice of proactively contacting requesters and working with requesters early on, when necessary, to clarify and/or narrow their requests. The current recommendation emphasizes the importance of providing clearer and consistent guidance earlier in the process to facilitate a more efficient adjudication process for FOIA requesters, including less need for time-consuming correspondence between requesters and agencies. Once OGIS completes its assessment, the Committee recommends that OGIS work with OIP on how best to convey additional guidance to agencies to improve the information provided on their FOIA websites.

2. **We recommend that OIP issue guidance to require agencies to include records management-related materials as part of agency websites and FOIA handbooks maintained pursuant to FOIA.**

Comment: The FOIA requires the head of each agency to make available for public inspection in an electronic format reference material or a guide for requesting records or information from agencies.[13]A separate provision of the FOIA requires each agency to similarly make available in an electronic format administrative staff manuals and instructions to staff that affect members of the public.[14] Additionally, the Federal Records Act (FRA) includes a requirement that agencies establish "procedures for identifying records of general interest or use to the public that are

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[11] According to the OIP Summary FOIA Report 2018 (n.6, *supra*), the average processing time for a "simple track" request in FY 2018 was 25 days; by contrast more than 70% of complex requests took more than 20 days to process, with more than 33% of all complex requests needing at least 100 days to process. In addition, the average processing time for simple requests has decreased in each of the past three Fiscal Years.

[12] 5 U.S.C. § 552(a)(6)(A)(i), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185.

[13] *See* 5 U.S.C. § 552(g).

[14] *See* 5 U.S.C. § 552(a)(2)(C).

appropriate for public disclosure, and for posting such records in a publicly accessible electronic format." [15]

Agency FOIA handbooks or reference guides found on agency websites and at the National FOIA Portal, FOIA.gov, are an important resource for FOIA requesters. However, there are a wide range of differences among websites and reference guides as to the level of detail provided that would enable FOIA requesters to determine what types of agency records exist, organized by records management category. In some cases, reference guides are out of date with respect to the actual known records management practices at the agency. Agencies also have not generally informed FOIA requesters about agency adoption of a "Capstone" email policy, requiring that all email be preserved in accordance with General Records Schedule 6.1. [16]

It would be useful for FOIA requesters to better understand how government records are managed within agencies. To that end, agency FOIA handbooks and reference guides available online should also contain, or provide hyperlinks to agency web pages that contain, information about:

- What records or information is publicly available without a FOIA request;
- A list of major records and information systems maintained by the agency;
- Descriptions of what records the agency maintains, particularly concerning frequently requested records;
- Information about agency records systems and databases, not limited to Privacy Act Systems of Records;
- Agency records schedules, records file plans, and records-management guidance; and
- Information about agency email systems, including information about the agency's Capstone email policies if applicable.

This recommendation requests that OIP issue guidance asking that agencies review and update agency FOIA reference guides, FOIA website guidance, and to require that agencies report on their efforts in their annual Chief FOIA Officer reports to make more transparent their internal records management categories and practices. OIP may also want to update its FOIA self-assessment toolkits; and instruct FOIA staff to ensure they collaborate with agency Records Management and Privacy professionals. OGIS should support this effort by reviewing and suggesting improvements to agency websites and reference guides and by identifying and highlighting best practices for integrating records management features into FOIA guidance. [17]

The Archivist may also wish to consider issuing jointly with OMB guidance directing federal

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[15] *See* 44 U.S.C. § 3102(2), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185.

[16] *See* NARA White Paper on Capstone Approach and Capstone GRS (April 2015), https://www.archives.gov/files/records-mgmt/email-management/final-capstone-white-paper.pdf; Frequently Asked Questions About GRS 6.1, https://www.archives.gov/records-mgmt/grs/grs06-1-faqs.html.

[17] Exceptions may be made for records management-related materials containing classified information or information withheld under a specified statute, in accordance with 5 U.S.C. § 552(b)(3).

agencies to undertake a review of their existing records management policies, procedures, and directives, including agency records schedules, records file plans, and agency records management guidance, for the purpose of publishing these materials online.[18] This proposal should be continuing in nature as records management policies are updated.

3. We recommend that OGIS work together with OIP to encourage agencies to work towards the goal of collecting, describing, and giving access to FOIA-released records in one or more central repositories in standardized ways, in addition to providing access on agency websites.

Comment: OIP currently hosts guidance for agencies regarding FOIA websites, under the title "Agency FOIA Websites 2.0."[19] This guidance instructs agencies on how their FOIA websites should be constructed, including with respect to what key information and resources should be contained on the website. In addition, following the issuance of DOJ's Open Government Plan 3.0, in 2013 DOJ provided additional guidance on "Using Metadata as the Foundation for a Government-wide FOIA library."[20] OIP acknowledges that agencies continue to have wide leeway in how their online web pages are structured, including what formats are used, how or even if documents are described (*e.g.*, using keywords and other forms of metadata tagging), and what, if anything, they post to these sites. Further, these sites may be difficult for the public to find, navigate, and search. There are unfortunate consequences of non-standard posting and metadata description of FOIA records, coupled with the myriad existing agency FOIA libraries (formerly known as electronic reading rooms); these may include agencies ending up duplicating their efforts by receiving unnecessary queries for FOIA records already released, and the public not otherwise being provided adequate access to FOIA-requested records.

A small number of federal agencies currently post records released via FOIA requests in a central digital repository, FOIAonline.gov.[21] Additionally, some agencies support web pages on FOIA.gov that act as links or "pointers" to agency FOIA websites. These pointers are not,

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[18] *See* 44 U.S.C. § 2904(a) (under the Federal Records Act, the Archivist has the general authority to "provide guidance and assistance to Federal agencies" to ensure "economical and efficient records management;" the "adequate and proper documentation of the policies and transactions of the Federal Government;" and "proper records disposition"). Section 2904 goes on to state that the Archivist has the responsibility "to direct the continuing attention of Federal agencies and the Congress on the need for adequate policies governing records management." *Id.*, § 2904(c)(5). Additionally, OMB has general oversight authority with respect to the "use of information resources to improve the efficiency and effectiveness of governmental operations . . . ." 44 U.S.C. § 3504(a). This provision further provides that OMB "develop, coordinate and oversee the implementation of Federal information resources management policies, principles, standards, and guidelines," as well as "provide direction and oversee records management activities." *Id.*, §§ 3504 (a)(1)(A) & B (iv).

[19] *See* https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20 Websites%202.0.

[20] *See* https://www.justice.gov/oip/blog/using-metadata-foundation-government-wide-foia-library.

[21] *See* https://foiaonline.gov/foiaonline/action/public/about.

however, standardized in a way that optimizes public access to the underlying materials or works toward a government-wide FOIA library.

Agencies should be encouraged to use an existing centralized FOIA records portal like FOIAonline.gov to post documents. They should also develop metadata standards building on the above-referenced DOJ/OIP metadata guidance. Finally, agencies should upgrade and standardize their links in FOIA.gov to documents posted on agency FOIA web pages. These actions will serve dual purposes: First, doing so will save agency time in FOIA processing and FOIA Library administration. Second, it will facilitate and expand public access to proactively released records from across the government, especially if accompanied by more standardized metadata.[22]

Improving Training

4. **We recommend that NARA and OIP offer targeted training in selected topics in federal records management to FOIA officers and FOIA Public Liaisons in federal agencies, and otherwise include a FOIA module in selected records management training courses open to all federal employees.**

Comment: OIP provides an extensive array of FOIA courses for FOIA access professionals, FOIA Public Liaisons, and FOIA Reference Services staff. For example, in 2015 OIP released various FOIA training tools, including two training modules: a basic primer for federal government employees and detailed training for FOIA professionals.[23] Additionally, agencies conduct their own internal FOIA training and sometimes report using outside academic and commercial training offered by such organizations as ASAP and Graduate School USA. Some of these courses touch on records management issues in passing, but generally do not explore them in depth.

With respect to records management online courses offered by NARA, they are open to all federal employees. NARA's program focuses on policies and procedures unique to the federal environment. The training program covers every aspect of federal records management and represents an important step in acquiring the skills necessary to manage federal records. NARA does not, however, offer a specific course targeted to FOIA staff. Nor are there any available Government-wide statistics indicating how many federal employees engaged in FOIA-related functions have undertaken records management training.

FOIA professionals would benefit from a more in-depth understanding of the current state of federal recordkeeping within agencies, especially with respect to how agencies are managing records in electronic or digital form. For example, FOIA professionals handling requests that necessarily involve searches of email records, as well as other structured and unstructured electronic records, should be aware of the overall approach taken by their agency to electronic

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[22] *See, e.g.,* data.gov as one possible model of a central standardized metadata repository pointing to documents on agency websites.

[23] *See* https://www.justice.gov/oip/blog/new-doj-foia-training-resources-now-available-agencies.
Agencies can load these modules onto an e-Learning platform to make available to their employees.

records management. Armed with this knowledge, FOIA personnel should have a greater appreciation for what constitutes an "adequate" search for agency records responsive to particular requests, and they will be better able to execute their overall FOIA job responsibilities.

Possible topics to be covered that would be of benefit and interest to FOIA staff include an overview of:

(a) what constitutes "adequate documentation" of agency activities under the Federal Records Act and NARA regulations;

(b) the function of agency file plans and records schedules describing individual record series, and their retention or disposition as temporary and permanent records of agencies;

(c) recent initiatives involving the transition to electronic recordkeeping in government;[24]

(d) NARA's Capstone policy for email recordkeeping, including General Records Schedule (GRS) 6.1; and

(e) best practices in conducting electronic records searches to find responsive agency records.

Records management training for FOIA staff could take the form of a separate module embedded within one or more current course offerings by OGIS and/or OIP, or could be developed as separate stand-alone training to be conducted either in person or on-line. Agencies may also wish to consider offering in-house records management training to their own agency FOIA personnel. Agency Chief FOIA Officers should report on what records management-related course(s) they and their FOIA staff have attended in the annual Chief FOIA Officer Reports submitted to OIP.

5. We recommend that OIP issue guidance requesting agencies to provide annual mandatory FOIA training to all agency employees, as well as provide FOIA training to all new agency employees and contractors onboarding with an agency, including program-specific training if applicable. We further recommend OGIS and OIP undertake a study of agencies' current FOIA training requirements and content.

Comment: While FOIA requires that each agency's Chief FOIA Officer "offer training to agency staff regarding their responsibilities under [the FOIA],"[25]not all agencies implement their Chief FOIA Officers' offer of training with a mandatory requirement that all FOIA professionals fulfill. Nevertheless, a series of past DOJ memoranda and guidance have encouraged agencies to utilize OIP's training resources "to ensure that all of your employees have a proper understanding of the FOIA and the important role they play in implementing this law."[26]

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[24] *See, e.g.,* M-19-21, "Transition to Electronic Government," dated June 28, 2019. https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf.

[25] 5 U.S.C. § 552(j)(2)(F).

[26] *See* DOJ/OIP Memorandum for Agency General Counsels and Chief FOIA Officers of Executive Departments and Agencies re: Freedom of Information Act Training, dated October 28, 2015, https://www.justice.gov/oip/memorandum-foia-training; *see also* OIP's 2015 Guidance for Further Improvement Based on 2015 Chief FOIA Officer Report Review and Assessment, dated July 23, 2015,

The latest OIP guidance on the Content of (FY) 2020 Chief FOIA Officer Reports highlights an annual training expectation by including specific questions relating to FOIA training during the prior year.[27] High-volume agencies were asked to report:

> 3. Did your FOIA professionals or the personnel at your agency who have FOIA responsibilities attend any substantive FOIA training or conference during the reporting period such as that provided by the Department of Justice?
>
> 4. If yes, please provide a brief description of the type of training attended or conducted and the topics covered.
>
> 5. Provide an estimate of the percentage of your FOIA professionals and staff with FOIA responsibilities who attended substantive FOIA training during this reporting period.
>
> 6. OIP has directed agencies to "take steps to ensure that all of their FOIA professionals attend substantive FOIA training at least once throughout the year." If your response to the previous question is that less than 80% of your FOIA professionals attended training, please explain your agency's plan to ensure that all FOIA professionals receive or attend substantive FOIA training during the next reporting year.[28]

Agency responses to the above reporting requirements are available online.[29] As discussed in prior Recommendation 4, many agencies take advantage of a variety of intra-agency training opportunities, by OIP and OGIS, and by outside sources.

Nevertheless, as part of the Time/Volume Subcommittee's survey to FOIA professionals and requester communities, the survey sought to ascertain whether there are significant gaps in existing training being conducted.[30] Approximately half of responding agency FOIA staff reported that they do not receive adequate FOIA training. Of those respondents who found FOIA training to be inadequate, the main reasons they gave included that: (i) no training at all was received; (ii) the training received needed more subject matter content and detail; (iii) refresher

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https://www.justice.gov/oip/oip-guidance-9 (stating that "[i]t is critical to any successful FOIA administration that the professionals responsible for implementing the law have adequate training resources available to them"); Attorney General's Memorandum for Heads of Executive Departments and Agencies on the Freedom of Information (FOIA) Act, dated March 19, 2009 (directing all Agency Chief FOIA Officers to "review all aspects of their agencies' FOIA administration … and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies."), at 3.

[27] See https://www.justice.gov/oip/chief-foia-officer-report-agency-received-more-50-requests-1.

[28] *Id.*, § 1.B.

[29] *See* https://www.justice.gov/oip/reports-1.

[30] *See* n.7, *supra*.

training was needed; (iv) national training was wished for; (v) more training on policy was desired; and that (vi) as a general matter, training was simply "ineffective."

Additionally, a quarter of the respondents from the FOIA requester community thought that agencies could improve their FOIA process by improving agency training and staffing.

In light of the results of the Time/Volume Subcommittee's survey, the Committee believes that agencies should implement mandatory and specialized FOIA training requirements for employees (including contractors), whose position descriptions include responsibility for FOIA processing, as well as all first-line FOIA supervisors. Such training should, at a minimum, include statute-specific information on: the application of FOIA exemptions; proactive disclosure; fees and fee waivers; and the presumption of openness.

Additionally, agencies should make available in-depth onboarding or refresher training for FOIA professionals. Such training should include in-depth coverage of statute-specific information covered in the annual mandatory training, as well as training to include: FOIA policies and procedures; FOIA workflows; technology and tools used to implement FOIA; and an overview of statutory amendments and/or significant changes to FOIA case law.

In carrying out mandatory training, agencies are encouraged to continue to use OIP training courses as well as outside source training to supplement agency specific information. Agencies should also be encouraged to require program or subject specific FOIA training for subject-matter experts and technology professionals, to increase their understanding of program information, workflows, and business practices.

OGIS and OIP should also undertake a study of agencies' FOIA training requirements and content, including an evaluation of mandatory training, onboarding or supplemental training, first-line supervisor training, and specific training for subject-matter experts and technology professionals. The study should also include an assessment of funding sources and allocations for the identified training.

6. **We recommend that OGIS and OIP assist agencies in establishing briefings for senior leaders during transition to a new administration or any change in senior leadership, for the purpose of providing a thorough understanding of their agency's FOIA resources, obligations, expectations during the FOIA process, as well as on matters of records management.**

Comment: As noted in Recommendation #4, there are a number of FOIA training programs created for federal employees. However, FOIA training specifically for senior agency leadership is not generally available. When there is a change in administration and the new agency leaders are appointed, many leaders are not familiar with the FOIA process.[31] The Committee believes that FOIA training created specifically for senior leadership would materially assist agencies with their education resulting in better administration of the FOIA. We further believe that

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[31] *See generally,* Partnership for Public Service, *2018 Annual Report* at 8 ("New administrations are often unfamiliar with the very institutions they were elected to lead."), https://ourpublicservice.org/wp-content/uploads/2019/05/Partnership-for-Public-Service-Annual-Report-2018_FINAL.pdf.

training is especially needed during a transition to a new administration, or when there are changes in the senior leadership of an agency.

The Committee suggests that OGIS and OIP provide a senior leadership FOIA training module. The module may be in the form of a FOIA training template, with general information on the agency meeting its FOIA obligations and expectations, and the availability of FOIA resources. OGIS and OIP may wish to supplement the module as appropriate with program specific administration on FOIA and records management issues facing particular agencies. OGIS and OIP may also choose to host one or more FOIA roundtables for senior leadership, with speakers from top performing agencies as well as from the requester community.

Raising the Profile of FOIA within Agencies

7. **We recommend that OGIS and OIP examine the FOIA performance measures used in Agency Performance Plans and Reports to encourage agencies to include FOIA in their performance plans. We further recommend that 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).**

Comment: Under the Government Performance and Results Act (GPRA) of 1993,[32] and the GPRA Modernization Act of 2010 (GPRAMA),[33] agencies are required to publish annual performance plans that include establishing a list of performance goals for each program.[34] The Senate Committee report on GPRAMA explained that while "GPRA require[d] executive agencies to develop annual performance plans covering each program activity in the agencies' budgets," GPRAMA further "requires an agency to describe how the performance goals contained in its performance plan contribute to the goals and objectives established in the agency's strategic plan, as well as any overall federal government performance goals."[35]

A discussion of how agencies are administering their FOIA program responsibilities is absent from many federal agency performance plans.[36] Given the high-level attention agencies devote to their strategic plans, coupled with publicization of those plans, the Committee believes that inclusion of FOIA performance goals tied to agency strategic plans would give a boost to the government's overall accountability and transparency. Doing so requires agency leadership to make it happen, supported by designated FOIA personnel, who on a day-to-day level track progress on FOIA implementation and are in a position to view the FOIA performance of the agency as a whole.[37]

Each agency could work with OMB and the Performance Improvement Council[38] to improve FOIA practices in ways which make sense for that specific agency's context. For example: the

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[32] Pub. L. 103–62.

[33] 31 U.S.C. § 1115, Pub. L. 111-352. GPRAMA updated the prior GPRA of 1993, Pub. L. 103–62, that first provided for agencies creating annual performance plans.

[34] *Id.*, § 1115(b)(1).

[35] *See* Report of the Senate Committee on Homeland Security and Governmental Affairs, S. Rep. No. 111-372, at 5, https://www.congress.gov/111/crpt/srpt372/CRPT-111srpt372.pdf.

[36] *See* Suzanne J. Piotrowski, et al., "Levels of Value Integration in Federal Agencies' Mission and Value Statements: Is Open Government a Performance Target of U.S. Federal Agencies?," *Public Administration Review*, 78: 705 (2018), https://www.researchgate.net/publication/324008996. Federal agency performance plans are publicly available at Performance.gov.

[37] In the prior 2016-2018 term, this Committee made recommendations in its Final Report regarding federal employee performance standards and FOIA. *See* https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf. Our recommendation here addresses not the performance of individual employees, but of agencies as a whole.

[38] *See* pic.gov.

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.

To determine which agencies are and are not addressing agency FOIA administration in GPRAMA performance plans, the Committee recommends that OGIS and OIP conduct such an examination. The Committee further recommends that OGIS submit its findings and potential recommendations to Congress and the President, as determined to be appropriate under 5 U.S.C. § 552 (h)(5).

8. **We recommend that OIP collect information as part of each agency's Chief FOIA Officer Report regarding Standard Operating Procedures for the processing of FOIA requests, to encourage agencies to improve their internal processes.**

Comment: The Time/Volume Subcommittee's survey asked FOIA agency personnel and the requester community to identify FOIA challenges. The top three concerns identified by requesters were: (i) the "process" the agency employed; (ii) "accountability and transparency;" and (iii) the "timeline" agencies have for responding to requests. In turn, a substantial number of FOIA agency personnel stated that "fix[ing] internal processes was their top 'magic wand' wish." Additionally, about a third of requesters responding to the survey stated they were "confused" by the FOIA process, and a comparable percentage of FOIA agency personnel reported that they similarly perceived requesters to be confused.

The survey responses together indicate that standardizing internal processes and creating guidance in the form of a "standard operating procedure" (SOP) would benefit agencies, by streamlining processes and potentially reducing backlogs. The survey also indicates that the requester community also would benefit by having a better understanding of each agency's process, as well as receiving agency responses to record requests in less time.

The survey results further suggest that agencies would benefit from conducting self-assessments and prepare FOIA process procedures in the form of an SOP. When drafting an SOP, an agency should thoroughly review each step in the FOIA process. During this review, the agency should identify suitable approaches, ensure compliance with their FOIA regulations, obtain feedback from staff, and implement best practices. In addition to creating a standard FOIA process, the SOP would be a useful tool in training new employees.

To assist in developing and standardizing the SOP, agencies should consult the 2017 DOJ/OIP Self-Assessment Toolkit.[39] The Toolkit was designed to provide "a resource for agencies to use when assessing their administration of the FOIA." With the toolkit, OIP intended agencies to "conduct self-assessments to review and improve their FOIA program." The Toolkit contains 13

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[39] *See* n.9, *supra*.

modules ranging from intake to FOIA reporting that agencies can use when they are creating and/or updating their SOPs.

After the creation of an SOP, an agency should review the SOP every two years to provide updates based on new law, best practices, and technology.

Providing clear information about the FOIA process to the requester community is one of the key components in alleviating conflicts and confusion among FOIA requesters. The most direct means for agencies to be more accountable and transparent about their FOIA process is to post information online, on their FOIA home page. An agency that posts its FOIA SOP on its FOIA website will help provide greater clarity and specific details to the requester community about the agency's FOIA process. *See also* Recommendation #1 above.

Through the CFO reports, OIP collects information and later summarizes and assesses each agency based on this information. Requiring CFOs to include information regarding FOIA SOPs (including updating content on FOIA webpages) in their CFO reports would highlight their importance and encourage the development of improved SOPs. These tools will greatly assist in the administration of OIA by streamlining the agency process and sharing the information with the requester community.

9. **We recommend that NARA incorporate and further develop the idea of public access to federal records, including through FOIA, as part of the NARA's Federal Electronic Records Modernization Initiative (FERMI).**

Comment: In undertaking the Federal Electronic Records Modernization Initiative (FERMI),[40] NARA is providing the Executive branch with standardized and interoperable records management solutions and services to federal agencies. NARA recognizes that agencies have common needs for managing their electronic records. A critical aspect of managing electronic records is providing for economical and efficient public access to those records. It follows that incorporating the idea of public access more expressly into the FERMI's baseline requirements is one way to address the issue of access to a rapidly rising volume of agency records in electronic or digitized form.

Within FERMI, the Universal Electronic Records Management (ERM) Requirements comprise six sections based on the lifecycle of electronic records management: capture, maintenance and use, disposal, transfer, metadata, and reporting. "Access," while not expressly identified as a category, is provided for as a requirement within the category of "Maintenance and Use."[41]

NARA should consider further highlighting and developing what constitute "Access" requirements that are common to federal agencies. One way of doing so is in the development of a FERMI "Use case" involving FOIA access, in order to make clear what additional functional

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[40] *See* https://www.archives.gov/records-mgmt/policy/fermi.

[41] The specification states: "2.01 Records of current and former employees must be managed in a manner that supports searching in response to information requests, including FOIA and agency business needs." *See* https://www.archives.gov/records-mgmt/policy/universalermrequirements (accompanying spreadsheet).

requirements are necessary to efficiently process FOIA requests for responsive records found in large electronic or digital agency repositories. These requirements should include, but not be limited to, the use of efficient forms of search technologies for locating responsive records.

NARA should be open to considering additional ways in which access issues can be highlighted in connection with records management initiatives. For example, NARA may wish to consider asking agencies to assist in responding to informal supplemental questions to the annual Federal Email Management Reports,[42] Senior Agency Officials for Records Management Annual Reports,[43] and Records Management Self-Assessment Reports[44] aimed at eliciting how electronic records are being accessed within agency repositories. For example, with respect to Capstone email policies, NARA could ask agencies (i) to report on the estimated volume of email records being managed in a Capstone email repository, and (ii) to provide updates on how Capstone repositories are being searched and which types of software are being used for these searches. Through this process, NARA may wish to revise and update its own policy guidance on the available means for capture and management of email records via Capstone programs.

10. We recommend that NARA and OIP each establish a liaison with the newly created Chief Data Officer Council, for the purpose of ensuring that CDO officials understand the importance of federal recordkeeping and FOIA requirements and how such laws apply to the maintenance of data within agencies.

Comment: The Open, Public, Electronic and Necessary (OPEN) Government Data Act, enacted on January 14, 2019,[45] provides for a newly-formed Chief Data Officer (CDO) Council, comprising designated CDOs from each agency.[46] In turn, CDOs are expected to lead the creation of a new Data Governance Body at each agency.[47] Senior agency officials who are to serve on each agency's Data Governance Body are expected to "set and enforce priorities for managing data as a strategic asset to support the agency in meeting its mission. . . ."[48] Each agency's Data Governance Body is to include the agency's General Counsel, Chief FOIA Officer (CFO), and Senior Agency Official for Records Management (SAORM), among others.[49] Through participation in the CDO council, NARA and DOJ have the opportunity to play an

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[42] *See* https://www.archives.gov/records-mgmt/resources/email-mgmt-reports.

[43] *See* https://www.archives.gov/records-mgmt/resources/saorm-reports.

[44] *See* https://www.archives.gov/records-mgmt/resources/self-assessment.html.

[45] *See* Title II of the Foundations for Evidence-Based Policymaking Act, Pub. L. 115-435, 132 Stat. 5529, 5534.

[46] 44 U.S.C. §§ 3520 & 3520A.

[47] *See* OMB Memorandum M-19-23, dated July 10, 2019, https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf.

[48] *Id.*

[49] *Id.,* Appendix C.

important, continuing role in educating the greater "open data" community regarding how federal data assets are currently managed under the FRA and FOIA.

In connection with the above efforts, OIP and NARA should also work with their respective agency CDOs to align FOIA policy and FERMI with the Administration's overall Federal Data Strategy,[50] including as set out in the President's Management Agenda[51] and Reform Plan.[52] It will be increasingly important that federal staff understand that federally-created data in numeric form should be included within FOIA and federal records management workflows. Aligning these policies will facilitate the proactive release of federal data, expand on the available catalog of data on data.gov, standardize the release of agency data in open standards and machine-readable formats, and enable better public use of agency-created data from across the federal government.

Embracing New Technologies

11. We recommend that OIP provide further guidance on the use of e-discovery tools to assist agencies in meeting their obligations to conduct an adequate search of electronic records, including but not limited to email in Capstone repositories.

Comment: In the annual 2019 Chief FOIA Officer (CFO) Reports, most agencies reported to OIP that they either have or are considering using some form of technology to aid in the FOIA workflow process. This included the use of forms of automated collection software (rather than relying on manual processes by individual employees), and of various forms of FOIA redaction software. Additionally, a modest number of agencies reported using some form of e-discovery search tools to conduct searches of agency records. For the most part, the descriptions given in these reports did not indicate if more advanced search tools were part of the software capabilities agencies have acquired. Specifically, there was no express mention by any agency in any of the CFO Reports of the use of "predictive coding" or "technology assisted review"[53] in conducting FOIA searches. This technology, a form of artificial intelligence (AI) using machine learning, has been increasingly adopted over the past decade – especially in private sector litigation – for the purpose of conducting more accurate and efficient searches at substantially reduced cost in legal e-discovery and investigations.[54] Such technology is in use in various select components of

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[50] *See* https://strategy.data.gov/overview (explaining that the mission of the Federal Data Strategy is "to leverage the full value of Federal data for mission, service and the public good . . . .").

[51] *See* https://www.whitehouse.gov/wp-content/uploads/2018/03/Presidents-Management-Agenda.pdf.

[52] See https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf.

[53] *See, e.g.,* The Sedona Conference Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery, 15 Sedona Conf. J. 217 (2014), www.thesedonaconference/publications.

[54] *See* Nicolas M. Pace & Laura Zakaras, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery," RAND Corporation (2012), https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

government in connection with ongoing litigation, as well as in processing data in connection with "second requests" filed in antitrust proceedings. OIP should issue guidance that commends greater agency adoption of e-discovery tools and encourages agencies to become aware of advanced search methods that may enhance the ability to find responsive agency records on a more expedited basis.

Doing so would especially aid in searches for governmental email records. Based on annual reports compiled for NARA by Senior Agency Officials for Records Management (SAORM),[55] on the order of 200 reporting components of the Executive branch have stated that they have adopted or are in the process of adopting NARA's "Capstone" approach to managing email, which provides a way of meeting the goals of the M-19-21 Memorandum with respect to the management of email. An agency that adopts a Capstone email policy commits to managing and preserving programs-related email from all employees for seven years under General Records Schedule (GRS) 6.1, with a subset of that email from designated senior officials (Capstone account holders) considered to be permanent records.[56] Capstone email from designated senior officials will be preserved in agency repositories until such time as it is transferred (*i.e.*, accessioned) into the National Archives at a future date as agreed to by the agency and NARA. Agencies that adopt the Capstone approach for managing their email records necessarily will see the volume of email records grow to a substantial number, potentially in the hundreds of thousands to many millions depending on existing email volumes at the agency. Given this circumstance, agencies would be well advised to give serious consideration to employing advanced search technologies for the purpose of efficiently searching increasingly large volumes of email as part of conducting "adequate searches" under FOIA for responsive records.[57]

Not all federal agencies may desire or otherwise be in need of e-discovery software to assist in conducting FOIA searches. In particular, smaller agencies and agencies that receive few FOIA requests annually may not yet be seeing a volume of electronic records that would justify the use of more automated methods. On the other hand, larger Cabinet departments and agencies should give serious consideration to using more advanced technology to increase their efficiency and lower their overall cost burden in responding to large-volume FOIA requests.[58]

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[55] https://www.archives.gov/records-mgmt/resources/saorm-reports.

[56] *See* n.16, *supra.*

[57] For a recent example of judicial awareness of the availability of e-discovery search tools in a FOIA context, *see Open Society Justice Initiative v. CIA, Dep't of Defense and State Dep't*, 399 F. Supp. 3d 161, 168 (S.D.N.Y. 2019) (the Court found "remarkable" that one of the defendants overseeing FOIA requests "does not possess eDiscovery software," and held that a court "must focus on a reasonable agency's technological capability" in assessing search adequacy. Additional case citations are noted in our Committee's Records Management Subcommittee Report at 7, n.14.

[58] Appendix B to this Final Report contains a set of "best practice" suggestions with respect to using e-discovery tools to conduct more efficient searches for responsive records. As part of any guidance to be issued, OIP and OGIS should consider adopting or further publicizing some version of this checklist for use in the greater FOIA community of agencies, including in agency procurement of software useful to FOIA processing.

12. We recommend that OGIS work together with OIP to encourage agencies to release FOIA documents to the public on their FOIA websites and in FOIA portals in open, legible, machine-readable and machine-actionable formats, to the extent feasible.

Comment: The current means of FOIA access for researchers and the public at large is still primarily through receipt of paper-based documents. Enactment of the Electronic Freedom of Information Act (E-FOIA) Amendments of 1996 required federal agencies to honor FOIA requests for records in electronic form.[59] In the vast majority of cases, however, requesters asking for documents in electronic form often obtain scanned documents that have not undergone optical character recognition (OCR) processing. Scanned textual documents of all types, along with handwritten documents, images, and photographs, are all very difficult to search, analyze or otherwise manipulate in any fashion. They also may have legibility issues due to poor reproduction – although sometimes the original source documents are themselves difficult to read.

By contrast, documents in "machine readable" formats are structured in a manner that can be processed by a computer. As defined in the Open, Public, Electronic and Necessary (OPEN) Government Data Act, data considered to be "machine readable" is "in a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost."[60] Examples of these formats are extensible markup language (XML), JavaScript Object Notation (JSON), Hypertext Markup Language (HTML), and spreadsheets with header columns that can be exported as comma separated values (CSV). The further term "machine-actionable" highlights the key aspect that structured formats allow for greater manipulation of the content of data and records through use of software.

The federal government has in the last several years moved inexorably toward more transparency in the form of embracing "open" data.[61] Under the OPEN Government Data Act, each agency is to ensure that its "public data assets" are machine-readable, and available as an open Government data asset.[62] The law underscores that the government at large is increasingly being encouraged and expected – through both legislation and Executive branch policies – to generally embrace open, machine-readable formats when releasing information to the public.[63]

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[59] 5 U.S.C. § 552(a)(3)B), as amended by Pub. L. 104-231 (1996).

[60] *See* 44 U.S.C. § 3502(18).

[61] *See, e.g.,* Executive Order 13642, "Making Open and Machine Readable the New Default for Government Information" (2013); Open Government Directive (2009), https://obamawhitehouse.archives.gov/open/documents/open-government-directive.

[62] *See* 44 U.S.C. § 3506(b)(6) & 3506(d)(5), as added by Pub. L. 115-435, Title II, § 202(c)(1) & (3), 132 Stat. 5536, 5537. These provisions became effective one year after the original enactment date of the Act. 44 U.S.C. § 3506 Note.

[63] We defer to guidance expected to be issued by OMB on the scope of newly amended 44 U.S.C. §§ 3506(b) & (d), as to whether "public data assets" include agency responses to FOIA requests.

There are already examples where both NARA and DOJ are embracing machine readable formatting of government information. NARA recently posted to data.gov searchable and manipulable versions of the General Records Schedules (GRS) in CSV format, to test the usefulness of records schedule data in this format.[64] The *FOIA Annual Report XML schema*[65] is another leading example of the use of a machine-readable format to publish information otherwise contained in FOIA annual reports.

Using a similar XML schema would be one way in which agencies could accomplish making FOIA documents searchable, sortable, downloadable in bulk, and machine-actionable. By publishing FOIA documents in this way, the government would choose to facilitate machine-learning, AI and advanced indexing, and allow the public to find and use FOIA documents in new and more efficient and effective ways – leveraging technology to improve FOIA administration. Combining machine-readable and actionable formats with standardized descriptive metadata will move the government one step closer to the aspirational goal of a government-wide FOIA library.

The existing universe of FOIA responses simply does not leverage or take advantage of "open" formats of software Internet technologies. To bring FOIA in line with open government best practices, OGIS and OIP should encourage agencies to release their FOIA documents in both human-readable and structured, machine-readable and machine-actionable formats, to the extent feasible using available technology.[66]

13. We recommend that agencies conduct a comprehensive review of their technological and staffing capabilities within two years, to identify the resources needed to respond to current and anticipated future FOIA demands.

Comment: When members of the requester community were asked in the Time/Volume Subcommittee's survey to identify areas in which agencies could improve, a number of responses referenced improving overall "efficiency." Similarly, when agency FOIA professionals were asked about the greatest impediment to processing FOIA requests in a timely manner, approximately half referenced "resources," in their responses. As a component of all respondents' frustrations with FOIA processing, "technology" was also specifically referenced in both surveys.

In recognition of these concerns, we believe agencies should conduct a comprehensive review of current technological capabilities and future demands. An agency's data-driven comprehensive review should include analyzing information already collected for FOIA Annual Reports, in order for the agency to compile a longitudinal look at the numbers of FOIA requests received and processed; track the volume of the records reviewed; and identify the average number of FOIA requests the agency's FOIA professionals have been able to process. Additionally, agencies should determine the types of records maintained within their current electronic

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[64] *See* https://records-express.blogs.archives.gov/2020/02/10/grs-uploaded-to-data-gov/.

[65] *See* https://www.foia.gov/developer/.

[66] *See* https://obamawhitehouse.archives.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government-.

systems, whether any new systems are anticipated, and identify the technologies needed to process these records under the FOIA. With this evidence in hand, agencies can better assess their current technological capabilities and anticipated future requirements, including staffing considerations, such as the number of FOIA professionals who will be required to process FOIA requests. This information will also be useful in contributing to agency performance plans and standard operating procedures (SOPs), in fulfillment of Recommendations 7 and 8 above.

Providing Alternatives to FOIA Access

14. We recommend that OGIS and OIP have agencies identify common categories of records requested frequently under the FOIA and/or Privacy Act by or on behalf of individuals seeking records about themselves, for the purpose of establishing alternative processes for providing access to these records to requesters in a more efficient manner than the FOIA.

Comment: The FOIA was originally intended as a measure to increase transparency of government operations by releasing information to the public, ultimately as a means of improving the public's ability to govern.[67] In recent years, the number of annual FOIA requests in the United States has ballooned to over 1,800,000, as has the cost of accommodating these requests – more than $545 million in FY 2018.[68] However, many government agencies have come to rely on the FOIA to address other needs for access to information by the public beyond the worthy goals of transparency and accountability originally envisaged by the Congress. There are numerous legitimate reasons why citizens (and non-citizens) require access to government information and records other than to hold the government accountable. A substantial volume of FOIA requests are requests by "individuals seeking records about themselves: for example, their own medical files, immigration records, or investigation files – often known as "first-person" FOIA requests."[69] As Professor Kwoka notes, while first-person requests "are frequently vital to the requester's interests . . . [t]hey do not, however, advance Congress' primary goal in enacting FOIA: to promote democratic oversight of government activities.[70]

In the Committee's view, overreliance on FOIA has a number of negative effects. First, it distorts the public's understanding of the true impact of FOIA and the real state of government transparency. Not only does it artificially inflate the number of requests made in the public interest, but it can also result in misleading statistics regarding the expediency of responses to FOIA requests.

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[67] Fred H. Cate, et al., "The Right to Privacy and the Public's Right to Know: The 'Central Purpose' of the Freedom of Information Act," *Administrative Law Review* 46:41 (1994), at 42.

[68] DOJ Summary of Annual FOIA Reports for FY 2018, https://www.justice.gov/oip/page/file/1170146/download, at 21; *see also* Amelia Brust, "2018 sees record number of FOIA requests, information seekers change," *Federal News Network* (Jun. 7, 2019), https://federalnewsnetwork.com/open-datatransparency/2019/06/2018-sees-record-number-of-foia-requests-information-seekers-change/.

[69] Margaret B. Kwoka, "First-Person FOIA," *Yale Law Journal* 127:8 (2018), at 2204.

[70] *Id.* at 2208.

Second, the FOIA provides a set of specific administrative deadlines that may be adequate for ensuring transparency of government operations, but that are inadequate for other cases. For instance, the FOIA requires a response from government agencies within 20 business days, but does not require that records be turned over within this time frame. This standard may be insufficient for individuals who need these records for legal or medical reasons.

Third, in some cases, requiring the use of FOIA for first-person requests leads to a duplication of work processes.[71] In the case of immigration files, even when information is consolidated from multiple government agencies in the hands of one agency, requesters must sometimes file requests with each agency individually.[72] Moreover, because FOIA requests are often not met within an adequate response time, attorneys often file requests with multiple agencies to see which one responds the fastest.[73] All of this leads to delays and extra work that is inefficient and costly.[74]

This recommendation aims to ensure that FOIA is primarily used to serve its original legislative intent of enhancing the transparency of government operations, while also meeting the needs of individuals seeking information from the government about themselves. The following are several ways in which access to information can be provided in a more efficient way than through FOIA:

1. Facilitating proactive administrative discovery in agency proceedings (such as immigration proceedings) that often require a FOIA request;
2. Eliminating "request and return" scenarios that require petitioners to file a FOIA request for records that are in an agency's possession to demonstrate that they are eligible for a government benefit;
3. Making select records available to the public in online databases, such as the Veterans Benefits Management System; and
4. Establishing other processes for requesting particular records outside of the FOIA, as the FBI has done with its requests for criminal background checks.[75]

To meet the goals of this recommendation, agencies should: (1) survey commonly requested categories of records to see which count a first-person FOIA requests; (2) establish a set of procedures outside of the FOIA for requesters to access these types of records; and (3) ensure

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[71] *Id. at* 2249-51.

[72] *Id. at* 2250.

[73] *Id.*

[74] In connection with the crafting of Recommendations 14 and 15, members of the Time/Volume Subcommittee surveyed FOIA laws in other countries to find solutions to improving FOIA processing times in the U.S. Members also used the Centre for Law and Democracy's Right to Know Rating (RTI Rating) tool, an online site providing information on access laws around the world. *See* Centre for Law and Democracy, https://www.law-democracy.org/live/rti-rating/global/. We wish here to acknowledge Toby Mendel, Executive Director for the Centre for Law and Democracy, who assisted us in identifying good candidate FOIA laws in other countries for examination.

[75] *See* Kwoka, "First-Person FOIA," n.68, *supra*, at 2255-2268.

that these procedures guarantee access to the same amount of records or more records than is possible under the FOIA within a quicker time frame.

15. We recommend that agencies provide for the dissemination of information outside of the FOIA, including in online databases where members of the public may access commonly requested types of documents.

Comment: The Committee supports the goal of encouraging agencies to make records publicly available outside of the FOIA by agency-specific statutes, particularly records dealing with the heart of the agency's mission. In this manner, the public may obtain these records online without the need for filing FOIA requests. At least two federal agencies, the U.S. Copyright Office,[76] and the Consumer Product Safety Commission (CPSC),[77] are providing this type of public disclosure, which has reduced the number of FOIA requests received at these agencies.[78]

The Committee notes that M-19-21, the joint memorandum issued by OMB and the Archivist on "Transitioning to Electronic Government" directs agencies to ensure that all federal records are created, retained and managed in electronic formats, with appropriate metadata, by December 31, 2022.[79] In furtherance of the goals of M-19-21 and other recent open government initiatives, the Committee recommends that agencies invest resources in developing online databases also with the specific aim in mind of providing the public with alternatives to the need to file FOIA requests.

Recommendations for Chief FOIA Officers Council

16. We recommend that the Chief FOIA Officers Council create a committee for cross-agency collaboration and innovation to:

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[76] The Copyright Office is required by statute to maintain a public catalog of all copyright registrations (17 U.S.C. § 707), and fulfills this statutory requirement by providing the records in an online database, *see* https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First. These records are arguably the most sought-after records that the Copyright Office maintains.

[77] At the CPSC, a 2008 amendment to the agency's governing statute requires the agency to maintain a public database on the safety of consumer products "that is [] publicly available; [] searchable; and [] accessible through the Internet website of the Commission." 15 U.S.C. § 2055a(a)(1). This database, Saferproducts.gov, allows members of the public to, *inter alia*, search consumer complaints on specific products, and review recall notices. The agency also provides national injury data online via its NEISS database https://www.cpsc.gov/Research--Statistics/NEISS-Injury-Data.

[78] The Copyright Office receives very few FOIA requests for copyright registrations: in FY18 they received 44; in FY17, 43 requests. Similarly, the number of FOIA requests at the CPSC agency is relatively low for an agency that "protects the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b). In FY 2018, they received 554 FOIA requests; in FY 2018, 664 requests.

[79] *See* n.24, *supra.*

- **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 a commitment to agency transparency.**

Comment: As described on OIP's web page, the FOIA Improvement Act of 2016 established the Chief FOIA Officers (CFO) Council,[80] which is tasked with:

- Developing recommendations for increasing FOIA compliance and efficiency;
- Disseminating information about agency experiences, ideas, best practices, and innovative approaches related to FOIA;
- Identifying, developing, and coordinating initiatives to increase transparency and FOIA compliance; and
- Promoting the development and use of common performance measures for agency compliance with the FOIA.

The CFO Council is co-chaired by the Directors of OIP and OGIS, and is composed of all agency CFOs and the Deputy Director for Management from the Office of Management and Budget (OMB).[81]

Every recommendation to the Executive branch made in this Report would benefit from the creative input and energy of the CFO Council in fulfillment of the CFO Council's mandate. The Committee has, however, identified three specific areas of need as set out above in this Recommendation which we believe the CFO Council could especially help address in the short-term. To that end, we recommend that the CFO Council establish a committee for cross-agency collaboration on these matters. We believe this recommendation would be readily endorsed by both the agency and requester communities.

17. **We propose that the Chief FOIA Officers Council recommend that agency leadership annually issue a memorandum 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.**

Comment: The Chief FOIA Officers (CFO) Council is tasked with "[d]isseminating information about agency experiences, ideas, best practices, and innovative approaches related to FOIA."[82] In March 2013, OGIS issued "Policy Recommendations for Improving Freedom of Information Act

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[80] 5 U.S.C. § 552(k).

[81] *See* https://www.justice.gov/oip/chief-foia-officers-council; and https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council.

[82] *See id.*

Procedures,[83] recommending that agency leadership actively support FOIA programs and encouraged the issuance of memos by senior agency officials. In a subsequent FOIA Ombudsman blog,[84] OGIS shared a supportive memorandum from the Archivist of the United States on FOIA, and encouraged leadership at other agencies to issue similar memos to promote FOIA's importance. The leadership at several agencies, including the Department of Transportation, Department of Energy, the Department of Agriculture, and the National Labor Relations Board, subsequently issued comparable memos in an effort to increase support for FOIA programs at those agencies.

The Committee believes issuance of an *annual* agency-wide memorandum on FOIA by all federal agencies would publicly show continued support for FOIA on a government-wide basis. In support of this goal, we believe the CFO Council should recommend to senior officials at each agency (including agency CFOs) that their agency issue an annual memorandum reminding the workforce of its responsibilities and obligations under the FOIA. We also believe that these memos should include encouraging the workforce to contact the agency's FOIA Officer for assistance with the FOIA process.

Recommendation for Council of Inspectors General on Integrity and Efficiency

18. We recommend that the Chair of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) that CIGIE consider designating as a cross-cutting project or priority area the issue of how agencies are doing in providing FOIA access to agency records in electronic or digital form.

Comment: The Council of the Inspectors General on Integrity and Efficiency (CIGIE) is an independent entity established within the Executive branch that addresses integrity, economy, and effectiveness issues "that transcend individual Government agencies."[85] As such, CIGIE is well-positioned to serve in an oversight capacity to monitor how well agencies are doing in providing access to agency records, especially in electronic repositories.

During our 2018-2020 Term, the FOIA Advisory Committee heard several representatives of Inspector General (IG) offices provide updates on recent audits involving the controls agencies had put into place on the subject of electronic records management. In response to a question posed by the Committee, one of the IG representatives indicated that the areas of records management and FOIA were "potential area[s] for CIGIE to convene a group to do a cross-cutting project or compile FOIA and records management audit reports."[86] The Archivist of the United States later indicated in the same meeting that "for several years, NARA's Inspector General has proposed that CIGIE take up records management as a cross-cutting project."

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[83] *See* https://www.archives.gov/files/ogis/assets/ogis-2013-recommendations.pdf.

[84] See https://foia.blogs.archives.gov/2013/04/03/foia-spread-the-word/ (April 3, 2013).

[85] *Id.*

[86] *See* Minutes of Meeting, at 4, https://www.archives.gov/files/ogis/assets/foiaac-mtg-min-11-29-2018.pdf.

The Archivist, either on his own or in conjunction with NARA's Inspector General, should request that CIGIE elevate the issue of how agencies are doing in providing access to records managed in electronic form. Initially, this could take the form of an audit or review of how agencies are planning to meet the goals set out in M-19-21, including its 2022 deadline for ensuring that all permanently appraised records are accessioned into NARA in electronic or digitized form. IG offices may also wish to consider establishing a point of contact within each office who will function as an in-house subject matter expert on records management and access issues and who will keep track of any audits conducted with respect to records management and access issues.

Recommendations for Congress

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

Comment: The recommendations in this and prior FOIA Advisory Committee reports are crucial steps towards bringing FOIA into the 21st century, but adoption of better websites, improved training, proactive disclosure, advances in artificial intelligence (AI), and other strategies do not themselves solve a more fundamental, underlying issue: financial support for FOIA administration has not kept up with increasing demands. As a result, FOIA programs are chronically underfunded, short-staffed, leading to a failure to meet statutory deadlines. Our country needs a robust, well-funded and carefully considered overall FOIA program to deliver the transparency and accountability that the American people deserve and expect.

Given the difficult responsibilities established by FOIA, including the rising volume and complexity of records requests, and the implementation challenges agencies have long faced, independent oversight is vital to ensure problems are addressed and agency performance improves. 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.

The congressional committees with primary responsibility for FOIA are the House Committee on Oversight Reform and the Senate Judiciary Committee. However, hearings by either committee on FOIA performance are currently infrequent, often occurring only once a year and offering only the broadest overview of agency performance. While we understand that Congress and these committees have many pressing issues competing for time and attention, the reality is that perceived intractable problems with FOIA will not be satisfactorily addressed without more steady Congressional oversight. Increased hearings around FOIA would allow committees to drill down on problems and hopefully identify solutions. Congress can look to the recommendations of this Committee's various terms to identify issues that need to be addressed.

Congress should also engage agencies more regularly outside of the hearing room with inquiries about agency performance, and follow up on previously discussed issues. This would effectively communicate to agencies that strong FOIA performance is a clear expectation of Congress.

Beyond its own oversight actions, Congress should strengthen 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 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.

20. We recommend that 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.

Comment: 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 the age of digital government, agencies are generating a growing amount of born-digital records and data 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 ecosystem and to facilitate more efficient and effective searching and disclosure of responsive records.

Congress controls funding for the Executive branch. We urge them to use that authority to ensure sufficient resources are committed to FOIA offices to handle current needs, as well as 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. Two that we would encourage Congress to consider as most expedient: first, Congress could require that the cost of FOIA offices and administration, including financial support for improvements in agency FOIA training and technology, become a budget line-item for agencies. This would allow Congress directly to appropriate greater FOIA funding to agencies with less 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.

Additional Recommendations Looking to the Future

As the joint OMB and NARA memorandum, "Transition to Electronic Records," (M-19-21),[87] recognizes, the government is undergoing transformational change, including moving to a "fully electronic environment." Improving access to government records will continue to play a

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[87] *See* n.24, *supra.*

prominent role, including providing access to new forms of data and employing new technologies.

To this end, we believe that the following further recommendations are worthy of consideration by the Archivist of the United States.

21. The Archivist should continue to take a leadership role in ensuring that ongoing and future federal data strategies incorporate existing FOIA access and federal recordkeeping policies.

Comment: 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, the aforementioned M-19-21 sets a December 31, 2022 deadline for agencies to transition recordkeeping (temporary and permanent) to a fully electronic environment and manage all records digitally, and for NARA to end its acceptance of paper records.[88]

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."[89] 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 FOIA and the FRA among other statutes.[90] 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 of the United States 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 FOIA [91] and federal "records" under the FRA .[92] 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 Act (incorporating the OPEN Government Data Act.)[93] 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

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[88] *Id.*

[89] *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.

[90] *Id.* at 1 n.2.

[91] *See* https://www.justice.gov/oip/blog/foia-update-foia-counselor-what-agency-record.

[92] *See* 44 U.S.C. § 3301.

[93] *Id.,* 132 Stat. 5534.

government data that are being created across the entirety of the Executive branch with each passing year.

22. The Archivist should work with other governmental components and industry in promoting research into using artificial intelligence, including machine learning technologies, to (i) improve the ability to search through government electronic record repositories for responsive records, and (ii) identify sensitive material for potential segregation in government records, including but not limited to material otherwise within the scope of existing FOIA exemptions and exclusions.

Comment: The 2016-2018 FOIA Advisory Committee made two specific recommendations related to search technologies. The first recommendation resulted in the creation of a Technology Committee of the Chief FOIA Officers (CFO) Council to study the utilization and deployment of FOIA technology across agencies and to identify best practices and recommendations that could be implemented. A Technology subcommittee was formed (later changed to a full Committee of the CFO Council), and its final report was published on February 14, 2020.[94] A second recommendation resulted in OIP's collection of detailed information as part of each agency's CFO Report, regarding specific methods and technologies agencies are using to search their electronic records, including email.

The 2019 CFO Reports show that federal agency FOIA staff do not appear to be well-versed in how artificial intelligence (AI) and machine learning technologies may improve the efficiency of FOIA searching in ever-growing digital repositories. This software has not, however, been generally deployed in the context of FOIA searches, nor has it been developed with an eye towards the types of record content with a range of sensitivities (*e.g.*, personally identifiable information) found within components of the federal government.[95]

This recommendation is aimed at promoting the use of advanced search capabilities to help solve FOIA issues that federal agencies are only now beginning to confront. These include searching large repositories of preserved emails pursuant to NARA's Capstone policy, and identifying or filtering sensitive content–including but not limited to FOIA-exempt materials–so as to more efficiently respond to access requests of all kinds in a more timely fashion. The initiative would be completely in keeping with NARA's announced strategy to "[e]xplore cutting-edge technologies such as advanced search to automate processing of large volumes of electronic records."[96] The intended use of advanced AI technologies such as machine learning would be to

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[94] *See* Report of the Technology Committee of the Chief FOIA Officers Council – Best Practices and Recommendations ("Technology Committee Report"), https://www.archives.gov/files/ogis/assets/cfoc-tech-comm-final.report-02-14-2020.pdf

[95] *See* Technology Committee Report, https://www.archives.gov/files/ogis/assets/cfoc-tech-comm-final.report-02-14-2020.pdf at 5 (quoting agency report saying "Often the technology that FOIA professionals leverage to search and review records are not specifically designed with FOIA in mind….").

[96] Strategic Plan, Goal 1.1. *See also* "Executive Order on Maintaining American Leadership in Artificial Intelligence" (EO 13859), dated Feb. 11, 2019, calling for AI efforts within government to be coordinated through the National Science and Technology Council (NSTC) Select Committee on Artificial Intelligence. Among other things, the EO states that in accordance with the President's Management Agenda, "agencies shall identify opportunities to use new technologies and best practices to increase

supplement – not replace – the continued involvement of FOIA subject matter experts in segregating FOIA-exempt material in specific documents.

The Archivist, either acting through or in conjunction with NARA's CDO, may choose to seek input from a variety of governmental components, including research components of NARA, the General Services Administration, the Networking and Information Technology Research and Development Program (NITRD), and the National Science and Technology Council (NSTC). The initiative could be coordinated with OMB's CIO and CDO councils, the Chief Technology Officer of the Office of Science and Technology Policy (OSTP), the National Institute of Standards and Technology (NIST), and designated Chief Privacy Officers from selected agencies. Consideration should also be given to establishing private-public partnerships to work with the commercial sector on any such initiative.

FINAL OBSERVATIONS

The Committee wishes to convey these additional observations for consideration by members of the succeeding 2020-2022 FOIA Advisory Committee.

In the spirit of expanding the reach of FOIA, we believe that the next term of the Committee should give due consideration to the possibility of extending some aspects of FOIA to parts of the legislative and judicial branches. The matter was raised late in this Committee's term. While there was significant interest in the idea, there were also several valid concerns raised about the scope and complexity of any such proposed recommendation. Because the members did not have adequate time to fully explore the issue and identify if any recommendations in this area could be advanced, the Committee agreed that the issue should be proposed as a topic for in-depth review during a future term of this Committee.

This Final Report forwards 22 recommendations for further consideration by the Archivist of the United States, OGIS, DOJ/OIP, Congress, federal agencies, and other components of the federal government. These supplement the recommendations and best practices suggestions advanced by the 2014-2016 and 2016-2018 terms of the FOIA Advisory Committee. As challenging as it has been to fashion these recommendations, the more difficult part is in seeing through their effective implementation.

Without intending to bind members of the next two-year term of this Committee, we have one further suggestion for the Committee to consider: rather than viewing their mission as one primarily involved in drafting many additional recommendations, members should spend a portion of their time devoted to publicizing past recommendations and measuring/evaluating compliance with them throughout the Executive branch. Ways in which members may want to proceed could include interviews with agency staff, conducting surveys, and inviting speakers to the Committee's public meetings to report on the progress being made at their respective agencies in implementing the Committee's recommendations. The Committee may also want to focus on one or more agencies to examine how implementation of past FOIA Advisory Committee recommendations have been or will be accomplished. In whatever ways future

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access to and usability of open data and models, and explore appropriate controls on access to sensitive or restricted data and models, consistent with applicable laws and policies. . ..”

members of this Committee choose to proceed, we trust and expect that they will continue to make positive contributions in ensuring the continued importance of FOIA.

SUBCOMMITTEE METHODOLOGY

Between September 5, 2018, and June 4, 2020, the full Committee met in a public forum in accordance with FACA a total of nine times. The agendas, minutes, transcripts, videos, documents discussed, and other information for each of these meetings can be found on the OGIS website.[14] At the Committee's first meeting on September 6, 2018, the members formed three subcommittees: Records Management, Time/Volume and Vision. Below is a discussion of the methodologies reported by each of the subcommittees.

Records Management

In connection with its ongoing work, the Records Management Subcommittee reviewed all available Chief FOIA Officer Reports submitted to OIP annually, as well as a sample of agency annual recordkeeping self-certification reports and Senior Agency Official for Records Management (SAORM) reports to NARA. The Subcommittee informally pursued lines of questioning about records management training with a liaison from NARA's Office of the Chief Records Officer. The Subcommittee also met with representatives of the Federal Records Officer Network (FRON), and through them conducted an informal survey on various topics of interest including recommendations on how FOIA and federal recordkeeping practices could better be integrated. Finally, the Subcommittee reached its conclusions based on one or more public presentations by agency staff at FOIA Advisory Committee hearings held during this term, including in follow-up conversations with those individuals.

Time and Volume

The Time and Volume Subcommittee focused on the current statutory time frames for responding to FOIA requests and the volume of requests received by federal agencies The Subcommittee focused on whether any improvements could be made in either area to reduce the number of requests that agencies receive, and to reduce the amount of time it takes for agencies to respond. The Subcommittee met as a group and decided on four main activities: (1) review past recommendations relevant to time and volume and track the progress of those recommendations; (2) review annual FOIA reports to track any trends that may contribute to backlogs; (3) review international right-to-information statutes to determine how foreign countries deal with the issue of time and volume; and (4) survey federal agency FOIA professionals and the requester community on these areas of interest.

The Subcommittee drafted two surveys to gather information about the FOIA process: one for the requester community and one for federal FOIA personnel. The surveys were designed to better understand the root causes of delays in the processing of FOIA requests; factors that contribute to a large volume of FOIAs and backlogs at some agencies; and agency and requester views about how to improve the FOIA process. The voluntary surveys were administered at the July 2019 annual training conference of the American Society of Access Professionals (ASAP), and members of the Subcommittee also distributed the surveys to their networks. The surveys garnered 81 responses from requesters and 111 responses from agency professionals.

The 12 survey questions for the requester community included questions designed to solicit information about requester familiarity with agency response times, resources available on agency websites, approaches to filing FOIAs including consultation with the agency prior to filing, familiarity with agency record keeping, approaches to drafting FOIA requests, receptivity to narrowing requests after filing, tendency to litigate FOIAs, questions regarding the FOIA process, and ways that the FOIA process could be improved. Subcommittee members distributed the survey to their networks.

The 14 survey questions for agency FOIA staff included questions designed to solicit information about impediments to timely processing FOIA requests, frustrations with processing, common areas of confusion among requesters, areas of disagreement between agency officials and requesters, impressions of FOIA software, interactions with OGIS, adequacy of job training, predictions about the future of FOIA processing, and fixes that might improve the FOIA process.[97]

In addition to reviewing and taking into consideration responses to the FOIA surveys, Subcommittee members conducted additional research and interviews to inform their recommendations, including with prominent international FOIA professionals with knowledge of examples of FOIA statutes from other countries addressing issues of time and volume. Finally, Subcommittee members focused on U.S. agencies that had reduced the number of FOIA requests by making information that went to the heart of the agencies' missions available online through alternative means, such as secure online databases; they used these agencies as models for the recommendations to provide alternative dissemination mechanisms of records commonly requested via the FOIA, and to modernize the dissemination of information requested outside of the FOIA.

Vision

The Vision Subcommittee focused their 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 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.

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[97] Supplemental details regarding the survey results are contained in the final report of the Time/Volume Subcommittee, see June 4th Meeting tab at https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings.

COMMITTEE MEMBERS

Current Members

Alina M. Semo, Chair, National Archives and Records Administration, Office of Government Information Services

Jason R. Baron, Faegre Drinker Biddle & Reath LLP

Emily Creighton, American Immigration Council

Kevin M. Goldberg, Digital Media Association (DiMA)

James R. Jacobs, Stanford University Libraries

Joan Kaminer, U.S. Environmental Protection Agency

Lizzette Katilius, U.S. Securities and Exchange Commission

Chris Knox, Deloitte

Sarah Kotler, U.S. Department of Health and Human Services, Food and Drug Administration

Ryan Law, U.S. Department of the Treasury

Abioye Mosheim, U.S. Consumer Product Safety Commission

Michael Morisy, MuckRock

Sean Moulton, Project On Government Oversight (POGO)

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Bobak Talebian, U.S. Department of Justice, Office of Information Policy

Patricia Weth, National Labor Relations Board

Bradley White, U.S. Department of Homeland Security

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Melanie A. Pustay, U.S. Department of Justice, Office of Information Policy,

ACKNOWLEDGMENTS

The Committee would like to acknowledge and thank many individuals for their invaluable contributions to and support of the work of the Committee and the completion of this report. We are grateful to our colleagues, stakeholders, and the public who provided written and oral comments which were helpful in informing the topics researched by the Committee. We also appreciate the following individuals for helping with the Committee's creation, organization, guidance, and administrative management and support:

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The staff from the following NARA offices:

> **Audio/Visual Services Team**
> **Office of Equal Employment Opportunity**

OGIS

Special Events and Scheduling Office

Speakers at Meetings During 2018-2020 Term

Khaldoun AbouAssi, Assistant Professor of Public Administration and Policy, American University

Laurence Brewer, Chief Records Officer of the United States, NARA

Ken Chason, Counsel, Office of Inspector General, National Science Foundation

Marta Erceg, Counsel, Office of Inspector General, National Credit Union Administration

Margaret B. Kwoka, Associate Professor, University of Denver Sturm College of Law

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Tina Nabatchi, Associate Professor, Public Administration and International Affairs, Syracuse University

Janet O'Connell, Office of the Inspector General, Intelligence Community

Michael Sarich, FOIA Officer, Veterans Health Administration, U.S. Department of Veterans Affairs

Eric Stein, Director, Office of Information Programs and Services, U.S. Department of State

GLOSSARY

AI: Artificial Intelligence

ASAP: American Society of Access Professionals

Capstone: An approach to managing email in which the emails of senior officials are scheduled as permanent records, with email of other federal employees scheduled as temporary records in accordance with General Records Schedule 6.1

CDO: Chief Data Officer

CFO: Chief FOIA Officer

CIGIE: Council of the Inspectors General on Integrity and Efficiency

CIO: Chief Information Officer

Committee: The Freedom of Information Act Advisory Committee

CPSC: Consumer Product Safety Commission

CSV: Comma Separated Values

DHS: Department of Homeland Security

DOJ: U.S. Department of Justice

DOL: U.S. Department of Labor

E-FOIA: Electronic Freedom of Information Act Amendments of 1996

FACA: Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972), 5 U.S.C. app.

FERMI: NARA's Federal Electronic Records Modernization Initiative

FOIA: Freedom of Information Act, 5 U.S.C. § 552

FPL: FOIA Public Liaison

FRA: Federal Records Act

FRON: Federal Records Officer Network

GPRA: Government Performance and Results Act of 1993

GPRAMA: GPRA Modernization Act of 2010

GRS: General Records Schedule

GSA: General Services Administration

HHS: U.S. Department of Health and Human Services

HTML: Hypertext Markup Language

IG: Inspector General

IT: Information Technology

JSON: JavaScript Object Notation

NARA: National Archives and Records Administration

NIST: National Institute of Standards and Technology

NITRD: Networking and Information Technology Research and Development Program

NSTC: National Science and Technology Council

OCR: Optical Character Recognition

OGIS: Office of Government Information Services

OIP: Office of Information Policy, U.S. Department of Justice

OMB: Office of Management and Budget

OPEN Government Data Act: Open, Public, Electronic and Necessary Government Data Act

OSTP: Office of Science and Technology Policy

SAORM: Senior Agency Official for Records Management Section 508: Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d

SOP: Standard Operating Procedures

Treasury: U.S. Department of the Treasury

XML: Extensible Markup Language

APPENDICES

National Archives and Records Administration
Freedom of Information Act Advisory Committee Charter

1. **Committee's Official Designation**: The name of this advisory committee shall be the Freedom of Information Act Advisory Committee (FOIA Advisory Committee).

2. **Authority**: The FOIA Advisory Committee was first established in 2014 in accordance with the second United States Open Government National Action Plan released on December 5, 2013, and the directive in the Freedom of Information Act, 5 U.S.C. § 552(h)(1)(C), that the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA) "identify procedures and methods for improving compliance" with the Freedom of Information Act (FOIA). The FOIA Advisory Committee is governed by the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

3. **Objectives and Scope of Activities**: The FOIA Advisory Committee advises on improvements to the administration of FOIA. The objective of the FOIA Advisory Committee is to study the current FOIA landscape across the Executive Branch and to make recommendations to the Archivist of the United States.

4. **Description of Duties**: The FOIA Advisory Committee fosters dialogue between the Federal Government and the requester community, solicits public comments, and develops recommendations for improving FOIA administration and proactive disclosures. The FOIA Advisory Committee is advisory only.

5. **Official(s) to whom the Committee Reports**: The FOIA Advisory Committee shall report to the Archivist of the United States.

6. **Support**: NARA's OGIS will provide funding and administrative support for the FOIA Advisory Committee to the extent permitted by law and within existing appropriations.

7. **Estimated Annual Operating Costs and Staff Years**: The annual operating cost for the FOIA Advisory Committee is estimated to be $90,000 and one full staff year. There will be no compensation for members of the FOIA Advisory Committee. Travel and/or per diem costs will not be provided by NARA.

8. **Designated Federal Officer (DFO)**: The DFO (or designee) is a full-time or permanent part-time employee, appointed in accordance with agency procedures, and will perform the duties set forth in § 102-3.120 of the FACA Final Rule. The Archivist of the United States shall designate a DFO who shall manage the FOIA Advisory Committee and provide such clerical, administrative, and logistical support as necessary for the FOIA Advisory Committee to effectively conduct its business. The DFO will approve or call all of the advisory committee's and subcommittees' meetings, prepare and approve all meeting agendas, attend all committee and subcommittee meetings, adjourn any meeting

when the DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the official to whom the advisory committee reports.

9. **Estimated Number and Frequency of Meetings**: In consultation with the Archivist of the United States, the DFO shall hold meetings up to four times per year and may call additional meetings as may be necessary.

10. **Duration**: The need for this FOIA Advisory Committee is continuing.

11. **Termination**: The Charter shall be eligible for renewal every two years.

12. **Membership and Designation**: The FOIA Advisory Committee will consist of no more than 20 individuals. Government members of the FOIA Advisory Committee should include, at a minimum, three FOIA professionals from Cabinet-level Departments; three FOIA professionals from non-Cabinet agencies; the Director of the Department of Justice, Office of Information Policy, or his/her designee; and the Director of OGIS, or his/her designee, will chair the committee. Non-governmental members of the FOIA Advisory Committee will include, at a minimum, two individuals representing the interests of non-governmental organizations that advocate on FOIA matters; one individual representing the interests of FOIA requesters who qualify for the "all other" FOIA requester fee category; one individual representing the interests of requesters who qualify for the "news media" FOIA requester fee category; one individual representing the interests of requesters who qualify for the "commercial" FOIA requester fee category; one individual representing the interests of historians and history-related organizations; and one individual representing the interests of academia. The FOIA Advisory Committee will be composed of Representative members and Regular Government Employees.

The Archivist of the United States shall appoint a Chairperson. If necessary, a Vice Chairperson may be designated annually by members of the FOIA Advisory Committee, in consultation with the Archivist of the United States. The Chairperson is the presiding officer of the FOIA Advisory Committee who guides its efforts to the effective completion of its assigned tasks. The Chairperson shall provide leadership and adhere to the Charter and such other rules of order and operating procedures as the FOIA Advisory Committee may adopt, maintain order, and conduct each meeting in accordance with FACA and the prescribed rules and procedures. The Chairperson is responsible for certifying the accuracy of FOIA Advisory Committee meeting minutes. The Vice Chairperson shall assume and perform the duties of the Chairperson in the event the Chairperson is absent or unavailable.

13. **Subcommittees**: NARA may approve the creation of subcommittees by the FOIA Advisory Committee as necessary to support the committee's work. The subcommittees report to the full FOIA Advisory Committee. The subcommittee chairperson(s) shall be a Committee member(s).

14. **Recordkeeping**: The records of the FOIA Advisory Committee and any subcommittee(s) shall be handled in accordance with General Records Schedule 6.2, item 10, and any approved agency records disposition schedule. These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. § 552 .

15. **Filing Date**: May 20, 2018

    Approved: 15 May 2018

    /s/ David S. Ferriero

    DAVID S. FERRIERO
    Archivist of the United States

Appendix B: E-Discovery Best Practices Checklist for Use in Responding to FOIA Requests

The following consists of a simplified checklist of best practices that agencies may find useful when considering the use of e-discovery tools to perform FOIA searches. References to selected further reading providing more comprehensive e-discovery protocols and workflows are also included.[1]

1. *Preservation*

An agency's responsibility for taking reasonable steps to preserve records subject to a pending FOIA request includes ensuring that electronic records are preserved. Custodians of responsive electronic records should be identified and placed on notice of the need to take preservation actions. As appropriate, this may include suspending auto-delete functions for email and elsewhere, as well as taking reasonable steps to preserve select backup media.[2]

2. *Collection and Search*

Agency records in electronic form may be found on network servers, local servers, databases, portable media (e.g., laptops, mobile devices and phones), in "the cloud," and on agency-controlled social media. Email may reside in a Capstone repository.[3] All forms of documents (structured and unstructured text, audio, video, graphics, foreign language, etc.) may be within the scope of a request. Documents collected in native form should include their associated metadata. The use of optical character recognition (OCR) software promotes search capability for scanned documents.

Keyword searching should be employed with Boolean operators ("and," "or," and "not").

Errors in keywords being misspelled should be accounted for through the use of wildcards (e.g., "*" for alternative individual letters, and "!" for alternative extensions of truncated keywords).

Predictive coding (also known as technology assisted review) should be considered when a review is to be conducted of very large universes of documents (exceeding tens of thousands). These advanced search methods use human reviewers to first code agency records as responsive, for the purpose of training software to identify further responsive records out of a much larger universe of documents.

Any process employed should be designed in a repeatable or standardized way that can be documented for further explanation to a requester or a tribunal.

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[1] Agency FOIA professionals should also consult with their respective records management officials for additional agency-specific guidance.

[2] Examples of "backup media" include backup tapes, optical drives, flash drives, and cloud storage.

[3] Under NARA's "Capstone approach" for managing email, email is managed at the account level, where selected senior officials have their email accounts designated as permanent records, with other staff's email accounts considered temporary records. *See* https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf.

Any process employed should include quality control features, such as random sampling of the portion of the universe of documents searched that are not initially considered "responsive."

3. *Culling/De-duplication*

Culling (also referred to as filtering) documents by custodian or date range will assist in filtering requests. As appropriate, determine whether certain file types can be culled as non-responsive (e.g., .dll, .db, .jpeg, etc.)

The use of de-duplication software with any of the above search methods will reduce the burden and cost of further review.

4. *Redacting*

Use of automated redaction software is encouraged to expedite the processing of responsive documents containing FOIA exempt.

Consideration can be given to the use of automated software that filters regular "expressions" containing personally identifiable information (PII).[4]

5. *Production*

Determine whether production will be in native or imaged formats. If the latter is deemed appropriate, consider using some form of Optical Character Recognition (OCR) to render documents searchable.
References

E-discovery General Protocols
https://www.mdd.uscourts.gov/sites/mdd/files/ESIProtocol.pdf
https://www.nap.edu/read/22986/chapter/13
https://www.wawd.uscourts.gov/sites/wawd/files/61412ModeleDiscoveryProtocol.pdf

Keyword searching
https://www.edrm.net/resources/project-guides/edrm-search-guide/search-methodologies/
https://www.edrm.net/collections/edrm-search-guide-glossary/

Predictive Coding / Technology Assisted Review Guidelines
https://www.edrm.net/wp-content/uploads/2019/02/TAR-Guidelines-Final.pdf
The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery (2014), www.thesedonaconference.org/publications

E-discovery Production Guide
https://www.edrm.net/resources/frameworks-and-standards/edrm-model/production/

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[4] Examples of potentially exempt PII contained in regular expressions may include social security numbers, numbers on credit cards, passports, and driver's licenses, telephone numbers, email addresses, etc.