

To: 2022-2024 FOIA Advisory Committee

From: Modernization Subcommittee of the 2022-2024 FOIA Advisory Committee

Date: March 18, 2024

Re: Modernization Subcommittee Report & Recommendations to the FOIA Advisory Committee

I. Introduction

From James Madison (“A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both”)¹ and Thomas Jefferson (“Information is the currency of democracy”),² to Louis Brandeis (“[S]unlight is said to be the best of disinfectants”)³ and Lyndon Johnson (“A democracy works best when the people have all the information that the security of the Nation permits”),⁴ access to information has been viewed as a basic principle of American civil society.

The Freedom of Information Act (FOIA) is the cornerstone of this principle, guaranteeing since 1967 that the public will have a judicially enforceable right of access to government information, with a presumption that the information should be publicly available, subject to exemptions that are to be narrowly construed.⁵ “The fundamental principle animating FOIA is public access to government documents.”⁶

Little wonder, then, that when this “cornerstone” is considered by many requesters no longer able to carry the weight of ensuring public access to government information in a timely, cost-effective, and user-friendly manner, it becomes every government agency’s responsibility to renew efforts to improve its administration of the FOIA.⁷ This requires continuous outreach, both

¹ Correspondence of James Madison to W. T. Barry, August 4, 1822, https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text

² JEFFERSON: WEBSTER’S QUOTATIONS, FACTS AND PHRASES 391 (Icon Group Int’l, Inc. 2008).

³ Louis Brandeis, OTHER PEOPLE’S MONEY - AND HOW THE BANKERS USE IT, Chap. 5, “What Publicity Can Do” (New York: Frederick A. Stokes 1914) (chapter 5 originally published in *Harper’s Weekly*, Dec. 20, 1913), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>

⁴ Statement by the President Upon Signing the Freedom of Information Act (July 4, 1966), <https://www.lbjlibrary.org/object/text/statement-upon-signing-freedom-information-act-07-04-1966>.

⁵ *FBI v. Abramson*, 465 U.S. 615, 630 (1982).

⁶ *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999).

⁷ During its current term, the FOIA Advisory Committee invited a panel of leading FOIA advocates from public interest organizations to provide their views on how federal agencies are meeting their FOIA obligations. Many of the views expressed were harshly critical of the state of FOIA administration. *See, e.g.*, Remarks of Anne Weismann (“my assessment based on the snags and problems I encounter at the administrative stage, and the fact that litigation is so rarely used now as a tool to actually litigate the legal merit[s], I think FOIA is broken”), transcript of FOIA Advisory Committee Public Meeting, December 1, 2022, <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term/foiaac-mtg-transcript-2022-12-01>. *See generally*, “FOIA Is Broken: A Report,” U.S.

to educate the public on what information might be available from that agency and how to efficiently access it, as well as to obtain feedback that will enable the agency to reevaluate, reengineer, and improve the processes by which it administers the Act. In short, greater public engagement is an indispensable avenue for ensuring a better operating FOIA with higher public satisfaction.

Recognizing that one size will not fit all agencies, our recommendations leave open to agencies a wide selection of ways to enhance and modernize their public engagement on FOIA practices, including a recognition that we live in a time of great technological changes.

II. Subcommittee Mission & Methodology

The Subcommittee originally defined its Mission as follows:

The Modernization Subcommittee’s mission is to seek to “upgrade” the administration of the FOIA by focusing on two main areas: examining current gaps in technology, and exploring ways in which interaction with the FOIA requester community can be revamped and improved. For the purpose of enabling the FOIA Advisory Committee to recommend changes in practice, among the actions the Subcommittee intends to take would include (a) conducting a review of the current status of governmental FOIA technology initiatives, (b) engaging with the requester community in soliciting feedback on where agency adoption of specific technologies would have a positive impact on the FOIA process; and (c) examining where improvements can be made in specific areas including, but not limited to, determination letters, large request best practices, default search protocols, and agency response timeframes.⁸

During the course of its work over the current term, the Subcommittee chose to narrow the scope of its activities in principally advancing a series of recommendations focused on improving the quality of agency engagement with individual requesters, as well as the greater FOIA community and civil society organizations. Our recommendations are, however, also premised on advances in technology that agencies have put into effect to meet new requirements involving electronic recordkeeping. Based primarily on the expertise and experience of its individual members, this Subcommittee Report contains four recommendations aimed at improving the FOIA process through agency interactions with requesters, agency outreach to the public at large, and additional actions that the Office of Government Information Services (OGIS), the Department of Justice (DOJ) Office of Information Policy (OIP), and other governmental components can take to enhance public engagement generally. A further recommendation involves development of a Request for Information (RFI) for the application of artificial intelligence to FOIA. *See* Part IV of this Report.

We include additional observations on the use of artificial intelligence by FOIA agencies (including machine learning and generative AI methods), and future public engagement by the FOIA Advisory Committee itself. *See* Part V of this Report.

House of Representatives, Committee on Oversight and Government Reform, Staff Report, 114th Congress (Jan. 2016), <https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf>

⁸ <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term/subcommittees>.

The Subcommittee made two additional recommendations this term that have been approved by the full Advisory Committee. We recommended that OIP issue a “model determination letter” for agency use. In connection with its development of the model letter, the Subcommittee sought public comment on an initial draft of the letter. A total of nine written comments were received from individuals, public interest and civil society groups, and a federal agency FOIA professional.⁹ The Subcommittee revised the text of the model letter in response to a number of these comments. In addition, the Subcommittee sought input from OIP, resulting in further improvements in the text of the letter. *See* Recommendation 2024-01, unanimously approved on March 1, 2024, including the text of the model determination letter (Appendix A to this Report).

Previously, at the public meeting on June 5, 2023, the full Committee unanimously passed the Subcommittee’s recommendation regarding a change in how agencies describe their application of the FOIA Exemption 5 “deliberative process” exemption with greater specificity. Recommendation 2023-1 can be found at Appendix B to this Report.

III. Subcommittee Members

Jason R. Baron, Co-Chair, University of Maryland
Gorka Garcia-Malene, Co-Chair, U.S. Department of Health and Human Services
Allyson Deitrick, U.S. Department of Commerce
Michael Heise, U.S. Equal Employment Opportunity Commission
Alexander Howard – Digital Democracy Project
Adam A. Marshall – Reporters Committee for Freedom of the Press
Luke A. Nichter – Chapman University
Thomas Susman – American Bar Association
Benjamin Tingo – OPEXUS

IV. Proposed Recommendations

We make the following recommendations in furtherance of enhancing public engagement with respect to FOIA.

Recommendation #1: We recommend that OIP issue guidance to federal agencies stating that agencies should proactively offer requesters the opportunity to discuss their request with an agency representative.

COMMENT

The FOIA process at its core involves interactive public engagement with individual requesters who, after an initial request has been made for agency records, expect that there will be more than a minimal level of engagement with individual agency personnel responsible for the handling of requests. The FOIA statute requires agencies to determine within 20 days after the receipt of a FOIA request “whether to comply with such request” and “shall immediately notify” requesters of (i) the reasons for the determination, (ii) the right of requesters to seek assistance

⁹ See <https://www.archives.gov/ogis/foia-advisory-committee/public-comments>.

from the FOIA Public Liaison (FPL) of the agency; in the case of an adverse determination, (iii) their right to appeal and (iv) the right to seek dispute resolution services from the FPL or OGIS.¹⁰ Specifically with respect to the position of FPL, the FOIA as amended in 2016 states that such officer is to be “responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.”¹¹

OIP has issued comprehensive guidance to agencies on the scope of duties of FPL officers to improve the “CX” of FOIA requesters.¹² OIP also has made clear that agency staff should be proactive in communicating with requesters, especially on the matters of clarifying and, as appropriate, reaching agreement on narrowing requests.¹³ And in their annual Chief FOIA Officer (CFO) Reports, virtually all agencies report that they work with requesters, particularly on complex requests, to clarify and narrow the scope of requests so as to be able to conduct a reasonable search for responsive documents. Numerous opportunities therefore exist for engagement with requesters throughout the FOIA administrative process.

Three initial observations are, however, in order. First, it is widely acknowledged that there is widespread dissatisfaction on the part of the requester community with respect to various aspects of the FOIA process. Delays in receiving responses is universally seen as the paramount issue on requesters’ minds, resulting in a substantial measure of disillusionment with the overall quality of the FOIA process.¹⁴ Agencies, in turn, face enormous challenges in handling an increasing number of FOIA requests,¹⁵ coupled with the special demands placed on staff due to litigation

¹⁰ 5 U.S.C. § 552(a)(6)(A).

¹¹ 5 U.S.C. § 552(l). The position of FOIA Public Liaison was actually “created” in a Dec. 14, 2005, Executive Order, Improving Agency Disclosure of Information, signed by George W. Bush. <https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051214-4.html>. The position was later added to the statute.

¹² OIP, The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (June 12, 2018), <https://www.justice.gov/oip/importance-quality-requester-services-roles-and-responsibilities-foia-requester-service-centers>.

¹³ See, e.g., OIP, “The Importance of Good Communication with FOIA Requesters 2.0” (Nov. 22, 2013), <https://www.justice.gov/oip/blog/importance-good-communication-foia-requesters-20>. Additionally, as set out in “OGIS Advisory Opinion No. 2020-01: Agencies Must Provide Estimated Dates of Completion Upon Request,” FOIA requires agencies to provide estimated dates of completion upon request, offering opportunities for engagement with the requester. See <https://www.archives.gov/ogis/advisory-opinions/2020-01-agencies-must-provide-edcs>.

¹⁴ Testimony of Alina M. Semo, Director of OGIS, Senate Committee on the Judiciary hearing on “The Freedom of Information Act: Improving Transparency and the American Public’s Right to Know for the 21st Century” (March 29, 2022) (“Over the last two years of the COVID-19 pandemic response, the top concern of both requesters and FOIA processors has been delays”), at 2, <https://www.judiciary.senate.gov/imo/media/doc/Semo%20testimony.pdf>; National Security Archive, “25-Year Old FOIA Request Confirms FOIA Delays Continue Unabated” (March 8, 2019), <https://nsarchive.gwu.edu/foia-audit/foia/2019-03-08/25-year-old-foia-request-confirms-foia-delays-continue-unabated>; see also A. Jay Wagner & David Cuillier, “Public Records Requester Survey” (Jan. 11, 2022), <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/survey-overview-05.04.2022-1.pdf> (“People who responded are generally unhappy with the request experience. Specifically, 48% said their overall experience is typically poor or terrible, 37% said it is “OK,” and 14% said good or excellent.”).

¹⁵ For the general upward trend, see OIP, “Summary of Annual FOIA Report for Fiscal Year 2022,” at 2, <https://www.justice.gov/oip/page/file/1581856/dl?inline=>.

over specific requests.¹⁶ Agencies struggle with the lack of resources they have to work within the 20-day parameters of the statute, and in reality, in a substantial number of cases, it may take many months or years before requesters receive a substantive response.

Second, many FOIA requesters file FOIA requests that fail to make clear the exact scope of the request. For example, there may be a lack of clarity in the subject matter of documents being requested, the temporal scope of the request, and/or the persons or components in an agency that the requester believes may possess responsive records. In the case of more sophisticated and complex requests coming from civil society organizations and academics, an agency may face a range of options as to how to scope the request (*e.g.*, choosing amongst keyword terms or other search parameters).

And third, the above-referenced OIP interpretive guidance and current agency practice place the onus on individual requesters to take the initiative in contacting an agency for the purpose of receiving additional information regarding their request. Requesters may have any number of reasons, however, for failing to initiate contact with an agency, including being intimidated by attempting to engage with a bureaucracy unknown to them, or being resigned based on past experience that a given agency will show no sign of interest in engaging with them.

A number of past recommendations of the FOIA Advisory Committee have focused on advising agencies to provide more information on their records holdings on FOIA web pages. *See, e.g.*, Recommendations 2020-02 and 2022-07. Even, assuming that agencies are continuously making good faith attempts to upgrade the quality of the information available to requesters online, we believe that a substantial number of requesters would benefit from having a “live” discussion with an agency representative. This representative could be either the designated FPL,¹⁷ or some other named or unnamed person in the initial outreach communication to a requester.

In practical terms, the proposed recommendation is intended to be modest in scope, involving only one or two additional sentences in an outgoing communication to a requester that might change the entire tone of the agency’s engagement. As OIP has said, “Often a simple change in language or the addition of a sentence or two of explanation in the agency’s response can go a long way to improving understanding.”¹⁸

The form of the offer to discuss a request could be as simple as the following sentence added to an acknowledgement letter, or a later communication triggered by the agency reaching the request in the top of its search queue:

¹⁶ For one particularly noteworthy case, *see* Josh Gerstein, “Judge balks at FBI’s 17-year timeline for FOIA request,” *Politico* (July 29, 2017),

<https://www.politico.com/blogs/under-the-radar/2017/07/29/judge-balks-fbi-foia-timeline-17-years-241127>.

¹⁷ “FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding the status of requests, and assisting in the resolution of disputes.” OIP, “The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons” (“OIP Quality Requester Services”), <https://www.justice.gov/oip/importance-quality-requester-services-roles-and-responsibilities-foia-requester-service-centers>.

¹⁸ *See, e.g.*, OIP, “The Importance of Good Communication with FOIA Requesters 2.0” (Nov. 22, 2013), <https://www.justice.gov/oip/blog/importance-good-communication-foia-requesters-20>.

“A FOIA staff representative is willing to discuss your FOIA request with you, to assist you in understanding how we intend to process your request, and to give you the opportunity to provide additional information to clarify or narrow your request to assist us in making a further response to you as efficiently as possible.”

The spirit of this recommendation will not be served if the offer comes after FOIA staff already have invested time and attention in searching for relevant records. Indeed, the entire purpose of the “early outreach” option would be to obviate the need for extensive searches in connection with particular requests, especially in cases where the request contains ambiguous language or leaves certain parameters open.¹⁹

We understand that some agencies may consider a best practices recommendation along these lines to constitute an unreasonable burden being imposed on already busy FOIA offices. We can imagine that in some cases, an agency’s FOIA Service Center and/or the agency’s FPL are/is already fielding miscellaneous requests from the public at large who do take the time to initiate calls or emails, making this generalized offer difficult to fulfill unless additional resources are diverted to responding.²⁰ In other cases, FOIA staff may reasonably be concerned that there may be particular requesters who wish to abuse the privilege being offered here, in demanding inordinate time and attention paid to their particular requests. One way of approaching this recommendation would be for an agency to institute a “pilot program” over the course of a given year, for the purpose of developing metrics on the increase in requester-initiated contacts received, and any additional resources devoted to engaging in those communications.

In anticipation of these responses, we believe the following: first, that fostering greater engagement with the requester community is a public good in itself, which serves to fulfill the highest purposes of the FOIA in its mandate to open records of the government to public scrutiny. Second, any short-term resource burden caused by implementing a policy of early engagement with requesters may be counterbalanced by considerable reductions in time and

¹⁹ Indeed, OIP has recognized the value of even earlier intervention:

Even before a request is made, the FOIA Requester Service Center should be able to assist members of the public by: identifying sources of information that is already posted and available, thereby potentially obviating the need to make a FOIA request in the first instance; informing potential requesters about the types of records maintained by the agency (or agency component) and providing suggestions for formulating requests; describing the agency’s various processing tracks and providing the average processing times for the various tracks; and answering questions about expedited processing standards and the FOIA’s fee provisions.

OIP Quality Requester Services, n.17, *supra*, <https://www.justice.gov/oip/importance-quality-requester-services-roles-and-responsibilities-foia-requester-service-centers>.

²⁰ We note, however, that number of inquiries to FPLs varies widely. In their latest annual summary, OIP reports that of “sixty-five agencies receiving more than fifty requests, thirty-one received ten or fewer requester inquiries to their FOIA Public Liaison during the reporting period. Fourteen agencies received 11-100 inquiries, another fourteen agencies received 101-1,000 inquiries, and six agencies received over 1,000 inquiries.” See OIP, “Summary of Agency Chief FOIA Officer Reports for 2023 and Assessment of Agency Progress in FOIA Administration with OIP Guidance for Further Improvement” (“OIP CFO Report Summary 2023”), at 6, https://www.justice.gov/d9/2023-09/final_2023_cfo_summary_approved_for_posting_full.pdf.

resources expenditures over the entire duration of responding to a request, including time and resources devoted to searching for responsive records and reviewing for exemptions.

As noted elsewhere in this Report (*see* Recommendation #2), electronic record repositories are rapidly growing in size, in turn placing a greater strain on agency staff to interpret FOIA requests in ways that will lead to reasonable searches. Early engagement with a broader subset of requesters will, in our view, result in the saving of resources over time. For all of the above reasons, we believe that the small amount of time spent with a willing requester would save potentially hundreds of hours of search and review time devoted to the request.

Recommendation #2. We recommend that OIP issue guidance to federal agencies encouraging the option of providing requesters an interim response consisting of a small sample of documents found as the result of searches conducted and subsequently reviewed for partial or full withholding.

COMMENT

Recent policy initiatives aimed at accelerating the transition to full electronic recordkeeping in federal agencies will continue to have an enormous impact on how agencies attempt to meet their FOIA obligations in conducting reasonable searches for responsive documents. On December 23, 2022, the Office of Management and Budget (OMB) and NARA jointly issued M-23-07, “Update to Transition to Electronic Records,” that directs by June 30, 2024, all records (both temporary and permanent) are to be managed electronically to the fullest extent possible.²¹

The problem of search and review costs is likely to substantially increase over the coming decade (and beyond) due to M-23-07 and related NARA initiatives aimed at transitioning agency recordkeeping practices from the older paper-based paradigm to embracing fully electronic management of records. In particular, the widespread adoption of the “Capstone approach” to archiving email records,²² will result in tens or hundreds of millions of records in electronic form that are or soon will be subject to FOIA.²³

²¹ https://www.whitehouse.gov/wp-content/uploads/2022/12/M_23_07-M-Memo-Electronic-Records_final.pdf

²² *See* GRS 6.1, <https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf>; *see also* NARA’s webpage listing agencies that have adopted Capstone archiving as their email policy, <https://www.archives.gov/records-mgmt/rcs/schedules/capstone-forms>. Under Capstone, the email accounts of designated senior officials are automatically deemed “permanent” records, with all other email program records to be held for seven or more years in agency electronic repositories. NARA recently issued guidance urging agencies to consider also captioning federal records in the form of electronic messages of all types in Capstone repositories. *See* NARA Bulletin 2023-02, <https://www.archives.gov/records-mgmt/bulletins/2023/2023-02>.

²³ Pursuant originally to M-12-18 (“Managing Government Records Directive”) and reaffirmed in M-19-21 (“Transition to Electronic Records”), agencies were required to transition to the electronic management of e-mail by December 31, 2016. Over 250 components of government have adopted the Capstone Approach to the management of email, resulting in current repositories of millions to tens of millions of e-mail records alone in larger cabinet departments. NARA has separately fulfilled the mandate in M-23-07 requiring NARA to “issue updated guidance clearly defining and expanding the Capstone approach to include all types of electronic messaging in addition to email, including ephemeral and encrypted messages. The updated guidance will incorporate new statutory requirements codified in the Electronic Message Preservation Act (EMPA).” *See* NARA Bulletin 2023-02, <https://www.archives.gov/records-mgmt/bulletins/2023/2023-02>.

As Eric Stein, Deputy Assistant Secretary for the Office of Global Information Services at the State Department, stated to the CFO Council,

[As we] search these large volumes of electronic archives and get thousands, tens of thousands, hundreds of thousands, millions of potentially responsive records, the amount of time it takes to manually go through that large volume makes FOIA almost impossible in certain instances. And we need to figure out a way to work through the challenges of large volumes of data.²⁴

Mr. Stein on this occasion and as a speaker at a meeting of this term's FOIA Advisory Committee on September 7, 2023,²⁵ highlighted the desirability of artificial intelligence (AI) applied to the problem of searching large repositories of electronic records. In accord with his remarks, the 2018-2020 FOIA Advisory Committee expressly recognized the need for further research into AI in Recommendation 2020-22.²⁶

Nevertheless, subject to limited exceptions,²⁷ agencies are presently still confronting the challenge of staggering volumes of electronic records to be searched by continued reliance on keyword searching. Searches are conducted by using search terms which FOIA staff believe to be the most responsive to a given request, with searches further limited to a set of likely custodians and bounded by time limitations. Once a search for potentially responsive documents is conducted, in the usual case agency staff will first follow up by undertaking a manual process of eliminating "false positives" from the universe of "hits" obtained through keyword searching. Thereafter, in a second pass staff will review documents for redactions of FOIA exempt material, subject to a "foreseeable harm" test, as applicable.

Our Subcommittee's recommendation recognizes the reality of the present-day government search and review process based on available technology, in suggesting a protocol for agencies to consider in cases where requesters express interest or are willing to engage in actively narrowing the scope of their request(s). The volume of records in electronic form is the principal driver of the proposed protocol.

In enacting the 2016 amendments to the FOIA, Congress itself recognized the problem of volume. As amended, the FOIA authorizes agencies to charge search fees for requests in which

²⁴ See CFO Council Meeting Transcript (April 29, 2021), <https://www.foia.gov/chief-foia-officers-council/cfo-council-transcript-04-29-2021>.

²⁵ See "Pilot Machine Learning for FOIA Requests," <https://www.archives.gov/files/ogis/foia-advisory-committee/2022-2024-term/foia-advisory-committee-presentation-piloting-machine-learning-for-foia-09072023.pdf>; Transcript of FOIA Advisory Committee Meeting (September 7, 2023) <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term/foiaac-mtg-transcript-2023-09-07>.

²⁶ See 2018-2020 FOIA Advisory Committee Report at 35, <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>. See also Jason R. Baron, "The Case for Applying AI to FOIA Processing: How Does Access To Government Records Work When An Agency Holds Hundreds of Millions of Emails?," *Americans for Prosperity Symposium* (March 2023), <https://americansforprosperity.org/applying-ai-to-foia/>; Statement of Jason R. Baron, Senate Committee on Homeland Security and Governmental Affairs, Hearing on "Correcting the Public Record: Reforming Presidential and Federal Records Management" (March 15, 2022), <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Baron-2022-03-15.pdf>.

²⁷ See Lewis Kamb, "Some U.S. Agencies are testing out AI to help fulfill public records requests," *NBC News* (August 1, 2023), <https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313>.

unusual circumstances apply and responsive records total over 5,000 pages, while at the same time requiring agencies to engage in discussions with requesters for the purpose of determining “how the requester could effectively limit the scope of the request.”²⁸ Where requesters are subject to fee regulations that take into account the cost of searching, the potential review burden is mitigated by the unwillingness of a requester to proceed with paying even nominal fees for an initial search. However, there are not insubstantial numbers of FOIA requests, including those from public interest organizations, journalists, historians, and members of the academic community, that are properly found to be subject to fee reductions or waivers. Especially in such cases, the potential for a substantial search and review burden remains present even for well-formulated requests.

Pursuant to the OPEN Government Act of 2007, the FOIA also contains a limited, express exception to the statutory 20-day period for responding to requests (with an additional 10 days if unusual circumstances apply), in cases where the agency makes “one request to the requester for information,” and is awaiting the receipt of “information that it has reasonably requested from the requester.”²⁹

The most recent annual agency CFO reports from FY 2023 confirm that many agencies conduct forms of outreach to requesters for complex requests involving larger volumes of records. Examples include:

- The Department of Education (ED) “routinely communicates with requesters concerning complex or voluminous requests. In coordination with the FOIA professionals in ED’s program offices, ED’s FPL reaches out to requesters to clarify or narrow the scope of a

²⁸ See 5 U.S.C. § 552(a)(4)(A)(viii)(II)(bb):

If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii) (II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph 6(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

²⁹ See 5 U.S.C § 552(a)(6)(A)(ii)(I). OIP guidance helpfully interprets the statutory provision in stating that:

“The standard to be used by the agency for this non-fee related tolling scenario is that the information sought from the requester be “reasonably requested.” For instance, during the course of conducting a search an agency may determine it needs additional information from the requester in order to determine if certain records are responsive to the request. The agency may contact the requester to obtain the necessary information and toll the twenty working-day time limit while it is waiting for the requester's response. Because there will only be one opportunity to toll the clock in order to obtain such information, agencies should take care to ask all their informational questions at one time.”

OIP, “New Limitations on Tolling the FOIA’s Response Time” (last updated Dec. 6, 2022), <https://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-limitations-tolling-foias-response-time>.

request. One recent example where ED provided the requester targeted search terms resulted in reducing the potential responsive records from 100,000 to 5,000 emails.”³⁰

- The US Citizenship and Immigration Services (USCIS) agency within the Department of Homeland Security “received a request that, as written, would have garnered records consisting of 11.5 GB of data (166,000 documents). However, USCIS FOIA personnel were able to negotiate the terms of this request and reduce the scope of records to 1.7 GB (25,000 pages). Working collaboratively with requesters in this manner is common practice within the USCIS FOIA program and ensures requesters receive the records they requested in the most efficient manner possible.”³¹
- The US Secret Service (USSS) “corresponded with requesters to clarify or narrow the scope of requests when an email search would yield over 50,000 possible hits. Additionally, USSS reaches out to anyone who submits a request that returns over 2,500 pages to negotiate an interim release schedule.”³²

As shown above, even where agencies and requesters have collaborated in narrowing search terms, it is not unusual that a given keyword search request will result in many tens of thousands of documents that need to be reviewed for possible responsiveness.³³ Moreover, notwithstanding OIP’s excellent guidance, it remains the case that agency staff unilaterally act on a given request by taking on the search and review burden without choosing to further interact with a requester. The resulting review process poses a substantial resource burden on agencies, and often results in many months or years passing before the agency sends a determination letter.³⁴

In the Subcommittee’s experience, some agencies are willing to go further than simply discuss clarifying and narrowing requests in the abstract. As in the example from USSS above, at least a small number of agencies are open to providing an interim release of responsive documents after negotiating with a requester what search terms and search parameters will be used in conducting a reasonable search. In cases where a large number of keyword “hits” have been identified representing potentially responsive documents, we believe that an agency can benefit from the requester reviewing a small sample of documents that have been subject to review, in order for the requester to have an opportunity to further narrow their request prior to a full search and review process being conducted over many months or years. Agencies should be open to seeking creative alternatives that will substantially reduce the costs and burdens of review.

³⁰ Department of Education 2023 Chief FOIA Officer Report, at 5, <https://www2.ed.gov/policy/gen/leg/foia/2023-ed-cfo-report-doj.pdf>.

³¹ Department of Homeland Security 2023 Chief FOIA Officer Report, at 17, <https://www.dhs.gov/sites/default/files/2023-06/Chief%20FOIA%20Officer%20Report%20for%202023.pdf>.

³² *Id.*

³³ The weight of FOIA law does not place limits on the volume of responsive records that might be subject to a request, so long as it is otherwise reasonably specific. Most recently, one court held that a request calling for a search of approximately one million emails for three named staffers constituted an unreasonable burden. *Center for Immigration Studies v. U.S. Citizenship and Immigration Services*, 628 F.Supp.3d 266 (D.D.C. 2022). Whether the reasoning of this decision sets a precedent in other cases remains to be determined.

³⁴ *See* nn.7 & 14.

To this end, we propose the following protocol to be employed where a requester exhibits a willingness to *engage in good faith* with an agency in working to further clarify and narrow a pending request.

- (1) In cases where it appears that a given FOIA request will result in a large number of responsive records retrieved and needing to be reviewed, agency staff should be open to having *requester-initiated* discussions with agency FOIA staff.
- (2) Alternatively, and consistent with existing OIP guidance, agency FOIA staff may initiate contact with a requester for the purpose of advising that the request as written will likely be voluminous. In doing so, staff shall invite a requester to narrow the request via an amendment that revises the temporal scope of the request, the number of component office(s) and/or staffer(s) identified in the request to search, or any other changes that both parties (agency and requester) would agree is likely to substantially reduce the expected volume of records.
- (3) In their initial discussion(s), the parties may explore any number of solutions to substantially narrow the volume of the records sought, including but not limited to (i) search terms used in conducting keyword searches; (ii) records custodians who may hold responsive records; (iii) specific locations (agency components, or specific repositories, e.g., Capstone email repositories) where responsive records may be located; (iv) limitations on the time period governing records to be searched; and (v) any other issues that would be useful in narrowing a FOIA request and reducing the burden on an agency before a search and review process is undertaken.
- (4) Where a consensus is reached, the agency should search for responsive records.
- (5) Once the search has been conducted, the agency shall disclose the number of “hits” obtained for potentially responsive records. If the yield is still voluminous in the agency’s view, the agency shall contact the requester with the intent of furnishing sufficient information concerning the scope of the search conducted to allow for a meaningful dialogue with respect to a further narrowing of the request.
- (6) To facilitate reaching consensus on the processing of a narrowed request, the agency may offer (or the requester can ask) to have FOIA staff select a sample of the potentially responsive records located, for the purpose of further review and redaction as appropriate. The sample size should be of a modest nature, enabling that the review process can be conducted in as timely a fashion as possible. A suggested sample size: where a keyword search produces 5,000 or more “hits,” an agency would offer to review a sample on the order of 100 to 200 documents.
- (7) The agency should next proceed to review the sample set of documents to determine actual responsiveness, and for possible withholding under applicable FOIA exemptions.
- (8) Production of the reviewed sample set of documents with redactions will be considered an interim response, not a final determination. Appeal rights would be provided per agency practice.
- (9) The purpose of providing the sample is to provide a requester with an idea of what the potentially responsive set of records looks like (in redacted form if applicable), so that the requester can make an informed decision as to further narrow the request via an amendment.
- (10) If a requester chooses not to further amend, the agency need not provide further sampling, but shall process the request in interim, monthly productions, if that is practicable for the agency, until the request is fully processed.

The carrying out of this protocol in the form of OIP guidance would be subject to these further conditions and understandings:

- (A) Where an agency initiates contact with a requester for the purpose of seeking additional information that would be useful in clarifying or narrowing a request, doing so will stop the statutory 20 working-day clock, until a discussion with the requester is conducted, and an agreement amending the request is reached. This tolling would be expected to occur in those cases where contact is made within the initial 20 working day provision for providing a response. Also, under the applicable tolling provision in the FOIA and OIP guidance, an agency would only be able to toll on a one-time basis for this type of discussion with a requester (*see* n.29, *supra*).
- (B) At all times when an agency has requested information of a FOIA requester, the requester will have an affirmative duty to respond to the agency request, and failure to do so within a reasonable time period set by the agency (e.g., 30 calendar days from the initial or subsequent contact date), may be construed by the agency to mean that a request is no longer interested in the request. In such circumstances, the agency will close the FOIA request without further processing.
- (C) Nothing in this protocol is intended to suggest that FOIA staff should “research” requests or provide extraordinary assistance to individual requesters in the fashioning of narrowed requests through interim sampling. FOIA processors are professionals whose job it is to release records to the requester community provided that no FOIA exemption applies prohibiting disclosure. At some point, it would not be an appropriate use of agency resources to expect that staff members conduct multiple interim searches for the purpose of narrowing requests. Agencies can, if asked, provide additional sampling, but they ought not be expected to do so.

* * *

The suggested search protocol is intended to provide a requester with an early look at how the agency intends to redact documents in the larger universe of potentially responsive records. Doing so may greatly inform requesters as to what to expect if they await a further, full production, and therefore will give them options on whether and how to proceed. In some cases, requesters will, after reviewing a sample of documents, be satisfied that they have received a sufficient number of documents on the issue they care to know more about. In other cases, requesters will, through this protocol, have a substantial opportunity to narrow their request further in various ways, saving the agency the expense of reviewing all of the documents retrieved to date.

The Subcommittee is aware that agencies may have legitimate reasons not to wish to adopt this type of search protocol. Depending on the nature of the engagement with a requester, an agency may have reason to believe that little progress will be made in narrowing or resolving issues in contention through the offer of a sample set leading to an interim production. Moreover, the suggested protocol should not be interpreted as asking an agency to continue to engage in multiple interim releases for the purpose of satisfying requester demands for documents.

This recommendation is properly considered in the nature of an extension of the Committee’s separate Recommendation #1 with respect to making an affirmative invitation to have requesters discuss their requests with agency staff. That is, where a requester wishes to engage with an agency on any number of issues involved in the submitted search request, an agency at its option may consider initiating the offer of a sampling protocol along the lines suggested above, or be receptive to a requester being interested in pursuing this type of interim review. Doing so may substantially reduce the ultimate burden associated with reviewing and possibly making redactions with respect to a huge universe of documents, while at the same time enhancing government transparency and shortening delays in requesters receiving at least some responsive documents.

Recommendation #3: We recommend that federal agencies expand public engagement activities focused on improving all aspects of their FOIA process.

COMMENT

The current Administration has shown support as a matter of *policy* for increasing the capacity for public engagement by agencies in a variety of contexts. Most prominently, on July 19, 2023, OMB issued a memorandum to Executive departments and agencies on the subject of “Broadening Public Participation and Community Engagement in the Regulatory Process,” which noted that “[e]ffective and meaningful public engagement has long been one of the foundational principles of Federal regulatory development.”³⁵ In similar fashion, to advance public engagement with the sciences, the President’s Council of Advisors on Science and Technology has recommended that the President:

Issue a clarion call to Federal agencies to make science and technology communication and public engagement a core component of their mission and strategy. An essential

³⁵ See Richard L. Revesz, OMB Office of Information and Regulatory Affairs, “Memorandum re: Broadening Public Participation and Community Engagement in the Regulatory Process” (July 19, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf>. The OMB Memorandum highlights a number of policy considerations with respect to the regulatory environment that, if applied specifically to FOIA, would provide further support to increasing agency engagement in obtaining public feedback on issues of importance the greater FOIA community. This can be seen in the following passage from the Memorandum (pp. 4-5), paraphrased here with the substitution of “FOIA”-related wording for the references to the “regulatory” process in the original:

Broadening public participation and community engagement in the [FOIA] process can help agencies produce more responsive, effective, durable, and equitable [FOIA] outcomes]. This is particularly true when agencies engage communities through trust-based, long-term, and two-way relationships. Participation and engagement can help agencies to better understand [FOIA] problems that could [be] address[ed] and identif[ie]d] [through FOIA reform] proposals that are responsive to public needs. Engagement with [FOIA] communities, for instance, can help agencies to identify administrative burdens that members of the public face when attempting to access [government information] and [make] relevant changes to agency [FOIA processes] to reduce those burdens. (Text substitutions inserted in brackets & citations omitted.)

pillar of this effort is ensuring that experts in participatory public engagement are included in agency senior-level policy development and decision-making processes.³⁶

Recent legislation also underscores the importance of public engagement. The OPEN Government Data Act³⁷ specifically requires that “with respect to information dissemination” agencies shall “regularly solicit and consider public input on the agency’s information dissemination activities,”³⁸ including as proposed in specific ways.³⁹ A number of agencies have taken steps to implement this recommendation; others had yet to make substantial progress as of 2021, according to a Government Accountability Office (GAO) Report.⁴⁰ The GAO Report makes this further observation: “Agencies that do not provide the public with the opportunity to directly provide feedback on open data miss the opportunity to better understand public demand for their data sets, and limit potential public use of data.”⁴¹

Expanding the public’s engagement in agency FOIA processes is also in line with this Administration’s various initiatives in promoting enhancements to the federal customer’s experience (“CX”). *See* Executive Order 12,862 (Dec. 13, 2021), on Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government;⁴² OMB Circular A-11, section 280, “Managing Customer Experience and Service Delivery.”⁴³ Additional

³⁶ Letter to the President, Advancing Public Engagement with the Sciences (August 2023), at 3,

https://www.whitehouse.gov/wp-content/uploads/2023/08/PCAST_Science-Engagement-Letter_August2023.pdf

³⁷ *See* Open, Public, Electronic and Necessary Government Data Act of 2018 (“OPEN Government Data Act”), Title II of the Foundations for Evidence-Based Policymaking Act, Pub. L. 115-435 (2019), 132 Stat. 5534.

³⁸ 44 U.S.C. § 3506(d)(2).

³⁹ 44 U.S.C. § 3506(d)(6) further requires each agency to “engage the public in using public data assets of the agency and encourage collaboration by . . . (A) publishing on the website of the agency on a regular basis (not less than annually), information on the usage of such assets by non-Government users; (B) providing the public with the opportunity to request specific data assets to be prioritized for disclosure and to provide suggestions for the development of agency criteria with respect to prioritizing data assets for disclosure; (C) assisting the public in expanding the use of public data assets; and (D) hosting challenges, competitions, events, or other initiatives designed to create additional value from public data assets of the agency.”

⁴⁰ *See* GAO Report 22-104574, “Open Data: Additional Action Required For Full Public Access” (“GAO Report”) (Dec. 2021), <https://www.gao.gov/assets/d22104574.pdf>; *see also* “ED wants to hear your thoughts on Open Data,” Department of Education, <https://data.ed.gov/pages/survey>.

⁴¹ GAO Report at 23.

⁴² *See* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/13/executive-order-on-transforming-federal-customer-experience-and-service-delivery-to-rebuild-trust-in-government/>.

⁴³ OMB Circular A-11 (2023), <https://www.whitehouse.gov/wp-content/uploads/2018/06/s280.pdf>, at section 280.2 states:

It is the Federal government’s responsibility to ensure that every interaction a member of the public has with their government demonstrates competence and transparency and builds trust. . . . [T]he term “customer experience” (“CX”) means the public’s perceptions of and overall satisfaction with interactions with an agency, product, or service. . . . [T]he term refers to a combination of factors that result from touchpoints between an individual, business, or organization and the Federal government over the duration of an interaction, service journey, and relationship. These factors of experience can include: ease/simplicity/effort (burden/friction), efficiency/speed, transparency, equity (e.g., participation, access), humanity (e.g., respect, dignity, empathy), effectiveness/perceived value of the service itself, and interactions with any employees. Perceived responsiveness to individual needs and ability to provide feedback is also important. Similar to their application in the private sector, these factors can drive the overall satisfaction with and trust in the program, agency, and the government at large. A customer’s experience interacting with the Federal government directly contributes to their trust in government itself.

illustrations of the importance of public engagement can be found on the President’s Management Agenda website devoted to CX,⁴⁴ citing to priority 2 of the President’s Management Agenda,⁴⁵ as well as the 21st Century IDEA Act,⁴⁶ the latter of which “directs the Federal government to improve the digital experience for government customers and reinforces existing requirements for Federal public websites.”⁴⁷

In the specific context of FOIA, a number of agencies have reported to OIP that they have undertaken outreach efforts with individual requesters “that went beyond the regular communication that takes place within the FOIA request and appeal process.”⁴⁸ As provided in the 2023 OIP CFO Summary Report, examples of agencies doing so include:

- “Consumer Financial Protection Bureau (CFPB)’s FOIA Public Liaison reach[ing] out to frequent requesters to learn about their utilization of FOIA proactive disclosures during a ‘Design Sprint’ which sought to improve the submission of FOIA requests and navigation of the CFPB’s FOIA Library.”
- “Department of Commerce (DOC)/Bureau of Industry and Security (BIS) proactively engag[ing] with requesters by offering them information that is frequently requested such as aggregate export license reports which are fully releasable.”
- “Department of Health and Human Services (HHS)/Centers for Medicare and Medicaid Services (CMS) us[ing] a web conferencing platform to provide an overview of a new request portal with various requester groups. As part of the overview, CMS provided an online training demo to walk through the process for submitting requests. CMS also developed 7 communication tools to explain how to access and submit requests through the National FOIA.gov portal, which interfaces with CMS’ internal request management system. CMS notes that the outreach efforts have improved FOIA administration and have been well received by the requester community.”⁴⁹

OIP has noted additional examples where agencies have made efforts to engage with the public at large, including the FOIA requester community and civil society organizations. For example, “[The U.S. Postal Service] (USPS) hosted two conference calls with the public that included an introduction to the FOIA and instructions on how to submit a proper FOIA request. Additionally, members of the public had the opportunity to ask questions during the conference calls.”⁵⁰

⁴⁴ <https://www.performance.gov/cx/>.

⁴⁵ <https://www.performance.gov/pma/cx/>.

⁴⁶ See Pub. L. 115-336, 132 Stat. 5025 (the 21st Century Integrated Digital Experience Act); see generally, <https://digital.gov/resources/delivering-digital-first-public-experience/>

⁴⁷ <https://www.performance.gov/cx/>.

⁴⁸ See OIP CFO Report Summary, n.20, *supra*, at 6.

⁴⁹ *Id.*

⁵⁰ *Id.* Another example of an agency soliciting public feedback involves FOIA staff at the Commodity Futures Trading Commission (CFTC) having “collaborated with its Office of Public Affairs on a new initiative called the ‘Knowledge Hub.’ The effort is intended to elicit feedback from the public that will allow CFTC to better anticipate the types of proactively disclosed information that would most benefit the public.” OIP CFO Report Summary 2023, n.20, *supra*, at 10.

To be sure, there always have been ways outside of the FOIA process members of the public have shared their feedback with FOIA personnel. Forums such as participation at American Society of Access Professionals (ASAP) training conferences, public interest group websites, listservs, and congressional hearings have all provided the opportunity for agency FOIA officers to hear public comments. However, in the absence of any direct statutory or policy guidance, most agencies on their own initiative do not appear to have developed robust, ongoing public forums for discussing FOIA reforms.⁵¹

Most recently, the expectation that agencies should pay greater attention to what the FOIA community might have to say has been spotlighted in the updated and revised 2023 edition of the FOIA Self-Assessment Toolkit (“DOJ FOIA Toolkit”) issued by OIP.⁵² In its announcement of the revised edition, OIP stated “[t]his update fulfills one of the Department’s commitments from the Fifth U.S. Open Government National Action Plan to strengthen access to government information through the FOIA.”⁵³ OIP considers the toolkit as “a resource for agencies to use when assessing their administration of the FOIA” and has stated that “[b]y continuing to identify areas for improvement and implement changes, agencies can further refine their administration of the FOIA and enhance the services provided to the public.”⁵⁴

The DOJ Toolkit is divided into 15 modules, each covering a different aspect of the typical agency FOIA process, and further subdivided into “milestones.” “For each milestone, agencies should document or reference any available evidence. Evidence may indicate success or the need for improvement in a particular area.”⁵⁵ Sources of evidence for each milestone include “public feedback.”⁵⁶ Seven out of the 15 modules contain one or more express references to agencies’ soliciting public feedback in furtherance of their evidence-gathering, including Module 3 (Acknowledgement Letters), Module 4 (Adjudicating Requests for Public Processing), Module 5 (Fee Correspondence), Module 7 (Processing Procedures), Module 8 (Consultations and Referrals), Module 11 (Requester Services), and Module 13 (FOIA Website Development and Maintenance).

In particular, Module 11 (Requester Services) concerns “[w]orking with FOIA requesters in a spirit of cooperation and maintaining open communication helps agencies and requesters alike.

⁵¹ The one notable exception is OGIS, as the FOIA requires OGIS to conduct an annual meeting open to the public where it reports on its current activities, and “allow interested persons to appear and present oral or written statements at the meeting.” 5 U.S.C. § 552(h)(6). See generally, <https://www.archives.gov/ogis/outreach-events/annual-open-meeting>.

⁵² <https://www.justice.gov/oip/page/file/1574281/download>.

⁵³ <https://www.justice.gov/oip/blog/updated-foia-self-assessment-toolkit-now-available#:~:text=The%202023%20update%20contains%20new,and%20guidance%20covering%20the%20topic>. The Fifth U.S. National Action Plan can be found at <https://open.usa.gov/national-action-plan/5/>.

⁵⁴ <https://www.justice.gov/oip/blog/updated-foia-self-assessment-toolkit-now-available#:~:text=The%202023%20update%20contains%20new,and%20guidance%20covering%20the%20topic>.

⁵⁵ DOJ FOIA Toolkit, at v.

⁵⁶ *Id.*

This module examines your Agency’s requester service and communication practices throughout the FOIA process.”⁵⁷ In Section B of Module 11, the Toolkit guidance states: “One of the cornerstones to working in a spirit of cooperation is ensuring that FOIA Staff promptly respond to requester inquiries and maintain open communication throughout the request process.”⁵⁸ In turn, Milestone 8.A of Section B contains the following element:

*Agency periodically reaches out to its requester community to facilitate open communication and feedback.*⁵⁹ (Emphasis added.)

In a “Best Practices and Guidance” section following this Milestone, DOJ goes on to advise agencies to: “Periodically reach out to the requester community and civil society organizations to help requesters better understand the agency’s FOIA process and to provide [the] requester community with an opportunity to share tips on how to engage effectively with requesters throughout the FOIA process.”⁶⁰

The present recommendation dovetails with the DOJ FOIA Toolkit’s best practice advice for conducting agency self-assessments and builds on the expectations for public outreach that DOJ already has in place. It may therefore be helpful to provide some further practical general guidance on how agencies might approach soliciting public input. The following does not purport to consist of a comprehensive roadmap, but, at a minimum, agencies might consider adopting one or more of the following approaches in raising their level of public engagement to improve FOIA processes:

With Respect to Individual Requesters

Agencies could consider asking requesters if they were satisfied with the *process* and if they were satisfied with the *results* of the request after each response. An agency could opt to do so either by including a sentence in communications with requesters that it welcomes them to contact the agency’s FPL (or ombuds person) to share feedback or, alternatively by directly surveying requesters by asking for feedback at the time of receipt of FOIA responses. (For example, the determination letter might provide an opportunity for the requester to go to a link to fill out a questionnaire about the agency’s processing of the request.⁶¹)

Attaining a high standard of requester satisfaction with the *results* of FOIA responses will always be challenging, but in choosing to seek requester feedback, agencies may find it useful as a resource in shaping and improving their processes. Moreover, over time, the responses to these questions may generate useful data that, especially if shared with the requester community,

⁵⁷ *Id.* at 58.

⁵⁸ *Id.* at 60.

⁵⁹ *Id.* at 61.

⁶⁰ *Id.* at 63.

⁶¹ Surveys created would need to be compliant with the requirements of the Paperwork Elimination Act, to the extent applicable. *See* 45 U.S.C. chap. 35.

would provide a public benchmark on how well each agency is doing in fulfilling their general CX mandates as applied to the FOIA.

With Respect to the FOIA Community & Civil Society Organizations

- Agencies could hold virtual or in-person public meetings (modeled after the OGIS annual meeting) -- bringing together members of the FOIA community, representatives of civil society organizations, and other public sector experts, researchers, technologists, and academics -- that provide a forum for dialogue, compliments, complaints, concerns, and recommendations on the agency's FOIA process. Subjects at a meeting may, for example, include recommendations for how the agency's use of FOIA.gov and how its reading rooms can be improved, as well as a discussion of applicable commercial or public sector technologies that would make processing more efficient.
- Agencies could set up online public participation channels of communication centered on requester feedback. *See generally*, <https://digital.gov/guides/public-participation/> One means of doing so would be creating an Online FOIA Customer Survey, along the lines of a CX survey. *See, e.g.*, <https://data.ed.gov/pages/survey>.
- Agencies could develop FAQs to respond to common questions or complaints received from requesters.
- Agencies could adopt various types of platforms and channels of communication (*e.g.*, blogs, short videos on leading social media sites) to promote their FOIA processing efforts and to announce changes in regulations or policies (with the opportunity to obtain comments before being made final). A mechanism could be provided for requesters to sign up for blog updates.
- Agencies could delegate to FPLs or other designated staff the task of curating blogs or the holding of virtual forums.
- Agencies could periodically reach out to the requester community and civil society organizations to help requesters better understand the agency's FOIA process and to share tips to provide the requester community an enhanced opportunity to engage effectively with the agency.
- Agencies should review additional ideas on public engagement activities as set out in the President's Management Agenda, including with a focus on improving the FOIA CX, to see what other ideas the agency might wish to incorporate into their FOIA program.
- Specific agencies that participate in the development of future National Action Plans for Open Government (including GSA, OMB, and DOJ/OIP) should engage the public in co-creating new commitments to improve the FOIA.⁶²

As a general matter, agency FOIA officers would do well to reach out to colleagues responsible for customer experience (CX), as well as CIOs, Chief Data Officers, Chief Privacy Officers, and staff in components of the agency focusing on innovation and in centers of excellence, to gather ideas and collaborate on cross-agency projects aimed at improving FOIA processes through

⁶² Details of the past five U.S. National Action Plans for Open Government can be found at <https://open.usa.gov/>.

greater public engagement. One additional resource may be the U.S. Public Participation Playbook, “a resource for government managers to effectively evaluate and build better services through public participation using best practices and performance metrics.” See <https://digital.gov/guides/public-participation/>.

The Subcommittee is keenly aware that agencies’ commitment to public engagement by any of the means outlined above involves a diversion of resources without receiving additional specific appropriations. Moreover, doing so comes at a time where the overall number of FOIA requests government-wide are voluminous and seemingly ever-increasing, and where many agencies currently suffer from long backlogs in their FOIA queues. Nevertheless, the commitment to attempting to enhance public engagement has been expressly recognized by DOJ/OIP as an important FOIA activity in connecting with agency self-assessments.

Finding ways to create feedback loops with individual requesters, the FOIA community, and civil society organizations advances FOIA’s aspirational goal of providing greater government accountability and transparency.

Recommendation #4: We recommend that the Archivist propose to OMB, OIP, and other agency participants taking a leading role in future U.S. National Action Plans for Open Government that they include new and continuing commitments to improving FOIA administration.

COMMENT

In 2011, the Open Government Partnership (OGP) was created as a “new multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.”⁶³ OGP states that “[a]ction plans are at the core of a member’s participation in OGP. They are the product of a co-creation process in which government and civil society define ambitious commitments to foster transparency, accountability and inclusion.”⁶⁴ The U.S. was a founding member of OGP’s original consortium of eight member-nations; OGP currently includes 75 member-nations and 104 local governments.⁶⁵

Five U.S. National Action Plans have been published to date, displaying various degrees of commitment to including FOIA initiatives amongst the ideas presented. The first three National Action Plans, published in 2011, 2013, and 2015, cumulatively contained 11 separate commit-

⁶³ U.S. Department of State, “Open Government Partnership,” <https://2009-2017.state.gov/j/ogp/#:~:text=It%20takes%20collaboration%20between%20government,new%20technologies%20o%20strengthen%20governance> (archived content).

⁶⁴ OGP, “Action Plan Cycle,” <https://www.opengovpartnership.org/process/action-plan-cycle/#:~:text=Action%20Plan%20Creation,foster%20transparency%2C%20accountability%20and%20inclusion>.

⁶⁵ OGP, “About Open Government Partnership,” [https://www.opengovpartnership.org/about/#:~:text=The%20Open%20Government%20Partnership%20\(OGP,thousands%20of%20civil%20society%20organizations](https://www.opengovpartnership.org/about/#:~:text=The%20Open%20Government%20Partnership%20(OGP,thousands%20of%20civil%20society%20organizations).

ments with respect to improving FOIA processes, one of which was the establishment of the present FOIA Advisory Committee.⁶⁶

Regrettably, the Fourth National Action Plan, issued in 2017, contained no similar commitments related to the FOIA.⁶⁷ With respect to the Fifth National Action Plan, commitments specifically with respect to the FOIA were added late in the process at the behest of civil society organizations.⁶⁸ The final version of the Fifth National Action Plan contains three such commitments.⁶⁹ Without taking a position on the matter, we wish to note that these commitments have been criticized as insufficiently “new,” to the extent they arguably reflect actions previously committed to by the Department of Justice.⁷⁰

Centering the FOIA as a flagship national open government initiative and priority should not be controversial. In accord with the original OGP mandate, government representatives and civil society organizations should aspire to co-create new initiatives aimed at improving the administration of FOIA, as part of the planning process for future National Action Plans. It follows that U.S. National Action Plans should ideally build upon, rather than simply reiterate already-in-place commitments.

The immediate effect of this recommendation is intended to be modest: as worded it simply would commit the Archivist of the U.S. to communicating to lead government actors in the open

⁶⁶ The first U.S. National Action Plan included two commitments to “Continue to Improve Freedom of Information Act Administration,” namely, that the U.S. will “[professionalize FOIA Administration,” and “Harness the Power of Technology.” See https://obamawhitehouse.archives.gov/sites/default/files/us_national_action_plan_final_2.pdf. The Second Open Government National Action Plan, in turn made five commitments to modernizing the FOIA, including, in addition to the creation of this Committee, (i) improving the customer experience through a consolidated online FOIA service; (ii) developing common FOIA regulations and practices for federal agencies; (iii) improving internal agency FOIA processes; and (iv) improving FOIA training across government to improve efficiency. See https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf.

The Third Open Government National Action Plan contained an additional four commitments, including to (i) expand the services offered on foia.gov; (ii) improve agency proactive disclosures by posting FOIA-released records online; (iii) improve agency FOIA websites; (iv) increase understanding of FOIA through NARA developing tools to teach students about the statute; and (v) proactively release nonprofit tax filings. See https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/final_us_open_government_national_action_plan_3_0.pdf

⁶⁷ <https://open.usa.gov/assets/files/NAP4-fourth-open-government-national-action-plan.pdf>.

⁶⁸ See USAgov, “Making Government More Inclusive and Responsive: What We Heard—and What We’re Exploring” (n.d.) (“In our public engagement sessions, stakeholders expressed interest in strengthening access to government information through the Freedom of Information Act”), <https://open.usa.gov/national-action-plan/co-creation/making-government-more-inclusive-and-responsive/>.

⁶⁹ The Fifth National Action Plan stated that the U.S. Department of Justice was committed to (i) issuing an updated FOIA Self-Assessment Toolkit; (ii) leading a CFO Council working group in collaboration with OGIS, GSA, and the Business Standards Council to develop shared FOIA business standards; and (iii) enhancement of the user experience on FOIA.gov. See <https://open.usa.gov/national-action-plan/5/>.

⁷⁰ Alex Howard, “Response to the proposed themes for a 5th U.S. National Action Plan on Open Government,” *Digital Government* (Dec 9, 2022), <https://governing.digital/2022/12/09/response-to-the-proposed-themes-for-a-5th-u-s-national-action-plan-on-open-government/>.

government movement that they should include FOIA initiatives in the Sixth U.S. National Action Plan. The Sixth Plan is expected to be co-created with the American people in the 2024-2025 timeframe, with an issuance date sometime between 2025 and 2027. To be optimally successful, the development of new FOIA initiatives will necessarily entail a government-wide effort, with coordination from the White House and the support from many stakeholders. These would be expected to include the Office of Information Policy within the Department of Justice; within the Executive Office of the President, the Office of Management and Budget, the Office of Science and Technology Policy, and the Office of Public Engagement; and the Open Government Secretariat at the General Services Administration.

A starting place for the Archivist to make recommendations on would be a governmental review of recommendations of past and present terms of the FOIA Advisory Committee, along with a review of commitments drawn from the first three National Action Plans. The requester community will have other suggestions that, if adopted and implemented, will help build trust in the process and the U.S. government's commitment to uphold the public's right to know.

Our country's continuing, bi-partisan commitment to the OGP, including through the issuance of U.S. National Action plans, demonstrates the interest the U.S. government has in upholding the open government principles of transparency, accountability, and inclusion. As part of the Sixth and future U.S. National Action Plans, our government should continue its commitment to funding open government policies, platforms, and programs that include express recognition of the enduring importance of the FOIA, and the Archivist can play a role in better ensuring that this will happen.

Recommendation #5: We recommend that the Chief FOIA Officers Council Technology Committee and interested agencies to publish requests for information (RFIs) on the subject of artificial intelligence (AI) tools and techniques as an aid to FOIA processing.

COMMENT

During its 2018-2020 term, the FOIA Advisory Committee made two recommendations intended to advance agency use of artificial intelligence (AI) in the context of FOIA processing. First, the Committee recommended that 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 to FOIA requests 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.⁷¹

⁷¹ Recommendation 2020-22, Final Report and Recommendations of the 2018-2020 FOIA Advisory Committee (2018-2020 Final Report), at 35, <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf#page=35>.

Second, the Committee recommended that OIP provide further guidance on the use of e-discovery tools to assist agencies in meeting their obligations to conduct adequate searches of electronic records, including but not limited to Capstone email repositories. In doing so, the Committee referenced machine learning tools that the legal profession was familiar with in the context of meeting search obligations in litigation. *See* Recommendation 2020-11.⁷²

Since the issuance of the 2018-2020 Final Report, OIP working with the Chief FOIA Officer (CFO) Council’s Technology Committee, have moved forward in embracing the subject of AI in the FOIA context. The current OGIS dashboard⁷³ summarizing the status of FOIA Advisory Committee Recommendation 2020-11, notes the following initiatives have been among the ones undertaken to date:

- OIP, in its Guidance for Further Improvement Based on 2021 CFO Report Review and Assessment,⁷⁴ continued to encourage agencies to leverage technology for greater efficiency.
- OIP and the CFO Council’s Technology Committee hosted an Artificial Intelligence 101 Workshop for FOIA in 2020.⁷⁵
- Agencies continue to report on their CFO Reports efforts to implement e-discovery and other tools.
- Vendors participating in the February 2022 NexGen FOIA Tech Showcase shared their commercial e-discovery tools for searching for records responsive to FOIA requests.⁷⁶
- The Search/Artificial Intelligence Working Group of the CFO Council’s Technology Committee continues to study the issue.

Additionally, in connection with Recommendation 2020-22, OGIS reports on its dashboard that NARA’s Chief Records Officer issued a white paper in 2020 that recognizes the importance of AI and machine learning in the field of records management generally.⁷⁷

The OGIS dashboard lists both Recommendations 2020-22 and 2020-11 as “in progress.”

A number of agencies are taking steps to incorporate AI in FOIA processes. As discussed in OIP’s 2023 annual summary of agency CFO reports:

OIP also specifically asked whether agencies used any technology to automate record processing, such as machine learning, predictive coding, and technology assisted review. The use of Artificial Intelligence and machine learning is an emerging area that presents significant opportunities to make the search and review of records more efficient and

⁷² Recommendation 2020-11, 2018-2020 Final Report, at 22, <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf#page=22>.

⁷³ <https://www.archives.gov/ogis/foia-advisory-committee/dashboard>.

⁷⁴ <https://www.justice.gov/oip/oip-guidance-further-improvement-based-2021-chief-foia-officer-report-review-and-assessment>.

⁷⁵ <https://www.justice.gov/oip/blog/oip-hosts-artificial-intelligence-event-featuring-cfo-council-technology-committee-working>

⁷⁶ <https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council/nexgen-foia-showcase>.

⁷⁷ NARA, “Cognitive Technologies White Paper Records Management Implications for Internet of Things, Robotic Process Automation, Machine Learning, and Artificial Intelligence” (Oct. 2020), <https://www.archives.gov/files/records-mgmt/policy/nara-cognitive-technologies-whitepaper.pdf>

accurate, but that still requires human monitoring and appropriate safeguards to ensure that it is consistent with the FOIA.⁷⁸

OIP's summary went on to list examples of various ways in which agencies are using AI to improve FOIA workflows, including but not limited to with respect to search and review.⁷⁹

Of particular interest, as stated elsewhere in this report, the FOIA Advisory Committee heard this term from Eric Stein, Deputy Assistant Secretary for the Office of Global Information Services at the Department of State, on how that agency has moved forward in using AI machine learning tools for the purpose of performing declassification on a universe of State Department historical cables. Mr. Stein is now actively engaged in applying the knowledge gained from this effort to be incorporated in FOIA search and review processes. Mr. Stein also made clear that the State Department had largely developed its own software in carrying out these projects.⁸⁰

Specifically with respect to searching for responsive records, the legal e-discovery community has for over a decade embraced machine learning approaches, referred to as “technology assisted review” (TAR) and “predictive coding.”⁸¹ Many agencies do employ this type of software in connection with conducting searches in response to document productions in litigation. To the extent that larger federal agencies are now having to conduct searches over hundreds of thousands or millions of emails and other electronic records in connection with FOIA requests, a growing need exists to apply similar advanced search methods in the latter context. As demonstrated in events such as the NexGen FOIA Tech Showcase event in 2022, there certainly are commercial vendors who would be expected to respond to a request by agencies for more

⁷⁸ OIP, “Summary of Agency Chief FOIA Officer Reports for 2023 and Assessment of Agency Progress in FOIA Administration with OIP Guidance for Further Improvement” (“2023 CFO Reports Summary”), at 11, https://www.justice.gov/d9/2023-09/final_2023_cfo_summary_approved_for_posting_full.pdf

⁷⁹ It is worth noting, however, that the great majority of agencies responded to OIP's annual CFO survey that they have no current plans for using machine learning in connection with FOIA. See 2022-2024 FOIA Advisory Committee, Implementation Subcommittee Report and Recommendations.

⁸⁰ See Transcript of FOIA Advisory Committee Meeting (September 7, 2023), <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term/foiaac-mtg-transcript-2023-09-0>. See also J. Heckman, State Department looks to AI, n.83, *supra*.

⁸¹ The first case recognizing TAR methods was *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) (Peck, Mag. J.), adopted sub nom. *Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012), *citing* M. Grossman & G. Cormack, “Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review,” 17 RICHMOND J. LAW & TECHNOLOGY, art. 11 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf>. In the decade since, hundreds of reported decisions, legal commentaries, and further research has validated the efficiency of using machine learning tools in conducting searches for legal and investigatory purposes, and an entire legal e-discovery industry has grown in supporting the use of these methods. See, e.g., The Sedona Conference TAR Case Law Primer (2d ed. 2023), https://thesedonaconference.org/publication/TAR_Case_Law_Primer; The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval in E-Discovery,” 15 SEDONA CONF. J. 217 (2014) (J.R. Baron & M. Grossman, eds. in chief), https://thesedonaconference.org/sites/default/files/publications/217-264%20Search%20and%20Information_0.pdf; EDRM/Bolch Institute, Duke Law School, “Technology Assisted Review Guidelines” (rev. date 2021), <https://edrm.net/wp-content/uploads/2019/02/TAR-Guidelines-Final.pdf>.

information on their products and services with respect to technology assisted review tools applied to the problem of FOIA searches.⁸²

The FOIA process does, however, present additional challenges with respect to the efficacy of current AI tools to identify withholdable material under various of the nine FOIA exemptions. With respect to personally identifiable information (PII) in the form of social security numbers, telephone and passport numbers, and other forms of numerical information, a variety of commercial vendors offer products and services that assist agencies in carrying out redactions under FOIA Exemptions 6 & 7(c). With respect to other forms of exempt material, we are aware of current research that shows the promise of machine learning applied to the task of reasonably segregating factual from deliberative material in documents, so as to isolate portions of documents covered under the FOIA 5 “deliberative process privilege” in accord with FOIA standards.⁸³

In furtherance of Recommendations 2020-11 and 2020-22, we believe that agencies would benefit from pro-actively seeking industry input in the use of AI tools to improve FOIA processes. A long-adopted approach for doing so is proceeding with market research through the issuance of RFIs, in conformance with GSA’s Federal Acquisition Regulations (the “FAR”).⁸⁴ A number of agencies have chosen to publish RFIs on the subject of e-discovery.⁸⁵ This recommendation would build upon these efforts to focus on how AI methods, including those used in e-discovery, would be of assistance in the FOIA context.

OIP has singled out the CFO Council’s Technology Committee as “continu[ing] to serve as a great resource for agencies exploring their FOIA technology needs.”⁸⁶ As part of this recommendation, we would ask that OIP seek out the necessary expertise on the CFO Technology Committee to co-develop have an RFI go forward with broad applicability to larger agencies represented on the CFO Council. In the alternative, OIP could directly work with chosen federal agencies to develop agency-specific RFIs tailored to the FOIA processes employed by a given agency.

Adoption of AI methods in FOIA is not without its critics. As reported in *Forbes*, members of the public interest community (including a member of this term’s FOIA Advisory Council) have

⁸² A Google search under “predictive coding,” “TAR,” or “TAR 2.0” (employing what is referred to as the latest “continuous active learning” tools) will reveal scores of vendors offering such services in the e-discovery space.

⁸³ See Karl Branting, et al., “Automated Detection of Sensitive Content in Government Records,” *ARTIFICIAL INTELLIGENCE AND LAW* (2023), <https://link.springer.com/content/pdf/10.1007/s10506-023-09383-6.pdf>; Jason R. Baron, et al., “Providing More Efficient Access to Government Records: A Use Case Involving Application of Machine Learning to Improve FOIA Review for the Deliberative Process Privilege,” *JOURNAL ON COMPUTING AND CULTURAL HERITAGE*, 15:1, article 5: 1-19 (2022), <https://dl.acm.org/doi/abs/10.1145/3481045>. See also MITRE, “Searching for Solutions: MITRE Tool Simplifies Freedom of Information Requests (Feb. 1, 2023), <https://www.mitre.org/news-insights/impact-story/mitre-tool-simplifies-freedom-information-act-requests>.

⁸⁴ See, e.g., § 15.201(c), Exchanges with industry before receipt of proposals (“Agencies are encouraged to promote early exchanges of information about future acquisitions”).

⁸⁵ See, e.g., “E-discovery Platform: Request for Information,” Defense Logistics Agency, https://imlive.s3.amazonaws.com/Federal%20Government/ID291571030166059685723364843163024305884/ESID_D_RFI_Redacted.pdf.

⁸⁶ <https://www.justice.gov/oip/blog/oip-hosts-artificial-intelligence-event-featuring-cfo-council-technology-committee-working>.

expressed concerns about over-reliance on AI in FOIA decision making, calling for clear standards in the use of AI including procedures in place for challenging decisions made in AI.⁸⁷ These concerns are legitimate and, as noted by OIP above, there should be “safeguards” in place in any future uses of AI technologies.

In sum, as OIP has recognized, AI “has great potential for reducing the search and review burden on agency FOIA offices.”⁸⁸ Given the reality of growing backlogs of FOIA requests at many agencies, coupled with rapidly accumulating volumes of electronic records (especially in Capstone email repositories), it makes eminent sense that agencies consider the use of AI tools and technologies through conducting outreach to industry resources in the form of RFIs.

V. Additional Remarks

A. Agency Use of Artificial Intelligence in the FOIA Process

As referenced in our prior commentary accompanying Recommendations #2 and #5, the State Department has been an early adopter of machine learning methods for declassification review and FOIA.⁸⁹ So too, as part of their e-discovery process, many agencies have begun to use machine learning methods known as “technology assisted review” to search for records. In proposing that the CFO Council and interested agencies consider publishing an RFI on the use of AI and FOIA, our Subcommittee believes that the use of these types of AI tools are on the cusp of being more widely integrated into the FOIA workflow process in connection with performing searches for responsive records, identifying potential exempt material within agency records, and being used in other ways to make the processing of records more efficient.⁹⁰

Most recently, generative AI, using large language models, has captured the attention of the public at large. ChatGPT, Google Bard, and similar examples of generative AI software are capable of rapidly searching through huge volumes of information to produce explanatory

⁸⁷ William Skipworth, “Federal Agencies Are Reportedly Using AI To Complete FOIA Requests, Sparking Concerns From Transparency Advocates,” *Forbes* (August 1, 2023), <https://www.forbes.com/sites/willskipworth/2023/08/01/federal-agencies-are-reportedly-using-ai-to-complete-foia-requests-sparking-concerns-from-transparency-advocates/?sh=2420b4f35c81>

(quoting Adam Marshall, Reporters Committee for Freedom of the Press). See also Lewis Kamb, “Some U.S. Agencies are testing out AI to help fulfill public records requests,” *NBC News* (August 1, 2023), <https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313>.

⁸⁸ <https://www.justice.gov/oip/oip-guidance-further-improvement-based-2021-chief-foia-officer-report-review-and-assessment>.

⁸⁹ See text at nn.24, 25 & 80, *supra*. See also Samuel Stehle, Matthew Graviss & Eric Stein, “The Department of State’s pilot project approach to AI adoption,” *Fedscoop* (August 15, 2023), <https://fedscoop.com/state-department-approach-to-ai-adoption/>.

⁹⁰ See Recommendation #5, text at nn.81-83. One recent example, detailed by Dr. Colleen Shogan, Archivist of the United States, involves NARA being able to eliminate the agency’s backlog for military veterans’ records that had grown during the COVID-19 pandemic by training AI to identify a key form (DD-214) out of complex files and then automate the process of disclosure. Dr. Shogan said that NARA is now exploring how methods of pattern recognition can be used in the FOIA process, potentially freeing up archivists to work on more complex requests. See “Preserving Presidential Records,” University of Virginia Miller Center (February 21, 2024), recording available at <https://millercenter.org/news-events/events/preserving-presidential-records>.

narratives in plain English responsive to specific query prompts.⁹¹ While these are still early days in the use of generative AI in the public sector -- let alone the FOIA process -- these tools, as well as the use of AI more generally, have raised both high hopes and concerns within the communities of FOIA professionals and FOIA requestors.⁹² In the words of Adam Marshall, a senior staff attorney at the Reporters Committee for Freedom of the Press and a member of this Subcommittee, there need to be “clear standards for the use of this technology and assurances that they’re being followed,” and “procedures in place for challenging decisions where machine algorithms are used.”⁹³

We note that the CFO Council’s Technology Committee chartered a Search/AI working group in 2022-2023 and an AI working group in 2020-2021.⁹⁴ At public meetings held over the past couple of years, both the CFO Council and OIP have preliminarily explored further agency adoption of AI methods in the FOIA process.⁹⁵ To build on these efforts, we believe that promulgating best practices for the uses of AI in FOIA, and setting precedents and defaults through the proactive disclosure of use cases, will be in the public interest, as well as represent a public good potentially leading to more widespread adoption by other public sector actors.⁹⁶

OIP’s issuance of guidance would also be in furtherance of Executive Order 13960 (Dec. 8, 2020), “Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government,” section 5 of which calls upon agencies to provide public notice of an inventory of AI use cases, consistent with guidance issued by the Federal Chief Information Officers (CIO) Council.⁹⁷ Although GAO has found that as a general matter agency efforts to fulfill the objectives of EO 13960 are presently incomplete,⁹⁸ we note that NARA has placed on its inventory a pilot AI application for FOIA,⁹⁹ and other agencies should be expected to do so as well.

⁹¹ See Adam Zewe, “Explained: Generative AI,” *MIT News* (November 9, 2023), <https://news.mit.edu/2023/explained-generative-ai-1109>; see generally “Generative Artificial Intelligence,” *Wikipedia*, https://en.wikipedia.org/wiki/Generative_artificial_intelligence.

⁹² <https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313>

⁹³ See article in *Forbes*, *supra*, n.87.

⁹⁴ <https://www.foia.gov/chief-foia-officers-council/committee/technology-committee>

⁹⁵ <https://www.justice.gov/oip/blog/chief-foia-officers-council-meeting-showcases-use-advanced-technologies-foia>

⁹⁶ Members of this and past terms of the FOIA Advisory Committee have interacted with international FOIA experts on surveys, and/or have been involved in associations involving State FOI laws. In our view, the greater world FOIA community would benefit from the lead taken by the federal government in developing AI best practices and use cases.

⁹⁷ See <https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government>. Section 9(b) & (c) of the EO goes on to specify that guidance with respect to the inventory should cover “AI designed, developed, acquired, or used specifically to advance the execution of agencies’ missions, enhance decision making, or provide the public with a specified benefit,” and that the EO “applies to both existing and new uses of AI; both stand-alone AI and AI embedded within other systems or applications; AI developed both by the agency or by third parties on behalf of agencies for the fulfilment of specific agency missions, including relevant data inputs used to train AI and outputs used in support of decision making; and agencies’ procurement of AI applications.”

⁹⁸ GAO, “ARTIFICIAL INTELLIGENCE: Agencies Have Begun Implementation but Need to Complete Key Requirements” (Dec. 2023), <https://www.gao.gov/assets/d24105980.pdf>

⁹⁹ NARA, “FOIA Discovery AI Pilot” (“NARA would like to utilize various AI techniques to respond to FOIA requests. The AI system will do two things. First, the AI system would offer an NLP based search technique based on the content similarity between the query and the content of the records. The second main AI application would be to redact based on the nature of the FOIA request. Most of the time, the personal information is redacted, but

With respect to best practices, we believe OIP (with assistance from the CFO Council Technology Committee) should consider the issuance of guidance to agencies on the subject of disclosure to requesters as to how and when forms of AI have been or are being used, including for (i) conducting searches for responsive records; (ii) redacting exempt material for the purpose of withholding records in whole or in part, (iii) generating response letters to individual FOIA requests; and (iv) any other purposes.

Such guidance could be in the form of direct reports to OIP as part of the CFO annual reporting requirement, a generic notice on the agency's FOIA website, and/or by way of a statement in agency responses to individual FOIA requests. Ideally, OIP's collective knowledge of agency uses of AI in the FOIA process could be aggregated and proactively disclosed by OIP as part of FOIA.gov in the form of open data. Doing so would ensure a single government website listing all such uses.

Given the prospect of more widespread deployment of AI methods integrated into agency FOIA processes, we anticipate that proactive disclosure guidance along the above lines will be of great interest not only to requesters, but also to Congress, the Government Accountability Office (GAO), and access professionals everywhere. Moreover, as AI tools mature and gain acceptance across agencies, proactive disclosure of when and how AI is used for FOIA will only serve to further an agency's interest in explaining the adequacy of its search and review process when in litigation or under scrutiny otherwise.

With respect to public disclosure of use cases, we believe the CFO Council would benefit from working with select agencies to produce public case studies for current uses of AI in the FOIA process which also could be proactively disclosed on FOIA.gov. As referenced above, the State Department and NARA are two agencies actively at work in this area, and there will be other agencies whose efforts could be publicized in such a manner.

Finally, we wish to suggest that OIP consider soliciting nominees for successful uses of AI to improve FOIA ahead of the Department of Justice's annual Sunshine Week awards, in light of the role that professional recognition and celebration can play in rewarding innovative applications of emerging technologies in the public interest.

OIP and the CFO Council have ample opportunities to help create a community of practice around the use of AI to aid in FOIA processing. We encourage representatives of both components of government to work towards greater public disclosure of AI methods in connection with FOIA, as a welcome development in furtherance of the goals of government transparency, accountability and the public trust.

additional information would also need to be redacted based on the requester.”), <https://www.archives.gov/data/ai-inventory>.

B. Public Engagement By The FOIA Advisory Committee

As stated on its home web page, the FOIA Advisory Committee “was established in accordance with the U.S. Second Open Government National Action Plan, released on December 5, 2013. The Committee’s work helps OGIS fulfill the directive in the statute that OGIS “identify procedures and methods for improving compliance” with FOIA, 5 U.S.C. § 552(h)(2)(C).¹⁰⁰ In relevant part, the Second National Action Plan proposed that the United States:

Establish a FOIA Modernization Advisory Committee. Improvements to FOIA administration must take into account the views and interests of both requesters and the Government. The United States will establish a formal FOIA Advisory Committee, comprised of government and non-governmental members of the FOIA community, to foster dialog between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures.¹⁰¹

Each term of the FOIA Advisory Committee has operated under a Charter that parallels the original Second National Action Plan remit. As part of the current 2022-2024 FOIA Advisory Committee’s Charter, the duties of the Advisory Committee are described as follows:

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 Committee may recommend legislative action, policy changes, or executive action, among other matters. The FOIA Advisory Committee is advisory only (italics added).¹⁰²

During the course of the four past two-year terms of the FOIA Advisory Committee, meeting from 2014 through 2022, its members have collectively passed 51 recommendations to improve agency administration of the FOIA, with a 52nd approved so far during the current term. The three current Subcommittees for this 2022-2024 term are in turn expected to collectively propose over a dozen further recommendations to this already extensive list. This robust effort has fully lived up to the remit of the Committee as set out in its successive Charters.

As part of the methodologies employed in fashioning its recommendations, Advisory Committee members have from time to time solicited public comments through a variety of means, including surveys and interviews.¹⁰³ For example, in connection with the 2020-2022 FOIA

¹⁰⁰ <https://www.archives.gov/ogis/foia-advisory-committee>.

¹⁰¹ https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf.

¹⁰² <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-foia-advisory-committee-charter>.¹⁰³ We note that the FOIA Advisory Committee itself has not conducted surveys as a collective body. Rather, individual non-government members from academia, non-government organizations, and the like have conducted these surveys and shared results with the Committee. In doing so, the Advisory Committee has not run afoul of any requirements imposed under the Paperwork Reduction Act, 44 U.S.C. chap. 35, that may entail obtaining a prior clearance from OMB.

¹⁰³ We note that the FOIA Advisory Committee itself has not conducted surveys as a collective body. Rather, individual non-government members from academia, non-government organizations, and the like have conducted these surveys and shared results with the Committee. In doing so, the Advisory Committee has not run afoul of any

Advisory Committee’s Recommendation 2022-015, concerning legislative action to empower OGIS to make binding decisions, two Committee members conducted a survey of 221 individuals who either used the MuckRock public interest website or were participants on a variety of FOIA-related listservs (including a mix of journalists, private citizens, and representatives of nonprofits).¹⁰⁴ Additionally, members of the 2018-2020 FOIA Advisory Committee’s Time/Volume Subcommittee conducted two surveys at the ASAP conference in July 2019 that elicited responses from both FOIA officers and FOIA requesters.¹⁰⁵ Time/Volume Subcommittee members also “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.”¹⁰⁶

One further example of public outreach consisted of an initiative by the 2016-2018 FOIA Advisory Committee, which reported out that:

In developing the categories of records identified as potential targets for proactive disclosure, the Subcommittee collected lists previously identified by civil society organizations and asked that OGIS solicit suggestions from the public. OGIS solicited this input via a blog post, which was shared on social media and on various listservs. The Subcommittee then considered and ranked the ease of posting each category of records and the degree to which it improved the public’s understanding of government actions.¹⁰⁷ (Internal footnote omitted.)

These past efforts in successive terms of the FOIA Advisory Committee to engage with the greater FOIA community and civil society organizations have all been commendable. However, they have been undertaken on an *ad hoc* basis by one or more subcommittee members in the course of researching and gathering evidence in support of draft recommendations, rather than considered to be a function to be undertaken in fulfillment of the Committee’s Charter.

To fulfill the Committee’s charge embodied in the Second National Action Plan and in its subsequent Charters, we believe that the FOIA Advisory Committee should endeavor to find ways to engage with the public during each of its terms, as a greater (and more visible) aspect of its ongoing activities. Surveys and interviews are excellent means in doing so; additionally, there

requirements imposed under the Paperwork Reduction Act, 44 U.S.C. chap. 35, that may entail obtaining a prior clearance from OMB.

¹⁰⁴ 2020-2022 FOIA Advisory Committee Final Report at 26 & n.36,

<https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2022-07-05.pdf> (citing to A. Jay Wagner & David Cuillier, *FOI Requester Survey* (2022), <https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/meetings/survey-overview-05.04.2022-1.pdf>)

¹⁰⁵ 2018-2020 FOIA Advisory Committee Final Report at 9, <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>

¹⁰⁶ *Id.* at 38.

¹⁰⁷ 2016-2018 FOIA Advisory Committee Final Report at 23, <https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf>.¹⁰⁸ We recognize from past experience that the majority of recommendations are finalized relatively late in the two-year term of the FOIA Advisory Committee. Nevertheless, there still may candidate recommendations sufficiently developed during the first year of future Committees to facilitate solicitation of public comments earlier in the process.

are a variety of types of outreach measures that the FOIA Advisory Committee may also wish to employ in the future, either acting as a Committee-of-the-whole or through its subcommittees. The following examples of public engagement are not intended to be comprehensive; they represent only some of the ways in which a greater commitment to soliciting public comments may be accomplished.

First, the Committee should, to the extent feasible, consider soliciting public input on draft recommendations.¹⁰⁸ So far as we are aware, the Modernization Subcommittee’s request to OGIS to solicit public feedback on a draft “model determination letter” (*see* Recommendation #6, *supra*) was the first time that the Advisory Committee has employed a type of “notice and comment” process.¹⁰⁹ After the request was made as part of the June 2023 public meeting of the Committee, OGIS staff were receptive to highlighting the request through publicizing it on the OGIS blog,¹¹⁰ as well as in promptly posting comments received on the FOIA Advisory Committee’s website.¹¹¹ As noted in this Final Report, our Subcommittee considered the comments received in crafting the final text of the model determination letter.

Second, the FOIA Advisory Committee should continue to more routinely invite representatives of the FOIA community and civil society organizations to speak at Committee public meetings. In both the past and current terms, the Chair of the FOIA Advisory Committee has endeavored to give a forum to members of the academic community to educate the Committee on their ongoing research. As noted, during this term the Committee also heard from three lawyers who represent public interest organizations based in Washington, D.C., each of whom has substantial experience in litigating FOIA cases against federal agencies.¹¹² Their perspective included valuable, constructive criticism of how the FOIA process is perceived in the public advocacy community. Additionally, providing multiple invitations during each term to a range of representatives from the FOIA community and civil society organizations – including advocates with differing perspectives on how well FOIA is working – would continue to be desirable.

Third, the FOIA Advisory Committee, working through OGIS, might consider –beginning each term with an open letter to civil society institutions and the public at large soliciting public comment on issues of current interest and concern regarding FOIA administration. As part of this effort, the Committee might wish to seek input not only from public interest groups, but also from a wider set of organizations that have a generalized interest in the FOIA, including but not

¹⁰⁸ We recognize from past experience that the majority of recommendations are finalized relatively late in the two-year term of the FOIA Advisory Committee. Nevertheless, there still may candidate recommendations sufficiently developed during the first year of future Committees to facilitate solicitation of public comments earlier in the process.

¹⁰⁹ We note that during the 2020-2022 term, at one of the Committee’s public meetings a representative of the Technology Subcommittee asked for public comment about a proposed recommendation regarding metadata. *See* <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/meetings/foiaac-mtg-transcript-2021-09-09>.

¹¹⁰ OGIS, “FOIA Advisory Committee Seeks Input on Draft Model Determination Letter,” *The FOIA Ombudsman* (June 14, 2023), <https://foia.blogs.archives.gov/2023/06/14/foia-advisory-committee-seeks-input-on-draft-model-determination-letter/>.

¹¹¹ *See* OGIS, Public Comments Submitted to the FOIA Advisory Committee, <https://www.archives.gov/ogis/foia-advisory-committee/public-comments>.

¹¹² *See* FOIA Advisory Committee Public Meeting, December 1, 2022, <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term/foiaac-mtg-transcript-2022-12-01>.

limited to the American Historical Association (AHA), the Organization of American Historians (OAH), the Society of Historians of American Foreign Relations (SHAFR), and others.¹¹³

In making these observations, we understand that all activities of the FOIA Advisory Committee are governed by the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. §§ 1001-1014. Accordingly, there are limits FACA places on the extent the Committee can engage in public advocacy beyond its members' participation in the Committee's public meetings. Likewise, members of the Committee representing government agencies may be further restricted in certain ways in their interactions with the public, under both applicable agency policies and government-wide ethics regulations. Nevertheless, within the constraints of law and policy, the FOIA Advisory Committee can continue to be creative in fashioning ways in which to engage in greater interactions with the public, in fulfillment of its overall mission.

¹¹³ We note that the 2022-2024 FOIA Advisory Committee's Charter does state that "one individual representing the interests of historians and history-related organizations" be appointed to the Committee. *See* <https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-foia-advisory-committee-charter>.

Appendix A to the Modernization Subcommittee Final Report

Recommendation 2024-01 (Approved March 2024)

We recommend that the Department of Justice’s Office of Information Policy publish the attached Model Determination Letter as a best practices reference for agencies.

COMMENT

Under the FOIA, an agency’s substantive response to an initial request is called a “determination.”¹ Issued in response to on the order of 900,000 requests across the federal government each year, a determination has both substantive and procedural consequences under FOIA.² The attached Model Determination Letter helps standardize content and format of such letters across the federal government, for the benefit of agencies and requesters alike. The result of collaboration between representatives of federal agencies and the requester community, the attached letter aims to be a model for FOIA professionals to consult during the administrative process. The Model Determination letter seeks to balance providing crucial information to requesters with the burden on agencies that are processing numerous requests. As its name suggests, this is a *model* letter: the Modernization Subcommittee anticipates that actual determination letters using it as a template will vary, including to take account of the volume of records at issue in response to any particular request. At its core, the Model Determination Letter aims to provide clarity in the FOIA process and improve communications between agencies and requesters.

The Model Determination Letter has been strengthened through public engagement. At the public meeting of June 8, 2023, the Chair of the FOIA Advisory Committee invited comments from agencies and members of the public on the draft letter. Civil society groups, professional organizations, and members of the public responded to the invitation. Many of the submissions provided helpful feedback, including both substantive and technical proposals. All of the public comments on the letter can be viewed online at the FOIA Advisory Committee’s website.³ The need for a model determination letter stems from: (1) the lack of current standardization across the federal government, (2) changes in FOIA’s legal standards and guidance over the last decade, (3) the benefits to requesters from additional information in the administrative process, and (4) the benefits that both agencies and requesters stand to gain from improved communication in the FOIA context.

First, the federal government already provides a variety of cross-agency guidance and best practices for FOIA through OIP and OGIS. Such guidance can assist agencies in the administration of FOIA.⁴ However, there is no standardization or government-wide template for

¹ 5 U.S.C. § 552(a)(6).

² See, e.g., *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180 (D.C. Cir. 2013) (“CREW”).

³ <https://www.archives.gov/ogis/foia-advisory-committee/public-comments>.

⁴ See, e.g., *OIP Guidance: Standard Operating Procedures for FOIA Offices*, Office of Information Policy, <https://www.justice.gov/oip/oip-guidance-standard-operating-procedures-foia-offices> (noting “Standardization of FOIA processing within the agency helps ensure that an agency’s handling of requests and appeals is consistent with

a determination letter that agencies can consult. As a result, there is great variation across agencies, hardly surprising given their wide array of missions, personnel, and resources. Nonetheless, FOIA’s standards are the same across the federal government.⁵ Providing a Model Determination Letter will help ensure that all agencies, regardless of their experience or resources, have a resource they can consult for current best practices.

Second, over the last decade the standards that govern FOIA in general, and determination letters in particular, have changed due to case law, amendments to the statute, and guidance from the Attorney General. In 2013, the United States Court of Appeals for the District of Columbia held that to qualify as a determination, an agency communication must “at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.”⁶ The FOIA Improvement Act of 2016, enacted three years later, added additional requirements, including that agencies must alert requesters in the case of adverse determinations as to their right to dispute resolution services from the agency FPL or OGIS. The FOIA Improvement Act also added the foreseeable harm standard, which limits the circumstances under which agencies can withhold records.⁷ In 2022, the Attorney General issued a new memorandum on FOIA, which includes a provision stating agencies should address the foreseeable harm standard in their determination letters.⁸ The Model Determination Letter synthesizes these updated requirements and guidance in one place, promoting compliance and best practices across all agencies.

Third, requesters often receive insufficient information in determination letters as to how agencies processed their request or why records are being withheld. A requester that does not know how an agency conducted a search, or has little information about a denial, cannot understand the basis for the result they received. This is particularly true for new or infrequent requesters who are not well-versed in the complexities of FOIA. And for new and experienced requesters alike, a dearth of information in a determination letter inhibits their ability to evaluate whether to file an administrative appeal in the context of an adverse result, let alone what they should argue in an appeal. The Model Determination Letter aims to address these informational gaps by providing detail that will help a requester understand and evaluate an agency’s response.

the FOIA, agency regulations, policy guidance, best practices, and the agency’s institutional knowledge.”); *Agency Best Practices: FOIA and Database Requests*, OGIS, <https://www.archives.gov/ogis/resources/foia-and-database-requests-for-agencies>.

⁵ *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001) (noting FOIA’s terms set forth “a government-wide rather than agency-specific standard”)

⁶ *CREW*, 711 F.3d at 188.

⁷ 5 U.S.C. § 552(a)(8); see also *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) (“the foreseeable harm requirement imposes an independent and meaningful burden on agencies.” (cleaned up)); OIP, “OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard” (updated April 12, 2023), <https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard>.

⁸ Attorney General, “Freedom of Information Act Guidelines” (March 15, 2022), (“To help ensure proper application of the foreseeable harm standard, agencies should confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.”), <https://www.justice.gov/media/1212566/dl?inline>

Fourth, improved communication can benefit both agencies and requesters in the FOIA process. For example, a requester who receives a “no records” response without any information about the steps an agency took to search for responsive records may assume that the search was deficient, leading them to file an administrative appeal even if the agency’s search was actually comprehensive. The same is true of a requester who receives a full denial with only vague citations to exemptions: they may opt to file an administrative appeal as a matter of course, challenging everything because they cannot understand the agency’s rationale. In these and similar situations, agencies may be required to process administrative appeals that would not have been filed (or would have been more limited) if the requester had been given more information in a determination letter. The Model Determination Letter aims to save resources of both agencies and requesters by including helpful information up front. By providing more detail about the substance of a determination, requesters can file more targeted and informed administrative appeals, or determine that they need not file an administrative appeal after all. Agencies, in turn, need not expend resources where they are not truly needed.

Finally, by providing clear, well-organized information about an agency’s response to a FOIA request, the Model Determination Letter seeks to build trust between the federal government and members of the public. By setting forth what an agency did in response to a request, and why they did it, the letter seeks to demystify the FOIA process and avoid a result that seems arbitrary or erroneous from the perspective of the requester.⁹ A response that follows the Model Determination Letter can thus improve not just the FOIA process; it can improve transparency and confidence in the work of agencies generally.

Model FOIA Determination Letter¹⁰

[Requester name]
[Requester Address]

[Date]

Re: [FOIA Request Tracking Number]

Dear [Requester],

This letter responds to your [/your client’s/your organization’s] Freedom of Information Act (FOIA) request, which was submitted to [agency], and assigned tracking number [tracking number]. For reference, this request sought: [insert verbatim description of requested records or a summary thereof, or attach copy of request].

This is a [final/interim] response to your request. [If interim response, note when the next and/or final response is expected.]

⁹ See *Memorandum From the Attorney General to Heads of Executive Departments and Agencies*, (Mar. 15, 2022) (“Each agency should actively work with requesters to remove barriers to access and to help requesters understand the FOIA process and the nature and scope of the records the agency maintains.”).

¹⁰ Bracketed information is either illustrative or is intended to provide guidance to agencies to fill out to individual requests as applicable.

History of Request

This request was received by [agency] on [date] via [method of transmission, e.g., portal, email, fax, etc.].

A letter acknowledging the request was sent on [date].

[If applicable, note other information about administrative history of the request, including (but not limited to): (1) whether the request was narrowed/modified, (2) whether a “still interested” letter was issued/responded to; (3) whether there were prior consults/referrals to other agencies; (4) whether there was a request for/adjudication of fee category, fee waiver or expedited processing; (5) whether “unusual circumstances” were invoked and the basis therefore, (6) whether and when a third party notification was sent pursuant to E.O. 12600, (7) what fee category the requester was determined to fall into, any applicable fees (search, review, duplication), and any determination on a fee waiver request, if one was made].

[Optionally, attach copies of correspondence to/from requester].

[Agency’s] Search for Responsive Records

A search for records responsive to this request was initiated on [date] and completed on [date]. [If applicable, note if different date cutoff(s) were used in conducting search.]

To locate responsive records, [agency] used the following methodology: [describe search keywords/terms, or other applicable search methodology].

The following locations or repositories were searched as they were determined to be reasonably likely to have records responsive to your request: [list search locations, databases, office names/divisions, custodians, etc.]

After completing its review, [agency] has identified a total of [###] pages [or documents/volume/other descriptor] as responsive to your request.

[If applicable, note limitations on search, including (1) whether records were accessioned to NARA, (2) whether records were destroyed in accordance with a federal records schedule, (3) whether there were other limitations on searching for records (e.g., encrypted files).]

[Agency’s] Determination

Following [agency’s] review of responsive records, [insert one of following based on whether full/partial grant/denial:]

[IF FULL GRANT]

[agency] has determined to grant your request in full. [number/volume of records/pages] are [will be] released. [If applicable, note when records will be released if not included with determination.]

[IF PARTIAL GRANT/PARTIAL DENIAL]

[Agency] has determined to grant your request in part and deny your request in part. [number of pages/volume of records] are [will be] released in full, [number of pages/volume of records] are being withheld in part, and [number of pages/volume of records] are being withheld in full. [If applicable, note when records will be released if not included with determination]

FOIA allows agencies to withhold information that is covered by one of nine exemptions, set forth at 5 U.S.C. § 552(b)(1)-(9), but only if the withholding is also permissible under the foreseeable harm standard, 5 U.S.C. § 552(a)(8). The foreseeable harm standard prohibits agencies from withholding information unless they reasonably foresee that releasing it would harm an interest protected by one or more of the nine exemptions, or disclosure is prohibited by law.

Each redaction in the record(s) that have been partially released to you contains an annotation with a number that corresponds to the applicable FOIA exemption. For example, a redaction that states “(b)(6)” corresponds to FOIA Exemption 6, which protects information about individuals in “personnel or medical files and similar files” when the disclosure “would constitute a clearly unwarranted invasion of personal privacy.”

The following information has been withheld from records responsive to your request:

[Note: the following are only examples of how an agency might describe withheld information and records. Agencies should aim to provide enough detail to afford a requester a meaningful opportunity to appeal. The level of detail provided will vary with regard to each request, type of information/record withheld, and the volume of withheld records. It is important to note that in instances where the agency withholds an entire record or records, the description below may be the only information the requester has upon which to file an administrative appeal. If Exemption 3 is cited, provide the corresponding statute.]

- EXAMPLE: Pursuant to Exemption 4, [agency] has withheld portions of pages consisting of testing data submitted by a third party. Information may be withheld pursuant to Exemption 4 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 4 because [. . .]
- EXAMPLE: Pursuant to Exemption 5 and the deliberative process privilege (noted as (b)(5)-DPP), [agency] has partially withheld internal emails regarding recommendations on a new agency policy. Information may be withheld pursuant to Exemption 5 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by the deliberative process privilege because [. . .]
- EXAMPLE: Pursuant to Exemption 6, [agency] has applied redactions to Social Security numbers and dates of birth. Information may be withheld pursuant to Exemption 6 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 6 because [. . .]
- EXAMPLE: Pursuant to Exemption 7(C), [agency] has redacted the phone numbers of third parties. Information may be withheld pursuant to Exemption 7(C) if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 7(C) because [. . .].

[IF FULL DENIAL]

[Agency] has determined to deny your request in full. [number of pages/volume of records] are being withheld.

FOIA allows agencies to withhold information that is covered by one of nine exemptions, set forth at 5 U.S.C. § 552(b)(1)–(9), but only if the withholding is also permissible under the foreseeable harm standard, 5 U.S.C. § 552(a)(8). The foreseeable harm standard prohibits agencies from withholding information unless they reasonably foresee that releasing it would harm an interest protected by one or more of the nine exemptions, or disclosure is prohibited by law.

In response to your request, records have been withheld in full, as follows:

[Note: the following are only examples of how an agency might describe withheld information and records. Agencies should aim to provide enough detail to afford a requester a meaningful opportunity to appeal. The level of detail provided will vary with regard to each request, type of information/record withheld, and the volume of withheld records. It is important to note that in instances where the agency withholds an entire record or records, the description below may be the only information the requester has upon which to file an administrative appeal. If Exemption 3 is cited, provide the corresponding statute. The number of pages or documents withheld under each exemption should be provided, unless doing so would harm an interest protected by the exemption]

- EXAMPLE: Pursuant to Exemption 3 and the Internal Revenue Code (26 U.S.C. § 6103(a)), which prohibits the release of tax information by an IRS employee, 18 pages of tax returns have been withheld.
- EXAMPLE: Pursuant to Exemption 4, [agency] has withheld 18 pages of product schematics submitted by a third party. Information may be withheld pursuant to Exemption 4 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 4 because [. . .].
- EXAMPLE: Pursuant to Exemption 5 and the deliberative process privilege, [agency] has withheld 14 pages consisting of two memoranda: the first of which is an options paper on a new agency policy, and the second is a draft statement describing the options paper. Information may be withheld pursuant to Exemption 5 if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 5 because [. . .].
- EXAMPLE: Pursuant to Exemption 7(A), [agency] has withheld 18 documents that concern an ongoing law enforcement investigation. Information may be withheld pursuant to Exemption 7(A) if [. . .]. The [agency] reasonably foresees that disclosure would harm an interest protected by Exemption 7(A) because [. . .].

Referrals

[If records have been referred to another agency, identify, if possible: (1) each agency to which records have been referred, (2) how many pages have been referred to which agency, (3) when the referral was made, (4) explain that the other agenc(ies) will provide a direct response, (5) contact information for the agencies to which a referral has been made.]

Your Rights

You have the right to appeal any adverse portions of this decision by writing to [agency] at the address below. Your appeal must be submitted within 90 calendar days from the date of this letter. Please submit your administrative appeal by [insert administrative appeal instructions/contact information]. [Insert additional administrative appeal requirements, if any.]

A failure to file a timely administrative appeal may affect your rights with respect to this request.

You also have the right to seek assistance and/or dispute resolution services from the [agency’s] FOIA Public Liaison (FPL) or the Office of Government Information Services (OGIS) with respect to this request. The FPL is responsible, among other duties, for assisting in the resolution of FOIA disputes within [agency]. OGIS, which is outside [agency], offers ombuds services, including dispute resolution services between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Please note that OGIS’s assistance does not replace the administrative appeals process. Please also note that contacting OGIS does not affect the deadline to submit an administrative appeal.

You may contact the FPL or OGIS at:

- [FOIA Public Liaison Name]
- [Mailing address]
- [Telephone number]
- [Email address]
- [Fax number, if applicable]

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: 202-741-5770; toll free at 1-877-684-6448

Conclusion

If you have questions about this response, please contact [agency] at the following: [insert contact info].

Sincerely,
[name]

* * *



Appendix B to the Modernization Subcommittee Report

Recommendation 2023-01 (Approved June 2023)

We recommend that the Office of Information Policy issue guidance stating that whenever an agency withholds information pursuant to Exemption 5, the agency should identify the corresponding privilege(s) invoked. If the withholding takes the form of a redaction, the identification of a privilege should be made part of the redaction label; if a record is withheld in full, the agency should identify privilege(s) in its determination letter.

Comment

Exemption 5 of the Freedom of Information Act (FOIA) applies to “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,”¹ which has been interpreted to incorporate civil litigation privileges.² (A privilege is a legal rule that protects communications within certain relationships from compelled disclosure in a court proceeding.) The three most common privileges cited in connection with Exemption 5 are the deliberative process privilege, attorney-client privilege, and attorney work-product privilege.³

When redacting records, FOIA generally requires agencies to indicate “the exemption under which the deletion is made . . . at the place in the record where such deletion is made.”⁴ Thus, for an Exemption 6 redaction, agencies will label the redaction “b6” or “(b)(6).” For redactions under Exemption 7, which has six sub-parts (A–F), agencies will also label redactions with the corresponding sub-paragraph (*e.g.*, “(b)(7)(C)”).

Although Exemption 5 incorporates numerous privileges, FOIA does not include subparagraphs for Exemption 5 as it does for Exemption 7. Currently, most agencies will label Exemption 5 redactions simply as “b5” or “(b)(5).” But invoking Exemption 5 without identifying the underlying privilege does not afford a requester the information needed to evaluate a withholding, including for the purposes of an administrative appeal. The legal tests for the various privileges incorporated by Exemption 5 are distinct and fact-specific; knowing what standard applies is a necessary condition for evaluating an Exemption 5 withholding.

There is a simple solution to this issue: wherever an agency identifies the withholding of information pursuant to Exemption 5, the agency should identify the corresponding privilege. If the withholding takes the form of a redaction, the identification of the privilege should be part of the redaction label.⁵ If a record is withheld in full, the agency should identify the privilege in its determination letter.⁶

¹ 5 U.S.C. § 552(b)(5).

² See *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975).

³ See *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). Other privileges, less commonly cited, have also been recognized. See, *e.g.*, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984) (recognizing privilege for “[c]onfidential statements made to air crash safety investigators”).

⁴ 5 U.S.C. § 552(b).

- Attorney-client privilege: b5-ACP
- Attorney work-product privilege: b5-AWP
- Deliberative process privilege: b5-DPP
- Other: b-5 other

For example:

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, **b5-AWP** has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the **b5-DPP** affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

b5-ACP

For less-commonly cited privileges,⁷ agencies should provide sufficient explanation in the determination letter for the requester to understand which privilege is being invoked under the label “Other.”

⁵ Cf. 5 U.S.C. § 552(b).

⁶ Cf. 5 U.S.C. § 552(a)(6)(A)(i)(I).

⁷ See, e.g., *Weber Aircraft Corp*, 465 U.S. at 7.
