The 2016 FOIA Amendments & Emerging FOIA Issues

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What We Said Before:
2016 FOIA Considerations

- Implement the 2016 FOIA Improvement Act
- Expanded Open Gov’t Initiatives
  - Open Gov’t Plan 2016 – 2018, includes FOIA
- Potential impact of Capstone
  - Effective 12/16; agencies must manage all email electronically, w/ some permanent retention
  - FOIA impact on searching & consultations w/ NARA (for permanent email)
FOIA Officers & Multi-Tasking?

The FOIA Officer

- Reasonable Segregation
- Proactive Posting
- Discretionary Release
- FOIA Release
2016 FOIA Improvement Act
What Should Have Already Been Done

- Post records requested 3+ times
- ID categories of records for pro-active posting
- Implement Foreseeable Harm standard
  - Applies only to Exemptions w/ discretionary release component (#’s 2, 5 & 7)
- Update response letters
  - Access to Public Liaison, OGIS & appeal rights
2016 FOIA Improvement Act
What Should Have Already Been Done

Update Agency FOIA regulations
   Must inc. foreseeable harm, fee changes, etc.

Chief FOIA Officer must annually review:
   Processing time, exemption use, annual training for FOIA staff, regs update, proactive posting, etc.

Goals: Recommend efficiency & enhancements; increased transparency & compliance w/ FOIA

Addt’l Annual Report data elements
   Ex.: # records available in e-format under (a)(2)
DOJ/OIP Instructions for 2018

Chief FOI Officer Annual Report

DOJ instructions issued 9-27-17

Emphasis on:
- Applying the presumption of openness
- Ensuring effective systems for responding to requests
- Increasing proactive disclosure
- Increasing use of technology
- Improving timeliness & reducing backlogs

Reports due to DOJ/OIP 1-29-18
2018 FOIA Program Issues

- Full Compliance with 2016 Amendments
- Budget & staffing restrictions
- Capstone access
- On-line Portal
- Managing requester expectations
2018 FOIA Issues

No Atty General (White House) guidance memo, at this time

- Breaks with tradition
- Monitor Chief FOI Officer Council @ OIP; & FOIA Advisory Comm. @ OGIS; for guidance & training opportunities
- Monitor Court decisions impacting FOIA using DOJ website (sign up for auto notice)

Address 2016 FOIA revisions, if incomplete
FOIA’s All About Resources

- No funds allocated under the statute (again)
- FOIA needs Mgm’t commitment to resources in a climate of budget & staffing reductions
  - Create addt’l workload metrics, inc. required posting & 508 compliance
  - Help Mgmt. understand the need & cost of not maintaining support
  - Monitor atty fee awards; if plaintiff “substantially prevails” payment comes from your Agcy (what can you afford to lose?)
Implementation – Mgmt. Support

Statutory requirements for expanded posting & proactive release
- Consult w/ Chief FOI Officer & local mgmt.
- IT/CIO support, esp. w/ remediation under section 508 of ADA
- Expect staffing loss (freezes, attrition) to result in backlog increase
- Adding addt’l staff may result in short term backlog increase, as Sr. staff review/mentor new staff, or complex records/issues
2018 FOIA Issues

Ensure FOIA office access to Capstone
- FOIA officer input re in-house retention times?
- How are records indexed for retrieval?
- Who manages meta data?
- Will this expand referrals/consultations?
- Are records being sent to NARA redacted or unredacted?
- Do records contain info subject to Privacy Act (PII or “personally identifiable info”)

On-Line Portal & Oppt’y to Participate in Development & Testing

Responsibility assigned to OMB in statute
OIP/DOJ working with GSA’s “18F” team
  Solicited input from agency FOI officers
  OIP memo of 9-20-17 states working “in the open”
  Offers Agencies oppt’y to work w/ development
    (email to: National.FOIAPortal@usdoj.gov)

Priorities:
  Interoperational w/ existing systems in agencies
  Submission of requests & to obtain status
  Reporting & search capability
Ensure Operation of a Consolidated Online Request Portal

Goal: allow requesters to submit requests to any agency, through a single website
- May include additional tools that OMB understands will improve FOIA processing & compliance
- Agencies may still maintain own online portals for request submission

OMB must establish standards for “interoperability between the consolidated portal and agency case management systems.”
Single Portal Challenges?

- Amendments require creation of single On-line Portal for requesters to submit, to any agency
- Define how your Agcy uses existing portals
  - Centralized or de-centralized
  - Is the FOIA log linked to on-line payments, form letters, reporting, repository, etc.?
- Stay in contact w/ CIO office for updates or changes
- Do you need IT to “build a bridge?”
Documentation – Part of the Administrative Record

- Foreseeable harm decisions
- Internal deliberation or predecisional; drafts; atty-client; denials, etc.
- Link to Capstone?
- Include unredacted copies of records?
- Privacy Act (PII) overlap?
Requester Community Concerns

- Facilitate requester understanding & communication thru education/outreach
- Requesters expect transparency cheaper & faster
  - Focus on clarification in letters & FOI Handbook
  - Initiate 2-way dialogue (see OGIS training)
- Use available resources - Public Liaison, OGIS & DOJ/OIP workshops
  - Negotiation w/ both requesters & agency staff
  - Phone rather than “still interested” letters
Requester Community Concerns

OGIS & “FOIA Improvement: Making It Easier to Help FOIA Requesters”

Highlight FOIA metrics on-line

- # pages/records released
- Quantify extent of pro-active release & posting
  - Inc. FACA, referrals & consultations, litigation, etc.
- # requests rec’d & answered
- Automatic email sent when data bases updated?

Use technology & email, but only in “formal” style – it’s still a gov’t response under FOIA
If you can’t “do more with less,” or even “the same with less,” do “less with less”

Don’t log requests that aren’t “perfected”
Send partial responses (esp. “simple” requests)
Ensure reasonable segregation
Make phone calls rather than “still interested” letters (document all communications)
Delegate - work with press office & CIO for ‘net posting without FOIA officers
Don’t duplicate – standardize responses (CD?)
Maximize use of staff talents – consider assigning work based on what they do best
Questions?

Thanks for your insight, dedication & hard work.

*FOIA is a job that matters.*