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Q #1 from FOIA Advisory Committee Members about communications

- **What constitutes a “meeting”?**
- **Are there rules about Members meeting between formal/public meetings?**
- **What if Members want to meet with non-committee members?**

A. A “committee meeting” is “any gathering of advisory committee members (whether in person or through electronic means) held with the approval of an agency for the purpose of deliberating on the substantive matters upon which the advisory committee provides advice or recommendations.” *See* the GSA Final Rule on FACA (July 19, 2001), Section 102-3.25, which is in the binder given to Members at the June 24, 2014 meeting and also is online at http://www.gsa.gov/graphics/ogp/FACAFinalRule_R2E-cNZ_0Z5RDZ-i34K-pR.pdf.

So long as Members are engaging with each other or with non-members in "pre-deliberative" activities, then there is no issue under FACA. Some examples of "pre-deliberation" include gathering data, drafting position papers, or developing options around committee topics. If, however, the discussion or activity involves "deliberation," such as weighing the issues, debating the issues, providing advice, making recommendations, and/or moving from discussion to decision-making, then "deliberation" is in play and could constitute a "meeting" subject to FACA. The key is "pre-deliberation" versus "deliberation." In addition, when a majority of the members meet, they should notify the Designated Federal Official (DFO), Christa Lemelin. (Please *see also* the discussion below about subcommittees.)

Q #2 from FOIA Advisory Committee Members about documentation:

- **Ground rules for decision-making and how to document?**
- **Document exchanges, including emails, between members or between members and the public on Committee business – rules for handling?**
- **Status of the work papers of the Committee and any other work product it generates?**
- **If a Committee Member receives an email from a member of the requester community on his or her government email account related to the business of the committee, does that email then become part of the Committee record? And is it a Federal record?**
- **Are there different rules depending on whether communications are by phone, in person or using collaborative tools?**

A: As you may be aware, all Federal records – including those created by the FOIA Advisory Committee and its subcommittees – are subject to recordkeeping requirements. These laws and practices ensure that the work of the committee is preserved.

Two good starting points for answering these questions are GSA’s Final Rule on FACA and NARA’s General Record Schedule 26 (see below). Taken together, these two sources tell us that documentation of any kind that relates to Committee work needs to be managed and preserved as a Federal record.

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Please look at the GSA regulation on Federal Advisory Committee Management, 41 C.F.R. Part 102–3, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title41-vol3/pdf/CFR-2011-title41-vol3-part102-id46.pdf>, particularly Subpart D—Advisory Committee Meeting and Recordkeeping Procedures, which states that:

Official records generated by or for an advisory committee must be retained for the duration of the advisory committee. Upon termination of the advisory committee, the records must be processed in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29–33, and regulations issued by the National Archives and Records Administration (NARA). [41 C.F.R. §102-3.175(e).]

NARA’s General Record Schedule (GRS) 26: <http://www.archives.gov/records-mgmt/grs/grs26.html>, provides that most records of the Committee’s establishment and management -- files documenting the Committee's establishment, membership, policy, organization, deliberations, findings, and recommendations -- are designated as permanent for transfer to NARA. These records include:

- Agendas, briefing books, minutes, testimony, and transcripts of meetings and hearings as well as audiotapes and/or videotapes of meetings and hearings which were not fully transcribed.
- Documentation of subcommittees, working groups, or other subgroups of advisory committees that support their reports and recommendations to the full or parent committee. This documentation may include, but is not limited to, minutes, transcripts, reports, correspondence, briefing materials, and other related records.
- Documentation of formally-designated subcommittees and working groups. This documentation may include, but is not limited to, minutes, transcripts, reports, correspondence, briefing materials, and other related records.

As a result, Members should preserve records (including email) that document Committee activities that are exchanged between Committee Members, stakeholders, and/or agency committee staff (such as the DFO).¹ Committee Members must copy the DFO on all committee correspondence to simplify recordkeeping.

As for public accessibility, the Committee records are to be available for public inspection and copying in accordance with Section 10(b) of the FACA. The purpose of that section “is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, provide a

¹ See Draft NARA GRS 6.2, dated April 22, 2014, which is a proposed new GRS for FACA records and a helpful guide for good record-keeping practices. <http://www.archives.gov/records-mgmt/grs/grs-6.2-review-package.pdf>

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meaningful opportunity to comprehend fully the work undertaken by the advisory committee.”²

Q #3: Will the committee have a Facebook and/or Twitter page to receive and field comments from the public and interact with public?

A. As you are aware, we want the public’s input. To that end, we have, with GSA’s help, set up a Google Group that will be open to the public; we will publish a Federal Register notice about the new discussion group and will send you guidance on using the Group once that is done. Additionally, we have created an email address for the public to communicate with the Committee: foia-advisory-committee@nara.gov. The DFO will moderate and control the committee’s email account. While the Committee does not have a Facebook page or a Twitter account, if you happen to see communication related to the committee through these media, please capture it. As to the use of social media, you might be interested in an article by Arian Ravansbaksh, one of NARA’s experts in records management, in Fed Tech, July 30, 2014, <http://www.fedtechmagazine.com/article/2014/07/agency-tweet-federal-record>, in which he states: “The fact of the matter is that social media content capture is an emerging practice, and records managers have not yet agreed on common standards for accomplishing it.” NARA has issued guidance on managing social media records: <http://www.archives.gov/records-mgmt/bulletins/2014/2014-02.html>.

Q #4: What are the rules for subcommittees? Do the subcommittee members have any responsibility to preserve their records or publicize their meetings?

A. Subcommittees do not have the same notice and open meeting requirements as the full Committee, as long as the subcommittees are reporting back to the full Committee.³ Our

² 41 C.F.R. § 102-3, Appendix A to Subpart D —Key Points and Principles, sec. III. Section 10(b) of FACA, provides that:

Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist. (i) The purpose of section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee.

³ 41 C.F.R. § 102–3.35. What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?

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Committee's membership balance plan states, "Any subcommittees to the FOIA Advisory Committee will report to the FOIA Advisory Committee, which will determine the balance of the subcommittee according to the criteria in this membership plan."

(1) Although there is no obligation to give public notice of subcommittee meetings, NARA is committed to having an open dialogue and we encourage you to include interested persons in your activities.

(2) There is an obligation to preserve the working records of the subcommittees. As noted above, just as with the committee activities, subcommittee Members should preserve records that document subcommittee activities, including correspondence.

Q #5: What does the membership plan mean for the subcommittees and how will it impact them?

A. As a start, each subcommittee has two co-leads, one from a government agency and one from outside the government. The subcommittee membership should be balanced between governmental and non-governmental members, just as the full committee is balanced (*see* the Committee Charter, ¶ 12).

Q #6: Several Members raised questions about exercising one's judgment in Committee deliberations, including: what are the obligations of governmental Members versus non-governmental Members?

A. We consulted with both GSA and the Office of Government Ethics on the interpretation of their guidance, the GSA Final Rule on FACA (2001) at http://www.gsa.gov/graphics/ogp/FACAFinalRule_R2E-cNZ_0Z5RDZ-i34K-pR.pdf (also in your binder) and the OGE guidance of 2005 at <http://www.oge.gov/displaytemplates/modelsub.aspx?id=1518>. It is also helpful to look again at your appointment letters, which appoint you either as a Government Member or as a Representative Member. (There are no Special Government Employees on this Committee.)

The following activities of an advisory committee are excluded from the procedural requirements contained in this subpart:

(a) *Preparatory work.* Meetings of two or more advisory committee or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee, or to draft position papers for deliberation by the advisory committee; and

(b) *Administrative work.* Meetings of two or more advisory committee or subcommittee members convened solely to discuss administrative matters of the advisory committee or to receive administrative information from a Federal officer or agency.

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As a Government Member, you are expected to provide a government perspective and exercise your own independent best judgment on behalf of the government in Committee deliberations, free from conflicts of interest. Because you are working on behalf of the government, you must comply with the conflict of interest rules and financial disclosure requirements.

As a Representative Member, you are appointed for the express purpose of providing the Committee with the “interests, views or biases” of a non-governmental entity or recognizable group of stakeholders in the area of FOIA, and to exercise your “best judgment” about the matters under consideration. We anticipate that all of you will offer a valuable perspective about the matters that the Committee considers.

On a related note, on August 13, 2014, OMB issued revised guidance on the appointment of lobbyists to Federal Advisory Committees, Boards and Commissions: <http://www.gpo.gov/fdsys/pkg/FR-2014-08-13/pdf/2014-19140.pdf>. The new guidance clarifies that the “lobbyist ban” [President’s Memorandum dated June 18, 2010] “applies to persons serving on advisory committees, boards, and commissions in their individual capacity and does not apply if they are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments.”