

**Written Questions of Chairman Patrick Leahy,
To Miriam Nisbet, Director,
Director, Office of Government Information Services
Senate Judiciary Committee Hearing on “We the People:
Fulfilling the Promise of Open Government Five Years After the OPEN Government Act”**

FOIA Portal

I commend the National Archives and Records Administration, the Environmental Protection Agency, the Department of Commerce, the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board for participating in a multi-agency FOIA portal that automates and stores FOIA requests and responses in electronic format. The online FOIA portal is making it easier for FOIA requesters to submit requests to the participating agencies. But, unfortunately, only a few federal agencies are participating in the online FOIA portal. **Do you recommend expanding the FOIA portal concept government-wide?**

Answer

The partners to *FOIAonline* constructed the system with the expectation that it could be a cost-effective solution for a much larger number of agencies than the initial partners. At the same time, bringing additional agencies onboard would need to be done in stages to accommodate each agency’s needs and to ensure that agency users are fully trained. There are 100 departments and agencies (with sub-agencies) subject to the FOIA which all have very different FOIA needs and resources. As with any effort to integrate a single technology across agencies, there are a number of challenges such as integration with their existing IT, meeting current information security requirements, and having an agreed upon governance and management structures, among other issues. The current agency partners will continue to monitor and evaluate *FOIAonline*’s potential to serve additional agencies, as well as to improve its capabilities for making the FOIA process easier for both its governmental and public users.

**“We the People: Fulfilling the Promise of Open Government
Five Years After the OPEN Government Act”
Questions for the Record submitted by Senator Charles E. Grassley
March 20, 2013**

Questions for Director Nisbet, Office of Government Information Services

1. It is troubling that a majority of federal agencies have not updated their FOIA regulations since Congress passed the OPEN Government Act in 2007. Your office works with agencies in several ways to assist with their FOIA compliance.
 - a. Given the failure of so many agencies to update their regulations, what, if anything, has your office done to assist agencies in updating their FOIA regulations?

OGIS, through our parent agency, the National Archives and Records Administration (NARA), submits public comments in response to notices of proposed FOIA-related rulemaking published in the *Federal Register*. Since the fall of 2010, OGIS has commented on:

*** Fourteen proposed department and agency FOIA regulations;**

*** Proposed FOIA/Privacy Act request forms used by U.S. Citizenship and Immigration Services and the Federal Investigative Service of the Office of Personnel Management; and**

*** In conjunction with NARA’s Information Security Oversight Office (ISOO), a Department of Defense Federal Acquisition Regulation about safeguarding unclassified information.**

OGIS also has worked with two Cabinet-level departments and an agency to review their FOIA regulations before the *Federal Register* comment period; several other agencies, including NARA, are updating their FOIA regulations and have asked OGIS to review them before *Federal Register* publication.

We are pleased that agencies have incorporated many of OGIS’s suggestions.

In some cases, where pre-publication OGIS review was not possible (for instance, where the public comment period pre-dated OGIS’s regulation review program, or even OGIS’s existence), we have sent letters to agency FOIA Public Liaisons and Chief FOIA Officers commenting on the regulations and alerting them to OGIS’s services.

OGIS review of agency FOIA regulations sparked the creation of our “Best Practices for Agency FOIA Regulations” handout, a copy of which is attached to this response and which also is posted on OGIS’s website:

<https://ogis.archives.gov/for-federal-agencies/agency-best-practices/agency-best-practices--agency-foia-regulations.htm>. It is important to note that some of the best practices are ones we observed at particular agencies during our review of FOIA regulations.

Why is it important for agencies to update their FOIA regulations?

The Open Government Act did not require implementing regulations for any of its provisions. Two preexisting provisions of the FOIA state that agencies “shall” have regulations:

- **Specifying a fee schedule that conforms to OMB guidelines and limiting those fees to reasonable standard charges, 5 U.S.C. § 552(a)(4)(A)(i)–(ii); and**
- **Providing for expedited processing, 5 U.S.C. § 552(a)(6)(E)(i);**

The FOIA also says that agencies “may” have regulations:

- **Providing for the aggregation of certain requests by the same requester or group of requesters acting together, 5 U.S.C. § 552(a)(6)(B)(iv); and**
- **Designating agency components to receive requests, 5 U.S.C. § 552(a)(6)(A)(i); and**
- **Providing for multi-track processing and an opportunity for requesters who do not qualify for the fastest track an opportunity to limit the scope of the request in order to qualify for faster processing, 5 U.S.C. § 552(a)(6)(D)(i)–(ii).**

Agencies should update these provisions of their regulations as they find necessary for the proper administration of their FOIA caseloads. Although FOIA itself does not mandate that regulations address other parts of the FOIA administrative process, OGIS believes that updating FOIA regulations can be helpful in having an effective, efficient, and fair agency FOIA process.

FOIA professionals use agency regulations as one of several resources when processing FOIA requests. Updating regulations also allows agencies to continue to refine their unique FOIA administrative processes. There is no single “right”

way to administer the FOIA. Indeed, the 100 departments and agencies that are subject to the Act display a diversity of sizes and of areas of expertise, missions, and records-management programs. Thus, updating regulations allows agencies to tailor their FOIA implementation to their own structures and functions, while at the same time complying with the statute.

OGIS has written about the importance of FOIA regulations on our blog (<http://blogs.archives.gov/foiablog/2012/12/13/dont-shut-your-eyes-to-the-importance-of-foia-regulations/>) and has discussed the importance of FOIA regulations in public presentations and seminars, including those of the American Society of Access Professionals (ASAP) in December 2012 and the Collaboration on Government Secrecy at American University Washington College of Law in January 2013.

2. At the hearing I expressed my concern with the continued rise in FOIA litigation. Last year, the Transaction Records Access Clearinghouse at Syracuse University released a study finding that there were more FOIA lawsuits during the Obama Administration's first term as compared to the second George W. Bush term. Your office's 2013 FOIA policy recommendation includes an expansion of the dispute resolution training program. I encourage this, because when Congress passed the OPEN Government Act we sought to limit costly litigation. Given this, how will the OGIS implement its recommendation to expand the use of dispute resolution in agencies, as an alternative to litigation?

OGIS recognizes the importance of developing a dispute-resolution mindset within agencies – not only to augment the efforts of our limited staff, but to resolve conflicts as early as possible. OGIS also appreciates the value of harnessing existing agency resources, particularly agency dispute-resolution professionals, who operate under the Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. §§ 571-584, and agency FOIA professionals, chiefly FOIA Public Liaisons, which FOIA itself says shall assist in resolving disputes between the agency and the requester, 5 U.S.C. § 552(a)(6)(B)(ii) and 5 U.S.C. § 552(l). To this end, OGIS is expanding its dispute resolution skills training program, which it has offered to agency FOIA professionals for more than three years. (The Department of Justice's Office of Information Policy regularly participates in training personnel at these inter-agency offerings.) The expansion will emphasize tailored, agency-specific training programs for both FOIA professionals and agency dispute-resolution professionals.

Our goals in bringing together agency dispute-resolution professionals with FOIA professionals for these new day-long trainings will be to:

- **start a conversation between agency professionals in these two fields—FOIA and dispute resolution—who may never have worked together;**
- **familiarize each type of professional with the others' roles and processes;**
- **identify issues and areas that are ripe for partnership.**

OGIS also is available to work with an agency's Chief FOIA Officer along with the agency dispute resolution programs, the general counsel's office, and FOIA offices to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. OGIS already has initiated discussions with several agencies to explore how we might collaborate in this way. Our goal is to conserve administrative resources, improve customer service, and short-circuit costly and time-consuming litigation.

3. Five years after the OPEN Government Act became law and sought to reform the fee assessment process problems remain. At the hearing I cited a recent letter I sent to the Attorney General, along with Senator Vitter and Congressman Issa, questioning whether the Environmental Protection Agency tried to assess a requestor with what could possibly be an illegal fee assessment, among other things. With these concerns in mind, has the OGIS considered examining the problem of fees and fee waivers as a way to improve FOIA administration?

As you are aware, fees are addressed in the Office of Management and Budget fee guidance published in 1987 and in the amendments to FOIA in 1996 and 2007. During this time, agencies have moved toward digitizing records, have established online FOIA Libraries, and may now be providing records through *FOIAonline*. Through our work providing mediation services, we have observed that fees and fee waivers issues can be a point of contention.

Resources permitting, OGIS plans to work with stakeholders from both inside and outside government to review the myriad issues surrounding FOIA fees. We anticipate this will take some time, and may or may not result in recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.

Best Practices for Agency FOIA Regulations

- Let the Freedom of Information Act (FOIA) itself be your guide. Many of the public comments OGIS submits pertaining to FOIA regulations relate directly to requirements of the FOIA amendments of 2007 (and sometimes the e-FOIA amendments of 1996). For example, OGIS frequently recommends that agencies specifically address the new requirements in 5 U.S.C. § 552 (b) that agencies shall (1) indicate, if technically feasible, the precise amount of information deleted and the exemption under which the deletion is made at the place in the record where the deletion is made, and (2) indicate the exemption under which a deletion is made on the released portion of the record, unless including that indication would harm an interest protected by the exemption.
- Tackle any updates or complete revisions of FOIA regulations as a team. Bring attorneys, FOIA processors, records managers and IT professionals to the table. Each will bring a different perspective — plus, a well-organized team can lighten the load for a single person on a tedious but important task.
- Don't forget plain writing. Although the Plain Writing Act of 2010 does not cover regulations, two executive Orders emphasize the need for plain language: E.O. 12866 says that regulations must be “simple and easy to understand, with the goal of minimizing uncertainty and litigation...” and E.O. 12988 says that each agency must specify its effect “in plain language.” Remember, FOIA regulations endure and are there for both agency FOIA professionals and the public.
- Many requesters confuse FOIA and Privacy Act requests. Consider clarifying in plain language that FOIA applies to requests for any agency records. By comparison, the Privacy Act of 1974 permits only a U.S. citizen or an individual lawfully admitted for permanent residence to seek access to only his or her own “record,” and only if that record is retrieved by that individual requester's name or personal identifier. As a matter of policy, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access.

Best Practices for Agency FOIA Regulations

- If your regulation includes a glossary, consider adding several terms, including requester category and fee waiver. OGIS has found that even experienced requesters can still confuse those terms. We also suggest including in a glossary FOIA Public Liaison, the definition of which is at 5 U.S.C. § 552 (l). We suggest including it to reflect the position's statutorily enhanced role in the 2007 FOIA amendments. Check out the OGIS Library at <https://ogis.archives.gov/the-ogis-library.htm> for definitions of FOIA terms.
- With regard to referrals, OGIS suggests that the referring agency notify requesters of the name of the agency to which the request has been referred and the part of the request that has been referred. OGIS suggests that the agency also provide the requester with a point of contact within the receiving agency to whom the requester can speak regarding the referral. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2011/05/11/ogistance-what%e2%80%99s-up-with-referrals-these-days/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapost/2011foiapost42.html>).
- OGIS suggests that agencies provide requesters with an estimated amount of fees, including a breakdown of fees for search, review or duplication. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2012/12/13/dont-shut-your-eyes-to-the-importance-of-foia-regulations/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapost/2013foiapost06.html>).
- OGIS suggests agencies include in their FOIA regulations information about the preservation of records and records management. OGIS has observed that good records management is essential to the FOIA administrative process. One Cabinet-level department FOIA regulation spells out that each component must preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the General Records Schedules of the National Archives and Records Administration (NARA) or other NARA-approved

Best Practices for Agency FOIA Regulations

agency records schedule. The regulation also states that materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or lawsuit is pending. This policy applies even if the records would otherwise be authorized for disposition or destruction under the agency's General Records Schedule or other NARA-approved records schedule.

- OGIS suggests agencies include in their regulations that they will work with the Office of Government Information Services (OGIS) to resolve disputes between FOIA requesters and the agency in accordance with FOIA and any agency policy memoranda. Also, that the agency, in its final appeal determinations, will alert FOIA requesters to OGIS's services, as recommended by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapost/2010foiapost21.htm>). In addition, OGIS recommends that agencies add language, in accordance with the 2007 amendments to FOIA (5 U.S.C. § 552 (h)), that direct agencies and their components to work with OGIS to resolve disputes between FOIA requesters and the agency as a non-exclusive alternative to litigation.

Specifically, OGIS suggests the following language:

A response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. A requester may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.nara.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

- At an impasse on updating your FOIA regulations? Need feedback? Call OGIS. We're here to help.