

TESTIMONY

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Hearing on “FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?”

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Good Morning, Mr. Chairman, Ranking Member Mr. Leahy, and members of the Committee. I am Miriam Nisbet, Founding Director of the Office of Government Information Services at the National Archives and Records Administration. It was my privilege to direct that office—usually referred to as OGIS or as the FOIA Ombudsman—from September 2009, when the Office opened its doors, until the end of November 2014, when I retired. Today I speak as a private citizen who, like you, cares deeply about the right of my fellow Americans and others around the globe to access government information.

Let me first congratulate you on—and thank you for—the FOIA Improvement Act of 2016. Without this Committee’s leadership, we would not be celebrating the amendments that were just signed into law, on the eve of the 50th anniversary of our country’s first Freedom of Information Act. Many stakeholders worked with you to move these amendments to fruition . . . stakeholders who are true believers in the power to FOIA as an essential and effective tool for ensuring accountability and transparency in government.

Every day we read news stories about what our government is doing that are based on records that have been disclosed under the law. Yet this Committee has observed many times that the process needs to work better. FOIA requesters wait too long for the records they want, receive response letters that are hard to understand, and sometimes never get a response at all. Agency FOIA professionals are bombarded with ever-increasing numbers of requests and are criticized even as they try to do their jobs, often with outdated technology. In some respects, the government is still trying to implement the 1996 amendments (the “e-FOIA”) to bring the FOIA fully into the electronic age. And there are the perennial and vexing problems of over-classification and slow declassification, which means that even historically important records remain a cipher for far too long.

The new amendments will surely help with many of these problems. Among the improvements are codifying the policy that agencies shall withhold information only if they identify a “foreseeable harm” through disclosure [new Subsection (a)(8)(A)(i)]; directing partial disclosure if full disclosure of a requested document is not possible [new Subsection (a)(8)(A)(ii)]; and placing a sunset of 25 years on Exemption 5’s deliberative process privilege [amended Subsection (b)(5)].

There are also provisions that aim to remove procedural obstacles and to reduce backlogs. These include: requiring publication in an electronic format of records requested under FOIA three or more times [new Subsection (a)(2)(D)(ii)(II)]; further limiting fees charged when statutory deadlines are not met [amended Subsection (a)(4)(A)(viii)]; establishing a singular online portal for the public to make FOIA requests [new Subsection (m)], which should assist requesters and agencies alike.

Other provisions flow directly from some of the goals stated eloquently by Chairman Grassley and Ranking Member Leahy over the past few years: to strengthen the FOIA Ombudsman's office and increase its institutional independence and to bolster the use of dispute resolution in the FOIA process. These changes in particular are the ones I want to focus on today.

First, the new law ensures that dispute resolution is an integral part of the FOIA process. Many requesters, and even some agencies, still do not understand or appreciate that the agency FOIA Public Liaisons play a crucial role. Since the 2007 amendments, Public Liaisons have been charged with helping to resolve disputes, including assisting FOIA requesters with the scope of a request and coming up with an agreed-upon time frame to process the request. In short, the FOIA Public Liaison is there to make the process smoother for everyone involved.

Agencies will now also notify requesters at two stages that the FOIA Public Liaison is available to assist them: first, when an agency advises the requester of its determination (that is, how the agency will respond to the request) and second, when an agency advises the requester that it is making an adverse determination and the requester can file an administrative appeal to challenge that determination. [Subsection (a)(6)(A)(i)(II)-(III)] Those appeal notices will now let FOIA requesters know that their rights include seeking help from the FOIA Public Liaison or the Office of Government Information Services. In addition, under the new law, agencies must tell requesters that dispute resolution services are available from OGIS when an agency sends notice that because of "unusual circumstances," the agency is taking more than a 10-day extension of time to respond to a request [Subsection (a)(6)(B)(ii)]. This is another opportunity to discuss the scope of the request and to understand better both the requester's needs and the agency's ability to meet those needs.

Additionally, the law directs Chief FOIA Officers to include dispute resolution efforts in the compliance reviews that the law requires them to conduct [new Subsection (j)(3)]. Section 3 of the FOIA Improvement Act of 2016 also requires an agency to set out in its implementing FOIA regulations the agency's procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS. [FOIA Improvement Act of 2016 as enacted June 30, 2016, Sec. 3(b)]

I would like to point out that since 2010, OGIS has trained more than 700 agency FOIA professionals in 60 agencies in dispute resolution skills. The statute does not require this training, but it was obvious to OGIS that it needed to assist FOIA Public Liaisons in their new challenge to prevent and resolve disputes at the earliest possible time in the FOIA process. FOIA

professionals are quite used to doing more with less, but in this case they were being called upon to provide a new kind of customer service that had not been part of their FOIA training.

Second, the law affirms the responsibility of OGIS to review agency FOIA compliance and solidifies the role of OGIS in the FOIA ecosystem.

The OPEN Government Act of 2007 included OGIS as a key reform intended to provide FOIA requestors and Federal agencies with a meaningful alternative to costly litigation. 153 Cong. Rec. S15831 (daily ed. Dec. 18, 2007) (Statement of Sen. Leahy). In the almost seven years that OGIS has been a part of the FOIA landscape—since the office was stood up in the fall of 2009—the dedicated staff has worked hard to reach out to agencies and to the public to let them know about its services. The office developed extensive contacts with FOIA operations across the government to carry out the office’s statutory mission: providing mediation services to resolve FOIA disputes, and reviewing agencies’ FOIA policies, procedures and compliance. By the end of Fiscal Year 2015, OGIS had assisted requesters and agencies in more than 5,000 FOIA-related instances, ranging from disputes over the application of a FOIA exemption, to helping requesters find the right place to send requests, to accessing government records maintained in databases or other electronic formats. Acting Director Nikki Gramian and her dedicated staff are carrying out more robustly the office’s review of agency compliance, for example through targeted [agency assessments of six FOIA programs](#). I refer you to the [OGIS Annual Reports](#), which have been published in electronic format from the beginning, for much more information about the office’s achievements.

The Office has worked well and productively with many departments and agencies, but often encountered resistance and confusion about what the new FOIA Ombudsman could do and would not do.

- The new law makes clear that Congress expects OGIS not only to review agencies’ policies, procedures and compliance, as the law has provided since 2007, but also to identify procedures and methods for improving FOIA compliance [new Subsection (h)(2)(C)]. From early in its existence OGIS has identified ways that agencies can make the FOIA process work better, for example, through publicizing [“OGIS Best Practices”](#) for agencies and for requesters; through its Dispute Resolution Skills training for agencies; and through its [FOIA Ombudsman blog](#) to reach the requester and agency communities and to address substantive issues. But the changes leave no question that Congress intends that OGIS make the results of its compliance review as broadly useful as possible to the agencies reviewed and to the public.
- OGIS will continue to report to Congress on its agency reviews and findings on procedures and methods to improve FOIA compliance; mediation activities, advisory opinions, and interactions with agencies in resolving disputes [new Subsection (h)(4)(A)(i)-(ii)]; and

legislative and regulatory recommendations to improve the administration of FOIA [new Subsection (h)(4)(A)(iii)].

- Agencies' annual FOIA reports will now go to the Department of Justice (DOJ) and to OGIS [amended Subsection (e)(1)].
- There is now a statutory relationship between OGIS and the Chief FOIA Officers [new Subsection (j)(1)-(3)]. The Chief FOIA Officers Council will be established and co-chaired by OGIS and DOJ's Office of Information Policy [new Subsection (k)]. Chief FOIA Officers were already meeting with DOJ as a group, but OGIS had not been included in those meetings. A formal structure like this new one will be another helpful way for OGIS to hear directly and regularly about agency problems and practices.

Dispute resolution can help to conserve administrative resources and to head off costly and time-consuming lawsuits. Just as importantly, though, the availability of dispute resolution at all stages of a FOIA request is good customer service. OGIS's customers are the citizens who pay for and own the records of our government and the FOIA professionals who are responding to requests for access.

Finally, from previous visits to this Committee I know that you and your colleagues in the Senate and the House had expected to receive unvarnished recommendations for legislative or regulatory change from an independent ombudsman. That could not happen during my tenure.

Congress wisely placed OGIS in the National Archives and Records Administration, the only Federal agency whose primary mission is to provide access to government information and which does that very well. And the Archivist of the United States, David S. Ferriero, was unfailingly supportive and helpful as we found our way through uncharted territory.

As a component of an Executive Branch agency, however, OGIS had to send its proposed recommendations for policy changes through the intra- and inter-agency review process that all agencies must follow. That meant that my draft recommendations, reports and testimony were reviewed and then approved—sometimes after lengthy debate and negotiation—by the very agencies that could be affected. You have fixed that.

The new law provides that the OGIS Director is not required to get the prior approval or comment of any officer or agency of the government before submitting reports, recommendations and testimony to Congress, so long as the submissions state that they do not necessarily represent the views of the President [new Subsection (h)(4)(C)]. The OGIS Director may also directly submit additional information to Congress and the President as the Director determines it appropriate [new Subsection (h)(5)].

From its first day in business, OGIS strived to be a neutral, impartial mediator who brings parties together voluntarily to resolve their differences. To carry out its mission, OGIS works to engender the trust and confidence of its customers, whether behind the scenes in mediation, or in conducting an agency review, or in public settings as an advocate for a fair Freedom of Information Act. Still, the authority to report or communicate directly to Congress, as the new law provides, is an important reform for an office that hears complaints, resolves disputes, reviews compliance—and is expected to speak truth to power. The change also accords with the long-established ombudsman model that is followed in the US and in other countries, independence being one of the criteria.

The United States government receives more than 700,000 FOIA requests each year; only about 2% are appealed and fewer still are litigated. Those figures might tell us the law works reasonably well. But any citizen who requests information from their government and cannot receive a response in a reasonable amount of time—or who is denied those records and feels that bringing a lawsuit against the government is the only recourse—is not being served by FOIA in the way Congress intended.

The Office of Government Information Services, the FOIA Ombudsman, has demonstrated that it can make the Freedom of Information Act work more smoothly and help move us away from such an adversarial environment. Like most government agencies, OGIS is challenged with having limited resources. But I am confident that OGIS and NARA will continue to find a way to serve both the general public and the Federal agencies effectively.

Thank you for the opportunity to testify. I look forward to answering any questions that you may have.