



OFFICE *of* GOVERNMENT INFORMATION SERVICES

TESTIMONY OF MIRIAM NISBET

DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON

“We the People: Fulfilling the Promise of Open Government Five Years After The OPEN Government Act”

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NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

8601 ADELPHI ROAD
OGIS
COLLEGE PARK, MD
20740-6001

web: www.ogis.archives.gov
e-mail: ogis@nara.gov
phone: 202-741-5770
toll-free: 1-877-684-6448
fax: 202-741-5769

Good morning, Mr. Chairman, Senator Grassley, and members of the Committee. I am Miriam Nisbet, Director of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA). Thank you for the opportunity to appear before you during Sunshine Week to discuss implementation of the OPEN Government Act of 2007, which included the creation of OGIS as one of its key amendments.

As you know, at OGIS, we work with *all* Executive Branch departments and agencies on various aspects of the Freedom of Information Act (FOIA). We are in a unique position to observe various aspects of agency FOIA processes, including efforts to implement the 2007 amendments. I also want to take this opportunity today to share more about OGIS's work.

The 2007 FOIA amendments centered on a few tenets: executive support, customer service, and dispute resolution. The new provisions in the law added heightened statutory roles for the Chief FOIA Officers and FOIA Public Liaisons within the agencies, both to provide top-down support for FOIA activities and also to provide a resource to improve interaction between requesters and agencies. Agencies benefit by having these roles filled by individuals well-suited as leaders on FOIA who provide exemplary service to the public. Officials in these positions may hold regular meetings of the FOIA staff, implement their own training sessions, and host special FOIA events, such as FOIA forums or symposiums. Introducing dispute resolution to the FOIA process was another important aspect of the amendments. Congress included this concept in three separate new provisions, which established OGIS and directed agencies to make its FOIA Public Liaisons available to assist in the resolution of disputes between the requester and the agency.¹



¹ 5 U.S.C. §§ 552(h)(1) and (3); (l); and (a)(6)(B)(ii).

In the three-and-a-half years that OGIS has been a part of the FOIA landscape, we have worked hard to reach out to agencies and to the public to let them know about us and our services. We have had extensive contacts with FOIA operations across the government as we carry out our two-pronged mission: providing mediation services to resolve FOIA disputes, and reviewing agencies' FOIA policies, procedures and compliance. We have assisted requesters and agencies in nearly 2,100 FOIA-related instances, ranging from disputes over the application of a FOIA exemption to helping requesters find the right place to send requests. In some cases, OGIS is able to assist a requester directly without involving an agency, but in most cases, we have an opportunity to connect with agencies and observe their FOIA processes at work. We also hear directly about obstacles and successes in FOIA operations as we provide training in dispute resolution skills for agency FOIA professionals.

Agencies maintain great autonomy in the FOIA context and OGIS was not created to serve as the "FOIA police" in that regard. But OGIS does provide a review of FOIA activity and can share its views with agencies where their approach may differ from the work of other agencies or can offer recommendations on how to resolve the dispute at hand. In our dispute-resolution cases, we typically discuss the matter with both parties to identify any issues with which we may be able to assist. In these conversations, OGIS can sometimes expand on agencies' response and appeal letters in order to provide a more detailed explanation to requesters as to why the agency acted as it did.

In some cases, a requester has found that an agency's correspondence does not provide sufficient detail about the agency's actions. In those situations, OGIS is able to assist requesters in better understanding the process and complexities of FOIA so they have a clearer picture of the agency's actions and the law or policy behind it. OGIS also offers suggestions to agencies in those cases on how they might provide more information to assist their requesters from the start.

OGIS also is in a unique position to observe agencies' FOIA practices as we review their FOIA policies, procedures, and compliance. We review proposed changes to agency FOIA regulations and offer to collaborate with agencies as they improve their own policies and procedures. To date, we have offered suggestions to 17 agencies that have proposed changes to their FOIA regulations or forms.

OGIS's review program also includes developing government-wide Best Practices, which we develop by analyzing agencies' Annual FOIA reports and Chief FOIA Officers' reports, as well as through observations from our dispute-resolution processes. Some examples of agency best practices are:

- In cases involving voluminous records, agencies are sending the requesters estimated completion dates for rolling releases and contacting the requesters with a new estimated completion date if the agency is unable to meet the original date.
- Agencies are increasingly working collaboratively in teams to address FOIA-related issues including release of large data sets, both proactively and in response to requests; processing backlogged requests; and examining an agency's FOIA process with a view to bettering it.

- In some cases, agencies have agreed to OGIS-facilitated conversations with the requester to discuss his or her request and the agency's action. As a result of these conversations, agencies have run additional searches and released records.

Our observations also help shape our FOIA recommendations. We determined early on that nearly everything we do at OGIS is geared toward improving FOIA in some way. We regularly provide suggestions to agencies and requesters on various aspects of the FOIA process and we track this activity on our "Improving FOIA" webpage. We also identify and target bigger-picture recommendations. Last year, we shared five recommendations to improve the FOIA process; I would like to update you on those recommendations and also share with you additional recommendations that are new this year.

- This year, OGIS recommends that agencies encourage and support the use of dispute resolution in FOIA processes. Although dispute resolution has been a fixture within Federal agencies since the mid-1990s, it is relatively new to the FOIA administrative context. OGIS seeks to more strongly connect FOIA professionals, legal counsel and dispute resolution professionals to embed dispute resolution firmly into the FOIA process with the goal of preventing and resolving disputes administratively. OGIS is available to work with an agency's Chief FOIA Officer along with the dispute resolution program, general counsel's office and FOIA office to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. Such an approach could help to conserve administrative resources, improve customer service, and avert costly and time-consuming litigation.
- OGIS encourages agencies to remind their staff members of the importance of FOIA and that "FOIA is everyone's responsibility."² FOIA professionals are leaders in delivering that message in their everyday work, but other agency professionals who may work on more mission-specific aspects of an agency's function can generally benefit from a refresher on the law and its applicability to their own work. For example, OGIS worked with our parent agency, NARA, to write a message to be distributed to the NARA staff this Sunshine Week. The Archivist of the United States, David Ferriero, agrees this is an important message and intends to send an annual announcement to this effect. We have attached the National Archives' memo as an exhibit and posted it on the OGIS website (in our agency FOIA toolkit) so that anyone may use it as a model.

Additionally, this year we have identified two FOIA-related issues that we will research and explore. While not ripe for recommendations just yet, we anticipate recommendations will be forthcoming.

- Examination of FOIA fees: The Office of Management and Budget last issued FOIA fee guidance in 1987.³ Since then, agencies have moved toward digitizing records, have

² Attorney General Memorandum on the Freedom of Information Act, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>

³ Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf

established online FOIA Libraries and may now be providing records through *FOIAonline*. Additionally, amendments to the law in 1996 and 2007 have addressed fees. OGIS has observed that fees and fee waivers remain a persistent point of contention administratively and in litigation. OGIS would like 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 include recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.

- Immigration records and FOIA: Individuals who are not U.S. citizens or lawful permanent residents access immigration-related records from various agencies through FOIA requests. OGIS has observed a large increase in our own cases related to these requests and has learned from the agencies that maintain these records that the volume of requests continues to grow each year. U.S. Citizenship and Immigration Services, the agency that maintains Alien files, reported that it averaged nearly 10,000 requests per month in Fiscal Year 2011. OGIS has already communicated with agency officials who receive these types of requests as well as some of the requester organizations and representatives who file them. We began in May 2012 with a preliminary examination of the records and issues. We now recommend that OGIS solicit input to examine potential solutions to ease the burden on both sides as they request or process these records. We do not anticipate that this effort will lead to a change in the FOIA itself, but we hope that it will improve FOIA administration.

The recommendations OGIS shared in 2012 continue to be a priority for the Office. We addressed five separate issues related to improving FOIA:

- Misdirected Inquiries [to OGIS] from the Public: OGIS joined the Office of Information Policy at the Department of Justice (DOJ) to host a Requester Roundtable event where we brought together agency FOIA professionals and the public to discuss first-party requests which are most often, but not always, Privacy Act requests as well. The offices provided information about Privacy Act requests and wrote about the roundtable on their blogs. OGIS also added a webpage to our site that provides more information about the Privacy Act including links to OMB guidance documents implementing the statute and agency Privacy contacts.
- Facilitating Agencies' Sharing of Information with OGIS: OGIS, in coordination with OMB, worked with DOJ to write model language that agencies can consider using in their Systems of Records Notices (SORNs) that would allow agencies to share information with OGIS, where appropriate. (Both FOIA and Privacy Act request files at every agency are covered by the Privacy Act. Without a routine use that expressly states that the agency will share those files with OGIS, we must get the individual's consent to communicate with the agency about the request. The consent authorizes OGIS to inquire on a customer's behalf regarding the request or administrative appeal at issue; the consent also authorizes departments and agencies to release to OGIS information and records related to the request or appeal.)

- Improving Public Access to FOIA Information: OGIS continues to work with the partner agencies as well as requesters to implement and improve *FOIAonline*, the multi-function FOIA portal that launched in October 2012. This system allows requesters to file and track their requests from one place, communicate with the processing agency, and as agencies post responsive records to the site, requesters can browse already released documents. *FOIAonline* provides agencies with a secure website to receive and store requests, assign requests, and post responses and generate reports. There are currently six agency partners that use some function provided by *FOIAonline*. We will continue to talk with other agencies about whether *FOIAonline* might help them carry out their statutory responsibilities; we believe that additional partners will make this shared service even more cost-effective for the government.
- Coordinating FOIA Responses Across Government: OGIS developed a strategy to coordinate agency contacts and facilitate communication on certain complicated and voluminous requests that are simultaneously sent to dozens of agencies across the Executive Branch. We continue to hear from both agencies and requesters in these cases — sometimes there are issues ripe for our assistance, and other times it is simply “for your information” outreach. Our experience is that this type of coordination reduces the burden on each agency, improves the quality of the responses, and provides better service to requesters.
- Dispute-resolution skills training for FOIA professionals: OGIS continues to encourage agencies to partner to expand and provide this training for their FOIA professionals. Congress’ innovation in bringing dispute resolution into the world of FOIA will work best when it is the agencies themselves that are preventing and resolving disputes. This effort is a good example of using existing agency resources to improve customer service and avoid litigation.

Finally, as I have shared with this Committee before, much of OGIS’s work in the last three years has been to establish the Office, including determining our role in the FOIA process while actively trying to carry out our important mission. The model that Congress chose for this office is a hybrid: we are to serve as a neutral place for FOIA requesters and agencies to come for non-binding assistance with FOIA disputes, and at the same time we review agencies’ FOIA policies, procedures, and compliance. In both instances, we must build the trust of agencies and gain their confidence in our work.

We recognize our limits as a small office with a large mandate within the executive branch. Our staff aims to split efforts between our two missions. However, because mediation cases continue to arrive in increasing numbers (up 130% in the first quarter of FY 2013 in comparison to the first quarter of FY 2012), the staff spends most of its time responding to those cases and has not yet been able to turn to building and carrying out the more robust review program that we envision. We continue to hope that will evolve and improve in the coming year.

There are still many improvements to be made in FOIA administration – indeed, my Office hears too often from requesters who cannot get a simple answer to when they can expect to get a reply from the agency. We also hear complaints from many requesters who do not appreciate the challenges that agency FOIA professionals face in dealing with complex requests and voluminous records. We believe that there continues to be too much FOIA litigation. Nevertheless, in carrying out our mission we believe we are making a positive impact on the FOIA process both from the standpoint of requesters and of agencies. We appreciate the unique position we are in as a way to observe and reflect on FOIA activity across the government. We continue to believe our role will be an important part of improving the FOIA process in years to come.