

TESTIMONY OF MIRIAM NISBET
DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON
“THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND
ACCOUNTABILITY IN THE DIGITAL AGE”
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Good morning, Mr. Chairman, Senator Grassley, and members of the committee, I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration. Thank you for the opportunity to appear before you during Sunshine Week to discuss the work of my office, an important part of the freedom of information and open government initiatives of the Federal Government.

As you know, the Office of Government Information Services, referred to in short as OGIS, has been hard at work carrying out its statutory mission since opening in September 2009. While we have worked to resolve disputes under the Freedom of Information Act, or FOIA, and to develop strategies to review agency FOIA policy, procedures and compliance, we have realized that much of our work falls under the designation that Congress gave us as the “FOIA ombudsman.” As an ombudsman, OGIS acts as a confidential and informal information resource, communications channel and complaint handler. We see the ombudsman role as the most fitting way for OGIS to work with members of the public and with Federal agencies to improve the administration of FOIA. OGIS supports FOIA – not by championing requesters over agencies or

vice versa. We work to encourage a more collaborative and accessible FOIA process for everyone in the FOIA community.

The first OGIS report issued just this month details the work our office has done. It focuses on our first fiscal year and discusses both our internal workload and experiences as well as what we have seen in working with the public and the 94 Executive Branch departments and agencies. This is only the beginning, but we are already off to quite a start. In the first five months of FY 2011 we opened an average of 38 cases a month compared to an average of 17 cases a month for the same time period in FY 2010.

In the first 18 months, we heard from requesters from 43 states, the District of Columbia, Puerto Rico and 12 foreign countries who asked for assistance on everything from how to make a Freedom of Information Act request to which agency might have records they are seeking, and from how to navigate fee categories and waivers to how to request mediation services over denials of information. We answered questions, provided information, listened to complaints and tried to help in any way we could. For the more substantive disputes, we facilitated discussions between the parties, both over the phone and in person, and worked to help them find mutually acceptable solutions.

The statutory term “mediation services” includes the following: formal mediation, facilitation and ombuds services. OGIS continues to offer formal mediation as an option for resolving disputes, but has not yet had a case in which the parties agreed to participate in that process. We have found that the less formal method of facilitation by OGIS staff members, a novel approach

when applied to FOIA, provides a very similar process, and parties are more willing to engage with OGIS and with each other without the perceived formality of mediation. OGIS-conducted facilitation is cost effective, as it bypasses hiring outside mediators to perform similar services.

Since September 2009, OGIS has closed 541 cases, 124 of them true disputes between FOIA requesters and agencies (for example, a dispute over application of an exemption or a fee assessment rather than a simple request for information). As a facilitator for the FOIA process to work as it is intended, we were not calling balls or strikes, but letting the parties try to work matters out with our assistance in an effort to avoid litigation. In three-quarters of the disputes we handled, the parties walked away satisfied. We believe that OGIS involvement helped to resolve their disputes.

A realization we quickly faced is that defining success is a challenge. The final result of our process is not both parties getting exactly what they want – sometimes not even close – but if we are able to help them in some way, by providing more information or by helping them understand the other party’s interests, we have provided a valuable service. When OGIS first set out to fulfill this part of its statutory mission we spoke of changing a culture or mindset, from one of reacting to a dispute in an adversarial setting to one of actively managing conflict in a neutral setting. Today, after 18 months of working to prevent and resolve FOIA disputes, the experience has revealed that our work may well go deeper than a culture change. We now see that the task before us also includes seeking more acceptable outcomes than “win-lose” scenarios. With this goal in mind, we continue to work on how we will define success with our customers – both requesters and agencies.

To date, OGIS cases have involved 36 Federal Departments and Agencies, including all 15 Cabinet-level agencies, some of which contacted OGIS with questions or for assistance with a dispute. We heard from agency FOIA professionals who wanted suggestions on how best to work with difficult requesters and who asked for OGIS assistance in resolving disputes related to FOIA responses. One area where we have had success this year is working with multiple agencies that have received essentially the same FOIA request to help facilitate a strategy for responding with some consistency across government. We have found that agency professionals faced with these sometimes daunting requests are greatly relieved to hear that someone else is working on the same thing and may be able to help. We also continue to provide agency FOIA Public Liaisons and their staffs with the tools they need to improve their approach to FOIA requests and to make the process less adversarial. One year ago OGIS developed and began offering dispute resolution skills training for agency FOIA professionals, helping build their skill sets to provide better customer service to requesters and also to work more successfully with other offices within their own agencies. More of this type of alternative dispute resolution (ADR) training is scheduled for this year, and our hope is that equipping FOIA professionals with these skills will help solve or prevent disputes.

Though we have heard from many agency professionals and members of the public, we know outreach continues to be essential. Increasingly, agencies are letting requesters know about OGIS as a resource – we know of 11 agencies that routinely do so – and we have had some OGIS customers come in by way of Congressional recommendation, but there are still agencies that have not yet begun to include the OGIS “pitch” in their letters to FOIA requesters. My staff and I

regularly meet with members of the requester community and attend meetings, conferences and events attended by requesters to let them know about OGIS services. We also are meeting with agency FOIA staffs, alternative dispute resolution professionals and general counsels' offices and participating in agency FOIA training offered by the Justice Department and by agencies themselves to get the word out. Our approach to providing information to agency FOIA professionals includes a sample facilitation, which has resulted in positive feedback from participants and has proven to be very effective in lessening the fear factor of how OGIS will work with agencies to resolve disputes.

Because we have had so many requests for mediation services, we have also been challenged in setting up a comprehensive review strategy to fulfill that prong of our statutory mission. We see and hear a lot about agency policy, procedures and compliance as we work to resolve disputes and answer inquiries, but are setting up a more robust method to accomplish the goals of this prong of our mission in our second year. For now, the review plan includes using existing data to create value-added reporting to topics such as backlogs or referrals and consultations and to offer what we call collaborative reviews of agency FOIA operations alongside willing agencies. By using our observations from our caseload as well as a thorough analysis of all 94 Chief FOIA Officer Reports of 2010, we were able to develop some best practices for agencies and requesters. We also have succeeded in engaging in collaborative review by offering our services to review agency FOIA regulations with agencies that are considering revising FOIA regulations or practices. A few agencies have already worked with OGIS in that capacity and we plan to continue the collaborative review process going forward. To further this goal, OGIS continues to invite agencies to participate in collaborative reviews of their FOIA processes and to gather ideas

from the public and Federal agencies about ways in which OGIS can best accomplish this prong of its mission in a cost-effective way.

OGIS has a unique perspective on the way FOIA works. As an entity that works side-by-side with agency FOIA professionals to improve the process from within and that also works closely with requesters on the outside to address shortcomings, we have seen the importance of building relationships – and trust – among the members of the FOIA community. It takes a lot of us to make FOIA work – agency FOIA staffs, general counsels, requesters, the Justice Department’s Office of Information Policy, the White House and of course all of you in Congress – and OGIS gets to work with all of these stakeholders to help build a better FOIA. It’s an exciting process and while we have just gotten started and see it as a long-term effort, we are pleased to see so many positive results in the short term and to see that our process works. We will continue to engage with all members of the FOIA community to improve the FOIA process by reviewing what works and what does not, resolving disputes and providing assistance wherever we can.

Please do not hesitate to contact us with any questions or if we can help you – or any of your constituents – on FOIA issues. Thank you for the opportunity to testify; I look forward to answering any questions you may have.