April 4, 2014

Committee on Collaborative Governance Administrative Conference of the United States

Re: Resolving FOIA Disputes Through Targeted ADR Strategies March 14, 2014 draft recommendation

To the Committee:

We, the undersigned organizations dedicated to advancing government transparency and accountability, welcome the opportunity to respond to the committee's draft recommendation on resolving Freedom of Information Act (FOIA) disputes through targeted alternative dispute resolution (ADR) strategies.

Our organizations undertake a variety of FOIA activities, including making requests, litigating disputes, and representing the concerns of requesters. The open government community has advocated for the effective use of alternative dispute resolution in FOIA, including the creation of the Office of Government Information Services (OGIS). Some of us have participated in FOIA ADR processes, including OGIS facilitation. Many of us were consulted by Professor Grunewald as part of the conference's study.

We share the perspective that more can be done to encourage appropriate use of ADR for FOIA disputes. We agree that greater use of ADR could increase transparency while avoiding the cost and delay of litigation. We appreciate the committee's work to develop recommendations to strengthen FOIA dispute resolution.

We offer the following suggestions to strengthen the draft recommendation:

- 1. Recommendation Four should encourage OGIS to undertake a pilot project to explore advisory opinions addressing individual cases;
- 2. Recommendations Six and Seven should place greater emphasis on agencies' responsibility to resolve disputes; and
- 3. The committee should add a recommendation to Congress to require agencies to cooperate with FOIA mediation.

1. Recommendation Four should encourage OGIS to undertake a pilot project to explore advisory opinions addressing individual cases

The language of the OPEN Government Act makes clear Congress' intention that OGIS have the authority to issue advisory opinions addressing disputes in individual cases:

The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute. (emphasis added)¹

However, in its current form, Recommendation Four would discourage OGIS from doing precisely what Congress authorized it to do, on the speculation "taking a position on an issue [in a particular case] may undercut its ability to act as a neutral mediator." We question this logic and note that it is purely hypothetical because the office, to date, has not issued any such advisory opinions. Furthermore, OGIS already does take positions on issues, including in its case closing letters and its recommendations to agencies and Congress, apparently without imperiling its capacity to resolve disputes.

Even if it were the case that issuing advisory opinions would "undercut [OGIS'] ability to act as a neutral mediator," there may be countervailing benefits. We note the project consultant's report, which comments that "though public advisory opinions can complicate constituency relations, they can, over time, also build credibility for the ombuds as a voice in the developing and refining [of] FOIA policy."²

The Administrative Conference has undertaken this project to "identify[] those areas where the capabilities and resources of [OGIS] ... could be directed most effectively." Clearly, both risks and rewards could potentially arise from OGIS issuing, as Congress intended, advisory opinions addressing individual cases. In order to increase understanding of those potential costs and benefits, the conference should recommend that OGIS undertake a pilot project to issue some advisory opinions and evaluate the response.

Suggested alternative language for Recommendation Four:

4. In appropriate situations, OGIS should make use of its statutory, discretionary authority to issue advisory opinions. In order to evaluate the potential costs and benefits of exercising this authority, OGIS should undertake a pilot project to issue advisory opinions in selected cases where mediation has not resolved the dispute. Factors such as potential breadth of application and frequency of occurrence of an issue, along with consideration of caseload manageability, should be among the primary, though not the exclusive, determinants for OGIS in deciding whether or not to initiate the advisory opinion process.

¹ 5 U.S.C. § 552(h)(3). ² Consultant's draft report at 65.

2. Recommendations Six and Seven should place greater emphasis on agencies' responsibility to resolve disputes

We believe agencies should recognize the significant potential value of ADR, including OGIS mediation. President Obama's FOIA memorandum directed agencies to act "in a spirit of cooperation, recognizing that such agencies are servants of the public." Embracing ADR as a means to assist requesters without the need to resort to litigation should be part of that "spirit of cooperation."

The current draft of Recommendations Six and Seven encourages agencies to more widely advertise the availability of dispute resolution services. However, the recommendations could go farther. The conference should recommend agencies seek to resolve FOIA disputes to the greatest extent possible, including through their FOIA Public Liaisons and OGIS. Additionally, the conference should recommend that agencies take additional actions to make requesters aware of the dispute resolution services available from OGIS.

Suggested alternative language for Recommendations Six and Seven:

- 6. All agencies, acting in a spirit of cooperation, should seek to resolve FOIA disputes to the greatest extent possible, including through their FOIA Public Liaisons and OGIS mediation or facilitation services. All agencies, through their FOIA Public Liaisons under the direction of their Chief FOIA Officers, should seek OGIS mediation or facilitation services at any stage in the processing of a request when it appears to the agency that OGIS engagement may aid in the resolution of a request.
- 7. All agencies, in any appeal determination letter in which a request is denied in whole or in part, should notify the requester of availability of OGIS mediation or facilitation services as a non-exclusive alternative to litigation. <u>Agency websites and FOIA</u> regulations should call attention to the dispute resolution services available from OGIS.

3. The committee should add a recommendation to Congress to require agencies to cooperate with FOIA mediation

As the draft recommendation notes, "the statute does not place any duty on the agency to participate in the OGIS mediation process." We believe that this lapse limits the effectiveness of the OGIS dispute resolution process. Under current law, a recalcitrant agency that ignores a

_

³ http://www.whitehouse.gov/the press office/FreedomofInformationAct

⁴ Draft recommendation at 4.

FOIA requester's concerns may pay equally little heed to entreaties from OGIS. The conference should add a recommendation that Congress express its expectation that agencies cooperate fully with FOIA mediation efforts.

Suggested language for a new Recommendation Ten:

Recommendation to Congress

10. Congress should pass legislation directing agencies to cooperate fully with efforts to mediate individual FOIA disputes and to provide information to OGIS upon request.

Conclusion

We appreciate the opportunity to comment on the committee's draft recommendation. We hope you take our concerns into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

Sincerely,

Center for Effective Government

Center for Science and Democracy at the Union of Concerned Scientists

Citizens for Responsibility and Ethics in Washington

OpenTheGovernment.org

Sunlight Foundation