



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance Minutes of Meeting – March 6, 2014

Committee Members

John Kamensky, Acting Committee Chair
Miriam Nisbet
Nina Olson
Patrick Patterson
Daniel Elliott (by telephone)
Michael Herz (by telephone)
Alice Kottmyer (by telephone)
LuAnn Glaser (rep. Allison Beck)
(by telephone)

Consultant

Mark Grunewald

Administrative Conference Staff

Paul Verkuil, Chairman
Matthew Wiener, Executive Director
Gretchen Jacobs, Research Director
David Pritzker, Deputy General Counsel
Jeffrey Lubbers (ACUS Special Counsel)
(by telephone)
Nathan Kupka (Intern)
Martin Saunders (Intern)

Public

Matthew Hurd (DOJ/OIP)
Wendy Ginsberg (CRS)
Daniel Metcalfe (American Univ/WCL)
David Batson (EPA)
Alan Margolis (EPA)

Meeting Opening

The meeting commenced at 1:30 p.m. in the conference room of the Administrative Conference (ACUS), conducted by Acting Committee Chair John Kamensky. The purpose of the meeting was to discuss a draft research report and potential recommendations on the subject of “Reducing FOIA Litigation Through Targeted ADR Strategies.” The Conference’s consultant for this project is Professor Mark Grunewald of the Washington and Lee University School of Law.

ACUS Chairman Paul Verkuil thanked Mr. Kamensky for agreeing to chair the committee’s activities in connection with this project. Mr. Verkuil explained that Mr. Kamensky was stepping in for the committee’s chair, Miriam Nisbet, the Director of the Office of Government Information Services (OGIS), because OGIS is the focus of several potential recommendations and portions of the underlying research report.

Mr. Kamensky welcomed everyone to the meeting and introduced the committee members. He noted that the committee’s next meeting is scheduled for April 7. He then introduced Professor Grunewald, who summarized his research and findings concerning litigation under the Freedom of Information Act (FOIA).

Discussion of the Project on Reducing FOIA Litigation Through Targeted ADR Strategies

Professor Grunewald noted that the number of FOIA requests per year has been increasing and a goal of his research was to look for ways to use alternative dispute resolution (ADR) approaches more effectively to avoid costly FOIA litigation. His research included an examination of FOIA cases closed in federal district courts in fiscal years 2010 through 2013, supplemented by other available case data and interviews with numerous individuals who have had extensive experience with the FOIA process.

Initially, it was anticipated that a study of litigated FOIA cases might lead to identification of characteristics amenable to particular ADR approaches. However, Professor Grunewald reported that his research did not point to direct relationships of this kind. His conclusions, instead, suggested broad steps that OGIS and federal agencies in general could take to make their FOIA processes more effective.

Ms. Nisbet thanked Professor Grunewald for his report and study. Ms. Nisbet said that the report reconfirmed her agency's own efforts to uncover how best to focus its work. She pointed out the paradoxical and difficult position of her agency, which is charged with both mediating disputes – acting in a neutral role – and drawing conclusions about recommendations for improving agency FOIA policies and procedures. Ms. Nisbet emphasized that OGIS is always open to recommendations on how it can better use its resources. She expressed appreciation that the draft recommendation now before the committee includes specific actions OGIS could take to improve the FOIA dispute resolution process.

Ms. Olson, the Internal Revenue Service's National Taxpayer Advocate, noted first that among ADR neutrals, there is a recognized category of "advocate ombudsmen," who do take positions on issues in the course of carrying out their duties. Ms. Nisbet agreed, but stated that OGIS does not do that. Ms. Olson said that although she has a staff of about 1900 people, they too have resource issues because of the large numbers of taxpayers who need their assistance. To better target resources, they have focused first on improving the instructions given to IRS staff. She suggested that OGIS might employ a similar focus on prevention by getting the right processes and guidance to agency FOIA staffs. She also advised obtaining better data on what the underlying issues are and why people are seeking assistance in connection with FOIA requests. She suggested it might be useful to survey past litigants to find out whether they knew about OGIS and considered seeking mediation from OGIS or any other source. Finally, Ms. Olson noted that some involvement by OGIS, even if just a phone call, might be very helpful in individual cases before the parties become fully engaged and are heading toward litigation.

The committee then turned to the draft recommendation. Mr. Pritzker reminded committee members that what the recommendations should or should not include is within the province of the committee. He explained that the draft circulated prior to the meeting was based on Professor Grunewald's conclusions, but it is only a starting point for committee discussion. There was agreement that the preamble should be shortened, and ACUS staff was asked to try to do this. The committee then turned to the various numbered sections of the draft recommendation.

Recommendations to OGIS

Recommendation #1:

Mr. Pritzker reported that some comments had already been received suggesting deletion of the provision in #1 that OGIS not offer any services to Privacy Act requesters. Ms. Nisbet stated that OGIS' "Quick Hit" service works very well and the part of #1 urging continuance of this service was very helpful. However, she was concerned that the sentence about the Privacy Act would be difficult to implement because it is often not easy to determine quickly whether a requester's issue involves the Privacy Act or FOIA. The committee discussed this and agreed to endorse the advice to continue the Quick Hit service but delete the second sentence of #1 concerning the Privacy Act.

Recommendation #2:

Professor Grunewald explained his reasoning for suggesting limitation of OGIS involvement, beyond Quick Hits, to those cases in which the requesters have exhausted the agency appeals process. He said

he thought this limitation would encourage agencies to care more about their FOIA appeals process. In addition, Mr. Grunewald emphasized the potential value of the appeals process and noted that #2 is focused on controlling caseload.

Professor Lubbers said he didn't think exhaustion of administrative remedies made sense in light of the purpose of mediation. He noted that mediation is often most successful when done earlier in the process. He suggested deferring to OGIS to determine which cases to take on and when to do so. Mr. Lubbers also stated that he thinks agencies would be less likely to participate in OGIS mediation if the agency appeals process had already been concluded.

Ms. Nisbet stated that encouraging the use of an agency's appeals process is a good thing, but that the recommendation is too limiting on OGIS. She proposed taking out some of the limiting language, pointing out that OGIS encourages requesters to use the appeals process, but sometimes there are opportunities for OGIS mediation before the agency appeals process has concluded. Citing the experience of her office, Ms. Olson agreed with Ms. Nisbet, favoring leaving it to OGIS to determine when it is best for them to step in. Professor Herz observed that OGIS' website currently encourages the use of the agency appeals process, but makes clear that parties may engage with OGIS immediately. He also suggested noting the distinction between OGIS' customer assistance and dispute resolution roles.

After further discussion the committee concluded that #2 should acknowledge the centrality of the agency appeals process, but maintain OGIS' current flexibility to engage with requesters at any point in the process.

Recommendation #3

Mr. Pritzker introduced #3, which distinguishes between substantive and delay issues. Ms. Nisbet commented that she was uncomfortable with the use of the word "advance" in connection with processing in cases of delay, because it might imply that OGIS can expedite a request or move it to the front of the line. The wording was changed to refer to "facilitating" processing.

The portion addressing assistance in cases with substantive issues was also revised to be consistent with the amended #2, with respect to exhaustion of the appeals process. This section was also revised to reflect OGIS' engagement with both the requester and the agency.

Recommendation #4

Professor Grunewald began discussion of #4 by explaining that OGIS' statute allows it to issue advisory opinions, but OGIS has yet to exercise this authority. Mr. Grunewald suggested that OGIS make appropriate use of advisory opinions.

Ms. Nisbet said that writing advisory opinions would be resource intensive and it was unclear what weight an advisory opinion would be given. In addition, she pointed out that OGIS' statute only allows for an advisory opinion "if mediation does not resolve the dispute." She questioned the usefulness of advisory opinions specifically where mediation has failed, distinguished from the potentially more helpful use of advisory opinions to identify systemic issues. Further discussion focused on this distinction and it was agreed to rewrite the recommendation to encourage use of advisory opinions in connection with identifying patterns, trends or systemic issues, but not when an advisory opinion may undercut OGIS' ability to act as a neutral mediator in an individual case.

Although the committee concluded that the phrasing of the statute makes the purpose of advisory opinions unclear, it ultimately decided not to include advice to Congress to modify the current statutory language to clarify the appropriate role for OGIS advisory opinions and separate advisory opinions from OGIS' mediation function.

Acquisition of Better Data and Agency Cooperation

The committee asked ACUS staff to add a section to the recommendation, as suggested by Ms. Olson, that would encourage OGIS to engage with agencies and prior litigants, perhaps through surveys, to obtain better, more consistent data on the sources of FOIA disputes and the extent to which parties had considered using available dispute resolution services.

Mr. Patterson advised being careful not to place a new undue reporting burden on agencies. Mr. Pritzker agreed and said that any recommendation involving data collection should include appropriate modifications for small agencies that have few FOIA requests.

Professor Lubbers suggested adding language that encourages agencies to participate in the mediation process as a way to reduce litigation.

Recommendations to Agencies

Recommendation #5

Mr. Pritzker noted the role of agency FOIA Public Liaisons and explained the purpose of #5 is to ensure that these officials are fully aware of the potentially helpful services that OGIS can add to the agency's FOIA process. The language of #5 was modified to be consistent with the deletion in #2 of the original advice relating to requiring completion of the agency appeals process prior to OGIS involvement.

Recommendation #6

Mr. Pritzker stated that the purpose of #6 is simply to provide notification of OGIS' services to requesters. After brief discussion the committee accepted #6 as written in the draft.

Recommendation #7

Suggestions were offered to include in #7, concerning effectiveness of FOIA Public Liaisons, training and support about the OGIS mediation process and customer service training.

Conclusion

After some discussion of the respective roles of OGIS and the Department of Justice's Office of Information Policy, Mr. Kamensky outlined the next steps for this project. ACUS staff will work on a new draft of the recommendation document, which will reflect the discussion at the March 6 meeting. The new draft will be posted on the ACUS website and circulated to interested persons and organizations with an invitation to submit comments. The committee's next meeting will be on Monday, April 7, for further consideration of potential recommendations, particularly in light of any comments received.

Ms. Jacobs and Mr. Verkuil thanked all the participants for their time and participation in the meeting.

The meeting was adjourned at 4:20 p.m.