



**Committee on Collaborative Governance
Minutes of Meeting – April 7, 2014**

Committee Members

John Kamensky, Acting Committee Chair
Miriam Nisbet (by telephone)
Patrick Patterson
Alasdair Roberts (by telephone)
Alice Kottmyer (by telephone)
LuAnn Glaser (rep. Allison Beck)
(by telephone)

Consultant

Mark Grunewald

Administrative Conference Staff

Matthew Wiener, Executive Director
David Pritzker, Deputy General Counsel
Gretchen Jacobs, Research Director
(by telephone)
Nathan Kupka, Intern

Public

Matthew Hurd (DOJ/OIP)
Wendy Ginsberg (CRS)
Cori Zarek (OGIS)
Alan Margolis (EPA)
Stephanie Garner (EEOC)
Gavin Baker (Center for Effective Government)
Catherine Potter (GWU Student)

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 continue the committee's consideration of potential recommendations on the subject of "Resolving FOIA Disputes Through Targeted ADR Strategies." The Conference's consultant for this project is Professor Mark Grunewald of the Washington and Lee University School of Law.

Mr. Kamensky gave a brief summary of the project to this point. He explained that the draft recommendation had been revised to reflect the committee's discussion at its March 6 meeting, and that the revised version, identified as "Public Comment Draft 3-14-2014," had been posted on the ACUS website and circulated widely.

Mr. Pritzker summarized the changes made since the last meeting and noted that ACUS had received comments from: Philip Harter; Daniel Metcalfe; Public Citizen Litigation Group (submitted by Allison Zieve and Alan Morrison); and a joint submission from Center for Effective Government, Center for Science and Democracy at the Union of Concerned Scientists, Citizens for Responsibility and Ethics in Washington, OpenTheGovernment.org, and Sunlight Foundation ("CEG et al."). All of the comments are available on the ACUS website. Mr. Pritzker reminded committee members and others that ACUS remains open to receiving additional comments, which will be distributed to committee members and posted on the website.

Preamble

The committee first discussed suggested changes to the preamble of the draft recommendation. Changes to the preamble were relatively limited. However, on page five of the draft, Public Citizen said

ACUS should not suggest that courts might defer to views expressed in an advisory opinion by the Office of Government Information Services (OGIS), particularly not to opinions about the proper outcome in individual cases. After brief discussion the committee decided to amend “judicial deference” to read “judicial consideration.”

Following comments of Mr. Harter and others, the committee discussed adding a general statement in the preamble to recognize that FOIA is a disclosure statute and that “close-calls” should be resolved in favor of disclosure. Ms. Zarek observed that in some cases certain FOIA exemptions might seem to create a presumption against disclosure, and the committee agreed to cite the basic policy that in the face of doubt, openness should prevail.

Recommendation #1:

The committee made no changes to recommendation #1.

Recommendation #2:

Mr. Metcalfe’s comments suggested modifying the advice that OGIS should continue encouraging requesters to complete the agency appeal process, by inserting “whenever in its judgment that would be most appropriate.” After brief discussion, the committee rejected this proposed change.

Recommendation #3:

Public Citizen suggested that recommendation #3 include timeframes for moving through the ADR process, to assure requesters that using ADR would not risk further delays. Ms. Zarek said that OGIS recognizes the desirability of adding timeframes to its process, but the diversity of cases makes it difficult for OGIS to develop timeframes. Ms. Zarek also stated that OGIS is working on developing metrics to track cases, but they may not necessarily be time-based.

Mr. Grunewald said that Public Citizen’s comment seemed to be focused on ensuring requesters that their participation in the OGIS process would not further delay resolution of their case, whereas the committee’s discussion seemed instead to be focused on case tracking or performance evaluation. The committee ultimately decided that recommending timeframes might be premature, as OGIS is already trying to formulate tracking metrics for cases it receives.

Recommendation #4:

CEG et al. suggested that ACUS recommend a pilot project to explore the use of advisory opinions in individual cases. However, Public Citizen suggested deletion of any part of the recommendation that might encourage OGIS to issue advisory opinions in individual cases. Public Citizen’s suggestion was based on the idea that OGIS’ issuance of such advisory opinions might taint its neutrality in a way that would make its mediation function less effective.

Ms. Zarek pointed out a potential conflict between Public Citizen’s and CEG’s views. Mr. Baker, representing CEG, stated that the two comments are not necessarily in conflict, but that CEG’s suggestion might be an intermediate solution that would allow OGIS to experiment with the issuance of individualized advisory opinions in order to determine whether their issuance would actually undercut OGIS’ neutrality. The committee decided to recommend that OGIS explore the possibility of issuing advisory opinions in selected cases, in order to evaluate the potential costs and benefits of exercising its

authority to issue advisory opinions. The committee also accepted Mr. Baker's suggested wording to recognize that in an individual case, OGIS taking a position on an issue "could be perceived" to undercut its ability to act as a neutral mediator.

Finally, the committee considered the proposal in Mr. Metcalfe's comments to add a sentence at the end of recommendation #4 on OGIS advisory opinions that would state: "Toward that end, OGIS should also consider existence of significant gaps currently in guidance provided by OIP." After some discussion, in the absence of specific information about any such gaps, the committee rejected this suggestion.

Recommendation #5:

Mr. Patterson said he was concerned about the potential burden that recommendation #5, urging improved data collection, may place on smaller agencies. He suggested modifying the first clause to read: "To the extent that OGIS and agency resources permit . . ." The committee accepted this change. Ms. Zarek responded to Mr. Patterson's concerns about agency burden and stated that OGIS was also exploring other less formal ways to collect data. Ms. Nisbet reminded committee members that OGIS lacks the statutory authority to require agency reporting.

Recommendation #6:

CEG et al. suggested that recommendations #6 and #7 should place more emphasis on agencies' responsibility to resolve disputes. Mr. Baker stated that agencies have no current duty to resolve disputes, but only a duty to respond to them. The committee agreed to add language stating that agencies should affirmatively seek resolution of FOIA disputes and that where there is discretion the agency should lean toward disclosure.

Public Citizen proposed an additional recommendation that would require agencies to supply requesters with an index of withheld records at an early stage of the ADR or administrative appeal process. This index would help requesters assess the value of pursuing the request. Mr. Hurd pointed out that providing an index for each requester might overburden agencies and further delay the processing of FOIA requests. Ultimately, the committee decided to include language that gives effect to Public Citizen's concerns without requiring that an index be provided to every requester. A sentence was added to recommendation #6 that urges agencies, as early in the dispute resolution process as possible, to provide requesters and OGIS with sufficient detail about the agency's position to enable a requester to make a knowledgeable decision on whether to pursue the request further.

Recommendation #7:

Public Citizen suggested expanding recommendation #7's language about the availability of OGIS' services to apply not only to the denial letter after an appeal, but also to the initial denial letter. Ms. Zarek said that including such information earlier might reduce use of the administrative appeal process and hamper efficiency. The committee decided not to accept this suggestion.

However, the committee did accept a suggestion that agency websites and FOIA regulations should call attention to the dispute resolution services offered by OGIS.

Recommendation #8:

The committee made no significant changes to recommendation #8.

Recommendation #9:

The committee accepted Mr. Metcalfe's suggestion to amend the language advising agencies to "cooperate fully with efforts to mediate" to read "cooperate fully with OGIS efforts to mediate or otherwise facilitate the resolution of" individual FOIA disputes. The committee also accepted Mr. Patterson's suggestion to add a phrase at the end of recommendation #9 that recognizes agencies' limited resources.

Proposed Additional Recommendations:

CEG et al. proposed an additional recommendation advising Congress to require agencies to cooperate with OGIS. Ms. Zarek stated that overall most agencies are very cooperative with OGIS' processes, but there are a few agencies that have been less cooperative. Mr. Grunewald stated that a requirement for agencies to cooperate with OGIS might be counter to the spirit of ADR and particularly mediation. He observed that with such a requirement agencies might participate pro forma, but not actually use the process in a meaningful way. After discussion, the committee members decided not to add such a recommendation.

Mr. Harter's comments contained a proposal for an additional recommendation that the courts should approach FOIA cases with a clean slate and not defer to an agency's determination to withhold agency records. Mr. Grunewald said this would be a tricky recommendation as most courts already formally recognize the de novo standard of review in FOIA cases. The committee decided against adding the proposed recommendation on the basis it would be too complex to implement.

Mr. Metcalfe's comments proposed recommending that Congress consider an amendment to subsection (h) of FOIA, which established OGIS. However, in the absence of specifics, the committee rejected this suggestion.

Conclusion

ACUS staff was asked to revise the draft recommendation in accordance with the decisions made at the meeting and to forward the resulting proposed recommendation to the ACUS Council for its consideration and placement on the agenda of the June 2014 plenary session.

The meeting was adjourned at 4:05 p.m.