

March 5, 2014

Committee on Collaborative Governance
Administrative Conference of the United States

Comments Offered for March 6, 2014 Committee Meeting

To the Committee:

Professor Grunewald in his report has done an excellent job of identifying many of the complex factors that enter into litigation decisions regarding public records requests in the federal realm.

I wish to offer three suggestions regarding the Draft Recommendation document.

1) RECOMMENDATION TWO SHOULD NOT PRECLUDE REQUESTER-SOUGHT ASSISTANCE FROM OGIS DURING THE PRE-ADMINISTRATIVE APPEAL STAGE

Recommendation Two states that “OGIS should normally provide requester-sought assistance beyond addressing Quick Hits only to requesters who have exhausted the agency appeal process...”

This is at odds with the recommendation’s discussion on page 3, second full paragraph, line 7 says: “...[A] mechanism external to the agencies that is open to all issues, all requesters, and all agencies, and that has appropriate FOIA dispute resolution authority, expertise and resources is paramount.”

OGIS’s most vital role, in my opinion, is to facilitate a forum for discussion between the agency and the requester. In many cases, this is the only such opportunity before the requester decides whether to resort to litigation. In many cases, as OGIS has found, the opportunity for a telephone discussion is sufficient to resolve the major disagreements or to identify that they are not true disagreements.

For example, if such a telephone meeting can include not only the agency FOIA Officer but also the cognizant Information Technology staffer, a difficult question about the actual difficulty of retrieving particular data from a database can be resolved easily. Another example would be to facilitate a conversation to identify the datafields that exist which fields in particular might be prone to cause the most administrative burden (and cost). OGIS in its annual reporting has identified fee issues as being particularly prevalent; this is an area where it can be particularly helpful at advising both the agency and requester without advocating for either.

FOIA impasses can be overcome when both sides are willing to compromise by exploring options of mutual benefit, something that is quite difficult within the confines of the administrative appeal process. FOIA impasses can also be overcome

when a FOIA office's unfamiliarity with an aspect of the law leads to taking a poorly justified legal posture.

I believe that much FOIA litigation (apart from advocacy organizations and pro se litigants) stems not from substantive disagreements over releasability of documents but rather from requesters who feel for whatever reason that the agency is entirely ignoring them, and is not paying attention to the proper carrying out of the process.

As a result, there are a number of instances where OGIS can be of great service in facilitating discussion between the agency and the requester before the administrative appeal stage. For instance, these situations would include:

- when agency staff (including the designated FOIA Public Liaison) refuse to discuss the request or a concern about the request by telephone;
- when the agency has not performed the most ordinary processing tasks;
- when there is an agency refusal to acknowledge a request;
- when a requester is making unwarranted assumptions about the records available or the ability to search;
- when the agency responds that a request has not been "perfected" but does not appear inclined to help identify a reasonable means of permitting the request to be perfected;
- when there is a non-substantive fee waiver dispute, such as obliging a requester to prove a negative, or when the fee waiver designation would not change the ultimate fees due (such as from a newsmedia or educational and scientific requester);
- when there is agency reluctance to search, extract and retrieve data records from an existing database, or when the extraction may require anything other than the production of a pre-existing report format;
- when requests are between five and ten years old, and thus considered "stale" or "having baggage";
- when an agency appears to be commingling or conflating search and review fees; or
- when an agency has provided an acknowledgment letter that proffers an overly large fee estimate that is not conducive to further discussion.

Moreover, as Professor Grunewald has mentioned (Report at 66), the formulation of an agency administrative appeal decision can tend to cement the agency's position,

as it represents the final decision of the agency. For *stare decisis* reasons, it is at that juncture difficult for an agency to reconsider its final determination. Professor Grunewald's view does not encompass the large number of sometimes illogical situations (as noted above) that can lead to impasse. Limiting the assistance provided by OGIS to the post appeal stage may be beyond the point at which the agency side is able to the most flexibility and opportunity for discussion.

The recommendation should thus not preclude requester-sought assistance before the exhaustion of the administrative appeal process.

2) RECOMMENDATION FOUR SHOULD BE DELETED BECAUSE AN ADVISORY OPINION PROCESS WOULD NOT ACCOMPLISH MUCH TOWARD THE GOAL OF REDUCING LITIGATION

Recommendation Four discusses an advisory opinion process at OGIS. Advisory Opinions may serve some general information purpose, but they do not replace the value of the courts in defining the scope of the Freedom of Information Act. (This comment does not take a position whether OGIS may or may not wish to engage in the practice of advisory opinions.) Nevertheless, Advisory Opinions would be unlikely to deter or reduce litigation, and therefore this recommendation is unnecessary and should be eliminated.

3) THE MEMO SHOULD INCLUDE A RECOMMENDATION TO ENCOURAGE A PILOT PROGRAM TO EXPLORE FORMAL MEDIATION IN SELECTED CASES SUCH AS THOSE INVOLVING SOPHISTICATED REQUESTERS.

As of last year, OGIS has not yet engaged in any formal mediation. Formal mediation may be a productive tool in certain circumstances, and this valuable tool has not yet been fully explored. I suggest addition of a recommendation encouraging OGIS to experiment with formal mediation in selected situations, including for example situations involving willing agencies and sophisticated requesters who may find a mediation environment productive.

Thank you for considering my suggestions, offered solely as my personal views.

Sincerely,

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