



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Memorandum

To: Committee on Collaborative Governance  
From: David Pritzker (Staff Counsel)  
Date: March 4, 2014  
Re: Draft Recommendation for Reducing FOIA Litigation Through Targeted ADR Strategies Project

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The following draft recommendation is based on the draft report entitled “Reducing FOIA Litigation Through Targeted ADR Strategies” by Professor Mark Grunewald of the Washington and Lee University School of Law. This draft is intended to facilitate the Committee’s discussion at its March 6, 2014 public meeting and not to preempt the Committee’s discussion and consideration of the proposed recommendations. In keeping with Conference practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

### **[DRAFT] PREAMBLE**

The Freedom of Information Act (FOIA)<sup>1</sup> provides a two-level agency process for decisions on requests for access to agency records: (1) an initial determination that is ordinarily made by the component of the agency with primary responsibility for the subject matter of the request; and (2) an appeal to an authority under the head of the agency in the case of an adverse initial determination. A requester’s formal recourse following an adverse determination on appeal (or the agency’s failure to meet the statutory time limits for making a determination) is a suit in federal district court to challenge the agency action or inaction. Attaining the highest level of compliance at the agency level, without the need for resort to litigation, has long been recognized as a critical FOIA policy objective. A series of amendments to the Act over the years has provided for more detailed monitoring of agency compliance and established agency mechanisms to promote compliance. Despite these efforts, several hundred agency FOIA determinations adverse to requesters are challenged annually in federal courts,<sup>2</sup> and it is widely

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<sup>1</sup> 5 U.S.C. § 552, as amended.

<sup>2</sup> The year 2012 saw the highest number of FOIA requests in the history of the law: a striking 650,000 requests were filed with agencies throughout the Executive Branch by individuals and organizations seeking government



assumed that a substantial number of other non-compliant agency FOIA determinations are not taken to court by requesters, primarily for reasons of cost and delay that inhere in federal court litigation.

The Administrative Conference considered the potential value of “alternative dispute resolution” (ADR) in relation to FOIA disputes in 1987, at a time when federal agency use of ADR processes was not as common as today, and concluded that the data then available did not clearly establish the need for either an independent administrative tribunal to resolve FOIA disputes or the appointment of a FOIA ombudsman within the Department of Justice. However, the Conference noted that greater reliance on informal approaches to FOIA dispute resolution could result in more effective handling of some FOIA disputes without resort to court litigation.<sup>3</sup>

The OPEN Government Act of 2007<sup>4</sup> reflected concerns that some agencies, as a whole, were not implementing FOIA as Congress intended. Significantly, the 2007 legislation included, for the first time in FOIA’s history, provisions that directed agency FOIA officers to “assist in the resolution of disputes” between the agency and a FOIA requester.<sup>5</sup> This legislation creates in each agency the positions of a Chief FOIA Officer and FOIA Public Liaisons, and by establishing the Office of Government Information Services (OGIS) in the National Archives and Records Administration, to perform a broad range of functions aimed at improving FOIA compliance and providing assistance to requesters. Those two developments are the only government-wide FOIA dispute resolution process changes since 1987.

## **The Role of OGIS**

OGIS has been in operation since September 2009. Acting, in effect, as a “FOIA ombudsman,” OGIS has a hybrid mission that includes: identifying and resolving individual

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information. Data from the Administrative Office of the United States Courts indicate that the number of FOIA cases has varied within a range of 280 to 388 over fiscal years 2007 through 2013. Annual agency FOIA litigation costs hover around \$23 million—a conservative estimate by some accounts.

<sup>3</sup> See ACUS Statement #12, 52 FR 23636 (June 24, 1987).

<sup>4</sup> Openness Promotes Effectiveness in Our National [OPEN] Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 25245 (codified at 5 U.S.C. § 552).

<sup>5</sup> 5 U.S.C. § 552(a)(6)(B)(ii)



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FOIA disputes between requesters and agencies through mediation services; and reviewing agency FOIA policies, procedures and compliance with FOIA and making recommendations to Congress and the President to improve the administration of FOIA.

The Administrative Conference undertook a study in 2013 to examine the issues and other case characteristics that most commonly lead to litigated FOIA disputes, and to consider whether particular types of ADR approaches are likely to be especially effective in resolving identified types of FOIA cases or issues in an efficient and effective manner short of litigation. The current study reviews FOIA cases closed in federal district courts in fiscal years 2010 through 2013 in order to categorize the bases for the most common types of FOIA lawsuits. Review of cases was supplemented by other case data and interviews with individuals whose experience with the FOIA process could give an understanding of the varying dimensions and perspectives of that process.

The Conference's study found wide variation in the form and substance of FOIA disputes between requesters and agencies, in the motivation, resources, and sophistication of requesters, and in the missions and the level of interest in agency records. The interplay of these variables has led to the conclusion that no simple formula for linking a particular set of case characteristics with particular ADR approaches is likely to be very fruitful. Instead, it appears that the most important targeting should be directed toward the dispute resolution mechanism itself. That is, 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.

In practice, OGIS's caseload is determined by whoever happens to contact the Office, typically by telephone or e-mail inquiries, some of which come from individuals who have never filed a FOIA request. Often such individuals seek only modest help, such as where to file or what form to use to obtain the desired records or information. Many of these inquiries are handled routinely on the day they are received. OGIS classifies such contacts as "Quick Hits." This service, along with the informational resources on the OGIS website, is frequently sufficient to assist the least sophisticated users of FOIA. This is a low cost/high value function that has instant payoff for a broad constituency. However, OGIS currently offers the same services to



requesters under the Privacy Act.<sup>6</sup> Because the statutory charge of OGIS does not extend to the Privacy Act, the Conference recommends that the Office's limited resources no longer be used for such requesters.

### **OGIS Caseload**

Although many inquiries to OGIS are routine in nature, others are not. Also, the issues involved in an inquiry sometimes turn out to be more complicated than initially realized. In such cases, OGIS will gather information from the requester and make a preliminary assessment of the case, to decide whether it seems appropriate for an OGIS contact with the relevant agency to find out the status of the case and whether the agency has taken a position. Since the statute does not place any duty on the agency to participate in the OGIS mediation process, OGIS depends on agency cooperation. The relatively small fraction of agency denials that are appealed to the courts, together with agency success rates in FOIA litigation may serve as a disincentive to agencies to participate meaningfully in a dispute resolution process at this point.

Although the Office of Information Policy (OIP) in the Department of Justice historically has considered itself to have a role as "FOIA ombudsman," the legislation that created OGIS clearly assigned a mediation role to OGIS and, in effect, the "FOIA ombudsman" responsibility.<sup>7</sup> Underlying this policy decision was the fact that OIP previously had both a FOIA compliance promotion function and a responsibility to represent agencies in lawsuits arising under FOIA. The OPEN Government Act of 2007 separated these functions, and OGIS has no agency representation responsibilities.

OGIS has implemented its ombudsman responsibility through facilitating communications between a requester and the agency or actually engaging in a mediating process to achieve a resolution satisfactory to both sides. The recommendations addressed to OGIS that follow are intended to optimize the use of its resources. Beyond its Quick Hit service, OGIS should normally provide requester-sought assistance only to requesters who have exhausted the agency appeal process with respect to any issue on which the requester seeks assistance, or for

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<sup>6</sup> 5 U.S.C. 552a

<sup>7</sup> However, the legislation (OPEN Government Act of 2007) does not use the term "FOIA ombudsman."



whom an applicable time limit has expired and the request for assistance concerns only steps that might advance more timely agency processing of the request. For a substantive issue on which the requester has exhausted the agency appeal, if the remaining issues in the request appear meritorious, OGIS should assist the requester in engaging the agency in a discussion that deters litigation, either through a change in the agency position or through the agency's providing fuller, more informative context for its position.

The OPEN Government Act of 2007, in addition to authorizing OGIS to provide mediation services to resolve FOIA disputes, provided that OGIS, at its discretion, may offer advisory opinions if mediation has not resolved the dispute.<sup>8</sup> However, OGIS has not yet chosen to exercise this authority. In appropriate cases when facilitation or mediation has not resolved the issues, the Conference suggests that issuance of an advisory opinion may forestall potential litigation, and that OGIS should make the parties aware of this authority.<sup>9</sup> 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. While an OGIS advisory opinion itself would not be subject to judicial review,<sup>10</sup> it may receive judicial deference under established standards of judicial review in a FOIA suit in which the advisory opinion is before a court, whether in the dispute which led to the opinion or another in which that issue is raised.<sup>11</sup>

Although either the requester or the agency could ask OGIS for an advisory opinion, OGIS should have discretion to determine whether to initiate the advisory opinion process. If OGIS decides to do so, it would notify the parties of that decision. While that notice would not

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<sup>8</sup> 5 U.S.C. § 552(h)(3).

<sup>9</sup> OGIS has described its advisory opinion authority as follows: "OGIS also is authorized to issue advisory opinions, formal or informal. By issuing advisory opinions, OGIS does not intend to undertake a policymaking or an adjudicative role within the FOIA process, but instead will illuminate novel issues and promote sound practices with regard to compliance with FOIA." *Available at*, <https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/the-ogis-mission.htm>.

<sup>10</sup> This exercise of discretion-- to undertake (or not undertake) a case for purposes of issuing an advisory opinion-- should not be judicially reviewable. *See Heckler v. Chaney*, 470 U.S. 821 (1985). The statute expressly uses the phrase, "at the discretion of the Office."

<sup>11</sup> *See United States v. Mead Corp.*, 533 U.S. 218 (2001).



preclude a requester from filing suit, if a suit is filed after notice, but before an opinion is issued, the advisory opinion process would be terminated.

### **Role of Public Liaisons**

The FOIA Public Liaison was created by the OPEN Government Act of 2007 specifically to foster assistance to FOIA requesters. Preventing or resolving FOIA disputes within agencies through the work of Public Liaisons advances the goals of the Act and can relieve the dispute resolution burden of both OGIS and the courts. These agency officials should be given appropriate training in dispute resolution skills and adequate support from agency leadership for carrying out their statutory dispute resolution function.

Agency FOIA Public Liaisons, under the direction of their Chief FOIA Officers, should be encouraged to 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. In such cases, if the requester agrees to participate, OGIS should make its services available whether or not the appeals process has been exhausted or any applicable time limit has expired. This opportunity for agency engagement of OGIS under a looser standard than might otherwise be applied to requesters recognizes (a) that once an agency has made a final determination on a request it is less likely than a requester to seek OGIS assistance, and (b) that agency-sought OGIS engagement may provide one of the most fruitful settings in which to obtain an informal resolution.<sup>12</sup> Whether or not an agency chooses to request OGIS assistance, each agency, in any appeal determination letter in which a request is denied in whole or in part,

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<sup>12</sup> OGIS has described its relationship with agency FOIA Public Liaisons as follows:

While the OPEN Government Act's definition of a [FOIA Public Liaison (FPL)] is simple and straightforward, we know that the reality of their positions is anything but. Some agencies have created new FPL positions that are completely dedicated to assisting requesters and resolving disputes. Other agencies — many of them smaller agencies — added the FPL tasks listed in the Act to the already-full plate of someone within the FOIA shop. We've also found that FPLs have a variety of approaches to their job, including everything from agitating for change within agencies to reiterating the party line.

<http://blogs.archives.gov/foiablog/2011/06/09/whats-a-foia-public-liaison>.



should notify the requester of the availability of OGIS mediation or facilitation services as a non-exclusive alternative to litigation.<sup>13</sup>

The largely distinct dispute resolution and compliance promotion roles assigned by Congress to OGIS, the Attorney General, and agency Chief FOIA Officers, respectively, should be recognized collectively as a set of administrative mechanisms sharing the goal of avoiding unnecessary FOIA litigation. An important goal of both Congress and the Executive Branch should be to maximize the effect of these separate roles on FOIA compliance and dispute resolution.<sup>14</sup>

### **[DRAFT] RECOMMENDATION**

#### **Recommendations to the Office of Government Information Services**

1. The Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, should continue to provide its “Quick Hit” service and the informational resources on its website, as principal means of assisting the least sophisticated users of the Freedom of Information Act (FOIA). OGIS should, however, no longer offer even that level of service for Privacy Act inquiries, a function that consumes some resources and that is not a part of its statutory charge.

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<sup>13</sup> OGIS itself has recommended such notice in the following form:

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

*Available at* <https://ogis.archives.gov/about-ogis/working-with-ogis/Standard-OGIS-Language-for-Agencies.htm>. OIP also has encouraged agencies to follow this practice. *Available at* <http://www.justice.gov/oip/foiapost/2010foiapost21.htm>.

<sup>14</sup> For example, H.R. 1211, "FOIA Oversight and Implementation Act of 2013," reported by the Committee on Oversight and Government Reform, would establish a "Chief FOIA Officer Council." The Council would be co-chaired by the Director of OIP and the Director of OGIS. It would be "tasked with: developing recommendations to increase FOIA compliance and efficiency; sharing information on ideas, best practices, and innovative approaches to improve FOIA; identifying ways to better coordinate initiatives to increase transparency; and promoting the development and use of performance measures for agency FOIA compliance." H.R. Rep. No. 113-155, at 4 (2013).



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2. OGIS should normally provide requester-sought assistance beyond addressing Quick Hits only to requesters who have exhausted the agency appeal process with respect to any issue on which the requester seeks assistance, or for whom an applicable time limit has expired and the request for assistance concerns only steps that might advance more timely agency processing of the request.

3. OGIS should continue to provide both facilitation and mediation assistance to requesters, depending on the nature of the issues in dispute.

(a) For a substantive issue on which the requester has exhausted the agency appeal process, if the remaining issues in the request appear meritorious, OGIS assistance to the requester should focus on enabling the requester to engage the agency in a discussion that deters litigation, either through a change in the agency position or through the agency's providing fuller, more informative context for its position.

(b) For a delay issue, OGIS assistance should focus on helping the requester with practical steps that, with agency cooperation, might advance processing of the request.

4. If facilitation or mediation assistance provided by OGIS does not produce an agreed resolution, either the requester or the agency could ask OGIS for an advisory opinion. In its discretion, OGIS would decide whether to initiate the advisory opinion process. If OGIS decides to commence the process, it should notify the parties of that decision and ask each party to provide whatever information OGIS deems necessary to prepare the opinion. The notice should indicate that OGIS will terminate the advisory opinion process if either party fails to provide the necessary information. That notice would not preclude a requester from filing suit. However, if a suit is filed after notice, but before an opinion is issued, OGIS should terminate the advisory opinion process. At any point after notice that the advisory opinion process has begun, the parties could jointly request that OGIS terminate the process.

### **Recommendations to Agencies**

5. 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



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processing of a request when it appears to the agency that OGIS engagement may aid in the resolution of a request. In such cases, if the requester agrees to participate, OGIS should make its services available whether or not the appeals process has been exhausted or any applicable time limit has expired.

6. 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.

7. All agencies should take steps to maximize the effectiveness of their FOIA Public Liaisons in fulfilling the dispute resolution function the Act assigns to Public Liaisons. These steps at a minimum should ensure that Public Liaisons receive necessary training in dispute resolution skills and support from agency leadership, including from agency Chief FOIA Officers, for their statutorily designated function.