



PUBLIC COMMENT DRAFT (With Comments 4-7-2014)

Resolving FOIA Disputes Through Targeted ADR Strategies

Committee on Collaborative Governance – Draft Recommendation

The Freedom of Information Act (FOIA)¹ makes available to any person, upon request, any reasonably described agency record that is not exempt under nine specified categories. Congress has stated: “disclosure, not secrecy, is the dominant objective of the Act.”² FOIA 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,³ and it is widely 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.

Comment [A1]: Metcalfe believes that these figures represent calendar years.

¹ 5 U.S.C. § 552, as amended.

² Openness Promotes Effectiveness in our National [OPEN] Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552), § 2(4).

³ 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 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.



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.⁴

The OPEN Government Act of 2007 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.⁵ This legislation created in each agency the positions of a Chief FOIA Officer and FOIA Public Liaisons, and established 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 subsequent to the earlier Administrative Conference study.

The Role of the Office of Government Information Services

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 FOIA disputes between requesters and agencies through mediation services; 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

⁴ See ACUS Statement #12, 52 FR 23636 (June 24, 1987).

⁵ OPEN Government Act of 2007, *supra* note 2, 5 U.S.C. § 552(a)(6)(B)(ii).



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 reviewed 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.

Comment [A2]: Metcalfe believes these are calendar year figures.

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. It is vital that OGIS, a mechanism external to the agencies that is open to all issues, all requesters, and all agencies, have appropriate FOIA dispute resolution authority, expertise, and resources.

In practice, OGIS's caseload is determined by whoever happens to contact OGIS, 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 and should be continued. This is a low cost/high value function that has instant payoff for a broad constituency.

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 (DOJ) historically considered itself to have a role as “FOIA ombudsman,” the legislation that created OGIS clearly assigned a mediation role to OGIS and, in effect, a “FOIA ombudsman” responsibility.⁶ Underlying this policy decision was the fact that DOJ, including OIP, previously had both a FOIA compliance promotion function and a responsibility to represent agencies in lawsuits arising under FOIA. Under the OPEN Government Act of 2007, OGIS has statutory responsibility to promote compliance but possesses no agency representation responsibilities.

Comment [A3]: Metcalfe says that “historically” would be a more accurate word.

OGIS has implemented its ombudsman responsibility through facilitating communications between a requester and the agency, helping the parties address factors contributing to delay, 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. OGIS encourages requesters to complete the agency administrative appeal process prior to significant OGIS engagement, so as to give the agency an opportunity to reconsider its initial decision to deny a request. Whether or not a requester has exhausted the agency appeal process, if the unresolved issues appear meritorious, OGIS assistance should focus on enabling the requester and the agency to engage in a discussion that resolves those issues or deters litigation, either through reconsideration of the agency position or through the agency providing a fuller, more informative explanation for its position.

Comment [A4]: Metcalfe would insert the word “however” here.

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

⁶ However, the legislation (OPEN Government Act of 2007, *supra* note 2) does not use the term “FOIA ombudsman.”



advisory opinions if mediation has not resolved the dispute.⁷ However, OGIS has not yet chosen to exercise this authority.⁸ The statutory linkage of OGIS advisory opinions to its mediation function is not ideal because a requester's or an agency's anticipation of OGIS's taking a public position in a particular case in which OGIS seeks to serve as a neutral mediator may discourage parties from participating in mediation. It therefore is important for OGIS to distinguish between expressing views on systemic issues or identifying broad trends or patterns and issuing advisory opinions that address the facts of individual cases it has sought to mediate. In appropriate cases, issuance of an advisory opinion may forestall potential litigation, and OGIS should make the parties aware of this authority.⁹ 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. An OGIS advisory opinion might 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.¹⁰

Comment [A5]: Zieve & Morrison say ACUS should not suggest that courts may defer to OGIS advisory opinions, particularly in an individual case.

Role of FOIA Public Liaisons

The FOIA Public Liaison role in each agency 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

⁷ 5 U.S.C. § 552(h)(3).

⁸ 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. An OGIS decision whether or not to issue an advisory opinion would likely not be subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821 (1985). The statute expressly uses the phrase, "at the discretion of the Office."

⁹ 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>.

¹⁰ See *United States v. Mead Corp.*, 533 U.S. 218 (2001).



should be given adequate authority and support from agency leadership for carrying out their statutory dispute resolution function, including appropriate training.

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 recognizes that (a) once an agency has made a final determination on a request it is less likely than a requester to seek OGIS assistance, and (b) agency-sought OGIS engagement may provide one of the most fruitful settings in which to obtain an informal resolution.¹¹ 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, should notify the requester of the availability of OGIS mediation or facilitation services as a non-exclusive alternative to litigation.¹²

Congress and the Executive Branch should recognize the largely distinct dispute resolution and compliance promotion roles of OGIS, agency Chief FOIA Officers, and the Department of Justice, as a collective set of administrative mechanisms sharing the goal of avoiding unnecessary FOIA litigation.

¹¹ 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>.

¹² 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>.

Comment [A6]: CEG at al. suggest: Add a recommendation #10 to Congress to require agencies to cooperate with FOIA mediation. “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.”

Metcalf suggests: “In conjunction with its consideration of current legislative proposals to amend the FOIA, Congress should also consider amendment of subsection (h) of the Act in light of recent experience.”



RECOMMENDATION

Recommendations to the Office of Government Information Services (OGIS)

1. 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).

2. Requesters may appropriately seek assistance from OGIS at any stage of the FOIA process. However, because the opportunity for a FOIA appeal within the agency is an important component of the process, OGIS should continue to encourage requesters to complete that step prior to significant OGIS engagement.

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

(a) For delay issues, OGIS assistance should focus on practical steps that, with agency cooperation, might facilitate processing of the request.

(b) For substantive issues, whether or not the requester has exhausted the agency appeal process, if the unresolved issues in the request appear meritorious, OGIS assistance to the requester should focus on enabling the requester and the agency to engage in a discussion that deters-resolves the dispute without litigation, either through agency reconsideration of its position or through provision of a more informative explanation of the decision.

4. In appropriate situations, OGIS should make use of its statutory, discretionary authority to issue advisory opinions. In implementing this authority, OGIS should distinguish between issuance of an advisory opinion in connection with (a) a systemic issue or identification of a broad trend or pattern, and (b) an individual case, for which OGIS taking a position on an issue may undercut its ability to act as a neutral mediator. Factors such as potential breadth of application and frequency of occurrence of an issue, along with consideration of caseload

Comment [A7]: Metcalfe would insert at the end of this sentence: "whenever in its judgment that would be most appropriate."

Comment [A8]: Zieve & Morrison suggest encouraging OGIS to adopt timeframes for moving through the ADR process, to assure requesters that using ADR does not risk further delays.

Comment [A9]: Metcalfe suggests revising to say: "if the unresolved issues in the request appear to merit it, OGIS assistance should focus . . ."

Comment [A10]: Staff suggestions

Comment [A11]: Metcalfe suggests inserting the word "agency's" before "decision."

Comment [A12]: CEG et al. suggest: #4 should encourage OGIS to undertake a pilot project to explore advisory opinions addressing individual cases. Harter notes the successful use elsewhere of "Med-Arb," a procedure in which the mediator issues a non-binding opinion if the mediation doesn't resolve the dispute. However, Zieve & Morrison recommend deletion of any suggestion for use of advisory opinions on specific requests.

Comment [A13]: CEG et al. suggest replacing this sentence with: "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."



manageability, should be among the primary, though not the exclusive, determinants for OGIS in deciding whether or not to initiate the advisory opinion process.

Comment [A14]: Metcalfe would add at the end: "Toward that end, OGIS should also consider the existence of significant gaps currently in guidance provided by OIP."

5. To the extent that resources permit, OGIS should consider ways to acquire better data from both agencies and litigants-requesters on the kinds of issues that have led to FOIA litigation recurring or protracted FOIA disputes. Such efforts may include working with agencies and others to create a consistent database for information on litigated issues and contacting former litigants to gain a better understanding of their awareness and usage of OGIS or other sources of dispute resolution services.

Comment [A15]: Staff suggestions.

Comment [A16]: Metcalfe suggests "of" not "for."

Recommendations to Agencies

6. 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.

Comment [A17]: Zieve & Morrison suggest including a recommendation that agencies supply requesters with an index of withheld records at an early stage of ADR or during the administrative appeal process, to help requesters assess the value of litigation.

Comment [A18]: CEG et al. suggest: #6 and #7 should place greater emphasis on agencies' responsibility to resolve disputes. They suggest inserting at the beginning of #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."

7. All agencies, in any appeal determination letter in which a request is denied in whole or in part, should notify the requester of the availability of OGIS mediation or facilitation services as a non-exclusive alternative to litigation.

Comment [A19]: Metcalfe would replace "a" with "that."

Comment [A20]: CEG et al. suggest inserting at the end of #7: "Agency websites and FOIA regulations should call attention to the dispute resolution services available from OGIS."

8. All agencies should take steps to maximize the effectiveness of their FOIA Public Liaisons in fulfilling the dispute resolution function that the Act assigns to Public Liaisons. Agency websites, as well as initial response letters to FOIA requests, should call attention to the problem resolution assistance available from Public Liaisons. In addition, agency leadership should provide adequate authority and support to Public Liaisons and should ensure they receive necessary training, including in dispute resolution, and are made aware of the services offered by OGIS.

Comment [A21]: Zieve & Morrison suggest expanding this language to apply not only to the denial letter after an appeal, but also to the initial denial letter. This would be more consistent with the "at any stage" language of #2. Also, augment #7 to state that the denial letter should direct the requester to an OGIS website page that explains ADR and the OGIS ADR process, and recommend that OGIS make this information easy to find.

Comment [A22]: Metcalfe.

Comment [A23]: Metcalfe would replace "and should ensure" with "by ensuring."

9. Upon request by the Director of OGIS, all agencies should cooperate fully with efforts to mediate individual FOIA disputes. Similarly, agencies should cooperate with efforts by OGIS to obtain consistent and comparable data relating to FOIA litigation, to the extent permitted by law.

Comment [A24]: Metcalfe: "with OGIS efforts to mediate or otherwise facilitate the resolution of"