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April 4, 2014

Committee on Collaborative Governance
Administrative Conference of the United States
1120 20th Street NW
Suite 706 South
Washington, DC 20036

Re: Reducing FOIA Litigation Through Targeted ADR Strategies

Dear Chairman Verkuil and Members of the Committee:

We are writing to comment on the March 14, 2014, draft recommendation on “Reducing FOIA Disputes Through Targeted ADR Strategies.” Both of us have both been FOIA requesters and FOIA litigators; and we serve as a public member and senior fellow, respectively, of the Conference.

The Committee’s project looked only at use of alternate dispute resolution in FOIA matters. Likewise, we limit our comments to that topic, although the issue of how to improve FOIA processing and FOIA compliance are obviously much broader and deserving of attention at some point.

We have the following suggestions:

(1) Recommendation 2 states that “[r]equesters may appropriately seek assistance from OGIS at any stage of the FOIA process.” Consistent with that statement, Recommendation 7, which recommends that agencies advise requesters about the availability of OGIS ADR when issuing a denial letter *after appeal*, should be expanded to include the initial, pre-appeal denial letter as well.

(2) By the time a FOIA request is denied, appealed, and denied again, months and often years have passed. With this in mind, the recommendation that each agency mention the possibility of OGIS ADR in its denial letter raises a concern about pushing requesters into a process that will lead to further lengthy delays. Recommendation 7 should therefore be augmented to state that the denial letter disclose that the optional ADR process has no deadlines. The letter should also direct the requester to a page on OGIS’s website that explains what the OGIS ADR process is and how it works.

(3) In this regard, although OGIS’s website prominently says that it may be able to assist in resolving disputes and how to ask for assistance, we did not see on OGIS’s website a page that explains the ADR process. ACUS should add as a recommendation to OGIS that it create such a

page or, if one exists, link to it on one of the top paragraphs on the home page so that it is easy to find.

(4) OGIS should be encouraged to adopt timeframes for moving through the ADR process. Although the report shows that OGIS has only a small backlog, requesters would likely be more interested in adding a step in the FOIA process if they knew that they were not risking extended delays.

(5) The recommendation that OGIS might issue advisory opinions on specific requests brought to its attention should be deleted. It would undermine the ability of OGIS to serve as a mediator if parties thought that it might during that process decide publicly to take a side.

Further, contrary to the statement in the preamble (at page 5), ACUS should not suggest that courts might defer to OGIS advisory opinions, particularly not to opinions about the proper outcome in a particular case. Given that FOIA requires courts to apply a de novo standard of review, 5 U.S.C. § 552(a)(4)(B)—and putting aside that they instead tend to give a tremendous amount of deference to the agency, as the ACUS report acknowledges (at page 7)—the suggestion that courts might properly defer to the view of OGIS runs contrary to the statute. In addition, notwithstanding the citation to *United States v. Mead Corp.*, 533 U.S. 218 (2001), the basis for deference seems dubious. Advisory opinions on agency best practices could be useful, but not on specific cases.

(6) A requester may sometimes think that records contain important or interesting information, when in fact they do not, or that material is not exempt, when it is. With this point in mind, agencies should consider ways in which they can use limited disclosures to enable requesters knowledgeably to assess the value of litigation. For example, a very useful step to avoid litigation would be for the agency to supply to the requester an index of withheld records or portions of records (along the lines of a privilege log or Vaughn index) at an early stage in the ADR process or, even better, during the administrative appeal process. An index would be invaluable in enabling the requester to narrow the scope of potential litigation and in some cases to forego it altogether. We suggest that the draft be supplemented to include such a recommendation.

Thank you for your work on this issue and for considering our comments.

Sincerely,

/s/
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