



OFFICE OF GOVERNMENT INFORMATION SERVICES

ISSUE ASSESSMENT: AGENCY COMPLIANCE WITH REQUIRED DISPUTE RESOLUTION NOTICES

AGENCIES PROVIDING REQUIRED NOTICES OF DISPUTE RESOLUTION SERVICES; CHANGES IN CORRESPONDENCE CAN IMPROVE REQUESTER UNDERSTANDING

A Message from the Director

The Freedom of Information Act (FOIA) mandates that the Office of Government and Information Services (OGIS) “shall ... review policies and procedures of administrative agencies ... review compliance ... by administrative agencies; and identify procedures and methods for improving compliance under this section.” *See* 5 U.S.C. § 552(h)(2). OGIS’s compliance program includes reviewing and commenting on agency FOIA regulations; providing targeted feedback to agencies through our agency FOIA compliance assessment program; reviewing and suggesting improvements to agency FOIA websites and template correspondence; and working with agencies on policies and procedures that appear to be inconsistent with FOIA law or policies.

The OGIS Compliance Team also reviews FOIA issues and trends observed through providing dispute resolution to requesters and agencies. This report assesses whether agencies are appropriately notifying requesters of dispute resolution services offered by agency FOIA Public Liaisons and OGIS. Our observations and recommendations are based on agency letters to requesters submitted to OGIS as part of our dispute resolution program. We hope that this report and our recommendations will assist agencies in improving communication with requesters.

ALINA M. SEMO
Director

Executive Summary

What OGIS Found

The FOIA Improvement Act of 2016 requires that agencies alert requesters to the availability of dispute resolution services when the agency makes an adverse determination during initial processing; and when the agency needs more than 10 additional days beyond the 20-day statutory response time to process in the instance of “unusual circumstances.” In addition, the U.S. Department of Justice’s Office of Information Policy (OIP) has strongly encouraged agencies to notify requesters of dispute resolution services offered by the Office of Government Information Services (OGIS) as a non-exclusive alternative to litigation as part of the agency's final response to administrative appeals.¹

The OGIS Compliance Team reviewed a sample of agency letters submitted to OGIS through its dispute resolution program during the first three months of 2018 (January – March 2018) to determine if agencies are notifying requesters of dispute resolution services. OGIS also compared the content of the letters to model language provided by OGIS² and OIP.³ OGIS also evaluated whether additional information in the letters could improve requester understanding of the FOIA process and promote the efficient administration of FOIA.

OGIS’s primary findings are:

- agencies are largely notifying requesters of dispute resolution services offered by agency FOIA Public Liaisons and OGIS;
- agencies often include limited contact information for the agency FOIA Public Liaison; and
- additional information in agency response letters would improve requester understanding of the process.

What OGIS Recommends

OGIS recommends that agencies:

- follow the suggested language and format of the OGIS and OIP model language;
- review OGIS’s advisory opinion on communication issued in conjunction with this report, and update their correspondence accordingly; and
- consider adopting the additional best practices highlighted in this report.

¹ See <https://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-notifying-requesters-mediation-services-offered-ogis>.

² See <https://update.archives.gov/ogis/mediation-program/model-letter-language>.

³ See https://www.justice.gov/oip/oip-guidance/implementation_checklist_and_sample_language_for_new_requirements_for_FOIA_response_letters.

Introduction

The Freedom of Information Act (FOIA) directs the Office of Government Information Services (OGIS) to review agency FOIA policies, procedures and compliance, and identify procedures and methods for improving compliance. *See* 5 U.S.C. § 552(h)(2). OGIS compliance issue assessments are independent and systematic evaluations of issues and trends observed through our activities, including providing dispute resolution to requesters and agencies. The issue assessments 1) provide factual and analytical information; 2) review compliance with the law, regulation, and policy; and 3) share best practices. The assessments also include recommendations for improvement.

What We Reviewed

The OGIS Compliance Team reviewed agency correspondence to requesters submitted to OGIS as part of a request for dispute resolution services during the first three months of 2018 (January 1, 2018 to March 31, 2018). The Compliance Team gathered this correspondence by reviewing the case files for all cases classified as “Complex” during this time period. (Complex cases are generally those that go beyond answering simple questions about the FOIA process or providing the status of delayed requests.) The sample consisted of 57 cases.

The Compliance Team reviewed 81 agency response letters from the sample. The letters originated from 18 departments and independent agencies, including eight of the 15 Cabinet-level departments, 17 component offices of departments and some Offices of Inspectors General. The types of reviewed letters include: initial responses; appeal responses; denial of requests for expedited processing; notification of “unusual circumstances;” notification of fee category; and a response to a request for dispute resolution services from an agency FOIA Public Liaison. We removed six letters from our sample because they were sent before or on the day the FOIA Improvement Act of 2016 went into effect.

Background

The FOIA Improvement Act of 2016 requires that agencies alert requesters to dispute resolution services at two distinct points in the FOIA process. In the case of an adverse determination, agencies must include information about dispute resolution services provided by the agency FOIA Public Liaison and OGIS.⁴ If an agency requires more than 10 additional days beyond the 20-day statutory response time to process a request in the instance of “unusual circumstances,” agencies must make the FOIA Public Liaison available and inform the requester of the right to seek dispute resolution services from OGIS.⁵ In addition, the U.S. Department of Justice’s Office of Information Policy (OIP) has strongly encouraged agencies to notify

⁴ *See* 5 U.S.C. § 552 (a)(6)(A)(i).

⁵ *See* 5 U.S.C. § 552 (a)(6)(B)(ii).

requesters of OGIS's dispute resolution services as a non-exclusive alternative to litigation as part of the agency's final response on administrative appeal.⁶

To assist agencies in meeting their statutory responsibility to alert requesters of dispute resolution services, OGIS⁷ and OIP⁸ have posted model language on their websites. The model language reflects feedback from agency personnel shared during the July 27, 2017 meeting of the Chief FOIA Officers Council.⁹ The model language recommends that agencies provide a mailing address, telephone number, email address, and fax number (if applicable) for agency FOIA Public Liaisons, along with comparable contact information for OGIS. The model language also underscores the importance of providing contact information for the agency FOIA Public Liaison and OGIS in two distinct paragraphs.

In the immediate aftermath of enactment of the FOIA Improvement Act of 2016, OGIS experienced a dramatic and sustained increase in demand for our services.¹⁰ In reviewing materials submitted to us as part of the dispute resolution process, we noted significant requester confusion regarding the appropriate next steps in the FOIA process, including whether to contact OGIS or the agency. This confusion contributed to requesters sending to OGIS a significant amount of material intended for the agency and an increase in calls to OGIS. We also noted that some requesters believed that requesting dispute resolution services stops the 90-day clock for submitting an administrative appeal. OGIS addresses these issues in an advisory opinion accompanying this report.

Finding 1: Agencies are largely notifying requesters of dispute resolution services offered by agency FOIA Public Liaisons and OGIS

With the exception of a small number of letters, agencies are notifying requesters of dispute resolution services provided by agency FOIA Public Liaisons as required by the statute and recommended by OIP. We recommend that agencies use the model language provided by OGIS and OIP to ensure that they comply with the statute and follow OIP guidance.

Almost all of the letters reviewed by OGIS notified requesters of dispute resolution services provided by agency FOIA Public Liaisons and OGIS as required by the statute. In addition to directing requesters to these services, some agency correspondence also directed the requester to the FOIA processor to discuss the request's processing. We observed a few letters that provided requesters with contact information for the FOIA processor, but did not provide any contact information for the FOIA Public Liaison. Although

⁶ See <https://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-notifying-requesters-mediation-services-offered-ogis>.

⁷ See <https://update.archives.gov/ogis/mediation-program/model-letter-language>.

⁸ See https://www.justice.gov/oip/oip-guidance/implementation_checklist_and_sample_language_for_new_requirements_for_FOIA_response_letters.

⁹ See <https://www.justice.gov/oip/blog/chief-foia-officers-council-meets-oip-updates-sample-language>.

¹⁰ See <https://update.archives.gov/files/ogis-final-fiscal-year-2017-annual-report.pdf>.

not required, we also observed agencies providing requesters with contact information for agency FOIA Public Liaisons in responses to appeals.

Most of the appeal determination letters reviewed by OGIS informed requesters of the availability of OGIS mediation services as a non-exclusive alternative to litigation. OGIS observed that some agencies did not notify requesters of OGIS's dispute resolution services in the final appeal determination when the appeal was remanded for further processing. OGIS also noted that not all agency correspondence informed requesters that OGIS's mediation services are a non-exclusive alternative to litigation.

We recommend that agencies use the model language suggested by OIP and OGIS to ensure compliance with statutory notification requirements. Using the model language also ensures the agency is following OIP guidance.

Finding 2: Agencies often include limited contact information for the agency FOIA Public Liaison

Agency letters frequently did not provide requesters with comparable contact information for agency FOIA Public Liaisons and OGIS; some letters provided all of the contact information for the FOIA Public Liaison and OGIS in one paragraph. The result is that OGIS receives materials and inquiries intended for the agency. Using the model language provided by OGIS and OIP will ensure materials and inquiries are appropriately directed to the correct office.

The model language provided by OGIS and OIP suggests that agencies provide comparable contact information for the agency FOIA Public Liaison and OGIS. OGIS's and OIP's model language also encourages agencies to provide FOIA Public Liaison contact information in a paragraph format that is clearly separated and distinct from OGIS's contact information.

Very few agency response letters reviewed by OGIS included comparable contact information for the agency FOIA Public Liaison and OGIS. Most of the letters provided at least a telephone number for the FOIA Public Liaison; approximately 30 percent of the letters we reviewed included only a telephone number to contact either the agency FOIA Public Liaison or the processor responsible for the response. And approximately 30 percent of the letters we reviewed included only an email address requesters could use to contact the agency.

Most of the letters we reviewed included multiple forms of contact information for OGIS in the body of the letter, including our office's address, e-mail address, standard and toll-free telephone numbers, and fax number. One letter included OGIS's contact information as a footnote; another agency directed requesters to an outdated URL to locate OGIS contact information.¹¹

Almost 40 percent of the letters we reviewed included contact information for the agency FOIA Public Liaison and OGIS in the same paragraph. Twenty percent of the reviewed letters used the two-paragraph format suggested by the OGIS and OIP model language. Letters from three Cabinet-level departments and four independent agencies used the suggested format from the model language.

¹¹ See <https://foia.blogs.archives.gov/2017/05/23/help-us-keep-improving-our-website/>.

The model language provided by OGIS and OIP is written and formatted to ensure requesters are able to easily identify possible next steps, including ways to contact the agency and OGIS. When agency correspondence includes only limited contact information for the agency and/or the information is mixed in with contact information from OGIS, we have observed that requesters often mistakenly send material to OGIS, including FOIA appeals, identity certifications and fee payments. Insufficient contact information for agencies also results in an increased amount of calls to OGIS from requesters attempting to contact the agency. Redirecting material and responding to calls – both intended for agencies – is not an efficient use of OGIS resources, increases requester frustration with the FOIA process, and makes the process less efficient for all.

Following the suggested content and format for contact information in the model language provided by OGIS and OIP will help requesters better understand how to contact the appropriate office, and promotes the efficient administration of FOIA.

Finding 3: Additional information in agency response letters would improve requester understanding of the process

Agency response letters generally do not adequately describe the role of the FOIA Public Liaison or explain that dispute resolution services do not stop or toll the 90 days requesters have to administratively appeal initial decisions. Some of the reviewed letters included useful additional information about the FOIA process. Correspondence that is not clear and concise leads to requester confusion and frustration with agencies and increases the possibility of a dispute. We recommend that agencies review OGIS's companion advisory opinion on communication and update their correspondence accordingly.

The letters we reviewed described the role of the agency FOIA Public Liaison in a variety of ways. Generally, the language of the letters indicated that requesters could contact the agency FOIA Public Liaison to discuss the agency's action on the request. Some of the letters described the agency FOIA Public Liaison as offering dispute resolution services; some provided contact information for the agency FOIA Public Liaison without any explanation of the FOIA Public Liaison's role.

Two of the reviewed letters explained that the use of dispute resolution services does not suspend the 90 days requesters are given to file an administrative appeal. One of the letters addressed only the use of dispute resolution services from the agency FOIA Public Liaison without addressing OGIS; the other letter clearly explained that the use of dispute resolution services from the agency FOIA Public Liaison and/or OGIS does not stop the 90-day clock to submit administrative appeals. Including this information in response letters ensures requesters are not confused about the appeal deadline and helps protect administrative rights.

OGIS also noted some best practices that help requesters better understand the process, including:

- the Internal Revenue Service provides requesters with a telephone number to contact regarding tax assistance;

- the Department of Health and Human Services' Centers for Disease Control and Prevention (CDC) provides requesters with the appeal deadline in date format rather than asking requesters to calculate the deadline themselves;
- CDC also proactively provides a requester with an estimated date of completion in a letter informing the requester of their placement in a particular fee category; and
- Several agencies, including the Department of Homeland Security's U.S. Citizenship and Immigration Services, the Department of the Treasury, and the National Archives and Records Administration, included language suggesting that requesters contact the agency FOIA Public Liaison to try to resolve the dispute before contacting OGIS. Especially early in the process, the agency FOIA Public Liaison is well-placed and uniquely positioned to assist requesters with a particular issue or answer specific questions about the agency's actions on a request.¹²

Additional information in agency response letters, including a clear description of the role of the agency FOIA Public Liaison and an explanation that dispute resolution services do not stop the 90-day clock to file an administrative appeal, would improve requester understanding of the process. Through its dispute resolution function, OGIS has noted that requester confusion about the process increases the possibility of a dispute between the agency and the requester. We recommend that agencies review OGIS's advisory opinion on communication and update their correspondence accordingly, and that agencies consider adopting other best practices noted in this report.

¹² See <https://update.archives.gov/files/updated-ogis-flyer.pdf>.