

April 11, 2017

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

8601 ADELPHI ROAD
OGIS
COLLEGE PARK, MD
20740-6001

web: www.ogis.archives.gov
e-mail: ogis@nara.gov
phone: 202-741-5770
toll-free: 1-877-684-6448
fax: 202-741-5769

The Honorable Charles Grassley
Chairman
Senate Judiciary Committee
U.S. Senate
Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable John Cornyn
Chairman
Subcommittee on Border and
Immigration
Senate Judiciary Committee
U.S. Senate
Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Judiciary Committee
U.S. Senate
Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Former Ranking Member
Senate Judiciary Committee
U.S. Senate
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley, Ranking Member Feinstein, Chairman Cornyn, and Former Ranking Member Leahy:

This responds to your March 15, 2017 letter regarding implementation of the Freedom of Information Improvement Act of 2016 and the role of the Office of Government Information Service (OGIS), which is part of the National Archives and Records Administration (NARA). Thank you for all your efforts to strengthen FOIA and your continued oversight of these critical issues.

The FOIA Improvement Act of 2016 significantly expanded OGIS's role in providing dispute resolution throughout the FOIA process and strengthened our mandate to assess and identify methods to improve compliance. We appreciate having the opportunity to respond to your questions about the effect of the law on our work, and to tell you more about our recommendations to improve the administration of FOIA, to improve customer service, and to ensure that requesters and agencies are effectively communicating early in the process.

Below are responses to each of the questions you raised in your March 15, 2017 letter:



1. Please explain any effect that the Office of Government Information Services (OGIS) has seen in the use of its services by requesters and agencies since the enactment of the FOIA Improvement Act of 2016. Has the volume or nature of requests for OGIS's services changed since the bill's enactment? If so, how?

The enactment of the FOIA Improvement Act of 2016 immediately and sharply increased demand for OGIS's dispute resolution services, both for mediation services and ombudsman services. During the fourth quarter of Fiscal Year (FY) 2016, we received 787 requests for assistance—a 142% increase from the same period in FY 2015, when we received 325 requests for assistance.

We have received approximately 2208 cases so far in FY 2017 (as of April 3, 2017) already surpassing FY 2016's caseload of 1,755 cases, and are on track to nearly quadruple our caseload for the first full fiscal year after enactment of the FOIA Improvement Act of 2016. Approximately 78% of our FY 2017 cases, which involve multiple issues, have been inquiries for ombudsman services. Such services typically involve an OGIS facilitator or other employee explaining to customers about the FOIA process and/or OGIS's role in that process, as well as its dispute resolution services.

In addition to the significant increase in volume, the nature of requests for OGIS services changed following the 2016 FOIA amendments. Most agencies are now alerting requesters about OGIS's services at an earlier stage in the FOIA process (following resolution of an initial request or in those instances where unusual circumstances exist) rather than only at the conclusion of the agency's adjudication of the administrative appeal. As a result, requesters may contact OGIS instead of filing an appeal, or contact OGIS and the agency FOIA Public Liaison and file an appeal, or any combination thereof. This has increased the need for OGIS to carefully coordinate our dispute resolution services with agencies at the outset of any new OGIS case. In particular, it has required OGIS to communicate and coordinate with the agency FOIA Public Liaisons regarding requesters' concerns, while simultaneously encouraging requesters to not forfeit their administrative appeal rights. We have also observed that requesters are often confused by agency letters that provide a range of these options, and they appear to not understand our role vis-à-vis the role of agency FOIA Public Liaisons.

OGIS staff has responded to the increase in requests for assistance by:

- establishing a process to prioritize time-sensitive requests;
- adding an additional processing queue, by creating a "complex-mid" queue which joins our "complex" and "simple" queues; and
- reworking our acknowledgment processes by issuing an electronic "auto-response" for email requests, but continuing to issue a formal acknowledgment letter for complex and complex-mid cases.

Despite the dramatic increase in the number of cases OGIS is now receiving, our staff size has shrunk since the enactment of the FOIA Improvement Act of 2016 due to employee attrition. The federal government hiring freeze has prevented OGIS from backfilling two vacant positions and hiring an additional facilitator. The rapid increase in demand for our services has required OGIS to take an “all-hands-on-deck” approach with regard to working dispute resolution cases. As of February 2017, our compliance team, which ceased to work on dispute resolution cases after 2015, resumed working cases in addition to their compliance work in an effort to help meet this increased customer demand.

2. The FOIA Improvement Act of 2016 increased the independence of OGIS and strengthened the Director’s ability to provide Congress with “recommendations” and other materials. Accordingly, what specific recommendations do you have for Congress at this time such that we can assist in ensuring compliance across the government with both the letter and the spirit of FOIA?

Our FY 2016 Annual Report, published in March 2017, includes a regulatory recommendation regarding FOIA fees made by the 2014-2016 FOIA Federal Advisory Committee. At the completion of the Committee’s work, its members unanimously recommended to update the Office of Management and Budget (OMB) 1987 FOIA fee guidelines. Although our FY 2016 report does not contain any specific recommendations to either the Congress or the President, OGIS supports that recommendation.

Last year, the Archivist renewed the FOIA Advisory Committee’s charter for an additional two-year term, appointed new Committee members, and renewed the appointments of certain existing Committee members. The 2016-2018 term of the Committee has met three times – July 21, 2016, October 25, 2016, and January 26, 2017, with five additional meetings scheduled in calendar years 2017 and 2018.

During its first two meetings, the 2016-2018 Committee members identified several major challenges that agency FOIA programs will face in light of an ever-increasing volume of electronic records, with the aim of charting a course for how FOIA should operate in the future. During its term, the 2016-2018 FOIA Advisory Committee has formed three distinct subcommittees each of which will address, respectively:

- 1) agency searches for records;
- 2) proactive disclosure and accessibility; and
- 3) efficiencies and resources.

OGIS will continue to track closely the issues considered by the 2016-2018 FOIA Advisory Committee, and will consider whether to make its own legislative and regulatory recommendations to improve the administration of FOIA to Congress as appropriate, in accordance with 5 U.S.C. § 552(h)(4)(A)(iii).

The OGIS compliance team is also working to gather information on government-wide challenges to the implementation of FOIA and identify procedures and methods for improving compliance. In FY 2016, OGIS worked with the office of the Chief Records Officer at NARA to include questions about FOIA compliance in the agency Records Management Self-Assessment surveys. OGIS will use this information to pinpoint potential issues concerning FOIA compliance across the government that merit further review.

Finally, as co-chair of the Chief FOIA Officers Council, 5 U.S.C. § 552(k), it is my goal to work closely and collaboratively with the Deputy Director for Management at OMB, the Director of the Office of Information Policy (OIP) at the Department of Justice (DOJ), and Chief FOIA Officers to leverage the Council to explore ways to improve FOIA customer service across government, improve communication between agencies and requesters, promote the efficient use of agency FOIA resources, and promote greater understanding of the FOIA process, including, importantly, the role that both OGIS and FOIA Public Liaisons play in that process.

3. What specific actions has OGIS taken or does it intend to take to encourage a more customer-friendly, collaborative FOIA response process? Has OGIS identified best practices that encourage communication and dialogue early in the FOIA request process between requesters and processors, and if so, what is OGIS doing to ensure that these practices are encouraged government-wide?

OGIS has a four-pronged approach to encouraging a customer-friendly, collaborative FOIA response process: dispute resolution training; dispute resolution services; ombudsman services; and compliance.

Within a year of opening its doors, OGIS identified a need to provide training on dispute resolution basics to help agencies resolve FOIA disputes at their earliest stages. In March 2010, we began offering dispute resolution training to help agency FOIA professionals fulfill this responsibility. This training teaches practical communication skills that FOIA professionals can use to understand and resolve disputes. From FY 2011 through the end of FY 2016, OGIS has trained more than 750 FOIA professionals from nearly 60 agencies. Seats for these sessions are regularly filled rapidly following the announcement for registration, and participants have consistently given our facilitators the highest ratings. We have also provided agency-specific training on dispute resolution skills by request. During FY 2016, for example, OGIS provided training to National Labor Relations Board FOIA employees and led an effective communication skills session for Department of Labor FOIA specialists.

As the FOIA Ombudsman, OGIS regularly engages with our stakeholders, both inside and outside of federal agencies, to better understand their issues and promote understanding. Through our dispute resolution services, we often help to ensure that the process is not slowed down by miscommunication or misunderstanding.

Our compliance program also works to identify and promote communications best practices both in our agency-specific and government-wide assessments. For example, in FY 2016, OGIS undertook an extensive study of agencies' use of "still interested" letters to administratively close FOIA requests. While all of the FOIA programs surveyed as part of the assessment reported following updated guidance from DOJ OIP to limit the use of these letters, OGIS made a number of recommendations to ensure that the policy is followed, including that:

- agencies write procedures for the use of "still interested" letters in agency Standard Operating Procedures and ensure that FOIA managers are aware of how processors use these letters; and
- OGIS assess the use of "still interested" letters in agency-specific assessments and bring misuse of these letters to the attention of agencies.

Our agency-specific reports have also included several recommendations to improve communications between requesters and agencies. As we have noted, effectively communicating with requesters is a low-cost way for an agency to improve its FOIA program's performance and potentially save resources. Some of the recommendations OGIS has made include:

- providing estimated dates of completion based on the agency's annual FOIA data;
- communicating proactively with requesters to alert them of the status of their requests; and
- providing explanations, in plain language, of:
 - agency FOIA processes (such as for charging fees or showing an overriding public interest);
 - information about FOIA exemptions, what they mean, and why certain material is covered by an exemption; and
 - information about the agency's search for records

We appreciate the continued support you and your staffs have extended to OGIS, and are happy to answer any additional questions you may have.

Please do not hesitate to contact me if you have any questions at 202-741-5771 or at alina.semo@nara.gov.

Sincerely,



ALINA M. SEMO
Director

cc: John Hamilton, Director, Congressional Affairs, NARA