

Office of Government Information Services

Building a Better FOIA Process

2016 Report for FY 2015



2015

Office of Government
Information Services

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Cover image: Detail of the National Archives and Records Administration (NARA) building in Washington, DC; photo by Jeffrey Reed of NARA.



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Message from the FOIA Ombudsman

The 2015 reporting cycle was a transition period between directors; however, the office continued to fulfill its statutory role of offering mediation services, and implementing its agency FOIA compliance program.¹ This year, we continued to carry out our role as an agent of change while maintaining a high level of quality for our established programs. The [Office of Government Information Services \(OGIS\)](#) mediation program is poised to grow and provide even better service to our customers—requesters and agencies. We also have significantly invested in developing a compliance program that can identify and help resolve programmatic issues in agency FOIA programs. I am honored to serve in the [National Archives and Records Administration's \(NARA\)](#) Office of Government Information Services under Archivist of the United States David S. Ferriero's leadership, and I am proud of the many dedicated public servants who are working tirelessly to improve the administration of FOIA.

OGIS's role as the FOIA Ombudsman encompasses a full range of activities including daily interaction with our customers, strategic outreach, and our communications and training programs. Over

the past year we have engaged our stakeholders and promoted our office's services in a number of ways, including presenting at FOIA training sessions and sitting down with civil society organizations to discuss issues. We also have increased our presence on the web and launched our presence on social media. Our Dispute Resolution Skills training program for agency FOIA professionals has been a key activity over the last several years, and

this report profiles that program and its impact. Since we introduced the training program six years ago, we have trained more than 600 people from 58 departments and agencies, including all of the Cabinet-level agencies.

OGIS's mediation program remains a strong element of the value we add as

the Federal FOIA Ombudsman's Office. Our Mediation Team assisted more than 1,200 customers with FOIA requests in fiscal year 2015, with issues ranging from delays to fees to withholdings. For instance, in two separate cases, we assisted requesters whose administrative appeals were considered untimely by the agency. In both cases, delivery was delayed because of an issue outside the requester's control and the agency's knowledge. Our involvement



¹ The Freedom of Information Act, 5 U.S.C. § 552(h).

allowed each party to understand the situation better, resulting in the agency accepting the appeals in both cases.

We launched our compliance program and reviewed FOIA programs within two agencies, NARA and the Department of Homeland Security.² While each program we assess is unique in the records it processes, through our compliance reviews and other activities we are observing common themes in the areas of management, technology, and communication. For example, we have observed that lack of continuity in staffing greatly affects FOIA processing and that without resources, agencies make small process adjustments. While many agencies are embracing President Obama's call to "harness new technologies to put information about their operations and decisions online and readily available to the public," some agencies find it difficult to take full advantage of those opportunities.³ We also have observed that communicating regularly and in plain language with requesters is crucial in helping them understand the process.

Last year, our annual report highlighted OGIS's launch of our compliance program and the creation of the [FOIA Advisory Committee](#), for which OGIS provides leadership and administrative support. This year's report discusses the growth of the compliance program and the important work of the FOIA Advisory Committee. In addition, this annual report provides a glimpse of how we are increasing our capac-

ity through staff development. Undergirding these new initiatives is our continued focus on assisting individuals and agencies through our mediation program.

As I embark in this new role as the Director of OGIS, I believe more than ever in the Ombudsman's charge of assisting individuals and agencies with problems experienced in the FOIA process, both through individual case assistance and programmatic recommendations. However, we cannot achieve this mandate alone. Every day the Ombudsman staff works with dedicated FOIA Public Liaisons and FOIA Officers to provide high-quality ombuds services for requesters who may not have had a great experience with the process. I very much appreciate our FOIA colleagues for their collaboration in this important work.

I want to thank Archivist of the United States David S. Ferriero and Deputy Archivist of the United States Debra Steidel Wall for their unwavering support for OGIS's mission, and Director of Agency Services Jay Trainer for his partnership in pursuing our shared goal of making access happen and connecting with our customers. I am also grateful for the entire team in the Ombudsman's office who fulfill our mission by helping individuals navigate the FOIA process and without whom publication of this in-depth report would not be possible.

Dr. James V.M.L. Holzer
Director

² OGIS Agency Assessments, accessed September 18, 2015, <https://ogis.archives.gov/about-ogis/agency-foia-compliance-review.htm>.

³ "Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government," January 21, 2009, President Barack Obama, accessed November 16, 2015, https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.



Authority

- [Administrative Dispute Resolution Act of 1996 \(ADRA\)](#), 5 U.S.C. §§ 571-84
- [Administrative Procedures Act](#), 5 U.S.C. §§ 551-559
- [Federal Advisory Committee Act \(FACA\)](#), 5 U.S.C. App. §§ 1-16
- [Freedom of Information Act \(FOIA\)](#), 5 U.S.C. § 552
- [Privacy Act of 1974](#), 5 U.S.C. § 552(a)

The Office of Government Information Services is a component of the National Archives and Records Administration.

Mission

As the Federal FOIA Ombudsman, we drive improvements to the FOIA process by resolving disputes, reviewing agency compliance with the FOIA, and making recommendations.

Functions

- Educate stakeholders about the services of the Ombudsman.
- Develop implementing OGIS regulations.
- Develop and evaluate OGIS management reporting and other administrative systems to identify risks and improve accuracy of information.
- Publicize and develop proactive strategies to market ombudsman services to the public, media, and open government groups.
- Hold presentations, briefings, training sessions, and conferences for all customers to provide information about ombudsman programs and to discuss relevant and significant issues.

- Conduct on-site and document reviews to monitor agency compliance with the FOIA.
- Analyze policies, operating programs, and procedures to determine if existing or proposed programs accomplish organizational goals and objectives.
- Work to explore possible changes in policy, procedures, or processes in response to trend analysis results.
- Collect and analyze relevant statistical data and, along with other information, report them annually to the President and Congress.
- Serve as spokesperson to Congress, the media, civil society, and the public.
- Recommend policy changes to the President.
- Chair and provide administrative support to the FOIA Federal Advisory Committee.
- Receive and take action on FOIA-related complaints.
- Track inquiries, complaints, and disputes to determine patterns and systemic issues that may need to be modified.
- Maintain liaison relationships with agencies.

Goals

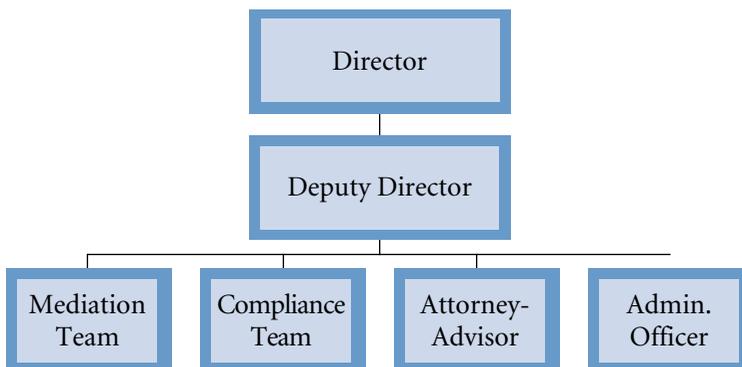
- Provide accessible, consistent, and responsive quality ombudsman services to all.
- Provide mediation services to resolve disputes between FOIA requesters and Federal agencies.
- Establish a robust oversight program to review Federal agencies' FOIA policies, procedures and compliance.
- Develop, implement, and manage OGIS programs to ensure OGIS fulfills its mission.
- Increase OGIS's impact through outreach, education, and training.
- Enhance OGIS staff expertise through targeted professional development.

OGIS Overview

The OPEN Government Act of 2007⁴ established the Office of Government Information Services (OGIS) in the National Archives and Records Administration (NARA). Under the Freedom of Information Act (FOIA), we review FOIA compliance government-wide, help to resolve disputes between requesters and agencies, and make recommendations to improve FOIA.

OGIS is an office under NARA's Office of Agency Services, which reports to the agency's Chief Operating Officer. The mission of Agency Services is to lead NARA's efforts in servicing the records management needs of Federal agencies and to represent the public's interest in the accountability and transparency of these records. OGIS is headquartered in Washington, DC, and is one of the five program offices under Agency Services.

OGIS's Director reports to NARA's Executive for Agency Services. The Director is aided by a deputy director, an attorney advisor, six management and program analysts, and a staff assistant. The office currently has 11 full-time employees,⁵ and the six management and program analysts are designated members of either the Compliance or Mediation teams.



⁴ Open Government Act of 2007, Public Law 110-81, 121 *U.S. Statutes at Large* 735 (2007).

⁵ One staff member is on a long-term detail to the Office of Science and Technology Policy at the White House.

Summary of FY 2015

In the 2015 reporting period—October 1, 2014 to September 30, 2015—the Ombudsman received nearly 1,200 requests for assistance, an increase of over 25 percent from the 2014 reporting period. Our customers come from across the country and around the globe—since 2009, we have assisted customers in all 50 states and 22 foreign countries.

OGIS has helped customers in all 50 states



and 22 foreign countries



In the 2015 reporting period, OGIS's requests for assistance divided into the following categories:

- General/process issues 39 percent
- Denied requests 37 percent
- Delayed requests 21 percent
- Fees 3 percent

We completed work on the cases closed in FY 2015 in an average of 42 working days.

During the 2015 reporting period, we completed [compliance reports](#) on two NARA FOIA programs and two Department of Homeland Security (DHS) FOIA programs. At NARA, we reviewed the Office of General Counsel, which processes requests for access to operational records created or received in carrying out NARA's mission and responsibilities. The Office of General Counsel also administers and processes all FOIA appeals for final adjudication and approval by the Deputy Archivist of the United States. We also assessed the Special Access and FOIA program, which processes FOIA requests for archival Federal records in the Washington, DC, area, the vast majority of which are available to the public without a FOIA request.

We assessed programs at the Federal Emergency Management Agency, where frequently requested records relate to disasters, individual assistance, and grants and contracts, and the United States Coast Guard, where final memorandums on maritime disasters and records pertaining to boating accident investigations are frequently requested.

We also began assessments of two other DHS FOIA programs—the Transportation Security Administration and Customs and Border Protection.

We also expanded and deepened our stakeholder relationships during the 2015 reporting period. We provided leadership and administrative assistance to the [FOIA Advisory Committee](#), offered a high-quality training session for agency FOIA professionals, and presented on OGIS's role in FOIA administration at several events.

We also launched OGIS's presence on social media by joining Twitter.



Ombudsman in Practice

As the FOIA Ombudsman, we consistently engage our stakeholders to improve our understanding of current issues and different viewpoints and to promote the availability of the office's services. We identify and address systemic issues with the administration of FOIA. We also commit to ensuring our staff has the skills they need to perform their jobs.

Stakeholder Engagement

We work to develop relationships with our stakeholders, including FOIA requesters, civil society organizations, and agency FOIA professionals. These interactions allow us to identify issues and trends that occur in the administration of FOIA and develop consensus solutions.

OGIS staff regularly participates in FOIA training sessions at the invitation of agencies, civil society organizations, and others. During FY 2015, we used these presentations to discuss the mediation and compliance programs and to share customer service best practices. The Department of the Treasury, the Department of Labor, and the Internal Revenue Service asked us to present dispute resolution skills to employees at agency-specific training. We also participated in several brown bag discussions about FOIA issues with representatives of civil society organizations and requesters, and participated in the [2015 Investigative Reporters and Editors Conference](#) in Philadelphia.

OGIS joined 33 information commissioners—freedom of information ombudsmen—from 25 countries who met to discuss transparency issues in April 2015 in Santiago, Chile, for the 9th International Conference of Information Commissioners.⁶ OGIS presented on the importance of government and

⁶ “International Conference of Information Commissioners 2015 Program” (in Spanish), accessed November 17, 2015, <http://www.consejotransparencia.cl/programa-seminario-internacional-icic-2015/consejo/2015-02-10/102436.html>.

civil society partnerships in meeting the challenges faced in ensuring that the right to access public information is available to all.

The conference included four working groups which met on topics such as comparative jurisprudence and comparative analysis of transparency policies. OGIS participated in the group examining mediation as a tool to advance the right of access to public information. Mediation is a key service offered by FOI ombudsmen's offices around the world. Although there were some disagreements and some differences in the way various commissioners' offices work, the group agreed that

- alternative dispute resolution (ADR) is an important tool for the right to access public information and must be conducted within the framework of that right;
- ADR must allow requesters and agencies to participate in the solution of their own conflict;
- ADR in the framework of one's right to access information is unique; and the ADR process (as opposed to the outcome) must be evaluated.

Agency Dispute Resolution Skills Training

In addition to creating OGIS to offer mediation services to assist with FOIA disputes, the OPEN Government Act of 2007 required agency FOIA staff—specifically, FOIA Public Liaisons—to assist with resolving FOIA disputes.⁷ In working with agency FOIA Public Liaisons, we identified a need to provide training on dispute resolution basics to help agencies resolve disputes at their earliest stages. In March 2010, we began offering [dispute resolution training](#) to help agency FOIA professionals fulfill this responsibility.

We have offered the Dispute Resolution (DR) Skills for FOIA Professionals program 25 times since 2010, training roughly 600 FOIA professionals from 58 departments and agencies, including all Cabinet-level agencies. During FY 2015, we held one DR skills training session; twenty-one Federal employees representing nine agencies participated in the session.

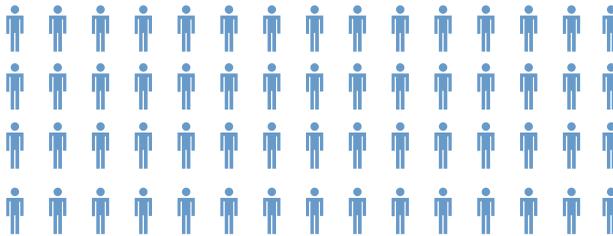
⁷ The Freedom of Information Act, 5 U.S.C. §§ 552(a)(6)(B)(ii) and (k)(6).

Dispute Resolution Training

Since March 2010
Held 25 Trainings

Including 58 Departments and Agencies

Reaching 600 FOIA Professionals



 = 10 FOIA professionals

While we originally envisioned FOIA disputes as essentially bilateral—with requesters and agencies disagreeing about requests—our training participants helped us understand that FOIA disputes tend to be multifaceted and often include other functions within the agency, such as information technology, program offices, and others. For instance, a FOIA processor may need to help a program officer who is dealing with competing priorities understand the importance of his/her role in searching for responsive records. We changed our exercises, examples, and role play to reflect this reality, and we spend time discussing how to work productively with one’s agency colleagues. As one participant said, OGIS’s DR Skills class helps her “successfully navigate everyday interactions with requesters and FOIA staff members.”

The program is designed to be practical and hands-on. The bulk of the class provides practice in four key dispute resolution communications skills and culminates in a four-part, complex mediation role play.

One recent training session participant said that because her agency has a significant backlog, she regularly deals with requesters who have not heard from the agency in two or more years. She has found the DR Skills training gives her the skills she needs to work with those requesters, many of whom are dissatisfied.

In addition to giving agency FOIA professionals practical communications tools to resolve disputes, we use our training to familiarize participants with OGIS's role in FOIA administration and the kinds of assistance we offer to agencies and requesters. One trainee commented that "before class, I was unsure of OGIS's role, especially where in the process OGIS fits. Now all is clear."

When asked if he would recommend this class to other FOIA professionals, one trainee responded: "of course, especially since litigation is so expensive and some problems can be avoided."

FOIA Advisory Committee

As part of the U.S. Government's [Second Open Government National Action Plan](#), OGIS committed "to foster dialog between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures" by creating a Federal [FOIA Advisory Committee](#).⁸

We provide leadership, administrative, and logistical support for the FOIA Advisory Committee, which includes 10 government and 10 non-government FOIA experts who were appointed by the Archivist of the United States. OGIS's Director serves as the Chair of the Committee.⁹ An OGIS staff member also serves as the Committee's Designated Federal Officer (DFO). The DFO provides clerical, administrative, and logistical support for the Committee to effectively conduct its business. NARA's Office of General Counsel also provides guidance

⁸ The White House, *The Open Government Partnership: Second Open Government National Action Plan for the United States of America*, last modified December 5, 2013, https://www.whitehouse.gov/sites/default/files/docs/us_national_action_plan_6p.pdf.

⁹ "Committee Member Biographies," accessed October 16, 2015, <https://ogis.archives.gov/foia-advisory-committee/committee-member-biographies.htm>.

on compliance with relevant laws, including the Federal Advisory Committee Act and the Paperwork Reduction Act.

During FY 2015, NARA hosted four FOIA Advisory Committee meetings.¹⁰

The work of the Advisory Committee is done primarily by its three subcommittees: FOIA Fees, Oversight and Accountability, and Proactive Disclosures. During FY 2015, each subcommittee engaged in various efforts to gather existing resources and new information on its topic. For example, the Proactive Disclosures Subcommittee explored how agency FOIA logs can help the agency decide which records to post online or make available proactively. We also helped the FOIA Fees and Oversight and Accountability Subcommittees to survey agency FOIA professionals about the use of fees and the role of FOIA Public Liaisons. The raw data from these surveys are available from the Advisory Committee's webpage at ogis.archives.gov.¹¹ At each Committee meeting, the subcommittees provide updates on their work, and the Committee hears public comments.

The Committee also joined in recognizing the 10th anniversary of [Sunshine Week](#) in March 2015 by issuing a joint statement.¹² Sunshine Week, an initiative launched in 2005 by the American Society of News Editors, brings together Federal, state and local agencies, and the public to focus on openness in government operations.

Promotion of OGIS Services

In addition to promoting the office's services during stakeholder engagements, we use our [website](#)¹³ and [blog](#)¹⁴ to share information with our stakeholders about our role in the FOIA landscape, and our work to improve the FOIA process.

¹⁰ "Meetings," accessed November 5, 2015, <https://ogis.archives.gov/foia-advisory-committee/meetings.htm>.

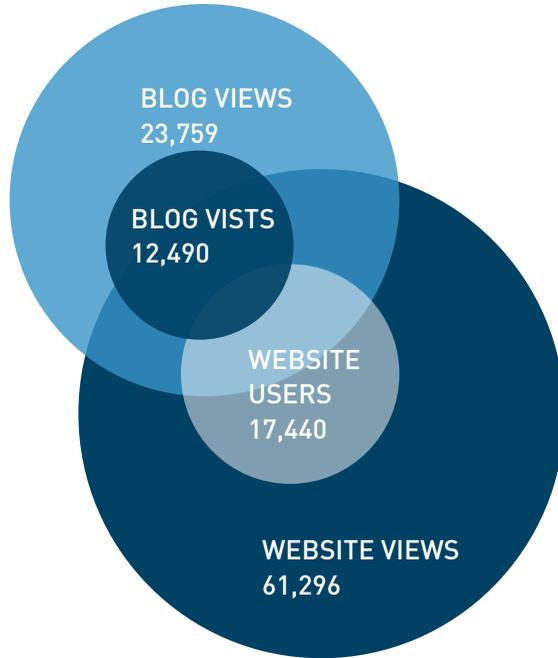
¹¹ "Freedom of Information Act (FOIA) Advisory Committee," accessed October 10, 2015, <https://ogis.archives.gov/foia-advisory-committee.htm>.

¹² "Joint Statement of the FOIA Advisory Committee for Sunshine Week 2015," accessed November 17, 2015, <https://ogis.archives.gov/foia-advisory-committee/documents/Joint-Statement-of-the-FOIA-Advisory-Committee-for-Sunshine-Week-2015.htm>.

¹³ "The Federal FOIA Ombudsman," accessed November 17, 2015, <https://ogis.archives.gov/>.

¹⁴ "The FOIA Ombudsman," accessed November 13, 2015, <http://foia.blogs.archives.gov/>.

Reaching Our Stakeholders



Our website hosts information intended both for FOIA requesters and agency FOIA professionals. The site allows users to track OGIS cases, provides FOIA resources and contact information for all OGIS staff, and includes a section devoted to the FOIA Advisory Committee. The number of visitors to the OGIS website grew by almost 27 percent—from 13,770 in FY 2014 to 17,440 in FY 2015; the number of site views grew by almost 11 percent—from 55,435 in FY 2014 to 61,296 in FY 2015. About 65 percent of users came to the website as the result of a search; fifty-one percent of users were referred from another website—72 percent of which were government websites.

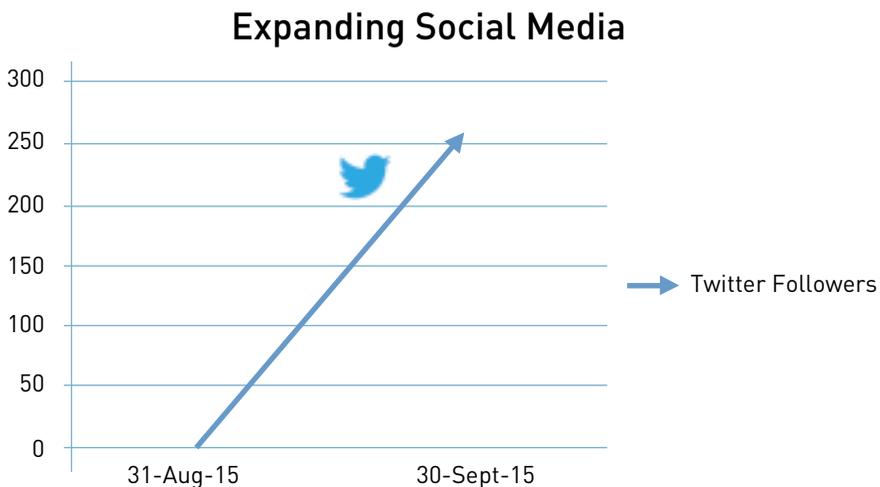
We also post a sample of copies of our final response letters to give the public insight into the kinds of issues we see in our mediation work and our process.¹⁵

¹⁵ “About OGIS Final Response Letters to Customers,” accessed November 17, 2015. <https://ogis.archives.gov/about-ogis/ogis-final-response-letters-to-customers.htm>.

When OGIS closes a mediation case, we inform the requester and the agency of the steps we took in working the case and any resolution or additional information we can provide. This final step may take different forms depending on the complexity of the case. In our most complex cases, OGIS creates a closing letter signed by the Director; relatively simple matters, like helping a requester obtain an estimated date of completion, may be closed by email or phone rather than a closing letter. In FY 2014, we chose a sample of about 30 of these letters to post to the website, focusing on posting letters where the facts of the case or the outcome were complex. During FY 2015, we ramped up the pilot program, posting more than 100 of these letters to our website.

We use The [FOIA Ombudsman blog](#) to announce events, including FOIA Advisory Committee meetings and dispute resolution skills training courses, and to explore topics of interest in the administration of FOIA. During FY 2015, we added 48 posts to our blog, and the blog was visited 12,490 times.

We also increased our use of social media to reach our stakeholders in FY 2015. During Sunshine Week 2015, March 15–21, we used NARA’s Twitter handle, @USNatArchives, to host virtual interviews with members of the FOIA Advisory Committee. We launched our own Twitter handle, [@FOIA_Ombuds](#), on September 12, 2015. In our first month, we gained 250 followers.

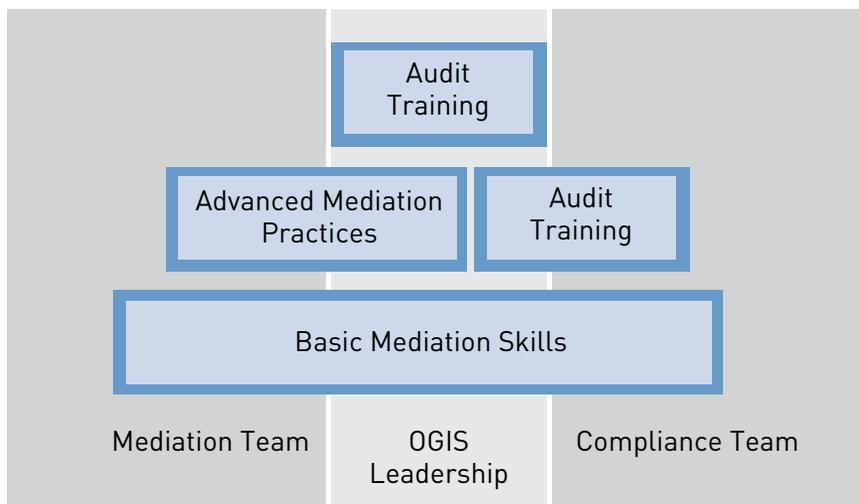


Develop Staff

During FY 2015, most of our staff took part in training courses offered by outside experts tailored towards improving the skills they need to perform their jobs. All new OGIS employees receive training in basic mediation skills; this course helps new employees understand the importance of impartiality in mediation, and provides skills that assist in resolving FOIA disputes. The Deputy Director, the Attorney-Advisor, and members of the Mediation Team also receive training in advanced mediation practices.

The Deputy Director and the head of the Compliance Team also completed a course on auditing. Although OGIS's Compliance Team does not conduct audits, per se, the team relies on many of the same skills that auditors use in providing objective analysis. These skills help Compliance Team members define specific areas where an agency is performing particularly well or where an agency might need to focus additional efforts to improve the FOIA process.

Building OGIS's Skillset





Mediation Program

5 U.S.C. § 552(h)(3) requires OGIS to offer mediation services to resolve disputes between FOIA requesters and agencies. The form that our assistance takes depends largely on the complexity of a dispute and the issues involved; a simple question about the FOIA process may be resolved through a single telephone call, while a more involved dispute regarding an agency's use of exemptions may call for a more involved facilitation.

While we have offered mediation services since we opened in 2009, we continue to wrestle with complex issues that affect our work:

- Balancing agencies' view of the voluntary nature of mediation against a requester's right to seek mediation as described in the FOIA
- Considering what assistance we can provide an agency seeking mediation services related to a particular request without violating the Privacy Act of 1974 when the agency has not included a routine-use for OGIS in its system of records¹⁶

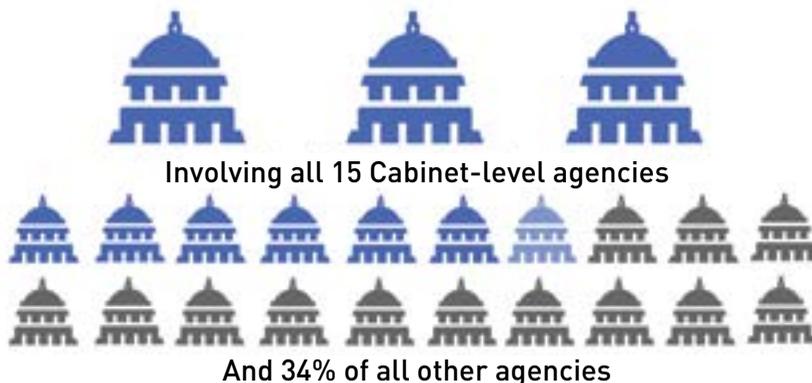
While these issues may not have easy answers, we will continue to seek their solutions and mitigate their impact on our work.

The demand for our mediation services grew significantly over the past year, from 880 requests received in FY 2014 to 1,160 in FY 2015, a 32-percent caseload increase. While there is no one obvious reason for this increase, we do know that the number of FOIA requests received by agencies has grown every year for the past five years. We closed 1,210 cases in FY 2015, including every case that remained open from FY 2014. On average, we closed our mediation cases within 42 days.

¹⁶ The following agencies had OGIS language in their systems of records as of September 30, 2015: Department of Agriculture Office of Inspector General; Department of Defense; Department of Education; Department of Homeland Security; Department of Justice; Department of State; Department of Transportation; Department of Treasury; Consumer Financial Protection Bureau; Office of Special Counsel; Privacy and Civil Liberties Oversight Board; Securities and Exchange Commission; U.S. Agency for International Development; and U.S. Postal Service.

OGIS CASE CLOSURES FY 2015

Closed 1,210 Requests for Assistance

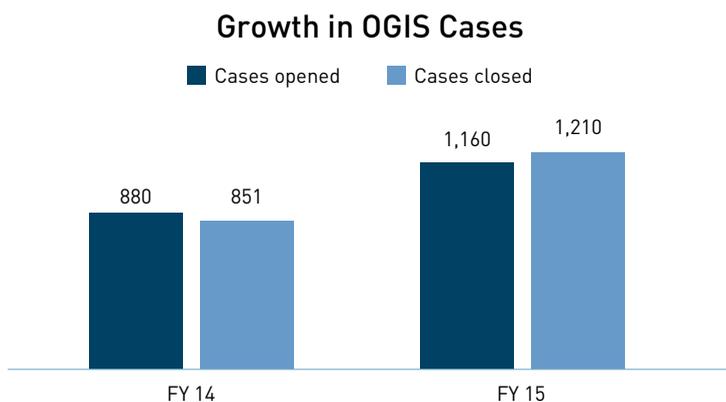


As in previous years, the majority of our mediation cases in FY 2015 were from requesters who made FOIA requests to the Department of Justice (DOJ)—27 percent—and the Department of Homeland Security (DHS)—19 percent. One-third of our DOJ cases came from the Federal Bureau of Investigation (FBI), the majority of which dealt with records that were denied pursuant to a FOIA exemption or a “no records” response. The FBI accounted for 41 percent of all full or partial denials of records at DOJ, according to FY 2014 data available on FOIA.gov; the FBI also accounted for 44 percent of all “no records” responses at DOJ. Thirty-eight percent of our DHS cases related to requests made to U.S. Customs and Border Protection (CBP), while 30 percent related to U.S. Citizenship and Immigration Services (USCIS). USCIS and CBP received the most and third-most number of requests, respectively, of all DHS components.

While much of our mediation work in FY 2015 was focused on assisting with requests to DHS and DOJ, the reach of our mediation program is expansive. Over the last six years, we assisted customers with requests from 60 of the

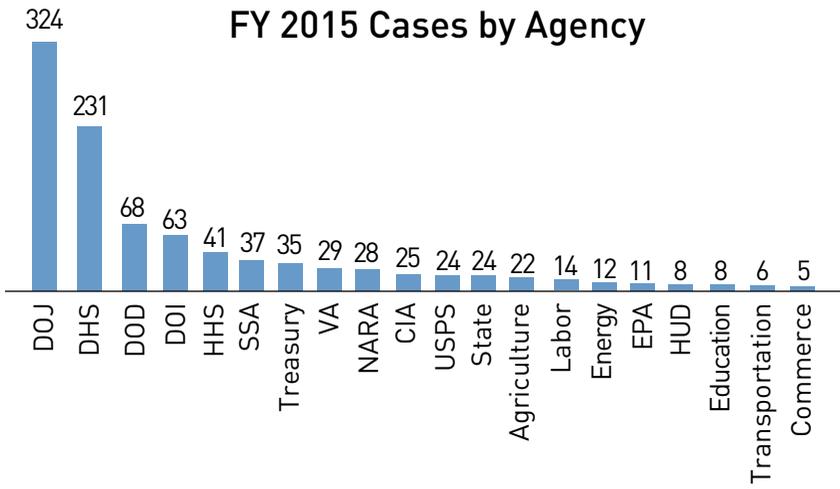
100 departments and agencies subject to FOIA, including all 15 Cabinet-level departments. Federal agencies processed more than 647,000 FOIA requests in FY 2014; half of a percent (0.5) of those requests were submitted to the 40 agencies for which we have not had a request for mediation services.

In cases in which the requester encounters an obstacle at some point in the process, we offer assistance to help the FOIA process work as it should. Thirty-four percent of our FY 2015 customers requested assistance after the agency considered their request on appeal, but the rest sought our assistance earlier in the process. Thirty-two percent of the cases occurring before the

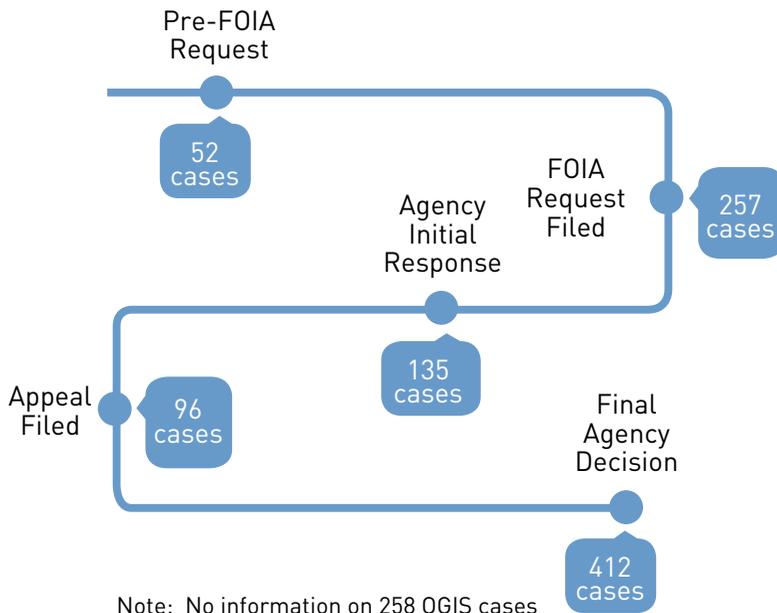


appeals process was complete related to processing delays. While we cannot ask an agency to process a particular delayed request before others in the queue, we assist customers with delayed requests by contacting the agency for estimated dates of completion.

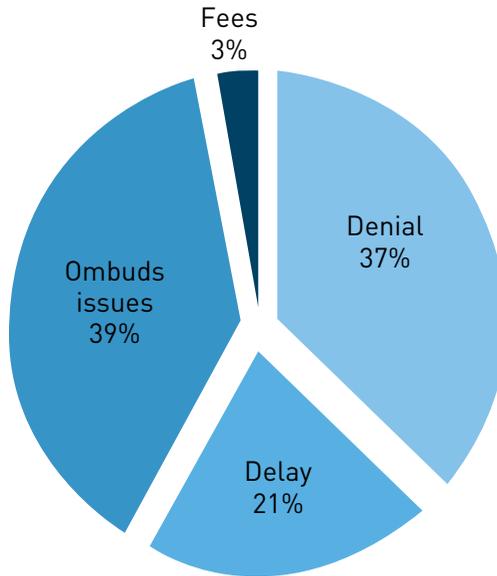
Thirty-seven percent of the cases we closed in FY 2015 related to agency denials of records, either in full or in part. In these cases, agencies most frequently withheld records under one or more of FOIA's nine exemptions. Our customers asked for assistance primarily with FOIA Exemptions 6 and 7(C) withholdings, both of which apply to information about third parties other than the requester, the latter specifically in law enforcement records. In working cases concerning withheld records, we contact the agency's FOIA Public Liaison to discuss the agency's position on the records. When there is



Where in the administrative process do customers request assistance?



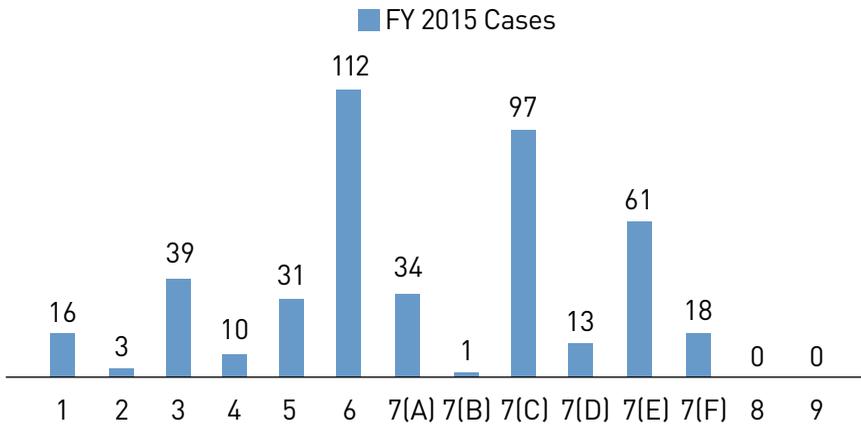
FY 2015 Case Closure by Category



some room for interpretation about how a particular exemption applies—for instance, in some situations involving FOIA Exemption 5, which allows withholding of inter- or intra-agency records that are normally privileged in the civil discovery context—we may conduct a more in-depth discussion with the agency regarding its use of an exemption and whether any additional material may be released. In cases in which the agency is firm in its position, we may provide additional explanation to help the requester better understand why the agency believes the records must be withheld.

Thirty-nine percent of our FY 2015 cases fall under a more general category of “ombuds issues.” This category relates to an ombudsman’s education/“listening ear” function; cases in this category include helping requesters understand the FOIA process better, or familiarizing them with our role. These cases tend to be simple, resolved through a single telephone conversation, email, or letter.

FOIA Exemptions Involved in OGIS Cases



Feedback from our mediation customers shows that they recognize the value of our services. One customer, who successfully challenged an agency’s “Glo-mar” response, in which the agency neither confirmed nor denied that it had responsive records, stated: “I was successful because OGIS let me know from the mediation that the [agency] was willing to accept additional information.” Another customer working on immigration matters commented: “I am positive that absent your intervention we would not have received this material.” Finally, one customer’s comment speaks directly to our mission—“without OGIS, I would have likely filed a lawsuit, which would have cost me hundreds of dollars and a lot of time.”

Case Study: Estimated Dates of Completion

While FOIA instructs agencies to respond to requests within 20 working days, the reality of many FOIA programs is that responses are frequently delayed. In fact, 20 percent of our mediation cases in FY 2015 involved delays exceeding the 20 days required by FOIA.

The 2007 amendments to the FOIA added process requirements to increase transparency and improve customer service. Among other changes, FOIA requires agencies to provide a tracking number for requests that take longer than 20 days to process, as well as a way for requesters to check the status of those requests. The legislation also requires agencies to provide an estimated date of completion for delayed FOIA requests.

Estimating a completion date for a particular FOIA request can pose a significant challenge for many agencies, since it requires them to quantify certain unknowns—such as the time it will take to process other requests in the agency’s queue. The Department of Justice Office of Information Policy issued guidance (<http://www.justice.gov/oip/oip-guidance-1>) on the topic in 2014, and we have shared best practices on the topic (<http://foia.blogs.archives.gov/2015/04/23/lets-talk-about-estimated-dates-of-completion/>). At this point, most agencies seem comfortable with the idea of estimating when a customer may receive a response to his or her FOIA request.

We have observed from several FY 2015 cases that estimating dates of completion for FOIA appeals seems to present a challenge for some agencies. In many agencies, the attorneys who process FOIA appeals are separate from the main FOIA staff, and appeals may be a collateral duty. Further compounding the problem, appeals often require more complex legal analysis and additional levels of review that initial responses may not need; these factors make estimating a completion date more challenging.

While the FOIA does not explicitly require agencies to provide an estimated date of completion for appeals, doing so is a good customer service practice. In our cases in which an agency cannot provide an estimated completion date, we ask the agency to provide the appeal’s location in the queue.

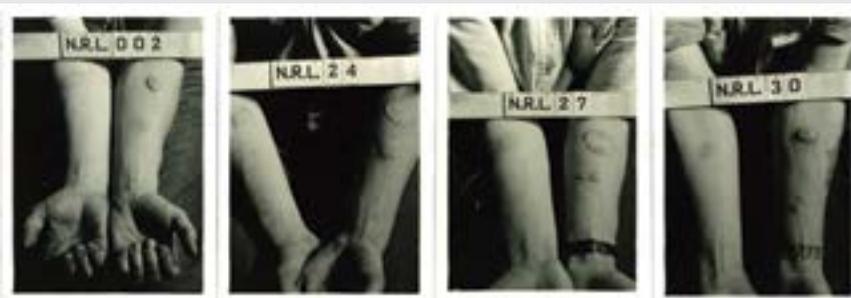
Case Study in Clarity

We play a valuable role in facilitating communications between a requester and an agency. A recent request made by National Public Radio (NPR) to the Naval Research Laboratory (NRL) provides an example of this function.

NPR reporter Caitlin Dickerson made a request to the NRL for records about a World War II era medical experiment that used human subjects; the agency released the records in full. While Ms. Dickerson was mostly pleased with the agency's release, the records included a number of photographs that, when reproduced, were blurry. NPR contacted the agency, asking that the images be re-scanned at a higher resolution; the NRL scanned the images again and released the second set. Unfortunately, this second set of images, while better than the first, were still not of a high-enough resolution to be useful to NPR. Ms. Dickerson contacted the agency again, but the NRL, having produced two sets of records at that point, thought that they had fulfilled the FOIA request in accordance with the law and closed the request.

At this point, NPR contacted OGIS to see if this dispute could be resolved outside of the administrative appeal process. NPR asked us to inquire whether someone from the organization could bring NPR's own equipment to the agency in order to scan the images at the resolution she needed. We contacted the agency to discuss this offer; the NRL declined, citing security regulations at the facility in which the records were held.

While we often encourage agencies to resolve complex FOIA issues by drawing on the knowledge of other departments (for instance, enlisting the assistance of the agency's information technology professionals with requests for database records), in this instance, the requester took the same approach. NPR discussed the matter internally, drawing on the expertise of NPR's photo editor. NRL agreed to scan the pictures again using NPR's recommended settings, and we facilitated this exchange of information. The



agency made the necessary adjustments and released a third set of records that met the NPR's needs.

While we primarily work with FOIA disputes at the conclusion of the FOIA process—after the agency has reviewed its actions and decisions on appeal—in this instance, an earlier intervention on a relatively simple matter helped the requester get the records she needed faster and kept an appeal out of the agency's backlog. The result was two news stories (<http://www.npr.org/2015/06/22/415194765/u-s-troops-tested-by-race-in-secret-world-war-ii-chemical-experiments> and <http://www.npr.org/2015/06/23/416408655/the-vas-broken-promise-to-thousands-of-vets-exposed-to-mustard-gas>) that illuminate a fascinating aspect of American military history, punctuated by photographs that make the stories that much more compelling.



Compliance Program

Our growing and robust oversight program fulfills FOIA’s requirement that OGIS “review [FOIA] policies and procedures of administrative agencies,” 5 U.S.C. § 552(h)(2)(A), and “review compliance with [FOIA] by administrative agencies,” 5 U.S.C. § 552(h)(2)(B).

Our review and compliance program includes a range of activities, including reviewing and commenting on agency FOIA regulations; addressing systemic issues affecting FOIA administration, such as still-interested letters; and conducting [compliance assessments](#) of agency FOIA programs.

An OGIS compliance assessment is a collaborative process in which we review an agency’s FOIA compliance against elements of an effective FOIA program. The assessment is the first of its kind in the administration of FOIA and includes a review of information such as an agency’s FOIA regulation, [annual reports](#) to the Department of Justice and FOIA litigation; an on-site visit; and a review of FOIA case files.¹⁷ A final report documents our findings and recommendations to the agency.¹⁸

While we have reviewed agency FOIA regulations and other agency materials since FY 2011, we launched our agency compliance program in FY 2014 and by the end of FY 2015, had assessed compliance at two FOIA programs at NARA and two FOIA programs at Department of Homeland Security (DHS) components.

NARA’s Office of General Counsel and its Special Access and FOIA Program volunteered to be the subjects of our first compliance assessments. The Office of General Counsel processes FOIA requests for operational records created or received in carrying out NARA’s mission and responsibilities as a Federal

¹⁷ OGIS’s compliance assessments differ from audits conducted by the Government Accountability Office, which investigates how the Federal government spends taxpayer dollars, and Inspector General offices, which audit and investigate fraud, waste, abuse, and mismanagement within their agency.

¹⁸ <https://ogis.archives.gov/foia--ompliance-program/agency-compliance-reports.htm>

agency, while the Special Access and FOIA Program processes requests for archival records in the Washington, DC, area, the vast majority of which are available without a FOIA request.

We launched our first external FOIA assessment at the Federal Emergency Management Agency (FEMA) and followed with an assessment of the United States Coast Guard FOIA program.

Our compliance assessments involve

- analyzing policies, operating programs and procedures;
- conducting on-site reviews to monitor agency compliance;
- determining patterns and systemic issues; and
- exploring possible changes in policy, procedures or processes.

We recognize that each FOIA program is unique in the records it processes and the manner in which it manages its program, and that there is no one-size-fits-all approach to administering FOIA. That said, the nearly 50 recommendations we made in our first four compliance reports in FY 2015 center on three areas—management, technology, and communications.

Management

When we review agency FOIA programs, we look at how the programs, given the resources they have, manage those resources to fulfill the statutory requirements of FOIA. Many FOIA programs struggle with staffing, including the numbers of staff allocated for FOIA and the level of expertise of staff. For example, Coast Guard FOIA coordinators within its 1,200-plus units are generally military personnel who redeploy every three to four years, a factor that led to a decision not to implement a FOIA tracking and processing system agency-wide. FEMA's FOIA program faces a drop in staffing during disaster responses when some FOIA processors can be temporarily deployed to non-FOIA-related recovery response jobs.

Agencies and Requesters Say:

“Thank you for the thoughtful report.”

—Martha Murphy, Chief, Special Access and FOIA Program,
NARA, March 24, 2015

“OGIS has earned the credibility to assess with sharp eyes what works and does not when the public exercises its right to be informed of what government is doing.”

—Rick Blum, Sunshine in Government Initiative, October 29, 2015

“[Y]our staff should be commended for the thoughtful, highly professional approach they took to assessing DHS component FOIA programs; identifying areas for improvement; and making recommendations. The final drafts that I reviewed far exceeded my expectations: they were extremely well organized, comprehensive, and insightful and provided practical recommendations.”

—Karen Neuman, Director, DHS Privacy Office, September 15, 2015

Some of our recommendations identify systemic problems and suggest ambitious and long-term solutions. For example, we recommended that the Coast Guard create a plan to centralize FOIA processing. Other recommendations are designed to be short-term and more easily implemented. We recommended that both Coast Guard and NARA’s Office of General Counsel create standard operating procedures for processing FOIA requests and appeals. Our recommendations for FEMA included tracking the volume of records processed and using pages processed as a management and oversight control tool. Finally, in accordance with NARA being the nation’s records manager, our recommendations have included improving records management practices to help ensure an efficient FOIA process.

Technology

Our compliance reviews show that agencies are investing in technology to help track and process FOIA requests, but agency FOIA personnel cannot or do not always take full advantage of the technology. DHS adopted a system for tracking and processing FOIA requests, which is available to but not required to be used by all components. Components that are using the system are not using it to its full capability. For example, a draft study conducted by the Coast Guard found that agency-wide implementation of a new FOIA processing system at Coast Guard could help improve data quality and make FOIA processing more efficient; however, staffing challenges discussed above led the agency to decide against implementing the system agency-wide. We also recommended that NARA consider convening a multi-disciplinary task force within the agency to address disparate technology used by the various NARA FOIA programs.

As with our management recommendations, our technology recommendations also include quicker-fix recommendations such as overhauling FOIA web pages, including reviewing all reference material for accuracy and fixing broken links and creating procedures to regularly identify records to post to FOIA websites.

Communication

Agency communication with FOIA requesters is an important way to ensure FOIA compliance and, unlike some management and technology issues, offers an opportunity for relatively low-cost changes with potentially big savings. Providing requesters with estimated dates of completion upon request, as the FOIA statute requires, and communicating regularly with FOIA requesters provide an opportunity for ensuring FOIA compliance—and possibly avoiding litigation. Lack of response was a factor in all 16 FOIA lawsuits filed against FEMA since 2009 and in six of seven FOIA lawsuits filed against Coast Guard during the same time.

Our communications recommendations include creating or revising template letters and creating a bank of standard language that explains, in plain language, processing queues, fees policies, interim responses, exemptions, and other FOIA-related processes.

FOIA Regulations

Our work strengthening FOIA regulations government-wide continued in FY 2015 when we assessed and commented on FOIA regulations at eight departments and agencies, bringing the total number of department and agency regulations we have reviewed to 41.

Agencies Accept Many OGIS Recommendations

“OGIS provided a number of constructive suggestions, primarily regarding language clarity and best practices in processing FOIA requests, many of which OGE has incorporated into the final rule.”

—[Office of Government Ethics Final Rule](#), published in the *Federal Register* September 22, 2015.

“The Commission is adopting most of OGIS’ suggestions in the final amendments set out below.”

—[International Trade Commission Final Rule](#), published in the *Federal Register* July 9, 2015.

Regulations are an important part of the FOIA process and lay out how an agency will fulfill its mandate under the FOIA statute. Our regulations review process includes ensuring that the regulation outlines procedures

for requesting expedited processing and a fee schedule that provides guidelines for reducing or waiving fees, both of which FOIA requires to be included in regulations.

We also review regulations to ensure compliance with other areas of the FOIA statute as well as for good practices observed by non-governmental organizations, such as the Center for Effective Government, which in 2013 published “[Best Practices for Agency Freedom of Information Act Regulations.](#)” Our work also helps ensure that a regulation is written in

OGIS Comment on Agency FOIA Regulations FY 2015

| | Describe individualized tracking number | Discuss estimated dates of completion | Provide 60 days to appeal | Mention OGIS mediation services | Require agency cooperation in OGIS mediation |
|--|---|---------------------------------------|---------------------------|---------------------------------|--|
| Department of Homeland Security | | | | | Proposed Sept. 2015 |
| Department of State | | | | | Proposed Sept. 2015 |
| Gulf Coast Ecosystem Restoration Council | Accepted | Accepted | | Accepted | |
| International Trade Commission | Accepted | Declined | | Accepted | |
| Office of Government Ethics | Declined | | 45-day deadline | Accepted | |

Note: OGIS also commented on Federal Maritime Commission (FMC) proposed regulations. FMC withdrew its regulation and will address OGIS comments in subsequent rulemaking.

a plain easy-to-understand manner for both requesters and for agency FOIA processors.

We frequently recommend that FOIA regulations

- clearly explain the intersection between FOIA and the Privacy Act;
- clearly explain the difference between requester categories and fee waivers;
- allow 60 days for requesters to appeal;
- include a provision for providing requesters with a brief description of the information the agency is withholding if it is possible without revealing exempt information;
- include a provision for providing requesters with a breakdown of fees for search, review and/or duplication in fee estimates;
- state that the agency will notify requesters of OGIS's mediation services in their final appeal responses; and
- include the following language: "When the requester elects to engage in the mediation services offered by the Office of Government Information Services of the National Archives, the agency shall be an active and engaged partner in the mediation process in an attempt to resolve the dispute."

In FY 2015 we also participated in the Department of Justice's multi-agency project to craft a common FOIA regulation, a commitment that was part of the [Second National Action Plan for Open Government](#), released by the White House in December 2013. The common FOIA regulation project continues in FY 2016.

Recommendations

FOIA directs that OGIS recommend to Congress and the President actions to improve FOIA administration. In our first five years, we recommended 11 actions aimed at improving the FOIA process, including seven actions specific to OGIS.

Status of Recommendations

- | | |
|--|---|
| <input checked="" type="checkbox"/> Develop multi-agency web portal | <input type="checkbox"/> Streamline process for requesting immigration-related records |
| <input checked="" type="checkbox"/> Provide day-one FOIA training for all new employees | <input type="checkbox"/> Explore how to improve the Privacy Act process |
| <input checked="" type="checkbox"/> Facilitate multi-agency FOIA requests | <input type="checkbox"/> Make it easy for all Federal agencies to share FOIA files with OGIS |
| <input checked="" type="checkbox"/> Encourage agency FOIA programs to embrace dispute resolution | <input type="checkbox"/> Bring new focus to exemplary customer service |
| <input checked="" type="checkbox"/> Train FOIA processors in dispute resolution skills | <input type="checkbox"/> Ensure FOIA requirements incorporated into new agency technology purchases |
| <input checked="" type="checkbox"/> Review issues with fees and fee waivers | |

One of our original recommendations, made in 2012, was to work with other agencies to consider how a government-wide FOIA web portal could improve public access to government information and to save taxpayers' money by sharing agency technology.

OGIS's first Director Miriam Nisbet's involvement in the project dates to its earliest days. In 2010, the Environmental Protection Agency (EPA) began looking at the feasibility of creating a FOIA portal using the framework of [Regulations.gov](https://www.regulations.gov), the Federal rulemaking portal that allows people to com-

ment on Federal regulations and other agency regulatory actions. By leveraging the infrastructure of Regulations.gov, *FOIAonline* avoided many start-up costs, resulting in a system that cost only \$1.3 million to launch.

Experts on *FOIAonline*

“We heard again and again that members of the FOIA community wanted an inexpensive shared service to make it easier to communicate with requesters and facilitate requests. FOIAonline, which is built on an existing platform and creates a central clearinghouse for released documents, addressed these needs in a number of ways.”

—First OGIS Director Miriam Nisbet, October 31, 2014

“I think having OGIS involved gave it the gravitas it needed to take off.”

—Krista Boyd, minority counsel to the House Oversight and Government Reform Committee, October 31, 2014

By the end of FY 2015, 11 agencies were partners in *FOIAonline*, which provides the public with an online system for tracking and receiving responsive records to FOIA requests from those agencies. *FOIAonline* also provides agency partners with services for processing requests, responding to requesters and generating reports.

When *FOIAonline* launched on October 1, 2012, about 1,600 agency FOIA professionals were registered users. By the end of FY 2015, more than 4,800 FOIA professionals and nearly 31,000 requesters were registered users. Requesters are encouraged but not required to register with *FOIAonline*. By

the end September 30, 2015, FOIA professionals processed more than 305,000 requests on *FOIAonline* and posted more than 600,000 documents online.

By the end of FY 2015, the Department of Justice (DOJ) announced it would join the partnership and provide governance, a big win for supporters pushing to take the portal government-wide.¹⁸ DOJ now co-chairs the *FOIAonline* Executive Committee, which OGIS Director Nisbet co-chaired between 2010 and 2014. OGIS continues to serve in an advisory capacity on the *FOIAonline* Advisory Board, “given its unique role in providing mediation services and reviewing agency compliance with the FOIA,” according to the Charter for *FOIAonline* Partnership Program.

We are pleased that the hard work by the founding partners in *FOIAonline* has paid off.

We also recommended that all Federal agencies remind their staff about the importance of FOIA and recognize FOIA as a priority that is every employee’s responsibility. The recommendation, made in 2013, also included asking that Federal agencies provide day-one training to all new employees as part of traditional agency orientation. We are pleased that the DOJ in March 2015 published a one-page handout covering FOIA basics for all employees new to the Federal workforce.¹⁹

Another recommendation from 2013 was to work with stakeholders from inside and outside the government to review the issues surrounding FOIA fees and fee waivers. We are pleased that the FOIA Advisory Committee, under the leadership of OGIS, is looking closely at FOIA fees. We look forward to the Committee’s findings and recommendations.

¹⁹ “The importance of Proper Case Management and Closing Out Fiscal Year 2015 Strong” last modified September 2, 2015, <http://www.justice.gov/oip/blog/importance-proper-case-management-and-closing-out-fiscal-year-2015-strong>.

²⁰ “FOIA infographic,” last modified October 9, 2015, http://www.justice.gov/sites/default/files/oip/pages/attachments/2015/03/13/foia_infographic.pdf.



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