

Office of Government Information Services

Building a Better FOIA PROCESS



2017 Report for FY 2016



2016

Office of Government
Information Services

Building a Better FOIA PROCESS

2017 Report for FY 2016



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



Table of Contents



Message from the **DIRECTOR**

I am pleased to present this report on the activities of the [Office of Government Information Services \(OGIS\)](#) in Fiscal Year (FY) 2016. I arrived in December 2016 during a particularly exciting time for OGIS. FY 2016 was a year of continued growth for both our dispute resolution and compliance programs. The [FOIA Improvement Act of 2016](#), which was signed into law in June, also expanded OGIS’s workload and role in the FOIA process, and strengthened our mandate to review agency compliance with the statute. I am happy to join this team and lead efforts to serve as the FOIA Ombudsman and to continue to improve the administration of FOIA. Our compliance team was busy in FY 2016, completing four agency compliance assessments and publishing a widely discussed report on the use of “still interested” letters. The compliance team also launched a government-wide FOIA self-assessment program and continued to review and comment on agency FOIA regulations.

Outreach to our stakeholders—including our social media presence, training program, and presentations—is a big part of what OGIS does. In 2016 our [Sunshine Week event](#) at the [National Archives](#), which included nearly 400 participants, featured several thought-provoking presentations and panel discussions. We also welcomed the second term of the [FOIA Advisory Committee](#) and the establishment of the [Chief FOIA Officers Council](#).

The passage of the FOIA Improvement Act of 2016 had a profound impact on OGIS. Our dispute resolution program’s caseload has grown steadily over time, but in the fourth quarter of 2016—after the passage of the FOIA Improvement Act—requests for our services grew by 142 percent over the same period in FY 2015. We have continued to work hard to provide our customers

with the high level of service that requesters expect of OGIS. In the year ahead, we will look for ways to build upon this growth and expand our efforts to help improve the FOIA process.

I want to thank David S. Ferriero, Archivist of the United States; Debra Steidel Wall, Deputy Archivist of the United States; William J. Bosanko, Chief Operating Officer; and Jay Trainer, Executive for Agency Services, for their support of OGIS's mission and for their partnership in pursuing our shared goal of making access happen and connecting with our customers. I am also grateful for the OGIS team who remains steadfast in their commitment to assist our customers and improve the FOIA process.

Sincerely,

A handwritten signature in black ink, appearing to read "Alina M. Semo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Alina M. Semo, Director

Office of Government Information Services*

* The views expressed in this report are those of the OGIS Director and do not necessarily represent the views of the President. See 5 U.S.C. § 552(h)(4)(C).



Executive Summary

Fiscal Year 2016 saw an unprecedented number of requesters—and agencies—relying on the [Office of Government Information Services](#) for assistance. By the end of FY 2016, our fourth-quarter caseload of 787 far surpassed our annual case load in OGIS’s early years; in FY 2010 and FY 2011, we opened 391 cases and 371 cases, respectively, each year.

Even before the [FOIA Improvement Act of 2016](#) highlighted OGIS’s role in the FOIA process, requests for our assistance increased from 836 between October 2014 and June 2015 to 968 between October 2015 and June 2016. After the act went into effect on July 1, 2016, our fourth quarter caseload of 787 more than doubled from the 325 of the fourth-quarter in FY 2015. The FOIA Improvement Act of 2016 has not only preserved our existing role as a nonexclusive alternative to litigation but also explicitly requires agencies to notify requesters of the availability of OGIS’s services during two points in the FOIA administrative process—when agencies take additional time to respond to a request in cases in which unusual circumstances exist, and when agencies provide an initial response to a request with an adverse determination.

During FY 2016, we also completed four agency [FOIA compliance assessments](#) and published three reports. We also published our first single-issue report on [agencies’ use of “still interested” letters](#) and launched a self-assessment program. The self-assessment—an online survey—was designed to help agency FOIA programs identify areas for improvement and give FOIA managers information they need to address issues and launch strategies to improve their FOIA programs.

We also continued our work to help agencies improve their FOIA regulations, which are an important part of the FOIA process. Through training we

have continued to help agency FOIA professionals use dispute resolution skills to resolve—and prevent—disputes. The [FOIA Advisory Committee](#) was initially established by the National Archives in 2014 to foster dialogue between the Administration and the requester community, solicit public comments, and develop recommendations for improving FOIA administration. In FY 2016, the committee recommended that the Archivist request that the Office of Management and Budget (OMB) revise its 1987 FOIA fee guidance to reflect technological changes and to clarify fee issues. The Archivist in August 2016 sent this recommendation to the Director of OMB, where the recommendation is pending. FY 2016 also saw the renewal of the FOIA Advisory Committee, which OGIS will continue to chair and provide administrative and logistical support.

The FOIA Improvement Act created a new opportunity for OGIS to engage in efforts to improve FOIA administration by serving as co-chair, along with the U.S. Department of Justice (DOJ) [Office of Information Policy \(OIP\)](#), of the [Chief FOIA Officers Council](#), which met for the first time on July 23, 2016.

Finally, we continued to contribute to the National Archives' work as a leader in advancing open government, launching new efforts to engage citizens with our nation's records, and participating in other government-wide efforts to modernize FOIA administration.

FOIA IMPROVEMENT ACT

In addition to requiring that agencies notify requesters of the right to seek dispute resolution services from OGIS and the agency FOIA Public Liaison at various times throughout the FOIA process, the FOIA Improvement Act of 2016 also requires agencies to provide requesters with a minimum of 90 days to file an administrative appeal. The act, signed into law on June 30, 2016, also codified the Department of Justice’s “foreseeable harm standard”— agencies shall withhold information under FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” The act amended FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to provide that “the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.” The act requires agencies to “make available for public inspection in an electronic format” records that have been requested three or more times. OGIS’s revised duties under the act also include submission to Congress and to the President (and online publication of) a report about our dispute resolution and compliance work, including any legislative and regulatory recommendations to improve FOIA. OGIS also is required under the act to convene a public meeting, at least annually, on our activities and “allow interested persons to present oral or written statements.”



Outreach and Collaboration

Stakeholder Engagement

OGIS has a broad range of stakeholders inside and outside of government, including requesters, representatives of civil society organizations, agency FOIA professionals, and members of the legislative branch. Our work with these communities helps us expand our visibility in the FOIA community, improve our understanding of the issues, and recommend improvements to the FOIA process.

Agencies, civil society organizations, and others regularly invite OGIS to participate in events related to FOIA and open government. During FY 2016, OGIS presented at programs organized by the [Government Publishing Office](#), the [Department of the Treasury](#), and the [National Archives](#). We presented sessions on management practices we have observed through our agency compliance program at the national training conference of the [American Society of Access Professionals \(ASAP\)](#), a nongovernmental association of agency FOIA professionals and FOIA requesters; at the same conference, we moderated a panel that presented requester perspectives on FOIA issues. Additionally, we regularly attended brown bag sessions with representatives of civil society organizations to hear their views on FOIA issues.

Chief FOIA Officers Council and other FOIA Improvement Initiatives

The passage of the FOIA Improvement Act created additional opportunities for OGIS to engage in efforts to improve the administration of FOIA. The [Chief FOIA Officers Council](#), which OGIS co-chairs with OIP, is organized to identify and address the challenges of administering FOIA across the government. The Coun-

cil met for the first time on July 23, 2016, to discuss the possible government-wide implementation of a proposed OIP policy requiring agencies to post all records released under FOIA—a policy known as “release to one, release to all.”

The White House announced the creation of a new Cross-Agency Priority (CAP) Goal for FOIA, jointly led by the National Archives (OGIS), DOJ (OIP), and OMB. The aim of the initiative is to improve the administration of FOIA and enhance the requester experience. OGIS, OMB, and OIP developed an action plan, set performance milestones, and established strategies to promote greater openness and improve FOIA processes and administration throughout the Federal government.

Open Government

OGIS continued to support the National Archives’ leadership in open government. In FY 2016, OGIS continued to engage with open government initiatives and contributed to the National Archives’ ongoing efforts to interact with citizens and promote access to our nation’s permanent records.

The [Third Open Government National Action Plan for the United States](#), released by the White House on October 27, 2015, includes commitments to modernize the administration of FOIA. It also includes a commitment that the National Archives will develop tools to teach students about FOIA. OGIS worked with our National Archives colleagues to develop useful, flexible educational resources using [DocsTeach](#), an online teaching tool that allows students to interact with, and examine, primary source documents from the [National Archives Catalog](#). We called on our National Archives colleagues and the public to help us identify records in the National Archives



that could demonstrate how FOIA can be used effectively to learn more about the government's actions. This led to the creation of an educational activity on *DocsTeach* that enriches student understanding of the civil rights marches in Selma, Alabama, using Federal Bureau of Investigation records released under FOIA. Pursuant to another commitment, we worked with OIP to identify ways to improve agency FOIA web pages.

The National Archives' [Fourth Open Government Plan](#), published in September 2016, reflects OGIS's continued commitment to the modernization of FOIA. We worked closely with our agency colleagues to develop the National Archives' ambitious open government agenda and encouraged our stakeholders to comment on the plan.

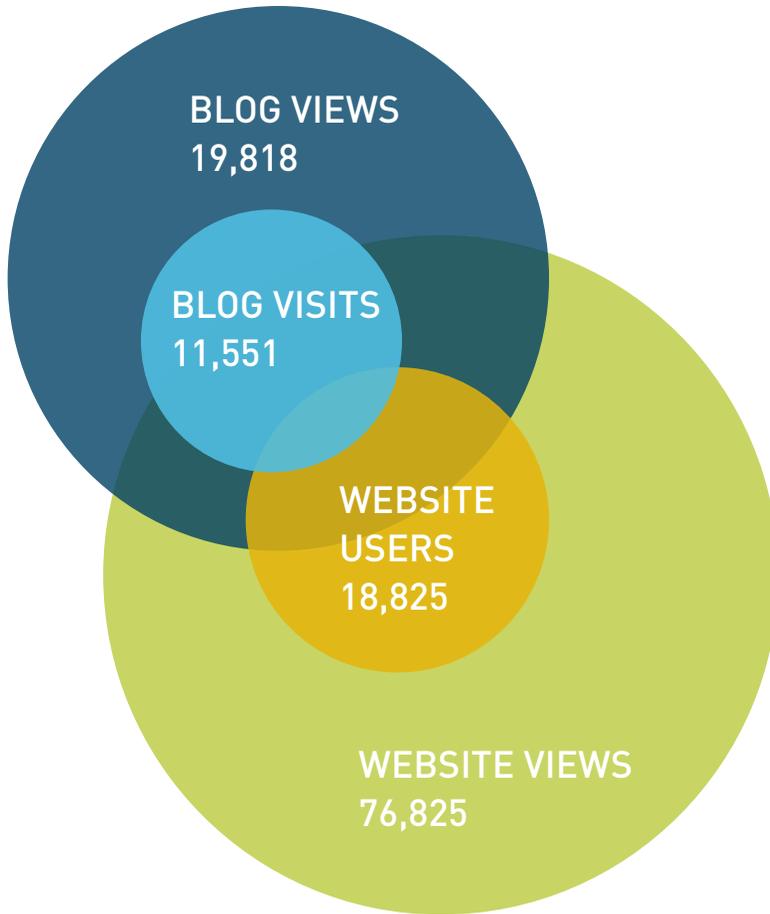
Website and Social Media

OGIS maintains an active website and social media presence. In FY 2016 the total number of views of OGIS's website and our blog, "[The FOIA Ombudsman](#)," grew by almost 14 percent compared to FY 2015. About 48 percent of users visited the [website](#) as the result of a search; 24 percent of users were referred from another website; and the remaining 28 percent of viewers arrived at our website from direct links and social media traffic.

During FY 2016, we revamped our website to better reflect our work and make it easier for stakeholders to find information about our dispute resolution and compliance programs, and provide resources for requesters and agencies.

During FY 2016 we also tripled the number of followers of our Twitter handle, [@FOIA_Ombuds](#). At the end of September 2016, we had more than 800 followers on Twitter and continue to add followers each week. (By January 2017 we reached 1,000 followers.)

Stakeholder Reach FY 2016





Sunshine Week at the National Archives 2016

OGIS hosted a celebration of [Sunshine Week 2016](#)—and the 50th anniversary of FOIA itself—at the National Archives on March 14, 2016. Sunshine Week is an annual nationwide celebration of open government that began as an initiative launched more than a decade ago by the [American Society of News Editors](#) to focus on the importance of open government. OGIS has observed Sunshine Week since 2010, six months after opening our doors.

Sunshine Week 2016 at the National Archives attracted approximately 400 participants, who attended either in person or via webstream. Thanks to our colleagues at the National Archives, the copy of the FOIA statute signed by President Lyndon B. Johnson in 1966 was displayed during the event. David S. Ferriero, the Archivist of the United States, noted how fitting it was to celebrate Sunshine Week at the National Archives given its mission to provide access to our nation’s records. Senator Patrick Leahy of Vermont—the Ranking Member of the Senate Judiciary Committee and a champion of FOIA and the public’s right to know—served as the keynote speaker.

Attendees heard from thought leaders both inside and outside of government, including Megan Smith, Chief Technology Officer of the United States; Archon Fung, Dean of the [Harvard Kennedy School of Government](#); and Andrew Lih, Associate Professor of Journalism at [American University](#). The event also included panel discussions with experts in using technology to advance open government.



We are grateful to all of the participants and audience who helped make Sunshine Week 2016 at the National Archives a success. We also recognize that this kind of event would not be possible without the help of so many of our National Archives colleagues. We thank the National Archives’ leadership for their support. We also owe a debt of gratitude to our colleagues who helped us arrange many of the logistics associated with the event, including our special events staff and our audiovisual team, among others.



Opposite Page: American University School of Communication Professor Andrew Lih talks about technology's role in open government. *Above:* NARA Chief Innovation Officer Pamela Wright listens as Sabrina Williams, a software engineer with the U.S. Digital Service, discusses government technology and innovation. *Below:* Senator Patrick Leahy of Vermont and Archivist of the United States David S. Ferriero meet over the copy of the FOIA statute signed by President Lyndon B. Johnson in 1966. (Photos by Jeffrey Reed of NARA.)





Dispute Resolution

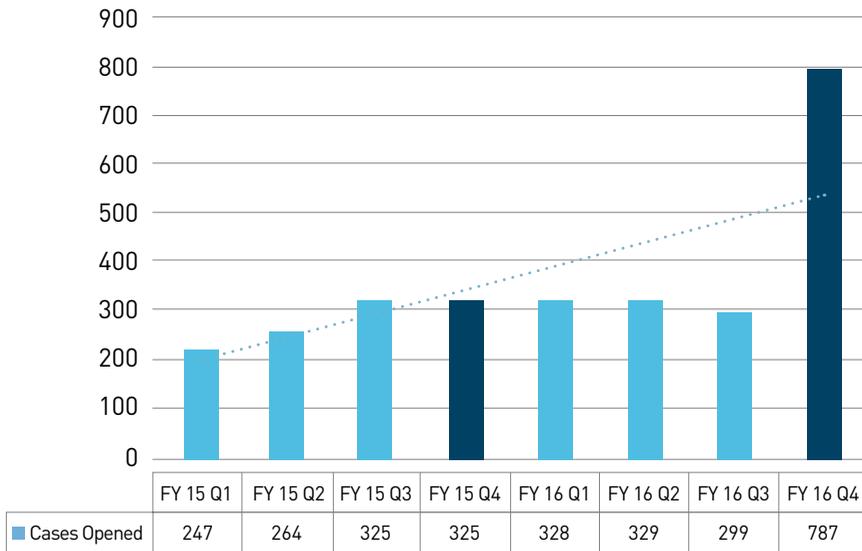
5 U.S.C. § 552(h)(3) requires OGIS to offer [mediation services](#) to resolve disputes between FOIA requesters and Federal agencies. The type of assistance that we provide depends largely on the complexity of a dispute and the issues involved; an inquiry about the status of a delayed request may be resolved quickly, while a multifaceted dispute regarding an agency's use of exemptions may call for a more involved facilitation. OGIS has traditionally provided its services after an agency responds to an administrative appeal—this has been the most logical place for OGIS to serve as a nonexclusive alternative to litigation.

The [FOIA Improvement Act](#) requires agencies to notify requesters of the opportunity for OGIS to assist with FOIA disputes at earlier points in the process. Specifically:

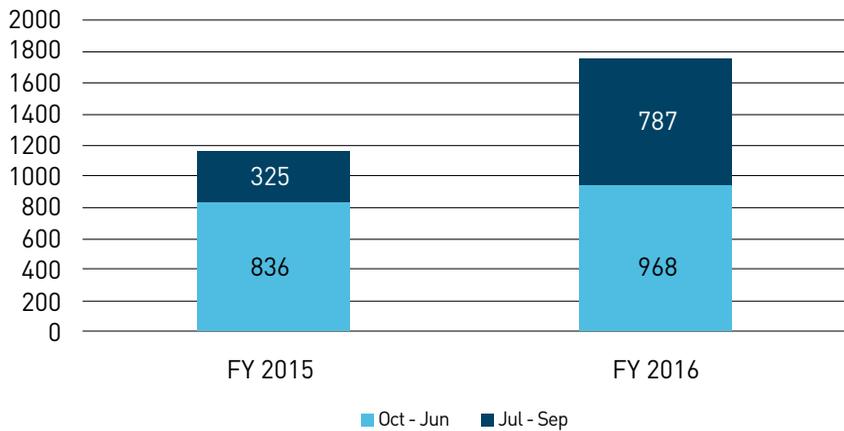
- In cases of adverse determinations, agencies are instructed to notify requesters of the right to appeal and “to seek dispute resolution services from the FOIA Public Liaison of the agency **or** the Office of Government Information Services.” 5 U.S.C. § 552 (a)(6)(A)(i)(III) (emphasis added).
- In cases of unusual circumstances in which more than 10 additional working days are given for an agency to respond, agencies must notify requesters of the right to seek dispute resolution services from the agency's FOIA Public Liaison **and** OGIS. 5 U.S.C. § 552 (a)(6)(B)(ii) (emphasis added).

These amendments had an immediate impact on the demand for OGIS's services. In the first three months after the bill passed, OGIS received 787 requests for assistance, a 142-percent increase from the same period in 2015, when we received 325 requests for assistance. OGIS staff responded to the increase

Cases Opened by Fiscal Year (FY) Quarter



Cases Opened in FY 2015 and FY 2016



by establishing a system to prioritize time-sensitive requests, creating a new queue, and reworking our acknowledgment processes.

Demand for our services had already been on the rise before the FOIA amendments. In the first three quarters of FY 2016, requests for OGIS's dispute resolution services increased by 16 percent compared to the same period in FY 2015; in the first three quarters of FY 2015 OGIS had received 836 requests for assistance in contrast to the first three quarters of FY 2016, during which OGIS received 968 requests for assistance.

While the 2016 FOIA amendments instruct agencies to inform requesters of OGIS's services at two additional points in the FOIA process, agencies must also inform requesters of the assistance they make available through FOIA Public Liaisons.

While these changes provide additional opportunities for OGIS to assist in the FOIA process, it has also created some confusion; requesters may contact OGIS instead of filing an appeal, or contact OGIS and the 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 while simultaneously encouraging requesters to not lose their administrative appeal rights as they seek OGIS assistance.

OGIS has also offered feedback to agency FOIA professionals on ways they can decrease the confusion that the changes under the FOIA Improvement Act may cause. For instance, OGIS has suggested to agencies that in their initial response letters they provide clear direction about the order of the steps a requester should take (such as first contacting the FOIA Public Liaison with concerns) rather than simply informing requesters of their options and shifting to the requester the responsibility of which option to pursue. We have also offered suggestions in cases in which agency contact information is confusing or incomplete based on our review of agency correspondence.

The FOIA Improvement Act instructs OGIS to provide in its report a summary of its mediation activities, including the number of times each agency “engaged in dispute resolution with OGIS or the FOIA Public Liaison.” 5 U.S.C. § 552 (h)(4)(A)(ii)(II). The illustration below shows the 10 agencies with which OGIS engaged most frequently in FY 2016. Not surprisingly, as in previous years, OGIS worked the most with those agencies that process the most FOIA requests—the Department of Homeland Security (DHS) and DOJ. (See Appendix A for a full listing of the number of cases OGIS had with each agency in FY 2016.) Agencies engage directly with requesters through their FOIA Public Liaisons, and DOJ has asked agencies to provide in their 2017 Chief FOIA Officer Reports an estimate of how often requesters sought such assistance.

The FOIA Improvement Act also underscores OGIS’s role in determining when it is appropriate to issue an advisory opinion in connection with the offering of mediation services, stating that we may do so at the discretion of the Office or upon request of any party to a dispute. 5 U.S.C. § 552 (h)(3). During FY 2016 OGIS did not issue any advisory opinions.

Frequency of OGIS Cases FY 2016



CASE STUDY

A requester contacted OGIS for assistance after being advised by the agency in the initial response letter about OGIS's services as directed by the FOIA Improvement Act. This requester had applied for a specific job at a Cabinet-level department but received notification that someone else had been selected for the position. He requested records related to the position, but the agency responded that it found no records responsive to his request because the department did not hire anyone for that position. The requester asked OGIS to resolve this discrepancy between the response to his job application (informing him that someone else was selected for the position) and his FOIA request (that no one was hired for that position so the agency found no responsive records).

OGIS staff contacted the agency to learn more about how it searched for responsive records. In researching this matter, agency FOIA staff discovered that a data-entry error by an agency hiring manager caused the confusion. Specifically, rather than noting in the agency's software that the agency decided not to fill the position, the hiring manager incorrectly selected an option that resulted in each applicant receiving a response stating that another candidate had been selected for the position. Once OGIS staff explained this to the requester, the dispute was resolved, and the need for an administrative appeals review was no longer necessary. Agencies receive numerous FOIA requests each year from individuals who are not selected for agency vacancies; these requests can involve higher emotional stakes as they move to the FOIA appeal stage. In this case, OGIS was able to assist by helping the requester better understand the agency's actions and stop the need for any further agency action.

Training for FOIA Professionals

Since March 2010, OGIS has offered free training in dispute resolution skills for FOIA professionals. In addition to providing tailored training for agencies on request, OGIS offers two dispute resolution skills training sessions per year that are open to all FOIA professionals.

Training participants learn practical communication skills to help understand and resolve disputes. We have learned that participants find these skills useful in their interactions with both requesters and colleagues. The sessions are developed to be hands-on, and culminate in a complex multipart role-playing exercise that enables participants to understand how the skills can be used to resolve FOIA disputes.

From FY 2011 through the end of FY 2016, OGIS had provided dispute resolution skills training to nearly 750 FOIA professionals in nearly 60 agencies. During FY 2016, 33 FOIA professionals from 12 agencies and departments participated in OGIS training sessions. Seats for these sessions were regularly filled within 24 hours of announcement, and participants generally gave the sessions the highest ratings. During FY 2016, OGIS also provided agency-specific training to FOIA employees at the [National Labor Relations Board](#) and taught a session on effective communication skills at a [Department of Labor](#) FOIA training session.

The passage of the FOIA Improvement Act not only reinforced OGIS's role in the FOIA process but it also emphasized the duties of agency FOIA Public Liaisons. To help agencies implement these aspects of the law, OGIS joined OIP in presenting a specialized training session for agency staff who work directly with requesters, including specifically FOIA Public Liaisons and agency employees who staff Requester Service Centers. The training included an in-depth presentation on OGIS's role in the process and how to work with us.



Compliance

5 U.S.C. § 552 (h)(2) requires OGIS to review agency FOIA policies, procedures, and compliance and “identify procedures and methods for improving [FOIA] compliance.”

To fulfill this mandate in FY 2016 OGIS

- completed four agency compliance assessments,
- studied and published a report on agency use of “still interested” letters,
- launched an agency self-assessment questionnaire, and
- reviewed and provided comments on FOIA regulations for three Cabinet-level departments and one agency.

Our compliance assessment program, the first of its kind in the administration of FOIA, was built after reviewing compliance at two DHS components in FY 2015: the [Federal Emergency Management Agency \(FEMA\)](#) and the [United States Coast Guard \(USCG\)](#), our first agencies outside of the National Archives and Records Administration (NARA). (In late FY 2014 and early FY 2015, we assessed the FOIA programs at [NARA’s Office of General Counsel](#), which processes FOIA requests for operational records that NARA creates or receives in carrying out its mission and responsibilities as an executive branch agency, and the [Special Access and FOIA](#) program, which processes requests for archival records in the Washington, DC, area, the vast majority of which are available without a FOIA request.)

We made a total of 39 recommendations in FY 2016 in our compliance assessments of the [Transportation Security Administration \(TSA\)](#), [Customs and Border](#)

Protection (CBP), and United States Secret Service (USSS).¹ Our recommendations centered on three areas—management, technology, and communication.

In assessing agency FOIA programs, we recognize that there is no one-size-fits-all approach to administering FOIA: each agency's records are unique, and management of the FOIA process differs from agency to agency.

Management

As part of our assessments, we evaluated how a FOIA program is managing the resources it is given by the agency. Our FY 2016 assessments show the importance of strong management practices to the success of the program. For example, our assessment of CBP showed that support from leadership and a plan for addressing both the backlog and incoming requests enabled the FOIA program to drive down its backlog by 74 percent in FY 2015—from 34,307 requests to 9,024 requests. Adopting management controls, including setting goals for the number of cases processors should close each week, also contributed to CBP's improvement. Among our 15 recommendations for CBP was to discuss with its leadership options for managing both the backlog and incoming requests, ensuring proper staffing levels in the coming years, and developing a standard operating procedure (SOP) for the entire FOIA process.

For TSA, we recommended that FOIA managers monitor the number of cases closed and volume of pages reviewed by each processor and set data-driven goals to reduce the backlog and increase timeliness. In response to our recommendations, one of 12 at TSA, the agency reported that establishing performance metrics for FOIA analysts and case closure goals for the office helped reduce its backlog in four months.

¹ Although we completed a compliance assessment at Immigration and Customs Enforcement (ICE), we published the report early in FY 2017.

WHAT DOES AN AGENCY ASSESSMENT LOOK LIKE?

An OGIS assessment is a collaborative process in which we review an agency's compliance with the FOIA statute and guidance issued by OIP through analysis of written material, including an agency's FOIA regulations, annual FOIA reports, standard operating procedures, weekly or monthly management reports, and organizational charts. We also analyze FOIA litigation in which the agency is involved and conduct a short survey of FOIA professionals to look for patterns or trends.

During an on-site visit, we interview FOIA professionals and review a sample of FOIA case files. A final report documents our findings and recommendations to the agency.

OGIS follows up in 120 days with the FOIA programs to learn what improvements, if any, the agency has made to its program. After evaluating the agency's responses, we close all of the recommendations that the agency has addressed. Of the 60 recommendations we made in our assessments of FEMA (FY 2015), USCG (FY 2015), TSA (FY 2016), and CBP (FY 2016), we have closed 58 recommendations, which represents an almost 97-percent rate of closure.

Technology

Our FY 2016 assessments showed the importance of technology to a FOIA program's success. CBP attributed part of its backlog reduction to a move to a FOIA tracking system that agency FOIA managers thought was better suited to handle the large volume of requests that CBP receives each year. At USSS, on the other hand, we documented issues the office experienced with its FOIA tracking and processing system, which were significant enough to require some FOIA processors to use tape to hand-redact documents. One of

our 12 recommendations to USSS was to ensure that the FOIA branch had sufficient IT support. Similarly, among our recommendations to TSA was that the agency fully implement its FOIA request tracking and processing system.

Our assessments also illustrated the importance of properly training FOIA processors and managers on how to use their FOIA processing systems. At USSS and TSA, we noted discrepancies between the tracking and processing system and the case files regarding FOIA exemption use. At CBP, we noted that FOIA processors sometimes failed to upload files into the tracking system, creating an incomplete administrative record.


Status of OGIS Compliance Recommendations

	Management	Technology	Customer Service
Response Received FY 2016			
Federal Emergency Management Agency	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>
United States Coast Guard	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>
Transportation Security Administration	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>
Customs and Border Protection	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>
Response Due FY 2017			
United States Secret Service	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>

Communication

Effectively communicating with requesters is a low-cost way to improve a FOIA program's performance and potentially save resources. Lack of response to a FOIA request was a factor in the majority of FOIA lawsuits filed against TSA, CBP, and USSS from 2009 to 2015, according to OGIS's review of FOIA litigation involving those agencies. We made specific recommendations to each of the FOIA programs to focus on improved communication with requesters. We recommended: that TSA add a brief explanation of FOIA exemptions to the FOIA response checklist, that CBP revise its template letters to shed more light on the process for the requester, and that the USSS write template letters that provide an explanation for why certain material is covered by an exemption.

“Still interested” letters

The compliance assessment reports we issued in FY 2016 recommended some action regarding the use of “still interested” correspondence—a letter or an email that an agency sends to a FOIA requester asking them if they remain interested in the requested records. Typically, by the time the agency issues such a letter, a significant amount of time has passed since the request was filed. The letter sets a deadline for the requester's affirmative response; in the absence of a response, the agency then closes the request.

In FY 2015, a coalition of open government groups asked OGIS to review agency use of still interested letters as a tool to administratively close FOIA requests. In April and May 2016, we issued a [three-part report](#) on the use of still interested letters. We analyzed historical data reported in the FOIA Annual Reports to the Attorney General for the 15 Cabinet-level departments for FY 1998 to FY 2014. We also used data from FY 2014 to select a sample of FOIA programs to review regarding their use of these letters.

We found that there was no universal use of a closing code when agencies reported requests that they had closed using still interested letters, and this contributed to a lack of transparency regarding their use. For this reason it was

difficult to get a true picture of how often these letters are used or to capture the full effect of the use of still interested letters on FOIA requests. However, even using a broad definition of what might constitute requests closed using these letters, our analysis showed that agencies appeared to close relatively few requests using still interested letters. The number of FOIA requests Cabinet-level departments reported closing using these letters accounted for less than 1 percent of all FOIA requests processed by those 15 departments in all but one of the 17 fiscal years we studied. We also found that the number of requests agencies reported as closed using still interested letters does not appear to have a large effect on the number of requests the agency reported pending at the end of the fiscal year.

Guidance issued by OIP instructs agencies to provide requesters with at least 30 working days to respond to still interested letters and emphasizes that a requester should not be disadvantaged if he/she misses the deadline; rather, the agency should reopen the request when contacted by the requester, and the request should be placed in the queue at approximately the same place it would have been had it never been closed in the first instance.

Our FY 2016 agency compliance assessments included recommendations regarding the use of still interested letters. We recommended that one agency—TSA—follow OIP guidance and DHS practice on the use of still interested letters by providing requesters with at least 30 working days to respond, rather than the 10 days that the agency had been providing. At USSS, we learned that the agency sends still interested letters after requests have been in the queue for one year. One of our recommendations was that the agency limit the use of still interested letters to conform to OIP guidance which requires that there be “good cause” to send such letters.

Agency Self-Assessments

With more than 100 Federal departments and agencies processing FOIA requests, we were not able to assess individual programs as quickly as we would have liked. With that in mind, we created a self-assessment program designed to complement

and supplement—rather than replace—our agency assessment program. The self-assessment—in the form of an online survey—is designed to help agency FOIA professionals identify areas for improvement and give FOIA managers information they need to address issues and launch strategies to improve their FOIA programs. The questions covered a range of topics, including statutory requirements, working with OGIS, FOIA program management and use of technology, proactive disclosures, and customer service. We sent the survey to Chief FOIA Officers at the 61 agencies that process more than 99.5 percent of all of the Federal FOIA requests. The survey was open from January to March 2016, and 127 FOIA professionals from 49 departments and agencies participated. We provided agency-specific feedback to assessment participants and plan to discuss the overall results of the self-assessment program later in FY 2017.

FOIA Regulations

Agency regulations are an important part of the FOIA process and establish the specific details of how each agency will fulfill the requirements of the FOIA statute. Since FY 2011, OGIS has worked to strengthen FOIA regulations government-wide by assessing, reviewing, and commenting on them. That work continued in FY 2016 when we provided comments on FOIA regulations at three Cabinet-level departments—[Homeland Security](#), [Interior](#), and [State](#)—and at the [National Council on Disability](#).

Our regulations review process involves collaboratively working with agencies as they craft updated regulations, providing comments through the interagency review process prior to publication in the *Federal Register*, and/or submitting comments through the public comment process following publication in the *Federal Register*.

As a result of an FY 2015 multiagency effort in which OGIS participated, OIP published a template for agency FOIA regulations in FY 2016. We again provided comments to OIP's template following the passage of the FOIA Improvement Act.



Recommendations

OGIS is required to submit to the [House Committee on Oversight and Government Reform](#), the [Senate Committee on the Judiciary](#), and the President a report that includes “[l]egislative and regulatory recommendations, if any, to improve the administration of FOIA.” 5 U.S.C. 552(h)(4)(A) (iii). This FY 2016 report does not contain any specific recommendations to either the Congress or the President. However, as discussed below, OGIS supports the Archivist’s recommendation to OMB.

FOIA Advisory Committee

Fiscal Year 2016 saw the end of the first term of the FOIA Advisory Committee and the beginning of the Committee’s second two-year term. The National Archives launched the FOIA Advisory Committee in 2014 with the goal of bringing together FOIA requesters and agency FOIA professionals to develop recommendations for improving the FOIA process. The Committee includes government and non-government members representing a variety of views.

The 2014–2016 term of the Committee delivered its final report and its first recommendation in April 2016. The report included a summary of the work of the three subcommittees:

- The [Oversight and Accountability Subcommittee](#) assembled and reviewed FOIA oversight reports issued by agency Inspectors General, the Government Accountability Office, and OGIS to identify possible trends.
- The [Proactive Disclosures Subcommittee](#) explored how agencies can use their FOIA logs to identify frequently requested record types and issues of general interest to the public.
- The [Fees Subcommittee](#) explored the views of agency FOIA professionals on various reform proposals and developed the Committee’s first recommendation.

Based on the work of the Fees Subcommittee in particular, the 2014–2016 Committee unanimously supported a recommendation to the Archivist. Specifically, the Committee recommended that OMB revise its 1987 fee guidance to:

- provide additional clarity on the difference between fee waivers and requester fee categories,
- include additional guidance on the term “representative of the news media” in light of the major changes to the news industry since the guidance was issued,
- incorporate statutory changes to FOIA’s fee structure made by Congress,
- provide guidance on fees for reproduction of documents in an electronic format,
- address agency discretion to not charge fees, and
- recognize the relatively small percentage of FOIA costs that are recovered in fees annually.

The Archivist sent this recommendation, which is included in this report as Appendix B, to the Director of OMB in August 2016. OGIS fully supports the Archivist’s recommendation to OMB.

Following the end of the Committee’s first term, 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. In conjunction with the President’s signing of the FOIA Improvement Act of 2016, the White House encouraged the Committee to study the challenges that agency FOIA programs will face in the future. The 2016–2018 term of the Committee held its first meeting on July 21, 2016. Future meetings of the Committee have been announced on the OGIS website.

Two of OGIS’s six outstanding recommendations for improving the FOIA process were addressed and closed in FY 2016. The first recommen-



Status of OGIS Recommendations to Agencies

- | | |
|---|---|
| <input type="checkbox"/> Update Office of Management and Budget fee Guidance | <input type="checkbox"/> Streamline process for requesting immigration-related records |
| <input checked="" type="checkbox"/> Bring new focus to exemplary customer service | <input type="checkbox"/> Explore how to improve the Privacy Act process |
| <input type="checkbox"/> Ensure FOIA requirements incorporated into new agency technology purchases | <input checked="" type="checkbox"/> Make it easy for all Federal agencies to share FOIA files with OGIS |

dation focused on exemplary customer service. In 2014, we recommended that the Administration take action to bring a focus on exemplary customer service for a better FOIA process, with particular attention to the importance of embedding Alternative Dispute Resolution (ADR) into the FOIA process and supporting FOIA Public Liaisons. In light of the expansion of the role and duties of agency FOIA Public Liaisons and OGIS in the FOIA process made by the FOIA Improvement Act, we consider this recommendation complete.

The second recommendation which OGIS considers resolved was to make it easier for all Federal agencies to share FOIA files with OGIS. In 2012, OGIS worked with OMB to create a Privacy Act routine-use procedure that streamlined the way in which agencies share with OGIS information about FOIA requests covered by the Privacy Act. This routine-use exception allows agencies to share information related to their first-party FOIA requests with OGIS. Such a routine-use procedure for OGIS has allowed us to assist FOIA requesters with disputes without the need to obtain consent for the agency to share information with OGIS. A routine-use exception has also allowed us to review FOIA case files as part of our compliance assessment program. OMB issued a recommendation to all agencies in 2015 that they establish a routine-use procedure. OGIS also worked with DOJ to develop model routine-use language that individual agencies could use for this purpose.

As a result of OGIS's consistent efforts, at the beginning of FY 2016, eight departments and six agencies had established routine-use exceptions for OGIS. During FY 2016, an additional six departments and eight agencies established routine-use exceptions for OGIS. The result: 93 percent of Cabinet-level departments and 14 additional agencies have complied with our request. We also received responses from 17 additional agencies; only three of those 17 agencies declined to establish a routine-use exception for OGIS. We look forward to the establishment of a routine-use exception by the remaining agencies in FY 2017.



Appendix A

Departments and agencies that engaged in dispute resolution with OGIS and the number of OGIS cases in FY 2016²

Department of Justice	512
Department of Homeland Security	304
Department of Defense	108
Department of Veterans Affairs	80
Department of the Interior	75
Department of Health and Human Services	67
Equal Employment Opportunity Commission	47
Department of the Treasury	45
Social Security Administration	43
Department of State	37
Central Intelligence Agency	36
U.S. Postal Service	36
National Archives and Records Administration	27
Department of Transportation	23
Department of Commerce	22
Department of Housing and Urban Development	22
Office of Personnel Management	21
Department of Agriculture	18

² The total is 1,674 (more than OGIS's FY 2016 case load) because some cases involved multiple agencies and/or multiple FOIA requests.

Department of Energy	17
Environmental Protection Agency	17
Department of Labor	16
Securities and Exchange Commission	16
Department of Education	12
Consumer Financial Protection Bureau	9
Federal Communications Commission	8
Merit Systems Protection Board	6
General Services Administration	6
National Aeronautics and Space Administration	5
Peace Corps	5
Federal Energy Regulatory Commission	4
Federal Trade Commission	3
Small Business Administration	3
Commodity Futures Trading Commission	2
Corporation for National and Community Service	2
Federal Deposit Insurance Corporation	2
Federal Housing Finance Agency	2
Federal Retirement Thrift Investment Board	2
National Labor Relations Board	2
Amtrak (National Railroad Passenger Corporation)	1
Board of Governors of the Federal Reserve System	1
Consumer Product Safety Commission	1
Export-Import Bank of the U.S.	1

Federal Election Commission	1
Office of Science and Technology Policy	1
Office of Special Counsel	1
Office of the Director of National Intelligence	1
Pension Benefit Guaranty Corporation	1
Railroad Retirement Board	1
Nuclear Regulatory Commission	1

Appendix B



NATIONAL
ARCHIVES

ARCHIVIST *of the*
UNITED STATES

DAVID S. FERRIERO
T: 202.357.5900
F: 202.357.5901
david.ferriero@nara.gov

26 August 2016
Mr. Shaun Donovan
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

SUBJECT: Freedom of Information Act (FOIA) Advisory Committee Recommendation
Regarding FOIA Fees

Dear Mr. Donovan:

The Freedom of Information Act (FOIA) Advisory Committee, established within the National Archives and Records Administration (NARA) in accordance with the second United States Open Government National Action Plan, submitted to me an approved recommendation that the Office of Management and Budget (OMB) revise its 1987 FOIA Fee Guidelines¹ to reflect technological changes and to clarify fee issues.

The Committee is governed by the Federal Advisory Committee Act, as amended, 5 U.S.C. App., and its objective is to advise on ways to improve FOIA administration, and to make recommendations to me.

This recommendation had been unanimously approved during the 2014-16 term on April 19, 2016. At the first meeting of its 2016-18 term on July 21, 2016, the Committee unanimously re-affirmed its recommendation.

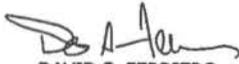
¹ "The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines," Federal Register, Vol. 52, No. 59, Friday, March 27, 1987, accessed August 12, 2016, https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf.

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION
700 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20408-0001
www.archives.gov

It is the Committee's view that revising OMB's fee guidelines would improve Government-wide administration of FOIA by clarifying fees issues for requesters and Federal agencies, establishing a less subjective and more transparent fee assessment process, and reducing the amount of time it takes agencies to assess fees.

Attached is a copy of the FOIA Advisory Committee's first term (2014-16) report and recommendation for your review. I respectfully request your consideration of the recommendations which reflect the Committee's thoughtful and thorough work on this important topic.

Sincerely,



DAVID S. FERRIERO
Archivist of the United States

cc: Ms. Lisa Danzig, OMB Associate Director for Performance and Personnel Management

Attachment: Final Report and Recommendations – FOIA Federal Advisory Committee
April 19, 2016

Freedom of Information Act Advisory Committee

David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

Dear Mr. Ferriero:

We are pleased to submit the final report and recommendations of the Freedom of Information Act (FOIA) Advisory Committee regarding FOIA Fees, Proactive Disclosure, and Oversight and Accountability.

The Committee was established in accordance with the second United States Open Government National Action Plan, and the directive in the FOIA, 5 U.S.C. § 552(h)(2)(C), that the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA) "recommend policy changes ... to improve" FOIA administration. This Committee is governed by the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

The Committee held its first meeting in June 2014. The Committee's objective was to study the current FOIA landscape across the Executive Branch, to provide advice on improving FOIA administration, and to make recommendations to the Archivist of the United States. The Committee formed three subcommittees: the subcommittee on Fees, the subcommittee on Proactive Disclosure, and the subcommittee on Oversight and Accountability. In light of the subcommittee's findings, the Committee respectfully submits the following recommendations for your consideration:

- The Office of Management and Budget (OMB) revise its fee guidance to reflect technological changes in the public's ability to disseminate information. Revision would clarify fee issues for requesters and agencies, providing less subjective and more transparent fee assessment process and reduce the amount of time it takes agencies to assess fees.
 - Provide clarity by clearly differentiating between two separate yet related issues: fee waivers and requester fee category status. Agencies need unambiguous, uniform guidelines on the criteria that must be met for each fee category. These guidelines should reflect the FOIA and relevant case law, including embracing members of the media who publish primarily through electronic means.
 - Provide agencies with additional guidance on what constitutes a "representative of the news media" that takes into account the changes in the journalism profession over the past 30 years due to technological advancements. These guidelines should be fair, balanced, and better enable agencies to make accurate fee category

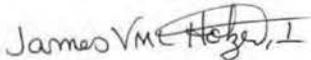
determinations. They should also clarify that fee categories are determined by the identity of the requester, not the particular request.

- Incorporate statutory changes to the FOIA relating to when FOIA fees can be charged. This includes 5 U.S.C. § 552(a)(4)(A)(viii), which states that certain fees cannot be charged when an agency fails to comply with any time limit, if no unusual or exceptional circumstances apply to the request. Clarification is also needed as to which fees may be charged if the 20 working-day statutory time limit is not met, because "unusual or exceptional circumstances" exist.
- Provide guidance on fees associated with reproduction costs, including providing electronic copies via email, CD or DVD. The guidance should also clarify the costs that may be charged for reproducing documents that are transferred from classified to unclassified systems so that they may be released electronically.
- Address how agencies may use their administrative discretion (rather than a formal fee waiver) to decide not to charge FOIA fees when the interest of the United States Government would be served and is clearly articulated.
- Recognize that FOIA fees cover a very small percentage of FOIA costs (in FY 2014 agencies processed 647,142 FOIA requests at a cost of \$462 million dollars and recouped just \$4.2 million dollars from FOIA fees, less than 1 percent of the reported cost). Moreover, these fees are paid to the General Fund of the Treasury, not to the agencies' FOIA offices. The current OMB guidelines appear to be missing a word in Section 8 which adds ambiguity to this expectation.

The report reflects the Committee's thoughtful and thorough work on this important topic.

Mr. Ferriero, on behalf of my FOIA Advisory Committee members, thank you for the opportunity to serve our country through participation in this Committee.

Sincerely,



Dr. James V.M.L. Holzer
Chair
Director, Office of Government Information Services

Attachment: Final Report and Recommendations - FOIA Federal Advisory Committee
April 19, 2016



www.ogis.archives.gov