



OFFICE of GOVERNMENT INFORMATION SERVICES

TESTIMONY OF MIRIAM NISBET

DIRECTOR OF
THE OFFICE OF GOVERNMENT INFORMATION SERVICES
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON

*“Open Government and Freedom of Information: Reinvigorating
the Freedom of Information Act for the Digital Age”*

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Good morning, Mr. Chairman, Ranking Member Grassley, and members of the Committee. I am Miriam Nisbet, Director of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA). Thank you for the opportunity to appear again before you leading up to Sunshine Week, to discuss “Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age.”

FOIA has been a part of American democracy for more than 40 years. Even before 1996, when Congress passed the Electronic Freedom of Information Act Amendments, or e-FOIA, both government and non-government organizations worked to bring FOIA into the digital age and we continue today to identify ways to integrate technology into FOIA efforts. Since last year’s Sunshine Week, we at OGIS have worked closely with government colleagues to contribute to five ambitious administrative efforts to modernize FOIA through the Administration’s second Open Government National Action Plan. All of these commitments embrace using technology in some way to improve FOIA processes.



For example, the Administration committed to launching a consolidated portal to give requesters a single site across government where they can file their requests and which will include additional tools to improve the customer experience. The existing and expanded *FOIAonline* system — in which NARA is a partner and which was the subject of an OGIS Recommendation in 2012 — will certainly inform this process. We look forward to assisting in Administration efforts to implement a service that will both simplify this practice for requesters and streamline the process for agency FOIA professionals.

IMPROVING FOIA — ONGOING EFFORTS

More specifically to the work of OGIS, the FOIA, as you know, directs my Office to recommend policy changes to Congress and the President to improve FOIA administration. Last year, we recommended four ways to improve FOIA administration, and our efforts with all four recommendations continue today. In addition to carrying over those recommendations, OGIS is closely involved in implementing the National Action Plan FOIA commitments, each of which has the potential to significantly improve FOIA processes, and OGIS is also implementing recommendations made by the Government Accountability Office (GAO), which released a report and recommendations in 2013 after conducting an audit of OGIS's work.

Continued OGIS Recommendations

OGIS is making progress on two 2013 recommendations that were intended to carry forward: the recommendation to examine FOIA fees and the recommendation to review the process for requesting immigration-related records. OGIS began examining these issues by reviewing our own cases over the past four years and identifying common themes. OGIS is continuing both projects in FY 2014 by working with stakeholders from both inside and outside government. For example, in 2013, OGIS began communicating with agency officials who receive FOIA requests for immigration records (primarily but not exclusively the Department of Homeland Security), as well as with some of the requester organizations and representatives who regularly file those requests. Examining both fees issues and immigration records processing are complex matters that require long-term, continuing attention and discussion as we assist the various stakeholders to identify issues and potential solutions.

The third 2013 recommendation involved working with agencies to implement dispute resolution for FOIA conflicts. OGIS identified several agencies including OGIS's parent agency, NARA, to examine targeted ways to prevent and resolve disputes as well as avoid litigation. OGIS began meeting with each of those agencies to determine the types of FOIA disputes that result in litigation for the agencies and to explore ways to incorporate dispute resolution into their FOIA processes with the goal of avoiding such litigation. OGIS continues this project in FY 2014. OGIS also worked with the Administrative Conference of the United States (ACUS) to promote research into dispute resolution strategies that might be most effective in reducing FOIA litigation, and we anticipate the resulting ACUS report to be very helpful.

The remaining 2013 recommendation involved reiterating the importance of FOIA, led by Archivist of the United States David Ferriero's message that FOIA is everyone's responsibility. We continue to encourage agencies to issue similar messages and were delighted to see that Energy Secretary Ernest J. Moniz last summer sent a memorandum to the heads of all Department of Energy offices calling on the agency's senior leaders to continue to support the President's commitment to Open Government and transparency.

National Action Plan Efforts

OGIS is working closely with the Department of Justice (DOJ) and the Administration to implement all five FOIA commitments that are part of the second Open Government National Action Plan. Specifically, NARA will support the new FOIA Modernization Advisory Committee, made up of government and non-government FOIA experts who will develop consensus recommendations for improving FOIA administration and proactive disclosures. The new advisory committee is expected to meet up to four times a year, starting this spring.

OGIS will contribute to other National Action Plan commitments being led by DOJ, including standardizing common FOIA practices across agencies either through a shared core regulation or a model regulation that agencies could use, and a series of workshops to improve internal agency FOIA processes. OGIS is also a part of the online FOIA service task force, which will assist in reviewing current practices, seeking public input and developing the best way to implement the consolidated FOIA service mentioned above. OGIS looks forward to assisting and supporting those and other FOIA commitments.

Audit Recommendations

In 2013, GAO released a report after carefully reviewing OGIS's work in carrying out the mission set forth in the FOIA statute. GAO made two recommendations for OGIS to improve our efforts, which OGIS appreciated and continues to implement. First, GAO recommended that OGIS adopt a time frame and methodology for reviewing agencies' FOIA policies, procedures and compliance. We will have that methodology by April 1. I want to emphasize that OGIS has been carrying out our review mission in a number of ways, including observing agencies' policies, procedures and compliance through the specific mediation cases that come to us, by reviewing proposed agency FOIA regulations, by reviewing government and non-government reports on FOIA activity and compliance, and by using all of that to inform OGIS's recommendations to improve FOIA. However, we have not been able to do this as fully as we would have liked. In that regard, I am pleased to tell you that NARA leadership has approved the hiring of three additional staff members at OGIS, specifically to work on OGIS's review mission.

Second, GAO recommended that OGIS adopt measures and goals for our mediation services. We have previously shared with this Committee OGIS's struggles to quantify our mediation efforts — a dilemma that is shared by mediators and ombuds offices, both inside and outside the government, around the globe. Despite that, we believe we can refine how we measure our processes and customer service and we are working on that now.

IMPROVING FOIA — NEW SUGGESTIONS

Beyond the ongoing recommendations and efforts OGIS continues to carry out, there are additional low- or no-cost ways to address technological issues and improve the FOIA process generally.

IT Professionals and FOIA

At any given time, agencies across the government are working to update or purchase new information technology infrastructure. We suggest that when procuring new technology, upgrading existing technology, or even creating a new database, agency program officers consult with their records managers and FOIA professionals to best determine how the records will be managed, how the agency might efficiently and effectively search for records in response to FOIA requests for the information contained in those records, and, ideally, how the agency might proactively disclose the information or data. This collaboration should extend to contracted Information Technology services so that when a FOIA request is received, neither agencies nor requesters are burdened with out-of-contract costs.

We intend to pursue this idea through the National Action Plan initiative led by DOJ to identify ways to improve internal agency FOIA processes. OGIS will work with the Chief Information Officers Council, the principal interagency forum for improving Federal agency practices for IT management, to explore available options that will help agencies embed FOIA into Federal IT policy. I note that one of the Council's objectives is to work with the Archivist of the United States to assess how the Federal Records Act can be addressed effectively by Federal IT initiatives and activities. Given the close link between records management and FOIA, we think folding FOIA into this Council objective makes a lot of sense from an efficiency standpoint. OGIS plans to also include the Federal Records Council in this planning and analysis process.

Additionally, while technology can theoretically make it easier to maintain information, it can sometimes pose a challenge to the process of extracting that information in response to a FOIA request. Undoubtedly, FOIA is *everyone's* responsibility, and FOIA professionals must be able to rely on their more technologically savvy colleagues to help unleash information held in databases or other systems. In this regard, we believe that implementation of the 2012 Managing Government Records Directive, led by NARA and the Office of Management and Budget, and the 2013 Open Data Policy will positively impact the work of FOIA professionals in agencies small and large.

Customer Service and FOIA

As we have mentioned in previous testimony, OGIS has observed through our casework — we have handled more than 2000 cases to date and seen a 40% increase in our caseload — that communicating with FOIA requesters goes a long way towards preventing and resolving disputes. Both OGIS and DOJ's Office of Information Policy regularly remind agencies of the importance of good communications between FOIA professionals and requesters. And of course, good customer service was one of the goals of the OPEN Government Act of 2007 and it is a goal in NARA's new Strategic Plan. This is an area where dispute resolution skills can be particularly effective.

For example, the right to request the estimated date that an agency expects to respond to the customer's FOIA request was extended to requesters in the OPEN Government Act of 2007, at 5 U.S.C. § 552(a)(7)(B); the 2007 amendments also provided that agency FOIA Public Liaisons are to aid requesters when the agency cannot process a request within the statutory time limits, to limit

the scope of the request and to agree on an alternative time frame, 5 U.S.C. § 552(a)(6)(B)(ii). Yet, a recurring issue in OGIS cases involves requesters who are having difficulty obtaining an estimated date that an agency expects to respond to the customer's FOIA request. We well appreciate that agencies have many demands placed on them, but we are seeing that providing information about the estimated date of completion is proving to be challenging for some agencies. OGIS is working with OIP on this issue and we believe that further developments in this area would go a long way to improving customer satisfaction.

This Administration agrees that customer service should be a priority. The President issued an Executive Order, E.O. 13571, in April 2011 directly committing the Administration to improve customer service. We are recommending that Executive Branch guidance be issued to agencies that focuses on ways agencies can provide exemplary customer service to FOIA requesters, with particular attention to the importance of appropriate dispute resolution through the FOIA Public Liaisons and through working with OGIS.

OGIS UPDATE

Finally, I would like to update you on OGIS's additional activities in the last year, which are outlined in our annual report and which include:

- working with agencies when the Office observes — through our mediation services — policies or procedures that OGIS believes are not consistent with FOIA law or policy or that may be different from practices occurring at other agencies.
- providing Alternative Dispute Resolution (ADR) skills training to agency FOIA professionals with the goal of giving the professionals ADR tools to incorporate into their FOIA work. In FY 2013, we held three trainings — two interagency and one agency-specific — and so far in FY 2014, we've held one ADR skills training session.
- offering best practices to agencies and requesters, publicized through our blog, The FOIA Ombudsman, which is updated weekly.
- reviewing agency FOIA materials, from agency websites to template letters.

Finally, OGIS continues to request that agencies update their System of Records Notices (SORNs) to include routine-use language allowing OGIS and the agency to discuss and share information about an individual's FOIA request. This administrative step would be helpful because the Privacy Act of 1974 prohibits disclosure of Privacy Act protected files (in general, records, such as FOIA request records, from which information is retrieved by an individual's name or some other personal identifier) to another person outside of the agency or to another agency, without the consent of the record subject.

When an appropriate routine use is not available, it is our practice to seek the individual's consent. However, attempting to obtain consent can be an obstacle when an agency, rather than an individual requester, is seeking OGIS assistance. The situation places agencies in the position of obtaining a requester's consent for the sole purpose of seeking OGIS' assistance in resolving a dispute (and the

agency may be contacting OGIS precisely because it is having a hard time communicating with the requester).

I appreciate the opportunity to appear before this Committee and thank you for the support that you have shown to the Office of Government Information Services.