



2013 Recommendations

OGIS Policy Recommendations for Improving Freedom of Information Act Procedures March 13, 2013

The National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS) has identified a number of areas where the Freedom of Information Act (FOIA) process could be improved, as well as areas where OGIS's role can be made more effective. These policy recommendations, prepared in accordance with Title 5 of United States Code, Section 552 (h)(2)(C), are based on OGIS's ongoing work with Federal agencies and with members of the public.

Issue 1: Implementing Dispute Resolution for FOIA Conflicts

Challenge:

Although dispute resolution has been a fixture within Federal agencies since the mid-1990s, it is relatively new to the FOIA administrative context. (The OPEN Government Act of 2007 established OGIS and for the first time offered dispute resolution in handling conflicts arising from FOIA requests.)¹ OGIS has observed that FOIA litigation is still accepted by many agencies and requesters as a foregone conclusion when a dispute or conflict arises. Connecting FOIA professionals, legal counsel and dispute resolution professionals to embed dispute resolution firmly into an agency's FOIA process would help to prevent and resolve disputes administratively as well as avoid litigation.

Recommendation and Action Step:

OGIS will expand its dispute resolution training program to help agency FOIA and dispute resolution professionals identify issues that are ripe for partnership and explore ways to work together. To aid that effort, OGIS recommends that agencies encourage and support the use of dispute resolution in the FOIA process. OGIS is available to work with an agency's Chief FOIA Officer along with the agency dispute resolution programs, general counsel's office and FOIA offices to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. Such an approach could help to conserve administrative resources, improve customer service, and avert costly and time-consuming litigation.

Issue 2: Reiterating the importance of FOIA

Challenge:

We continue to observe that agency FOIA professionals face challenges working with colleagues within their own agencies to obtain responsive records and recognize FOIA as a priority. While FOIA touches nearly all aspects of an agency's activities, many agency employees may be unfamiliar with their own responsibilities under the law.

Recommendation and Action Step:

¹ 5 U.S.C. §§ 552(h)(1) and (3); (l); and (a)(6)(B)(ii).

OGIS encourages agencies to remind their staff members of the importance of FOIA and that “FOIA is everyone’s responsibility.”² FOIA professionals are leaders in delivering that message in their everyday work, but other agency professionals who may work on more mission-specific aspects of an agency’s function can generally benefit from a refresher on the law and its applicability to their own work. For example, OGIS worked with our parent agency, NARA, to write a message to be distributed to the NARA staff this Sunshine Week. The Archivist of the United States, David Ferriero, agrees this is an important message and intends to send an annual announcement to this effect. We have attached the National Archives’ memo as an exhibit and posted it on the OGIS website (in our agency FOIA toolkit) so that anyone may use it as a model.

Issue 3: Examination of FOIA fees

Challenge:

The Office of Management and Budget issued FOIA fee guidance in 1987.³ Since then, agencies have moved toward digitizing records, have established online FOIA Libraries, and may now be providing records through *FOIAonline*. Additionally, amendments to the law in 1996 and 2007 have addressed fees. OGIS has observed that fees and fee waivers remain a persistent point of contention administratively and in litigation.

Recommendation and Action Step:

OGIS would like to work with stakeholders from both inside and outside government to review the myriad issues surrounding FOIA fees. We anticipate this will take some time, and may or may not result in recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.

Issue 4: Immigration records and FOIA

Challenge:

Individuals who are not U.S. citizens or lawful permanent residents access immigration-related records from various agencies through FOIA requests. OGIS has observed a large increase in our own cases related to these requests and has learned from the agencies that maintain these records that it is difficult to keep up with such requests. For example, U.S. Citizenship and Immigration Services, the agency that maintains Alien files, reported that it averaged nearly 10,000 requests per month in Fiscal Year 2011.⁴

Recommendation and Action Step:

OGIS has already communicated with agency officials who receive these types of requests, as well as some of the requester organizations and representatives who file them. We began in May 2012 with a preliminary examination of the records and issues. We now recommend that OGIS continue to work with the agency to develop possible methods to streamline the process. We do not anticipate that this effort will lead to a change in the FOIA itself, but we hope that it will improve FOIA administration.

² Attorney General Memorandum on the Freedom of Information Act, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>

³ Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf

⁴ Department of Homeland Security 2012 Freedom of Information Act Report to the Attorney General of the United States at page 3, available at: <http://www.dhs.gov/sites/default/files/publications/foia/privacy-foia-annual-report-fy-2012-dhs.pdf>.