



# *The Freedom of Information Act Ombudsman* 2020 REPORT FOR FISCAL YEAR 2019

#### Message from the Director

I am pleased to present the 2020 Office of Government Information Services (OGIS) Annual Report to Congress and the President of the United States. This report, which covers Fiscal Year (FY) 2019, fulfills the mandate in the Freedom of Information Act (FOIA) that OGIS report on our ongoing efforts to build a better FOIA process.

FY 2019 challenged OGIS in unexpected ways. OGIS began the year with budget constraints while the National Archives and Records Administration (NARA) operated under a series of continuing resolutions, preventing us from filling vacancies. The longest shutdown in the history of the Federal government followed. Despite these obstacles, OGIS celebrated its 10th anniversary while continuing to manage the 2018-2020 term of the FOIA Advisory Committee, and ensuring that the eight recommendations from the 2014-2016 and 2016-2018 terms of the Committee remained on track.

Inquiries to OGIS continued at a pace roughly the same as the previous fiscal year. Streamlined processes in the face of staff shortages helped OGIS decrease our backlog by 50 percent in FY 2019 and handle and close all cases pending from FY 2017.

As the FOIA Ombudsman, OGIS continued its focus on improving the administration of FOIA and ensuring that the FOIA process works as it should. We furthered two of NARA's strategic goals — *Making Access Happen* and *Connecting with Customers* - by facilitating greater access and transparency to Federal government records and assisting anyone who seeks assistance with the FOIA process).

OGIS excelled this year due to the continued support and leadership of the Archivist of the United States, David S. Ferriero. Many thanks also to Deputy Archivist Debra Steidel Wall, Chief Operating Officer William J. Bosanko, Executive for Agency Services Jay Trainer, and General Counsel (and Chief FOIA Officer) Gary M. Stern. OGIS is also grateful for the continued collaboration between our office and the Chief Records Officer for the U.S. Government, Laurence Brewer, and his staff; that partnership recognizes the crucial relationship between FOIA and records management issues.

Thank you to agency FOIA professionals who have helped us understand the FOIA process at their respective agencies and helped resolve numerous disputes this past fiscal year. Thank you also to requesters for sharing their experiences and concerns with us. OGIS has used this information to continue to build a FOIA process that works for all.

Finally, I am grateful for the small but mighty OGIS team who, despite challenges, remain singularly focused on assisting our customers and exploring meaningful ways to continue to improve the FOIA process.

Sincerely,

in MS\_

Alina M. Semo, Director Office of Government Information Services

### **Executive Summary**

The Office of Government Information Services (OGIS) celebrated 10 years as the Freedom of Information Act (FOIA) Ombudsman in Fiscal Year (FY) 2019. Much has changed in the FOIA landscape since OGIS became fully woven into the FOIA process. No longer is litigation the only avenue for requesters and agencies to resolve FOIA disputes. OGIS has become an increasingly powerful voice in the FOIA process. Whether we are reviewing agencies' efforts to comply with the FOIA statute or helping to resolve FOIA disputes, we are a strong advocate for a fair process for requesters and agencies.

Among our activities in FY 2019:

- Handling 4,649 requests for assistance from both FOIA requesters and agencies.
- Teaching eight sessions of FOIA Dispute Resolution Skills for FOIA Professionals (seven agency-specific and one interagency).
- Leading and managing the 2018-2020 term of the FOIA Advisory Committee and its subcommittees: Records Management, Time/Volume, and Vision of FOIA.
- Completing three of seven recommendations made by the 2016-2018 term of the FOIA Advisory Committee to the Archivist of the United States, including advocating that access to Federal agency records is a requirement of the Federal procurement process for records-related information technology.
- Continuing our partnership with the National Archives and Records Administration's Office of the Chief Records Officer (CRO) for the U.S. Government to ask governmentwide FOIA questions, including questions about preparing documents for posting on agency FOIA websites and FOIA performance measures for non-FOIA professionals.
- Completing two assessments—one of an agency FOIA program (our 13<sup>th</sup> agency review) and one FOIA issue assessment.
- Reviewing proposed amendments to FOIA regulations by nine departments and agencies.
- Hosting Sunshine Week at the National Archives and OGIS's statutorily required Annual Open Meeting celebrating the work of OGIS on its 10<sup>th</sup> anniversary.
- Co-chairing with the Office of Information Policy (OIP) at the Department of Justice two Chief FOIA Officer Council meetings that provided an opportunity to discuss important issues with FOIA professionals across the Federal government.

# **Compliance Work**

The FOIA statute mandates that OGIS review FOIA policies, procedures, and compliance and "identify procedures and methods for improving compliance," 5 U.S.C. § 552(h)(2). We do that in a variety of ways, including assessing individual agency FOIA programs; connecting with virtually every agency subject to FOIA through a self-assessment program; and leading and supporting the FOIA Advisory Committee.

For a third consecutive year, we partnered with NARA colleagues who administer the annual Records Management Self-Assessment (RMSA). As part of its oversight of Federal records management programs, NARA conducts the self-assessment to determine whether Federal agencies are complying with statutory and regulatory records management requirements. The partnership with the CRO has assisted us with expanding our review of agency FOIA policies and procedures, identifying potential compliance issues that merit further exploration, and setting OGIS's goals and priorities.

The FOIA Advisory Committee — 20 FOIA experts from inside and outside the government who are appointed by the Archivist of the United States (the Archivist) — studies the FOIA landscape government-wide and advises on improvements to the administration of the statute by the 15 Cabinet-level agencies and 103 independent agencies.

The 2018-2020 term of the Committee held four public meetings in Fiscal Year (FY) 2019. A range of experts presented to the Committee on such topics as inspector general audits of agency FOIA and records management programs; academic research on FOIA administration and trends, including how first-party requests dominate some agency FOIA programs; and the use of technology in administering FOIA.

In between full Committee meetings, the Committee's three subcommittees — Records Management, Time/Volume, and Vision of FOIA — met and began drafting proposed recommendations to the Archivist. The Committee anticipates issuing a final report to the Archivist, including recommendations and best practices, when its term ends in June 2020.

In FY 2019, the OGIS staff continued work on the seven recommendations made by the 2016-2018 term of the FOIA Advisory Committee. The recommendations and best practices focused on search technology, accessibility, and performance standards. OGIS also continued to track the single recommendation from the 2014-2016 term of the FOIA Advisory Committee requesting that the Office of Management and Budget (OMB) update its 1987 OMB Guidelines for FOIA Fees which govern FOIA fees government-wide.

By the end of FY 2019, OGIS had addressed five of the eight cumulative recommendations, and it launched action on two additional recommendations. OGIS has partially addressed the final recommendation and will continue to work on it in FY 2020.

FOIA Advisory Committee Recommendations to the Archivist			
2016-2018 Term			
<b>Status</b> <b>COMPLETED.</b> The CFO Technology Committee, established in late FY 2018, met throughout FY 2019 and drafted a report with best practices and recommendations that we expect to present to the CIO Council in FY 2020.			
COMPLETED. As we reported in our Annual Report for FY 2018, OIP included the following question in the 2019 CFO Report template: <i>"Is your agency leveraging technology to facilitate efficiency in conducting searches, including searches for emails? If so, please describe the type of technology used. If not, please explain why and please describe the typical search process used instead."</i> OGIS analyzed the responses agencies provided to this question in their 2019 CFO reports and published an issue assessment, "Leveraging Technology to Improve FOIA Searches," in July 2019. OGIS's assessment of the reports shows that FOIA processors at some Federal agencies are working across disciplines, collaborating with agency technology tools to conduct more efficient			

2016-2018 Term			
Recommendation	Status		
	with other program offices to improve searches for responsive records.		
3. <b>SEARCH TECHNOLOGY</b> "Suggest a modification to the Federal Acquisition Regulation (FAR) to require all agencies, when acquiring electronic records management software, electronic mail software, and other records related information technology, to consider features that will help facilitate the agencies' responsibilities under FOIA to provide access to federal agency records." The FAR governs how Federal agencies acquire goods and services through purchase or lease.	<b>COMPLETED.</b> OGIS drafted a business case in FY 2019 that would modify the FAR to require access to Federal agency records as a consideration in the procurement process. NARA submitted the business case to the Office of Management and Budget (OMB) in early FY 2020 for consideration by the FAR Council.		
4. FOIA AND ACCESSIBILITY "Launch an interagency effort to develop standard requirements for FOIA processing tools, to ensure that both the tools and their outputs are Section 508-compliant."	IN PROGRESS. Aspects of this recommendation have been addressed through the submission of the FAR business case discussed above. In addition, the Technology Committee of the Chief FOIA Officers Council (CFO) Council spent FY 2019 studying the FOIA technology landscape. The Committee's report and recommendations, to be shared with the CIO Council in FY 2020 and posted on the OGIS and DOJ OIP websites		
<ul> <li>5. FOIA AND ACCESSIBILITY "Request that OGIS conduct an assessment of the methods undertaken by agencies to prepare documents for posting on agency FOIA reading rooms."</li> <li>The FOIA Improvement Act of 2016 amended the Federal Records Act, at 44 U.S.C. § 3102, to include a requirement that</li> </ul>	IN PROGRESS. As a first step in assessing the methods agencies use to prepare documents for posting, OGIS included two questions about this issue in the 2018 RMSA that was administered by the CRO's office in March and April of 2019. The responses showed that, generally, agencies are complying with FOIA's mandate and have procedures for preparing documents for		

# FOIA Advisory Committee Recommendations to the Archivist

FOIA Advisory Committee Recommendations to the Archivist			
2016-2018 Term			
Recommendation	Status		
agencies establish "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format." This requirement broadens existing agency responsibilities under 5 U.S.C. § 552(a)(2).	posting on FOIA reading rooms; and it is largely FOIA staff who are preparing documents for posting. The responses form the foundation for a separate OGIS issue assessment that we expect to publish in FY 2020 in accordance with the FOIA Advisory Committee's recommendation.		
6. FOIA AND ACCESSIBILITY "Encourage OGIS to highlight the issues with proactive disclosure and Section 508 compliance in its report to Congress by recommending that legislation be enacted to clarify agency requirements under the Rehabilitation Act, especially as they relate to proactive posting of large numbers of records."	<b>COMPLETED.</b> OGIS included a recommendation to Congress in our 2019 Annual Report on FY 2018: <i>OGIS recommends that Congress pass</i> <i>legislation to provide agencies with</i> <i>sufficient resources to comply with the</i> <i>requirements of both FOIA and Section</i> <i>508 of the Rehabilitation Act of 1973, as</i> <i>amended, especially as they relate to</i> <i>proactive posting of large numbers of</i> <i>records.</i>		
7. FOIA PERFORMANCE STANDARDS "Direct OGIS to examine the use of appropriate performance standards in federal employee appraisal records and work plans to ensure compliance with the requirements of FOIA. The Committee further recommends that OGIS submit the results of its assessment and any recommendations to Congress and the President in accordance with 5 U.S.C. § 552(h)(5)."	IN PROGRESS. The 2018 RMSA also included a question about FOIA performance measures. The responses show that nearly half of the agencies do not have FOIA performance measures for non-FOIA professionals. The responses to this question will form the foundation for a separate OGIS issue assessment that we expect to publish later in FY 2020.		

FOIA Advisory Committee Recommendations to the Archivist 2014-2016 Term			
Recommendation	Status		
8. FOIA FEES "That the Archivist	<b>COMPLETED.</b> The Archivist sent a letter to		
recommend to OMB that it update its 1987	OMB on August 26, 2016. OGIS has provided		
OMB Guidelines for FOIA Fees, which govern	OMB with suggested updates to the fee		
FOIA fees government-wide."	guidelines and we continue to monitor		
	progress and assist where possible to ensure		
	completion. As we reported in the OGIS		
	Annual Report on FY 2018, we consider this		
	recommendation complete on our end.		

In addition to the FOIA Advisory Committee, we fulfilled our compliance mandate during FY 2019 by:

- Completing and publishing one agency compliance assessment: U.S. Department of Education (September 25, 2019);
- Completing and publishing one issue assessment: "Leveraging Technology in FOIA Searches" (July 31, 2019);
- Launching an issue assessment on Estimated Dates of Completion (expected publication date: early 2020);
- Continuing our participation in NARA's RMSA, administered in March and April of 2019 (report of FOIA-related responses published February 11, 2020);
- Working with individual agencies on specific compliance issues that arose in the course of providing dispute resolution services; and
- Reviewing updated FOIA regulations from nine departments and agencies:
  - □ Council of the Inspectors General on Integrity and Efficiency (October 2018)
  - Food and Drug Administration (November 2018)
  - National Aeronautics and Space Administration (December 2018)
  - Department of the Interior (January 2019)
  - Committee for Purchase from People Who are Blind or Severely Disabled (April 2019)
  - Commission of Fine Arts (May 2019)
  - Department of State (May 2019)
  - American Battle Monuments Commission (June 2019)
  - Environmental Protection Agency (July 2019)

Our assessment of the Department of Education is the 13th assessment of an agency FOIA program since OGIS established its compliance program. OGIS recommended seven actions that the Department should take to comply with FOIA, including updating its FOIA regulations to reflect amendments to FOIA as well as the Department's processes for implementing the substantive and procedural changes. The Department published its updated FOIA regulation

early in FY 2020. OGIS will check back with Education to determine its responses to the seven recommendations.

# **Dispute Resolution Work**

The FOIA statute mandates that OGIS "offer mediation services to resolve disputes between person making [FOIA] requests ... and administrative agencies," 5 U.S.C. § 552(h)(3).

Demand for OGIS services remained robust in FY 2019. We received more than 4,440 submissions, roughly equivalent to the number we received in FY 2018. We closed 4,649 requests for assistance, which also is comparable to FY 2018. As in previous years, the majority of those who requested our assistance in FY 2019 were individuals seeking assistance with the FOIA process.

OGIS's programs — including our dispute resolution and compliance programs, as well as our other activities — share the goal of improving the FOIA process wherever and whenever possible. In our dispute resolution work, we view our interactions with requesters and agencies as an opportunity to educate FOIA's stakeholders to improve the process overall.

In FY 2019, we looked closely at the information we share with requesters to ensure that we are providing information that not only assists with the dispute at hand, but may improve future FOIA requests. We also encouraged requesters, whenever possible, to seek assistance directly from the agency in question — for instance, requesting an estimated date of completion using the agency's resources in the first instance before asking OGIS to request a date on their behalf.

# Training

OGIS's Dispute Resolution Skills for FOIA Professionals training program continued to be a vital part of our service to agencies in FY 2019. Despite a nearly five-week government shutdown, OGIS provided dispute resolution skills training an unprecedented eight times in FY 2019.

In our two previous Annual Reports, we noted an increased demand for training tailored to the needs of individual agencies. This trend continued in FY 2019, as we presented agency-specific training to the Food and Drug Administration (two sessions), the Department of Homeland Security, the Environmental Protection Agency, the Department of Agriculture, the Department of Defense, and the Department of the Treasury. We also provided one interagency session in November 2018.

While the inter-agency training sessions offer an invaluable opportunity for FOIA professionals from across the government to share ideas and learn from one another, the move toward agency-specific training is a positive trend. No longer is dispute resolution

viewed as the sole domain of the FOIA Public Liaison; instead, agencies see the value of the entire FOIA staff learning skills that improve communication with customers and one another.

FY 2019 training participants affirmed the program's value, giving our training an average satisfaction rating of 4.9 out of 5 in their responses to our post-training feedback forms. Participants' comments include:

- "[I] will utilize some of the skills to defuse specific situations."
- "Now [I am] fully aware of how to calm a stressed out requester."
- "It will help me and remind me to reach out to requesters more often."
- "Thank you for conducting such great training that touched on all of the learning style[s]."
- "Already thinking of other options for calls with certain requesters."
- "It should be offered to every FOIA professional."
- "Definitely should be mandatory."

#### Outreach

OGIS continued its outreach efforts in both the agency and requester communities through a variety of activities including a Sunshine Week program featuring a conversation between Archivist of the United States David S. Ferriero and Beryl A. Howell, Chief Judge of the U.S. District Court of the District of Columbia. The event also included panel discussions on the past, present and future of OGIS, and the future of electronic recordkeeping.

OGIS's Annual Open Meeting, required by the statute, celebrated OGIS's first 10 years. And two meetings of the Chief FOIA Officers Council provided an opportunity to discuss important issues with FOIA professionals across the Federal government.

OGIS staff also presented to a variety of organizations, including the American Society of Access Professionals (ASAP) and the Coalition of Federal Ombudsmen (COFO). OGIS staff members also presented to FOIA programs sponsored by the U.S. Census Bureau and the Centers for Disease Control and Prevention.

#### OGIS Staff

Title	Name
Director	Alina M. Semo
Deputy Director	Martha W. Murphy

Title	Name
Attorney-Advisor	Sheela Portonovo
Staff Assistant	Teresa Brady
Student	Laurielle Lambert (February 2019 - January 2020)
Compliance Team	Kirsten B. Mitchell (Lead) Christa Lemelin
Mediation Team	Carrie McGuire (Lead) Dwaine Bacon Jessica Hartman

#### **Appendix**

FOIA requires OGIS to report "the number of times each agency engaged in dispute resolution with the assistance of [OGIS] or the FOIA Public Liaison," 5 U.S.C. §552(h)(4)(A)(ii)(II). The chart below provides that information for FY 2019.

The total number of OGIS cases does not equal the total number of cases OGIS handled in FY 2019 because some cases involved multiple agencies or requests. In other cases, mostly involving telephone calls, the name of the agency was not relevant to the issue and OGIS did not note the agency name.

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison <sup>1</sup>
Department of Justice	1,112	10,000
Department of Homeland Security	591	8,400

<sup>&</sup>lt;sup>1</sup> From 2019 Chief FOIA Officer Reports available at <u>https://www.justice.gov/oip/chief-foia-officer-reports-2019</u>. N/A means that the agency processed 50 or fewer requests in FY 2017 and thus was not asked to report on requesters seeking assistance from the FOIA Public Liaison. (*See* "Guidelines for 2019 Chief FOIA Officer Reports," <u>https://www.justice.gov/oip/oip-guidance-13</u>).

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Social Security Administration	260	7,300
Department of Health and Human Services	254	1,250-1,750
Department of Defense	226	> 1,000
Department of Veterans Affairs	118	179
Department of Labor	103	699
Department of State	91	2000
Equal Employment Opportunity Commission	89	1,748
Department of the Treasury	73	2,100
Department of the Interior	59	115
National Archives and Records Administration	51	121
U.S. Postal Service	48	52
Central Intelligence Agency	47	0
Department of Agriculture	31	50
Department of Transportation	31	260

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Department of Commerce	26	21
Office of Personnel Management	24	300
Environmental Protection Agency	22	250
Small Business Administration	22	225
Department of Housing and Urban Development	20	25-30
Securities and Exchange Commission	19	10
Pension Benefit Guaranty Corporation	18	1
Department of Energy	17	32
Department of Education	15	96
Office of the Director of National Intelligence	13	5
Federal Communications Commission	10	28
Office of Special Counsel	8	82
National Transportation Safety Board	6	0
Federal Trade Commission	5	60

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
U.S. Agency for International Development	5	< 5
Federal Housing Finance Agency	4	0
Merit Systems Protection Board	4	2
Consumer Financial Protection Bureau	3	200
Executive Office of the President: Office of Management and Budget	3	0
General Services Administration	3	200
National Aeronautics and Space Administration	3	4
National Labor Relations Board	3	95
U.S. Consumer Product Safety Commission	3	800-900
Executive Office of the President: Office of the U.S. Trade Representative	2	45
Federal Deposit Insurance Corporation	2	6
Federal Energy Regulatory Commission	2	70
Tennessee Valley Authority	2	0
Amtrak	1	0

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Board of Governors of the Federal Reserve System	1	50
Executive Office of the President: Office of Science and Technology Policy	1	0
Federal Election Commission	1	2
Millennium Challenge Corporation	1	N/A
Office of Government Ethics	1	30
Railroad Retirement Board	1	0
U.S. Access Board	1	N/A
U.S. Agency for Global Media <sup>2</sup>	1	0
Administrative Conference of the United States	0	N/A
Advisory Council on Historic Preservation	0	N/A
American Battle Monuments Commission	0	N/A
Appraisal Subcommittee	0	N/A
Armed Forces Retirement Home	0	N/A

<sup>&</sup>lt;sup>2</sup> Formerly Broadcasting Board of Governors

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Chemical Safety and Hazard Investigation Board	0	0
Commission of Fine Arts	0	N/A
Committee for Purchase from People Who Are Blind or Severely Disabled	0	N/A
Commodity Futures Trading Commission	0	<10
Corporation for National and Community Service	0	0
Council of Inspectors General on Integrity and Efficiency <sup>3</sup>	0	N/A
Court Services and Offender Supervision Agency	0	4
Defense Nuclear Facilities Safety Board	0	N/A
Denali Commission	0	N/A
Executive Office of the President: Council on Environmental Quality	0	10
Executive Office of the President: Office of National Drug Control Policy	0	0
Export-Import Bank	0	12
Farm Credit Administration	0	N/A

<sup>&</sup>lt;sup>3</sup> CIGIE has an agreement for its FOIA requests to be processed by the U.S. Department of Justice Office of Inspector General.

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Farm Credit System Insurance Corporation	0	N/A
Federal Financial Institutions Examination Council	0	N/A
Federal Labor Relations Authority	0	0
Federal Maritime Commission	0	N/A
Federal Mediation and Conciliation Service	0	3
Federal Mine Safety and Health Review Commission	0	1
Federal Open Market Committee	0	N/A
Federal Retirement Thrift Investment Board	0	N/A
Gulf Coast Ecosystem Restoration Council	0	N/A
Harry S. Truman Scholarship Foundation	0	N/A
Institute of Museum and Library Services	0	N/A
Inter-American Foundation	0	N/A
James Madison Memorial Fellowship Foundation	0	N/A
Legal Services Corporation	0	N/A

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Marine Mammal Commission	0	N/A
Morris K. Udall Foundation	0	N/A
National Capital Planning Commission	0	N/A
National Commission on Military, National, and Public Service	0	N/A
National Council on Disability	0	N/A
National Credit Union Administration	0	"very few, if any"
National Endowment for the Arts	0	* not reported
National Endowment for the Humanities	0	0
National Indian Gaming Commission	0	0
National Mediation Board	0	N/A
National Science Foundation	0	0
Neighborhood Reinvestment Corporation	0	N/A
Nuclear Regulatory Commission	0	1
Nuclear Waste Technical Review Board	0	N/A

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
Occupational Safety and Health Review Commission	0	0
Office of Navajo and Hopi Indian Relocation	0	10
Overseas Private Investment Corporation	0	0
Peace Corps	0	0
Postal Regulatory Commission	0	N/A
Presidio Trust	0	N/A
Privacy and Civil Liberties Oversight Board	0	N/A
Selective Service System	0	N/A
Social Security Advisory Board	0	N/A
Special Inspector General for Afghanistan Reconstruction	0	N/A
Surface Transportation Board	0	0
U.S. African Development Foundation	0	N/A
U.S. Commission on Civil Rights	0	N/A
U.S. Copyright Office	0	N/A

Department/Agency	No. of OGIS cases	No. of times requesters sought assistance from agency FOIA Public Liaison
U.S. Election Assistance Commission	0	N/A
U.S. Institute of Peace	0	N/A
U.S. Interagency Council on Homelessness	0	N/A
U.S. International Boundary and Water Commission	0	0
U.S. International Trade Commission	0	N/A
U.S. Trade and Development Agency	0	N/A



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