

Overview: The Freedom of Information Act (FOIA) mandates that the Office of Government Information Services (OGIS) review agency FOIA policies, procedures and compliance. See 5 U.S.C. §§ 552 (h)(2)(A) and 552 (h)(2)(B). The statute neither defines nor states how such review is to be carried out.

OGIS currently reviews agency FOIA policies, procedures and compliance by

- providing Dispute Resolution Skills training to agency FOIA professionals;
- highlighting agency best practices;
- reviewing and commenting on proposed agency FOIA regulations;
- reviewing and suggesting improvements to agency FOIA materials;
- working with agencies when the Office observes policies and procedures that appear to OGIS to be inconsistent with FOIA law or policy; and
- reviewing government and non-government reports on FOIA activities and compliance.

OGIS will build on these activities by launching an agency assessment program in which OGIS will review agency FOIA programs by

- Providing agencies with materials to conduct self-assessments
- Assessing agency FOIA programs through a review of sources to include
  - FOIA request files;
  - supporting documentation to include but not limited to agency FOIA regulations and internal guidance for processing requests; and
  - agency visits.
- Providing agencies with FOIA compliance reports
- Assisting agencies in solving their biggest FOIA challenges

As with its mediation services, OGIS's mission to review agency policies, procedures and compliance will be conducted as an advocate for the FOIA process with a focus on impartiality and fairness.

### Methodology for Current OGIS Review Activities

OGIS provides Dispute Resolution Skills training to agency FOIA professionals to help them comply with the statutory requirement that FOIA Public Liaisons assist in resolving disputes, 5 U.S.C. §§ 552(a)(6)(B)(ii) and 552(l). OGIS's innovative approach assists FOIA Public Liaisons across the government with fulfilling their mandate to assist in the resolution of disputes between the requester and the agency (5 U.S.C. §§ 552(a)(6)(B)(ii) and 552(1)) and to assist in reducing delays, increasing transparency and understanding the status of requests (5 U.S.C. § 552(l)).

OGIS conducts multi-agency training twice a year and agency-specific training as needed. Participants in the multi-agency training are generally self-selecting, although some agency FOIA programs have asked their professionals to attend as part of FOIA training in general. OGIS selects the agencies for agency-specific training by fielding requests from agencies and by suggesting the program to agencies.

# Methodology for OGIS Review of Agency Policies, Procedures and Compliance

March 31, 2014

OGIS publishes best practices on its blog and in handouts for agencies and requesters to use in striving for an efficient and fair FOIA process for all. OGIS has best practice handouts including those on the following topics:

- FOIA request filing and process
- communications and customer service
- FOIA requests for database records
- agency FOIA regulations

OGIS publishes best practices and blog posts when we notice issues arising from our mediation casework or we handle a case with novel issues.

OGIS reviews and suggests improvements to agency FOIA regulations. OGIS subscribes to daily alerts from the Federal Register and each day reviews any proposed rules, rules, and notices regarding the Freedom of Information Act.

When an agency publishes a FOIA regulation (or another FOIA-related document such as a form used to submit FOIA requests), OGIS reviews for compliance with the statute and for OGIS best practices.

Specifically, OGIS reviews whether the regulations

- Specify a fee schedule
- Specify guidelines for reducing or waiving fees
- Properly establish that
  - commercial requesters may be charged direct costs for search, review and duplication;
  - educational/noncommercial scientific institution /news media requesters are not charged for search and review but must pay direct costs after 100 pages of duplication; and
  - all other requesters pay direct costs after 2 hours of search time and after the first 100 pages of duplication.
- Address how requesters seek a fee waiver because the information is in the public interest and likely to contribute significantly to public understanding of operations or activities of the government and is not primarily in the commercial interest of the requester.
- Address how requesters can seek expedited processing
- Require advance payment of fees only in cases in which the requester has previously failed to pay fees in a timely manner or the agency has determined that the fees will exceed \$250
- Provide for a breakdown of fees for search, review and duplication
- Include information about OGIS's mediation services as a non-exclusive alternative to litigation

OGIS also reviews the regulations for such issues as aggregation of requests, multi-track processing, and referrals and consultations.

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OGIS comments are submitted to the Strategy Division of the National Archives and Records Administration (NARA), which shepherds them through the public comment process generally via regulations.gov.

OGIS conducts similar reviews of regulations during pre-public comment review if requested; because such review precedes the public comment structure, OGIS communicates directly with the agency.

OGIS also reviews and suggests improvements to agency FOIA materials, including websites, template letters and FOIA guides. OGIS publicizes this service on its blog and during Dispute Resolution Skills training. OGIS reviews these materials with the following in mind:

- FOIA, 5 U.S.C. § 552
- Guidance from the Office of Information Policy, Department of Justice, including DOJ's Guide to the Freedom of Information Act
- Office of Management and Budget Guidelines for Fees, 1987
- Plain Writing Act of 2010, Public Law 111-274, mandating clear and concise language
- Executive Order 13571, calling on Federal agencies to streamline service delivery and improve customer service
- Memoranda from the President and Attorney General
- OGIS Best Practices
- Relevant FOIA case law

OGIS works with agencies when it observes, including through its mediation work, 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. This occurs when an OGIS facilitator, deputy director or director notice an issue in one particular case or as a trend in several cases. Past examples include:

- A 20- or 30-day appeal time, far shorter than the 45- or 60-day appeal window at many agencies.
- A policy regarding the release of information older than 100 years.
- A policy regarding when a requester gets two free hours of search time and 100 free pages of duplication.

In these cases, OGIS brings the issue to the agency's attention and facilitates a series of discussions with agency FOIA professionals. In some but not all cases a letter is sent from the OGIS Director to the agency's FOIA Public Liaison and/or Chief FOIA Officer. OGIS plans to post these letters on its website.

OGIS reviews government and non-government reports on FOIA activities and compliance, including FOIA reports and Chief FOIA Officer reports submitted annually to the Department of Justice. Non-governmental organizations, including OpenTheGovernment.org, the National Security Archive, Cause of Action, and the Sunshine in Government Initiative also issue reports on FOIA activities and compliance, and OGIS uses these reports to inform its observations of FOIA.

## Methodology for Expanded Review Activities

Scope: OGIS will continue all existing review activities and build on them twofold: by conducting agency assessments, both on a regular schedule and in certain circumstances under special request, and by selecting particular issues to review on an *ad hoc* basis.

By broadening the scope of OGIS's review function to include agency assessments, OGIS hopes to touch as many agency FOIA programs as possible. FOIA applies to all 15 Cabinet-level departments and 85 agencies; as such, OGIS's jurisdiction extends to those departments and agencies. OGIS's work touches all aspects of FOIA, from the administrative process itself to the use of exemptions to withhold information to fees. Each regularly scheduled agency assessment may touch on any and all aspects of FOIA, while special request assessments may focus on a particular issue or issues.

OGIS assessments will include review of an agency FOIA program with a focus on the process that the agency uses to fulfill its statutory requirements under FOIA. When applicable, OGIS will coordinate with the Government Accountability Office (GAO), which is mandated in the FOIA statute with conducting audits of administrative agencies on FOIA implementation and issuing reports detailing the results of such audits, 5 U.S.C. § 552(i).

Special requests for assessments may come from either an agency itself or a requester or group of requesters.

Schedule: At the beginning of each fiscal year, OGIS will publish a schedule of agencies it plans to assess during that fiscal year. NARA's Office of General Counsel, which processes FOIA request for operational records of the agency, has volunteered to be the pilot for OGIS's first assessment. The number of agencies OGIS assesses each fiscal year will depend on our early assessment experiences and the number of OGIS staff dedicated to the Office's review program. OGIS hopes to have a three-member team in place by July 1, 2014.

In addition to regularly scheduled assessments, agencies and requesters may request oversight activities be performed by OGIS. Such activities may be scaled to an agency's specific needs and requirements. For example, an agency or a requester or group of requesters may request that OGIS review policies, procedures and compliance regarding one particular component or regarding a specific FOIA issue, such as fees or estimated dates of completion.

Criteria: OGIS's Assessment Program will be based on OGIS's Elements of an Effective Agency Freedom of Information Act Program, a detailed schema based on

- the FOIA statute;
- Office of Management and Budget Guidelines for Fees;
- Presidential Memoranda;
- Attorney General Memoranda;
- Guidance from the Department of Justice's Office of Information Policy, including DOJ's Guide to the Freedom of Information Act;
- OGIS Best Practices; and
- Inconsistencies and non-compliance observed during OGIS's mediation services.

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OGIS also will consider Executive Orders, such as EO 13571, Streamlining Service Delivery and Improving Customer Service; and non-FOIA statutes such as the Plain Language Act of 2010.

Evaluation Questions: Evaluation Questions will be based on OGIS's Elements of an Effective Agency FOIA Program. OGIS, working in consultation with the Information Security Oversight Office (ISOO) and other offices within NARA, will build a survey tool that agency FOIA professionals can take anonymously to give a snapshot of their FOIA programs. The survey tool includes automatic response compilation.

OGIS will

- Provide agencies with materials to conduct self-assessments; OGIS will work with both ISOO and NARA's Records Management professionals to build the self-assessment with existing resources that factors in logic checks
- Assess agency FOIA programs through a review of sources to include
  - a sampling of FOIA request files;
  - supporting documentation to include but not limited to agency FOIA regulations and internal guidance for processing requests\*;
  - agency training materials;
  - agency website;
  - agency Annual FOIA and Chief FOIA Officer reports to DOJ; and
  - agency visits to include interviews.
- Provide agencies with the results of OGIS's assessments
- Assist agencies in solving their biggest challenges

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\* NOTE: OGIS will be limited in its ability to review FOIA request files. That is because the Privacy Act covers FOIA and Privacy Act request files at every agency, which means that FOIA request files, which are retrieved by an individual's name or personal identifier, cannot be disclosed to another person (outside of the agency) or to another agency, with certain exceptions.

One exception is when an individual consents to disclosure of his or her records request file. That's where OGIS's consent requirement comes in. In many instances, such consent is required before we can contact the agency to try to begin facilitating a resolution to a dispute.

Another exception to the non-disclosure provision of the Privacy Act is when an agency "routinely" needs to disclose those records for certain purposes: for example, the Department of Justice (DOJ) and the Department of Homeland Security. In those instances, the agency publishes what's called a Systems of Records Notice (SORN) in the Federal Register describing the records, how the records are maintained, and when and how they disclose them without first getting the consent of the individual.

The following departments and agencies have OGIS language in their SORNs:

- Defense

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- Health & Human Services
- Homeland Security Justice
- Office of Special Counsel
- Privacy & Civil Liberties Oversight Board
- Securities & Exchange Commission
- State
- Transportation
- USAID (3/10/14)
- USPS