

NARA, PLEASE FUND OGIS!! (PART 1)

**HAMMOND SEPTEMBER 9, 2021
FOIA ADVISORY COMMITTEE MEETING SPEAKER NOTES**

**Chief FOIA Officers Council
Public Comment**

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October 22, 2021**

OUTLINE

- Preface - I continue to support OGIS ...
- OGIS Budget Requests – NARA Congressional Justifications
- September 9, 2021 Meeting Speaker Notes: Oral Comments to FOIA Advisory Committee “OGIS Funding and Case Accountability Logs”
- September 9, 2021 Meeting Chat Comments
- NARA, Please Fund OGIS!!



PREFACE - I CONTINUE TO SUPPORT OGIS

With my deep respect ...

As an initial matter, I want to recognize the Archivist of the United States, **The Honorable David S. Ferriero**; the very accomplished Office of Government Services (OGIS) Director, **Alina Semo**; and the extraordinary, dedicated OGIS Staff, particularly the FOIA Compliance Team: **Kirstin B. Mitchell** and **Christa Lemelin**. the Mediation Team: **Carrie McGuire**, **Dwayne Bacon**, and **Jessica Hartman**.

Notwithstanding my September 9, 2021 speaker notes herein, I am currently seeking input from experts (including NARA staff) on how much funding OGIS needs to accomplish its critical, statutorily mandated, dual FOIA Compliance and Mediation missions, and I am working to obtain funding. Absent adequate OGIS funding, FOIA does not function properly; it dies in darkness and neglect. I have noted my concerns about OGIS budgets and pressed for increases, including reallocating FY 2021 and now FY 2022 funds during CR, as best NARA is able.

Going forward, I am advocating for NARA budget requests that fully fund OGIS - with strong, candid supporting justifications documenting what OGIS cannot accomplish absent such increased funding. Seemingly, a twenty-fold increase. Please inform Congress and the President.

I have pressed to discontinue unlawful, inaccurate citations in FOIA determination and appeal letters throughout the Federal government (including OGIS, DOJ, DOD, etc.) that “disappear” or reduce OGIS mediation workload by misinforming requesters of their statutory mandatory rights.

I have not walked a mile in Mr. Ferriero’s or Ms. Semo’s shoes. My comments are observational.

I need your help. The American citizens need your help.

OGIS BUDGET REQUESTS – NARA CONGRESSIONAL JUSTIFICATIONS

Going into FY 2013 OGIS had a staff of seven. “OGIS asked for additional FTE's as part of the FY 2012 budget initiative, however this request for additional FTE's was not approved.”

I note that thru 2013 OGIS had not done any compliance audits. (OGIS “has not conducted any reviews of agencies' compliance with the law.”)

In a separate audit, OGIS stated that it could not split its mediation team to do audits. (“compliance ... Given OGIS's small staff, the establishment of such a team was not deemed feasible.”)

Déjà vu 2021 with a two-person compliance team and a three-person mediation team with 1,500% more mediation requests.)

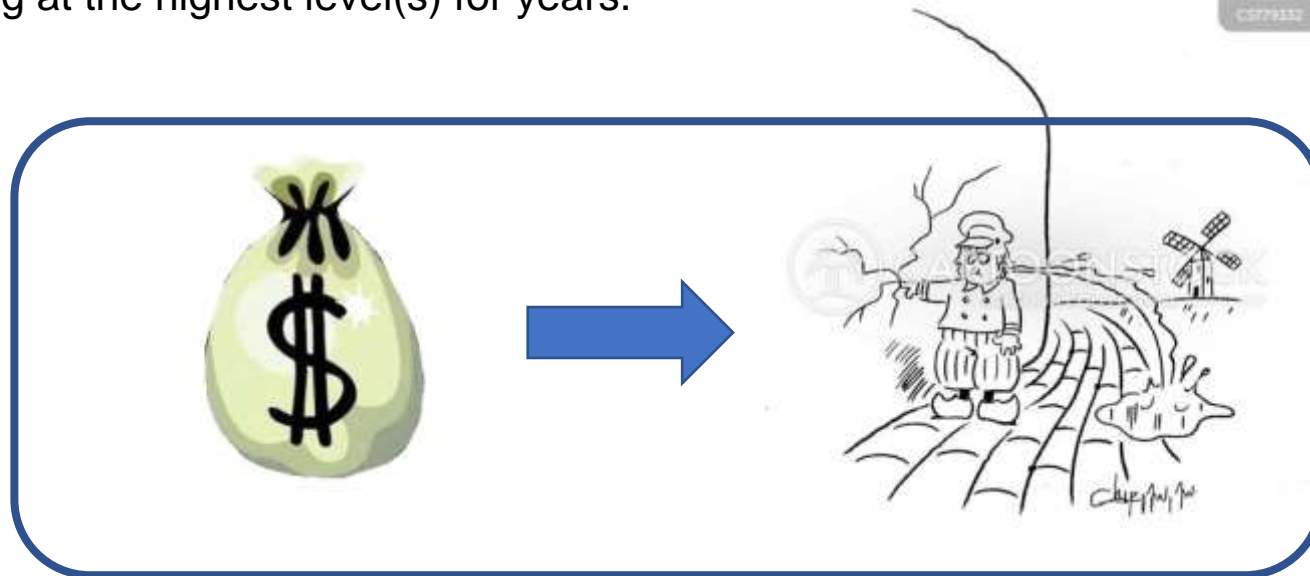
OGIS Budget. Not adjust for inflation or mandatory pay increases.	
	\$ in Thousands Requested
FY 2022	\$1,588
FY 2021	\$1,289
FY 2020	\$1,212
FY 2019	\$1,317
FY 2018	\$1,012
FY 2017	\$1,114
FY 2016	\$1,094
FY 2015	\$913
FY 2014	\$1,074
FY 2013	\$1,629
FY 2012	\$1,529

Then, OGIS is not able to do true mediation at all (per governing statutes). Rather – at best - only seeking untimely clarification from the agencies and parroting agency responses no matter how ludicrous or unlawful they are. Such is inadequate resourcing ...

Meanwhile, “Compliance,” in my view, is a complete failure of OGIS’s statutory mission. Not in my lifetime will OGIS make a single pass thru the Federal Agencies and sample a statistically significant number of requests and appeals for “marginal” assessment.

The audit goal must be a statistically significant source records sample of the total request/appeal population each year, matched with FOIA raw data and Annual FOIA Reports (not a couple hundred records per year).

As OGIS is aware (DOJ OIP also), massive fraud – not error – exists in FOIA reporting, which I have been documenting at the highest level(s) for years.



Speaker Notes for Oral Comments to FOIA Advisory Committee: “OGIS Funding and Case Accountability Logs.”

I want to follow-up on a commitment that I made to help seek additional funding for the Office of Government Services, OGIS, in their important dual missions of compliance and mediation services to resolve disputes between persons making FOIA requests and administrative agencies,” per statute (5 U.S.C. § 552(h)(3)). I know that this Committee has also been seeking ways to get additional funding for OGIS. Recommendation # 19, “Congress strengthen the Office of Government Information Services with clearer authority and expanded resources.”

As an initial matter, “The Federal FOIA Advisory Committee reports to the Archivist of the United States. The Office of Government Information Services (OGIS) serves as the chair of the Committee, and OGIS staff provides administrative and logistical support.” The Honorable David S. Ferriero is the Archivist of the United States.

To the people doing the day-to-day work, I stand with you on the enormous need for more resources, more help. Many in this meeting may not know that OGIS has just two people assigned to the FOIA Compliance Team: **Kirstin B Mitchell** and **Christa Lemelin**. And just three people assigned to the Mediation Team: **Carrie McGuire**, **Dwayne Bacon**, and **Jessica Hartman**.

In correspondence and in a past meeting, I commented that from my experience in the budget world when you tell leadership that you are doing more with less, you get less. So (I said), I would rather have my requests take longer but be more thorough. And, because of the extremely important dual

OGIS missions, I made a commitment to advocate for additional OGIS funding, including writing to members of Congress.

It was time to make good on my promise. So, I looked to the OGIS FOIA Reports to Congress and the President to learn what I could that might be helpful. I learned that in FY 2020 OGIS processed **4,169** requests for assistance. I thought, “This is good stuff. I can divide three staff members into 4,169 requests for assistance and make a strong case.” I think that most of you would agree that is an impossible task for Carrie, Dwaine, and Jessica to do the quality of work that in their hearts want to do. They need more help.

But then I read - in that report to Congress and the President - that OGIS has “decreased our backlog by 83 percent from the end of FY 2019.” “Decreased our backlog by 83 percent.”

Then I learned from NARA’s FY 2020 & FY 2021 Congressional Budget Justifications that NARA sought for OGIS an increase of only \$77,000, barely the rate of inflation. NARA got everything that it asked for, including \$377,823,000 with \$1,212,000 for OGIS; barely enough for salaries and paperclips You will not get money if you don’t ask for it.

When I made that promise to advocate for more OGIS resources, it was from my heart. To the OGIS Team on the front lines, though I want to and stand with you, I cannot help you. No one on this committee can help you, in my view.

Yet, Congress and the President do step up when presented with facts of significant problems affecting our citizens. FOIA is important.

I am reminded of the recent horror affecting our veterans. This may not be a good analogy, so please don't take it literally. All the reports said that veteran patient backlogs were decreasing. Senior executives were getting fat bonuses. While the reality on the ground was that veterans were waiting weeks and months for appointments, becoming sicker and, sadly, in some cases passing away. When the reality on the ground became known, Congress and the President stepped up, provided substantial additional funding, and passed the Veterans Choice and Accountability Act of 2017 allowing veterans to see a local private doctor in certain cases and the VA would pay for it. Congress and the President do step up.

Carrie, Dwaine, and Jessica, I stand with you in your urgent need for more resources; more help.

But, what caused the case backlog to go away? Did something happen to make part of caseload go away? Are agencies (DOD) refusing to engage in dispute resolution? Have requesters become disillusioned and quit relying on OGIS? Is OGIS closing cases without dispute resolution? Is OGIS processing cases in the order received? (On that last issue, just a few days ago, I received a curious letter from Director, OGIS addressing three cases that were themselves only days old, while I have open cases dating back to 2018). Very curious.

DOD has stated that they are not required to include the mandatory right to alternative dispute resolution in adverse determination letters and the OGIS Director agreed with DOD's position until just days ago in a limited retraction to one of those days-old cases. The facts are overwhelming. All public DOJ and OGIS documents and the statute itself state that mandatory right. DOJ and OGIS have posted Model Letters.

In 2020 DOD issued a change to the Code of Federal Regulations governing their FOIA processing. Among others, my presentation to this Committee related to this matter entitled “Mandatory Right to Dispute Resolution” has curiously not been posted, although it meets all OGIS Public Comments Posting Guidelines.

Then, I learned - from OGIS reports to Congress and the President - in FY 2019 OGIS handled 4,649 request cases. **4,649**. In FY 2020 OGIS received only **4,062** requests. What caused the workload to go away, what is ground truth about how the backlog is being cleared, and importantly what of the quality of work that the Mediation Team would in their hearts strive to do?

Here are my recommendations.

- I believe that this Committee, OGIS Compliance, and DOJ OIP must address the issue of DOD’s change to 32 CFR part 286, which does not contain the mandatory right of OGIS dispute resolution and does not appear to comport with laws, regulations, and policies. (Note, DOD INSTRUCTION 5145.05 requires DOD to “actively promote the use of ADR,” and “eliminate barriers to the use of ADR,” which contradicts 32 CFR part 286.4.)
- I believe an audit of OGIS processes, performance metrics, and raw data is also in order. It is also important that the Compliance and Mediation Team workers be evaluated fairly and rewarded for quality work in helping to “resolve disputes between persons making FOIA requests and administrative agencies.” I am awaiting relevant records.
- I believe that OGIS should resume posting response letters and logs and include anonymous surveys in response letters to ascertain effectiveness in executing FOIA dispute resolution. The

private sector uses them extensively to make corrections and keep their customers. The Mediation Team could be rewarded for quality work. Prior to September 22, 2016, OGIS posted logs of its dispute resolution cases and letters, which contained a statement and link, “We appreciate your feedback. Please visit <https://www.surveymonkey.com/s/OGIS> to take a brief anonymous survey on the service you received from OGIS.”

- The Archivist of the United States should reallocate FY 2021 funding within NARA to support the OGIS mission.

Carrie, Dwaine, and Jessica; Kirstin and Christa, I stand with you in your urgent need for more resources, more help.

Please post my associated Public Comments, “OGIS Funding and Case Accountability Logs.”

Thank you.

With my deep respect,

Robert Hammond

SEPTEMBER 9, 2021 MEETING CHAT COMMENTS

(Note, capitalization is not shouting. Needed as separator as chat removes all carriage returns and formatting).

Pls Announce.

On September 3, 2021 6:06 PM, I sent an email to 'foia-advisory-committee@nara.gov, seeking accommodation. I stated, "Per Federal Register Doc. 2021-18430 Filed 8-26-21; 8:45 am, please advise me how I may access a real-time transcript of the September 9, 2021 meeting. I am registered." I have not received a reply.

Pls Announce.

June 10, 2021 FOIA Advisory Committee Meeting link to transcripts is inaccurate; does not go there. Link to Public Comments does not go directly to Public Comments. Pls fix today, if possible. Certified meeting minutes are imprecise.

MINUTES. "Mr. Hammond further noted he submitted additional public comments and did not see them posted on the OGIS website. He noted emails dated May 13 and June 4 around violations of the ADA and FOIA Redactions that are not 508 compliant. He asked if the DOJ/OIP will issue an advisory opinion. Ms. Semo noted that OGIS is aware of the issue and that the FOIA Advisory Committee is not designed to discuss individual requests."

BUT THIS IS NOT ONE REQUEST & ADA BRIEFING CITES MULTIPLE.

ACTUAL. "Okay, so let me respond to two parts of that. First, this is not just one FOIA request. I get this a lot. So, it's a big problem. It's really easy to fix. And so, I think if unless the -- unless there's some kind of an advisory or something, many agents, agencies may not know that they're doing this."

Pls Announce. June 21 Minutes Wrong.

MINUTES. “Mr. Talebian noted his office will continue to work with Mr. Hammond about his concerns. Mr. Hammond asked about public responses to his questions. Mr. Talebian noted OIP has responded.”

BUT OIP HAS NOT RESPONDED.

TRANSCRIPT. “I’ll jump in here really quick because I know that slides are directed at OIG and Mr. Hammond we’d be happy to work with you. I believe your issues are regarding our working compliance inquiries, as well as a disposition of an agency on reporting. My team will continue to work with you on those issues.”

Pls Announce. June 21 Minutes.

MINUTES. “Mr. Hammond noted another question about the Department of Defense change to 32 CFR Part 286.4 that states participation in alternative dispute resolution is optional. Mr. Hammond stated this is contrary to the FOIA statute. Ms. Semo noted OGIS would respond privately to Mr. Hammond about the issue.”

BUT CHANGE TO CFR MUST BE ADDRESSED PUBLICLY & MS. SEMO CUT ME OFF. DOD IS RELYING ON 32 CFR 286 IN REFUSING TO INCLUDE THE MANDATORY RIGHT OF OGIS DISPUTE RESOLUTION IN ADVERSE DETERMINATIONS. DOD and Director, OGIS have stated that including the right to OGIS dispute resolution in adverse determinations is not mandatory, but optional, which is contrary to all posted DOJ OIP and NARA OGIS guidance and the FOIA itself.

Pls Announce. June 21 Minutes Omitted, Public Comments Posting:

TRANSCRIPT HAMMOND. Okay. I appreciate it. You know, the other thing, as to, you know, public comments, and addressing things, I'm not -- I don't know if I've -- if I ever put something in my public comments that you think don't comply with your posting requirements, I would really appreciate feedback on that. Well actually, I need feedback on that to know what it is that OGIS or OIP, I think OGIS posts these, believes is not in line with the posting requirements. So, I appreciate that. The other thing in your public comments, when I read -- and I read those, I read your guidelines very carefully to make sure that I comply, and I'm pretty certain that I do, but it also suggests the good submissions include anecdotes, and experiences, and those kinds of things. It's hard to make broad generalizations about an issue without citing specific examples. And in fact, your public comments call for that.”

Pls Announce. June 21 Minutes Omitted, Public Comments Posting Continued:

TRANSCRIPT HAMMOND. “So, my intent is not to embarrass any agency or anything like that. But again, this is one that I think is kind of a broad issue. And so, I'll appreciate a public response to that. Again, since my comments in the chat room apparently didn't go to all of the members of the panel, I'll post those after the meeting or ask that they be posted as public comments.”

I SENT THE CHAT ROOM COMMENTS. BUT THEY ARE NOT POSTED OR INCLUDED IN THE MINUTES.

OGIS STILL HAS NOT POSTED SOME OF MY PUBLIC COMMENTS, NOR STATED THE STATUTORY OR OTHER BASIS FOR NOT DOING SO. ALL ARE COMPLIANT.

Pls Announce. The April 29, 2021 Chief FOIA Officers Council meeting minutes and mandatory posting of associated records has not been done. Is there a performance metric for this?

Pls Announce. Question for Ms. Semo, NARA OGIS.

The Chief FOIA Officer Council statute mandates posting of all attendees; government, and non-government. Will you adopt the same protocol for posting all attendees for the FOIA Advisory Committee?

Pls Announce. Question for Ms. Semo, NARA OGIS.

OGIS has still not posted my Public Comments, Mandatory Right to Dispute Resolution. Pls publicly state the reason.

Pls Announce. Question for Ms. Semo, NARA OGIS.

OGIS has still not posted my Public Comments, “OGIS response Hammond public comments 9 July 2021.pdf”, which is your letter to me regarding Public Comments Posting and is clearly germane. Pls publicly state the reason.

Pls Announce.

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Thx.

Robert Hammond

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AMERICA! AMERICA! GOD SHED HIS GRACE ON THEE.

The FOIA

The United States Supreme Court has explained that the, "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." The "FOIA is often explained as a means for citizens to know 'what their Government is up to.'" The Supreme Court stressed that "[t]his phrase should not be dismissed as a convenient formalism." Rather it, "defines a structural necessity in a real democracy." As President Obama has declared a, "democracy requires accountability, and accountability requires transparency." The FOIA "encourages accountability through transparency.

VITAL TO DEMOCRACY