

## Openness: Are We There Yet (and How Will We Know)?

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In the United States, the Freedom of Information Act (FOIA) provides the public with the right to access U.S. government records and information. The law -- passed in 1966<sup>1</sup> and one of the older FOI statutes in the world -- was a 20<sup>th</sup> century product of the Open Government principles developed by our nation's founders. The U.S. federal law and its counterpart state laws are now well established as an essential way for the public to learn about the inner workings of the government, fostering transparency and accountability and nurturing the nation's democracy.

With the FOIA as a backdrop, and fueled by technological development, the government has the ability now – more than ever – to make its records available to the governed (that is, the public) without waiting for a request to be made under the FOIA. In other countries as well, many of them new to “on demand” access to government information, citizens have unprecedented access to government information, a development (or vision) that many refer to as “Open Government.” When we talk about Open Government, however, we find that the term means very different things to different people.

Is Open Government about using technology to make government work better and disclosing vast amounts of data for use by citizen entrepreneurs? Is it using more inclusive and cooperative processes to help government agencies develop workable solutions on controversial and complex issues (collaborative governance)? Is it making government records more readily available to shine light on government operations and root out corruption?

Open Government is all those and more.<sup>2</sup> Let me focus on two aspects that are particularly relevant to those of you in the archival world, who are critically important to making Open Government work. Also, I invite you to address the challenge of measuring success in achieving openness, transparency and public collaboration.

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<sup>1</sup>5 U.S.C. § 552 (1966), Pub. L. 89-554, 80 Stat. 383.

<sup>2</sup> The Open Government Partnership, which now has 55 member countries, calls for a member's commitment to open government across four key areas – fiscal and budget transparency, freedom of information, asset disclosures for public officials, and citizen engagement. White House, “Fact Sheet: The Open Government Partnership,” September 20, 2011, <http://www.whitehouse.gov/the-press-office/2011/09/20/fact-sheet-open-government-partnership>. See also Open Government Partnership at <http://www.opengovpartnership.org/>

## A meaningful path to access

The U.S. FOIA is fairly straightforward in concept: anyone can ask for records of the executive branch agencies (our equivalent of ministries), which then – within strict time limits – must release the records or tell the requester why the information is being withheld under specific exemptions. But the access law proved to be more difficult and costly than any of us could have imagined and so our Congress has continued to improve it, sometimes at the behest of FOIA requesters and sometimes at the urging of agency officials who implement the law.

Typically, each year the U.S. government receives around 600,000 FOIA requests and over 9,000 administrative appeals from denials of access. Agencies spend more than one-third of a billion dollars annually on FOIA administration and litigation.<sup>3</sup> Given the volume of requests and appeals, it is not surprising that disputes regularly arise between members of the public and the federal agencies. These parties sometimes have very different opinions on what should be disclosed, how to disclose it, how much to charge for it, and many other issues.

When Congress amended the U.S. law in 1974 to give it “teeth” and to make it what is basically today’s FOIA, Congress included enforcement mechanisms so that a FOIA requester, if dissatisfied with an agency’s response, can file an administrative appeal within the agency, and then file a lawsuit in federal court to challenge the agency’s action.<sup>4</sup> Having different routes to enforce the right of access is crucial to the success of any access law.

Still, these disputes far too often end up in federal court. To try to prevent or resolve disputes that arise in the FOIA context, Congress recently created a federal office – the Office of Government Information Services, within our National Archives and Records Administration – to provide mediation services to FOIA requesters and federal agencies, as an alternative to litigation.<sup>5</sup>

We are now fairly well established and have handled more than 1,000 requests for assistance in resolving disputes. Introducing mediation services to the FOIA process is a creative and collaborative approach to changing the culture of a well-established system, which I have heard criticized too often as balky, impenetrable and adversarial.

In addition to helping to resolve disputes, my Office is charged with reviewing agency FOIA policies, procedures and compliance and recommending policy changes to Congress and the President to improve the administration of FOIA.<sup>6</sup> Our handling of cases, as we mediate and facilitate disputes, gives us a first-hand look at agency practices that also is helpful to us in our review role.<sup>7</sup>

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<sup>3</sup> <http://www.justice.gov/oip/reports.html>

<sup>4</sup> The U.S. district courts have exclusive jurisdiction over FOIA cases. 5 U.S.C. § 552(a)(4)(B).

<sup>5</sup> 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. See 5 U.S.C. § 552(h)(1)-(3).

<sup>6</sup> 5 U.S.C. § 552(h)(2) (2007).

<sup>7</sup> The U.S. Department of Justice also looks at and encourages agency FOIA compliance in its long-established role in leading FOIA implementation and issuing policy guidance; the Justice Department also defends agencies in FOIA litigation.

We have heard great appreciation for our dispute resolution and other activities to ensure that the FOIA is working as it should. However, we also faced criticism this past year from the requester community that the government bureaucracy was keeping us from being able to freely make recommendations for change and that we are not forcing the agencies to do certain things. Yet the statute gives us no enforcement power. And although everyone including our Congress refers to OGIS as the independent FOIA Ombudsman, neither the word independent nor the title Ombudsman appear in the law.

The recent changes to the U.S. law reflect a maturity in implementation that some might characterize as: what took so long? In addition to establishing my office and for the first time directing the agency FOIA offices to use dispute resolution in handling FOIA requests, our law now expressly requires the appointment of a high-level official to be responsible for making the FOIA process work well.<sup>8</sup> The amended law was passed at the end of 2007 and went into effect in 2008. But the changes benefited considerably from a boost when President Obama, on his first full day in office on January 21, 2009, issued two directives to the heads of U.S. departments (our ministries) and agencies on Open Government<sup>9</sup> and on the Freedom of Information Act.<sup>10</sup> Certainly the U.S. experience underscores that without top-down support at the highest levels of government, even the most beautifully written FOI or Access To Information law cannot succeed.

Records management as the backbone of good government

Technology and the power of the Internet raise many additional implementation issues. With the advance of the Open Government initiative in many countries, one recurring question I hear is: Is FOI obsolete? My answer is a resounding “no.” Unless one wants to depend solely upon the voluntary disclosure of documents by those most likely to want to withhold them, one must let members of the public tell the government what information they want.

And, if we intend to improve the delivery of information that our citizens want and can use, access professionals must be on the frontline in managing and preserving information. Even in countries that are presumed to be leaders, we face enormous challenges whether dealing with traditional or digital media. Technology has certainly raised the bar on the critical need for modern records management. The U.S. government included in its 2011 Open Government National Action Plan several interrelated pieces – increased efforts at proactive disclosure of government data; continued improvement of our FOIA, and modernized management of government records. As the Archivist of the United States likes to say: The backbone of an open and accountable government is strong records management. How do we achieve that in the face of information inflation?

Archivists more than anyone understand that managing government records is a complex proposition that involves a commitment from all levels within an agency and the means with which to store, maintain and retrieve those records. We are fortunate in the U.S. that the importance of good records management was highlighted in [President Barack Obama's November 2011 memorandum](#)<sup>11</sup> on managing government records, which launched an executive branch-wide effort

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<sup>8</sup> 5 U.S.C. § 552(k) (2007).

<sup>9</sup> [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment)

<sup>10</sup> [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct)

<sup>11</sup> <http://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>

to modernize records management policies and practices, and called for the development of a Records Management Directive. Implementation of the Directive, which is expected any day now, cannot happen without continued collaboration among many stakeholders, beyond those in the government, to include the public interest community, the business and Information Technology community, and members of the public at large. If the goal is to ensure transparency and accountability, then good records management policies must be “baked into” government processes at all levels. While we are doing that, we need to weave freedom of information principles into records management – as we create and manage records, we should consider how to make it easier to disclose them, if not immediately, then later. Building in openness and accessibility, just as it is with architecture, should be as the way governments do business.

#### Metrics of success

Improving records management and providing meaningful public access to information require change, and change is hard for most of us. Our experience in the U.S. is that culture change does not come without executive leadership and commitment at the highest levels of government, combined with collaboration with private industry and non-governmental organizations. I have found that it is difficult to engender conversations within agencies and among agencies, not to mention between government officials and members of the public, unless leaders make it clear that they expect and demand a culture of collaboration.

As we consider how far we have come and where we are going, we must look for ways to measure the impact, costs and effectiveness of Open Government in its various forms. How do we know whether we are spending our efforts and resources wisely? How do we know where we are falling short?

I will use the Office of Government Information Services (OGIS) as an example of the metrics challenge. As a new part of the U.S. FOI landscape, OGIS is encouraging a new mindset by offering a different way of doing business. We believe that OGIS is contributing to the evolution of the FOI culture by redefining the meaning of success from being a win-lose situation to one where the parties to a dispute can buy into an outcome of their own making, and by emphasizing the cost-saving benefits of stakeholder collaboration.

But we would welcome a less elusive way of assessing our effectiveness in mediating disputes. We have some ideas for measuring success, for example:

1. A study of FOIA litigation and which matters are most litigated. By getting our finger on the pulse of what is most litigated – delays, denials due to a certain exemption, fees, etc. – we can use that information to focus on the issues in our ombuds efforts to prevent litigation. But the question remains of how we can measure a reduction in litigation and, if there are fewer cases, to what is that attributable? Are more disputes being prevented at an earlier point and, if so, how do we capture that phenomenon?
2. A survey based on a sample of our closed cases. Can we better identify the recurring problems, especially the systemic ones? Are the solutions that OGIS has helped facilitate something that agencies and requesters can live with, recognizing that the goal is ensuring that FOIA works, not that one party wins and the other party loses?

We have invited our stakeholders and any interested parties to work with us in developing effective tools and methodologies for assessing the federal FOIA system, as well as the use of mediation as an innovative approach to improving the process. But the larger questions extend to other aspects of Open Government and are ones that call for careful study and thoughtful action. Researchers and academics are asking: Is the unprecedented access citizens now have to government data creating transparency? And if so, what impact is that transparency having on government and society? How do we measure what is not happening, that is, who and what are being left out of the openness tent? What data and evaluation tools and techniques can be leveraged to answer and understand these complex questions?<sup>12</sup>

The answers will lead us to better and more open government.

Additional resources:

- Text of the Freedom of Information Act, including the Memorandum of the President of the United States dated January 21, 2009: <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-partI-chap5-subchapII-sec552.pdf>
- New federal FOIA mediation office marks first anniversary: <http://rcfp.org/newsitems/index.php?i=11643&fmt=print&PHPSESSID=31a98479393001b4d2bd0027831252c9>
- FOIA dispute mediator opens doors: <http://fcw.com/Articles/2010/01/14/NARA-OGIS.aspx>
- Office of Government Information Services (OGIS) reports on activities and recommendations to Congress: <https://ogis.archives.gov/about-ogis/ogis-reports.htm>
- Attorney General's Memorandum for Heads of Executive Departments and Agencies, Freedom of Information Act, March 19, 2009: <http://www.justice.gov/ag/foia-memo-march2009.pdf>

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<sup>12</sup> See, for example, the work of the Center for Technology in Government at the University of Albany (New York, USA): [http://www.ctg.albany.edu/projects/opengov\\_sap](http://www.ctg.albany.edu/projects/opengov_sap)