



DOD Cites Change to CFR 32 CFR part 286.4 as Unlawful Basis for Omitting OGIS Mediation Rights

September 4, 2021

**(Resubmitted
June 26, 2022)**

**(Updates Public Comments of March 3, 2021 & May 3, 2021, 4:46 PM)
by Robert Hammond
FOIAcompliance@gmail.com**

BACKGROUND. FREEDOM OF INFORMATION ACT (FOIA) Advisory Committee

FOIA Advisory Committee

- The National Archives and Records Administration established the Federal Freedom of Information Act (FOIA) Advisory Committee in 2014 to foster dialog between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures.
- The Federal FOIA Advisory Committee reports to the Archivist of the United States (AOTUS) who chartered the Committee in May 2014. AOTUS renewed the Committee's charter in May 2016, May 2018, and May 2020.
- The Office of Government Information Services (OGIS) serves as the chair of the Committee, and OGIS staff provides administrative and logistical support.



ISSUE: DOD CHANGE TO 32 CFR § 286.4

OGIS Dispute Resolution, Optional



- The FOIA Improvement Act of 2016 mandates that agencies include in adverse FOIA determinations the right of the requester to seek dispute resolution services from the National Archives and Records Administration (NARA) Office of Government Information Services (OGIS).
- DOD has implemented a change to 32 CFR § 286.4 that appears to be contrary to the intent of Congress by making participation in OGIS dispute resolution optional; then citing 32 CFR § 286.4 as authority to omit the right to OGIS dispute resolution in adverse determinations.
- Upon appeal of DOD failing to include in adverse determinations the right to seek dispute resolution from OGIS, DOD has repeatedly and unlawfully stated in appellate determinations that it is not required to do so, and has relied on 32 CFR § 286.4 as late as **August 21, 2021**. [This presentation prepared in September 2021, not updated.]
- OGIS has issued conflicting guidance identical to DOD appellate determinations that including the right to seek OGIS services in adverse determinations is not required, but optional. Global correction and Advisory are needed.

32 CFR § 286.4 - FOIA Public Liaisons and the Office of Government Information Services



By Federal Register

Docket ID: DOD-2019-OS-0069 of 07/02/2020,

DOD proposed and then subsequently implemented a change as follows:

Amend § 286.4 by revising paragraph (b) to read as follows:

§ 286.4

FOIA Public Liaisons and the Office of Government Information Services.

(b) Engaging in dispute resolution services provided by OGIS. These dispute resolution processes are voluntary processes. If a DoD Component agrees to participate in the dispute resolution services provided by the Office of Government Information services (OGIS), it will actively as a partner to the process in an attempt to resolve the dispute.

DOD EXAMPLES #1 & 2

OGIS Dispute Resolution Not Required



From: Bob Hammond <perseverance2013@aol.com>

Sent: Friday, October 26, 2018 2:54 PM

To: Melanie.A.Pustay@usdoj.gov; alina.semo@nara.gov

Cc: OGIS@nara.gov; nikki.gramian@nara.gov; alina.semo@nara.gov; adam.yost@navy.mil; wendy.winston@navy.mil; grant.lattin@navy.mil; emilee.k.baldini@navy.mil; kirk.foster@navy.mil; soto.alaric@mail.mil; paul.richelmi@navy.mil; eva.lose@navy.mil; james.mckeeon@navy.mil; Meredith.werner@navy.mil; matthew.roush@navy.mil; griffin.farris@navy.mil; robin.patterson@navy.mil; donfoia-pa@navy.mil; mary.p.shaw@navy.mil; richard.r.strong@navy.mil; joshua.portner.ctr@navy.mil; montant.johnson.ctr@navy.mil; Raymond.Hartwick.ctr@navy.mil; montana.johnson.ctr@navy.mil; robert.miller3.ctr@navy.mil; james.p.hogan4.civ@mail.mil

Subject: Compliance Inquiry. Initial Determination Letters Not Containing Right to OGIS Dispute Resolution

Dear Ms. Pustay,

Please open a new DOJ compliance inquiry regarding Department of Navy's statement that FOIA initial determination letters do not have to contain a statement regarding the right to seek dispute resolution from OGIS. The statute is clear in that regard. My express purpose in pursuing this is for Navy to change this practice **and afford ALL requests that statutory right**. Please provide me a separate letter with your findings and include this compliance inquiry in your reporting. I look forward to a prompt reply to this straight forward matter.

Ms. Semo,

Please also address this matter.

Thank you.

With my respect,
Robert Hammond

DOD EXAMPLES #1 & 2, Continued ...

OGIS Dispute Resolution Not Required NME

NME October 24, 2018

“The second basis of your appeal is NME's failure to advise you of your right to mediation by OGIS. You assert that such notification is required by statute. Your assertion is incorrect. The FOIA requires this agency to notify requesters of "the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services." 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb) (emphasis added). NME's September IO, 2018 response notified you of your "right to seek dispute resolution services from the DOD Navy Component FOIA Public Liaison, Mr. Chris Julka " NME properly notified you of your right to seek dispute resolution services from the FOIA Public Liaison for this agency. **The FOIA statute does not require this agency to also notify you of your right to seek such services from OGIS** in addition to notifying you of your right to seek such services from the agency FOIA Public Liaison. Alternatively, your multiple FOIA requests to this agency have included many responses that inform you of your right to seek such services from OGIS, so you have not been harmed by the failure of NME to inform you of that right. For these reasons, the second basis of your appeal is denied.”



DOD EXAMPLE #1 & 2, Continued

OGIS Dispute Resolution Not Required NSWC PC

NSWC Panama City Appellate Determination

October 29, 2018

“The third basis of your appeal is NSWC Panama City's failure to advise you of your right to seek dispute resolution services from the FOIA Public Liaison of the agency of the Office of Government Information Services, and therefore the initial determination is contrary to law and your appeal must be sustained. As I previously stated, you are clearly aware of your right to dispute resolution services and have suffered no harm. The third basis of your appeal is denied as moot.”



DOD EXAMPLE #3 DOD IG

OGIS Dispute Resolution Not Required DODIG

Appeals April 26, 2019 & March 22, 2021 (remand)

“6. The Agency failed to advise me of my rights after failing to answer my request within 20 working days.

- a. Whenever agencies extend the time limits by more than ten additional working days, in the written notice to the requester they “must notify the requester of right to seek dispute resolution services from the Office of Government Information Services.””

DODIG Appellate Responses of January 25, 2021 & August 17, 2021

- “On April 6, 2019, you requested appellate review of this decision. Your appeal was based on a list of numbered assertions. Regarding the assertions of your appeal numbered 1-8, these matters are not adverse determinations that can be appealed under the DoD’s published FOIA Program.¹”
- “ You submitted a second appeal on March 23, 2021, with a list of numbered assertions. Regarding the assertions of your appeal numbered 1-6, 34 and 35, these matters are not adverse determinations that can be appealed under the DoD’s published FOIA Program.¹”

¹Title 32, Code of Federal Regulations, Part 286

ACTIONS SOUGHT



- Address my comments in Public Forum.
- OGIS and/or DOJ issue an advisory stating that statutory language “the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services;” must be included in adverse determinations and that the word “or” does not mean that the Agency can omit “the Office of Government Information Services” in adverse determinations.
- Agencies publish the Raw Data associated with their requests for FOIA Public Liaison assistance. Raw data should include: Agency case number, date received, date completed (blank if not completed), summary of issues.
- OGIS include in its Freedom of Information Act Ombudsman Fiscal Year Reports to Congress and the President the number of times that agencies declined to participate in OGIS dispute resolution.
- To increase accountability of OGIS dispute resolution cases, OGIS make public the Raw Data used in calculating request received, processed and backlogged. Raw Data should include: OGIS case number, date received, date completed (blank if not completed), summary of issues.

BACKUP



REFERENCES



References:

- (a) The Freedom of Information Act (FOIA) Improvement Act of 2016 (Public Law No. 114-185), available at <https://www.justice.gov/oip/freedom-information-act-5-usc-552>
- (b) Administrative Instruction 106, “Alternative Dispute Resolution (ADR) Program,” January 30, 2014
- (c) DoD 5400.11-R, “Department of Defense Privacy Program,” May 14, 2007
- (d) DoD Directive 5145.01, “General Counsel of the Department of Defense (GC DoD),” December 2, 2013, as amended
- (e) DoD Directive 5145.04, “Defense Legal Services Agency (DLSA),” April 16, 2012
- (f) DoD Directive 5400.11, “DoD Privacy Program,” October 29, 2014
- (g) DoD Manual 8910.01, Volume 1, “DoD Information Collections Manual: Procedures for DoD Internal Information Collections,” June 30, 2014
- (h) Executive Order 12988, “Civil Justice Reform,” February 5, 1996
- (i) Public Law 101-552, “Administrative Dispute Resolution Act,” November 15, 1990
- (j) Public Law 104-320, “Administrative Dispute Resolution Act of 1996,” October 19, 1996
- (k) Presidential Memorandum for Heads of Executive Departments and Agencies, “Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking,” May 1, 1998
- (l) United States Code, Title 5
- (m) DoD Instruction 5145.05, “Alternative Dispute Resolution (ADR) and Conflict Management

OGIS Contrary Guidance



“In your July 31, 2021, email, as well as in public comments you have submitted to the Chief FOIA Officers Council, the FOIA Advisory Committee, and the OGIS Annual Open meeting, you request that “ OGIS and/or DOJ issue an advisory stating that statutory language ‘the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and’ must be included in adverse determinations and that the word “ or” does not mean that the Agency can omit “ the Office of Government Information Services” in adverse determinations. We direct you to **OGIS Advisory Opinion 2018-01: Agency Communication with Requesters** (<https://www.archives.gov/ogis/advisory-opinions/2018-01-agency-comms-with-requesters>) where we have previously addressed this issue. Agencies have the option to include either or both the FPL and OGIS in adverse determinations.”

**Yet, OGIS Advisory Opinion 2018-01 states the opposite.
Including OGIS dispute resolution services is mandatory.**

OGIS Contrary Guidance Continued



“With regard to dispute resolution services, the FOIA statute is clear: in case of an adverse determination, agencies shall inform requesters of their right “ to seek dispute resolution services from the FOIA Public Liaison (FPL) of the agency **or** the Office of Government Information Services (emphasis added.) ” 5 U.S.C. §§ 5 52 (a)(6)(A)(i)(I)- (III). It appears that [agency] followed the statute correctly by offering FPL services without also including OGIS dispute resolution services.”

**The above statement appears contrary to law
and all posted DOJ and OGIS policy direction.**

DOJ OIP Guidance

THE FOIA IMPROVEMENT ACT OF 2016



Response Letters - New Required Elements for Response Letters

When agencies make their determinations on requests they must offer the services of their FOIA Public Liaison **and** must notify requesters of their services provided by the Office of Government Information Services (OGIS). They must also allow requesters a period of at least 90 days within which to file an administrative appeal. Specifically, agencies **must include** in their notification to the requester:

- “the right of such person to seek assistance from the FOIA Public Liaison of the agency,” and, in the case of an adverse determination:
- the right to appeal within a period of time “that is not less than 90 days after the date of such adverse determination,” **and**
- **“the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.”**

NARA OGIS Opinion No. 2018-01: Agency Communication with Requesters



- The FOIA Improvement Act's **mandate** that Federal agencies alert FOIA requesters to OGIS's dispute resolution services at various points throughout the administrative process has increased our visibility in the FOIA processes ...
- The FOIA Improvement Act of 2016 amended the law to **require** that when notifying a requester of an adverse determination, agencies **must include information about dispute resolution services provided by the agency and OGIS. 5 U.S.C. 552 § (a)(6)(A)(i)**. Agencies must also make information regarding their FOIA Public Liaison (FPL) available, and inform the requester of the right to seek the services of OGIS when notifying a requester that the agency seeks an extension of response time of more than 10 working days due to “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(ii).

(link removed) [.archives.gov/ogis/advisory-opinions/2018-01-agency-comms-with-requesters](https://www.archives.gov/ogis/advisory-opinions/2018-01-agency-comms-with-requesters))

OGIS Issue Assessment. Agency Compliance With REQUIRED DISPUTE RESOLUTION NOTICE



- The Freedom of Information Act (FOIA) mandates that the Office of Government and Information Services (OGIS) “shall ... review policies and procedures of administrative agencies ... review compliance ... by administrative agencies; and identify procedures and methods for improving compliance under this section.” See 5 U.S.C. § 552(h)(2).
- The FOIA Improvement Act of 2016 requires that agencies alert requesters to the availability of dispute resolution services when the agency makes an adverse determination during initial processing; and when the agency needs more than 10 additional days beyond the 20-day statutory response time to process in the instance of “unusual circumstances.” In addition, the U.S. Department of Justice’s Office of Information Policy (OIP) has strongly encouraged agencies to notify requesters of dispute resolution services offered by the Office of Government Information Services (OGIS) as a non-exclusive alternative to litigation as part of the agency's final response to administrative appeals.

(See <https://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-notifying-requesters-mediation-services-offeredogis>.)

OGIS Issue Assessment. Continued



- To Assist agencies in meeting their statutory responsibility to alert requesters of dispute resolution services, OGIS and OIP have posted model language on their websites. The model language reflects feedback from agency personnel shared during the July 27, 2017 meeting of the Chief FOIA Officers Council. The model language recommends that agencies provide a mailing address, telephone number, email address, and fax number (if applicable) for agency FOIA Public Liaisons, along with comparable contact information for OGIS. The model language also underscores the importance of providing contact information for the agency FOIA Public Liaison and OGIS in two distinct paragraphs.
- We recommend that agencies use the model language suggested by OIP and OGIS to ensure compliance with statutory notification requirements. Using the model language also ensures the agency is following OIP guidance
- The model language provided by OGIS and OIP is written and formatted to ensure requesters are able to easily identify possible next steps, including ways to contact the agency and OGIS.

DOJ OIP Model Language



For Adverse determinations:

You may contact [optional: the analyst who processed your request and/or the FOIA Requester Service Center, as well as] our FOIA Public Liaison, [name], for any further assistance and to discuss any aspect of your request at:

[Mailing address]

[Telephone number]

[Email address]

[Fax number, if applicable]

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

OGIS Model Language



Model OGIS Language for Agencies to Include in Response Letters

Office of Government Information Services (OGIS) Standard Language to include in Agency Response Letters

The FOIA **requires** agencies to notify requesters of their right to pursue alternative dispute resolution at three points in the Freedom of Information Act (FOIA) process. Please use the updated model language included with the Department of Justice, Office of Information Policy's guidance regarding the new required notification. Below, we duplicated the model language in italics. We have also included model language to include in responses to appeals. If you have any questions, please contact us at ogis@nara.gov or 202-741-5770.

(link removed [.archives.gov/ogis/mediation-program](https://www.archives.gov/ogis/mediation-program))

OGIS Model Language

Initial Determinations



1. Suggested language for initial determination letters

The new law says that in cases of adverse determinations, agencies shall notify requesters of the right of the person to appeal and to “to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.” 5 U.S.C. § 552 (a)(6)(A)(i)(III).

You may contact [optional: the analyst who processed your request and/or the FOIA Requester Service Center, as well as] our FOIA Public Liaison, [name], for any further assistance and to discuss any aspect of your request at:

[Mailing address] [Telephone number] [Email address] [Fax number, if applicable]

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

OGIS Model Language

Appeals



2. Suggested language for appeal response letters

Agencies must also notify requesters of their right to seek assistance from OGIS in appeal response letters, pursuant to guidance from the Office of Information Policy at the Department of Justice.

The Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers services to help resolve disputes between FOIA requesters and Federal agencies.

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road--OGIS
College Park, MD 20740-6001
Email: ogis@nara.gov
www.archives.gov/ogis
Telephone (main): 202-741-5770
Telephone (toll-free): 1-877-684-6448

OGIS Model Language

Unusual Circumstances



3. Suggested language for requests in which unusual circumstances allow for 10 additional working days to respond

In cases of unusual circumstances in which the law gives 10 additional working days for agencies to respond, agencies must notify requesters of the right to seek dispute resolution services from the agency's FOIA Public Liaison and OGIS. 5 U.S.C. § 552 (a)(6)(B)(ii). After explaining the nature of the “unusual circumstances” and providing the requester with an opportunity to narrow the scope of a request or to arrange an alternative time for processing:

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact [optional: the analyst handling your request at ---, or] our FOIA Public Liaison, [name], for any further assistance and to discuss any aspect of your request at:

[Mailing address] [Telephone number] [Email address] [Fax number, if applicable]

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone (main): 202-741-5770
Telephone (toll-free): 1-877-684-6448
Fax: 202-741-5769.

CONCLUSION



1. OGIS' policy statements that agencies may offer "FOIA Public Liaison (FPL) services without also including OGIS dispute resolution services" in adverse determinations, and "Agencies have the option to include either or both the FPL and OGIS in adverse determinations" appear contrary to law and all posted DOJ OIP and OGIS policy direction.
2. Mandatory inclusion of the right to seek OGIS dispute resolution services in adverse determinations and throughout the FOIA process has been addressed in the FOIA Advisory Committee, Chief FOIA Officers Council and the Annual OGIS Open FOIA meetings, which are appropriate venues.
3. Mandatory inclusion of the right to seek OGIS dispute resolution services in agency letters is an essential safeguard for FOIA requesters and a compliance requirement for agencies. Immediate resolution is needed.

ADDITIONAL OGIS INFO



FOIA IMPROVEMENT ACT OF 2016

Revised Duties for OGIS



Revised Duties for OGIS

The duties for OGIS have been revised and new reporting obligations are included.

- OGIS shall “identify procedures and methods for improving compliance” under the FOIA.
- In providing mediation services, OGIS may issue advisory opinions at its discretion **or upon the request of any party to the dispute.**
- Not less than annually OGIS shall submit to Congress and the President, and make available to the public electronically:
 1. A report on its findings from its reviews of agency policies, procedures, and compliance.
 2. A summary of its mediation services, including any advisory opinions issued and the number of times each agency engaged in dispute resolution with the assistance of OGIS or the FOIA Public Liaison.
 3. Any legislative and regulatory recommendations to improve FOIA.
- OGIS is not required to obtain prior approval of any officer or agency of the United States before submitting to Congress reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed are those of the OGIS Director and not necessarily the views of the President.
- Not less than annually, OGIS shall hold a **public meeting** on its activities and “allow interested persons to appear and **present** oral or written statements.”

FOIA IMPROVEMENT ACT OF 2016

OGIS Dispute Resolution



- (6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—
- (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such a request of —
 - (I) such determination and the reasons therefor;
 - (II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and
 - (III) in the case of an adverse determination —
 - (aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and
 - (bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and ...

FOIA IMPROVEMENT ACT OF 2016

OGIS Dispute Resolution vs FPL



Whereas only notification of FPL is required if the determination is not adverse, adverse determinations require additional notification of OGIS rights.

shall immediately notify the person making such a request of – [...]

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an **adverse determination** – ...

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and ...

NARA OGIS

Posting Policy for Public Comments



- **Comments to the FOIA Advisory Committee**

should consist of substantive comments on topics pertaining to the Committee's work. OGIS will not post comments that:

- are clearly off-topic;
 - promote services or products;
 - contain abusive, vulgar, offensive, threatening, or harassing language;
 - are personal attacks of any kind;
 - use offensive terms that target specific individuals or groups;
 - are requests for OGIS assistance with individual requests or issues; requests for or concerns about specific FOIA requests and issues should be addressed to ogis@nara.gov; or
 - contain gratuitous links to products, services, or entities to sites are viewed as spam.
- OGIS reserves the right not to post comments that do not adhere to these standards.
 - ...
 - Data and/or anecdotes drawn from your experience can help the Committee understand your position on an issue. Wherever possible, include citations or links to relevant studies, articles, reports, or legal authorities that support your points.