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## OGIS – CREATING A FOIA PROCESS THAT WORKS FOR ALL

ALINA M. SEMO\* &amp; SHEELA PORTONOVO\*\*

## I. INTRODUCTION

FIRST enacted in 1966, and taking effect on July 5, 1967, Congress created the Freedom of Information Act (FOIA)<sup>1</sup> to allow any person to request access to records of the executive branch agencies or entities. FOIA is a disclosure statute and requires agencies to disclose records upon receiving a written request for them.<sup>2</sup> However, the FOIA also contains nine specific exemptions under which federal agencies may or must withhold information.<sup>3</sup> Requesters also have a right to file an administrative appeal.<sup>4</sup> And this right of access is enforceable in federal court, with the government carrying the burden of demonstrating why information cannot be disclosed and justifying the applicable FOIA exemptions it is asserting.<sup>5</sup>

Per the FOIA, the term, “‘agency’ . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”<sup>6</sup> Congress and the Judicial Branch, however, are not subject to the FOIA.

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1. 5 U.S.C. § 552 (2018).

2. See 5 U.S.C. § 552(a).

3. See 5 U.S.C. § 552(b).

4. *Id.*; see 5 U.S.C. § 552(a)(6)(A).

5. 5 U.S.C. § 552(a)(4)(b).

6. 5 U.S.C. § 552(f). Note, however, that not every office within the Executive Office of the President is subject to the FOIA. The Office of the President, including the “President’s immediate personal staff or units in the Executive Office

As Congress and the Executive Branch have both recognized, the FOIA is a vital part of the United States' democracy.<sup>7</sup> The U.S. Supreme Court has explained that the fundamental purpose of the 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,"<sup>8</sup> and to provide "a means for citizens to know 'what their Government is up to.'"<sup>9</sup>

One of the FOIA's greatest strengths is the large amount of dedicated people inside and outside of government who are committed to ensuring that the public has access to records that improve our understanding of the government. At many agencies, though, backlogs and delays continue to be a huge source of frustration. A lack of understanding about the FOIA process, coupled with requesters and agencies who fail to communicate effectively further compounds that problem.<sup>10</sup>

To help address this problem, in 2007, Congress created the Office of Government Information Services (OGIS) to serve as the federal FOIA Ombudsman in order to help resolve FOIA disputes, identify methods to improve compliance with the statute, and educate our stakeholders about the FOIA process.<sup>11</sup> OGIS values transparency (access to agency records improves public understanding of the government's actions); collaboration (an open and inclusive work environment based on respect and communication benefits the FOIA community); effectiveness (using our authorities and resources improve the administration of the FOIA); and learning (listening to stakeholders and improving understanding of FOIA helps us fulfill our mission).<sup>12</sup>

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whose sole function is to advise and assist the President" are not subject to the FOIA. *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 156 (1980). In contrast, offices that "wield[] substantial authority independent of the President," such as the Office of Management and Budget are subject to the FOIA, *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978).

7. See Charles Grassley, FOIA Improvement Act of 2015, S. REP. NO. 114-4, at 2 (2015). See, e.g., Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (March 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> [<https://perma.cc/B4QX-WXHG>].

8. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

9. *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

10. See Michael Morisy, Agency Voice: The Office of Government Information Services' Alina M. Semo, MUCKROCK (Mar. 10, 2017), <https://www.muckrock.com/news/archives/2017/mar/10/agency-voice-office-government-information-service/> [<https://perma.cc/GSF2-EQJX>].

11. See Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

12. See National Archives, *About OGIS: Vision, Mission and Values*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/about-ogis> [<https://perma.cc/G48S-F5HX>] (last visited Nov. 14, 2018).

The FOIA Improvement Act of 2016 raised OGIS's profile and improved our ability to understand potential issues with the implementation of FOIA across the government. The 2016 amendments also provided OGIS with a greater ability to share with our stakeholders both our frank observations about the administration of FOIA and ideas for improvement. While our new visibility in the process has created challenges, our broader exposure to agency interactions with requesters significantly improves our understanding of the implementation of the FOIA across the government—including potential compliance issues. OGIS looks forward to continuing to identify and amplify strategies to improve compliance through our agency assessment program, our comments on agency FOIA regulations, and through our work with the FOIA Advisory Committee and Chief FOIA Officers Council. This note briefly covers OGIS's legislative history, the office's current work, and our future plans for continuing to improve the FOIA process.

## II. BACKGROUND/LEGISLATIVE HISTORY

As early as 1987, the Administrative Conference on the United States (ACUS) recommended the “voluntary use of informal alternative dispute resolution techniques, such as informal investigation of complaints, mediation or conciliation, and the provision of a neutral government official to aid the parties in reaching settlement, to avoid unnecessary litigation of Freedom of Information Act disputes.”<sup>13</sup>

Twenty years later, on December 31, 2007, the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act of 2007) was signed into law by President George W. Bush, amending the FOIA for the first time in over a decade.<sup>14</sup> These 2007 amendments established the Office of Government Information Services as an ombudsman within the National Archives and Records Administration (NARA).<sup>15</sup> Congress envisioned that OGIS would serve as a resource for information and assistance for FOIA requesters, and tasked the office with helping to resolve disputes between Federal agencies and FOIA re-

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13. ACUS Statement on the Resolution of Freedom of Information Act Disputes, 52 FR 23636 (June 24, 1987), <https://www.acus.gov/recommendation/statement-12-statement-resolution-freedom-information-act-disputes> [<https://perma.cc/VWE7-KUBC>] (last visited Nov. 15, 2018).

14. *See* Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007). The 2007 amendments addressed several procedural issues concerning FOIA administration, including the definition of news media requesters; the recovery of attorneys' fees and litigation costs; computing and tolling (or stopping) the time limits for responding to requests; tracking requests; agency annual reporting requirements; Attorney General and Special Counsel reporting requirements; treatment of agency records maintained by government contractors; codification of the key roles played by Chief FOIA Officers and FOIA Public Liaisons; and new marking requirements for documents. *Id.*

15. 5 U.S.C. § 552(h)(1) (2007).

questers. OGIS was also charged with reviewing FOIA policies and procedures, monitoring agency compliance, and providing findings and recommendations to Congress with respect to improving the administration of the FOIA.<sup>16</sup>

OGIS's first years had been largely successful in carrying out our mission and serving as a bridge between Federal agencies and FOIA requesters—with a particular focus on its dispute resolution and mediation practice. However, Congress recognized that OGIS had been “hampered in one of its most fundamental duties”: the ability to independently review policies and procedures of administrative agencies under the FOIA and recommend policy changes to Congress and the President to improve the administration of the FOIA. Congress noted that “[s]ince [OGIS’s] inception . . . [the Department of Justice] has required OGIS to submit its findings and recommendations to several executive agencies for final approval before receiving permission to deliver its findings to Congress.” Congress further noted that “[t]his process [ran] contrary to Congress’s intent in creating OGIS, and raise[d] questions about its independence, as well as with the timeliness with which Congress and the President [could] expect to receive its findings and recommendations.”<sup>17</sup>

Congress addressed these deficiencies—and strengthened the role of OGIS—when it passed the FOIA Improvement Act of 2016 (the Act).<sup>18</sup> The Act clarifies that OGIS is not required to obtain the prior approval or comment of any agency, or the White House, before submitting its findings and recommendations to Congress and the President. Second, the Act requires agencies to notify requesters of the right to seek dispute resolution services from OGIS or the agency’s FOIA public liaison, to encourage alternative dispute resolution in lieu of litigation. Third, it provides OGIS with the authority to issue advisory opinions at its own discretion following the completion of mediation services, which will provide guidance for similar disputes going forward.<sup>19</sup>

The first full year in which OGIS operated under the FOIA Improvement Act of 2016 was a critical period in our growth and development. The Act significantly expanded OGIS’s visibility in the FOIA process, highlighted OGIS’s crucial role in improving compliance with the statute, and improved our ability to communicate and share our observations with OGIS’s varied stakeholders. OGIS complemented and amplified the impact of the FOIA Improvement Act changes through our continued leadership and support of the FOIA Advisory Committee, which brings together government and non-government FOIA experts to identify the greatest challenges in the implementation of FOIA and develop consensus

16. See Charles Grassley, FOIA Improvement Act of 2015, S. REP. NO. 114-4, at 2 (2015).

17. See *id.* at 3.

18. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016); see also S. REP. NO. 114-4, at 4.

19. 130 Stat. 538; see also S. REP. NO. 114-4, at 4.

recommendations.<sup>20</sup> OGIS also worked with our NARA colleagues to leverage existing agency activities to significantly enhance our understanding of FOIA policies across the government,<sup>21</sup> continued to provide high-quality training that gives agency FOIA professionals the skills they need to resolve and prevent disputes with requesters,<sup>22</sup> and organized well-received events which highlighted the importance of FOIA and open government.<sup>23</sup>

### III. DISPUTE RESOLUTION PROGRAM

Since we opened our doors in September 2009, OGIS has built a robust mediation program that provides valuable assistance to both FOIA requesters and agencies.<sup>24</sup> 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 increased our visibility in the FOIA process and increased demand for our services. In the fiscal quarter immediately following the enactment of the FOIA Improvement Act, we experienced a 142% spike in requests for our services compared with the same period in Fiscal Year (FY) 2015.<sup>25</sup> Throughout most of FY 2017, demand for our services continued to increase, leading to an over 160% overall increase in our FY 2017 caseload compared with FY 2016. Although we have been challenged to keep up with the influx in new cases, we have been grateful for our heightened visibility in the FOIA process, which has given us additional insight into how agencies interact with requesters, particularly in the early stages of the FOIA process, and has enabled us to develop new relationships with agencies that may not process a large volume of requests each year. We continue to look for

20. See National Archives, *Freedom of Information Act (FOIA) Advisory Committee*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/foia-advisory-committee> [https://perma.cc/47XR-ZRGZ] (last visited Nov. 14, 2018).

21. See National Archives, *Assessing Freedom of Information Act Compliance through the 2016 National Archives and Records Administration's Records Management Self-Assessment*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/files/2016-foia-compliance-self-assessment-results.pdf> [https://perma.cc/T57K-XTZY] (last visited Nov. 14, 2018).

22. See National Archives, *Training Opportunities*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/outreach-events/training-opportunities> [https://perma.cc/2NK7-XB8A] (last visited Nov. 14, 2018).

23. See National Archives, *Outreach and Events*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/outreach-events> [https://perma.cc/WB9V-SJB2] (last visited Nov. 14, 2018).

24. See National Archives, *About Mediation Program*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/mediation-program> [https://perma.cc/TZ43-LXJH] (last visited Nov. 14, 2018).

25. See National Archives, *Mediation Case Metrics 4th Quarter FY 2016*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/files/ogis/assets/4th-quarter-meditation-performance-one-pager.pdf> [https://perma.cc/Y7B9-75QX] (last visited Nov. 14, 2018).

strategies and additional efficiencies that will help us respond as quickly as possible to our customers.

The FOIA Improvement Act of 2016 also brought increased attention to the role of FOIA Public Liaisons (FPLs) in resolving FOIA disputes and directed us to report to Congress annually regarding the frequency of their use. OGIS has continually recognized a need for specific training that arms agency FOIA professionals, including FPLs, with the tools they need to prevent and resolve disputes at the agency level. In 2010, OGIS launched the *Dispute Resolution Skills for FOIA Professionals* training program.<sup>26</sup> We presented our cross-agency training program twice in both FY 2017 and FY 2018. All four of these sessions filled up within twenty-four hours of their announcement and received high marks and positive feedback from the attendees. In addition to these sessions, OGIS conducted agency-specific dispute resolution training sessions for NARA, the U.S. Department of State, U.S. Citizenship and Immigration Services, the Centers for Disease Control and Prevention, the Department of Homeland Security, the National Oceanic and Atmospheric Administration, and the Social Security Administration. We continue to work with agencies to provide tailored training that addresses their individual needs. We are also developing a new training program to reinforce and expand on communication skills for agency FOIA professionals.<sup>27</sup>

#### IV. COMPLIANCE

The FOIA Improvement Act of 2016 also highlighted OGIS's critical role in improving compliance with the statute. Our approach to compliance has evolved significantly over the last few years.<sup>28</sup> Currently, we provide agency-specific assistance and recommendations through our agency assessment program and comments on FOIA regulations. We also identify and address government-wide compliance issues using responses to self-assessment questions.<sup>29</sup>

Our compliance team has developed a specific agency assessment methodology that relies on generally accepted government auditing stan-

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26. See National Archives, *Dispute Resolution Skills Training*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/outreach-events/training-opportunities/dispute-resolution-skills-training> [https://perma.cc/7FFP-RF69] (last visited Nov. 14, 2018).

27. See National Archives, *Building a Better FOIA Process: 2018 Report for FY 2017*, OFFICE OF GOVERNMENT INFORMATION SERVICES (2018), <https://www.archives.gov/files/ogis-final-fiscal-year-2017-annual-report.pdf> [https://perma.cc/V77V-DUPK], at 8–10 [hereinafter *FY 2017 Annual Report*].

28. See National Archives, *About Compliance Program*, OFFICE OF GOVERNMENT INFORMATION SERVICES, <https://www.archives.gov/ogis/foia-compliance-program/about-compliance-program> [https://perma.cc/KZ8E-6JNJ] (last visited Nov. 14, 2018).

29. See National Archives, *Agency Self-Assessment Results*, OFFICE OF GOVERNMENT INFORMATION SERVICES (July 25, 2018), <https://www.archives.gov/ogis/foia-compliance-program/self-assessments> [https://perma.cc/6MP5-4K9L].

dards and our staff's knowledge of best practices to identify issues in the administration of FOIA and make tailored recommendations.<sup>30</sup>

Our compliance assessment process recognizes that there is no one-size-fits-all approach to administering FOIA—each agency's records are unique and as such, management of the FOIA process differs. The tailored recommendations we include in our assessment reports are intended to help the agency improve its FOIA performance. One hundred and twenty days after our assessment reports are published, we initiate a process to follow-up with the agencies to determine what steps they have taken to address our recommendations. The response from agencies that have gone through our process has been quite positive, with participating agencies addressing more than 95% of our recommendations.<sup>31</sup>

In our assessments, we have observed that successful FOIA programs share three general characteristics: they manage their resources appropriately; they use technology effectively; and they communicate well with requesters. In the area of management, our findings indicated that effective, efficient, and successful FOIA programs generally have strong leadership support, and use management techniques that ensure staff has a clear understanding of its roles and responsibilities. Our findings have also continued to show the value of investments in technology, as well as the importance of training FOIA staff to use available technology tools and sufficient IT support effectively and efficiently. Finally, we have continued to observe that good communication helps ensure a smooth FOIA process—and helps to prevent disputes that may otherwise lead to litigation.<sup>32</sup>

By requiring agencies to update FOIA regulations, the FOIA Improvement Act of 2016 also provided OGIS with a fresh opportunity to review and provide agency-specific suggestions to improve compliance with the law. OGIS has always considered reviewing agency FOIA regulations an important part of our review of policies and procedures. From the passage of the Act through the end of FY17, OGIS has reviewed regulations published in the *Federal Register* by fifty departments and agencies.<sup>33</sup>

OGIS's compliance program hit a new milestone in FY 2017 thanks to a successful collaboration with NARA's Chief Records Officer of the United States (CRO). In FY 2017, and again in FY 2018, OGIS was able to collect self-reported data on FOIA implementation from almost every agency subject to FOIA. Our partnership with the CRO to include questions about FOIA implementation in NARA's annual Records Manage-

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30. See National Archives, *Methodology for OGIS Review of Agency Policies, Procedures, and Compliance*, OFFICE OF GOVERNMENT INFORMATION SERVICES (Mar. 31, 2014), <https://www.archives.gov/files/ogis/assets/ogis-review-methodology-final.pdf> [<https://perma.cc/W24X-RG6D>].

31. See *FY 2017 Annual Report*, *supra* note 27, at 15–19.

32. See *id.* at 17–19.

33. See *id.* at 20.



ment Self-Assessment (RMSA)<sup>34</sup> has enabled us to leverage the CRO's experience and expertise in conducting self-assessments and expand our understanding of FOIA implementation across the government. The responses to the questions in both the 2016 and 2017 RMSA surveys created a baseline and a reference point for our understanding of the relationship between FOIA Officers and Federal Agency Records Officers. And it helped further enhance OGIS's understanding of the critical relationship between strong records management and FOIA, add to observations about agency compliance noted in our agency compliance assessments, and explore issues about agency FOIA search practices raised by the FOIA Advisory Committee. It also provided insight regarding the systems agencies do—or do not—have in place to identify information that could be proactively released. The questions and survey responses to the 2016 RMSA survey have also furthered our perspectives on observations in our agency compliance reports regarding program management, the use of technology, and communication with requesters.<sup>35</sup>

#### V. FOIA ADVISORY COMMITTEE

OGIS has also been learning more about the implementation of FOIA across the government and trying to drive improvements to the process through our work with the FOIA Advisory Committee, which the Director of OGIS chairs and OGIS administratively supports.<sup>36</sup> The Federal FOIA Advisory Committee, established by NARA in 2014, brings together FOIA experts from inside and outside of government to discuss the greatest challenges in the administration of FOIA and identify consensus solutions. The Committee reports to the Archivist of the United States.<sup>37</sup> During its most recently completed term (2016-2018), the Committee focused its efforts on improving proactive disclosure and the accessibility of records for people with disabilities, improving FOIA searches, and identifying practices that promote the efficient use of resources.<sup>38</sup> At the Committee's final meeting on April 17, 2018, the members voted to approve more than half a dozen recommendations for specific actions and a number of best

34. See National Archives, *Federal Agency Records Management 2016 Annual Report*, OFFICE OF GOVERNMENT INFORMATION SERVICES (Oct. 2, 2017), <https://www.archives.gov/files/records-mgmt/resources/2016-federal-agency-records-management-annual-report.pdf> [<https://perma.cc/5NVY-XL3M>].

35. See National Archives, *Assessing Freedom of Information (FOIA) Compliance through the 2016 National Archives and Records Administration's Records Management Self-Assessment*, OFFICE OF GOVERNMENT INFORMATION SERVICES (2017), <https://www.archives.gov/files/2016-foia-compliance-self-assessment-results.pdf> [<https://perma.cc/F4JD-D4GS>].

36. See National Archives, *Freedom of Information Act (FOIA) Advisory Committee*, OFFICE OF GOVERNMENT INFORMATION SERVICES (Sept. 25, 2018), <https://www.archives.gov/ogis/foia-advisory-committee> [<https://perma.cc/5MUW-63K3>].

37. See *id.*; see also *FY 2017 Annual Report*, *supra* note 27, at 26–28.

38. See National Archives, *2016-2018 Term*, OFFICE OF GOVERNMENT INFORMATION SERVICES (Sept. 5, 2018), <https://www.archives.gov/ogis/foia-advisory-committee/2016-2018-term> [<https://perma.cc/S6YV-77RT>].

practices to address these issues.<sup>39</sup> OGIS subsequently transmitted the Committee's Final Report and Recommendations to the Archivist of the United States.<sup>40</sup>

#### VI. CHIEF FOIA OFFICERS COUNCIL & OGIS OUTREACH

The FOIA Improvement Act of 2016 also established the Chief FOIA Officers Council, with the Director of OGIS and the Director of the Office of Information Policy, Department of Justice as c-chairs. The position allows OGIS to work closely with the U.S. Department of Justice's Office of Information Policy, the Office of Management and Budget, and officers of every agency to develop recommendations, best practices, initiatives, and other measures to improve FOIA performance across the government. We used the July 2017 meeting to identify communication issues in agency response letters, and ways to address requester confusion regarding steps in the FOIA process.<sup>41</sup>

As the FOIA Ombudsman, OGIS takes very seriously its responsibility to educate stakeholders about the process and promote understanding of the various viewpoints among our broad range of stakeholders inside and outside of government. In FY 2017 OGIS staff were invited to speak at training sessions and events hosted by federal agencies, academic institutions, and professional organizations.<sup>42</sup> We have also maintained an active social media presence, including our blog, titled *The FOIA Ombudsman*,<sup>43</sup> and our Twitter account, *@FOIA\_Ombuds*. This past year, we relaunched our website on the NARA platform.<sup>44</sup> Our refreshed website helps the public understand our position within the National Archives, includes enhanced navigation, and is optimized for mobile devices.<sup>45</sup> OGIS also hosted our second annual Sunshine Week celebration in NARA's William G. McGowan Theater and our first annual Open Meeting, which gave the public an opportunity to submit oral and written comments about OGIS's activities.<sup>46</sup> We look forward to continuing these efforts in the coming

39. See National Archives, *National Archives and Records Administration FOIA Advisory Committee Meeting*, OFFICE OF GOVERNMENT INFORMATION SERVICES (Jan. 16, 2018), <https://www.archives.gov/ogis/foia-advisory-committee/2016-2018-term/meetings> [<https://perma.cc/5ZDW-83NS>].

40. See *FY 2017 Annual Report*, *supra* note 27, at 28.

41. See *id.* at 14, 25.

42. See *id.* at 21.

43. See Office of Government Information Services, *FOIA Ombudsman*, <https://foia.blogs.archives.gov> [<https://perma.cc/UU82-9H44>] (last updated Sept. 26, 2018); see also *FY 2017 Annual Report*, *supra* note 27, at 22.

44. See National Archives, *Home*, OFFICE OF GOVERNMENT INFORMATION SERVICES, [www.archives.gov/ogis](http://www.archives.gov/ogis) [<https://perma.cc/97YE-2YKU>] (last updated Oct. 25, 2018).

45. See *FOIA Ombudsman*, *supra* note 43; see also *FY 2017 Annual Report*, *supra* note 27, at 22.

46. See *FOIA Ombudsman*, *supra* note 43; see also *FY 2017 Annual Report*, *supra* note 27, at 23–25.

year, as we look for new ways to educate the public about the FOIA process.

## VII. THE FUTURE

The future for OGIS looks bright. Not only will we continue all of the great work that we have been doing, we will continue to explore new avenues for improving the FOIA process. There has been a recent increase in FOIA litigation. As a nonexclusive alternative to litigation, we have thought hard about how to be most effective in the FOIA process. Whether a case ends up in litigation or if the issues can be successfully mediated by OGIS is dependent to a high degree on the incentives of both the FOIA requester and the agency. While a proportion of the FOIA cases filed each year could have been resolved either through bilateral communications between the agency and the requester, or through OGIS's services, it is still important to realize that courts play a critical role in the FOIA process. Federal court decisions provide agencies and requesters with clear guidance about the administration and application of the statute.<sup>47</sup>

Therefore, our goal is not to eliminate FOIA litigation; there will always be important legal issues that require judicial resolution. Rather, OGIS exists to provide a nonexclusive alternative to litigation that allows the parties to come to a mutual agreement or at least reduce the number and scope of issues in dispute. OGIS can also provide information about the FOIA process that can be used both by requesters and agencies to help each to understand the position of the other.<sup>48</sup>

One way to do this is through advisory opinions. Prior to the passage of the FOIA Improvement Act, OGIS could only issue advisory opinions for individual disputes, if mediation had not resolved the dispute.<sup>49</sup> For several years OGIS struggled with how to reconcile its authority to issue advisory opinions with its ability to be an impartial party that facilitates the resolution of disputes between requesters and agencies.

We are grateful that Congress recognized this tension, and with the FOIA Improvement Act, gave OGIS the power to issue advisory opinions at its discretion.<sup>50</sup> OGIS intends to utilize this now-modified advisory opinion power to issue opinions that address the most common disputes, complaints, and trends that we uncover through our dispute resolution practice that are mostly likely to lead to litigation. Our plan is to build a body of advisory opinions, available online for both requesters and agencies to consult, that will help head off disputes before they fester or lead to litigation.

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47. See Morisy, *supra* note 10.

48. See *id.*

49. See Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

50. See 5 U.S.C. § 552(h)(3) (2018).

General education about the FOIA is also a key way to avoid litigation and is a critical component of our work as the FOIA Ombudsman. We regularly participate in forums with various stakeholders inside and outside of government, maintain a strong social media presence, and regularly update our refreshed website. To supplement these activities, we are particularly excited to roll out our new *FOIA Ombuds Observer* in the coming months. The *FOIA Ombuds Observer* will address a variety of FOIA-focused topics based on questions we are receiving frequently and repeatedly from our customers. We envision that the *FOIA Ombuds Observer* will serve as a vehicle that will allow OGIS to continue to educate requesters about various facets of the FOIA.

#### VIII. CONCLUSION

FOIA, ultimately, is about access to government records. It is often described as the law that keeps citizens in the know about their government. If the process is working, the public should be able to gain access to records that demonstrate whether our government is functioning properly. For nearly a decade, OGIS has played a critical role in building trust between requesters and agencies and helping each understand the other's position. Every time a requester comes to OGIS for assistance with a FOIA dispute, our goal is to, at a minimum, help them better understand the FOIA process and the agency's actions, but also assist the agency in understanding the requester's concerns. OGIS's success lies in our ability to foster open and effective dialogue in order to promote access to important government documents. Through our current work and future plans, OGIS helps to create a FOIA process that works for all.