

THE EVOLVING FOI CULTURE IN THE U.S.

Presentation for the 2012 International Ombudsman Institute World Conference, Wellington, New Zealand

KAREN M. FINNEGAN, Deputy Director, Office of Government Information Services (OGIS), National Archives and Records Administration, Washington, DC, USA

karen.finnegan@nara.gov

www.ogis.archives.gov

Office: +1- 202-741-5772

On July 4, 1966, President Lyndon B. Johnson signed the Freedom of Information Act (FOIA) into law. According to historians, President Johnson did so quietly and grudgingly, dispensing with the formal signing ceremony that he was known to favor in such situations.¹ Bill Moyers, who at the time served as White House press secretary, later commented that President Johnson “had to be dragged kicking and screaming to the signing.... He hated the very idea of the Freedom of Information Act.”²

Though President Johnson may have downplayed the signing ceremony and expressed his doubts about the necessity of FOIA, over the years FOIA has grown into an invaluable tool that is used every day to learn about the business of American government. Executive branch agencies received nearly 600,000 FOIA requests and more than 9,000 administrative appeals challenging those responses in 2010, according to the Department of Justice’s Office of Information Policy.³ What was initially thought of by some as an unnecessary and possibly harmful law has clearly become essential to American democracy.

The U.S. FOIA is fairly straightforward in concept: anyone can ask for records of the executive branch agencies, which then—within strict time limits—must release the records or tell the requester why the information is being withheld under specific exceptions, known as exemptions. A requester who is dissatisfied with an agency’s response may file an administrative appeal with the agency’s appeals office⁴ and then file a lawsuit in federal

¹ Freedom of Information at 40, LBJ Refused Ceremony, Undercut Bill with Signing Statement, National Security Archive Electronic Briefing Book No. 194, July 4, 2006: <http://www.gwu.edu/~nsarchiv/anniversary/moyers.htm>.

² Moyers, Bill, In the Kingdom of the Half-Blind, a prepared text of the address delivered on December 9, 2005 by Bill Moyers for the 20th anniversary of the National Security Archive, a non-governmental research institute and library at The George Washington University in Washington, D.C.: <http://www.gwu.edu/~nsarchiv/anniversary/moyers.htm>.

³ Summary of Annual FOIA Reports For Fiscal Year 2010: <http://www.justice.gov/oip/foiapost/fy2010-ar-summary.pdf>.

⁴ 5 U.S.C. § 552(a)(6)(A)(ii) (2007).

court to challenge the agency's action.⁵ When a FOIA lawsuit involves a dispute about information withheld under one or more of FOIA's nine exemptions the requester will ask the court to decide whether the agency properly applied the exemption(s).⁶ This type of lawsuit can span many years and is costly to the requester, the agency, and the taxpaying public.

The Creation of the Office of Government Information Services (OGIS)

FOIA is firmly established in the U.S. government landscape, yet the law continues to evolve. Time has shown that the law is more difficult and costly to administer than anyone could have imagined in 1966. The U.S. Congress has continued to make improvements in the law, sometimes at the behest of FOIA requesters and sometimes at the urging of agency officials who implement the law. In 2007, Congress amended FOIA⁷ to address several procedural and legal issues. Perhaps the most unique part of the 2007 FOIA amendments was the creation of the Office of Government Information Services (OGIS) within the National Archives and Records Administration, which laid the groundwork for a FOI culture change.

Congress has called OGIS the "FOIA Ombudsman" and our statutory directive is to offer a range of mediation services to resolve FOIA disputes and to review agencies' FOIA policies, procedures, and compliance.⁸ OGIS also recommends policy changes to Congress and the President to improve the administration of FOIA.⁹ Above all, our role is to advocate for the proper administration of FOIA itself—from agency practices to the resolution of individual disputes between requesters and agencies. We serve as a neutral third party within the Federal Government to which anyone can come for assistance with any aspect of the FOIA process.

In creating OGIS, Congress changed the FOI landscape by introducing alternative dispute resolution (ADR) as a non-binding alternative to litigation. Since 1996, U.S. agencies have been required to adopt a policy for and encourage the use of ADR.¹⁰ Although ADR has increasingly found solid ground in the U.S. legal world, its use in federal agencies has largely been in the areas of civil enforcement and regulation; claims against the

⁵ 5 U.S.C. § 552(a)(4)(B) (2007).

⁶ The U.S. district courts have exclusive jurisdiction over FOIA cases. 5 U.S.C. § 552(a)(4)(B).

⁷ 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub.L.No. 110-175, 121 Stat. 2524.

⁸ 5 U.S.C. §§ 552(h)(2)(A) & (B) and (h)(3) (2007).

⁹ 5 U.S.C. §§ 552(h)(2)(C) (2007).

¹⁰ Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, Sec. 3.

government; contracts and procurement; and workplace disputes.¹¹ Introducing mediation services to the FOIA process is a creative and collaborative approach to changing the culture of a well-established system, which we have heard described as opaque and adversarial. In addition to creating OGIS, the 2007 amendments bolstered the new approach by creating the statutory position of FOIA Public Liaison within agencies, whose responsibilities include assisting in resolving disputes between a FOIA requester and the agency.¹² Congress also statutorily defined the role of Chief FOIA Officer in the 2007 amendments. An agency's Chief FOIA Officer is a senior official who has agency-wide responsibility for efficient and appropriate FOIA compliance and monitors implementation of FOIA throughout the agency.¹³

OGIS and the Culture of Open Government

Although the OPEN Government Act passed into law in December 2007, OGIS did not open until September 2009. This coincided with the FOI culture change ushered in by President Barack Obama who issued a memorandum on his first full day in office in January 2009 stressing the importance of FOIA. The [President's memorandum](#) launched a new FOI mindset that included a clear presumption—when in doubt, openness prevails. The President's memorandum also expressed his commitment to Open Government:

In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.¹⁴

In March 2009, Attorney General Eric Holder issued his own [FOIA memorandum](#) to department and agency leaders that re-emphasized the presumption of openness and encouraged agencies to make discretionary disclosures of information even though the information may technically be exempt under FOIA. The U.S. Attorney General, as the head of the U.S. Department of Justice, oversees FOIA policy and implementation. The Attorney General also emphasized that responsibility for effective FOIA administration belongs to everyone and is not merely a task assigned to an agency's FOIA staff. In the memorandum,

¹¹ Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government, April 2007:

http://www.adr.gov/pdf/iadrsc_press_report_final.pdf.

¹² 5 U.S.C. § 552(a)(6)(B)(ii) and (I) (2007).

¹³ 5 U.S.C. §§ 552(k)(1) & (2) (2007).

¹⁴ President's Memorandum of January 21, 2009: Freedom of Information Act at 1:

http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/

Holder states “[w]e all must do our part to ensure open government.”¹⁵ OGIS is an important symbol of both the Obama administration’s commitment to Open Government and Congress’s vision of a better Freedom of Information Act.

OGIS’s Mission and Services

OGIS’s statutory mission is to review FOIA policies, procedures and compliance; to recommend policy changes to Congress and the President to improve the administration of FOIA; and to offer mediation services to resolve disputes between FOIA requesters and agencies.¹⁶

Since opening three years ago, our focus has been to carry out our mission with these principles in mind:

- OGIS advocates for a fair FOIA process and for improving FOIA;
- OGIS’s work must complement agency practice without making the process more burdensome;
- OGIS exists as a resource to help requesters navigate the FOIA landscape and to help agencies improve their FOIA practices; and
- FOIA Public Liaisons are essential to improving FOIA administration, and OGIS must support them and promote their role.

One part of our mission is to offer “mediation services” to resolve disputes between FOIA requesters and agencies. We have interpreted that phrase to include several alternative means of dispute resolution. In the ADR world, “mediation services” encompasses formal mediation, facilitation and ombuds services,¹⁷ and we have adopted this approach. OGIS employs facilitation as an informal tool for resolving disputes because it does not involve an outside mediator, or formal agreements or formal procedures.

In the last three years, OGIS opened more than 1000 cases and handled more than 780 phone and email requests for quick assistance that did not require opening a case. OGIS cases have come from 48 states, the District of Columbia, Puerto Rico and 13 foreign countries, including Australia, Cambodia, Canada, France, India, Iraq, and Mexico. OGIS’s customers are individuals, including veterans, researchers, professors, journalists, attorneys, and inmates, and in the year ending September 30, 2011 four cabinet-level (ministry-level) departments and a handful of smaller agencies sought OGIS assistance on a range of issues, from dealing with repeat requesters to working with program offices within the same agency to locate responsive records. Overall, our cases have involved 42 departments and agencies, including all 15 Cabinet-level departments.

¹⁵ Attorney General’s FOIA Memorandum, March 19, 2009, at 2:
<http://www.justice.gov/ag/foia-memo-march2009.pdf>.

¹⁶ 5 U.S.C. §§ 552(h)(1) – (3) (2007).

¹⁷ 5 U.S.C. § 571(3) (1996).

Requests for OGIS help range from questions about how to file a FOIA request and how to appeal an agency release determination to more difficult inquiries about resolving disputes pertaining to specific exemption use or agency FOIA policy. Many cases opened in OGIS do not rise to the level of a “true dispute.” We define a true dispute as those cases in which the requester and the agency disagree about FOIA policies, procedures, or compliance with FOIA or are at a communications impasse that goes beyond administrative matters like how to file a FOIA request, the status of a request, and the like. Although OGIS has no investigatory or enforcement power and cannot compel an agency to release documents, the Office successfully facilitated resolutions in two-thirds of the 373 cases opened in the year ending September 30, 2011 that involved a true dispute.

OGIS devised a cost-effective way to start implementing the second prong of its statutory mission—to review agencies’ FOIA policies, procedures, and compliance—by analyzing existing data and using available resources. The process that OGIS developed to begin to implement this part of its mission includes: (1) reviewing proposed changes to agency FOIA regulations that every agency must circulate for comment; (2) collaborating with Federal agencies in developing changes to FOIA regulations, policies, and practices; and (3) analyzing agencies’ Annual FOIA Reports and Chief FOIA Officer Reports which are reported to the Department of Justice; and (4) observing agency practices through our casework.

In implementing OGIS’s review mission, we have proceeded carefully because we have observed that there is an inherent tension between OGIS’ two statutory missions: (1) to review agencies’ FOIA policies, procedures and compliance, and (2) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies. These two missions are interrelated; however, we have determined that they require separate and distinct methodologies to properly implement them. In offering mediation services, we see the operations of only a small portion of the FOIA programs that exist across the Executive Branch, and see only the portion of the program related to the present dispute. Therefore, in providing mediation services, OGIS *may* gather information on which to evaluate a particular agency’s FOIA compliance — but only on the specific FOIA issue at hand, such as fees or appeal rights. Casework does not lend an opportunity to review the agency’s program or its compliance with the law in general.

Moreover, as the FOIA Ombudsman, OGIS is a neutral complaint handler and information channel. Although we may assess agencies’ FOIA policies and practices on the basis of the complaints and/or disputes brought to us, that ombuds role is not advanced by ranking agencies. For this reason, OGIS has determined that its review mission would best be implemented by a separate team of OGIS staffers who do not handle disputes, but instead assess agencies’ FOIA policies, procedures and compliance. Given OGIS’s small staff and the current budgetary environment, we have not yet established such a team.

FOIA and Customer Service

With the 2007 amendments to FOIA and the Obama administration's emphasis on the principles of Open Government—transparency, participation and collaboration—it is clear that customer service is an essential component of the U.S. FOI world. Congress “baked” customer service into FOIA when it created OGIS to assist in resolving disputes between FOIA requesters and agencies. Both the Obama and Holder FOIA memoranda stress the importance of customer service. President Obama stated that “[i]n responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.” Attorney General Holder reiterated this new FOI mindset when he stated:

FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.¹⁸

For the U.S. access community the evidence of an evolving FOI culture may be subtle. We have heard from some of our external stakeholders that the slowness with which the government is implementing a FOI culture change is frustrating. Change is hard and any culture change requires commitment from all levels within the government and, perhaps most importantly, time.

As of the newest feature on the U.S. FOI landscape, OGIS is creating a new FOI mindset by offering a different way of doing business and encouraging agency FOIA shops to do the same. We offer dispute resolution skills training to FOIA professionals so that government employees have the skills needed to resolve disputes and to communicate in a way that avoids disputes. For the past three years, OGIS has emphasized that good customer service is the linchpin to avoiding disputes and improving the administration of FOIA.

OGIS's new way of doing business is contributing to the evolution of the FOI culture by redefining the meaning of success. FOIA disputes were once defined as strictly win-lose situations; through the use of ADR techniques OGIS is encouraging parties to collaboratively define mutually beneficial outcomes. OGIS's approach to resolving disputes has demonstrated the cost-saving benefits that can be realized when agencies and requesters work together. We have planted the seeds for how to work smarter in a restrained budgetary environment, which includes transparency about the process, participation by the public and collaboration with all stakeholders. In all of these ways, OGIS is helping to realize the necessity of a transparent and accountable Government to a democratic society.

¹⁸ Attorney General's FOIA Memorandum at 2.



www.archives.gov/ogis

Karen M. Finnegan, OGIS Deputy Director - karen.finnegan@nara.gov

National Archives and Records Administration

accountability
through
transparency
= democracy

Freedom of Information Act (FOIA): the original Open Government law

“FOIA is indispensable in shining light on government policies, good and bad [and] help[s] ensure the public’s right to know and legitimize the consent of the governed.”

U.S. Senator John Cornyn

FOIA reform in U.S. since 1966

- exemptions from disclosure
- fees
- time limits
- law enforcement
- technology

2007 OPEN Government Act

- Dispute resolution
- Customer service
- Executive responsibility

OGIS: The FOIA Ombudsman

- Resolve FOIA disputes
- Review FOIA compliance in agencies
- Recommend policy changes

OGIS: The FOIA Ombudsman

- Resolve FOIA disputes
- Review FOIA in agencies
- Recommend policy changes

Advocate for FOIA

challenge:

measuring progress

leadership
+
commitment =
culture change

“In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.”

President Barack Obama

Contact OGIS:

www.ogis.archives.gov

OGIS@nara.gov

+1 202 741 5770

blogs.archives.gov/foiablog