

Office of Government  
Information Services

# The First Year

*Building Bridges Between FOIA  
Requesters and Federal Agencies*

March 2011



*Cover:* Sipapu Bridge, White Canyon, Natural Bridges National Monument, Utah, May 1972 (NARA 412-DA-2446)

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## **MESSAGE *from the* DIRECTOR**

I am proud to present the first report of the Office of Government Information Services (OGIS). Our office 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 (FOIA). I thank President Obama for his support of OGIS’s mission, and Congress for the clear mandate it presented in the OPEN Government Act of 2007, which created the Office, and for its continued support.

Congress has called OGIS the “FOIA ombudsman.” Our statutory directive is to offer a range of mediation services to resolve FOIA disputes and to review agencies’ FOIA policies, procedures, and compliance. Above all, our role is to advocate for the proper administration of FOIA itself—from agency practices to resolution of disputes between requesters and agencies.

OGIS opened in September 2009. Through the hundreds of cases brought to us, we have observed that the 94 departments and agencies of the Federal Government count among their ranks many hardworking and committed FOIA professionals. While these people are determined to help the public obtain access to Federal records, they face significant obstacles including inadequate funding for FOIA operations, insufficient support from agency leaders, and unrealistic statutory deadlines.

We also have observed repeatedly the importance of good communication between agencies and FOIA requesters. Though OGIS was established to provide a range of mediation services (up to and including formal mediation), our experience shows that facilitating constructive communications between agencies and requesters prevents or resolves many disputes. Changing the FOIA culture to foster communications is as real an obstacle as lack of resources and more difficult to overcome than might be imagined.

Since opening, OGIS has been figuring out *how* to do our work *while* doing our work. Several cases awaited me when I opened the office; since then we have hired staff, created policies and procedures, dealt with unexpected obstacles, provided training, explored technological solutions to help us do our job, and communicated with FOIA Public Liaisons—all while handling FOIA disputes. Throughout, our focus was 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.
- FOIA Public Liaisons are essential to improving FOIA administration, and OGIS must support them and promote their role.

We continue to adhere to and build on these principles in our second year. I thank David S. Ferriero, Archivist of the United States, and Adrienne C. Thomas, Deputy Archivist of the United States, for their unwavering support in helping transform OGIS from statutory language to reality.

Sincerely,



Miriam Nisbet, Director

Office of Government Information Services (OGIS)

## EXECUTIVE SUMMARY

The Office of Government Information Services (OGIS) serves—in the words of Congress—as the nation’s Freedom of Information Act (FOIA) ombudsman. The mission is simple:

*Improving the FOIA process and resolving disputes  
between Federal agencies and FOIA requesters.*

The mission dovetails with that of OGIS’s parent agency, the National Archives and Records Administration (NARA), which states, in part:

*We ensure continuing access to the essential  
documentation of the rights of American citizens  
and the actions of their Government.*

In OGIS’s first year as FOIA ombudsman, the Office worked to fulfill its mission by helping FOIA requesters and agencies with everything from filing requests and appeals to dealing with difficult requesters to resolving disputes. OGIS handled 391 cases, the majority of which did not rise to the level of a dispute. Of the 83 cases involving disputes between FOIA requesters and 24 departments and agencies, OGIS resolved a majority—more than four out of five cases ended with the requester and the agency reaching an agreement. But for OGIS, most of these customers would not have received help.

OGIS also teamed with existing agency Alternative Dispute Resolution programs to launch targeted training for agencies interested in applying mediation techniques to FOIA disputes. Many agencies embraced this creative approach, and more training is planned. Collaboration with Federal agencies also focused on identifying and solving FOIA’s shortcomings, while collaboration with nongovernmental organizations offered the Office another perspective into its work.

OGIS's first-year caseload allowed the Office to observe effective and efficient FOIA programs, as well as programs that would benefit greatly from improved customer service. The Office's list of best practices offers commonsense recommendations for improving communications between agencies and requesters, an approach that could help prevent many disputes.



*"Under the Freedom of Information Act, I'm requesting that you disclose what you have on me in your files."*

This first year, OGIS wrestled with how to fulfill its mandate to review agency FOIA policies, procedures, and compliance in order to recommend policy changes to Congress and the President. The Office, meanwhile, is working to implement a comprehensive review plan.

OGIS remains a nascent program with much work left to do. In its second year, OGIS is working toward advancing its mission and the goals of the Obama administration's Open Government Initiative by establishing a comprehensive process for reviewing agency FOIA policies and procedures, better educating FOIA requesters, establishing a permanent case management system, developing a fully operational mediation program, and regularly offering dispute resolution skills training for agency FOIA professionals.

## FOIA MATTERS

*“The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors or failures might be revealed, or because of speculative or abstract fears.”*

President Barack Obama

January 21, 2009

FOIA matters. Every day, FOIA helps countless members of the public learn about the inner workings of their Government, fostering transparency and accountability and, in turn, nurturing the nation's democracy.

As President Obama said on his first full day in office, “A democracy requires accountability, and accountability requires transparency.” FOIA, he said, “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.”

In the last fiscal year, FOIA shined a light on oil drilling, falsified military valor claims, and Government credit card misuse, among many other examples. After the April 2010 BP oil disaster in the Gulf of Mexico, the nonprofit Center for Public Integrity analyzed data obtained under FOIA and reported in May that 97 percent of all “egregious willful” violations cited by Occupational Safety and Health Administration inspectors in the previous three years were found at two BP-owned refineries.<sup>1</sup> The Associated Press relied on FOIA to report in May that the Minerals Management Service (recently renamed the Bureau of Ocean Energy Management, Regulation and Enforcement) violated its own policy by not conducting monthly inspections on

BP’s Deepwater Horizon rig.<sup>2</sup>

Two weeks later, *The New York Times* reported that Federal drilling records and well reports obtained from the Bureau under FOIA helped reveal a history of problems with a blowout preventer and casing long before the Deepwater Horizon explosion.<sup>3</sup>

## **The New York Times** Expect the World® Documents Show Early Worries About Safety of Rig

By IAN URBINA May 29, 2010

WASHINGTON — Internal documents from BP show that there were serious problems and safety concerns with the Deepwater Horizon rig far earlier than those the company described to Congress last week.

A Washington, DC-area man uses FOIA daily to obtain official military medal citations from the National Archives and Records Administration’s National Personnel Records Center. Vietnam veteran

Doug Sterner has uncovered hundreds of cases of falsified military valor in his compilation of a database of more than 200,000 military honor citations.<sup>4</sup>

FOIA sometimes reveals misuse of Government resources. The *Washington Times* reported in May 2010 that 21 employees of the Federal Protective Service used Government credit cards to buy gold coins, flat-screen televisions, gym memberships, and clothing.<sup>5</sup> Several months earlier, the *Times* reported that the Securities and Exchange Commission investigated more than two dozen of its employees and contractors after they viewed pornography on their Government computers during the work day.<sup>6</sup>

*Politico* used FOIA to learn from the FBI about threats made against members of Congress.<sup>7</sup> The New York City News Service, run by The City University of New York Graduate School of Journalism, obtained the FBI file on the late Senator Jesse Helms of North Carolina, which shows that he received repeated death threats and, early in his career as a broadcaster, offered to help the FBI.<sup>8</sup> And Representative John Dingell of Michigan used FOIA to obtain Federal inspection reports revealing that the Ambassador Bridge connecting Detroit, Michigan, and Windsor, Ontario, suffered corrosion, cracked concrete, and rusted railings.<sup>9</sup> Best-selling author Jon Krakauer used FOIA in reporting about Pat Tillman's journey from the National Football League

## THE DANGERS OF DISSENT

THE FBI AND CIVIL LIBERTIES SINCE 1965

IVAN GREENBERG



to the U.S. Army in Afghanistan in *Where Men Win Glory: The Odyssey of Pat Tillman*.<sup>10</sup> FOIA helped writer Ivan Greenberg trace the evolution of FBI spying in *The Dangers of Dissent: The FBI and Civil Liberties since 1965*.<sup>11</sup> And FBI files obtained under FOIA contributed to author Alex Heard's research for *The Eyes of Willie McGee: A Tragedy of Race, Sex, and Secrets in the Jim Crow South*, about a black man sentenced to death for raping a white woman in Mississippi in 1945.<sup>12</sup>

## OGIS CASE STUDY

OGIS received a letter in March 2010 from an imprisoned veteran who had requested a section of a document from the Department of Veterans Affairs (VA). The VA denied the FOIA request because the document is freely available online; however, the customer does not have Internet access at his prison facility. OGIS contacted the VA, explained the situation, and the agency fulfilled the request. OGIS served a vital ombudsman role by short-circuiting what could have become a lengthy series of back-and-forth letters.



## THE OGIS MISSION

Congress's mandate creating OGIS as an outward-facing office is two-pronged: review agencies' policies, procedures, and compliance, and offer mediation services to resolve disputes between FOIA requesters and Federal agencies.

OGIS took the 104 words added to FOIA in the 2007 legislation that created the Office and worked within their strictures, spirit, and intent. As the FOIA ombudsman, OGIS serves its customers—FOIA requesters

and Federal agencies—to fulfill a role that previously did not exist in the Federal Government. OGIS advocates for a fair process and for FOIA to work as intended, not championing requesters over agencies, or vice versa. OGIS’s FOIA advocacy ties directly to the Obama administration’s commitment to transparency and Open Government, and to President Obama’s statement on his first full day in office that “information maintained by the Federal Government is a national asset.”

*The Office of Government Information Services shall*

- (A) review policies and procedures of administrative agencies under this section;*
- (B) review compliance with this section by administrative agencies; and*
- (C) recommend policy changes to Congress and the President to improve the administration of this section.*

The Freedom of Information Act  
5 U.S.C. § 552 (h)(2)(A)-(C)

Requesters and many Federal agencies warmly welcomed OGIS. However, in the first year, OGIS observed that some Federal agencies viewed OGIS as the “FOIA police” and thus were somewhat reluctant to share information with OGIS and to work with the Office to resolve disputes. To ensure that OGIS can effectively and impartially work to facilitate resolutions of FOIA disputes through Alternative Dispute Resolution (ADR), OGIS adheres to the provisions of the Administrative Dispute Resolution Act of 1996 (ADRA) [5 U.S.C. §§ 571–84], including the confidentiality provision. OGIS strives to strike a balance between confidentiality allowed under ADRA, and openness and transparency. With continued outreach, OGIS is confident that agencies will come to understand that the Office is here to assist them as well as requesters, and that sharing information with OGIS will not adversely affect agency operations.

OGIS spent much of its first year working to resolve disputes that FOIA requesters and Federal agencies brought to the Office, and to track issues related to FOIA administration and performance. For example, OGIS created “best practices” (see pages 19–25 and Appendices, Best Practices) based on the Office’s own observations and its review of all 94 reports to the Attorney General from Agency Chief FOIA Officers. In resolving disputes using mediation services, OGIS also tracks troubling observations. A more structured approach to these reporting duties is being implemented.

Congress saw a role for OGIS in evaluating agency performance as a Government-wide office interacting with all departments and agencies on FOIA issues. OGIS recognized immediately that its review and compliance mission is similar to the role undertaken by the Department of Justice through its Office of Information Policy (OIP). One of OIP’s regulatory responsibilities is to develop, coordinate, and implement FOIA policy [28 C.F.R. 0.24]. There is an intersection of duties that can enhance the services of both offices to agencies and requesters alike, but that also has created tension. To that end, OGIS and OIP are working together to define interagency procedures for successfully fulfilling both offices’ roles. Collaboration between OGIS and OIP, while not yet fully realized, is critical to the effectiveness of both offices. A successful working relationship will dispel any agency and public confusion about the offices’ roles, and strengthen FOIA as Congress intended.

OIP, pursuant to the Attorney General’s statutory duty, collects and publishes agency FOIA data. This is information OGIS also will use to perform its statutory duty of reviewing agency policies, procedures, and compliance. OGIS foresees the need for flexibility among the agencies to share additional data and to assist the Office in establishing the parameters of its reporting.

In providing mediation services, OGIS occasionally encountered disputes that touched on agencies’ policies and procedures; in an attempt

to resolve those disputes, OGIS consulted with OIP, as the FOIA policy office. OGIS's and OIP's collaborative efforts highlight the potential for leveraging the authorities of both offices to improve the administration of FOIA.

*The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.*

The Freedom of Information Act  
5 U.S.C. § 552 (h)(3)

OGIS created a framework for offering mediation services by drawing on the array of services that mediation can encompass, taking a commonsense and fiscally sound approach to dispute resolution. This includes traditional formal mediation as well as more informal facilitation. These are novel approaches when applied to FOIA.

Congress used the term “mediation services” to describe OGIS’s work, and the Office explored a range of services within that spectrum. Both mediation and facilitation are forms of “mediation services.” In mediation, a neutral third party, the mediator, assists disputing parties in reaching a mutually agreeable resolution. Facilitation is one approach used by mediators to help each party to understand the other’s position, interests, and needs. OGIS uses the term facilitation to indicate those cases in which OGIS staff (as opposed to an outside mediator) works in a less-structured, informal manner with the parties to find common ground to resolve disputes. OGIS has found that informally facilitating communication between the parties is a successful approach to avoiding and resolving disputes. In its first year, OGIS used facilitation in 83 cases, and it fully succeeded in 68 cases, with

the requester and the agency reaching an agreement. Whether records were disclosed or withheld, the parties in each of these cases agreed with the outcome, and the FOIA process worked.

Mediation training for OGIS staff members has equipped the Office with the skills needed to help resolve disputes. Though OGIS has yet to handle a case that resulted in formal mediation, the Office is creating procedures for conducting mediation and assembling a pool of trained outside mediators who can work with FOIA disputes.

OGIS strives to work in conjunction with the current request and appeal process that exists within Federal agencies. The goal is for OGIS to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. Examples of OGIS services include helping requesters narrow the scope of their FOIA requests; helping agencies deal with difficult requests and serial requesters; obtaining information related to agency practices, policies, and procedures; working through issues related to fees and requests for fee waivers; and encouraging agencies to reconsider determinations to withhold requested agency records, particularly to look for instances where no foreseeable harm can be identified from release.

All of OGIS's mediation services are voluntary and conducted in accordance with the Administrative Dispute Resolution Act of 1996 (ADRA). It is within the scope and intent of the 2007 FOIA amendments for OGIS to encourage participants to use its mediation services at any point at which such services could be helpful. Although ADRA has been in effect since 1996, the application of ADR to FOIA is an innovative approach—but one very much in line with Federal Open Government initiatives.

OGIS also is authorized to issue advisory opinions, formal or informal. By issuing advisory opinions, OGIS does not intend to undertake a policymaking or an adjudicative role within the FOIA process, but instead will illuminate novel issues and promote sound practices with regard to compliance with FOIA. OGIS did not issue any advisory opinions in its first year.

*“Establishing this new FOIA office within the National Archives is essential to reversing the troubling trend of lax FOIA compliance and excessive Government secrecy during the past eight years. OGIS will also play a critical role in meeting the goals of President Obama’s new directive on FOIA.”*

Senator Patrick Leahy  
March 5, 2009

## OPENING *the* OFFICE

OGIS opened September 8, 2009, with the arrival of Director Miriam Nisbet, an expert in information policy law with a distinguished career both within and outside of the Federal Government. Director Nisbet assembled a diverse staff with expertise in Open Government, Federal and state access laws, information science, mediation, journalism, and database analysis. Since May 2010, OGIS has been staffed with seven professionals including from both the agency access and the FOIA requester communities.

The OGIS web site, which went live within a few weeks of the Office opening, explains the Office’s services and provides links to a wide variety of resources including guides to requesting documents under FOIA, obtaining previously released FOIA records, and seeking OGIS assistance.

The Office also created and widely distributed an OGIS fact sheet for potential customers and other interested parties (see Appendix). In the interest of transparency and accountability, OGIS case logs, which detail the cases OGIS handles, are posted weekly on *archives.gov/ogis* allowing

customers—and the public—to track the progress of cases. OGIS regularly hears from agency professionals who routinely read the case logs in an effort to address potential problems in their FOIA operations.

OGIS created a database to serve as an interim case management system, helping the office track cases and measure the effectiveness of its work. The Office’s growing caseload demands a more robust solution for case management, and OGIS is implementing a sophisticated interactive electronic case management system.

OGIS also addressed various procedural requirements related to establishing a new Federal office by developing policies and procedures that should be published in early 2011. As required by the Privacy Act of 1974, OGIS published a new “Privacy Act System of Records Notice, NARA 40” (75 Fed. Reg. 45674, August 3, 2010), which informs the public of the types of information OGIS maintains, the procedures for accessing this information, and how OGIS safeguards the information.

OGIS created and refined its process for helping customers, both FOIA requesters and Federal agencies. When a requester contacts OGIS, the staff determines whether the individual seeks personal records. Such “first-party” requests are considered Privacy Act requests and thus fall outside the scope of the Office’s mission. In its ombudsman role, OGIS has succeeded in assisting those requesters with determining the status of their requests or appeals or directing them to other entities such as the courts or state agencies.

Once OGIS opens a case, it is assigned to an OGIS staff member who fact finds with the requester and the agency and works to resolve the dispute. Each agency’s FOIA Public Liaison, who has a statutory role to assist in resolving disputes, is usually the Office’s first point of agency contact.

In aiming to complement agency practice, OGIS encourages customers to allow FOIA’s administrative procedures to work whenever possible. Although customers can contact OGIS at any point in the

administrative process, the Office encourages them to wait for the agency's appeal determination before engaging OGIS. But OGIS recognizes that, in cases of lengthy delays at the request or appeal stage or a breakdown of communications between requester and agency, such advice is not always practical.

## OGIS CASE STUDY

When General Motors declared bankruptcy and canceled its contract with the Stillwater Mining Company, Al Knauber, editor of the *Big Timber Pioneer*, noticed an effect on his small town of Big Timber, Montana. Wanting to know more, Knauber submitted a FOIA request to the Department of the Treasury in January 2010.  Knauber, hoping to get a better picture of why the contract was cancelled, asked the Treasury Department's Office of Financial Stability (OFS)—the office that oversees the Federal Troubled Asset Relief Program, or TARP—for correspondence between GM and any Federal agency.

The search returned only a few e-mails, surprising Knauber who thought there were far more records in the agency. He asked OGIS to look into it. A call to the OFS showed that there were a lot more records related to the Stillwater Mining Company and GM held by the OFS, but they were not correspondence between the agency and GM, which is what Knauber had specifically asked for.

The office suggested that Knauber broaden the scope of his request to include internal agency documents and correspondence so the remaining records could be properly processed and released. Knauber was glad to hear there were more records and that he simply had to rewrite his request. He submitted a new request in July and received 88 pages of records two months later. "Without the assistance of your office, I would have been left to start over," Knauber wrote OGIS in an e-mail.

## RESOLVING DISPUTES

The first requests for assistance from OGIS awaited Director Nisbet on her first day. Within the year, the OGIS caseload, which includes both requests for dispute resolution as well as more general inquiries, swelled to 391 cases from 40 states, the District of Columbia, and 7 countries. More than one-third of the cases came from six locales: New York (9 percent), Washington, DC (9 percent), California (6 percent), Texas (6 percent), Pennsylvania (5 percent), and Virginia (5 percent), collectively. In 35 percent of all cases, OGIS provided ombudsman services, such as guidance on filing FOIA requests and appeals or information about how the FOIA process works. For many OGIS customers, the Office was a call of last resort.

As the caseload grew, so did refinements to data collection in the OGIS case-tracking system; some data are unavailable for OGIS's earliest cases.

In the first year, 83 of OGIS's 391 cases were considered actual disputes between FOIA requesters and agencies. Of those 83 disputes, which involved 24 agencies and departments, OGIS resolved 68. OGIS defines a successfully resolved case as one in which the disputing parties agree on the outcome. For example, the resolution may not result in further disclosure of records to the requester or in having the requester narrow the scope of his or her request. Rather, the object of the OGIS process is for the parties to agree on a solution that prevents litigation.

Despite OGIS's best efforts, it failed to resolve disputes between requesters and agencies in 15 of the 391 cases brought to the Office during the first year. In one case, for example, an agency agreed to provide data but the requester was still not satisfied. In another, a Federal agency customer requested mediation but the requester's attorney advised against it. OGIS spent nearly eight months working

to facilitate a resolution in another dispute in which a Federal agency was so unresponsive that the requester ended up filing a lawsuit. Not surprisingly, request denials and delays in agencies responding to requests together accounted for nearly half of the cases OGIS handled in its first year. Specifically, 61 cases involved agencies fully or partially denying release of requested records, while in 28 cases, agencies found no records to release. Eighty-three cases involved delays of initial requests or appeals. Seventy-eight percent of OGIS cases originated with individuals, while 16 percent came from organizations, including the media, nonprofits, businesses, and educational institutions. Fewer than 2 percent of OGIS cases came from Government entities, including Federal agencies and congressional offices.

FOIA requests to all 15 Cabinet-level Departments and 15 of the 79 Federal agencies comprised the OGIS first-year caseload. The bulk of OGIS cases—38 percent—involved FOIA requests to the Department of Justice and 18 of its components, including the Federal Bureau of Investigation, the Federal Bureau of Prisons, and the Executive Office for United States Attorneys.

About 9 percent of OGIS cases involved requests to the Department of Veterans Affairs. Requests to the Department of Defense accounted for 7 percent of OGIS's first-year caseload, while requests to the National Archives and Records Administration and the Department of Homeland Security each accounted for 5 percent of OGIS's caseload.

It would be incorrect to infer that the above-listed departments have more problematic FOIA processes than other departments, particularly since the Departments of Justice and Veterans Affairs were the first agencies to routinely use response letters and appeal letters to inform their FOIA requesters about OGIS and its mission. At OGIS's request, the Office of Information Policy published guidance in July 2010 directing agencies to notify requesters in their final agency responses that OGIS offers mediation services.

OGIS cases were open an average of 25 working days with a median of 16 working days. Fifty-five cases were closed within one week, while the above-mentioned case in which the customer filed a lawsuit stretched 174 days.

Ninety-four cases involved Privacy Act, or first-party, requests, which fall outside the scope of the OGIS mission; however, in many of those cases, the Office successfully assisted those requesters with determining the status of their requests or appeals. The volume of those cases—comprising one-quarter of the OGIS caseload—suggests the need for an ombudsman for first-party requests.

## IMPROVING *the* FOIA PROCESS

*“What is most critical is a change in the ethic and the culture of the Federal Government when it comes to our citizens and their requests for information, which is not the Government’s. It is theirs. Citizens requesting information should be treated as valued customers, not as adversaries, and certainly not a nuisance. They should be engaged and assisted and not avoided.”*

Senator John Cornyn  
September 30, 2009

*“A responsibility of both the people and the Government is to work with each other on issues of access and accountability. . . . Working together, you can avoid the delays, misunderstandings and frustrations that can unfortunately characterize the*

*FOIA process. You should both adopt the attitude  
of ‘Help me help you.’”*

Representative William Lacy Clay  
March 19, 2010

OGIS has found that simple communication between a FOIA requester and an agency FOIA professional can go a long way in avoiding frustration and disputes. OGIS also has observed that agencies whose FOIA professionals provide good customer service have a greater chance of resolving disputes than agencies with FOIA offices that need improvement. OGIS invites any agency that has a good practice to contact the Office.

Observed agency customer service best practices, detailed in an OGIS chart (see Appendix), include the following:

- Several component offices within the Department of Agriculture immediately acknowledge FOIA requests with the name and telephone number of the FOIA professional assigned to the case.
- Several agencies created model letters for acknowledging, handling, and responding to requests.
- The Department of Labor’s Employment Training Administration wrote response templates for requests resulting in no records, partial releases, and third-party notifications.
- The FBI’s FOIA web site explains how to understand and obtain records from the agency and includes information about what happens after a request is made. Requesters also can learn how long it takes to receive information and what requesters can expect to receive after FBI processing.
- A Forest Service FOIA analyst informed a requester who was willing to pay thousands of dollars to obtain records that he could easily download the data free from the Federal Procurement Data System web site.



- The State Department makes rolling releases of information to requesters rather than waiting until processing ends.
- In cases requiring referral to or consultation with another agency, an Air Force FOIA officer created for the Department of Defense (DoD) a document-sharing platform to streamline FOIA referrals and consultations.
- The Surface Transportation Board adopted an informal policy of accepting administrative appeals in cases where the only reason to refuse the appeal is technical, such as the appeal was received after the deadline for filing an appeal.
- The Environmental Protection Agency operates a national FOIA hotline where callers can talk to a FOIA specialist about their requests or general FOIA questions.
- The DoD’s Office of Secretary of Defense/Joint Staff FOIA Office established a new position to coordinate directly with OGIS.
- The Departments of Education and the Interior and 11 non-Cabinet-level agencies, including the Council on Environmental Quality, updated their FOIA regulations since the 2007 FOIA amendments. Such regulations outline agency-specific procedures governing the FOIA request process.

OGIS also has observed—and FOIA requesters have reported to the Office—that customer service could be greatly improved at some agency FOIA offices. Among OGIS’s observations: Some FOIA Public Liaisons do not publicize their telephone numbers, do not have voice mail that accepts messages, and return calls only sporadically, if ever. Some liaisons did not seem interested in resolving disputes, and refused OGIS’s offers of assistance. Other liaisons did not appear familiar with FOIA.

Several requesters reported an unprofessional tone used by FOIA staff, including, in response to one requester’s follow-up question, an

admonition to “Read your letter.” One FOIA appeals attorney repeatedly insisted that an appeal letter was “self-explanatory” and discussed its contents only in response to specific questions from OGIS. One requester reported being hung up on three times when she called an agency’s FOIA Public Liaison office. OGIS also has encountered hurdles in getting responses from several agencies.

To improve the administration of FOIA, OGIS recommends that agencies establish standards for customer service, everything from returning telephone calls to explaining clearly the distinction between fee categories and fee waivers. OGIS recommends the following best practices:

- Ensure that each agency and department employee recognizes that she or he represents the Federal Government
- Ensure that all FOIA professionals—from the paralegal to the FOIA Public Liaison to the agency Chief FOIA Officer—are courteous and patient with requesters and respond quickly to their communications
- Require FOIA Public Liaisons to be FOIA professionals with good communication skills
- Publicize widely the FOIA Public Liaison’s name, telephone number, and e-mail address on the agency’s FOIA web page, within the agency, across the Government, and throughout the FOIA requester community
- Set up FOIA professionals’ voice mail to accept messages and return all messages
- Create a general FOIA e-mail account that all FOIA Public Liaisons can access for requesters to write with concerns or questions
- Include information about OGIS in final appeal letters advising requesters that the Office can assist in resolving FOIA disputes as an alternative to litigation

- Attend dispute resolution skills training offered by OGIS
- Provide in writing to the requester the tracking number and contact information for the FOIA Public Liaison and the FOIA professional assigned to the case as quickly as possible, along with an estimate of how long the request is going to take to process, even if the agency is unable to make the 20-day response time, as required under the law
- Create an online system to allow FOIA requesters to easily check the status of their requests
- Develop intra- and interagency agreements (memoranda of understanding) regarding the processing of routine agency-specific documents, releases, and withholdings to avoid or minimize the need for referral or consultation between agencies
- Inform requesters, when practicable, about records referrals and consultations, including which agencies are involved and how to contact those agencies
- Post in plain language information about and examples of agency determinations on fees charged, fee categories, and fee waivers
- Cite OGIS and the services it offers when updating agency FOIA regulations.

*“[T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”*

Attorney General Eric Holder

March 19, 2009

An agency is to deny disclosure only if, after review, the agency can reasonably foresee that disclosure would harm an interest protected by one of FOIA's nine exemptions. OGIS recommends that agencies develop

guidance on how to conduct foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure. If the agency cannot identify harm, it should consider disclosing the information as a matter of discretion. Such discretionary disclosures should include making partial disclosures when full disclosure is not possible. Observed agency foreseeable harm best practices include the following:

- Senior officials responsible for processing FOIA requests at the Department of Commerce must certify that a foreseeable harm analysis is applied to all responsive documents.
- Forest Service employees wishing to withhold records under Exemptions 2 (purely internal matters that courts have ruled are of no interest to the public) or 5 (interagency or intra-agency documents) must provide the Washington, DC, office with written justification outlining the harm that would result from release of the requested information. Requesters can now obtain accident investigation report recommendations from Forest Service headquarters, documents that were previously withheld in their entirety under Exemption 5.
- Re-review of materials previously found to be protected under Exemption 5 resulted in the Department of Energy releasing an agreement between the Savannah River Ecology Laboratory and the University of Georgia. The re-review determined that release would cause no foreseeable harm. The stepped-up foreseeable harm reviews resulted in a 17-percent drop in the Department's use of Exemption 5 between FY2009 and FY2010.
- The Nuclear Regulatory Commission updated its FOIA training class and its written guidance to include instruction on foreseeable harm review. OGIS also recommends that agencies establish procedures for identifying information appropriate



for disclosure and establish categories of records that can be disclosed regularly without waiting for a FOIA request, such as calendars and travel records of senior agency leaders. OGIS foresees a day when agencies can, with ease, release all FOIA requests and responsive documents online. Until then, OGIS recommends that agencies post online significant documents that have been released under FOIA without waiting for a second FOIA request. A number of agencies reported significant reductions in FOIA requests for the same information posted proactively.

Observed agency proactive disclosure best practices include posting on agency web sites:

- Downloadable state-by-state and nationwide lists of all Federal firearms and Federal explosives licenses issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives<sup>13</sup>
- Previously restricted classified records of the Department of Justice's Civil Rights Division's historic investigation into the 1964 murders of civil rights workers James Chaney, Andrew Goodman, and Michael Schwerner, also known as the "Mississippi Burning" incident<sup>14</sup>
- Statistics on wild horses and burros on land managed by the Bureau of Land Management<sup>15</sup>
- The 333-page FBI file on pop singer Michael Jackson, whose June 25, 2009, death sparked a high volume of FOIA requests<sup>16</sup>
- A subscription offer for people wishing to receive automated e-mails every time the Department of Agriculture's Food Safety and Inspection Service updates its log of FOIA requests<sup>17</sup>
- Lists of Government credit card holders in Federal agencies, including the Departments of Agriculture and Labor headquarters, the Bureau of Labor Statistics, the Department of



Justice’s National Drug Intelligence Center, the National Science Foundation, and the United States Postal Service<sup>18</sup>

- Environmental Protection Agency’s “MyPropertyInfo” database allowing users to determine if there are environmental records on a specific property<sup>19</sup>

## OUTREACH *and* TRAINING

OGIS’s staff made 43 presentations in the Office’s first year. This included 41 presentations to agencies, nongovernmental organizations, academic groups, state organizations, and international organizations. In addition, Director Nisbet testified twice before Congress: in September 2009 before the Senate Judiciary Committee and in March 2010 before the House Committee on Oversight and Government Reform’s Information Policy, Census, and National Archives Subcommittee. Early on, OGIS recognized that an important aspect of its outreach would be educating the FOIA community about dispute resolution. Although most Federal agencies have active and effective Alternative Dispute Resolution (ADR) programs, applying mediation principles and techniques to FOIA disputes is relatively novel. An informal inquiry into whether any agency ADR programs handle FOIA conflicts has not found any examples. OGIS views agency ADR programs as a great untapped resource to help extend the Office’s reach by leveraging existing agency resources to help resolve FOIA disputes.

OGIS places a priority on establishing a program to provide dispute resolution skills training for FOIA Public Liaisons, designated in FOIA to help resolve any disputes between the requester and the agency. The goal is to equip FOIA Public Liaisons with the tools needed to address requester concerns while working within their agencies to prevent or

resolve disagreements. FOIA Public Liaisons, in their new statutorily enhanced role, can most efficiently avoid disputes, remove obstacles to access, and provide excellent FOIA customer service.

Soon after OGIS opened, Deirdre Gallagher of the ADR staff of the Federal Energy Regulatory Commission (FERC) approached Director Nisbet about collaborating with OGIS to develop dispute resolution skills training for FOIA professionals. Ms. Gallagher and her FERC colleagues Jerrilynne Purdy and Paula Felt produced a cross-agency FOIA dispute resolution training program, co-sponsored by OGIS and the Department of Justice's Office of Information Policy (OIP).

## OGIS CASE STUDY

ESPN reporter Elizabeth Merrill filed a FOIA request for immigration records with the Department of Homeland Security (DHS) in September 2009. The records concerned Sahel Kazemi, who was allegedly having an

affair with Tennessee Titans quarterback Steve McNair, and who police say murdered him before she took her own life. The FOIA request initially produced some heavily redacted documents and a response letter stating that 19 additional pages had been referred to other agencies. Merrill didn't hear anything about where those referrals went or how to follow up with them. ESPN contacted OGIS for assistance in May 2010, and the DHS FOIA Public Liaison was able to share the names of the agencies where the records were sent so the reporter could follow up. Merrill obtained a few additional records right away although others were still in a queue in the other agencies.

Merrill produced a July 2010 article using some of the records she obtained. This case led to an OGIS "Best



Updated: July 4, 2010  
**The woman forever tied to Steve McNair**

**Former Titans QB Steve McNair was shot and killed July 4, 2009**

By Elizabeth Merrill  
ESPN.com

NASHVILLE, Tenn. -- They gathered in a parking lot long past nightfall, after the last karaoke singer stumbled over the final note and the signs flipped to CLOSED. It was fitting, that Sahel Kazemi's candlelight vigil would be held in the backdrop of Opryland, where the stars gravitate. Kazemi always said that someday she'd be famous.

OGIS received nearly 100 responses for the 30 slots available in the March 2010 training, attended by FOIA professionals from 27 departments and agencies. The daylong workshop included a review of the FOIA process, an introduction to mediation, a discussion of applying mediation to resolve FOIA disputes, an overview of successful communication techniques, the role OGIS plays in resolving FOIA disputes and how OGIS intends to work with agencies, and role-playing by participants using scenarios based on OGIS cases. Attendee feedback was very positive, with attendees noting that it was enlightening to learn about how agency ADR programs could be applied to FOIA disputes.

Practice” suggesting that when agencies refer records to another agency for review, they should let requesters know where the records were sent and how to contact that agency.

ESPN reporter Paula Lavigne contacted OGIS to follow up on the network’s requests for assistance, and shared the following: “When ESPN was trying to get records from USCIS [U.S. Citizenship and Immigration Services], OGIS really helped us by breaking up a logjam in our request. We were unsure of the status of several documents in our request based on a somewhat ambiguous initial response from USCIS. The response indicated that several of our records actually belonged to other agencies, but it didn’t say which ones. [OGIS Attorney Adviser] Corinna Zarek intervened and found out which agencies had those records, what they were doing with them and which people at those agencies could help us follow up. She also gave us contact information of someone at USCIS who actually responded to our public records questions in a timely fashion. It just felt good to have someone who could grease the wheels a bit so we didn’t feel as if our request had just disappeared into the ether.”

*<http://sports.espn.go.com/espn/otl/news/story?id=5347315>*

OGIS again collaborated with FERC and OIP to provide similar training at the 2010 public summer conference of the American Society of Access Professionals (ASAP), a nongovernmental association of agency FOIA professionals and FOIA requesters. While OGIS will continue to offer this popular cross-agency training regularly, several agencies, including the Departments of Defense, Health and Human Services, Homeland Security, and Interior, are interested in developing agency-specific FOIA dispute resolution training programs. The Department of Veterans Affairs (VA) took this step in July 2010 by teaming with FERC and OGIS to offer a half-day of dispute resolution skills training for VA FOIA professionals.

In addition to the dispute resolution skills training targeted to FOIA Public Liaisons, OGIS and OIP together presented two orientation sessions for the Public Liaisons, to acquaint them with OGIS and its services, in December 2009 and again in March 2010. The latter session was held under the auspices of ASAP.

OGIS also wrote a letter of introduction to the Public Liaisons and created a blog to communicate with the agency and requester communities.

Soon after opening, OGIS engaged the services of an expert to explore whether online dispute resolution (ODR) may be viable for providing mediation services. The private sector has had great success in using ODR as a tool for resolving disputes in connection with large caseloads. OGIS considered this approach in an effort to harness technology and as a fiscally responsible way to provide mediation services. The ODR feasibility study examined OGIS's internal processes, the FOIA administrative process employed at Federal agencies, and the data being compiled in OGIS's case database. After careful consideration, the expert found that OGIS's current caseload has not yet reached a level that would benefit from ODR.

At the same time, ODR-type tools could be employed to prevent disputes or resolve them at an early stage, and implementation efforts are

being evaluated. Although the expert did not recommend that OGIS use ODR now, he provided invaluable insight into how to build efficiencies into OGIS's internal processes and how to capture pertinent data for self evaluation.

## **COLLABORATING *with* GOVERNMENT AGENCIES**

Collaboration is a cornerstone of OGIS's outreach efforts. Starting in November 2009 with the Department of the Army, the Office participated in seven agency FOIA training sessions to alert agencies to OGIS's role in the FOIA process. OGIS regularly presents at Office of Information Policy agency-wide FOIA training programs. OGIS also has worked with Federal agencies, FOIA requesters, and FOIA advocates to identify the law's shortcomings and to develop solutions to help it work more effectively and efficiently. For example, OGIS collaborated with OIP on a few disputes brought to OGIS that involved questions about the interpretation and implementation of agencies' FOIA policies.

Early on, Director Nisbet joined the Interagency Alternative Dispute Resolution (ADR) Working Group, comprised of ADR leaders throughout the Government who meet to discuss common issues and share best practices.

To further OGIS's commitment to support FOIA Public Liaisons and other FOIA professionals in improving the administration of FOIA, OGIS also is collaborating with the ADR specialists at the Departments of Defense, Interior, and Veterans Affairs, which have volunteered to serve as pilots in extending their existing mediation and dispute resolution programs to include FOIA disputes.

ADR specialists at Defense and Interior are quickly advancing their respective pilot programs, which they hope to launch in FY 2011; OGIS

continues to work with both departments. Recently, the Department of Homeland Security agreed to collaborate with OGIS to develop a department-wide dispute resolution skills training program for its FOIA Public Liaisons. Also, the FBI has agreed to work with OGIS to develop a plan for providing this training to its FOIA professionals. OGIS is excited about the opportunity to collaborate with these departments and agencies.

## OGIS CASE STUDY

A requester filed a request with the Central Intelligence Agency (CIA) for records for a book that he was writing. The CIA began processing the request, placing the requester in the “commercial” fee category, which would require him to pay for all fees incurred in the processing of the request. The requester, believing he should qualify for a favorable fee category, contacted OGIS. OGIS spoke with the CIA about the various categories and whether this requester best fit with the “commercial” status, and the CIA decided to waive all fees for the request.

## COLLABORATING *with* NGOs

From its inception, OGIS has enjoyed the support and interest of nongovernmental organizations (NGOs), primarily nonprofit Open Government groups in Washington, DC, that made creation of a Federal FOIA ombudsman’s office a high priority when Congress began considering amending FOIA in 2004. The groups lobbied hard to keep the ombudsman provision in the legislation as it moved through Congress, and even after the OPEN Government Act of 2007 was signed into law, they continued advocating for the resources and attention needed to open and operate OGIS.

In 2008 and 2009, NGO FOIA advocates met among themselves to suggest strategies for OGIS and discussed the Office in meetings with other stakeholders including OIP and the White House. These NGO groups were quick to contact Director Nisbet early on, beginning a regular series of informal meetings that continues today. The NGOs regularly contact OGIS with informal observations or questions, but they also have come to OGIS for formal assistance with FOIA requests. About two dozen of OGIS's cases in its first year were from members of this active requester community. These interactions give the NGOs the opportunity to see how OGIS works to resolve disputes and to provide helpful feedback and suggestions to help OGIS in continuing to perfect its practices and procedures.

## A LOOK AHEAD

In its second year, OGIS is working to better educate FOIA requesters, implement a comprehensive plan for reviewing agency FOIA policies and procedures, regularly offer dispute resolution skills training, establish a permanent case management system, and develop measures of effectiveness of a fully operational mediation program. Meeting these objectives will help to implement fully OGIS's mission to improve the FOIA process as well as realize President Obama's Open Government Initiative and his January 21, 2009, FOIA Memorandum.

Many individuals who request information from the Government are FOIA savvy; others may be aware they have a right to request information from the Government, but are not sure how to do it. They may not understand the fee structure, or know how to check the progress of their requests, or even know where to send requests. The Department of Justice, along with the Office of Management and Budget and the

General Services Administration, publishes “Your Right to Federal Records,” a helpful guide to requesting records under FOIA and the Privacy Act. However, the guide does not explain some of the trickier nuances under FOIA; for example, the distinction between a fee category and a fee waiver and how those might be determined. The guide also has not been updated to outline the role and duty of the FOIA Public Liaisons at agencies or to discuss OGIS and the statutory right of agencies and requesters to ask for assistance. A variety of nongovernmental organizations provide information on the FOIA process, including these specific explanations and suggestions, and it makes sense that OGIS as a Government-wide FOIA office provide similar tips to aid requesters and agencies.

OGIS fielded dozens of calls in the first year from FOIA requesters asking for basic information about the law, such as how to make FOIA requests, where to send them, the correct points of contact within an agency, and whether the U.S. Congress or private corporations are subject to FOIA (they are not). OGIS also met more experienced

## OGIS CASE STUDY

A requester contacted OGIS seeking to understand what was necessary in a fee waiver appeal to the Centers for Disease Control and Prevention. The letter the requester received did not clearly address how or what a requester must do to file a proper appeal of a fee waiver denial decision. OGIS explained to the requester the fee waiver as well as fee category aspects of FOIA including how to properly appeal those decisions. The requester then filed a fee waiver appeal. Although the agency denied the fee waiver, the FOIA requester was able to understand what is needed in order to obtain a fee waiver as well as the difference between the favorable fee categories and fee waivers.



requesters who had questions or misconceptions about FOIA. These calls and interactions show the need for education and training on FOIA processes and procedures for all levels of the requesting public, and as the outward-facing Federal FOIA ombudsman, OGIS is ideal to fill that need.

In its mission of reviewing agency compliance with FOIA, OGIS is creating a comprehensive plan for such review. As previously mentioned in this report, OGIS will consider the FOIA-reporting framework already in existence, and will work to complement, not duplicate, that process.

OGIS's mission to provide mediation services is inextricably intertwined with the FOIA Public Liaisons' statutory role of helping reduce delays, increase transparency and understand the status of requests, and assist in resolving disputes, 5 U.S.C. §§ 552(h)(3) & (l). Early on, OGIS observed that the duties of FOIA Public Liaisons were unclear. To address that, OGIS committed itself to engaging FOIA Public Liaisons as a community within the 94 departments and agencies, providing regular dispute resolution skills training, and establishing itself as a resource for FOIA Public Liaisons. This fiscally sound approach recognizes that by supporting the work of FOIA Public Liaisons, OGIS is efficiently implementing its statutory mission. One of OGIS's top priorities is to offer regular dispute resolution skills training for FOIA Public Liaisons and for other FOIA professionals. In OGIS's first year, the need for formal mediation to resolve a dispute did not arise. OGIS is considering various mediation program models to determine the most efficient and cost-effective way to establish its mediation program. As a newly created office providing services that have never existed in the Federal Government, OGIS's efforts are complicated by the need to predict many vital factors, including the potential size of the caseload requiring formal mediation, the time required to mediate FOIA disputes, and the logistics of convening geographically

dispersed parties. OGIS intends to operate a mediation program that is flexible, efficient, and cost-effective.

With the support of the Archivist of the United States, OGIS is planning to move from the National Archives' College Park, MD, facility to a location in downtown Washington, DC, closer to the Federal departments and agencies with which it works. OGIS hopes to complete this move by the middle of FY 2011.

## SPECIAL THANKS

OGIS is grateful to the 111th Congress: Senate Judiciary Committee Chairman Senator Patrick Leahy, Committee Member Senator John Cornyn, and Representative William Lacy Clay, chairman of the House Subcommittee on Information Policy, Census, and National Archives of the House Oversight and Government Reform Committee, and their personal and committee staffs. OGIS looks forward to working with the 112th Congress, including those previously mentioned as well as Representative Darrell Issa, chairman of the House Oversight and Government Reform Committee, and Representative Trey Gowdy, chairman of that committee's Subcommittee on Health Care, District of Columbia, Census and the National Archives, and their personal and committee staffs.

OGIS would like to thank several professionals for their outstanding work with OGIS and on behalf of FOIA.

OGIS appreciates the dedication of the Federal Energy Regulatory Commission Alternative Dispute Resolution Specialists Paula Felt, Deirdre Gallagher, and Jerrilynne Purdy who assisted OGIS in developing and presenting agency training programs. The commitment of these FERC professionals made possible this innovative collaboration.

Although OGIS has successfully interacted with many FOIA Public Liaisons, three FOIA Public Liaisons are leaders in their efforts to work collaboratively with OGIS. The Office’s interactions with FBI FOIA Public Liaison Dennis Argall, DHS FOIA Public Liaison William Holzerland, and former VA Public Liaison Lizzette Katilius have been particularly effective and efficient, and in many cases have led to resolution of issues.

OGIS appreciates Treasury Department attorney Allan Blutstein’s patience in providing OGIS with a roadmap for how the Department operates. OGIS also is grateful for the continuous help in understanding the FOIA structure of the Department of Health and Human Services (HHS), provided by Carol Maloney, director of the Division of FOIA Services for the HHS Program Support Center.

Many thanks go to Adrianna Rodriguez, OGIS’s first law clerk and a student at Harvard Law School, who worked diligently—and without pay—to advance OGIS’s mission with her excellent legal research and writing.

Finally, the American Society of Access Professionals (ASAP) and its Executive Director, Claire Shanley, provided opportunities early and often for OGIS to participate in ASAP programs, for which OGIS is most grateful.

## OGIS TIMELINE

<b>Sept. 8, 2009</b>	Miriam Nisbet opens the Office of Government Information Services
<b>Sept. 9, 2009</b>	OGIS opens its first case involving a delay
<b>Sept. 30, 2009</b>	Director Nisbet testifies before the Senate Judiciary Committee at a hearing on “Advancing Freedom of Information in the New Era of Responsibility”
<b>Oct. 13, 2009</b>	Staff Assistant Barbara Gordon joins OGIS
<b>Oct. 20, 2009</b>	<i>archives.gov/ogis</i> goes live
<b>Oct. 26, 2009</b>	Candace Boston joins the OGIS staff as its first analyst
<b>Nov. 10, 2009</b>	OGIS adds to its web site a case-tracking log allowing customers to check the status of their OGIS cases
<b>Nov. 22, 2009</b>	Attorney Adviser Corinna Zarek becomes OGIS’s fourth staff member
<b>Dec. 6, 2009</b>	Karen Finnegan joins the OGIS staff as deputy director
<b>Dec. 7, 2009</b>	OGIS and the Department of Justice’s Office of Information Policy (OIP) co-host a meeting for FOIA Public Liaisons to discuss the new FOIA landscape
<b>Jan. 21, 2010</b>	OGIS receives its 50th case

- Feb. 9–11 & 24–26, 2010** OGIS works through the blizzards of 2010
- Mar. 1, 2010** Analyst Carrie McGuire joins the OGIS staff
- Mar. 9, 2010** OGIS receives its 100th case
- Mar. 15–19, 2010** OGIS participates in a number of Sunshine Week events
- Mar. 18, 2010** Director Nisbet testifies before the House Committee on Oversight and Government Reform's Information Policy, Census, and National Archives Subcommittee
- Mar. 23, 2010** OGIS holds its first training session for FOIA Public Liaisons in collaboration with the Federal Energy Regulatory Commission (FERC) and OIP
- Apr. 18–23, 2010** Director Nisbet represents OGIS at the Chilean Council for Transparency
- Apr. 29, 2010** OGIS receives its 200th case
- May 10, 2010** Analyst Kirsten Mitchell becomes OGIS's seventh staff member
- May 24, 2010** Adrianna Rodriguez becomes OGIS's first law clerk
- July 14, 2010** OGIS receives its 300th case
- Aug. 24, 2010** Director Nisbet represents OGIS at the 7th National Transparency Week Conference in Mexico City, Mexico

## OGIS STAFF



*Front row (left to right):* Candace Boston, Miriam Nisbet; *Second row:* Corinna Zarek, Carrie McGuire, Kirsten Mitchell, Adrianna Rodriguez; *Back row:* Barbara Gordon, Karen Finnegan.

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## APPENDICES

# Office of Government Information Services (OGIS)

## *Resolving Federal FOIA Disputes*



### About OGIS ([www.archives.gov/ogis](http://www.archives.gov/ogis))

The OPEN Government Act of 2007 amended the Freedom of Information Act (5 U.S.C. Section 552) to create an Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA).

OGIS opened in early September 2009, with its main office at NARA in College Park, Maryland. The OGIS staff has been working with the Department of Justice, other agencies, and with private-sector stakeholders to promote transparency, provide training, and resolve requester and agency FOIA issues.

### OGIS Mission

1. **Review compliance and policy.** Review policies and procedures of administrative agencies under the Freedom of Information Act (FOIA). Review compliance with FOIA by agencies. Recommend policy changes to Congress and the President to improve the administration of FOIA.
2. **Mediate disputes.** Offer mediation services to resolve disputes between persons making FOIA requests and agencies (nonexclusive alternative to litigation). May issue advisory opinions if mediation has not resolved the dispute.
3. **Serve as ombudsman.** Solicit and receive comments and questions from Federal agencies and the public regarding the administration of FOIA to improve FOIA processes and facilitate communication between agencies and FOIA requesters.

### OGIS Contact Information

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**www.archives.gov/ogis**

The amended portions of the FOIA, 5 U.S.C. Section 552, concerning OGIS as well as some other aspects of agency compliance and service are:

- (h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.
- (2) The Office of Government Information Services shall—
- A. review policies and procedures of administrative agencies under this section
  - B. review compliance with this section by administrative agencies, and
  - C. recommend policy changes to Congress and the President to improve the administration of this section.
- (3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.
- (i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.
- (j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).
- (k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—
- 1) have agency-wide responsibility for efficient and appropriate compliance with this section
  - 2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section
- 3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section
- 4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section
- 5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply, and
- 6) designate one or more FOIA Public Liaisons.
- (l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

In addition, subsection (b)(6)(B)(ii)—which gives a FOIA requester and an agency the opportunity to modify the scope of a request and to agree to an alternative time frame for processing the request—was amended:

To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.



## Office of Government Information Services

National Archives and Records Administration  
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## FOIA Requirements, Agency Best Practices, and OGIS Recommendations

Requirements	Observed Agency Best Practices	OGIS Recommended Best Practices
<p>President Obama's Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act Issued: Jan. 21, 2009</p> <ul style="list-style-type: none"><li>Apply a presumption of openness and a presumption in favor of disclosure</li></ul>	<p>Department of Labor and Nuclear Regulatory Commission: Developed training programs for staff on implementing the President's and Attorney General's memoranda; the new requirements of the OPEN Government Act of 2007 and the "foreseeable harm" standard</p>	<ul style="list-style-type: none"><li>Establish procedures for identifying information appropriate for disclosure and establish categories of records that can be disclosed regularly, such as calendars and travel records of senior agency leaders</li><li>Provide FOIA training to all new employees, including political appointees, and provide annual FOIA refresher training for all employees</li></ul>
<p>Attorney General Holder's Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act Issued: Mar. 19, 2009</p> <ul style="list-style-type: none"><li>Deny disclosure only if the agency can reasonably foresee that disclosure would harm an interest protected by a statutory exemption</li></ul>	<p>Department of Agriculture/Animal and Plant Health Inspection Service: Implemented a universal foreseeable harm standard to determine the appropriate withholdings under FOIA Exemptions 2, 5, and 7</p> <p>Department of Commerce: Requires certification that a foreseeable harm analysis has been applied to all withheld documents with a determination that disclosure would result in harm</p>	<ul style="list-style-type: none"><li>Establish agency-specific record types that are likely candidates for discretionary disclosure</li><li>Develop agency-specific guidance on how to conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure</li><li>Department of Agriculture/Forest Service: Employees wishing to withhold records under Exemptions 2 or 5 must provide in writing the harm that would result from the release of the requested information</li><li>Department of Justice/Federal Bureau of Prisons: Released 8 pages in full, 21 in part of Federal prison records that</li></ul>

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<p><b>Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies on the Freedom of Information Act</b></p> <p>Issued: Mar. 19, 2009</p>	<ul style="list-style-type: none"> <li>could have been properly withheld under FOIA Exemptions 2 and 5</li> </ul> <p><b>Department of Justice/FBI:</b> In response to a high volume of requests, made a discretionary release of 333 pages of FBI investigatory records on Michael Jackson, who died June 25, 2009</p>	<ul style="list-style-type: none"> <li><b>Department of Transportation:</b> Released documents that could have been withheld under Exemption 5, including internal managerial e-mails discussing a controversial proposed agency policy and e-mails regarding safety issues for medical air ambulances</li> <li><b>Department of Agriculture/Food Safety and Inspection Service:</b> Offers subscriptions to e-mail notifications of updates to its log of FOIA requests; more than 9,100 people subscribe</li> <li><b>Department of Agriculture/Agriculture Marketing Service:</b> Posted online a searchable database of 50,164 animal care inspection reports for 2006, 2007, and 2008; the number of incoming FOIA requests dropped by nearly 35 percent</li> <li><b>Department of Justice/Bureau of Alcohol, Tobacco, Firearms and Explosives:</b> Posted lists of all active Federal firearms licenses and Federal explosives licenses in the United States</li> </ul>
<p><b>Freedom of Information Act, 5 U.S.C. § 552, as amended by the OPEN Government Act of 2007</b></p>	<ul style="list-style-type: none"> <li>Make a determination on a records request and notify the requester within 20 business days after receiving the request</li> </ul>	<ul style="list-style-type: none"> <li>Keep requesters informed about the timeframe for release and how they can track their requests, even if the agency cannot meet 20-day response time</li> <li>Develop an online or e-mail system for filing FOIA requests, allowing requesters to easily check the status of their requests</li> </ul>

	<b>Requirements</b>	<b>Observed Agency Best Practices</b>	<b>OGIS Recommended Best Practices</b>
<b>Response Time:</b>	<ul style="list-style-type: none"> <li>Determine within 10 days of receiving request whether requester has demonstrated “compelling need” requiring expedited processing</li> <li>Determine an appeal within 20 business days of appeal’s receipt</li> </ul>	<ul style="list-style-type: none"> <li>Make rolling releases in cases with many records</li> <li>Establish procedures for promptly analyzing and responding to requests for expedited processing</li> <li>Designate one senior staff member, and other employees as necessary, to act quickly on requests for expedited processing</li> </ul>	<ul style="list-style-type: none"> <li>Establish online procedure for tracking appeal status</li> </ul>
<b>Tolling:</b>	<ul style="list-style-type: none"> <li>Extend 20-day processing time for no more than 10 days only after giving written notice of “unusual circumstances”</li> </ul>	<ul style="list-style-type: none"> <li><b>Surface Transportation Board:</b> Adopted an informal policy accepting administrative FOIA appeals in cases in which the only reason to refuse the appeal is technical, such as the appeal was received after the deadline for filing an appeal</li> <li><b>Defense Intelligence Agency:</b> Detail in interim response letters to requesters the “unusual circumstances” preventing the agency from responding to request within required time period</li> </ul>	<ul style="list-style-type: none"> <li>Explain to requester the “unusual circumstances” causing the need for 10 extra days to respond to request</li> <li>Advise the requester of option to narrow request or arrange an alternative timeframe for processing request with the agency</li> </ul>
<b>Fee categories:</b>	<ul style="list-style-type: none"> <li>Extend time for processing a request only in unusual circumstances and only after consulting with another agency, or two or more components within an agency with a “substantial interest” in the request</li> <li>Agency may make one request for additional information and toll the 20-day processing time while waiting for a response from requester</li> <li>Commercial use: reasonable standard charges for search, duplication, review</li> </ul>	<ul style="list-style-type: none"> <li><b>Department of Defense:</b> In cases requiring referral to another agency, an Air Force FOIA officer created a FOIA document-sharing platform to streamline FOIA referrals and consultations</li> </ul>	<ul style="list-style-type: none"> <li>When a request is referred, notify the requester of the referral, the agency it was sent to, and how to follow up on the status of the request</li> <li>Use technology to maximize efficiency of referral/consultation process</li> <li>Develop intra- and interagency agreements (MOUs) regarding processing routine agency-specific documents, releases, and withholdings to avoid the need for referral/consultation</li> </ul>
		<ul style="list-style-type: none"> <li><b>U.S. Census Bureau:</b> Provides customers with clear breakdown of fees</li> </ul>	<ul style="list-style-type: none"> <li>Post clear information about and examples of agency determinations on fee categories</li> </ul>

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<ul style="list-style-type: none"> <li>• Educational, noncommercial scientific institutions, and representatives of the news media: reasonable standard charges for document duplication</li> <li>• All other requesters: reasonable standard charges for document search and duplication</li> </ul>		<ul style="list-style-type: none"> <li>• Make public information easy to find for requesters</li> <li>• Develop guidance for determining whether bloggers meet the “representative of the news media” status</li> <li>• Negotiate lower fees with requesters willing to narrow the scope of their requests</li> <li>• Provide requesters with a breakdown of the total fee estimate</li> <li>• Develop guidance on how to analyze requests for fee waivers</li> <li>• Post in plain language information about and examples of agency determinations on fee waivers</li> <li>• Develop guidance on types of information that would be in the public interest to disclose</li> <li>• Adopt an expansive view of information that is in the public interest to disclose</li> </ul>
<p><i>Fee waivers:</i></p> <ul style="list-style-type: none"> <li>• Charge no fee if the costs of routine fee collection and processing are likely to equal or exceed the fee amount. Charge no fees for first two hours of search and first 100 pages of duplication for noncommercial requesters</li> <li>• Charge no fees or reduced fees if disclosure is in the public interest and likely to contribute significantly to public understanding of operations or activities of the Government and is not primarily in the commercial interest of the requester</li> <li>• Assess no fees if the agency fails to comply with any time limit, if no unusual or exceptional circumstances apply to processing the request</li> <li>• No advance payment required unless fee will exceed \$250, or requester has previously failed to pay fees</li> </ul>	<p><i>Fee waivers:</i></p> <ul style="list-style-type: none"> <li>• Department of Agriculture/Forest Service: A FOIA analyst informed a requester who was willing to pay thousands of dollars to obtain records that he could easily download the data free from the Federal Procurement Data System</li> </ul>	<ul style="list-style-type: none"> <li>• Department of Agriculture/Forest Service: A FOIA analyst informed a requester who was willing to pay thousands of dollars to obtain records that he could easily download the data free from the Federal Procurement Data System</li> <li>• Operates a national FOIA hotline allowing callers to speak to a FOIA specialist about their requests or get answers to general FOIA questions</li> <li>• Provide in writing to the requester the tracking number and contact information for the FOIA Public Liaison as quickly as possible</li> <li>• Provide requester with an estimate of how long the request is likely to take to process</li> </ul>
<p><i>Tracking requests:</i></p> <ul style="list-style-type: none"> <li>• Assign and provide to requester a tracking number for each request that will take longer than 10 days to process</li> <li>• Provide requesters with an estimated time of completion of request</li> </ul>		<p><i>Environmental Protection Agency:</i></p> <ul style="list-style-type: none"> <li>• Operates a national FOIA hotline allowing callers to speak to a FOIA specialist about their requests or get answers to general FOIA questions</li> </ul>

OGIS e-mail: [ogis@nara.gov](mailto:ogis@nara.gov) • telephone: 301-837-1996 • toll-free: 1-877-684-6448 • fax: 301-837-0348  
 web site: [www.archives.gov/ogis](http://www.archives.gov/ogis) • NARA's web site: [www.archives.gov](http://www.archives.gov)

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<ul style="list-style-type: none"> <li>Establish telephone line or web service providing the status of a request using the tracking number</li> </ul>	<ul style="list-style-type: none"> <li><b>Department of Agriculture/Animal and Plant Health Inspection Service/Office of the Assistant Secretary for Civil Rights:</b> immediately acknowledges requests and provides name and contact information of FOIA specialist assigned to the case</li> <li><b>Department of Justice/Bureau of Alcohol, Tobacco, Firearms and Explosives:</b> Created acknowledgement tracking log to allow the chief FOIA officer to track the progress of each FOIA request</li> </ul>	<ul style="list-style-type: none"> <li>Post a case log on agency FOIA web page allowing requesters to search by tracking number; update weekly</li> <li><b>Department of Justice/Executive Office for U.S. Attorneys:</b> Created a multitrack system for processing FOIA requests—expedited, complex, and simple; simple requests no longer must wait until larger, more complex requests are finished</li> <li><b>National Archives and Records Administration:</b> Expanded the use of multiple tracking queues to ensure that simple, easily processed requests are not caught behind more complex requests. For very old cases, NARA contacts requesters to determine whether requesters are still interested in the requested record or if they are willing to narrow the request to a smaller subset of records</li> <li><b>FPLs should be FOIA professionals with good communication skills</b></li> <li><b>Publicize widely the FPL's name, telephone number, and e-mail address on the agency's FOIA web page, within the agency, government-wide, and in the FOIA requester community</b></li> </ul>
<i>Multitracking requests:</i>	<ul style="list-style-type: none"> <li>Develop multitrack system for requests based on amount of work and/or time involved in processing the requests</li> </ul>	<ul style="list-style-type: none"> <li><b>OGIS e-mail:</b> ogis@nara.gov • <b>telephone:</b> 301-837-1996 • <b>toll-free:</b> 1-877-684-6448 • <b>fax:</b> 301-837-0348 <b>web site:</b> www.archives.gov/ogis • <b>NARA's web site:</b> www.archives.gov</li> </ul>
<i>FOIA Public Liaisons (FPLs):</i>	<ul style="list-style-type: none"> <li>Designate FOIA Public Liaisons (FPLs) within each agency who shall assist in resolving disputes between requesters and agencies</li> </ul>	

Requirements	Observed Agency Best Practices	OGIS Recommended Best Practices
<b>OGIS:</b> <ul style="list-style-type: none"> <li>• Offer “mediation services” to resolve FOIA disputes between requesters and agencies</li> <li>• Issue advisory opinions if warranted when mediation fails to resolve dispute</li> <li>• Review agency FOIA policies and procedures</li> <li>• Review agency compliance with the FOIA</li> <li>• Recommend policy changes to Congress and the President</li> </ul>	<p>The following agencies currently include OGIS language in their appeal letters:</p> <ul style="list-style-type: none"> <li>• Department of Agriculture</li> <li>• Department of Health and Human Services</li> <li>• Department of Homeland Security/U.S. Citizenship and Immigration Services &amp; U.S. Immigration and Customs Enforcement</li> <li>• Department of the Interior</li> <li>• Department of Justice/Office of Information Policy and National Drug Intelligence Center</li> <li>• Department of Veterans Affairs</li> <li>• Corporation for National and Community Service</li> <li>• Social Security Administration</li> <li>• U.S. Postal Service</li> </ul>	<ul style="list-style-type: none"> <li>• Set up FOIA professionals’ voice mail to accept messages, and respond to requesters</li> <li>• Create a general FOIA e-mail account to which requesters can write with concerns or questions</li> <li>• Attend OGIS dispute resolution skills training</li> <li>• Include OGIS language in agency final appeal letters to advise requesters that OGIS can assist in resolving any FOIA disputes as an alternative to litigation</li> <li>• Include OGIS link and information on agency FOIA web pages</li> <li>• Update agency FOIA regulations to reflect new requirements added to the FOIA by the OPEN Government Act of 2007</li> <li>• Post agency FOIA regulations on the FOIA web page</li> </ul>

#### Additional recommended OGIS Best Practices:

- Contacting requesters need not always be by mail. Often, it may be more efficient to contact requester by e-mail or by telephone; these messages can be memorialized in writing later.
- Agencies should post their FOIA regulations on their FOIA web pages.
- Agencies should update their FOIA regulations to reflect new requirements added to the FOIA by the OPEN Government Act of 2007.

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