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OGIS: "Oh, Get It Solved"

Recommendations for Ramping Up the Office of Government Information Services at the National Archives and Records Administration: A Requester Perspective

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Before Congress created the Office of Government Information Services (OGIS) within the National Archives and Records Administration, the federal government lacked an independent entity to help the public resolve disputes that arise in the government's implementation of the Freedom of Information Act (FOIA). The Sunshine in Government Initiative believes this independent office could help resolve disputes faster, strengthen understanding of FOIA and increase public trust in the FOIA system.

In our view, the Office of Government Information Services will perform a wonderful service to the public and government alike if it can fill the gap between an agency's denial of a FOIA request and litigation. OGIS will not be successful if it over-promises or tries to accomplish too much. The Office could quickly become overrun by requests for mediation. The last thing the public needs is another layer of delay between a requester's initial request and the government's final response.

The Openness Promotes Effectiveness in our National Government Act of 2007 (P.L. 110-175) mandates that OGIS provide mediation services and public analyses of the federal government's implementation of FOIA. Currently the largest gap for OGIS to fill is the lack of independent mediation services. OGIS will most affect the public's FOIA experience through its mediation, so for OGIS to be effective early it will be important to have a functioning and effective mediation program in place as soon as possible. Thus, the following recommendations will focus primarily on the mediation function.

Fairness in Promoting a Presumption of Openness: Creating the OGIS Mission and Principles

To be effective, it is important for this new office to clearly identify its mission, principles and goals. The Office should be guided by both the presumption of openness embodied in the law and the fair

American Society of Newspaper Editors · The Associated Press · Association of Alternative Newsweeklies ·
Coalition of Journalists for Open Government · National Association of Broadcasters ·
National Newspaper Association · Newspaper Association of America ·
Radio-Television News Directors Association ·
The Reporters Committee for Freedom of the Press · Society of Professional Journalists

implementation of the law in the spirit and letter in which it is intended. These principles, which the office should reaffirm at every opportunity, suggest two tasks.

- a. **Strengthen open government and public trust in the FOIA process as the mission of this Office.** Defining OGIS's mission as strengthening open government and public trust is consistent with the statutory presumption of openness found in FOIA and the mandate for the office established by the OPEN Government Act (P.L. 110-175), the law that created OGIS.
- b. **Cultivate a reputation for fair-mindedness.** OGIS should have a reputation with requesters and agencies alike as an independent authority that helps resolve disputes in a fair and consistent manner. OGIS should help the federal government ensure that information requiring protection is properly protected and that everything else is publicly available.

Manage the Mediation Caseload: Design an Accessible, Authoritative Voice

A key challenge will be for this office to focus its formal mediation services narrowly on a manageable caseload. OGIS should avoid creating another step in the FOIA process where requests can bottle up backlogged and unaddressed. While state FOI mediators by and large handle the volume of requests for mediation effectively and OGIS should consider several states' experience, at the federal level the volume of requests is much higher.

If OGIS were to guarantee mediation services to all comers, it would be quickly overrun, creating a backlog for OGIS that would further frustrate requestors and undermine the purpose of the office.

On the other hand, OGIS could select a few cases chosen from objective criteria and mediate them well. Other requesters could be helped by technical tools, like a website with troubleshooting questions, similar to those in computer manuals (e.g., "Did you address your request to the proper agency?" "Yes, and I still didn't get an answer." "No, but I will try that now." "Did you include a telephone number where the processor could reach you?") However, selectively responding to a few requests would result in many requestors languishing without the benefit of mediation.

We suggest as an alternative a system for handling mediation requests both informally and through formal advisory opinions as needed, posting previous decisions with extensive plain-English explanations (FAQs) and other creative approaches to provide guidance to both requesters and agencies. This should help narrow OGIS's workload.

- a. **Create criteria for selecting cases to mediate.** OGIS should involve the public in writing clear, explicit criteria for selecting cases to mediate. Some criteria might include:
 1. **Accept requests only from the public, not from agencies or lawmakers, who have other tools available (such as GAO).** Agencies should not be able to request mediation or toll a request pending mediation, which would provide another reason for a delay in processing a request.
 2. **Design a mediation system that is accessible through electronic communications and other tools.** Requesters should not have to hire legal representation to avail themselves of

mediation services. Use electronic communications to provide mediation services and accept mediation requests. OGIS mediation services should be available online. Mediation would be accessible to someone living in Washington, DC or Washington state, and mediations could be done quickly and cheaply if based on electronic communications such as email or online submission forms.

- 3. Give priority to requests intended to disseminate information to the public.** Such requests may come from reporters, independent researchers, book authors, historians or neighborhood activists. It follows that the office should not take on cases that also involve Privacy Act requests. Such requests are often handled quickly by the responding agency in the first instance. Thus, any needed assistance would come in the form of merely directing the requester to the correct office to make the request. This is primarily the responsibility of agencies subject to FOIA. Intervening on these requests is unlikely to help future requesters and wastes OGIS resources. The Office might also choose to de-prioritize mediation requests wherein the FOIA requester is not eligible for fee waivers, which would filter out commercial requesters.
 - 4. Give priority to requests involving disputes likely to be encountered by future requesters.** Creating a body of published advisory opinions on disputes that are likely to be encountered by other requesters, and making those opinions available online, will help in several ways. OGIS will help cut down on its workload. Requesters can find these decisions and obtain guidance on situations similar to their own. This could lead to a better understanding of agency decisions. It also has the possibility of potentially improving agency decisions in the first instance.
- b. Effectively respond to as many requests as possible while providing in-depth advisory opinions as needed.** We suggest a two-tier system for responding to mediation requests.
- 1. Informal FOIA requester assistance.** We urge you respond to as many requests as possible through informal responses. Responses may briefly explain the reasonableness of an agency's position, provide advice for a requester on resolving a dispute, or refer a requester to a previous OGIS opinion in a substantially similar case.
 - 2. Provide formal mediation to resolve select cases.** When informal requester assistance does not succeed, human intervention and a more formal review of a case may be required to issue an opinion. Where such resource-intensive review is required, OGIS should give special weight to those requests involving disputes likely to be encountered by future requesters. The Interagency Security Classification Appeals Panel (ISCAP) may be a useful model for such reviews.¹
- c. Post written advisory opinions online.** OGIS should post all written advisory opinions online in an indexed and easily searched form. A publicly available body of administrative law would help agencies and requestors alike self-resolve disputes, and allow OGIS to easily respond to requestors whose disputes are substantially similar to disputes previously addressed in earlier advisory opinions.

At least two models exist within the federal government for making advisory opinions publicly available. The National Mediation Board's Office of Alternative Dispute Resolution Services helps resolve disputes for airlines and railroads. The Office maintains an online database of its arbitration decisions.

¹ ISCAP, which is run out of the National Archives, is a body consisting of classification experts from several agencies who hear appeals of agency responses to requests to declassify documents.

The database helps mediators create consistent, predictable decisions, and makes that knowledge available to the public.² Second, the Office of Government Ethics, an independent agency within the executive branch that oversees federal conflict-of-interest laws, posts its advisory memoranda to federal agencies on its website (www.usoge.gov). Publicly available versions of these memoranda redact the agency that requested the rules interpretation and identifying information about individuals mentioned so agencies can obtain candid advice on handling a particular situation.

Making these advisory opinions public allows the public and others within government to benefit from OGE's interpretations and advice. Similarly, publicly posting OGIS opinions could educate the public about FOIA operations. Over time, this educational effect will help reduce requests for mediation and possibly improve agency decisions.

- d. Build on effective models in federal and state governments.** Many states have created ombudsman or commission positions to mediate disputes.³ The Archives' own declassification programs may serve as models or at least provide lessons for OGIS's mediation services. In particular, the Information Security Oversight Office (ISOO), which manages the federal government's information security programs, has a strong reputation both inside and outside government as an even-handed manager of the classification system. It, and the effective but small ISCAP, could be models for designing the formal dispute resolution services.
- e. Obtain public input on OGIS activities.** OGIS should consider establishing its own advisory council comprising common requester communities, some state government ombudsmen and possibly even other agency and legislative staffers. The council should be constituted as a FACA-compliant agency so that the public garners greatest benefit from the lessons learned.

Interim Steps

Budget and resource realities will dictate an OGIS that begins with the achievable and grows into the attainable. It is more important for OGIS to do its work deeply and well than to cast its services broadly. Credibility will build resources. Thus, it may be desirable for OGIS to begin its functions within a limited scope of agencies. It might be best, for example, for OGIS to begin this work with five or six agencies chosen from an array of cabinet-level departments and to test its talents before throwing open the doors. If so, it would be best for OGIS to choose its target agencies from a sample of types of agencies that will give it the greatest breadth of experience. It should study request volumes before choosing and try to aim at agencies with histories of poor response records. It also, again, should target for its customer base those requesters who are eligible for fee waivers; the fee waiver can be a proxy for choosing those gathering information for purposes of dissemination.

² "Online system takes a quick route to resolving disputes," *Government Computing News*, 2/18/2008, http://www.gcn.com/print/27_4/45819-1.html

³ See Harry Hammitt, "Mediation Without Litigation," *FOI Reports*, Vol. 2, No. 3, National Freedom of Information Coalition. Available at http://www.nfoic.org/resources/reports/hammitt_mediation_without_litigation.html, accessed 2/29/08.