

TESTIMONY OF NIKKI GRAMIAN
ACTING DIRECTOR OF
THE OFFICE OF GOVERNMENT INFORMATION SERVICES
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON
“ENSURING AN INFORMED CITIZENRY: EXAMINING THE ADMINISTRATION’S
EFFORTS TO IMPROVE OPEN GOVERNMENT”

May 6, 2015

Good morning, Mr. Chairman, Ranking Member Leahy, and members of the Committee. I am Nikki Gramian, Acting Director of the Office of Government Information Services (OGIS), a component of the National Archives and Records Administration (NARA). As Acting Director, it is my great honor to appear before you to share our observations on the current state of the Freedom of Information Act (FOIA) and update you on OGIS’s activities. Regarding the status of the search for a new OGIS Director, NARA is currently reviewing applications from qualified candidates for the position and will be scheduling interviews soon.

I want to start by noting the important interplay between records management and access. It has long been OGIS’s observation that access to records under the FOIA is linked to and greatly enhanced by good records management. OGIS recognizes that when an agency achieves excellence in records management, its FOIA administration benefits, and both programs succeed. Linking improvements to the FOIA with improvements to records management programs is an OGIS best practice.

NARA provides key leadership in the area of records management. In coordination with the Office of Management and Budget (OMB) and as part of the Administration’s broader Open Government Initiative, including the National Action Plan for Open Government, NARA plays a

key role in a multi-year, executive branch-wide effort to reform and modernize records management policies and practices. The 2012 OMB/NARA Managing Government Records Directive (M-12-18) has established important requirements for electronic recordkeeping, which will begin to take effect in 2016.

IMPROVING FOIA — ONGOING EFFORTS

OGIS has launched a number of new initiatives since former Director Miriam Nisbet last testified before this Committee in March 2014.

Administrative Conference of the United States Report

On April 28, 2014, the Administrative Conference of the United States (ACUS) issued its report, *Reducing FOIA Litigation Through Targeted ADR Strategies*. The study carefully analyzed disputes between FOIA requesters and agencies, and found that the unique aspects of both individual agencies and requesters make it extremely difficult – if not impossible – to generalize about which alternative dispute resolution strategy would be most useful in a particular situation. In the absence of such a “formula,” the study recognizes the important role OGIS plays, and Congress’ intent in establishing OGIS as an effective vehicle for reducing disputes and decreasing litigation.

The study also made a number of recommendations that we believe will help increase the use of alternative dispute resolution across the federal government, including that:

- Agencies approach OGIS for mediation services at any stage in the process if it appears that OGIS engagement may resolve the dispute;
- All agencies let requesters know about the availability of dispute resolution services by OGIS in their final response letters and on their website; and
- All agencies ensure that FOIA Public Liaisons receive necessary training in dispute resolution and support from agency leadership.

Establishment of Review Team

In her 2014 testimony, Ms. Nisbet discussed the Government Accountability Office's (GAO's) report on OGIS's work in carrying out our mission, as set forth in the FOIA statute. In its report, GAO recommended the office adopt a methodology and timeframe for reviewing agencies' FOIA policies, procedures and compliance. While OGIS has been carrying out our review mission in a number of ways since the office opened its doors in 2009—including by observing agencies' policies, procedures and compliance through our mediation cases, reviewing and commenting upon proposed agency FOIA regulations and reviewing government and non-government reports on FOIA, Ms. Nisbet acknowledged that we want to take additional steps to better fulfill our review mandate.

I am pleased to share that since OGIS's last appearance before this committee, NARA has hired two additional OGIS staff members to work on our review mission. The review team members are now on board, and in Fiscal Year (FY) 2014, OGIS launched a formal agency assessment program. This program will assess individual agency FOIA programs by reviewing the agency's FOIA regulations, website, and FOIA request files. In addition, the program will survey and conduct onsite interviews with agency FOIA professionals, and produce a report at the conclusion of each agency assessment.

OGIS's assessment reports are not designed to provide grades, rankings or include a comprehensive tally of every aspect of an agency's FOIA program; rather, the reports are intended to provide thoughtful and practical analysis in a readable and useful format. The reports will be posted on OGIS's website and shared with the reviewed agency, particularly its FOIA staff, Chief FOIA Officer and agency head.

Since its establishment, the review team has completed reviews of NARA's Operational FOIA and Special Access FOIA programs. Reviews are currently underway of six components of the Department of Homeland Security: the Federal Emergency Management Agency, the U. S. Coast Guard, the Transportation Security Administration, the Secret Service, U.S. Immigrations and Customs Enforcement, and U.S. Customs and Border Protection. While we are very excited about this robust

new review framework, we will also continue our previously existing review activities, which provide valuable insight into agency FOIA programs.

FOIA Advisory Committee

As shared in our 2014 testimony before this Committee, OGIS is working closely with the Department of Justice and the Administration to implement the five FOIA-related commitments included in the second Open Government National Action Plan. Specifically, OGIS, with the support and guidance of NARA, is supporting the Freedom of Information Act Advisory Committee. This federal advisory committee is made up of government and non-government FOIA experts who will develop consensus recommendations for improving FOIA administration and proactive disclosures. OGIS worked with the General Services Administration (the lead agency for the Federal Advisory Committee Act) to quickly get the committee up and running.

In May 2014, the Archivist of the United States, David S. Ferriero, appointed 20 members to the FOIA Advisory Committee. The members are split evenly between those who work within the government and those who don't. At its first meeting in June 2014, the Committee identified three areas upon which to focus its efforts: oversight and accountability; FOIA fees; and proactive disclosure. The Committee established subcommittees—each led by one government member and one non-government member—to examine these issues.

The oversight and accountability subcommittee is looking at what FOIA oversight mechanisms currently exist, including identifying both gaps in current oversight efforts and potential oversight best practices in state, Federal, and international programs. In addition, subcommittee members are examining how compliance audits might contribute to robust oversight. The proactive disclosure subcommittee is identifying the barriers to proactive disclosure and studying how agencies can use data about FOIA requests to improve proactive disclosure practices. The fees subcommittee is discussing whether and how to reform the method by which agencies assess fees in the FOIA process and reducing “fee animosity” between requesters and agencies.

Recommendations

The FOIA directs OGIS to recommend policy changes to Congress and the President to improve FOIA administration; in previous years, OGIS has presented those recommendations to the Committee as part of our testimony. OGIS has not issued new recommendations for 2015. Once a new director is selected, we will continue to work on a new set of recommendations under the guidance of the new OGIS Director.

Although we do not have new recommendations to share at this time, I want to update you on our continued work in this area. OGIS continues to request that agencies update their system of records notices (SORNs) to include routine uses that allow OGIS and the agency to discuss and share information about an individual's FOIA requests. Currently, the absence of an appropriate routine use creates a logistical challenge for our review work and our capacity to provide efficient and effective mediation services. During an agency assessment, our review team will evaluate a sample of agency FOIA case files against FOIA's requirements and selected DOJ and OGIS best practices. If the agency has updated its SORNs to include a routine use for the disclosure of records to OGIS, the agency is permitted to share case files without taking additional steps. However, the absence of an appropriate routine use requires additional administrative steps OGIS and the agency must take to share the information. For example, OGIS or the agency would have to obtain the consent of the individual to whom the records pertain for each of the case files OGIS would like to review; alternatively, the agency must conduct a page-by-page and line-by-line review of the case files to insure that only the information required to be released pursuant to the FOIA is given to OGIS.

In addition, in the course of our mediation work, when an appropriate routine use is not available, our practice is to seek the individual's consent to allow OGIS and the agency to share information. However, when an agency is seeking OGIS's assistance with a dispute, the agency must obtain consent from the requester before contacting us. This can be an obstacle, particularly in situations in which an agency seeks our assistance with a requester with whom communications have broken down.

OGIS also continues to work on its recommendation to streamline the process of requesting immigration-related records. OGIS worked with U.S. Citizenship and Immigration Services (USCIS) to convene an August 2014 stakeholder meeting that included immigration lawyers and FOIA

requesters as well as representatives of other agencies, including the Department of Health and Human Services, other Homeland Security components that deal with immigration related records, and the State Department. Through its mediation services, OGIS continues to work with USCIS, requesters, immigration lawyers and other agencies to help streamline the processing of immigration records.

OGIS UPDATE

Finally, I would like to update you on OGIS's additional activities in the last year, which are outlined in our annual report and include:

- working with agencies when the Office observes — through our mediation services — policies or procedures that OGIS believes are not consistent with FOIA law or policy or that may be different from practices occurring at other agencies.
- providing Alternative Dispute Resolution skills training to agency FOIA professionals with the goal of giving the professionals ADR tools to incorporate into their FOIA work. Since its first year, OGIS has trained more than 500 FOIA professionals in dispute resolution skills. Demand for OGIS training sessions is high, and OGIS regularly receives positive feedback from attendees on the usefulness of the training.
- offering best practices to agencies and requesters, publicized through our blog, The FOIA Ombudsman, which is updated weekly.
- reviewing agency FOIA materials, from agency websites to template letters.

I appreciate the opportunity to appear before this Committee and thank you for the support that you have shown to the Office of Government Information Services.