

**OGIS RESPONSE TO QUESTIONS FOR THE RECORD
FROM SENATOR CHARLES GRASSLEY
TO
MIRIAM NISBET**

FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:

**“THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND
ACCOUNTABILITY IN THE DIGITAL AGE.”**

HELD ON MARCH 15, 2011

1. On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda purportedly designed to usher in a “new era of open government.” The President’s memorandum on the Freedom of Information Act (“FOIA”) called on all government agencies to adopt a “presumption of disclosure” when administering the law. To further his goals, President Obama directed the Attorney General to issue new FOIA guidelines for agency heads. Attorney General Holder issued FOIA guidelines in a memorandum dated March 19, 2009.

Notwithstanding the orders from the President and the Attorney General, Ted Bridis of The Associated Press (“AP”) uncovered that for at least a year, the Department Homeland Security (“DHS”) was diverting requests for records to senior political advisers, who delayed the release of records they considered politically sensitive.

Specifically, the AP’s July 21, 2010 article revealed that in July of 2009, the DHS introduced a directive requiring a wide range of information to be vetted by political appointees, no matter who requested it. Career employees were ordered to provide Secretary Napolitano’s political staff with information about the people who asked for records — such as where they lived, whether they were private citizens or reporters — and about the organizations where they worked.

According to reports, your agency, the Office of Government Information Services (“OGIS”), assisted with the AP receiving nearly 1,000 emails from the DHS, which became the basis for the AP’s article.

What was the OGIS’s role in obtaining the release of the DHS emails regarding the political vetting of FOIA requests to the AP?

OGIS was contacted on May 6, 2010, by counsel for the Associated Press requesting assistance on a FOIA matter with the Department of Homeland Security. The AP told OGIS that the agency had not responded to a FOIA request within the 20-day statutory time frame and had also not responded to an appeal filed on the basis of a constructive denial within the 20-day response period. The AP asked if OGIS could help resolve the issue of delay in this case.

As you know, OGIS was created to resolve Federal FOIA disputes by providing mediation services. OGIS interprets “mediation services” as a term that includes formal mediation, facilitation and ombuds services as set out in the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. § 571(3). In this instance, OGIS engaged in facilitation with the AP and DHS to try to resolve the delay issue related to the AP’s request. As with all of OGIS’s mediation services, this facilitation was conducted in accordance with the ADRA, 5 U.S.C. §§ 571–84, which has a specific provision providing for confidentiality. OGIS strives to strike a balance between confidentiality allowed under ADRA, and openness and transparency, and will discuss the OGIS role generally in this case.

OGIS staff initially contacted DHS FOIA staff by phone to let DHS know about the OGIS case. OGIS received an update on the status of the FOIA response from DHS by phone and was authorized to share that with the AP. OGIS shared with the AP that DHS expected the response to go out in mid-June 2010. When AP had not yet received the response in mid-June, counsel for AP contacted OGIS to ask for a status update. OGIS contacted DHS via phone and email to inquire about the status of the response but was unable to connect with DHS staff. At about the same time, OGIS was scheduled to meet with DHS staff to discuss the OGIS process generally and how OGIS and DHS would work together. At that meeting on June 24, 2010, OGIS inquired about the AP request; DHS staff stated that the response would be sent by the following week. OGIS was contacted by DHS staff subsequently to advise that the response had been sent via FedEx on June 29, 2010.

The AP contacted OGIS when the documents were received and on July 7, 2010, agreed that because the delay was resolved and the response had been received, the OGIS case should be closed.

2. Who from the DHS did the OGIS interact with in connection with the release of the emails?

OGIS initially contacted the DHS FOIA Public Liaison. As the position is statutorily charged with assisting in the resolution of disputes within the agency, the FOIA Public Liaison is usually the first person that OGIS contacts when it receives a case, both to inform that person of the dispute and to determine who would be the appropriate person to help resolve the dispute from within the agency.

The liaison informed OGIS that the proper point of contact to discuss this particular dispute was DHS’s deputy associate general counsel. OGIS primarily interacted with DHS OGC to facilitate resolution of this dispute.

3. What reason did the DHS give the OGIS for its not timely complying with the AP’s FOIA request?

The OGIS role is to help to resolve disputes. Here, the dispute was the delay in the AP receiving a response to its FOIA request from DHS. OGIS's focus was to determine when the AP would receive its response and keeping the lines of communication open with the agency to stay updated on the status. OGIS did not learn of any reasons why DHS was unable to comply with the FOIA response in a timely manner.

4. Were all emails and documents responsive to the AP's FOIA request turned over by the DHS or did it withhold any emails or other documents?

The OGIS role was limited to helping resolve the dispute over the delay in response. The AP did not ask for OGIS assistance with the substance of the request and OGIS did not itself review the response or discuss it further with the AP.

5. Once the OGIS learned about the political vetting policy at the DHS, did you report it to anyone? If so, who? If not, why not?

If you are referring to the policy by which senior agency management at DHS was made aware of FOIA requests that might draw public attention and reviewed responses to those requests before release, OGIS learned about that policy by reading it in news reports. At that time, the policy was already publicly known and being widely discussed in news reports, and thus, OGIS did not bring it to anyone's attention.

6. Does the OGIS believe that it has a legal obligation to report any incidents of misconduct in connection with the processing of FOIA requests that it becomes aware of? Describe in detail the OGIS's legal obligations in this regard.

FOIA charges OGIS with reviewing FOIA policies, procedures and compliance of administrative agencies. If OGIS independently learned of FOIA misconduct within an agency, OGIS would have a legal and ethical duty to inquire as to the misconduct and notify any appropriate officials of the facts as OGIS understands them to ensure proper action would be taken.

7. Have you or has the OGIS been contacted by the Department of Justice or any other agency as part of an investigation of the political vetting policy at the DHS? If so, who contacted you and what were you and/or the OGIS asked?

OGIS was contacted by the DHS Office of Inspector General to discuss the office's role in the FOIA request and dispute that led to the release of documents regarding DHS's FOIA procedures. OGIS also spoke to the State Department's Office of Inspector General in connection with the letter from Senator Grassley and Representative Issa to Inspectors General for 29 agencies seeking a review of the extent to which political appointees are systematically made aware of FOIA requests and their role in decision-making.

8. At the hearing, we heard about the FOIA training sessions run by the OGIS. The OGIS also emphasizes its training sessions on its website.

- (a) Prior to the uncovering of the political vetting policy at the DHS, did the OGIS's training sessions address this issue? If so, describe in detail how it was covered.**
- (b) Since the uncovering of the political vetting policy at the DHS, have the OGIS's training sessions been revised to directly address the improper political vetting of FOIA requests? If so, describe in detail how this issue is now covered in the OGIS's training sessions. In particular, are career employees instructed that they should report any orders from superiors or political staff to vet FOIA requests?**
- (c) If this issue is not currently covered by the OGIS's training sessions, why isn't it?**

The OGIS role in training agency FOIA professionals is limited. OGIS provides *dispute resolution skills* training to help agency FOIA staffs prepare to prevent and resolve disputes within their own agencies and with members of the public. In providing this training issues related to FOIA's requirements are addressed in a variety of exercises. OGIS and the Justice Department's Office of Information Policy (OIP) collaborate in providing this training. OIP provides government-wide FOIA training that covers all aspects of the FOIA process. OGIS also makes presentations about its statutory mission at OIP's FOIA training programs.

OGIS plans to expand its training topics and offerings to help agency FOIA professionals develop the skills they may need to address and resolve disputes that arise in the FOIA process but will continue to defer to OIP to provide substantive FOIA training and legal guidance.

9. Are political appointees required to attend the training sessions given by the OGIS? If so, describe in detail exactly who must attend and which sessions they must attend.

If they are not required to attend, do you believe that mandatory FOIA training sessions for political appointees is appropriate, especially in light of the political vetting of FOIA requests by the DHS?

FOIA does not charge OGIS with conducting training, mandatory or otherwise. OGIS training is voluntary but is widely sought. For the four full-day offerings of OGIS dispute resolution skills training we have held to date for inter-agency participation, the limited number of 20 to 30 course slots were filled within hours of announcing the training. The dozens of FOIA professionals who were unable to join the courses have been encouraged to try to attend future offerings; we offered six additional one-day courses in 2011. Most if not all of the FOIA professionals who attend OGIS training are career employees rather than political appointees.

We believe that training is always helpful for government officials involved in the FOIA process, whether they are FOIA professionals, agency attorneys, or agency managers, and regardless of whether they are career employees or appointed by the President or agency leadership.

10. In August of last year, Representative Darrell Issa and I wrote the Inspectors Generals for 29 agencies and asked them to review whether their agencies were taking

steps to limit responses to FOIA requests from lawmakers, journalists, activist groups and watchdog organizations. In particular, the IGs were asked to determine the extent to which political appointees are systematically made aware of FOIA requests and their role in decision-making.

The agencies that have not responded are: the DHS, the Central Intelligence Agency, the Federal Housing Financing Authority, the Department of Commerce, the Department of the Interior, the Department of Defense, the Department of Education, the Environmental Protection Agency, the Federal Trade Commission, the Government Accountability Office, the General Services Administration, the Department of Health and Human Services, the National Archives and Records Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Small Business Administration, the Social Security Administration, Veterans' Affairs, and the Energy Department.

What can the OGIS do to obtain answers to my letters from the agencies that have not responded?

As you know, most OIGs operate largely independently of their agencies. Specifically, we have learned that the OIG of the National Archives and Records Administration did respond to you and Representative Issa by letter dated September 1, 2010. (A copy of that letter is attached here.) We have also learned that the Inspectors General from the following agencies have responded to you and Representative Issa: Department of Defense, Department of Commerce, the Nuclear Regulatory Commission, the Social Security Administration, Veterans Affairs, and the National Aeronautics and Space Administration. We also understand that some OIGs have worked with your offices to discuss the scope of their responses.

11. On March 17, 2011, Ted Bridis of *The Associated Press* reported that Catherine Papoi, formerly the Deputy Chief FOIA Officer at the DHS was effectively demoted and denied a promotion. According to news reports, Ms. Papoi had complained to the Inspector General of the DHS about the political vetting policy implemented by Secretary Napolitano's political staff. Also according to news reports, the day after she spoke with investigators, Ms. Papoi was told of her replacement as the Deputy Chief FOIA at the DHS and was told to clear out her office.

The adverse employment action taken against Ms. Papoi appears to be retaliatory. It is sure to deter other career employees in all agencies from reporting misconduct about the handling of FOIA requests and/or any other misconduct.

What is the OGIS doing to counter the negative message sent by the effective demotion of Ms. Papoi?

OGIS has no independent knowledge of any of the facts or circumstances surrounding the situation you describe with Ms. Papoi and has only learned of the matter through news reports and a brief discussion of it during a hearing held by the House Committee on Oversight and

Government Reform on March 17, 2011. OGIS has not independently inquired about this DHS policy and action, and without definitive facts, OGIS does not believe it to be appropriate to draw any conclusions or present any messages on the issue.

12. By statute, the OGIS should be regularly involved in facilitating or mediating disputes between government agencies and FOIA requesters.

If as part of that process, the OGIS believes that political vetting or other improper conduct has occurred as part of the handling of a FOIA request, does the OGIS have a legal obligation to investigate that misconduct?

If the OGIS maintains that it is not obligated to investigate, does the OGIS have a legal obligation to report the misconduct and if so, to whom must it report it?

If the OGIS maintains that it has no obligation to either investigate or report misconduct in connection with the handling of FOIA requests, in light of the political vetting policy at the DHS, going forward, will the OGIS report suspected misconduct? If so, to whom will it report that misconduct?

As discussed in the response to question 6 above, if OGIS became aware of misconduct in the handling of a FOIA request, OGIS would have a legal and ethical duty to inquire as to the misconduct and notify any appropriate channels of the facts as OGIS understands them to ensure proper action would be taken. The carefully crafted language in FOIA that created OGIS specifically commands OGIS to “review” agency policies, procedures and compliance, and omits such terms as “investigate” or “oversight,” which are traditionally invoked to confer investigatory or oversight powers. Therefore, with its review power and authority, OGIS would inquire into the misconduct by conducting the sort of fact-finding that OGIS might engage in with a general FOIA dispute. OGIS would determine on a case-by-case basis the appropriate persons or officials to inform about any suspected or actual misconduct; that may include persons within and outside of an agency such as the Chief FOIA Officer, senior agency management, the agency Inspector General or the chairman of the Congressional committee that has oversight over a particular agency. In this instance, OGIS learned fairly quickly after the news reports, including reports from the Associated Press, that the DHS Inspector General was investigating allegations. That appeared to be an appropriate action and, soon thereafter, OGIS was contacted by the DHS Inspector General.

OGIS has not yet independently encountered misconduct in either its mediation services or agency review processes and would likely only be able to develop a firm strategy for action once such a situation arises.