

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES GRASSLEY
TO
MIRIAM NISBET
FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:
“THE FREEDOM OF INFORMATION ACT: SAFEGUARDING CRITICAL
INFRASTRUCTURE INFORMATION AND THE PUBLIC’S RIGHT TO KNOW.”
HELD ON MARCH 13, 2012

1. The Office of Government Information Services (OGIS) was created to mediate disputes between the federal government and FOIA requestors.

(a) How many formal mediations has OGIS conducted in each fiscal year since it was created?

As explained below, OGIS has not conducted any formal mediations since it was created, however, during its first two fiscal years, OGIS opened 764 cases in response to requests for assistance — 391 in its first year and 373 in its second year, ending September 30, 2011. In June 2010, OGIS also began tracking phone and email “quick assists,” and by the end of Fiscal Year (FY) 2011, the Office had helped nearly 500 callers and emailers.

The majority of OGIS cases—more than three-quarters in FY 2011—did not rise to the level of actual disputes. (OGIS defines true disputes as those cases in which the requester and the agency disagree about FOIA policies, procedures and compliance with FOIA or are at a communications impasse that goes beyond how to file a FOIA request, the status of a request and the like.) Of the 66 cases that OGIS identified as involving true disputes in FY 2011, two-thirds resulted in disputing parties agreeing to an outcome.

Congress used the term “mediation services” to describe OGIS’s work. OGIS has interpreted “mediation services” as an umbrella term that includes the following: (1) Mediation, a voluntary and confidential process in which a neutral and independent third party, a mediator, assists disputing parties in reaching a mutually agreeable resolution; (2) Facilitation, one approach used by mediators to assist each party to communicate and to understand the other’s position, interests and needs; and (3) Ombuds services, in which an ombudsman acts as a confidential and information resource, communications channel and complaint handler. OGIS’s work providing mediation services is done in accordance with the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §§ 571-84, including its confidentiality provisions.

During OGIS’s first two years, no cases resulted in formal mediation and the Office issued no advisory opinions. Several cases were ripe for mediation, but in those cases, both

parties could not agree on entering into mediation. (A well-established tenet of mediation is that it works best when both disputing parties agree to participate.) In one case, a Federal agency customer requested mediation, but the requester's attorney advised against it. In another case, despite nearly eight months of OGIS working to facilitate a resolution, the matter was still unresolved and the requester proceeded to litigation. In several cases, agencies reviewed and reaffirmed their final decisions and OGIS determined that the cases were not candidates for formal mediation.

(b) If there have been any formal mediations conducted by OGIS, who has conducted them? Are the mediators government employees or is OGIS hiring private mediators?

Although OGIS has not yet had to conduct a formal mediation, it does anticipate that it would use both government mediators and private mediators; the parties to a dispute must agree on the mediator and therefore the mediator could be either government or non-government. OGIS anticipates that it would bear the costs of hiring non-government mediators and the travel costs of government mediators, to the extent that the mediation could not be accomplished by teleconference or other technological means.

(c) If OGIS is paying private mediators, how much are they being paid?

OGIS has not yet had to hire a private mediator.

(d) How many OGIS employees are qualified to conduct mediations?

All six of OGIS's professionals are trained in mediation services. OGIS's three facilitators became certified in Federal workplace mediation in FY 2011 by Northern Virginia Mediation Service, an affiliate of George Mason University School of Conflict Analysis and Resolution. OGIS's Director, Deputy Director and staff attorney have completed mediation training offered by Pepperdine University's School of Law, Straus Institute for Dispute Resolution. Although OGIS has not, to date, handled any cases that have gone into formal mediation, it works regularly with government dispute resolution specialists and it has contacted several private professional mediators, all of whom are able to provide formal mediation should the need arise. In addition, OGIS continues to consider various mediation program models. OGIS's goal is to formally establish an effective and cost-efficient mediation program that can work with geographically dispersed parties as well as parties in and around the nation's capital.

(e) If OGIS employees are not qualified to conduct mediations, shouldn't a requirement for employment at OGIS be significant experience in conducting mediations?

OGIS's mission also includes review of agency FOIA policies, procedures and compliance. That portion of the mission is currently handled by every member of OGIS's professional staff. Although all six members are trained in mediation services, it is the view of

OGIS that, although helpful, significant experience in mediation services is not necessary for carrying out the review mission.