

**“Ensuring an Informed Citizenry:
Examining the Administration’s Efforts to Improve Open Government”
Written Questions for the Record Submitted by Chairman Charles E. Grassley of Iowa
May 13, 2015**

Questions for Ms. Gramian

1. I continue to hear of challenges that impact FOIA compliance. It’s important that FOIA processors have a clear understanding of FOIA’s purposes, including the President’s directives on transparency and the “presumption of openness.” This is especially crucial given the increased FOIA litigation and claims that the only way to force government compliance is to sue.
 - a. In what areas are FOIA processors and management in most need of additional training?

Response: The majority of FOIA professionals with whom OGIS interacts in the course of our work are knowledgeable about the law and process and want to do their jobs well. In addition to training already offered to FOIA professionals by the Department of Justice’s, Office of Information Policy (OIP) and OGIS , one area where there appears to be a gap in many agencies is in top-level support for FOIA and a lack of appreciation for shared responsibility under the law for preventing and resolving FOIA disputes. In 2013, OGIS recommended that agency leaders remind all staff of the importance of FOIA, and provide training to every new employee. We believe that such training and support from the top will improve FOIA programs across the government.

- b. What resources are most needed to ensure that FOIA processors can effectively do their jobs?

Response: Through our mediation and review work across the government, we have heard from agencies, particularly those with a large backlog that additional training and support from agency leaders would improve FOIA programs across the government and the ability of agencies to comply with the law.

We also observe that many FOIA offices are not able to easily and efficiently search information systems or extract information for FOIA processing. In addition to having access to existing modern technology that improves the office’s ability to search, extract and process records, it is critical that an agency involve records managers and FOIA professionals in developing and investing in additional technological resources. Engaging both FOIA professionals and records managers when an agency is acquiring new technological systems helps improve the life cycle management of information, allowing agencies to efficiently and effectively search for and process responsive records. Building FOIA release into the collection and storage of government information would also improve the ability of agencies to make proactive disclosures without spending additional time processing proactive material.

Additional resources that would assist agencies include: providing alternative dispute resolution training for FOIA professionals and continued development of shared agency technology to process FOIA requests and make records available.

2. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. Your testimony references the recent Administrative Conference recommendations regarding OGIS's services, including a recommendation that agencies let requesters know about the availability of dispute resolution services by OGIS in their final response letters and on their websites.
 - a. How well are agencies currently doing this?

Response: The Office of Information Policy at the Department of Justice issued guidance in 2010 instructing agencies to include in their final agency determinations a standard paragraph notifying the requester of the availability of mediation services offered by OGIS. The Departments of Justice and Homeland Security were the first agencies to inform requesters about OGIS's mediation services in their administrative appeal determination letters and given the high volume that those two agencies handle, as a result of those notifications OGIS has seen that nearly half of the mediation cases that OGIS handles – 44 percent in Fiscal Year 2014 – involve those agencies. According to information collected by the Department of Justice through the 2014 Chief FOIA Officers reports, almost all agencies that processed requests either let requesters know about OGIS' services or plan to take steps to do so in the future. It is hard to tell exactly how many agencies are letting customers know about OGIS because the data does not differentiate between agencies that are doing so and agencies that did not process any appeals. We know that more agencies are beginning to include OGIS' language in their final responses, however, because we receive requests for assistance involving a greater variety of agencies.

- b. Do you feel that there could be more engagement with the requester community by agencies to inform them of the mediation services that OGIS provides?

Response: We are happy to be assisting in cases that involve a wider variety of agencies, and continue to encourage agencies to let requesters know about our services through their final appeal response letters and on their websites. We would also like to note that resolving disputes with requesters is a shared responsibility under the statute. It is important for requesters to have easy access to agency FOIA Public Liaisons, meaning the FOIA Public Liaison's up-to-date contact information should be included in all correspondence with requesters and on the agency's website.

3. As we continue to see a rise in FOIA litigation, I'm concerned that the mediation services that OGIS was created to provide are not being adequately incorporated into the FOIA process.

- a. Can you provide some insight into the challenges OGIS is facing in offering mediation services?

Response: The two biggest challenges OGIS faces in offering mediation services are discussing specific FOIA requests with agencies that do not have an applicable routine use in place in a Privacy Act system of records, and developing a dispute resolution mindset within agencies. As I testified, the Privacy Act of 1974 protects FOIA and Privacy Act request and appeal files, and generally prohibits agencies from sharing information that is in those files without a routine use provision or prior written consent of the requester. Without an applicable routine use, before OGIS facilitators can contact agencies to discuss FOIA/Privacy Act requests or appeals, we must first obtain a signed and dated consent from the requester authorizing OGIS and any federal agency to share information and records related to the request. As of May 15, 2015, six cabinet-level departments and six agencies have Privacy Act routine-use provisions in place allowing us to discuss requesters' FOIA files without their signed and dated consent. With respect to dispute resolution, OGIS appreciates the value in harnessing existing agency resources, including agency FOIA professionals, chiefly FOIA Public Liaisons, who are mandated with resolving disputes between the agency and the requester, 5 U.S.C. § 552(a)(6)(B)(ii) and 5 U.S.C. § 552(l). We recognize that harnessing these resources among 15 Cabinet-level departments and their components and 85 agencies takes time and we are committed to helping foster a dispute resolution mindset across the government.

- b. Are agencies generally willing to take part in these mediations?

Response: We have a strong record of working with agencies to resolve FOIA disputes. At the conclusion of OGIS' involvement in a case, particularly in a complex case or where we notice an unusual policy or practice, we generally write a final letter explaining our interactions with the requester and the agency, the resolution of the case, and if applicable, whether the agency or the requester declined to cooperate. A sample of these letters is available on our website.

- c. Are agencies generally cooperative and helpful throughout the process?

Response: OGIS has built strong working relationships with FOIA professionals based on an understanding of our role as a neutral third-party that advocates for neither the requester nor the agency but for the FOIA process. As awareness of our services continues to spread across agencies and among the requester community, we look forward to continuing to develop these relationships.