OGIS
OFFICE of GOVERNMENT INFORMATION SERVICES

OFFICE of GOVERNMENT INFORMATION SERVICES

NATIONAL ARCHIVES and RECORDS ADMINISTRATION

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March 12, 2013

The Honorable Patrick J. Leahy
Chairman
The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley,

Thank you for your continuing interest in improving the administration of the Freedom of Information Act (FOIA). Enclosed please find a report that describes, in accordance with Title 5 of United States Code, Section 552 (h)(2)(C), policy recommendations and other matters that the National Archives and Records Administration's (NARA) Office of Government Information Services' (OGIS) has identified that could be addressed to make further improvements in the administration of FOIA. To provide you with additional background regarding OGIS, which as you know, opened in September 2009, I also have enclosed a report of OGIS' third year of operations, through Fiscal Year 2012. This report provides a description of the types of requests and issues that OGIS has handled. An identical letter and report have been sent to the House Committee on Oversight and Government Reform.

NATIONAL ARCHIVES

This report, as well as the reports on our first and second years, highlights agency Best Practices and other strategies for making FOIA work better. OGIS also regularly posts on its blog suggestions to improve the FOIA process administratively, such as the importance of updating FOIA regulations, the benefits from coordinating communication for FOIA requests received across the government, and the importance of plain writing with FOIA correspondence.

We appreciate your continued support as OGIS has been transformed from statutory language to reality. Our office is an important symbol of Congress's vision of a better FOIA.

I hope that you find this information helpful as you examine agencies' implementation of FOIA. If you have any further questions, please do not hesitate to call NARA's Office of Congressional Affairs at 202-357-5100.

Sincerely,

Miriam Nisbet, Director
Office of Government Information Services

Enclosures:

OGIS Policy Recommendations for Improving Freedom of Information Act Procedures and the Administration of the Office of Government Information Services, March 2013
OGIS Report: Building A Bridge, March 2013

cc:
The Honorable Thomas Carper, Chairman, United States Senate, Committee on Homeland Security and Governmental Affairs
The Honorable Tom Coburn, Ranking Member, United States Senate, Committee on Homeland Security and Governmental Affairs

OGIS
OFFICE of GOVERNMENT INFORMATION SERVICES

2013 Recommendations

OGIS Policy Recommendations for Improving Freedom of Information Act Procedures
March 13, 2013

The National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS) has identified a number of areas where the Freedom of Information Act (FOIA) process could be improved, as well as areas where OGIS's role can be made more effective. These policy recommendations, prepared in accordance with Title 5 of United States Code, Section 552 (h)(2)(C), are based on OGIS's ongoing work with Federal agencies and with members of the public.

Issue 1: Implementing Dispute Resolution for FOIA Conflicts

Challenge:

Although dispute resolution has been a fixture within Federal agencies since the mid-1990s, it is relatively new to the FOIA administrative context. (The OPEN Government Act of 2007 established OGIS and for the first time offered dispute resolution in handling conflicts arising from FOIA requests.)[1] OGIS has observed that FOIA litigation is still accepted by many agencies and requesters as a foregone conclusion when a dispute or conflict arises. Connecting FOIA professionals, legal counsel and dispute resolution professionals to embed dispute resolution firmly into an agency's FOIA process would help to prevent and resolve disputes administratively as well as avoid litigation.

Recommendation and Action Step:

OGIS will expand its dispute resolution training program to help agency FOIA and dispute resolution professionals identify issues that are ripe for partnership and explore ways to work together. To aid that effort, OGIS recommends that agencies encourage and support the use of dispute resolution in the FOIA process. OGIS is available to work with an agency's Chief FOIA Officer along with the agency dispute resolution programs, general counsel's office and FOIA offices to develop an approach that would allow an agency to benefit from the expertise of its own employees to prevent and resolve disputes. Such an approach could help to conserve administrative resources, improve customer service, and avert costly and time-consuming litigation.

Issue 2: Reiterating the importance of FOIA

Challenge:

We continue to observe that agency FOIA professionals face challenges working with colleagues within their own agencies to obtain responsive records and recognize FOIA as a priority. While FOIA touches nearly all aspects of an agency's activities, many agency employees may be unfamiliar with their own responsibilities under the law.

Recommendation and Action Step:

[1] 5 U.S.C. §§ 552(h)(1) and (3); (l); and (a)(6)(B)(ii).

OGIS encourages agencies to remind their staff members of the importance of FOIA and that "FOIA is everyone's responsibility."[2] FOIA professionals are leaders in delivering that message in their everyday work, but other agency professionals who may work on more mission-specific aspects of an agency's function can generally benefit from a refresher on the law and its applicability to their own work. For example, OGIS worked with our parent agency, NARA, to write a message to be distributed to the NARA staff this Sunshine Week. The Archivist of the United States, David Ferriero, agrees this is an important message and intends to send an annual announcement to this effect. We have attached the National Archives' memo as an exhibit and posted it on the OGIS website (in our agency FOIA toolkit) so that anyone may use it as a model.

Issue 3: Examination of FOIA fees

Challenge:
The Office of Management and Budget issued FOIA fee guidance in 1987.[3] Since then, agencies have moved toward digitizing records, have established online FOIA Libraries, and may now be providing records through *FOIAonline*. Additionally, amendments to the law in 1996 and 2007 have addressed fees. OGIS has observed that fees and fee waivers remain a persistent point of contention administratively and in litigation.

Recommendation and Action Step:
OGIS would like to work with stakeholders from both inside and outside government to review the myriad issues surrounding FOIA fees. We anticipate this will take some time, and may or may not result in recommendations for legislative or executive action, but we hope to come away with consensus support for some options for improvement.

Issue 4: Immigration records and FOIA

Challenge:
Individuals who are not U.S. citizens or lawful permanent residents access immigration-related records from various agencies through FOIA requests. OGIS has observed a large increase in our own cases related to these requests and has learned from the agencies that maintain these records that it is difficult to keep up with such requests. For example, U.S. Citizenship and Immigration Services, the agency that maintains Alien files, reported that it averaged nearly 10,000 requests per month in Fiscal Year 2011.[4]

Recommendation and Action Step:
OGIS has already communicated with agency officials who receive these types of requests, as well as some of the requester organizations and representatives who file them. We began in May 2012 with a preliminary examination of the records and issues. We now recommend that OGIS continue to work with the agency to develop possible methods to streamline the process. We do not anticipate that this effort will lead to a change in the FOIA itself, but we hope that it will improve FOIA administration.

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[2] Attorney General Memorandum on the Freedom of Information Act, March 19, 2009, http://www.justice.gov/ag/foia-memo-march2009.pdf

[3] Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf

[4] Department of Homeland Security 2012 Freedom of Information Act Report to the Attorney General of the United States at page 3, available at: http://www.dhs.gov/sites/default/files/publications/foia/privacy-foia-annual-report-fy-2012-dhs.pdf.

NARA NOTICE 2013-105

Date: March 08, 2013
To: All Employees
Subject: FOIA Is Everyone's Responsibility

FOIA matters. Each year, nearly 650,000 Freedom of Information Act (FOIA) requests are made to Federal agencies, including more than 13,000 to NARA in Fiscal Year 2012. NARA's core mission, of course, is to make our archival records available to the public, including through FOIA.

Responding to access requests doesn't rest solely on NARA's FOIA and archival staff. FOIA is everyone's responsibility. This year, as we celebrate Sunshine Week by displaying the original FOIA statute in the East Gallery of the National Archives' Rotunda in Washington, D.C., I thank you for taking seriously your responsibility to meet FOIA's important legal obligations and remind you that FOIA applies equally to our internal operational records.

Every document you create and email you send in the course of doing your job may potentially be a Federal record subject to FOIA. As you may know, FOIA provides the public with the right to access Federal records with limited exceptions. After all, in a democracy, the government is conducting business on behalf of the public. When a member of NARA's FOIA staff contacts you about records your office may have, please respond and keep open a line of communication with the agency's FOIA professionals. FOIA gives Federal agencies just 20 working days under the law to respond to requests, and that can happen only through teamwork and a commitment to FOIA from everyone.

FOIA nurtures our democracy through transparency and accountability, helping countless people each year learn about some aspect of their government. This is especially important here at NARA, where records matter. I thank each one of you for your commitment to FOIA and the public's access to government records.

DAVID S. FERRIERO
Archivist of the United States

2012

Office *of* Government
Information Services

Building a Bridge Between FOIA Requesters & Federal Agencies

2013 Report for FY 2012

NATIONAL ARCHIVES

OGIS

Cover image: Peeradach Rattankoses/Shutterstock.com

TABLE *of* CONTENTS

Message from the Director	1
Executive Summary	3
FOIA Matters	4
Improving FOIA	7
Measuring OGIS's Effectiveness	11
Resolving Disputes	12
Agency Review	18
Records Management	25
Technology	26
Outreach	32
Training	38
A Look Ahead	41
Special Thanks	41

MESSAGE *from the* DIRECTOR

I am pleased to present the third report from the Office of Government Information Services (OGIS). Congress created OGIS more than five years ago as the Freedom of Information Act (FOIA) Ombudsman, directing us to offer a range of mediation services to resolve FOIA disputes and to review agencies' FOIA policies, procedures, and compliance. We do that by serving as a neutral party within the Federal Government to which anyone—requester or agency—can come for assistance with any aspect of the FOIA process.

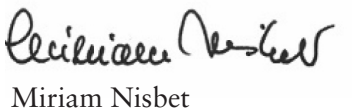
In our third year—we opened our doors in September 2009—we continued our important mission of providing mediation services to resolve FOIA disputes. To date, we have assisted nearly 2,000 FOIA requesters, and we closed 354 cases in Fiscal Year (FY) 2012 alone. We are pleased that every year more agencies are adopting OGIS best practices such as good communication with requesters and use of the "team approach" to collaborate with agency colleagues in responding to FOIA requests. These best practices not only help resolve disputes, but also prevent them.

FOIA also directs OGIS to recommend policy changes to Congress and the President to improve the administration of FOIA. In this spirit, we provided Congress with five recommendations for improving the FOIA process. We also used the OGIS website to highlight ways that agencies can improve the FOIA process. We look forward to adding to our list of recommendations in the coming year.

OGIS found ways enhance its own processes in FY 2012. We launched a new, more user-friendly website linked with a case management system that allows us to better track our casework. We en-

joyed increased communication with agencies and requesters through our dispute-resolution training program, review of agency FOIA regulations, and our blog, *The FOIA Ombudsman: Information and Advice*. If you have suggestions for other ways we can improve our work, please let us know.

Sincerely,



Miriam Nisbet

EXECUTIVE SUMMARY

OGIS, in its third year as the FOIA Ombudsman, built on the successes of its first two years by releasing recommendations for improving FOIA, providing mediation services to requesters and agencies, and reviewing agency policies, procedures, and compliance.

OGIS provided Congress with five recommendations for improving the FOIA process:

- Providing assistance for requesters seeking their own records under the Privacy Act of 1974
- Encouraging agency participation with *FOIAonline,* the Government-wide FOIA portal
- Facilitating the coordination of interagency communication for Government-wide FOIA requests
- Creating a Government-wide Privacy Act routine-use procedure to streamline the way in which agencies share information with OGIS
- Delivering dispute-resolution skills training for FOIA professionals

The Office also created an Improving FOIA page on its website and highlighted additional suggestions for agencies to consider, including:

- Providing all new Federal employees with "Day One" and refresher FOIA training
- Standardizing agency FOIA web pages
- Professionalizing the FOIA career track

OGIS, where it was able to, began working immediately to implement or encourage implementation of both the formal recommendations to Congress and the suggestions for improving FOIA.

OGIS closed 354 cases in Fiscal Year (FY) 2012 in response to requests for assistance, down from the 373 cases and 391 cases closed in FY 2011 and FY 2010, respectively. However, OGIS cases have grown increasingly more complex, and the Office refined its case-intake process to track instances in which it can offer immediate assistance (now labeled "quick hits"), resulting in fewer total cases.

OGIS handled cases involving requests to 37 Federal departments and agencies, including all 15 Cabinet-level departments, in FY 2012. Altogether, OGIS cases and "quick hits" totaled 768 in FY 2012.

In its third year, OGIS expanded its dispute-resolution skills training to include agency-specific training for three Cabinet-level departments. OGIS did not handle any cases in FY 2012 that required the services of an outside mediator.

OGIS continued its review of department and agency FOIA regulations, both by submitting public comments through its parent agency, the National Archives and Records Administration (NARA), and by working collaboratively with agencies before the public comment period.

OGIS also created a draft assessment framework for measuring an effective FOIA program based on similar work conducted by NARA's Information Security Oversight Office.

FOIA MATTERS

When requesters gain access to records under FOIA, Government transparency flourishes, which nurtures accountability and, in turn, our democracy. Although journalists and Government oversight groups make up a small portion of the more than 600,000 FOIA requests to Federal departments and agencies, their work most publicly illustrates FOIA.

In the year ending September 30, 2012, journalists and Government watchdog groups relied on FOIA to report on a wide variety of stories dealing with subjects past and present. The FBI released more than 750 pages of records to The Associated Press showing that in the 1960s, U.S. Senator Robert C. Byrd obtained secret FBI documents about the civil rights movement that were leaked to the CIA, sparking conflict between the two agencies, the AP reported.

Cause of Action, a nonpartisan Government oversight group, found that the Office of Government Ethics gave the General Services Administration's ethics program high marks just days after a 2010 Las Vegas conference that was later plagued by allegations of waste and abuse, the *Washington Post* reported.

USA Today used FOIA to obtain documents, including a 2007 internal report, from the Environmental Protection Agency (EPA) showing that some agency regulators knew about dangerous lead levels in soil in hundreds of neighborhoods, but did little to address the problem. (EPA's Inspector General plans to investigate.)

A *Washington Post* report about economic incentives integrated into the U.S. health-care system showed that drug companies made billions of dollars in profits while millions of patients were subjected to potentially dangerous doses of drugs. The results of a clinical trial, released by the Food and Drug Administration under FOIA, contributed to the newspaper's investigation.

Data obtained under FOIA from the Department of Labor showed that nearly one in five National Guard, reserve and active-duty troops returning from Iraq or Afghanistan who allege job discrimination say Federal Government agencies, not private employers, are discriminating, the *Washington Post* reported.

Author Joshua Kurlantzick used FOIA to uncover a wealth of documents from the FBI, the Departments of Defense and State, and other U.S. Government agencies about "Silk King" Jim Thompson, an American expatriate in

Several agencies—including the Council on Environmental Quality, the Federal Housing Finance Agency, the Peace Corps, and the Special Inspector General for Afghanistan—train all new employees about FOIA.

FOIA helped authors Stuart Wexler and Larry Hancock obtain information about Martin Luther King, Jr. (NARA ARC Identifier 542014)

Thailand who vanished in the jungle more than 45 years ago. Aided by documents from the National Archives, Kurlantzick portrays Thompson in the book *The Ideal Man: The Tragedy of Jim Thompson and the American Way of War* as a U.S. Army Officer in the Office of Strategic Services, the precursor of the Central Intelligence Agency, who steadfastly championed democracy and fought colonialism.

Authors Stuart Wexler and Larry Hancock used FOIA to obtain documents from the FBI that unveiled two previously secret plots to assassinate Martin Luther King, Jr. The documents and other records obtained under FOIA helped Wexler and Hancock chronicle the events detailed in the book *The Awful Grace of God: Religious Terrorism, White Supremacy, and the Unsolved Murder of Martin Luther King, Jr.*

BEST PRACTICES: A Team Approach

Whether it's to resolve a dispute or to evaluate internal processes, agencies are increasingly working collaboratively in teams to tackle FOIA-related issues. Some examples OGIS found while combing through Chief FOIA Office reports for FY 2011 include the following:

The high level of interest in the April 2010 oil spill in the Gulf of Mexico sparked a project in which *data.gov* is featuring data related to the spill, its effects, and the clean-up effort from the Department of Energy (DOE), the Environmental Protection Agency (EPA), the National Oceanic and Atmospheric Administration (NOAA), the Department of the Interior (DOI), and the states of Florida and Louisiana. Data include oil and gas flow and recovery measurements, air and water sample data, oil spill–related exposure information, and other data of interest to scientists, recovery workers and citizens.

At the Department of State (State), several teams have been formed to make the FOIA process more efficient, including a team to process the 250 oldest requests. A Rapid Response Team (RRT) to address referrals led to an agreement between State and U.S. Citizenship and Immigration Services, Department of Homeland Security, regarding guidelines for referrals, which dropped from 4,000 a month to 430 a month. The referral backlog fell from 4,121 in March 2011 to 1,756 in March 2012.

The Chief FOIA Officer of the National Archives and Records Administration is in-

IMPROVING FOIA

"The Office of Government Information Services shall … recommend policy changes to Congress and the President to improve the administration" of FOIA.
5 U.S.C. § 552(h)(2)(C)

In Fiscal Year (FY) 2012, OGIS recommended to Congress five areas that agencies can address to improve the FOIA process. In addition to formal recommendations, OGIS's day-to-day work sparks suggestions for improving FOIA.

The five recommendations to Congress are:

- Provide assistance for requesters seeking their own records under the Privacy Act

volved in a 20-oldest-case initiative through the National Declassification Center, working with agencies with an equity in classified records.

Each department within the U.S. Postal Service has a representative who works with the Records Office to identify records to disclose proactively online. The Records Office also is available to help FOIA coordinators and others with record-release determinations and other FOIA matters.

The Food and Drug Administration, Department of Health and Human Services, has a FOIA council that examines backlog issues.

The Social Security Administration's FOIA Process Evaluation Working Group works to reassess and improve the agency's FOIA processing. The group's review of FOIA procedures led to recommendations including updating case processing procedure, obtaining new equipment to improve the intake process, redesigning a FOIA tracking worksheet, and scheduling a monthly FOIA analyst meeting.

At the Environmental Protection Agency, a FOIA Workgroup examined all aspects of the agency's FOIA processes and issued 22 recommendations, including developing guidelines on a foreseeable-harm standard, revising FOIA regulations, and establishing a searchable records repository.

- Create a Government-wide Privacy Act routine-use procedure to streamline the way in which agencies share information with OGIS
- Encourage agency participation with *FOIAonline,* the Government-wide FOIA portal
- Facilitate the coordination of interagency communication for Government-wide FOIA requests, and
- Recommend dispute-resolution skills training for FOIA professionals.

Where it could, OGIS began working immediately to implement these recommendations. OGIS and the Office of Information Policy at the Department of Justice (DOJ) sponsored a Requester Roundtable event bringing together agency FOIA professionals and the public to discuss Privacy Act requests, in which requesters seek access to information pertaining to themselves. While OGIS's mandate is in FOIA and not the Privacy Act, both laws can apply to first-party requests, and whenever possible, OGIS strives to assist requesters seeking records under both laws. OGIS provided information about Privacy Act requests and also wrote generally about the differences between FOIA and the Privacy Act on the OGIS blog. OGIS plans to add agency privacy contacts and general Privacy Act information to the OGIS website.

OGIS also worked with the DOJ to write model language that agencies can use in revising their Systems of Records Notices (SORNs) to share information with OGIS. Without such a routine use under the Privacy Act of 1974, OGIS is required to get written consents from requesters before contacting Federal agencies to begin to discuss disputes. OGIS plans to contact Chief Privacy Officers at the 11 Cabinet-level departments that do not have such a routine use to provide them with the model language. (See Agency Review section.)

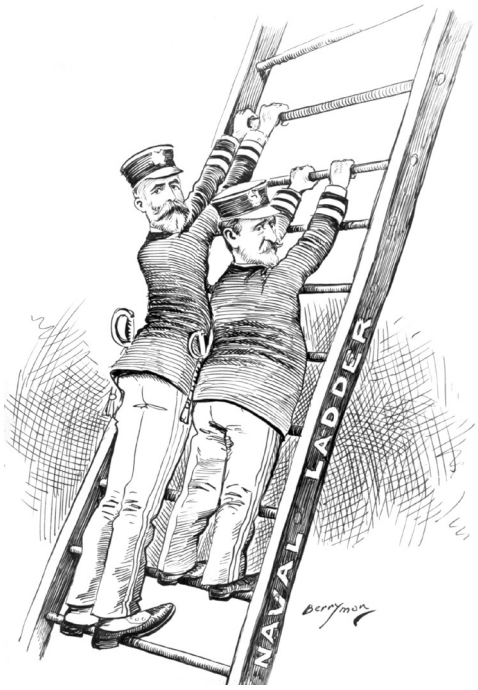
FOIAonline, the FOIA portal, launched at the start of FY 2013. Throughout FY 2012, OGIS worked with the partner agencies as well as with requester stakeholders to share information about the tool in presentations, meetings, discussions, and, of course, on the OGIS blog. (See Technology section.)

OGIS developed a strategy to coordinate agency contacts and facilitate

communication on multiagency requests in which the same request is made to multiple agencies. This approach ensures that agencies are aware that the request has been received by fellow agencies; puts agency points of contact in touch with one another so they can share tips and strategies for fulfilling the request; and also helps to avoid redundancies.

OGIS continues to encourage departments and agencies to partner to expand and provide dispute-resolution skills training for their FOIA professionals.

OGIS also focused in FY 2012 on its day-to-day suggestions for agencies and requesters through its new Improving FOIA web page. Some examples include



Support from agency leadership helps FOIA professionals at all rungs of the ladder do a great job.

Clifford Berryman's 1898 drawing "An Advantage in Reach and Pull." (NARA ARC Identifier 6010289)

- Agency-wide FOIA training: providing "Day One" and refresher training to all agency employees in addition to specialized FOIA training for FOIA professionals.
- Standardized agency web pages: collaborating with agencies to develop an easy-to-use design template featuring standardized FOIA reading rooms, contact information, and features for each agency to customize.
- Top-down agency FOIA support: encouraging agency leadership to actively support FOIA programs, policies, and initiatives through senior official memos and agency all-hands meetings.
- Professionalization of the FOIA career track: OGIS began planning in FY 2012 for facilitating an interagency working group developing standard position descriptions that agencies can use under the new Government information specialist job series, 0306.

OGIS continues to find ways the FOIA process might be improved upon through its resolution of specific disputes and work with agencies and requesters generally.

OGIS CASE STUDY: GENEALOGICAL RESEARCH

For years, historians and genealogists traced parentage by filing FOIA requests with the Social Security Administration (SSA). In 2011, the SSA implemented a new policy regarding release of information in cases involving extreme age from its Form SS-5, which is used to apply for a Social Security number.

Researchers who previously received unredacted SS-5 forms from SSA instead received responses notifying them that parents' names cannot be released because they are protected from a clearly unwarranted invasion of personal privacy under both Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6), and the Privacy Act of 1974, 5 U.S.C. § 552a(b).

Many of those requesters came to OGIS for assistance. OGIS learned that the SSA's official policy on the release of parents' names on SS-5 forms is that the agency will not release those names unless

- It receives their written consent or proof of death
- Their birth dates are more than 120 years ago, or
- The number holder on the SS-5 is at least 100 years old.

Acceptable proof of death includes a death certificate, a statement of death by a funeral director, an obituary or newspaper article, or a coroner's report.

In its role as the FOIA Ombudsman, OGIS spoke to SSA FOIA professionals about its SS-5 policy, raising the concerns of OGIS's customers. OGIS learned that in creating this policy, the SSA looked at how other agencies, including the Department of Justice and the Federal Bureau of Investigation, handle records involving extreme age. Generally, both agencies will not release records about individuals who are younger than 100 years without proof of death. Because Social Security applications are unique records in that they list both parents' names, SSA added 20 years to the 100-year requirement to protect the privacy interests of the parents.

SSA FOIA professionals explained that they constantly strike a balance between their responsibility to protect personal information contained in the agency's records and the desire of the public to gain access to that information. As a result of discussions with OGIS, the SSA agreed to revisit its policy on SS-5s to reconsider whether the current age thresholds are too restrictive. In the meantime, SSA added more information about its current SS-5 policy to its FOIA web page so requesters can access the information.

MEASURING OGIS's EFFECTIVENESS

> *"The Office of Government Information Services shall review policies and procedures of administrative agencies under [FOIA]; review compliance with [FOIA] by administrative agencies; and … shall offer mediation services to resolve disputes between persons making requests under [FOIA] and administrative agencies as a non-exclusive alternative to litigation."*
> 5 U.S.C. § 552(h)(2)-(3)

OGIS has two fairly different statutory missions: providing mediation services to resolve FOIA disputes, and reviewing agencies' FOIA policies, procedures, and compliance. With no formal metrics for measuring its success, the Office has had to be creative in determining how to assess its effectiveness. In Fiscal Year (FY) 2012, OGIS committed to finding more objective ways to report its effectiveness and worked with volunteer consultants, underwent an Office of Inspector General (OIG) audit, and developed its own criteria to evaluate performance. Previously, most of OGIS's feedback came from follow-up comments to OGIS staff or in-person encounters regarding FOIA dispute cases.

A volunteer team of law students and professionals from Harvard Law School's Negotiation and Mediation Clinical Program, which partnered with OGIS in FY 2011, spent three months in FY 2012 looking specifically into OGIS's goals as an office, particularly into determining how best to measure the effectiveness of OGIS's work. The Harvard team recommended that OGIS distribute feedback requests to its agency and requester customers.

OGIS had previously developed customer service assessments to share with individuals who received dispute-resolution services from the Office. The Harvard team—which included survey professionals—worked with OGIS to refine the questions and finalize the assessment, which, as of FY 2013, is offered to both agency and requester OGIS customers to evaluate OGIS's mediation services. In the coming months, OGIS will implement the Harvard

Harvard Law School students studied ways that OGIS could best measure its effectiveness.

This 1967 photo shows Corpsmen studying at a Civilian Conservation Corps Center in Minnesota. (NARA ARC Identifier 2132734)

team's recommendation to develop and provide feedback requests to agency contacts as well.

As part of its routine examination of NARA offices, the Inspector General (IG) selected OGIS to be evaluated in FY 2012 to determine whether OGIS was adequately established and meets Congress's intent. The IG found that OGIS meets the requirements set forth in FOIA with regard to both review and dispute resolution. The IG found that "additional resources could significantly improve OGIS's ability to address and meet its mission." OGIS will discuss the IG's recommendation with NARA as part of the annual budget process.

The IG's office noted that OGIS's dispute-resolution cases were closed at a slower rate in the first two quarters of calendar year 2012 than in OGIS's first two calendar years due, in part, to the Office's transition to an online case management system without increasing corresponding technological capabilities. The IG recommended that OGIS obtain a high-speed scanner in FY 2012 to maintain its case closure rate.

RESOLVING DISPUTES

In OGIS's third year, the Office continued to offer mediation services—ranging from ombuds services to facilitation to mediation—to resolve

disputes between FOIA requesters and Federal agencies. In its first three years, OGIS's reach stretched across every state except Wyoming, the District of Columbia, the Northern Mariana Islands, Puerto Rico, and 13 foreign countries, including Australia, Cambodia, Canada, France, India, Iraq, Mexico, and the United Arab Emirates.

OGIS assisted almost 2,000 requesters in its first three years, receiving a total of 1,125 cases—391 in its first year, 373 in its second year, and 361 in its third year. (The remaining 875 involved "quick hits" in which OGIS offers immediate assistance without having to open a case.) OGIS closed 354 cases in FY 2012, about the same as the 357 closed in FY 2011. At any given time, the workload is approximately 100 open cases. In 73 percent of cases closed in FY 2012, OGIS provided ombuds services, acting as a confidential and informal information resource, communications channel, complaint-handler, and dispute-resolver. OGIS also handled 314 "quick hits"—e-mails and phone calls from requesters and agency FOIA professionals.

OGIS cases come from around the globe, including many from the Washington, DC, area.

This circa 1800 map shows the United States; the British possessions of Canada, Nova Scotia, New Brunswick, and Newfoundland divided with the French; and the Spanish Territories of Louisiana and Florida.

The OGIS staff tweaked existing internal processes to work more efficiently and to excel in customer service while resolving disputes. To help with this process, OGIS deployed a new online case management system at the beginning of FY 2012, which eases reporting and tracking of OGIS services. Throughout the year, OGIS continued to add more data fields to obtain additional metrics. For example, one of the new fields in the system directly reports the current status of the OGIS cases in real-time to the OGIS website. The new case management system can track other OGIS internal data points.

OGIS also refined its intake process to better identify incoming requests that can be handled on the same day as "quick hits," rather than "cases," which require more research and analysis. While one result of this process is improved customer service—simple requests for information are handled immediately by OGIS staff— this change also resulted in fewer OGIS cases in FY 2012.

OGIS cases were open an average of 89.5 working days, with a median of 56 working days in FY 2012. In the third and fourth quarters of FY 2012, OGIS concentrated on closing the oldest pending cases, most of which were from OGIS's first year and which increased the time OGIS cases are open from an average of 50 working days in FY 2010 and 31 working days in FY 2011. The oldest closed case, open a total of 644 working days, dated to January 2010 and involved the customer coming to OGIS early in the processing of the FOIA request, then returning at each step in the process until the agency's final determination.

An analysis of the OGIS cases shows that the Office's FY 2012 cases were more complex and substantive than in previous years. For example, OGIS's caseload in the first two years consisted of many cases in which requesters sought access to information pertaining to themselves under the Privacy Act of 1974. Because Federal agencies process such first-party requests under both FOIA and the Privacy Act of 1974 in order to give requesters the fullest degree of access available, OGIS provides ombuds services to such requesters, including information about the process and the status of requests. However,

BEST PRACTICES: Proactive Disclosure

No FOIA program is complete without a strong commitment to proactively disclose high-interest records and datasets. In reviewing the 2011 Chief FOIA Officer Reports, OGIS saw many examples of agencies proactively disclosing records, including the following:

- The U.S. Department of State posted more than 2,200 records from the Rwandan Declassification Collection, describing the role of the international community and its response to the Rwandan Genocide, the civil war in Burundi, and the resulting destabilization of the East Africa region.
- The Federal Communications Commission launched a website that offers Government data sets in formats required by entrepreneurs who wish to build innovative applications.
- The Corporation for National and Community Service expanded its release of grant application review materials to all of its competitive grant programs. The materials include blank external review templates and the names of external peer reviewers.
- The United States Postal Service (USPS) added information to its website about all leased postal facilities and land in all states and U.S. territories including annual rent, lease information, square footage and tax information, as well as information on USPS-owned facilities and land.
- Upon receiving a FOIA request for a gaming contract, National Indian Gaming Commission FOIA professionals immediately start the submitter notice process so that it can process, redact, and post the contract to the agency website. By doing so, agency FOIA professionals believe that they have reduced the number of FOIA requests they receive.
- The Department of Energy collects and disseminates information about patents that result from research sponsored by the agency.

because OGIS jurisdiction springs from FOIA and not the Privacy Act, OGIS is not in a position to assist with substantive Privacy Act issues. In FY 2012, 39 OGIS cases involved Privacy Act requests, a drop from 50 in FY 2011 and 94 in FY 2010, respectively. Cases involving Privacy Act requests are usually simpler—and take less time to complete—since status and ombuds services are the only services OGIS can provide under FOIA to those customers.

Additionally, although many agencies cooperate with OGIS, there still are some that do not fully engage or are slow to engage with the Office. After careful consideration, OGIS believes that the increase in the time to handle OGIS cases can be attributed to several factors: the increased complexity of cases received, the lack of timely agency and requester responses, the readjustment of OGIS's case intake process, implementation of the new case management database (and with it, a new process requiring that all case-related materials be scanned and uploaded); and, until recently, limited scanning capabilities.

In FY 2012, OGIS's closed cases involved 37 Federal agencies, including all 15 Cabinet-level departments:

78 cases (22 percent) from the Department of Justice
52 cases (~15 percent) from the Department of Homeland Security
28 cases (~8 percent) from the Department of Veterans Affairs
27 cases (~8 percent) from the Social Security Administration
16 cases (~4.5 percent) from the Department of Defense
16 cases (~4.5 percent) from the Department of Treasury

These cases, 217 in total, accounted for 62 percent of the cases OGIS closed in FY 2012. The numbers do not imply that these agencies have more problematic FOIA operations than other agencies; rather, those agencies regularly refer requesters to OGIS for assistance. OGIS also opened one case from an agency to assist with an internal agency disagreement about the processing of a request.

Forty percent of requesters who came to OGIS sought assistance with denials, and 28 percent with delays. The remaining cases dealt with general FOIA processing issues, fees, or policy matters. The denial cases involved seven of the nine exemptions to FOIA. No OGIS case has involved the least-cited Exemption 9, which protects "geological and geophysical data, including maps, concerning wells," and in FY 2012, OGIS

More than a quarter of OGIS's cases involve requesters facing delays in agency response time.

This fence delayed anyone wishing to get to the other side of the Brooklyn Naval Yard in 1913. (NARA ARC Identifier 6038914)

did not handle any cases involving Exemption 8, which protects records pertaining to the regulation or supervision of financial institutions.

OGIS, created to complement existing FOIA practices and procedures, strives to work in conjunction with the existing request and appeal process; however, OGIS may become involved at any point in the administrative process. About 33 percent of OGIS customers in FY 2012 requested assistance after an agency's final determination on appeal, but many came to OGIS with questions earlier in the process: after filing a request (31 percent); before receiving a response to an appeal (15 percent); after receiving an initial response (9 percent); or before even filing a FOIA request (1 percent). In about 10 percent of the cases, the data is either unknown or unavailable.

The majority of the denial cases that OGIS handled involved Exemptions 6 and 7, which protect personnel, medical, and similar files, the release of which would invade personal privacy, and records and information compiled for law enforcement purposes, respectively. The bulk of these requests dealt with requesters seeking information about third parties, in which written consent, proof of death, or an overriding public interest in disclosure is generally required under both FOIA and the Privacy Act.

During OGIS's first three years, the Office issued no advisory opinions.

AGENCY REVIEW

> *"The Office of Government Information Services shall review policies and procedures of administrative agencies under this section; [and] review compliance with this section by administrative agencies."*
> 5 U.S.C. § 552(h)(2)(A)-(B)

Immediately after opening in September 2009, OGIS began offering mediation services. Implementation of the second prong of the Office's statutory mission—review of agencies' FOIA policies, procedures, and compliance—started late in OGIS's first full year and includes review of proposed changes to agency FOIA regulations and collaboration with agencies in developing changes to FOIA regulations, policies, and procedures. OGIS's review program also includes developing Government-wide best practices by analyzing Annual FOIA reports and Chief FOIA Officer reports, and observing agency practices through casework.

OGIS expanded its review of agency FOIA policies, procedures, and compliance in FY 2012 by

- Expanding review of regulations to include agency Privacy Act Systems of Records Notices (SORNs)
- Offering plain language training and review of written agency FOIA materials
- Creating metrics for a draft assessment program.

Agency FOIA Regulations

In FY 2012, OGIS submitted public comments to proposed changes in the FOIA regulations of the

- Central Intelligence Agency
- National Labor Relations Board
- Office of Science and Technology Policy
- Special Inspector General for Afghanistan Reconstruction

OGIS also collaborated with the Department of State (State) in reviewing existing and newly written FOIA regulations. OGIS shared many of its best practices with State to ensure that the regulations are written clearly, explain the FOIA administrative process, and provide information pertaining to OGIS services.

OGIS is pleased that as a result of collaboration with the Department of the Interior (DOI) in FY 2011, the agency incorporated several of OGIS's suggestions into its proposed regulation, including recognizing the important statutory role of the FOIA Public Liaison in reducing delays, increasing transparency, and understanding the status of requests. The DOI also proposed several items that OGIS applauds, including informing requesters that consent or proof of death of a third-party individual is required before the agency can release records on that individual, and providing in the regulation information about the preservation of records and records management. (OGIS has observed that good records management is essential to the FOIA administrative process.)

Government agencies will release information on third parties only with their consent or proof of death.

William Wirt, U.S. Attorney General from 1817 to 1829, is buried at Congressional Cemetery, Washington, DC, shown in this 1860s photo by Mathew Brady. (NARA ARC Identifier 529409)

Finally, OGIS is pleased that the Federal Housing Finance Agency (FHFA) incorporated several of the recommended changes that OGIS proposed during the public comment period in FY 2011. OGIS followed up on those comments with a letter to the agency that more fully explained OGIS's statutory mission and internal processes.

Agency Systems of Records Notices (SORNs)

OGIS expanded its regulatory collaboration and comment program to include revisions to agencies' Systems of Records Notices (SORNs) for FOIA and Privacy Act request files. The Privacy Act of 1974 prohibits agencies from sharing information contained in FOIA and Privacy Act request and appeal files without prior written consent of the requester or the existence of a routine use allowing such disclosure. As such, OGIS has obtained signed and dated agreements from more than 1,000 requesters since opening three years ago.

OGIS has observed that requiring formal signed consent can be an obstacle when an agency seeks OGIS assistance. The situation may place agencies in the position of obtaining requester consent for the sole purpose of discussing an issue with OGIS in an attempt to prevent or resolve a dispute connected to that requester. Consent also may not be feasible when records are relevant to an OGIS review of an agency's policies, procedures, or compliance (although OGIS anticipates that there would be considerably less need for access to individual files for that purpose than when OGIS is providing mediation services).

OGIS worked with the Department of Justice (DOJ) to develop a model routine use that agencies can use:

> *To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. § 552(h), to review administrative agency policies, procedures*

The Legal Services Corporation's president issued a corporation-wide directive stating that FOIA obligations are as important as any other statutory obligation.

and compliance with the Freedom of Information Act (FOIA), and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

In addition to DOJ, the Departments of Health and Human Services, and State, the Office of Special Counsel, and the U.S. Postal Service revised their SORNs in FY 2012 to include a routine use that allows the sharing of information with OGIS. (The Department of Transportation amended its SORN in FY 2011 to include an OGIS routine use.) Amending agencies' SORNs to include OGIS as a routine use builds efficiencies into the FOIA administrative process, of which OGIS is an important part.

Plain Writing

The Plain Writing Act of 2010, which went into effect in October 2011, mandates that any new or substantially revised written communication with the public must be clear, concise, and well-organized. With the guidance of the interagency Plain Language Action and Information Network, agencies have taken a fresh look at their websites, correspondence, and other communications to make those documents more easily understood.

The Plain Writing Act offers a perfect opportunity for FOIA offices to improve their processes by explaining technical and legal information in easy-to-understand language. FOIA offices have direct contact with the public through correspondence and agency websites, and the legislation is designed to impact precisely the kind of communications that FOIA professionals produce. However, some FOIA professionals see a tension between plain writing and the technical and legal information that FOIA letters must contain.

OGIS's mission to assist agencies in resolving disputes with FOIA requesters is inextricably linked with good customer service and im-

Plain writing makes reading easier.

A child enjoys a book at the Ghedi Air Base in Italy in 2000. (NARA ARC Identifier 6512896)

proved communications. The Office recognizes the opportunity for improved customer service presented by the Plain Writing Act; OGIS seized this opportunity by adding the topic of plain writing to its training program.

This year OGIS presented training on plain writing in the following venues:

- OGIS's Interagency Dispute-Resolution Skills for FOIA Professionals training
- Agency-specific training for the Departments of State, Homeland Security, and Health and Human Services, and
- Sessions at two American Society of Access Professionals (ASAP) conferences.

OGIS also added plain writing review to the menu of services it offers agencies. Though agency regulations are not included in the Plain Writing Act of 2010, two Executive Orders emphasize the need for plain language: E.O. 12866 and E.O. 12988. OGIS suggests ways to make regulations more easily readable when it reviews them. The Office also invites agencies to submit their form letters and other FOIA correspondence for plain language review; so far one agency has taken OGIS up on this offer. Finally, OGIS invites agencies to use the information the Office developed for the "OGIS Library" section of the OGIS website on their own websites or in letters—all of that material adheres to plain writing guidelines.

Draft Assessment Program

OGIS envisions a robust review strategy to fully implement this aspect of its mission. OGIS's collaboration in FY 2011 with the National Archives' Information Security Oversight Office (ISOO), which oversees Government and industry security-classification programs, resulted in a draft assessment

framework that includes elements of an effective FOIA program. OGIS will continue to shape the framework to include collaborative assessments of agency FOIA programs. OGIS had hoped to launch its first assessment in FY 2012, but could not do so without hampering its offering of mediation services, including ombuds services, and other aspects of its review mission.

OGIS realizes that there is an inherent tension between its two statutory missions: (1) to review agencies' FOIA policies, procedures, and compliance, and (2) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies. When OGIS facilitators serve as neutral third parties to assist in resolving FOIA disputes, it could be difficult for those same individuals to separately review an agency's practices. While these two missions are interrelated, OGIS has determined that they require separate and distinct methodologies to properly implement them. As such, OGIS's review mission would best be implemented by a separate team of OGIS staffers who do not handle complaints, but instead assess agencies' FOIA policies, procedures, and compliance. Given OGIS's small staff, it has not been able to establish such a team.

OGIS's nascent review program includes a draft assessment for an effective FOIA program.

These Air Force pilots review a checklist before a training mission at Vance Air Force Base in Oklahoma in 1984. (NARA ARC Identifier 6387652)

OGIS CASE STUDY: THE BLACK HOLE OF REFERRALS

Tom Tangen is a man on a mission. For the last six years, he's made more than 25 trips from Minnesota to the National Archives in College Park, MD, on a quest to locate records pertaining to American rifle grenade launchers and rifle grenades from World War I to 1960.

His research has yielded a cache of previously classified documents from as far back as 1910 and as recent as the late 1940s. Nearly five years ago, Tangen discovered the existence of classified records from the 1950s that contained potentially valuable information about a little-known weapon of the World War II and Korean War eras. Tangen, who is retired from the airline industry, submitted a Freedom of Information Act (FOIA) request in July 2008 hoping to get the records declassified.

Nearly two years later, Tangen came to OGIS. The Office learned that NARA sent records responsive to the request to three other agencies for their review, and explained to Tangen the referral and consultation process as well as the FOIA backlog facing the Archives. OGIS urged him to be patient. Tangen returned to OGIS in 2012. Though he'd received documents from one of the agencies, neither he nor Supervisory Archives Specialist David Fort had any luck tracking down 195 pages sent to two Department of Defense (DoD) components: Office of the Secretary of Defense-Joint Chiefs of Staff (OSD/JS) and the Department of the Army. The records appeared to have disappeared into a black hole.

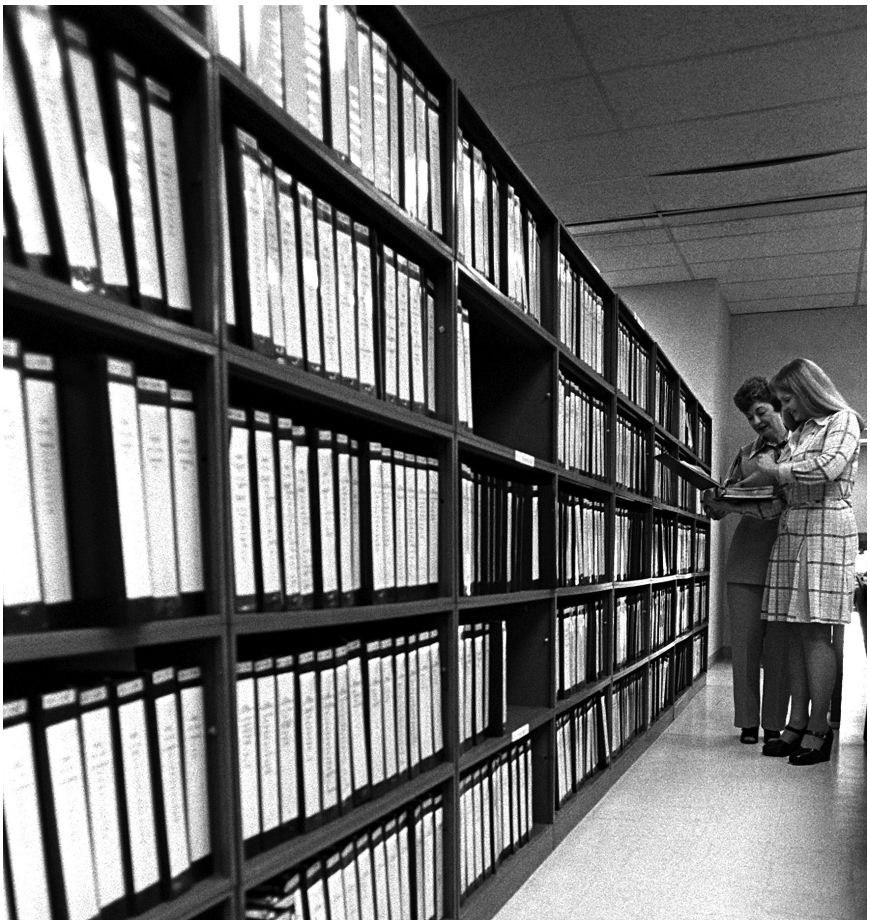
OGIS re-opened the case and contacted Stephanie Carr, DoD's FOIA Public Liaison, who tracked the records to the Picatinny Arsenal, U.S. Army Armament Research, Development and Engineering Center, in northern New Jersey. A Picatinny FOIA professional discovered the classified records tucked away in a safe in her office; she and her colleagues quickly reviewed the documents and determined that although they no longer contained DoD- or Army-classified information, they did contain some foreign government information of possible interest to the State Department. Fort showed the documents to State Department reviewers at the Archives, and they had no objection to release, so the records were declassified.

Tangen returned to the Archives to review the material, which he plans to compile, along with the other information he's gathered, for reference by other interested enthusiasts.

"Without Mr. Fort's ongoing assistance and yours, I would likely still be waiting for access to the material," Tangen wrote OGIS.

RECORDS MANAGEMENT

OGIS recognizes that when an agency achieves excellence in records management and links that management to FOIA, both programs succeed, nurturing transparency and accountability. Records management took on increased importance in 2012 for the entire Government. With a focus on a digital transition, the Managing Government Records Directive issued jointly by the Office of Management and Budget and the National Archives and Records Administration (NARA), intends to improve records management policies and practices across the executive branch. Specifically, the August 24, 2012, directive establishes two broad goals coupled with specific steps for agencies to take to achieve those goals:



Good records management is crucial to the FOIA administrative process.

Records appear well-organized in this Air Force records depository in Arlington, VA, in 1975. (NARA ARC Identifier 6343975)

- The first, to "Require Electronic Recordkeeping to Ensure Transparency, Efficiency, and Accountability," sets a 2019 deadline for all agencies to electronically manage their permanent records, with a 2013 cutoff to come up with a plan to do so. It also requires agencies to electronically manage all e-mail by 2016.
- The second, to "Demonstrate Compliance with Federal Records Management Statutes and Regulations," requires agencies to designate a senior official to oversee review of the existing records management program, ensure records are properly transferred to NARA, establish agency-wide records management training, and work with NARA to ensure comprehensive agency-wide records schedules.

Implementing these steps should lead to improved openness and accountability by better documentation of agency actions, more effective transfer of permanently valuable records to NARA—OGIS's parent agency—and cost savings through more efficient operations agency-wide, according to the directive.

There can be no access under FOIA without good records management. Linking the FOIA and records management programs is an OGIS best practice, and OGIS fully expects that the records management directive will improve both records management programs and FOIA programs Government-wide.

TECHNOLOGY

OGIS recognizes the vital importance of technology to the FOIA process and in Fiscal Year (FY) 2012 participated in a number of technology-related initiatives designed to make the process more efficient for all—requesters and agencies.

FOIAonline

Through its parent agency, the National Archives and Records Administration, OGIS continued its partnership with the Environmental Protection Agency (EPA) and the Department of Commerce (DOC), begun in

BEST PRACTICES: Technology

Agency FOIA professionals are using technology in smart and creative ways to manage their FOIA programs.

Many agencies are looking into ways to help search for records in response to FOIA requests. The Department of State (State) uses search capabilities of e-Discovery tools the agency already uses for litigation to assist with processing FOIA requests. The Institute of Museum and Library Services created a virtual collaborative workspace with a central repository that has full text search capability. Allowing for quick and accurate searches for agency documents in a central location streamlines FOIA processing. The Federal Open Market Committee launched a document-sharing platform that allows for collaboration with the multiple entities within the agency, speeding the review process.

State, looking to cut costs and reduce the time and expense required to mail responses to requesters, is looking into secure electronic systems to deliver document responses to requesters.

The Environmental Protection Agency, the Department of Commerce, the National Archives and Records Administration, and several other agencies teamed to create a centralized FOIA portal through *FOIAonline,* a multiagency portal that offers requesters one place to submit FOIA requests, track their progress, communicate with the processing agency, search other requests, access previously released documents, and file appeals with participating agencies. Additional agency partners will make the portal more useful for agencies and requesters.

The Department of Justice's FOIA.gov provides FOIA contacts for all agencies as well as data regarding FOIA programs at all agencies.

The Department of Energy launched a FOIA hub that provides real-time access to documents previously released under FOIA with full text search capability, the ability to file requests, and easy access to FOIA contact information within the agency.

FY 2011, to build *FOIAonline*. Launched at the start of FY 2013, *FOIA online* is a multiagency portal that offers requesters one place to submit FOIA requests, track their progress, communicate with the processing agency, search other requests, access previously released responsive documents, and file appeals with participating agencies.

For agencies, *FOIAonline* provides a secure website to receive and store requests, assign and process requests, post responses, generate metrics, manage records electronically, create management reports, and electronically generate the annual report required from each agency by FOIA.

EPA began looking at the feasibility of a FOIA portal in 2010 with the idea of leveraging *Regulations.gov,* the Federal rulemaking portal that allows the public to comment on Federal regulations and other agency regulatory actions. The EPA administers *Regulations.gov,* which launched in 2002 and now has 38 partner agencies that govern and financially support the program. By leveraging the infrastructure of *Regulations.gov, FOIAonline* avoided many start-up costs. OGIS will continue to work with its partners in FY 2013, and looks forward to welcoming more agencies to the partnership.

Throughout FY 2012, representatives from NARA and Commerce, along with the EPA, worked with and received input from both the agency FOIA professional and the requester communities.

At the end of FY 2012, three additional Federal agencies had partnered with NARA, the DOC, and EPA to participate in FOIAonline: the Department of the Treasury, the Federal Labor Relations Authority, and the Merit Systems Protection Board, each of which deployed on its own schedule in early FY 2013.

FOIA IT Working Group

In the summer of 2011, OGIS convened a meeting of agency FOIA professionals to discuss technology solutions that simplify some aspects of processing FOIA requests. Those who attended wished to continue the conversation, and OGIS agreed to facilitate a working group.

The FOIA IT Working Group, consisting of representatives from six agencies, meets every other month to discuss technology developments in the FOIA world. One of the group's goals is providing neutral feedback on

potential technology solutions, in particular, low- or no-cost tools to which agencies already have access but which may not be used for the FOIA process. The FOIA IT working group uses *The FOIA Ombudsman: Information and Advice,* OGIS's blog, to communicate with the larger FOIA community.

Web Presence

In November 2011, OGIS launched a new website connected to a new online case management system, the OGIS Access System, which allows OGIS to more effectively and efficiently manage the requests for OGIS assistance from FOIA requesters and agencies. The system, one of the first in a generation of cloud computing services in the Federal Government, provides information and tools for FOIA requesters and Federal agencies to help navigate the FOIA process. The web features:

- Online submission process to request OGIS assistance
- A searchable library of FOIA terms
- The ability for OGIS customers to subscribe to updates to the website
- A real-time searchable log of OGIS cases, including the status of open cases
- Access to the OGIS blog, *The FOIA Ombudsman: Information and Advice*
- Capability to engage with the public on ways to improve FOIA
- An Events and Presentations calendar of training opportunities and other OGIS events

The OGIS Access System allows customers to submit requests for OGIS assistance online. The submission form not only captures general information regarding the request for assistance, but also provides information to the requester to help determine whether OGIS can assist. OGIS's staff had been spending a lot of time addressing basic FOIA issues and providing agency contact

The Farm Credit Administration received a request for 10 years of records pertaining to employee awards. The requester did not want to pay fees. Agency FOIA professionals discussed the request with the requester and found a creative way to search, which resulted in a narrowed request, the release of nonexempt information, no fees, and a satisfied requester.

OGIS CASE STUDY: CIVIL WAR-ERA PENSION RECORDS

University of California–Los Angeles economics professor Dora Costa knew that military files of Civil War veterans who lived to be at least 95 years old would be crucial to her research on aging and extreme longevity.

So Costa filed a Freedom of Information Act (FOIA) request with the Department of Veterans Affairs (VA) in March 2010 seeking access to files of 1,000 named veterans who lived to be 95 years old or older.

While the records are physically stored in Federal Records Centers run by the National Archives and Records Administration (NARA), the records remain under VA control. The VA responded that, pursuant to its standard agreement with the Federal Records Centers to pay the labor costs associated with processing records requests, it would cost $50 per hour to process Costa's request. What's more, the average time for each record is one hour. VA's $50,000 estimate floored Costa as did the policy, which she had not encountered despite previous work with NARA on military records at Federal Records Centers. She filed a FOIA appeal, and the VA affirmed its action.

VA regulations allow the agency to charge the direct costs of responding to a request; however, the VA did not address Costa's requester status or whether she might qualify for a preferred requester category. (Costa's research is part of a mammoth project—which includes 12 universities and has spanned more than 20 years—funded by a Federal grant from the National Institute on Aging, part of the National Institutes of Health.)

The parties were at an impasse. Costa needed the records for her research and didn't see why these costs would come up when she had previously obtained records stored at NARA facilities without such expense. The VA could process the request, but would get a hefty bill from NARA for its labor—and if the VA couldn't pass it on to the requester, as its regulations allow, the agency would be out 50 grand.

In May 2010, Costa asked OGIS for help. It took nearly 2½ years, but OGIS worked with the VA, NARA, and Costa to resolve the fee issue, locate records around the country, and get copies to Costa and her team.

At OGIS's request, the VA reviewed the fee category and determined that Costa qualified as an educational requester. (In the end, the VA waived all fees entirely because of the length of time involved.) Next, OGIS worked with Costa and the VA to identify the records sought by using VA and NARA records databases. Staffers at nine Records Centers from Seattle to St. Louis copied the re-

cords Costa sought access to and sent them to the VA, which reviewed the records for names of any possible living beneficiaries. In October 2012, 21 boxes of records arrived in Costa's office.

The request was filled thanks to the collaboration and assistance from the professionals at the VA, NARA, and the Federal Records Centers across the country. OGIS kept the ball moving, giving the occasional prod when needed, but it was the perseverance of the folks in the agency trenches that got Costa's request processed. They made a plan to locate the records using sometimes-outdated databases, worked to pull the files, copied the delicate pages, and reviewed them line-by-line.

"Your involvement made a huge difference," Costa told OGIS.

information, and now the online submission tool can assist visitors to the website with much of that information. The tool involves a series of questions designed to point visitors to particularly helpful information. OGIS also developed a searchable library of FOIA terms and concepts. And visitors can always continue to submit OGIS cases either online, by mail, fax, e-mail, or telephone.

These new web tools allowed OGIS's staff of seven to provide personal assistance to customers at the appropriate point in the process while also providing general information to customers. Information was submitted through the online submission form 105 times from December 2011 through the end of FY 2012; however only 36 of those actually became OGIS cases, saving time and effort. The customers who did not open a case online left the online submission page to either view the OGIS Library or other resources provided on the OGIS site. During the 10 months that the site was in operation in FY 2012, it received 12,852 visits from 7,778 unique visitors. The most viewed pages were the OGIS staff contacts page, the OGIS Library, and the Events and Presentations pages. More than 85 percent of all site visitors were from the United States. However, there were visits from more than 100 countries, including Canada, China, Australia, India, United Kingdom, Russia, Brazil, and Germany.

Database Requests

As part of its mission of providing mediation services, OGIS has observed agencies facing FOIA requests for large amounts of electronic data or for Government databases themselves. In response, OGIS worked with both the agency and the requester communities to come up with OGIS best practices for making and responding to such requests; some of these best practices came from cases OGIS handled involving database requests. The central tenet of the agency best practices is teamwork: OGIS suggests that agencies assemble an array of professionals to respond to such requests, including IT professionals, records managers, privacy professionals, and attorneys. OGIS suggests that requesters do their homework before filing a FOIA request for a database, including learning which databases agencies have and the types of information included in those databases.

OGIS moderated panels for the American Society of Access Professionals (ASAP) and Investigative Reporters and Editors (IRE) on database requests in FY 2012, bringing together veteran requesters of FOIA databases and agency FOIA professionals to discuss best practices for tackling database requests.

OUTREACH

Outreach to the agency and requester communities remained both a challenge and an opportunity for OGIS in FY 2012. This year OGIS explored new ways to get its message out while remaining firmly connected to audiences that the Office has previously developed.

The FOIA Ombudsman

One key outreach tool is OGIS's blog, *The FOIA Ombudsman: Information and Advice,* updated at least weekly for a total of 56 posts in FY 2012. While the majority of the blog posts address substantive is-

sues such as best practices, case studies, and analysis of FOIA issues, OGIS also uses the blog to announce training opportunities and OGIS events.

It is difficult to quantify the impact that *The FOIA Ombudsman* has in the FOIA requester and agency communities. OGIS is aware that blogging is a relatively novel way for Government agencies to communicate with one another, and FOIA professionals are hesitant to leave comments about issues within their own agencies. That said, OGIS knows from anecdotal feedback that not only are agencies and requesters reading the blog, but that many high-profile agency FOIA professionals keep up with *The FOIA Ombudsman*.

2012 Sunshine Week

OGIS marked Sunshine Week—a celebration of Government openness that takes place each March—with a special event. The National Ar-

Sunshine Week promotes openness in government and freedom of information.

Detail from Clifford Berryman's 1924 drawing "There's Always a Ray of Sunshine." (NARA ARC Identifier 6011842)

BEST PRACTICES: Foreseeable-Harm Analysis

On his first day in office, President Obama directed departments and agencies not to withhold information "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." A few months later, Attorney General Eric Holder said that in the absence of an articulated harm that would come from disclosure under FOIA or a prohibition of such disclosure, records must be released.

Several agencies have concrete steps for conducting an analysis of the harm that could come from disclosure of records pertaining to internal agency deliberations.

FOIA professionals at the Farm Credit Administration (FCA) ask a series of questions whenever considering withholding information under several exemptions:

Would disclosure be reasonably likely to harm the agency? Is disclosure prohibited by law?

- If no: Release
- If yes: 1) Identify specific information and analyze exemption(s) application to that information; and 2) Revisit reasonable harm and whether truly prohibited by law.

The FCA makes discretionary releases if the likelihood of harm is reasonably low and not truly prohibited by law. Using this analysis, the agency made discretionary releases of information that could have been withheld under several exemptions to FOIA.

At the Centers for Disease Control and Prevention, the FOIA officer reviews with a subject matter expert all potential withholdings under Exemption 5, which may protect privileged interagency and intraagency memoranda. At the U.S. Postal Service, the Records Office trained FOIA coordinators in field offices that a foreseeable-harm standard is to be applied when withholding agency records.

chives featured a display of the original Freedom of Information Act, Public Law 89-487 (1966), in the National Archives East Rotunda Gallery. OGIS sponsored a special viewing of the FOIA document that

included remarks from Archivist of the United States David Ferriero and OGIS Director Miriam Nisbet. A sizable crowd joined OGIS to view the original statute and hear about the importance of Government transparency and OGIS's work.

As in previous years, Director Nisbet testified before Congress during Sunshine Week, discussing FOIA and information technology with the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Government and Oversight Reform. Director Nisbet presented testimony titled "The FOIA: Safeguarding Critical Infrastructure and the Public's Right to Know" to the Senate Judiciary Committee. OGIS also participated in a Sunshine Week program sponsored by the Washington College of Law at American University in Washington, DC.

And OGIS participated in a Sunshine Week Twitter discussion about the future of FOIA, sponsored by the American Society of News Editors.

U.S. Outreach

OGIS has always enjoyed strong support from nongovernmental organizations, particularly groups such as the American Society of Access Professionals, a nongovernmental association of agency FOIA professionals and FOIA requesters, and the Sunshine in Government Initiative, a coalition of media groups working to ensure that government is accessible, accountable, and open. Requester groups and other open-government advocates remain interested in OGIS's activities, and OGIS regularly solicits their input and feedback on its work.

In FY 2012, OGIS continued its regular Requester Roundtables bringing together Government professionals with FOIA requesters to discuss specific issues. Co-sponsored with the Office of Information Policy, the 2012 meetings covered declassification, records searches, referrals

and consultations, contractor and business records, and records on third parties. OGIS looks forward to continuing these conversations at the FY 2013 roundtables.

OGIS also discussed FOIA with a number of other groups in FY 2012. Those groups include:

- American Bar Association at its spring conference on dispute resolution
- Coalition of Federal Ombudsmen's annual conference
- Cold War Patriots, a group advocating for members of the Energy Employees Occupational Illness Compensation Program
- Investigative Reporters and Editors' annual conference
- Law Librarians' Society of Washington, DC
- National Press Club
- NPR
- Union of Concerned Scientists and the First Amendment Center's Improving Government
- Access to Scientific Information
- White House and National Archives Smart Disclosure summit

Director Miriam Nisbet continued working with Government and nongovernmental professionals to improve the administrative process through her representation of NARA on the Administrative Conference of the United States (ACUS) and the White House Task Force on Smart Disclosure; her chairmanship of the Federal Interagency Alternative Dispute Resolution (ADR) Working Group Steering Committee; and her membership in the American Bar Association (ABA). Director Nisbet's work helps ensure that executive branch agencies and their FOIA staffs know about OGIS and the services it offers as part of the FOIA administrative process.

OGIS's work has global reach, both in providing mediation services and in its outreach efforts.

A globe manufactured by Terr-A-Qua Globes and Maps on display at the National Archives in 1973. (NARA ARC Identifier 2581365)

FOIA's Global Reach

The Freedom of Information Act celebrated its 46th birthday on July 4, 2012. Many other countries have passed Access to Information laws in the last 15 years, and the recent Open Government Partnership (OGP), a global effort to make governments more transparent, effective, and accountable, requires countries wishing to join the partnership to have an access law. As the FOIA Ombudsman, OGIS is often asked to speak about the American FOIA experience.

OGIS shared its message at three international events in FY 2012. They were:

- The Canadian Access and Privacy Association annual conference in Ottawa, Canada
- The International Council on Archives (ICA) Congress in Brisbane, Australia, and ICA-related events sponsored by the Records and Information Management Professionals of Australia in Melbourne, Australia, and Wellington, New Zealand
- The 7th International Conference on Information Commissioners in Ottawa, Canada

As in previous years, dignitaries from other nations included meeting with OGIS on their Washington, DC, travel itineraries. In FY 2012, those meetings included:

- Brazilian officials in Washington, DC, through the George Washington University Center for Latin American Issues
- Representatives of China's Supreme People's Court, the top Chinese judicial agency, in Washington, DC, through the U.S.-China Business Training Center
- A delegation from the Government of Nigeria in Washington, DC
- A delegation of municipal officials from Argentina in Washington, DC

TRAINING

OGIS continued to expand its training program in 2012.

Dispute-Resolution Skills for FOIA Professionals

OGIS has presented training in dispute resolution to FOIA professionals for nearly three years, and in that time, the Office has changed the pro-

gram in response to participant feedback. Since its launch, the format of the Dispute-Resolution (DR) skills training has been a day-long program for professionals from across the Government. Attendees learn about communication and dispute-resolution skills, with a heavy emphasis on moving disputing parties from their positions (the demands they bring to the dispute) to interests (the underlying and unspoken needs upon which positions are based). OGIS continued interagency training in 2012, offering three sessions and training to nearly 100 FOIA professionals from more than 15 agencies.

After participating in the DR skills training, FOIA professionals from a few larger agencies asked OGIS for training sessions designed especially for their agencies. The Office presented the first agency-specific session in the summer of 2011 to the Department of Homeland Security's U.S. Citizenship and Immigration Services. The OGIS trainers found that agency-specific training participants were able to more fully discuss

OGIS regularly offers Dispute-Resolution Skills for FOIA Professionals training.

This Washington, DC, sixth-grade class learned food rationing skills during World War II. (NARA ARC Identifier 196400)

the issues facing their agencies, and that they appreciated the familiar context of their own processes and terms.

OGIS expanded the agency-specific training in FY 2012, providing four sessions to three agencies—the Departments of Homeland Security, the Interior, and State. More agencies are interested in this customized training, so OGIS's 2013 training schedule will be a mix of agency-specific and interagency sessions.

Other Training

OGIS continued its strong relationship in 2012 with the American Society of Access Professionals (ASAP), a nongovernmental association of agency FOIA professionals and FOIA requesters. OGIS staff presented a number of sessions at ASAP's events throughout the year. Topics included:

- FOIA and the Plain Writing Act
- Best practices for database requests
- Difficult conversations
- Best practices for FOIA appeals

The Department of Justice's Office of Information Policy presents a multiday training session for FOIA professionals throughout the year. OGIS takes part in this program, presenting information on the services of the Office and good FOIA customer service. OGIS also presented at agency FOIA training sessions, including those for the Department of Health and Human Services and multiagency FOIA training for eight agencies: the Departments of Commerce, Homeland Security, State, Transportation, and Treasury, and the US Agency for International Development, the Environmental Protection Agency, and the Merit Systems Protection Board.

A LOOK AHEAD

In its fourth year, OGIS continues to provide mediation services and review agency FOIA policies, procedures, and compliance as robustly as possible with its staff of seven.

OGIS's dispute-resolution skills training in FY 2013 will include both interagency and agency-specific sessions, according to demand. OGIS also plans to expand its nascent review program by working with Cabinet-level agencies to adopt Privacy Act routine uses to streamline the way in which agencies share information with OGIS and by developing a framework for OGIS assessment of agency FOIA programs.

In OGIS's first couple years, the Office envisioned cases going into "formal mediation" in which an outside mediator (either from inside or outside the Government) provides mediation. After closing more than 1,100 cases, OGIS has realized that its cases typically have not warranted an outside mediator. All of OGIS's professionals are trained in mediation and are using mediation services to resolve disputes brought to OGIS—by providing information or facilitating discussions with the parties to resolve disputes. OGIS services are voluntary, and in a few cases that may have benefitted from a more structured or "formal" mediation approach, one party or the other has not agreed to engage. Because of this, OGIS has come to realize that the designation of "formal" mediation is not meaningful.

SPECIAL THANKS

OGIS thanks the 112th Congress for its support of the FOIA Ombudsman's office:

Senate Judiciary Committee Chairman Senator Patrick Leahy and Ranking Member Senator Chuck Grassley, and their personal and committee staffs;

The U.S. military "Thank You America" float in the 1991 post-Desert Storm National Victory Celebration in Washington, DC. (NARA ARC Identifier 6481455)

Representative Darrell Issa, chairman of the House Committee on Oversight and Government Reform, Ranking Member Representative Elijah Cummings, and Representative Trey Gowdy, chairman of that committee's Subcommittee on Health Care, District of Columbia, Census and the National Archives, and their personal and committee staffs.

We extend a special thanks to our colleagues at the National Archives, including David S. Ferriero, Archivist of the United States; William J. Bosanko, Executive Head for Agency Services; and National Archives General Counsel Gary M. Stern for their support of OGIS's work. Agency Services' Chief of Staff Carla Riner and Administrative Officer Karen DeGrazia deserve a special mention for their tireless assistance and patience in working with OGIS to ensure that our internal operations run smoothly.

Assistant General Counsel Jean Whyte, director of the National Archives Alternative Dispute Resolution (ADR) program, continued to provide invaluable input to and helped teach OGIS's Dispute-Resolution Skills courses in FY 2012 for which we are most grateful.

OGIS also thanks Senior Policy Analysts Laura McCarthy and Kimberly Keravuori of the National Archives' Strategy Division for shepherding OGIS comments on agency FOIA regulations through the public comment process. Their work contributed to an important part of OGIS's statutory mission: our nascent agency review program.

Project Manager Aaron Woo provided a bright light as OGIS navigated the process of getting our case management system up and running.

OGIS thanks our *FOIAonline* partners, including Joseph Scanlon, the Archives' FOIA and Privacy Act Officer, and Jay Olin, Deputy FOIA Officer; the Environmental Protection Agency's Tim Crawford, Senior Policy Adviser, Open Government; Larry Gottesman, National FOIA Officer, and John Moses, Director, Collection Strategies Division; and the Department of Commerce's FOIA and Privacy Act Officer Brenda Dolan and Deputy Director of Open Government Joey Hutcherson. This

multiagency partnership worked tirelessly to oversee the retooling of *Regulations.gov* into *FOIAonline,* which launched at the beginning of FY 2013. We look forward to continuing the partnership—and welcoming more agencies to the collaboration.

FOIA Public Liaisons play an important role in the FOIA process and in OGIS's work. We are particularly grateful to Timothy Graham of the Veterans Health Administration, Department of Veterans Affairs, who appeared on several OGIS-moderated panels to discuss the FOIA process, and to Stephanie Carr, Policy Team Lead and OGIS Liaison, Department of Defense (DoD) FOI and Policy Office.

Finally, OGIS thanks Aaron Rauh, a student at Georgetown University Law Center, who volunteered in the summer of 2012 as a member of the OGIS team, and Jerel Downer who also volunteered his time.

SENATE COMMITTEE ON THE JUDICIARY

Hearing On
"We the People: Fulfilling the Promise of Open Government Five Years After The OPEN Government Act"

March 13, 2013

Statement of Anne L. Weismann,
Citizens for Responsibility and Ethics in Washington

Five years ago, the access community welcomed the changes to the Freedom of Information Act ("FOIA") made by the OPEN Government Act of 2007. From its vantage point as a frequent user of and litigant under the FOIA, Citizens for Responsibility and Ethics in Washington ("CREW") saw the OPEN Government Act as an opportunity to reduce unnecessary litigation so that requesters and agencies alike could focus on achieving faster and more comprehensive responses to requests. Unfortunately, the experience of the past five years has not lived up to the promise of the 2007 FOIA amendments, primarily because of the refusal of the federal government to implement the changes as enacted.

The OPEN Government Act made a number of changes to the FOIA, including five key provisions that promised to effect a significant change in "business as usual" at the agency level. First, it put in place a definition of "representative of the news media" that incorporated the growing and changing nature of this medium. Specifically, the Act made clear newly emerging alternative media such as bloggers qualify as representatives of the news media, as do freelance journalists. 5 U.S.C. § 552(a)(4)(A)(ii). The amendments also directed agencies to promulgate regulations implementing these changes.

Second, the OPEN Government Act dictated that attorney fees incurred in litigation are to be paid from the defendant agency's own appropriations, rather than the Judgment Fund, when a FOIA requester can show it substantially prevailed in the litigation. 5 U.S.C. § 552(a)(4)(E)(i). The amendments also defined the term "substantially prevailed" as including relief either through a judicial order or enforceable written agreement, or through a voluntary or unilateral change in the agency's position in response to a claim that is "not insubstantial." *Id.* at (E)(ii)(i) and (ii). These changes were intended to act as an incentive for agencies to avoid unnecessary litigation and to clarify the meaning of "substantially prevailed" under the FOIA.

Third, the OPEN Government Act prohibited agencies from assessing certain processing fees if they fail to comply with the FOIA's deadlines, absent unusual or exceptional circumstances. 5 U.S.C. § 552(a)(4)(A)(viii). This provision was added as an incentive to agencies to process requests within 20 days, as the FOIA requires.

Fourth, the amendments established the Office of Government Information Services ("OGIS") to review agency FOIA policies, procedures, and compliance with the FOIA; to recommend policy changes to Congress and the president; and to mediate and resolve disputes between requesters and agencies. 5 U.S.C. § 552(a)(7)(N)(2)(h)(2). No other change promised as significant a reform as the creation of OGIS.

Fifth, the Open Government Act imposed on agencies a number of procedural requirements designed to allow requesters to better track the status of their requests and communicate more easily with the agencies to which their requests were directed. 5 U.S.C. § 552(a)(7). These changes were intended to streamline the process, a response to complaints from requesters that all too often FOIA requests fell into a black hole.

With five years of experience under our belt, now is an appropriate time to assess the

effectiveness of the Open Government Act. Unfortunately, a review reveals a stubborn refusal on the part of the federal government, especially the Department of Justice ("DOJ"), to conform its actions to the amendments. Strikingly, the number of new FOIA lawsuits has actually increased during the Obama administration. According to a study done by the Transactional Records Access Clearinghouse's ("TRAC") FOIA Project, six percent more FOIA lawsuits were filed in President Obama's first term than in the preceding term of the Bush administration. A comparison of the first two years of each administration shows an overall increase in FOIA complaints under President Obama of 28 percent. And the agency-by-agency breakdown is no less startling. Despite the pro disclosure policy issued in March 2009 by Attorney General Eric Holder, 50 percent more FOIA lawsuits were filed against DOJ.[1]

For those of us who litigate frequently, these statistics, while disturbing, are not surprising as they reflect our experiences. Litigation has increased in part because agencies refuse to implement the amended definition of news media requester, and a significant number of agencies have not amended their regulations to reflect this and other statutory changes over the last decade. According to a study performed recently by the National Security Archive, 62 out of 99 government agencies have not updated their FOIA regulations since the passage of the OPEN Government Act, despite its mandate to do so.[2] Included within this group is DOJ, which last updated its FOIA regulations on January 31, 2003. *Id.* To be fair, DOJ attempted to implement new regulations last year. They had to be withdrawn, however, in the face of a large public outcry against proposals to permit lying to FOIA requesters, disqualifying online publications as news media requesters, and disqualifying most students from fee waivers.[3] DOJ has not since proposed other regulations.

In the absence of updated fee regulations reflecting the changes Congress made in 2007, agencies are continuing to apply incorrect standards in determining who qualifies as a media requester. In every FOIA request, CREW demonstrates its status as a news media requester, explaining how it routinely and systematically disseminates information to the public in a number of ways, including through its frequently visited website, which last month had over 44,000 page views; publicly posting all FOIA documents it receives on www.scribd.com, a site that has received nearly two and one-half million visits to CREW's documents since April 2010; publishing an online newsletter with well over 15,000 subscribers; publishing a blog that last month had over 4,000 page views; and publishing numerous reports to educate the public about government ethics and corruption. Despite this evidence, which clearly satisfies the FOIA requirements for news media status, agencies deny CREW news media status again and again.

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[1] *See* http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/.

[2] *See* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB405/.

[3] These extreme regulations led the National Security Archive to award DOJ its annual "Rosemary Award," named after Rosemary Woods, for the worst open government performance by a federal agency.

Just as troubling, agencies that have previously granted CREW news media status refuse to recognize that status on an ongoing basis. As a result, CREW has had to expend additional resources litigating its fee status, especially at the administrative level. Courts regularly have recognized CREW's entitlement to a fee waiver. Indeed, CREW has never lost a court case litigating this issue.

CREW has successfully recovered attorney fees relying on the standard set forth in the OPEN Government Act. Nevertheless, agencies persist in taking the same flawed approaches to CREW's requests. Agencies flout their FOIA responsibilities even in the face of adverse court rulings, undeterred by their likely liability for attorney fees. For example, in a series of lawsuits against DOJ, CREW seeks to learn why the agency refused to indict numerous members and former members of Congress, despite the abundant public evidence of criminal conduct. Notwithstanding the voluminous record in each case, which typically includes a public acknowledgment from the member that he or she was criminally investigated, DOJ has categorically denied CREW's requests for closed investigative records, arguing privacy must be protected. Two district court judges have ruled this categorical approach does not comply with DOJ's obligations under the FOIA, yet the agency continues to make the exact same argument in other pending cases. Apparently, even liability for attorney fees does not sufficiently ensure compliance with the FOIA.

In the past five years, agencies also have found an easy work-around to avoid forfeiting the ability to assess fees for failing to process requests within 20 working days. Specifically, agencies routinely and reflexively claim "unusual" or "exceptional" circumstances regardless of the scope of the request. In our experience, it is the rare case that an agency fails to claim "unusual circumstances," usually justified by a claimed need to search more than one office. Thus, a provision intended to push agencies to process requests more quickly has proven to be a minor obstacle, easily overcome.

Agencies have found many other ways to avoid processing requests within 20 business days. For example, agencies claim to need clarification on the meaning or scope of even simple requests. In CREW's experience, agencies require clarification when the request is likely to encompass a large number of responsive documents, or pertains to a subject that may prove embarrassing for the agency. Thus, it appears the need for clarification is merely a ruse to prevent the 20-day clock from commencing. Similarly, for very old requests, many agencies have adopted the practice of advising the requester the agency is closing the request unless the requester notifies the agency of its continued interest in maintaining its FOIA request. This practice places a burden on the requester that runs counter to the FOIA's structure and substance.

The creation of OGIS offered the most promise for improving the FOIA process and narrowing or eliminating issues for litigation. Yet since its creation, OGIS has had to fight to be heard. Rather than welcoming OGIS to the FOIA process, DOJ has fought it at every turn. This ugly turf battle began when DOJ maneuvered to have OGIS housed at DOJ, despite Congress' intent that OGIS be part of the National Archives and Records Administration ("NARA"). Unsuccessful in that effort, DOJ has contrived to crowd OGIS out of the FOIA space. For

example, DOJ not only has refused to participate in the FOIA module that OGIS supports, but has actively lobbied behind the scenes against the portal. But the biggest obstacle to OGIS's success is the severe lack of funding. With a tiny staff, OGIS cannot fulfill all of its obligations and has focused the majority of its time and attention on mediating disputes, rather than studying how the FOIA can better be implemented throughout the executive branch.

Nevertheless, under the strong leadership of Miriam Nisbet, OGIS already has made a mark, offering valuable mediation training to agencies to implement in their relationships with requesters. CREW has used OGIS to mediate two disputes. In one, the mediation resolved a threshold issue of CREW's entitlement to a fee waiver, avoiding costly litigation. The other dispute, which involved DOJ's Office of Information Policy ("OIP"), failed because DOJ declined to participate further in the mediation process.

The procedural requirements implemented by the OPEN Government Act have improved the FOIA process in many agencies, but at others it remains impossible to even make telephone contact with anyone processing the request. New technologies, such as the FOIA module developed by EPA, with help from the Department of Commerce and NARA, offer the most promise, perhaps because requesters are not dependent on agency personnel to learn the status of their requests.

The last five years have been disappointing on many fronts, and the promise of the OPEN Government Act has not been fully realized. The fault, however, lies not with the legislation, which pinpointed many of the problem areas in FOIA processing, but with agencies that have successfully resisted complying fully with the meaning and intent of the Act. The Federal Election Commission ("FEC"), for example, has essentially rewritten the FOIA by construing the 20-day processing period as nothing more than a requirement to notify requesters the agency is in receipt of their requests and will comply, in some fashion and at some unidentified time. Notably, when requested to weigh in on the issue by the U.S. Court of Appeals for the D.C. Circuit, DOJ filed a brief supporting the FEC in an interpretation that disregards and undermines congressional intent in enacting the FOIA.

These experiences highlight a fundamental underlying problem: there is no effective oversight of FOIA compliance within the executive branch. DOJ's Office of Information Policy issues guidance, but has no teeth. This is not to suggest OIP should be given greater authority. It has little credibility in the access community, given its demonstrated inclination to always align with agency interests, rather than the interests of the public. OGIS has no authority to tell agencies what they should be doing under the FOIA, and can offer only guidance on best practices. And while the federal courts remain available to resolve FOIA disputes, the burden and expense of litigation severely narrows the number of cases that proceed to court. Even once a lawsuit has been filed, the courts – at least here in the District of Columbia – are so burdened with FOIA and other lawsuits that resolution is a long way off. Often, by the time a court orders an agency to produce documents unlawfully withheld, the need for the documents has lessened or public attention has waned.

Congress needs to step into this breach and demand more accountability under the FOIA. Congress should give OGIS, an entity in which requesters are willing to place their trust, more authority to make recommendations, issue guidance, and play a more active role in how agencies implement the statute. Congress should hold DOJ accountable for the ever-widening gap between its stated FOIA policy, supposedly based on a presumption of disclosure, and its actual practices, which reflect no change from the no-holds barred litigation posture DOJ displayed under President George W. Bush. Congress took an important step toward a more open government when it enacted the OPEN Government Act. Now it must follow through with oversight to ensure the promise of that legislation becomes a reality.

The goals of transparency and accountability the OPEN Government Act was enacted to advance also are thwarted by the growing trend of holding secret the legal justifications for questionable government actions set forth in memoranda from DOJ's Office of Legal Counsel ("OLC"). Public debate over the use of torture on detainees was severely hampered by the refusal of the Bush administration to disclose the highly controversial analyses done by OLC that concluded such torture was consistent with U.S. laws and treaty obligations. Although the OLC torture memos addressed fundamental questions of national policy, they were off limits to the public until President Obama ordered their release in April 2009.

Unfortunately, the current administration has followed the Bush administration's lead, refusing to disclose OLC memos explaining the government's rationale for killing Americans abroad through the use of deadly U.S. drones. Beyond classification issues, DOJ has justified withholding these opinions as deliberative, protected by the attorney-client privilege, and therefore within the scope of FOIA Exemption 5. This justification does not pass muster. Historically, OLC opinions have been viewed both within and outside the executive branch as final, binding legal analyses agencies are not free to ignore. As such, they clearly fall outside of the protection of Exemption 5.

Keeping these pivotal OLC opinions secret not only deprives the public of vital information, but threatens the rule of law on which our democracy is based. Citizens cannot know if the president is executing the laws faithfully, as the Constitution commands, if the laws the president executes are shielded from public view. Such secrecy in government also threatens our constitutionally established system of checks and balances. Particularly where the government keeps secret an OLC opinion concluding the executive branch need not comply with a federal statute, both the courts and Congress are deprived of their oversight roles. Congress specifically cannot legislate effectively if it does not know how the executive branch interprets existing laws. Our tripartite system of government works only when all three branches and American citizens know what the law is.

According to a recently released analysis by the *Associated Press*, during the past year, the government has increased its reliance on Exemptions 1 and 5 to withhold government

records from the public.[4] This signals a dangerous trend toward more secrecy, a trend that cannot be reconciled with the underlying purpose of the FOIA and the president's stated commitment to becoming the most transparent administration. Through its oversight role, Congress should examine the reasons for this greater secrecy and whether legislation is needed to curb this trend and better align the implementation of the FOIA with its intent to provide the public a window on what its government is up to and why.

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[4] *See* Jack Gillum and Ted Bridis, FOIA Requests Being Denied More Due To Security Reasons Than Any Time Since Obama Took Office, *Associated Press*, March 11, 2013, available at http://hosted.ap.org/dynamic/stories/U/US_SUNSHINE_WEEK?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2013-03-11-09-51-17.

AP, March 11, 2013

WASHINGTON — The U.S. government, led by the Pentagon and CIA, censored or withheld for reasons of national security the files that the public requested last year under the Freedom of Information Act more often than at any time since President Barack Obama took office, according to a new analysis by The Associated Press.

Overall, the Obama administration last year answered its highest number of requests so far for copies of government documents, emails, photographs and more, and it slightly reduced its backlog of requests from previous years. But it more often cited legal provisions allowing the government to keep records or parts of its records secret, especially a rule intended to protect national security.

The AP's analysis showed the government released all or portions of the information that citizens, journalists, businesses and others sought at about the same rate as the previous three years. It turned over all or parts of the records in about 65 percent of requests. It fully rejected more than one-third of requests, a slight increase over 2011, including cases when it couldn't find records, a person refused to pay for copies or the request was determined to be improper.

The government's responsiveness under the FOIA is widely viewed as a barometer of the federal offices' transparency. Under the law, citizens and foreigners can compel the government to turn over copies of federal records for zero or little cost. Anyone who seeks information through the law is generally supposed to get it unless disclosure would hurt national security, violate personal privacy or expose business secrets or confidential decision-making in certain areas.

The AP's review comes at the start of the second term for Obama, who promised during his first week in office that the nation's signature open-records law would be "administered with a clear presumption: In the face of doubt, openness prevails." The review examined figures from the largest federal departments and agencies. Sunday was the start of Sunshine Week, when news organizations promote open government and freedom of information.

White House spokesman Eric Schultz said in a statement that during the past year, the government "processed more requests, decreased the backlog, improved average processing times and disclosed more information pro-actively." Schultz said the improvements "represent the efforts of agencies across the government to meet the president's commitment to openness. While there is more work to be done, this past year demonstrates that agencies are responding to the president's call for greater transparency."

The administration cited exceptions built into the law to avoid turning over materials more than 479,000 times, a roughly 22 percent increase over the previous year. In many cases, more than one of the law's exceptions was cited in each request for information.

In a year of intense public interest over deadly U.S. drones, the raid that killed Osama bin Laden, terror threats and more, the government cited national security to withhold information at least 5,223 times – a jump over 4,243 such cases in 2011 and 3,805 cases in Obama's first year in

office. The secretive CIA last year became even more secretive: Nearly 60 percent of 3,586 requests for files were withheld or censored for that reason last year, compared with 49 percent a year earlier.

Other federal agencies that invoked the national security exception included the Pentagon, Director of National Intelligence, NASA, Office of Management and Budget, Federal Deposit Insurance Corporation, Federal Communications Commission and the departments of Agriculture, Commerce, Energy, Homeland Security, Justice, State, Transportation, Treasury and Veterans Affairs

U.S. courts are loath to overrule the administration whenever it cites national security. A federal judge, Colleen McMahon of New York, in January ruled against The New York Times and the American Civil Liberties Union to see records about the government's legal justification for drone attacks and other methods it has used to kill terrorism suspects overseas, including American citizens. She cited an "Alice in Wonderland" predicament in which she was expected to determine what information should be revealed but unable to challenge the government's secrecy claim. Part of her ruling was sealed and made available only to the government's lawyers.

"I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules – a veritable Catch-22," the judge wrote. "I can find no way around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."

The AP could not determine whether the administration was abusing the national security exemption or whether the public was asking for more documents about sensitive subjects. Nearly half the Pentagon's 2,390 denials last year under that clause came from its National Security Agency, which monitors Internet traffic and phone calls worldwide.

"FOIA is an imperfect law, and I don't think that's changed over the last four years since Obama took office," said Alexander Abdo, an ACLU staff attorney for its national security project. "We've seen a meteoric rise in the number of claims to protect secret law, the government's interpretations of laws or its understanding of its own authority. In some ways, the Obama administration is actually even more aggressive on secrecy than the Bush administration."

The Obama administration also more frequently invoked the law's "deliberative process" exception to withhold records describing decision-making behind the scenes. Obama had directed agencies to use it less often, but the number of such cases had surged after his first year in office to more than 71,000. After back-to-back years when figures steadily declined, as agencies followed the president's instructions, the government cited that reason 66,353 times last year to keep records or parts of records secret.

Even as the Obama administration continued increasing its efforts answering FOIA requests, people submitted more than 590,000 requests for information in fiscal 2012 – an increase of less than 1 percent over the previous year. Including leftover requests from previous years, the

government responded to more requests than ever in 2012 – more than 603,000 – a 5 percent increase for the second consecutive year.

The Homeland Security Department, which includes offices that deal with immigration files, received more than twice as many requests for records – 190,589 new requests last year – as any other agency, and it answered significantly more requests than it did in 2011. Other agencies, including the State Department, National Transportation Safety Board and Nuclear Regulatory Commission performed worse last year. The State Department, for example, answered only 57 percent of its requests, down from 75 percent a year earlier.

U.S. Citizenship and Immigration Services drove a dramatic increase in the number of times DHS censored immigration records under exceptions to police files containing personal information and law enforcement techniques. The agency invoked those exemptions more than 136,000 times in 2012, compared with more than 75,000 a year earlier. Even though USCIS is not a law-enforcement agency, officials used the exceptions specifically reserved for law enforcement.

The AP's analysis also found that the government generally took longer to answer requests. Some agencies, such as the Health and Human Services Department, took less time than the previous year to turn over files. But at the State Department, for example, even urgent requests submitted under a fast-track system covering breaking news or events when a person's life was at stake took an average two years to wait for files.

Journalists and others who need information quickly to report breaking news, for example, fared worse last year. The rate at which the government granted so-called expedited processing, which moves an urgent request to the front of the line for a speedy answer, fell from 24 percent in 2011 to 17 percent last year. The CIA denied every such request last year.

Under increased budget pressure across the government, agencies more often insisted that people pay search and copying fees. It waived costs in 59 percent of requests, generally when the amount was negligible or the release of the information is in the public interest, a decline from 64 percent of cases a year earlier. At the Treasury Department, which faced questions about its role in auto bailouts and stimulus programs during Obama's first term, only one in five requests were processed at no charge. A year earlier, it granted more than 75 percent of fee waivers. The CIA denied every request last year to waive fees.

The 33 agencies that AP examined were: Agency for International Development, CIA, Agriculture Department, Commerce Department, Consumer Product Safety Commission, Defense Department, Education Department, Energy Department, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Interior Department, Justice Department, Labor Department, State Department, Transportation Department, Treasury Department, Department of Veterans Affairs, Environmental Protection Agency, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Election Commission, Federal Trade Commission, NASA, National Science Foundation, National Transportation Safety Board, Nuclear Regulatory Commission, Office of Management and Budget, Office of the Director of National Intelligence,

Securities and Exchange Commission, Small Business Administration, the Social Security Administration and the U.S. Postal Service.

Four agencies that were included in AP's previous analysis of FOIA performance did not publicly release their 2012 reports. They included the Office of National Drug Control Policy, the Office of Science and Technology Policy, the Council on Environmental Quality and the Office of Personnel Management.