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TESTIMONY OF ALINA M. SEMO

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BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

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“The Freedom of Information Act: Improving Transparency and the American Public’s Right to Know for the 21st Century”

Good morning Chairman Durbin, Ranking Member Grassley and members of the Committee. I am Alina Semo, Director of the Office of Government Information (OGIS) at the National Archives and Records Administration (NARA). Thank you for the opportunity to appear before you during Sunshine Week to discuss the Freedom of Information Act (FOIA) and OGIS’s recent work.

Thanks to the enhanced independence granted to OGIS by the FOIA Improvement Act of 2016, the views expressed in my testimony are those of OGIS, and do not necessarily represent the views of the President.

FOIA is our nation’s premier transparency law. Its basic purpose “is to ensure an informed citizenry vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹ The “FOIA is often explained as a means for citizens to know ‘what their Government is up to.’”²

OGIS: The FOIA Ombudsman

As the FOIA Ombudsman, OGIS plays an important and unique role in the FOIA process. FOIA authorizes our office to review agencies’ policies, procedures, and compliance with the FOIA, and to offer mediation services to resolve disputes between FOIA requesters and agencies. We use these mandates, along with the ombuds standards of independence, impartiality, and

¹ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

² *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

confidentiality³ to identify procedures and methods to improve overall compliance with the FOIA.

We advocate for the FOIA process itself rather than individual FOIA stakeholders. Our unique position within the FOIA process allows us to hear from a variety of requesters, from the least experienced to the most experienced. We also hear from agencies—in particular, the hardworking FOIA professionals who invite us to help them improve the efficiency of their offices and the quality of their communications with requesters. We engage with the U.S. Government Accountability Office (GAO) and U.S. Department of Justice Office of Information Policy (OIP), frequently sharing our observations regarding the FOIA landscape. By observing how FOIA functions across the government, we are able to help identify best practices in FOIA and develop recommendations to improve FOIA overall.

OGIS’s work as the FOIA Ombudsman dovetails seamlessly with the FOIA statute and Congress’s vision for our office. By listening and observing the FOIA process in action, we help to “resolve disputes ... as a nonexclusive alternative to litigation.”⁴ By allowing our casework to serve as a FOIA barometer and assessing a range of FOIA issues, we fulfill Congress’s mandate to review FOIA policies, procedures and compliance, and identify procedures and methods for improving compliance with FOIA.⁵ And by speaking about systemic change in a variety of ways, we are fulfilling Congress’s mandate to “identify procedures and methods for improving compliance” with FOIA.⁶

We are pleased to share with you our observations on the state of FOIA today, the COVID-19 pandemic’s effect on the FOIA process, other issues we have observed, as well as legislative recommendations we believe will improve the administration of the FOIA.

OGIS and the FOIA Process

As the public’s trust in government institutions waxes and wanes, ombuds offices play an important role in bolstering public trust and confidence. OGIS’s role as the FOIA Ombudsman is doubly important, considering that FOIA provides access to information that sheds light on the actions of government agencies. In our dispute resolution practice today, we are increasingly encountering requesters who are angry and frustrated with the government in general. We are also hearing anecdotal stories of FOIA professionals experiencing frustration and burnout. Over the last two years of the COVID-19 pandemic response, the top concern of both requesters and FOIA processors has been delays.

³ See 2016 Administrative Conference of the United States (ACUS) Recommendation 2016-5, “A Reappraisal – The Nature And Value Of Ombudsmen In Federal Agencies Part 2: Research Report .” available at https://www.acus.gov/sites/default/files/documents/PART%202_Research%20Final%20%2011.14.16%20%28ACUS%29.pdf.

⁴ 5 U.S.C. § 552(h)(3).

⁵ 5 U.S.C. §§ 552(h)(2)(A)-(B).

⁶ 5 U.S.C. § 552(h)(2)(C).

While we discuss the effects of the pandemic and OGIS's efforts to assist both requesters and agencies more specifically below, I would like to note that the primary challenges in FOIA today continue to be a lack of resources, confusion about the FOIA process, and lack of communication between requesters and agencies. Although OGIS was created as an alternative to litigation, many of the conflicts and/or difficulties that requesters encounter during the FOIA process and bring to OGIS are not necessarily ripe for litigation—or even mediation. We strive to meet requesters where they are in the process: whether it is explaining the FOIA process to a first-time requester or attempting to reopen communication between an experienced requester and an agency. We also strive to meet agencies where they are in the process and help develop ways agencies can better communicate with requesters.

The thread that runs through all of our work is building trust in the FOIA process by holding space for vital and sometimes difficult conversations to occur and using what we learn to raise awareness regarding broad, systemic issues ripe for attention and change. The requester community has given us specific feedback that OGIS has been very transparent and open when it runs its public meetings as we simultaneously run events via WebEx and the NARA YouTube channel.⁷ We ensure that our website⁸ contains updated information regarding all of our activities—including detailed information of the work of the FOIA Advisory Committee, and Chief FOIA Officers Council, our compliance work, Annual Reports, and upcoming events on Eventbrite.⁹ And we maintain a constant social media presence through our blog site. The FOIA Ombudsman,¹⁰ and our Twitter account.¹¹ We have endeavored to be as accessible as possible—particularly during the pandemic—and it has broadened our ability to reach our stakeholders.

The Pandemic's Effect on the FOIA Process

In the earliest days of the pandemic, OGIS issued an assessment on FOIA's requirement that agencies provide a requester with an estimated date of completion (EDC) upon request.¹² Our assessment found that agencies were challenged, even before the pandemic began, to provide EDCs, and that agency responses to such requests are mixed. One of our key recommendations is that agencies use average processing times for simple and complex requests to help determine EDCs. We also issued an advisory opinion stressing the importance of compliance with FOIA's

⁷ https://www.youtube.com/playlist?app=desktop&list=PLugwVCjzrJsWX2o94WrDBxASNVEajHJ_L.

⁸ <https://www.archives.gov/ogis>.

⁹ <https://www.eventbrite.com/o/office-of-government-information-services-7515239993>.

¹⁰ <https://foia.blogs.archives.gov/>.

¹¹ https://twitter.com/foia_ombuds?lang=en.

¹² <https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/agency-compliance-with-edc-2020-mar-31>.

EDC requirement¹³ and a *FOIA Ombuds Observer* providing requesters with tips for obtaining an EDC.¹⁴

As the pandemic set in and much of the federal workforce was sent into a full-time work-from-home environment, we observed a sharp increase in the number of submissions for OGIS dispute resolution related to delayed FOIA requests. We saw the number of requests for OGIS assistance involving delays jump 73% in fiscal year 2021. And for 85% of those requests for our assistance involving delays, a requester had asked for and was unable to obtain an estimated date of completion.

In many of these cases, OGIS's Mediation Team contacted the agency's FOIA staff to obtain an estimated date of completion. As we provided this individualized assistance, we observed patterns that flowed from these cases, and offered our services on a higher level where appropriate. For example, whenever we observed a number of people seeking the status of delayed requests pending with a particular agency, OGIS staff worked with that agency to develop standard language for requesters to explain how the pandemic was affecting that agency's ability to retrieve records. In this way, OGIS helped the agency better understand the needs of the requester, and the requester better appreciate the obstacles faced by the agency.

Communications During COVID-19

Communication between agencies and requesters has been an issue that OGIS has continually stressed—and one that became paramount during the pandemic. Our Compliance Team assessed how well agencies were communicating with requesters on their websites regarding how the pandemic was affecting agency FOIA processing. Our review of FOIA websites for 305 Cabinet-level departments and their components as well as independent agencies in May and June 2020 showed that a majority of agency FOIA websites—nearly 63%—did not provide updates on how COVID-19 was affecting FOIA processing.¹⁵ We followed up in October 2020 and found that 81% of FOIA programs that received more than 10,000 FOIA requests in FY 2020 used their websites to notify requesters about pandemic-related delays.¹⁶

RMSA Survey Results

Through our regular meetings with requesters, OGIS has received much anecdotal evidence of the effect the pandemic has had on the requester experience. To learn how the pandemic was affecting agencies, we partnered with our NARA colleagues in the Office of the Chief Records Officer for the U.S. Government (CRO) on the Records Management Self-Assessment (RMSA),

¹³ <https://www.archives.gov/ogis/advisory-opinions/2020-01-agencies-must-provide-edcs>

¹⁴ <https://www.archives.gov/ogis/resources/foia-ombuds-observer/2020-01>.

¹⁵ <https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/agency-website-comms-assessment-15-jun-2020>.

¹⁶ <https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/agency-website-comms-assessment-27-jan-2021>,

an annual survey to determine whether federal agencies are complying with statutory and regulatory records management requirements. Our now five-year partnership with the CRO has allowed us to expand our review of agency FOIA policies and procedures by asking targeted FOIA-related questions that help us identify potential compliance issues that merit further exploration.

The 2020 RMSA survey—administered to agency records officers from January 19, 2021 to March 19, 2021—included several questions regarding the challenges of administering FOIA during the pandemic.¹⁷ Key results include:

- Nearly half of all respondents (49%) reported that the COVID-19 pandemic disrupted their agency’s ability to respond to FOIA requests.
- A majority of respondents (80%) whose FOIA programs were disrupted reported that their agency’s paper records were inaccessible due to office closures while nearly half (46%) reported that agency staff were not available to search for records.
- A majority of respondents (72%) reported that their agencies worked directly with requesters to tailor their requests for most efficient processing during the COVID-19 pandemic.
- Over half of respondents (56%) said that they included information about anticipated delays in requester communications, including acknowledgement letters; 52% assessed their technology to ensure the most efficient administration of FOIA; and 50% reported that their agencies posted notices on their FOIA websites informing requesters of the most efficient ways to make requests.

Centers for Disease Control and Prevention Webinars

As FOIA backlogs increased, so did requester frustration. Helping people develop new approaches to solving problems is an important ombuds function and is illustrated in our work with the FOIA program at the Centers for Disease Control and Prevention (CDC) during the pandemic. The CDC saw a staggering increase in its FOIA caseload, due in large part to requests for COVID-19 records. The CDC recognized the need to communicate with requesters and trusted OGIS to provide a neutral space for this conversation to occur. On May 12, 2020,¹⁸ and May 6, 2021,¹⁹ OGIS hosted public webinars with CDC FOIA leadership to discuss how the agency is responding to COVID-19 requests and provide tips for successful FOIA requests, especially for pandemic-related electronic records. These webinars contained useful information for any FOIA requester interested in making a CDC request, and our office made sure to post recordings, presentation slides, and transcripts of these webinars on our website to maximize transparency and accessibility to this valuable information.

¹⁷ <https://www.archives.gov/ogis/foia-compliance-program/agency-self-assessments/2020-rmsa>.

¹⁸ <https://www.youtube.com/watch?v=iwVRMhZ0A6A>.

¹⁹ <https://www.youtube.com/watch?v=mss803SrXRw>.

Chief FOIA Officers Council

The theme of improving FOIA technology to decrease backlogs and improve the FOIA process continued with our work on the Chief FOIA Officers (CFO) Council, which we co-chair along with the Director of OIP. We have convened the Council and its two Committees a number of times since the pandemic upended FOIA administration two years ago. Some of these events focused on technology, the importance of which increased even more during the pandemic. OGIS and OIP collaborated with the Council's Technology Committee on two events:

- A virtual FOIA technology showcase during which 18 private sector vendors demonstrated their technology tools for federal agencies in response to FOIA case processing challenges raised through the Council's Technology Committee. Nearly 500 members of the federal civilian and military workforce registered for the event, the first of its kind. (February 9-10, 2022).²⁰
- An "Artificial Intelligence (AI) 101" webinar to provide agency FOIA professionals with a primer on different types of AI and AI-related tools, key terms, and possible applications to the FOIA administrative process. (November 5, 2020).

In October 2020, the CFO Council co-chairs established the Committee on Cross-Agency Collaboration and Innovation (COCACI) to research and propose cross-agency grant programs and funding sources, create federal career paths for FOIA professionals, and promote models to align agency resources with agency transparency. COCACI, which began meeting in March 2021, is currently focusing on three topic areas: virtual FOIA office administration; the Government Information Specialist job series; and technology standardization.

FOIA Advisory Committee

Another way that we advocate for the FOIA process is by chairing the FOIA Advisory Committee (Committee). The Archivist of the United States established the Committee in 2014 in accordance with the U.S. Second Open Government National Action Plan, released on December 5, 2013, and consistent with the directive in FOIA that OGIS "identify procedures and methods for improving compliance" with FOIA.²¹

Now in its fourth term, the Committee comprises 20 members from federal government departments and agencies and the requester community who are appointed by the Archivist and study the FOIA landscape to make recommendations for improvement. Since 2016, four terms of the Committee have made 36 recommendations in such areas as technology, FOIA training, accessibility and performance standards. (The Committee passed five recommendations at its meeting earlier this month.) Of the 36 recommendations, work on 10 recommendations is complete; work on 15 recommendations is in progress; and six recommendations are pending. To

²⁰ <https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council/nexgen-foia-showcase>.

²¹ https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf; 5 U.S.C. § 552(h)(2)(C).

help the public track these recommendations, we have created a FOIA Advisory Committee Recommendations Dashboard²² that I invite you to review.

We also issued another compliance assessment during the pandemic that focused on a review of commonly requested categories of first-party records, which looks at records that requesters seek pertaining to themselves.²³ Each day, people seeking records about themselves use the FOIA process to obtain their records as they navigate health care, employment, immigration, law enforcement or other issues that intersect in some way with the federal government. The 2018-2020 term of the FOIA Advisory Committee studied first-party requests and noted in its July 2020 final report that “many government agencies have come to rely on FOIA to address ... needs for access to information by the public beyond the worthy goals of transparency and accountability [for all] originally contemplated by Congress.”²⁴ This compliance assessment identified common categories of records requested frequently under the FOIA and/or Privacy Act by—or on behalf of—individuals seeking records about themselves and completed OGIS’s work on *FOIA Advisory Committee Recommendation No. 2020-14*. OGIS will continue to monitor this important topic—and the FOIA Advisory Committee continues work on the issue.

OGIS notes that the newly-issued Attorney General guidelines encourage agencies to continue their efforts to remove barriers to requesting and accessing government records and to reduce FOIA processing backlogs.²⁵ The announcement that Executive Office for Immigration Review (EOIR) would be changing its policy and no longer require individuals to file FOIA requests to obtain official copies of their own records of immigration court proceedings dovetails perfectly with the efforts of the FOIA Advisory Committee, which has been studying how to pivot away from using FOIA to access frequently requested records—such as immigration files, Social Security benefits information, and Veterans benefits information, and instead establish alternative processes for providing access to these first-party requests. All of OGIS’s compliance assessments are on our website.²⁶

Recommendations to Congress

In its Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee to the Archivist the Committee proposed:

²² <https://www.archives.gov/foia-advisory-committee/dashboard>.

²³ <https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/first-party-records-30-aug-2021>.

²⁴ 2018-2020 FOIA Advisory Committee, “Final Report and Recommendations to the Archivist of the United States,” July 9, 2020, <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>.

²⁵ <https://www.justice.gov/ag/page/file/1483516/download>.

²⁶ <https://www.archives.gov/ogis/foia-compliance-program>.

In the spirit of expanding the reach of FOIA, we believe that the next term of the Committee should give due consideration to the possibility of extending some aspects of FOIA to parts of the legislative and judicial branches.²⁷

As a result, the Legislation Subcommittee of the 2020-2022 term of the FOIA Advisory Committee carefully studied this issue and proposed the following recommendation:

Congress should adopt rules or enact legislation to establish procedures for effecting public access to legislative branch records in the possession of congressional support offices and agencies modeled after those procedures contained in the Freedom of Information Act. These should include requirements for proactive disclosure of certain information, procedures governing public requests for records, time limits for responding to requests, exemptions to be narrowly applied, and an appeal from any initial decision to deny access.

It is important to note that the Committee is not recommending that individual member offices or Committee offices be covered by such disclosure procedures. The Legislation Subcommittee recognized that the constituent-elected official relationship should continue outside of public scrutiny. The Legislation Subcommittee also recognized that in many ways, the legislative branch has been among the most transparent of the three branches of government and in recent decades has taken additional steps to increase public access to its work.²⁸ The full Committee passed the recommendation on June 13, 2021, and sent it to the Archivist, who has accepted it. We continue to work through the process of the Archivist sending the recommendation forward through formal channels to Congress.

OGIS has made several additional recommendations to Congress that I urge you to consider. These recommendations, which are briefly summarized below, are highlighted in our 2021 OGIS Annual Report for Fiscal Year 2020 (Annual Report).²⁹ The first is:

OGIS recommends that Congress pass legislation to provide agencies with sufficient resources to comply with the requirements of both FOIA and Section 508 of the Rehabilitation Act of 1973, as amended, especially as they relate to proactive posting of large numbers of records.

We first made this recommendation in our 2019 OGIS Annual Report on FY 2018 and included three possible legislative options.³⁰ We also issued a comprehensive report on the methods

²⁷ <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>.

²⁸ <https://www.archives.gov/files/ogis/assets/fac-rec-2021-01.pdf>.

²⁹ <https://www.archives.gov/ogis/about-ogis/annual-reports/ogis-2021-annual-report-for-fy-2020>.

³⁰ <https://www.archives.gov/files/ogis/assets/ogis-2019-annual-report-for-fy-2018.pdf>.

agencies use to prepare documents for posting on agency FOIA websites, and continue to observe agencies struggling with balancing the requirements of both statutes.³¹

As a result of another FOIA Advisory Committee recommendation from the 2018-2020 term that Congress engage in regular and robust oversight of FOIA, hold more hearings, establish regular and coordinated communication with agencies, and strengthen OGIS with clearer authority and expanded resources (*FOIA Advisory Committee Recommendation No. 2020-19*), OGIS recommended in its Annual Report as follows:

OGIS recommends that Congress ask the Government Accountability Office (GAO) to pinpoint systemic and/or specific compliance issues at agencies that Congress could then address in a targeted, surgical fashion, either through hearings or additional inquiries.

Finally, as a result of the FOIA Advisory Committee's 2018-2020 term's recommendation that Congress address funding for agency FOIA programs and ensure that agencies have sufficient resources to comply with FOIA (*FOIA Advisory Committee Recommendation No. 2020-20*), we advanced the following recommendation in our 2021 Annual Report:

OGIS recommends that Congress ask GAO to conduct a study of the funding for agency FOIA programs to determine whether agencies have adequate funding to comply with FOIA and respond to requests in a timely manner, and what additional resources agencies need in order to improve the FOIA process overall.

We are pleased that Chairman Durbin and Ranking Member Grassley, Senator Leahy and Senator Cornyn, along with House Committee on Oversight and Reform Chairwoman Carolyn Maloney and Ranking Member James Comer tasked GAO earlier this month with conducting a government-wide survey or convening focus groups of a representative sample of FOIA officials to examine FOIA backlogs.³² We would welcome a similar GAO study of FOIA funding.

CONCLUSION

OGIS has continued to take advantage of the opportunities presented by the FOIA Improvement Act of 2016. Our heightened visibility in the FOIA process significantly improves our understanding of FOIA across the government as well as our ability to provide important space for communication among all stakeholders in the process. These changes have enhanced OGIS's ability to act as the federal FOIA Ombudsman.

OGIS looks forward to continuing to identify and amplify strategies to improve compliance through our interactions with requesters and agencies, our work with the FOIA Advisory Committee and Chief FOIA Officers Council, and through our dispute resolution work.

³¹ <https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/posting-docs-assessment-2020-Dec-16>.

³² <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2022-03-16.CBM%20Comer%20et%20al.%20to%20Dodaro-GAO%20re%20FOIA%20Study.pdf>.

I appreciate the opportunity to appear before this Committee and thank you for the support that you have shown to the Office of Government Information Services. I look forward to answering any questions you may have.
