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To the Information Policy, Census, and National Archives Subcommittee,
Oversight and Government Reform Committee,
U.S. House of Representatives

Hearing on the structure and function of the Office of Government Information Services established by the "Openness Promotes Effectiveness in Our National Government Act of 2007" (P.L. 110-175)

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Thank you very much, Chairman Clay, and members of the Subcommittee, for inviting this testimony today. This hearing is timely indeed. Congress's intent and the plain language of a statute hang in the balance. Congress's attention to this issue is the only guarantee that the law will be carried out. So I applaud the Subcommittee for its follow-through, and encourage you to include in your plans for 2009 another hearing to assess progress at that time. Regrettably, we are not likely to have much progress until late in 2009, because of the administration's obstruction to date.

I'll come back to this point, but let me first introduce myself and my organization, the National Security Archive at George Washington University. We are an independent research institute and journalism center founded by journalists and historians in 1985. We receive no government funding. We have filed more than 35,000 Freedom of Information Act and declassification review requests over 23 years, and in April 2000 won the George Polk Award for "piercing self-serving veils of government secrecy." Over the past six years, we have carried out seven government-wide audits of agency FOIA performance that generated national headlines and directly changed agency behavior on backlogs, tracking, Web site structure and content, and communication with requesters. Detailed reports on each of these audits are posted on the Archive's Web site at http://www.gwu.edu/~nsarchiv/nsa/foia/audits.htm.

We were the only outside organization cited in the Attorney General's 2007 report to the President on FOIA improvement, and the metric we developed of asking agencies for their "10 oldest requests" has now been adopted by many federal agencies in their improvement plans to help identify backlogs. Multiple committees of the Congress, including this distinguished panel, have requested our formal testimony based on our audit experiences, and the Open Government Act of 2007 included a series of reforms and new requirements for agency reporting that were based on our audit findings. We have also become a leader of the international movement for freedom of information, and assisted in drafting and campaigning for FOI laws in more than 40 countries, many of which feature ombudsman offices or information commissioners whose experiences offer some lessons for today's hearing on OGIS.

The provision of the OPEN Government Act of 2007 that is the subject of today's hearing has the distinction of having been signed into law by President Bush in December 2007, only to be rejected by the President's staff almost before the ink was dry on the law. In January 2008, the administration's proposed budget shifted the responsibility for the Office of Government Information Services (OGIS) away from Congress's designated sponsor, the National Archives and Records Administration, and over to the Department of Justice. I do not have to belabor for this Subcommittee the inherent conflict of interest in giving FOIA dispute resolution responsibilities to the very department that defends federal agencies in court against FOIA requesters. This retrenchment flew in the face of the direct recommendations for the Office from the requester community, the clear intent of the distinguished co-sponsors of the legislation from both parties, and the overwhelming – indeed, unanimous – approval of the Congress for OGIS to reside at the National Archives. Thankfully, the Congress has already indicated that it will appropriate one million dollars for the Office and has specified that the Office will remain at the National Archives.

The amount and timing of this appropriation will determine some of the structural questions about OGIS that we are addressing in this hearing. Since the budget with this new appropriation is not likely to be enacted until March 2009, only then can the National Archives begin the formal hiring process for a director of the new Office. The new director would not likely be in place until the early summer of 2009, and would require some months to complete the staffing of the Office – probably a maximum of six people given the overall budget level. Then the Office will need to produce

regulations and guidelines for its operations, all of which means that a fully functioning OGIS is not likely before the end of 2009. In other words, nearly two years will have elapsed between Congress's mandate and the actual beginning of Freedom of Information mediation and dispute resolution.

That delay and the administration's attempt at obstruction make even more essential continuing Congressional oversight of the proposed Office. This hearing already has encouraged the National Archives to reach out to stakeholders such as my own organization and begin the dialogue about the initial challenge of defining the OGIS Director's job description and desired qualifications. I applaud the National Archives' initiative. A follow-up hearing at this time next year will give the new Director the opportunity for public dialogue with stakeholders and the Congress about the structure and functioning of the Office, as well as providing an impetus for the Office's planning and implementation process.

As we think about how to structure OGIS to ensure its success, there is a great deal of experience that we can draw on from countries around the world as well as from several American states. For example, Scandinavian countries had freedom of information laws long before the U.S. did (Sweden in 1766 and Finland in 1919), and also invented the concept of the ombudsman, a governmental office designated to receive, investigate and resolve complaints against the government. While Congress considered but did not include an ombudsman in either the original 1966 Freedom of Information Act or in the 1974 amendments that form the core of the law today, this role has been central to many FOI laws enacted subsequently around the world. The most prominent example may be found in the New Zealand Official Information Act of 1982, which specifically empowered the existing public ombudsman to carry out the new law, because of his independence and standing as a respected institution (one of the few at the time in the country). A number of American states over the years have adopted similar enforcement or implementation mechanisms for state-level freedom of information statutes, with varying degrees of advisory or binding legal powers, some in the form of information commissions (such as Connecticut) and others housed in the state attorney-general's office (as in Texas).

Strongly influenced by the Scandinavian model, the global wave of FOI laws since the end of the Cold War in 1989 have almost all featured

information commissioners or ombuds officials in core implementation and monitoring roles, starting with the Hungarian law of 1992, which combined a FOI and Privacy ombuds function in the same office. The Mexican access law, which over the past six years arguably has been implemented more effectively than any other FOI law in history, including our own, depends for its success on the information commission (known as IFAI, its Spanish acronym) that goes well beyond ombuds functions to those of a quasi-judicial tribunal as well as information disseminator and public educator. Information commissioners are now so numerous around the world that their association's semi-annual conference has become a major event not only for government officials but also for NGOs, policy analysts, and journalists (for news from the most recent conference, see http://www.freedominfo.org/news/20071212.htm).

Each of the international as well as state-level experiences with information commissioners and similar ombuds offices has been different, depending on the specific political circumstances, bureaucratic cultures, governmental structures, and constituent demands. But there are some common lessons from all these experiences that I believe do apply to the structure and function of OGIS.

It is instructive to look, for example, at the single model that most directly parallels the statutory language that Congress approved for OGIS – the New York approach with an advisory body that renders non-binding opinion in disputes over access to state-held information. The New York Committee on Open Government (www.dos.state.ny.us/coog/) has only four full-time employees and an annual budget of $350,000 or so (as of 2006), and does not have the power to enforce its opinions or even to go to court, merely to report and mediate. Yet this New York office, headed for many years by Robert Freeman, has become so well-respected that when disputes do end up in court, judges cite the office's opinions as the key legal authority, and state agencies by and large take the office's advice, while requesters get relatively rapid responses. The New York office has created a body of administrative opinions available online for requesters and officials to consult, thus heading off disputes before they can fester or lead to litigation. There are real lessons here for OGIS. Legitimacy and effectiveness in FOI dispute resolution do not depend on having binding legal power, but rather increase over time when the office demonstrates leadership, expertise, and transparency in its own process, and when it produces constructive solutions

that help both requesters and the government to improve the FOI process on both sides of the exchange.

Leadership:

The very first decision that the government makes about OGIS is likely to be the most important, that is, the appointment of the Director. The National Archives and Records Administration has already reached out to us and other stakeholders about working together on the position description and recruitment process for what will be a senior civil servant position reporting directly to the Archivist of the United States. The model here should be the sterling example of success and leadership in a similar position and structure at the National Archives: the Information Security Oversight Office (ISOO). This very small agency dedicated to oversight of the security classification system has achieved credibility inside and outside government because of the quality of its leadership over several decades (Steven Garfinkel, William Leonard, Jay Bosanko), and the transparency of its own process (annual report to the President, audits as well as training for agencies, frequent meetings with stakeholders). ISOO's leaders have long recognized that they best protect the government's internal interests and real national security secrets by achieving the maximum possible release of information. Similarly, the OGIS Director will need to be sensitive to official interests while recognizing the mandate of the law for the presumption that government information belongs to the public.

The Director of OGIS does not necessarily have to be a lawyer, but he or she does need to be a leader, with the independent standing associated with the Senior Executive Service level of the civil service. The Office should have staff with legal expertise, but the role of the OGIS Director, like the role of the ISOO Director, does not depend upon a law degree. What is necessary is a keen appreciation of government processes combined with the motivation and commitment to open government. For example, one of the most effective information commissioners internationally is Kevin Dunion of Scotland, whose background was in environmental advocacy work and international development aid – each involving the reconciliation of divergent interests – rather than the law or the Scottish bureaucracy. Dunion organized an effective dispute resolution process, issued more than 600 final opinions in the first three years of the Scottish law, and has received judicial endorsement of his major findings. The Scottish experience and that in other states and countries suggests that the Director of OGIS should have dispute

resolution experience or leadership experience that demonstrates that he or she will be able to resolve disputes.

Transparency:

Transparency of the office's process is vital for legitimacy and effectiveness. This means that there should be public criteria for taking a case for dispute resolution services, publication of opinions online, guidance about best and worst practices, and regular (at least annual) reporting to the legislative branch, the Archivist, and the public.

The New York example is again helpful in this respect. The New York Committee on Open Government provides both written and oral advice and opinions, makes them available online, promulgates rules and regulations for the state FOI and Open Meetings laws, and annually reports its observations and recommendations to the Governor and the state legislature, . The New York example also points to the reinforcing role the courts can play in using the office's analysis in their own disposition of cases, the reinforcing role of the agencies in relying on the office's analysis to construct their own best practices, and the reinforcing role of the requester community in appreciating the dispute resolution role played by the office and the net contribution to greater state government openness. This is exactly what Congress had in mind for OGIS.

OGIS will have to take full advantage of the new information technologies to meet the transparency challenge. The OGIS Web presence will be essential for fulfillment of this mission, and should include not only all the advisory opinions that OGIS issues (indexed by subject matter and by chronological order), but also Frequently Asked Questions in an interactive format that will allow visitors to create their own pathways through the information and find their own answers. The potential volume of efficient online assistance dwarfs the direct assistance that the office will be able to render. Again, the example of the New York open government office is instructive: In 2007, that four-person staff answered 6,600 telephone inquiries, issued 800 written opinions, and gave 127 presentations – a highly productive year – yet the largest audience for the office's work was online, where 146,000 unique visitors registered more than 2.5 million "hits" to the office's Web site.

Priority Setting to Focus on Systemic Disputes:

Even with the best leadership and exemplary transparency in its operations, the OGIS could still be overwhelmed with the sheer volume of disputes and potential disputes in the U.S. Freedom of Information system. Depending on how we count the requests by veterans and senior citizens for files relating to themselves or their families, Americans file between a million and 20 million information requests every year with the federal government. Tens of thousands of these requests reach the administrative appeals mechanisms inside federal agencies, and hundreds wind up in federal courts. According to National Security Archive audits, some Freedom of Information Act requests have languished with federal agencies for as long as 20 years! The OGIS will have to set priorities and clear criteria for which cases it takes on, and will have to emphasize preventive action that focuses on disputes that affect large groups of requesters and systemic problems. Otherwise, the office will fall into a reactive pattern, and will add a whole new layer of backlog and delay to the already backlogged FOIA process.

Here, one of the other key provisions of the OPEN Government Act of 2007 can bring to bear expertise and additional resources far beyond what will be available to OGIS alone. This key provision mandates that the Government Accountability Office "shall conduct audits of administrative agencies" on FOIA and "issue reports detailing the results of such audits." Previous GAO audits have been enormously helpful both to Congress and the agencies in identifying problems and making suggestions for improvements, many of which also found their way into the OPEN Government Act of 2007. GAO has built a team of information specialists with extensive experience in the FOI and records management processes of both large and small agencies. GAO's expertise and staff resources should provide exactly the investigative capacity that the OGIS can draw on to identify systemic problems and get out in front of the most significant FOI disputes.

While reduced litigation will initially be achieved by resolving those disputes already on track for litigation, fixing the broken FOIA system will require OGIS to identify – with GAO's help – the most common disputes, the most common complaints, and the most frequent bases for litigation. Past litigation provides one guide; another may be found in the administrative appeals that agencies are dealing with; and requester complaints will also give OGIS something of an early warning system. Which agencies are generating more disputes than others? Why? Is this a

function of the agency's administrative process, bureaucratic culture, or the nature of the requester audience? Are there examples of best practices among the federal agencies where litigation rates are low, requesters are satisfied, backlogs are limited, and disclosure rates high? How can other agencies replicate these best practices?

There is an issue with regard to agencies such as the Departments of Veterans Affairs and Health and Human Services that primarily handle first person requests for personal or family information. These privacy information cases are such an enormous universe (tens of millions) that mediating them could overwhelm OGIS. On the other hand, this information exchange involves so many citizens, and is such a hallmark of the government-citizen interaction, that to ignore the problems that arise here would diminish the legitimacy of the OGIS. But the way for OGIS to deal with this problem of scale is to establish a preventive approach, looking for the most common disputes and offering guidance on those, rather than becoming the office of last resort for a veteran's family trying to find her service records and benefit eligibility.

For the purposes of this hearing on OGIS, the OPEN Government Act of 2007 has several provisions beyond the specific OGIS language that we should take into account. Extremely important are the new reporting requirements for agency annual reports, which should dramatically improve our ability to spot problems and anomalies, and give both GAO and the OGIS better metrics for identifying both best and worst practices. The new reporting information will become available with the February 2009 deadline for agency annual reports, and thus should inform the priority-setting process we are recommending for the OGIS.

Also important is the statutory ratification of the new Chief FOIA Officer and FOIA Public Liaison structures that were the one significant reform in President Bush's 2005 executive order on FOIA. The National Security Archive's audit in March 2008 did find some measurable improvement in customer service from this change, even though the backlog problem did not improve. While there plainly needs to be some relationship between the activities of OGIS and the individual agency Chief FOIA officers, there also must be independence between them. OGIS must be able to remain independent in order to properly act as a mediator for dispute resolution. An advisory council of Chief FOIA Officers would create both the appearance and the reality of a conflict for OGIS.

Similarly, the Chief FOIA Officers at many agencies are high level officials who outrank the OGIS Director and have independent duties to represent their agency's best interests. They are not properly subordinate to OGIS. The statute requires the Chief FOIA Officers to report not only to the head of their agencies, but also to their agency's chief legal officer, and to the Attorney General. In effect, the statute does leave a significant FOIA implementation and guidance role for the Justice Department and its long-standing Office of Information Policy (OIP), which should continue its current practice of cumulating the agency annual reports and improvement plans, issuing legal and administrative guidance to agencies, and publishing the FOIAPost and the annual compilation of caselaw.

Despite the conflicts of interest, both structures – OGIS and the Chief FOIA Officers – were established by Congress to make the FOIA system better serve the public. Accordingly, there should be a liaison and coordinating relationship between the two. As OGIS develops recommendations and findings, those should be communicated to the agencies through the Chief FOIA Officers. The Chief FOIA Officers also need to be closely involved in the dispute resolution processes, especially where GAO and OGIS find systemic problems that require changing agency practices. In resolving individual complaints, the statute is clear that the FOIA Public Liaisons have the primary responsibility, and as OGIS begins to operate, this specifically means that the Liaisons are charged with applying the OGIS guidance to the individual cases.

None of this will be easy, as you know, Mr. Chairman. Every bureaucracy in world history has utilized secrecy as a core tool of its power. The iron laws of turf protection, embarrassment avoidance, and controlling the spin all mean that freedom of information is a constant struggle. But Congressional attention like this hearing today really works, providing decision-forcing deadlines, encouraging wider public dialogue, clarifying both official and stakeholder positions. Again, I thank you for your leadership on this issue, and I welcome your further questions.

Disclosure under House Rule XI clause 2(g)(4):

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