

TESTIMONY OF MIRIAM NISBET
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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
BEFORE THE SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND
NATIONAL ARCHIVES
OF THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
ON
“ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT:
CURRENT TRENDS”

MARCH 18, 2010

Good Afternoon, Mr. Chairman, Ranking Member McHenry and members of the Subcommittee. I am Miriam Nisbet, Director of the Office of Government Information Services at the National Archives and Records Administration.

Thank you for the opportunity to appear before you today to tell you more about the Office of Government Information Services. I am especially happy that you called this hearing today, during Sunshine Week. We are honored to be a part of a government-wide effort to improve the administration of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. As you know, our office was created through the OPEN Government Act of 2007 (P.L. 110-175) and we opened our doors just six months ago, in September 2009. Since then, we have been working to fulfill our statutory mandates. One is to review Federal agencies’ FOIA policies, procedures and compliance, so that we may make policy recommendations to Congress and the President. The second mandate is to offer mediation services to resolve FOIA disputes. In addition, we have

been serving as a FOIA ombudsman (a term coined by Senators Leahy and Cornyn, original sponsors of the legislation creating OGIS) soliciting assistance from Federal agencies and the public to improve the FOIA process generally.

The right of the public to access information from its government is fundamental. FOIA is a strong mechanism that allows citizens to exercise that right and, in the more than 40 years since FOIA was enacted, Congress has consistently worked to make it stronger. We hope that the Office of Government Information Services, or OGIS, will become an instrumental component of FOIA's strengthening process. We are a somewhat small part, with a staff of six to reach across the entire executive branch. We hope that we can grow our capabilities within the next year within existing resources to better serve both the general public and the Federal agencies that use us.

The United States government received more than 600,000 FOIA requests in 2008; only 1.5% of those were appealed and only .05% of the total requests were litigated — by those measures, the law works reasonably well. But the costs of those 321 lawsuits — for the requesters, for the agencies, for the courts and passed onto the public — are significant. And any person who requests information from our government and cannot receive a response in a reasonable amount of time — or who is improperly denied those records and feels that bringing a lawsuit against the government is the only recourse -- is not being served by FOIA in the way Congress intended. OGIS has been working closely with the Office of Information Policy at the Justice Department as well as with other Federal agencies and FOIA requesters and advocates to identify FOIA's shortcomings and to develop solutions to help FOIA work more effectively and efficiently. For

example, our experience confirms that simple communication between a FOIA requester and an agency FOIA professional can go a long way in avoiding frustration and preventing disputes at an early stage or even before they arise.

To enhance communication and provide mediation services, we are taking five different paths, including working with agencies' FOIA Public Liaisons whose role it is to resolve disputes; developing a pool of trained mediators to draw on to formally mediate disputes; informally mediating disputes using OGIS staff; exploring whether online dispute resolution may be viable; and using existing alternative dispute resolution programs, or ADR, within agencies to begin handling FOIA disputes.

The ADR and FOIA professionals at the Federal Energy Regulatory Commission (FERC) volunteered to collaborate with us to develop dispute resolution skills training for FOIA Public Liaisons and officers within the agencies. Our first offering of this course at FERC, co-hosted with the Justice Department, is set for next Tuesday, March 23, with space for 30 FOIA professionals. Within a few hours of announcing the training, we had received more than 60 RSVP requests. Such a demonstration of interest underscores the need to provide specialized training on dispute resolution to the "front line" agency individuals who are responsible for carrying out this important law. We already are trying to schedule additional dates to accommodate the demand and to reach as many FOIA professionals as possible. This is because we see that FOIA Public Liaisons in their new statutorily enhanced role can be the most effective way to prevent disputes, to remove obstacles to access and to provide good FOIA customer service.

OGIS also has met with representatives from several agencies, including the Departments of Defense, the Interior, and Veterans Affairs, which, like FERC, have volunteered to serve as pilots in extending their existing mediation and dispute resolution programs to include assisting with FOIA disputes. OGIS is also working to develop a pool of trained mediators from inside and outside of government to formally mediate cases as needed.

As we work to create these formal mediation programs, OGIS has been providing informal mediation to resolve the disputes brought to us. In the last quarter of 2009, we opened 30 cases and have resolved all but six of them as of March 12. In January 2010 alone, we opened 31 cases and have added another 49 cases since, totaling 80 as of March 12. We have resolved 60 of the 2010 cases thus far. We expect this pattern to continue and our caseload to grow. In terms of the types of cases we are seeing, many of them involve requesters who are experiencing delays in the process with the agencies. This is not a new problem – indeed, it has persisted since the early days of the FOIA -- and is one that agencies are working hard to remedy. The Chief FOIA Officers have just submitted their Chief FOIA Officer Reports to the Attorney General. But as the agencies work to reduce their backlogs and get caught up, their FOIA professionals can help avoid disputes by keeping the lines of communication open with the requesters. The training we have developed with FERC will hopefully encourage open dialogue and reduce the need for OGIS to get involved to help requesters who simply want to determine how and why their request or appeal is stalled.

We also have seen many cases in which documents were denied in whole or in part. In some instances, after hearing from us, agencies have voluntarily re-reviewed the responses and found that more information could be released without causing harm to the government or that more records may exist than were initially provided. In other cases, the agency has held to its position, but at least provided the requester with more of a rationale for why the agency could not make the release. In all of the cases we have resolved, we have been able to give the requester the answers he or she previously was unable to obtain from the agencies — even if it is not always the solution the requester was hoping to reach.

The category of cases OGIS has seen most, however, has to do with basic requests for information. Often, FOIA requesters do not know where to go to find the information they need to make a FOIA request. They may not know how to draft the request, or where to send it, or what types of information they should expect to be released. They may not be sure who within an agency would be the best point of contact to answer their questions. Just as there is an important education component for FOIA professionals in the agencies — DOJ has been providing substantial training for nearly 30 years — there is a need to educate the public about FOIA as well. We envision OGIS' Web site as a resource and tool to provide that information and we are developing it for that purpose. We intend to offer step-by-step aid to requesters throughout the process so they can help themselves. We also plan to document good agency FOIA practices and provide basic tips to both agencies and requesters. And as an interface between the public and the government, OGIS plans to make the site as interactive as possible, to solicit questions, comments and suggestions from anyone. To that end, we are conducting a

feasibility study to see whether technology can assist in our mission, through online dispute resolution (ODR) such as is used every day by commercial entities.

Along with the mediation component of the office, OGIS is also reviewing agency FOIA policy, procedures and practice to identify areas of the law that may need attention, to fulfill the second prong of the office's mission. We plan to provide Congress and the President with recommendations for those changes at the end of the fiscal year.

To determine agencies' strengths and weaknesses with respect to FOIA, OGIS will review the agencies' Annual FOIA Reports as well as the new Chief FOIA Officers' Reports, which are both filed with the Justice Department. We also will continue to rely on the insights and assessments of the requester community, which, as this Subcommittee knows, are indispensable in getting a complete picture of access to government information. As directed by the law, we will report on agencies' compliance with FOIA. In that regard, I can say now that we already are seeing much greater attention throughout the agencies to the importance of improving FOIA performance, as a result of the President's memoranda on openness and FOIA, the Attorney General's efforts, and OMB's Open Government Directive. OGIS has been pleased to be part of the collaborative inter-agency work on Federal agencies' Open Government Plans. The criteria for those Plans include strengthening the focus on FOIA and increasing agencies' commitments to transparency and public access.

Finally, as you know, many people, including the Congress, have referred to OGIS as the "FOIA Ombudsman," though this is not a term used in the statute. As an impartial office devoted to

FOIA, we have embraced this informal role as well as acting as a mediator (assuming that a FOIA requester has not already decided to go to court) and as a source of information. OGIS has engaged in regular outreach to members of the public through presentations, informal meetings, press briefings, and through its Web site. We have reached out in equal part to members of the Federal government community. OGIS has met with agency FOIA and legal staffs to brief them on the office's activities and goals, staff members have provided training and presentations to FOIA professionals on OGIS's role, and the office is constantly looking for input from those individuals to find the best ways to serve them.

There is no question but that there is a role for the Office of Government Information Services: to assist Federal agencies and members of the public to resolve disputes, to learn where improvement can be made and generally to better navigate the FOIA process. There is a lot of work ahead of us yet, but in six short months, agencies and the public have expressed a deep appreciation for the services we provide. With all of this setting the stage in the office's early days, we look forward to becoming instrumental in making FOIA as strong and effective a tool in public oversight as Congress intended.