

**Testimony of Rick Blum
On Behalf of the
Sunshine in Government Initiative**

**Before the
Oversight and Government Reform Committee
Subcommittee on Information Policy, Census and National Archives**

**On the Office of Government Information Services,
National Archives and Records Administration**

September 17, 2008

Mr. Chairman,

I am Rick Blum, coordinator of the Sunshine in Government Initiative, a coalition of nine major media associations formed in 2005 to promote policies that ensure an accessible, accountable and open government.

Our coalition strongly supported the creation of the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA) when Congress considered reforms to strengthen the way agencies implement the Freedom of Information Act (FOIA). We view it as one of the key provisions in the OPEN Government Act (P.L. 110-175). OGIS can help make FOIA work more effectively for citizens and the media.

Mr. Chairman, we applaud you for holding this hearing to emphasize the importance of this new Office at Archives. Congressional oversight of its new functions is critical to ensure that OGIS is implemented in the first place and implemented in the way that Congress intended. We believe this independent office can help resolve disputes faster, strengthen understanding of FOIA and increase public trust in the FOIA system.

FOIA helps reveal important stories

FOIA is an essential tool for citizens, not just the media, to inform the public about government activities and other events that shape their lives. (It should be noted this is not just a "media issue." Agency statistics show media requesters account for just six percent of FOIA requests.) For instance:

- Bill Dedman, a reporter for MSNBC, used FOIA to discover that equipment designed to allow injured firefighters to be located in a burning building did not work well when exposed to high heat and moisture, two conditions firefighters are likely to face.
- Christian Lowe, a reporter covering the military, used FOIA to reveal the Army was shipping body armor to soldiers in Iraq despite failing ballistics tests. Faced with imminent publication of the story, the Army recalled 5,277 vests.

These stories illustrate powerfully why FOIA is so important.

OGIS can help resolve disputes without litigation

Oftentimes the media and citizens run into roadblocks with government agencies where there is no alternative but to go to court. OGIS will provide another, much-needed avenue to resolve a FOIA request.

Let me give you an example.

Mark Schleifstein, a reporter in New Orleans, is still waiting more than three years after filing a FOIA request with the Environmental Protection Agency (EPA) for information about chemicals spilled into New Orleans floodwaters following Hurricane Katrina. Mark reports that congressional investigations have uncovered some relevant information, but his FOIA request still has been unfulfilled.

Mark's request is a good example of the impact an ombudsman can have on FOIA requests. Mark made his request knowing that reports of chemical spills are initially reported to the National Response Center. He found some Katrina related spills, but knew enough to know he wasn't seeing a complete picture. Interested in helping his readers protect themselves against the chemicals they faced upon returning home, Mark filed a FOIA request to determine which chemicals were likely lurking in specific neighborhoods.

As the weeks and months passed with no response, the relevance for Mark and his readers faded. Long after evacuees needed immediate answers, the EPA responded to Mark by referring him to the National Response Center website, the same website Mark had examined to focus his FOIA request. Mark explained this to EPA in early 2006.

Mr. Chairman, at this point an ombudsman would recognize that fulfilling this request could broadly inform the public, and that the agency has provided no meaningful response. Mark has been busy covering the hurricane season and efforts to reconstruct the levee system. Mark told me last week that he is still waiting to hear back from EPA.

State-level ombudsmen are already helping to make freedom-of-information laws work better. Their intervention has helped citizens dislodge records revealing criminal activities among those who worked in Chicago schools, misuse of municipal cell phones by employees who called places like the Victoria's Secret store in Puerto Rico, and a private foundation in Florida created as a "slush fund" for developers and shut down once disclosed. The experience of many states has shown ombudsmen can be effective in making freedom-of-information laws work better.

Recommendations

We have three major recommendations with respect to the implementation of OGIS.

1. OGIS should be led by a senior executive reporting directly to the Archivist.
2. NARA should imbue OGIS with the stature, independence and reputation for fairness that the Office will need to be effective.
3. OGIS should quickly ramp up its mediation program.

Please allow me to briefly discuss background on OGIS and explain each recommendation.

Congress Placed OGIS at National Archives and Reaffirmed this Policy this Year

The 2009 Administration budget proposed to eliminate the OGIS entirely and shift its functions back to the Justice Department.¹ After the Sunshine in Government Initiative found this one-paragraph provision placed deep in the budget, we explained quickly and clearly our position: In order for OGIS to function effectively, it was specifically placed in Archives, which has a strong record of openness, and is separate from the government litigator who defends FOIA suits.

Mr. Chairman, the last thing that those who championed the FOIA reforms in Congress wanted was for Justice to be both the federal government's lawyer and independent mediator. The conflict of interest is inherent and unavoidable. We applaud appropriators in both the House of Representatives and Senate who rejected this proposal and provided \$1 million in fiscal year 2009, specifically for the National Archives to get OGIS started, and we are pleased this Committee cares enough to hold today's hearing. We hope Congress can quickly complete work on the 2009 budget so OGIS can get serious about its work.

Guiding Principles: Independence, Fairness and the Presumption of Disclosure

To help reduce litigation and resolve disputes for requesters who cannot afford access to the courts, the Office of Government Information Services should be guided by a mission devoted to helping the public understand and use FOIA. The Office should strive to strengthen public trust in the FOIA process and promote the presumption of disclosure. OGIS should have a reputation with requesters and agencies alike as an independent authority that helps resolve disputes in a fair and consistent manner.

Recommendation One:

OGIS should be led by a senior executive reporting directly to the Archivist.

We strongly urge NARA to establish OGIS reporting directly to the Archivist of the United States. Much like the existing Information Security Oversight Office, whose director currently reports directly to the Archivist, OGIS must be taken seriously by other federal agencies for it to succeed.

It also follows that the person serving as director of this new office will shape the program and its fate. The OGIS Director should be a position within the Senior Executive Service.

Finally, OGIS should be independent of the Archive's own agency FOIA operations. Neither should it become an office of lawyers, which I will discuss in a moment. It would therefore be inappropriate for it to fall within the general counsel's office.

Recommendation Two:

Leading OGIS will require management, legal and mediation experience.

The qualities of the director will no doubt shape this office. The Office should not become a law firm. It is vitally important that OGIS and its staff speak "Main Street" so the public can find help and better understand how FOIA operates. In addition, legal training will be important in

¹ "Appendix: Budget of the United States Government, Fiscal Year 2009," Executive Office of the President of the United States, p. 209. Available at www.budget.gov/budget.

interpreting case law and ensuring mediation decisions are legally sound. The OGIS director and deputy director will need the right mix of management, legal, mediation and policy skills to be effective in carrying out the Office's mandate as set forth in the OPEN Government Act.

Mediation will be a key function of this office. The ideal candidate to lead OGIS should have experience leading mediation services. As District of Columbia Circuit Appeals Court Judge David Tatel noted as recently as last week, “[a]lmost everyone who really wants their documents goes to court.”² Unfortunately, there are plenty of requesters who really want their documents but cannot afford to hire an attorney to press their FOIA cases.

This is where OGIS comes in. Since mediation will be such a visible and significant function for this office, the OGIS Director should have extensive experience providing mediation services, particularly in a federal environment.

While legal and mediation experience are critical, the director should also be able to operate OGIS in a "non-lawyerly" manner. (Alternatively, a director can be successful in the position without formal legal training if the deputy director or legal counsel within OGIS is dedicated to providing OGIS with legal advice.) OGIS should be able to independently assess arguments from the agencies, including the Justice Department, while providing a service to resolve disputes that is accessible for the average requester to participate in without hiring an attorney.

Other factors to consider when hiring the director include a commitment to open and accountable government, familiarity with the Freedom of Information Act and experience with agency implementation of FOIA. In our view, litigation experience is not necessary for this position.

**Recommendation Three:
OGIS should focus early on ramping up its mediation services.**

A key challenge will be for this office to focus its formal mediation services narrowly on a manageable caseload. OGIS should avoid creating another step in the FOIA process where requests can bottle up backlogged and unaddressed. OGIS should not attempt to accept every invitation to mediate a request if such a goal creates another delay or backlog stalling FOIA requests.

OGIS should involve the public in developing clear, explicit criteria for selecting cases to mediate. OGIS should emphasize giving priority to requests intended to disseminate information to the public. Similarly, OGIS should prioritize cases involving disputes likely to be encountered by future requesters. To maximize limited resources, OGIS should focus mediation efforts on requests from the public, not from agencies or lawmakers.

The Office should bring mediation services to Main Street's everyday residents by making the system friendly so requesters do not have to hire legal representation. Further, the Office should use electronic communications to provide mediation services, accept mediation requests and post written advisory opinions online. A publicly available body of administrative law could help

² "D.C. Circuit hears author's Plea for attorney fees in FOIA case," Reporters Committee for Freedom of the Press, September 10, 2008, available at <http://www.rcfp.org/newsitems/index.php?i=6979>; accessed September 11, 2008.

agencies and requestors alike self-resolve disputes, educate the public about FOIA operations, reduce requests for mediation and improve agency decisions.³

OGIS can also build on models and lessons in federal and state governments. Many states have created ombudsman or commission positions to mediate disputes.⁴ NARA's own Information Security Oversight Office (ISOO), which manages the federal government's information security programs, has a strong reputation both inside and outside government as an even-handed manager of the classification system. It, and the effective but small ISCAP, could be models for designing the formal dispute resolution services.

Conclusion

OGIS will require support to make it work well. OGIS will require the support of Congress through dedicated resources and active oversight, of which this hearing is an important part. It will require the Archivist's commitment to OGIS' independence so the Office can build a reputation for fairness to both requestors and agencies. And as the budget proposal shows, we at the Sunshine in Government Initiative along with other groups will need to be vigilant to ensure that OGIS's important mission – of making FOIA work more effectively – is achieved.

Mr. Chairman, thank you for the opportunity to testify at today's hearing, and I look forward to answering any of the Committee's questions.

Disclosure Pursuant to House Rule XI, Clause 2(g)(4)

Pursuant to House Rule XI, I hereby affirm to the best of my knowledge that neither the Reporters Committee for Freedom of the Press, a nonprofit organization based on Arlington, Virginia which serves as host to the Sunshine in Government Initiative, nor the Sunshine in Government Initiative coalition, has received federal grant monies in the current or previous two fiscal years.

³ At least two models exist within the federal government for making advisory opinions publicly available. The National Mediation Board's Office of Alternative Dispute Resolution Services helps resolve disputes for airlines and railroads. That Office maintains an online database of its arbitration decisions. The database helps mediators create consistent, predictable decisions, and makes that knowledge available to the public. ("Online system takes a quick route to resolving disputes," Government Computing News, 2/18/2008, http://www.gcn.com/print/27_4/45819-1.html)

Second, the Office of Government Ethics, an independent agency within the executive branch that oversees federal conflict-of-interest laws, posts its advisory memoranda to federal agencies on its website (www.usoge.gov). Publicly available versions of these memoranda redact the agency that requested the rules interpretation and identifying information about individuals mentioned so agencies can obtain candid advice on handling a particular situation.

Making these advisory opinions public allows the public and others within government to benefit from OGE's interpretations and advice.

⁴ See Harry Hammitt, "Mediation Without Litigation," *FOI Reports*, Vol. 2, No. 3, National Freedom of Information Coalition. Available at http://www.nfoic.org/resources/reports/hammitt_mediation_without_litigation.html, accessed 2/29/08.

**Attachment:
Recommendations for Ramping Up
the Office of Government Information Services
at the National Archives and Records Administration:
A Requester Perspective**

The Sunshine in Government Initiative

April 2008

Before Congress created the Office of Government Information Services (OGIS) within the National Archives and Records Administration, the federal government lacked an independent entity to help the public resolve disputes that arise in the government's implementation of the Freedom of Information Act (FOIA). The Sunshine in Government Initiative believes this independent office could help resolve disputes faster, strengthen understanding of FOIA and increase public trust in the FOIA system.

In our view, the Office of Government Information Services will perform a wonderful service to the public and government alike if it can fill the gap between an agency's denial of a FOIA request and litigation. OGIS will not be successful if it over-promises or tries to accomplish too much. The Office could quickly become overrun by requests for mediation. The last thing the public needs is another layer of delay between a requester's initial request and the government's final response.

The Openness Promotes Effectiveness in our National Government Act of 2007 (P.L. 110-175) mandates that OGIS provide mediation services and public analyses of the federal government's implementation of FOIA. Currently the largest gap for OGIS to fill is the lack of independent mediation services. OGIS will most affect the public's FOIA experience through its mediation, so for OGIS to be effective early it will be important to have a functioning and effective mediation program in place as soon as possible. Thus, the following recommendations will focus primarily on the mediation function.

**Fairness in Promoting a Presumption of Openness:
Creating the OGIS Mission and Principles**

To be effective, it is important for this new office to clearly identify its mission, principles and goals. The Office should be guided by both the presumption of openness embodied in the law and the fair implementation of the law in the spirit and letter in which it is intended. These principles, which the office should reaffirm at every opportunity, suggest two tasks.

- a. **Strengthen open government and public trust in the FOIA process as the mission of this Office.** Defining OGIS's mission as strengthening open government and public trust is consistent with the statutory presumption of openness found in FOIA and the mandate for the office established by the OPEN Government Act (P.L. 110-175), the law that created OGIS.
- b. **Cultivate a reputation for fair-mindedness.** OGIS should have a reputation with requesters and agencies alike as an independent authority that helps resolve disputes in a fair and consistent

manner. OGIS should help the federal government ensure that information requiring protection is properly protected and that everything else is publicly available.

Manage the Mediation Caseload: Design an Accessible, Authoritative Voice

A key challenge will be for this office to focus its formal mediation services narrowly on a manageable caseload. OGIS should avoid creating another step in the FOIA process where requests can bottle up backlogged and unaddressed. While state FOI mediators by and large handle the volume of requests for mediation effectively and OGIS should consider several states' experience, at the federal level the volume of requests is much higher.

If OGIS were to guarantee mediation services to all comers, it would be quickly overrun, creating a backlog for OGIS that would further frustrate requestors and undermine the purpose of the office.

On the other hand, OGIS could select a few cases chosen from objective criteria and mediate them well. Other requestors could be helped by technical tools, like a website with troubleshooting questions, similar to those in computer manuals (e.g., "Did you address your request to the proper agency?" "Yes, and I still didn't get an answer." "No, but I will try that now." "Did you include a telephone number where the processor could reach you?") However, selectively responding to a few requests would result in many requestors languishing without the benefit of mediation.

We suggest as an alternative a system for handling mediation requests both informally and through formal advisory opinions as needed, posting previous decisions with extensive plain-English explanations (FAQs) and other creative approaches to provide guidance to both requestors and agencies. This should help narrow OGIS's workload.

- a. **Create criteria for selecting cases to mediate.** OGIS should involve the public in writing clear, explicit criteria for selecting cases to mediate. Some criteria might include:
 1. **Accept requests only from the public, not from agencies or lawmakers, who have other tools available (such as GAO).** Agencies should not be able to request mediation or toll a request pending mediation, which would provide another reason for a delay in processing a request.
 2. **Design a mediation system that is accessible through electronic communications and other tools.** Requesters should not have to hire legal representation to avail themselves of mediation services. Use electronic communications to provide mediation services and accept mediation requests. OGIS mediation services should be available online. Mediation would be accessible to someone living in Washington, DC or Washington state, and mediations could be done quickly and cheaply if based on electronic communications such as email or online submission forms.
 3. **Give priority to requests intended to disseminate information to the public.** Such requests may come from reporters, independent researchers, book authors, historians or neighborhood activists. It follows that the office should not take on cases that also involve Privacy Act requests. Such requests are often handled quickly by the responding agency in the first instance. Thus, any needed assistance would come in the form of

merely directing the requester to the correct office to make the request. This is primarily the responsibility of agencies subject to FOIA. Intervening on these requests is unlikely to help future requesters and wastes OGIS resources. The Office might also choose to de-prioritize mediation requests wherein the FOIA requester is not eligible for fee waivers, which would filter out commercial requesters.

- 4. Give priority to requests involving disputes likely to be encountered by future requesters.** Creating a body of published advisory opinions on disputes that are likely to be encountered by other requesters, and making those opinions available online, will help in several ways. OGIS will help cut down on its workload. Requesters can find these decisions and obtain guidance on situations similar to their own. This could lead to a better understanding of agency decisions. It also has the possibility of potentially improving agency decisions in the first instance.
- b. Effectively respond to as many requests as possible while providing in-depth advisory opinions as needed.** We suggest a two-tier system for responding to mediation requests.
- 1. Informal FOIA requester assistance.** We urge you respond to as many requests as possible through informal responses. Responses may briefly explain the reasonableness of an agency's position, provide advice for a requester on resolving a dispute, or refer a requester to a previous OGIS opinion in a substantially similar case.
 - 2. Provide formal mediation to resolve select cases.** When informal requester assistance does not succeed, human intervention and a more formal review of a case may be required to issue an opinion. Where such resource-intensive review is required, OGIS should give special weight to those requests involving disputes likely to be encountered by future requesters. The Interagency Security Classification Appeals Panel (ISCAP) may be a useful model for such reviews.⁵
- c. Post written advisory opinions online.** OGIS should post all written advisory opinions online in an indexed and easily searched form. A publicly available body of administrative law would help agencies and requestors alike self-resolve disputes, and allow OGIS to easily respond to requestors whose disputes are substantially similar to disputes previously addressed in earlier advisory opinions.

At least two models exist within the federal government for making advisory opinions publicly available. The National Mediation Board's Office of Alternative Dispute Resolution Services helps resolve disputes for airlines and railroads. The Office maintains an online database of its arbitration decisions. The database helps mediators create consistent, predictable decisions, and makes that knowledge available to the public.⁶ Second, the Office of Government Ethics, an independent agency within the executive branch that oversees federal conflict-of-interest laws, posts its advisory memoranda to federal agencies on its website (www.usoge.gov). Publicly

⁵ ISCAP, which is run out of the National Archives, is a body consisting of classification experts from several agencies who hear appeals of agency responses to requests to declassify documents.

⁶ "Online system takes a quick route to resolving disputes," *Government Computing News*, 2/18/2008, http://www.gcn.com/print/27_4/45819-1.html

available versions of these memoranda redact the agency that requested the rules interpretation and identifying information about individuals mentioned so agencies can obtain candid advice on handling a particular situation.

Making these advisory opinions public allows the public and others within government to benefit from OGE's interpretations and advice. Similarly, publicly posting OGIS opinions could educate the public about FOIA operations. Over time, this educational effect will help reduce requests for mediation and possibly improve agency decisions.

- d. Build on effective models in federal and state governments.** Many states have created ombudsman or commission positions to mediate disputes.⁷ The Archives' own declassification programs may serve as models or at least provide lessons for OGIS's mediation services. In particular, the Information Security Oversight Office (ISOO), which manages the federal government's information security programs, has a strong reputation both inside and outside government as an even-handed manager of the classification system. It, and the effective but small ISCAP, could be models for designing the formal dispute resolution services.
- e. Obtain public input on OGIS activities.** OGIS should consider establishing its own advisory council comprising common requester communities, some state government ombudsmen and possibly even other agency and legislative staffers. The council should be constituted as a FACA-compliant agency so that the public garners greatest benefit from the lessons learned.

Interim Steps

Budget and resource realities will dictate an OGIS that begins with the achievable and grows into the attainable. It is more important for OGIS to do its work deeply and well than to cast its services broadly. Credibility will build resources. Thus, it may be desirable for OGIS to begin its functions within a limited scope of agencies. It might be best, for example, for OGIS to begin this work with five or six agencies chosen from an array of cabinet-level departments and to test its talents before throwing open the doors. If so, it would be best for OGIS to choose its target agencies from a sample of types of agencies that will give it the greatest breadth of experience. It should study request volumes before choosing and try to aim at agencies with histories of poor response records. It also, again, should target for its customer base those requesters who are eligible for fee waivers; the fee waiver can be a proxy for choosing those gathering information for purposes of dissemination.

⁷ See Harry Hammitt, "Mediation Without Litigation," *FOI Reports*, Vol. 2, No. 3, National Freedom of Information Coalition. Available at http://www.nfoic.org/resources/reports/hammitt_mediation_without_litigation.html, accessed 2/29/08.