

APSA Pracademic Fellowship: Office of Government Information Services

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The Office of Government Services is an office at the National Archives and Records Administration (NARA) that serves as the Freedom of Information Act (FOIA) Ombudsman Office for the entire federal executive branch. OGIS is divided into the mediation program and compliance program, and during most of my time at OGIS, the office was staffed with 9 full-time employees. The Mediation Team directly responds to inquiries for assistance from FOIA requesters, or those attempting to file a FOIA request. The number of requests that OGIS receives has steadily increased over time, and during both Fiscal Years 2020 and 2021, the OGIS Mediation Team processed approximately 4200 requests for assistance from requesters and agencies (OGIS NARA 2021)¹. The work of the Compliance Team includes review of agency FOIA policies, procedures and compliance, including highlighting agency best practices. The Compliance Team also reviews and comments on proposed agency FOIA regulation, and conducts individual agency assessments and broader issue assessments, providing recommendations for improvement.

While the responsibilities of the Mediation and Compliance Teams are distinct, they work in conjunction with one another. Specifically, reoccurring difficulties experienced by requesters, or repeated complications with a particular agency that appear in the mediation process can signal to the Compliance Team that examination of a certain agency's practices is necessary. The Director of OGIS also serves as the chair of the FOIA Advisory Committee, a committee comprised of government FOIA officials and non-governmental FOIA experts who develop recommendations to the Archivist of the United States to enhance and improve FOIA administration and government transparency.

During my time at OGIS, most of my direct work was with the Mediation Team, reflecting my interest in FOIA litigation and desire to understand how disagreements between requesters and agencies can eventually lead to legal disputes in federal court. However, I was able to interact regularly with all members of the OGIS staff. My Pracademic Fellowship tenure took place remotely given that during the ongoing COVID-19 pandemic, many federal offices, including OGIS, had transitioned to full-time telework.

OGIS AND THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA), 5 USC. § 552, was initially signed into law in 1966 by President Lyndon B. Johnson (Baron 2021, Wood and Lewis 2017) and has

been amended multiple times, most recently in 2016 with the FOIA Improvement Act. The key manner in which FOIA facilitates government transparency is by allowing the public to request access to records held by federal agencies, unless those records are protected by one of nine FOIA exemptions (Johnson 2021). Although there was a slight decrease in requests during Fiscal Year 2020, followed by an increase of requests during Fiscal Year 2021 (838,164)², public use of the Freedom of Information Act has increased steadily overtime reaching a record high of 877, 964 requests during Fiscal Year 2019(OIP DOJ 2021A).

However, the implementation of FOIA has faced criticism and concern from various segments of the FOIA requester community (legal organizations, transparency advocates, media) and Congress (Alvarez-Jones 2017, Gershman 2016, Stewart and Davis 2016). Complaints include delays in agency response times in acknowledging requests and releasing records, and concerns regarding the excessive use of redactions leading to reduced transparency. Conflict over the implementation of FOIA seemingly reached a zenith under the Trump Administration, where FOIA-based litigation filings in federal court reached record highs (Mehta 2018). While litigation has increased, it is important to note that rates of litigation relative to individual FOIA requests is quite low, often at a rate of less than one percent (OIP DOJ 2021B). However, with the arrival of COVID-19, agencies faced new difficulties in responding to requests as federal offices transitioned to full-time telework, which at times made it difficult to examine hard copy documents, including classified records, or access records held at NARA's Federal Records Centers, all of which closed during the height of the pandemic (Hackman 2022, Jones 2020).

In addition to my direct work with the Mediation Team, I took part in virtual FOIA training meetings and meetings of ombudsman representatives from across the federal executive branch, and was able to learn first-hand of agency challenges related to COVID-19 in terms of delivery of services and interfacing with the public.

INSTITUTIONAL DESIGN AND UNDERSTANDING THE FOIA PROCESS

OGIS was created by the Open Government Act of 2007 and became operational in 2009. A review of the legislative history for OGIS shows that in addition to reviewing and auditing agency FOIA programs, OGIS mediation

services were expected to “alleviate the need for litigation whenever possible³.” The subsequent FOIA Improvement Act of 2016 expanded OGIS’s role by requiring federal agencies to explicitly notify requesters of the ability to seek dispute resolution assistance from OGIS at any stage in the FOIA administrative process (i.e. if an agency is unable to process a request within the statutorily mandated time-frame). During my time at OGIS, requesters would sometimes explicitly state that they were reaching out to OGIS in the hopes of eliminating the need to litigate in federal court, indicating an alignment with that portion of the office’s mission.

OGIS staff would often note that their responsibility during mediation is to ensure that the “FOIA process” is followed properly, and this included ensuring that requesters and agencies both have an accurate understanding of the statutory and regulatory requirements of FOIA. This perspective is akin to court-ordered mediation where the mediator does not advocate for a specific party, but rather takes a “neutral” posture in the dispute (Menkel-Meadow 2015).

One potential concern regarding OGIS’s position as mediator is that OGIS is technically a part of the executive branch, as are the agencies that are involved in the FOIA disputes with requesters. However, OGIS was purposefully placed within the National Archives, an independent agency whose mission includes providing access to Federal records, to promote a position of neutrality. Interestingly, shortly after the passage of the Open Government Act, the Bush II Administration attempted to redirect OGIS funding and responsibilities to the Department of Justice, which oversees FOIA compliance and provides FOIA guidance to federal agencies. However, this attempt at institutional rearrangement was strongly opposed by Senator Patrick Leahy (D-VT), one of the co-sponsors of the Open Government Act, who argued that shifting OGIS responsibilities to the Department of Justice would present a clear conflict of interest given that the Department of Justice is also responsible for defending agencies sued under FOIA⁴.

I saw the benefit and necessity of having an external ombudsman office—detached from any agency’s specific FOIA office—in instances when an OGIS request for assistance involved a request that was referred to, or involved, more than one agency. Specifically, after receiving a FOIA request, an agency will conduct a search and locate certain records that contain equities of other agencies. In those instances, the originating agency will refer those records to the agency with equities either for a consultation and then get back to the requester with a complete response; or ask the agency with equities to provide a direct response to the requester. In some instances, the receiving agency may inform the requester that another agency has the requested records. In such a situation, a neutral entity, separate from the agency FOIA offices directly involved in the dispute, can help disentangle the apparent communication breakdown between and among the requester and involved agencies.

Importantly, advocating for the “FOIA process” can bring frustration from requesters who have experienced difficulties navigating FOIA. In addition to interfacing with the public through mediation, and FOIA Advisory Committee Meetings, OGIS staff periodically met informally with rep-

resentatives from segments of the highly-experienced FOIA requester community (i.e., interest groups, advocacy organizations, scholars). During these gatherings, stakeholders spoke candidly about the obstacles they have encountered as they navigate the federal FOIA process, raising the alarm directly with OGIS about problems they have recently encountered with various agencies, and providing recommendations on how Congress, the Department of Justice, and OGIS should address these concerns.

TRANSPARENCY POLICY AND ACCESSIBILITY

An important and perhaps less visible component of OGIS’s work involves illuminating portions of the FOIA process to requesters. While proactive disclosures of information can significantly ease the administrative burden (Herd and Moynihan 2019) associated with transparency policy for requesters, there will always be instances where direct requests of internal information are required, particularly for sensitive information, which requires that resources are available to assist those seeking information. During my work with OGIS, I observed the wide variety of requesters who sought assistance from OGIS, including lawyers making requests on behalf of clients, former government employees, academics, veterans, and incarcerated individuals, each of whom presumably had varying levels of experience interfacing with FOIA, but all required assistance. While some requesters required assistance further along in the process (i.e., next steps after an agency has reaffirmed an earlier decision not to release requested records), other requesters need assistance in discerning what counts as an agency “record” or how to tailor a FOIA request in the first place. This information required on the “front-end” of the FOIA process is somewhat akin to what Herd and Moynihan (2019) describe as “learning costs,” or the “time and effort expended to learn about the program or service ... and how to gain access” (23). While the concept of administrative burden is often applied to social services, learning costs can also make “entry” into the transparency sphere difficult for various segments of the public. The goal of most transparency policies is to promote open government; however, these policies must ensure that the resources are in place to assist all individuals, and particularly those requesters with less experience, navigate the contours and complexities of transparency procedures.

CONCLUDING THOUGHTS

Going into the OGIS Pracademic Fellowship, my central focus was gaining an understanding of FOIA litigation at an earlier stage in the process (i.e., which disputes are likely to trigger litigation). And working with OGIS provided in-depth insight into the agency-requesters interactions that may be more likely or less likely to turn into a legal dispute in federal court. However, through my daily work with OGIS, I gained an enhanced appreciation for the importance of accessibility of transparency policy. Direct work with OGIS allowed me to observe the visible mechanisms in place that promote transparency policy access, mechanisms that do not necessarily show up in litigation, but are essential to an inclusive and open government.

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Endnotes

1. Fiscal Year 2021 mediation figures provided by the Office of Government Information Services (National Archives and Records Administration).
2. Fiscal Year 2021 FOIA request figures provided by the Office of Information Policy (Department of Justice).
3. US Congress, Senate, Committee on the Judiciary, Open Government Act of 2007: Report (to accompany S. 849) 110th. Congress, 1st sess, 2007. S. Rep. 110-59, 7.
4. “Leahy: FOIA Ombudsman Belongs at Archives, Not DOJ.” Press Release. February 14, 2008. <https://www.leahy.senate.gov/press/leahy-foia-ombudsman-belongs-at-archives-not-doj>.

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