

## TESTIMONY

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National Archives and Records Administration**

**before the Subcommittee on Government Operations,  
House Committee on Oversight and Government Reform**

**February 27, 2015**

Good Morning, Mr. Chairman, Ranking Member Mr. Connolly, and members of the Subcommittee. I am Miriam Nisbet, Founding Director of the Office of Government Information Services at the National Archives and Records Administration. It was my privilege to serve in that position from September 2009, when the Office opened its doors, until the end of November 2014, when I retired. Today I speak as a private citizen who, like you, cares deeply about the right of my fellow Americans and others around the globe to access government information.

Thank you for the opportunity to appear before you today regarding H.R. 653, the FOIA Oversight and Implementation Act of 2015. I want to thank you too for your consideration—so early in this Session—of a bill that would significantly reform and improve the Freedom of Information Act. FOIA is, of course, a vital tool in our country for ensuring accountability and transparency in government. Though many take it for granted that we have such a law—next year will be the 50<sup>th</sup> anniversary of its passage—I commend this Subcommittee for its leadership and determination to make FOIA even more effective.

H.R. 653 proposes a number of wide-ranging revisions to which the other panelists will speak. I want to focus my comments on those portions that pertain to the Office of Government Information Services, usually referred to as OGIS or as the FOIA Ombudsman. Committee Ranking Member Elijah Cummings and Representative Darrell Issa co-sponsored the introduction of this bill and the one passed by the House in the last session. Those gentlemen have stated that among the purposes of this legislation are to strengthen the FOIA Ombudsman's office and increase its independence and to bolster the use of dispute resolution in the FOIA process. I agree that changes to the law are needed if OGIS is to fulfill the vision that Congress had when it created the office.

The OPEN Government Act of 2007 included OGIS as a key reform intended to provide FOIA requestors and Federal agencies with a meaningful alternative to costly litigation. [153 Cong. Rec. S15831](#) (daily ed. Dec. 18, 2007) (Statement of Sen. Leahy). In the five years that OGIS has been a part of the FOIA landscape, the dedicated staff has worked hard to reach out to agencies and to the public to let them know about its services. The staff of seven developed extensive contacts with FOIA operations across the government to carry out its two-pronged statutory mission: providing mediation services to resolve FOIA disputes, and reviewing agencies' FOIA policies, procedures and compliance. By the end of Fiscal Year 2014, the office had assisted requestors and agencies in more than 3,500 FOIA-related instances, ranging from disputes over the application of a FOIA exemption, to helping requestors find the right place to send requests,

to accessing government records maintained in databases or other electronic formats. The office also regularly provides training in dispute resolution skills for agency FOIA professionals. And last year, OGIS was able to add three additional staff members and to begin to carry out more robustly its review of agency compliance.

These are some of the highlights of the office's work and I refer you to the [OGIS Annual Reports](#) for much more information. By any measure, OGIS's achievements and its considerable caseload demonstrate the success of Congress's innovation through the 2007 amendments. Why then does the FOIA bill have more than a dozen provisions—perhaps 18, depending upon how you count—that directly affect OGIS and its responsibilities? I would answer that question by summarizing three areas of reform.

First, the bill would affirm the responsibility of OGIS to review agency FOIA compliance and would solidify the role of OGIS as a key component in the FOIA ecosystem. The Office has worked well and productively with many departments and agencies, but has often encountered resistance as the new kid on the FOIA block.

- The proposed revisions would make clear that Congress expects OGIS not only to review agencies' policies, procedures and compliance, as the law currently states, but also to identify methods that improve compliance, including in specific matters such as timely processing and how agencies assess fees and fee waivers [revision to Subsection (h)(2)]. From early in its existence OGIS has identified ways that agencies can make the FOIA process work better, for example, through publicizing "[OGIS Best Practices](#)" for agencies and for [requesters](#); through its Dispute Resolution Skills training for agencies; and through its [FOIA Ombudsman blog](#) to reach the requester and agency communities and address substantive issues. But the changes would leave no question that Congress intends that OGIS make the results of its compliance review as broadly useful as possible to the agencies reviewed and to the public.
- The Office of Management and Budget (OMB) would consult with OGIS on guidelines for fees and fee waivers [revision to Subsection (a)(4)(A)(i)]. In addition OGIS would consult with the Department of Justice (DOJ) and OMB on agencies' annual FOIA reports, including on reporting and performance guidelines [revisions to Subsection (e)(1) and (e)(5)].
- There would be a statutory relationship between OGIS and the Chief FOIA Officers [new Subsection (j)(2)(F)]. A Chief FOIA Officers Council would be established and co-chaired by OGIS and the Department of Justice's Office of Information Policy [new Subsection (k)]. Chief FOIA Officers already meet with DOJ as a group, but OGIS has not been included in those meetings. OGIS has had access to Chief FOIA Officers only as it has been able to build relationships one by one. Doing it that way has its advantages; nonetheless, a formal structure would be very helpful and efficient in hearing directly and regularly about agency practices.

- OGIS would report to Congress on agency compliance with new requirements for updating FOIA regulations [new Subsection (k)(1)].

Second, the proposed changes would ensure that requesters are told that dispute resolution is an integral part of the FOIA process. Many requesters, and even some agencies, still do not understand or appreciate that the FOIA Public Liaisons have an important responsibility, currently set out in two different provisions of the FOIA, to assist in preventing and resolving disputes. The bill would amend Subsection (a)(6)(A) to require agencies to notify requesters at two stages that the FOIA Public Liaison is available to assist them: when an agency makes an adverse determination (that is, it denies some aspect of a FOIA request) and when an agency sets out its decision on an administrative appeal [revisions to Subsection (a)(6)(A)(i) and (ii)].

Since 2010, Department of Justice FOIA policy tells agencies that when they respond to administrative appeals, they should not only explain the right to seek judicial review, as required by the statute, but they should also advise requesters that OGIS's services are available as an alternative to litigation. But many agencies do not yet follow the policy, nor do they understand that OGIS is a neutral entity that is available to agencies as well as to requesters to assist in resolving disputes and avoiding unnecessary litigation. The bill would amend Subsection (a)(6)(A)(ii) to codify the DOJ policy so that a FOIA requester must be informed directly by an agency that, while the requester has the right to go to court if dissatisfied with the agency's decision, the agency's FOIA Public Liaison and OGIS are available to assist them with dispute resolution services. Additionally, the bill would direct Chief FOIA Officers to include dispute resolution efforts in their compliance reviews [new Subsection (j)(2)] and to direct agencies to set out in their implementing regulations procedures for engaging in dispute resolution and for engaging with OGIS [new Subsection (j)(1)].

Dispute resolution can help to conserve administrative resources and to head off costly and time-consuming lawsuits. Just as importantly, the availability of dispute resolution at all stages of a FOIA request is good customer service. OGIS's customers are the citizens who pay for and own the records of our government and the FOIA professionals who are responding to requests for access. I commend to you a Report and [Recommendation](#) from the Administrative Conference of the United States (ACUS) last year about the critical role that both OGIS and dispute resolution in the agencies' administrative process play in building a better FOIA. ACUS concluded, inter alia, that "[a]ll agencies should take steps to maximize the effectiveness of their FOIA Public Liaisons in fulfilling the dispute resolution function that the Act assigns to Public Liaisons." The Conference also recommended that "all agencies should cooperate fully with OGIS efforts to mediate or otherwise facilitate the resolution of individual FOIA disputes." (Recommendation 2014-1, Adopted on June 5, 2014, at p. 9).

Third, the revisions would guarantee independence as befits an ombudsman. I have heard OGIS variously described as an independent "watchdog" or "overseer." Congress wisely placed OGIS in the National Archives and Records Administration, the only federal agency whose primary mission is to provide access to government information and which does that very well. Nonetheless, as the law currently reads, OGIS is not independent. OGIS is a component of an

Executive Branch agency and it must send its proposed recommendations for policy changes through the intra- and inter-agency review process that all agencies must follow—unless there is a specific exception by law.

I understand that you and your colleagues in the Senate expected to receive unvarnished recommendations for legislative or regulatory change from an independent and impartial ombudsman. If you do want recommendations, reports and testimony that have not had to be reviewed, changed and approved by the very agencies that might be affected, then you should change the statute. Such a change also would accord with the long-established ombudsman model that is followed in the US and in other countries, independence being one of the criteria. One example that comes to mind is the [Ombudsman for the US Citizenship and Immigration Services](#), Department of Homeland Security.

Let me caution that OGIS's firm policy has been to decline to call out publicly agencies that have problems with FOIA implementation or that do not cooperate with OGIS. Being the "FOIA Police" is simply not compatible with being the neutral, impartial mediator who brings parties together voluntarily to resolve their differences. To carry out its mission, OGIS works to engender the trust and confidence of its customers, whether behind the scenes in mediation, or in conducting an agency review, or in public settings as an advocate for a fair FOIA. Still, the authority to report or communicate directly to Congress, as H.R. 653 provides [proposed Subsection (h)(4)(D)], would be an important reform for an office that hears complaints, resolves disputes, reviews compliance—and is expected to speak truth to power.

The United States government receives more than 700,000 FOIA requests each year; less than 2% are appealed and fewer still are litigated. Those figures might tell us the law works reasonably well. But any citizen who requests information from his or her government and cannot receive a response in a reasonable amount of time or who is 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.

The Office of Government Information Services, the FOIA Ombudsman, has demonstrated that it can be a strong tool to make the Freedom of Information Act work more smoothly and to move us away from such an adversarial environment. I am confident that OGIS can take on the additional responsibilities envisioned by H.R. 653 to serve both the general public and the Federal agencies even more effectively.

Thank you for the opportunity to testify; I look forward to answering any questions that you may have.

## **Miriam McIntire Nisbet**

In September 2009, Miriam Nisbet became the first Director of the Office of Government Information Services (OGIS) at the US National Archives and Records Administration. OGIS is the Freedom of Information Act ombudsman office created by the 2007 FOIA Amendments, charged with providing mediation services to resolve disputes between FOIA requesters and the Executive Branch agencies and with improving the US government's administration of the FOIA. In addition to establishing OGIS, Miriam represented the National Archives at the Administrative Conference of the United States; the International Council on Archives; the International Federation of Library Associations and Institutions; the US National Commission for UNESCO; and the International Conference of Information Commissioners. She was chair of the FOIA Advisory Committee, established by NARA in 2014 as one of the US government's commitments under its National Action Plan for the Open Government Partnership. Miriam retired from NARA in November 2014.

Miriam previously served for two years at the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris as Director of the Information Society Division, in UNESCO's Communication and Information Sector. From 1999 to 2007, Miriam was Legislative Counsel for the American Library Association in ALA's Washington Office, working primarily on copyright and other intellectual property issues raised by the digital information environment. She was Special Counsel for Information Policy, National Archives and Records Administration, from 1994 to 1999, where she advised the Archivist of the US, other NARA officials and federal agency officials on legal issues concerning the Federal Records Act, Presidential Records Act, Freedom of Information Act, Privacy Act, Presidential Recordings and Materials Preservation Act, John F. Kennedy Assassination Records Collection Act, and the Executive Order on national security information.

Prior to joining the National Archives, Miriam had served since 1982 as the Deputy Director of the Office of Information and Privacy, US Department of Justice. In that position, Miriam was responsible for final action on initial requests (approximately 800 per year) under the Freedom of Information Act and Privacy Act for records of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Policy Development and Public Affairs. She also supervised and conducted defense of numerous lawsuits, on behalf of various US government agencies, under the access statutes in federal district court and courts of appeals and provided training and guidance on FOIA interpretation, policy and administration to attorneys and paralegals government wide.

Miriam received a BA degree from the University of North Carolina at Chapel Hill and a JD degree from the University's School of Law. She is a member of the Bars of the District of Columbia and North Carolina and was elected in 2005 to the American Law Institute. She taught as an Adjunct Lecturer at the University of Maryland's College of Information Studies during the academic year 2013-14. Miriam received the Sunshine in Government Award in 2014 and the American Society of Access Professionals President's Award for Distinguished Public Service in 2013.