

February 24, 2017

Alina M. Semo, Director  
Office of Government Information Services  
National Archives and Records Administration  
800 N. Capitol Street, N.W., Room 795

Re: Comments on proposed implementing guidance and procedures for OGIS (RIN 3095-AB88)

Dear Ms. Semo:

On behalf of the undersigned organizations concerned with government openness and accountability, we are writing to provide comments on the [proposed rule](#) on the implementing guidance and procedures issued by the Office of Government Information Services (OGIS). We appreciate the efforts by OGIS to issue regulations explaining OGIS's statutory role in the FOIA process and setting out procedures for one of OGIS's primary functions - assisting agencies and FOIA requesters with efforts to resolve FOIA disputes.

We have concerns, nonetheless, that certain provisions of the guidance would impose restrictive confidentiality requirements and should be revised to ensure the maximum disclosure of information developed as part of OGIS's dispute resolution process. Accordingly, we submit the following comments that are designed to ensure the OGIS regulations uphold requesters' rights under the FOIA statute, and do not place restrictive confidentiality requirements on requesters who chose to use OGIS's mediation and dispute resolution services.

We also note that these proposed regulations only cover General Information and Dispute Resolution Services (subparts A and B), but not Reviews of Agency FOIA Policies, Procedures and Compliance (subpart C) nor Advisory Opinions (subpart D). We consider these OGIS functions to be significant, congressionally directed, and integral to the role of the Office, and we look forward to the development of regulations covering these functions as well.

## **A. Comments**

### **Subpart B – Dispute Resolution Services**

#### **§ 1291.10 Dispute resolution services, policies, and responsibilities**

Subpart (c) of this section states that OGIS follows the Administrative Dispute Resolution Act (ADRA) principles for confidentiality strictly and does “not disclose any information parties share as part of OGIS's dispute resolution efforts, unless an exception applies under ADRA, 5 U.S.C. 574.”

Unless OGIS is legally bound by the statute, it may not make requesters abide by the confidentiality requirements of the ADRA. It is not clear, however, whether OGIS's services are in fact covered by the ADRA. While OGIS has [indicated](#) that it is *guided* by the provisions of the Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. §§ 571-84, the OPEN Government Act of 2007, which amended the FOIA and created OGIS, does not reference the ADRA, nor does the [Congressional Record](#) on the 2007 amendments show any congressional intent that OGIS comply with that Act. Moreover, OGIS has [indicated](#) that "Notwithstanding the requirements of the ADRA and requirements protecting materials reflecting Office deliberations, OGIS will endeavor to make available as much information as lawfully possible."

#### **§ Section 1291.14 Dispute resolution process.**

Subpart (g) of this section addresses confidentiality requirements related to OGIS's final response letters. It states:

*OGIS issues a final response letter to the parties when the dispute resolution process concludes. This letter documents the outcome of the process and any resolution the parties reach. No party may rely on the letter in subsequent proceedings and its contents are confidential unless both parties agree in writing to allow OGIS to disclose it publicly.*

We are concerned that this confidentiality requirement is overly restrictive and would severely weaken the role of OGIS in providing expertise on FOIA issues for other agencies, lawyers, and judges, as well as the public. Forcing parties to keep the letters confidential would directly contradict one of the primary goals of OGIS, which is to provide important information on problems that FOIA requesters and processors encounter. Imposing such restrictions would limit access to other requesters dealing with the same agency and take away the ability of the public and Congress to monitor agency FOIA practices.

Even if the ADRA were considered by OGIS to apply to dispute resolution services, it would only apply to the specific portions of closure letters which reveal the positions taken by the parties, and either party may waive confidentiality for the portions of a letter specific to *it*, regardless of whether the other party waives confidentiality. Finally, any statements of OGIS's opinion of the legal principles applicable to a case would not be covered by this presumption of confidentiality, as they do not reveal the thoughts or actions of either party.

With regard to a letter's use in subsequent proceedings, this confidentiality provision would carry no legal weight in a judicial proceeding, as NARA does not have authority through rulemaking to affect a court's decision-making regarding the admissibility of evidence. A court presented with such a closure letter could only legally rely on this regulation as justification for a protective order, as is the standard treatment of evidence subject to a non-disclosure agreement. The purpose of this provision is, thus, unclear; even in such a circumstance, the

court itself would still consider the evidence (presuming that it was admissible for other reasons).

If the sole purpose of this provision is to restrict a court's ability to consider a closure letter as evidence, it cannot do so. NARA should either strike the provision as unenforceable or specify the exact types of *non-judicial* "subsequent proceedings" to which it refers in the regulation.

We thank you for the opportunity to submit comments, and appreciate your consideration. For further information, please contact Patrice McDermott at [OpenTheGovernment.org](http://OpenTheGovernment.org) ([pmcdermott@openthegovernment.org](mailto:pmcdermott@openthegovernment.org)) with any questions.

Sincerely,

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Bill of Rights Defense Committee/Defending Dissent Foundation  
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The FOIA Project  
National Security Archive  
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Transactional Records Access Clearinghouse