Reducing FOIA Litigation Through Targeted ADR Strategies

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ADMINISTRATIVE CONFERENCE
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EXECUTIVE SUMMARY

The Freedom of Information Act[1] provides a two-level agency process for decisions on requests for access to agency records: (1) an initial determination that is ordinarily made by the component of the agency with primary responsibility for the subject matter of the request and (2) an appeal to an authority under the head of the agency in the case of an adverse initial determination.[2] A requester's formal recourse following an adverse determination on appeal (or the agency's failure to meet the statutory time limits for making a determination) is a suit in federal district court to challenge the agency action or inaction.[3] Attaining the highest level of compliance at the agency level, without the need for resort to litigation, has long been recognized as a critical FOIA policy objective. A series of amendments to the Act over the years has provided for more detailed monitoring of agency compliance and has established agency mechanisms to promote compliance.[4] Despite these efforts, several hundred agency FOIA determinations adverse to requesters are challenged annually in federal court, and it is widely assumed that a substantial number of other non-compliant agency FOIA determinations are not taken to court by requesters, primarily for reasons of cost and delay that inhere in federal court litigation. This study examines the issues and other case characteristics that most commonly lead to compliance disputes and evaluates dispute resolution strategies that are most likely to resolve such FOIA disputes in an efficient and effective manner short of litigation.

The current study is divided into eight parts. Part I indicates the scope and methodology of the study. Part II briefly acknowledges some of the basic sources of variation in FOIA disputes and recognizes there exists a systemic complexity in FOIA implementation that counsels in favor of a multi-dimensional approach to assessing the dispute resolution process. Part III examines the current and historic levels of FOIA requests and agency processing to those requests. Part IV surveys the current and historic levels of litigation of FOIA claims and the formal and "informal" resolution of those claims in litigation. Part V seeks to move beyond the limits of available hard data toward practical considerations that inevitably become a part of evaluating the prospects for the better and greater use of alternative methods to resolve FOIA disputes. This section is substantially informed by the insight gained from a series of interviews or group sessions, conducted by the author, with a wide range of FOIA experts—both within and outside government—with experience in FOIA policy and litigation or dispute resolution. Part VI examines existing sources of FOIA alternative dispute processes external to agency process. Part VII provides a brief comparative analysis of the use of alternative FOIA dispute resolution systems in the

[1] 5 U.S.C. § 552.
[2] 5 U.S.C. § 552(a)(6)(A).
[3] 5 U.S.C. § 552 (a)(4)(B).
[4] The Act was passed in 1966 and became effective in 1967. It underwent significant amendment in 1974, 1986, 1996, and 2007.

states and in other countries. Part VIII contains the study's conclusions and recommendations.

The study finds wide variation in the form and substance of FOIA disputes between requesters and agencies, and in the motivation, resources, and sophistication of requesters, and in the missions and the level of interest in agency records. The seemingly most specific ways of targeting alternative dispute resolution, for example, focusing on particular issues, categories of requesters, or certain agencies, in a system with the complexity of FOIA, tends to pose irreconcilable choices in accomplishing the broad goals of the Act. Whether one looks at the FOIA process in the agencies or in the courts, no simple set of targets emerges as most compelling. Even if one became convinced that some issues, requesters, or agencies seem more compelling targets as a matter of FOIA policy, those targets would not necessarily be the ones that lend themselves best to the use of post-agency process alternative to the courts. The search for targets in terms of case characteristics, while informative in some respects, does not serve well to identify disputes that are particularly amenable to informal dispute resolution and thus deserving, based on those characteristics, of a pre-determinable share of the limited dispute resolution resources available.

Rather, the study concludes that the most important targeting should be directed toward the dispute resolution mechanism itself. That is, the availability of a mechanism external to the agencies that is open to all issues, all requesters, and all agencies, and that has appropriate FOIA dispute resolution authority, expertise, and resources is paramount. Choices involving such matters as case prioritization and dispute resolution techniques should be made by the dispute resolution body. In 2007, Congress broke with the FOIA dispute resolution structure that had been in place for forty years, creating a dispute resolution body *external* to the agencies that is available as a non-exclusive alternative to litigation--the Office of Government Information Services (OGIS). The study makes a series of recommendations to foster the development and dispute resolution centrality of OGIS--the targeting choice made in the first instance by Congress.

I. STUDY METHODOLOGY AND SCOPE

The objective of the study is to establish a research basis for recommendations that would serve the purposes of making government more efficient, while also promoting accessibility and openness of government information, with benefits to both FOIA requesters and federal agencies, while forestalling litigation. The study consists of analysis of FOIA case processing in the agencies at both the initial and appeals level and in the courts. The analysis is both quantitative and qualitative. Examining both the agency caseload and its processing and the court caseload and its processing, because of limits in the nature of the available data and certain unique characteristics of FOIA disputes,

constrains the insight that can be drawn in terms of the use of alternative methods for dispute resolution. Many of the shortcomings of that data are offset by a series of interviews with FOIA experts inside and outside the government with experience in FOIA case processing in the agencies and with FOIA litigation or policy generally. The author interviewed 32 individuals and participated in group discussion sessions with 22 other individuals in these categories. They are identified in Appendix B of the study. The study also examines the existing FOIA alternative dispute resolution structure and provides some comparison with such structures in other countries and in the states.

The scope of the study is necessarily limited in practical ways to only some of the plethora of policy and practice issues related to FOIA that could, in one form or another, be said to bear on FOIA dispute resolution. In other words, the study is not a general examination of the ways in which FOIA compliance could be improved.

First, the study title uses the term "ADR." "Alternative Dispute Resolution" mechanisms are most commonly thought of as alternatives to judicial proceedings. That is the primary sense in which the term is used here. It is not possible, however, to identify prospectively the FOIA claims that will lead inevitably to litigation unless resolved through an alternative mechanism. Yet it is also difficult to examine the potential value of greater use of ADR mechanisms without having a frame of reference for considering the scale of the undertaking with sensitivity to manageability. Therefore, this study proceeds from the assumption that only some FOIA disputes are likely to benefit sufficiently from the availability of a dispute resolution mechanism external to the agencies to justify making the inherently limited ADR resources available to them. The benefit may be the actual avoidance of litigation in a particular dispute, or it may be the provision of assistance that enables the requester and the agency to arrive at a resolution that is consistent with the policies of the Act without regard to the likelihood of litigation. An important question, however, is whether the characteristics of those cases can be identified with sufficient particularity to deem them appropriate "targets" for allocating ADR resources.

Second, the study centers on FOIA disputes that arise under current law and practice. It is important to understand that numerous proposed reforms of FOIA law or practice have the potential to reduce or eliminate certain disputes within the scope of the study. For example, proposals for greater "proactive" records releases by agencies, narrowing the scope of particular exemptions, formally applying a "harm" standard for what would otherwise be discretionary denials of access, and a broad web-based portal for making and tracking individual requests are all significant proposals.[5] The merits of these

[5] A recent example of an extensive series of proposals of this general nature is found in "Best Practices for Agency Freedom of Information Regulations," published in December 2013 by the Center for Effective Government. GAVIN BAKER, CTR. FOR EFFECTIVE GOV'T, BEST PRACTICES FOR AGENCY

proposals, however, can be assessed independently of the value of using alternative dispute resolution mechanisms for disputes that develop under current law and practice. The study does not speculate on the likelihood of any of these proposals being adopted or the possible impact on dispute resolution if one or more of the proposals were to be adopted.

Third, the study is of necessity a study within the context of a "system" of FOIA law and practice that has developed over a period of more than four decades. The behavior of participants in the system--requesters, agencies and courts--is sensitive, in certain obvious ways, either to formal changes in the system or to events external to the system. For example, a judicial broadening or narrowing of the interpretation of the scope of an exemption could have several systemic consequences, such as increasing or reducing the number of requests for records for which the exemption may be relevant, changing agency reliance on that exemption or another, or making the resolution of disputes under that exemption easier or more difficult.[6] Similarly, a high profile news event involving the federal government that attracts public attention may lead to significant increases in requests to particular agencies and may create heightened agency sensitivities toward those requests.[7] These systemic consequences almost always have impact on available dispute resolution mechanisms and resources. Because the factors that can trigger systemic reaction and the extent of that reaction are largely unforeseeable, it is not possible to account for their effect in this study, but the study does seek to account for the ways in which changes in dispute resolution mechanisms themselves could have systemic effect.

Finally, the author of this study conducted a study of FOIA dispute resolution for the Administrative Conference in 1987.[8] The Conference did not adopt any recommendations based on the earlier study, but did issue a "Statement on the resolution of FOIA disputes," which encouraged agencies to make greater use of informal dispute resolution mechanisms in FOIA cases, referring particularly to a type of informal assistance then provided by the Department of Justice on a limited basis.[9] The Openness Promotes Effectiveness in our

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FREEDOM OF INFORMATION REGULATIONS, http://www.foreffectivegov.org/files/info/foia-best-practices-guide.pdf.

[6] *See infra* note 25 and accompanying text (discussing effect of Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011)).

[7] The recent controversy surrounding the work of the National Security Agency is a good example. FOIA requests to the agency increased over 1000%, comparing the period from 6/6/13 through 9/4/13 with the period 6/6/12 through 9/4/12. *See* Zack Sampson, NSA Inundated by FOIA Requests After Snowden Leaks, Oct. 7, 2013, https://www.muckrock.com/news/archives/2013/oct/07/nsa-inundated-foia-requests-after-snowden-leaks.

[8] The article adaptation of the study appears as: Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1 (1988) [hereinafter "1987 ACUS Study"].

[9] Statement on Resolution of Freedom of Information Act Disputes, 52 Fed. Reg. 23,636 (June 24, 1987).

National (OPEN) Government Act of 2007[10] sought to formalize agency assistance to requesters through the creation in each agency of a Chief FOIA Officer and FOIA Public Liaisons,[11] and established the Office of Government Information Services[12] (OGIS) in the National Archives and Records Administration to perform a range of functions aimed at improving FOIA compliance and providing assistance to requesters. Those two developments are the only formal government-wide FOIA dispute resolutions changes since 1987. While the landscape for FOIA alternative dispute resolution is now different in these two respects, the nature of FOIA disputes and many of the challenges in resolving them, as described in the 1987 study, remain largely applicable today. The 1987 study, thus, is helpful in some ways as a comparative reference.

II. FOIA OVERVIEW AND DISPUTES

A. Brief Overview of FOIA Process

The Act makes available to any person, upon request, any reasonably described agency record that is not exempt (or excluded) from disclosure under the terms of the Act.[13] The nine exemptions to the Act are for records that contain certain:

1. Information properly classified for national security or foreign relations reasons.
2. Information related solely to agency internal personnel rule and practices.
3. Information that is expressly exempted from disclosure by statute.
4. Information that is a trade secret or is commercially or financially confidential.
5. Information that reveals privileged agency deliberative process.
6. Information that would constitute an unwarranted invasion of personal privacy.
7. Information from certain records compiled for law enforcement purposes.
8. Information related to the regulation of financial institution.
9. Information consisting of geological and geophysical data.

Normally, a request is required by the Act to be determined by the agency within 20 working days. After receiving a determination or if the applicable time limit has not been met, a requester normally can appeal the determination or lack of action to a higher authority within the agency, which itself has 20 working days to determine the appeal. Agencies are required to disclose the non-exempt segregable portions of an otherwise exempt record. Agencies may charge certain fees for search, review, and duplication of requested records, but are required to waive those charges for requesters in certain categories. Agencies are also required to consider requests for expedited processing of

[10] Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 25245 (codified at 5 U.S.C. § 552).
[11] 5 U.S.C. §§ 552(j)-(l).
[12] *Id.* § 552(h).
[13] Relevant provisions of the Act are presented in Appendix A of the study.

requests under certain circumstances. If an agency makes a final denial of a request for access to an agency record for any reason, or if the agency fails to make a determination on the request within an applicable time limit, the requester may bring an action in federal district court to review *de novo* the agency determination or failure to act. The court may award attorney fees and costs to a plaintiff who prevails in the judicial proceeding.

B. FOIA Disputes

Requester use and agency implementation of FOIA, under the supervision of the courts, has followed a remarkably consistent pattern for over four decades, but one often viewed at odds with some of the basic provisions of the Act and certain aspirations of open government policy.[14] The use and implementation pattern, while consistent, is at the same time complex. The formality of the pattern is a requester seeking records from an agency under a statutory scheme that, on the one hand, has quite detailed procedural elements and, on the other hand, has substantive elements that are much less detailed and that may invite some exercise of discretion. But a significant and further level of complexity derives primarily from elements in the pattern that are not formally recognized in the terms of the Act. For example, a core concept in the Act is "requester."[15] And for the most part, it is a fundamental principle of the Act that all requesters have equal access rights. But requesters vary widely in their motivations, resources, and sophistication, to mention only a few areas of possible difference. These differences in turn affect the details of their usage of the Act and their likely usage of its dispute resolution mechanisms.

Similarly, the term, "agency,"[16] relies upon a slight variant of the definition of "agency" in the Administrative Procedure Act,[17] the larger statutory scheme of which FOIA is a part. The generality of most APA provisions, largely procedural in nature, is relatively easily adaptable to the wide range of substantive functions federal agencies perform, and where necessary, can be refined by agencies through regulations to fit the procedural needs of particular statutory missions. FOIA, on the other hand, contains both detailed

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[14] For a recent example, see Margaret B. Kwoka, *Deferring to Secrecy*, 54 BOSTON COLLEGE L. REV. 185 (2013). An even more recent study by the Center for Effective Government (CEG) scores the performance of the 15 agencies receiving the largest number of FOIA requests. The rates of disclosure, fullness of information provided, timeliness of responses, and the extent of adoption of best practices (*see supra* note 5) in FOIA regulations are assigned grades based on a CEG formula. Four agencies received overall grades in the B to C range, four received Ds, and seven received Fs. Gavin Baker & Sean Moulton, *Making the Grade: Access to Information Scorecard 2014 Shows Key Agencies Still Struggling to Effectively Implement the Freedom of Information Act* 4-7, CENTER FOR EFFECTIVE GOVERNMENT, http://www.foreffectivegov.org/files/info/access-to-information-scorecard-2014.pdf.

[15] The statutory term is technically "any person." 5 U.S.C. § 552(a)(3)(A).

[16] 5 U.S.C. § 552(f).

[17] 5 U.S.C. § 551 et seq.

procedural provisions and sets substantive standards through its nine exemptions[18] that are unvarying across agencies and agency missions. This could be viewed as either a strength or weakness of the statute, but is noted here for the effect it has on the complexity of the overall use and implementation pattern that has developed under the Act. All agencies are covered by the same substantive access provisions with the exception of unique Exemption 3 statutes,[19] but agency missions and external interest in agency affairs vary widely. The pattern of requester and agency experience under the Act and, in turn its dispute resolution mechanisms, are affected by this variance. This variance consists not only in quantitative measures such as volume of requests, but also qualitative ones that can ebb and flow as the focus of public policy and public attention changes over time.

Likewise, any effort at gaining true empirical understanding of the overall system inevitably encounters the highly variable uses of the core terms "request" for "a record" or a "full or partial" disclosure or denial of a record. A record can be one page or 1,000 pages. A request for records, similarly, can be for more than one and possibly thousands of records. A full disclosure could be for all 500 pages of a single record or a set of records, or a partial disclosure could be of one paragraph in a five-page record. This characteristic confounds most attempts to understand caseload and case processing more deeply. It also can produce a skewed view of what is going on in the dispute resolution process. The redaction of one "key" paragraph in a 100-page record may trigger a lawsuit, just as likely as the withholding of 49 pages in a 50-page record. Neither the level of requester interest nor the extent of agency effort in dealing with the matter can be measured by volume alone, though clearly a request for tens of thousands of multi-page records has a practical quantitative consequence.

Finally, for all but the last four years under the Act, the only statutorily provided dispute resolution mechanism external to the agency process was an action in federal district court. In 2009, the resource provided by the creation of OGIS became operational. Nonetheless, to this point, it is the judicial role that has been and remains dominant in interpreting and refining the Act's broad statutory language and providing important independent oversight and enforcement of the Act. In the use and implementation pattern that has developed under the Act, the judicial role also has taken on unique characteristics that are superimposed on the statutory scheme. For example, under the statute, judicial review of agency FOIA determinations is to be "*de novo*."[20] For a variety of reasons, however, there is a degree of judicial deference to agency FOIA decision-making that is

[18] 5 U.S.C. § 552(b)(1)-(9).
[19] 5 U.S.C. § 552(b)(3). There are scores of Exemption 3 statutes, for example, 42 U.S.C. §§ 2000e-5(b) and 2000e-8(e) (Information pertaining to charges of unlawful employment practices; information obtained by the EEOC in investigating charges of unlawful employment practices) and 50 U.S.C. § 403g (Intelligence sources and method).
[20] 5 U.S.C. § 552(a)(4)(b).

difficult to reconcile with the notion of *de novo* review.[21] Or equally "extra-statutory," the mere filing of a FOIA lawsuit often has a significant impact on agency processing of a request, despite the fact the judicial proceeding only infrequently leads to a substantive FOIA decision.

In short, the use, implementation, and enforcement pattern that has developed from the requester-agency-court interactions is a far more complex one than the terms of the statute suggest. Within that complexity, the challenge is to reach an understanding of ADR needs and mechanisms so as best to align them to advance FOIA compliance and minimize FOIA litigation.

III. AGENCY PROCESSING OF FOIA REQUESTS

A. Initial Processing

The analysis of almost any FOIA policy, certainly including dispute resolution policy, must begin with the scale of FOIA usage. In the 2012 fiscal year, 99 covered federal agencies reported *receiving* 651,254 FOIA requests. The number of requests reported for fiscal years 2011 and 2010 were 644,165 and 597,415, respectively.[22] While many of these were routine requests for common categories of agency records and could be handled routinely within agencies, the gross volume figures are significant in at least two respects. First, they serve as somewhat of a proxy for the level of agency resource that must be devoted to FOIA case processing in whatever form. Second, and more importantly, the caseload, unsurprisingly, is not distributed evenly across agencies. As Table 1, below, illustrates, roughly 85% of the total caseload is concentrated in twelve departments and agencies, four of which operate primarily in areas of defense, foreign relations, or national security. Operations of the eight others encompass a relatively wide range of governmental

[21] *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 732-41 (2002). *See also* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 2317, 2358 (2010).

[22] The number of agencies reporting in FY 2010 was 97 and in FY 2011 and FY 2012 was 99. In earlier years, the number of reporting agencies was significantly lower, for example 72 and 73 in FY 2009 and FY 2008, respectively. For agency data, therefore, the study relies primarily on the three most recently reported and most complete years, FY 2010-2012.

After the draft version of this report was completed and was posted on the ACUS website in February 2014, the Department of Justice, Office of Information Policy, released in March 2014 the FY 2013 reported data. It shows an increase from 651,254 FOIA requests in FY 2012 to 704,394 in FY 2013 or an 8.16% increase. While all the new FY 2013 data are not simply proportional (in relation to this increase) to the FY 2010 though FY 2012 data used in the report, an initial review of the FY 2013 data reflects no notable inconsistencies with the conclusion from agency data contained in this report.

functions. Initial FOIA request processing for these twelve agencies is presented to provide some representative detail of that stage in the dispute resolution process.

While routine cases have a significant effect on the gross volume of requests for most agencies, the workload relief that routine cases may provide can easily be offset by a small number of requests (counted as only "one" in the volume statistic) that seek a large number of agency records. And even this caveat does not capture the workload impact of a request that not only seeks a large number of records, but also seeks them in a critical area of the agency's work. Nonetheless, overall and undifferentiated request volume is at least the starting point for measuring caseload potential in any FOIA alternative dispute resolution mechanism.

Table 1: Initial Requests Received by 12 Agencies Receiving the Highest Number of Requests

Agencies - Agencies in alphabetical order[23]	Number FOIA Requests Received		
	FY 2010	FY 2011	FY 2012
Department of Agriculture (Agriculture)	20,368	23,065	22,175
National Archives and Records Administration (Archives)	15,781	18,129	13,345
Department of Defense (Defense)	73,573	74,117	66,078
Equal Employment Opportunity Commission (EEOC)	16,652	18,424	18,726
Department of Health and Human Services (Health & Human Services)	63,839	67,431	68,467
Department of Homeland Security (Homeland Security)	130,098	175,656	190,589
Department of Justice (Justice)	63,682	63,103	69,456
Department of Labor (Labor)	17,398	18,012	18,560
Social Security Administration (Social Security)	32,997	32,456	31,329
Department of State (State)	30,206	14,298	18,521
Department of Treasury (Treasury)	16,911	16,776	16,610
Department of Veterans Affairs (Veterans Affairs)	29,127	27,655	24,423
Total requests to these agencies	510,632	549,122	557,243
Total requests to all other agencies	86,783	95,043	94,011
Total requests to all reporting agencies	597,415	644,165	651,254
Percent of Total Represented by 12 Agencies	85%	85%	86%

Derived from: foia.gov

The grant-denial volume is the natural next step for measuring caseload potential for any dispute resolution mechanism. Requests granted in full have no subsequent

[23] Throughout the report, agency names in tables are listed in alphabetical order, using the short-form names as indicated in parentheses in Table 1.

dispute resolution potential.[24] Requests denied in full or in part, either by application of an exemption or for a non-exemption based reason such as "no record found responsive to the request," may remain in dispute.

In fiscal years 2010, 2011, and 2012, agencies *processed* at the initial determination level 600,849; 631,424; and 665,924 requests, respectively. Of these, 227,227; 236,474; and 234,049 were granted in full in in those years, respectively. The remaining requests in each year were denied in full or in part either on the basis of an exemption or for a non-exemption-based reason. The requests denied in full or in part numbered 373,662; 394,950; and 431,875 in fiscal 2010, 2011, and 2012, respectively. This large number of requests denied in full or in part becomes the first measurable level of requests that have a potential need for dispute resolution. Table 2, below, reflects the grant and denial distribution for the twelve agencies receiving the highest number of requests, as shown in Table 1.

Table 2: Initial Grants and Denials Processed by 12 Agencies Receiving Highest Number of Requests

Agencies	Full Grants			Partial or Full Denials based on exemptions or other reasons		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	15,415	17,748	17,168	1,949	5,191	4,518
Archives	456	395	1,173	15,117	16,787	12,573
Defense	29,491	30,923	25,672	45,299	44,725	40,979
EEOC	908	796	714	15,435	17,501	18,004
Health & Human Services	35,063	43,173	42,637	34,797	27,006	26,601
Homeland Security	16,721	15,203	21,715	121,930	130,428	184,182
Justice	26,376	28,719	30,623	36,988	35,273	37,908
Labor	4,358	3,737	2,869	13,267	14,392	16,355
Social Security	31,099	30,498	29,218	1913	1,947	2,366
State	8,710	4,090	2,313	9,676	22,742	13,030
Treasury	6,515	6,042	5,911	12,049	10,641	10,294
Veterans Affairs	11,808	10,821	10,241	17,049	17,070	14,544
Total All Reporting Agencies	227,227	236,474	234,049	373,622	394,950	431,875

Derived from: foia.gov

[24] Of course, unless an agency follows a practice of publicly posting at least some disclosed records, every full grant could become the subject of another request, but not one with significant dispute potential.

These numbers do not include for the three-noted fiscal years those requests for which the agency failed to provide an initial determination within the statutory 20 business-day time limit. Requests that fall into that category in a fiscal year are not required to be reported in that particular form. Nonetheless, because many agencies report an average processing time greater than 20 days for simple requests and most agencies report a processing time greater than 20 days for complex requests, the number of requests that become subject to dispute because of the expiration of the 20-day time limit would likely add significantly to the already large number of requests which are denied in whole or part in any fiscal year. Table 3 reflects reported processing times for the same agencies shown in Tables 1 and 2.

Table 3: Average Processing Times for 12 Agencies Receiving Highest Number of Requests

Agencies	Average Days Simple Requests			Average Days Complex Requests		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	26	19	33	50	57	76
Archives	17	11	58	471	382	917
Defense	24	19	11	127	111	115
EEOC	11	16	18	0	0	0
Health & Human Services	33	35	35	140	112	80
Homeland Security	39	37	72	88	78	99
Justice	26	25	19	113	107	100
Labor	12	38	48	27	215	55
Social Security	18	22	19	50	56	57
State	144	155	88	284	342	560
Treasury	18	11	17	14	27	26
Veterans Affairs	0	1	11	14	16	28

Derived from: foia.gov

The annual total of full and partial denials and delayed determinations would thus, by sheer volume, present a serious manageability challenge to any external dispute resolution mechanism that was open to those cases.

The distribution of exemptions relied upon in exemption-based denials likewise is not even across agencies, though use patterns do, in some predictable ways, follow agency missions as shown in Appendix C, Table C-1. For fiscal years 2010-12, the exemptions most commonly relied upon by the 12 agencies receiving the highest number of requests are detailed. Unsurprisingly, Exemption 1 denials are most common in defense, foreign relations and domestic and national security agencies. Presumably, because of the

Supreme Court decision in *Milner v. Department of the Navy*[25], Exemption 2 denials dropped dramatically across all agencies from FY 2010 to FY 2012, and most dramatically in the Department of Homeland Security by 99% from 53,828 claims to 480, and in some agencies to zero. Exemption 3 denials, like Exemption 1 denials, occur primarily in defense, foreign relations and security agencies, corresponding to the distribution of Exemption 3 statutes. Exemption 4 denials, among all major exemptions number the fewest; and among the twelve agencies receiving the most FOIA requests, Exemption 4 is a significant portion of denials only in the Department of Labor. Exemptions 5, 6, and 7 are, by far the most frequently used exemptions. Exemption 7, the most frequently used, is naturally used predominantly in agencies that have significant law enforcement responsibilities. Exemptions 5 and 6 denials combined are fewer than Exemption 7 denials in total, but Exemptions 5 and 6, have relatively broad application across all agencies.

Two of the most prominent non-exemption-related issues subject to dispute in the FOIA process are requests for fee waivers and requests for expedited processing. The agency determination on either issue can have significant impact on the further development of a case. The denial of a fee waiver request, whether proper or improper, may lead a requester with limited resources to drop the request entirely. A denial of expedited processing, again whether proper or improper, may extend the likely processing time for a request to a point that the value of the information later disclosed to the requester is significantly reduced or eliminated.

Fee waiver grants and denials as well as average days to adjudicate the request for 12 agencies receiving the highest number of records requests are reflected in Appendix C, Table C-2. Although there is wide variation in the fee waiver grant rates for the agencies in FY 2010-2012, the overall grant rates were 60.9%, 63.7%, and 54.2%, respectively. The difference in grant rates among agencies likely reflects in part the proportion of fee waiver requests made in cases in which the requester, whether an individual or an entity, seeks records about itself.[26] The processing times for fee waiver determination vary widely. This time, in many cases, imposes an additional layer of delay in the overall processing of a request and consumes additional agency resources in the determination process.

The distribution of grants, denials, and average time to adjudicate expedited processing requests is reflected in Appendix C, Table C-3. The statutory standards for expedited processing are generally more stringent than for fee waiver requests, and a decision to grant any expedited request has, at least theoretically, a negative impact on the processing times for other requesters. Fee waivers primarily shift the cost of certain

[25] 131 S. Ct. 1259 (2011)(rejecting application of Exemption 2 in so-called "High 2" cases, involving a claim that disclosure of certain internal agency records would risk circumvention of the law).
[26] The standards for fee waivers are set out in the statutory excerpts in Appendix A at A 1-2. 5 U.S.C. 552(4)(A)(i-viii).

aspects of processing from the requester to the agency. For the twelve agencies, the percentage of expedited processing requests granted was 21.1%, 24.3%, and 17.2% in fiscal years 2010, 2011, and 2012, respectively. Among the agencies, grant rates varied widely, but also again likely reflect in part the proportion of first-party requesters.[27]

B. Appeals Processing

While request processing at the initial agency level addresses a heavy caseload and reflects some of the FOIA variation and complexity at that level, interestingly the vast majority of requests are not disputed following the initial determination or the expiration of the time limit at the initial request stage. As noted earlier, in fiscal 2010, 2011, and 2012, respectively, 373,662; 394,950; and 431,875 requests government-wide were denied in whole or part. While the year of denial would not necessarily be the year in which an appeal was or could have been filed, there is very significant overlap, and it is reasonable to use the number of appeals in a given fiscal year as a close approximation of the proportion of denials appealed in that year. For the fiscal 2010, 2011, and 2012, the number of appeals filed government-wide was 10,948; 10,705; and 11,899, respectively. There is no agency reporting requirement for the number of appeals based exclusively on the expiration of the time limit for the initial determination on the request. Table 4 reflects the number of appeals received by the twelve agencies receiving the highest number of appeals. The list of agencies differs, in part, from the list of agencies receiving the highest number of initial requests. Archives and Social Security drop off, and the CIA and EPA appear.

[27] The standards for expedited processing are also set out in the statutory excerpts in Appendix A at A 5-6. 5 U.S.C. 552(4)(E)(i-vi).

Table 4: Twelve Agencies Receiving Highest Numbers of Appeals

Agencies	Number FOIA Appeals Received		
	FY 2010	FY 2011	FY 2012
Agriculture	197	225	210
Central Intelligence Agency (CIA)	224	212	315
Defense	1,107	1,066	1,148
EEOC	313	598	370
Environmental Protection Agency (EPA)	204	215	215
Health & Human Services	194	316	311
Homeland Security	2,740	1,917	2,345
Justice	3,351	3,258	3,569
Labor	353	338	414
State	174	342	212
Treasury	372	347	313
Veterans Affairs	231	345	225
Total appeals to these Agencies	9,460	9,179	9,647
Total appeals to all other Agencies	1,488	1,526	2,252
Total appeals to All Reporting Agencies	10,948	10,705	11,899
Percent Twelve Agencies of Total	86%	86%	81%

Derived from: foia.gov

There is no simple way to determine the reason for the low number of appeals from the quite large number of denials that are appealable. Over the three-year period addressed above, the rate of appeal was just under 3%. The explanations could range from, among other possible considerations, a high level of satisfaction with initial determinations to a high level of confusion or concern as to the proper form, timing or content of an appeal to a loss of interest after receiving an official, but negative, response from a government agency. The actual reasons are not unimportant, but developing a reliable account would require a well-designed empirical study addressed to an appropriate sample of the hundreds of thousands of requesters who choose each year not to appeal an initial denial. An undertaking of that nature is beyond the scope of this study.

Appeal rates are not, however, consistent across all agencies. Table 5 reflects appeal rates among the 12 agencies receiving the highest number of appeals.

Table 5: Disposition of Appeals by the 12 Agencies Receiving the Highest Number of Appeals

Agencies	Full and Partial Denials			Number and Rate of Appeals		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	1,949	5,191	4,518	197 = 10.1%	225 = 4.3%	210 = 4.6%
CIA	2,546	2,751	3,230	224 = 8.8%	212 = 7.7%	315 = 9.8%
Defense	45,299	44,725	40,979	1107 = 2.4%	1066 = 2.4%	1148 = 2.8%
EEOC	15,435	17,501	18,004	313 = 2.0%	598 = 3.4%	370 = 2.1%
EPA	5,626	4,972	4,540	206 = 3.7%	215 = 4.3%	215 = 4.7%
Health & Human Services	34,797	27,006	26,601	194 = .6%	316 = 1.2%	311 = 1.2%
Homeland Security	121,930	130,428	184,182	2740 = 2.2%	1917 = 1.5%	2345 = 1.3%
Justice	36,988	35,273	37,908	3351 = 9.1%	3258 = 9.2%	3569 = 9.4%
Labor	13,267	14,392	16,355	353 =2.7%	338 = 2.3%	414 = 2.5%
State	9,676	22,742	13,030	174 = 1.8%	342 = 1.5%	212 = 1.6%
Treasury	12,049	10,641	10,294	372 = 3.1%	347 = 3.3%	313 = 3.0%
Veterans Affairs	17,049	17,070	14,544	231 = 1.4%	345 = 2.0%	225 = 1.5%
All Reporting Agencies	373,622	394,950	431,875	10,948 = 2.9%	10,705 = 2.7%	11,899 = 2.6%

Derived from: foia.gov

Appeal rates among these twelve agencies range from lows of 1.4%, 1.2 %, and 1.2% in fiscal 2010, 2011, and 2012, respectively, to highs of 10.1%, 9.2%, 9.4%, respectively in those years. While all the rates vary year to year among agencies, the CIA and the Department of Justice relatively consistently have the highest rates, centering around 9%.

For the twelve agencies receiving the highest number of appeals, the most commonly relied upon exemptions are detailed in Appendix C, Table C-4. The disposition of appeals by these twelve agencies on the basis of one or more exemptions reflect roughly the same distribution in the use of exemptions that are reflected in initial processing, as shown in Appendix C, Table C-1. The relationship of agency mission to particular exemptions would be expected to show that sort of proportionality, but there is also rough proportionality across all exemptions. Agencies, of course, make decisions on some appeals to release records or portions of records that were deemed exempt in initial processing, but with respect to those withheld in full or in part on the basis of exemptions, the distribution pattern remains essentially the same. Or to put it slightly differently, in the case of the more narrow set of agencies shown here, the use of the appeals process does not produce significantly different rates of use for particular exemptions. Nonetheless, agency use of a particular exemption either initially or on appeal may change as a result of change in agency policy or in law. This can been seen most dramatically in decline in use of Exemption 2 across several agencies after the *Milner* decision, or in the case of a particular

agency, the reduction in the use of several exemptions by the Department of Homeland Security from their FY 2010 levels.

Agencies also use certain non-exemption-based grounds for disposition of appeals. For the twelve agencies shown in Appendix C, Table C-4, three of the most common[28] non-exemption-based appeals dispositions are reflected in Appendix C, Table C-5. These, as well as the less common ones, also become part of appeals dispositions that have potential need for further dispute resolution if they remain in dispute.

Among the less common non-exemption-based appeals dispositions are those made in appeals that seek only review of an initial determination to deny expedited processing status. In the three fiscal years, 2010-12, a total of only 185 such appeals were taken, and 165 of these were to the twelve agencies in Appendix C, Table C-5. The 165 appeals were from well over 8000 initial expedited-processing requests denied by these agencies. While agency failure to meet the 20-day time limit is often the subject of appeal, the more critical the processing time, the less attractive is further time expended through an appeal. For cases that requesters perceive as warranting expedited processing, the appeals process is thus virtually disregarded.

C. Agency Processing Costs

The financial cost of pursuing (for the requester) and processing (for the agency) a FOIA request at the agency level, which could include both the initial and appellate stages, is difficult to gauge. One could say that for the requester, the expenditure for both an initial request and an appeal, in the simplest form of a letter or an electronic communication to the agency stating the nature of the initial request and or the reason for an appeal, is minimal. But that does not begin to account for the varying nature of requests, both as to scope and subject matter, nor does it capture the scale of the time and effort committed by the agency to the request, usually related to the degree of the sophistication of the requester. And even a seemingly simple request by an unsophisticated requester with a novel interest in an aspect of government can trigger an agency's devoting a substantial level of resource to processing the request. The balance is generally perceived as tilting toward far greater cost to the agency than the requester, though for a requester with limited resources, a substantial commitment of time and effort by the agency to a request can be costly to the agency and (particularly if fees are to be charged) to the requester. The actual collection of search, review and duplication fees, and the grant or denial of fee waivers can also affect to some degree the relative consumption of resources.

[28] Other non-exemption-based appeals dispositions include such matter as, "request withdrawn," "not an agency record" and "request in litigation."

The Act requires agencies to report processing costs and fees collected. This provides a piece of the picture of FOIA dispute resolution at the agency level. Table 6 shows the reported processing costs for fourteen agencies, both the twelve used for initial processing data, and the two agencies added in appeals processing data, as well as the total for all reporting agencies.

Table 6: Processing Costs and Fees Collected by 14 Agencies Receiving the Highest Number of Requests and/or Appeals

Agencies	Processing Costs in dollars			Collected Amount in dollars		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	13,447,891	12,920,286	11,153,997	92,484	87,358	44,987
Archives	2,973,280	3,162,915	3,078,553	206	607	203
CIA	10,000,000	10,500,000	10,700,000	2,054	520	1,852
Defense	87,742,648	89,602,701	72,894,645	407,739	585,461	490,415
EEOC	2,075,812	2,541,509	2,541,509	44,033	48,094	60,514
Environmental Protection Agency	20,529,057	17,352,298	17,602,417	464,209	329,811	385,722
Health & Human Services	36,243,521	45,748,344	47,219,436	796,587	1,152,405	1,016,530
Homeland Security	36,678,628	33,361,701	36,748,129	393,027	369,371	435,891
Justice	52,358,200	55,303,213	57,896,289	201,492	123,862	82,594
Labor	12,593,730	13,074,204	12,598,645	290,434	289,284	260,681
Social Security	6,123,535	3,982,633	4,368,669	1,684,081	314,028	268,833
State	12,993,612	15,653,418	16,467,583	9,711	19,471	11,557
Treasury	10,487,966	10,328,842	11,404,027	209,510	314,028	268,833
Veterans Affairs	12,214,528	16,332,658	18,293,547	17,439	102,100	48,015
Total 14 Agencies	316,462,408	329,864,722	322,967,446	4,613,006	3,736,400	3,376,627
Total All Reporting Agencies	394,222,134	412,647,829	405,464,199	5,935,854	6,193,011	4,788,879

Derived from: foia.gov

Processing costs vary widely among agencies and are not closely correlated with the number of requests an agency processes. This is not unexpected, not only because of agency to agency variation in the systems used for processing requests, but also and perhaps more importantly, because the complexity of a "request" can vary, often affected by the particular mission of an agency. Additionally, the prescribed method for calculating processing costs is not highly precise. Department of Justice instructions for reporting processing cost read:

> Provide the sum of all costs expended by the agency for processing FOIA requests at the initial request and administrative appeal levels. Include salaries of FOIA personnel, overhead, and any other FOIA-related expenses.[29]

This instruction leaves considerable discretion in the agencies for associating costs with FOIA processing. For a function that can spread across an agency in so many different ways, there is probably no more practicable definition of FOIA costs. What one should make of this level of cost is a difficult question. One could take the total processing costs in a given fiscal year and divide it by the number of requests processed in that fiscal year and arrive at some approximation of the cost per request processed. Government-wide, for FY 2012, the cost figure would be $405,464,199 divided by 665,924 cases processed, or $609 per case. Because in that same fiscal year, $4,788,879 was collected in fees, that could be said to have reduced processing costs by that amount to $400,675,320 or $602 per case. Even that exercise, however, is problematic because, among other reasons, the processing costs include appeals processing as well, and only a small portion of cases contribute to appeals processing costs. Ultimately, without knowing more about the underlying cases, these numbers provide no real insight into how these costs might bear on agency amenability to alternative dispute resolution processes.

D. Overall Effect of the Appeals Process

Cost aside, the fact remains that relatively few denials of any type are appealed. Nonetheless, a small but not insignificant number of appeals do lead to complete reversals in the appellate process, leaving even fewer denials with further dispute potential. The number of appeals received by an agency in a particular fiscal year would not normally be the same as the number of appeals disposed of by the agency in that fiscal year. Some cases for which there is a current-year appeals disposition came from a prior fiscal year and some cases appealed within a particular fiscal year may not reach appellate disposition until a subsequent fiscal year. Nonetheless, the numbers of appeals dispositions reported on a fiscal-year basis correspond closely to proportions of appeals received and are large enough to permit drawing some conclusions about the effect of the appeals opportunity when a requester chooses to use that process.

[29] DEPARTMENT OF JUSTICE HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFORMATION ACT REPORTS P. 55, Oct. 29, 2013, http://www.justice.gov/oip/docs/doj-handbook-for-agency-annual-freedom-of-information-act-reports.pdf.

Table 7: Government-Wide FOIA Appeals Dispositions (FY 2010 - FY 2012)

Year	Affirmed in Full	Affirmed in Part	Reversed in Full	Other[30]	Total
FY 2010	4,350	4,317	1,936	3,370	13,973
FY 2011	4,640	1,740	1,516	2,788	10,684
FY 2012	5,268	1,892	1,809	2,820	11,789
Total	14,258	7,949	5,261	8,978	36,446

Derived from: foia.gov

As Table 7 reflects, in fiscal year 2010, 13,973 appeals were disposed of government wide, as reflected in Table 8 In fiscal year 2011, the number was 10,684, and in fiscal year 2012, 11,789. Of those, 1936 or 14% in fiscal 2010, 1516 or 14% in fiscal 2011, and 1809 or 15% in fiscal 2012 were complete reversals of the initial agency decision. Of the roughly 85% that were not completely reversed in the three-fiscal-year period, 14,258 or 46% were affirmed in full, 7,949 or 25% were affirmed only in part, and 8,978 or 29% were disposed of on procedural grounds. These cases total 31,185 over the three fiscal years for an average of 10,395 requests per year that had a potential need for post-appeal dispute resolution, i.e., the request, at least in part, remained unfulfilled. This compares to 14,494 such cases in a three-year period examined in the 1987 ACUS study, or an average of 4,831 per year at that time.[31] This difference is roughly proportional to the difference in the number of exemption-based denials in the two three-year periods.

While it would be sheer speculation to suggest in what portion of these cases the requester has an interest in pursuing the request further, the crudest measure would be to identify the number of cases in which a requester who has received an appeals determination chooses to file suit under the Act. Of course this number would miss all requesters who remain interested in pursuing their requests but, for a variety of possible reasons, are deterred from suing. Even setting aside that group of requesters, which is likely to be quite large, there is no wholly accurate way for determining whether filed FOIA suits have been filed by requesters who have received an appeal determination. Some requesters file suit after the expiration of the 20-day time limit on initial requests without a determination having been issued and some file suit after expiration of the 20-day time limit on an appealed request without an appeal determination having been issued. Court dockets in many cases, whether through the content of the complaint or otherwise, do not

[30] The category "Other" includes cases in which the agency "neither affirms nor reverses (either entirely or partially) the initial request determination, but rather closes the appeal for other reasons (e.g., the request was in litigation, the appeal was a duplicate appeal, the appeal was premature, etc.)." DEPARTMENT OF JUSTICE HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFORMATION ACT REPORTS: http://www.justice.gov/oip/docs/doj-handbook-for-agency-annual-freedom-of-information-act-reports.pdf at 14.

[31] 1987 ACUS Study at 9.

reveal consistently whether the suit proceeds on the basis of "constructive exhaustion" because of the expiration of a time limit or whether the suit follows an appeals determination. While in most cases that reach the point of a merits decision, even if only a decision on a motion for summary judgment, the fact of an appeals determination would be noted in the order and opinion, but those cases are relatively few. Nonetheless, the scale of cases that have been pursued fully through the agency appeals process and leave the requester with a request unfulfilled, at least in part, are the most highly processed set of cases from the total of all requests received. To better understand the possible significance of that pool of cases for dispute resolution purposes, it is necessary to turn to the use of the formal judicial remedy.

IV. FOIA LITIGATION

The annual number of lawsuits under FOIA is low relative to the number of FOIA requests filed annually, and low even relative to the number of requests that remain in potential dispute after appeals determinations in agencies. Using the most recent three-year average annual number of post-appeal requests remaining in that category, as calculated above, the comparison is 10,395 cases to 371 suits. Thus, treating as one pool for comparison only those cases that have received an agency determination on appeal that is at least in part adverse to the requester, the proportion of cases filed to prospective cases is 1 in 28.[32] Among other possible shortcomings, this calculation excludes constructive denial cases eligible for suit because of the expiration of either the initial or appellate 20-day time limit. An important question, nonetheless, is why cases that have been contested to appeal by requesters and have generally received a meaningful degree of processing on the merits in agencies as initial requests and appeals, though not fully granted, lead to so few suits.

In some respects, the question is similar to that of why there is such a sharp drop off between initial determinations that have denied records to requesters and the number of administrative appeals taken from those denials. Undoubtedly, there is a behavioral dimension to the question that can only be answered by empirical inquiry addressed to a properly constructed sample of individual FOIA users, which as noted earlier, is beyond the scope of this study. But unlike the low rate of usage of the relatively low-cost appeals process, there are significant barriers to undertaking a suit in federal district court. Those are important to consider, but first it is helpful to get a broader picture of FOIA suits generally. That picture is formed in this study with data from three sources: The Administrative Office of the U.S. Courts (AOUSC), the Inter-university Consortium for

[32] Using essentially the same methodology for then-most-recent three-year period, the 1987 ACUS study identified a ratio of 1 in 10. *Id.* at 9.

Political and Social Research (ICPSR)/National Archive of Criminal Justice Database (NACJD) depository "Civil Terminations Sections of the Federal Court Cases: Integrated Data Base series, 2007-2011," and the Transactional Records Access Clearinghouse (TRAC) foiaproject.org.

A. District Courts

1. Caseload Data

A starting point is the number of FOIA cases filed in federal district court each year. The Administrative Office of the United States Courts tracks Freedom of Information cases under one of the "nature of suit" codes[33] it uses in tracking the overall federal civil docket. AOUSC publishes statistical data like that shown in Table 9, below, for all civil cases and for some subcategories of those cases. FOIA cases, however, are not broken out in any published form. AOUSC provided the author with the FOIA-specific data from which Tables 8, 9, and 10 were constructed. Table 8 shows the number of FOIA cases filed and the number of FOIA cases terminated annually from FY 2000 through FY 2013 in all federal district courts.

Table 8: FOIA Cases Filed and Terminated, U.S. District Courts (FY 2000 – 2013)

Fiscal Year	Total Filings	Total Terminations	FISCAL YEAR	Total Filings	Total Terminations
2000	341	339	2007	335	302
2001	325	348	2008	280	298
2002	271	277	2009	314	288
2003	283	262	2010	298	292
2004	315	300	2011	388	318
2005	404	410	2012	344	365
2006	312	315	2013	382	364

Source: Administrative Office of the U.S. Courts

While the average number of cases filed per year over this 14-year period is 328, the number has varied considerably from a low of 271 in 2002 to a high of 404 in 2005. The 1987 ACUS study found that for the six-year period 1980 through 1985, the number of case filings averaged slightly over 500 per year. Government-wide data collection on request and appeal volume and disposition in that period was less exacting and less readily accessible than similar data is today. Thus, any close statistical comparison of agency-level case data in that period with current agency-level data would be dubious. Nevertheless, an average filing volume of 334 cases per year for the most recent six-year period--a period of undoubtedly higher agency level initial and appeal denial volume--the decline in filing

[33] The code for FOIA cases is 895.

volume is notable. The potential for a significantly higher number of FOIA suits has simply not materialized.[34]

The pace of FOIA litigation is also a part of the post-agency dispute resolution picture. The median processing time intervals for cases terminated in the years 2007 through 2013 period are reflected in Table 9 below.

Table 9: Time Intervals Filing to Termination of FOIA Case in District Courts (FY 2007-2013)

Fiscal Year	Total Cases		No Court Action		Court Action			
					Before Pretrial		During or After Pretrial	
	Number of Cases	Median Time Interval (months)	Number of Cases	Median Time Interval (months)	Number of Cases	Median Time Interval in (months)	Number of Cases	Median Time Interval in (months)
2007	302	9.4	76	7.0	209	9.7	16	13.2
2008	298	8.3	89	7.3	192	9.0	16	11.7
2009	288	9.6	83	7.8	188	9.9	16	11.5
2010	292	10.0	82	8.3	185	10.0	25	13.1
2011	318	9.3	106	7.7	192	9.3	18	14.1
2012	365	10.5	89	6.4	236	11.5	38	12.6
2013	364	9.2	116	6.1	220	10.0	28	12.3

Source: Administrative Office of the U.S. Courts[35]

Over the seven-year period, 2007-2013, median time from filing to termination has ranged from a low of 8.3 months to a high of 10.5 months, an interval range roughly comparable to that found in the 1987 ACUS study.[36] Over the years 2007-2013, using a calculating period ending March 31, rather than September 30, the median processing times for all civil cases in federal districts courts were 7.4 9.7, 8.2, 8.2, 7.9, 6.8, and 8.4 months, respectively.[37]Thus, in this most general characteristic, FOIA suits do not vary widely from all civil suits. In other respects, discussed later, they do. But most observers,

[34] Over the 14-year period covered by Table 8, there are a total of 4,592 filings and a total of 4,478 terminations, producing a small gross backlog in the period of 114 cases or only 2%. Thus, while there is clearly considerable variance in filings over time, some of which may arguably be related to volume of requests, there are no dramatic trends. In the three most recent years, however, total filing volume has been roughly 10% above the longer-term average.

[35] E-mail from Wendell Skidgel, Senior Attorney Advisor, Public Access and Records Management Division, Administrative Office of the United States Courts, to author (December 16, 2013) (on file with author).

[36] *See* 1987 ACUS Study.

[37] "Statistical Table Archive," Administrative Office of the U.S. Courts, http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.aspx

and certainly many requesters, nonetheless view a judicial processing time of 8 to 10 months, after what may have been a similarly lengthy period during agency processing, to be contrary to the goals of FOIA. There is little point in rehearsing here the extensive commentary on the FOIA delay and the harms to the policy objectives of the Act that flow from it. It is sufficient at this point to note that the need to resort to the judicial remedy and the time consumed in the judicial process exacerbate the consequences of delay in agency FOIA process.

Another notable general characteristic of FOIA filings in federal district court is the high proportion of cases filed in the United States District Court for the District of Columbia. This proportion is explained, in substantial part, by the venue provision of FOIA that permits any action to be brought in the District Court for the District of Columbia (DDC). Thus as Congress presumably intended, this court has become not only the federal district court with the heaviest FOIA caseload, but also is thereby perceived as the most expert FOIA court and the one whose decision are informally considered the most authoritative.

Table 10: District Courts Ranked by Annual Number of FOIA Filings (Top Five Districts FY 2007–13)

FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
DDC (142)	DDC (121)	DDC (116)	DDC (124)	DDC (148)	DDC (150)	DDC (176)
SDNY (16)	ND Cal (15)	SDNY (25)	SDNY (22)	ND Cal(28)	SDNY (26)	ND Cal (19)
ED Cal (10)	SDNY (10	ND Cal (8)	ND Cal (19)	SDNY (20)	ND Cal (14)	CD Cal (15)
SD Fla (9)	CD Cal (8)	MD Fla (9)	ND Ill (10)	WD Wash (15)	WD Wash (10)	SDNY (13)
ND Ill (8)	SD Cal (8)	WD Wash (8)	SD Fla (8)	ED Va (9)	ND Ill (8)	ED Va (11)
All Districts (335)	All Districts (280)	All Districts (314)	All Districts (298)	All Districts (388)	All Districts (344)	All Districts (382)
42.4% DDC	43.2% DDC	36.9% DDC	41.6% DDC	38.1% DDC	43.6% DDC	46.0% DDC

Source: Administrative Office of U.S. Courts

As Table 10 reflects, of a total of 2,341 FOIA filings from 2007 through 2013, 977, or 41.7% were filed in the District Court for the District of Columbia. In any of the represented years, while the next four highest districts varied, none was close to the DDC. The next highest percentage occurred in the Southern District of New York in 2008 at 8% of total filings, and at the fifth level the most prominent district was never more than 6% of the DDC's average FOIA caseload during this time period.

2. FOIA Case Dispositions

Examining the FOIA judicial caseload more substantively is a major practical challenge. While, as noted above, the Administrative Office of the United States Courts (AOUSC) tracks FOIA cases with a separate code in its tracking of the overall federal civil docket, many of the more substantive parts of the tracking are not routinely made public

routinely. Data as to case "disposition" and "judgment for" were not provided to the author because those are not "required" elements of data entry and are not "validated."[38] That data is, however, archived through an arrangement between the Federal Judicial Center and ICPSR. ICPSR serves as a repository for the full body of court statistical data from 1979 to 2011, which is now held subject to a "restricted access" protocol administered by the National Archive of Criminal Justice.[39] The author sought and received approval for access to the data for the fiscal years 2007 through 2011, the five most recent years for which that data is available. From the coding in this data, the author derived the information set out in Table 11 below.

[38] *See supra* note 35.

[39] Inter-university Consortium for Political and Social Research. http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies?archive=ICPSR&sortBy=7 (listing available coded and restricted studies, five of which the author obtained and using the statistical program, Stata, derived the data shown in Table 11.) There have been studies generally confirming the statistical reliability of most of the FJC/ICPSR databases. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1281-85 (2005).

Table 11: Dispositions in Terminated Cases

YEAR	Disposition			Judgment				Plaintiff	
	Dismissal	Judgment	Other	For Defendant	For Plaintiff	For Both	Unknown	Repres-ented	Pro Se
2007 Terminations / 302 Cases									
DDC	73	54	57	32	4	5	143	109	75
All Other Districts	38	49	31	33	3	0	82	86	32
Total District Courts	111	103	88	65	7	5	225	195	107
2008 Terminations / 295 Cases									
DDC	116	53	15	46	4	6	128	113	71
All Other Districts	70	35	6	24	0	3	84	69	42
Total District Courts	186	88	21	70	4	9	212	182	113
2009 Terminations / 288 Cases									
DDC	113	50	10	44	6	4	119	116	57
All Other Districts	83	26	6	23	3	2	87	89	26
Total District Courts	196	76	16	67	9	6	206	205	83
2010 Terminations / 292 Cases									
DDC	124	36	3	36	4	4	119	104	59
All Other Districts	88	29	12	29	0	2	97	106	22
Total District Courts	212	65	15	65	4	6	216	210	81
2011 Terminations / 318 Cases									
DDC	143	42	18	43	2	7	151	122	81
All Other Districts	82	27	6	27	3	0	84	96	18
Total District Courts	225	69	24	70	5	7	235	218	99

Derived from: FJC/ICPSR

The utility of this summary is, however, quite limited. The "disposition" entry is extremely broad, covering a range of "dismissals" (for example, want of prosecution, lack of jurisdiction, voluntary dismissal, and settled) and separates those from a wide range of "judgments" (on default, on consent, on motion before trial and jury verdict). Apart from those, the category of "others" includes such dispositions as "transfers to other districts," "statistical closings," and apparently "unknowns." Only in 2007, however, were "others" a substantial portion of the recorded dispositions. If the two broad categories "dismissal" and "judgment" are used, disregarding "others," for FOIA cases terminated in the district of D.C., "dismissals" occurred 71.8%[40] of FOIA in the years 2007 through 2011, and judgments

[40] For 2007-2011, DDC dismissal percentages were 57.5, 68.6, 69.3, 77.5 and 77.3, respectively.

occurred in 29.2%[41] of FOIA cases terminated in that period. Again excluding the "other" category, the division in dispositions across all other district courts did not vary much from those in the district of D.C. In all other districts combined, dismissals occurred in the 68.5%[42] of terminated FOIA cases, and judgments occurred 31.5%[43]. When all district courts are combined, dismissals occurred in 69.9% of cases terminated, and judgments occurred 30.1%, with the proportions between dismissals and judgments being identical in the last two years of the five-year period. If the first year of the five-year period, which contains what appears to be an aberrationally large number of "others" is excluded, the overall proportion is 68.7% dismissals and 31.3% judgments.

The modest utility of the summary is that it loosely confirms the widely understood fact that most FOIA suits are terminated prior to any formal judgment. Nonetheless, because many of the most substantive of these dismissals (e.g., settlements between the requester/plaintiff and the agency for full or partial records disclosure) do not produce court records reflecting deep levels of detail as to the resolution of the dispute, they provide little meaningful insight. Court records are even more opaque when the resolution of the dispute is a voluntary dismissal for which there is no substantive detail.

There is similarly limited utility in the distribution of cases by "judgment for," but the data itself is more problematic. There is a very high number of "unknown" in each year. This is in part explained by the fact that for the cases in which there is no "judgment" coded, there would be no "judgment for." But even limiting the base to those cases in which there is a count in the judgment column, the total number of judgments for "defendant," "plaintiff," and "both" does not equal the number of cases in any year or in any court grouping of the number of cases in which "judgment" is coded. Given that the differences there are, however, relatively small, the "judgment for" category may well be roughly accurate. Using only the cases in which a "judgment for" is shown, the percentages of cases, for all district courts in which judgment was for the defendant were 84.4%, 84.3%, 81.7%, 86.7% and 85.4%, for the years 2007 through 2011, respectively. The percentages of cases in which judgment was for the plaintiffs were 9.1%, 4.8%, 11.0%, 5.3%, and 6.1% for the same years, respectively. The percentages in which judgment was for "both" were 6.5%, 10.8%, 7.3%, 8.0%, and 8.5%, also for the same years, respectively.

Again, this confirms a widely understood fact, namely, defendant agencies prevail either fully or in part in most FOIA cases in which a court enters a judgment. This fact, however, has more significance for alternative approaches to dispute resolution than other FOIA litigation characteristics. Whatever the reasons for the high agency success rate in

[41] For 2007-2011, DDC dismissal percentages were 42.5, 31.4, 30.7, 22.5 and 22.7, respectively.
[42] For 2007-2011, "Other" judgment percentages were 43.7, 66.7, 76.1, 75.2 and 75.2, respectively.
[43] For 2007-2011, "Other" dismissal percentages were 56.3, 33.3, 23.9, 24.8 and 24.8, respectively.

FOIA litigation, in those cases that agencies choose to contest to the point of judgment, the high success rate may disincline agencies from engaging in an alternative dispute resolution process.

At the heart of most commentary on the judicial affirmance rates for agency FOIA decisions is the seeming departure by the courts from the review standard set in the Act, namely de novo review. This form of review in principle essentially instructs the court to treat the issue(s) presented on review without deference to the agency decision. Whatever the intent of Congress in choosing this review standard for FOIA cases, it is well documented, as noted above, that FOIA review is generally quite deferential.[44] It is certainly possible that more intensive judicial review of agency FOIA decisions would have the effect of heightening compliance at the agency level, thus arguably reducing the need for post-agency dispute resolution process. This study, however, is centered on dispute resolution techniques that could serve as alternatives to the judicial process, and thus any measure aimed at increasing the intensity of judicial review is beyond its scope.

The overall FOIA judicial case disposition picture is also affected, in ways that are difficult to assess, by the high proportion of FOIA plaintiffs who proceed "*pro se"* as opposed to being represented by counsel. Table 11 reflects that *pro se* plaintiffs accounted for 35.4%, 38.3%, 28.8%, 27.8%, and 31.2% of the FOIA caseload, respectively, in the years 2007 through 2011. The combined number of *pro se* cases over the five-year period is 483 of 1495 cases, or 32.3%. The fact that nearly a third of FOIA cases were brought *pro se* would seem to have some significance in considering the use of alternative dispute resolution processes. Passing the question of whether the merits in *pro se* cases are higher or lower than in the cases of represented plaintiffs, an instinctive reaction might be that, almost by definition, an alternative to court would be attractive for the unrepresented plaintiff. But this instinct may have to be tempered by consideration of the nature of the alternative process. The more formal it is or the more adversarial it is, the lesser the advantage for the *pro se* participant. Nevertheless, the presence of this plaintiff characteristic in a significant proportion of FOIA cases must be accounted for in considering alternative processes.

One further derivative of the FJC/ICPSR data is reflected in Table 12 below. This table contains mean and median processing times for cases closed in the 2007 through 2011 period broken out by the times in the District Court for D.C., then for all other district courts and finally the times for D.C. and all other districts combined.

[44] *See supra,* notes 14 and 21 and accompanying text.

Table 12: Filing to Termination Interval Means and Medians in Months

Court	Year									
	FY 2007		FY 2008		FY 2009		FY 2010		FY 2011	
	Mean	Median	Mean	Median	Mean	Median	Mean	Median	Mean	Median
DDC	18.7	12.2	12.7	9.9	17.8	12.8	16.6	12.8	15.1	10.2
All Other District Courts	10.1	8.1	11.0	8.8	12.1	8.4	12.8	8.4	11.4	7.8
ALL	13.5	9.5	11.3	8.4	14.4	9.8	14.5	10.2	12.8	9.4

Derived from: FJC/ICPSR

Two characteristics may be noted. First, mean processing time exceeds median processing time by roughly three to four months over the five-year period represented here. That difference suggests that outlier cases are more prominent *above* than *below* the median. Second, both mean and median processing time in the District Court for the District of Columbia is longer than that for the "all other" districts group, sometime exceeding it substantially. As noted earlier, however, for most FOIA requesters neither of these characteristics is likely to be important. Rather, it is the total amount of time that can be consumed in the sequential administrative and judicial processes that is the concern.

The Transactional Records Access Clearinghouse (TRAC) is a research center at Syracuse University, "established in 1989 in order to obtain detailed information from various federal agencies under the FOIA."[45] TRAC operates "The FOIA Project," the goal of which is "to provide the public with timely and complete information about . . . FOIA . . . now includes detailed information on every case that challenges government withholding in federal court."[46] Each day the FOIA Project searches the federal court's Public Access to Court Electronic Records (PACER) website for cases under the Freedom of Information Act and downloads and makes available on its website the docket entries and corresponding documents, including some additional documents supplied to The FOIA Project by parties.[47] TRAC's FOIA database provides, in a user-friendly and non-fee form, the documents available through PACER and adds to that some content of its own. The FOIA Project is thus a resource that provides convenient access to a level of FOIA lawsuit data that is not available through AOUSC or FJC/ICPSR.

For the purpose of this study, the author undertook, along with a law student research assistant, to review the TRAC/PACER FOIA lawsuit data for cases closed in fiscal years 2010 through 2013, the four most recent full fiscal years. The TRAC entries for 1,402

[45] *See* The FOIA Project, *About TRAC*, http://foiaproject.org/about/about-trac.
[46] *See* The FOIA Project, *About the FOIA Project*, http://foiaproject.org/about.
[47] *See* The FOIA Project, *About FOIA Lawsuit Data*, http://foiaproject.org/about/data.

closed cases were reviewed.[48] While this review added some elements to the AOUSC and ICPSR data presented earlier, the picture in terms of suit characteristics that may bear on alternative dispute resolution approaches remains relatively opaque. In most cases, pleadings, of course, present the claims and responses of the parties in considerable detail. The problem, however, lies in finding meaningful ways to code the detail beyond further formal substantive and procedural categorizations. Just as the factual presentation of a FOIA case in a published court opinion is a highly distilled account of the case details, the pleadings and other case records that become part of the docket are an entirely undistilled account of the case—except in one respect. What is missing, of course, are the underlying motives, concerns, and strategies that caused an escalation of the dispute from the agency to court and then what actually drove resolution in the large number of cases that are terminated in some agreed form.

This is not a critique of the TRAC/PACER database, which provides a wealth of FOIA detailed case information in a highly accessible form. For example, reliably compiling the identity of FOIA plaintiffs and defendants can be surprising cumbersome. The TRAC/PACER FOIA database is helpful for this purpose. Just as certain agencies receive high numbers of requests and appeals from initial denials, certain agencies are sued under FOIA at notably high rates. A list of the most frequently sued agencies from FY 2009 through FY 2013, derived from the TRAC FOIA Project is shown in Table 13, below.

[48] The TRAC FOIA Project seeks to remove from its database cases that are miscoded in the PACER system.

Table 13: Fourteen Agencies Most Frequently Sued under FOIA Based Upon Filings (FY 2009 – FY 2013)

Agencies	Number of FOIA Cases Filed Against Agency				
	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Agriculture	5	8	11	9	10
CIA	20	10	16	15	11
Defense	43	37	39	41	37
Department of the Interior (Interior)	19	16	11	14	26
Department of Transportation (Transportation)	10	2	1	6	8
Environmental Protection Agency	6	8	9	7	13
Health & Human Services	23	19	23	19	18
Homeland Security	35	36	50	46	48
Justice	53	82	109	108	81
Labor	7	6	10	3	9
Social Security	4	5	9	8	11
State	17	22	19	20	23
Treasury	37	32	19	20	24
Veterans Affairs	5	5	9	7	7
Total Filings for 14 Agencies	284	288	335	323	326
Total Filings	314	298	388	344	382

Derived from: TRAC foiaproject.org

These fourteen agencies accounted for 90% of all FOIA court filings from fiscal 2009 through fiscal 2013. With the exception of the EEOC, each of the agencies in the most-appeals-received table (Table 4) appears in this list. Additionally, the Department of Interior, the Department of Transportation, and the Social Security Administration appear. The Department of Justice, the Department of Homeland Security, and the Department of Defense, accounted for 25%, 12% and 11%, respectively, of all filings in this period.[49]

The litigant picture becomes fuller with the addition, from the TRAC/PACER database, of the frequencies with which certain parties are plaintiffs in FOIA cases. In FOIA cases terminated in the four fiscal years 2010-2013, seven advocacy organizations were plaintiff in 10 or more suits. In order of number of suits, those organizations are: Judicial Watch with 91, Public Employees for Environmental Responsibility (PEER) with 30; Citizens for Responsibility and Ethics in Washington (CREW) with 24; American Small

[49] The Department of Justice not only is the most frequently sued agency, but also is the agency that, in its representational capacity, defends most agencies in their FOIA litigation.

Business League (ASBL) with 19; Natural Resources Defense Council (NRDC) with 17; Electronic Frontier Foundation (EFF) with 14; and Electronic Privacy Information Center (EPIC) with 11. Several other organizations had FOIA suit numbers just below these; the American Civil Liberties Union (ACLU), if the suits of its separate chapters were combined, had 30 suits total. Two individuals had 10 or more suits in the same period. For organizations like Judicial Watch, PEER, and CREW, their suit numbers approach the number of suits in the same period against some agencies that are among the most frequently sued, as shown in Table 13. The fact that there are frequent "repeat-player" organizational plaintiffs, like those noted, can have a number of implications for dispute resolution that are addressed later in the study.

Repeat-player plaintiffs also include other sorts of organizations, businesses, law firms, media outlets, and FOIA-requester websites, like muckrock.org. Sometimes, too, organizations file suit in the name of an individual, rather than the organization, having the effect (though not necessarily the purpose) of making it harder to identify the frequency of their suits. These numbers thin out at a point after which it may be more accurate to refer to these requesters not so much as repeat players, but as experienced plaintiffs, though not necessarily with the level of FOIA sophistication of some of the most prominent advocacy organization plaintiffs.

3. Attorney Fee and Cost Awards[50]

The TRAC/PACER database also provides some insight into attorney fees and costs awarded pursuant to court order or negotiated settlement in FOIA cases. The Department of Justice's annual *FOIA Litigation and Compliance Reports* are also a source for fee award information.[51] Because these Justice Department reports provide a listing of cases in which fees or costs were awarded, it is a ready source from which to compile this information, but it is not necessarily complete. The TRAC/PACER data requires the scouring of individual case dockets for recorded fee awards. It is more cumbersome to use for this purpose, but includes some awards that the Justice Department reports do not, and vice versa. Even a

[50] Both with respect to attorney fees and costs, as well as government litigation costs, the available data generally includes combined amounts attributable to district court and appellate court litigation (and on rare occasion, even Supreme Court litigation).

[51] A FOIA provision requires the Justice Department to report annually to Congress on the agency's efforts to promote FOIA compliance, as well as FOIA litigation. *See* 5 U.S.C. § 552(e) (2006 & Supp. IV 2010). The Department of Justice's Office of Information Policy (OIP) publishes these annual FOIA reports, and they are currently available on the agency's website for fiscal years 1998 through 2012. *See, e.g.*, UNITED STATES DEPARTMENT OF JUSTICE, THE DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION LITIGATION AND COMPLIANCE REPORT 2012 [hereinafter generally "DEPARTMENT OF JUSTICE FOIA LITIGATION AND COMPLIANCE REPORT"], http://www.justice.gov/oip/lc-rpt-2012/2012-liti-comp-rpt.pdf.

combination of the results from both is likely not complete.[52] Using the two sources together, nonetheless, provides the best-available picture of the number and amounts of fees and costs obtained by plaintiffs in FOIA cases.

Table 14 shows the attorney fees and cost amount derived from filings associated with the TRAC/PACER data for 1,402 FOIA cases closed in the fiscal years 2010 through 2013.

Table 14: Attorney Fee and Cost Awards in FOIA Litigation Based on TRAC/PACER Data (Fiscal Years 2010 – 2013)

Fiscal Year	Number of Cases with Fee Awards	Award Total	Average Award (per case)	Highest Award (per case)	Lowest Award (per case)	Median Award (per case)
2010	10	$236,911	$23,691	$86,885	$300	$20,021
2011	13	$267,415	$20,570	$121,000	$36	$7,000
2012	29	$1,313,742	$45,301	$321,014	$419	$15,000
2013	6	$55,084	$9,181	$24,500	$350	$8,117

Table 15 shows the fees awarded in federal FOIA litigation in calendar years 2008 through 2012, as reported in the Justice Department's *FOIA Litigation and Compliance Reports* for those years.[53]

Table 15: Attorney Fee and Cost Awards in FOIA Litigation Based on DOJ Annual Reports (Calendar Years 2008 – 2012)

Calendar Year	Number of Cases with Fee Awards	Award Total	Average Award (per case)	Highest Award (per case)	Lowest Award (per case)	Median Award (per case)
2008	6	$233,198	$38,866	$233,198	$1,293	$40,560
2009	5	$83,466	$16,693	$83,466	$350	$14,282
2010	1	$455	$455	$455	$455	$455
2011	4	$61,200	$15,300	$61,200	$36	$6,227
2012	14	$1,473,299	$105,236	$383,218	$1,216	$56,557

[52] There simply is a high risk of error in compiling these numbers because of the variety and sometimes unpredictable ways in which they appear as a matter of record.

[53] *See* UNITED STATES DEPARTMENT OF JUSTICE, DEPARTMENT OF JUSTICE FOIA LITIGATION AND COMPLIANCE REPORT, List of FOIA Cases in Which a Decision was Rendered, Calendar Years 2008 to 2012, http://www.justice.gov/oip/reports.html#s1.

Undoubtedly, some of the difference between the fee awards reflected in Table 18 and 19 are simply attributable to different time periods. While the calculating periods for the two sources are different, the periods overlap considerably. In each year, around 350 FOIA cases were closed. The total number of awards taken from the TRAC/PACER data review is nearly twice that of the Department of Justice annual FOIA reports, though because of the size of the reported awards the average amount of the awards from those reports is almost double the amount of the awards from the TRAC/PACER data.

The seemingly most anomalous feature of both the Department of Justice and the TRAC/PACER data is the far greater number of awards and their size in calendar and fiscal 2012, respectively, compared to any of the other years. Because both compilations, however, contain this quantitative feature in roughly the same degree in roughly comparable periods, it may simply be that the period was an anomalous one.[54]

Certainly it would be a mistake to draw precise award-number and dollar-based conclusions from either of these two compilations. But they do rather clearly demonstrate that the number of fee awards from the total pool of closed FOIA cases is small. This fact probably serves in a sense to confirm that the number of cases in which a plaintiff "prevails," and is thereby eligible for attorney fees, is a small portion of the total number of cases closed.

Fee awards, though relatively infrequent, when large could have meaningful impact on agency budgets as a result of a change brought about through a provision of the OPEN Government Act of 2007. Formerly, FOIA fee awards were paid from the Judgment Fund of the Treasury, but under the 2007 amendments to FOIA these fees must now be paid from the annual appropriations of the agency.[55]This change may become a factor in agency case processing and agency amenability to dispute resolution alternatives.

4. Agency Litigation Costs

The other cost factor for the government in FOIA disputes is the actual costs incurred in litigation. This cost is reported on much the same basis as agency reporting of request processing costs. The Department of Justice instruction for reporting litigation costs simply reads:

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[54] The TRAC/PACER based data includes the full 2013 fiscal year, which shows much lower numbers of awards in that period than in fiscal 2012. The Department of Justice report for calendar 2013 is not yet available. If it, too, shows similarly lower numbers for calendar 2013, the conclusion that fiscal and calendar 2012 were, in fact, just anomalous periods may be justified.

[55] 5 U.S.C. 552(a)(4)(E)(ii).

> Provide the sum of all costs expended by the agency in litigating FOIA requests. Include salaries of personnel involved in FOIA litigation, litigation overhead, and any other FOIA litigation-related expenses.[56]

Most of the cost for agencies is, of course, absorbed by the Department of Justice in its representational capacity, and therefore accounts, in part, for the outsized costs attributed to Justice.

Table 16: Litigation Costs of Agencies with Highest Volume of FOIA Requests (FY 2010 – 2012)

Agencies	Litigation Costs in Dollars		
	FY 2010	FY 2011	FY 2012
Agriculture	1,392,291	718,613	721,937
Archives	0	0	0
CIA	1,800,000	1,890,000	1,900,000
Defense	4,243,616	4,118,975	3,396,612
EEOC	2,682	1,110	320
Environmental Protection Agency	461,468	457,450	416,100
Health & Human Services	917,246	239,775	1,847,314
Homeland Security	1,985,762	1,956,380	1,884,874
Justice	7,545,248	9,494,587	9,804,330
Labor	485,000	497,973	497,973
Social Security	29,134	38,507	84,080
State	721,594	777,588	964,757
Treasury	31,854	102,089	200,365
Veterans Affairs	41,481	189,869	96,524
Total for 14 Agencies	19,657,376	20,482,916	21,815,186
Total for All Reporting Agencies	22,186,782	23,359,047	24,160,095

Derived from: foia.gov

As a general matter, insight into the dispute resolution process provided by this data is no greater than that provided by the agency request processing cost data. One might observe, however, that while government-wide litigation costs on an annual basis are less than 10% of government-wide request processing costs, that cost is devoted to only a small number of cases per year as opposed to the well over 600,000 requests per year to which the processing cost figures apply. If the total litigation cost of $69,705,924 for the three

[56] DEPARTMENT OF JUSTICE HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFORMATION ACT REPORTS P. 55, Oct. 29, 2013, http://www.justice.gov/oip/docs/doj-handbook-for-agency-annual-freedom-of-information-act-reports.pdf

fiscal years shown in Table 8 were divided by the 975 FOIA cases terminated in the district courts in the same three fiscal years shown in Table 12 above, the reported litigation cost to the government would be $71,499 per case. Certainly, these costs are not distributed equally across these cases, but it is not possible from the reports available to associate the undifferentiated costs with particular cases. Also, while this calculation uses as the denominator the number of cases terminated in the district courts in the period, there undoubtedly are Courts of Appeals cases (and possibly Supreme Court cases) that make up part of the numerator. The cost reports, however, do not distinguish court level either.

5. Exemptions Asserted in Litigation

The Justice Department's *FOIA Litigation and Compliance Reports* and the review of cases from the TRAC/PACER database both serve as resources for estimating the types and frequency of exemptions asserted in FOIA lawsuits. For the cases reviewed from the TRAC/PACER database, as noted earlier, the filings associated with the docket entries must be examined to determine the exemption asserted, and in many cases it is possible to identify the primary exemption at issue. In the *FOIA Litigation and Compliance Reports*, the exemptions are explicitly noted, but there is a risk of over-count because a case is entered for each year in which a "decision" was rendered. For example, for a case in which the defendant's motion for summary judgment was denied in one year, but in which the plaintiff's motion for summary judgment was denied in part and granted in part in a subsequent year, the exemptions at issue would be entered for both years. Additionally, the Justice Department reports include any exemption asserted in the pleadings, leading to cases in which multiple exemptions are counted, while the review in the study based on the TRAC/PACER cases sought to identify the primary exemption at issue.

Nonetheless, within these limits, the two sources provide a sense of the frequency at which particular exemption claims are litigated. Table 17 contains the data from the Justice Department reports; and Table 18, the data from the TRAC/PACER case review.

Table 17: Exemptions Asserted in Litigation Based on Justice Department Annual Reports (Calendar Years 2008 – 2012)

Exemption	CY 2009	CY 2010	CY 2011	CY 2012	Total
Exemption 1	12	9	16	25	66
Exemption 2	41	33	20	12	123
Exemption 3	34	17	44	41	189
Exemption 4	19	11	13	15	72
Exemption 5	56	32	39	54	212
Exemption 6	44	36	48	54	207
Exemption 7	118	112	94	108	496
Exemption 8	0	1	1	1	3
Exemption 9	0	0	0	0	0

Table 18: Exemptions Asserted in Litigation Based on TRAC/PACER closed cases (Fiscal Years 2010 – 2013)

Exemption	FY 2010	FY 2011	FY 2012	FY 2013	Total
Exemption 1	11	3	15	16	45
Exemption 2	17	12	22	19	70
Exemption 3	21	19	31	26	97
Exemption 4	18	14	28	20	80
Exemption 5	39	24	63	61	187
Exemption 6	39	36	74	57	206
Exemption 7	41	31	70	66	208
Exemption 8	0	1	1	2	4
Exemption 9	0	0	0	0	0

Perhaps most significantly, both sources reflect general proportionality with the exemptions relied upon in agency appeal dispositions, as shown in Appendix C, Table C-4.[57] Some exemption claims initially relied upon may be dropped in litigation of particular cases, but the overall patterns are not markedly different.[58]

[57] Appendix C contains tables showing agency dispositions of requests for fee waivers and expedited processing. These requests can become an issue in litigation. The filings associated with the TRAC/PACER data for cases closed in fiscal 2010 through 2013 show that fee-waivers denial claims were presented in 170 of the 1402 cases reviewed and that expedited processing claims were presented in 140 of those cases. The resolution of those claims in the judicial proceeding was clear in very few of the cases.

[58] There is, however, some delay effect from changes in law or practice. For example, the shift away from Exemption 2 (perhaps toward other exemptions) at the agency level as a product of *Milner* will not be seen in closed case data immediately.

B. Courts of Appeal

District Court FOIA decisions that are appealed and lead to merits decisions from Court of Appeals are, of course, an important part of the body of case law that has developed under FOIA since its enactment, especially decisions from the District of Columbia Circuit. Table 19 shows all FOIA terminations in the United States Courts of Appeals for the fourteen fiscal years from 2000 to 2013.

Table 19: Courts of Appeals Decisions in FOIA Appeals Terminated (FY 2000 – 2013)

Year Ending Sept 30	Total Appeals Terminated	Terminated on Procedural Grounds	Terminated on the Merits						
			Total	Affirmed / Enforced	Dismissed	Reversed	Consolidations	Remanded	Other
2000	80	30	50	38	2	4	2	3	1
2001	77	29	48	38	2	4		1	3
2002	72	23	49	39	1	3	5		1
2003	63	18	45	33	1	6	2	2	1
2004	58	18	40	30	2	6	2		
2005	66	26	40	28	1	4	5	2	
2006	74	27	47	27	2	8	8	2	
2007	76	31	45	36		6	3		
2008	70	24	46	31	3	7	2	3	
2009	75	30	45	34	2	6	1	1	1
2010	58	30	28	21		6	1		
2011	67	20	47	40		5	2		
2012	51	21	30	20	2	4	4		
2013	48	16	32	22	1	9			

Source: Administrative Office of the U.S. Courts

A total of 887 FOIA appellate cases were terminated in that 14-year period, or an average of 68 cases per year. Of those 887 cases, 560 or 63.1% of those, or on average 43 cases per year, were terminated on the merits, as opposed to procedural grounds. In 415 cases, or 74.1% of the cases terminated on the merits, the appellate decision was an affirmance. As reflected in Table 8, in the same 14-year period, 4,478 FOIA cases were terminated in the district courts. While the appeals courts case terminations in those fiscal years are not the same set of cases that were terminated in the district courts in those years, the 14-year totals for the same years from the district and appeals courts provide a reasonable approximation of the proportion of FOIA district court terminations that are appealed. In that period, there were 887 appeals terminations or 19.2% of the 4478 district court terminations. In sum, using this methodology, FOIA cases appear to be appealed at roughly a 19% rate; of those appealed, roughly 63% are decided on the merits, and roughly 74% of those are affirmed. The characteristics of the appeals from district court, however, are not examined in this study because once the judicial process has been

invoked in a FOIA case, the methods and opportunities for informal case resolution become a judicial matter, not an administrative one.[59]

V. THE INTERVIEWS

Because of the many shortcomings of the available hard data regarding FOIA requests, disputes, and their resolution, some of the deepest insight into these matters resides with individuals and organizations that use FOIA and the agency officials who process FOIA requests. In many ways, the most critical part of this study is the understanding obtained from the numerous experts who were interviewed[60] by, or who attended a group session[61] with the author. The goal of the interviews was to gain an understanding of the varying dimensions of the FOIA process that might suggest ways that FOIA dispute resolution efforts should be targeted. In this section, these dimensions are first identified and then related to dispute resolution processes. All the views and conclusions expressed in this report, however, are those of the author and represent a distillation of the range of perspectives offered in the interviews. These are not necessarily the views of any particular interviewee or group session attendee.

A. Requesters Types: Motivation

As noted at the outset, "requesters" vary widely in their motivations, resources and sophistication. Motivation is a dimension that is difficult to capture. For example, some requesters have what might be characterized as a personal curiosity about a government

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[59] Courts do provide mechanisms to facilitate the informal resolution of cases that have entered the judicial process, court-administered mediation programs being the most common. The operation and level of success in these programs is beyond the scope of this study. Measures in the District Court for the District of Columbia and in the U.S. Court of Appeals for the District of Columbia seem to point in opposite directions. District court local rule 16.3(b) excludes FOIA cases from the list of cases in which the parties have a "duty to confer" as part of the scheduling conference. Local rule 16.3(c), which lists the matters the parties must discuss, includes "whether the case could benefit from the Court's alternative dispute resolution procedure." https://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/2010_MARCH_LOCAL_RULES_REVISED_July2011_July2013.pdf at pp.37-38. The rule does not preclude the use ADR in FOIA cases; it simply excludes them from the mandatory duty to confer.

In contrast, in January 2013, the Court of Appeals, began a pilot program to require attempt mediation in two classes of case, one being FOIA cases. The number of FOIA cases that have followed this requirement is too small from which to draw any meaningful conclusions, but the Electronic Privacy Information Center reports recently reaching a settlement under the D.C. Circuit mediation program. "EPIC Settles FOIA Case, Obtains Body Scanner Radiation Fact Sheets," *available at* http://epic.org/2014/01/epic-settles-foia-case-obtains.html.

[60] See list of interviewees in Appendix B.

[61] See list of attendees of group sessions, also in Appendix B.

matter -- for lack of a better term, “curious” requesters. Among them, that curiosity might be deep and enduring, and even grow with time, or it might be fanciful and passing, but without extensive empirical work the intensity of that curiosity is an unknown.

The first step, making a request, is relatively easy and low cost. If curious requesters get what they sought, they have no need for “dispute resolution” because there is no dispute. Recognizing, however, the dramatic drop-off between denied or partially denied requests and administrative appeals, and assuming the curious requesters are at least equally if not more highly represented in the drop-off, they generally do not take the second step, the administrative appeal. Thus, lacking any other measure to gauge the intensity of their interest, one might reasonably conclude that those curious requesters who appeal demonstrate a commitment to the process that distinguishes them significantly from most denied curious requesters. The fact that their motivation is only curiosity does not, however, diminish the significance of their requests under the policies of the Act. Yet it may affect their further participation in the dispute resolution process if their appeal is denied in whole or part.

Other requesters have what could be as described an incidental, targeted motivation. Such requesters find themselves in positions in which it would be desirable to have access to some agency records for an immediate and limited purpose. "Incidental" requesters, again for lack of a better term, could be individuals, businesses, or other organizations. They could, for example, be individuals or businesses pursuing a government status or benefit or parties in engaged in litigation whether with the government or otherwise. It is not the particular reason that is important, but that motivation is focused and relatively short-term. At times, requests from researchers or media representatives might fit this category of motivation as well. However broad this category, the particularity of the need and its immediacy suggests that such requesters would appeal full or partial denials at higher rates than merely "curious" requesters, but that sense, too, is anecdotal, not empirical.[62] Nonetheless, administrative appeals from such requesters, like all appeals, are part of the low number of requests pursued after initial denials. The likelihood of further participation in the dispute resolution process may, if higher for incidental requesters than for curious requesters, depend on factors other than initial motivation, such as some measure of the actual “value” of the information to the requester.

Still other requesters have what might be characterized as a mission-driven motivation. These requesters are primarily advocacy organizations and could be said also

[62] There does not appear to be any careful empirical study of requester behavior, across the range of requester types, in their use of the FOIA process at various stages. This could be a useful undertaking in assessing approaches to FOIA dispute resolution.

to include at least some media requesters. Frequently, the work of one or more agencies is closely related to the ongoing mission that motivates such requests. The importance of this relationship or mission-commitment would suggest a greater likelihood of an appeal from an initial denial than from a curious or incidental requester and perhaps a greater likelihood of further participation in the dispute resolution process. The fact, that many mission-driven requesters end up as repeat plaintiffs in the FOIA litigation process provides quasi-empirical support for viewing them, in terms of motivation, as the most likely participants in the post-agency dispute resolution process.

B. Requester Types: Resources and Sophistication

Concededly, limiting requester-motivation types to these three—curious, incidental, and mission-driven—is somewhat of an oversimplification; and even among these, the lines tend to blur. Nonetheless, the utility of this categorization lies in providing at least a minimal framework from which to consider the layering of factors that appear ultimately to affect recourse to post-agency dispute resolution processes. The two most frequently identified further factors are requester financial resources and requester sophistication. And, in fact, the two seem interrelated. Individual curious requesters could have strong financial resources, but there is no reason to assume that they are in any better position than the average citizen to afford the various costs of federal court litigation. Incidental requesters, with a monetarily, or sometimes personally, valuable interest at stake may see litigation costs differently than the merely curious requester, but it is more likely to be the corporate/business requester who has the resources to weigh litigation meaningfully on a cost-benefit basis. Mission-driven requesters are not necessarily stronger in terms of financial resources than curious or incidental requesters. Yet they often have what might be viewed as a substitute for financial resources. Mission-driven requesters frequently have a level of experience and sophistication for engaging in meaningful cost-benefit analysis in deciding whether or not to pursue litigation, as well as the internal expertise to engage in it. The latter strength, in fact, may be the most significant factor of all. Having FOIA litigation expertise or being able to afford retaining it affects not only the choice of whether to pursue post-agency process, but also the quality of the engagement in that process.

C. Agency Engagement

The picture on the agency side has some similarities and some differences. The decision by any requester to resort to litigation under the Act is, ordinarily, preceded, except in cases of delay or other procedural issues, by an agency decision to deny a request for access, at least in part. Described mechanically, that decision would always require a determination within the agency whether an exemption to disclosure applies, and if so, then arguably whether discretion, where available, should be exercised to permit

disclosure. Agency officials responsible for these decisions, however, operate under constraints that make the mechanical description quite superficial. These constraints, of course, vary among agencies both in degree and in kind.

First, limited resources are available to an agency (or are made available) for FOIA. This constraint is one that virtually everyone inside and outside government agrees is a problem, but also one that no one is inclined to critique with much specificity—that is, asserting what level and quality of resources would be enough. Most observers would agree that there is a high level of compliance with the Act in the agencies, despite limited resources, particularly for the mass of relatively routine requests that nonetheless can be tedious and consume resources heavily. Agency officials on the front lines of this sort of work are generally highly professional and often under-appreciated and under-recognized.

Further constraints can also be said to be related to resources, though with a somewhat different character. First, "control" over agency records lies with the agency offices that perform the primary substantive missions of the agencies. It is easy for those offices to see any FOIA processing demands as taking away resources from other agency matters. Second, and somewhat more subtly, the very decision to be made—disclosure or not—can sometimes be seen by these offices, whether rightly or wrongly, as using agency resources to produce a harmful or embarrassing outcome for the agency or for particular agency officials. The point here is not whether the product of these constraints is actual non-compliance with the Act, but rather that the complex of requester motivations in using the Act and its dispute resolution processes has corollaries in agency decision-making. A decision to issue a final denial at the agency level is, in effect, a decision to risk (however small or large the risk) engaging in litigation.

D. Intractable and "Tractable" Issues

Sometimes the ultimate value of, or consequences from, a decision is commensurate between requester and the agency. In other words, the denial of access to particular records would pose just as significant a loss to the requester, given the motivation for the request, as the granting of access would have to the agency, or at least to important agency officials. This category of case has relatively little potential for an informal post-agency resolution. Both parties probably see the case as requiring a judicial decision. These cases, of course, cannot always be confidently identified from a general description. A typical case, however, is likely to be one involving a mission-driven requester who has learned of (or suspects) the possible existence of a document in its area of interest that would help it understand an agency policy or practice or that otherwise might be newsworthy or bear upon the performance of high official in the agency. The status of the record under the Act might give each side a colorable argument, and the stakes are too high for either side to want other than a judicial resolution, in part for its precedential value. The mission-driven

requester is likely to have both the resources and expertise to bring the case, and the government at least equal capacity to defend it.

A possible diversion of the case might occur if, before its decision to make a final denial on appeal, the agency consults with the Office of Information Policy in the Department of Justice. The guidance provided by OIP in such consultations fulfills part of the statutory duty of the Attorney General to encourage compliance with the Act. It is commonly assumed this consultation is the primary occasion on which the Department could express concern about the legal defensibility of a contemplated agency decision if it has such concern. Because the content of this consultation is considered privileged, there is no publicly available record of its impact in the decisional process. A common, though not empirically informed, perception is that these consultations with OIP, sometimes including participation from the Civil Division, may urge reconsideration of the contemplated denial, but rarely lead to a conclusion on the part of Justice that the denial, if made, would not be defended if a suit were filed.

Thus, some cases just seem destined for court. Even though these essentially intractable cases may be among the most important FOIA cases in terms of the goals of the Act, they are probably not the most fruitful targets for alternative dispute resolution. But they implicitly suggest case types where there is potential for alternative approaches; and those can be described in part by the absence of characteristics in the litigation-destined case.

E. Dispute Resolution "Typologies"

There is a rich and interesting body of ADR literature that develops typologies of disputes that may best lend themselves to resolution short of litigation.[63] These typologies depend heavily on the substantive areas of law involved and the form of the potential resolution, e.g. a dollar-amount settlement.[64]The FOIA dispute is not easily placed among those types. The "value" of the thing at issue is not monetary (though at times it can relate to a monetary dispute) and the parties' respective needs for obtaining or protecting the information are difficult to quantify. But unique features of FOIA cases may lend themselves to at least partial informal resolution and thereby may minimize or eliminate the need to resort to court.

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[63] *See generally* Nancy Neslund, *Dispute Resolution: A Matrix of Mechanisms*, 1990 J. Disp. Resol. 217 (1990), *available at* http://scholarship.law.missouri.edu/jdr/vol1990/iss2/1.

[64] *See generally* International Institute for Conflict Prevention and Resolution, ADR Suitability Guide, *available at* http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/cpr%20suitability%20guide.pdf

Some of the FOIA case features that most strongly suggest dispute resolution potential and their association with types of requester can be identified. A merely curious, but not well resourced or experienced requester, may make a request that would commonly be recognized as having little chance of success, but if that requester is the unusual one who presses the matter to appeal and loses, the experience (bad from the requester's point of view) may tempt the filing of a suit. Lacking empirical data as to what might push the requester one way or the other, it nonetheless seems reasonable that a confirmation from a neutral source (external to the agency) as to the weakness of the requester's case may end the matter. It would not be possible to say that a suit has been avoided, but it seems relatively obvious that the neutral had real potential to affect the choice.

Similarly, the core of the dispute that may exist between a requester and an agency not infrequently centers on the scope of the request and the question of the volume and type of records that may be responsive. In some respects this issue presents the true uniqueness of the FOIA dispute. One party, the agency, may know fairly well what the requester is interested in and roughly what records may be responsive, though not always. The other party, particularly an unsophisticated requester, knows the topic of interest (even if not always expressed clearly) but would probably not know much about the records that would be responsive. Since the 1996 FOIA amendments, the Act has sought to provide a degree of relief from this problem through encouraging agency-requester communications aimed at focusing the request;[65] and since the OPEN Government Act of 2007, the required agency position of "FOIA Public Liaison" has, at least theoretically, added a resource for this purpose. The problem of differential knowledge, however, breeds suspicion and mistrust on the part of many requesters. When agency-requester communications break down, ultimately leading to a denial through the appeal level, engagement of a neutral may be able to close the gap in understanding by conveying information about the general nature and volume of responsive records, and may lead to a solution short of litigation. The neutral role in this situation may benefit the sophisticated requester, as well as the unsophisticated, because it may provide some guidance as to the likelihood of success in litigation.

It is quite well understood, particularly among sophisticated requesters, that filing suit changes the nature of the dispute in just that way. Once a suit is filed, the agency dispute resolution effort can change dramatically. Generally, the suit promptly raises the level of attention to the matter in the agency. Sometimes the mere filing of the suit leads to a production of some or all of the requested records. In most cases, that is not an immediate result, but through the filing of the complaint and the receipt of the answer, the range of procedural moves and party conversations increase. That may lead, in turn, to the

[65] 5 U.S.C. 552(a)(6)(B)(ii).

requester-plaintiff beginning to develop a more detailed picture of what is at issue and the likelihood of success from pushing forward with the case. Reaching the procedural point that would require the production of a *Vaughn*[66] index, adds to the assessable information that was not normally available at the agency-level process. It is also the information that may lead to settlement, not infrequently the requester-plaintiff agreeing to a dismissal with prejudice. However useful this unfolding process may be for the party with the resources and sophistication to bring suit, it is not available to the under-resourced and/or unsophisticated requester. A significant number of unsophisticated requesters bring suit, *pro se* litigants in particular, but their action is unlikely to produce a meaningful and effective engagement with counsel for the agency. For the well-resourced and sophisticated requester, there may be no attractive informal alternative to the use of the suit to help frame, narrow and possibly resolve the dispute. The external neutral in the informal, non-litigation setting, cannot assume there will be the same level of engagement by the government attorneys that might be expected in court, but a non-judicial neutral setting aimed at promoting that sort of exchange[67] may have a place, if only for a limited class of cases.

Neutral assistance with the bedeviling problem of delay in FOIA cases also warrants consideration. Fully recognized judicially since *CREW v. FEC,*[68] a requester will be deemed to have exhausted agency level process, unless the agency makes a substantive "determination" on the request within the applicable 20-day time limit. For some requesters, passing a time period that will be deemed "constructive exhaustion" is, short of obtaining the requested records, the desired result, in that a suit can be brought immediately. For the more typical requester, reaching a point in the agency process when the exhaustion requirement has been satisfied makes suit an option, but an option that might willingly be postponed through meaningful engagement with the agency to obtain a better understanding of the cause for the delay and the prospects for obtaining a reasonably prompt resolution.

Requests for fee waiver and for expedited processing are two further areas where the engagement of a neutral may be useful, but in a somewhat different sense. While fee waiver denials and expedited request denials can become issues in FOIA litigation, they would not normally be the exclusive basis for a suit. The underlying substantive request for access will be part of the litigation. Fee waiver issues may lend themselves particularly well to engagement of a neutral. Depending on the resources of a requester and the potential amount of the fees that might be imposed for a request, if a fee waiver has been denied or not timely decided by the agency, the cost facing the requester may force a choice between

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[66] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
[67] For example, agency cooperation through providing an informal or draft *Vaughn* index.
[68] 711 F.3d 180, 189 (D.C. Cir. 2013).

dropping the request or filing suit. Because a fee waiver denial or delay may make the agency suspect in the eyes of a requester, and because the fee waiver issue rarely has any relationship to the mission of the agency, engagement of a neutral may help resolve this threshold issue in a way that makes interchange between the parties for resolving the underlying substantive issue easier. To the extent, however, that an agency might be inclined to use fee waiver denials as a form of docket control in an understaffed FOIA support setting, fee waiver becomes an issue of considerable importance to the agency and perhaps one more difficult to resolve informally.

VI. EXISTING FOIA ALTERNATIVE DISPUTE RESOLUTION STRUCTURE

A. Department of Justice: Office of Information Policy

As noted earlier, FOIA requires the Attorney General to report annually the efforts of the Department of Justice to encourage agency compliance with FOIA. For many years the Department, through the Office of Information Policy (OIP) and its predecessor offices, had included in the statutorily required report information regarding what the Office referred to as an "ombudsman function." In 1993, it described the function as follows:

> [W]e maintain what we call our "FOIA Counselor Service," through which we handle more than 2,000 calls for advice and assistance on a variety of FOIA-related matters each year. I emphasize this because I want to call your attention to a related service provided by our office--known as our FOIA "ombudsman" function -- in which we are available to assist FOIA requesters who believe that the agencies processing their FOIA requests are operating contrary to, or under a misunderstanding of, applicable legal requirements. Sometimes, we've found, simply facilitating better communication between FOIA requesters and agency FOIA personnel can clear up problems in the process.[69]

The scale of this function can be traced through references to it in the Annual Compliance Reports. For example, in the 1998 report, the performance of this function was summarized as follows:

> OIP . . . in its "FOIA Ombudsman" capacity . . . responded to several complaints received directly from members of the public who were concerned that an agency had failed to comply with the requirements of the

[69] FOIA Update, Vol. XIV, No. 3 1993 (presentation made by OIP Co-Director Daniel J. Metcalfe at the National Press Club's celebration of Freedom of Information Day), *available at* http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page5.htm.

> Act. In all such instances involving a concern of agency noncompliance, the matter was discussed with the agency and, wherever appropriate, a recommendation was made regarding the steps needed to be taken by the agency in order to bring it into proper compliance. Additionally, OIP responded to 315 written inquiries from members of the public seeking information regarding the basic operation of the Act or related matters, as well as to innumerable such inquiries received by telephone.[70]

The report continued over the years in a similar form with some variation in the number of complaints and written inquires. Beginning in 2002, in addition to listing those numbers, the reports noted, "The number of written inquiries received . . . continued to be smaller than in recent years, due largely to the increased availability of information that is now accessible to the public through the Justice Department's FOIA Web site."

In 2007, after passage of the OPEN Government Act creating the Office of Government Information Services, the report ceased referring to the function as one of "Ombudsman," but has continued to note numbers of complaints and written inquiries it receives. In 2008, OIP reported receiving "no written inquiries from members of the public. In 2009, OIP reported handling 13 written complaints from members of the public. In 2010, OIP reported handling 17 "matters" from the public, 20 matters in 2011, and 19 matters in 2012.

It is clear from these reports that OIP has receded, at least somewhat, from the role it played in assisting individual requesters, whether characterized as an ombuds function, or otherwise. This could be attributable to a decline in requester interest in using an office in the Department of Justice as a source of neutral assistance in dealing with agency request processing, but is just as likely attributable to the statutory establishment of the Office of Government Information Services, specifically to perform a FOIA ombuds role.

B. NARA: Office of Government Information Services

The Office of Government Information Services (OGIS) was created by the OPEN Government Act of 2007 and became operational in September 2009. OGIS is established as an entity within the National Archives and Records Administration. The Act requires OGIS, which refers to itself as the FOIA Ombudsman,[71] to (1) review agency policies and procedures and compliance with FOIA, (2) recommend policy changes to Congress and the

[70] *Available at* http://www.justice.gov/oip/98rep.htm. The reports from 1998 forward are available from year-base links at: http://www.justice.gov/oip/reports.html under the heading "Department of Justice FOIA Litigation and Compliance Reports."

[71] The FOIA Ombudsman, About the FOIA Ombudsman: Information and Advice, http://blogs.archives.gov/foiablog/about-2.

President to improve the administration of FOIA and (3) offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.[72]

Unlike the Department of Justice, which is charged with a FOIA compliance promotion function *and* a responsibility to represent agencies in suits arising under FOIA, OGIS has no agency representation responsibility. In creating a new FOIA compliance-promotion function through the establishment of OGIS, and its placement in the National Archive and Records Administration (NARA), Congress clearly intended a distinct and separate role for OGIS. Congress, however, left in place the Attorney General's compliance responsibilities carried out primarily through OIP. Thus, OGIS and OIP co-exist with some overlap of functions.[73] But apart from full separation from the FOIA litigation defense function, OGIS uniquely has been assigned statutory responsibility to provide mediation services to resolve disputes between agencies and FOIA requesters as an alternative to litigation.[74] It is the OGIS mediation function that is most relevant to this study, although

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[72] 5 U.S.C. § 552(h).

[73] At times, there has been an uneasy relationship between OPI and OGIS. Some aspects of this problem are well summarized in a Congressional Research Service Report:

> As noted earlier in this report, DOJ is charged with ensuring that agencies comply with FOIA, and performs this mission by issuing guidance and conducting training. DOJ is also the department that defends federal agencies in FOIA-related litigation. OGIS, in contrast, is charged with reviewing agencies' compliance with FOIA, recommending ways to improve FOIA administration, and mediating FOIA disputes that emerge between agencies and the public. OGIS has defined itself as a "FOIA ombudsman," seeking to facilitate "clear, direct communication" where it "has been lacking."
>
> Congress, at times, has encountered executive-branch resistance to FOIA amendments. OGIS's inception provides one such example. The OPEN Government Act of 2007 (P.L. 110-175) created OGIS to review FOIA policies and agency compliance as well as to recommend ways to improve FOIA. Pursuant to the OPEN Government Act, the office was to be placed within NARA. President George W. Bush's FY2009 budget recommendations, however, sought a repeal of the creation of OGIS and, instead, sought OGIS's enacted responsibilities be assigned to the Department of Justice. In creating OGIS, legislators had purposefully placed it outside of the Department of Justice, which represents agencies sued by FOIA requesters.
>
> The 111th Congress responded to the Administration's recommendation by appropriating $1 million for OGIS and explicitly requiring its establishment within NARA. OGIS began operations within NARA in September 2009. Subsequent appropriations for OGIS have come from NARA's general appropriation and have not appeared as a separate line-item.

See Wendy Ginsberg, R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues* at 16 (January 23, 2014) (internal citations omitted), *available at* http://www.hsdl.org/?view&did=749606.

[74] Senator Leahy's office issued a release regarding his letter to Attorney General Holder concerning a Justice Department reference to its "Ombudsman" function:

effective exercise of its review and recommendation functions has the potential to reduce FOIA disputes and, in turn, FOIA litigation.

The list of OGIS functions suggests a scope of responsibility that would entail a large staff. The reality is quite different. Since the end of its first year of operation, OGIS has had a staff of six: a Director, an Assistant Director, an Attorney Advisor, three Program Analyst Managers, and a Staff Assistant. The limited staff resources must be spread across its three statutory functions. The entire budget for the Office for the four fiscal years 2010 through 2013 has averaged just over one million dollars per year, and generally has been declining: $1.2 million (FY 2010), $1.6 million (FY 2011), $1.0 million (FY 2012), and $ 0.92 million (FY 2013).[75] The budget increase in FY 2011 is attributable to OGIS's move to its current office location and its purchase and implementation of a new electronic case management system.[76] The budget has also been significantly smaller than the cost estimated by the Congressional Budget Office in reviewing the bill that, in substantially similar form, became the OPEN Government Act of 2007.[77]

> The Justice Department recently noticed publicly its proposed modifications to its Privacy Act and Freedom of Information Act system of records. The modifications included several references to the Office of Information Policy acting in the role of an "ombudsman" in disputes between federal agencies and individuals who submit FOIA requests. However, legislation authored by Leahy and Cornyn in 2007 – the OPEN Government Act – created the Office of Government Information Services within the National Archives and Records Administration to expressly fulfill the role of FOIA Ombudsman.
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> "As the authors of the OPEN Government Act, we are very troubled that the Department's proposal is inconsistent with of the plain language of that law and with our intent," wrote Leahy and Cornyn. "We are also concerned that the proposed modification to the Department's records system will create unnecessary confusion for agencies and requesters alike, regarding how FOIA disputes are to be resolved within the Federal Government. We urge the Department to reconsider the proposed modification to its records system."

"Leahy, Cornyn Urge DOJ To Clarify Department's Position On FOIA Ombudsman" http://www.leahy.senate.gov/press/leahy-cornyn-urge-doj-to-clarify-departments-position-on-foia-ombudsman.

[75] E-mail from Miriam Nisbet, Director, Office of Government Information Services, to author (January 16, 2014) (on file with author).

[76] *Id.*

[77] The CBO cost estimate for that bill read as follows:

> Section 11 would establish an Office of Government Information Services within the Administrative Conference of the United States. The office would review FOIA policies and practices, make recommendations, offer mediation services, and conduct audits of agency's FOIA programs.
>
> Based on information from DOJ and the cost of similar offices, CBO estimates that implementing this provision would cost $7 million annually for additional staff to conduct audits of FOIA programs. CBO expects that the new agency would take about two years to reach that level of effort. We estimate that operations of the new office would cost $27 million over the 2008– 2012 period, assuming appropriation of the necessary amounts.

S. Rep. No. 110-59 at 11, accompanying S. 849, Senate Committee on the Judiciary.

Table 20 below summarizes broadly the OGIS mediation caseload over the first four full fiscal years of operation, though as a result of changes in its case management system in FY 2011, complete data in a consistent form is not available for all four fiscal years.

Table 20: OGIS Caseload (FY 2010 – 2013)

OGIS Caseload	FY 2010	FY 2011	FY 2012	FY 2013
Cases Received	391	373	361	508
Cases Closed	320	357	354	497
Quick Hits	N/A	314[78]	314	225
No. of Agencies	24	42	37	36
Top Five Agencies[79]	Justice-38%	Justice-25%	Justice-22%	Justice -28%
	Veterans Affairs-9%	Homeland Security-12%	Homeland Security-15%	Homeland Security-21%
	Defense-7%	Veterans Affairs-7%	Veterans Affairs-8%	Treasury-6%
	Archives-5%	Defense-7%	SSA-8%	Veterans Affairs-6%
	Homeland Security-5%	Health & Human Services-3%	Defense-5%	USPS-5%
From Individuals	N/A	78%[80]	N/A	N/A
From Organizations		16%		
From Agencies		2%		
Delay	N/A	N/A[81]	28%	28%
Full/Partial Denial	N/A	N/A	40%	46%
Other Issues[82]	N/A	N/A	32%	26%
Stage in Agency Before request	N/A	5%	1%	1%
After request	N/A	26%	31%	28%
After determination	N/A	9%	9%	10%
After appeal filed	N/A	10%	15%	9%
After appeal determination	N/A	20%	33%	45%
Exemptions (range)	N/A	1-8	1-7	1-7
Privacy Act Cases	97	50	39	85

Derived from data provided by the Office of Government Information Services[83]

OGIS's implementation of its review, recommendations, and mediation functions are described in its annual reports and reviewed in a 2013 Government Accountability Office

[78] Between June 2010, when OGIS began tracking telephone and email Quick Hits, and the end of FY 2011, the Office helped nearly 500 callers and emailers.

[79] The frequency with which matters from particular agencies were brought to OGIS's attention was affected, in part, by those agencies' including a reference to OGIS in their final denial letters.

[80] These percentages were available for FY 2011 and considered accurate by OGIS, but OGIS is not confident that that data for the later years is comparable because of possible inconsistencies in how the information may have been added to its new case management system.

[81] In FY 2011, cases involving delays and denials accounted for 56% of OGIS's caseload.

[82] Other issues include FOIA processing issues, fees, or policy matters.

[83] E-mail from Christa Lemelin, Management and Program Analyst, Office of Government Information Services, to author (January 9, 2014) (on file with author).

(GAO) report.[84] With respect to its mediation function, some of the richest detail is presented in those reports anecdotally. Those accounts suggest OGIS handles a range of challenging disputes with skill and often much success. The GAO report, while reviewing the mechanics of the mediation function, faulted OGIS for failing to have metrics for measuring success in mediation.[85] It then used a categorization of its own, in a sample of 44 cases, to measure outcomes in terms of success. GAO concluded, by its measure, the outcome in 22 of the 44 cases to be successful.[86]

Determining success in mediation is notoriously difficult. It is often measured by whether the process has produced a consensual resolution of "the dispute." In the FOIA area, however, simply facilitating some steps in a conversation between a requester and an agency may sometimes lead to a subsequent resolution that did not require the continued engagement of the "mediator." The Archivist of the United States responded to GAO regarding the measurement concern by letter after receiving a draft of the report.[87] The Archivist indicated that issues of measurability are now being considered internally.[88] The present study does not pursue the "measurability" question directly. Rather it seeks to describe the practical dynamics of the OGIS mediation function that bear generally on its prospects to accomplish the "alternative dispute resolution" portion of its statutory charge.

Currently, OGIS is open to all comers. Its caseload is determined by whoever happens to contact the Office. OGIS receives some phone calls and emails from individuals who have never interacted significantly in any way with a federal agency and who certainly have never filed a FOIA request. The help many of these individuals seek is modest (e.g., where to file, what form to use, etc.) and can be delivered in a single short phone call or email. Most of these inquiries are opened and closed the same day, and are the ones OGIS classifies as "Quick Hits." Some of them, however, turn out to be more complicated than they initially seemed or lead to follow up calls or emails that are more substantive. Nonetheless, a portion of OGIS's workload falls into the relative straightforward category. As Table 20 shows, the number of Quick Hits in the first couple of years of OGIS's operation was around 300. In the most recent year, the number is lower, arguably attributable to OGIS's use of its website to disseminate broadly the kinds of information that would typically have led to Quick Hit inquiries. At the same time, however, the number of cases that are not Quick Hits has increased substantially from FY 2012 to FY 2013.

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[84] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-13-650, FREEDOM OF INFORMATION ACT—OFFICE OF GOVERNMENT INFORMATION SERVICES HAS BEGUN IMPLEMENTING ITS RESPONSIBILITIES, BUT FURTHER ACTIONS ARE NEEDED, Sept. 10, 2013, http://www.gao.gov/assets/660/657697.pdf.
[85] *Id.* at 21.
[86] *Id.* at 12.
[87] *Id*. at 26.
[88] *Id.*

OGIS has used various terms to label its cases that are not Quick Hits. They have been referred to variously as ombuds cases, facilitations, or mediations. The meaning appears to vary based largely on the degree to which OGIS becomes involved substantively. At one extreme, OGIS may simply make a call on behalf of a requester to an agency to determine what the cause of delay in a response may be. At the other extreme, OGIS may become involved as a classical mediator, discussing respective positions with requester and agency parties and seeking to a promote conversation that will lead to an agreed resolution. In the latter role, OGIS may communicate to either party informally its own view on the matter in dispute. While the degree of OGIS's substantive involvement in these non-Quick Hit cases varies, they all fall under its statutory "mediation" function and will for the remainder of this study be referred to as mediation cases.

In the field of alternative dispute resolution, some observers view "mediation" as a relatively precise term of art; others view it as a broad umbrella term with many sub-forms all aimed at assisting parties to a dispute to reach an agreed resolution, short of formal adjudication of the dispute.[89] It is in the broader sense the term is used here. Congress, itself, did not define the term "mediation" in the OPEN Government Act of 2007,[90] and OGIS appears to have operated under a broad notion of the term.

Without regard to the stage at which a FOIA case may lie in the administrative process, OGIS may be approached by a requester for assistance. If OGIS sees the case as requiring more than Quick Hit treatment, it must gather information from the requester. Depending on the nature of the matter, that information may have to be quite detailed. Once OGIS believes it has enough information to make preliminary assessment of the case, it must decide whether the case seems appropriate for an OGIS contact with the subject agency. From its initial assessment, OGIS may see there is no meaningful likelihood of success on the request and may communicate that view to the requester, closing the case on the OGIS docket.[91]If it sees the case more positively, it will likely choose to contact the agency to ascertain the status of the case, and if the agency has taken a position, what that position is.

This is the first point at which a structural problem in OGIS's statutory mediation function may appear. The statute does not expressly impose upon agencies a duty to participate in the OGIS mediation process. For the most part, OGIS appears to have received cooperation from agencies in responding to its inquiries in connection with its mediation function. No purpose would be served here by putting too fine a point on the degree of cooperation because it does not lend itself to precise measurement. The important point is

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[89] *See* note 64 and accompanying text.

[90] Nor did Congress define the term, “mediation,” in the Administrative Dispute Resolution Act, 5 U.S.C. 571.

[91] The requester, however, may not see the case as "closed" and is free to pursue a lawsuit.

simply that OGIS depends on agency cooperation, and the incentive for agency cooperation is not always obvious, given the overall FOIA dispute resolution process. Litigation, for reasons of cost among others, is clearly not the method generally desired by agencies for FOIA dispute resolution, but agency success rates in FOIA litigation may to some degree serve as a disincentive to participate meaningfully in a dispute resolution effort external to the agency, but short of court.

Of course, disputes that reach OGIS vary widely. Undoubtedly, seeking to help a requester understand the source of, and possible solution to, delay in an agency response to a request is likely a simpler matter than carrying out the mediation function when a requester feels a strong entitlement to a particular record and an agency feels that record need not be disclosed because of an exemption to the Act. More specifically, for example, the value of the information to a reporter who is on the verge of breaking a high-profile story and the value to the agency of, rightly or wrongly, protecting that information (in its discretion or otherwise) which may cause official embarrassment or perceived harm to the agency mission are in direct, and possibly irreconcilable conflict. Pure compromise, like reaching a dollar-amount midpoint in a civil case settlement, is a remote possibility at best.

That remote possibility may reach absolute impossibility if substantive assessment of the issue(s) requires impartial review of the agency records. As is common to all FOIA cases, the agency generally knows and the requester may suspect, but generally does not know, the content of the requested records. Unless the agency chooses to share with OGIS the contents of the records, OGIS is in the same position as the requester and any OGIS assessment must depend upon a very general understanding of the records and their relation to the agency's asserted reason(s) for withholding. OGIS has no authority to obtain the records, and an agency's incentive to voluntarily provide access to OGIS access would largely be a function of the value the agency sees in that step to having the dispute resolved informally and acceptably.

To put it quite simply, OGIS's mediation docket ranges from relatively easy cases to extremely difficult cases. Its ability to deal effectively with that caseload is in part a function of staff resources. It handles a large number of mediation cases with an extremely small staff that is charged not only with the mediation function, but also with the compliance review and recommendation functions. And it must contend with structural issues of type just described.

The statutory expression of OGIS's mediation function includes an additional, discretionary authority. The full statutory provision reads "[OGIS] . . . shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation *and, at the discretion of*

the Office, may issue advisory opinions if mediation has not resolved the dispute.[92]" OGIS has not yet chosen to exercise its advisory opinion authority.

C. Other Agencies: Content-Specific Dispute Resolution

Over time there have been a few instances of information dispute resolution structures used on a content-specific basis, for example, in connection with the Kennedy Assassination.[93] Only one continues to operate today on a substantial basis, the Interagency Security Classification Appeals Panel (ISCAP).

ISCAP was created by Executive Order 13526[94] in 2009 and decides individual challenges to security classification of agency records. ISCAP is made up of senior level representatives appointed by the Departments of State, Defense, and Justice, the National Archives, the Office of the Director of National Intelligence, and the National Security Advisor.

ISCAP offers an alternative process to requests to agencies for records access that might be denied under Exemption 1. Instead of making a FOIA request to an agency, the requester can seek from the record-holding agency Mandatory Declassification Review (MDR) under the Executive Order. To be eligible ultimately for ISCAP review, the requester must elect to submit to the agency an MDR request rather than a FOIA request. Denials of requests for information under FOIA will not be reviewed by ISCAP.[95] Under the Executive Order, if a party makes a request to an agency for MDR, the requester is entitled to appeal an initial denial within the agency, similar to an appeal from an initial FOIA denial. If the administrative appeal to the agency is denied, the requester can then appeal the decision to ISCAP for what will be a final decision, without judicial review.[96]

The ISCAP process is, thus, an alternative to a FOIA request for classified information and the judicial review that would follow a FOIA denial. Its attractiveness to requesters as an alternative dispute resolution process for this limited category of records appears to be a function of obtaining a sophisticated classification review external to the deciding agency. While neither judicial process nor ISCAP process is fast, ISCAP is generally perceived as somewhat more likely to order declassification of records than a court under FOIA. A requester may, nevertheless, have reason to bring a FOIA request, and then after the expiration of any determination time limit be free to bring suit in federal court with the attendant publicity, though perhaps not as intensive review.

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[92] 5 U.S.C. 552(h)(3).
[93] President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, Section 7, Establishment and Powers of the Assassination Records Review Board.
[94] Exec. Order No. 13526, 75 Fed. Reg. 707 (January 5, 2010).
[95] *Id.*
[96] *Id.*

The Information Security Oversight Office (ISOO),[97] ISCAP's administrative home, in its 2012 Annual Report to the President, provides the following summary of MDR process in agencies:

> Agencies received 7,589 initial mandatory declassification review (MDR) requests and closed 6,533 requests. The average number of days to resolve each request was 228. . . . Agencies reviewed 372,354 pages under MDR, and declassified 217,456 pages in their entirety, declassified 86,587 pages in part, and retained classification of 68,311 pages in their entirety. Agencies received 368 MDR appeals and closed 321 appeals. The average number of days to resolve each appeal was 240. . . . Agencies reviewed 10,920 pages on appeal, and declassified 3,173 pages in their entirety, declassified 3,442 pages in part, and retained classification of 4,305 pages in their entirety.[98]

The Report also summarizes ISCAP's FY 2012 action in completing review in 35 of 169 appeals from agency MDR decisions:

> In FY 2012, the Panel decided upon 35 MDR appeals, containing a total of 163 documents. The documents within these MDR appeals were classified either in part or in their entirety. The Panel declassified additional information in 150 documents (92 percent), and affirmed the prior agency classification decisions in 13 documents (8 percent). Of the 150 documents identified for additional declassification, the Panel declassified 63 documents (39 percent) in their entirety and 87 documents (53 percent) in part and affirmed the remaining classified portions.[99]

The ISCAP process, thus, stands as an alternative to FOIA processing that has some attraction to requesters whose interests lie in the area of security classified records, but its methodic operation may also have costs to requester interests in terms of the time consumed in the process and the unavailability of judicial review.

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[97] NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, INFORMATION SECURITY OVERSIGHT OFFICE, ANNUAL REPORT TO THE PRESIDENT 2012, http://www.archives.gov/isoo/reports/2012-annual-cost-report.pdf.

[98] *Id*. at 1.

[99] *Id*. at 20.

VII. COMPARATIVE FOIA DISPUTE RESOLUTION

A. International

In 1966, the United States could claim, through the passage of the Freedom of Information Act, the first national, detailed statutory scheme providing public access to governmental records. Today, at least 95 nations have "freedom of information" laws. These countries include the entire developed world and many developing nations. As would be expected, there are areas of commonality and areas of difference among these statutes. One area of difference is in the mechanisms used for dispute resolution. In virtually all, the judiciary plays some role in the ultimate resolution of a dispute; but procedures alternative to, or at least preliminary to, the courts are used in many nations. U.S. border-neighbors, Canada and Mexico, have two of the most well respected freedom of information schemes.

1. Canada

The 1987 Administrative Conference study summarized the Canadian dispute resolution structure of the 1983 Access to Information Law, which established as an arm of Parliament, the Office of the "Information Commissioner," an investigative body that issues non-binding reports on requester complaints and can bring suit on behalf of a requester. The Commissioner describes the Office today as follows:

> The Office of the Information Commissioner investigates complaints about federal institutions' handling of access requests. The Information Commissioner has strong investigative powers to assist her in mediating between dissatisfied information applicants and government institutions. As an ombudsperson, the Commissioner may not order a complaint to be resolved in a particular way, though she may refer a case to the Federal Court for resolution.
>
> Whenever possible, the Commissioner relies on persuasion to solve disputes, asking for a Federal Court review only if an individual has been improperly denied access and a negotiated solution has proved impossible.
>
> When the Office receives a complaint, it confidentially investigates the facts, allowing both the complainant and the federal organization to present their cases. This effort may require Office staff to critically analyze and review policies, procedures, legislation and case law, as well as examining government records. The Office obtains the information needed to examine the complaint from all perspectives through meetings or correspondence with officials and the complainant.

> In accordance with the information gathered through the investigation, the Commissioner makes a finding. If, on the conclusion of the investigation, the finding supports the complainant's complaint, the Commissioner will facilitate a resolution or make a recommendation for corrective action. Where there is insufficient evidence to establish that the complaint is justified, the investigation is concluded and the complainant is advised of the results in writing.
>
> Most complaints are resolved by mediation. Those that involve important principles of law or legal interpretation may be referred to court if the complainant agrees.[100]

In 2009, the Office had a staff of approximately 80 employees, and for the fiscal year ending March 31, 2010, had overall operating expenses of $13,420,475 (CDN) and closed 2117 complaints.

2. Mexico

The Mexican "Federal Transparency and Access to Public Government Information Law," enacted in 2002, established a complex of administrative structures to implement the new transparency law. National implementation is supervised by the Federal Institute for Access to Information (IFAI). The IFAI's five Commissioners are appointed by the President, subject to Senate approval.

Among many other functions, the IFAI hears and decides appeals from agency information request denials. It investigates and compiles a response to the appeal that is binding upon the agency. A requester who is not satisfied with the IFAI's decision on appeal may seek court review of the case.

A 2006 report from the Annenberg School for Communication at the University of Pennsylvania noted that:

> The proportion of appeals to requests for information [under the new Mexican law] has been steadily increasing, from 2.6% in 2003 to 3.8% in 2004 and 4.2% to the early part of 2005. By acting on appeals, IFAI sets the tone for government action as a whole with respect to freedom of information.

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[100] Office of the Information Commissioner of Canada, What We Do, http://www.oic-ci.gc.ca/eng/abu-ans_what-we-do_ce-que-nous-faisons.aspx.

> Within [IFAI], appeals are assigned to individual Commissioners for initial investigation and consideration. If the petition lacks specific details that it needs, or if it is deficient in some way IFAI has a procedure to assist the requestor in correcting their [sic] appeal. The responsible Commissioner then has the power to invite both the requestor and the relevant federal agency to meet separately with him or her to present their arguments concerning the pending appeal. The Commissioner is empowered to require the production of the disputed information for the purpose of resolving the appeal.
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> During its first 22 months of operation (through April 2005), IFAI received 2,591 appeals from agency determinations on information requests. That number represents 3.5% of the 74,000 requests submitted to federal agencies during the same period of time.
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> * * *
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> IFAI's statistics indicate that the appeal process has resulted in the disclosure of some or all of the disputed information in 56% of the cases brought before IFAI. Initial agency non-disclosure determinations were upheld in 16% of the cases (in the remaining 28% of cases, the appeal did not proceed for a variety of procedural reasons).[101]

The structure and functions of the IFAI and its role in the dispute resolution process stand in marked contrast to U.S. and Canadian models. The core post-agency adjudicative role in Mexico rests with the IFAI. The assignment of this role to the IFAI was an important part of a major national undertaking with respect to access to government information that is barely 10 years old. Assimilation of the broad access concepts and dispute resolution scheme of the new law by Mexican administrative agencies and in Mexican culture is still at an early stage compared to the U.S. and Canadian systems.

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[101] "The Federal Institute for Access to Public Information in Mexico and a Culture of Transparency," *available at* http://global.asc.upenn.edu/fileLibrary/PDFs/mex_report_fiai06_english.pdf. The Annenberg report goes on to note:

> The IFAI does not possess the legal means to enforce compliance with its orders. That responsibility resides with the Ministry of Public Function ("SFP") . . . . If IFAI decides that documents required by citizens have not been delivered it must send a recommendation to the SFP. The relationship between IFAI, as overseer of the information request response process and as arbiter of disputes between the agencies and citizens requesting information, and the obligated agencies, subject to IFAI's mandates, is thus moderated by the SFP.

3. "Right To Information" (RTI) and Global Comparison

The Global Right To Information Rating System is a project jointly sponsored by British-based Info Access, "a human rights organization dedicated to promoting and protecting the right of information access in Europe," and the Canadian-based Centre for Law and Democracy, "which works to promote, protect and develop . . .human rights which serve as the foundation . . . democracy, including the right . . . to freedom of . . . access to information.[102]" The rating system has no official status, but includes summaries and comparisons of information access laws in 95 countries, including the United States, Canada, and Mexico.

According to the sponsors, the "central idea behind the RTI Rating is to provide RTI advocates, reformers, legislators and others with a reliable tool for assessing the overall strength of the legal framework in their country for RTI. The Rating also indicates the strengths and weaknesses of the legal framework in seven different categories, namely: Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and Protections, and Promotional Measures.[103]

The category of the RTI rating system most relevant to this study is "Appeals," referring to an appeal external from a government agency's decision on a request for access. Evaluation in that category seeks to determine whether the following 14 features are present in the country's system:

> 1. The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).
>
> 2. Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g., an information commission or ombudsman).
>
> 3. The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.
>
> 4. The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.

[102] Center for Law and Democracy, Global Right to Information Rating, http://www.rti-rating.org/about.php.
[103] *Id.*

5. There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.

6. The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.

7. The decisions of the independent oversight body are binding.

8. In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.

9. Requesters have the right to lodge a judicial appeal.

10. Appeals to the oversight body (where applicable, or to the judiciary if no such body exists) are free of charge and do not require legal assistance.

11. The grounds for appeal to the oversight body (where applicable, or to the judiciary if no such body exists) are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).

12. Clear procedures, including timelines, are in place for dealing with external appeals (oversight/judicial).

13. In the appeal process (oversight/judicial) the government bears the burden of demonstrating that it did not operate in breach of the rules.

14. The external appellate body has the power to impose appropriate structural measures on the public authority (e.g., to conduct more training or to engage in better record management). [104]

The methodology for rating is described, but there is considerable subjectivity in applying it. Consequently, the greatest value of the ratings is not in the strength-weakness rank-order assigned to the 95 countries, but rather in consistently described categories for assessment and descriptions of national laws within those categories. The points assigned within those categories, by an RTI-selected expert, like the overall rating system, is subjective, but the description of the national statutory standards (as opposed to real world application) appears to be reasonably accurate.

[104] *Id.*

The RTI comparison of the post-agency dispute resolution mechanisms for FOIA cases in the "Appeals" category for the United States, Canada and Mexico is set out in an excerpted form in Appendix D. The numerical "ratings" in the "Appeals" category for all countries range from a high of 29 to a low of 0. Mexico is scored 26; Canada 24; and United States, 14. The primary reason for the generally higher "Appeals" score for Canada and Mexico appears to be that OGIS (the U.S. "appeals body") neither adjudicates, nor currently issues, advisory opinions.

B. State FOIA Alternative Dispute Resolution Approaches

The 1987 ACUS study summarized the operations of the two then-most-prominent state FOIA dispute resolution mechanisms short of litigation--the Connecticut and the New York systems.[105] Connecticut uses an adjudicative body, the Freedom of Information Commission, to act on post-agency FOIA disputes.[106]New York uses the Open Government Committee, an ombuds office that issues advisory opinions.[107] The key features of each described in the 1987 study continue today.

Since 1987, however, more states have established mechanisms to provide alternatives to litigation in FOIA disputes. Not surprisingly, the mechanisms vary widely in their structure and operation. Twelve states now have what tend to be characterized as ombuds offices.[108]

Apart from New York, Virginia has the longest operating and one of the most successful FOIA ombuds offices. The Virginia Freedom of Information Advisory Council, an arm of the Virginia General Assembly, both responds to general requester inquiries and issues advisory opinions when sought by a requester or an agency.[109] The advisory opinions are not binding, but are published. A requester contact that begins as a general inquiry may develop into a request for an advisory opinion, but it is also possible that a request for an advisory opinion, once more fully vetted with the parties, may lead to an informal resolution.

For the most recently reported twelve-month period (ending November 30, 2012) the Council "fielded" 1408 inquiries. Of these inquiries, five resulted in formal, written opinions. The Council notes:

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[105] 1987 ACUS Study, *supra* note 8 at 13.
[106] *Id.* at 14
[107] *Id.* at 15
[108] *See* BallotPedia, States with FOIA Ombudsmen, http://ballotpedia.org/States_with_FOIA_ombudsmen. *See generally* Harry Hammitt, Mediation Without Litigation, *available at* http://www.nfoic.org/sites/default/files/hammitt_mediation_without_litigation.pdf.
[109] Virginia Freedom of Information Advisory Council, http://foiacouncil.dls.virginia.gov/Services/welcome.htm.

> By issuing written opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide future practices. In addition to sending a signed copy of the letter opinion to the requester, written opinions are posted on the Council's website in chronological order and in a searchable database.
>
> * * *
>
> Typically, the Council provides advice over the phone and via e-mail. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses are recorded in a database for the Council's own use, but are not published on the website as are written advisory opinions. Questions are often answered on the day of receipt, although response time may be longer depending on the complexity of the question and the research required. [110]

While there is now a wide range of state experiences with FOIA alternative dispute resolution mechanisms, there remain questions of comparability with a national governmental information access system. Issues of scale and subject matter alone generally lead to the conclusion that a national system cannot simply be modeled on a successful state scheme.[111] Perhaps the most generalizable lesson that can be drawn from state FOIA alternative dispute resolution is that most have used some form of the ombuds model, including some or all of the following: (1) the provision of informal advice, (2) the offering of mediation services, and (3) the issuance of advisory opinions. Only Connecticut has chosen the administrative adjudicative model. Among the states that have acted, the consensus approach is clear. The principal development in the state environment since the 1987 ACUS study is not the adoption of new or novel methods, but rather the preponderant and growing choice of the ombuds model.

[110] *Id.*

[111] 1987 ACUS Study, *supra* note 8, at 16.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

The idea of "targeting" FOIA ADR strategies may, on first impression, suggest identifying characteristics of the FOIA dispute resolution process that pose particular problems and that may lend themselves best to additional efforts toward resolution without litigation. This approach has some appeal, but ultimately appears to raise more issues than it resolves. As this study reflects, FOIA disputes can be sliced and diced (typologized) in many ways. But while those classification schemes may provide useful insight to the alternative dispute "resolver," they do not meaningfully suggest a set of "targets" to which particular kinds of tools should be applied. Rather, it appears that the dispute resolution mechanism itself is ultimately more important. The desirability and feasibility of primary attention to dispute-mechanism approach as opposed to dispute-characteristic approach is best understood by way of example.

1. Targeting FOIA ADR by Dispute Characteristics

One tempting characteristic to target in FOIA dispute resolution may be the particular exemption involved. This might lead one to say, for example, that Exemption 1 claims because of their particular delicacy and because of the available ISCAP mechanism should be excluded from efforts at post-agency alternative dispute resolution. This, in turn, would be to say that classification review decisions that follow the FOIA process, rather than the MDR/ISCAP process, should receive no post-agency dispute resolution attention short of litigation. The notion would be that an agency or agencies reviewing classified records under FOIA would never be moved to compromise in a setting apart from the federal courts. An alternative dispute resolver with limited resources for assisting requesters may find this notion persuasive. If that notion were applied strictly to the dispute resolution docket, the potential caseload would be reduced by some amount, but probably not significantly. Exemption 1 claims are presented in only roughly 5% of litigated cases. And it is possible that the most desired part of a currently classified record is the portion that is also arguably subject to another exemption claim. The important issue ultimately in dispute may really lie there rather than in the classification.

Turning to more commonly used exemptions standing alone, such as Exemptions 5, 6, and 7, it is tempting to suggest that the discretion that inheres in applying these exemptions (however narrow or broad it may be) could be the basis for a mediated conversation that might lead to a compromise that would avoid litigation. In contrast, those Exemption 3 statutes that admit of no discretion would have no such potential. Interestingly, in both categories, as is really the case with almost any exemption claim, the actual legal applicability of the exemption may be just as much an issue of dispute as any

argument as to room for discretionary release. The potential for an informal resolution of the dispute may simply not be determinable until there is some engagement external to the agency. And ultimately, the legal issue may be paramount, rather than the exercise of discretion.

Alternatively, one might think in terms of requester categories. For example, sophisticated repeat FOIA requesters might be able to participate more knowledgeably in an external process for dispute resolution than individuals who have filed their first request. Having sophistication on each side in the alternative process would certainly have some advantages. But often, it is the sophisticated requesters whose FOIA requests are the most complex and that are aimed at areas of agency operation that have, from the agency perspective, the greatest sensitivities, whether clearly warranting an exemption or not. Likewise, some sophisticated requesters have organizational interests that make getting to court quickly more important perhaps than an attempt at informal resolution. Sometimes those interests may be oriented toward public relations or sometimes to a perceived need to have an issue litigated to a conclusion that will have precedential effect. Even if the characteristic of requester sophistication has some relevance, as a matter of broader FOIA policy, it would seem odd to disadvantage, by a scheme of prioritization, the class of requesters, who because of their lack of sophistication, may need informal assistance the most.

One might also think of procedural issues as prime targets for FOIA ADR. These could include processing delay--one of the most common procedural issues--or could include more standards-oriented issues, such as requests for fee waiver or expedited processing. These issues can often be critical ones for the requester, but again resource allocation by prioritization would require a further balancing of important interests, for example, perhaps differences among *types* of media representatives. These issues too, for instance, equitably resolving a delay issue through a significant departure from a first-in, first-out approach, could sometimes raise more challenging problems for an agency than re-examining the application of an exemption or the making of a discretionary release.

Examples of the issues raised through a dispute-characteristic approach are essentially limitless. Recognizing the wide range of differences FOIA disputes can present: (1) in substantive exemption issues, as well as in processing issues, (2) in requester sophistication, resources, and motivation, (3) in agency mission and public profile and (4) in scale and general complexity, one is driven almost inevitably to the conclusion that "targeting" essentially requires the exercise of a high degree of informed discretion. As a practical matter, those critical discretionary judgments must come from within the dispute resolution mechanism itself.

2. Targeting FOIA ADR by Mechanism Characteristics

The OPEN Government Act of 2007, in a number of ways, particularly through the creation in each agency of a Chief FOIA Officer and FOIA Public Liaisons, sought to promote a higher level of compliance and new opportunities for requester dispute resolution *within* the agencies. While this study does not examine the effect of these new positions, their creation was a continuation of congressional effort over many years to increase the stature of, and accountability for, the internal FOIA process. There are undoubtedly good reasons to monitor and nurture the development of these internal agency resources. The focus of the study, however, is on the dispute resolution process external to agencies.

The establishment of OGIS in the same legislation represented a sharp departure from the traditional U.S. approach to post-agency dispute resolution under FOIA. OGIS became the institutional center for requester assistance external to the deciding agencies, short of litigation. Though housed in NARA, and thus a part of the Executive branch, OGIS is understood to have independent responsibility. Its statutory charge situates it as both a reviewer of agency policies and practices under FOIA and a vehicle for FOIA dispute resolution.

OGIS's authority, however, is not that of an adjudicator.[112] It has the power to review and recommend changes to policy, and it has the power, statutorily associated with its mediation function, to issue advisory opinions. That mixture of authority is sound, and perhaps even essential to an effective role in reducing the need for resort to litigation in FOIA disputes.

OGIS issuance of "best practices" advice often has the effect of not only enhancing compliance when followed, but also reducing litigation. As noted early in this study, changes in agency practices and procedure, both positive and negative, can have important systemic effects in terms of overall FOIA dispute resolution. But whether agency developed, OGIS recommended, or congressionally mandated, policy and practice changes may reduce, but do not eliminate, the need for attention to case-specific disputes. It is in this respect that, for the purposes of this study, the practical functioning of OGIS is critical.

[112] The 1987 ACUS Study examined in some detail the use of a FOIA adjudicatory agency, or in other words, a FOIA administrative court, for dispute resolution. The cost of such a system if only supplemental to the current system, rather than a mandatory forum, is difficult to justify. A major change from the longstanding role of Article III courts in FOIA cases raises fundamental questions for requesters and for agencies that are explored in the 1987 study. Much, too, has changed politically since 1987 that would raise questions of the feasibility creating a new agency of that sort. Finally, the establishment of OGIS itself has changed the picture dramatically. Thus, while the idea of an Article I FOIA court remains a theoretically available approach to post-agency FOIA dispute resolution, it is most realistically viewed as an idea whose time has passed.

OGIS, as presently staffed, is an extremely small agency. Like any agency, OGIS must prioritize its use of limited resources. But any *one* of OGIS's three main charges--as FOIA reviewer, recommender, and mediator--is, on a government-wide basis, a major undertaking. The case-specific assistance OGIS provides, because it is open to all comers--requesters and agencies--has the greatest potential to grow in a manner that may present manageability challenges, and in turn, to raise effectiveness questions.

OGIS currently divides its individual assistance services (to requesters or agencies) into two categories: "Quick Hits" and "cases." The latter term is generally a reference to its statutory "mediation" function, but at times has also been characterized as conciliation or ombuds service. The case category, which includes everything that is not a Quick Hit, has grown in just the last fiscal year by 40%. Certainly, not every case in OGIS's existing and growing caseload makes the same demand on resources. And in the persistently difficult to quantify world of FOIA cases, it is especially problematic to seek to measure mission success numerically. Nonetheless, it may be possible to draw some procedural or substantive lines that, in effect, provide a basis for prioritization or suggest a need for expansion.

To the most unsophisticated requesters, OGIS's Quick Hit service is likely to be considered particularly valuable. In terms of government-wide benefit, it may also smooth paths and even at times head off requests that do not belong in the FOIA process at all. For almost any other requesters, OGIS's web-based information serves the same function, and for many requesters that level of informational service is not needed or sought from OGIS.

The remainder of OGIS's ombuds-type work appears to be where the greatest potential and greatest challenge lies. In carrying out a mediative role between requesters and agencies, OGIS must retain the confidence of both groups, and even that of particular participants from each group. While OGIS is free to express views to a party on the merits of a dispute within the confidential confines of mediation, an OGIS role beyond mediation that puts it on record with respect to a substantive issue underlying the dispute is somewhat problematic in two respects. First, it alters the traditional understanding of the function of a mediator as someone who facilitates discussion and possible agreement between the parties, not someone who communicates a substantive view of the dispute publicly. Second, with repeat players (both requesters and agencies) being a common feature in some of the most contentious FOIA disputes, OGIS's making public a substantive view on an issue in dispute, risks losing some of those parties as active and willing participants in the traditional mediative role.

Somewhat curiously, the OGIS statutory charter connects the mediation function with the advisory opinion function. The language reads:

> The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, *may issue advisory opinions if mediation has not resolved the dispute.*[113]

This expression of the OGIS function appears to contemplate an OGIS-managed mediation that does not resolve the dispute, thus freeing OGIS, in its discretion, to issue an advisory opinion on the issue(s) in dispute.[114] The further implication appears to be that the advisory opinion would be public because, presumably, OGIS could and probably would have communicated its position to the parties individually and privately in the mediation. There would then be no need to "issue" an advisory opinion were it not to be public. None of the legislative history of the 2007 legislation addresses specifically OGIS's use of this discretionary authority.

Several related matters, however, seem clear. First, OGIS is widely perceived, without particular attention to the statutory language, as having the authority to issue advisory opinions either generally or as a follow on to its work in seeking to mediate a dispute. Second, other FOIA ombuds offices--for example on a national level, the Canadian Information Commissioner's office, or on the state level, many ranging from the long-established New York Open Government Committee to the more recent but well-regarded Virginia Freedom of Information Advisory Council--seek both to mediate disputes and also to issue public, but non-binding, advisory opinions. Third, though public advisory opinions can complicate constituency relations, they can, over time, also build credibility for the ombuds as a voice in the developing and refining FOIA policy.

OGIS's yet-unexercised authority to issue advisory opinions, thus, deserves attention. Setting aside for a moment the circumstance under which OGIS might issue advisory opinions, it must be recognized that the preparation of meaningful advisory opinions not only requires the sort of high-level of expertise that OGIS possesses, but also would consume some of its limited professional resources. Consequently, undertaking advisory opinions would in all likelihood necessitate some change in the allocation of its resources or the addition of new resources. Those steps require both the conceptualization of an integrated approach to OGIS's ombuds authority and the exercise of discretion vested in the OGIS Director to guide its implementation.

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[113] 5 U.S.C. § 552(h)(3)(emphasis added).

[114] It would not, however, seem unreasonable to conclude also that mediation "has not resolved the dispute" if a necessary party has refused to participate in mediation.

B. Recommendations

What follows, then, are recommendations for a structure (a) that seeks to take account of some of the most promising areas for FOIA alternative dispute resolution efforts, (b) that recognizes the resource limitations that inhere in the use and implementation of FOIA, and (c) that acknowledges the importance of the role of OGIS, the entity Congress has chosen to be the dispute resolution vehicle beyond the work of the agencies and short of litigation.

1. OGIS should continue its Quick Hit service and its website informational resources to assist the least sophisticated FOIA users. This is a low cost/high value function that has instant payoff for an important FOIA constituency.

2. Beyond its Quick Hit service, OGIS should normally provide requester-sought assistance only: (a) to requesters who have exhausted the agency appeal process with respect to any issue on which the requester seeks assistance, or (b) to requesters for whom an applicable time limit has expired and the request for assistance concerns steps that might advance more timely agency processing of the request. The extremely sharp drop off at the agency level from requests that could be appealed to requests that actually are appealed suggests that substantive OGIS engagement with requests at an early stage may allocate resources to requests for which there is little sustained interest on the part of the requesters.[115] Of course, delaying engagement until after an agency has taken a position on appeal may mean that a position has "hardened" before OGIS engagement, but it may also mean that the matter has developed detail and focus that will enable a different, but nonetheless valuable, form of OGIS engagement. It must be acknowledged that this approach would in many cases mean a more restrictive "exhaustion" requirement to obtain OGIS assistance than is needed to file suit.[116] It seems reasonable, however, to assume that for

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[115] OGIS has described its approach to case intake in a somewhat similar manner:

> OGIS strives to work in conjunction with the current request and appeal process that exists within Federal agencies. The goal is for OGIS to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. Examples of OGIS services include helping requesters narrow the scope of their FOIA requests; helping agencies deal with difficult requests and serial requesters; obtaining information related to agency practices, policies, and procedures; working through issues related to fees and requests for fee waivers; and encouraging agencies to reconsider determinations to withhold requested agency records, particularly to look for instances where no foreseeable harm can be identified from release.

Available at https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/the-ogis-mission.htm. The recommended intake approach is more specific and narrower, but recognizes, through the use of the term "normally," that some departures from this approach may be necessary and desirable.

[116] For example, it would exclude OGIS engagement in cases in which a determination has been made at the initial consideration level in a timely fashion, but in which an appeal has not been

requesters for whom OGIS assistance would be superior to a lawsuit, this constraint would be relatively unimportant.[117]

3. Ombuds assistance to requesters should take the same variety of facilitative and mediative forms OGIS has used since it became operational. For a substantive issue on which the requester has exhausted the agency appeal, OGIS would seek, if the remaining issues in the request appear meritorious, to assist the requester in engaging the agency in a discussion that deters litigation, either through a change in the agency position or through the agency's providing fuller, more informative context for its position. For a delay issue, the OGIS role would be maintained in its current form, aiming to assist the requester with practical steps that, with agency cooperation, might advance processing of the request.

4. If the facilitative/mediative step does not produce an agreed resolution, either the requester or the agency could ask OGIS for an advisory opinion in the case.[118] In its complete discretion,[119] OGIS would decide whether to initiate the advisory opinion process in the case. If OGIS decides to initiate the advisory opinion process, it would notify the parties of that decision. That notice would not preclude a requester from filing suit, but if a suit is filed after notice, but before an opinion is issued, the advisory opinion process would be terminated. Both the requester and the agency would be expected to provide to OGIS information OGIS deemed necessary to preparing the opinion. If OGIS initiates the advisory opinion process, and either party fails to provide information needed for preparation of the opinion, OGIS would provide notice to the parties that the advisory opinion process will be terminated because of a failure of a party to provide necessary information.

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taken. It would not, however, exclude OGIS engagement with a delay issue either at the initial or appeal stage at the expiration of an applicable time limit in cases in which OGIS assistance is sought with respect to the delay.

[117] Nonetheless, by including "delay" cases in addition to cases in which the appeals process has been exhausted, an important channel is opened. Clearly a large number of cases in which no appeals determination (or even an initial determination) has been made are delinquent with respect to the applicable statutory time limit. Without regard to exemption issues or other procedural issues, these cases may warrant OGIS assistance on the matter of delay. Delay often is related to an issue on which limited OGIS assistance or even mediation could be valuable. The "time-default" status of the case is thus a natural entry point from which ADR efforts could develop more fully.

[118] OGIS has described its advisory opinion authority as follows: "OGIS also is authorized to issue advisory opinions, formal or informal. By issuing advisory opinions, OGIS does not intend to undertake a policymaking or an adjudicative role within the FOIA process, but instead will illuminate novel issues and promote sound practices with regard to compliance with FOIA." *Available at* https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/the-ogis-mission.htm.

[119] This exercise of discretion-- to undertake (or not undertake) a case for purposes of issuing an advisory opinion-- should not be judicially reviewable. *See* Heckler v. Chaney, 470 U.S. 821 (1985). The statute expressly uses the phrase, "at the discretion of the Office."

At any point after notice the advisory opinion process has begun, the parties could jointly request that OGIS terminate the process. Factors such as potential breadth of application and frequency of occurrence of an issue, along with consideration of caseload manageability, should be among the primary, though not the exclusive, determinants for OGIS in deciding whether or not to initiate the advisory opinion process. While an OGIS advisory opinion itself would not be subject to judicial review, it may receive some consideration from a court in a FOIA suit in which the issue addressed in the advisory opinion is before a court, whether in the dispute which led to the opinion or another in which that issue is raised.[120]

5. All agencies, through their FOIA Public Liaisons under the direction of their Chief FOIA Officers, should seek OGIS mediation services at any stage in the processing of a request that it appears to the agency that OGIS engagement may aid in the resolution of a request. In such cases, if the requester agrees to participate, OGIS should make its services available whether or not the appeals process has been exhausted or any applicable time limit has expired. This opportunity for agency engagement of OGIS under a looser standard than would normally be applied to requesters under Recommendation 2 simply recognizes (a) that once an agency has made a final determination on a request it is less likely than a requester to seek OGIS assistance, and (b) that agency-sought OGIS engagement may provide one of the most fruitful settings in which to obtain an informal resolution.[121]

6. All agencies, in any appeal determination letter in which a request is denied in whole or in part, should notify the requester of availability of OGIS mediation services as a non-exclusive alternative to litigation.[122] Agency

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[120] While the de novo decisional standard in FOIA suits and the very nature of OGIS advisory opinions would negate the applicability of deference under Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), there is no reason an OGIS opinion could not be cited by a party in a FOIA suit and be given respectful consideration by the court. See United States v. Mead Corp., 533 U.S. 218 (2001).

[121] OGIS has described its relationship with agency FOIA Public Liaisons as follows:

> While the OPEN Government Act's definition of a FPL is simple and straightforward, we know that the reality of their positions is anything but. Some agencies have created new FPL positions that are completely dedicated to assisting requesters and resolving disputes. Other agencies — many of them smaller agencies — added the FPL tasks listed in the Act to the already-full plate of someone within the FOIA shop. We've also found that FPLs have a variety of approaches to their job, including everything from agitating for change within agencies to reiterating the party line.
> http://blogs.archives.gov/foiablog/2011/06/09/whats-a-foia-public-liaison.

[122] OGIS itself has recommended such notice in the following form:

> As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

websites and FOIA regulations should also call attention to the dispute resolution services available from OGIS.

7. All agencies should take steps to maximize the effectiveness of their FOIA Public Liaisons in fulfilling the dispute resolution function the Act assigns to Public Liaisons. These steps at a minimum should ensure that Public Liaisons receive necessary training in dispute resolution skills and support for their statutorily designated function from agency leadership, including from agency Chief FOIA Officers. Preventing or resolving FOIA disputes *within* agencies through the work of Public Liaisons advances the goals of the Act and can relieve the dispute resolution burden of both OGIS and the courts.

8. The largely distinct and individually important dispute resolution and compliance promotion roles assigned by Congress to OGIS, the Attorney General and agency Chief FOIA Officers, respectively, should each be fostered and should be recognized collectively as a set of administrative mechanisms sharing the goal, among others, of avoiding unnecessary FOIA litigation.[123]

The recommendations made here suggest somewhat of an administrative[124] narrowing of the scope of OGIS's dispute resolution work, but at the same time a deepening of it. Between scope and depth, there are, of course, other choices that could be made. Most importantly, it is the centrality and effectiveness of OGIS's placement as the non-judicial external body in the FOIA dispute resolution process that must be fostered in any course of action followed.

Available at https://ogis.archives.gov/about-ogis/working-with-ogis/Standard-OGIS-Language-for-Agencies.htm. OIP also has encouraged agencies to follow this practice. *Available at* http://www.justice.gov/oip/foiapost/2010foiapost21.htm.

[123] The method of implementing this recommendation could take many forms. Whatever the form, an important goal should be to maximize the effect of these separate roles on FOIA compliance and dispute resolution. For example, H.R. 1211,"FOIA Oversight and Implementation Act of 2013," reported by the Committee on Oversight and Government Reform, would establish a "Chief FOIA Officer Council." The Council would be co-chaired by the Director of OIP and the Director of OGIS. It would be "tasked with: developing recommendations to increase FOIA compliance and efficiency; sharing information on ideas, best practices, and innovative approaches to improve FOIA; identifying ways to better coordinate initiatives to increase transparency; and promoting the development and use of performance measures for agency FOIA compliance." H.R. Rep. No. 113-155, at 4 (2013). The bill passed the House on February 26, 2014, but has not yet been taken up by the Senate. FOIA Oversight and Implementation Act of 2014, H.R. 1211, 113th Cong. (2014).

[124] These recommendations would not require legislative action, though further development of OGIS's capacity for implementing its dispute resolution function would in all likelihood require additional funding.

APPENDIX A: FREEDOM OF INFORMATION ACT SECTIONS REFERENCED IN REPORT

5 U.S.C. 552:

(3)(A)

. . . [E]ach agency, upon any request for records which (i) reasonably describes such records and(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)

(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced . . . .

(ii) Such agency regulations shall provide that—

> (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
> (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
> In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be

news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

* * *

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

* * *

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant

has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

* * *

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection. The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by

written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist

and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of

whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

* * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
(A) could reasonably be expected to interfere with enforcement proceedings,
(B) would deprive a person of a right to a fair trial or an impartial adjudication,
(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * *

(e)(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

* * *

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;
(B) review compliance with this section by administrative agencies; and
(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;
(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;
(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;
(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;
(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and
(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

APPENDIX B: LIST OF INDIVIDUAL INTERVIEWEES & GROUP SESSION ATTENDEES

Individual Interviewees: (listed alphabetically; organization association shown for identification purposes only)

Gavin Baker, Open Government Analyst, Center for Effective Government
Gary Bass, Executive Director, Bauman Foundation/Founder, OMB Watch
Michael Bekesha, Staff Attorney, Judicial Watch
Amy Bennett, Assistant Director, Open the Government.org
Rick Blum, Coordinator, Sunshine in Government Initiative
Stephanie Garner, Assistant Legal Counsel FOIA Programs, EEOC
Alan Gernhardt, Virginia Advisory Council on Open Government
Josh Gerstein, White House Reporter, Politico
Wendy Ginsberg, Analyst in American National Government, Congressional Research Service
Harry Hammitt, Publisher, Access Reports
Scott Hodes, Attorney and President, American Society of Access Professionals
James Holzer, Senior Director, FOIA Operations, Privacy Office, Department of Homeland Security
William Holzerland, Director, Division of Freedom Information, Food and Drug Administration
Richard Huff, Former Co-Director Office of Information Policy, US Department of Justice
Nate Jones, FOIA Coordinator, National Security Archive
Ryan Law, Director of Disclosure Services, U.S. Department of Treasury
Lisa Martin, General Counsel, Office of Inspector General, U.S. Postal Service
Ginger McCall, Federal Policy Manager, Sunlight Foundation
Patrice McDermott, Executive Director, OpentheGovernment.org
Vern McKinley, Researcher
Daniel J. Metcalfe, Adjunct Professor of Law, American University; Former Co-Director, Office of Information Policy, US Department of Justice
Miriam Nisbet, Director, Office of Government Information Services
Melanie Ann Pustay, Director, Office of Information Policy, US Department of Justice
Michael Ravnitzky, Chief Counsel, Postal Regulatory Commission
Megan Rhyne, Executive Director, Virginia Coalition for Open Government
Adina Rosenbaum, Attorney, Public Citizen Litigation Group
Jeff Ruch, Executive Director, Public Employees for Environmental Responsibility
David Sobel, Senior Counsel, Electronic Frontier Foundation
Tom Susman, Director, American Bar Association Office of Government Affairs
Anne Weismann, Chief Counsel, Citizens for Responsibility and Ethics in Washington
Amy Wind, Chief Circuit Mediator, US Court of Appeals for the District of Columbia Circuit
Corinna Zarek, Attorney Advisor, Office of Government Information Services

Group Session Attendees: (listed alphabetically; organization association shown for identification purposes only)

Ryan Alexander, The Constitution Project
Katherine Blair, Bauman Foundation
Danielle Brian, Project on Government Oversight
Angela Canterbury, Project on Government Oversight
Mark Caramanica, Freedom of Information Director, Reporters Committee for Freedom of the Press
Jessica Conway-Ellis, National Newspaper Association
Sophia Cope, Newspaper Association of America
MarQuis Fair, Center for Effective Government
Shannon Bradford Franklin, The Constitution Project
Kevin Goldberg, American Society of Newspaper Editors
Emily Grannis, Reporters' Committee
Julia Horowitz, Electronic Privacy Information Center
Karen Kaiser, Associated Press
Kathy Kirby, Radio, Television, Digital News Association
Sean Moulton, Center for Effective Government
Abbey Paulson, OpentheGovernment.org
Scott Roehm, The Constitution Project
Matt Rumsey, Sun Light Foundation
Tonda Rush, National Newspaper Association
Wick Schellenbach, Center for Effective Government
Daniel Shuman, Citizens for Responsibility and Ethics in Government
Katherine Stern, The Constitution Project

APPENDIX C: AGENCY-LEVEL FOIA PROCESSING DATA

1. Initial Requests: Use of FOIA Exemptions by Twelve Agencies Receiving Highest Number of Requests

Table C- 1: Initial Requests – Agency Use of Exemptions 1 & 2

Agencies	Exemption 1			Exemption 2		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	8	7	5	124	110	61
Archives	113	86	178	32	24	64
Defense	1,279	1,510	2,390	3,361	2,163	681
EEOC	0	0	0	2	3	0
Health & Human Services	0	0	0	142	95	2
Homeland Security	92	19	20	53,828	17,807	480
Justice	639	549	408	4,100	1,699	147
Labor	0	0	2	611	423	144
Social Security	0	0	0	66	12	556
State	408	531	203	162	134	22
Treasury	3	9	5	157	187	97
Veterans Affairs	0	0	2	109	53	0
Total 12 Agencies	2,542	2,711	3,213	62,694	22,710	2,254
Total all Reporting Agencies	3,743	4,333	5,403	64,260	24,450	3,011

Derived from: foia.gov

Table C- 2: Initial Requests – Agency Use of Exemptions 3 & 4

Agencies	Exemption 3			Exemption 4		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	401	474	474	385	387	410
Archives	80	73	155	14	16	22
Defense	2,512	2,827	3,276	2,020	1,870	1,395
EEOC	2,497	4,037	5,362	38	32	41
Health & Human Services	101	103	135	736	772	571
Homeland Security	1,670	1,941	3,884	1,051	510	559
Justice	1,360	1,361	1,282	224	278	298
Labor	97	62	89	3,522	3,474	3,835
Social Security	90	55	76	35	46	28
State	5,517	15,129	5,789	95	105	37
Treasury	2,291	2,121	2,769	307	206	177
Veterans Affairs	2,514	3,447	2,347	217	279	245
12 Agency Total	19,130	31,630	25,638	8,644	7,975	7,618
Total All Reporting Agencies	22,014	36,094	30,514	11,846	11,475	10,914

Derived from: foia.gov

Table C- 3: Initial Requests – Agency Use of Exemptions 5 & 6

Agencies	Exemption 5			Exemption 6		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	262	296	589	1,472	1,559	1,222
Archives	43	47	45	158	103	180
Defense	1,895	1,975	2,331	13,083	12,238	13,604
EEOC	10,582	11,818	12,779	2,088	2,714	2,876
Health & Human Services	360	375	354	8,482	5,858	5,950
Homeland Security	41,828	31,601	54,121	54,548	58,710	80,933
Justice	1,231	1,500	1,404	6,484	5,455	5,469
Labor	4,136	3,516	3,133	2,149	2,108	2,058
Social Security	75	99	98	1,288	1,241	987
State	240	361	213	2,669	3,282	480
Treasury	620	575	657	907	831	799
Veterans Affairs	157	170	161	10,351	9,496	8,999
12 Agency Total	61,429	52,333	75,885	103,679	103,595	123,557
Total All Reporting Agencies	64,669	56,267	79,474	111,362	115,140	136,470

Derived from: foia.gov

Table C- 4: Initial Requests – Agency Use of Exemptions 7(C) & 7(E)

Agencies	Exemption 7(C)			Exemption 7(E)		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	577	560	414	43	66	86
Archives	49	23	83	13	26	70
Defense	7,113	5,816	7,539	121	213	360
EEOC	4,169	6,309	6,314	0	4	2
Health & Human Services	269	415	684	27	65	53
Homeland Security	64,905	68,467	99,597	55,198	52,174	93,985
Justice	8,158	6,941	7,211	1,717	1,636	2,249
Labor	5,085	5,492	6,066	894	981	1,176
Social Security	15	17	41	0	4	577
State	68	94	81	26	77	269
Treasury	963	993	1,179	873	873	1,161
Veterans Affairs	1,365	1,501	1,601	11	19	10
12 Agency Total	92,736	96,628	137,111	58,923	56,138	99,998
Total All Reporting Agencies	95,578	102,568	137,837	100,549	56,491	59,120

Derived from: foia.gov

2. Fee Waivers

Table C- 5: Fee Waiver Decisions and Days to Adjudicate

Agencies	Fee Waiver Granted			Fee Waiver Denied			Average Days to Adjudicate		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	1,163	1,242	1,233	60	56	78	43	20	36
Archives	11	7	35	54	92	22	65	5	8
Defense	1,736	2,214	1,137	613	564	696	639	627	252
EEOC	4	27	10	36	0	1	1	0	2
Health & Human Services	291	272	332	66	35	36	32	182	47
Homeland Security	74	93	131	163	160	245	38	48	16
Justice	151	147	145	1,166	1,113	343	4	48	65
Labor	365	375	290	344	603	931	45	122	1,830
Social Security	0	2	3	18	18	11	5	8	8
State	1	0	58	98	5	54	18	3	0
Treasury	132	214	124	192	68	527	84	11	114
Veterans Affairs	482	296	110	26	69	100	113	12	194
12 Agency Total	4,410	4,889	3,608	2,836	2,783	3,044	N/A	N/A	N/A

Derived from: foia.gov

3. Expedited Processing: Disposition & Timing

Table C- 6: Expedited Requests Grants, Denials, and Days to Adjudicate

Agencies	Number Granted			Number Denied			Average Number of Days to Adjudicate			Number Adjudicated w/in 10 Calendar Days		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	35	45	33	371	472	475	30	32	26	387	516	495
Archives	11	6	22	54	12	4	5	5	0	65	18	18
Defense	285	757	377	438	700	749	350	98	95	575	1,339	1,009
EEOC	1	2	9	39	2	7	0	20	0	0	4	14
Health & Human Services	19	24	27	186	163	272	84	59	39	75	78	265
Homeland Security	27	36	59	1,449	1,529	1,122	17	20	44	1,410	1,377	991
Justice	261	203	106	887	1,046	866	83	43	100	911	1,113	867
Labor	213	171	117	241	383	470	2,079	1,743	35	199	247	231
Social Security	0	0	0	7	0	0	4	0	0	7	0	0
State	1	3	16	97	204	205	31	24	0	15	27	75
Treasury	166	223	140	110	105	206	30	34	38	251	294	323
Veterans Affairs	27	29	28	40	49	78	4	65	12	56	72	81
12 Agency Total	1,046	1,499	934	3,919	4,665	4,454	N/A	N/A	N/A	3,951	5,085	4,369

Derived from: foia.gov

4. Appeal Dispositions

a. Exemption-Based Dispositions: Use of FOIA Exemptions by Twelve Agencies Receiving Highest Number of Appeals

Table C- 7: Appeals – Agency Use of Exemptions 1 & 2

Agency	Exemption 1			Exemption 2		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	0	0	0	2	6	0
CIA	72	140	106	1	2	0
Defense	92	58	180	58	51	11
EEOC	0	0	0	0	0	0
Environmental Protection Agency	0	0	0	1	2	0
Health & Human Services	0	0	0	0	3	2
Homeland Security	2	2	1	2,735	398	16
Justice	35	67	60	390	147	1
Labor	0	0	0	1	0	1
State	206	196	56	12	10	0
Treasury	0	0	1	10	9	4
Veterans Affairs	0	0	0	1	3	0
12 Agency Total	407	463	404	3,211	631	35

Derived from: foia.gov

Table C- 8: Appeals – Agency Use of Exemptions 3 & 4

Agency	Exemption 3			Exemption 4		
	FY 2010	FY 2011	FY 2012	FY 2012	FY 2011	FY 2012
Agriculture	12	23	26	8	10	11
CIA	74	143	107	0	0	1
Defense	81	54	142	20	34	31
EEOC	95	12	63	0	0	1
Environmental Protection Agency	2	0	2	13	6	12
Health & Human Services	10	5	3	21	24	20
Homeland Security	60	56	58	34	21	14
Justice	117	128	119	12	14	8
Labor	0	0	0	23	17	9
State	67	112	42	18	8	2
Treasury	93	99	90	9	15	11
Veterans Affairs	15	22	21	6	3	9
12 Agency Total	626	654	673	164	152	129

Derived from: foia.gov

Table C- 9: Appeals – Agency Use of Exemptions 5 & 6

Agency	Exemption 5			Exemption 6		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	13	29	13	52	39	40
CIA	2	8	5	3	2	10
Defense	60	62	98	154	142	202
EEOC	3	86	144	3	27	27
Environmental Protection Agency	25	23	35	9	16	15
Health & Human Services	13	20	24	11	34	45
Homeland Security	2,456	560	660	2,636	674	909
Justice	127	130	118	444	477	362
Labor	7	8	6	3	5	7
Veterans Affairs	16	22	32	60	54	84
State	66	61	13	85	124	29
Treasury	91	55	44	60	47	61
12 Agency Total	2,879	1,064	1,192	3,520	1,641	1,791

Derived from: foia.gov

Table C- 10: Appeals – Agency Use of Exemptions 7(C) & 7(E)

Agency	Exemption 7(C)			Exemption 7(E)		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	24	27	18	9	15	11
CIA	1	0	0	0	0	0
Defense	76	54	82	2	3	8
EEOC	21	59	94	0	2	1
Environmental Protection Agency	2	5	5	2	1	2
Health & Human Services	5	7	14	0	0	2
Homeland Security	3,321	816	1,067	2,936	719	991
Justice	671	791	667	233	329	424
Labor	111	83	54	1	1	1
Veterans Affairs	16	10	15	0	3	1
State	6	10	8	2	11	5
Treasury	70	54	57	40	42	22
12 Agency Total	4,324	1,916	2,075	3,225	1,126	1,044

Derived from: foia.gov

b. Appeals Dispositions Not Based on FOIA Exemptions

Table C- 11: Non-Exemption-Based Appeal Dispositions

Agencies	No Records			Fee-Related Reason			Improper FOIA Request		
	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012	FY 2010	FY 2011	FY 2012
Agriculture	11	14	10	5	6	2	4	2	4
CIA	1	1	2	0	0	0	0	0	0
Defense	106	144	145	20	18	22	56	21	15
EEOC	5	1	0	0	0	0	3	0	0
Health & Human Services	16	15	36	4	4	1	0	3	0
Homeland Security	7	47	85	2	6	19	191	134	156
Justice	631	704	968	149	142	70	62	64	126
Labor	48	40	32	6	1	2	27	16	27
Social Security	2	7	47	2	1	0	0	0	0
State	7	5	6	19	0	0	0	0	0
Treasury	43	47	54	6	7	3	10	32	17
Veterans Affairs	40	43	59	1	7	10	0	3	13
12 Agency Total	917	1,068	1,444	214	192	132	353	275	358
99 Agency Total	1,092	1,201	1,592	264	248	176	384	327	438

Derived from: foia.gov

APPENDIX D: EXCERPTS OF RTI APPEAL RATING SUMMARIES FOR USA, CANADA, AND MEXICO

	United States		
	Description	Findings	Statute
1	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	YES	Section 6(a)(ii) provides for an internal appeal with a relatively short timeframe.
2	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	Partially	[T]he Office of Government Information Services acts as a mediator - but is not a formalized [adjudicative] appeal process [as contemplated here.]
3	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	NO	
4	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	NO	
5	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	NO	
6	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	NO	
7	The decisions of the independent oversight body are binding.	NO	
8	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	NO	
9	Requesters have the right to lodge a judicial appeal.	YES	Section 4(b)
10	Appeals to the oversight body (where applicable, or to the judiciary if no such body exists) are free of charge and do not require legal assistance.	Partially	[T]echnically no lawyer is required . . . but it is nonetheless a difficult process for a layman . . . . [F]iling fee is $350, but can be waived . . . .
11	The grounds for appeal to the oversight body (where applicable, or to the judiciary if no such body exists) are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	YES	Yes - all these are complaints that the judge can evaluate on a de novo standard.
12	Clear procedures, including timelines, are in place for dealing with external appeals (oversight/judicial).	Partially	There are clear procedures, particularly as these cases are generally decided on summary judgment, but no timelines.

	United States		
	Description	Findings	Statute
13	In the appeal process (oversight/judicial/) the government bears the burden of demonstrating that it did not operate in breach of the rules.	YES	Yes - the burden is on the agency to sustain its action.
14	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	Partially	[O]rdinarily Courts do not make such orders, but they can be included . . . . within the Court's recommendations.

	CANADA		
	Description	Findings	Statute
1	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	NO	No internal appeals procedure.
2	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	YES	Section 30
3	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	YES	Appointed by GiC with approval of the House of Commons and the Senate and can be dismissed by GiC only upon address to the House and Senate.
4	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	YES	Section 38
5	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	Partially	The conventions of Canada's system suggest that the Information Commissioner will be politically neutral and have appropriate expertise, but the fact that this is a convention.
6	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	YES	Section 36
7	The decisions of the independent oversight body are binding.	NO	Section 37(4)
8	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	Partially	Section 37 - Can recommend disclosure.
9	Requesters have the right to lodge a judicial appeal.	YES	Section 41 - also implicit in Canada's system of administrative law
10	Appeals to the oversight body (where applicable, or to the judiciary if no such body exists) are free of charge and do not require legal assistance.	YES	Section 30

	CANADA		
	Description	Findings	Statute
11	The grounds for appeal to the oversight body (where applicable, or to the judiciary if no such body exists) are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	YES	Section 30
12	Clear procedures, including timelines, are in place for dealing with external appeals (oversight/judicial).	Partially	Clear procedure spelled out here: http://www.oic-ci.gc.ca/eng/investigations-enquetes.aspx but no timelines.
13	In the appeal process (oversight/judicial/) the government bears the burden of demonstrating that it did not operate in breach of the rules.	YES	This isn't stated explicitly, but is implicit in Canada's system of administrative law, and in the functioning of the Information Commission as an investigative office.
14	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	Partially	Section 37 - Can recommend changes.

	MEXICO		
	Description	Findings	Statute
1	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	NO	No internal appeals.
2	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	YES	Article 37(ii) - however this appeal does not apply to requests made to the legislature, judiciary, or autonomous constitutional bodies such as the central bank - a significant shortcoming.
3	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	YES	Article 34 - named by executive, approved by legislature. Independent and difficult to dismiss.
4	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	YES	Article 37(xviii) - Budget goes to the secretariat of the treasury to be integrated into the federal budget.
5	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	YES	Article 35 has professional requirements, and limits on some politically established individuals
6	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies..	Partially	Article 17 - institute has the power to review classified documents.
7	The decisions of the independent oversight body are binding.	YES	Article 59

	MEXICO		
	Description	Findings	Statute
8	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	YES	Article 56 - Can order information disclosed.
9	Requesters have the right to lodge a judicial appeal.	YES	Article 59
10	Appeals to the oversight body (where applicable, or to the judiciary if no such body exists) are free of charge and do not require legal assistance.	YES	Article 52
11	The grounds for appeal to the oversight body (where applicable, or to the judiciary if no such body exists) are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	YES	Article 50
12	Clear procedures, including timelines, are in place for dealing with external appeals (oversight/judicial).	YES	Article 55
13	In the appeal process (oversight/judicial) the government bears the burden of demonstrating that it did not operate in breach of the rules.	YES	Article 53
14	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	Partially	Article 37(v) - The body has the power to make recommendations - the extent to which these recommendations are binding is not clear.