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February 27, 2017

Submitted via regulations.gov

## Re: Proposed Rule RIN 3095-AB88

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”) appreciates this opportunity to comment on Proposed Rule RIN 3095-AB88, published December 28, 2016, which addresses certain of the functions of the Office of Government Information Services (“OGIS”) (hereinafter, the “Proposed Rule”).<sup>1</sup>

The Reporters Committee has long supported the creation and mission of an ombudsman’s office to assist reporters and other individuals with requests made under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or “the Act”). Indeed, as a member of the Sunshine in Government Initiative,<sup>2</sup> RCFP was involved in the discussions that helped lay the foundation for OGIS’s creation. Attorneys at the Reporters Committee have utilized OGIS’s services when representing journalists in FOIA matters, and inform representatives of the news media and the public at large about the existence of OGIS and the services it offers to requestors through RCFP’s publications, legal hotline, and educational events.

The Reporters Committee firmly believes that a robust, independent, and assertive FOIA ombudsman’s office will benefit requestors and agencies alike. To that end, the comments below address two aspects of the Proposed Rule that RCFP believes should be modified.

### I. The scope of the Proposed Rule is inadequate.

As a preliminary matter, the scope of the Proposed Rule is inadequate, as it only addresses one of OGIS’s duties—namely, its role in dispute mediation. The Reporters Committee appreciates the importance of the dispute mediation services provided by OGIS; as FOIA clearly sets forth, however, OGIS has a number of other important responsibilities and obligations. They include reviewing agencies’ FOIA policies and procedures, reviewing agency compliance with the Act, identifying procedures and methods for improving compliance, issuing advisory opinions, among others.

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<sup>1</sup> The Reporters Committee takes no position on any portion of the Proposed Rule not specifically addressed herein.

<sup>2</sup> The Sunshine in Government Initiative is now News Media for Open Government. See <http://foropengov.org/wordpress/blog-post/release-sgi-adopts-new-name-broadened-focus-news-media-for-open-government/>

See 5 U.S.C. § 552(h). The Proposed Rule addresses none of these other duties that have been ascribed to OGIS by the Act.

OGIS has been operating since 2009.<sup>3</sup> It is inexcusable that the Proposed Rule, issued more than seven years later, only addresses one of OGIS's responsibilities, particularly given that OGIS is clearly exercising at least some of its other statutory authority.<sup>4</sup> The Proposed Rule does not explain nor offer any reason for why its scope is so limited. And the narrow scope of the Proposed Rule is especially frustrating because both agencies and requesters—especially reporters and other representatives of the news media—could benefit from the full panoply of OGIS's services. For example, OGIS has yet to issue a single advisory opinion even though FOIA plainly empowers it to “issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.” 5 U.S.C. § 552(h)(3). Section 1291.4 of the Proposed Rule, which sets forth “OGIS functions and responsibilities,” does not even mention advisory opinions.

The Proposed Rule clearly needs to be expanded to address *all* of OGIS's functions as set forth in the Act. Merely stating, as the Proposed Rule does, that regulations addressing those important responsibilities will be issued “[i]n the future” is not acceptable. Regulations regarding OGIS's other functions need to be promulgated so that the public and responding agencies understand and appreciate OGIS's role in the FOIA process; such understanding is necessary if OGIS is to be effective. Accordingly, the Reporters Committee recommends that the Proposed Rule be amended to address each of OGIS's functions.

## **II. The Proposed Rule's confidentiality provisions are unwarranted and unacceptable.**

The Reporters Committee is deeply troubled by a number of provisions in the Proposed Rule that aim to impose confidentiality and secrecy requirements on requesters who use OGIS's dispute mediation services. Not only is there no legal basis for such requirements, but that they are contrary to OGIS's mission and will limit its usefulness to FOIA requesters. RCFP recommends that they be removed in their entirety or modified to address the concerns raised herein.

The specific provisions of the Proposed Rule that RCFP finds objectionable are located in Sections 1291.10(e)(1) (stating that parties wishing to use OGIS's dispute resolution services must “agree to keep the content of dispute resolution discussions confidential,”), 1291.14(d) (stating that “[t]he parties also agree to keep the content of the dispute resolution discussions confidential[,]”), 1291.14(f) (stating that “[a]ny assessment the Deputy Director provides is confidential and the parties may not rely on it in any subsequent proceedings[,]”), and 1291.14(g) (stating that “[n]o party may rely on [OGIS's final response letter] in subsequent proceedings and its contents are confidential unless both parties agree in writing to allow OGIS to disclose it publically[.]”).

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<sup>3</sup> Office of Government Information Services, *The First Year* at 1 (Mar. 2011), <https://ogis.archives.gov/Assets/Website+Assets/About+OGIS/Building+Bridges+Report.pdf?method=1>

<sup>4</sup> See, e.g., OGIS, *Recommendations*, <https://ogis.archives.gov/recommendations.htm>; OGIS, *FOIA Compliance Program*, <https://ogis.archives.gov/foia-compliance-program.htm>.

It appears that many of these confidentiality and secrecy provisions derive from the Proposed Rule's assertion that OGIS provides its "dispute resolution services and responsibilities in accordance with the [Alternative Dispute Resolution Act ("ADRA")], 5 U.S.C. § 571–584." Proposed Rule § 1291.10(b). There is no evidence, however, that Congress required or intended OGIS's "mediation services," 5 U.S.C. § 552(h)(3), to be provided pursuant to the provisions of the ADRA. The OPEN Government Act of 2007, Pub. L. 110-175, which created OGIS and defines its responsibilities, contains no reference or citation to the ADRA, and there is no reference to the ADRA in the legislative history of that law. The Reporters Committee is also not aware of any provision in the ADRA itself that requires OGIS to conduct its "mediation services" under the ADRA's framework. Indeed, the ADRA states that it "supplement[s] rather than limit[s] other available agency dispute resolution techniques." 5 U.S.C. § 572(c). Absent any indication from Congress that OGIS's "mediation services" should be conducted pursuant to the ADRA, there is no reason for its incorporation into the Proposed Rule.

Moreover, imposing the confidentiality and secrecy requirements reflected in the provisions of the Proposed Rule that are cited above would significantly reduce FOIA requesters' use of OGIS's mediation services. In many cases, requesters contact OGIS before litigation in an effort to work with the responding agency to resolve their dispute. If the requester later chooses to file a lawsuit against the agency, presumably because it was not possible to resolve the dispute through mediation, it is important that the requester be able to advise the court (1) that the parties attempted to resolve the dispute through mediation and were unsuccessful, (2) of the nature of those mediation proceedings, and (3) of any advisory opinion or other determination that OGIS made in connection with those proceedings. The legislative history of the OPEN Government Act of 2007 clearly indicates that OGIS's services were designed to fulfill the desire for a FOIA ombudsman "who could *provide guidance to requesters before*, or as an alternative to, litigation." H. Rep. No. 110–45, at 4 (emphasis added). If mediation is unsuccessful, and a requester is prohibited from later informing a court about anything that happens during the mediation process, including OGIS's final letter, *cf.* Proposed Rule § 1291.14(g), or any advisory opinions it issues, that requester will have received no benefit from seeking to resolve their dispute through OGIS. In fact, the requester would be *penalized* for using OGIS's services; mediation would have delayed resolution of the dispute while leaving the requestor with nothing to show for it—she would be unable to even inform a court that she attempted to resolve the dispute, or even that OGIS believed the agency to be wrong.

Federal Courts also have an independent interest in understanding the scope and outcome of any pre-litigation mediation efforts on the part of requestors and agencies. Without access to material and information documenting the proceedings or outcomes of OGIS-facilitated mediations, courts would be forced to make decisions based on an incomplete record, potentially harming requesters and agencies alike.

The secrecy and confidentiality provisions of the Proposed Rule are also counterproductive within the administrative process. For example, take a requester who has received a denial from an agency on the basis that all of the records responsive to her

request are exempt from disclosure under FOIA. The requester is informed by the agency that she may seek the assistance of OGIS and may file an administrative appeal, as is required by the Act. 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb). The requester chooses to go to OGIS first, and through OGIS engages in a mediation process with the agency. The first attempt at mediation does not resolve the requester's issue and so the Deputy Director provides the parties with an "assessment" pursuant to Section 1291.14(f). As part of that assessment, the Deputy Director, based on a review of the dispute and conversations with the parties, determines that the agency did not conduct a segregability analysis with respect to the records at issue. Notwithstanding that determination, the agency refuses to reconsider its position, and OGIS closes the case. The requester is now (in most cases) *required* to file an administrative appeal before proceeding to court. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61–63 (D.C. Cir. 1990). But under the Proposed Rule, the requester cannot make use of one of the most powerful arguments they have—that OGIS determined that the agency did not conduct a segregability analysis and produce non-exempt portions of responsive records. *Cf.* Proposed Rule § 1291.14(f).

At present, attorneys at Reporters Committee routinely inform journalists of the availability of OGIS's services through multiple avenues, including in response to inquiries it receives from journalists through RCFP's legal hotline. If the confidentiality provisions in the Proposed Rule that restrict *requesters'* ability to use information obtained during mediation are not removed, OGIS's usefulness in that context will be jeopardized, if not entirely eliminated.

### **III. Conclusion**

The Reporters Committee is deeply committed to ensuring OGIS's success, and believes it has the potential to be an indispensable resource for FOIA requesters who need assistance. Incorporating the comments set forth herein are necessary for OGIS to fulfill its statutory purpose and improve its role in the FOIA process.

Sincerely,

The Reporters Committee for Freedom of the Press