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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Office of Government Information Services

36 CFR Chapter XII

[FDMS No. NARA-16-0004; NARA-2017-001]

RIN 3095-AB88

Office of Government Information Services

AGENCY: Office of Government Information Services, NARA.

ACTION: Proposed Rule.

SUMMARY: The Open Government Act of 2007 created the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). OGIS has three statutorily defined functions: OGIS offers mediation services to help resolve FOIA disputes; reviews agency FOIA policies, procedures and compliance; and identifies procedures and methods for improving compliance under the FOIA. This proposed rule sets out the implementing guidance and procedures by which OGIS carries out its statutory mission, and explains OGIS's role in the FOIA process.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on this rule, identified by RIN 3095-AB88, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* Regulation_comments@nara.gov. Include RIN 3095-AB88 in the subject line of

the message.

- Mail (for paper, disk, or CD-ROM submissions): Send comments to: Regulations Comments Desk (External Policy Program, Strategy & Performance Division (SP)); Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.
- Hand delivery or courier: Deliver comments to front desk at 8601 Adelphi Road, College Park, MD, addressed to: Regulations Comments Desk, External Policy Program; Suite 4100.

FOR FURTHER INFORMATION CONTACT: For information or questions about the regulation and the comments process, contact Kimberly Keravuori, External Policy Program Manager, by email at regulation_comments@nara.gov, or by telephone at 301.837.3151. For information or questions on the OGIS program, contact Nikki Gramian, Deputy Director, OGIS, by telephone at 1-877-684-6448.

SUPPLEMENTARY INFORMATION:

Background

The OPEN Government Act of 2007 (Pub. L. 110-175, 121 Stat. 2524) amended the Freedom of Information Act, or FOIA (5 U.S.C. 552, as amended), and created the Office of Government Information Services (OGIS) within the National Archives and Records Administration. OGIS began receiving FOIA cases in September 2009.

This proposed regulation explains OGIS's statutory role in the FOIA process and sets out procedures for one of OGIS's primary functions: assisting agencies and FOIA requesters with efforts to resolve FOIA disputes. In the future, this regulation will also include provisions on OGIS's other functional areas, which are currently under development.

OGIS's mediation function

Title 5, United State Code § 552(h)(3), states that “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...”

As a result, we offer dispute resolution services, which is an umbrella term encompassing formal mediation (where a mediator conducts formal sessions to assist in resolving a dispute), facilitation (an informal process in which a mediator aids communication among and between the parties to resolve a dispute), and other commonly recognized resolution methods. OGIS's dispute resolution services may also include OGIS's ombuds services (which include providing information) when those services aid in resolving disputes. Our goal is to be an alternative to litigation by facilitating communication between a requester and the agency and by attempting to resolve disputes arising out of requests for information. We provide all our dispute resolution services in accordance with the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. 571, *et seq.*

Both FOIA requesters and agencies may contact us to help resolve a dispute at any point in the FOIA process. We do not advocate on behalf of a requester or agency; the office promotes a fair FOIA process and works with parties to reach a mutually agreeable resolution. If the parties agree that the dispute has been resolved, we will close the case and may follow-up with the agency to confirm that any agreed-upon action was taken. However, if the parties cannot agree on a resolution, OGIS will issue a final response letter to the parties indicating that we are concluding the dispute resolution efforts.

Regulatory analysis

Review under Executive Orders 12866 and 13563

Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), and Executive Order 13563, Improving Regulation and Regulation Review, 76 FR 23821 (January 18, 2011), direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This proposed rule is “significant” under section 3(f) of Executive Order 12866 because it establishes OGIS implementing regulatory provisions for the first time. The Office of Management and Budget (OMB) has reviewed this proposed regulation.

Review under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*)

This review requires an agency to prepare an initial regulatory flexibility analysis and publish it when the agency publishes the proposed rule. This requirement does not apply if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). NARA certifies, after review and analysis, that this proposed rule will not have a significant adverse economic impact on small entities.

The proposed regulation interprets OGIS’s mandate under its authorizing statute, and any requirements within the proposed regulation apply to Federal agencies subject to FOIA. The proposed rule also eases burdens on members of the public who encounter difficulty in accessing Federal information; and encourages the use of alternative dispute resolution methods as an additional means by which people or businesses may receive aid in resolving such difficulties.

Review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*)

This proposed rule contains information collection activities that are subject to review and

approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. We refer to the following OMB-approved information collection in § 1291.12 of this regulation: OMB control No. 3095-0068, Request for Assistance and Consent (NA Form 10003), approved through December 31, 2016. We published the information collection notice in the *Federal Register* in June 2010 (75 FR 36122, June 24, 2010) for public comment, and the notice of OMB review in the *Federal Register* in September 2010 (75 FR 57819, September 22, 2010), providing a second opportunity for public comment.

Review under Executive Order 13132, Federalism, 64 FR 43255 (August 4, 1999)

Review under Executive Order 13132 requires that agencies review regulations for Federalism effects on the institutional interest of states and local governments, and, if the effects are sufficiently substantial, prepare a Federal assessment to assist senior policy makers. This proposed rule will not have any direct effects on State and local governments within the meaning of the Executive Order. Therefore, this regulation does not require a Federalism assessment.

List of Subjects in 36 CFR part 1291.

Alternative dispute resolution, Freedom of Information Act, Information, Mediation, Record-keeping requirements.

For the reasons stated in the preamble, NARA proposes to amend by add Subchapter I of chapter XII, title 36 of the Code of Federal Regulations, to read as follows:

Chapter XII—National Archives and Records Administration

SUBCHAPTER I – OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS)

PART 1291—OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS)

PROGRAMS

Subpart A—General Information

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Authority: 5 U.S.C 552, as amended; Pub. L. 110-175, 121 Stat. 2524; 44 USC 2104(a)

Subpart A—General Information

§ 1291.1 Scope of this part.

This part establishes policies and procedures for Federal agencies and public requesters who wish to make use of OGIS’s voluntary dispute resolution services.

§ 1291.2 Definitions.

The following definitions apply to this part:

Agency is any organization within the executive branch of the Federal Government that is subject to the FOIA. This includes any executive department, military department, independent regulatory agency, Government corporation, and other establishment within the executive branch (including the Executive Office of the President).

Agency records are records the agency (1) either creates or obtains, and (2) maintains under its control at the time of the FOIA request in any format, including electronic.

Administrative appeal is a request asking an agency to independently review determination(s) it made in response to an initial FOIA request. The FOIA grants requesters the right to appeal.

Chief FOIA officer is a designated high-level official within each agency who has overall responsibility for the agency's compliance with the FOIA.

Confidentiality means that OGIS and the parties participating in dispute resolution efforts will not disclose information you provide in the course of dispute resolution discussions and sessions, unless an exception applies under the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. 571-584.

Dispute resolution services are the formal and informal processes through which a neutral third party -- a mediator -- assists parties to reach a mutually agreeable resolution to FOIA disputes. Our dispute resolution services include formal mediation (where a mediator conducts formal sessions to assist in resolving a dispute), facilitation (an informal process in which a mediator aids communication among and between the parties to resolve a dispute), and other commonly recognized resolution methods. They may also include our ombuds services (which include providing information) when the ombuds services aid in resolving disputes.

Exhaustion of administrative remedies means that a requester sent an initial FOIA request to an agency, received a substantive response from the agency, filed a timely administrative appeal about the response, and received a final determination on that appeal. Constructive exhaustion of administrative remedies may also occur when the agency fails to meet applicable deadlines set out in 5 U.S.C. 552(a)(6)(C)(i).

FOIA is the Freedom of Information Act, 5 U.S.C. 552, as amended.

FOIA request is a request submitted to a Federal agency asking for agency records on any topic.

A FOIA request can generally be made by any person and to any Federal agency. A request can be a first-party request (requester seeking documents on themselves) or a third-party request (requester seeking documents on other individuals, companies, or topics of interest.)

In confidence means a party provides information to the mediator and expressly requests that the mediator not disclose that information to the other party(ies) or others, except to the extent the information is publicly available.

Initial FOIA request is the FOIA request a person or organization first submitted to the agency, prior to any appeal.

Mediator is an OGIS staff member or an outside mediator who provides dispute resolution services through OGIS's program. See definition of *dispute resolution services* for more detail.

Requester or FOIA requester means any person or organization requesting records from a Federal agency under the FOIA.

§ 1291.4 OGIS functions and responsibilities.

Pursuant to 5 U.S.C. 552(h), OGIS:

- (1) Reviews agency FOIA policies and procedures;
- (2) Reviews agency compliance with the FOIA;
- (3) Identifies procedures and methods for improving compliance under the FOIA; and
- (4) Offers mediation services to help FOIA requesters and agencies resolve disputes, as a non-exclusive alternative to litigation.

§ 1291.6 Contact information.

You may contact OGIS by mail at Office of Government Information Services (OGIS); National Archives and Records Administration (NARA); 8601 Adelphi Road; College Park, MD 20740, by telephone at 202.741.5770 or toll-free at 1.877.684.6448, by fax at 202.741.5769, or by email at ogis@nara.gov. You may also find additional information about OGIS at www.archives.gov/ogis.

Subpart B—Dispute Resolution Services

§ 1291.10 Dispute resolution services, policies, and responsibilities.

- (a) OGIS dispute resolution services facilitate and promote dispute resolution through non-binding, voluntary actions aided by an unbiased third party, as a non-exclusive alternative to litigation.
- (b) We perform all our dispute resolution services and responsibilities in accordance with the ADRA, 5 U.S.C. 571-584.
- (c) We follow the ADRA's principles for confidentiality strictly and do not disclose any information parties share as part of OGIS's dispute resolution efforts, unless an exception applies under ADRA, 5 U.S.C. 574. Therefore, we will not disclose OGIS's dispute resolution discussions, materials, correspondence, notes, any draft resolutions, and any other material related to the dispute. This allows all parties in dispute resolution discussions to be forthcoming, candid, and without concern that either OGIS or the other party may later use any statements against them.
- (d) We offer dispute resolution services only at the request of one or more of the parties to the dispute, but we may decline to offer dispute resolution services when:

- (1) The requester seeks OGIS assistance concerning matters other than access to records under the FOIA;
 - (2) The requester fails to provide the necessary information under § 1291.12(a) of this part; or
 - (3) The requester files a request for assistance with OGIS six or more years after the agency's decision on their FOIA request (the statute of limitations period for filing a lawsuit challenging an adverse decision under FOIA is six years (see 28 U.S.C. 2401(a) and *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987))).
- (e) Dispute resolution services may occur only when all parties agree to participate.
- (1) The parties must agree to OGIS's assistance, agree that dispute resolution services are a supplement to, not a substitute for, the agency's administrative FOIA process, agree to keep the content of dispute resolution discussions confidential, and agree that OGIS's services are a non-exclusive alternative to Federal court litigation.
 - (2) Agreeing to participate in dispute resolution services and to discuss a dispute and possible resolutions does not mean that an agency is admitting to noncompliance, and resolving a dispute does not constitute a finding that the agency did not comply with FOIA.
- (f) Once the parties agree to engage in dispute resolution services, they should participate fully and promptly in any meetings or telephone discussions arranged by OGIS as part of the dispute resolution process. Either party can share information with OGIS in confidence to enable OGIS's dispute resolution process to work as intended.

§ 1291.12 Requesting dispute resolution services.

- (a) To request OGIS dispute resolution services, either the agency or the FOIA requester must file a written request that includes:

- (1) Your name (individual, or representative of an agency or other group);
 - (2) Contact information (mailing address, phone number, email address);
 - (3) Brief description of the nature of the dispute;
 - (4) Name of the agency; and
 - (5) Copies of the following documents: (i) the initial FOIA request; (ii) any agency responses to the initial request; (iii) the appeal, if any; (iv) any agency responses to the appeal; and (v) any other relevant correspondence between the FOIA requester and the agency about processing the initial FOIA request or appeal.
- (b) In addition, if you are a FOIA requester, you may also need to submit a signed NA Form 10003, Consent to Make Inquiries and Release of Information and Records (available at <https://ogis.archives.gov/mediation-program/request-assistance/privacy-consent-statement.htm>), OMB control No. 3095-0068. OMB Control No. 3095-0068 governs collection of the information in this section and the NA Form 10003. You need to submit this form to OGIS only if the agency you submitted your FOIA request to does not already have a FOIA routine use in place allowing them to release information about your FOIA request to us. You may find out if an agency has this kind of routine use in place on our website at <https://ogis.archives.gov/mediation-program/request-assistance/routine-uses.htm>.
- (c) After we receive the request for dispute resolution services, we review the request and any enclosures, enter the request into our case tracking system, and assign a case number to the request.
- (d)(1) We send you an acknowledgement letter in writing within ten business days after we receive your request for dispute resolution services. The acknowledgment letter does not mean that we have committed to offering dispute resolution services in your case.

(2) If your dispute resolution services request did not include sufficient information, the acknowledgment letter may request additional information or clarification. In such cases, you have 20 business days from the date on the acknowledgment letter in which to send us the additional information, initiate contact to discuss the request, or request additional time.

(e) If you don't provide the additional information or contact OGIS within 20 business days from the date on the acknowledgment letter requesting additional information, we may close the case. If you contact OGIS with additional information after the 20 business days expire, we will open a new case.

§ 1291.14 Dispute resolution process.

(a) When we receive a request for dispute resolution services from one or more parties to a dispute, we review the information to determine if we may appropriately offer such services. To make this determination, we review the dispute resolution request and make sure it meets the requirements for dispute resolution services contained in 36 CFR §§ 1291.10 and 1291.12 of this part.

(b) Once we determine that we may appropriately offer dispute resolution services, the other party or parties must also agree to engage in the process before resolution efforts can occur. If they agree, we assign one or more mediators to the dispute. If we determine that we are unable to offer dispute resolution services, we notify the party who requested the services, explain why we are unable to provide dispute resolution services, and advise them of other options.

(c) Mediators facilitate communication between the parties, including joint or separate discussions, to help them come to a mutually agreeable solution. The mediators may use all appropriate customary techniques associated with dispute resolution.

(d) We do not permit the parties to make any audio or video recordings of dispute resolution

meetings. The mediator's notes are confidential and we do not disclose them. The parties also agree to keep the content of the dispute resolution discussions confidential.

(e) Proceedings with the mediator are informal, and the mediator has no authority to compel the parties to resolve the dispute. Either party may withdraw from the dispute resolution process at any point. If one of the parties initiates litigation during the course of the dispute resolution process, they must notify us.

(f) If the parties reach an impasse, the mediator may raise the dispute to the Deputy Director of OGIS. The Deputy Director may provide the parties with an assessment of the situation as an additional level of dispute resolution efforts to assist the parties with breaking the impasse. Any assessment the Deputy Director provides is confidential and the parties may not rely upon it in any subsequent proceedings.

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

Subpart C---Reviews of Agency FOIA Policies, Procedures, and Compliance [Reserved]

Subpart D---Advisory Opinions [Reserved]

Dated: December 14, 2016

David S. Ferriero,

Archivist of the United States.

