



Request for Proposals—April 2, 2013

Reducing FOIA Litigation Through Targeted ADR Strategies

The Administrative Conference of the United States is seeking a consultant to undertake a research project that will study Freedom of Information Act (FOIA) litigation in federal courts with the goal of determining how alternative dispute resolution (ADR) procedures might help to reduce litigation over FOIA disputes. Proposals are due by 9:00 a.m. Eastern Time on Tuesday, April 30, 2013.

Background

The year 2012 saw the highest number of FOIA requests in the history of the law: a striking 650,000 requests were filed with agencies throughout the Executive Branch by individuals and organizations seeking government information. Similarly, results from a recent study by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University revealed that the number of FOIA cases has risen steadily over the last several years. Annual agency FOIA litigation costs hover around \$23 million—a conservative estimate by some accounts.

Moreover, it has been six years since enactment of the OPEN Government Act of 2007, a law reflecting concerns that some agencies, as a whole, were not implementing FOIA as Congress intended. Significantly, the law included, for the first time in FOIA's history, provisions that directed agency FOIA officers to "assist in the resolution of disputes" between the agency and a FOIA requester (5 U.S.C. § 552(a)(6)(B)(ii)).

Among other measures, the Act, established the Office of Government Information Services (OGIS) within the National Archives and Records Administration. OGIS has been in operation since September 2009. OGIS, acting, in effect, as a "FOIA ombudsman," has a hybrid mission: first, to identify and resolve individual FOIA disputes between requesters and agencies through "mediation services"; and, second, to review agency FOIA policies, procedures and compliance with FOIA and to make recommendations to Congress and the President to improve the administration of FOIA.

Description of Project

Faced with an ever-increasing caseload and inherent resource constraints, OGIS has encouraged the Administrative Conference to help identify the areas in which ADR techniques could be applied most effectively, to forestall federal FOIA litigation.

To address this need, the Conference plans to undertake a study that would ascertain the principal reasons for FOIA litigation in the federal courts, with an eye to identifying those areas where the ADR capabilities and resources of OGIS and other agencies could be directed most effectively. The study would review federal district and appellate court opinions, party filings (such as complaints), and similar sources to determine and categorize the bases for FOIA litigation. Categories of interest should include the most common types of FOIA lawsuits (e.g., constructive denials, exemption issues, fees, segregability of releasable information, and adequacy of search), as well as less frequent issues (e.g., exclusions, "Glomar responses," and



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defining the “agency record”). The study should also address whether particular types of ADR approaches are likely to be most effective in relation to identified types of FOIA cases or issues and, if so, lead to recommendations that would aid OGIS or other agencies in targeting their respective ADR approaches most effectively. The objective 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.

Content of Research Proposal

(a) Conduct a study of recent litigation in the federal courts under the Freedom of Information Act (5 U.S.C. § 552). Your proposal should clearly set forth a research strategy that would lead to a sufficient basis for identifying and categorizing the range of issues arising in FOIA litigation, their frequency, and the types of ADR, if any, that would be potentially effective in avoiding or resolving particular types of FOIA cases or issues. In particular, your proposal should include your plan for any practical limitations (e.g., range of years, selective sampling of specific jurisdictions) on the body of cases that you would examine.

(b) The study described above should include a search of the relevant literature and existing government and non-government databases and/or websites that report or maintain data on FOIA litigation. Your plan should also address the extent to which you would conduct appropriate interviews with, for example, agency officials, litigants, or non-government counsel and, if applicable, how your plan would address any concerns about timely completion of your research in view of the requirements of the Paperwork Reduction Act.

How to Submit a Proposal

Proposals are invited from qualified persons who would like to serve as a research consultant on this project. All responses will be considered by the Conference staff and the Chairman.

To submit a proposal to serve as the Conference’s consultant on this project, you must:

- Send an e-mail message to David Pritzker, Deputy General Counsel, at dpritzker@acus.gov. *Proposals must be submitted by e-mail.*
- Include the phrase “ACUS Project Proposal” in the subject line of your e-mail message.

The text of your proposal may be submitted in the body of the e-mail message or as an attachment. In your submission, please:

- State the name of the project for which you are submitting a proposal: “Reducing FOIA Litigation Through Targeted ADR Strategies.”
- Explain why you would be well qualified to work on the project. Include your *curriculum vitae* or other summary of relevant experience and research publications, if any.



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- Explain your research methodology and how you would develop recommendations based on the research. There is no required format and 2-3 pages should probably be sufficient for this section.
- State how much funding you would need for the project, keeping in mind that a typical Conference research contract includes a consulting fee of \$12,000 plus travel expenses of \$1,000, and research assistance expenses of \$1,000. There may be some flexibility in the budget based on factors relating to the proposal (*e.g.*, the consultant's location relative to Washington, DC, and the need for research assistance and empirical or interviewing work), so your proposal should suggest any special needs in this regard. The amount of the consulting fee and expenses is not a critical factor in the award of the contract; the quality of the proposal and of the consultant's ability to carry out the study will be the most important factors.
- Propose a schedule for the project. The Conference's research projects typically call for submission of an outline, a draft report, and a final report. Multiple draft reports may be necessary based on input from the Chairman, staff, or committee. The draft report should be substantially complete and ready for consideration by the committee and should be submitted no later than three months prior to the Conference plenary session at which the full membership will consider this project. Although consideration at the December 2013 plenary session is preferable, scheduling for June 2014 may be considered, as high quality research leading to a well-written report will be the prime consideration.

Submit your proposal by 9:00 a.m. Eastern Time on Tuesday, April 30, 2013. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on the:

- qualifications and experience of the researcher(s), and knowledge of literature in the field (if applicable);
- quality and clarity of the proposal;
- timeline of the proposal, and the ability of the researcher to perform the research in a timely manner;
- likelihood that the research will contribute to greater understanding of the subject matter studied and lead to an Administrative Conference recommendation that will improve administrative procedures in the federal government; and
- cost of the proposal (although the other factors are more important).

Failure to follow the above instructions may result in your proposal not being considered. Including the phrase "ACUS Project Proposal" in the subject line of your e-mail submission is important so that your proposal can be easily identified.



Administrative Conference Research Process

A consultant's study should result in a report that is delivered first for review by the Conference staff and Chairman. After staff review, the report, which should contain the results of the study, including the researcher's conclusions, proposed recommendations, and an Executive Summary, will be forwarded to a committee of the Conference membership for consideration. The recommendations should be suitable for adoption as recommendations of the Administrative Conference and in a form and style consistent with prior Conference recommendations. The report's proposed recommendations will be used to guide the committee in formulating its own recommendations. The consultant will be expected to work with Conference staff and the committee to refine and further shape the report and may work with Conference staff to revise the recommendations. Recommendations approved by the committee are then forwarded to the Council of the Conference for consideration, and the Council forwards the recommendations (with its views) to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and <http://www.acus.gov>).

The Conference will provide a consulting fee for this study plus a budget for related expenses. The Conference also typically encourages its consultants to publish the results of their studies in journals or other publications. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice.

Persons submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will (in most cases) need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.