

Comment from Robert E. Rutkowski on Disclosure of Agency Legal Materials
July 29, 2022

Andrew Fois, Chairman
Administrative Conference of the United States
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Re: Comment on making agency legal materials public

Dear Chair:

Transparency and openness are essential components of a strong democracy.

CREW recently responded to a request for comments from the Administrative Conference of the United States (ACUS) on making federal agencies' legal materials publicly available. The comment contains two primary recommendations: first, they urge ACUS to adopt a clear and comprehensive definition of the term "agency legal materials," and, second, they recommend that all available opinions from the Department of Justice's (DOJ) Office of Legal Counsel (OLC) be made publicly available.

Though ACUS's request for comments featured the term "agency legal materials," there exists, to CREW's knowledge, no legally or even generally accepted definition of the phrase. In fact, the DOJ has previously exploited the vagueness of the term to conceal its legal opinions from the public, creating a shroud of secrecy around the agency's work. ACUS should adopt an explicit and thorough definition of "agency legal materials," rather than leave the determination up to individual agencies, to ensure that the public may access all materials impacting its legal relationship with the federal government.

CREW also recommend, as they've long advocated for, that ACUS require the DOJ to make the OLC's legal opinions publicly available. Through its formal, written opinions, the OLC has historically advised the executive branch on some of its most pivotal decisions, including, for example, the president's authority to use military force without congressional approval. Yet, despite the critical role that OLC opinions play in policymaking, American citizens do not have access to them. By recommending an amendment to the Freedom of Information Act (FOIA), ACUS can ensure that we're able to read legal opinions that often alter the course of our government and, at times, even history.

ACUS has a significant opportunity to foster transparency between federal agencies and the public—implement the two recommendations and promote government integrity and accountability.

Full comments:

<https://www.citizensforethics.org/wp-content/uploads/2022/07/CREW-ACUS-Comment.pdf>

Yours sincerely,
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