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A BILL

To provide for the proactive disclosure of certain agency legal materials.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PROACTIVE DISCLOSURE OF CERTAIN AGENCY LEGAL MATERIALS.

(a) AMENDMENTS TO FOIA.—Section 552 of title 5, United States Code, is amended as follows:

() Subsection (a)(2) is amended by striking “for public inspection” and inserting “on its website”.

(1) Subsection (a)(2)(A) is amended by striking “final opinions” and all that follows through the semicolon at the end and inserting “all listed agency legal materials as defined in subsection (f)(3), and not exempt from disclosure under subsection (b) or (c) or identified as exempt under paragraph (9) of this section.”

(2) Subsection (a)(2)(D) is amended by striking “and” at the end.

(3) Subsection (a)(2)(E) is amended by adding “and” at the end.

(4) Subsection (a)(2) is further amended by adding after subparagraph (E) the following new subparagraph:

“(F) a legal materials disclosure plan, which shall, as applicable, include a catalog of—

“(i) which categories or types of agency legal materials an agency maintains,

“(ii) which of those materials the agency proactively makes available online,

“(iii) which of those materials the agency claims are identifies as exempt from proactive disclosure obligations under this section,

“(iv) where the various categories of proactively disclosed materials can be located online,

“(v) how the public can search for relevant records,

“(vi) how outdated materials are identified and archived, and

“(vii) any other information the public needs to understand the agency’s policies concerning proactive disclosure of legal materials;”.

(5) Subsection (a)(2) is further amended in the material following subparagraph (F)—

(i) by inserting “other type of listed agency legal material,” after “staff manual, instruction,”; and

(ii) by inserting “or other type of listed agency legal material,” after “staff manual or instruction”.

(6) Subsection (a)(4)(B) is amended by striking “to order the production of any agency records improperly withheld from the complainant” and inserting “to order the production (i) to the complainant of any agency records improperly withheld from the complainant; or (ii) to the public in compliance with paragraphs (1) and (2), for any agency records improperly withheld from the public under those paragraphs”.

(7) Subsection (a)(4)(F) is amended by striking “the production of any agency records improperly withheld from the complainant” and inserting “the production to the complainant of any agency records improperly withheld from the complainant, or

Commented [ST/OMB1]: SJT: Our understanding is that these amendments are not meant to alter the existing exemptions from disclosure otherwise available under 552(b) and pursuant to relevant case law. To provide clarity and avoid any confusion on this point, a rule of construction could be added at the end:

“Nothing in this Act, or the amendments made by this Act, shall be construed to require the disclosure of information or records that any agency may properly withhold from public disclosure under section 552(b) of title 5, United States Code.”

Commented [AM2]: Below you use “online” – is that different from website? I note that website is used in the E Gov Act.

Commented [AM3]: Consider changing “listed” here and elsewhere to “agency”

Commented [AM4]: Clarifying Amendment

Commented [HS/EPA5]: Added to implement the recommendation’s stated intent to retain existing FOIA exemptions. As written, this only exempts those agency legal materials that agencies themselves have exempted under proposed new section 552(a)(9).

Commented [AM6]: Clarifying Amendment

Commented [AM7]: What does “as applicable” mean / exclude?

Commented [AM8]: Why catalog? Why not have the plan describe each of the items?

Commented [HS/EPA9]: “Include a catalog” is confusing. Is the “catalog” a separate document from the “disclosure plan” itself that must be incorporated into the disclosure plan? Or is the disclosure plan, the catalog? Consider saying “describe” instead.

Commented [HS/EPA10]: Amendment

Commented [AM11]: Do this refer to 552(a)(1)& (2)? Right designation?

DRAFT

47 production to the public in compliance with paragraphs (1) or (2), for any agency records
48 improperly withheld from the public.”

49 (8) Subsection (a)(6)(C)(i) is amended by inserting after “paragraph (1), (2), or (3) of
50 this subsection” the following: “, including a request to an agency under paragraph (10),”.

51 (9) Subsection (a) is further amended by adding at the end the following new
52 paragraphs:

53 “(9) An agency may promulgate regulations identifying some listed agency legal materials as
54 exempt from the requirement in subsection (a)(2) that they be made available for public
55 inspection in electronic format. The regulations must identify with specificity the individual
56 records or categories of records covered by the exemption and must explain the justification for
57 the exemption. The only authorized bases for an exception are which must be that making the
58 records available for public inspection in electronic format would be either (A) duplicative,
59 because there is a large volume of records that do not vary significantly in their factual contexts
60 or the legal issues they raise; or (B) misleading. The regulations must also describe the
61 information, if any, the agency will make available for public inspection in electronic format
62 instead of the exempted records themselves (such as aggregate data or representative samples) to
63 adequately inform the public about agency activities.

64 “(10) With respect to records that an agency is required to make available to the public under
65 paragraph (1) or (2) of this subsection but has failed to do so, and except as provided in
66 subparagraph (3)(E), the agency, upon any request from a person other than an entity described
67 in paragraph (3)(E)(i)-(ii) for records which (i) reasonably describes such records and (ii) is
68 made in accordance with published rules stating the time, place, and procedures to be followed,
69 shall make the records promptly available to the public in compliance with paragraph (1) or (2)
70 (as applicable). Each agency shall ensure that the portals or other processes made available for
71 requests under paragraph (3) (including portals and processes described in subsection (m)) are
72 also available for requests under this paragraph.”

73 (10) Subsection (f) is amended—

74 (A) by striking “and” at the end of paragraph (1);

75 (B) by striking the period at the end of paragraph (2) and inserting a semicolon;
76 and

77 (C) by adding at the end the following new paragraphs:

78 “(3) ‘agency legal materials’ means, with respect to the agency concerned, all documents
79 that establish, interpret, apply, explain, or address the enforcement of legal rights and
80 obligations of a member of the public, along with constraints imposed, implemented, or
81 enforced by or upon the agency that affect a member of the public. Such term includes, but is
82 not limited to, listed agency legal materials; and

83 “(4) ‘listed agency legal materials’ means, with respect to the agency concerned--

84 “(A) final opinions (including concurring and dissenting opinions) and orders, issued in
85 adjudications that are governed by section 554, 556, or 557, or otherwise issued after a
86 legally required opportunity for an evidentiary hearing, regardless of any designation given
87 to the opinion or order with respect to its legal or binding effect (such as precedential, non-
88 precedential, published, or unpublished);

89 “(B) written documents that communicate to a member of the public the agency’s
90 decision not to enforce a legal requirement against one or more individuals or entities or
91 categories thereof, including documents that communicate such matters as (i) a decision to
92 grant a waiver or exemption, (ii) an advisory opinion that applies generally applicable legal

Commented [AM12]: Do this refer to 552(a)(1)& (2)?
Right designation?

Commented [AM13]: Unclear what the reference is to
(10).

Commented [AM14]: Possible changes re “listed” and in
“electronic format”. The latter is especially important
because agencies could start doing this on paper.

Commented [ST/OMB15]: SJT: What is meant by with
specificity?

Commented [HS/EPA16]: Should this be “exemption” to
match the previous sentence’s formulation?

Commented [HS/EPA17]: The language here varies from
the ACUS recommendation. As written here, this seems to
say that the only way an exemption would apply is if there is
something about electronic posting that would be
misleading. I don’t think that’s the intention. This could be
re-written to match the ACUS recommendation or “in
electronic format” could be removed.

Commented [CD18R17]: To Aid Discussion-- Paragraph
2 of Rec. 2023-1 states:

“Congress should provide in 5 U.S.C. § 552 that an agency
may promulgate regulations providing that it will not
proactively disclose some records described in Paragraph 1
of this Recommendation, and subject to the exemptions and
exclusions in 5 U.S.C. § 552(b) and (c), because individual
records in the relevant category do not vary considerably in
terms of their factual contexts or the legal issues they raise,
or that proactive disclosure of such documents would be
misleading. Any such rule should explain which records the
agency will not proactively disclose and what other
information (e.g., aggregate data, representative samples), if
any, the agency will proactively disclose instead to
adequately inform the public about agency activities.”

Commented [ST/OMB19]: SJT: Recommend minor edits
to avoid unintended consequences with respect to requests
from representatives of foreign governments.

Commented [HS/EPA20]: As drafted, this does not
incorporate the full FOIA disclosure process provided by
552(a)(3) et. al. There are instances where the full
... [1]

Commented [HS/EPA21]: This is too broad and pulls in
materials that would be exempt under FOIA even though the
recommendation states that it is subject to the existing FOIA
exemptions.

Commented [ST/OMB22]: SJT: Consistent with the
public transparency purpose of these amendments, and
existing and proposed provisions in § 552 governing the
scope of covered records, recommend limiting the new
... [2]

Commented [HS/EPA23]: Amendment

Commented [HS/EPA24]: The ACUS recommendation
says “may include.” As used here “including” would be
broader as it implies non-exclusive list of included items
rather than a non-exclusive list of possibly included items.

93 requirements to specific facts, or (iii) an explanation as to how the agency will exercise its
 94 discretion in particular cases;
 95 “(C) written legally binding opinions and memoranda issued by or under the authority of
 96 the agency’s chief legal officers **that affect a member of the public;**
 97 “(D) settlement agreements to which the agency is a party;
 98 “(E) memoranda of understanding, memoranda of agreement, and other similar
 99 interagency or inter-governmental agreements that **may** affect a member of the public;
 100 “(F) operative agency delegations of legal authority;
 101 “(G) operative orders of succession for agency positions whose occupants must be
 102 appointed by the President with the advice and consent of the Senate; and
 103 “(H) statutory or agency designations of first assistant positions to positions whose
 104 occupants must be appointed by the President with the advice and consent of the Senate.”.
 105 (11) Subsection (j)(1) is amended by adding at the end the following: “Each agency
 106 shall also designate one or more officers **responsible for overseeing the development and**
 107 **implementation of the agency’s legal materials disclosure plan referred to in subsection**
 108 **(a)(2)(F), and for overseeing the agency’s compliance with all legal requirements for the**
 109 **proactive disclosure of listed legal materials.”.**
 110 (b) AMENDMENTS TO E-GOVERNMENT ACT. —The E-Government Act of 2002 (44 U.S.C.
 111 3501 note) is amended as follows:
 112 (1) Section 206 is amended by striking subsection (b) and redesignating subsections
 113 (c), (d), and (e), as (b), (c), and (d), respectively.
 114 (2) Section 207(b) is amended—
 115 (A) by striking “DEFINITIONS” and all that follows through ““directory”” and
 116 inserting “DEFINITION.—In this section, the term ‘directory’”; and
 117 (B) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2) and
 118 realigning accordingly.
 119 (3) Section 207 is further amended by striking subsection (c) and redesignating
 120 subsections (d) through (g) as (c) through (f), respectively.
 121 (4) Section 207(c) (as so redesignated) is amended—
 122 (A) by striking paragraph (1);
 123 (B) by redesignating paragraph (2) as paragraph (1) and, in that paragraph, by
 124 striking “Not later than 1 year after the submission of recommendations under
 125 paragraph (1), the” and inserting “The”;
 126 (C) by inserting after such paragraph the following new paragraph (2):
 127 “(2) LISTED LEGAL MATERIALS.—The policies required by paragraph (1) shall **be**
 128 **periodically updated to** ensure that agencies present listed legal materials, required by
 129 section 552 of title 5, United States Code, to be made available for public inspection in
 130 electronic format, in a clear, logical, and readily accessible fashion.”;
 131 (D) in paragraph (3) by striking “the Committee” and inserting “relevant inter-
 132 agency bodies”; and
 133 (E) in paragraph (4) by striking “paragraph (2)(A)” and inserting “paragraph
 134 (1)(A)”.
 135 (5) Section 207(d) (as so redesignated) is amended—
 136 (A) by striking paragraph (1);

- Commented [HS/EPA25]:** Is this broader than what the recommendation included?
- Commented [CD26R25]:** To Aid Discussion-- Para. 1(b) of Rec. 2023-1 states:

"Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to Paragraph 2 of this Recommendation and the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), that each agency make available on its website...Written documents that communicate to a member of the public the agency’s decision not to enforce a legal requirement against an individual or entity. Such documents may include decisions to grant an individual or entity a waiver or exemption, and advisory opinions that apply generally applicable legal requirements to specific facts or explain how the agency will exercise its discretion in particular cases;"
- Commented [HS/EPA27]:** The ACUS recommendation provides this item and the previous as one compound clause. Here, this item loses an important qualification, i.e., the item isn't just any explanation but is advisory opinion that explains how the agency will exercise discretion.
- Commented [CD28R27]:** To Aid Discussion-- Para. 1(b) of Rec. 2023-1 states:

"Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to Paragraph 2 of this Recommendation and the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), that each agency make available on its website...Written documents that communicate to a member of the public the agency’s decision not to enforce a legal requirement ag... [3]
- Commented [ST/OMB29]:** SJT: Consistent with the public transparency purpose of these amendments, and existing and proposed provisions in § 552 governing the scope of covered records, recommend limiting the new... [4]
- Commented [ST/OMB30]:** SJT: Consider defining settlement agreement. Left undefined, it would be ambiguous as to what this covers, including whether it... [5]
- Commented [HS/EPA31]:** "May" is not in the ACUS recommendation. It isn't clear what it adds and may introduce more ambiguity.
- Commented [HS/EPA32]:** Should this be identified as someone in OGC?
- Commented [HS/EPA33]:** If not housed in a GC office, why not have as another duty for the Chief FOIA officer?
- Commented [ST/OMB34]:** SJT: We moved the addition of both periodically and as appropriate at the Plenary session and thought that both were accepted. Listed legal mate... [6]
- Commented [CD/ACUS35R34]:** Sec. 1(b)(4)(C) is intended to implement sentence 2 of Para. 4(c) of Rec. 2023-1, which reads, in relevant part:

... [7]
- Commented [CD36R34]:** NOTE: The Assembly did consider an amendment (proposed by Steph Tatham) to Rec. 2023-1 at the 79th Plenary that would have added ", as appropriate," after "legal materials" in sentence 2 of ... [8]

DRAFT

137 (B) by redesignating paragraph (2) as paragraph (1) and, in that paragraph, by
138 striking “Not later than 1 year after the submission of recommendations by the
139 Committee under paragraph (1), the” and inserting “The”;
140 (C) by redesignating paragraph (3) as paragraph (2) and, in that paragraph—
141 (i) by striking “paragraph (4)” and inserting “paragraph (3)”; and
142 (ii) by striking “the Committee and”; and
143 (D) by redesignating paragraph (4) as paragraph (3) and, in that paragraph, by
144 striking “paragraph (2)(A)” and inserting “paragraph (1)(A)”.

145 (6) Section 207(e) (as so redesignated) is amended—
146 (A) in paragraph (1) by striking “STANDARDS FOR AGENCY WEBSITES” and
147 inserting “GUIDANCE FOR AGENCY WEBSITES”;
148 (AB) in paragraph (1)(A)—
149 (i) by striking “subsections (a)(1) and (b)” and inserting “subsection
150 (a)(1)”; and
151 (ii) by striking “and” at the end;
152 (BC) in paragraph (1) by redesignating subparagraph (B) as subparagraph (C)
153 and by inserting after subparagraph (A) the following new subparagraph:
154 “(B) requirements that websites include, for each substantive rule and rule of
155 agency organization, procedure, or practice of an agency—
156 “(i) the text of the rule or a direct link to the text of the rule; and
157 “(ii) to the extent feasible, links to related agency legal materials, such
158 as preambles and other guidance documents explaining the rule or
159 significant adjudicative opinions interpreting or applying it; and”;
160 (ED) in paragraph (2)(A) by striking “consult the Committee and”; and
161 (DE) in paragraph (2)(B) by striking “consulting with the Committee and”.
162 (7) Section 207(f) (as so redesignated) is amended by striking paragraphs (3) through
163 (5).

Commented [HS/EPA37]: Edited for consistency, and also because “standards” implies requirements, but this is agency guidance.

Commented [HS/EPA38]: See comment above re: referring to guidance as “requirements.”

In addition, “requirements” seems inconsistent with the ACUS recommendation it is supposed to implement, which is also written in aspirational terms:

“Congress **should** provide that each agency **should** post each of its legislative rules, or a link to those rules, on its website, and **should**, to the extent feasible, include links to related agency legal materials, such as preambles and other guidance documents explaining the rule or significant adjudicative opinions interpreting or applying it.”

DRAFT

5 U.S.C. §552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public-

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available on its website for public inspection in an electronic format-

(A) all listed legal materials, as defined in paragraph (f)(3), and not exempt from disclosure under subsection (b) or (c) or identified as exempt under paragraph (9) of this section; final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format-

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; ~~and~~

(E) a general index of the records referred to under subparagraph (D); ~~and~~

(F) a legal materials disclosure plan, which shall, as applicable, include a catalog of—

(i) which categories or types of agency legal materials an agency maintains,

(ii) which of those materials the agency proactively makes available online,

(iii) which of those materials the agency ~~claims are~~ identifies as exempt from proactive disclosure obligations under this section.

Commented [AM39]: Below you use “online” – is that different from website? I note that website is used in the E gov Act.

Commented [AM40]: Consider changing “listed” here and elsewhere to “agency”

Commented [HS/EPA41]: To implement the Recommendation’s intent to retain existing FOIA exemptions. As written, this only exempts those agency legal materials that agencies themselves have exempted under proposed new section 552(a)(9).

Commented [AM42]: What does “as applicable” mean/exclude?

Commented [HS/EPA43]: See previous comment on this language.

Commented [AM44]: Why catalog? Why not have the plan describe each of the items?

Commented [HS/EPA45]: Amendment

DRAFT

- (iv) where the various categories of proactively disclosed materials can be located online.
- (v) how the public can search for relevant records.
- (vi) how outdated materials are identified and archived, and
- (vii) any other information the public needs to understand the agency's policies concerning proactive disclosure of legal materials;

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, other type of listed agency legal material or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction or other type of listed agency legal material that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if-

- (i) it has been indexed and either made available or published as provided by this paragraph;
- or
- (ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each 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.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

Commented [AM46]: If we change listed, we need to make the change here & perhaps other places.

DRAFT

255 (D) For purposes of this paragraph, the term "search" means to review, manually or by
256 automated means, agency records for the purpose of locating those records which are responsive
257 to a request.

258 (E) An agency, or part of an agency, that is an element of the intelligence community (as that
259 term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)))¹ shall
260 not make any record available under this paragraph to-

261 (i) any government entity, other than a State, territory, commonwealth, or district of the
262 United States, or any subdivision thereof; or

263 (ii) a representative of a government entity described in clause (i).

264 (4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate
265 regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees
266 applicable to the processing of requests under this section and establishing procedures and
267 guidelines for determining when such fees should be waived or reduced. Such schedule shall
268 conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public
269 comment, by the Director of the Office of Management and Budget and which shall provide for a
270 uniform schedule of fees for all agencies.

271 (ii) Such agency regulations shall provide that-

272 (I) fees shall be limited to reasonable standard charges for document search, duplication,
273 and review, when records are requested for commercial use;

274 (II) fees shall be limited to reasonable standard charges for document duplication when
275 records are not sought for commercial use and the request is made by an educational or
276 noncommercial scientific institution, whose purpose is scholarly or scientific research; or a
277 representative of the news media; and

278 (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard
279 charges for document search and duplication.

280 In this clause, the term "a representative of the news media" means any person or entity that
281 gathers information of potential interest to a segment of the public, uses its editorial skills to turn
282 the raw materials into a distinct work, and distributes that work to an audience. In this clause, the
283 term "news" means information that is about current events or that would be of current interest to
284 the public. Examples of news-media entities are television or radio stations broadcasting to the
285 public at large and publishers of periodicals (but only if such entities qualify as disseminators of
286 "news") who make their products available for purchase by or subscription by or free distribution
287 to the general public. These examples are not all-inclusive. Moreover, as methods of news
288 delivery evolve (for example, the adoption of the electronic dissemination of newspapers through
289 telecommunications services), such alternative media shall be considered to be news-media
290 entities. A freelance journalist shall be regarded as working for a news-media entity if the
291 journalist can demonstrate a solid basis for expecting publication through that entity, whether or
292 not the journalist is actually employed by the entity. A publication contract would present a solid
293 basis for such an expectation; the Government may also consider the past publication record of
294 the requester in making such a determination.

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

299 (iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication,
300 or review. Review costs shall include only the direct costs incurred during the initial examination

DRAFT

301 of a document for the purposes of determining whether the documents must be disclosed under
302 this section and for the purposes of withholding any portions exempt from disclosure under this
303 section. Review costs may not include any costs incurred in resolving issues of law or policy that
304 may be raised in the course of processing a request under this section. No fee may be charged by
305 any agency under this section-

306 (I) if the costs of routine collection and processing of the fee are likely to equal or exceed
307 the amount of the fee; or

308 (II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two
309 hours of search time or for the first one hundred pages of duplication.

310 (v) No agency may require advance payment of any fee unless the requester has previously
311 failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

312 (vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically
313 providing for setting the level of fees for particular types of records.

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

317 (viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in
318 the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees)
319 under this subparagraph if the agency has failed to comply with any time limit under paragraph
320 (6).

321 (II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined
322 in paragraph (6)(B)) and the agency provided a timely written notice to the requester in
323 accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an
324 additional 10 days. If the agency fails to comply with the extended time limit, the agency may
325 not assess any search fees (or in the case of a requester described under clause (ii)(II) of this
326 subparagraph, duplication fees).

327 (bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages
328 are necessary to respond to the request, an agency may charge search fees (or in the case of a
329 requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has
330 provided a timely written notice to the requester in accordance with paragraph (6)(B) and the
331 agency has discussed with the requester via written mail, electronic mail, or telephone (or made
332 not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope
333 of the request in accordance with paragraph (6)(B)(ii).

334 (cc) If a court has determined that exceptional circumstances exist (as that term is defined in
335 paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time
336 provided by the court order.

337 (B) On complaint, the district court of the United States in the district in which the
338 complainant resides, or has his principal place of business, or in which the agency records are
339 situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding
340 agency records and ~~to order the production of any agency records improperly withheld from the~~
341 ~~complainant to order the production (i) to the complainant of any agency records improperly~~
342 ~~withheld from the complainant; or (ii) to the public in compliance with paragraphs (1) and (2),~~
343 ~~for any agency records improperly withheld from the public under those paragraphs.~~ In such a
344 case the court shall determine the matter de novo, and may examine the contents of such agency
345 records in camera to determine whether such records or any part thereof shall be withheld under
346 any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency

Commented [AM47]: Do this refer to 552(a)(1)& (2)?
Right designation?

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347 to sustain its action. In addition to any other matters to which a court accords substantial weight,
348 a court shall accord substantial weight to an affidavit of an agency concerning the agency's
349 determination as to technical feasibility under paragraph (2)(C) and subsection (b) and
350 reproducibility under paragraph (3)(B).

351 (C) Notwithstanding any other provision of law, the defendant shall serve an answer or
352 otherwise plead to any complaint made under this subsection within thirty days after service
353 upon the defendant of the pleading in which such complaint is made, unless the court otherwise
354 directs for good cause shown.

355 [(D) Repealed. Pub. L. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357.]

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

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

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

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

364 (F)(i) Whenever the court orders ~~the production of any agency records improperly withheld~~
365 ~~from the complainant~~ the production to the complainant of any agency records improperly
366 withheld from the complainant, or production to the public in compliance with paragraphs (1) or
367 (2), for any agency records improperly withheld from the public, and assesses against the United
368 States reasonable attorney fees and other litigation costs, and the court additionally issues a
369 written finding that the circumstances surrounding the withholding raise questions whether
370 agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special
371 Counsel shall promptly initiate a proceeding to determine whether disciplinary action is
372 warranted against the officer or employee who was primarily responsible for the withholding.
373 The Special Counsel, after investigation and consideration of the evidence submitted, shall
374 submit his findings and recommendations to the administrative authority of the agency
375 concerned and shall send copies of the findings and recommendations to the officer or employee
376 or his representative. The administrative authority shall take the corrective action that the Special
377 Counsel recommends.

378 (ii) The Attorney General shall-

379 (I) notify the Special Counsel of each civil action described under the first sentence of
380 clause (i); and

381 (II) annually submit a report to Congress on the number of such civil actions in the
382 preceding year.

383 (iii) The Special Counsel shall annually submit a report to Congress on the actions taken by
384 the Special Counsel under clause (i).

385 (G) In the event of noncompliance with the order of the court, the district court may punish for
386 contempt the responsible employee, and in the case of a uniformed service, the responsible
387 member.

388 (5) Each agency having more than one member shall maintain and make available for public
389 inspection a record of the final votes of each member in every agency proceeding.

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

Commented [AM48]: Same point re paragraphs 1 & 2.

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392 (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after
393 the receipt of any such request whether to comply with such request and shall immediately
394 notify the person making such request of-

395 (I) such determination and the reasons therefor;

396 (II) the right of such person to seek assistance from the FOIA Public Liaison of the
397 agency; and

398 (III) in the case of an adverse determination-

399 (aa) the right of such person to appeal to the head of the agency, within a period
400 determined by the head of the agency that is not less than 90 days after the date of such
401 adverse determination; and

402 (bb) the right of such person to seek dispute resolution services from the FOIA Public
403 Liaison of the agency or the Office of Government Information Services; and

404 (ii) make a determination with respect to any appeal within twenty days (excepting
405 Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the
406 denial of the request for records is in whole or in part upheld, the agency shall notify the
407 person making such request of the provisions for judicial review of that determination under
408 paragraph (4) of this subsection.

409 The 20-day period under clause (i) shall commence on the date on which the request is first
410 received by the appropriate component of the agency, but in any event not later than ten days
411 after the request is first received by any component of the agency that is designated in the
412 agency's regulations under this section to receive requests under this section. The 20-day period
413 shall not be tolled by the agency except-

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

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

420 (B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in
421 either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the
422 person making such request setting forth the unusual circumstances for such extension and the
423 date on which a determination is expected to be dispatched. No such notice shall specify a date
424 that would result in an extension for more than ten working days, except as provided in clause
425 (ii) of this subparagraph.

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

DRAFT

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

440 (I) the need to search for and collect the requested records from field facilities or other
441 establishments that are separate from the office processing the request;

442 (II) the need to search for, collect, and appropriately examine a voluminous amount of
443 separate and distinct records which are demanded in a single request; or

444 (III) the need for consultation, which shall be conducted with all practicable speed, with
445 another agency having a substantial interest in the determination of the request or among two
446 or more components of the agency having substantial subject-matter interest therein.

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

453 (C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3),
454 including a request to an agency under paragraph (10) of this subsection shall be deemed to have
455 exhausted his administrative remedies with respect to such request if the agency fails to comply
456 with the applicable time limit provisions of this paragraph. If the Government can show
457 exceptional circumstances exist and that the agency is exercising due diligence in responding to
458 the request, the court may retain jurisdiction and allow the agency additional time to complete its
459 review of the records. Upon any determination by an agency to comply with a request for
460 records, the records shall be made promptly available to such person making such request. Any
461 notification of denial of any request for records under this subsection shall set forth the names
462 and titles or positions of each person responsible for the denial of such request.

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

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

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

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

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

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

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

481 (II) in other cases determined by the agency.

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

Commented [AM49]: Unclear what the reference is to (10).

DRAFT

- 483 (I) that a determination of whether to provide expedited processing shall be made, and
484 notice of the determination shall be provided to the person making the request, within 10 days
485 after the date of the request; and
- 486 (II) expeditious consideration of administrative appeals of such determinations of whether
487 to provide expedited processing.
- 488 (iii) An agency shall process as soon as practicable any request for records to which the
489 agency has granted expedited processing under this subparagraph. Agency action to deny or
490 affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by
491 an agency to respond in a timely manner to such a request shall be subject to judicial review
492 under paragraph (4), except that the judicial review shall be based on the record before the
493 agency at the time of the determination.
- 494 (iv) A district court of the United States shall not have jurisdiction to review an agency denial
495 of expedited processing of a request for records after the agency has provided a complete
496 response to the request.
- 497 (v) For purposes of this subparagraph, the term "compelling need" means-
- 498 (I) that a failure to obtain requested records on an expedited basis under this paragraph
499 could reasonably be expected to pose an imminent threat to the life or physical safety of an
500 individual; or
- 501 (II) with respect to a request made by a person primarily engaged in disseminating
502 information, urgency to inform the public concerning actual or alleged Federal Government
503 activity.
- 504 (vi) A demonstration of a compelling need by a person making a request for expedited
505 processing shall be made by a statement certified by such person to be true and correct to the best
506 of such person's knowledge and belief.
- 507 (F) In denying a request for records, in whole or in part, an agency shall make a reasonable
508 effort to estimate the volume of any requested matter the provision of which is denied, and shall
509 provide any such estimate to the person making the request, unless providing such estimate
510 would harm an interest protected by the exemption in subsection (b) pursuant to which the denial
511 is made.
- 512 (7) Each agency shall-
- 513 (A) establish a system to assign an individualized tracking number for each request received
514 that will take longer than ten days to process and provide to each person making a request the
515 tracking number assigned to the request; and
- 516 (B) establish a telephone line or Internet service that provides information about the status
517 of a request to the person making the request using the assigned tracking number, including-
- 518 (i) the date on which the agency originally received the request; and
519 (ii) an estimated date on which the agency will complete action on the request.
- 520 (8)(A) An agency shall-
- 521 (i) withhold information under this section only if-
- 522 (I) the agency reasonably foresees that disclosure would harm an interest protected by an
523 exemption described in subsection (b); or
- 524 (II) disclosure is prohibited by law; and
- 525 (ii)(I) consider whether partial disclosure of information is possible whenever the agency
526 determines that a full disclosure of a requested record is not possible; and
- 527 (II) take reasonable steps necessary to segregate and release nonexempt information; and

DRAFT

528 (B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited
529 from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

530 (9) An agency may promulgate regulations identifying some listed agency legal materials as
531 exempt from the requirement in subsection (a)(2) that they be made available for public
532 inspection in electronic format. The regulations must identify with specificity the individual
533 records or categories of records covered by the exemption and must explain the justification for
534 the exemption. The only authorized bases for an exception are which must be that making the
535 records available for public inspection in electronic format would be either (A) duplicative,
536 because there is a large volume of records that do not vary significantly in their factual contexts
537 or the legal issues they raise; or (B) misleading. The regulations must also describe the
538 information, if any, the agency will make available for public inspection in electronic format
539 instead of the exempted records themselves (such as aggregate data or representative samples) to
540 adequately inform the public about agency activities.

541 (10) With respect to records that an agency is required to make available to the public under
542 paragraph (1) or (2) of this subsection but has failed to do so, and except as provided in
543 subparagraph (3)(E), the agency, upon any request for records from a person other than an entity
544 described in paragraphs (3)(E)(i)-(ii) which (i) reasonably describes such records and (ii) is made
545 in accordance with published rules stating the time, place, and procedures to be followed, shall
546 make the records promptly available to the public in compliance with paragraph (1) or (2) (as
547 applicable). Each agency shall ensure that the portals or other processes made available for
548 requests under paragraph (3) (including portals and processes described in subsection (m)) are
549 also available for requests under this paragraph.

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

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

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

555 (3) specifically exempted from disclosure by statute (other than section 552b of this title), if
556 that statute-

557 (A)(i) requires that the matters be withheld from the public in such a manner as to leave
558 no discretion on the issue; or

559 (ii) establishes particular criteria for withholding or refers to particular types of matters to
560 be withheld; and

561 (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically
562 cites to this paragraph.

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

565 (5) inter-agency or intra-agency memorandums or letters that would not be available by law
566 to a party other than an agency in litigation with the agency, provided that the deliberative
567 process privilege shall not apply to records created 25 years or more before the date on which
568 the records were requested;

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

571 (7) records or information compiled for law enforcement purposes, but only to the extent
572 that the production of such law enforcement records or information (A) could reasonably be
573 expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a

Commented [AM50]: Possible changes re "listed" and in "electronic format". The latter is especially important because agencies could start doing this on paper.

Commented [ST/OMB51]: SJT: What is meant by with specificity?

Commented [HS/EPA52]: Should this be "exemption" to match the previous sentence's formulation?

Commented [HS/EPA53]: The language here varies from the ACUS recommendation. As written here, this seems to say that the only way an exemption would apply is if there is something about electronic posting that would be misleading. I don't think that's the intention. This could be re-written to match the ACUS recommendation or "in electronic format" could be removed.

Commented [ST/OMB54]: SJT: Recommend minor edits to avoid unintended consequences with respect to requests from representatives of foreign governments.

Commented [HS/EPA55]: As drafted, this does not incorporate the full FOIA disclosure process provided by 552(a)(3) et. al. There are instances where the full requirements and qualifications applicable to FOIA disclosures are not pulled in. (see 552(a)(6)).

It may also be that agency FOIA regulations only directly reference the current statutory text that references requests made pursuant to (a)(3)--thus their "published rules" may not automatically extend to requests made under (a)(10). This may require agencies to update (possibly through notice-and-comment) their regulations to also apply to requests made under (a)(10).

As such, there may be a way to this paragraph more of an additional step or requirement rather than a quasi-new process. For example, a new paragraph could be added 552(a)(3)(F) that says the public can, at the time of submitting a request for records under (a)(3), may also request that the records be posted in compliance with (a)(1) or (2), which the agency must determine whether to comply with at the same time as the determination to comply under (a)(6)(A) is made.

At the very least, I would strongly recommend a thorough scrubbing to make sure this recommendation appears seamless with the existing disclosure process, which would appear to be the intent of the ACUS recommendation.

DRAFT

574 fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an
575 unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the
576 identity of a confidential source, including a State, local, or foreign agency or authority or any
577 private institution which furnished information on a confidential basis, and, in the case of a
578 record or information compiled by criminal law enforcement authority in the course of a
579 criminal investigation or by an agency conducting a lawful national security intelligence
580 investigation, information furnished by a confidential source, (E) would disclose techniques
581 and procedures for law enforcement investigations or prosecutions, or would disclose
582 guidelines for law enforcement investigations or prosecutions if such disclosure could
583 reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected
584 to endanger the life or physical safety of any individual;

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

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

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

596 (c)(1) Whenever a request is made which involves access to records described in subsection
597 (b)(7)(A) and-

598 (A) the investigation or proceeding involves a possible violation of criminal law; and

599 (B) there is reason to believe that (i) the subject of the investigation or proceeding is not
600 aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be
601 expected to interfere with enforcement proceedings,
602 the agency may, during only such time as that circumstance continues, treat the records as not
603 subject to the requirements of this section.

604 (2) Whenever informant records maintained by a criminal law enforcement agency under an
605 informant's name or personal identifier are requested by a third party according to the informant's
606 name or personal identifier, the agency may treat the records as not subject to the requirements
607 of this section unless the informant's status as an informant has been officially confirmed.

608 (3) Whenever a request is made which involves access to records maintained by the Federal
609 Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international
610 terrorism, and the existence of the records is classified information as provided in subsection
611 (b)(1), the Bureau may, as long as the existence of the records remains classified information,
612 treat the records as not subject to the requirements of this section.

613 (d) This section does not authorize withholding of information or limit the availability of
614 records to the public, except as specifically stated in this section. This section is not authority to
615 withhold information from Congress.

616 (e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General
617 of the United States and to the Director of the Office of Government Information Services a
618 report which shall cover the preceding fiscal year and which shall include-

DRAFT

- 619 (A) the number of determinations made by the agency not to comply with requests for
620 records made to such agency under subsection (a) and the reasons for each such determination;
- 621 (B)(i) the number of appeals made by persons under subsection (a)(6), the result of such
622 appeals, and the reason for the action upon each appeal that results in a denial of information;
623 and
- 624 (ii) a complete list of all statutes that the agency relies upon to authorize the agency to
625 withhold information under subsection (b)(3), the number of occasions on which each statute
626 was relied upon, a description of whether a court has upheld the decision of the agency to
627 withhold information under each such statute, and a concise description of the scope of any
628 information withheld;
- 629 (C) the number of requests for records pending before the agency as of September 30 of the
630 preceding year, and the median and average number of days that such requests had been
631 pending before the agency as of that date;
- 632 (D) the number of requests for records received by the agency and the number of requests
633 which the agency processed;
- 634 (E) the median number of days taken by the agency to process different types of requests,
635 based on the date on which the requests were received by the agency;
- 636 (F) the average number of days for the agency to respond to a request beginning on the date
637 on which the request was received by the agency, the median number of days for the agency to
638 respond to such requests, and the range in number of days for the agency to respond to such
639 requests;
- 640 (G) based on the number of business days that have elapsed since each request was
641 originally received by the agency-
- 642 (i) the number of requests for records to which the agency has responded with a
643 determination within a period up to and including 20 days, and in 20-day increments up to
644 and including 200 days;
- 645 (ii) the number of requests for records to which the agency has responded with a
646 determination within a period greater than 200 days and less than 301 days;
- 647 (iii) the number of requests for records to which the agency has responded with a
648 determination within a period greater than 300 days and less than 401 days; and
- 649 (iv) the number of requests for records to which the agency has responded with a
650 determination within a period greater than 400 days;
- 651 (H) the average number of days for the agency to provide the granted information beginning
652 on the date on which the request was originally filed, the median number of days for the
653 agency to provide the granted information, and the range in number of days for the agency to
654 provide the granted information;
- 655 (I) the median and average number of days for the agency to respond to administrative
656 appeals based on the date on which the appeals originally were received by the agency, the
657 highest number of business days taken by the agency to respond to an administrative appeal,
658 and the lowest number of business days taken by the agency to respond to an administrative
659 appeal;
- 660 (J) data on the 10 active requests with the earliest filing dates pending at each agency,
661 including the amount of time that has elapsed since each request was originally received by
662 the agency;

DRAFT

663 (K) data on the 10 active administrative appeals with the earliest filing dates pending before
664 the agency as of September 30 of the preceding year, including the number of business days
665 that have elapsed since the requests were originally received by the agency;

666 (L) the number of expedited review requests that are granted and denied, the average and
667 median number of days for adjudicating expedited review requests, and the number
668 adjudicated within the required 10 days;

669 (M) the number of fee waiver requests that are granted and denied, and the average and
670 median number of days for adjudicating fee waiver determinations;

671 (N) the total amount of fees collected by the agency for processing requests;

672 (O) the number of full-time staff of the agency devoted to processing requests for records
673 under this section, and the total amount expended by the agency for processing such requests;

674 (P) the number of times the agency denied a request for records under subsection (c); and

675 (Q) the number of records that were made available for public inspection in an electronic
676 format under subsection (a)(2).

677 (2) Information in each report submitted under paragraph (1) shall be expressed in terms of
678 each principal component of the agency and for the agency overall.

679 (3) Each agency shall make each such report available for public inspection in an electronic
680 format. In addition, each agency shall make the raw statistical data used in each report available
681 in a timely manner for public inspection in an electronic format, which shall be made available-

682 (A) without charge, license, or registration requirement;

683 (B) in an aggregated, searchable format; and

684 (C) in a format that may be downloaded in bulk.

685 (4) The Attorney General of the United States shall make each report which has been made
686 available by electronic means available at a single electronic access point. The Attorney General
687 of the United States shall notify the Chairman and ranking minority member of the Committee
688 on Oversight and Government Reform of the House of Representatives and the Chairman and
689 ranking minority member of the Committees on Homeland Security and Governmental Affairs
690 and the Judiciary of the Senate, no later than March 1 of the year in which each such report is
691 issued, that such reports are available by electronic means.

692 (5) The Attorney General of the United States, in consultation with the Director of the Office
693 of Management and Budget, shall develop reporting and performance guidelines in connection
694 with reports required by this subsection by October 1, 1997, and may establish additional
695 requirements for such reports as the Attorney General determines may be useful.

696 (6)(A) The Attorney General of the United States shall submit to the Committee on Oversight
697 and Government Reform of the House of Representatives, the Committee on the Judiciary of the
698 Senate, and the President a report on or before March 1 of each calendar year, which shall
699 include for the prior calendar year-

700 (i) a listing of the number of cases arising under this section;

701 (ii) a listing of-

702 (I) each subsection, and any exemption, if applicable, involved in each case arising under
703 this section;

704 (II) the disposition of each case arising under this section; and

705 (III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of
706 subsection (a)(4); and

707 (iii) a description of the efforts undertaken by the Department of Justice to encourage
708 agency compliance with this section.

DRAFT

709 (B) The Attorney General of the United States shall make-
710 (i) each report submitted under subparagraph (A) available for public inspection in an
711 electronic format; and
712 (ii) the raw statistical data used in each report submitted under subparagraph (A) available
713 for public inspection in an electronic format, which shall be made available-
714 (I) without charge, license, or registration requirement;
715 (II) in an aggregated, searchable format; and
716 (III) in a format that may be downloaded in bulk.
717 (f) For purposes of this section, the term-
718 (1) 'agency' as defined in section 551(1) of this title includes any executive department,
719 military department, Government corporation, Government controlled corporation, or other
720 establishment in the executive branch of the Government (including the Executive Office of
721 the President), or any independent regulatory agency; ~~and~~
722 (2) 'record' and any other term used in this section in reference to information includes-
723 (A) any information that would be an agency record subject to the requirements of this
724 section when maintained by an agency in any format, including an electronic format; and
725 (B) any information described under subparagraph (A) that is maintained for an agency
726 by an entity under Government contract, for the purposes of records management;-
727 (3) 'agency legal materials' means, with respect to the agency concerned, all documents that
728 establish, interpret, apply, explain, or address the enforcement of legal rights and obligations
729 of a member of the public, along with constraints imposed, implemented, or enforced by or
730 upon the agency that affect a member of the public. Such term includes, but is not limited to,
731 listed agency legal materials; and
732 (4) 'listed agency legal materials' means, with respect to the agency concerned--
733 (A) final opinions (including concurring and dissenting opinions) and orders, issued in
734 adjudications that are governed by section 554, 556, or 557, or otherwise issued after a
735 legally required opportunity for an evidentiary hearing, regardless of any designation given
736 to the opinion or order with respect to its legal or binding effect (such as precedential, non-
737 precedential, published, or unpublished);
738 (B) written documents that communicate to a member of the public the agency's decision
739 not to enforce a legal requirement against one or more individuals or entities or categories
740 thereof, including documents that communicate such matters as (i) a decision to grant a
741 waiver or exemption, (ii) an advisory opinion that applies generally applicable legal
742 requirements to specific facts, or (iii) an explanation as to how the agency will exercise its
743 discretion in particular cases;
744 (C) written legally binding opinions and memoranda issued by or under the authority of
745 the agency's chief legal officers that affect a member of the public;
746 (D) settlement agreements to which the agency is a party;
747 (E) memoranda of understanding, memoranda of agreement, and other similar
748 interagency or inter-governmental agreements that may affect a member of the public;
749 (F) operative agency delegations of legal authority;
750 (G) operative orders of succession for agency positions whose occupants must be
751 appointed by the President with the advice and consent of the Senate; and
752 (H) statutory or agency designations of first assistant positions to positions whose
753 occupants must be appointed by the President with the advice and consent of the Senate.

Commented [HS/EPA56]: As written, this is too broad. And is this definition needed?

Commented [ST/OMB57]: SJT: Consistent with the public transparency purpose of these amendments, and existing and proposed provisions in § 552 governing the scope of covered records, recommend limiting the new disclosure requirements to documents that would affect members of the public. See existing § 552(a)(2)(C), (flush); see also proposed § 552(a)(4)(B), (E)

Commented [HS/EPA58]: Amendment

Commented [HS/EPA59]: The ACUS recommendation says "may include." As used here "including" would be broader as it implies non-exclusive list of included items rather than a non-exclusive list of possibly included items.

Commented [HS/EPA60]: Is this broader than what the recommendation included?

Commented [HS/EPA61]: The ACUS recommendation provides this item and the previous as one compound clause. Here, this item loses an important qualification, i.e., the item isn't just any explanation but is advisory opinion that explains how the agency will exercise discretion.

Commented [ST/OMB62]: SJT: Consistent with the public transparency purpose of these amendments, and existing and proposed provisions in § 552 governing the scope of covered records, recommend limiting the new disclosure requirements to documents that would affect members of the public. See existing § 552(a)(2)(C), (flush); see also proposed § 552(a)(4)(B), (E)

Commented [ST/OMB63]: SJT: Consider defining settlement agreement. Left undefined, it would be ambiguous as to what this covers, including whether it includes consent decrees, deferred prosecution agreements, non-prosecution agreements, and plea agreements.

Setting aside the scope of what constitutes a settlement agreement, there are considerations that may weigh in favor of excluding settlement agreements from mandatory disclosure, such as privacy interests and agency resource constraints.

Commented [HS/EPA64]: "May" is not in the ACUS recommendation. It isn't clear what it adds and may introduce more ambiguity.

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754 (g) The head of each agency shall prepare and make available for public inspection in an
755 electronic format, reference material or a guide for requesting records or information from the
756 agency, subject to the exemptions in subsection (b), including-

- 757 (1) an index of all major information systems of the agency;
- 758 (2) a description of major information and record locator systems maintained by the agency;
- 759 and
- 760 (3) a handbook for obtaining various types and categories of public information from the
761 agency pursuant to chapter 35 of title 44, and under this section.

762 (h)(1) There is established the Office of Government Information Services within the National
763 Archives and Records Administration. The head of the Office shall be the Director of the Office
764 of Government Information Services.

- 765 (2) The Office of Government Information Services shall-

- 766 (A) review policies and procedures of administrative agencies under this section;
- 767 (B) review compliance with this section by administrative agencies; and
- 768 (C) identify procedures and methods for improving compliance under this section.

- 769 (3) The Office of Government Information Services shall offer mediation services to resolve
770 disputes between persons making requests under this section and administrative agencies as a
771 nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the
772 Office or upon request of any party to a dispute.

- 773 (4)(A) Not less frequently than annually, the Director of the Office of Government
774 Information Services shall submit to the Committee on Oversight and Government Reform of the
775 House of Representatives, the Committee on the Judiciary of the Senate, and the President-

- 776 (i) a report on the findings of the information reviewed and identified under paragraph (2);
- 777 (ii) a summary of the activities of the Office of Government Information Services under
778 paragraph (3), including-

- 779 (I) any advisory opinions issued; and
- 780 (II) the number of times each agency engaged in dispute resolution with the assistance of
781 the Office of Government Information Services or the FOIA Public Liaison; and
- 782 (iii) legislative and regulatory recommendations, if any, to improve the administration of
783 this section.

- 784 (B) The Director of the Office of Government Information Services shall make each report
785 submitted under subparagraph (A) available for public inspection in an electronic format.
- 786 (C) The Director of the Office of Government Information Services shall not be required to
787 obtain the prior approval, comment, or review of any officer or agency of the United States,
788 including the Department of Justice, the Archivist of the United States, or the Office of
789 Management and Budget before submitting to Congress, or any committee or subcommittee
790 thereof, any reports, recommendations, testimony, or comments, if such submissions include a
791 statement indicating that the views expressed therein are those of the Director and do not
792 necessarily represent the views of the President.

- 793 (5) The Director of the Office of Government Information Services may directly submit
794 additional information to Congress and the President as the Director determines to be
795 appropriate.
- 796 (6) Not less frequently than annually, the Office of Government Information Services shall
797 conduct a meeting that is open to the public on the review and reports by the Office and shall
798 allow interested persons to appear and present oral or written statements at the meeting.

DRAFT

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

801 (j)(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such
802 agency (at the Assistant Secretary or equivalent level). Each agency shall also designate one or
803 more officers responsible for overseeing the development and implementation of the agency's
804 legal materials disclosure plan referred to in subsection (a)(2)(F), and for overseeing the
805 agency's compliance with all legal requirements for the proactive disclosure of listed legal
806 materials.

807 (2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the
808 agency-

809 (A) have agency-wide responsibility for efficient and appropriate compliance with this
810 section;

811 (B) monitor implementation of this section throughout the agency and keep the head of the
812 agency, the chief legal officer of the agency, and the Attorney General appropriately informed
813 of the agency's performance in implementing this section;

814 (C) recommend to the head of the agency such adjustments to agency practices, policies,
815 personnel, and funding as may be necessary to improve its implementation of this section;

816 (D) review and report to the Attorney General, through the head of the agency, at such times
817 and in such formats as the Attorney General may direct, on the agency's performance in
818 implementing this section;

819 (E) facilitate public understanding of the purposes of the statutory exemptions of this
820 section by including concise descriptions of the exemptions in both the agency's handbook
821 issued under subsection (g), and the agency's annual report on this section, and by providing
822 an overview, where appropriate, of certain general categories of agency records to which those
823 exemptions apply;

824 (F) offer training to agency staff regarding their responsibilities under this section;

825 (G) serve as the primary agency liaison with the Office of Government Information
826 Services and the Office of Information Policy; and

827 (H) designate 1 or more FOIA Public Liaisons.

828 (3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all
829 aspects of the administration of this section by the agency to ensure compliance with the
830 requirements of this section, including-

831 (A) agency regulations;

832 (B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

833 (C) assessment of fees and determination of eligibility for fee waivers;

834 (D) the timely processing of requests for information under this section;

835 (E) the use of exemptions under subsection (b); and

836 (F) dispute resolution services with the assistance of the Office of Government Information
837 Services or the FOIA Public Liaison.

838 (k)(1) There is established in the executive branch the Chief FOIA Officers Council (referred
839 to in this subsection as the "Council").

840 (2) The Council shall be comprised of the following members:

841 (A) The Deputy Director for Management of the Office of Management and Budget.

842 (B) The Director of the Office of Information Policy at the Department of Justice.

843 (C) The Director of the Office of Government Information Services.

844 (D) The Chief FOIA Officer of each agency.

Commented [HS/EPA65]: Should this be identified as someone in OGC?

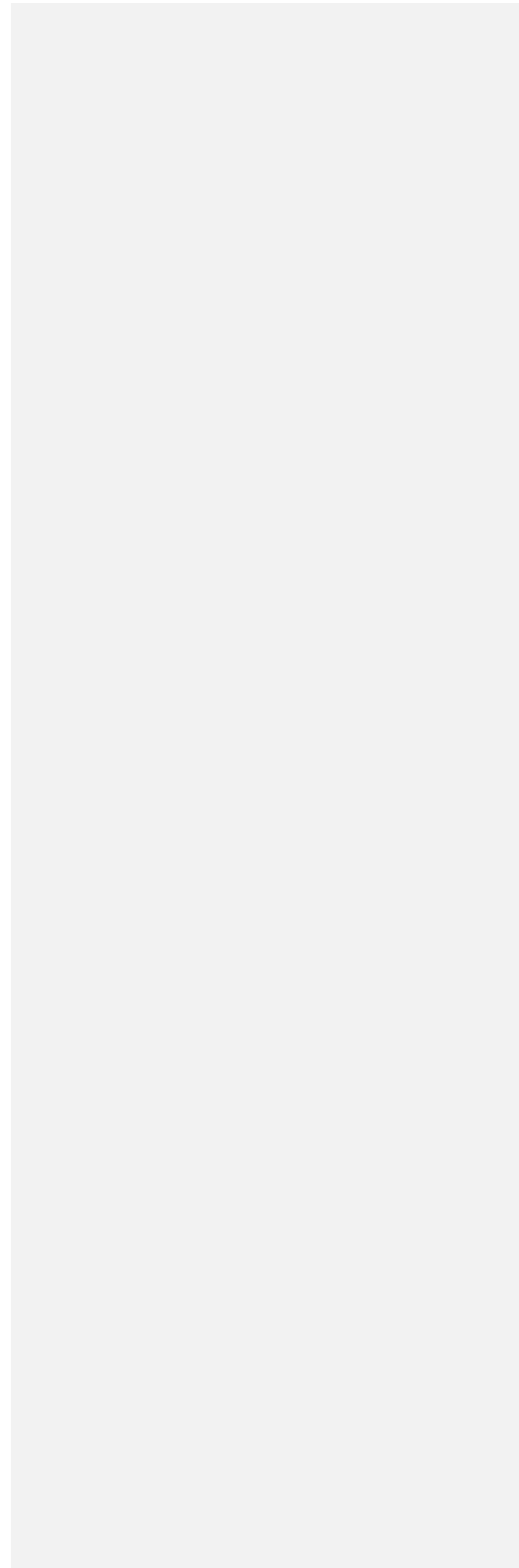
Commented [HS/EPA66]: If not housed in a GC office, why not have as another duty for the Chief FOIA officer?

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845 (E) Any other officer or employee of the United States as designated by the Co-Chairs.
846 (3) The Director of the Office of Information Policy at the Department of Justice and the
847 Director of the Office of Government Information Services shall be the Co-Chairs of the
848 Council.
849 (4) The Administrator of General Services shall provide administrative and other support for
850 the Council.
851 (5)(A) The duties of the Council shall include the following:
852 (i) Develop recommendations for increasing compliance and efficiency under this section.
853 (ii) Disseminate information about agency experiences, ideas, best practices, and innovative
854 approaches related to this section.
855 (iii) Identify, develop, and coordinate initiatives to increase transparency and compliance
856 with this section.
857 (iv) Promote the development and use of common performance measures for agency
858 compliance with this section.
859 (B) In performing the duties described in subparagraph (A), the Council shall consult on a
860 regular basis with members of the public who make requests under this section.
861 (6)(A) The Council shall meet regularly and such meetings shall be open to the public unless
862 the Council determines to close the meeting for reasons of national security or to discuss
863 information exempt under subsection (b).
864 (B) Not less frequently than annually, the Council shall hold a meeting that shall be open to
865 the public and permit interested persons to appear and present oral and written statements to the
866 Council.
867 (C) Not later than 10 business days before a meeting of the Council, notice of such meeting
868 shall be published in the Federal Register.
869 (D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices,
870 working papers, drafts, studies, agenda, or other documents that were made available to or
871 prepared for or by the Council shall be made publicly available.
872 (E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of
873 the persons present, a complete and accurate description of matters discussed and conclusions
874 reached, and copies of all reports received, issued, or approved by the Council. The minutes shall
875 be redacted as necessary and made publicly available.
876 (I) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as
877 supervisory officials to whom a requester under this section can raise concerns about the service
878 the requester has received from the FOIA Requester Center, following an initial response from
879 the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in
880 reducing delays, increasing transparency and understanding of the status of requests, and
881 assisting in the resolution of disputes.
882 (m)(1) The Director of the Office of Management and Budget, in consultation with the
883 Attorney General, shall ensure the operation of a consolidated online request portal that allows a
884 member of the public to submit a request for records under subsection (a) to any agency from a
885 single website. The portal may include any additional tools the Director of the Office of
886 Management and Budget finds will improve the implementation of this section.
887 (2) This subsection shall not be construed to alter the power of any other agency to create or
888 maintain an independent online portal for the submission of a request for records under this
889 section. The Director of the Office of Management and Budget shall establish standards for

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890 interoperability between the portal required under paragraph (1) and other request processing
891 software used by agencies subject to this section.



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44 U.S.C. §3501 note (E-Government Act of 2002)

SEC. 206. REGULATORY AGENCIES.

"(a) PURPOSES.-The purposes of this section are to-

"(1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and

"(2) enhance public participation in Government by electronic means, consistent with requirements under subchapter II of chapter 5 of title 5, United States Code, (commonly referred to as the 'Administrative Procedures Act').

~~"(b) INFORMATION PROVIDED BY AGENCIES ONLINE.-To the extent practicable as determined by the agency in consultation with the Director, each agency (as defined under section 551 of title 5, United States Code) shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.~~

~~"(eb) SUBMISSIONS BY ELECTRONIC MEANS.-To the extent practicable, agencies shall accept submissions under section 553(c) of title 5, United States Code, by electronic means.~~

~~"(ec) ELECTRONIC DOCKETING.-~~

~~"(1) In general.-To the extent practicable, as determined by the agency in consultation with the Director, agencies shall ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under section 553 of title 5, United States Code.~~

~~"(2) Information available.-Agency electronic dockets shall make publicly available online to the extent practicable, as determined by the agency in consultation with the Director-~~

~~"(A) all submissions under section 553(c) of title 5, United States Code; and~~

~~"(B) other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted electronically.~~

~~"(ed) TIME LIMITATION.-Agencies shall implement the requirements of this section consistent with a timetable established by the Director and reported to Congress in the first annual report under section 3606 of title 44 (as added by this Act).~~

SEC. 207. ACCESSIBILITY, USABILITY, AND PRESERVATION OF GOVERNMENT INFORMATION.

"(a) PURPOSE.-The purpose of this section is to improve the methods by which Government information, including information on the Internet, is organized, preserved, and made accessible to the public.

~~"(b) DEFINITIONS.-In this section, the term-~~

~~"(1) 'Committee' means the Interagency Committee on Government Information established under subsection (e); and~~

~~"(2) 'directory'~~

~~(b) DEFINITION.—In this section, the term 'directory' means a taxonomy of subjects linked to websites that-~~

~~"(A1) organizes Government information on the Internet according to subject matter; and~~

~~"(B2) may be created with the participation of human editors.~~

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938 ~~"(c) INTERAGENCY COMMITTEE.-~~
939 ~~"(1) ESTABLISHMENT. Not later than 180 days after the date of enactment of this title~~
940 ~~{Dec. 17, 2002}, the Director shall establish the Interagency Committee on Government~~
941 ~~Information.~~
942 ~~"(2) MEMBERSHIP. The Committee shall be chaired by the Director or the designee of the~~
943 ~~Director and-~~
944 ~~"(A) shall include representatives from-~~
945 ~~"(i) the National Archives and Records Administration;~~
946 ~~"(ii) the offices of the Chief Information Officers from Federal agencies;~~
947 ~~and~~
948 ~~"(iii) other relevant officers from the executive branch; and~~
949 ~~"(B) may include representatives from the Federal legislative and judicial~~
950 ~~branches.~~
951 ~~"(3) FUNCTIONS. The Committee shall-~~
952 ~~"(A) engage in public consultation to the maximum extent feasible, including~~
953 ~~consultation with interested communities such as public advocacy organizations;~~
954 ~~"(B) conduct studies and submit recommendations, as provided under this section,~~
955 ~~to the Director and Congress; and~~
956 ~~"(C) share effective practices for access to, dissemination of, and retention of~~
957 ~~Federal information.~~
958 ~~"(4) TERMINATION. The Committee may be terminated on a date determined by the~~
959 ~~Director, except the Committee may not terminate before the Committee submits all~~
960 ~~recommendations required under this section.~~
961 ~~"(d) CATEGORIZING OF INFORMATION.-~~
962 ~~"(1) COMMITTEE FUNCTIONS. Not later than 2 years after the date of enactment of this Act~~
963 ~~{Dec. 17, 2002}, the Committee shall submit recommendations to the Director on-~~
964 ~~"(A) the adoption of standards, which are open to the maximum extent feasible, to~~
965 ~~enable the organization and categorization of Government information-~~
966 ~~"(i) in a way that is searchable electronically, including by searchable~~
967 ~~identifiers; and~~
968 ~~"(ii) in ways that are interoperable across agencies;~~
969 ~~"(B) the definition of categories of Government information which should be~~
970 ~~classified under the standards; and~~
971 ~~"(C) determining priorities and developing schedules for the initial~~
972 ~~implementation of the standards by agencies.~~
973 ~~"(2) FUNCTIONS OF THE DIRECTOR. Not later than 1 year after the submission of~~
974 ~~recommendations under paragraph (1), the~~The ~~Director shall issue policies-~~
975 ~~"(A) requiring that agencies use standards, which are open to the maximum extent~~
976 ~~feasible, to enable the organization and categorization of Government~~
977 ~~information-~~
978 ~~"(i) in a way that is searchable electronically, including by searchable~~
979 ~~identifiers;~~
980 ~~"(ii) in ways that are interoperable across agencies; and~~
981 ~~"(iii) that are, as appropriate, consistent with the provisions under section~~
982 ~~3602(f)(8) of title 44, United States Code;~~

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983 "(B) defining categories of Government information which shall be required to be
984 classified under the standards; and
985 "(C) determining priorities and developing schedules for the initial
986 implementation of the standards by agencies.

987 "(2) LISTED LEGAL MATERIALS.—The policies required by paragraph (1) shall be
988 periodically updated to ensure that agencies present listed legal materials, required by
989 section 552 of title 5, United States Code, to be made available for public inspection in
990 electronic format, in a clear, logical, and readily accessible fashion.

991 "(3) MODIFICATION OF POLICIES.—After the submission of agency reports under paragraph
992 (4), the Director shall modify the policies, as needed, in consultation with ~~the~~
993 ~~Committee~~ relevant inter-agency bodies and interested parties.

994 "(4) AGENCY FUNCTIONS.—Each agency shall report annually to the Director, in the report
995 established under section 202(g), on compliance of that agency with the policies issued
996 under ~~paragraph (2)(A)~~ paragraph (1)(A).

997 "(ed) PUBLIC ACCESS TO ELECTRONIC INFORMATION.—

998 ~~"(1) COMMITTEE FUNCTIONS.—Not later than 2 years after the date of enactment of this Act~~
999 ~~[Dec. 17, 2002], the Committee shall submit recommendations to the Director and the~~
1000 ~~Archivist of the United States on—~~

1001 ~~"(A) the adoption by agencies of policies and procedures to ensure that chapters~~
1002 ~~21, 25, 27, 29, and 31 of title 44, United States Code, are applied effectively and~~
1003 ~~comprehensively to Government information on the Internet and to other~~
1004 ~~electronic records; and~~

1005 ~~"(B) the imposition of timetables for the implementation of the policies and~~
1006 ~~procedures by agencies.~~

1007 ~~"(2) FUNCTIONS OF THE ARCHIVIST.—Not later than 1 year after the submission of~~
1008 ~~recommendations by the Committee under paragraph (1), the~~ The Archivist of the United
1009 States shall issue policies—

1010 "(A) requiring the adoption by agencies of policies and procedures to ensure that
1011 chapters 21, 25, 27, 29, and 31 of title 44, United States Code, are applied
1012 effectively and comprehensively to Government information on the Internet and
1013 to other electronic records; and

1014 "(B) imposing timetables for the implementation of the policies, procedures, and
1015 technologies by agencies.

1016 ~~"(3) MODIFICATION OF POLICIES.—After the submission of agency reports under~~ paragraph
1017 ~~(4) paragraph (3), the Archivist of the United States shall modify the policies, as needed,~~
1018 ~~in consultation with the Committee and interested parties.~~

1019 ~~"(4) AGENCY FUNCTIONS.—Each agency shall report annually to the Director, in the report~~
1020 ~~established under section 202(g), on compliance of that agency with the policies issued~~
1021 ~~under ~~paragraph (2)(A)~~ paragraph (1)(A).~~

1022 "(f) AGENCY WEBSITES.—

1023 "(1) ~~STANDARDS~~ GUIDANCE FOR AGENCY WEBSITES.—Not later than 2 years after the
1024 effective date of this title [see Effective Date note set out under section 3601 of this title],
1025 the Director shall promulgate guidance for agency websites that includes—

1026 "(A) requirements that websites include direct links to—
1027 "(i) descriptions of the mission and statutory authority of the agency;

Commented [ST/OMB67]: SJT: We moved the addition of both periodically and as appropriate at the Plenary session and thought that both were accepted. Listed legal materials helps provide clarity here, but we'd like to confirm the language in the recommendation.

Commented [CD68R67]: To Aid Discussion -- Sec. 1(b)(4)(C) is intended to implement sentence 2 of Para. 4(c) of Rec. 2023-1, which reads, in relevant part:

"Because various provisions of the E-Government Act...governing proactive disclosure are duplicative, contain drafting errors, or are outdated, Congress should amend the statute to...require that OMB, after consultation with other relevant inter-agency bodies, periodically update its guidance on federal agency public websites to ensure that agencies present legal materials, required to be disclosed proactively, on their websites in a clear, logical, and readily accessible fashion." [emphasis added]

Commented [HS/EPA69]: Edited for consistency, and also because "standards" implies requirements, but this is agency guidance.

Commented [HS/EPA70]: This is guidance for agency websites, so it can't include "requirements."

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1028 (ii) information made available to the public under ~~subsections (a)(1) and~~
1029 ~~(b) subsection (a)(1)~~ of section 552 of title 5, United States Code
1030 (commonly referred to as the 'Freedom of Information Act');
1031 (iii) information about the organizational structure of the agency; and
1032 (iv) the strategic plan of the agency developed under section 306 of title
1033 5, United States Code; ~~and~~
1034 “(B) requirements that websites include, for each substantive rule and rule of
1035 agency organization, procedure, or practice of an agency—
1036 “(i) the text of the rule or a direct link to the text of the rule; and
1037 “(ii) to the extent feasible, links to related agency legal materials, such as
1038 preambles and other guidance documents explaining the rule or significant
1039 adjudicative opinions interpreting or applying it; and
1040 “(B) minimum agency goals to assist public users to navigate agency websites,
1041 including-
1042 (i) speed of retrieval of search results;
1043 (ii) the relevance of the results;
1044 (iii) tools to aggregate and disaggregate data; and
1045 (iv) security protocols to protect information.
1046 (2) AGENCY REQUIREMENTS.-(A) Not later than 2 years after the date of enactment of
1047 this Act [Dec. 17, 2002], each agency shall-
1048 (i) ~~consult with the Committee and~~ solicit public comment;
1049 (ii) establish a process for determining which Government information the
1050 agency intends to make available and accessible to the public on the Internet and
1051 by other means;
1052 (iii) develop priorities and schedules for making Government information
1053 available and accessible;
1054 (iv) make such final determinations, priorities, and schedules available for public
1055 comment;
1056 (v) post such final determinations, priorities, and schedules on the Internet; and
1057 (vi) submit such final determinations, priorities, and schedules to the Director, in
1058 the report established under section 202(g).
1059 (B) Each agency shall update determinations, priorities, and schedules of the agency, as
1060 needed, after ~~consulting with the Committee and~~ soliciting public comment, if
1061 appropriate.
1062
1063 (3) PUBLIC DOMAIN DIRECTORY OF PUBLIC FEDERAL GOVERNMENT WEBSITES. -
1064 (A) Establishment.-Not later than 2 years after the effective date of this title [see
1065 Effective Date note set out under section 3601 of this title], the Director and each
1066 agency shall-
1067 (i) develop and establish a public domain directory of public Federal
1068 Government websites; and
1069 (ii) post the directory on the Internet with a link to the integrated Internet-
1070 based system established under section 204.
1071 (B) Development.-With the assistance of each agency, the Director shall-
1072 (i) direct the development of the directory through a collaborative effort,
1073 including input from-

Commented [HS/EPA71]: See comment above re: referring to guidance as “requirements.”

In addition, “requirements” seems inconsistent with the ACUS recommendation it is supposed to implement, which is also written in aspirational terms:

“Congress **should** provide that each agency **should** post each of its legislative rules, or a link to those rules, on its website, and **should**, to the extent feasible, include links to related agency legal materials, such as preambles and other guidance documents explaining the rule or significant adjudicative opinions interpreting or applying it.”

DRAFT

1074 " (I) agency librarians;
1075 " (II) information technology managers;
1076 " (III) program managers;
1077 " (IV) records managers;
1078 " (V) Federal depository librarians; and
1079 " (VI) other interested parties; and
1080 " (ii) develop a public domain taxonomy of subjects used to review and
1081 categorize public Federal Government websites.
1082 "(C) UPDATE.-With the assistance of each agency, the Administrator of the Office
1083 of Electronic Government shall-
1084 " (i) update the directory as necessary, but not less than every 6 months;
1085 and
1086 " (ii) solicit interested persons for improvements to the directory.
1087 "(e) ACCESS TO FEDERALLY FUNDED RESEARCH AND DEVELOPMENT.-
1088 " (1) DEVELOPMENT AND MAINTENANCE OF GOVERNMENTWIDE REPOSITORY AND WEBSITE.-
1089 " (A) REPOSITORY AND WEBSITE.-The Director of the Office of Management and
1090 Budget (or the Director's delegate), in consultation with the Director of the Office
1091 of Science and Technology Policy and other relevant agencies, shall ensure the
1092 development and maintenance of-
1093 " (i) a repository that fully integrates, to the maximum extent feasible,
1094 information about research and development funded by the Federal
1095 Government, and the repository shall-
1096 " (I) include information about research and development funded
1097 by the Federal Government, consistent with any relevant
1098 protections for the information under section 552 of title 5, United
1099 States Code, and performed by-
1100 " (aa) institutions not a part of the Federal Government,
1101 including State, local, and foreign governments; industrial
1102 firms; educational institutions; not-for-profit organizations;
1103 federally funded research and development centers; and
1104 private individuals; and
1105 " (bb) entities of the Federal Government, including
1106 research and development laboratories, centers, and offices;
1107 and
1108 " (II) integrate information about each separate research and
1109 development task or award, including-
1110 " (aa) the dates upon which the task or award is expected to
1111 start and end;
1112 " (bb) a brief summary describing the objective and the
1113 scientific and technical focus of the task or award;
1114 " (cc) the entity or institution performing the task or award
1115 and its contact information;
1116 " (dd) the total amount of Federal funds expected to be
1117 provided to the task or award over its lifetime and the
1118 amount of funds expected to be provided in each fiscal year
1119 in which the work of the task or award is ongoing;

Page 2: [1] Commented [HS/EPA20]

Helen Serassio / EPA

10/6/2023 1:14:00 PM

As drafted, this does not incorporate the full FOIA disclosure process provided by 552(a)(3) et. al. There are instances where the full requirements and qualifications applicable to FOIA disclosures are not pulled in. (see 552(a)(6)).

It may also be that agency FOIA regulations only directly reference the current statutory text that references requests made pursuant to (a)(3)--thus their "published rules" may not automatically extend to requests made under (a)(10). This may require agencies to update (possibly through notice-and-comment) their regulations to also apply to requests made under (a)(10).

As such, there may be a way to this paragraph more of an additional step or requirement rather than a quasi-new process. For example, a new paragraph could be added 552(a)(3)(F) that says the public can, at the time of submitting a request for records under (a)(3), may also request that the records be posted in compliance with (a)(1) or (2), which the agency must determine whether to comply with at the same time as the determination to comply under (a)(6)(A) is made.

At the very least, I would strongly recommend a thorough scrubbing to make sure this recommendation appears seamless with the existing disclosure process, which would appear to be the intent of the ACUS recommendation.

Page 2: [2] Commented [ST/OMB22]

Steph Tatham / OMB

10/6/2023 11:03:00 AM

SJT: Consistent with the public transparency purpose of these amendments, and existing and proposed provisions in § 552 governing the scope of covered records, recommend limiting the new disclosure requirements to documents that would affect members of the public. See existing § 552(a)(2)(C), (flush); see also proposed § 552(a)(4)(B), (E)

Page 3: [3] Commented [CD28R27]

Conrad Dryland 10/6/2023 1:59:00 PM

To Aid Discussion-- Para. 1(b) of Rec. 2023-1 states:

"Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to Paragraph 2 of this Recommendation and the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), that each agency make available on its website...Written documents that communicate to a member of the public the agency's decision not to enforce a legal requirement against an individual or entity. Such documents may include decisions to grant an individual or entity a waiver or exemption, and advisory opinions that apply generally applicable legal requirements to specific facts or explain how the agency will exercise its discretion in particular cases;"

Page 3: [4] Commented [ST/OMB29]

Steph Tatham / OMB

10/6/2023 11:08:00 AM

SJT: Consistent with the public transparency purpose of these amendments, and existing and proposed provisions in § 552 governing the scope of covered records, recommend limiting the new disclosure requirements to documents that would affect members of the public. See existing § 552(a)(2)(C), (flush); see also proposed § 552(a)(4)(B), (E)

Page 3: [5] Commented [ST/OMB30]

Steph Tatham / OMB

10/6/2023 11:08:00 AM

SJT: Consider defining settlement agreement. Left undefined, it would be ambiguous as to what this covers, including whether it includes consent decrees, deferred prosecution agreements, non-prosecution agreements, and plea agreements.

Setting aside the scope of what constitutes a settlement agreement, there are considerations that may weigh in favor of excluding settlement agreements from mandatory disclosure, such as privacy interests and agency resource constraints.

Page 3: [6] Commented [ST/OMB34]

Steph Tatham / OMB

10/6/2023 11:11:00 AM

SJT: We moved the addition of both periodically and as appropriate at the Plenary session and thought that both were accepted. Listed legal materials helps provide clarity here, but we'd like to confirm the language in the recommendation.

Page 3: [7] Commented [CD/ACUS35R34] Conrad Dryland 10/6/2023 11:21:00 AM

Sec. 1(b)(4)(C) is intended to implement sentence 2 of Para. 4(c) of Rec. 2023-1, which reads, in relevant part:

"Because various provisions of the E-Government Act...governing proactive disclosure are duplicative, contain drafting errors, or are outdated, Congress should amend the statute to...require that OMB, after consultation with other relevant inter-agency bodies, *periodically* update its guidance on federal agency public websites to ensure that agencies present legal materials, required to be disclosed proactively, on their websites in a clear, logical, and readily accessible fashion." [emphasis added]

Page 3: [8] Commented [CD36R34] Conrad Dryland 10/6/2023 2:08:00 PM

NOTE: The Assembly did consider an amendment (proposed by Steph Tatham) to Rec. 2023-1 at the 79th Plenary that would have added ", as appropriate," after "legal materials" in sentence 2 of paragraph 4(c) of the rec. But, prior to adoption, the Tatham amendment was modified, without objection, by a 2nd degree amendment moved by F. Laguarda that struck "as appropriate" and substituted ", required to be disclosed proactively,". The Tatham amendment, as modified by the Laguarda amendment, was then adopted by unanimous consent.

79th Plenary Recording (2:20:10) --

<https://www.youtube.com/live/8pFBBY6WgHU?si=s1NO7R1yuRB42yWw&t=8410>