

Comments from member William Funk on Disclosure of Agency Legal Materials

Because I will be in an airplane over Canada during this meeting, I am not able to attend the meeting on April 26.

First, I want to second Alan Morrison's comments regarding OLC and Presidential records. OLC opinions which are not binding on agencies should remain exempt as traditional attorney advice (e.g., opinions for the White House), but those opinions that are binding on agencies as the official executive interpretation of the law should be proactively disclosed. Presidential documents telling agencies what to do, which if agency documents would not be exempt from disclosure under the FOIA, should be proactively disclosed.

Second, on line 36, I raised a concern with the phraseology, which I did not think was categorical enough to explain that FOIA exemptions, where applicable, would apply of their own force to all of the matters recommended for proactive disclosure. I suggest: "All records identified for proactive disclosure in this Recommendation would still be subject to the exemptions from FOIA, such that if a record were exempt from disclosure upon request, it would be exempt from any proactive disclosure requirement."

Third, lines 60 and 61. The proposed addition of "Current" and "Any existing" was intended to make clear that these were not requirements to create delegations or orders of succession. I think this would be communicated most clearly by saying only "Any" agency delegations and "Any" orders of succession. Putting in "current" or "existing" could be read to mean that only those delegations and orders of succession in existence at the time of legislation would need to be proactively disclosed.

However, this issue led me to identify a concern with items a. through g. as well. That is, does e. require proactive disclosure of memoranda of understanding that are no longer in effect; does d. require proactive disclosure of settlement agreements no longer in effect? Moreover, does a. and b. require agencies to go back historically and proactively disclose all its past final opinions and order and all its decisions not to enforce communicated to a member of the public since the agency's creation? Presumably, we mean for the agency to proactively disclose these things when the agency creates these records in the future. However, we probably want the agency to proactively disclose when the legislation was enacted those records identified in a. through g. that currently reflect the agency's legal decisions. How to phrase this is another question.