

**Comments by William G. Kelly, Jr., General Counsel,
Center for Regulatory Effectiveness,**

**on Proposed Recommendations for Addressing “Agency Publicity in the Internet
Era” (Administration and Management Committee of the Administrative
Conference of the United States)¹**

October 5, 2015

These comments take into account the report and recommendations by Prof. Cortez, ACUS consultant, dated Sept. 25, 2015.

The “Information Quality Act” (“IQA”) and the OMB guidance² promulgated pursuant to the IQA should be given more attention as a vehicle for addressing the issues discussed in the consultant’s report. The IQA and OMB guidance address many of the subjects raised in ACUS recommendation 73-1 and the consultant’s recommendations. These include, for example, the need for agencies to publish their procedures, the need for pre-dissemination review to ensure accuracy, the need to acknowledge limitations, and the need for agency action on requests for correction or retraction.

The IQA and the OMB guidance were intended specifically to address problems posed by increasing agency disseminations of information (or “publicity”) on the Internet, and the IQA and guidance are far broader than 73-1, encompassing all agency information disseminations “regardless of form or format.”³

The IQA and its guidance are therefore ideally suited as a vehicle for addressing the concerns raised by the Committee project and its consultant. Prof. Cortez’s detailed analysis points out a number of areas of concern that appear to be weaknesses in the current OMB guidance and agency-specific guidance, such as the possible need for special treatment of certain types of sensitive information (particularly time-sensitivity), the use social media, and the validity of exemptions in the guidelines. All of these could be addressed in ACUS recommendations to OMB for revisions in its guidance.⁴ The OMB guidance expressly recognized that it would

¹ For consideration at the Committee’s October 7, 2015 meeting on this project.

² The OMB IQA “Guidelines” are legally binding legislative rules, as recognized by the D.C. Circuit in *Prime Time Int’l* and by the Ninth Circuit in *Harkonen*. The same is certainly true also with regard to OMB’s IQA peer review “Bulletin.”

³ 44 U.S.C. § 3504(d)(1), a provision of the Paperwork Reduction Act of 1995, which is incorporated by reference into the IQA.

⁴ Problems with the agency-specific IQA guidelines should not be a concern, since those guidelines are required to be consistent with the OMB guidelines (although it would be appropriate to note this).

evolve and that “OMB will refine these guidelines as experience develops and further public comment is obtained.”⁵

OMB’s apparent exemption for all “press releases” is a particular concern expressed in the consultant’s report. In *Harkonen*, which challenged the accuracy of a DOJ press release, the Appellant argued that the Paperwork Reduction Act (“PRA”) statutory provisions incorporated by reference into the IQA provide for coverage of all disseminations “regardless of form or format,” and the CRE amicus brief provided the court with detailed information showing that OMB/OIRA had clarified that the exemption should be interpreted to pertain only to press releases that announced or summarized (accurately) information otherwise disseminated by the agency. Nevertheless, the OMB government-wide guidance in the *Federal Register* still gives the appearance of providing a blanket exemption for all press releases. As Prof. Cortez found, most agencies have complied with this OMB interpretation (as they must), but a significant number have not. In addition, the government argued in *Harkonen* that the press release exemption was a blanket exemption, and the court, in its opinion, took no notice of the PRA provision regarding “regardless of form or format” or the OMB interpretation, and applied *Auer* deference to uphold a DOJ interpretation of the exemption as a blanket exemption.⁶ In light of all this, it appears appropriate for ACUS to recommend that OMB clarify more formally the press release exemption or delete it entirely.

The distinct advantage of focusing recommendations on OMB and its IQA guidance is that the guidance is already enacted into law and considered by the courts to be binding. Prof. Cortez expresses concerns that agency actions under the IQA might not be judicially reviewable, and references a number of cases in which federal courts have so held. Since judicial reviewability is an important consideration, and the consultant has recommended against it, the subject deserves comment, both here and by ACUS.

There have been nine district court cases addressing IQA judicial review. Only four of those cases have been appealed to circuit courts (*Salt Institute* (4th Cir.), *Americans for Safe Access* (9th Cir.), *Prime Time Int’l* (D.C. Cir.), and *Harkonen* (9th Cir.)). None of the circuit decisions have adopted the district courts’ broad holdings of no IQA judicial review and their reasoning; instead they have either relied on OMB exemptions (“adjudicatory proceedings” in *Prime Time*, “press releases” in *Harkonen*), or availability of alternative proceedings, in *Americans for Safe Access*, or have found the IQA not to be applicable to the plaintiff’s complaint, in *Salt Institute*.)

The district court decisions have created a vicious circle, wherein they rely on each other as determinative precedent, without engaging in critical analysis. Many of the district courts have also cited a single sentence from the 4th Circuit’s *Salt Institute* decision – taken out of context -- to conclude that the IQA confers no right on which to base judicial review of agency action. A close reading of the *Salt Institute* circuit opinion, however, will show that the court was addressing only whether the IQA gave a right to access to data underlying non-governmental studies and the correctness of those studies, not to government dissemination of information. In

⁵ 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002).

⁶ The DOJ guidance regarding press releases was arguably consistent with the OMB interpretation.

oral argument before the 4th Circuit, the government emphatically argued this exact position, that the case did not present an IQA judicial review issue. Despite this, in subsequent cases the Department of Justice has repeatedly relied on that single sentence from the opinion that, when taken out of context, appears to constitute a broad ruling against IQA judicial review.⁷

No IQA case to date has considered what should be regarded as the clear basis for judicial review under the APA⁸: The IQA and OMB and agency guidelines clearly mandate a petition process for correction of disseminated information that does not comply with the OMB guidance.⁹ The APA defines “agency action” (or failure to act) on a petition as a type of agency action expressly subject to judicial review (if final, not precluded, and not committed by law to agency discretion).¹⁰ Agency action on a petition that is adverse (or withheld) satisfies the finality requirement of the APA because the IQA provides that petitioners have a right to “seek and obtain” a correction. Preclusion has never been raised as an issue, and the district court decisions that have held that agency action on petitions for correction is committed by law to agency discretion lack any merit in view of the detailed criteria for correctness set out in the OMB guidance (under “objectivity”) and the extensive caselaw on this very narrow exception to APA reviewability.¹¹

Thus, established law provides a very strong basis for concluding that agency action on IQA petitions is judicially reviewable. In view of this, it is doubtful that a legislative recommendation on this issue is necessary or advisable, and any statement by ACUS to the effect that the basis for judicial review is doubtful would be inappropriate. However, it would be appropriate for ACUS to explain why it believes existing law provides for judicial review.

Finally, the frequent statements in the courts and others that there is no legislative history for the IQA, or that it is very limited, and that therefore it would be appropriate to seek Congressional review of the IQA in order to obtain Congressional views on the issues it has raised deserves comment. First, it should be noted that the IQA is not standalone legislation without prior

⁷ CRE filed an amicus brief in *Harkonen* that discussed this matter in detail. The 9th Circuit opinion did not mention the *Salt Institute* opinion.

⁸ This is true also of the consultant’s report. The consultant’s report appears to regard the agency action potentially subject to judicial review as issuance of the “publicity,” when the agency action should be considered to be the final action on a petition for correction.

⁹ Although the IQA does not use the word “petition,” the courts and litigants consistently refer to IQA requests for correction as petitions.

¹⁰ 5 U.S.C. §§ 551(11)(C) and (13).

¹¹ There is also the matter of disclaimers of judicial reviewability that appear in some agency-specific guidelines (e.g., Dept. of Justice and the OMB peer review guidance). In view of the holding in *Prime Time Int’l* that the OMB government-wide guidelines are legally binding rules and the D.C. Circuit’s decision in *Appalachian Power v. EPA* (208 F.3d 1015, 1023) that such disclaimers are of no effect on legislative rules, it would be appropriate for ACUS to recommend that OMB remove, and require removal of, such disclaimers. Such disclaimers can also raise a serious separation of powers issue.

history. The IQA is essentially a Congressional directive to OMB to implement mandates for guidance on the quality of information disseminations already contained in the Paperwork Reduction Act of 1995 (the “PRA”). Two of those PRA provisions of particular importance are expressly incorporated into the IQA, and further reference is made to all PRA information dissemination provisions and goals. Therefore, in order to review the legislative history of the IQA, one must research the legislative history of the information dissemination provisions in the PRA. When this is done, one finds that there is considerably more legislative history (both with regard to the PRA and the IQA itself) than many have assumed without research, although much of it is fairly general, which might well be due to the legislation being non-controversial.¹² OMB went through notice-and-comment rulemaking when it promulgated its government-wide guidelines (including the peer review “Bulletin”), and commenting was very extensive. If ACUS were to recommend changes, or review of certain issues, regarding the OMB guidance, there would undoubtedly be broad interest and extensive comment that would suffice to fully air the issues.

One final thought is that it might be that various courts and others have largely ignored the PRA provisions incorporated into, and the basis for, the IQA simply because the name “Paperwork Reduction Act” does not appear to indicate pertinence to information dissemination and quality. Perhaps ACUS should consider whether to recommend to Congress that it simply amend the title of the PRA to the “Paperwork Reduction and Information Quality Act” to accurately reflect its content (which probably should have been done in 1995), but not recommend any substantive amendments.

If the Committee or its staff have questions or would like additional information or explanation of any of the points made above, please feel free to contact CRE.

Thank you for the opportunity to comment.

/s/
William G. Kelly, Jr

¹² CRE has done considerable research on this, although it has not published it in detail. See Kelly WK. 2008 Correcting the Record on the Data Quality Act. *Science* 319(5860):158b. A comprehensive law review article on all aspects of the IQA is planned.