

## David Pritzker

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**From:** Philip J. Harter <phil@pjharter.com>  
**Sent:** Friday, April 04, 2014 4:00 PM  
**To:** David Pritzker  
**Subject:** Comments on FOIA ADR Draft

David:

I have some general comments on the draft that I would like to throw into the hopper for Monday's meeting.

· While the preamble notes that FOIA is a disclosure statute and not one designed to further withholding, the recommendations do not really follow up on that. It seems to me that it would make sense to say that in close cases the agencies *should* resolve issues in favor of disclosing the requested documents. There is, it seems to me, a latent burden of proof lurking in FOIA.

· But that view may be naive, if as the preamble mentions, agencies win a lot of the cases and still other requests are dropped. The paragraph at the top of Page 4 is critically important if one is looking at the dynamics of the potential benefit of using ADR to resolve disputes. This paragraph would mean, without more, that agencies on the whole lack the incentive to resolve FOIA disputes through negotiation. In short: why bother since it is likely we will win in the end. That needs to be addressed.

· One way of addressing that imbalance would be through the use of the advisory opinion. Med-Arb is a highly successful and widely used form of ADR. The issue is mediated and if the mediation is not successful in resolving the matter, the mediator issues a non-binding opinion as to how the mediator believes the issue should be resolved. That opinion may then even garner *Skidmore* deference.

· But, then, if that process is used, would agencies be even more reluctant to use it? Perhaps. If so, that needs to be addressed in the recommendation. Otherwise, I fear you are calling a party to which no one will come. I would love to make a proposal as to what that recommendation might be, but I fear I don't know unless it is here that the Conference makes a pitch that agencies should only withhold for issues in which an exemption *clearly* applies and the withholding furthers an identifiable and important issue of public policy. It takes more than the current Paragraph 9 which is an exhortation in the teeth of practical power.

· I guess I am left wondering just what Paragraph 6 means in practice. Do we have any idea when "OIAS engagement may aid in the resolution of a request?" From the preamble, this would seem to be limited to a clarification of the request itself and perhaps of the scope of disclosure, although even that likely gets into areas

where the agency may feel it has the upper hand. Whatever it may mean, I think it would help to give examples or push a bit.

--Phil

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