Memorandum

To: Committee on Rulemaking
From: Emily F. Schleicher (Staff Counsel)
Date: April 15, 2011
Re: Results of Research Requested at March 25 Meeting

At its first public meeting on March 25, 2011, the Committee on Rulemaking requested that Conference staff research several questions that bear on the Committee's consideration of the Draft Recommendation regarding legal issues agencies face in e-Rulemaking. This memorandum sets forth the results of research into five questions, including whether: (1) courts have upheld the legality of agencies using technological proxies to conduct document review in contexts other than e-Rulemaking, such as the Freedom of Information Act ("FOIA"); (2) agencies would have good arguments against liability for the disclosure of protected information in comments posted in an online docket; (3) the System of Records Notice ("SORN") for the Federal Docket Management System ("FDMS") satisfies the requirements of the Privacy Act; (4) the National Archives and Records Administration ("NARA") has advised agencies that it is lawful to destroy the paper copy of a comment once that comment has been scanned and included in an approved electronic recordkeeping system; and (5) it is appropriate for the Administrative Conference to issue recommendations to courts.

I. Have Courts Held That Agencies May Lawfully Use Technological Proxies to Review Documents in Other Contexts, Such As FOIA?

Yes, at least where the use of the technological proxy in the circumstances satisfies FOIA's requirement that an agency conduct an adequate search for requested documents. Faced with a FOIA request, an agency "must show beyond material doubt that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."[1] This standard "'is measured by a standard of reasonableness, and is dependent upon the circumstances of the case.'"[2] To meet its burden of proof, an agency typically submits to the court one or more affidavits that describe "at a minimum, the search methods employed and the files targeted."[3] The facts provided need only show that the search was reasonable, as there is no requirement that the search be exhaustive.[4]

In the FOIA context, courts often find that agencies have performed adequate searches using technological proxies such as keyword searches in electronic databases likely to contain

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1 Physicians for Human Rights v. U.S. Dep't of Defense, 675 F. Supp. 2d 149, 157 (D.D.C. 2009) (internal quotation marks omitted).

2 *Id.* (quoting Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

3 *Id.* at 158.

4 *See id.* at 157.

documents of the kind requested. For example, in *Anderson v. U.S. Dep't of State*,[5] the United States District Court for the District of Columbia found that the agency's search for documents was adequate where it has explained, in detail, "the various keywords and methods it used to examine its electronic records, ha[d] listed all of the various databases it searched, and ha[d] averred that it searched 'any and all records systems reasonably expected to contain the information sought by the plaintiff.'"[6]

These cases suggest that an agency can use technology proxies to the extent that doing so is consistent with applicable legal standards. This should give the Committee some comfort that agencies may lawfully use technological proxies to review comments submitted in e-Rulemaking, provided that they do so in a manner consistent with their obligations under the APA to consider and respond to comments.

II. What is the Potential Scope of Agency Liability for the Disclosure of Protected Information in Comments?

A. Limitations on Privacy Act Liability

While agencies may, in theory, be liable for Privacy Act violations when they post comments containing personal information, it appears that there are several aspects of the doctrine that render the risks of such liability quite low.

The Privacy Act of 1974 "'protect[s] the privacy of individuals identified in information systems maintained by Federal agencies'"[7] by regulating agencies' use of such information and "recogniz[ing] a civil action for agency misconduct fitting within any of four categories."[8] For each category of misconduct, the statute provides a specific method of redress.[9] While the first three categories address particular types of misconduct, the fourth category operates as a catchall for any other violation of the statute that has an "adverse effect" on an individual.[10] The nonconsensual disclosure of protected information in a posted comment would fall within this

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5 661 F. Supp. 2d 6 (D.D.C. 2009).

6 *Id.* at 11; *see also Physicians for Human Rights*, 675 F. Supp. 2d at 158 (finding agency met its burden with respect to an electronic search for documents by submitting a declaration setting forth the "search terms used in the electronic review and describe[ing] the two documents that were produced").

7 Doe v. Chao, 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974, § 2(a)(5), 88 Stat. 1896).

8 *Id.*; *see also* Bartel v. FAA, 725 F.2d 1403, 1407 (D.C. Cir. 1984) ("The Privacy Act safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records.").

9 *See Chao*, 540 U.S. at 618-19.

10 *See* 5 U.S.C. § 552a(g)(1)(D) (providing that if an agency "fails to comply with" the Privacy Act, "or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction").

fourth statutory category.[11] If a plaintiff succeeded on such a claim, the statutory remedy would be a payment of damages from the agency in question.[12]

"To recover damages for an improper disclosure . . . a plaintiff must prove that: (1) the information in question is a 'record' contained within 'a system of records;' (2) the agency improperly 'disclosed' the information; (3) an adverse impact resulted from the disclosure; and (4) the agency's disclosure was willful or intentional."[13] Each of these requirements limits an agency's liability for improper disclosure in ways that may be applicable in the e-Rulemaking context.

1. The Information Disclosed Must Have Been Contained in a Record Actually Retrieved From a System of Records

"[T]he Privacy Act's disclosure provision prohibits federal agencies and their officials from 'disclos[ing] any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.'"[14] The statute defines a "record" as "any item, collection or grouping of information about an individual that is maintained by an agency," which contains personal information about the individual and "his name, or the identifying number, symbol, or other identifying particular assigned to the individual."[15] A "system of records" is in turn defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."[16] As the D.C. Circuit has explained, these statutory definitions yield the rule that "a group of records should generally not be considered a system of records unless there is actual retrieval of records keyed to individuals."[17] The "capacity to retrieve information indexed under a person's name" is insufficient to establish a "system of records" under the Privacy Act; agency officials must "in fact retrieve records" using an individual identifier.[18]

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11 *Chao*, 540 U.S. at 618-619 (explaining the type of misconduct addressed by each of the four statutory categories).

12 *See* 5 U.S.C. § 552a(g)(4).

13 Krieger v. U.S. Dep't of Justice, 529 F. Supp. 2d 29, 41 (2008) (citing Barry v. United States DOJ, 63 F. Supp. 2d 25, 27 (D.D.C. 1999)).

14 Cloonan v. Holder, 2011 U.S. Dist. LEXIS 22993, *24 (D.D.C. March 8, 2011) (quoting 5 U.S.C. § 552a(b)).

15 5 U.S.C. § 552a(a)(4).

16 *Id.* at § 552a(a)(5).

17 Henke v. United States Dep't of Commerce, 83 F.3d 1453, 1460 (D.C. Cir. 1996).

18 *Id.* at 1461 n.12; *see also Krieger*, 529 F. Supp. 2d at 45 ("[A] search function does not a system of records make.").

Agency liability for nonconsensual disclosure under the Privacy Act is thus limited by the "rule of retrieval." The rule requires a plaintiff to prove "that the information disclosed was 'directly or indirectly retrieved from a system of records.'"[19] In practice, this means "that even if agency official discloses information that exists in the agency's records, the disclosure is rarely actionable unless the official physically retrieved the information from those records."[20]

The rule of retrieval is often used to limited agency liability for a disclosure of information that, while contained in an agency record, was actually derived from an independent source prior to disclosure.[21] But an agency faced with a claim of improper disclosure in e-Rulemaking may be able to defend itself using the rule. For example, there may be a strong argument that the rule of retrieval applies where a disclosure results from auto-posting—a process that does not appear to involve an agency official actually retrieving the information from a system of records via a personal identifier and then disclosing it.[22]

2. The Agency Must Have *Improperly* Disclosed the Information

The Privacy Act's broad prohibition on nonconsensual disclosures of personal information contained in agency records "is tempered by a dozen exceptions," at least one of which may be applicable in the e-Rulemaking context.[23] This relevant exemption allows agencies to disclose information without an individual's consent for a "routine use," which the statute defines as "the use of such record for a purpose which is compatible with the purpose for which it was collected."[24] To take advantage of this exemption, an agency must "publish in the Federal Register" a System of Records Notice ("SORN") that includes, among other things, "each routine use of the records contained in the system, including the categories of users and the purpose of such use."[25] A properly drafted SORN provision establishing an agency's policy for routinely posting comments that may include personal information to facilitate dialogue in e-Rulemaking may protect an agency from liability for nonconsensual disclosures that occur as a result of such practices.

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19 *Id.* at 47 (quoting Fisher v. Nat'l Inst. of Health, 934 F. Supp. 464, 473 (D.D.C. 1996), *aff'd without opinion*, 107 F.3d 922 (D.C. Cir. 1996)).

20 *Id.* (internal quotation marks omitted); *see* Office of Management and Budget Privacy Act Implementation Guidelines and Responsibilities, 40 Fed. Reg. 28, 948, 23, 952 (July 9, 1975).

21 *See, e.g.*, *Cloonan*, 2011 U.S. Dist. LEXIS 22993 at *26-37 (explaining the circumstances in which the rule of retrieval is applicable); *Krieger*, 529 F. Supp. 2d at 47-48 (same); *see also Krieger*, 529 F. Supp. 2d at 49 ("Because [the agency official] did not disclose any information about [the plaintiff] that was retrieved from a record maintained in a system of records, the Court shall grant Defendants' Motion for Summary Judgment.").

22 *See Cloonan*, 2011 U.S. Dist. LEXIS 22993 at *37 ("Whether the retrieval rule has been satisfied is an issue of material fact because the inquiry as to whether an agency official *actually* retrieved a plaintiff's records is dispositive.")

23 Tijerina v. Walters, 821 F.2d 789, 793 (D.C. Cir. 1987).

24 5 U.S.C. § 552a(a)(7).

25 *Id.* at 552a(e)(4)(D).

3. An Agency is Liable For Improper Disclosure Only if its Acton Was "Intentional or Willful"

A plaintiff seeking civil damages for an improper disclosure is also required to prove that the disclosure was "intentional or willful" under the Privacy Act's "unique and exacting" standard.[26] Subsection (g)(4) mandates this standard in delineating the circumstances in which an award of monetary damages is appropriate:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
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> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and
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> (B) the costs of the action together with reasonable attorney fees as determined by the court.[27]

Relying on the statute's legislative history, courts have held "that something more than gross negligence is required" to satisfy this standard of "intentional or willful" conduct.[28] Indeed, courts have held the standard "contemplate[s] action so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful."[29] This standard, which is evaluated in light of "(1) the 'purpose' for which the disclosure was made; (2) 'the source of the idea to' make the disclosure; and (3) other circumstances surrounding the disclosure,'"[30] places a heavy burden on plaintiffs.[31]

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[26] Convertino v. U.S. Dep't of Justice, No. 04-cv-0236-RCL, 2011 U.S. Dist. LEXIS 30510, *15 (D.D.C. March 24, 2011).

[27] 5 U.S.C. § 552a(g)(4).

[28] *E.g.*, Andrews v. Veterans Admin., 838 F.2d 418, 424 (10th Cir. 1988) (interpreting the term and surveying other courts' interpretations).

[29] *Id.* at 425 (internal quotation marks omitted); *see also Convertino*, 2011 U.S. Dist. LEXIS 30510, *17 (citing Laningham v. U.S. Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1984)).

[30] *Convertino*, 2011 U.S. Dist. LEXIS 30510, *18 (quoting Albright v. United States, 732 F.2d 181, 189 (D.C. Cir. 1989)); *see also* Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 549 (6th Cir. 2010) (holding that "courts generally look to the entire course of conduct in context" in evaluating whether the Privacy Act has been violated).

[31] *See also* Doe v. Gen. Servs. Admin., 544 F. Supp. 530, 541 (D. Md. 1982) (explaining that, while "proof of premeditated malice" is not required, the "willful or intentional" standard "is an extreme departure from the standard of ordinary care and . . . is somewhat greater than gross negligence" (internal quotation marks omitted)).

4. Plaintiff Must Also Prove Actual Damages

The Supreme Court has held that a plaintiff is not entitled to recover damages for an improper disclosure under the Privacy Act unless he proves "some actual damages."[32] This holds even where a plaintiff seeks to recover only the minimum statutory damages provided under subsection (g)(4)(A).[33] This requirement operates as a final limitation on agency liability—even if a plaintiff satisfies the first three requirements discussed above, the agency will not be liable for civil damages unless the plaintiff can also show that he has "suffered some actual damages."[34]

B. Potential Liability for Copyright Infringement

Although additional research has revealed no authorities directly on point, it has identified authority that corroborates the Report's conclusion that an agency would not likely be found liable for copyright infringement based upon the inclusion of copyrighted material in comments posted in e-Rulemaking.

In 1983, the Office of Information Policy ("OIP") issued guidance on "Copyrighted Materials and the FOIA"[35] that may be instructive to the Committee. The guidance generally addresses the interaction between FOIA and the Copyright Act, with particular attention to the circumstances in which a document containing copyrighted work may be exempt from disclosure under FOIA. One of the questions considered in the guidance, however, is whether an agency may be liable for copyright infringement when it releases a document containing copyrighted information that is *not* exempt from disclosure under FOIA. The guidance concluded that "the position of the Department of Justice is that the release of [nonexempt copyrighted] materials under the FOIA is a defensible 'fair use.'"[36]

OIP's fair use conclusion was supported by *Jartech, Inc. v. Clancy*,[37] a Ninth Circuit case, which is still good law today, holding that a local government had made "fair use" of copyrighted material when it used "abbreviated copies" of an adult film as evidence for a nuisance abatement proceeding.[38] In reaching this conclusion, the court reasoned that "the

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32 *Chao*, 540 U.S. at 616.

33 *Id.* at 627 ("The entitlement to recovery necessary to qualify for the $1,000 minimum is not shown merely by an intentional or willful violation of the Act producing some adverse effect," but is available "only to plaintiffs who have suffered some actual damages." (internal quotation marks and alteration omitted)).

34 *Id.*

35 FOIA Update, Vol. IV, No. 4 (1983), http://www.justice.gov/oip/foia_updates/Vol_IV_4/page3.htm.

36 *Id.* at 5.

37 666 F.2d 403 (9th Cir. 1982).

38 *Id.* at 407.

Council's use was neither commercially exploitive of the copyright, nor commercially exploitive of the copyright holder's market."[39]

Nimmer's treatise on copyright sustains this application of fair use doctrine, but notes that "[a] more difficult question may be raised where the work is reproduced by a nonjudicial governmental entity."[40] Consistent with the Report's analysis, however, Nimmer states that in this context, "the determination of fair use should turn on whether the reproduction is for a different functional purpose than that of a commercial publisher."[41] When an agency reproduces copyrighted material in a comment submitted in e-Rulemaking, it is likely that the agency does so for a functional purpose very different from that of a commercial publisher. Where the reproduction is only of a relevant excerpt of the copyright material, this element may be particularly clear.[42]

These authorities appear to confirm the Report's legal conclusion that an agency is unlikely to be liable for copyright infringement when it posts just the relevant excerpt of copyrighted material included in a submitted comment. As the Committee discussed at its meeting, however, agencies may face practical difficulties in adhering to such a policy, particularly where a commenter does not identify the relevant excerpt of a copyrighted work. The best course may thus be to recommend that agencies: (1) post excerpts when a commenter identifies or exclusively includes the relevant excerpts of a copyrighted work; and (2) post information sufficient for the public to find a copyrighted work (e.g., the cover or title page of a book) when a commenter includes or refers to an entire copyrighted work without identifying excerpts relevant to the comment.

III. What is the "System of Records Notice" for FDMS and Does It Comply with the Privacy Act?

As explained above, the Privacy Act exempts agencies from liability under the Privacy Act for disclosing information in the course of a "routine use" properly noticed in a SORN published in the Federal Register.[43] In 2005, the eRulemaking PMO published a SORN for FDMS.[44] An agency that uses FDMS can rely on this SORN to the extent that the routine uses of the system described therein are consistent with the agency's routine uses. If, however, the agency has different or additional routine uses for records collected, maintained, and disclosed

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39 *Id.*; *cf.* Images Audio Visual Prods., Inc. v. Perini Bldg. Co., Inc., 91 F. Supp. 2d 1075 (rejecting fair use claim for use of photos in arbitration of contract dispute where pictures had been created specifically for the purpose of proving performance of the same contract).

40 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.05[D][2]

41 *Id.*

42 *See Jartech*, 666 F.2d at 407.

43 *See* 5 U.S.C. §§ 552a(a)(7), (e)(4)(D).

44 *See* Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. 15086 (March 24, 2005).

through FDMS, the agency bears the responsibility of publishing a supplementary SORN in the Federal Register.

The Draft Recommendation addresses two issues regarding the FDMS SORN. First, the SORN was published in 2005, and the use of FDMS has grown and evolved considerably since that time. Thus, it may be prudent for the eRulemaking PMO to consider whether the SORN needs to be updated. Second, few agencies that use FDMS have published supplementary SORNs. This may reflect the agencies' judgment that the existing SORN is sufficient. But to the extent that agencies have not considered whether their uses of FDMS deviate from the routine uses identified in the general FDMS SORN—or to the extent that their uses of the system have evolved since that SORN was published—agencies should consider whether they need to publish supplementary SORNs.

IV. Has the National Archives and Records Administration ("NARA") Instructed That Agencies May Destroy a Paper Copy of a Record Once it has Been Scanned and Included in an Electronic Recordkeeping System?

Yes, at least under certain circumstances. Section 2 of NARA's General Records Schedule 20 appears to provide the relevant rule. This provision addresses how agencies should treat "Input/Source Records," which are described as "[h]ard copy (non-electronic) documents used to create, update, or modify electronic records when the electronic records are retained to meet recordkeeping requirements and are covered by a NARA-approved schedule."[45] The description expressly includes "hard copy documents that are scanned into an electronic recordkeeping system (e.g., correspondence, reports, still pictures, maps, etc.)."[46] With certain exceptions for permanent records[47] and records containing information that cannot be adequately captured in scanning,[48] NARA instructs that agencies should:

> Destroy [hard copy documents] after the information has been converted to an electronic medium and verified, when no longer needed for legal or audit purposes or to support the reconstruction of or serve as a backup to the electronic records, or (applicable to permanent records only) 60 days after NARA has been provided the notification required by 36 CFR 1225.24(a)(1), whichever is later.[49]

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45 National Records and Archives Administration, General Records Schedule 20, Transmittal No. 22. § 2 (April 2010), http://www.archives.gov/records-mgmt/grs/grs20.html.

46 *Id.*

47 *See id.* at §§ 2(a)(1)-(2).

48 *See id.* at § 2(a)(3).

49 *Id.* at § 2(a)(4).

General Records Schedule ("GRS") 20 thus appears to establish a default rule in favor of destroying paper comments once they have been scanned and included in an agency's approved electronic recordkeeping system. Typically, NARA works with each agency to create an agency-specific records schedule, using the General Records Schedules as a starting point. Thus, an agency must examine its own records schedule to determine the precise circumstances in which it may or must lawfully destroy paper copies of comments scanned and included in an electronic record.

We reached out to NARA and confirmed that this understanding is technically accurate. It bears emphasizing, however, that GRS 20 does not itself authorize agencies to retain electronic in lieu of paper copies. Rather, an agency is authorized to follow such a policy only if its own records schedule so provides.

The Draft Recommendation has been revised to emphasize that the APA does not pose an impediment to the destruction of paper copies of comments properly scanned into an agency's electronic recordkeeping system, reflect NARA's more nuanced position with respect to the propriety of destruction as a matter of federal records law, and clearly retain the Committee's recommendation that agencies adhere to a policy of destroying paper copies to the extent permitted by law.

V. Is it Appropriate for the Conference to Issue Recommendations Directed to Courts?

Yes. Although the Administrative Conference Act expressly permits the Conference to make recommendations only to the Judicial Conference,[50] the Conference has historically issued recommendations directed to courts.[51] Indeed, past recommendations to courts have included recommendations that courts interpret or apply the law in a particular fashion, in accord with the Conference's judgment regarding what the law is.[52] The language of paragraph 4 of the revised Draft Recommendation, which states in relevant part that "[c]ourts should continue their efforts

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[50] 5 U.S.C. § 594(1) (providing that "the Administrative Conference of the United States may . . . make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States").

[51] *See, e.g.*, Administrative Conference of the United States, Recommendation No. 88-6, Judicial Review of Preliminary Challenges to Agency Action, ¶ 3 ("Where jurisdiction over claims involving unlawful delay by an agency lies in the courts of appeals, those courts should assure that their procedures provide adequately for prompt and efficient disposition of such claims.").

[52] *See, e.g.*, Administrative Conference of the United States, Recommendation No. 95-4, Procedures for Noncontroversial and Expedited Rulemaking, ¶ II(C) ("Where an agency has used post-promulgation comment procedures . . . , courts are encouraged not to set aside such ratified or modified rule solely on the basis that inadequate good cause existed originally to dispense with prepromulgation notice and comment procedures."); Administrative Conference of the United States, Recommendation No. 74-4, Preenforcement Judicial Review of Rules of General Applicability, ¶ 2 ("The term 'substantial evidence on the record as a whole,' or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency.").

to embrace electronic filing and curtail requirements to file additional paper copies of rulemaking records," is consistent with the Conference past practice on this score.