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July 18, 2022

## **Re: Comments on Disclosure of Agency Legal Materials in Response to 87 FR 30445**

The Reporters Committee for Freedom of the Press (“Reporters Committee” or “RCFP”) appreciates the opportunity to provide input regarding the disclosure of agency legal materials in response to the request for public comments made by the Administrative Conference of the United States (“ACUS”). See 87 FR 30445 (May 19, 2022) (the “Notice”). The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.<sup>1</sup> The topics for public comment specified in the Notice are addressed, in turn, below.

### **1. What types of agency records should ACUS consider to be “agency legal materials” for the purpose of this project?**

ACUS should adopt a broad definition of “agency legal materials” that is commensurate with the extensive authority and power exercised by federal agencies. As the Notice itself correctly acknowledges, “[a]gencies generate a wide range of materials that impose legal obligations on members of the public, agency employees, and agency heads; determine the rights or interests of private parties; advise the public of the agencies’ interpretation of the statutes and rules they administer; advise the public prospectively of the manner in which agencies plan to exercise discretionary powers; or otherwise explain agency actions that affect members of the public.” At a minimum, the Reporters Committee recommends that “agency legal materials” should include the following categories of records for purposes of affirmative disclosure to the public; several of these categories also have been identified by the FOIA Federal Advisory Committee<sup>2</sup>:

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<sup>1</sup> More information about the Reporters Committee may be found at [www.rcfp.org](http://www.rcfp.org)

<sup>2</sup> Freedom of Information Act Federal Advisory Committee, Final Report and Recommendations, 2016–2018 Committee Term 18–20 (2018), <http://perma.cc/5C8U-E8VA>.

- **Unclassified reports and testimony submitted to Congress.** Such records are often the subject of multiple requests and are of substantial interest to journalists and the public.
  - **All Formal Office of Legal Counsel (“OLC”) opinions.** OLC’s formal written opinions bind the executive branch and establish a system of legal precedent.
  - **Each agency’s ten largest contracts, task orders, and grants by dollar value.** Such records allow the public to scrutinize how its money is being spent and what programs agencies are prioritizing;
  - **Court filings in cases involving the agency, including documentary evidence in federal criminal trials.** Such court records help the news media and the public understand agency’s legal positions on key issues and enable journalists to better cover prosecutions by the federal government;
  - **Agency correspondence about regulations with stakeholders.** Correspondence with stakeholders helps the news media and the public better scrutinize agency relationships with third parties and their involvement in agency decision making;
  - **Guidance documents for stakeholders.** Guidance documents may set forth agency policies on statutory, regulatory, or technical issues, or offer interpretations of a statute or regulation—all of which are of substantial interest to the news media and the public.
  - **FBI investigative and legal files.** In particular, (1) FBI investigative and legal files on persons who the FBI has released to another nation-state and who have been subsequently prosecuted, and (2) FBI 302 forms after the closure of the agency’s investigation.
- 2. What obstacles have you or others faced in gaining access to agency legal materials?**

Because agencies’ proactive disclosure programs are so minimal, an attempt to obtain access to records falling within most of the categories identified in Section 1, *supra*, requires a reporter or news organization to file a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As has been well-documented, delays and improper denials of access under FOIA are widespread.<sup>3</sup>

- 3. Are there certain types of agency legal materials or legal information that agencies aren’t making publicly available that would be useful for you or others?**

Agencies generally do not make the categories of records identified in Section 1, *supra*, available to the public proactively. Proactive disclosure of those records in a timely, reliable fashion would significantly improve the news media’s ability to inform the public about the activities of the federal government.

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<sup>3</sup> See, e.g., Beryl Lipton, *Phil Eil’s FOIA Nightmare*, Muckrock (Dec. 12, 2014), <https://perma.cc/4K63-WL7A>; *FOIA Is Broken: A Report*, U.S. House of Representatives, Committee on Oversight and Government Reform (Jan. 2016), <https://perma.cc/5WCB-F5S4>.

#### **4. For agency legal materials that should be proactively disclosed, where or how should agencies make them publicly available?**

Agency legal materials should be proactively disclosed on agency websites. They should be made available in their original, native format, with metadata intact. If it is not possible to post a record in its original, native format—or if the record originated on paper—agencies should ensure it is subject to optical character recognition (“OCR”) to facilitate indexing and searching.

The benefits of posting material online are legion. As Professor Margaret Kwoka has noted, affirmative disclosure, “especially in light of technological advances . . . holds the key to unlock true government transparency[.]”<sup>4</sup> Affirmative disclosures on agency websites would also help alleviate the high volume of FOIA requests agencies receive, making the overall administration of FOIA faster and more efficient.<sup>5</sup>

#### **5. How should agencies balance the public interest in disclosure with any private or governmental interests in nondisclosure?**

At a minimum, agencies should proactively disclose all legal materials that would be subject to disclosure under FOIA. In that regard, it is important to note that under the FOIA Improvement Act of 2016, Pub. L. 114-185, an agency can withhold records only if it “reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law[.]” 5 U.S.C. § 552(a)(8). As interpreted by the U.S. Court of Appeals for the D.C. Circuit, FOIA’s “foreseeable harm” provision means that “[a]gencies cannot rely on mere speculative or abstract fears, or fear of embarrassment to withhold information. Nor may the government meet its burden [to justify the withholding of records] with generalized assertions.”<sup>6</sup> Accordingly, most, if not all, agency legal materials should be disclosed to the public.

Even if particular legal materials could technically be withheld under FOIA, they should nonetheless be disclosed if the public interest in access outweighs the government

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<sup>4</sup> Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1414, 1429 (2016); *see also* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1149 (2017) (“The most scalable approach (or family of approaches to transparency policy, and the most plausible substitute for the traditional FOIA model, is affirmative disclosure. Rather than wait for a request for specific records to be filed, whole categories of records deemed appropriate for release can be posted online or otherwise published on a regular schedule.”).

<sup>5</sup> *See, e.g.*, Delcianna J. Winders, *Fulfilling the Promise of Efoia’s Affirmative Disclosure Mandate*, 95 Denv. L. Rev. 909, 926 (2018) (describing the increase in FOIA requests backlogs at the Agency and Plant Health Inspection Service after the removal of a large number of records from its website).

<sup>6</sup> *Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350, 369 (D.C. Cir. 2021) (internal citations omitted) (cleaned up)

interest in secrecy.<sup>7</sup> In evaluating the public interest, agencies should consider, among other things, the importance of the records in furthering democratic processes, whether disclosure would shed light on any reasonable suspicion of government wrongdoing, the age of the records, whether disclosure would further the public's understanding of the reason(s) for government action or inaction, and any other relevant public interests.<sup>8</sup>

**6. What inconsistencies, ambiguities, and overlaps exist in the main statutes governing disclosure of agency legal materials?**

The news media and the public would benefit from resolving ambiguities in the E-Government Act of 2002.<sup>9</sup> The E-Government Act of 2002 contains two provisions related to the electronic dissemination of agency legal materials that should be clarified: Sections 206 and 207. Section 206 states the following:

To the extent practicable as determined by the agency in consultation with the Director [of OMB], each agency . . . 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.

Commentators have noted that this provision contains inconsistencies that risk making it an empty instruction or redundant.<sup>10</sup> Section 552(a)(2) does not “requir[e]” information “to be published in the Federal Register,” as Section 206 appears to suggest, and instead, mandates that “final opinions, orders, and other materials falling under its ambit be made available for public inspection” in reading rooms.<sup>11</sup> Furthermore, Section 206 only directs agencies to disclose § 552(a)(1) and (a)(2) materials online “to the extent practicable as determined by the agency.”<sup>12</sup>

Section 207 of the E-Government Act of 2002 requires agency websites to provide links to “information made available to the public under subsections (a)(1) and (b) of section 552 of title 5, United States Code.”<sup>13</sup> But section 552(b) of FOIA largely lists exemptions to the disclosure of public records, which is incongruous with what appears to be the intent behind Section 207.

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<sup>7</sup> Cf. Katie Townsend & Adam A. Marshall, *Striking the Right Balance: Weighing the Public Interest in Access to Agency Records Under the Freedom of Information Act*, in *Troubling Transparency: The Freedom of Information Act and Beyond* 226–246 (2018).

<sup>8</sup> *Id.* at 237.

<sup>9</sup> Pub. L. No. 107–347.

<sup>10</sup> See Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. Envtl. L.J. 18, 45 (2003).

<sup>11</sup> *Id.* at 46.

<sup>12</sup> See Daniel J. Sheffner, *Access to Adjudication Materials on Federal Agency Websites*, 51 Akron L. Rev. 447, 461 (2017).

<sup>13</sup> 44 U.S.C. § 3501 (2016).

## 7. What other statutory reforms might be warranted to ensure adequate public availability of agency legal materials?

FOIA imposes affirmative disclosure obligations on agencies to make certain agency legal materials publicly available. In particular, section (a)(2)—the “reading room” provision—requires that agencies make electronically available any documents that might constitute authoritative rules or guidance ( e.g., “statements of policy and interpretations”) that are not otherwise published in the Federal Register, such as those that are not of “general applicability,” as well as agency “opinions,” “orders,” and “administrative staff manuals and instructions to staff that affect a member of the public.”<sup>14</sup> However, there is currently disagreement among federal appellate courts as to the enforcement of FOIA’s reading room requirement. Congress should resolve this disagreement in favor of the ability to enforce the reading room provision for the public’s benefit.

In *Citizens for Responsibility and Ethics in Washington v. United States Department of Justice* (“*CREW*”), the D.C. Circuit dismissed a lawsuit by a public interest organization alleging that the Office of Legal Counsel’s refusal to disclose all of its formal opinions under FOIA’s reading room provision was arbitrary and capricious under the Administrative Procedure Act (“APA”).<sup>15</sup> The court found that the case was improperly brought under the APA: because a remedy under the APA is available only as a last resort, and FOIA was an “adequate alternative, the availability of FOIA “preclu[ded] APA review.”<sup>16</sup> However, the court also suggested that anyone who sought to enforce the reading room provision would only be entitled to a narrow scope of relief. Specifically, the court stated that “*CREW* may, in a FOIA suit to enforce section 552(a)(2), seek an injunction that would (1) apply prospectively, and would (2) impose an affirmative obligation to disclose upon OLC, but that would (3) require disclosure of documents and indices *only to CREW, not disclosure to the public.*”<sup>17</sup>

The Ninth Circuit reached the opposite conclusion in *Animal Legal Defense Fund v. United States Department of Agriculture* (“*ALDF*”). It held that FOIA provides federal courts with authority to make agency records “available for inspection in an electronic format” under the reading room provision.<sup>18</sup> In that case, the Animal Legal Defense Fund and other animal rights organizations brought a claim against the Animal and Plant Health Inspection Service for removing various compliance and enforcement records from its website.<sup>19</sup>

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<sup>14</sup> 5 U.S.C. § 552(a)(2).

<sup>15</sup> 846 F.3d 1235 (D.C. Cir. 2017).

<sup>16</sup> *Id.* at 1245.

<sup>17</sup> *Id.* at 1244 (emphasis added).

<sup>18</sup> 935 F.3d 858 (9th Cir. 2019).

<sup>19</sup> *Id.* at 864-65

The Ninth Circuit rejected the argument that courts were not permitted to order the posting of records to public reading rooms, and that they could only order agencies to release copies to individual plaintiffs.<sup>20</sup> Such a reading, the court said, “collapses an agency’s affirmative responsibility to post certain records (identified in the statute by Congress) into an agency’s responsibility to respond to requests for copies of documents under § 552(a)(3)[.]” leaving courts with authority only to address reactive disclosures under FOIA.<sup>21</sup> Accordingly, the Ninth Circuit held that “FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online.”<sup>22</sup>

Congress should resolve this disagreement among the court in favor of the Ninth Circuit’s holding in *ALDF*, and make clear that courts have authority to address violations of FOIA’s reading room provision, including by ordering agencies to post agency legal materials online.

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The Reporters Committee appreciates the opportunity to provide these comments in response to ACUS’s Notice. Please feel free to contact Adam A. Marshall at [amarshall@rcfp.org](mailto:amarshall@rcfp.org) with any further questions.

Sincerely,  
The Reporters Committee for  
Freedom of the Press

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<sup>20</sup> *Id.* at 872

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 869.