

Comment from OSHA in response to Request for Information for *Disclosure of Agency Legal Materials*
July 29, 2022

OSHA's Responses to ACUS RFI on Disclosure of Agency Legal Materials

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1. What types of agency records should ACUS consider to be "agency legal materials" for purposes of this project?

OSHA issues a number of kinds of documents relevant here, including:

- Regulations:
 - [Standards](#)—impose requirements on employers to implement measures to protect employees
 - [Recordkeeping regulations](#)—impose requirements on employers to report and maintain records injuries, illnesses and fatalities
 - Procedural Regulations—lay out procedures and criteria OSHA uses in making various determinations authorized by statute. These include a wide variety of procedural rules such as those [governing inspections](#) and [establishing](#) new occupational safety and health standards.
- [Letters of interpretation](#)—explain OSHA's interpretation of its regulations, and are usually issued at the request of stakeholders. OSHA publishes these documents on its website when they address matters of broad concern.
- Enforcement policy documents—help OSHA field personnel ensure nationwide uniformity in the investigation and citation of OSHA violations. They have the secondary effect of allowing employers to understand how OSHA will enforce its requirements. They include:
 - [Field Operations Manual](#)—policy document for how OSHA conducts enforcement in the field. It is a systematic approach to how we conduct our enforcement operations nationwide: conduct of inspections, development of citations, legal responsibilities, special circumstances, and post citation guidance.
 - [Whistleblower Investigations Manual](#)—policy document governing how whistleblower complaints are investigated and resolved.
 - [Directives](#)—instructions for investigating violations of particular standards; these may contain interpretations of particular provisions (e.g., OSHA's [Compliance Directive for the Excavation Standard](#).) Particular directives also address recurring issues in enforcement, such as OSHA's [Multi-Employer Citation Policy](#).
 - [Enforcement Memoranda](#)--These documents can provide agency policies and/or supplementary enforcement guidance, and some memos may include an interpretation of an OSHA standard.
 - [National/ Local](#) Emphasis Programs: These documents provide neutral administrative criteria for targeting inspections at workplaces that are likely to

have hazards OSHA is particularly concerned about. (E.g., OSHA’s [National Emphasis Program on Outdoor and Indoor Heat-Related Hazards](#)).

- General advice to employers for addressing workplace hazards—stand-alone documents or webpages that provide employers advice on how to protect employees against particular workplace hazards. These documents generally note any applicable OSHA requirements, but also usually provide recommendations for protective measures not mandated by OSHA regulations. Examples of these kinds of documents include OSHA’s [Prevention of Musculoskeletal Injuries in Poultry Processing](#) and OSHA’s safety and health topics page on [heat](#).
- Explanatory guidance—these documents are aimed at stakeholders and explain the requirements of particular standards and recordkeeping regulations. They are generally not interpretative in nature. An example of this kind of document is [OSHA’s Small Entity Compliance Guide for the Respirable Crystalline Silica Standard for Construction](#).

The first category—regulations—should obviously be included within the term “agency legal materials,” as should the second and third categories, which are for the most part interpretations, general statements of policy, and/or rules of agency organization, procedure, or practice.

The fourth and fifth categories are informational in nature and should not be included within definition of agency legal materials. Because the purpose of these materials is to inform the public and they are explanatory in nature, rather than interpretative, it can generally be assumed that the agency will make them readily available, and they do not directly impact stakeholders’ legal rights.

2. What obstacles have you or others faced in gaining access to agency legal materials?

n/a

3. Are there certain types of agency legal materials or legal information that agencies are not making publicly available that would be valuable to you or others?

n/a

4. Agencies provide public access to legal materials in different ways. Agencies make some materials available to the general public on their own initiative without having received a request from a member of the public (i.e., proactive disclosure). Other materials are provided to members of the public on request. What types of legal materials should agencies proactively disclose to the general public? What types of legal materials may or should agencies disclose only in response to a request from a member of the public?

OSHA makes all of the materials described above available on its website. However, in some cases, it does not publish letters of interpretation that address narrow concerns that are unique to particular stakeholders, because they are not of general public interest.

5. For agency legal materials that should be proactively disclosed, where or how should agencies make them publicly available (on agency websites, in the Federal Register, or elsewhere)?

OSHA makes all of its materials identified in response to question 1, above, publicly available on its website, and OSHA believes its stakeholders are generally very familiar with how to find these materials. OSHA's website is searchable and indexed. OSHA also [retains](#) archived versions of documents that have been rescinded or superseded by revisions on its website.

6. Are there certain types of agency legal materials, or certain types of information contained in agency legal materials, that agencies should not make publicly available? When there is public interest in these types of materials or information, how should agencies balance the public interest in disclosure with any private or governmental interests in nondisclosure?

One difficult issue is public availability of copyrighted consensus standards that have been incorporated by reference into OSHA standards. OSHA makes them available for public inspection at its national and regional offices. DOL's current position is that it does not post such standards electronically, due to copyright concerns. In addition, some consensus bodies rely on the sales revenue from their standards to fund their standards development activities, and they are concerned that free publication of their products on agency websites will significantly decrease needed revenue streams. OSHA takes this concern seriously. Consensus standards can provide valuable information about how to keep workers safe, and OSHA does not want to undermine their development. In general, OSHA has not heard complaints from stakeholders about OSHA's practices with respect to standards incorporated by reference, other than a general need to keep the incorporations current with the latest versions of the standard.

Additionally, agencies should not be required to disclose materials that might prejudice enforcement activity or disclose deliberative processes. For example, OSHA generates lists of employers to inspect according to various inspection programs. Those lists, or the statistical means used to generate those lists, should not be made publicly available, as they would provide notice to the targeted employers. Nor should internal drafts of regulatory or guidance materials be made public, to avoid the chilling effect on agency deliberations the disclosure of such material might create. OSHA relies on the exemptions to FOIA to protect these materials from disclosure, subject to the requirements of EO 12866.

7. Some statutes governing the public availability of agency legal materials apply to most or all agencies (e.g., Federal Register Act), whereas others apply to only one or a small number of agencies (e.g., Food and Drug Administration Modernization Act of 1997). When should Congress create disclosure requirements that apply to most or all agencies, and when should Congress create disclosure requirements that apply to only one or a small number of agencies?

OSHA has no opinion on this question.

8. Are there certain best practices regarding disclosure of legal materials on agency websites that should be required by statute (e.g., indexing of legal materials, search functions to help find

legal materials)? If so, should these practices be required for all legal materials or only certain types of legal materials?

Because each agency's context varies, OSHA counsels against statutory requirements for agency websites that are too prescriptive. For example, OSHA devoted significant resources to preparing a separate guidance index in compliance with the specific requirements of EO 13891, and the guidance that OMB issued under it, that provided little additional value because OSHA's materials were already readily accessible on its website. OSHA believes it is enough to require in general terms that agency legal materials be posted to public websites that searchable by a search engine and/or indexed in a way that makes sense in the context.

9. What inconsistencies, ambiguities, and overlaps exist in the main statutes governing disclosure of agency legal materials (e.g., FOIA, Federal Register Act, E-Government Act of 2002, Federal Records Act) that Congress should remedy?

The first sentence of 44 USC § 1507 and the first sentence of the second paragraph of 5 USC § 552(a)(1) appear to be substantially the same.

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

While it makes sense to publish final rules in the Federal Register and the CFR, OSHA does not believe it makes sense publish any of the other materials noted above in the Federal Register, because OSHA already publishes them on its website, which is more accessible to stakeholders. The distinction in FOIA between "statements of general policy or interpretations of general applicability formulated and adopted by the agency," 5 USC § 552(a)(1)(D), which are required to be published in the Federal Register, and other guidance materials not required to be so published is difficult to implement, and given the advent of the internet, unnecessary.