ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Disclosure of Agency Legal Materials

Ad Hoc Committee on Disclosure of Agency Legal Materials

Draft Recommendation from Project Consultants | March 29, 2023

[NOTE: The paragraphs below are reproduced verbatim from the consultants' draft report, pages 126–141, available at https://www.acus.gov/report/disclosure-agency-legal-materials-draft-report-22323. At the March 29 meeting, the committee will consider at a high level the consultants' draft recommendation as a whole and each paragraph individually. Based on the committee's discussion at the meeting, the ACUS staff, committee chairs, and consultants will work together to prepare a draft for more in-depth consideration.]

Types of Agency Legal Materials

1. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to clarify that "final opinions" and "orders" include all such opinions and orders, regardless of agency designation as precedential/non-precedential, published/unpublished, or similar designation.

2. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to clarify that "orders" include all written enforcement decisions that have either a legal or a practical effect on, and have been communicated to, an individual or entity outside of the agency. Such written enforcement decisions include written assurances not to enforce, such as waivers and variances.

The way #2 is written, it is not obvious if the Committee recommends that agencies publish enforcement Warning Notices and Letters. DOE is opposed to disclosure of such materials because it could unjustly harm businesses and professional reputations, publishing such documents would be large administrative burden for the agency, and publishing these could

adversely affect enforcement functions. On this last point, agencies use such documents to educate, give companies a chance to correct noncompliance, and prioritize enforcement.

3. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include all settlement agreements to which an agency is a party that resolve actual or potential litigation in court.

DOE opposes disclosing settlement agreements of enforcement cases for five reasons:

a. Settlement agreements contain business information that we do not disclose under Exemption 4.
b. Reviewing a history of an agency's settlement agreements reveals patterns that may interfere with enforcement practices. One singular settlement agreement may not disclose techniques and procedures for enforcement. But many settlement agreements together can create a mosaic—a story—that tells of the agency's techniques, procedures, and patterns of practice.
c. Companies use settlement agreements to calculate the average settlement percentage for cases and use this number to anchor settlement negotiations.
d. Companies use settlement agreements to calculate the average settlement percentage for cases and use this number to calculate the cost of doing business. when civil penalties become a part of regular business expenses.
e. Writing a settlement agreement without information that's exempt under Exemption 4 and 7 would make the settlement agreement virtually meaningless.