12/2022 Tentative Recs	12/2022 FTC Objections	2/2023 Report	3/2023 FTC Objections
Types of Agency Legal Materials			
1. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2)(A), should be amended to clarify that "final opinions" and "orders" include all decisions made in relation to an adjudication regardless of agency designation, such as precedential/non-precedential or published/unpublished.		1.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"final opinions" and "orders" include all such opinions and orders, regardless of agency designation as precedential/non-precedential, published/unpublished, or similar designation.	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)(A), should be amended to clarify that "orders" include all written enforcement actions, including decisions not to enforce (such as waivers and variances), that have either a legal or a practical effect on a private party.	The FTC strongly disagrees with this recommendation. Under the FTC's organic statute and regulations, see, e.g., 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10, FTC law enforcement investigations are nonpublic until they are disclosed by the agency in the course of litigation or settlement. The FTC relies on the nonpublic nature of its investigations to obtain information and assistance from investigational targets and third parties – the confidential nature of these investigations provides assurances to these entities, enabling the FTC to receive the most sensitive of corporate and personal information. Many of these investigations, however, are closed without seeking further action. If the FTC had an affirmative obligation to disclose decisions that litigation or settlement were not warranted, it would reveal these investigational decisions and the involved entities and chill their cooperation and assistance to the FTC, thus impeding the FTC's law enforcement mission. Affirmative disclosure of decisions not to initiate enforcement proceedings also permits two misleading inferences: (1) a wrongdoer who the FTC decided not to pursue for logistical or resource-related reasons could claim that the decision not to enforce is exoneration; or (2) a company that the FTC decided not to pursue after finding the conduct lawful could be nonetheless inappropriately and publicly tarred by its involvement in a federal investigation. More generally, treating a decision not to engage in law enforcement proceedings as an "order" stretches the definition of the term. "Order" means "1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a government official, esp. a court or judge." ORDER, Black's Law Dictionary (11th ed. 2019). This definition conveys the imposition of an affirmative legal obligation, not the decision to refrain from action. Indeed, APA case recognizes this distinction by making decisions not to enforce unreviewable. See e.g., Heckler v. Chaney, 470 U.S. 821, 831 (1985).	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.	Same objection. As a note, we do publish closing letters but these usually are not helpful for establishing legal precedent due to disclaimers. **FTC Alternative: Strike the language defining written enforcement orders to include decisions not to enforce.**

3. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include all settlement agreements resolving litigation to which an agency is a party.		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.	
4. Congress should clarify that FOIA's affirmative disclosure, 5 U.S.C. §552(a)(2), includes legal opinions that are written by agency lawyers and directed to the public or to other members of the government, including those opinions produced by the Department of Justice's Office of Legal Counsel and agency general counsel offices.	The FTC strongly disagrees with this recommendation for two reasons: (1) This new interpretation is not tethered to any existing language in 5 U.S.C. § 552(a)(2) and thus represents a new disclosure obligation that Congress did not require; and (2) as written, the current recommendation does not sufficiently protect attorney-client, work product, deliberative process or other privileges from disclosure. Indeed, FOIA and discovery case law provide protections for privileged information that cut strongly against interpreting 552(a)(2) in the way proposed here and that are not overcome by the limited references to isolated precedents in Second or D.C. Circuit law. There are circumstances in which agency legal opinions written by agency lawyers and directed to other members of the government could retain privilege, particularly with respect to litigation involving multiple agencies. This general recommendation does not address or account for those circumstances.	4. FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a)(2), should be amended to provide that formal written opinions by the Department of Justice's Office of Legal Counsel should be made available for public inspection in electronic format.	See also rec #5 below.
[No corresponding rec.]	[No corresponding objection.]	5. FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a)(2), should be amended to provide that "interpretations" of law include opinions that agencies' chief legal officers (or their staffs) provide to officials within the agency that a. are a part of a defined corpus of opinions and that (i) involve determinations of law that reference earlier opinions in that corpus, and (ii) effectively bind agency officials; or b. serve as the basis for either (i) the agency's conclusion that the law does permit the agency to take a certain action or (ii) the agency's refusal to take an action requested because contrary to law. With regard to the opinions described in (b), agencies can alternatively comply with its affirmative disclosure obligation by setting forth the agency's legal basis for action in a separate, publicly released decisional document.	Same objection as to 12-2022 recommendation 4: As written, the current recommendation does not sufficiently protect attorney-client, work product, deliberative process or other privileges from disclosure. Indeed, FOIA and discovery case law provide protections for privileged information that cut strongly against interpreting 552(a)(2) in the way proposed here and that are not overcome by the limited references to isolated precedents in Second or D.C. Circuit law. There are circumstances in which agency legal opinions written by agency lawyers and directed to other members of the government could retain privilege, particularly with respect to litigation involving multiple agencies. This general recommendation does not address or account for those circumstances. New recommendation 5(a) raises concerns because it defines agency legal opinions broadly and could potentially sweep in otherwise-privileged material. The recommendation does not clearly define the kinds of legal opinions that would be subject to disclosure and how these could be distinguished from privileged legal advice. In addition, being required to affirmatively state the reason for refusing to take a certain action as contrary to law (recommendation 5 (b)(ii)) raises

			similar concerns as recommendation 2 and invokes the same objection to being required to affirmatively state the bases for nonaction. **FTC Alternative: Strike this recommendation.**
8. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include memoranda of understanding (MOUs), memoranda of agreement (MOAs), and other similar inter-agency or inter-governmental agreements.	The FTC does not support this recommendation, for two reasons: (1) This new interpretation is not tethered to any existing language in 5 U.S.C. § 552(a)(2) and thus represents a new disclosure obligation that Congress did not require; and (2) as written, the current recommendation assumes that all MOUs are suitable for public disclosure. There may be occasions when agencies enter into MOUs for law enforcement or investigational purposes where public disclosure would thwart or impede the purpose of the MOU. This recommendation should account for those circumstances.	6. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include memoranda of understanding (MOUs), memoranda of agreement (MOAs), and other similar inter-agency or inter-governmental agreements.	Restating objection as to 12-2022 rec 8: As written, the current recommendation assumes that all MOUs are suitable for public disclosure. There may be occasions when agencies enter into MOUs for law enforcement or investigational purposes where public disclosure would thwart or impede the purpose of the MOU. This recommendation should account for those circumstances. **FTC Alternative: Provide exceptions for nonpublic MOUs, MOAs, and interagency agreements and/or reaffirm the applicability of FOIA exemption 7 as applied to these materials.**
9. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to provide that an agency may forgo affirmative disclosure of the materials encompassed in recommendations #1 through #8 in limited circumstances. This option should apply if an agency finds publication of the full set or any subset of records otherwise required to be affirmatively disclosed would be both (A) impracticable to the agency because of the volume or cost and (B) of de minimis value to the public due to records' repetitive nature. In such an event, an agency can avoid its obligation to publish the full range of material if it undertakes a notice-and-comment rulemaking to determine and explain what records will not be published; what aggregate data, representative samples, or other information about the records, if any, will be published in lieu of the primary documents that will adequately inform the public about agency activities; and justifications for those choices. Any legislation to implement this recommendation should ensure that this alternative is not available to allow an agency to reduce their current disclosure practices.	The FTC does not support this recommendation because the reasons an agency may forgo affirmative disclosure are too limited. Agencies engaging in law enforcement investigations and litigation may have reasons for withholding information that include investigational necessities, the need to protect confidential or sensitive information, work product, or privilege. To the extent this recommendation is intended to allow for exemptions from the tentative recommendations above, it needs to address these other circumstances.	7. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to provide that an agency may forgo affirmative disclosure of the materials encompassed in Recommendations #1 through #6 in limited circumstances. This option should apply if an agency finds publication of the full set or any subset of records otherwise required to be affirmatively disclosed would be both (A) impracticable to the agency because of the volume or cost and (B) of de minimis value to the public due to records' repetitive nature. In such an event, an agency can avoid its obligation to publish the full range of material if it undertakes a notice-and-comment rulemaking to determine and explain what records will not be published; what aggregate data, representative samples, or other information about the records, if any, will be published in lieu of the primary documents that will adequately inform the public about agency activities; and justifications for those choices. Any legislation to implement this recommendation should ensure that this alternative is not available to allow an agency to reduce their current disclosure practices.	Same objection. The requirement of notice-and-comment rulemaking to do this is particularly onerous. **FTC Alternative: Broaden the circumstances that would allow forgoing affirmative disclosure.**
6. Congress should repeal §206(b) of the E-Government Act, codified at 55 U.S.C. §3501, as the provision consists of duplicative and inoperative language and non-sensical scrivener's errors.		8. Congress should repeal §206(b) of the E-Government Act.	
5. Congress should amend the Federal Register Act provision requiring publication in the Federal Register of certain presidential proclamations and executive orders, 44 U.S.C. §1505(a), to provide that written presidential directives, including		9. Congress should amend the Federal Register Act provision requiring publication in the Federal Register of certain presidential proclamations and executive orders, 44 U.S.C. § 1505(a), to provide that written presidential directives, including	

amendments and revocations, regardless of designation, should be published in the Federal Register if they (A) directly impose obligations on or alter rights of private persons or entities or (B) direct agencies to consider or implement actions that impose obligations or alter rights of private persons or entities. Congress should clarify the President's authority to withhold from publication directives that relate solely to the internal personnel rules and practices of the Executive Branch or an agency. Congress should also specify that such revised §1505(a) disclosure requirements are subject to the exemptions set out in FOIA, including those found in §552(b)(1).		amendments and revocations, regardless of designation, should be published in the Federal Register if they (A) directly impose obligations on or alter rights of private persons or entities or (B) direct agencies to consider or implement actions that impose obligations or alter rights of private persons or entities. Congress should clarify the President's authority to withhold from publication directives that relate solely to the internal personnel rules and practices of the Executive Branch or an agency. Congress should also specify that such revised § 1505(a) disclosure requirements are subject to the exemptions set out in FOIA, including those found in § 552(b)(1).	
7. To maintain the originally intended congruence between the Presidential Records Act and FOIA exemptions, Congress should amend Section 2204 of the PRA to eliminate language that tracks—or once tracked—FOIA exemptions, and instead incorporate those exemptions by reference, specifically subsections 552(b)(1), (b)(3), (b)(4), and (b)(6).		10. To maintain the originally intended congruence between the Presidential Records Act and FOIA exemptions, Congress should amend Section 2204 of the PRA to eliminate language that tracks—or once tracked—FOIA exemptions, and instead incorporate by reference those exemptions—specifically subsections 552(b)(1), (3), (4), and (6).	
Methods of Disclosure of Agency Legal Materials			
12. Congress should amend the Freedom of Information Act to require agencies to develop, publish online, and implement internal management plans and procedures for making legal materials available online. Such plans should include: a. Definitions and descriptions of categories or types of legal materials covered by the agency's affirmative disclosure plan; b. Definitions and descriptions of categories or types of legal materials that are not covered by the agency's affirmative disclosure plan or that are exempt from affirmative disclosure; c. The criteria used for identifying material to be disclosed online pursuant to the affirmative disclosure plan, including specific criteria that clearly specify what material, if any, deemed exempt from affirmative disclosure; d. A description of locations on the agency's website where material falling into different categories can be found; e. A description of the agency's document labeling and numbering systems used to track agency legal materials that are made available online; f. A description of how the agency will ensure the accuracy and currency of posted legal materials; g. A description of how the agency will use online archiving or other means to maintain public access to amended, inoperative, superseded, or withdrawn agency legal materials, including: i. Any criteria for relocating to a portion of the agency's website dedicated to archiving materials	The FTC does not support this recommendation because it seems unnecessarily prescriptive in directing specific forms of agency compliance with FOIA. More generally, the requirement to develop, publish online, and implement such affirmative disclosure plans would impose additional costs and expand current FOIA obligations in a way that effectively amounts to an unfunded mandate.	11. Congress should amend the Freedom of Information Act to require agencies to develop, publish online, and implement affirmative disclosure plans. These are internal management plans and procedures for making legal materials available online. Congress should also require each agency to designate an officer who has overall responsibility for ensuring the agency develop and implement faithfully the required affirmative disclosure plan and for overseeing the agency's compliance with all legal requirements for the affirmative disclosure of agency legal materials.	Same objection. Note: the subparts of the original recommendation have been moved to the text of the accompanying report. **FTC Alternative: Strike this recommendation.**

that are inoperative or have been amended, superseded, or withdrawn; and ii. Labels affixed to amended, inoperative, superseded, or withdrawn to indicate their current legal status. h. The name of and contact information for the agency official responsible for ensuring that the agency develops and implements the affirmative disclosure plan; i. Training practices used to ensure agency personnel will consistently carry out the agency's affirmative disclosure plan; j. A stated commitment for periodic review of the affirmative disclosure plan and its implementation, including: i. Metrics and procedures that the agency will use to evaluate whether the agency is providing comprehensive and up-to-date public access to all legal material covered by the plan; and ii. Specific time intervals when the agency will periodically review its plan and its implementation; and k. Opportunities for public feedback on the agency's affirmative disclosure plan and the agency's procedures for effective appeal of the plan and its implementation. Congress should also require each agency to designate an officer who has overall responsibility for ensuring the agency develop and implement faithfully the required affirmative disclosure plan and for overseeing the agency's compliance with all legal requirements for the affirmative disclosure of agency legal materials.			
10. Congress should amend §207 of the E-Government Act to clarify each agency's obligation to make its legal materials not merely available but also easily accessible to and usable by the public, including by (A) amending §207(f)(1)(A)(ii) of the E-Government Act to eliminate its cross-reference to FOIA §552(b), and (B) amending §207 to specify that, with respect to agency rules listed on their websites, links to or online entries for each rule should be accompanied by links to other related agency legal materials, such as any guidance documents explaining the regulation or major adjudicatory opinions applying it.		12. Congress should amend § 207 of the E-Government Act to clarify each agency's obligation to make its legal materials not merely available but also easily accessible to and usable by the public, including by (A) amending § 207(f)(1)(A)(ii) of the EGovernment Act to eliminate its cross-reference to FOIA § 552(b), and (B) amending § 207 to specify that, with respect to agency rules listed on their websites, links to or online entries for each rule should be accompanied by links to other related agency legal materials, such as any guidance documents explaining the regulation or major adjudicatory opinions applying it.	
11. Congress should update §207 of the E-Government Act to eliminate references to the no-longer-extant Interagency Committee on Government Information. Instead, it should require OMB to update its agency website guidance (A) after consultation with the Federal Web Managers Council, (B) no less often than once every two years, and (C) with explicit attention to ensuring that agency legal materials are, as an amended §207		13. Congress should update § 207 of the E-Government Act to eliminate references to the no-longer-extant Interagency Committee on Government Information. Instead, it should require OMB to update its agency website guidance (A) after consultation with the Federal Web Managers Council, (B) no less often than once every two years, and (C) with explicit attention to ensuring that agency legal materials are, as an amended § 207	

should require, easily accessible, usable, and searchable.		should require, easily accessible, usable, and searchable.	
13. Congress should direct the Office of the Federal Register (OFR) to study how best to organize presidential directives on the OFR website to make presidential directives of interest easily ascertainable, such as by codifying them and making them full-text searchable.		14. Congress should direct the Office of the Federal Register (OFR) to study how best to organize presidential directives on the OFR website to make presidential directives of interest easily ascertainable, such as by codifying them and making them full-text searchable.	
14. Congress should eliminate any statutory requirement, including in 44 U.S.C. Chapter 15 (the Federal Register Act), for a printed version of the Federal Register, allowing the official record to be a permanent digital record accessible to the public.		15. Congress should eliminate any statutory requirement, including in 44 U.S.C. Chapter 15 (the Federal Register Act), for a printed version of the Federal Register, allowing the official record to be a permanent digital record accessible to the public.	
Incentives to Disclose Agency Materials			
15. FOIA's judicial review provision, 5 U.S.C. §552(a)(4), should be amended to clarify that district courts have the power to order compliance with agencies' affirmative disclosure obligations, including those under 5 U.S.C. §552(a)(1), 5 U.S.C. §552(a)(2), and any other provisions responsive to this set of recommendations. FOIA should also be amended to specify that members of the public seeking to enforce statutory or regulatory obligations under those affirmative portions of the Act must first file a request for affirmative disclosure of the disputed materials and exhaust FOIA's administrative remedies with respect thereto.		16. FOIA's judicial review provision, 5 U.S.C. § 552(a)(4), should be amended to clarify that district courts have the power to order compliance with agencies' affirmative disclosure obligations, including those under 5 U.S.C. § 552(a)(1), 5 U.S.C. § 552(a)(2), and any other provisions responsive to this set of recommendations. FOIA should also be amended to specify that members of the public seeking to enforce statutory or regulatory obligations under those affirmative portions of the Act must first file a request for affirmative disclosure of the disputed materials and exhaust FOIA's administrative remedies with respect thereto.	
16. Congress should clarify that a member of the public is entitled to use 5 U.S.C. §552(a)(3) to obtain materials that an agency was required to affirmatively disclose but has failed to do so. Congress should further provide that such if a person makes a request under (a)(3) for records that should have been, but were not, affirmatively disclosed, that request qualifies for expedited processing under 5 U.S.C. §552(a)(6)(E). In addition, Congress should provide if a person makes a request under (a)(3) for records that should have been affirmatively disclosed but were not, the agency may not charge search, duplication, or review fees under 5 U.S.C. §552(a)(4)(A), regardless of requester status.		17. Congress should clarify that a member of the public is entitled to use 5 U.S.C. § 552(a)(3) to obtain materials that an agency was required to affirmatively disclose but has failed to do so. Congress should further provide that such if a person makes a request under (a)(3) for records that should have been, but were not, affirmatively disclosed, that request qualifies for expedited processing under 5 U.S.C. § 552(a)(6)(E). In addition, Congress should provide if a person makes a request under (a)(3) for records that should have been affirmatively disclosed but were not, the agency may not charge search, duplication, or review fees under 5 U.S.C. § 552(a)(4)(A), regardless of requester status.	NEW OBJECTION: FTC opposes recommendation to require expedited processing or to disallow fees. If the agency did not affirmatively disclose something, then presumably then the agency had a reason/informed decision as to why affirmative disclosure was not warranted. Requiring expedited treatment and disallowing fees appears punitive to this judgment. **FTC Alternative: Strike this recommendation.**
[No corresponding recommendation.]		18. The Conference's Office of the Chairman should prepare and submit to Congress proposed statutory changes consistent with Recommendations #1 through #17.	

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.

   FTC Comment: We restate our original objection to this recommendation as proposed in December 2022:

   > The FTC strongly disagrees with this recommendation. Under the FTC's organic statute and regulations, see, e.g., 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10, FTC law enforcement investigations are nonpublic until they are disclosed by the

agency in the course of litigation or settlement. The FTC relies on the nonpublic nature of its investigations to obtain information and assistance from investigational targets and third parties – the confidential nature of these investigations provides assurances to these entities, enabling the FTC to receive the most sensitive of corporate and personal information. Many of these investigations, however, are closed without seeking further action. If the FTC had an affirmative obligation to disclose decisions that litigation or settlement were not warranted, it would reveal these investigational decisions and the involved entities and chill their cooperation and assistance to the FTC, thus impeding the FTC's law enforcement mission.

Affirmative disclosure of decisions not to initiate enforcement proceedings also permits two misleading inferences: (1) a wrongdoer who the FTC decided not to pursue for logistical or resource-related reasons could claim that the decision not to enforce is exoneration; or (2) a company that the FTC decided not to pursue after finding the conduct lawful could be nonetheless inappropriately and publicly tarred by its involvement in a federal investigation.

More generally, treating a decision not to engage in law enforcement proceedings as an "order" stretches the definition of the term. "Order" means "1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a government official, esp. a court or judge." ORDER, Black's Law Dictionary (11th ed. 2019). This definition conveys the imposition of an affirmative legal obligation, not the decision to refrain from action. Indeed, APA case recognizes this distinction by making decisions not to enforce unreviewable. See e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

FTC Alternative: strike the language defining written enforcement orders to include decisions not to enforce.

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.

4. FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a)(2), should be amended to provide that formal written opinions by the Department of Justice's Office of Legal Counsel should be made available for public inspection in electronic format.

5. FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a)(2), should be amended to provide that "interpretations" of law include opinions that agencies' chief legal officers (or their staffs) provide to officials within the agency that

    a. are a part of a defined corpus of opinions and that (i) involve determinations of law that reference earlier opinions in that corpus, and (ii) effectively bind agency officials; or

    b. serve as the basis for either (i) the agency's conclusion that the law does permit the agency to take a certain action or (ii) the agency's refusal to take an action requested because contrary to law.

    With regard to the opinions described in (b), agencies can alternatively comply with its affirmative disclosure obligation by setting forth the agency's legal basis for action in a separate, publicly released decisional document.

FTC Comment*: *We restate our original objection to recommendation 4 from December 2022, from which this current recommendation appears based and provide additional reasoning:

The FTC strongly disagrees with this recommendation for two reasons: (1) This new interpretation is not tethered to any existing language in 5 U.S.C. § 552(a)(2) and thus represents a new disclosure obligation that Congress did not require; and (2) as written, the current recommendation does not sufficiently protect attorney-client, work product, deliberative process or other privileges from disclosure. Indeed, FOIA and discovery case law provide protections for privileged information that cut strongly against interpreting 552(a)(2) in the way proposed here and that are not overcome by the limited references to isolated precedents in Second or D.C. Circuit law. There are circumstances in which agency legal opinions written by agency lawyers and directed to other members of

the government could retain privilege, particularly with respect to litigation involving multiple agencies. This general recommendation does not address or account for those circumstances.

With respect to the current recommendation 5, this recommendation does not sufficiently protect attorney-client, work product, deliberative process or other privileges from disclosure. Indeed, FOIA and discovery case law provide protections for privileged information that cut strongly against interpreting 552(a)(2) in the way proposed here and that are not overcome by the limited references to isolated precedents in Second or D.C. Circuit law. There are circumstances in which agency legal opinions written by agency lawyers and directed to other members of the government could retain privilege, particularly with respect to litigation involving multiple agencies. This general recommendation does not address or account for those circumstances.

New recommendation 5(a) raises concerns because it defines agency legal opinions broadly and could potentially sweep in otherwise-privileged material. The recommendation does not clearly define the kinds of legal opinions that would be subject to disclosure and how these could be distinguished from privileged legal advice.

In addition, being required to affirmatively state the reason for refusing to take a certain action as contrary to law (recommendation 5 (b)(ii)) raises similar concerns as recommendation 2 and invokes the same objection to being required to affirmatively state the bases for nonaction.

FTC Alternative: Strike this recommendation.

6. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to include memoranda of understanding (MOUs), memoranda of agreement (MOAs), and other similar inter-agency or inter-governmental agreements.

FTC Comment*: *We restate our objection to the original recommendation, which was 8 from December 2022:

As written, the current recommendation assumes that all MOUs are suitable for public disclosure. There may be occasions when agencies enter into MOUs for law enforcement or investigational purposes where public disclosure would thwart or impede the purpose of the MOU. This recommendation should account for those circumstances.

FTC Alternative: Provide exceptions for nonpublic MOUs, MOAs, and interagency agreements and/or reaffirm the applicability of FOIA exemption 7 as applied to these materials.

7. FOIA's affirmative disclosure provision, 5 U.S.C. §552(a)(2), should be amended to provide that an agency may forgo affirmative disclosure of the materials encompassed in Recommendations #1 through #6 in limited circumstances. This option should apply if an agency finds publication of the full set or any subset of records otherwise required to be affirmatively disclosed would be both (A) impracticable to the agency because of the volume or cost and (B) of de minimis value to the public due to records' repetitive nature. In such an event, an agency can avoid its obligation to publish the full range of material if it undertakes a notice-and-comment rulemaking to determine and explain what records will not be published; what aggregate data, representative samples, or other information about the records, if any, will be published in lieu of the primary documents that will adequately inform the public about agency activities; and justifications for those choices. Any legislation to implement this recommendation should ensure that this alternative is not available to allow an agency to reduce their current disclosure practices.

FTC Comment: We restate our objection to the original recommendation, which was 9 from December 2022:

The FTC does not support this recommendation because the reasons an agency may forgo affirmative disclosure are too limited. Agencies engaging in law enforcement investigations and litigation may have reasons for withholding information that include investigational necessities, the need to protect confidential or sensitive information, work product, or privilege. To the extent

this recommendation is intended to allow for exemptions from the tentative recommendations above, it needs to address these other circumstances.

We add that the requirement of notice-and-comment rulemaking to do this is particularly onerous.

FTC Alternative: Broaden the circumstances that would allow forgoing affirmative disclosure.

8. Congress should repeal §206(b) of the E-Government Act.

9. Congress should amend the Federal Register Act provision requiring publication in the Federal Register of certain presidential proclamations and executive orders, 44 U.S.C. § 1505(a), to provide that written presidential directives, including amendments and revocations, regardless of designation, should be published in the Federal Register if they (A) directly impose obligations on or alter rights of private persons or entities or (B) direct agencies to consider or implement actions that impose obligations or alter rights of private persons or entities. Congress should clarify the President's authority to withhold from publication directives that relate solely to the internal personnel rules and practices of the Executive Branch or an agency. Congress should also specify that such revised § 1505(a) disclosure requirements are subject to the exemptions set out in FOIA, including those found in § 552(b)(1).

10. To maintain the originally intended congruence between the Presidential Records Act and FOIA exemptions, Congress should amend Section 2204 of the PRA to eliminate language that tracks—or once tracked—FOIA exemptions, and instead incorporate by reference those exemptions—specifically subsections 552(b)(1), (3), (4), and (6).

Methods of Disclosure of Agency Legal Materials

11. Congress should amend the Freedom of Information Act to require agencies to develop, publish online, and implement affirmative disclosure plans. These are internal management plans and procedures for making legal materials available online. Congress should also require each agency to designate an officer who has overall responsibility for

ensuring the agency develop and implement faithfully the required affirmative disclosure plan and for overseeing the agency's compliance with all legal requirements for the affirmative disclosure of agency legal materials.

FTC Comment: We restate our objection to the original recommendation, which was 12 from December 2022:

> The FTC does not support this recommendation because it seems unnecessarily prescriptive in directing specific forms of agency compliance with FOIA. More generally, the requirement to develop, publish online, and implement such affirmative disclosure plans would impose additional costs and expand current FOIA obligations in a way that effectively amounts to an unfunded mandate.

FTC Alternative: Strike this recommendation.

12. Congress should amend § 207 of the E-Government Act to clarify each agency's obligation to make its legal materials not merely available but also easily accessible to and usable by the public, including by (A) amending § 207(f)(1)(A)(ii) of the E-Government Act to eliminate its cross-reference to FOIA § 552(b), and (B) amending § 207 to specify that, with respect to agency rules listed on their websites, links to or online entries for each rule should be accompanied by links to other related agency legal materials, such as any guidance documents explaining the regulation or major adjudicatory opinions applying it.

13. Congress should update § 207 of the E-Government Act to eliminate references to the no-longer-extant Interagency Committee on Government Information. Instead, it should require OMB to update its agency website guidance (A) after consultation with the Federal Web Managers Council, (B) no less often than once every two years, and (C) with explicit attention to ensuring that agency legal materials are, as an amended § 207 should require, easily accessible, usable, and searchable.

14. Congress should direct the Office of the Federal Register (OFR) to study how best to organize presidential directives on the OFR website to make presidential directives of

interest easily ascertainable, such as by codifying them and making them full-text searchable.

15. Congress should eliminate any statutory requirement, including in 44 U.S.C. Chapter 15 (the Federal Register Act), for a printed version of the Federal Register, allowing the official record to be a permanent digital record accessible to the public.

Incentives to Disclose Agency Legal Materials

16. FOIA's judicial review provision, 5 U.S.C. § 552(a)(4), should be amended to clarify that district courts have the power to order compliance with agencies' affirmative disclosure obligations, including those under 5 U.S.C. § 552(a)(1), 5 U.S.C. § 552(a)(2), and any other provisions responsive to this set of recommendations. FOIA should also be amended to specify that members of the public seeking to enforce statutory or regulatory obligations under those affirmative portions of the Act must first file a request for affirmative disclosure of the disputed materials and exhaust FOIA's administrative remedies with respect thereto.

17. Congress should clarify that a member of the public is entitled to use 5 U.S.C. § 552(a)(3) to obtain materials that an agency was required to affirmatively disclose but has failed to do so. Congress should further provide that such if a person makes a request under (a)(3) for records that should have been, but were not, affirmatively disclosed, that request qualifies for expedited processing under 5 U.S.C. § 552(a)(6)(E). In addition, Congress should provide if a person makes a request under (a)(3) for records that should have been affirmatively disclosed but were not, the agency may not charge search, duplication, or review fees under 5 U.S.C. § 552(a)(4)(A), regardless of requester status.

FTC Comment: We are adding a new objection:

The FTC opposes recommendation to require expedited processing or to disallow fees. If the agency did not affirmatively disclose something, then presumably then the agency had a reason/informed decision as to why affirmative disclosure was not warranted. Requiring expedited treatment and disallowing fees appears punitive to this judgment.

FTC Alternative: Strike this recommendation.

18. The Conference's Office of the Chair should prepare and submit to Congress proposed statutory changes consistent with Recommendations #1 through #17.