Comments from Senior Fellow Allison Zieve on Disclosure of Agency Legal Materials
March 30, 2023

On the Report

I suggest cutting the discussion on pages 12-22 that justifies the exemptions. The report says that it takes no position on the exemptions, so it strikes me as odd to spend 12 pages justifying them.

If you decide to keep pages 12-22, I have small comments on the discussion of two exemptions.

First, on page 17, the discussion of "safeguarding the quality of agency deliberations," which is a basis for exemption 5, talks about agency "directives"—which are not deliberative. It also talks about "circumvention of the law"—which is maybe an exemption 7(E) issue but not an exemption 5 issue. So we wanted to suggest you look again at the middle paragraph on page 17.

Also, both that paragraph and the ones before and after seem to take a position on the value of the exemption—which is something that the report earlier says it is not going to do.

Second, on page 21, re exemption 4, the report says: "Food Marketing has arguably broadened the scope of the exemption beyond such concerns, though the new exemption 4 legal regime is still in its infancy." I think that the word "arguably" doesn't belong. FMI has *indisputably* broadened exemption 4. Perhaps the most accurate way to say it would be that FMI "has broadened the courts' longstanding interpretation exemption 4."

Also, the clause "though the new exemption 4 legal regime is still in its infancy" seems to suggest, particularly given "arguably," that maybe FMI did not *actually* broaden the accepted scope of exemption 4. But there is no maybe. It *absolutely* broadened how ex 4 is applied by both agencies and courts. It's a small point, but I can't see any reason for the report to suggest that FMI might not have had real consequences.

On the Recommendations

Re #3: On page 128, regarding settlement agreements, I wanted to suggest that the drafters think about how the recommendation would operate in cases where the agency agrees to confidentiality in the agreement and whether to address that situation, either in the recommendation or the commentary beneath it.

Re #7: As explained at the meeting, I suggest deleting (A), for two reasons: First, if disclosure would have de minimis public value, that should be enough. Second, agencies may argue that affirmative posting is burdensome because "voluminous" where the burden exists (if at all) only because the agency has violated its affirmative disclosure obligation for so long. (Not a hypothetical--we have seen the argument made in these circumstances.) (A) could potentially allow an agency to use its violation as an excuse to continue its non-compliance. Eliminating (A) would eliminate this possibility.

Also, I favor the notice-and-comment requirement to provide an opportunity for the agency to identify material that arguably fits under (a)(1) but that it thinks should be exempt because of its de minimis value. Addressing the categories of documents in a notice-and-comment rulemaking seems like an efficient way to identify the "limited circumstances" (quoting the recommendation) in which an agency may forgo compliance with (a)(1).

Re #9: On page 132, I am concerned about whether this recommendation would narrow the scope of existing practice regarding disclosure of presidential executive orders and proclamations. I am also concerned about applying FOIA exemptions to presidential EOs and proclamations—that seems like a big change. I'd like to suggest revising this recommendation to state, in its entirety:

> "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, unless doing so would threaten national security or foreign relations."

(Basically, disclosure unless an exemption 1 concern.)

Re #14: On page 138, I suggest that the recommendation be a requirement to implement, rather than a requirement to study:

> "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."

OFR will of course think about how to organize before it does so, but the recommendation will not be useful if it only suggests a study requirement.

Also, I am not sure what the word "ascertainable" means in this context. I think a different word would likely be better.

Re #16: On page 140, I urge you to delete "indicating a lack of clarity in drafting and confusion in the law." As we see in many APA cases where the Supreme Court says that statutory text is clear, disagreement by litigants or disagreement in the lower courts does not necessarily mean that the law is ambiguous. And on this point, stating that the law is not clear takes a position on a disputed legal issue—which I don't think is the drafter's intent—because in litigation over the enforceability of (a)(1) plaintiffs argue that the law is clear. For this reason, and because the phrase is not necessary to the sentence, I hope that you will delete it.

Also, the next paragraph states: "The primary concern with clarifying the availability of a private right of action under FOIA to enforce affirmative disclosure obligations." I don't think that the concern is "with clarifying"; the concern is with a private right of action. I therefore suggest this

edit to better reflect the concern: “The primary concern with ~~clarifying the availability of~~ a private right of action under FOIA to enforce affirmative disclosure obligations.”

[The word “clarify” also appears in the recommendation itself, but I don’t see an easy way to avoid the word there.]