



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Disclosure of Agency Legal Materials MORRISON EDITS

### 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

Just so that everyone knows I advance, I would add something along these lines at the start:

“Subject to the alternative provided in paragraph 7....”

And I would also add (separate thought), “and subject to the current exemptions in 5 USC 552(b)”

I also suggest we review the order in which these six items appear, perhaps in connection with any priority determinations.

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“final opinions” and “orders” include all such opinions and orders, regardless of agency designation as precedential/non-precedential, published/unpublished, or similar designation.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, and agency interpretations of applicable law.

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

**Commented [MAB1]:** I assume that settlement agreements for internal agency litigation are covered elsewhere.

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. Except for formal opinions that are properly classified or are provided directly to the President or others reporting directly to the President, such formal opinions should be indexed and the index made publicly available in electronic format.

**Commented [MAB2]:** This could be the subject of a separate recommendation, perhaps combined with some of item 5.

Alternative suggestion, modeled on other temporal restrictions under exemption 5:

~~4.~~ “Absent exceptional circumstances [good cause], all formal OLC opinions other than those that remain properly classified or were provided directly to the President or others reporting directly to the President, shall be made public no later than five years after they are issued.

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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 a subordinate who has been expressly authorized to issue opinions in the name of the chief legal officer~~their staffs~~) provide to officials within the agency with respect to the law applicable to that agency that

**Commented [MAB3]:** This limit may not be necessary, but if the opinion relates to the APA or FOIA or the Constitution, should this recommendation apply?

- 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 the action would, if taken, be 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.

**Commented [MAB4]:** Is this worth it to agencies? I do not object if they want to do more work.

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.
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 that 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. ~~If, aftern such an event,~~ an agency ~~can avoid its obligation to publish the full range of material if it~~ undertakes a notice-and-comment rulemaking ~~and to determine and explains~~ what records will not be published, ~~and sets forth;~~ what aggregate data, representative samples, or other information about the records, ~~if any,~~ will be published in lieu of the primary documents ~~and that such publication~~ will adequately inform the public about agency activities, ~~the agency need not comply with its primary obligation; 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.
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).

**Commented [MAB5]:** Is such a determination subject to judicial review? We should be clear either way.

**Commented [MAB6]:** President Trump issued many such orders that significantly affected the rights of federal employees. Why shouldn't all such orders be public? Those orders are very different from the kinds of orders etc covered by exemption (2) to FOIA.

**Commented [MAB7]:** Are there other comparable statutes?

**Commented [MAB8]:** Not (b)(2) - see above.

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).

**Commented [MAB9]:** Merits aside, what about other exemptions? I would oppose this for exemptions 2, 5 & 7 - I have no views about 8 & 9.

### 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.

**Commented [MAB10]:** Subject to 553? Also subject to judicial review or not?

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.

**Commented [MAB11]:** Not sure that this is the right word. Identifiable? Locatable?

**Commented [MAB12]:** What does this mean?

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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 alleges that such person made 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.

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

Commented [MAB13]: Should the strict time limits of FOIA for requests for specific records apply?

Commented [MAB14]: Is there going to have to be litigation over whether the records should have been affirmatively disclosed as a condition of getting to the head of the FOIA line? Is that small advantage worth it?