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.]

General feedback: Responding to filed FOIA requests in a timely way is our first priority. We fully comply with the proactive disclosure requirements of the FOIA, and we do not believe that creating these additional statutory requirements (and liability) is necessary or desirable. Our overall concern is that these recommendations will overwhelm agencies by requiring proactive production of a large volume of records, each necessitating meticulous review and significant time/effort to produce, while providing no additional resources (or time) to agencies that are already overburdened by responding to FOIA requests. Moreover, these recommendations create a judicial remedy for failure to proactively produce these voluminous records when court dockets are already rife with FOIA litigation. This would require a heavy infusion of resources to implement, and we wonder if the value additional disclosure might provide would be worth that sustained effort, when the public already has the right to request such records? We believe the recommendations should more balanced and also provide flexibilities and resources to agencies. See below for specific comments on the individual recommendations.

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"final opinions" and "orders" include all such opinions and orders, regardless of agency designation as precedential/non-precedential, published/unpublished, or similar designation.

No issues with this recommendation per se, but we have concerns about the affirmative disclosure provisions. See #2 below.

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.

This definition does not appear wholly consistent with the APA's definition of final agency action, as explicated in Bennett v Spear, *520 U.S. 154, 178 (1997). As written, this recommendation would include proactively disclosing dismissals of ULP charges of which we have thousands every year. (Despite the limitation on this provided in item 7, that might still have to be litigated. We note that the draft report discusses the distinction between final action under the FOIA and the APA, but it would seem odd to have those definitions differ, when technically, the FOIA is part of the APA.*

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.

Does this definition include EEO settlements, court settlements, union grievances? Even if this would be subject to certain redactions (Ex. 4 and 6), this is also a tremendous logistical problem.

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

This might cover our General Counsel, who is an independent officer, as well as her entire staff. Moreover, we are concerned that the scope is overbroad. This definition could possibly be read to include Internal Casehandling Guidance memos that contain Exemption 7A protected information.

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

What is a "defined corpus of opinions"? This provision could reasonably be interpreted as including Final Investigative Reports, since Regional Directors are acting on behalf of the GC. Additionally, it would take substantial resources to identify the records subject to this provision and then determine which of those could be released (and with what redactions).

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.

This could well include attorney-client protected information. The Board may or may not disagree with the GC's recommendation (in whole or part), and so to release the GC's recommendation does not shed light on the ultimate decision, which is what is actually important to understanding the workings of the government.

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.

Does this mean posting final determinations on any case (e.g., all dismissal letters)?

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.

We have no concerns with this recommendation.

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

It is unclear precisely how a court might determine what is "impracticable" due to "volume or cost." How much deference would an agency receive on that assessment? How would an agency balance volume vs. cost, especially considering its other budgetary priorities? Can agencies wholesale exclude certain types of records? Also, given that most agencies are already overwhelmed and underfunded re: FOIA operations, wouldn't that trigger the "impracticable" element frequently?

(B) of de minimis value to the public due to records' repetitive nature.

It would still be necessary to do a review to make this determination, which requires resources that very few agencies possess.

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.

This recommendation would be highly burdensome for the agency, as notice and comment rulemaking is a heavy lift, especially for small and medium size agencies. All agency records can be requested under the FOIA, so we believe there is limited utility to creating such extensive new proactive disclosure requirements.

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

   We have no objection to this recommendation.

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.

We don't have an objection to this in theory, but we simply don't have the resources to implement this. Additional funds, time and FTEs would be required.

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.

This would be incredibly burdensome to implement and maintain. This would implicate resources beyond FOIA and OCIO.

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.

What are the implications for non-compliance by an agency?

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.

We are concerned about many members of the public that do not have digital access. Although efforts are being made to bridge the digital divide, it is a long way from being resolved.

Incentives to Disclose Agency Legal 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.

This appears to be a significant drain on judicial resources. Plus, the heading is a bit misleading because this is not an "incentive"; it's a requirement, and moreover, will subject agency to paying attorneys' fees if the agency loses the FOIA litigation Further, this would require that the agency create new infrastructure to deal with this provision. FOIA processors do not have the background or training to determine whether records should be proactively disclosed. Additionally, what is the timeline for posting proactive disclosures after their creation that would result in a finding of non-compliance? This provision would also likely result in many appeals. How do we adjudicate the merits of such appeals?

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.

See comment for #15 above. Further, requesters already have the right to request any record from an agency. Adding the requirement for expedited processing and judicial review is unnecessary and will only add to agency backlogs.

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

We are concerned that the recommendation in the report pertaining to "Budgetary Considerations" (that Congress ensure agencies have adequate funding) was not included in this list. The Conference should also consider making recommendations providing agencies with further resources and flexibilities for responding to FOIA requests (e.g., adjusting the statutory timeframes).