Disclosure of Agency Legal Materials Consultative Group Meeting Minutes: Executive Summary and Tentative Recommendations
December 12, 2022

Introductory Matters

Staff from the Administrative Conference of the U.S. (ACUS) welcomed the consultative group and introduced the consultants.

The lead project consultant introduced the executive summary and recommendations, underscoring their tentative status and emphasizing proactive disclosure in line with the Freedom of Information Act (FOIA) requirements.

ACUS staff answered a question regarding the ACUS committee process for this project, with additional explanation by the consulting team.

Incorporation by Reference (IBR)

A consultative group member inquired about a statement in the report or recommendations regarding ACUS revisiting IBR. The consultative group member stated that the inaccessibility of IBR materials is the most impactful limitation upon the availability of agency legal materials.

The project consultants responded that they have given it a lot of thought, and that they have not taken a more forceful position not because they don't agree that IBR is a striking example of the *un*availability of agency legal materials, but because they don't know that it's their role as consultants to determine what ACUS's agenda is or should be. The project consultants stated they were tasked with developing recommendations to Congress with the context of the body of existing ACUS recommendations, and that they need to process feedback as a group. They confirmed IBR will be discussed in the full report, even though this project will likely not propose a recommendation on the subject. They stated IBR is an important, large, and

contentious issue that's not tractable within this particular project, and it's not clear what the solution is given the issues involved—that's part of the challenge. The consulting team will discuss it in the report, since it is the major departure from the principle that law directed at individuals should be readily available.

A consultative group member from an agency that uses IBR stated that they use very technical codes in accordance with the National Technology Transfer Act. They noted there would be significant intellectual property issues if this information had to become and remain public at no charge, and that years of additions and addenda would have to be available electronically, while those documents are already available at the National Archives (NARA) and at the agency. They noted that the American Society of Mechanical Engineers provides read-only access during rulemaking, and the documents are available free of charge if visiting the agency or NARA.

Another consultative group member said addressing IBR would involve a statutory change and is within the scope of this project; agencies incorporate particular provisions of standards by reference, not the whole code included in the standard. The consultative group member thought there are ways of dealing with this issue statutorily and that such statutory changes should be endorsed.

Tentative Recommendation 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.

A consultative group member stated this tentative recommendation needs greater clarity. Agencies don't necessarily publicize why a complaint is closed, or they don't have the resources to prosecute all violations, and the range of reasons why agencies choose not to enforce would make it difficult to implement.

Tentative Recommendation 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.

A consultative group member noted there would be some issues working through publicizing or revealing all settlements. Their agency was sued in the past regarding trade secrets, and it would be difficult to reveal settlements without revealing something confidential. The consultative group member would want more pressure testing around the government regarding settlements and privacy.

A consultative group member stated this recommendation should be broadened because the government enters settlement agreements to avoid litigation. An agency may threaten enforcement action, and then may settle in advance of litigation.

The discussion shifted to possible requirements that agencies post the resolution of enforcement actions, including settlements of administrative as opposed to judicial proceedings. A consultative group member stated their agency issued 22,000 citations in one year, which would be a lot to put on its website given current resources. They question the value of that as an affirmative obligation. They noted that it's possible researchers are looking carefully at this agency's citations, but that information is disclosed under FOIA. At their agency, almost every citation is settled in some way, so there's the same volume question there.

A project consultant asked about what's on that agency's website already, to which the consultative group member responded there are summaries of each citation, but they don't have the full text, which would be the burdensome issue.

Tentative Recommendation 4: Congress should clarify that FOIA's affirmative disclosure provision, 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 (OLC) and agency general counsel offices.

Two consultative group members underscored the importance of not including general counsel advice documents in the scope of disclosure. One of these members noted the importance of recognizing the current FOIA exemptions, and that simply mandating disclosure subject to existing exceptions does not solve the problem with the recommendation. The implication of the recommendation is that many opinions will be disclosed, even though almost all will be subject to withholding. Resolving questions regarding which opinions are outside of exemption 5 protections is difficult, and particularly in the abstract. And the consequences for agencies will be all the more pronounced given the recommendation of a private right of action to enforce the proactive disclosure provisions. (Tentative Recommendation 16).

A consultative group member noted agencies sometimes provide legal advice to other federal agencies, and expressed concern that the recommendation would include such legal opinions. ACUS and the consultants must be careful about how something like this would be drafted so that a larger percentage would be disclosed.

Another consultative group member expressed concerns, noting the implications and resources.

A project consultant noted that some agencies must disclose internal opinions by statute, e.g., the IRS, and that these opinions look a lot like OLC memos because they involve situations in which agency counsel has the power to control or constrain agency discretion. The project consultant noted there are bodies of opinions that serve as precedent. He stated such undisclosed bodies of precedent are a paradigm case illustrating the concern about a body of secret law, imposing constraints on an agency based on higher authority about which the public may have no knowledge. The project consultant stated that if such bodies of opinions are subject to reactive disclosure (because the attorney client and deliberative process privileges do also apply), and there are DC Circuit precedents to that effect, such bodies of opinions should arguably be subject to affirmative disclosure. He asked if there is an issue with disclosure in that context. He emphasized the focus on moving agency legal materials currently subject only to reactive disclosure to the affirmative disclosure regime, and that the project consultants are not recommending changing the statute regarding the exemptions. He noted some of these bodies of precedent are not protected by the privileges, and provided an example from a particular agency.

The project consultant also discussed a controversy that recently gave rise to a D.C. Circuit opinion. In that situation the agency had concluded that as a result of a statutory change certain condition of its permits to regulated entities could no longer be enforced, and accordingly refused public request to enforce it, citing the legal opinion. However, the agency refused to disclose it citing the attorney-client privilege.

A consultative group member noted those are good scenarios to be thinking about. The member noted that it's good to have disclosure of legal opinions, but the case law is not that clear nor are the actions of OLC/OGCs easy to categorize, and that there are arguable zones of ambiguity. He stated if someone were drafting a statute to say which of these should be disclosed, either reactively or proactively, they would have to be very careful because a lot of opinions that get expressed by OGCs could arguably fall on one side or the other of the line and it would make a huge difference to how agencies depending on how that line is defined. If it were ambiguous, it wouldn't be helpful to anyone. He noted it would take more than just saying "include legal opinions, but we exclude those that are exempt from disclosure under FOIA (b)(5)" because it will create a lot of uncertainty to just say agency opinions should be disclosed. He continued that it makes sense to draw a distinction between those that are agency actions or advising a client as to what they can do or the risk level of certain actions. He stated that the exemption is the crucial question here, and that there's no way to raise this without delimiting some of the parameters.

A consultative group member seconded what those concerns, and noted the project consultant's response was helpful. The member noted it seems the recommendation is looking for things that serve as precedents for future actions, and that language from another recommendation could be pulled up into this recommendation to provide greater clarity.

A consultative group member stated they were not sure what this tentative recommendation means if directed to the public or other entities. Their agency shares opinions with other agencies on a regular basis.

Tentative 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.

A consultative group member requested clarification, and expressed concern, regarding duplicability and commercial information in those agreements, to which a project consultant responded they were considering arrangements between governmental agencies rather than private entities, and that the latter are probably not on the radar screen. He emphasized the project is not recommending changes to the FOIA exemptions, and that exemption 4 may or may not cover the information of concern to the consultative group member; it's not entirely clear.

A consultative group member expressed concern as to retroactive application of this requirement. A project consultant responded that the consultants anticipated that in general their proposed changes would be prospective, applying to agency legal materials produced after the enactment of any new requirements. He noted that there might be a currently operative MOU or MOA that would fit into the category, yet was entered into a long time ago. This would raise the problem of being required to go through a process to allow a business to comment upon whether its arguably confidential business information should be disclosed as a part of the mandatory affirmative disclosure of the relevant MOU. The consultative group member expressed concern that requiring such an effort would be unwarranted.

A consultative group member said it's hard to know how general "general" is in FOIA (a)(1)(D) as an agency counsel. He expressed hope that the project would shine light on how to draw that line on an interpretive or legislative rule versus a statement of general applicability.

A project consultant replied that if it were merely a statement of policy, a court could invalidate it as a legislative rule.

A consultative group member spoke about the concept of fair notice, and noted that if a reviewing court or agency thinks there was not fair notice, the agency would not be able to enforce the policy.

Another consultative group member noted that he thought the difference between (a)(1) general statements and (a)(2) was the source of the interpretation. He noted that some things are done at the commission or agency level, but most things are done by staff, and thus staff corresponds to (a)(2), and the commission or agency, (a)(1).

The distinction between a general or specific client was also noted.

Tentative Recommendation 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.

A consultative group member noted the paperwork burden on the agency involved with notice and comment rulemaking. They also noted the number of person hours that go into rulemaking is underestimated, and they're not sure it's necessary here. They liked the idea of deferring to agencies for coming up with a plan to affirmatively disclose.

A consultative group member stated this tentative recommendation is one way to give agencies less freedom to opt out of compliance, and recommended the recommendation suggest documents that the agency has not been disclosing so far, and putting a start time or date on it rather than applying it retroactively. They noted balancing the burden on the agency and opting out.

A consultative group member stated they liked the idea of incorporating this into a records management plan, as noted by a prior consultative group member as well. They were not sure what's meant by "repetitive nature." They would encourage broadening that in some way, perhaps just striking "repetitive nature" language and retaining *de minimis* value for that reason. They noted something that's not in the recommendations, § 552(a)(1)(d) requires *Federal Register* publication for statements of general policy and applicability, struggled with knowing exactly what those things are, requirement requiring publication/reliance interpretation. They asked if the consultants were thinking about eliminating that requirement, given the robust affirmative disclosure or electronic disclosure that this project contemplates, or as a defense that the document is available on the agency's website.

A consultative group member noted the prior comments provided the opposite position to their own comments and perspective. Requiring an agency to go through rulemaking would make this member feel a lot better, because then the public can comment on what they're interested in rather than the agency deciding what is interesting to the public.

Tentative Recommendation 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.

A consultative group member had questions and comments regarding the E-Government Act. They asked if there is duplication between its requirements and *Federal Register* publication requirements, and about eCFR issues. They noted that in 2002, putting the onus on agencies to post things on their own websites without a centralized *Federal Register* website made sense, whereas now the *Federal Register* website is great and easy to search. They thought that agency websites seem to serve to reduce *Federal Register* publication.

A project consultant responded regarding FOIA (a)(1) material versus (a)(2) material. The project consultant thought that the difference evaporated with electronic reading rooms and material available online, noting that there is overlap there. The project consultant stated everyone agrees that the *Federal Register* and eCFR are excellent. They noted the approach has been that the *Federal Register* serves a distinct and important function. Though it's duplicative, it's valuable to have material on agency websites because that's a place people look for it, especially more non-lawyers. Therefore, an agency can cluster related material, and can have everything together in one place.

A consultative group member responded that the agency could serve the same function by linking to the *Federal Register* website instead, and therefore identify that material where it exists.

Another consultative group member stated that it's a really good idea for each agency to have a page with regulations and interpretive material together; their agency has that for some things and not others, but it would be very burdensome for all.

Tentative Recommendation 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.

A consultative group member stated the potential plans under this tentative recommendation would be very prescriptive in nature. Projecting how to comply and the personnel burden would perhaps require a lot of work at the beginning, while updating it periodically might take less work. They would be interested in what regulatory staff say they would need to respond.

A consultative group member shared concerns with this tentative recommendation providing standards and metrics to ensure disclosure. They stated it would probably be burdensome for agencies, and very constraining.

Tentative Recommendation 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.

They asked if the consultants were thinking about how the *Federal Register* is funded, and noted that having agencies pay by column is a significant disincentive. They were interested in returning to the *Federal Register* as a centralized repository, and opposed to a prior suggestion regarding eliminating § 552 requirements from another consultative group member.

In response to a question about funding, a project consultant replied, confirming they did consider many things in that regard. They stated they're not sure that ACUS is the right body to make recommendations regarding the budget, because there are many different costs and issues there. The consultants do not have access to data or studies regarding behavioral effects of changing the funding structure. The aspiration of not printing the *Federal Register* is a potential cost savings for agencies, but the consultants don't have those tools in the toolkit.

A consultative group member stated that GPO establishes pay per page, which is not necessarily calculated by NARA. Regarding publishing online only, they noted this has been tried several times. The consultative group member stated that law librarians raise concerns about this issue, and that GPO stated that publishing online only may not necessarily decrease costs for agencies. They noted there is a GPO circular letter that's available to everyone on this issue.

Concluding Remarks

ACUS staff and the project consultants thanked the consultative group for their participation and encouraged consultative group members to submit written comments.