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Administrative Conference of the United States
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Comments on Disclosure of Agency Legal Materials

The Project On Government Oversight (POGO) appreciates the opportunity to submit the following comment regarding the Administrative Conference of the United States' review of federal agency legal material transparency.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

We recommend the Administrative Conference consider four issues in its review of federal agency material transparency: Office of Legal Counsel transparency, federal charging decision transparency, standards incorporated by reference, and award documents.

Office of Legal Counsel Transparency

The Office of Legal Counsel (OLC) at the Department of Justice has an outsized impact on legal interpretation across the executive branch. Its interpretations are considered binding not only within the Justice Department but on any federal agency. As such, we recommend that the Administrative Conference's review of public access to agency legal materials address the importance of OLC transparency.[1]

As OLC itself notes, the fact that its opinions are considered binding within the executive branch, combined with the nature of the issues it analyzes, which often cannot come before the courts, means its "advice may effectively be the final word on the controlling law."[2] Despite this, OLC claims its written products are exempt from the Freedom of Information Act. While OLC

[1] POGO has regularly argued for OLC transparency. See David Janovsky, "Closely Held Contrivances," Project On Government Oversight, September 22, 2021, https://www.pogo.org/analysis/2021/09/closely-held-contrivances; Melissa Wasser, "Fact Sheet: Office of Legal Counsel Transparency," Project On Government Oversight, November 3, 2021, https://www.pogo.org/resource/2021/11/fact-sheet-office-of-legal-counsel-transparency.
[2] David Barron, acting assistant attorney general, to attorneys of the Office of Legal Counsel, about "Best Practices for OLC Legal Advice and Written Opinions," July 16, 2010, 1, https://www.justice.gov/olc/page/file/1511836/download.

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claims to have a presumption toward publication, in practice its decision to release memos is highly selective.[3]

Because of the weight OLC memos carry, they need to be as public as possible in order to guarantee thorough scrutiny. Without transparency, Congress loses its ability to conduct robust congressional oversight, engage in public debate, and make important legislative corrections when necessary. The public loses its ability to scrutinize and question the legal analysis of these opinions in real time. This powerful office is thus permitted to operate under a veil of secrecy, with enormous and harmful consequences to our constitutional system.

OLC opinions, enabled in part by their secrecy, have chipped away at the separation of powers and permitted presidential actions that subsequent review has shown to be clearly unconstitutional. While a full recounting is outside the scope of this comment, the office's most notorious failings demonstrate the point. OLC advised the CIA that torture was permissible, despite federal and international law that explicitly prohibited it.[4] The office approved warrantless surveillance of Americans' communications despite the clear requirements of the Fourth Amendment.[5] It also signed off on a drone strike against a U.S. citizen abroad, despite serious constitutional concerns stemming from due process rights.[6] And OLC's opinions on the scope of congressional oversight have diminished Congress's ability to oversee the executive branch.[7] Those opinions remain a source of delay for the House Select Committee to Investigate the January 6th Attack on the United States Capitol.[8]

Disclosure of the opinions ensures a proper check on the executive branch's authority, forces debate on Congress's prerogatives, and promotes greater transparency and public confidence in our government. Public criticism and judicial review (when OLC positions do wind up in court) have proven to be effective checks on the office's abuses in some instances, but transparency is a prerequisite to both.[9] Legal experts, including a number of former OLC attorneys, have for

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[3] Organizations, including POGO, have routinely needed to sue OLC to obtain even the titles of unremarkable memos, such as advice on appointments to the Kennedy Center board.

[4] See, for example, Jay S. Bybee, assistant attorney general, to Alberto R. Gonzales, counsel to the president, about "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002, https://www.justice.gov/olc/file/886061/download.

[5] John Yoo, deputy assistant attorney general, to John Ashcroft, attorney general, about "Constitutionality of Expanded Electronic Surveillance Techniques Against Terrorists," November 2, 2001, https://www.justice.gov/olc/page/file/1154156/download.

[6] David J. Barron, acting assistant attorney general, to Eric Holder, attorney general, about "Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi," July 16, 2010, https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf.

[7] For example, see memorandum from Steven Engel, assistant attorney general, to Pat Cipollone, White House counsel, about "Congressional Oversight of the White House," January 8, 2021, https://www.justice.gov/olc/file/1355831/download.

[8] See, for example, Harper Neidig, "Judge asks DOJ to explain whether Meadows is immune from House Jan. 6 subpoena," *The Hill*, June 23, 2022, https://thehill.com/regulation/court-battles/3535169-judge-asks-doj-to-explain-whether-meadows-is-immune-from-house-jan-6-subpoena/.

[9] Sonia Mittal, "OLC's Day in Court: Judicial Deference to the Office of Legal Counsel," *Harvard Law and Policy Review* 9, (2015): 212-240, https://harvardlpr.com/wp-content/uploads/sites/20/2015/04/9-1_Mittal.pdf.

decades called for greater transparency for OLC memos.[10] However, these calls have yet to change the status quo. The topic is ripe for consideration by the Administrative Conference.

Given OLC's significant role in creating the legal landscape across the executive branch, we suggest that the Administrative Conference set out recommendations to ensure transparency for OLC's legal interpretations, including:

- Directing OLC to publish its legal memos online. A requirement could be modeled on language that has been included in the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies.[11] Such an approach would require OLC to publish its final opinions unless the attorney general determines there is a specific statutory, national security, foreign policy, or personal privacy justification for withholding.
- Requiring timely disclosure. OLC often evaluates proposed executive actions shortly before their implementation. The public should have access to the underlying legal analysis as soon as possible, and within 30 days of its completion.
- In cases where the attorney general determines that there is an exemption from disclosure, requiring the attorney general to provide a written explanation of the decision.
- Require OLC to publicly report withdrawal of opinions. The public needs to know when the office has revised its prior opinions. Requiring public reporting on opinion withdrawals forces additional public scrutiny and transparency into the office's decision-making process and ensures a shared understanding of OLC's most current interpretation of the law.

Charging Decision Transparency

Federal prosecutors have significant discretion over charging decisions. This can allow for appropriate tailoring to ensure that prosecutions advance the goal of justice. However, in the long run, these decisions amount to policy decisions that the public should have insight into.

At worst, discretion combined with a lack of transparency can also allow well-connected defendants to gain favor. White-collar crime cases offer the starkest example. Corporations charged with criminal wrongdoing have endlessly deep pockets, enabling them to hire lawyers — often former government prosecutors who can pull strings within the Justice Department to get charges reduced or dropped.

In 2019, POGO highlighted a case involving Monsanto, which was able to head off felony charges for illegally spraying a banned and highly toxic pesticide and nerve agent in

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[10] See Harold Koh, "Protecting the Office of Legal Counsel from Itself," *Cardozo Law Review* 15, (1993); Walter E. Dellinger et al, "Principles to Guide the Office of Legal Counsel," December 21, 2004, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2927&context=faculty_scholarship; and American Constitution Society, "Statement: The Office of Legal Counsel and the Rule of Law, October 2020, https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf.

[11] See Committee on Appropriations, *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2022,* H.R. Rep. No. 117-97, 60-61 (2022), https://www.congress.gov/117/crpt/hrpt97/CRPT-117hrpt97.pdf.

Hawaii.[12] The company hired a prominent law firm to appeal directly to political officials at the Justice Department, who overruled that decision. As a result, the company faced only misdemeanor charges.

Justice Department charging declinations can reflect the priorities of the department and potential improper influence. Because of this, we recommend that the Administrative Conference consider data on these decisions in its review of agency legal transparency. Specifically, we recommend the Administrative Conference consider two recommendations:

- The Justice Department should publish data annually on the frequency of instances in which Main Justice has reviewed prosecutorial decisions at the request of defense counsel and the outcome of those reviews. The department should consult with experts, including a diverse group of stakeholders, in crafting this transparency policy, with consideration to mitigating undue external interference in department decision-making.
- The Justice Department should return to its previous practice of providing information on the more specific reasons for declining prosecution of cases in response to Freedom of Information Act requests.

Standards Incorporated by Reference

Under federal law, agencies are allowed to incorporate private standards developed by industry associations and other parties into federal regulations by simply referencing those standards. According to a 2016 American Bar Association report, agencies have used the practice of incorporation by reference thousands of times to incorporate standards on everything from children's toys to offshore drilling.[13]

While the practice may save agencies time and effort not spent developing wholly new standards, there are serious concerns about the accessibility and transparency of standards that regulated parties have a legal obligation to meet. Incorporation by reference currently allows the private parties that created the standards to continue to control the documents, even after complying with them becomes a legal obligation. This means that private parties can limit access to these documents, track users by requiring login accounts to access read-only copies, charge for hard copies or savable digital copies, and even claim copyright protections on these documents. Such hurdles to access federally adopted standards should be unacceptable.

During an investigation into offshore drilling standards in 2018, POGO staff encountered copyrighted standards written by the American Petroleum Institute that could be viewed on an

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[12] Nick Schwellenbach, "How Corporate Lawbreakers Get a Leg Up at the Justice Department," Project On Government Oversight, October 23, 2019, https://www.pogo.org/investigation/2019/10/how-corporate-lawbreakers-get-a-leg-up-at-the-justice-department.

[13] "Section of Administrative Law and Regulatory Practice, Report to the House of Delegates on Resolution 107A," American Bar Association, 2016, https://www.americanbar.org/content/dam/aba/administrative/administrative_law/107a%20incorporation%20by%20reference.authcheckdam.pdf.

institute website (without search or print capacity), but for which the association was charging almost $450 for copies that could be printed.[14]

A fundamental principle of a democratic system is that the public must have ready access to laws, regulations, and legal standards. Secret rules, or rules that are challenging to access, create an unfair system that results in unequal application of the laws and standards. The federal government's goal for regulations should be full compliance. To achieve such a goal, agencies should strive to make all regulations and standards as easy to access as possible. Allowing private parties to offer varying degrees of access with changing requirements for users adds more levels of difficulty to an already complicated system.

We urge the Administrative Conference to recommend agencies publish all regulatory language and standards either in the Code of Federal Regulations or on agency-controlled resource pages. Posting copies of standards incorporated by reference on agency pages would ensure consistent access standards are applied to all materials and would allow impartial agency personnel to address any access issues.

Award Documents

Each year, the federal government spends hundreds of billions of dollars in contracts, grants, loans, and other awards. But taxpayers don't always know how their money is being spent because federal agencies fail to regularly disclose contracts, grant agreements, and other award documents that describe the scope of work being funded. While there has been some progress on transparency around spending data through USASpending.gov, agencies still frequently rely on requests under the Freedom of Information Act to access copies of contracts and other records. This approach entangles the public in an arduous process that can take significant time and effort before any award records can be accessed.

In a 1981 FOIA Update from the Department of Justice, the agency noted "government contracts are 'public contracts,' and the taxpayers have a right to know — with very few exceptions — what the government has agreed to buy and at what prices."[15] While these right-to-know points were made about contracts, the same principles also apply to grants, loans, and other federal awards. And yet, more than 40 years after this finding, federal agencies continue to balk at regular disclosure of contracts and other award documents. In May 2010, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued an advance notice of proposed rulemaking to explore establishing standards for posting federal contracts online.[16]

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[14] David S. Hilzenrath, "Interior Dept Gives Rules Drafted by Oil Industry Force of Law," Project On Government Oversight, August 7, 2018, https://www.pogo.org/investigation/2018/08/interior-dept-gives-rules-drafted-by-oil-industry-force-of-law.
[15] Department of Justice, Office of Information Policy, FOIA Counselor, "FOIA Update Vol. II, No.2: Disclosure of Prices," January 1, 1981, https://www.justice.gov/oip/blog/foia-update-disclosure-prices.
[16] "Advanced Notice of Proposed Rulemaking: Federal Acquisition Regulation: FAR Case 2009—004, Enhancing Contract Transparency," 75 Fed. Reg. 26916-26917, May 13, 2010, https://www.govinfo.gov/content/pkg/FR-2010-05-13/pdf/2010-11381.pdf.

However, after contractors and agencies claimed the disclosure would cost too much and might reveal confidential business information, the proposal was shelved.[17]

But concerns about costs and protected information are largely false narratives used as excuses to avoid the accountability that would accompany disclosure of these records. A 2017 POGO review of state websites found that 33 states regularly post award documents for some or most of their government-awarded contracts.[18] None of those states raised cost concerns associated with posting the records, and many had been maintaining those records for years without issue. States also cited posting the records as a means to satisfy legal obligations, since the contracts were subject to public disclosure. That aligns with the 1981 Department of Justice finding that the majority of contract documents should be disclosable.

More recently, the Freedom of Information Act Advisory Committee recognized the importance of disclosing these legal records. In the final report for its 2016-2018 term, the committee included a recommendation that agencies proactively disclose all contracts, task orders, and grants valued at more than $100 million, and the top ten largest awards in those areas if they were for smaller amounts.[19] The committee noted that "the public has an interest in and right to know how the government is spending its money."

We suggest the Administrative Conference include a recommendation that agencies proactively disclose copies of award documents including contracts, grant agreements, loans, and other documents for all awards over $1 million. Assistance to individuals and households would be excluded from the disclosure requirement to protect personal privacy. If implementation concerns necessitate the disclosure requirement be phased in over time, a larger dollar threshold can be used at the start and be lowered each year until the majority of large awards are disclosed.

Conclusion

We believe the materials detailed above merit inclusion in the Administrative Conference's review of legal materials that agencies should disclose. The materials will help inform the public about federal agencies' activities and enable easier engagement between agencies and stakeholders. Thank you for your consideration of these matters.

If you would like any further information, please contact Sean Moulton (sean.moulton@pogo.org) or David Janovsky (david.janovsky@pogo.org).

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[17] "Advanced Notice of Proposed Rulemaking: Withdrawal, Federal Acquisition Regulation; Enhancing Contract Transparency," 76 Fed. Reg. 7522-7526, February 19, 2011, https://www.govinfo.gov/content/pkg/FR-2011-02-10/pdf/2011-2900.pdf.

[18] Sean Moulton, "Contract Transparency: What Uncle Sam Can Learn from the States," Project On Government Oversight, March 15, 2017, https://www.pogo.org/analysis/2017/03/contract-transparency-what-uncle-sam-can-learn-from-states.

[19] Freedom of Information Act Advisory Committee, "Report to the Archivist of the United States, Freedom of Information Act Federal Advisory Committee, Final Report and Recommendations, 2016-2018 Committee Term," April 17, 2018, https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf.