

To: Committee on Rulemaking
From: Bernard Bell (Public Member) and Michael Herz (Senior Fellow)
Re: October 28, 2022 Draft of Regulatory Enforcement Manuals Recommendation
Date: October 31, 2022

As Michael Herz mentioned at the last Committee meeting, the two of us (along with Cary Coglienesse, Margaret Kwoka, and Orly Lobel) are working on an ACUS project on the Availability of Agency Legal Materials. There is some overlap between our project and the present draft recommendation. The five of us have not finalized recommendations or our report, and we thought it would be both premature and outside our lane to weigh in as a group on the Enforcement Manuals recommendation.

The two of us, speaking only for ourselves, would offer the following two suggestions, however.

Lines 15-16: Change the last clause of this sentence to: “. . . and to ensure that agency enforcement is internally consistent, fair, efficient, effective, and legally sound.”

Explanation: To say, as the current draft does, that having policies ensures that personnel act consistently with policies is slightly tautological. Presumably, personnel will comply with the policies, and such compliance is not an end in itself. The rewording makes clear that the benefit flow from the substance of the policies themselves. In addition, it makes explicit an important benefit that was previously unmentioned or only implicit: consistency *among* enforcement personnel.

Lines 20-33: Revise as follows:

The Freedom of Information Act (FOIA) requires agencies to place in their electronic reading rooms “administrative staff manuals and instructions to staff that affect a member of the public.”¹ To be sure, several courts of appeals have held that this provision simply does not apply to some portions of enforcement manuals. But whatever the exact scope of this provision, the policies underlying it are relevant. Like other internal manuals, enforcement manuals can also be a useful, practical resource for the public. By providing public access to enforcement manuals, agencies can improve awareness of and compliance with relevant policies and promote transparency more generally. ~~In disclosing enforcement manuals, h~~However, agencies must be careful not to reveal information that disclosure of some portions of enforcement manuals might also enable persons to circumvent the law by revealing forms of noncompliance that will not lead to investigation or enforcement. Avoiding such disclosures is both legitimate and important. Accordingly, FOIA ~~The Freedom of Information Act (FOIA) recognizes agencies’ right to do so by~~ exempting from disclosure records or information that “would disclose techniques and procedures for law enforcement investigations or prosecutions” or “guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”² FOIA also allows agencies to withhold records that fall within the attorney work-product privilege. This exemption may encompass information provided to enforcement personnel about litigation strategies and legal theories, the disclosure of which would adversely affect the integrity of adversarial proceedings.³ Agencies cannot rely on these exemptions reflexively, however. All or part of a manual can be withheld only if “the agency reasonably foresees that disclosure would harm an interest

¹ 5 U.S.C. § 552(a)(2)(C).

² 5 U.S.C. § 552(b)(7)(E).

³ See *ACLU of N. Cal. v. U.S. DOJ*, 880 F.3d 473, 486–88 (9th Cir. 2018); *Nat’l Ass’n of Crim. Def. Lawyers v. U.S. DOJ Exec. Off. for U.S. Attys.*, 844 F.3d 246, 254 (D.C. Cir. 2016).

protected by” an exemption; absent such foreseeable harm, the manual should or must be disclosed.⁴~~However, agencies may proactively choose to disclose exempted materials, so long as any legally protected information is removed.~~

Explanation: The suggested revisions do not fundamentally change the meaning of the paragraph. They fully recognize the potential harm of disclosure of enforcement manuals. But they place a little more stress on the presumption of openness and flesh out the actual FOIA provisions a bit (including most particularly the foreseeable harm standard).

⁴ 5 U.S.C. §552(a)(8)(A).