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### Enhancing Public Access to Agency Law

Cary Coglianese

*University of Pennsylvania Carey Law School, cary\_coglianese@law.upenn.edu*

Bernard W. Bell

*Rutgers Law School, bbell@law.rutgers.edu*

Michael Herz

*Yeshiva University, herz@yu.edu*

Margaret Kwoka

*The Ohio State University Moritz College of Law, kwoka.1@osu.edu*

Orly Lobel

*University of San Diego School of Law, lobel@sandiego.edu*

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# ENHANCING PUBLIC ACCESS TO AGENCY LAW

BERNARD BELL\*  
CARY COGLIANESE\*\*  
MICHAEL HERZ\*\*\*  
MARGARET KWOKA\*\*\*\*  
ORLY LOBEL\*\*\*\*\*

“Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible.”

- Administrative Conference of the United States (1973)<sup>†</sup>

It is axiomatic that in a just society the law must be broadly accessible.<sup>1</sup> This principle obviously applies to legislatures and courts, but it applies no less to administrative agencies which regularly make, interpret, and apply laws. Agencies should make the legal materials they produce open and accessible to the public. These materials include documents that establish, interpret, apply, explain, or address the legal rights and obligations of members of the public, along with any materials articulating legal constraints imposed upon agencies themselves. These are among the most important types of agency documents for the public to be able to access, precisely because they constitute the actual or working law that agencies administer.

The Freedom of Information Act (“FOIA”)<sup>2</sup> does require that agencies affirmatively disclose online some legal materials—such as agency rules.<sup>3</sup> Other legal materials, though, must be disclosed only upon request.<sup>4</sup> For decades, the Administrative Conference of the United States (“ACUS”) has made recommendations to agencies about how to ensure better access to all their legal materials so that the public can understand what agency-developed law means and how it is applied.<sup>5</sup> But these recommendations have not been uniformly adopted across the federal government.

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\* Professor of Law and Herbert Hanooh Scholar, Rutgers Law School.

\*\* Edward B. Shils Professor of Law, Professor of Political Science, and Director of the Penn Program on Regulation, University of Pennsylvania Carey Law School.

\*\*\* Arthur Kaplan Professor of Law, Benjamin N. Cardozo School of Law of Yeshiva University.

\*\*\*\* Lawrence Herman Professor in Law, Ohio State University Moritz College of Law.

\*\*\*\*\* Warren Distinguished Professor of Law, University of San Diego School of Law.

<sup>†</sup> Admin. Conf. of the U.S., Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19782, 19788 (July 23, 1973).

<sup>1</sup> LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (“[T]here can be no rational ground for asserting that a [person] can have a moral obligation to obey a legal rule that . . . is kept secret . . .”).

<sup>2</sup> 5 U.S.C. § 552.

<sup>3</sup> See *id.* § 552(a)(2).

<sup>4</sup> See *id.* §§ 552(a)(3)(A)–(E).

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 2023-1, *Proactive Disclosure of Agency Legal Materials*, 88 Fed. Reg. 42678 (July 3, 2023).

As a result, ACUS asked us to undertake a study to inform recommendations that the Conference could make to Congress about legislative reforms that would increase online accessibility of agency legal materials.<sup>6</sup> Usually ACUS just directs its recommendations to administrative agencies. But recognizing that statutory reforms could better support implementation of its past recommendations across the federal government, ACUS's Council approved a project aimed at providing guidance to Congress on how to reform existing statutes to promote public accessibility to agency legal materials.

After a year-long study, we submitted a more than 150-page report to ACUS that recommended seventeen legislative changes to improve federal agencies' affirmative disclosure of their legal materials.<sup>7</sup> Although our report was detailed and comprehensive, its conclusions and recommendations can be encapsulated in one simple, succinct principle: *All legal materials that agencies are obligated to disclose upon request by a member of the public should be affirmatively made accessible to the public on agency websites.*

We came to this conclusion—and our seventeen specific recommendations for legislative reform—after an extensive process of deliberation, legal research, engagement with agency officials, and solicitation of public comments. We conducted a series of meetings with a consultative group made up of more than sixty current ACUS members from within and outside of government, including representatives from fifty federal agencies. We also received and digested more than thirty written comments from ACUS members, consultative group members, and members of the public. We learned a great deal from this considerable input.

Many agencies currently disclose online different kinds of legal materials. Some even have impressive and comprehensive disclosure regimes in place. But overall, federal agencies can and should be doing much better. The bottom line is that, for standard reasons of good government, agencies should affirmatively disclose *all* their legal materials by posting them in readily findable locations on their websites. It is time for Congress to require federal agencies to take affirmative steps to disclose all legal materials that they are already obligated to disclose upon request—and to disclose them in an effective, user-friendly, and readily accessible manner.

Our recommendations can be divided into three parts: the first set of recommendations addresses what legal materials agencies should be required to disclose on an affirmative basis; the second set addresses how agencies should disclose these items; and the third set addresses ways of strengthening agencies'

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<sup>6</sup> *Request for Proposals—February 3, 2022, Disclosure of Agency Legal Materials*, ADMIN. CONF. OF THE U.S. (Feb. 3, 2022), <https://www.acus.gov/sites/default/files/documents/Disclosure%20RFP%20FINAL%20POSTED%20%203%202022.pdf> [<https://perma.cc/RCN4-4A7B>].

<sup>7</sup> See BERNARD W. BELL, CARY COGLIANESE, MICHAEL HERZ, MARGARET B. KWOKA & ORLY LOBEL, *DISCLOSURE OF AGENCY LEGAL MATERIALS* (June 2, 2023). On the basis of our report, an ACUS committee generated its own set of eight recommendations, which ultimately led to ACUS's adopting a set of recommendations to Congress at its Plenary session in June 2023. Admin. Conf. of the U.S., Recommendation 2023-1, *supra* note 5. The present essay is drawn from the executive summary of our report to ACUS. A revised version of the full body of the report is forthcoming as Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Improving the Affirmative Disclosure of Agency Legal Materials*, MICH. J. ENV'T & ADMIN. L. (forthcoming 2024).

incentives for disclosure of all their legal materials and providing for thorough and accurate internal systems of records management and affirmative disclosure of this important legal information.<sup>8</sup>

The first set of recommendations identifies places where Congress should more precisely define or expand the materials subject to affirmative disclosure. Six of our recommendations call for amending FOIA to require affirmative disclosure of final opinions and orders, written enforcement decisions, settlement agreements that resolve actual or pending court litigation, Department of Justice Office of Legal Counsel opinions, certain opinions of agencies' chief legal officers, and inter-agency memoranda of understanding.<sup>9</sup> Three other recommendations call for amending parts of the E-Government Act,<sup>10</sup> the Federal Register Act,<sup>11</sup> and the Presidential Records Act<sup>12</sup> in ways that would promote disclosure of various other legal materials. We make clear that certain forms of presidential directives already either qualify as agency legal materials by statute or are subject to disclosure in response to public requests submitted to the agencies targeted by the directives.<sup>13</sup> We recommend that these existing obligations be maintained but updated to place less weight on the label given to the directive and more on its substance and function.<sup>14</sup> The Federal Register Act, for example, already requires that certain presidential directives labeled as "proclamations" or "executive orders" be published in the *Federal Register*.<sup>15</sup> But many directives labeled as "presidential memoranda" are functionally indistinguishable from proclamations and orders, and they should be affirmatively disclosed as well.

We recognize that legislation clarifying that agencies must affirmatively disclose more categories of documents than they already do will in some instances impose substantial burdens in terms of processing voluminous sets of legal materials and then posting them online. This concern is especially salient,

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<sup>8</sup> By and large, ACUS formally adopted our recommendations in June 2023. Admin. Conf. of the U.S., Recommendation 2023-1, *supra* note 5; *see also* Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Affirmatively Disclosing Agency Legal Materials*, THE REG. REV. (Sept. 11, 2023), <https://www.theregreview.org/2023/09/11/bell-coglianese-herz-kwoka-lobel-affirmatively-disclosing-agency-legal-materials/> [<https://perma.cc/72GB-CLUC>]. Subsequently, ACUS convened a working group—comprising, among other ACUS members, some of the authors of this essay—which resulted in a concrete legislative package that was transmitted to Congress in December 2023. Letter from Andrew Fois, Chairman, Admin. Conf. of the U.S., to Committee Chairs and Ranking Members, U.S. Cong. (Dec. 11, 2023), [https://www.acus.gov/sites/default/files/documents/23-12-11\\_Office%20of%20the%20Chair%20Transmittal%20to%20Congress.pdf](https://www.acus.gov/sites/default/files/documents/23-12-11_Office%20of%20the%20Chair%20Transmittal%20to%20Congress.pdf) [<https://perma.cc/9MUQ-FSKG>].

<sup>9</sup> BELL ET AL., *supra* note 7, at ii.

<sup>10</sup> Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified in scattered sections of 44 U.S.C., including § 101 (note), § 3501 (note), and §§ 3601–3606).

<sup>11</sup> 44 U.S.C. §§ 1501–11.

<sup>12</sup> 44 U.S.C. §§ 2201–09.

<sup>13</sup> BELL ET AL., *supra* note 7, at 38–40, 112–16, 140–42.

<sup>14</sup> *Id.* at 112–14, 141. To anyone who might wonder why recommendations about presidential documents are contained in a project on agency legal materials, we would simply note that the Executive Office of the President is defined as an "agency" in the Freedom of Information Act. *See* 5 U.S.C. § 551(f)(1). Those directives are also transmitted to agencies, whereby they can already be required of agencies to disclose to the public upon request.

<sup>15</sup> *See* 44 U.S.C. § 1505.

for example, with respect to final adjudicatory opinions and orders and the results of enforcement actions. For some agencies, making these materials available online may necessitate an upfront investment in improved technologies or additional contractor or personnel time.<sup>16</sup> Still, bodies of adjudicatory opinions have proven valuable to the public.

To balance the interests and burdens at stake, we recommend a novel statutory provision that would authorize agencies to exempt themselves, by notice-and-comment rulemaking, from an affirmative obligation to disclose any of these materials under limited conditions.<sup>17</sup> Specifically, under our recommendation, agencies could exempt certain types of documents from affirmative disclosure when such disclosure would be both impracticable to the agency and of de minimis value to the public due to records' repetitive nature.<sup>18</sup> That said, an agency should still be expected to set forth in any such exempting rule a plan for some kind of alternative disclosure of aggregate data, representative samples, or other information needed to inform the public about the legal materials being exempted.<sup>19</sup> The notice-and-comment rulemaking process is important to effectuate such a self-exemption because it will allow members of the public to participate in a decision that will affect their access to basic components of agency law.<sup>20</sup>

In terms of *how* agencies should disclose their legal materials—the second major focus of our proposals—we recommend that Congress direct agencies to develop detailed affirmative disclosure plans, which would enable each agency to customize its procedures and practices.<sup>21</sup> This recommendation sets forth eleven key elements of such plans, drawn largely from prior ACUS recommendations.<sup>22</sup> These elements include:

- Clear descriptions of the types of legal materials covered by an agency's affirmative disclosure plan;

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<sup>16</sup> For a discussion of the budgetary implications of expanding the affirmative disclosure of agency legal materials, see BELL ET AL., *supra* note 7, at 27–28. Of course, some of the upfront investment costs for improving the affirmative disclosure of agency legal materials will be recouped by savings on the processing of FOIA requests for such material.

<sup>17</sup> BELL ET AL., *supra* note 7, at 133–34, 139–40.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* On the value of public participation in the regulatory process more generally, see Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. U. L. REV. 924 (2009).

<sup>21</sup> BELL ET AL., *supra* note 7, at 142–44. This recommendation would reinforce existing obligations under the E-Government Act. *See* 44 U.S.C. § 3501 note.

<sup>22</sup> *See* Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61728, 61737 (Dec. 29, 2017) (recommending that policy statements be made available promptly); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927, 38929 (Aug. 8, 2019) (recommending that interpretive rules be made available promptly); Admin. Conf. of the U.S., Recommendation 2012-5, *Improving Coordination of Related Agency Responsibilities*, 77 Fed. Reg. 47810, 47812 § 3(b) (Aug. 10, 2012) (recommending that MOUs with implications for the public be affirmatively disclosed); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019) (recommending that agencies develop procedures for management and disclosure of guidance documents).

- Listings of the locations on an agency’s website where legal material can be found;
- Document labeling and numbering practices used to track agency legal materials;
- Practices or procedures to ensure the accuracy and currency of disclosed legal materials;
- Practices or procedures for online archiving of amended, inoperative, superseded, or withdrawn agency legal materials;
- Employee training to ensure that the affirmative disclosure plan will be carried out;
- Plans or procedures for the periodic review and updating of the plan; and
- Opportunities for members of the public to provide feedback on the agency’s affirmative disclosure plan and its implementation.

These elements of an affirmative disclosure plan reflect a well-established management-based governance approach, in which entities are directed to produce plans that satisfy general criteria designed to promote an intended goal.<sup>23</sup> These plans should of course also themselves be made public, which will inform the public of what materials the agency produces and where it can be found. Unfortunately, members of the public are too often unaware of what legal materials agencies produce.<sup>24</sup> It is hard to find something one does not know exists.

Our recommendations as to the manner of disclosing legal materials also include recommendations to amend the E-Government Act to encourage agencies to provide cross-links on relevant portions of their agency websites to enable members of the public to find relevant legal materials more easily.<sup>25</sup> Furthermore, we call on Congress to direct the Office of Management and Budget to update its website guidance for agencies and the Office of Federal Register to study how best to make presidential directives searchable online.<sup>26</sup> Finally, we recommend that the Federal Register Act<sup>27</sup> be amended to allow a permanent digital record to become the official version of the Federal Register—replacing the current requirement that only the print version be the official one.<sup>28</sup>

To provide agencies with appropriate incentives to maintain functioning disclosure practices for their legal materials—the third major area of proposed

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<sup>23</sup> See NAT’L ACADS. OF SCIS., DESIGNING SAFETY REGULATIONS FOR HIGH-HAZARD INDUSTRIES 124–39 (2018); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC. REV. 691 (2003); Cary Coglianese & Shana M. Starobin, *Management-Based Regulation*, in POLICY INSTRUMENTS IN ENVIRONMENTAL LAW 292–307 (Kenneth R. Richards & Josephine van Zeven eds., 2020).

<sup>24</sup> See JOSHUA GALPERIN & E. DONALD ELLIOTT, PROVIDING EFFECTIVE NOTICE OF SIGNIFICANT REGULATORY CHANGES 36–41 (May 17, 2022), <https://www.acus.gov/report/providing-effective-notice-significant-regulatory-changes-final-report> [<https://perma.cc/8PT8-FJR5>]; Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENV’T & ADMIN. L. 243, 261–69 (2020).

<sup>25</sup> BELL ET AL., *supra* note 7, at 44–46, 145.

<sup>26</sup> *Id.* at 43–44, 146–47.

<sup>27</sup> 44 U.S.C. §§ 1501–1511 (originally enacted as Federal Register Act of 1935, ch. 417, 49 Stat. 500).

<sup>28</sup> BELL ET AL., *supra* note 7, at 32–35, 147.

reforms—we recommend some modest modifications to judicial review provisions and fee reimbursement policies with respect to the disclosure of agency legal materials. In particular, we recommend that Congress explicitly allow suits to enforce agencies’ affirmative disclosure provisions (after, of course, appropriate administrative exhaustion).<sup>29</sup> This would resolve a current split in the circuits<sup>30</sup> and provide an essential vehicle for enforcement of agencies’ disclosure obligations. Without the assurance that someone can obtain judicial enforcement of affirmative disclosure requirements, agencies lack little intrinsic or self-reinforcing incentives to maintain comprehensive and current online repositories of all of their legal materials.<sup>31</sup> In addition, we also recommend that when individuals seek specific legal materials that an agency should have, but has not, affirmatively disclosed, the agency should provide the materials to the requester on an expedited basis and without charging fees.<sup>32</sup>

Importantly, all of our recommended legislative reforms can be adopted without Congress needing to reconsider the substantive value choices underlying FOIA’s current tradeoffs between public access to information and other values such as individual privacy, protection of confidential business information, and the preservation of some modicum of secrecy surrounding law enforcement practices and internal governmental deliberations. These reforms, in other words, can be adopted while taking FOIA’s existing disclosure exemptions as given. Indeed, in our report to ACUS, we made clear that we were taking no position with respect to any ongoing debates about the scope of particular exemptions.<sup>33</sup> Congress can adopt our recommendations and so meaningfully enhance transparency without touching any existing FOIA exemption. Likewise, our recommendations are also fully compatible with any revision of FOIA’s exemptions that Congress wishes to make.

The point is that whatever one thinks about the reach of FOIA, there is much that Congress and agencies can do to improve the affirmative disclosure of those agency legal materials that would already have to be released in response to a FOIA request. This is important because it ensures that such new requirements will be practical and feasible for agencies to implement. Our recommendations, it bears repeating, also do not extend to *all* agency information—they are focused on agency *legal* materials. Legal materials, unlike some other materials, are documents that agencies must regularly rely upon in their ongoing operations to comport with the rule of law. For that reason, they are both more important, and more feasible to disclose affirmatively (if for

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<sup>29</sup> See *id.* at 130, 147–48.

<sup>30</sup> Compare *Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (holding that reviewing court can order agency only to provide documents to individual requestor, not compel it to make documents publicly available), with *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 224–25 (2d Cir. 2021) (holding that courts have authority to compel compliance with affirmative disclosure obligations), and *Animal Legal Def. Fund v. USDA*, 935 F.3d 858, 874 (9th Cir. 2019) (same).

<sup>31</sup> See *BELLE ET AL.*, *supra* note 7, at 127–34.

<sup>32</sup> See *id.* at 133, 148–49.

<sup>33</sup> See *id.* at iii (“Importantly, this report takes FOIA’s existing disclosure exemptions as a given and does not take a position in any ongoing debates about the contours of particular exemptions.”); see also *id.* at 14 (“[I]n formulating our recommendations in this Report, we have simply taken FOIA’s existing exemptions as a given.”).

no other reason than that they are fewer in number), than *all* agency documents otherwise releasable under FOIA.

In addition, almost all our recommendations have some prior precedent in some federal agencies' current practices.<sup>34</sup> As a result, our recommendations are merely an attempt to “level up” all agencies to engage in disclosure practices that have already proven feasible.

We do recognize that agencies have varied types of legal materials and distinctive capacities for managing these materials and proactively making them available online. That is why we urge Congress to direct agencies to customize their own planning for affirmative disclosure and even exempt themselves from what would otherwise be applicable disclosure obligations. New legislation can provide some flexibility for agencies in light of their unique circumstances. But Congress should ensure that agencies are at least fully transparent about any customization that excludes certain types of legal materials from affirmative online disclosure.

Public availability of agency legal materials must be comprehensive. In the digital era, it is unacceptable for the full suite of agency legal materials not to be available online to the public.<sup>35</sup> But mere online availability is itself no longer sufficient. Members of the public should be able to locate legal materials easily and use them effectively.<sup>36</sup> By recommending that Congress direct agencies to prepare clear affirmative disclosure plans, provide them to the public, and ensure that materials are indexed and searchable, we are building on past ACUS guidance to agencies.<sup>37</sup> Although that guidance acknowledges that agencies can differ in how and where they place their legal materials online, it is well past time for all agencies to do more to make transparency meaningful and real.

The legal materials produced by administrative agencies are of paramount importance to regulated entities, regulatory beneficiaries, and members of the public at large. Like all law, these materials must be available to all. Except when a valid FOIA exemption applies, agencies already have a clear obligation to release any information upon request by a member of the public. Yet when it comes to agencies' *legal materials*, the public should not need to file a request with the agency. All these materials should already be disclosed in a readily accessible location on agencies' websites.

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<sup>34</sup> See *id.* at 9, 12–13, 30–32, 41–43, 128.

<sup>35</sup> See MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT* 181–200 (2021); Bernard W. Bell, *Making Soup from a Single Oyster? CREW v. DOJ and the Obligation to Publish Office of Legal Counsel Opinions*, *YALE J. REG.: NOTICE & COMMENT* (May 13, 2019), <https://www.yalejreg.com/nc/making-soup-from-a-single-oyster-crew-v-doj-and-the-obligation-to-publish-office-of-legal-counsel-opinions-part-i/> [<https://perma.cc/9ZXT-5LDL>] (three-part series); Coglianesse et al., *supra* note 20, at 936–37; Cary Coglianesse, *Illuminating Regulatory Guidance*, 9 *MICH. J. ENV'T & ADMIN. L.* 243, 259–69, 271–72 (2020); Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 *CARDOZO PUB. L. POL'Y & ETHICS J.* 577 (2009).

<sup>36</sup> See Cary Coglianesse, *A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*, 44 *ENV'T L. REP.* 10660 (2014).

<sup>37</sup> See CARY COGLIANESE, *PUBLIC AVAILABILITY OF AGENCY GUIDANCE DOCUMENTS* 35–44 (May 15, 2019).