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Improving the Affirmative Disclosure of Agency Legal Materials

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It is axiomatic that in a democratic society the law must be broadly accessible. Administrative agencies produce a plethora of materials imposing legal obligations on commercial or individual actors in the private sector. Other materials bind the agencies themselves in ways that affect the rights or interests of private parties. Still other materials provide the public with information about how agencies interpret and apply the statutes and rules they administer, or how agencies seek to

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This Article comprises an edited version of a report that was prepared for the Administrative Conference of the United States (ACUS) and which provided a basis for the adoption of ACUS Recommendation 2023-1. Admin. Conf. of the U.S., *Proactive Disclosure of Agency Legal Materials*, 88 Fed. Reg. 42678 (July 3, 2023). This was a large project and the thanks we owe to others are correspondingly extensive. At ACUS, Acting Chair Matthew Lee Wiener and then Chair Andrew Fois, along with various ACUS staff, including Reeve Bull, Jeremy Graboyes, Todd Rubin, and Alexandra Sybo, provided valuable input and support. We also owe a huge debt of gratitude to many previous ACUS consultants and members whose work we learned from and relied upon in our own research and deliberations. Of course, the Article's conclusions and recommendations do not necessarily reflect the views of ACUS, including its Council, committees, or members. We also benefitted from another indispensable source of assistance: the knowledgeable, talented, and remarkably generous members of the consultative group assembled to provide input into our report. These members of this group are listed in the appendix to this Article, and the minutes from our group meetings are available on the ACUS website. Some of the individual members of the consultative group, along with a dozen or so members of the public, submitted written comments in response to a request for information and in response to initial drafts of the report upon which this Article is based. We read each of these written comments with care, benefitted from them, and express our appreciation to each individual who submitted them. We hugely appreciate the time, expertise, and insights of all the consultative group members and public commenters. Not every one of these individuals would endorse everything in this Article, and thus its substance should not necessarily be attributed to them. Finally, in light of the scary number of footnotes in this Article, we are enormously grateful to Luke Klage, who provided diligent assistance in initially formatting these notes and performing invaluable cite checking. Samantha Bowen, Cross Conrad, Benjamin Friedman, Santoro Giuggio, and Olivia Reynolds provided excellent support with the preparation of the final manuscript. The outstanding members of this journal's editorial staff—especially Shanthi Chackalackal, Camille Avella, Anna Benham, Dylan Cohen, Aaron Hayse, Taylor Hopkins, and Sarah Mastrian—provided further indispensable guidance and assistance, for which we are exceedingly grateful.

deploy their discretion or take other actions that can affect private individuals or organizations. This Article focuses on improving the public availability of all of these agency legal materials. It is premised on the principle that all legal material 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.

In Part I, we lay out our broad objective, which is to ensure the public has ready access to legal materials that are important for the public to know, while recognizing that a limited set of legal materials will be subject to exemption from disclosure for countervailing reasons requiring secrecy. In Part II, we delve into an analysis of the current state of disclosure requirements and how they apply to each type of agency legal material that we address in this Article. We identify opportunities to clarify, improve, or strengthen the law, and argue that all non-exempt records that constitute agency legal materials should be affirmatively disclosed, rather than subject only to reactive disclosure—that is, disclosure in response to a request. Part III goes beyond the question of which agency materials constitute legal materials and should be made affirmatively available. It tackles the question of how agencies should make those materials available and what mechanisms will be available to enforce these disclosure requirements. Part IV summarizes our recommendations for legislative actions to ensure effective and comprehensive public access to agency legal materials.

Public availability of agency legal materials must be comprehensive and real. In the digital era, it is no longer acceptable for the full suite of agency legal materials not to be accessible to the public online. And mere online accessibility is also insufficient. Members of the public must be realistically able to locate agency legal materials and effectively use them.

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INTRODUCTION

> "There can be no rational ground for asserting . . . a moral obligation to obey a legal rule that . . . is kept secret."[1]
>
> – Lon Fuller

Among the billions of documents produced by the federal government each year, which materials must it make publicly available and how? This profound question lies at the confluence of powerful trends toward open government around the world. We do not aim to fully answer this question here. This Article focuses on the public availability of just a subset of all government information: agency legal materials.

Still, the broader question lies at the heart of this Article. No matter how one answers the big question, legal materials must surely be at or near the top of anyone's list of what the government must publicize. Government makes and enforces the law; it can do so legitimately only if the public knows what the law is, and the public can learn what the law is only if the government reveals it. This "publicity principle" is an essential, defining feature of legitimate law. Indeed, it has been long recognized that "[a]gency policies which affect the public should be articulated and made known to the public to the greatest extent feasible."[2]

In the United States, the trend toward open government is most evident in, although hardly limited to, the evolution of the Freedom of Information Act (FOIA) since its enactment in 1966. FOIA is most famous for its requirement that an agency must release a record if someone requests it. But FOIA's request-driven approach—which David Vladeck labels "FOIA's Achilles' heel" and describes as "an often-fatal barrier to the statute's usefulness"[3]—is enormously time-consuming and resource-intensive. From FOIA's initial passage to today, compliance with requests—when it occurs—has been bedeviled by delays and backlogs.[4] Moreover, FOIA's reactive approach means that access to government information is "inherently limited by the fact that the requester, by definition, does not know what the agency has and so does not know what to ask for."[5]

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1. LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969).

2. Recommendations and Miscellaneous Statements, 38 Fed. Reg. 19781, 19788 (July 23, 1973) (Administrative Conference Recommendation No. 71-3, Articulation of Agency Policies).

3. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1789 (2008).

4. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 34-39 (2016) (describing the many barriers facing requestors, including, to quote the title of the final section, "The Biggest Barrier of All: Delay, Delay, Delay").

5. Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 585 (2009).

The obvious response to these shortcomings has been to urge a shift from the request-driven approach to a regime of affirmative disclosures.[6] Although FOIA has contained some affirmative disclosure requirements since its inception, they have tended to be narrowly construed, inconsistently implemented, and under-enforced.[7] Technological changes—especially agency websites—have made affirmative disclosure easier and more effective than was conceivable in 1966. Every record that is posted to a website is a record that no one needs to ask for.[8] Agency practice and the law itself have steadily moved in that direction, most importantly in 1996 when Congress adopted the so-called "frequently requested records" provision. In 2009, President Obama instructed all agencies to disclose more information affirmatively: "The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely."[9]

Attorney General Eric Holder followed up with a memorandum directing agencies to "readily and systematically post information online in advance of any public request."[10] Although compliance with these directions is imperfect,[11] overall law and practice are turning increasingly away from the request-driven model and toward the affirmative disclosure model.

No one has seriously argued that FOIA itself should be amended to provide that agencies must affirmatively disclose all non-exempt records. But if we limit the inquiry to just agency legal materials, that approach is wholly appropriate. Of course, some materials related to binding agency law may still be legitimately

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6. *See generally* MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 181–200 (2021); Delcianna J. Winders, *Fulfilling the Promise of EFOIA's Affirmative Disclosure Mandate*, 95 DENV. L. REV. 909 (2018).

7. 5 U.S.C. § 552(a)(1)–(2); *see also* Herz, *supra* note 5 (documenting the constrained nature of FOIA's affirmative disclosure requirements); Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENV'T & ADMIN. L. 243, 259–69, 271–72 (2020) (discussing concerns about weak enforcement of affirmative disclosure obligations related to agency guidance documents).

8. It has been urged that "agencies should publish, on their Web sites, any information that they, or the courts, determine does not fall within a FOIA exemption. To enhance timely access, such information should be made available without forcing the public to go through what would be, in instances where information has already been released or determined to be releasable, a superfluous administrative procedure." Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. L. REV. 924, 936–37 (2009).

9. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009).

10. Memorandum from Eric Holder, Att'y Gen., to Heads of Exec. Dep'ts and Agencies 3 (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf.

11. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-254, FREEDOM OF INFORMATION ACT: ACTIONS NEEDED TO IMPROVE AGENCY COMPLIANCE WITH PROACTIVE DISCLOSURE REQUIREMENTS (2021) (detailing striking compliance failures by several specific agencies); Winders, *supra* note 6.

exempted from disclosure; we discuss relevant considerations in Part I.C below, and they are accounted for in FOIA exemptions. We further acknowledge in Part I.D that some up-front investment of resources may be required for agencies to comply with new disclosure requirements and initiatives. Indeed, at each strengthening of the public's right to access government records, starting with FOIA's original enactment, agencies have raised such concerns.[12] Yet, when laws are strengthened agencies have been able to rise to the challenge, as we document in the numerous instances of successful agency disclosure practices in this Article. Moreover, we emphasize that, as new requirements are enacted, it is imperative that Congress adequately fund these measures. It is in everyone's interest that agencies be fully supported to ensure successful implementation.

But, consistent with an increasing scholarly and agency emphasis on affirmative disclosure and with the fundamental publicity principle, a reasonable bumper sticker summary of our proposals would be straightforward: agencies should affirmatively make publicly available all non-exempt legal materials.

This Article grows out of a request from the Administrative Conference of the United States (ACUS) for us to prepare a report addressing "whether the main statutes governing disclosure of agencies' legislative rules, guidance documents, adjudicative decisions, and other important legal materials should be amended to consolidate and harmonize their overlapping requirements, account for technological developments, correct certain statutory ambiguities and drafting errors, and address other potential problems that may be identified."[13] To fulfill this mandate, we conducted our own legal research and solicited public comments on the project. We also conducted a series of five two-hour meetings (spanning three stages of the project) with an over sixty-member consultative group made up of current ACUS members from within and outside of government, including representatives of fifty federal agencies. The membership of this consultative group is listed in Appendix A to this Article. We received thirty-eight written comments from ACUS members, consultative group members, and members of the public, all of which are posted on the ACUS page for this project.[14] We also learned a great deal from the considerable input we received from the public and the consultative group. Finally, we learned a tremendous amount from each other. As this Article

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12. *See, e.g.*, 120 CONG. REC. 6815 (1974) (statement of Rep. Fascell) (noting that at the time of FOIA's original enactment, "every single witness from the Federal bureaucracy . . . opposed the bill . . . claim[ing] that it would seriously hamper the functioning of Federal agencies" and that FOIA "has been in operation now for 7 years, and all of the cries that were raised at the time of the original act was passed can be summed up probably in this fashion: That it was said that if we passed the Freedom of Information Act, it would bring the executive branch of the Government to a grinding halt. None of that, of course, has happened.").

13. ADMIN. CONF. OF THE U.S., REQUEST FOR PROPOSALS: DISCLOSURE OF AGENCY LEGAL MATERIALS (Feb. 3, 2022), https://www.acus.gov/sites/default/files/documents/Disclosure%20RFP%20FINAL%20POSTED%202%203%202022.pdf.

14. *Proactive Disclosure of Agency Legal Materials*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/research-projects/disclosure-agency-legal-materials.

represents a collaboration of five authors with varied perspectives on open government issues, the more than twenty meetings among the five of us held over an eleven-month period—for a total of more than 200 person-hours of robust discussion—constitutes an additional basis for the recommendations contained in this Article.

This Article proceeds as follows. In Part I, we begin by laying out our broad objective, which is to ensure the public has ready access to legal materials that are important for the public to know, while recognizing that a limited set of legal materials will be subject to exemption from disclosure for countervailing reasons requiring secrecy. We also endeavor to acknowledge the practical considerations agencies will face if disclosure requirements expand—and to suggest methods for addressing them.

In Part II, we delve into an analysis of the current state of disclosure requirements and how they apply to each type of agency legal material that we address in this Article. After we detail the formal requirements and agency practices, we use past ACUS recommendations and guidance as a yardstick against which to measure where the law falls short and how it might be improved. For each instance in which we identify an opportunity to clarify, improve, or strengthen the law, we flag the issue and cross-reference the resulting recommendation that we present in the final Part of this Article. The upshot of Part II is that all non-exempt records that constitute agency legal materials should be affirmatively disclosed, rather than subject only to reactive disclosure in response to a request.

Part III goes beyond the question of *which* agency materials constitute legal materials and should be made affirmatively available. It tackles the question of *how* agencies should make those materials available and what mechanisms will be available to enforce these disclosure requirements. Here, too, relevant gaps and areas for improvement are identified and resulting recommendations are cross-referenced as they appear in the final Part of this Article.

Part IV concludes by summarizing our statutory recommendations. Congressional adoption of our recommendations—which have been adopted in substantial part by the Administrative Conference of the United States—would go a long way toward ensuring that the public has ready access to the consequential legal materials produced by administrative agencies across the federal government. In a digital age, government agencies have an affirmative duty to make all of their otherwise retrievable legal materials easily accessible online.

I. OVERARCHING OBJECTIVES

Law must be publicly available. This principle is embedded in the Due Process Clause as well as in statutory, regulatory, and decisional law. Part II of this Article describes these requirements in detail as to agency legal materials. For example, Section 552(a)(1) of the Administrative Procedure Act (APA) (or of

FOIA, depending on one's preference[15]) requires publication in the *Federal Register* of a wide variety of agency legal materials. Under the E-Government Act, all such information must also be made available on an agency website.[16] Absent good cause, a substantive regulation cannot take effect for at least thirty days after its publication in the *Federal Register*.[17] Substantive rules published in the *Federal Register* must then be published in the Code of Federal Regulations,[18] which must be updated annually.[19] Much other legal material that need not appear in the *Federal Register* (e.g., orders in adjudications) must still be made available to the public in electronic format.[20] These provisions reflect what the U.S. Supreme Court has acknowledged as "a strong congressional aversion to 'secret [agency] law,' . . . [and] an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.' "[21]

The hard questions, then, are not about the central proposition that agency law must be public. The difficult questions arise at the margin.

The first challenge is specifying exactly what materials count as agency legal materials and are subject to the obligation of openness. Part I.A takes on this challenge. Part I.B goes on to document the theoretical basis for requiring maximum disclosure of agency legal materials, and it acts as our guidepost in making recommendations we believe will achieve that goal.

Part I.C recognizes the reality that, in some circumstances, countervailing considerations may justify not disclosing certain legal materials. Importantly, it sets out and explains our deliberate determination, for purposes of this Article, not to take any position on the current state of FOIA's exemptions to disclosure, but instead to focus our efforts on requiring affirmative disclosure of agency legal materials that otherwise would already have to be released reactively in response to a FOIA request.

Part I.D acknowledges practical challenges agencies may face in implementing new broad disclosure obligations and discusses means of mitigating those obstacles. Taking each of these pieces together, this Part sets out the parameters of this Article and the recommendations that flow from it.

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15. This provision began life as § 3 of the original Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 552). It has been amended many times since by the Freedom of Information Act and amendments thereto. In general, a reference to "FOIA" is to all of § 552, including the provisions that predated that law by two decades.

16. E-Government Act of 2002, Pub. L. No. 107-347, § 206(b), 116 Stat. 2899, 2916 (2002) (codified at 44 U.S.C. § 3501 note). The Act also requires each agency to post to a website "descriptions of the mission and statutory authority of the agency." *Id.* § 207(f)(1)(A)(i).

17. 5 U.S.C. § 553(d); *see also* 44 U.S.C. § 1507.

18. The CFR is authorized but not required by statute. *See* 44 U.S.C. § 1510(a)–(b). By regulation, the Administrative Committee has imposed the obligation on itself to "publish periodically" a code of federal regulations. *See* 1 C.F.R. § 8.1(a) (2024).

19. 44 U.S.C. § 1510(c).

20. 5 U.S.C. § 552(a)(2).

21. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (first alteration in original) (citations omitted).

A. Defining Agency Legal Materials

Agencies produce a plethora of materials and records. Many of these materials impose legal obligations on or hold important legal implications for commercial or individual actors in the private sector. Others bind the agencies themselves in ways that affect the rights or interests of private parties. Other materials can provide the public with information about how agencies interpret and apply the statutes and rules they administer, or how agencies seek to deploy their discretion or take other actions that can affect private individuals or organizations. This Article is focused on the public availability of all of these agency legal materials.

For purposes of this Article, "agency legal materials" are documents that create rights or impose obligations on those subject to the agency's authority, constrain agency action, or explain legal obligations imposed or enforced by the agency as guidance for the public. In other words, agency legal materials are documents produced by an agency that establish, interpret, apply, explain, or address the enforcement of legal rights and obligations, along with constraints imposed, implemented, or enforced by or upon an agency.[22] As is apparent, we use the term "agency legal materials" capaciously to include a wide range of agency documents while still restricting the term to a subset of all the documents produced by an agency.

As different agencies may use different names for—or apply different taxonomies to—these materials, we adopt a substantive or functional, rather than a semantic or formal, definition of legal materials. We focus not on how agencies label their materials but instead take into account the legal force of these materials and their effects on and implications for the public. Agency legal materials, as explored in detail in Part II, include, but are not limited to, substantive legislative rules, guidance documents, procedural rules, opinions and settlements in adjudications, advice letters, declaratory orders, memoranda of understanding, and staff manuals addressing the interpretation or enforcement of the law.[23]

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22. For purposes of this Article, we treat as an "agency" any governmental entity or office that is defined as an agency under federal law. This includes "each authority of the Government of the United States" except Congress, the courts, and other entities exempted from the definition of an agency in the Administrative Procedure Act. 5 U.S.C. § 551(1). It also includes any entity defined as an "agency" in the Federal Register Act, which includes "the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government." 44 U.S.C. § 1501.

23. Our capacious definition of agency legal materials here is consistent with our mandate from ACUS, which called for us to consider possible legislative improvements to the availability of agency materials that (1) "determine the rights or interests of private parties," (2) "advise the public of the agencies' interpretation of the statutes and rules they administer," (3) "advise the public prospectively of the manner in which agencies plan to exercise discretionary powers," or (4) "otherwise explain agency actions that affect members of the public." Disclosure of Agency Legal Materials; Comment Request, 87 Fed. Reg. 30445, 30445 (May 19, 2022). Our definition also accords with public comments submitted to ACUS in response to a general request in connection with this project on which this Article is based. Electronic Privacy Information Center (EPIC), for example, called on ACUS to "interpret the term as broadly as possible so that the public is aware of agencies' legal decisions and actions," Elec. Priv. Info.

As capacious as our definition of agency legal materials may be, the types of materials addressed in this Article are not the only important materials produced by administrative agencies that should be affirmatively made available to the public as a matter of law or good governance. To choose just a few examples, budget holds, financial materials, grants, diversity statistics, government contracts, and agency briefs filed in litigation fall outside the definition of agency legal materials we apply here.[24] Many of these other materials are already affirmatively made available to

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Ctr., Comment Letter on Disclosure of Agency Legal Materials 2 (July 17, 2022), https://www.acus.gov/sites/default/files/documents/EPIC-Comments-ACUS-Agency-Legal-Records-18-Jul-2022-combined[1]_0.pdf, and the U.S. Chamber of Commerce Litigation Center similarly put forward the position that "any agency document that potentially imposes a legal or compliance expectation for members of the public, irrespective of its classification, should proactively be made available." Chamber of Com. of the U.S., Comment Letter on Disclosure of Agency Legal Materials (July 18, 2022), https://www.acus.gov/sites/default/files/documents/220715_Comments_DisclosureofAgencyLegalMaterials_ACUS.pdf. Citizens for Responsibility and Ethics in Washington (CREW) likewise opined that "[a]ny definition ACUS adopts will overlap with other categories of records that ACUS already has addressed, such as agency guidance documents and adjudication materials, but should also include materials that fall outside those groups yet still impact the legal relationships and obligations between the public and the federal government." Citizens for Responsibility and Ethics in Washington, Comment Letter on Disclosure of Agency Materials 1 (July 18, 2022) (footnotes omitted), https://www.acus.gov/sites/default/files/documents/FINAL%20ACUS%20comments.pdf.

24. For example, through the Federal Funding Accountability and Transparency Act of 2006 (FFATA), the Government Funding Transparency Act, the Digital Accountability and Transparency Act (DATA Act), and the Taxpayer Right-to-Know Act, Congress has required agencies to disclose a variety of budget and spending information. The DATA Act, for example, requires agencies to prepare and submit standardized, accurate information about their spending. 31 U.S.C. § 6101 note (Purposes); Pub. L. 113-101, § 2, 128 Stat. 1146, 1146 (May 9, 2014). Such information is made available via the USAspending.gov website, which uses data visualizations to help site visitors to understand federal spending data across different areas. In 2021, the GAO released a report showing that most but not all agencies submitted complete and timely data in response to the DATA Act. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104702, FEDERAL SPENDING TRANSPARENCY: OPPORTUNITIES EXIST TO FURTHER IMPROVE THE INFORMATION AVAILABLE ON USASPENDING.GOV (2021). The Congressional Budget Justification Transparency Act of 2021 now requires federal agencies to make available their budget justification materials on their websites. 31 U.S.C. § 1105(i)(2)(A); Pub. L. No. 117-40, sec. 2(b), § 3(i)(2)(A), 135 Stat. 337, 337 (Sept. 24, 2021). And generally, the public is entitled to access on request all records concerning loans from the U.S. Small Business Administration, unless they fall under an exemption or exclusion. *See FOIA*, U.S. SMALL BUS. ADMIN. (Apr. 4, 2024), https://www.sba.gov/about-sba/open-government/foia. Yet public access to important budgetary and appropriations information is far from complete. Budget holds can have important implications for how agencies interpret and apply the law but are not always required to be disclosed. Similarly, as Gillian Metzger recently noted, there is a "lack of statutorily mandated procedure . . . [on] administrative decisions on appropriations, such as OMB and agency apportionment, reprogramming, and transfer decisions." Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1119 (2021). Furthermore, although we do not include agency contracts, grants, loans, and other awards as within the scope of this report, we acknowledge that they can have binding effects on those subject to these materials as well as broader implications for the public. *See, e.g.*, Project on Gov't Oversight, Comment Letter on Disclosure of Agency Materials (July 18, 2022), https://www.acus.gov/sites/default/files/documents/POGO%20ACUS%20comment%207-18-22.pdf. Finally, another important type of agency material not within the scope of the report are anti-discrimination policies and disclosures pertaining to agency diversity, discrimination, and harassment claims. The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) requires that agencies make available

the public by at least some agencies, either by legal requirement or agency practice, and the exclusion of these or any other agency records from this Article's scope should not be taken to imply any diminishment of the public interest in their disclosure. They simply are not our topic here.

Still, our broad definition of agency legal materials is consistent with existing legislation. The Federal Records Act (FRA), for example, already requires agencies to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency" and to "establish safeguards against the removal or loss of records the head of such agency determines to be necessary and required by regulations of the Archivist."[25] The FRA governs, of course, not merely agency legal materials but all agency records. Still, it bears noting that the FRA already obligates agencies to develop "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format."[26] If nothing else, all the agency legal materials discussed in this Article should, by definition, be "records of general interest . . . that are appropriate for public disclosure."[27]

Of course, FOIA itself already imposes upon agencies an obligation to disclose certain information affirmatively. FOIA's affirmative disclosure obligations focus largely on agency legal materials of the kind that fall within this Article's definition. FOIA requires certain types of agency materials, such as "rules of procedure" and "substantive rules of general applicability," to be published in the *Federal Register*.[28] Other materials must be posted on agency websites—such as all "statements of policy and interpretations which have been adopted by the agency" and "administrative staff manuals and instructions to staff that affect a member of the public."[29] These broad categorical requirements for publication reflect Congress's animating concern that the public be fully informed of what the law is.

Additional legislative action by Congress, as recommended in this Article, would help clarify ambiguities as to certain categories of records and the obligation to publish them and ensure that agencies are carrying out their existing legal obligations. Statutory amendments to carry out our recommendations would, if adopted, ensure that all agency legal materials—in the broadest sense of the term—are "publicly accessible" on their websites.

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online quarterly updates of data on equal employment opportunity complaints they receive. 107 Pub. L. 174, § 301, 116 Stat. 566, 573.

25. 44 U.S.C. §§ 3101, 3105; *see also* Armstrong v. Bush, 924 F.2d 282, 284-85 (D.C. Cir. 1991) (discussing the Federal Records Act).

26. 44 U.S.C. § 3102(2) (as amended by FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 544).

27. *Id.*

28. 5 U.S.C. § 552(a)(1).

29. *Id.* § 552(a)(2).

B. Publicizing the Law

For law to be legitimate—indeed, to merit the very name of "law"—its requirements must be known. This proposition is ancient, undisputed, and indisputable. To quote William Blackstone:

> [A] bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. . . . [W]hatever [means of notification] is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.[30]

In the modern era, Lon Fuller has articulated the principle most cogently. Fuller identified eight jurisprudential "routes to disaster,"[31] ways in which a legal system might fail. Each involved the failure to make rules that were knowable and capable of being complied with. Number two on his list was "a failure to publicize, or at least make available to the affected party, the rules he is expected to observe."[32]

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30. 1 WILLIAM BLACKSTONE, COMMENTARIES *45-46; *see also* Screws v. United States, 325 U.S. 91, 96 (1945) ("To enforce such a [vague] statute would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.' ") (quoting SUETONIUS, THE LIVES OF THE TWELVE CAESARS 278, ¶ XLI).

31. FULLER, *supra* note 1, at 39.

32. *Id.*; *accord* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 205 (1960) ("[G]overnment must never coerce an individual except in the enforcement of a known rule."). Here is Fuller's summary of the eight routes to disaster:

> The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.
>
> A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.

FULLER, *supra* note 1, at 39. The eight principles boil down to two basic propositions: there must be rules, and the rules must be capable of being followed. Margaret Jane Radin, *Reconsidering the Rule of Law,* 69 B.U. L. REV. 781, 785 (1989).

This requirement of notice or publicity comports with universal principles and settled law. It is central to due process, a basic tenet of which is that a law cannot be enforced against someone who had, and could have had, no notice of the legal requirements being enforced.[33] The APA embodies the same principle. Regulations and other items required to be published in the *Federal Register*,[34] and orders, opinions, and other material that affect members of the public and are required to be made publicly available,[35] are unenforceable if not so published or made available except as against someone with actual knowledge thereof.

Advocates for greater publicity in the administrative state often invoke the specter of "secret law."[36] Usually the term refers to "agency use of precedents, policies, or controlling interpretative principles without prior publication or public availability of those uses"[37] and to undisclosed "'opinions and interpretations' which embody the agency's effective law and policy."[38] It typically does not refer to a failure to publish primary binding materials such as statutes and regulations, for those are reliably published and widely available. Whatever its particular application, the term can be effective precisely because it seems to be an oxymoron: if something is secret, it cannot be law. We discuss in the next section some of the reasons for which "secret law"—or at least certain materials closely related to binding law—might in limited circumstances be legitimate. For now, the essential point is that law without disclosure is an aberration—or, as Kenneth Culp Davis once put it, "an abomination"[39]—an exception that requires powerful justification.

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33. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.' ") (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

34. 5 U.S.C. § 552(a)(1) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.").

35. *Id.* § 552(a)(2) ("A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.").

36. *See, e.g.*, Cnty. of Los Angeles v. Kling, 474 U.S. 936, 938 & n.1 (1985) (Stevens, J., dissenting) (objecting to the Court of Appeals' practice of not publishing its opinions as "spawning a body of secret law" and lamenting the "proliferation of . . . secret law"). *See generally* ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., THE NEW ERA OF SECRET LAW (2016), https://www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law.pdf; Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law,* 57 WM. & MARY L. REV. 2141 (2016); Mark Rumold, *The Freedom of Information Act and the Fight Against Secret (Surveillance) Law*, 55 SANTA CLARA L. REV. 161 (2015).

37. 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 6:10, at 199 (2014).

38. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967)). In *Sears, Roebuck*, the Court adopted the phrase "working law" as a descriptor. *Id.*

39. Panel Discussion, *Public Information Act and Interpretative and Advisory Rulings*, 20 ADMIN. L. REV. 1, 29 (1967) (comment of Kenneth Culp Davis, who was urging publication of SEC no-action letters). Davis seems, and claims, to have been the person who coined the phrase "secret law." 1

At least five distinct principles or policies support the presumption of publicity.[40] The first, and most obvious, has already been mentioned. It violates basic principles of fairness, due process, and the rule of law to penalize someone for failing to comply with a law of which that person could not have been aware. Notice is essential to protect the interests of the regulated party who is subject to the law. Indeed, the presumption that every person knows the law necessarily rests on it being knowable by, at a minimum, being publicly available.[41]

Second, knowing the content of the law is a prerequisite to—a necessary though not sufficient condition for—compliance. As Anne Joseph O'Connell has succinctly put it: "agency activity cannot be hidden if agencies expect anyone to comply with their rules."[42] The more fully law is known and understood, the more complete compliance with it can be.[43]

Third, even if the law is not enforced against an unwitting violator, uncertainty about the existence or substance of the law has real costs. Economic actors thrive on

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KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5:18, at 364 (2d ed. 1978) (stating that he first used the term "secret law" when testifying to Congress in 1964). Here is an early example:

> I firmly believe that staff manuals or instructions in the nature of substantive or procedural law should be available. For instance, 'guidelines for the staff in auditing' of tax returns ought to be open to the taxpayer to the extent that they tell the auditor the position of the Internal Revenue Service on any question of tax law. . . . [S]ecret law is an abomination.

KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 137 (Supp. 1970).

40. A useful summary, with a particular emphasis on national security, is Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 814–26 (2018). *See also* Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. L.J. 241 (2015).

41. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *see also* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 265 (2020) ("'Every citizen is presumed to know the law,' and 'it needs no argument to show . . . that all should have free access' to its contents.") (quoting Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886)). The full portion of the Massachusetts case reads:

> Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public. It is its duty to provide for promulgating them.

Nash, 6 N.E. at 560.

42. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 928 (2008).

43. *See generally* JOSHUA ULAN GALPERIN & E. DONALD ELLIOTT, PROVIDING EFFECTIVE NOTICE OF SIGNIFICANT REGULATORY CHANGES 25–28 (2022), https://www.acus.gov/sites/default/files/documents/Providing%20Effective%20Notice%20of%20Significant%20Regulatory%20Changes%20Final%20Report_0.pdf (final consultant's report to the Administrative Conference of the U.S.).

certainty; much useful activity may be forgone because of doubt over its legality. And individuals may be chilled in their private activities, including constitutionally protected activities, if legal boundaries are uncertain. Of course, an utterly secret body of law (a "deep secret") will not have these effects, because those potentially subject to the law will not even know of its existence and so will not worry about its reach. But "shallow" secret law—the unwritten rules of enforcement discretion, the secret no-fly list, other aspects of the agency's "working law"[44] whose existence is known or assumed but the content of which is unknown—can have these impacts.

Fourth, regulatory beneficiaries also benefit from knowing the law. This is not because otherwise the law might be unfairly applied against them, but because they should be able to ensure they receive the protections the law provides. They may be able to take citizen enforcement actions, file private damage lawsuits, report violations to the authorities, engage the assistance of elected representatives, or publicize non-enforcement through the media. Any public response to the under-enforcement of the law requires familiarity with the law itself.

Fifth, anyone—regulated entities, regulatory beneficiaries, interested citizens, legislators—who seeks to change the law needs first to know what the law is. Public disclosure of the law and the legal process is a fundamental precondition of democratic government. This is equally true as a matter of logic and as a matter of political reality. To the extent law is unknown, a popular or legislative campaign to alter it is doomed. Neither legislators nor the public will rally around an effort to fix an invisible problem.[45] The go-to quote (likely a misapplication of what its author had in mind, but effective nonetheless) is from James Madison: "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both."[46]

In light of these principles, it is hardly a surprise that public accessibility of agency legal materials has widespread support. Numerous ACUS recommendations, for example, address the importance of agencies posting legal

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44. "Working law" has become a FOIA term of art. It refers to intra-agency material that is pre-decisional and non-binding when first produced, but over time comes to embody principles that effectively bind the public because the agency treats them as definitive. This shift might be de jure, as when the agency expressly adopts or incorporates by reference an internal memorandum, or de facto. Most judicial invocations of the "working law" concept arise when an agency is relying on exemption 5 of FOIA, arguing that a record is "pre-decisional." Where a record has come to "embody the agency's effective law and policy"—when it has become "working law"—it is "post-decisional" and not protected by that exemption (though other exemptions may apply). NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975); *see also* N.Y. Times Co. v. U.S. Dep't of Just., 939 F.3d 479, 489-93 (2d Cir. 2019) (providing an overview of the "working law" doctrine); Citizens for Resp. and Ethics in Wash. v. U.S. Dep't of Just., 922 F.3d 480, 486-89 (D.C. Cir. 2019) (applying "working law" analysis by asking whether agencies adopted OLC formal written opinions).

45. *See* Conor Friedersdorf, *Why Secret Law Is Un-American: The System Established by the U.S. Constitution Requires an Informed Electorate*, ATLANTIC (Jan. 3, 2014), http://www.theatlantic.com/politics/archive/2014/01/why-secret-law-is-un-american/282786/; Manes, *supra* note 40, at 822.

46. Letter from James Madison to William Taylor Barry, Lieutenant Governor of Ky. (Aug. 4, 1822) (on file with Library of Congress).

materials to their websites. Most of these recommendations are summarized in the ACUS *Statement of Principles for the Disclosure of Federal Administrative Materials*.[47] The *Statement of Principles* rests on a straightforward and simple proposition: "agencies should proactively disclose on agency websites administrative materials that affect the rights and interests of members of the public."[48] Although not limited to legal materials, the *Statement of Principles* extends to many items that fall into that category. It calls for agencies to proactively post to their websites the following:

- Legislative rules;[49]
- Guidance documents;[50]
- Adjudicative opinions and orders;[51]
- Delegations of authority;[52]
- Interagency agreements that have broad policy implications or that may affect the rights and interests of the general public;[53]
- Decisions and supporting materials (e.g., pleadings, motions, and briefs) issued and filed in adjudicative proceedings;[54]
- Publicly filed pleadings, briefs, and settlements, as well as court decisions bearing on agencies' regulatory or enforcement activities.[55]

Three items covered by ACUS recommendations that were adopted after the *Statement of Principles* was released can be added to this list:

- Precedential adjudicatory decisions, including notice of the overruling or modification thereof, and, at the agency's discretion, brief

47. OFF. OF THE CHAIRMAN, ADMIN. CONF. OF THE U.S., STATEMENT OF PRINCIPLES FOR THE DISCLOSURE OF FEDERAL ADMINISTRATIVE MATERIALS (rev. 2022) [hereinafter STATEMENT OF PRINCIPLES], https://www.acus.gov/sites/default/files/documents/Statement%20of%20Principles%20for%20Disclosure%20FINAL%20POSTED.pdf.

48. *Id.* at 3. As this Report describes in some detail, this proposition is not simply a statement of best practices; it is reflected in various statutory provisions. *See, e.g.*, 5 U.S.C. § 552(a)(2) (FOIA) (requirement to make certain materials electronically available); 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services §§ 206–207 (E-Government Act)) (requirements for e-rulemaking and posting of material to agency websites); 44 U.S.C. § 3102(2) (Federal Records Act) (requirement to maintain a management system for records of general interest); 5 U.S.C. § 601 note (Small Business Regulatory Enforcement Fairness Act, § 212(a)(2)(A)) (requirement of "posting of the [small business compliance guide] in an easily identified location on the website of the agency").

49. STATEMENT OF PRINCIPLES, *supra* note 47, at 3.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

summaries of precedential decisions, a digest of precedential decisions, and an index, organized topically, of precedential decisions;[56]

- Enforcement manuals, or portions thereof, at least "when doing so would improve public awareness of relevant policies and compliance with legal requirements or promote transparency more generally;"[57] and
- Certain settlement agreements in administrative enforcement actions.[58]

We use these previous ACUS studies as guideposts, but we do not seek to replough well-tilled ground from prior ACUS recommendations. While we do discuss general concerns and have some thoughts on best practices, our aim is not to revisit past ACUS recommendations but to assess defects in existing *statutory provisions* in light of those recommendations and our own assessment of the law. Thus, our formal recommendations all propose specific amendments to statutory provisions that are anachronistic, incoherent, or incomplete, all with the goal of ensuring the affirmative disclosure of all legal materials that agencies would need to disclose upon request.

C. Countervailing Considerations

Notwithstanding the strong reasons for governmental transparency, numerous countervailing considerations cut against disclosing certain types of government information. Many are captured by FOIA's exemptions, particularly those protecting personal privacy, national security, law enforcement efficacy, business secrecy, and privileged communications or relationships. FOIA's exemptions apply to both the statute's reactive—or "upon-request"—obligations, and its affirmative disclosure provisions, our focus in this Article.[59]

Congress has sought to limit the capaciousness of FOIA's exemptions by codifying a "foreseeable harm" standard. This critical 2016 addition to FOIA specifies that an agency may *not* withhold a record pursuant to an exemption if its

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56. Adoption of Recommendations, 88 Fed. Reg. 2312, 2313 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-4, Availability of Precedential Decisions, ¶¶ 11-16).

57. Adoption of Recommendations, 88 Fed. Reg. 2312, 2315 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-5, Disseminating Enforcement Manuals to the Public, ¶ 8).

58. Adoption of Recommendations, 88 Fed. Reg. 2312, 2316 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-6, Recommendation ¶ 1).

59. Federal Open Market Committee v. Merrill, 443 U.S. 340, 360 n.23 (1979) (recognizing statements of policy may nonetheless be exempted from FOIA affirmative disclosure requirements); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, OFF. OF INFO POL'Y, U.S. DEP'T OF JUST. (July 4, 1967), https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act (discussing exemptions from affirmative disclosure and upon-request disclosure).

release would not foreseeably cause the type of harm the exemption is designed to prevent.[60] As a result, agencies must consider not only the exemptions' text, but their underlying rationales as well.

Our discussion of countervailing considerations here focuses on their implications for disclosure of agency legal materials. As we discuss below, insofar as the definition of legal materials encompasses directives or guidance to government officials, and not merely those directed to the public, there can, at times, exist an almost inverse relationship between the goals served by transparency and the rationales underlying some of the countervailing considerations. This is particularly so with regard to countervailing considerations related to preventing the circumvention of the law, protecting deliberative intra-governmental processes, and respecting the separation of powers. Moreover, without exemptions protecting such countervailing interests, agencies might either avoid providing directives or guidance to subordinates or do so in ways that would not be captured by FOIA (such as by oral directives), at significant cost in terms of both managerial control over line officials and transparency.

The appropriate scope and weight to be accorded the countervailing considerations reflected in FOIA's exemptions, *inter alia*, can be complex, context-specific, and vigorously contested. The caselaw is voluminous,[61] although the subset of cases construing FOIA's exemptions in the context of FOIA affirmative disclosure is relatively modest. Yet, because this Article's core message is that agencies should affirmatively make publicly available all *non-exempt* legal materials, it is necessary for us to offer at least some modest background on these exemptions.

We thus review FOIA's exemptions without taking any position on whether they should or should not be modified, interpreted, or applied in any particular manner. Indeed, in formulating our recommendations in this Article, we have simply taken FOIA's existing exemptions as a given. We have not sought to resolve debates about the contours of particular exemptions, even as applied to legal materials that we recommend making subject to affirmative disclosure. Such a task is beyond both our available time and, arguably, our mandate. And taking on such an endeavor would risk diverting us, and ACUS more broadly, from this project's primary goal—crafting the outlines of a legislative proposal for enhancing the meaningful affirmative disclosure of agency legal materials. Our recommendations, therefore, are to clarify or expand categories of materials that must be made affirmatively available, subject to precisely the same exemptions

60. FOIA Improvement Act of 2016, Pub. L. 114–185, § 2, 130 Stat. 538, 538 (June 30, 2016) (codified at 5 U.S.C. § 552(a)(8)(A)(i)(I)). Judicial construction of the foreseeable harm standard is not well developed, and the Supreme Court has yet to construe the provision.

61. The Department of Justice's *Guide to the Freedom of Information Act* extensively discusses the caselaw and provides comprehensive caselaw-based guidance to federal agencies on the exemptions' scope. *See* U.S. DEP'T OF JUST. (DOJ), DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT (Mar. 5, 2024), https://www.justice.gov/oip/doj-guide-freedom-information-act-0.

and exclusions that would apply if those same materials were requested by a member of the public under FOIA. We aim to move categories of records that already must be released upon request from a "reactive" disclosure regime to a "proactive" disclosure regime.

We recognize that adopting our recommendations about FOIA's affirmative disclosure provisions while the extant law on exemptions remains unchanged would leave the state of the law unsatisfactory to many and deeply disturbing to others. Should Congress adopt legislation based on this Article that leaves the existing exemptions intact, we recommend that it should simply avoid *inadvertently* endorsing any extant judicial interpretation of those exemptions. In other words, we are not endorsing any particular extant exemption nor any existing judicial interpretation of FOIA's exemptions.[62]

We nonetheless discuss the unique implications that various exemptions and limitations on disclosure have on the availability of agency legal materials to provide context relevant to our recommendations and to clarify their likely practical effect on the availability of agency legal materials.

FOIA operationalizes many countervailing considerations to disclosure by its general exemptions,[63] as well as exclusions,[64] by incorporating many statutes that provide for withholding in particular contexts,[65] and even by the judicially created neither-confirm-nor-deny (NCND), *i.e.*, *Glomar*, doctrine.[66] These countervailing considerations have given rise to a bewilderingly extensive and complex body of caselaw.

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62. There are reasons for courts to generally view the periodic amendments to FOIA as congressional ratification of at least some extant judicial interpretations of FOIA. *See* Bernard Bell, *Oh SNAP!: The Battle Over "Food Stamp" Redemption Data That May Radically Reshape FOIA Exemption 4* (pt. III-A), YALE J. OF REGULATION NOTICE & COMMENT BLOG §§ II & III (Sept. 28, 2018), https://www.yalejreg.com/nc/oh-snap-the-battle-over-food-stamp-redemption-data-that-may-radically-reshape-foia-exemption-4-part-iii-a/. For a discussion of the ratification (or reenactment) doctrine, see Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); United States v. Cerecedo Hermanos y Compañia, 209 U.S. 337, 339 (1908) ("[R]eenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 78–84, 129–31 (1988).

63. 5 U.S.C. § 552(b)(1)–(b)(9).

64. *Id.* § 552I.

65. *Id.* § 552(b)(3). *See* OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., STATUTES FOUND TO QUALIFY UNDER EXEMPTION 3 OF THE FOIA (2022), https://www.justice.gov/oip/page/file/1394846/download; U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-148, FREEDOM OF INFORMATION ACT: UPDATE ON FEDERAL AGENCIES' USE OF EXEMPTION STATUTES, app. III-IV (2021), https://www.gao.gov/assets/gao-21-148.pdf.

66. Traditionally NCND applied to request for records related to national security matters. *See* CLASSIFICATION COMM., FOIA ADVISORY COMM., RECOMMENDATIONS REGARDING GLOMAR RESPONSES (2022), https://www.archives.gov/files/ogis/assets/22-03-03-draft-classification-subcommittee-glomar-recommendations-white-paper.pdf. But it can apply beyond the national security sphere. *See, e.g.*, Montgomery v. IRS, 40 F.4th 702 (D.C. Cir. 2022).

Nevertheless, in the context of agency legal materials, the countervailing considerations may be less compelling and the reasons to overcome them may be stronger. Indeed, with respect to material addressed to the public for purposes of guiding their conduct (or, in the case of adjudication, particular members of the public), there is a compelling case for disclosure of such materials. Individuals cannot and should not be expected to comply with secret dictates.[67] Moreover, in that context, several agencies have proven adept in addressing the concerns captured in the exemptions by discouraging unnecessary submission of sensitive information, anonymizing some agency legal documents (such as adjudicatory opinions), crafting agency legal documents in a manner that does not divulge sensitive information, or redacting specific information. These strategies may well suffice for many types of government records, but they are more challenging to use to accommodate countervailing considerations with respect to agency legal materials.

We discuss six broad categories of countervailing concerns particularly relevant to agency legal materials: (1) preventing the circumvention of the law; (2) safeguarding the quality of government deliberations; (3) preserving national security and homeland security; (4) honoring the separation of powers; (5) protecting personal privacy; and (6) protecting private "proprietary" information.

1. Anti-Circumvention

In certain circumstances, disclosure of the government's plans or strategy may enable private entities or individuals to defeat the government's ability to execute its intentions. Disclosure of law enforcement or prosecutorial strategies, for example, may allow private individuals or entities inclined to engage in unlawful activities to take measures to avoid detection and prosecution.

In some ways, concerns about circumvention are the mirror image of the interest in transparency.[68] The more members of the public know about the legal standard governing their conduct or eligibility for benefits, the more likely they will arrange their conduct to meet those requirements. But full knowledge of the law may facilitate complying with a legal mandate in "form" but not "substance."[69] Such technical compliance could be characterized as a form of circumvention. Nevertheless, fairness considerations presumably overcome such circumvention

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67. *See* Manes, *supra* note 40, at 814-15 (arguing secret law is a threat to individual liberty), GOITEIN, *supra* note 36, at 16 (arguing secret law is inconsistent with the publicity principle for legitimate lawmaking).

68. *See* Dirksen v. U.S. Dep't of Health & Hum. Servs., 803 F.2d 1456, 1461–62 (9th Cir. 1986) (Ferguson, J., dissenting) (criticizing the majority's approach as making "the risk of circumvention . . . indistinguishable from the prospect of enhanced compliance").

69. *See, e.g.*, Cary Coglianese, *The Limits of Performance-Based Regulation*, 50 U. MICH. J.L. REFORM 525, 558–61 (2017) (offering case of EPA tailpipe emission standards as an example of rules formally complied with but substantively circumvented).

concerns in virtually every circumstance in which the standards governing private citizens' conduct or eligibility for benefits or forbearance are at issue.

The balance is different for disclosure mandates related to information about the allocation of the agency's investigative resources (e.g., focusing resources on particular types of violations), specifying the circumstances under which certain investigative techniques should be employed, and setting forth prosecutorial/enforcement standards (i.e., instructing prosecutors or enforcement officials which types of violations to pursue in the use of prosecutorial discretion).[70] Public compliance with legal dictates and eligibility criteria will often be facilitated by the prospects of potential investigation and enforcement actions against those who violate their legal obligations. Even if guidelines about investigation and prosecution are not affirmatively published, citizens are aware of their legal obligations; they just cannot calibrate their chances of being "caught."[71]

These concerns were operationalized in FOIA, at least in the context of instructions to line officials, by specifying that the "manuals" to be disclosed in agency "reading rooms" must be "administrative" manuals and instructions.[72] The Attorney General advised agencies that portions of manuals or instructions that could lead to circumvention of the government's efforts were to be identified and segregated from the remainder of the document, and that only the redacted document need be made publicly available.[73] This means that the balance between transparency and anti-circumvention concerns weighs more heavily in favor of withholding "legal materials" that outline investigation priorities and detail enforcement rules, standards, and priorities.[74]

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70. Knowledge of such rules may facilitate private conduct that, even if not fully compliant with legal requirements, is at least less harmful than some other forms of non-compliance. Jonathan Manes, *Secrecy & Evasion in Police Surveillance Technology*, 34 BERKELEY TECH. L.J. 503, 543-44 (2019).

71. *See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59. Illustrative examples culled from the Senate and House reports included: "(1) the selection of samples in making 'spot investigations,' (2) standards governing the examination of banks, the selection of cases for prosecution, or the incidence of 'surprise audits,' and (3) the degree of violation of a regulatory requirement which an agency will permit before it undertakes remedial action." *Id.*; *accord* Manes, *supra* note 70, at 539–46; JORDAN LEE PERKINS, REGULATORY ENFORCEMENT MANUALS 38–39 (2022), https://www.acus.gov/report/regulatory-enforcement-manuals-final-report-12922 (report to the Admin. Conf. of the U.S.).

72. 5 U.S.C. § 552(a)(2)(C); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59.

73. *FOIA Guide, 2004 Edition: Exemption 2*, U.S. DEP'T OF JUST.: OFF. OF INFO. POL'Y (Dec. 3, 2021), https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-2.

74. Nevertheless, the public has a significant interest in participating in debates over methods of investigation and enforcement priorities. *See* Manes, *supra* note 70, at 527–37. There is certainly an interest in the constraints imposed upon the employment of known investigative techniques which have implications for privacy rights. Arguably, there is even a greater concern, in terms of democratic accountability, when the public is kept completely unaware of the existence of a technique that has privacy implications.

The courts have sought to refine the line between agency manuals, prosecutorial policies, and the like that must be disclosed and those that may be withheld, both in exploring the basic definition of *administrative* manuals[75] and in construing exemption 7(E)'s anti-circumvention provision. The latter allows the government to withhold certain law enforcement "techniques and procedures" and prosecutorial and investigative "guidelines."[76]

2. Government Deliberations

Government officials must be able to engage in preliminary discussions without having those conversations and communications revealed to the public (i.e., government cannot "'operate in a fishbowl'").[77] Government officials must also be able to confidentially consult agency lawyers. Various privileges designed to protect the quality of government deliberation are incorporated into FOIA exemption 5, including the deliberative process privilege, the attorney-client privilege, the attorney work-product privilege, and the privilege of confidential presidential communications.[78] That said, in *NLRB v. Sears, Roebuck & Co.*, the Supreme Court reconciled some of these confidentiality interests with section 552(a)'s requirement that agencies promptly disclose and index final opinions and statements of policy adopted by the agency, i.e., reflecting Congress' strong aversion to "secret law."[79] The exemption 5 privileges must generally give way with respect to documents covered by section 552(a)(2).[80]

With regard to the final laws or standards that bind or affect private citizens—which are the results of internal deliberations—the concerns animating

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75. *See* PERKINS, *supra* note 71, at 16-20 (summarizing considerations for whether portions or the entirety of an enforcement manual is a staff manual subject to mandatory disclosure).

76. The law enforcement exemption was added to include an anti-circumvention provision in 1974 and refined in 1986. *Attorney General's Memorandum on the 1974 Amendments to the FOIA*, U.S. DEP'T OF JUST.: OFF. OF INFO. POL'Y, https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia.

The "law enforcement" exemption is not limited to traditional law enforcement agencies, such as the Federal Bureau of Investigation. However, when "a mixed-function agency," like the Internal Revenue Service, invokes exemption 7(E) "a court must scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under FOIA Exemption 7." Pratt v. Webster, 673 F.2d 408, 418, 420 n.32 (D.C. Cir. 1982).

77. H.R. REP. NO. 1497, at 31 (1966). This is not to deny, of course, the approach of a technologically feasible future in which "cameras and microphones are placed in every government office, or chips loaded in the brains of bureaucrats, with the digital data instantly uploaded to the Internet." Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE 529, 538 (2009).

78. We discuss these privileges in more detail. *See infra* Part II.C.2.

79. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153-54 (1975) (differentiating between attorney work-product subject to Exemption 5 and final opinions subject to affirmative disclosure); *accord* Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979).

80. *See Sears, Roebuck*, 421 U.S. at 153-54; *Merrill*, 443 U.S. at 360 n.23.

these privileges, namely safeguarding the quality of government deliberations, are essentially non-existent. Thus, the case for disclosure is compelling.

The arguments for public disclosure are almost as compelling with regard to directives or opinions addressed to agency officials' exercise of judgment in determining compliance with requirements or eligibility for benefits or forbearance, such as enforcement guidelines. However, the balance is different for the subset of these documents involving investigative and enforcement efforts. Because they are not substantive, such documents are less useful in enhancing the public's understanding of its legal obligations and entitlements. And by revealing how and when agencies may identify and prosecute non-compliance, disclosure raises anti-circumvention concerns.

The broader class of pre-decisional documents that provide insight beyond the published rule might well involve incursions into both intra-governmental deliberations and attorney-related privileges. For example, legal or policy analysis, or documents laying out alternative regulatory approaches and their costs and benefits, may often prove quite helpful in understanding a final rule. However, they may also involve the give-and-take between advisors to the official promulgating the rule, interactions that could be chilled if such deliberations were made public. Similarly, agency heads might avoid communicating candidly with agency counsel (or avoid consulting the Department of Justice's Office of Legal Counsel altogether) should the legal opinions they seek be subject to disclosure at all, much less affirmative disclosure.

3. National Security and Homeland Security

Preserving national and homeland security is the third critically important countervailing principle. Courts have been quite generous in protecting such interests. FOIA permits properly classified documents to be withheld.[81] But Congress amended FOIA to make clear that courts were to perform an independent assessment of the justification for a record's classification.[82] Even so, courts have given the Executive Branch a wide berth, crafting a generous rule on judicial review of the correctness of the classification[83] and adopting a neither-confirm-nor-deny

81. 5 U.S.C. § 552(b)(1).

82. Initially, the Supreme Court held that courts could not second-guess classification decisions. EPA v. Mink, 410 U.S. 73, 84 (1973). But in the 1974 amendments, Congress expressly provided that courts were to consider whether the classification of requested documents was appropriate. 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552(a)(4)(B)).

83. The Courts have upheld classification designations so long as the Government's justification is "logical" and "plausible." ACLU v. U.S. Dep't of Def., 901 F.3d 125, 133–34 (2d Cir. 2018); ACLU v. Dep't of Just., 681 F.3d 61, 69–71 (2d Cir. 2012); *see also* Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just., 331 F.3d 918, 927 (D.C. Cir. 2003) (reiterating the need to give deference to the executive in matters relating to national security).

(NCND) (i.e., *Glomar*) doctrine to allow protection of national security.[84] In a way, protecting such secrets reflects a concern about the risk of a particularly troubling type of circumvention. Transparency may allow the nation's adversaries to frustrate the diplomatic and military initiatives the nation seeks to pursue. In this Article, such issues will come to the fore with respect to presidential national security and homeland security directives, which are arguably a form of "secret law."

4. Separation of Powers

Congress must respect the separation of powers. Although the law of executive privilege has not been well developed, the privilege has been recognized in many ways.[85] Perhaps for such reasons, FOIA and the APA do not apply to the President or the President's closest advisors.[86] (Notably, however, the Federal Register Act does impose transparency requirements on the President, requiring certain written presidential directives to be published in the *Federal Register*.[87]) Currently, the law is quite protective of the President's ability to act confidentially. This consideration does come into play with regard to the consideration of standards for disclosure of presidential directives and the disclosure of Office of Legal Counsel opinions addressed to the President, White House Counsel, and the President's other close advisors, as discussed later in this Article.

Outside of those specific contexts, the confidentiality component of separation of powers doctrines is generally less critical. To the extent that the President gives directives to agencies, allowing those directives to remain secret can hamper the public's right to participate in the *agency proceedings* that will determine how the agency translates those presidential directives into *agency* rules or policies.[88] Effective advocacy with respect to agency decision-making may require access to a major source that will structure the agency's consideration of an initiative, namely the relevant presidential directive.

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84. Outside of the FOIA context, the Court has continued to affirm the common-law state secrets privilege. U.S. v. Zubaydah, 595 U.S. 195, 212 (2022) (applying privilege to subpoenas for CIA documents in a criminal investigation); FBI v. Farzaga, 595 U.S. 344 (2022) (applying privilege to claims under the Foreign Intelligence Surveillance Act).

85. Congressional Oversight of the White House, 45 Op. O.L.C. at 30 (Jan. 8, 2021) (identifying "at least five well-recognized, and sometimes overlapping, components of executive privilege: national security and foreign affairs, law enforcement, deliberative process, attorney-client communications and attorney work product, and presidential communications").

86. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

87. 44 U.S.C. § 1505. *See generally* 44 U.S.C. §§ 1501-11. Notably, the Federal Register Act also states that a "'Federal agency' or 'agency' means the President of the United States." 44 U.S.C. § 1501.

88. In some ways, a presidential directive may be no less essential to meaningful comment on agency initiatives than is the sort of scientific data that was the focus of *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (noting that "unless there is common ground, the [public] comments are unlikely to be of a quality that might impress a careful agency"). *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 310–14 (6th ed. 2018).

5. Personal Privacy

Preserving personal privacy is yet another countervailing value. It is protected by two FOIA exemptions: (b)(6) and (b)(7)(C). Exemption (b)(6), permitting agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," has been applied more broadly than its terms suggest, encompassing an extremely wide range of records.[89] Exemption (b)(7)(C), by omitting the "clearly unwarranted" language, sets forth a heightened standard to overcome privacy concerns, presumably in view of the fact that involvement in a law enforcement matter can be particularly stigmatizing.[90] In addition, FOIA also protects privacy by authorizing agencies to redact individuals' identifying details from records required to be disclosed under its general provisions.[91]

These various provisions shield from disclosure information of "an intimate personal nature,"[92] such as "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, [and] reputation."[93] Thus, private individuals who interact with the government about non-commercial matters will most likely possess the greatest legitimate interest in privacy. Many individuals seeking monetary or other benefits from the federal government must provide detailed confidential personal information. For example, applicants for supplemental security income disability benefits and veteran's benefits, and those seeking asylum or some other immigration status, must disclose highly personal information.[94] Tax filers must disclose extensive personal financial information on various tax forms that many individuals otherwise keep confidential.

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89. U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982) (stating a broader intent for the exemption to apply to "Government records on an individual which can be identified as applying to that individual") (quoting 5 U.S.C. § 552(b)(6)).

90. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 165–66 (2004) (higher standard); McCutchen v. U.S. Dep't of Health & Hum. Servs., 30 F.3d 183, 187-88 (D.C. Cir. 1994) (finding stigma associated with law enforcement investigations gives rise to a privacy interest in anonymity); *see also* Dep't of the Air Force v. Rose, 425 U.S. 353, 378–79 n.16 (1976) (comparing the legislative histories of Exemption 6 and 7); *FOIA Guide, 2004 Edition: Exemption 7(C)*, U.S. DEP'T OF JUST.: OFF. OF INFO. POL'Y, https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-7c (stating that names in a law enforcement file carry a "stigmatizing connotation").

91. 5 U.S.C. § 552(a)(2)(E).

92. Sims v. CIA, 642 F.2d 562, 573-74 (D.C. Cir. 1980).

93. Rural Hous. All. v. U.S. Dep't of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974) (providing examples of intimate details that qualified an investigatory report as a "similar file" within the meaning of Exemption 6).

94. *See, e.g., id.* at 77; Jud. Watch, Inc. v. Reno, No. 00-0723, 2001 WL 1902811, at *8 (D.D.C. Mar. 30, 2001) (applying Exemption 6 to an asylum application).

Although corporations may lack an interest in personal privacy,[95] individuals who engage in commercial activities can claim an interest in personal privacy, but generally not with respect to their business judgment and relationships. Thus, the privacy interests of persons engaging in commercial enterprises, particularly those subject to regulation, will often be significantly less weighty or more easily overcome than those of persons engaging in non-commercial conduct.[96]

Disputes arising under the privacy exemptions, more than just about any other exemption, involve a somewhat *ad hoc* judicial balancing of competing values: privacy versus the need for transparency. Cases in which the government invokes the privacy exemptions, thus, can be somewhat document-specific and difficult to handicap.[97] This may pose a challenge in the context of agencies' affirmative disclosure obligations. There may be much litigation over whether, in particular cases or with respect to particularly small categories of documents, the incursions into privacy outweigh the public interest.

Personal privacy might constrain most, in terms of agency legal materials, when the law is developed through resolution of individual cases. Opinions resolving cases may require discussion of personal details, particularly where the legal doctrine is nuanced and heavily fact-dependent. Once again, there is a compelling case for disclosure with respect to legal materials that apply directly to individuals, a category that includes adjudicatory orders and opinions.[98] Individuals must have access to the standard by which the conduct or their applications for benefits, protection, regulatory relief, and the like are to be judged.

On the whole, directives to staff and explanatory materials will probably not raise significantly greater concerns with regard to personal privacy. They will presumably discuss the standards to apply in terms of general guidelines or considerations, rather than discussing particular cases.

Personal privacy may be more of an issue to the extent the concept of agency legal materials is expanded to include enforcement documents (such as records on the issuance of fines, settlements of administrative charges, warning letters, consumer complaints, and inspection records).[99] These documents could

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95. FCC v. AT&T Inc., 562 U.S. 397 (2011).

96. *See, e.g.*, Wash. Post Co. v. U.S. Dep't of Just., 863 F.2d 96, 100 (D.C. Cir. 1988) ("Information relating to business judgments and relationships does not qualify for exemption."); *Sims*, 642 F.2d at 575 ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships."); Doe v. Fed. Election Comm'n, 920 F.3d 866, 872 (D.C. Cir. 2019) (stating that a trust does not qualify for the personal privacy protections of Exemption 7(C)); Besson v. U.S. Dep't of Com., 480 F. Supp. 3d 105 (D.D.C. 2020).

97. *See, e.g.*, Prison Legal News v. Samuels, 787 F.3d 1142, 1150–51 (D.C. Cir. 2015) (illustrating the diversity of privacy interests that may be involved in a given claim that are difficult to categorize together).

98. Agencies appear to have successfully navigated these privacy issues. *See infra* Part I.C.

99. As we argue below, these documents might prove quite helpful to private entities seeking to supplement the agencies' law enforcement efforts or seeking to assess how faithfully the agency is performing its enforcement functions. *See infra* Part II.D.2.

harm an individual's business and professional reputation. Indeed, some may merely amount to allegations that the target will wish to contest. The privacy harms from releasing such information may resemble the harms flowing from release of records that assert allegations early in a criminal case or that reveal that a person is under criminal investigation.

6. Proprietary Information

The government often obtains confidential commercial information from private entities or individuals, sometimes by compulsion, at other times as the price for participation in a government program, and at still other times from completely voluntary submissions.

A major issue involving proprietary, indeed copyrighted, material is agency incorporation by reference of standards produced by private standard-setting bodies. We discuss incorporation by reference in some detail below in our treatment of the accessibility of rules.[100] But we ultimately offer no recommendation on the issue for reasons set forth in that discussion.

Proprietary information requires protection. First, the ability to safeguard commercial financial information is essential to companies obtaining a return on innovation and investment, ensuring that competitors cannot unfairly frustrate their future plans, and generally maintaining their competitive positions. The ability to take advantage of confidential information in this way is not merely important as a matter of fairness to economic entities, but it is a foundation of a free enterprise economy.

Second, to the extent that government relies on voluntary provision of information, it should not discourage such sharing of information by divulging it against the companies' wishes. Third, to the extent that businesses must provide information to participate in a government program, the goals of the program and the eligible entities' willingness to participate may be hampered if the government cannot provide some assurances of confidentiality.[101]

On the other hand, business entities' violation of legal obligations and information necessary for employees' or consumers' ability to protect their own interests (and make fully informed decisions about their own safety or well-being) should ordinarily not be kept confidential. Nor should a business enterprise's contractual arrangements with the government be legitimately considered confidential.

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100. *See infra* Part II.A.3.

101. Examples of programs asking for businesses to provide confidential information include the Troubled Assets Relief Program, the Paycheck Protection Program, and the National Flood Insurance Program. See 12 U.S.C. ch. 52, subch. I; *PPP Loan Forgiveness*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness#id-how-to-apply-for-forgiveness; 42 U.S.C. ch. 50, subch. I.

Exemption 4 reflects many of these concerns.[102] The law surrounding exemption 4 that developed prior to the Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media* reflected many of those themes as well.[103] *Food Marketing* broadened the scope of the exemption beyond such concerns, although the new exemption 4 legal regime is still in its infancy.

Under *Food Marketing*, to warrant protection as confidential business information, the information must customarily be "closely held" by the person imparting it to the government.[104] In addition, the government may also be required to have provided some assurance that it would not disclose the information.[105] The Office of Information Policy has directed agencies to assume that the second condition is also necessary to invoke exemption 4. Moreover, it has advised that some information, such as the prices that the government pays to contractors, cannot be considered confidential commercial information of the private partner with which the government is dealing.[106]

D. Practical Considerations About Disclosure

We recognize that any legislative change broadening mandatory disclosure will result in increased burdens on agencies, particularly at the outset. This section details two practical considerations that agencies will face and suggests aspects of the issues or strategies that may ameliorate the burden. We make no specific

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102. The Attorney General lays out much of the legislative history, while ultimately observing "[t]he scope of this exemption is particularly difficult to determine." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59.

103. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (interpreting exemption 4 to apply when disclosure of commercial or financial information would substantially harm a person's competitive position); Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (echoing need for confidentiality assurances in certain instances of voluntary provision of confidential information to the government).

104. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 435 (2019).

105. *Id.*

106. *See Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media*, U.S. DEP'T OF JUST. (Oct. 4, 2019), https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media ("[W]hat the government pays a private entity to supply goods or services to the government reflects the government's own actions and will often undermine a submitter's claim to reasonably expect such information to be kept confidential.").

Enforcement records might have implications with regard to confidential financial and commercial information. One court has held that observations made by government inspectors who inspect a commercial enterprise constitute confidential information that can be withheld. *See, e.g.*, Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1076, 1081 (9th Cir. 2004) (concerning quality assessment of raisins, "including weight, color, size, sugar content, and moisture" prepared by USDA inspectors during plant visits), *overruled on other grounds by* Animal Legal Def. Fund v. FDA, 836 F.3d 987, 990 (9th Cir. 2016); *accord* DOJ, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 4, at 11 n.49 (2021). It seems odd that the observation of enforcement officials on a company's premises pursuant to proper authorization could be confidential commercial information, particularly given that any violation of legal requirements would be of such importance to the public as to negate all but the most explicit promise of confidentiality by government officials.

recommendations concerning these matters, as they are outside this project's scope. But we do want to highlight that any legislation that increases the scope of agency affirmative disclosure obligations should be accompanied by legislative efforts to ensure that agencies will have adequate resources to ensure their eventual success.

1. Section 508 Compliance

One important consideration in making agency legal materials affirmatively available online is the accessibility of those materials to members of the public with disabilities in compliance with anti-discrimination law. Most notably, Section 508 of the Rehabilitation Act, as amended in 1998, requires that federal agencies ensure that

> [I]ndividuals with disabilities who are members of the public seeking information or services from a Federal department or agency . . . have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.[107]

This basic requirement reflects the Rehabilitation Act's "emphasis on independent living and self-sufficiency [which] ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons."[108] The statute does provide an exception for instances where "an undue burden would be imposed on the department or agency,"[109] in which case the agency "shall provide individuals with disabilities . . . with the information and data involved by an alternative means of access that allows the individual to use the information and data."[110]

The U.S. Access Board is charged with administering the Rehabilitation Act, including by carrying out a statutory duty to publish standards setting forth a definition of electronic and information technology and the technical and functional performance criteria necessary to ensure access to individuals with disabilities.[111] Acting under this statutory authority, the Board promulgated a set of regulations called the Information and Communication Technology Standards and Guidelines (ICT).[112] These regulations set forth detailed requirements, including, for example, that all textual documents be machine-readable and that there be a text equivalent provided for every non-text element, i.e., a description of a photo or a graph within a document.[113]

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107. 29 U.S.C. § 794d(a)(1)(A)(ii).

108. Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1269 (D.C. Cir. 2008).

109. 29 U.S.C. § 794d(a)(1)(A).

110. *Id.* § 794d(a)(1)(B).

111. *Id.* § 794d(a)(2)(A).

112. Information and Communication Technology Standards and Guidelines, 82 Fed. Reg. 5790 (Jan. 18, 2017) (codified at 36 C.F.R. pts. 1193-94).

113. *Id.* § 1194 app. C § 414.

In addition, Congress in 2018 reinforced the importance of full accessibility to agency websites when it adopted the 21st Century Integrated Digital Experience Act.[114] This law requires that agencies "shall ensure to the greatest extent practicable that any new or redesigned website, web-based form, web-based application, or digital service . . . is accessible to individuals with disabilities in accordance with section 508 of the Rehabilitation Act of 1973."[115]

Agencies have routinely noted that Section 508 imposes additional burdens on posting records on their websites, especially voluminous records housed in the so-called electronic reading rooms maintained to comply with FOIA's affirmative disclosure provisions.[116] Many records are not routinely machine-readable, either because they are scanned, rather than born-digital, or because some agencies' processing software strips the kind of meta-data from their documents needed by machine-reading software.[117] Moreover, for those records with graphic elements, agency personnel must dedicate time to remediating the records by providing text tags on those elements describing their contents. As the Office of Government Information Services (OGIS) has noted, agencies frequently pull resources either from the IT departments or their FOIA professionals, or contract out for those services. But regardless of the method, document remediation can be costly and under-resourced.[118]

Moreover, the "undue burden" exception to Section 508 requirements has not been well-developed.[119] The Access Board has explained that when an agency determines that complying with 508 standards "would impose an undue

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114. Pub. L. 115-336, 132 Stat. 5025 (2018) (codified as amended at 44 U.S.C. § 3501 note).

115. *Id.* § 3(a)(1).

116. The tension between agency affirmative disclosure obligations and section 508 obligations was raised at one of the meetings of the consultative group for this project. *See* ADMIN CONF. OF THE U.S., MINUTES FROM THE FIRST CONSULTATIVE GROUP MEETING FOR *DISCLOSURE OF AGENCY LEGAL MATERIALS* 3 (2022), https://www.acus.gov/sites/default/files/documents/Consolidated%20Consultative%20Group%20Meeting%20Minutes.pdf.

117. *See, e.g.*, OFF. OF GOV'T INFO. SERVS., THE FREEDOM OF INFORMATION ACT OMBUDSMAN 10 (2021), https://www.archives.gov/files/ogis/assets/ogis-2021-annual-report-for-fy-2020.pdf ("The procedures and tools often used by agencies to process records for public release under FOIA strip away metadata and other features that make those records accessible and Section 508 compliant. Agencies often lack the resources to remediate these records to meet Section 508 requirements. This conflict between current FOIA processing technology and Section 508 compliance prevents a number of agencies from proactively disclosing records.").

118. *Id.*

119. *See, e.g.*, Leiterman v. Johnson, 60 F. Supp. 3d 166, 176–79 (D.D.C. 2014) (discussing section 508 claim without elaboration on the undue burden exception); Latham v. Brownlee, No. SA-03-CA-0933, 2005 WL 578149, at *9 (W.D. Tex. Mar. 3, 2005); Gonzalez v. Perdue, No. 18-CV-459, 2020 WL 1281237 at *15-16 (E.D. Va. Mar. 17, 2020); D'Amore v. Small Bus. Admin., No. 21-CV-1505, 2021 WL 6753481, at *6-12 (D.D.C. Sept. 25, 2021); Clark v. Vilsak, No. 19-384, 2021 WL 2156500, at *4 (D.D.C. May 27, 2021). However, some courts have considered an "undue burden" exception in the context of claims made under other sections of the Rehabilitation Act. One leading case in the area, *American Council of the Blind v. Paulson*, adopted a relatively strict construction. 525 F.3d 1256, 1263-66 (D.C. Cir. 2008) (holding that the US Treasury's currency design violated the statute and that when redesigning currency it must make size and color variations).

burden or would result in a fundamental alteration in the nature of the ICT, conformance shall be required only to the extent that it does not impose an undue burden."[120] In making such a finding, the agency is supposed to consider if conformance "would impose significant difficulty or expense considering the agency resources available to the program."[121] The agency also must document its rationale and provide alternative means of access to individuals with disabilities.[122]

There are scant judicial interpretations that shed light on the meaning of these statutory provisions. One notable reason is that until recently every court to consider the question has concluded that there is no private right of action to enforce Section 508 obligations.[123] Courts' general reluctance to recognize a private right of action has rested upon (a) statutory silence and (b) an arguable implicit preclusion of such a right in the form of an express statutory provision authorizing "any individual with a disability [to] file a complaint" with the *agency* alleged to have violated these obligations.[124]

Regardless of enforcement mechanisms, any additional disclosures that agencies might have to make in response to legislative action will need to comply with the Rehabilitation Act's requirements for accessible documents. Indeed, because agency legal materials are one of the most important categories of agency documents to members of the public, it is especially important that these records be made accessible to all members of the public regardless of disability.

Several factors lessen the predicament for agencies. First, legal materials are only a relatively small subset of agency records of interest to the public. The volume of such records that would be subject to disclosure requirements is not nearly as high as other types of disclosures may be in response to FOIA requests on timely topics. Second, many—if not most—types of legal materials would not require redaction or otherwise be processed through software that would make the records inaccessible. Third, agency legal materials are unlikely to contain voluminous graphics that need manual tagging, unlike, for example, PowerPoint presentations. Finally, for any new requirements that Congress might adopt, agencies would be put on clear notice of the need to adapt their procedures for

120. 36 C.F.R. § 1194 app. A ¶ E202.6 (2023).

121. *Id.* app. A ¶ E202.6.1.

122. *Id.* app. A ¶¶ E202.6.2, E202.6.3.

123. *See, e.g.*, *Clark*, 2021 WL 2156500. In February 2023, the D.C. Circuit recognized a private right of action under section 508 for any plaintiff with a disability who has filed an administrative complaint about technology accessibility. Orozco v. Garland, 60 F.4th 684, 689, 692 (D.C. Cir. 2023) (holding that 29 U.S.C. § 749(d)'s enforcement provision incorporates the right to use the "remedies, procedures, and rights" of Title VI to assert claims about technology inaccessibility). The court, though, did not reach the merits.

124. 29 U.S.C. § 794d(f). If the administrative complaint goes unremedied, a person with a disability seeking to enforce technology accessibility may turn to the courts. *See Orozco*, 60 F.4th at 689.

the creation of records in those categories to ensure they are "born accessible."[125] By designing agency legal materials in advance with accessibility in mind, agencies can forestall the need for costly remediation after the fact.

For all these reasons, Section 508 requirements are unlikely to present agencies with any great burden in the context of agency legal materials—especially compared with what might be involved in the context of responses to FOIA requests, release-to-one-release-to-all policies, or other reading room requirements. Ultimately, of course, the precise Section 508 implications of any new legislation will depend on what that legislation requires. It will also likely vary from agency to agency. As OGIS has repeatedly taken up the issue of the burdens associated with Section 508 compliance, it will probably be in the best position to inform Congress of the likely effects of new legislative action. As recently as 2021, OGIS renewed a call on Congress to amend Section 508 and provided a menu of feasible alternatives.[126] Given the work that OGIS has already done and could do in the future, this Article will not revisit the broader Section 508 questions.

2. Budgetary Considerations

Outside of Section 508 compliance, agencies will need to incur costs associated with creating, disclosing, and maintaining agency legal materials. The cost of creating agency online resources, especially well-designed, searchable, indexed databases that warehouse agency legal materials, can be measured in dollars. Additional costs of disclosure may include redactions, selected removal of certain records from the public domain, and tailored privacy policies. Other monetary costs might include salaries and other similar expenses related to hiring new employees in the utilization and deployment of new technologies. Congress should ensure agencies have adequate funds to support the prompt and accessible disclosure of agency legal materials, including funds for the development and maintenance of advanced search engines.

Another cost may come from providing public notice about new materials, such as by alerting the public through public email distribution lists, social media, or at conferences or meetings, in addition to any printed pamphlets or other hard copy documents.[127] Some costs of putting legal materials on agency websites directly relate to the acquisition of new technology. A recent FOIA

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125. *See* Brad Turner, *Benetech Global Literacy Services: Working Towards a 'Born Accessible' World*, 31 LEARNED PUBLISHING 25, 28 (2018) ("Instead of requiring the remediation to make publications accessible, instead of having to create special versions for the users of AT, and instead of those versions costing extra and often available only long after publication, publications should have accessibility built in at the point of creation.").

126. OFF. OF GOV'T INFO. SERVS., *supra* note 117, at 10-11.

127. *See* Adoption of Recommendations, 84 Fed. Reg. 38927, 38933 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3, Public Availability of Agency Guidance) (recommending additional efforts for publicizing new or revised agency guidance documents).

Advisory Committee report specifically recommended creating add-ons to IT systems for exporting records, deploying a more centralized tracking platform, and exploring new e-discovery tools.[128] Investing in the use of such new technologies undoubtedly comes with monetary and labor costs.

One way to address such costs is to recognize how existing costs might be reduced. For example, creating add-ons for exporting records can lower processing costs by reducing overall search times. Increased exportation and release of materials would ultimately reduce FOIA requests, a monetary and administrative offset. Furthermore, regularly exploring e-discovery tools would allow for the discovery and implementation of software that is more efficient and affordable in the long-run.

It is worth also exploring the cost-savings that may accrue through a reduction in individual FOIA requests.[129] The U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) credited its decision to publish its Animal Welfare Act enforcement records with a decrease in FOIA requests for these records and an increased efficiency in the agency's ability to fulfill remaining requests.[130] The Securities and Exchange Commission (SEC) likewise reported a decrease in FOIA requests after it began publishing its comment letters.[131]

The Consumer Product Safety Commission's (CPSC) statutorily mandated SaferProducts.gov site publishes consumer complaints online after a two-week period of review by the agency and manufacturer.[132] This information "was previously only available through FOIA requests."[133] ACUS has also adopted a recommendation setting out best practices for agencies that disclose consumer complaints.[134] Implementing such a recommendation may require some start-up

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128. 2016-2018 FREEDOM OF INFORMATION ACT (FOIA) FEDERAL ADVISORY COMM., NAT'L ARCHIVES & RECS. ADMIN., FINAL REPORT AND RECOMMENDATIONS 16-17 (2018), https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf.

129. For example, ACUS previously reported that NLRB found that publishing various adjudication orders and opinions on the website "translates to lower printing costs and fewer FOIA requests." DANIEL J. SHEFFNER, ADJUDICATION MATERIALS ON AGENCY WEBSITES 29 (2017) (report to the Admin. Conf. of the U.S.).

130. *See* U.S. DEP'T OF AGRIC., CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT 12 (2021); *see also* U.S. DEP'T OF AGRIC., FREEDOM OF INFORMATION ACT ANNUAL REPORT FY 2020, at 9 (2021), https://www.usda.gov/sites/default/files/documents/usda-fy20-annual-foia-report.pdf.

131. SEC, FOIA ANNUAL REPORT (2006), https://www.sec.gov/foia/arfoia06.htm.

132. U.S. CONSUMER PROD. SAFETY COMM'N, https://www.saferproducts.gov; *see* 15 U.S.C. § 2055a(1)(c).

133. U.S. DEP'T OF JUST., SUMMARY OF AGENCY CHIEF FOIA OFFICER REPORTS FOR 2017 AND ASSESSMENT OF AGENCY PROGRESS IN FOIA ADMINISTRATION WITH OIP GUIDANCE FOR FURTHER IMPROVEMENT § III (2017), https://www.justice.gov/oip/reports/2017_cfo_summary_and_assessment.pdf/download.

134. Adoption of Recommendations, 81 Fed. Reg. 40259 (June 21, 2016) (Administrative Conference Recommendation 2016-1).

costs but, as with the experience at CPSC, these costs would be offset by a reduction in FOIA requests and any associated costs in responding to those requests.

To reduce FOIA requests, it will of course be necessary to ensure that the public can actually find information that is affirmatively disclosed on agency websites. This issue is discussed at greater length in Part III.A of this Article. For now, it is enough to note that ACUS has already encouraged agencies to build websites with clear links to downloadable versions of many types of agency legal material. ACUS has urged agencies to ensure their websites provide easy access to such material by including features "such as options to sort, narrow, or filter searches by record type, action or case type, date, case number, party, or specific words or phrases."[135] Other suggestions favor the inclusion of "[p]lain language explanations . . . that define . . . documents, explain their legal effects, or give examples of different types of . . . documents"—as well as "contact information or a comment form to facilitate public feedback related to potentially broken links, missing documents, or other errors or issues related to the agency's procedures for the development, publication, or disclosure of its guidance documents."[136] Tools such as these, as well as those discussed further in Part III.A, would not only give the public greater access to information but also help agencies with maintaining accurate information.

II. ANALYSIS OF DISCLOSURE OF AGENCY LEGAL MATERIALS

The centerpiece of federal transparency law—FOIA—provides the most important existing requirements for the affirmative or proactive disclosure of agency legal materials. These requirements fall squarely in line with this Article's animating concern, which is to ensure that non-exempt agency legal materials that define, explain, or justify existing legal requirements are disclosed in an efficient and effective manner to the public. This Article thus focuses on recommendations to improve "the disclosure of *law*,"[137] not of government information more generally.

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135. Adoption of Recommendations, 82 Fed. Reg. 31039, 31040 (July 5, 2017) (Administrative Conference Recommendation 2017-1); *see also* Aaron L. Nielson, *Accessing Agency Procedure*, REGUL. REV. (May 29, 2019) (summarizing the 2018 ACUS recommendations on the public availability of adjudication rules), https://www.acus.gov/newsroom/administrative-fix-blog/accessing-agency-procedure. Congress should support "access to all procedural materials related to adjudications—and promptly update such materials when appropriate." *Id.*; *see also* Adoption of Recommendations, 87 Fed. Reg. 1715, 1716 n.5 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-6, Public Access to Agency Adjudicative Proceedings) (examples of supporting adjudicative materials that may reduce FOIA requests are "online disclosures of transcripts and recordings of adjudicative proceedings and real-time broadcasts of open proceedings").

136. Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3, Public Availability of Agency Guidance Documents).

137. Herz, *supra* note 5, at 586.

FOIA's affirmative disclosure obligations fall into two categories. Some records, sometimes referred to as "(a)(1) material" (after the applicable section of FOIA), must be published in the *Federal Register*.[138] These include:

> (A) descriptions of agency organization, locations, and methods for obtaining public information;
> (B) general statements of agency functions and requirements for agency procedures;
> (C) general rules of agency procedure;
> (D) substantive agency rules and statements of general policy or interpretations of general applicability; and
> (E) each amendment, revision, or repeal of the previous four categories.[139]

In essence, these provisions require the publication in the *Federal Register* of all binding, generally applicable agency law and procedures as well as guidance documents that interpret and explain the law in general terms.

The second category, known as "(a)(2) material", consists of records that must be made "available for public inspection in an electronic format."[140] Agencies originally met their (a)(2) obligations by placing material in a physical "reading room" to which the public had access during business hours. A 1996 amendment added the reference to "an electronic format," and agencies now meet their (a)(2) obligation by posting records on agency webpages known as "electronic reading rooms."[141] Records covered under section (a)(2) include:

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*;
> (C) administrative staff manuals and instructions to staff that affect a member of the public[.][142]

Taken together, (a)(1) and (a)(2) reflect a seemingly categorical decision to require affirmative disclosure of all agency working law.[143]

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138. 5 U.S.C. § 552(a)(1).

139. *Id.*

140. *Id.* § 552(a)(2).

141. DOJ, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 6 (noting that electronic reading rooms are also known as FOIA Libraries).

142. 5 U.S.C. § 552(a)(2).

143. There is one additional provision of the reading rooms requirements which does not specifically address agency legal materials. In 1996 Congress added this provision, FOIA's so-called "frequently requested records" provision, which states that all agencies must publish, in electronic format, copies of records that have been released in response to a FOIA request and that "because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same

As will be detailed below, some of these requirements have been implemented successfully and to the great benefit of the public. In other instances, however, the definitions of documents requiring affirmative disclosure have been found ambiguous or interpreted narrowly, functionally excluding from the law's ambit certain categories of records that represent a body of agency legal materials. Moreover, FOIA's requirements for agencies to index and organize their records are limited and confusing. The result is a wide variety of practices in publication, some of which can make it extremely difficult for the public to locate records of interest or to know what kinds of legal materials an agency has available to the public. Furthermore, although the incentives for compliance are very strong as to some kinds of materials—particularly those that are subject to effective self-enforcing publication requirements as described below—the failure of an agency to affirmatively disclose other types of materials comes with no real consequence.

Other statutes intersect with FOIA's affirmative provisions and bear on requirements to publish agency legal materials. For example, the Federal Register Act requires disclosure of certain agency legal materials in the *Federal Register*. Of course, FOIA itself enumerates items to be published in the *Federal Register*. The Federal Register Act incorporates those requirements by reference, listing as one of the "documents to be published" in the *Federal Register* "documents or classes of documents that may be required so to be published by Act of Congress."[144] But the Federal Register Act also enumerates other categories of records to be published in those volumes, including:

> (1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;[145] and
> (2) [D]ocuments or classes of documents that the President may determine from time to time to have general applicability and legal effect.[146] The statute specifies that "[f]or the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect."[147]

The Federal Register Act also specifies that additional documents can be authorized to be published by regulations with the approval of the President and that the requirements of publication can be suspended in times of an attack on the United States.[148]

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records" or have been requested at least three times. 5 U.S.C. § 552(a)(2)(D). Because this provision does not target agency legal materials and would only affect their publication incidentally, we do not further address it or any potential reforms to it in our report.

144. 44 U.S.C. § 1505(a)(3).

145. *Id.* § 1505(a)(1).

146. *Id.* § 1505(a)(2).

147. *Id.* § 1505(a).

148. *Id.* §1505(b)-(c).

In addition to the Federal Register Act, the 2016 FOIA Improvement Act amended the Federal Records Act to require agencies to establish and maintain "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format."[149] Many agency legal materials fall within that provision's ambit, although its limitation to records that are "appropriate" for disclosure appears to give some discretion to the agencies and undercuts the force of the requirement. Nevertheless, the Federal Records Act, with its 2016 amendments, demonstrates Congress's general policy in favor of openness of government records and its direction that agencies establish records management systems.[150]

Finally, sections 206(b) and 207(f) of the E-Government Act require agencies to post online all agency materials that FOIA (already) requires them to put in the *Federal Register* or to make available in electronic format.[151] As we discuss below,[152] these provisions suffer from a litany of drafting flaws and are largely or wholly redundant of FOIA's obligations. While Congress should correct these drafting errors, those changes are mere housekeeping. A key implication of the E-Government Act is that it affirms an overarching principle of open government that runs through a variety of statutes pursuant to which agencies must affirmatively disclose legal material on their websites.

In addition to these generally applicable disclosure requirements, some agency-specific statutes impose separate and additional requirements for the disclosure of certain agency legal materials. A particularly successful example is the FDA Modernization Act, which requires that the Food and Drug Administration publish all of its guidance documents online.[153] We discuss this statute in greater depth in Part III.A below.

The upshot is a patchwork of requirements that does not fully effectuate the basic principle that all agencies have an affirmative obligation to make all non-exempt agency legal material available on their websites. At a minimum, various drafting errors call for amendment. More broadly, Congress's previous attempts to keep up with governance in an electronic age have not been comprehensive nor fully effective. The remainder of this Article will focus on the statutory changes, both substantive and procedural, that can meaningfully improve the public's access to agency legal materials, accounting for the changes in technology, the ways the public

149. FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 4, 130 Stat. 538, 544 (codified at 44 U.S.C. § 3102).

150. Consider that the legislative language quoted earlier in this paragraph appears in a section of the FOIA Improvement Act of 2016 entitled "Proactive Disclosure Through Records Management." Pub. L. No. 114–185, § 4, 130 Stat. 538, 544. We also take up improvements to records management in this Article in Part III.A.

151. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. § 3501 note).

152. *See infra* Part II.A.1.c.

153. 21 U.S.C. § 371(h).

uses agency records, and the capacity of agencies to provide meaningful disclosure in an electronic era. This Part reviews existing law and identifies gaps in disclosure obligations related to four main types of agency legal material: (a) substantive rules, (b) guidance documents, (c) legal advice, and (d) adjudication material.

A. Agency Substantive Rules

Under the principles described above, substantive agency regulations must, of course, be made publicly available. No one would argue otherwise, and Congress has established an effective mechanism for ensuring that they are by requiring that these rules must be published if an agency wishes to enforce them or otherwise rely on them. In this section, we review the requirements for publishing agency substantive rules, discuss agency regimens for publishing material integral to understanding agency rules, and highlight the issues surrounding the incorporation by reference of nongovernmental standards into agency rules.

1. Publication of Substantive Rules

We begin by reviewing existing requirements and identifying certain specific, modest ways in which they might be clarified or improved. These requirements call for publication of substantive rules in the *Federal Register* and the Code of Federal Regulations, as well as on agency websites.

a. The *Federal Register*

The Federal Register Act of 1935 created the Office of the Federal Register (OFR), headed by a Director who is appointed and supervised by the Archivist of the United States.[154] The OFR "is charged with the custody and, together with the Director of the Government Publishing Office [(GPO)], with the prompt and uniform printing and distribution of the documents required or authorized to be published" in the *Federal Register*.[155] Overseeing the operation is the Administrative Committee of the Federal Register (ACFR), which consists of four members: the Archivist of the United States, who serves as Chair, the Director of the GPO, an appointee of the Attorney General, and the Director of the Federal Register.[156] The ACFR has rulemaking authority to set prices, prescribe the manner and form of *Federal Register* publication and distribution to customers, and ensure proper organization of materials and codification of amendments.[157]

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154. Federal Register Act of 1935, Pub. L. No. 74-220, § 2, 49 Stat. 500 (codified at 44 U.S.C. § 1502).

155. 44 U.S.C. § 1502.

156. 44 U.S.C. § 1506(a).

157. *Id.* §§ 1506(a), 1510; *see generally* 1 C.F.R. ch. 1 (2024) (codifying ACFR regulations on the manner and form of *Federal Register* publication). The ACFR's regulations are subject to the approval of the President. 44 U.S.C. § 1506(a). That authority has been delegated jointly to the Archivist and the

The Federal Register Act requires daily publication of the *Federal Register* and inclusion therein of all government "documents" that "have general applicability and legal effect."[158] This phrase clearly applies to substantive rules. Separately, the Administrative Procedure Act requires all "substantive rules of general applicability adopted as authorized by law" to be published in the *Federal Register*.[159] A rule not so published is unenforceable against any person lacking actual notice.[160] And publication in the *Federal Register* must precede the rule's effective date by at least thirty days unless the rule grants an exemption or relieves a restriction or the agency has good cause for a shorter, or no, grace period.[161] For the past half century or so, the ACFR has imposed a standardized format for proposed and final rules appearing in the *Federal Register*.[162]

By statute, a document submitted to the *Federal Register* must be made publicly available prior to its actual publication.[163] The OFR has a standard schedule under which a submission received before 2:00 p.m. is made available for public inspection two days later and published the day after that.[164] Documents available for public inspection can be seen in person at the OFR's offices and are also posted online.[165]

Agency compliance with APA and regulatory requirements for the publication of substantive rules in the *Federal Register* is high. To be sure, there is a recurrent issue over the identification of rules that are substantive as opposed to interpretive or procedural or statements of policy. But that fight is not about *publication*; it is about whether a given rule must go through notice and comment.[166] If an agency deems a rule substantive, it publishes it in the *Federal Register*. After all, if it does not, it cannot later enforce the rule against a party without actual notice of it.[167] Thus, agencies have a strong incentive to publish substantive rules and no

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Attorney General. *See* Exec. Order No. 10530 § 6(b), 19 Fed. Reg. 2709, 2712 (1954), as amended by Exec. Order. No. 12608, 52 Fed. Reg. 34617, 34618 (1987).

158. 44 U.S.C. §§ 1504, 1505(a)(2).

159. 5 U.S.C. § 552(a)(1)(D).

160. *Id.* § 552(a)(1).

161. 5 U.S.C. § 553(d); *see also* 44 U.S.C. § 1507.

162. 1 C.F.R. § 18 (2024); *see generally* OFF. OF THE FED. REG., DOCUMENT DRAFTING HANDBOOK (2018 ed., rev. 2.1 2023).

163. 44 U.S.C. § 1503.

164. 1 C.F.R. § 17.2(c) (2023).

165. *See Public Inspection Issue*, FED. REG., https://www.federalregister.gov/public-inspection/current (updating daily).

166. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007) (criticizing the IRS for over-reliance on exceptions to notice-and-comment requirement but finding that all the Directives and Regulations studied were published in the *Federal Register*).

167. 5 U.S.C. § 552(a)(1); 44 U.S.C. § 1507 ("A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with

real reason not to do so. Even if a rule is "actually" substantive but is deemed by the agency, spuriously, to be an interpretive rule or statement of policy, it must still be published in the *Federal Register*.[168] The statutory publication requirement is comprehensive.

The *Federal Register* has always been printed in hard copy. This remains a statutory requirement. The Federal Register Act requires the *Federal Register* to be "printed" and distributed "by delivery or by deposit at a post office."[169] The hard copies are provided free of charge on request to Congress, agencies, and the courts[170] as well as to the more than 1,000 federal depository libraries around the country. Hard copies are otherwise available for sale.[171] As new technologies of distribution have developed, these have been adopted but paper publication has persisted.[172]

Since 1994, the *Federal Register* has been available online.[173] The creation of online versions is the product of both OFR initiative and statutory mandate. The ACFR is authorized to determine "the manner and form in which the Federal Register shall be printed, reprinted, and compiled, indexed, bound, and *distributed*," language which seems broad enough to permit the quite sensible decision to produce it electronically as well.[174] More specifically, Congress in 1993 directed that the Government Printing Office (GPO) "provide a system of online access" to the *Federal Register*.[175]

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the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it.").

168. 5 U.S.C. § 552(a)(1)(D).

169. 44 U.S.C. § 1504.

170. 1 C.F.R. §§ 12.1, 12.2 (2024); 44 U.S.C. § 1506(b)(1).

171. 1 C.F.R. § 11.2(a) (setting price for annual *Federal Register* subscriptions in paper format); *id.* § 11.3(a) (same for CFR).

172. 1 C.F.R. § 5.10 (2024); *see also id.* The *Federal Register* and CFR were also previously available in microfiche form, but the ACFR has recently discontinued microfiche as an official format. Discontinuation of *Public Papers of the Presidents* Book Series and Removal of Microfiche as Official Format of the Federal Register and Code of Federal Regulations, 87 Fed. Reg. 79999, 80000 (Dec. 29, 2022) (codified 1 C.F.R. pts. 2, 5, 8, 10-12).

173. The Government Printing Office started to put the *Federal Register* online in 1994, but daily editions were not published online until 1995. JIM HEMPHILL, OFF. OF THE FED. REG., FEDERAL REGISTER FACTS (2010); Benjamin Jordi, *Federal Register Digitalization Project*, OFF. OF THE FED. REG. ANNOUNCEMENTS (Jan. 13, 2017), https://www.federalregister.gov/reader-aids/office-of-the-federal-register-announcements/2017/01/federal-register-digitization-project.

174. 44 U.S.C. § 1506(a)(3) (emphasis added).

175. Government Printing Office Electronic Information Access Enhancement Act of 1993, Pub. L. No. 103-40, § 2(a), 107 Stat. 112, 112 (codified at 44 U.S.C. § 4101(a)(2)). The Government Printing Office was renamed the Government Publishing Office in 2014, further reflecting the shift from print to online publishing. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 1301, 128 Stat. 2130, 2537 (2014) (codified in part at 44 U.S.C. §§ 301-07).

The OFR publishes two online versions of the *Federal Register*. One, found at https://www.govinfo.gov/app/collection/fr, provides PDF and XML versions of the hard copy. The other, https://www.federalregister.gov/, is a more user-friendly and functional site sometimes referred to as "*Federal Register 2.0*."[176] It is widely admired. Indeed, in 2011, ACUS selected it as its inaugural winner of the Walter Gellhorn Innovation Award.[177] It is comprehensive and easy to use, with robust search tools and a clear presentation. Like GovInfo, documents are available in both PDF and XML format. However, in the HTML version, documents are organized and displayed in an easier-to-read format with navigation aids and links to related or cited material, including the Code of Federal Regulations and the United States Code. The site provides user aids designed to help people find what they are looking for, including broad topical sections in six areas of interest, suggested searches for trending items, and agency "home pages" that list every *Federal Register* document published by an agency and its sub-agencies.

The system for publishing substantive rules in the *Federal Register* (and then in the Code of Federal Regulations, discussed in the next section) functions well. The underlying statutory provisions also seem appropriate. While technological changes may well bring further changes in the future, we see no need for statutory revisions, with only one minor exception.

The minor exception concerns the hard-copy version of the *Federal Register*. Unsurprisingly, the printed *Federal Register* has become steadily more marginal as the online version has become so easy to use. In 2011, the White House instructed executive agencies to cancel their print subscriptions. The move, done with some fanfare at the suggestion of a federal employee participating in a contest for cost-cutting ideas, was estimated to save $4 million in printing costs annually by eliminating almost 5000 subscriptions.[178] In 2018,

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176. *See, e.g.*, David Ferriero, *Federal Register 2.0*, NAT'L ARCHIVES (July 22, 2010), https://aotus.blogs.archives.gov/2010/07/22/coming-soon-federal-register-20/; Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENV'T & ADMIN. L. 1, 21 (2012). The OFR itself has used the term. *See, e.g.*, Michael Wilson, *What FedThread Has Sown*, OFF. OF THE FED. REG. ANNOUNCEMENTS (July 28, 2011), https://www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2011/07/what-fedthread-has-sewn (referring to the anniversary of "Federal Register 2.0"); *see also Resolution Celebrating the 75th Anniversary of the Federal Register Act*, AM. ASS'N OF L. LIBRS. (July 8, 2010), https://www.aallnet.org/about-us/what-we-do/resolutions/resolution-celebrating-the-75th-anniversary-of-the-federal-register-act/; CONG. RSCH. SERV., R42817, GOVERNMENT TRANSPARENCY AND SECRECY: AN EXAMINATION OF MEANING AND ITS USE IN THE EXECUTIVE BRANCH 17 (2012), https://www.everycrsreport.com/files/20121114_R42817_cd2b7b2efd48a8b2fd169df829eb3019f05397e9.pdf.

177. Michael White, *FederalRegister.gov Wins Award for Innovation & Best Practices*, OFF. OF THE FED. REG. ANNOUNCEMENTS (Dec. 15, 2011), https://www.federalregister.gov/reader-aids/office-of-the-federal-register-announcements/2011/12/federalregister-gov-wins-award-for-innovation-best-practices.

178. *See* Memorandum from Jeffrey Zients, Deputy Dir. for Mgmt., OMB, to All Exec. Dep'ts and Agencies (Apr. 25, 2011); Robert Jackel, *Federal Register Will No Longer Be Printed, Obama Says*, REGUL. REV. (June 22, 2011), https://www.theregreview.org/2011/06/22/federal-register-will-no-longer-be-printed-obama-says/.

Congress went a step further. The Federal Register Printing Savings Act of 2017[179] prohibits GPO from distributing the *Federal Register* without charge to Members of Congress or any other office of the United States unless they request a specific issue or an annual subscription. Subscriptions must be renewed annually. In May 2022, the ACFR finalized amendments to its regulations reflecting the new law.[180]

Congress has considered and come close to passing legislation that would eliminate the print version of the *Federal Register* altogether. The Archivist of the United States has supported such legislation.[181] In the 116th Congress, the Federal Register Modernization Act passed the House (426-1) and was reported out of committee but not voted on in the Senate.[182] The bill would have replaced the term "print" with "publish," which it defined as "to circulate for sale or distribution to the public."[183] The ACFR was to issue regulations providing for "the manner and form in which the *Federal Register* shall be published."[184] Thus, the proposal would not have prohibited a print version outright, and in some places anticipates that it might continue, but it would have left the decision to the ACFR.

Eliminating the requirement of a printed *Federal Register* is eminently sensible. While the effect would be modest, it would eliminate the costs of printing, reprinting, wrapping, binding, and distribution. Ideally, some or all of the savings could be passed on to agencies through reductions in publication fees or their elimination altogether. Our recommendation in this regard can be found in Part IV of this Article at Recommendation 15.

b. The Code of Federal Regulations

A codification of agency rules is not explicitly required by statute. The Federal Register Act *authorizes* the ACFR to require preparation and publication of a codification of rules published in the *Federal Register*, to be entitled the "Code

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179. Pub. L. No. 115-120, § 2(a)(3), 132 Stat. 28, 28 (2017) (codified at 44 U.S.C. § 1506).

180. *See* Official Subscriptions to the Print Edition of the Federal Register, 87 Fed. Reg. 26267 (2022) (Administrative Committee of the Federal Register) (codified at 1 C.F.R. pt. 12).

181. *See* Letter from David S. Ferriero, Archivist, Nat'l Archives & Recs. Admin., to John Boehner, Speaker, U.S. House of Representatives (Nov. 12, 2013); H.R. REP. NO. 113-515, at 3 (2014). The bill was opposed by the American Association of Law Libraries. AM. ASS'N. OF L. LIBRS., THE FEDERAL REGISTER AND CODE OF FEDERAL REGULATIONS (2014), https://www.aallnet.org/wp-content/uploads/2017/11/2014-IB-One-Pager-The-Federal-Register-and-Code-of-Federal-Regulations.pdf.

182. Federal Register Modernization Act, H.R. 1654, 116th Cong. (2019). A previous version also passed the House, this time unanimously, but died in the Senate. *See* Federal Register Modernization Act, H.R. 4195, 113th Cong. (2014); *H.R.4195 - Federal Register Modernization Act*, CONG., https://www.congress.gov/bill/113th-congress/house-bill/4195 (last visited May 25 2024).

183. Federal Register Modernization Act, H.R. 1654, 116th Cong. §§ 2(a)(1), 2(b)(2) (2019). *See generally* S. REP. NO. 116-57 (2019). The proposed change is consistent with the 2014 renaming of the Government Printing Office as the Government Publishing Office.

184. Federal Register Modernization Act, H.R. 1654, 116th Cong. §2(f) (2019).

of Federal Regulations."[185] If the ACFR does produce this codification, it must update and republish each volume at least annually.[186] Soon after creation of the *Federal Register*, the ACFR imposed on itself the obligation to "publish periodically" a Code of Federal Regulations (CFR), triggering the statutory requirement of annual updates.[187] OFR has published the CFR annually since 1938.[188]

As with the *Federal Register*, Congress has required that the CFR "be printed and bound in permanent form."[189] (Again, this entails annual reprinting.) And, like the *Federal Register*, the result is that the CFR appears in print and electronic versions.[190] Annual editions of the CFR going back to 1996 are also available online in multiple formats (PDF, text file, and XML) on the GovInfo site.[191] Separately, OFR and GPO also maintain a purely electronic version of the CFR, the eCFR.[192] The eCFR is a "point-in-time" system, meaning it is updated continuously, without maintaining a historical record.[193] OFR states that it updates the system daily and that in general it is current within two business days.[194] Unlike the web versions of the *Federal Register*, the eCFR, although widely used, is not required by statute and is not an official, authoritative presentation.[195]

The popularity of the eCFR is not surprising. It is well-designed, up-to-date, and easily searchable. Nonetheless, three possible statutory changes could be or have been suggested. We review them below, but ultimately recommend against each.

First, in contrast to the *Federal Register*, Congress has never explicitly required that OFR provide online access to the Code of Federal Regulations. Given that OFR has created such access, there is no dispute over its authority to do so,

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185. 44 U.S.C. § 1510(a)-(b).

186. *Id.* § 1510(c).

187. 1 C.F.R. § 8.1(a) (2024).

188. *See* FED. REG., *FEDERAL REGISTER FACTS* (2010), https://www.federalregister.gov/uploads/2011/01/fr_facts.pdf. (noting the President first authorized the publication of the *Code of Federal Regulation* in 1938).

189. 44 U.S.C. § 1510(b). This provision also refers to subdividing the CFR "into separate books." *Id.*

190. 1 C.F.R. § 8.6 (2023); *see also id.* § 11.3(a) (setting price for annual CFR subscriptions in print).

191. *Code of Federal Regulations (Annual Edition)*, GOVINFO, https://www.govinfo.gov/app/collection/cfr/. This version tracks the print version and is updated only when the print volumes are updated.

192. CODE OF FED. REGULS., https://www.ecfr.gov/.

193. While the default version of the content displayed in eCFR is the most current version, viewers may access historical versions dating back to 2017. *eCFR Changes Through Time*, CODE OF FED. REGULS.: READER AIDS :: INSIGHT INTO THE ECFR, https://www.ecfr.gov/reader-aids/using-ecfr/ecfr-changes-through-time.

194. *Understanding the eCFR: How is the eCFR Updated?*, CODE OF FED. REGULS.: READER AIDS :: INSIGHT INTO THE ECFR, https://www.ecfr.gov/reader-aids/understanding-the-ecfr/how-is-the-ecfr-updated.

195. *See Understanding the eCFR: What Is the Legal Status of This Publication?*, CODE OF FED. REGULS.: READER AIDS, https://www.ecfr.gov/reader-aids/understanding-the-ecfr/what-is-the-ecfr. The GovInfo site is authoritative.

and it is unimaginable that it would abandon the project, an explicit statutory authorization or requirement seems unnecessary. As such, we make no affirmative recommendation on this point.[196]

Second, the proposed Federal Register Modernization Act would have made changes with regard to the CFR corresponding to those it proposed for the *Federal Register*. Statutory references to "print" and "printing" would have been changed to "publish" and "publishing," and the ACFR would have been authorized to "regulate the manner and forms of publishing this codification."[197] We are less certain that the paper CFR is as obsolete as the paper *Federal Register*. The decision whether to continue to produce a printed copy should turn in significant part on the strength of the market for the print copy; if the OFR can cover its costs in producing the printed version, it should continue to produce it. Again, we flag the possibility of some statutory change but take no affirmative position on the merits.

Third, ACUS has recommended expanding the online version of the CFR. ACUS Recommendation 2014-3 stated:

> The Office of the Federal Register and the Government Printing Office are encouraged to work with agencies to develop ways to display the Code of Federal Regulations in electronic form in order to enhance its understanding and use by the public, such as developing reliable means of directing readers to relevant guidance in preambles to rules and to other relevant guidance documents.[198]

Obviously, the first portion of that recommendation has come to pass; the CFR exists in electronic form. The second has come to pass in part. The eCFR *does* link to the *Federal Register* notice for the final rule. All regulations published in the

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196. The same point can be made, mutatis mutandis, about regulatory authorization. The Administrative Committee has authorized publication of the CFR only (a) in paper format and (b) "[o]nline on www.govinfo.gov." 1 C.F.R. § 8.6(a) (2024). Accordingly, the eCFR seems not to have formal approval and the negative inference would be that it is unauthorized, since it is linked from but not located "on" govinfo.gov. But that really does not matter.

197. Federal Register Modernization Act, H.R. 1654, 116th Cong. § 2(g) (2019).

198. Adoption of Recommendations, 79 Fed. Reg. 35988, 35993 (Administrative Conference Recommendation 2014-3, Electronic Presentation of Regulations) (June 25, 2014). In 1976, ACUS recommended: "The Administrative Committee and the agencies should act to preserve in the Code of Federal Regulations those statements of basis and purpose (or portions thereof) accompanying the publication in the Federal Register of newly promulgated rules that are of continuing interest to members of the public." Miscellaneous Amendments, 41 Fed. Reg. 29653, 29654 (July 19, 1976) (Admin. Conf. of the U.S. Recommendation No. 76-2, Strengthening the Informational and Notice-Giving Functions of the "Federal Register") (to be codified at 1 C.F.R. pt. 305). This recommendation has been overtaken by events and technological developments. For one thing, given the lengths of modern preambles, including them in the text of the CFR would be very cumbersome. More important, however, a link to the online *Federal Register* does the trick.

CFR include a citation to their statutory or other authority[199] and their source.[200] It is straightforward to turn those citations into links, and OFR does so. In this way, users are "direct[ed] . . . to relevant guidance in preambles to rules" (to quote the recommendation language excerpted immediately above).[201] This arrangement works well; it provides direct and easy access to preambles, which are a valuable form of guidance in themselves.[202]

On the other hand, the eCFR does not currently direct readers to "other relevant guidance documents," as the ACUS Recommendation encourages. Nor does it link to other materials that might help explicate or elaborate the meaning of a regulation, such as adjudicatory decisions, enforcement records or policies, and the myriad other "legal materials" that are the subject of this Article.

Such links would be useful.[203] The question is whether they belong *in the CFR*. One possible downside would be clutter. A more significant concern is whether the OFR and GPO are the right entities to maintain a system for such links. The underlying information itself would have to come from staff members at individual agencies, who would also have to be relied on to gather the relevant links or submit the relevant materials. That seems the long way round. It makes more sense for each agency to prepare such pages itself and include them on its own website. Several have already done so, as we discuss in the next section and in the section on guidance documents.

c. Agency Websites

Agencies should and generally do post their own substantive rules to their websites. The relevant legal requirements, however, are somewhat hazy. Two separate provisions of the E-Government Act of 2002, Sections 206(b) and 207(f), although poorly worded, arguably require each agency to post online its substantive regulations (as well as its procedural rules and interpretive rules and policy statements of general applicability). The Federal Records Act imposes a similar requirement. We examine each of these sources of law before turning to a discussion of agency practices.

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199. *See* OFF. OF THE FED. REG., *supra* note 162, at § 3.12 (stating that agencies must cite the authority that allows them to amend the CFR).

200. As explained in the "Explanation" section that appears at the beginning of every volume of the CFR: "Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication." *See, e.g.*, 2 C.F.R. at vii.

201. Adoption of Recommendations, 79 Fed. Reg. 35988, 35993 (Administrative Conference Recommendation 2014-3, Electronic Presentation of Regulations) (June 25, 2014).

202. Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016); Kevin M. Stack, *Where to Find Authoritative Guidance on Regulatory Meaning*, YALE J. REGUL.: NOTICE & COMMENT (Jan. 31, 2018), https://www.yalejreg.com/n.c/where-to-find-authoritative-guidance-on-regulatory-meaning-by-kevin-m-stack/ (arguing preambles are the most authoritative source for determining the meaning and application of agency rules).

203. Cary Coglianese, Stuart Shapiro & Steven J. Balla, *Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System*, 57 ADMIN. L. REV. 621, 641–42 (2005).

i. Section 206(b)

Section 206(b) of the E-Government Act requires each agency to "ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the *Federal Register* under" FOIA.[204] FOIA requires agencies to publish substantive rules, guidance documents, and procedural rules in the *Federal Register.*[205] So at first blush, it would seem that Section 206(b) applies to these rules. However, that section is limited to "information about th[e] agency." One might read "information about the agency" as referring to items that describe an agency and its operations, such as an organization chart, telephone directory, or an account of the agency's history. On the other hand, any document produced by an agency tells the reader something about the agency; in this sense, anything from the agency—rules emphatically included—is "information about the agency."

As between these narrow and broad readings, the latter is preferable. Indeed, the best reading of Section 206(b) is to treat "information about the agency" as meaning, simply, "agency documents."[206] To be sure, doing so renders "about the agency" surplusage. But at least five considerations cut the other way. First, most material that is covered by the sections cross-referenced by the E-Government Act is not "information about the agency" in the narrow sense; the requirement would be trivial if it were limited to the "About Us" section of a website. Second, a fundamental purpose of the E-Government Act was to make materials that were already publicly available more readily so, in electronic format. A restrictive reading clashes with that goal. Third, Section 206 is mainly about online rulemaking; it would be peculiar to require agencies to post rulemaking dockets but not rules themselves. Fourth, Section 206(d)(2), entitled "information available," explicitly refers to all public comments and all other material that agencies normally include in rulemaking dockets. That indicates a sweeping understanding of the term "information" (although this use of the term omits the "about the agency" qualifier).[207] Finally, the Senate Report explicitly states that Section 206(b) requires the posting of everything (not just "information about the agency") required to be published in the *Federal Register* under FOIA Section 552(a)(1), explicitly including substantive rules.[208]

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204. E-Government Act of 2002, Pub. L. No. 107-347, § 206(b), 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note) (italics added).

205. 5 U.S.C. § 552(a)(1)(C), (D) ("Each agency shall separately state and currently publish in the Federal Register . . . rules of procedure, . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . .").

206. Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENV'T L.J. 12, 45 & n.111 (2003).

207. *Id.* at 45 n.111 ("For [section 206(d)] to serve any function, it must require posting of documents other than those that are part of the rulemaking.").

208. COMM. ON GOV'T AFFS., E-GOVERNMENT ACT OF 2002, S. REP. NO. 107-174, at 24 (2002).

There is one last wrinkle. Assuming Section 206(b) does apply to agency rules, there remains a question about whether it requires agencies to post the covered items on *their own* websites. True, the section is entitled "Information Provided by Agencies Online," suggesting that it is about what the agency itself posts, but what it literally requires is that the agency must ensure that *a* government website includes this information, not that *the agency's* website does so.[209] As detailed above, the *Federal Register*'s contents are available on at least two separate "publicly accessible Federal Government websites." Accordingly, an agency's obligations under Section 206(b) would seem fulfilled even if it had no website at all.[210] This reading is consistent with Section 207(f) of the E-Government Act, which requires that each agency website provide "direct links" to "information made available to the public under" Section 552(a)(1). The requirement of a link indicates that the material need not appear on the agency's own website. As we detail below, some agencies do post their regulations on their websites, while others link to the *Federal Register* or eCFR sites.

We think the better reading of this provision is that agencies must post all items required to be published in the *Federal Register*, or links thereto, on their websites. Certainly, that is the sensible rule. At a minimum, Section 206(b) should be amended to make that clear.[211]

If Congress acts to clarify Section 206(b)'s obligations, one other legislative change is also appropriate. The whole section is qualified by an opening "to the extent practicable." That language is anachronistic surplusage; there is now no practical barrier to making agency material available on a website. Because this phrase is pointless and might possibly be relied on by an agency seeking to skirt the requirement, it should just be deleted.[212]

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209. E-Government Act of 2002, § 206(b), 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services) (requiring that each agency "ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under" 5 U.S.C. § 552(a)(1)-(2)).

210. To be sure, this automatic compliance would only occur for rules and guidance documents that have actually been published in the *Federal Register*. While agencies are required to publish guidance documents of general applicability in the *Federal Register*, 5 U.S.C. § 552(a)(1)(D), compliance with that obligation is notoriously hit or miss. *See, e.g.*, Miscellaneous Amendments, 41 Fed. Reg. 29653, 29654 (July 19, 1976) (Administrative Conference Recommendation No. 76-2, Strengthening the Informational and Notice-Giving Functions of the "Federal Register") (noting that despite the requirement of publication, "surprisingly few such policy statements and interpretations are in fact published in the Federal Register"). However, substantive and procedural rules are reliably published in the *Federal Register* and, therefore, codified in the CFR.

211. As we elaborate below, however, our primary recommendation about Section 206(b), found in Recommendation 8 in Part IV.A of this Article, is that Congress repeal it altogether. It is both incoherent and pointless.

212. This or an equivalent phrase, such as "if practicable," appears 18 times in the E-Government Act. Most or all of those occurrences likely could be deleted; it is certain that the other instances of "to the extent practicable" in § 206, which have to do with online comments and rulemaking dockets, *see id.* § 206(d)-(e), should be struck.

ii. Section 207(f)

Section 207(f)(1) specifically addresses agency websites. It avoids both the confounding problems of Section 206(b) but creates its own uncertainties. It requires the Office of Management and Budget (OMB) to issue "guidance" that "requires" that agency websites "include direct links to . . . information made available to the public under" Section 552(a)(1). There is no "about the agency" qualifier. And elsewhere, Section 207(f)(1) repeatedly uses the phrase "Government information,"[213] which is quite broad. It seems reasonable to read "information" as just a generic term, meaning something like "material" or "items," that covers everything required to be published in the *Federal Register* by subsection (a)(1). The requirement of a "direct link" is vague. The website cannot just provide a cite to the CFR as a whole. But can it send the user to the relevant part of the eCFR? How specific a provision must be linked? Just to all Environmental Protection Agency regulations? Clean Air Act regulations? New Source Performance Standards? Standards for coal-fired power plants? Or must the agency actually have a link on its website for each regulation that goes directly to the text of that regulation?[214]

iii. Federal Records Act

Also relevant is the Federal Records Act. The statute provides:

> The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for . . . procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.[215]

An agency's substantive regulations (and procedural rules and guidance documents of general applicability) surely qualify as "records of general interest or use to the public." Arguably, rulemaking materials—proposed rules, background documents and studies, public comments—also qualify, as we discuss below.

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213. *See, e.g.*, § 207(f)(2)(A)(ii) (requiring agencies to "establish a process for determining which Government information the agency intends to make available and accessible to the public on the Internet and by other means").

214. Strikingly, the OMB policies do nothing to answer these questions because they simply ignore this requirement in section 207(f)(1), saying nothing explicit about posting or linking to substantive rules. Memorandum from Joshua B. Bolten, Dir., OMB, to all Exec. Dep't and Agency Heads, M-03-18, (Aug. 1, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2003/m03-18.pdf.

215. 44 U.S.C. § 3102.

iv. Current, and Best, Practices

Whether or not as a result of these legal obligations, many agencies do either post all their own regulations on their own websites or provide links to their regulations in the eCFR. These postings are somewhat redundant with the eCFR, but not wholly so. Especially for non-lawyers, it will be easier to find a relevant regulation on the agency's own website than by going to the CFR. That is where many users are likely to start any search. And a well-designed website can steer visitors to relevant regulations not just by having a "regulations" section but by including links to regulations within subject-matter pages. In addition, an agency can group the text of the rule with other helpful information, such as relevant opinions or guidance, providing a kind of one-stop shopping experience for the user.

Agency websites vary enormously in clarity, comprehensiveness, ease of use, and currency. One excellent example is the website of the Federal Trade Commission (FTC). The FTC has an unusually comprehensive online law library, found at https://www.ftc.gov/legal-library/browse. Clicking on "Rules" from that page brings the user to a list of all FTC rules, searchable by keyword and capable of being filtered by various topics, location, and status. (The filters are applicable to all materials in the law library, not just rules.) Clicking on an individual rule opens a page that gives the CFR citation, a quick summary of the rule, and links to the text of the rule (in the eCFR), PDFs of the *Federal Register* notices for the proposed and final rule, and, if relevant, press releases, advisory opinions, and other information.

Figure 1 illustrates what the FTC's website provides for one of the agency's rules.[216] Clicking on the blue box labeled "Text of Rule" brings the user to the relevant provision on the eCFR site. This approach has one significant advantage over posting the text of the rule on the agency's own website: updates take care of themselves. Because the eCFR is a point-in-time resource, updated whenever a final rule appears in the *Federal Register*, no action needs to be taken by the agency. Keeping websites up to date is a significant problem in and out of the government; all websites are out of date in some respect or other. Linking to the eCFR is a handy solution to that problem in this particular setting.[217]

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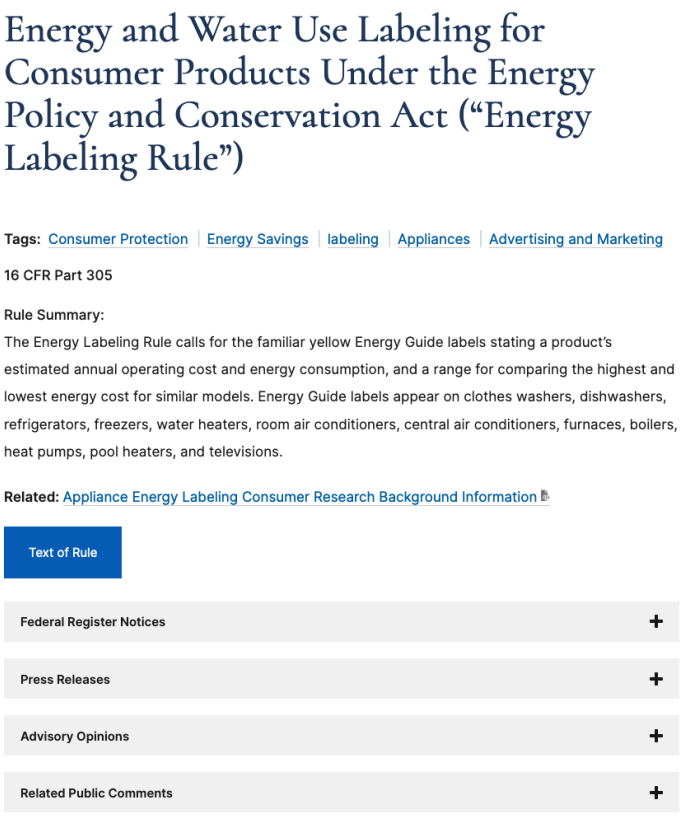
216. *Energy and Water Use Labeling for Consumer Products Under the Energy Policy and Conservation Act ("Energy Labeling Rule")*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/rules/energy-water-use-labeling-consumer-products-under-energy-policy-conservation-act-energy-labeling (last visited July 20, 2024).

217. One might compare the FTC website with that of the Social Security Administration (SSA). When visited in February 2023, the SSA regulations page stated that it was last updated April 1, 2021, almost two years prior. *Code of Federal Regulations, Title 20—Employees' Benefits—Chapter III—Social Security Administration*, SOC. SEC. ADMIN, https://www.ssa.gov/OP_Home/cfr20/cfrdoc.htm (visited Feb. 2023). When visited again in July 2024, the page stated it was last updated April 1, 2023. On both occasions, the page offered this extraordinarily unhelpful suggestion: "For more recent regulations, see the Regulations.gov web site." *Id.* The link to Regulations.gov is not to any particular

Figure 1: Example of Rule Available on the Federal Trade Commission Website



Another well-constructed website in this regard is that of the Occupational Safety and Health Administration (OSHA).[218] OSHA posts the full text of all its standards in HTML, not as a link to the eCFR. The standards are searchable by keyword and can also be displayed by topic (General Industry, Construction, Maritime, Agriculture, etc.). The preambles of final rules also appear on the same page. In addition, the website has pages devoted to particular topics,[219] and the Laws and Regulations page has a pull-down menu for Topics (Employer Help, Worker Rights, Fall Prevention, Heat, Personal Protective Equipment) and a list of sectors (Agriculture, Construction, etc.). The page for each of these topics includes a link for "standards," which opens a page with links for individual regulations, relevant *Federal Register* notices, guidance, and letters of interpretation.

SSA rulemaking, but just to the Regulations.gov home page. It is possible, of course, to search for recent SSA rulemakings from there, but doing so is not straightforward.

218. *Laws and Regulations*, OSHA, https://www.osha.gov/laws-regs (last visited Mar. 10, 2024).

219. *Alphabetical Listing of Topics*, OSHA, https://www.osha.gov/topics/text-index (last visited Mar. 10, 2024).

Although they are somewhat different in presentation, the FTC and OSHA sites have in common certain important characteristics:

- Regulations are easy to find without endless clicks.
- The material is presented in a clear and visually crisp manner.
- Regulations can be discovered by searching for a particular topic even if the user has no idea about what or where to find the regulations about that topic.
- Regulations are easily searched.
- Regulations are up to date.
- Other relevant legal materials are grouped with individual regulations.

We have not looked at each agency's website, and we have no interest in singling out particular agencies for criticism. But it is helpful also to look at less successful websites. The National Highway Traffic Safety Administration's (NHTSA) website, for example, has a "Laws and Regulations" page that lists its regulations.[220] It seems comprehensive, and it includes links to Final Rules, Proposed Rules, and, in some cases, regulatory impact analyses. But shortcomings remain, such as the following:

- The blurb under the heading implies these are only Motor Vehicle Safety Standards, but that is misleading; for example, the Corporate Average Fuel Economy (CAFE) standards also appear.
- Browsing is difficult, because the regulations are listed in alphabetical order by first word—a word that may or may not be intuitive or revealing. It is not possible to reorder by some other criterion.
- No dates appear. One cannot tell when a particular rule was issued. For rules where the only document is a notice of proposed rulemaking (NPRM), one cannot tell when it was issued or whether the rulemaking is currently live. Worse, if one clicks on the NPRM, the due date for comments does not appear, because the posted version is what was *sent to* the *Federal Register* rather than what *appeared in* the *Federal Register*, so these documents all state that comments must be received "not later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]."
- The search function does not work well. For example, if one searches all the rules for the *phrase* "air bags," there are only two results. But if one chooses to show only those rules under

220. *Laws and Regulations*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/laws-regulations (last visited Mar. 10, 2024).

> the *topic* "Air Bags," there are five results. And if one searches for "208," the safety standard that imposes the air bags requirement, there are nine results.
> - Some of the entries have nonfunctioning links[221] or no linked documents at all.[222]
> - The documents appear in HTML format rather than as PDFs, making the site sometimes difficult to read and, at least with some browsers, can contain stray typographical marks and formatting errors.[223] HTML can be more brittle than the permanent fixing of a document into PDF format.

Each of these alone may seem like a modest inconvenience. But together they make the page far less useful, and the agency's legal materials far less accessible, than they could and should be.

Congress, of course, should not be, and never has been, in the business of detailing the design and content of agency websites. Rather than directly imposing specific requirements for the electronic dissemination of information in general, or for the particulars of agency websites, Congress has delegated that task to OMB, informed by an advisory body. Section 207(c) of the E-Government Act required the Director of OMB to establish an Interagency Committee on Government Information (ICGI).[224] While the Committee's work product was to be only advisory, the Act charges OMB with issuing policies "requiring that agencies use standards . . . to enable the organization and categorization of Government information" and, separately, with promulgating "guidance for agency websites."[225] Although labeled "guidance," these are also denominated "standards for agency websites" and the Act states that they are to set out "requirements that websites" have certain features.[226] OMB established the ICGI in 2002. ICGI issued recommendations in 2004, and OMB's initial set of guidelines followed. OMB then issued updated policies in 2016, which remain in place today. As noted above, one way in which the policies violate the Act is in their failure explicitly to require agencies to provide direct links to material published in the *Federal Register*.[227]

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221. *See, e.g.*, *id.* (entry under "Child Restraint System – Anton's Law - FY 2005") (linking to a YouTube video unrelated to the description of the rule supposedly linked to).

222. *See, e.g.*, *id.* (entry under "Door Locks and Door Retention Components and Side Impact Protection").

223. In the ACUS report on which this Article is based, we reported having found numerous formatting errors in the pages on this part of NHTSA's website. We were pleased that we could no longer find these problems when returning to the NHTSA website in the process of publishing the report as this Article. Still, the HTML format of the materials on this site does make it more cumbersome to read and search through the documents than if they were uploaded as PDF files.

224. E-Government Act of 2022 § 207(c)(1), 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services).

225. *Id.* § 207(d)(2)(A), (f)(1).

226. *Id.* § 207(f)(1)(A).

227. *See supra* note 209 and accompanying text.

The E-Government Act authorized OMB to terminate the ICGI once it had submitted its recommendations. Although OMB never formally did so, the ICGI, in fact, no longer exists. It has evolved into the Federal Web Managers Council, often referred to simply as the Federal Web Council.[228] The Council consists of two co-chairs, one from the General Services Administration (GSA) and one from the Department of Homeland Security (DHS), and about two dozen federal web managers.[229]

As detailed in Part IV, in our Recommendations 12 and 13 we indicate that Congress should amend the E-Government Act to repeal its currently nonsensical, unclear, and inoperative provisions and, in their place, clarify agencies' obligations to make substantive regulations easily accessible and usable by the public on the agency's own website, including links to related materials. Congress should further require OMB to update its website guidance and to do so in consultation with the Federal Web Managers Council.[230]

2. Publication of Rulemaking Materials

Despite their strengths, neither the FTC's website nor OSHA's website links to electronic rulemaking dockets. Some agencies do provide a link to Regulations.gov, but the link brings users to that site's home page, not to the docket for a particular rulemaking.[231] Other agencies give the docket number, so someone who knew what they were doing could go to Regulations.gov and track it down, but without a link.[232]

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228. *See An Introduction to the Federal Web Council*, DIGITAL.GOV, https://digital.gov/resources/federal-web-council/ (last visited Mar. 10, 2024).

229. *Id.*

230. Congress might consider one additional change with regard to the E-Government Act of 2002. Portions of the Act are codified in the U.S. Code. *See, e.g.*, E-Government Act of 2002 § 101, 44 U.S.C. §§ 3601-06 (creating the Office of Electronic Government within OMB and other structures of e-government). But all of Title II of the Act, "Federal Management and Promotion of Electronic Government Services," which includes the provisions discussed herein, is not codified but simply stuck into the notes following 44 U.S.C. § 3501. This was not a decision of the Law Revision Counsel; the E-Government Act itself dictated this placement. But burying these provisions in the Note, alongside several other pieces of legislation, is at best inconvenient. At worst it makes these provisions invisible. In our view, Title II is sufficiently general, permanent, and important to merit actual codification.

231. For example, on a page entitled "Regulations, Laws and Standards," the website of the Consumer Product Safety Commission provides a "Quick Link" for "List of Proposed and Final Regulations." Where does the link take the user? To the home page of Regulations.gov, which is of essentially no use at all. *Regulations, Laws and Standards*, CONS. PRODUCT SAFETY COMM'N, https://www.cpsc.gov/Regulations-Laws--Standards (last visited Mar. 10, 2024).

232. *See, e.g.*, *Final Rule for Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards*, EPA, https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-control-air-pollution-motor-vehicles-tier-3 (last visited Feb. 27, 2024) (EPA motor vehicle emissions regulations).

Current law is slightly unclear as to agencies' obligations in this respect. Subject to various exemptions found in Sections 553(a) and (b), the APA requires that a rulemaking begin with an NPRM that must be published in the *Federal Register*. The text of the APA does not explicitly require the notice to contain the text of a proposed rule, although in practice it generally does. A proposed rule set out in an NPRM is not published in the CFR—after all, it is not a regulation.

Agencies sometimes issue an advance notice of proposed rulemaking (ANPRM), or a request for information (ROI), in anticipation of and prior to an NPRM. The APA makes no mention of these items, and the Federal Register Act does not independently require that they be published in the *Federal Register*.[233] Some individual statutes authorize or require agencies to "publish" or "issue" ANPRMs; most do not say what "publication" entails.[234] Given the context, one might read the term "publish" to mean "publish in the *Federal Register*," and that would make sense, but the fact that Congress sometimes explicitly refers to publication "in the *Federal Register*" and sometimes is silent supports the opposite inference. In any event, such publication is standard practice and if an agency cares enough to produce an ANPRM, it would be strange if it did not want to publish it in the *Federal Register.* Congress might consider amending the APA to require that, if an agency issues an ANPRM, it also publish it in the *Federal Register*, but because that would simply confirm universal practice there is not a strong argument for doing so and, as such, we make no affirmative recommendation in that regard.

Under the E-Government Act, all materials included in the docket of a rulemaking must be available online.[235] True, the statute qualifies this obligation with "[t]o the extent practicable."[236] But at this point, it is entirely practicable to include everything in the paper docket in an electronic docket. Indeed, given that most comments are submitted electronically, what may *not* be practicable, and what is certainly onerous, would be creating a hard-copy version of the docket. Accordingly, and subject to restrictions in the Privacy Act and the Trade Secrets

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233. 44 U.S.C. § 1505(a) (requiring publication of various presidential documents, other documents that the president has determined have "general applicability and legal effect" (which ANPRs and ROIs plainly do not), and documents required to be published by Congress).

234. *See, e.g.*, 15 U.S.C. § 2643(a) (requiring EPA to issue ANPRMs); 49 U.S.C. § 106(f)(3)(A) (requiring FAA to issue ANPRMs); 49 U.S.C. § 31136(g) (requiring Secretary of Transportation to issue ANPRM and ROI for commercial vehicle motor safety regulations). *But see* 15 U.S.C. § 57a(b)(2)(A) (requiring FTC to "publish an advance notice of proposed rulemaking in the Federal Register" prior to issuing an NPRM for a trade regulation rule); 15 U.S.C. § 1193(g) (authorizing publication of an ANPRM in the *Federal Register* for certain FTC rulemakings); 41 U.S.C. § 1502(c)(3)(A) (requiring Cost Accounting Standards Board to "publish an advanced notice of proposed rulemaking in the Federal Register").

235. E-Government Act § 206(d), 44 U.S.C. § 3501 note.

236. *Id.*

Act,[237] all (a) relevant agency notices, (b) background studies or documents on which the agency is relying,[238] and (c) public comments, must be available online. Most agencies fulfill this obligation through www.regulations.gov, although some independent agencies—notably the SEC and the FCC—maintain their own rulemaking portals.[239]

The E-Government Act is focused on ongoing rulemakings; it seeks to ensure that potential commenters will be able to find materials online and participate electronically. It says nothing about preserving that material's online availability after a rulemaking is completed. This gap should be corrected. In 2011, ACUS recommended that:

> Agencies should develop systematic protocols to enable the online storage and retrieval of materials from completed rulemakings. Such protocols should, to the extent feasible, ensure that Web site visitors using out-of-date URLs are automatically redirected to the current location of the material sought.[240]

This recommendation also suggests that agency websites include a link to dockets for completed rulemakings. Such a link would be a helpful, and simple, feature to add. Yes, the *Federal Register* notices are the most important rulemaking materials, with the Final Rule preamble being more important than the NPRM. By analogy to legislative history, the Final Rule's preamble corresponds to the Committee Report; if anything is relevant, it is that. And yes, interested persons can find this material online by searching the *Federal Register* website or, as explained above, on the agency's own website. But the submitted comments and background documents, including the regulatory impact analysis, if one exists, are also part of the "administrative history" of the regulation and thus potentially relevant to understanding a regulation. These should be available along with material published in the *Federal Register*.

Again, the electronic docket need not necessarily be housed on the agency's own website; a link to Regulations.gov (for those agencies that use it) would suffice. But users should be able to go from the agency website to materials

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237. *See generally* Adoption of Recommendations, 86 Fed. Reg. 6612, 6614-15 (Jan. 22, 2021) (Administrative Conference Recommendation 2020-2, Protected Materials in Public Rulemaking Dockets) (outlining protections from disclosure of confidential information in agency rulemaking).

238. *See* United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251 (2d Cir. 1977) (finding the scientific data relied on by the agency should have been disclosed to interested parties); *see also* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (discussing the use of background documents to inform agency rules).

239. *Rulemaking Activity*, SEC, https://www.sec.gov/rules/proposed.shtml (Mar. 10, 2024); *Welcome to the FCC's Electronic Comment Filing System*, FCC, https://www.fcc.gov/ecfs/search/search-filings (last visited Mar. 10, 2024).

240. Adoption of Recommendations, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012) (Administrative Conference Recommendation 2011-8, Ensuring Access to Materials from Completed Rulemakings).

from a particular completed rulemaking in a single click. Such a link should not be (as is currently often the case) to the Regulations.gov homepage; it should take the user directly to the docket for the particular rulemaking. This recommendation is included in our Recommendation 11.

3. Incorporation by Reference

Some substantive regulations incorporate by reference standards developed by private organizations.[241] Incorporation by reference (IBR) has the effect of making private standards enforceable as federal law. Incorporated standards have the force and effect of law just as if they themselves had been published. Yet the actual legal requirements (which may be copyrighted) are not set out in the body of the regulation. This practice poses an obvious problem with regard to availability. Someone who wants to know what the law is will be unable to find it in the ordinary locations: the CFR or the agency's website. And when they do hunt it down, they may have to pay to access it. In short, IBR is a stark and controversial exception to contemporary standards of open government.

IBR does, of course, have benefits. It reduces the size of the *Federal Register* and the CFR (a consideration that was much more salient when these were published only in hard copy and would become trivial if, as we recommend, hard copies were eliminated). Much more importantly, it enables agencies to draw on the expertise and resources of private-sector standards developers (by incorporating standards that are copyright-protected and could not otherwise be published in the *Federal Register*) rather than reinventing the wheel. And it furthers a widely accepted federal policy, embodied in the National Technology Transfer and Advancement Act of 1995[242] and OMB Circular A-119,[243] in favor of agency use of voluntary consensus standards.

FOIA authorizes IBR only if the incorporated material is "reasonably available to the class of persons affected" and the promulgating agency secures the "approval of the Director of the Federal Register."[244] Tracking FOIA, OFR regulations permit IBR only when the incorporated publication is "reasonably available to and usable by the class of persons affected."[245] Availability, in turn, is a function of "(i) The completeness and

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241. Material the agency itself develops is ordinarily not eligible for incorporation by reference; it still needs to be set out in full in the *Federal Register* and CFR. 1 C.F.R. § 51.7(b) (2024).

242. § 12(d)(1), Pub. L. No. 104-113, 110 Stat. 775, 783 (1996) (codified at 15 U.S.C. § 272 note and scattered sections of 15 U.S.C.).

243. OFF. OF MANAGEMENT AND BUDGET, CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (2016), https://www.nist.gov/system/files/revised_circular_a-119_as_of_01-22-2016.pdf.

244. 5 U.S.C. § 552(a)(1) ("For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.").

245. 1 C.F.R. § 51.7(a)(3) (2024).

ease of handling of the publication; and (ii) Whether it is bound, numbered, and organized, as applicable."[246] Notably, the cost of access is not expressly included in the considerations that determine whether an incorporated standard is "reasonably available."

OFR's *Incorporation by Reference Handbook* offers some modest guidance and suggestions about how to make incorporated material "reasonably available," such as working with the copyright-holder to provide a read-only copy on its or the agency's website.[247] It then cautions:

> *Remember*: Read-only access, on its own, may not meet the reasonable availability requirement at the *final rule stage* of rulemaking . . . . [If the] regulated parties [are not able] to use the material (which may be different than simply reading or accessing it) throughout the life of the rulemaking[, this] could lead to enforcement issues.[248]

Although the statute and regulations require "reasonable availability" as a condition of incorporation, a leading scholar of IBR (and overall supporter of the practice) reports that, "in practice, OFR enforces the requirement minimally. OFR usually considers it sufficient that the material be available for purchase somewhere, regardless of cost."[249] The central battle over IBR concerns whether, in fact, incorporated material is "reasonably available."

When an agency incorporates material by reference, it is supposed to file a "legal record copy" of the incorporated material with OFR; in principle, that copy is available for in-person inspection and limited photocopying free of charge.[250] Thus, the material is not literally unavailable. However, it is hard to consider the in-person availability of a hard copy of a standard to be "reasonable" or at least practically sufficient availability for two reasons. First, the existence of a single free copy in the United States falls far short, not just of current standards of availability, but even pre-internet standards, when the *Federal Register* could be found in libraries across the country. Second, in actuality, copies filed with OFR seem often to *not* actually be available. Public inspection of documents filed with OFR is now entirely online,[251] but

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246. *Id.*

247. OFF. OF THE FED. REG., INCORPORATION BY REFERENCE HANDBOOK 9 (2023 ed.).

248. *Id.* (italicized words bolded in original).

249. Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 158 (2013).

250. 1 C.F.R. §§ 51.5(b)(4)-(5) (2024) (providing that the Director will approve IBR only if, among other things, the incorporated publication is on file with the OFR); *see Incorporation by Reference*, OFF. OF THE FED. REG., https://www.archives.gov/federal-register/cfr/ibr-locations.html#why (last visited Feb. 27, 2024).

251. *See Understanding Public Inspection*, FED. REG. READER AIDS: INSIGHT INTO THE FR ECOSYSTEM, https://www.federalregister.gov/reader-aids/using-federalregister-gov/understanding-public-inspection (last visited Mar. 10, 2024).

copyrighted incorporated documents cannot be and are not posted online. So, the ordinary public inspection process is simply inapplicable. In addition, there are multiple anecdotal reports of individuals' failed efforts to see copies of incorporated material at the OFR.[252]

OFR has asserted that "we require that agencies maintain a copy of the documents they IBR."[253] Thus, whether or not a single copy can be read at OFR, in principle one can be read at the agency. Yet this route to "reasonable availability" suffers from the same two shortcomings as reliance on OFR's record copy. First, one single free copy in the United States is an extraordinarily unavailable kind of availability. And second, it is not clear that agencies do in fact always retain and make available copies of incorporated material. For one thing, OFR regulations do not explicitly require them to do so. And for another, there is anecdotal evidence that these materials are not always, in fact, available.[254]

When it studied IBR more than a decade ago, ACUS noted the complex challenges:

> Ensuring that regulated and other interested parties have reasonable access to incorporated materials is perhaps the greatest challenge agencies face when incorporating by reference. When the relevant material is copyrighted—as is often the case with voluntary consensus standards—access issues are particularly problematic. There is some ambiguity in current law regarding the continuing scope of copyright protection for materials incorporated into regulations, as well as the question of what uses of such materials might constitute "fair use" under section 107 of the Copyright Act. Efforts to increase transparency of incorporated materials may conflict with copyright law and with federal policies recognizing the significant value of the public-private partnership in standards.[255]

The ACUS recommendation urged agencies to ensure that incorporated materials are in fact "reasonably available." It also made the uncontroversial suggestions that agencies should make incorporated materials electronically available if there is no copyright or other legal barrier to doing so and should work with copyright holders to do as much as possible to ensure the availability of referenced materials.[256] The

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252. *See, e.g.*, David S. Hilzenrath, *Big Oil Rules: One Reporter's Runaround to Access "Public" Documents*, PROJECT ON GOV'T OVERSIGHT (Dec. 6, 2018), https://www.pogo.org/investigation/2018/12/big-oil-rules-one-reporters-runaround-to-access-public-documents.

253. Incorporation by Federal Reference, 79 Fed. Reg. 66267, 66271 (Nov. 7, 2014).

254. *See, e.g.*, Milice v. Consumer Prod. Safety Comm'n, 2 F.4th 994 (D.C. Cir. 2021) (recounting petitioner's inability to review incorporated material at agency headquarters).

255. Adoption of Recommendations, 77 Fed. Reg. 2257, 2258 (Jan. 17, 2012) (footnotes omitted) (Administrative Conference Recommendation 2011-5, Incorporation by Reference).

256. *Id.* at 2258.

recommendation also implies that in some circumstances the practical unavailability of privately developed standards should preclude IBR.[257]

There has been a modest shift toward greater openness since the 2011 ACUS recommendation, reflected in amendments to OFR regulations and Circular A-119. Yet the relative unavailability of these proposed, or actual, binding regulatory provisions on any consistent basis remains a striking outlier to ordinary standards of publicity. Although many commentators deem current practices appropriate, or at least an acceptable compromise of competing considerations, for others they are flatly unacceptable. In 2016, the ABA House of Delegates adopted a resolution calling on Congress to require each agency to provide free online access, at least in read-only form, to any text that it proposes to or does incorporate by reference in a regulation.[258]

In this Article, we do not attempt to articulate any appropriate standards for IBR. We note only that the practice remains a matter of ongoing disagreement and merits a more in-depth consideration than could feasibly fit within the scope of our study.[259] Giving all the relevant considerations and conflicting views their due was simply not possible in light of the range of other transparency issues contemplated for the report that underlies this Article. Although ACUS has already devoted substantial resources to a study and recommendation specifically on IBR, the failure of its 2011 Recommendation to resolve the IBR controversy may well justify ACUS focusing its attention on this subject once again. But this present study is not the appropriate venue for a reconsideration of the substance of the IBR debate.

B. Procedural Rules, MOUs, and Guidance Documents

This section addresses a suite of agency legal materials that, unlike the legislative rules discussed in the preceding section, do not themselves typically have a binding effect on individuals or entities outside of the government. But these materials do speak, sometimes authoritatively, to how binding legal materials, such as legislative rules, should be understood by both agencies and the public. In addition, these materials may be used by agencies to bind themselves in how they operate or interact with the public, such as through the establishment of internal agency policies and procedures or through the creation of memoranda of understanding (MOUs). The type of materials addressed in this section can thus be quite voluminous. Indeed, agencies produce much more explanatory, interpretive,

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257. *See id.* at 2258-59.

258. *ABA Resolution 112*, 42 ADMIN. & REG. L. NEWS, Fall 2016, at 10. *See generally* Ronald M. Levin, *ABA Adopts Incorporation by Reference Resolution*, 42 ADMIN. & REG. L. NEWS, Fall 2016, at 8; Nina A. Mendelson, *American Bar Association Resolution 112: Championing Public Access to the Law*, 42 ADMIN. & REG. L. NEWS, Fall 2016, at 11.

259. Important IBR scholarship to date includes Bremer, *supra* note 249; Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014) (discussing issues of accessibility created by IBR); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013) (calling for revision to IBR regulations in light of digital advances).

or other internal material than they do actual binding law. And substantial portions of this material will have consequences for, or be relevant to, the private organizations and individuals affected by what agencies do.

To be concrete, the material we cover in this section of this Article includes the following:

- agency internal rules and procedures;
- staff manuals;
- policies related to inspections, enforcement, penalties, waivers, and settlements;
- interagency MOUs or memoranda of agreement (MOAs); and
- general guidance documents, such as policy statements and interpretive rules.[260]

These materials have no direct binding effect on the public, and they may not even bind the agency—at least with some exceptions, such as with certain internal policies and procedures or MOUs. Nevertheless, because these materials are related so intimately with agencies' interpretation and application of the law, they can have important practical effects for individuals and entities in terms of how they understand their legal obligations and how they order their affairs in response.

We begin this section with an account of the current law governing the disclosure of the various kinds of legal materials covered here: namely, procedural rules, MOUs, and guidance documents. Although these different types of documents can be distinguished from each other, they are encompassed together in this section of this Article for economy of presentation.[261] As a general matter, they share a common, if not virtually indistinguishable, set of disclosure requirements. Although they should all be disclosed online, agencies do not always do so. After reviewing existing disclosure

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260. We emphasize "general" guidance in this section. Guidance can also be specific and individualized, such as with legal advisory letters. We treat such individualized guidance elsewhere in this Article—in both our discussion of adjudication and agency general counsel documents.

261. Our decision to treat these materials together is also at least partly justified as a substantive matter because, as discussed further in the text, the disclosure requirements that apply to these different documents are virtually indistinguishable: basically, all must be made available online to the public. We note that others have similarly grouped together vast swathes of agency legal materials that are neither orders nor legislative rules. *See, e.g.*, Exec. Order No. 13791, 82 Fed. Reg. 20427, 20427 (May 1, 2017) ("The term 'guidance document' means any written statement issued by the Department [of Education] to the public that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue, including Dear Colleague letters, interpretive memoranda, policy statements, manuals, circulars, memoranda, pamphlets, bulletins, advisories, technical assistance, and grants of applications for waivers."); Guidance out of Darkness Act, H.R. 4809, 115th Cong. § 5(2) (2018) (listing illustrative examples of guidance documents as including an agency memorandum, notice, bulletin, directive," "news release, letter, blog post, no-action letter, speech by an agency official, advisory, manual, and circular). That said, such a capacious definition of "guidance" is far from universal. *See* Coglianese, *supra* note 7, at 252–53 (quoting U.S. Department of Transportation and FDA definitions that expressly distinguish guidance documents from "purely internal agency policies," agency "procedures," and "memoranda of understanding").

requirements, we turn to an account of concerns about the lack of public access to this material. As with substantive legislative rules, our principal conclusion is that even though existing laws require disclosure of these materials, there are inadequate assurances that disclosure will be meaningful. That is, publication of procedural rules, MOUs, and guidance material is too often haphazard, incomplete, or difficult to locate.[262] As a result, our general discussion of methods of disclosure in Part III.A of this Article is especially pertinent to the kind of material treated in this section. We also offer recommendations in Part IV for Congress to clarify the requirements for disclosure of this material as well as to compel and provide incentives for agencies to improve the actual accessibility of this material on their websites.

1. Current Publication Requirements

In light of the importance of procedural rules, MOUs, and guidance documents, it is fitting that existing law requires most of this material to be disclosed proactively to the public, either in the *Federal Register*, on an agency's website, or both. Some of this material is exempt from disclosure altogether because it falls within one of the nine exemptions listed in FOIA Section 552(b). For example, although staff manuals are generally required to be affirmatively disclosed,[263] agencies need not disclose manuals that are "related solely to . . . internal personnel rules and practices"[264] or that contain "guidelines for law enforcement investigations or prosecutions . . . [when] disclosure could reasonably be expected to risk circumvention of the law,"[265] as discussed in greater detail above in Part I.C.

Putting the FOIA exemptions aside, as we take no position either endorsing or recommending changes to those exemptions, we can distinguish between two types of affirmative disclosures required of agencies under FOIA: (i)

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262. Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3, Public Availability of Agency Guidance) (identifying "comprehensiveness," "currency," "accessibility", and "comprehensibility" as key criteria for ensuring meaningful availability). For a further discussion of these criteria with respect to guidance disclosure, see Coglianese, *supra* note 7, at 298.

263. 5 U.S.C. § 552(a)(2)(C); *see, e.g.*, Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359 (N.D. Ohio 1976) (holding that the National Highway and Traffic Safety Administration was required to disclose instructions to agency staff).

264. 5 U.S.C. § 552(b)(2). *Cf.* Milner v. Dep't of the Navy, 562 U.S. 562 (2011).

265. 5 U.S.C. § 552(b)(7); *see, e.g.*, Capuano v. Nat'l Transp. Safety Bd., 843 F.2d 56, 58 (1st Cir. 1988) (noting that enforcement manuals are not required to be published to the *Federal Register*); Roberts v. IRS, 584 F. Supp. 1241, 1245 (E.D. Mich. 1984) (holding IRS manual containing sensitive law enforcement information was exempt from disclosure); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1063-66 (D.C. Cir. 1981) (discussing legislative intent behind exemptions to agency material disclosure); Ginsburg, Feldman & Bress v. Fed. Energy Admin., 591 F.2d 752 (D.C. Cir. 1978); Concord v. Ambrose, 333 F. Supp. 958, 959-960 (N.D. Cal. 1971). But even if an agency claims that manuals are related to law enforcement, the courts may require disclosure if there is no showing that disclosure would jeopardize enforcement or undermine compliance with the law. Stokes v. Brennan, 476 F.2d 699, 701-02 (5th Cir. 1973).

information that must be published in the *Federal Register* and posted online, and (ii) information that must be published online but need not be published in the *Federal Register.*[266]

As noted above, FOIA Section 552(a)(1) requires specified materials to be published in the *Federal Register*. Furthermore, for information required by FOIA to be published in the *Federal Register*, section 206(b) of the E-Government Act of 2002 (arguably) requires agencies to post this same information on their websites.[267] Included in this first category are:

- "rules of procedure,"
- "descriptions of forms available or the places at which forms may be obtained,"
- "instructions as to the scope and contents of all papers, reports, or examinations,"
- "statements of general policy," and
- "interpretations of general applicability."[268]

Section 552(a)(2) does not require publication in the *Federal Register* but does require agencies to "make available for public inspection in an electronic format" certain material.[269] Included in this category are:

- "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," and
- "administrative staff manuals and instructions to staff that affect a member of the public."[270]

More broadly, this second category includes virtually any agency document that is of "general interest or use to the public,"[271] as the Federal Records Act requires agencies to develop and follow a program for identifying these records and then "for posting such records in a publicly accessible electronic format."[272]

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266. *See supra* Part II.A.1.

267. E-Government Act of 2002 § 206(b), 44 U.S.C. § 3501 note. This obligation applies "to the extent practicable." *Id.*

268. Freedom of Information Act § 552(a)(1)(C)-(D), 5 U.S.C. § 552(a)(1)(C)-(D). With respect to agency forms, a 2018 law calls on agencies to "ensure that any paper based form that is related to serving the public is made available in a digital format" on agency websites. 21st Century Integrated Digital Experience Act, Pub. L. No. 115-336, § 4(c) 132 Stat. 5025, 5027 (2018) (codified at 44 U.S.C. § 3501 note).

269. 5 U.S.C. § 552(a)(2).

270. *Id.* § 522(a)(2)(B)-(C).

271. 44 U.S.C. § 3102.

272. *Id.* FOIA itself has a provision that, in its way, tracks the Federal Records Act's "general interest" standard. Section 552(a)(2)(D) requires the affirmative disclosure in electronic format of all records "that have been released to any person . . . and . . . that because of the nature of their subject matter, the agency determines

Finally, two provisions of the E-Government Act, although poorly worded, seem to require agencies to post all material covered by Section 552(a)(2) to "a" or "their" website.[273] Section 206 of the Act, in addition to requiring electronic commenting and docketing in notice-and-comment rulemakings, imposes a general obligation to post certain documents on the web.[274] These documents include "all information about the agency required to be published in the Federal Register under paragraph[] . . . (2) of" Section 552(a). Of course, there is no such information, since that paragraph does not require anything to be published in the *Federal Register*. The limitation to "information about the agency" is also perplexing and perhaps problematically limited.[275] Setting aside the ambiguities, this provision does *no* work. As noted above, FOIA already requires agencies to make all (a)(2) material available in electronic format by "computer telecommunications;" they comply by posting to electronic reading rooms on their websites. A separate provision telling them to make the same material available on "a publicly accessible Federal Government website" is duplicative.

Section 207(f) of the E-Government Act, entitled "agency websites," also seems to have been intended to require posting (a)(2) material to agency websites, but suffers from similar deficiencies. It does not refer to (a)(2) at all; instead, it requires agencies to ensure their websites include links to "information made available to the public under subsections (a)(1) and (b) of section 552."[276] Once again, the Act requires posting items in a null set: subsection (b) does not make any information available to the public—just the opposite, that section contains the exemptions to disclosure. Almost certainly, what was intended was a reference to Section 552(a)(2).[277] But, as with Section 206, that reading simply imposes an obligation that duplicates the requirements of (a)(2) itself.

The upshot is that federal law generally requires the affirmative online disclosure of vast swathes of agency materials that establish procedures, document interagency agreements, and provide internal and external guidance on how laws

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have become or are likely to become the subject of subsequent requests for substantially the same records; or . . . that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D).

273. For discussion of these two provisions, see *supra* Part II.A.1.

274. The full text of the provision reads:

> (b) INFORMATION PROVIDED BY AGENCIES ONLINE—To the extent practicable as determined by the agency in consultation with the Director, each agency (as defined under section 551 of title 5, United States Code) shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.

E-Government Act of 2002 § 206(b), 44 U.S.C. § 3501 note.

275. *See generally* Gerrard & Herz, *supra* note 206, at 46.

276. E-Government Act § 207(f)(1)(A)(ii).

277. Gerrard & Herz, *supra* note 206, at 47-48.

are implemented and enforced. That default disclosure obligation is, as noted, qualified by the nine standard FOIA exemptions. In addition to these generally applicable exemptions, statutory and judicial decisions indicate that several other limitations may apply to certain types of guidance-related information. For example, Section 552(a)(2) provides that staff manuals have to be disclosed only if they "affect a member of the public."[278] As a result, courts have held that manuals related to general agency housekeeping matters do not need to be disclosed.[279]

Similarly, although Section 552(a)(1) requires "rules of procedure," without qualification, to be published in the *Federal Register*,[280] some courts have held that agencies need not publish rules of procedure that do not apply to or adversely affect outside parties—such as purely internal rules about when a board calls its members to a meeting.[281] And when an agency's modification of a procedural rule does not result in any "substantial prejudice" to anyone, courts have concluded that publication in the *Federal Register* is not necessary.[282] Of course, even if an internal rule of procedure is not required to be published in the *Federal Register*, its online disclosure may still be required under Section 552(a)(2) or under an agency records program established under the Federal Records Act.

An important set of agency legal materials having no direct binding effect on the public, but which can still be so related to agencies' interpretation and application of the law that they have important effects for the public, never receives mention by name in either Sections 552(a)(1) or (a)(2). These are inter-agency MOUs or MOAs.[283] As with some staff manuals and internal agency procedures, some MOUs and MOAs deal with general housekeeping matters, such as shared office space between different government agencies.[284] But many MOUs and MOAs go well beyond housekeeping matters. They can memorialize shared interpretations of statutory requirements, agreed-upon divisions of jurisdiction or rules of procedure, or common sets of enforcement priorities and

278. 5 U.S.C. § 552(a)(2)(C).

279. Cox v. U.S. Dep't of Just., 576 F.2d 1302, 1308-09 (8th Cir. 1978).

280. 5 U.S.C. § 552(a)(1)(C).

281. *E.g.*, Consol. Aluminum Corp. v. Tennessee Valley Auth., 462 F. Supp. 464, 476 (M.D. Tenn. 1978).

282. *See, e.g.*, Am. Farm Lines v. Black Ball, 387 U.S. 532, 539 (1970).

283. We place emphasis throughout this section on the interagency agreements. We are not including in this discussion nor expressing any view on agreements between government agencies and private individuals, a vast domain that includes all government contracts.

284. Of course, even what might seem like mere "housekeeping" items can still have important effects on the public. As the 1967 Attorney General memorandum on FOIA notes, even "procurement and other public contract functions and, in some cases, surplus property disposal functions are matters in which members of the public have an interest." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59.

practices. In effect, MOUs and MOAs can allocate governmental authority across federal as well as state, local, or international agencies. They can also outline policies over the extent to which agencies share the information they have obtained from, or information about, members of the public. Knowing what these MOUs and MOAs contain can help members of the public know better which agency to seek out in resolving legal matters as well as which procedures need to be followed to do so.[285]

MOUs and MOAs already can fall within the existing categories of materials that agencies are required to disclose on their websites under Section 552(a)(2). Although these materials take a form that looks like they are contracts between agencies (hence, the moniker "agreements"), they are sometimes agreements over policy and interpretation (hence, the moniker "understanding"). As such, they sometimes either contain or are themselves "statements of policy and interpretations" that should be disclosed affirmatively under Section 552 (a)(2). For example, the stated purpose of one MOU between the U.S. Department of Labor, Equal Employment Opportunity Commission, and U.S. Department of Justice is to ensure that the different agencies "take a consistent approach to the complex legal and enforcement issues" that come before the agencies under Title VII of the Civil Rights Act.[286] Even when MOUs and MOAs are not making policy or interpretive statements, they sometimes provide "instructions to staff" or establish "rules of procedure," both categories of material which must also be affirmatively disclosed.

Arguably many MOUs and MOAs do not fall neatly within these existing categories that would direct their affirmative disclosure.[287] Nevertheless, ACUS has previously recommended that "[a]gencies should make available to the public, in an accessible manner, interagency agreements that have broad policy implications or that may affect the rights and interests of the general public unless the agency finds good cause not to do so."[288] We also found that several agencies

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285. Public comments submitted to ACUS in response to a request for information related to this study highlighted the public interest in access to agency MOUs and MOAs. *See, e.g.*, Elec. Priv. Info. Ctr., Comment Letter on Disclosure of Agency Legal Materials, *supra* note 23 (urging "the public release of any memoranda of understanding or agreement (MOUs/MOAs) between federal agencies and other federal, state, local, or international agencies or companies"); Diane M. Rodriguez, Am. Ass'n of L. Librs., Comment Letter on the Disclosure of Agency Legal Materials2 (July 12, 2022) (recommending consideration of the disclosure of "non-confidential agency memoranda, and cooperation agreements with other federal agencies and international bodies").

286. MEMORANDUM OF UNDERSTANDING AMONG THE U.S. DEPARTMENT OF LABOR, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND THE U.S. DEPARTMENT OF JUSTICE (2020), https://www.dol.gov/sites/dolgov/files/OFCCP/regs/compliance/directives/files/FullyExecutedOFCCP-EEOC-DOJ-MOU11-3-20-508c.pdf.

287. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1161 (2012).

288. Adoption of Recommendations, 77 Fed. Reg. 47800 , 47812 (Aug. 10, 2012) (Administrative Conference Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, §3(b)).

do affirmatively disclose their MOUs and MOAs on their websites,[289] including the Commodity Futures Trading Commission,[290] the Equal Employment Opportunity Commission,[291] the U.S. Geological Survey,[292] and parts of the U.S. Department of Labor.[293] But not all agencies do so.[294] In fact, some agencies have specifically disavowed an obligation to treat MOUs and MOAs as material that should be disclosed, even when they affect the public.[295]

Clearly MOUs and MOAs can go beyond housekeeping matters and truly affect the public, and they can sometimes already fit under existing categories of material that must be affirmatively disclosed. Nevertheless, a clear gap in agency practice exists that Congress would do well to close through clarification of existing affirmative disclosure requirements. It can easily do so by adding MOUs and MOAs expressly to the list of materials in Section 552(a)(2) that must be affirmatively disclosed. Precisely because MOUs and MOAs are binding on agencies and can affect the public, especially when they interpret law, demarcate jurisdictional boundaries, or define procedures, we offer Recommendation 6 in Part IV of this Article, urging Congress to amend Section 552(a)(2) to expressly include MOUs and MOAs.

2. Concerns About Inaccessibility

As discussed in detail below in Part III.B, unlike with binding substantive rules which are unenforceable if not properly published,[296] there is generally no intrinsic, self-enforcing mechanism that encourages agencies to disclose nonbinding material on their websites. MOUs, for example, are themselves "generally not legally enforceable," whether published or not.[297] Similarly, guidance documents, for example, do not themselves have the force of

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289. Some agencies also publish some MOUs in the *Federal Register*. Freeman & Rossi, *supra* note 287, at 1161 n.135.

290. *Memoranda of Understanding*, COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/International/MemorandaofUnderstanding/index.htm (last visited Mar. 10, 2024).

291. *Memoranda of Understanding,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/mou/memoranda-understanding (last visited Mar. 10, 2024).

292. *Memorandums of Understanding (MOU)*, USGS.GOV, https://www.usgs.gov/memorandums-of-understanding/documents (last visited Mar. 10, 2024).

293. *Memoranda of Understanding*, U.S. DEP'T OF LABOR: OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/mou (last visited Mar. 10, 2024).

294. *See* Freeman & Rossi, *supra* note 287, at 1161 (noting that agency MOUs are "hard to track").

295. *See* Coglianese, *supra* note 7, at 252-53 (quoting U.S. Department of Transportation and FDA definitions of guidance that expressly exclude memoranda of understanding).

296. 5 U.S.C. § 552(a)(1) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.").

297. Freeman & Rossi, *supra* note 287, at 1165.

law and thus are not enforceable, under any circumstances, no matter where or how they are publicized.[298] If an agency seeks to impose an obligation on someone, it must cite the underlying binding law, not rely on a guidance document. As a result, if an agency fails to publish guidance in the *Federal Register* or even post it on its website, its inability to cite that material does not fundamentally put the agency in any worse predicament. This asymmetry in consequences for failing to disclose guidance versus rules has contributed to one of the major concerns about access to guidance material: too much of it goes undisclosed. Moreover, even when it is technically made available on an agency website somewhere, it can sometimes be hard to locate or to know if it reflects the agency's current views.

In a study released a decade after agencies were first required to post guidance material on their websites, the nongovernmental National Security Archive reported that out of 149 agency FOIA webpages surveyed in early 2007, only fifty-two percent contained "statements of agency policy" and only forty-eight percent contained "staff manuals."[299] The organization filed FOIA requests with forty-six of these agencies to request copies of "their policies for posting information in electronic reading rooms"—and after receiving a relatively meager response, they "concluded that few agencies have standard procedures for establishing, organizing, and maintaining the FOIA portions of their Web sites."[300]

In 2015, the U.S. Government Accountability Office (GAO) released an audit of guidance disclosure at twenty-five component subagencies within four major federal departments: the U.S. Department of Labor, U.S. Department of Education, U.S. Department of Health and Human Services (HHS), and USDA.[301] The GAO found that "[m]ost components did not have written procedures for guidance initiation, development, and review."[302] Although all the components posted some guidance documents on their agencies' websites, the

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298. For discussion of the legal status of policy statements and interpretive rules, see Adoption of Recommendations, 82 Fed. Reg. 61728, 61734 (Dec. 29, 2017) (Administrative Conference Recommendation 2017-5, Agency Guidance Through Policy Statements); Adoption of Recommendations, 84 Fed. Reg. 38927, 38927 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-1). ACUS has recognized that "[p]olicy statements and interpretive rules are similar in that they lack the force of law," even though some observers contest describing interpretive rules as "non-binding." *Id.* at 38928 (footnote omitted). *See generally* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 263 (2018) (describing tendency among lawyers to refer to nonbinding rules as "guidance").

299. NAT'L SEC. ARCHIVE, FILE NOT FOUND: 10 YEARS AFTER E-FOIA, MOST FEDERAL AGENCIES ARE DELINQUENT 6–8 (2007), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB216/e-foia_audit_report.pdf.

300. *Id.* at 9 n.14.

301. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015), https://www.gao.gov/assets/670/669688.pdf.

302. *Id.* at 24.

GAO noted that it was not always easy to find these materials: "[I]t was not always clear where to find guidance on a component website. We found guidance was sometimes dispersed across multiple pages within a website, which could make guidance hard to find and could contribute to user confusion."[303] For example, the GAO reportedly could not locate any dedicated webpage containing significant guidance material on the Department of Health and Human Services' website.[304] Moreover, the GAO came across broken links and found that "[f]ew components effectively distinguished whether their online guidance was current or outdated to ensure the relevance of their online information."[305]

After the GAO issued its audit, the American Bar Association's Section of Administrative Law and Regulatory Practice issued a report recommending, among other things, that agencies "make it a priority to ensure that all agency guidance documents are made available online in a timely and easily accessible manner."[306] The Section report noted that "[m]embers of the public need to be able to find relevant guidance documents, but they are not always accessible on agency websites—and even when the documents are accessible, they can be very difficult for members of the public to locate."[307]

In 2018, the majority staff of the House Oversight and Government Reform Committee released a report of its review of guidance disclosure at forty-six federal agencies.[308] Only twenty-seven of these agencies could provide the committee with a complete inventory of all their guidance documents.[309] Although the Committee staff found that "most agencies" provided links to guidance documents on their webpages,[310] it was clear to the Committee that only "[s]ome agencies maintain easily identifiable and navigable online repositories for their guidance documents on their websites."[311]

Over the years, concerns about public access to agencies' procedural rules, MOUs, and guidance documents have motivated a number of projects and recommendations by ACUS, which has taken a longstanding, consistent position that "[a]gency policies which affect the public should be articulated and made

303. *Id.* at 38.

304. *Id.* at 33 n.39.

305. *Id.* at 38.

306. SECTION OF ADMIN. LAW & REG. PRAC., ABA, IMPROVING THE ADMINISTRATIVE PROCESS: A REPORT TO THE PRESIDENT-ELECT OF THE UNITED STATES 11 (2016), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf.

307. *Id.*

308. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 115TH CONG., SHINING LIGHT ON REGULATORY DARK MATTER (2018), https://republicans-oversight.house.gov/wp-content/uploads/2018/03/Guidance-Report-for-Issuance1.pdf.

309. *Id.* at 4.

310. *Id.* at 13.

311. *Id.*

known to the public to the greatest extent feasible."[312] We have already noted that ACUS has recommended that MOUs with implications for the public should be disclosed affirmatively.[313] Over the last dozen years, ACUS's concern about public access to agency legal material has been directed specifically toward, and with considerable emphasis on, public access to guidance documents and related material.

In a 2011 recommendation aimed at improving the online transparency of rulemaking information, for example, ACUS noted that its "recommendation also extends to guidance documents on which an agency is seeking or intends to seek public comment."[314] In 2017, ACUS recommended that "[a]ll written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a manner in which they may readily be found."[315] In 2018, in a recommendation that included attention to guidance documents related to agency adjudicatory procedures, ACUS found that "some websites are much more effective than others in organizing these materials and placing them in a logical location on the agency website such that they are easily accessible."[316] ACUS recommended agencies consider making readily available on their websites "all . . . guidance documents and explanatory materials" related to adjudicatory procedures.[317]

In 2019, ACUS adopted two relevant recommendations. First, it issued a recommendation on interpretive rules that called for agencies to ensure that such rules are "promptly made available electronically and indexed, in a manner in which they may readily be found."[318] In that recommendation, ACUS also stated that "[i]nterpretive rules should . . . indicate the nature of the reliance that may be placed on them and the opportunities for modification, rescission, or waiver of them."[319]

Second, ACUS adopted a recommendation in 2019 specifically on the public availability of all types of guidance documents.[320] The preamble to that

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312. Miscellaneous, 38 Fed. Reg. 19782, 19788 (July 23, 1973) (Administrative Conference Recommendation 71-3, Articulation of Agency Policies).

313. Adoption of Recommendations, 77 Fed. Reg. 47800, 47812 § 3(b) (Aug. 10, 2012) (Administrative Conference Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities).

314. Adoption of Recommendations 77 Fed. Reg. 2257, 2264, 2265 n.5 (Jan. 17, 2012) (Administrative Conference Recommendation 2011-8, Agency Innovations in E-Rulemaking).

315. Adoption of Recommendations, 82 Fed. Reg. 61728, 61737 (Dec. 29, 2017) (Administrative Conference Recommendation 2017-5, Agency Guidance Through Policy Statements).

316. Adoption of Recommendations, 84 Fed. Reg. 2139, 2142 (Feb. 6, 2019) (Administrative Conference Recommendation 2018-5, Public Availability of Adjudication Rules).

317. *Id.*

318. Adoption of Recommendations, 84 Fed. Reg. 38927, 38929 (Aug. 8, 2019) (Administrative Conference Recommendation, 2019-1, Agency Guidance Through Interpretive Rules).

319. *Id.*

320. Adoption of Recommendations, 84 Fed. Reg. 38927, 38931 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3, Public Availability of Agency Guidance Documents).

recommendation acknowledged that "[a]lthough many agencies do post guidance documents online, in recent years concerns have emerged about how well organized, up to date, and easily accessible these documents are to the public."[321] The preamble continued:

> Agencies should be cognizant that the primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) comprehensiveness (whether all relevant guidance documents are available), (b) currency (whether guidance documents are up to date), (c) accessibility (whether guidance documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).[322]

Among a dozen best practices put forward in this recommendation, ACUS advised agencies to "maintain a page on their websites dedicated to informing the public about the availability of guidance documents and facilitating access to those documents."[323] ACUS said that agencies "should undertake affirmative measures to alert interested members of the public to new and revised guidance documents."[324] They also "should keep guidance documents on their websites current."[325] Whenever an agency's "website contains obsolete or modified guidance documents," ACUS recommended that "it should include notations indicating that such guidance documents have been revised or withdrawn" and that, "[t]o the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date."[326] ACUS stated that "[i]f a guidance document has been rescinded, agencies should provide a link to any successor guidance document."[327]

To facilitate implementation of these best practices, ACUS also urged agencies to "develop written procedures pertaining to their internal management of guidance documents" and to "develop and apply appropriate internal controls to

321. *Id.* at 38932.

322. *Id.*

323. *Id.*

324. *Id.* at 38933.

325. *Id.*

326. *Id.*

327. *Id.*

ensure adherence to guidance document management procedures."[328] In addition, ACUS recommended that "[t]o facilitate internal tracking of guidance documents, as well as to help members of the public more easily identify relevant guidance documents, agencies should consider assigning unique identification numbers to guidance documents covered by their written guidance procedures."[329]

A few months after ACUS issued its recommendation on the public availability of guidance documents, then-President Donald J. Trump issued an executive order that followed in several respects the best practices identified in the ACUS recommendation.[330] Among other things, Executive Order 13,891 directed agencies to "establish or maintain on [their] website[s] a single, searchable, indexed database that contains or links to all guidance documents."[331] In this respect, the executive order mirrored a 2007 OMB bulletin on "good guidance practices" that expressly directed agencies to post to a website, or include on an online list, all of its "significant guidance documents in effect."[332]

Even prior to the issuance of Executive Order 13,891, many agencies did include guidance documents on their websites. When the GAO conducted its review of guidance document management at four cabinet departments, it reported that all twenty-five subagencies it examined at these four departments had posted some guidance documents on their websites.[333] Nevertheless, the concerns about guidance availability persisted, largely because many agencies lacked a comprehensive, clear, and systematic way of maintaining a centralized webpage with their guidance documents. In fact, the GAO noted that "it was not always clear where to find guidance" on subagencies' websites because "guidance was sometimes dispersed across multiple pages within a website, which could make guidance hard to find and could contribute to user confusion."[334] GAO also reported that only about half of the twenty-five subagencies it examined had a process in place for regularly reviewing their guidance documents to make sure what was appearing on their websites was current.[335]

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328. *Id.* 38932.

329. *Id.*

330. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019). The President gave agencies until February 2020 to comply.

331. *Id.* § 3(a); *see also* OFF. OF MGMT. & BUDGET, M-20-02, MEMORANDUM FROM DOMINIC MANCINI TO REGULATORY POLICY OFFICERS AT EXECUTIVE BRANCH DEPARTMENTS AND AGENCIES AND MANAGING AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES AND COMMISSIONS: GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13891, TITLED "PROMOTING THE RULE OF LAW THROUGH IMPROVED AGENCY GUIDANCE DOCUMENTS" (Oct. 31, 2019) [hereinafter Mancini Memo], https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf.

332. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).

333. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 301, at 31.

334. *Id.* at 38.

335. *Id.* at 29.

The adoption of Executive Order 13,891 appears to have resulted in agencies reviewing their guidance documents, posting more of them online, and in some cases creating more centralized or easier to comprehend webpages containing these documents.[336] According to one self-acknowledged rough estimate, more than 70,000 additional agency guidance documents were made available in the period following the adoption of the executive order.[337]

In January 2021, President Joseph R. Biden revoked Executive Order 13,891.[338] It remains unclear at present how much any improvement in guidance accessibility has remained in effect after the executive order's roughly fourteen-month duration. At least some agencies reportedly took down their dedicated guidance webpages following the executive order's revocation.[339]

Notwithstanding the effects Executive Order 13,891 may have had, it is clear that concerns about the accessibility of guidance documents on agency websites remain. In December 2021, for example, ACUS adopted a further recommendation specifically directed at public availability of *inoperative or rescinded* guidance documents.[340] The recommendation followed from a study that looked for a sample of guidance documents known to have been rescinded or superseded by agencies, finding about eighty percent of the documents in the sample still available online but only about sixty percent of these labeled in a manner that would make clear to the public that the guidance documents were no longer operative.[341] The ACUS recommendation did not call for agencies to keep all inoperative guidance available online, but instead it directed agencies to develop procedures for determining which ones should be retained and for labeling clearly the inoperative or rescinded status of those that are.[342]

In 2022, ACUS adopted a recommendation specifically targeted at agency enforcement manuals. In that recommendation, ACUS called upon agencies to "make their enforcement manuals, or portions of their manuals, publicly available

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336. Clyde Wayne Crews, Jr., *Trump's Executive Order 13,891 Creates Portals For Federal Agency Guidance Documents; and Here They Are*, FORBES (Sept. 22, 2020), https://www.forbes.com/sites/waynecrews/2020/09/22/trumps-executive-order-13891-creates-portals-for-federal-agency-guidance-documents-and-here-they-are/.

337. Clyde Wayne Crews, Jr., *Laws Have Mercy: Here Is How Biden Is Restricting Access to Regulatory Guidance Documents*, FORBES (Apr. 27, 2021), https://www.forbes.com/sites/waynecrews/2021/04/26/laws-have-mercy-here-is-how-biden-is-restricting-access-to-regulatory-guidance-documents/?sh=5c9be0304bbd.

338. Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 25, 2021).

339. Crews, *supra* note 337.

340. Adoption of Recommendation, 87 Fed. Reg. 1715, 1718 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-7).

341. TODD RUBIN, PUBLIC AVAILABILITY OF INOPERATIVE AGENCY GUIDANCE DOCUMENTS (2021) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/Public%20Availability%20of%20Inoperative%20Agency%20Guidance%20Documents%20Final%20Report.pdf.

342. Adoption of Recommendation, 87 Fed. Reg. 1715, 1718 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-7).

on their websites when doing so would improve public awareness of relevant policies and compliance with legal requirements or promote transparency more generally, and if they have adequate resources available to ensure publicly available enforcement manuals remain up to date."[343]

Also in 2022, in response to a public request for information that ACUS issued in connection with the study underlying this Article, some commenters reaffirmed the longstanding concerns about accessibility of all types of guidance-related material. The Reporters Committee for the Freedom of the Press, for example, noted that guidance materials "are of substantial interest to the news media and the public" and recommended that Congress take steps to increase the incentives for agencies to comply with their obligation to affirmatively disclose these materials.[344]

The American Association of Law Libraries (AALL) noted that improved "public access to internal agency memoranda that are not classified would also be helpful because these materials describe important program guidance and policy requirements."[345] Although noting that "some agencies . . . make memoranda available to the public in a central location on their websites, which is very useful," the AALL expressed the view that "most agencies . . . provide access to only a selection of memoranda."[346] Moreover, AALL noted that "[f]requently, these memoranda are not available in a central location but rather linked to from press releases or other documents."[347]

After outlining ways that guidance documents can "constrain or influence the discretion of agency staff or otherwise have real-world legal consequences,"[348] the U.S. Chamber of Commerce emphasized the reports that some agencies had deleted their dedicated guidance webpages: "Pause to consider that—these agencies took *affirmative steps* to conceal their legal pronouncements."[349] The Chamber recommended that Congress adopt "durable requirements, mandated by statute and not revocable at the discretion of the Executive, for the permanent disclosure of these materials."[350]

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343. Adoption of Recommendations, 88 Fed. Reg. 2312, 2315 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-5, Regulatory Enforcement Manuals).

344. Reps. Comm. for the Freedom of the Press, Comment Letter on Disclosure of Agency Legal Materials 2, 6 (July 18, 2022), https://www.acus.gov/sites/default/files/documents/RCFP%20Comments%20to%20ACUS%20re%2087%20FR%2030445.pdf.

345. Diane M. Rodriguez, Am. Ass'n of L. Libr., Comment Letter on Disclosure of Agency Legal Materials 2 (July 12, 2022), https://www.acus.gov/public-comment/response-rfi-diane-m-rodriguez-aalls-7-12-2022.

346. *Id.*

347. *Id.*

348. U.S. Chamber of Com. Litig. Ctr, on Disclosure of Agency Legal Materials 7 (July 18, 2022), https://www.acus.gov/sites/default/files/documents/220715_Comments_DisclosureofAgencyLegalMaterials_ACUS.pdf (emphasis in original).

349. *Id.*at 9.

350. *Id.*

If nothing else, considerable variation remains with respect to the degree that different agencies' guidance documents are available and accessible to the public. Some agencies do have in place dedicated webpages that contain comprehensive and up-to-date repositories of guidance material. The Food and Drug Administration, for example, "has one of the more sophisticated online repositories of guidance" that even "purports to include *all* agency guidance documents."[351] Overall, a study conducted for ACUS on agency disclosure of guidance materials identified a range of best agency practices in terms of records management, online availability, labeling and nomenclature, affirmative outreach efforts, and ongoing review and feedback.[352]

But not all agencies follow best practices. And not all agencies include all their guidance documents online. Under the OMB Bulletin, agencies are not even expected to make anything other than "significant" guidance documents available online.[353] A "significant" guidance document is one "that may reasonably be anticipated to":

> (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
> (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
> (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
> (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended.[354]

Notably, under the Bulletin's express terms, a "significant guidance document" does *not* include:

> legal advisory opinions for internal Executive Branch use and not for release (such as Department of Justice Office of Legal Counsel opinions); briefs and other positions taken by agencies in investigations, pre-litigation, litigation, or other enforcement proceedings . . . ; speeches; editorials; media interviews; press

351. Coglianese, *supra* note 7, at 289 n.214 (emphasis added).

352. CARY COGLIANESE, PUBLIC AVAILABILITY OF AGENCY GUIDANCE DOCUMENTS (May 15, 2019), https://www.acus.gov/sites/default/files/documents/Coglianese%20Guidance%20Report%20to%20ACUS%2005.15.19%20-%20FINAL.pdf (Final Report to the Administrative Conference of the United States).

353. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).

354. *Id.* at 3439.

> materials; Congressional correspondence; guidance documents that pertain to a military or foreign affairs function of the United States (other than guidance on procurement or the import or export of non-defense articles and services); grant solicitations; warning letters; case or investigatory letters responding to complaints involving fact-specific determinations; purely internal agency policies; guidance documents that pertain to the use, operation or control of a government facility; internal guidance documents directed solely to other Federal agencies; and any other category of significant guidance documents exempted by an agency head in consultation with the OIRA Administrator.[355]

This explicit delineation of what is and what is not a significant guidance document matters because the Bulletin specifies that "[e]ach agency shall maintain on its Web site . . . a current list of its significant guidance documents in effect."[356] Furthermore, that list must include a link to the significant guidance document itself.[357] And new significant guidance documents must be listed and linked to on the agency's website "promptly"—meaning "no later than 30 days from the date of issuance."[358]

Even though these best practice principles apply across the executive branch, the very fact that some agencies' online repositories remain more systematic, comprehensive, and accessible than others indicates that there exists room for improvement and increased consistency across the federal government in making such material affirmatively accessible.[359]

3. Opportunities for Legislative Action

As a matter of principle, the basic contours of the current legal requirements governing disclosure of guidance material seem sound: all documents of general interest to the public should be affirmatively disclosed on the website. The Federal Records Act articulates such a principle, and that same principle is also reflected in FOIA's section 552(a)(1) and (2) combined with the E-Government Act of 2002.

Yet, it is also clear that the mere articulation of a standard of online disclosure of all documents of interest to the public—guidance documents,

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355. *Id.*

356. *Id.* at 3440.

357. *Id.*

358. *Id.*

359. We also note that, in announcing standards only for the online publication of significant guidance documents, the OMB Bulletin is more limited than FOIA and the E-Government Act, which make no such distinction in the significance of guidance documents but instead require all of them to be available electronically.

internal procedures, staff manuals, and the like—does not translate into a reality in which all of this information is in fact disclosed or is readily accessible to the public.

Some legislative proposals over the last decade have aimed to impose requirements that would make guidance materials more publicly accessible. For example, the Guidance Out of Darkness (GOOD) Act was introduced in March of 2021 "to increase access to agency guidance documents."[360] An earlier version of this bill was passed in September 2018 by the U.S. House of Representatives. It would have required agencies to publish guidance documents "in a single location on an online portal designated by the Director of the Office of Management and Budget."[361] The legislation also would require agencies to provide links to guidance on the agency's website and ensure that these materials are "clearly identified," "sorted by subcategories," "searchable," and "published in a machine-readable and open format."[362]

In September 2022, in a new Congress, the Senate passed similar legislation—the Guidance Clarity Act—but it was never approved in the House.[363] In January 2023, Senator Lankford introduced the Guidance Clarity Act again in yet another session of Congress.[364]

Congress has already adopted a legislative requirement on guidance accessibility for one specific agency: the Food and Drug Administration. The provisions of the Food and Drug Administration Modernization Act of 1997 are worth highlighting as they contain some core features that could be a model for more generally applicable legislation:

> In developing guidance documents, the Secretary [of HHS] shall ensure uniform nomenclature for such documents and uniform internal procedures for approval of such documents.
>
> The Secretary shall ensure that guidance documents and revisions of such documents are properly dated and indicate the nonbinding nature of the documents. The Secretary shall periodically review all guidance documents and, where appropriate, revise such documents.
>
> The Secretary, acting through the Commissioner, shall maintain electronically and update and publish periodically in the *Federal Register* a list of guidance documents. All such documents shall be made available to the public.
>
> The Secretary shall ensure that an effective appeals mechanism is in place to address complaints that the Food and

360. Guidance Out of Darkness Act, S. 628 (117th Cong. 2021).

361. Guidance Out of Darkness Act, § 3(c)(1), H.R. 4809, 115th Cong. (2018).

362. *Id.* § 3(c)(3).

363. Guidance Clarity Act of 2021, S. 533, 117th Cong. (2021).

364. Guidance Clarity Act of 2023, S. 108, 118th Cong. (2023).

> Drug Administration is not developing and using guidance documents in accordance with this subsection.
>
> Not later than July 1, 2000, the Secretary after evaluating the effectiveness of the Good Guidance Practices document, published in the Federal Register at 62 Fed. Reg. 8961, shall promulgate a regulation consistent with this subsection specifying the policies and procedures of the Food and Drug Administration for the development, issuance, and use of guidance documents.[365]

The FDA has subsequently issued a regulation on its guidance management and disclosure practices that provides a framework for implementing these provisions of its governing statute.[366]

The core components of the FDA Modernization Act have much in common with the basic contours of ACUS Recommendations 2019-3 and 2021-7 on guidance availability, recommendations which themselves can provide a basis for provisions in new legislation.[367] Those recommendations should be consulted in the drafting of legislation as many of their provisions can be easily adapted into statutory form.

Guidance, however, is not the only type of agency legal material the publication of which raises serious concerns about comprehensiveness, indexing, search capabilities, and organization. Indeed, these concerns apply generally to agency practices for the affirmative disclosure of all legal materials. Indeed, the FDA Modernization Act can serve as a useful example of legislation that could speak to public access to all agency legal materials, not just guidance documents. As such, we make no recommendations specific to guidance documents per se. Rather, we recommend that Congress adopt legislation requiring agencies to develop, publish, and implement affirmative disclosure plans that would cover all of their legal materials, including guidance documents. We discuss our recommendation on the means of disclosure below in Part III.A, which forms the basis for our global recommendation on affirmative disclosure plans for all agency legal materials.

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365. 21 U.S.C. § 371(h)(2)-(5). We exclude Section 371(h)(1) from our excerpt in the text because it imposes public participation requirements on FDA when it is issuing guidance. Obviously, there is a connection between transparency of government information and public participation. *See* Coglianese, Kilmartin & Mendelson, *supra* note 8. But the focus of the present report, however, is on transparency, not public participation in the process of developing rules or guidance materials. For a discussion of public participation in the development of guidance material, see Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57 (2019).

366. Administrative Practices and Procedures; Good Guidance Practices, 65 Fed. Reg. 56468 (Sept. 19, 2000) (codified in scattered portions of 21 C.F.R.).

367. *See* Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3); Adoption of Recommendation, 87 Fed. Reg. 1715, 1718 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-7).

C. Agency Legal Advice

Government lawyers routinely counsel agency officials and render legal opinions which are delivered orally, in informal memoranda, letters, or email, or in formal written opinions. In whatever form, the opinions often explain to agency officials seeking guidance the constraints the U.S. Constitution, federal statutes, treaties, or other sources of law impose upon those officials, either in dealing with the public or otherwise carrying out their responsibilities. At the same time, legal consultations may also be a part of a deliberative process within the agency to which the lawyer contributes legal and practical judgments as well as potential alternative strategies for achieving the agency's objectives.

One such set of documents is produced by the Office of Legal Counsel (OLC) within the U.S. Department of Justice. The OLC provides legal advice to other agencies as well as to the President. Not surprisingly, public access to OLC memoranda has garnered significant public debate and attention.

Another set of legal advice documents is produced by agency general counsels' offices. These documents set forth legal opinions directed to other officials, typically at their own agency. Compared to the attention that has been given to the public accessibility of OLC memoranda, the issue of public access to documents from agency general counsels' offices has flown under the radar. Regardless, such internally directed legal opinions produced within agency general counsels' offices are, like OLC memos, "agency legal materials" in the colloquial sense—they discuss the legal rights and responsibilities of the agency, and often of members of the public as well. Nevertheless, government attorney legal opinions pose a basic dilemma:

> The American people have the right to know the laws and policies that bind our government and its agencies. At the same time, government officials must be able to receive confidential legal advice and deliberate frankly . . . We can . . . accommodate both by carefully defining the boundary between law, on the one hand, and advice on the other.[368]

The line between "law" and "advice" is, at least tentatively, the line between opinions that agencies should disseminate and ones that agencies should be entitled to withhold under FOIA's exemptions (as discussed in Part I.C of this Article) so long as their release may result in foreseeable harm.[369]

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368. ACLU v. NSA, 925 F.3d 576, 583 (2d Cir. 2019) (Cabranes, J.); *accord*, Sterling Drug Inc. v. FTC, 450 F.2d 698, 713 (D.C. Cir. 1971) (Bazelon, C.J., dissenting) ("[A]t the same time that Congress [in enacting FOIA] sought to enhance the process of policy formulation, it indicated unequivocally that the purpose of the Act was to forbid secret *law*.").

369. *See* 5 U.S.C. § 552(a)(8) (articulating the foreseeable harm standard).

This section focuses on whether legal opinions are, or should be, subject to an affirmative disclosure regime for the same reasons that other types of legal documents are subjected to affirmative disclosure—namely, ensuring that "law" is publicly accessible. Merely requiring affirmative disclosure, of course, leaves the scope of the applicable exemption 5 privileges unresolved. While we will discuss some of the anomalies in the current law, we do not offer recommendations about modifying the scope of the exemptions in this context. This is consistent with our general approach of avoiding proposals to modify FOIA's exemptions as described above in Part I.C.

Granted, if the courts settle on a broad interpretation of the exemption 5 privileges, a revision of Section 552(a) to include a requirement for affirmative disclosure of internally directed legal opinions may shift only a small portion of such records from the reactive disclosure regime to an affirmative disclosure regime. Still, our animating principle in this Article applies equally to these materials: any *non-exempt* agency legal materials should be proactively disclosed on the agency's website without waiting for a member of the public to make a FOIA request.

1. Current Publication Requirements

Section 552(a)(1), provides that agencies must submit for publication in the *Federal Register* "substantive rules of general applicability adopted as authorized by law, and *statements of general policy or interpretations of general applicability* formulated and adopted by the agency."[370] Subsection (a)(2) then requires agencies to make available for public inspection in an electronic format "*those statements of policy and interpretations* which have been adopted by the agency and are not published in the Federal Register."[371]

The term "interpretation" can be quite capacious, and it could easily encompass agency counsels' legal opinions, so long as the "agency" can be viewed as adopting them. Moreover, the rationale underlying the first three provisions of (a)(2) is "to afford . . . private citizen[s] the essential information to enable [them] to deal effectively and knowledgeably with the Federal agencies."[372] And even though the law prior to FOIA might arguably have been focused on materials addressed to the public, FOIA's amendments make it clear that it applies to internally focused documents that "affect members of the general public."[373] For

370. 5 U.S.C. § 552(a)(1) (emphasis added).

371. 5 U.S.C. § 552(a)(2) (emphasis added).

372. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, , *supra* note 59 (quoting S. REP. NO. 88-1219, at 12); *see also id.* (provisions are designed "to enable the public 'readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.'").

373. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59 ("Standards established in agency staff manuals and similar instructions to

reasons detailed below, many OLC and agency general counsel opinions do affect members of the public, and they thus should fall within the ambit of the agency's duties of affirmative disclosure.

Nevertheless, in light of agency officials' need to receive confidential legal advice, this strictly textualist interpretation can be contested. As a structural matter, Section 552(a) does not easily accommodate disclosure of agency lawyers' elaboration of *external* legal constraints in the course of reviewing and approving (or disapproving) policymakers' initiatives. Agency counsel elaborate upon these externally imposed legal constraints in ways that constrain agency policymakers and other actors. But Section 552(a) does not require agencies to publish in the *Federal Register* or place on its websites *external legal constraints*, such as the Constitution, statutes, and treaties, presumably because such sources of law are generated *outside* the agency.

Agency lawyers' power to override agency policymakers on the basis of *external* constraints seems different from legal opinions concerning the customary law-generating functions of agencies directed at the public (even if not addressed to the public)—where *the agency* is making the *policy* choices that shape the rights and obligations of citizens. When agency lawyers issue opinions about how statutes or agency regulations apply to members of the public, they are engaged in a process of illuminating or interpreting law, if not essentially creating it.

While an assessment of the information the public *should* know to effectively and knowledgeably deal with the law could be used as a metric for construing the types of "interpretations" that must be posted online under subsection (a)(2), it is far from clear that such an approach is compelling (and itself leaves many ambiguities). Indeed, Congress might have assumed that most agency counsel opinions would be protected by the attorney-client privilege, the deliberative process privilege, or the work-product privilege, making a focus on agency counsel opinions in this context an academic exercise. As noted above, the main source of contemporary guidance, the *Department of Justice's FOIA Guide*, in excising the word "interpretation" in its summary of the affirmative disclosure provisions, suggests that agency general counsel opinions fall outside Section 552(a)'s scope.

There has been little litigation over agencies' affirmative disclosure obligations, in part because the remedies for such violations appear to be no more robust than the remedies available to plaintiffs for agencies' failure to provide Section 552(a)(2) materials in response to reactive disclosure requests.[374] (The need

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staff may often be, for all practical purposes, as determinative of matters within the agency's responsibility as other subsection (b) materials which have the force and effect of law.").

374. Kennecott Utah Copper Corp. v. Dep't of the Interior, 88 F.3d 1191, 1202–03 (D.C. Cir. 1996). Thus, in *Tax Analysts*, the plaintiff raised such a claim, which might have resulted in a ruling that the agency counsel opinions in questions were "interpretations" under section 552(a), but they did not pursue the claim on appeal because the District Court held that the only remedy was provision of the materials to the plaintiff. In *Citizens for Responsibility and Ethics in Washington (CREW) v. U.S. Department of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), plaintiffs sought to compel the OLC to publicly

for clarity in defining "interpretations" in FOIA's affirmative disclosure provisions may become more critical if, as we recommend in Part IV.B, enforcement of affirmative disclosure obligations is made more efficacious.) Thus, the case law provides little guidance on the scope of the term "interpretation," except indirectly in cases involving reactive disclosure. In reactive disclosure cases, the courts must sometimes resolve FOIA requesters' claims that invocation of the privileges that customarily protect legal opinions should be rejected on the grounds that the opinions constitute "secret law." It is in these cases that the courts distinguish "law"—which must be disclosed—and "advice"—which need not be. As such, the basic question of whether legal opinions are included within the existing affirmative disclosure requirements reveals statutory ambiguity worth addressing. Our recommendations described at the bottom of this section aim to do just that.

The bigger challenge, however, lies beyond the purpose of this Article. The scope of exemption 5 privileges in this area is hotly contested and remains poorly defined. Because we take no position on the scope of exemption 5 privileges—neither to ratify the current state of affairs in practice, in the courts, or on paper, nor to recommend changes thereto—we describe the issues here for the purposes of ensuring the reader understands the limited, but still meaningful, effect we believe our recommendations would have in practice.

2. Exemption 5 Privileges

Agency heads and high-level government officials must have access to legal advice, and that requires some level of a confidential relationship with agency counsel. Three litigation privileges incorporated into FOIA's exemption 5 bear directly on the availability of legal advice documents under either a reactive or affirmative disclosure regime.

First, the attorney-client privilege is essential to ensuring that government officials share with agency lawyers relevant facts, contemplated actions, and concerns related to decisions before them.[375] The privilege is designed to protect clients' disclosure of confidences to their attorney in the course of seeking legal advice or representation. It protects clients' communications with their attorneys. But to prevent the risk of inadvertent indirect disclosure of the client's confidences,

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disseminate its opinions along with an index. The D.C. Circuit held that the remedial provisions of FOIA allowed it only to order provision of such materials to the plaintiff, not the public at large, and that the APA did not confer jurisdiction to order OLC to publicly disseminate its opinions. The Ninth and Second Circuits have held to the contrary. *See* Animal Legal Def. Fund v. USDA, 935 F.3d 858, 874 (9th Cir. 2019); N.Y. Legal Assistance Grp. v. BIA, 987 F.3d 207, 224 (2d Cir. 2021). For a full discussion of remedial issues, see *infra* Part III.B.

375. *See* Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981) ("[T]hat sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client").

the privilege also protects communications from attorneys to clients as well.[376] The latter aspect of the privilege operates when (1) the communication from attorney to client is "confidential," and (2) the communication is "based on confidential information provided by the client."[377]

The D.C. Circuit has held, however, that otherwise confidential agency memoranda fall outside the attorney-client privilege if such memoranda qualify as authoritative interpretations of agency law because "Exemption 5 and the attorney-client privilege may not be used to protect . . . agency law from disclosure to the public."[378] As the court explained in *Tax Analysts v. Internal Revenue Service*, "no private attorney has the power to formulate the law to be applied to others. Matters are different in the governmental context, when the counsel rendering the legal opinion in effect is making law."[379] In characterizing the agency counsel opinions as agency law, though, the court emphasized that the source of facts providing the basis for those opinions were members of the public rather than agency officials.[380] Thus, in *Tax Analysts*, the D.C. Circuit noted that "some [opinions of IRS counsel] might reveal confidential information transmitted by field personnel about 'the scope, direction, or emphasis of audit activity.'"[381] It explained that such aspects of the opinions could be withheld on the basis of the attorney-client privilege. [382]

Relatedly, the attorney work-product privilege "provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." [383] This privilege's "purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny."[384] However, the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.[385] The D.C. Circuit has ruled that the privilege "extends to

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376. Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977); *accord*, Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 384 F. Supp. 2d 100, 114; *see* McKinley v. Bd. of Governors of Fed. Res. Sys., 849 F. Supp. 2d 47, 65 (S.D.N.Y. 2012) (finding that attorney-client privilege covers facts divulged by client to attorney and opinions given by attorney to client based on those facts (citing *Elec. Privacy Info. Ctr.*)); Judicial Watch, Inc. v. Dep't of the Army, 466 F. Supp. 2d 112, 121 (D.D.C. 2006) (same).

377. Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d at 254; Schlefer v. U.S., 702 F.2d 233, 245 (D.C. Cir. 1983).

378. Tax Analysts v. I.R.S., 117 F.3d 607, 619 (D.C. Cir. 1997); Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 360-61 (2d Cir. 2005) (attorney-client privilege's rationale of protecting confidential communications is inoperative for documents that reflect actual agency policy).

379. *Tax Analysts*, 117 F.3d at 619.

380. *Id.* (citing *Schlefer*, 702 F.2d at 237).

381. *Id.*, at 619-20.

382. *Id.*

383. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980).

384. DOJ, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 5, at 52-53 [hereinafter EXEMPTION 5 GUIDANCE].

385. *Coastal States*, 617 F.2d at 865.

documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."[386] As a result, "courts have found that no segregation of factual information is required for information falling within the privilege."[387]

Thus, FOIA exempts from disclosure materials prepared by an attorney in anticipation of litigation.[388] In reactive disclosure cases, the work-product privilege has been used to protect certain manuals providing guidelines for government litigators' conduct, *i.e.,* the Blue Book, from discovery.[389] It has also protected law enforcement investigations, when the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer."[390] Likewise, the privilege has been asserted to protect a recommendation to close a litigation or pre-litigation matter.[391]

The work-product privilege has been found applicable even when the document has become the basis for a final agency decision.[392] The Court has

386. Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992).

387. EXEMPTION 5 GUIDANCE, *supra* note 384, at 62; *see* Martin v. Off. of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) ("The work product privilege simply does not distinguish between factual and deliberative material."); *accord* Pacific Fisheries Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008) (noting that "if a document is covered by the attorney work-product privilege, the government need not segregate and disclose its factual contents"); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 147 (2d Cir. 1994) ("The work product privilege draws no distinction between materials that are factual in nature and those that are deliberative.").

The work-product privilege is not absolute. Because factual work-product enjoys qualified immunity from civil discovery, such materials are discoverable "only upon a showing that the party seeking discovery has substantial need" of materials which cannot be obtained elsewhere without "undue hardship." FED. R. CIV. P. 26(b)(3).

388. DOJ, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: ATTORNEY WORK-PRODUCT PRIVILEGE, at 48, 51, 55-56; FTC v. Grolier, 462 U.S. 19, 27 (1983) (holding that "the work-product of agency attorneys would not be subject to discovery in subsequent litigation unless there was a showing of need and would thus fall within the scope of Exemption 5"); *accord*, Judicial Watch, Inc. v. DOJ, 432 F.3d 366, 371 (D.C. Cir. 2005) ("[F]actual material is itself privileged when it appears within documents that are attorney work-product.").

389. *See* ACLU v. DOJ, 880 F.3d 473, 486 (9th Cir. 2018) (finding that "[t]he portions of the USA Book that provide instructions to investigators regarding obtaining court authorization for electronic surveillance would have been created in 'substantially similar form' regardless of whether those investigations ultimately lead to criminal prosecutions" and therefore privilege does not apply to those portions); Nat'l Ass'n of Criminal Def. Laws. v. DOJ Exec. Off. for U.S. Att'ys, 844 F.3d 246, 257 (D.C. Cir. 2016) (finding it appropriate to assess whether Blue Book contains non-exempt statements of government's discovery policy that are reasonably segregable from protected attorney work-product).

390. SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991).

391. Kishore v. DOJ, 575 F. Supp. 2d 243, 259 (D.D.C. 2008) (applying privilege to document explaining government's reasons for declining prosecution); Gavin v. SEC, 2007 WL 2454156, at *9 (D. Minn. Aug. 23, 2007) (approving use of privilege for documents recommending closing of SEC investigations); Heggestad v. U.S. Dep't of Just., 182 F. Supp. 2d 1, 10–11 (2000) (holding privilege applicable to prosecution-declination memoranda); *cf.* Grecco v. DOJ, No. 97- 0419, slip op. at 12 (D.D.C. Apr. 1, 1999) (holding privilege applicable to records concerning determination whether to appeal lower court decision).

392. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 159-60 (1975) (holding that Advice and Appeals Memoranda "directing the filing of a complaint" are protected by Exemption 5 as attorney

asserted that a final opinion that would ordinarily fall within Section 552(a)(2)'s mandatory disclosure requirements could be withheld on the basis of the work-product privilege, even in response to a FOIA request.[393] This contrasts with the treatment of the attorney-client privilege, in part because an agency policy can never qualify as a client confidence.[394] The courts also appear to reject that approach in the context of the deliberative process privilege.[395]

Finally, the deliberative process privilege, unlike the attorney-client and work-product privilege, is not unique to lawyers; it generally protects all consultations and communications between government officials in the course of reaching a policy decision.[396] First, the communication must be pre-decisional, i.e., "antecedent to the adoption of an agency policy."[397] Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[398]

Post-decisional documents, unlike pre-decisional documents, are not covered by the privilege. These documents "generally embody statements of policy and final opinions that either have the force of law, implement an established policy of an agency, or explain actions that an agency has already taken."[399] According to the Supreme Court, "exemption 5 ordinarily does not apply to post-decisional documents as 'the public is vitally concerned with the reasons which did supply the

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work product); *see also* Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (explaining the Court's rationale in *Sears*).

393. 443 U.S. at 360 n.23 ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."). *But see* Grolier, 462 U.S. at 32 n.4 (Brennan, J., concurring) ("[I]t is difficult to imagine how a final decision could be 'prepared in anticipation of litigation or for trial'"); N.Y. Times Co. v. DOJ, 138 F. Supp. 3d 462, 474 (S.D.N.Y. 2015) (concluding that express adoption doctrine applies to work-product privilege).

394. Nat'l Immigr. Project v. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 729 n.10 (S.D.N.Y. 2012) ("FOIA prohibits agencies from treating their policies as private information.").

395. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (holding that "Exemption 5 does not apply to those Appeals and Advice Memoranda which conclude that no complaint should be filed" because "[d]isclosure of these memoranda would not intrude on predecisonal processes").

396. The DOJ has listed the three most consistent policy reasons for this privilege: "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action." EXEMPTION 5 GUIDANCE, *supra* note 384, at 15 & n.87 (citing Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. DOJ, 591 F.2d 753, 772–73 (D.C. Cir. 1978) (en banc)).

397. EXEMPTION 5 GUIDANCE, *supra* note 384, at 16-17 (quoting Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011).

398. *Id.* (quoting Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)).

399. *Id.* at 20–21; *see also id.* at 21 nn.106–08.

basis for an agency policy actually adopted.'"[400] The privilege is also inapplicable when an agency incorporates a document by reference in later decisions, as in *La Raza*, a case in which "the court found [that] DOJ had 'publicly and repeatedly depended on the Memorandum [it sought to withhold] as the primary legal authority justifying and driving . . . [its policy decision] and the legal basis therefor.'"[401]

Material must also be "deliberative" to be protected from disclosure.[402] "As the D.C. Circuit has held, to be protected by the deliberative process privilege, the document must 'reflect[] the give-and-take of the consultative process,' either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate a decision."[403] "Generally, factual information is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel."[404]

The deliberative process privilege certainly protects communications to and from lawyers operating as policy advisors, such as when they opine on various policy options' wisdom or their legal risks. Policymakers and enforcement authorities often provide lawyers with facts and policy analysis about particular situations or potential initiatives; ordinarily much of what lawyers communicate in return are not facts but legal analysis. There may be ways to segregate the underlying facts, particularly when an action is *not* taken, from both the agency lawyers' legal analysis and from agency officials' preliminary considerations or discussions about policy.

3. Office of Legal Counsel Opinions

Since 1789, the Attorney General has possessed statutory authorization "to give his advice and opinion upon questions of law when required by the President of the United States, or . . . the heads of any of the departments."[405] The Attorney

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400. *Id.* at 21 (quoting *Sears*, 421 U.S. at 152). "[T]he D.C. Circuit held that Field Service Advice memoranda (FSAs) issued by the IRS Chief Counsel's Office are not predecisional documents, because they constitute 'statements of an agency's legal position.' The court reached this conclusion even though the opinions were found to be 'nonbinding' on the ultimate decisionmakers." *Id.* at 24 (quoting Tax Analysts v. I.R.S., 117 F.3d 607, 617 (1997)).

401. *Id.* at 51 (alteration in original) (quoting Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 358 (2d Cir. 2005)); *see also id.* at 48 n.194.

402. *Id.* at 27.

403. *Id.* at 28 (alteration in original) (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

404. *Id.* at 29; *see also id.* 28-29 & nn.137-39.

405. Judiciary Act of 1789, § 35, 1 Stat. 73, 93 (codified as amended at 28 U.S.C. §§ 511–13). State attorneys general possess similar authority. For a history of the origins and development of the opinion-giving authority of state attorneys general, see William N. Thompson, *Transmission or Resistance: Opinions of State Attorneys General and the Impact of the Supreme Court*, 9 VAL. U. L. REV. 55, 60 (1974).

General has delegated that authority to the Office of Legal Counsel (OLC) within the Justice Department.[406] This discrete class of legal opinions has been the subject of litigation, proposed legislative action, and commentary (including public comments submitted to ACUS in the course of this project).[407]

To begin, OLC decisions represent an authoritative exposition of the U.S. government's position, and thus they serve as external constraints on agencies' actions. OLC itself views its formal opinions "as provid[ing] *controlling* advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."[408] When agencies submit a question, they must agree to abide by the OLC's conclusion.[409] Indeed, in most circumstances the Department of Justice, not the agencies receiving OLC's advice, possesses exclusive authority to litigate on behalf of the United States.[410] Were an agency inclined to disregard an OLC legal opinion, the Department of Justice would presumably refuse to take a position at variance with a relevant OLC opinion in litigation.

OLC opinions also operate in a common-law fashion. Indeed, OLC itself characterizes the corpus of its decisions as its "overall jurisprudence," and OLC opinions regularly cite prior OLC opinions as precedent. OLC opinions are the most formal, rigorously considered, and authoritative of all opinions issued by Executive Branch lawyers. The opinions are developed by a rigorous process designed to produce opinions that can stand the test of time.[411]

OLC opinions may also be definitive and not later subject to judicial review. The Department of Justice must explicate some constitutional provisions that will likely never be subject to authoritative judicial interpretation, as well as statutes constraining government agencies.[412] Thus, OLC opinions often serve as

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406. 28 C.F.R. § 0.25 (2023). The Office of Legal Counsel itself was created by Act of Congress in 1934, as a part of a larger reorganization of the Department of Justice.

407. *E.g.*, Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, 922 F.3d 480 (D.C. Cir. April 30, 2019) (*CREW II*); Elec. Frontier Found. v. U.S. Dep't of Just., 739 F.3d 1 (D.C. Cir. 2014) (*Electronic Frontier*); ACLU v. Nat'l Sec. Agency, 925 F.3d 576, 584, 592 (2d Cir. 2019); N.Y. Times, Co. v. U.S. Dep't of Just., 806 F.3d 682, 687 (2d Cir. 2015); Demanding Oversight and Justification Over Legal Conclusions Transparency Act, S. 3858, 117 Cong., 2d Sess.; GOITEIN, *supra* note 36; 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, 16, 21, 2019) (three-part series).

408. Memorandum from David J. Barron, Acting Assistant Att'y Gen. to Atty's of the Off. of Legal Couns. 1 (July 16, 2010) [hereinafter Best Practices Memo] (emphasis added), https://www.justice.gov/media/1226496/dl?inline.

409. *Id.*, at 3. *See generally* Michael Herz, *The Attorney Particular: Government Role of the Agency General Counsel, in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 158, 161 (Cornell W. Clayton ed., 1995).

410. *See* 28 U.S.C. § 516; 5 U.S.C. § 3106.

411. *See* Best Practices Memo, *supra* note 408, at 3–4 (characterizing OLC opinions as "the product of a careful and deliberate process" and the result of "rigorous review within OLC").

412. *Id.*, at 1 (OLC "is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC's advice may effectively be the final word on

the final word on such issues. They can essentially immunize conduct from punishment.[413] In short, they will be followed by the Department of Justice in taking legal positions and viewed as constraints by the recipient agencies.

Accordingly, while OLC opinions are neither addressed to private persons or entities, nor directly binding upon them, they do impose an external "legal" constraint upon agencies: they define legal obligations imposed by the Constitution, statutes, treaties, or other forms of law and cannot be countermanded by agencies. These binding legal restraints not uncommonly work to compel or authorize agencies to treat private persons and entities in particular ways.

Indeed, the effect of OLC opinions on private individuals or entities can be extremely significant.[414] For example, secret OLC memos issued during the George W. Bush Administration permitted use of "enhanced interrogation techniques" upon enemy combatants.[415] In part, President Obama refrained from prosecuting such officials because they had acted pursuant to OLC opinions authorizing such actions.[416]

In another telling instance, a 2011 OLC opinion concluded that the Wire Act's prohibitions on "betting and wagering" were limited to sports gambling.[417] In reliance upon that ruling, at least one private contractor invested tens of millions in building a lottery system used by three states, and the states came to rely on the stream of revenues from such lotteries.[418] Seven years later, OLC reversed itself, publishing a formal opinion that superseded the 2011 Opinion.[419] A district court found *the OLC opinion* to be a final agency action that was subject to judicial review under the APA.[420]

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the controlling law"); *see also* Memorandum from Steven A. Lengel, Assistant Att'y Gen., Off. of Legal Counsel, to the Att'y Gen. (May 3, 2019), https://www.justice.gov/olc/opinion/file/1162686/download (resolving question left unreviewed as non-justiciable in *Heckler v. Chaney*, 470 U.S. 821 (1985), and concluding that FDA's exercise of enforcement discretion was unreviewable "inaction").

413. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 149–50 (2007) ("Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from prosecution for wrongdoing.").

414. For a taxonomy of the effects of state attorney general opinions that render them "sources of law," see Winthrop Jordan, *The State Attorney General's Duty to Advise as a Source of Law*, 54 U. RICH. L. REV. 1139, 1152–64 (2020).

415. *See generally* Status of Certain Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, 33 Op. O.L.C. 131 (2009), https://www.justice.gov/olc/file/2009-01-15-wd-911/download.

416. Presidential Statement on the Release of Department of Justice Office of Legal Counsel Memos Concerning Interrogation Techniques, 1 PUB. PAPERS 509 (April 16, 2009).

417. Whether the Wire Act Applies to Non-Sports Gambling, 35 Op. O.L.C. 134, 151 (2011), https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-09-20-wire-act-non-sports-gambling.pdf. The relevant provision of the Wire Act is codified at 18 U.S.C. § 1084(a).

418. N.H. Lottery Comm'n v. Rosen, 986 F.3d 38, 47–48 (1st Cir. 2021).

419. Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C., 2018 WL 7080165, at *14 (Nov. 2, 2018).

420. N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132, 146 (D.N.H. 2019). The Court of Appeals also found the case justiciable—the risk of prosecution was sufficiently great given the combination of the OLC opinion and the Rosenstein memo (despite the series of memos from the

Finally, a January 2020 OLC opinion addressed two questions: whether the Equal Rights Amendment had been ratified and whether Congress could extend the deadline for ratification.[421] OLC was responding to a request for advice from the Archivist of the United States, who is statutorily charged with the responsibility of publishing each constitutional amendment "upon receiving formal instruments of ratification from the necessary number of States."[422] OLC concluded that the ERA had *not* been ratified and that Congress may not "change the terms upon which the 1972 Congress proposed the ERA for the States' consideration."[423] In effect, the opinion asserted that a pending joint resolution to do just that should be considered invalid were it to be enacted.[424]

As these examples illustrate, the public can have great interest in OLC opinions. They can and do have tangible effects on the public. Awareness of applicable OLC opinions is also often helpful for members of the public to engage in effective advocacy in agency processes.[425]

By serving as constraints on agencies, OLC opinions limit agencies' responses to members of the public. Members of the public involved in agency proceedings cannot dispute agencies' potential misapplication of principles enunciated in secret OLC opinions. And citizens unaware of the external constraints placed upon the agency, such as OLC interpretations of binding law, cannot develop an effective strategy for complying with an agency's requirements.

Criminal Division that prosecutors were to forbear bringing prosecutions). N.H. Lottery Comm'n v. Rosen, 986 F.3d 38, 49-54 (1st Cir. 2021). It did not need to reach the final agency action question because it found sufficient basis in the Declaratory Judgment Act to provide the needed relief. *Id.* at 62.

421. Ratification of the Equal Rights Amendment, 44 Op. O.L.C., slip op. (Jan. 6, 2020), https://www.justice.gov/olc/file/1232501/download.

422. *Id.*, at 2; 1 U.S.C. § 106b.

423. Ratification of the Equal Rights Amendment, *supra* note 421.

424. *Id.* Two years later, asked by the Counsel to the President to clarify its opinion about Congress' power to change the ratification deadline, OLC issued another opinion stating that its prior opinion should not stand as an obstacle to congressional extension of the deadline. Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment, 46 Op. O.L.C., slip op. at 1 (Jan. 26, 2022), https://www.justice.gov/d9/2022-11/2022-01-26-era.pdf.

425. Recall, the mandatory disclosure provisions were to enable the public "readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59 (quoting (S. REP. NO. 1219, at 3 (1964)); *accord*, S. REP. NO. 813, (1965) (the basic purpose *of subsection (b)* is "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies").

OLC opinions are accordingly within the broad definition of agency legal materials as we have defined it for this Article.[426] Yet they also pose a unique set of problems. In the face of litigation focused on OLC opinions, and in the absence of a statute that directly addresses OLC opinions, the courts have reached something of a middle ground with respect to whether these opinions must be disclosed publicly. To some observers, this middle ground is practically and logically unsatisfying, and it remains vigorously contested.

The courts' prevailing middle-ground approach holds that OLC opinions must be disclosed by the receiving agency only if "adopted" by the agency.[427] The critiques of this approach are many. We describe them here so the reader understands the issues, but we do not weigh in on the debate. We note only that, given the critiques, any change Congress makes to agencies' obligations for disclosing OLC opinions should avoid inadvertently ratifying the current state of the case law. Indeed, if exemption 5 is to be revisited in this regard, it should be approached with careful thought and study.

Opponents of the current approach raise the following sets of concerns and arguments. First, the Supreme Court's seminal case resolving the tension between exemption 5 and FOIAs affirmative disclosure provisions, *Sears, Roebuck*, does not require "adoption" by the agency official receiving a "final opinion," only an obligation to obey.[428]

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426. Granting disclosure of formal OLC opinions may be less urgent for legal advice to the President. The greater the right to participate in proceedings, the greater the need for information to allow the private citizen to effectively advocate for their position, i.e., to "afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." Members of the public have far fewer rights to participate in presidential decision-making than in agency decision-making.

427. "An OLC opinion in the latter category qualifies as the 'working law' of an agency only if the agency has 'adopted' the opinion as its own." Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Just., 922 F.3d 480, 486 (D.C. Cir. 2019).

428. In *Sears, Roebuck* it was sufficient that the General Counsel had issued a final decision that the Regional Counsel should dismiss the unfair practice claim. The Court did not require that the Regional Counsel "adopt" that final decision; the Regional Counsel was bound by it. NLRB v. Sears, Roebuck & Co., 431 U.S. 132, 148, 153-54 (1975); *see also id.* at 142 (describing relationship between General Counsel and Regional Counsel).

The result is arguably the same in the context of inter-agency final opinions. The Supreme Court has suggested recently *final* biological opinions by Fish & Wildlife Service and the National Marine Fisheries Service, which are binding on the agencies that ultimately have the power to take action, fall outside the deliberative process privilege. U.S. Fish & Wildlife Serv. v. Sierra Club, 592 U.S. 261, 269-72 (2021). The documents at issue were *draft* biological opinions, and the Court concluded that they could be withheld because they were "drafts." *Id.* at 786-88. But the case could easily have been disposed of if opinions from one agency to another are not final decisions so long as they were sent to agencies that has the sole power to act. Granted, the biological opinions were not legal opinions. Nevertheless, the case casts significant doubt on the proposition that the ability to give an opinion divorced from the power to take action renders it "predecisional," and thus withholdable under FOIA.

Second, the middle-ground position conflicts with D.C. Circuit law on general counsel legal opinions.[429] In those cases, the courts held that the opinions were "law" that must be transparent even though the decisions were not expressly binding, and indeed apparently expressly non-binding and non-precedential.[430] It was sufficient that they were held in high regard and followed.

Third, the middle-ground position appears to some observers to be nonsensical given that, as described above, agencies are *always* bound by OLC opinions they receive. Thus, agencies have no discretion to adopt or refuse to adopt such opinions, making the judicially required "adoption" inquiry meaningless.[431] Moreover, agencies can "accept" (i.e., acquiesce to) OLC conclusions and even act on the assurances provided by the OLC opinion without formally adopting the decision or incorporating it by reference. For example, if OLC concludes that the agency has the legal power to act, the agency can base its decision to take such an action on policy considerations, the agency's own reformulated version of the OLC opinion, or perhaps the agency's own legal conclusions, so long as they do not conflict with OLC's.

Fourth, the middle-ground position fails to consider whether OLC opinions are the opinions of the Department of Justice, which is itself an agency for purposes of FOIA.[432] At present, it is OLC, not the requesting agency, that decides whether to publish the resulting OLC opinion based upon its own considerations. This is not typical of the attorney-client privilege, in which *the client*, not the lawyer, is entitled to decide whether the privilege may be waived.[433]

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429. *E.g.*, Tax Analysts v. I.R.S., 117 F.3d 607 (1997); Schlefer v. U.S., 702 F.2d 233 (D.C. Cir. 1983); Taxation With Representation Fund v. I.R.S., 646 F.2d 666 (D.C. Cir. 1981).

430. *Tax Analysts,* 117 F.3d at 609, 617-18; *Schlefer v. U.S.*, 702 F.2d at 237-44; *Taxation With Representation Fund*, 646 F.2d at 676-81. As the D.C. Circuit noted in *Coastal States v. Department of Energy*, "[a] strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" 617 F.2d 854, 867 (D.C. Cir. 1980).

431. Perhaps it is meaningful when the agency receives an OLC opinion endorsing the legality of a certain action, and then decides *not* to take the action because the agency itself nevertheless believes the action is illegal. It is unclear how frequent an occurrence this is. Even in such a case, the OLC opinion remains an extant part of the Department of Justice's "working law."

432. And finally, of course, if a court concludes that a FOIA litigant is entitled to OLC opinions and an index under 552(a), in the D.C. Circuit the court may be limited to ordering OLC to provide the documents to that one litigant, but in the Second and Ninth Circuits the court might be able to order OLC to make its opinions and index publicly available.

433. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 62, 86. Granted, perhaps publication of OLC opinions fits into the exception allowing disclosure, "when no material risk to a client is entailed" for "purpose of professional assistance and development [or] historical research." *Id.* § 62, cmt. h. In any event, agencies are not ensured confidentiality even under the current regime to the extent that OLC opinions reveal "confidential" matter.

For all these reasons, exemption 5 privileges may be relatively diluted in this setting. Of course, weighing on the other side of the scale, the public's need for these opinions in many cases may be less than the need for other agency legal materials. More importantly, agencies should be encouraged to seek OLC's legal advice, not avoid consultation for fear of disclosure. If agencies and OLC know that OLC opinions must generally be disclosed, this may discourage consultation in the first place or may lead to more OLC advice being transmitted by phone or in person, rather than through the deliberate and memorialized process that leads to written opinions. Furthermore, if agencies seek OLC's advice less frequently, this may undermine the benefits that come from having a centralized source of authoritative legal advice in the executive branch.

Currently, the OLC does publish some, but not all, of its formal legal opinions.[434] Its stated principles for deciding which opinions to publish are illuminating. In determining whether an opinion warrants publication, OLC considers: (1) "the potential importance of the opinion" to other agencies or officials; (2) "the likelihood that similar questions may arise in the future;" (3) "the historical importance of the opinion or the context in which it arose;" and (4) "the potential significance of the opinion to the [OLC]'s overall jurisprudence."[435] OLC has identified one subset of legal opinions as particularly worthy of "[t]imely publication": opinions that conclude that a federal statutory requirement is unconstitutional and prompt agencies to disregard the statute.[436]

Several "countervailing considerations" may overcome OLC's presumption favoring publication. Such considerations include concerns about: (1) disclosure of "classified or other sensitive information relating to national security;" (2) interference with federal law enforcement efforts; (3) legal prohibitions on disclosure of information; and (4) the protection of internal executive-branch deliberative processes or the confidentiality of information covered by the attorney-client privilege.[437] Emblematic of the fourth consideration, when an agency requests

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434. Best Practices Memo, *supra* note 408, at 5-6. We have not ascertained the percentage of formal OLC opinions that are immediately released to the public. OLC has made available in its FOIA Electronic Reading Room many advice memoranda and letters not designated as formal opinions of the Office. *See* OFF. OF LEGAL COUNSEL, *OLC FOIA Electronic Reading Room*, U.S. DEP'T OF JUST. (May 19, 2023), https://www.justice.gov/olc/olc-foia-electronic-reading-room. The site also includes lists of OLC opinions dating back to 1998 and OLC's Classified Daybooks dating back to 1974. Recently, an updated, more complete, and less-heavily redacted version of the lists of OLC opinions has been posted to the website, in response to litigation. Stephanie Krent, *Inching Toward a More Transparent Office of Legal Counsel*, JUST SEC. (May 19, 2023), https://www.justsecurity.org/86591/inching-toward-a-more-transparent-office-of-legal-counsel/ (referencing Francis v. Dep't of Just., No. 2:19-cv-1317 (W.D. Wash. dismissed Aug. 16, 2021) and Project on Gov't Oversight, Inc. v. U.S. Dep't of Just., 1:20-cv-01415 (D.D.C. filed May 28, 2020)).

435. Best Practices Memo, *supra* note 408, at 5.

436. *Id.* The Department of Justice must notify Congress when it concludes that statutes, treaties, and the like are unconstitutional. 28 U.S.C. § 530D.

437. Best Practices Memo, *supra* note 408, at 5–6.

advice on the legality of a proposed course of action, OLC is reluctant to publish its opinion when OLC concludes the proposed action is legally impermissible and the agency refrains from taking the action.[438] Although publishing opinions about proposals abandoned as a result of OLC's opinions is sound, we wonder whether that same approach should apply where the proposal being abandoned is one originating not with the agency but with a public request for action. In that circumstance, disclosure of the request for an OLC opinion on the proposal may reveal merely that the agency asked OLC for advice on a proposal made by a member of the public.

Our basic principle in this Article is that Congress should require agencies to disclose affirmatively any legal material that must be disclosed in response to a FOIA request. Consistent with that principle, one approach for Congress to take might simply be to require affirmative disclosure of all non-privileged 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. One concern with this approach, however, might be that the unsettled state of the law about several relevant privileges recognized under exemption 5—the attorney-client, attorney work-product, and deliberative process privilege—would make quite perilous the task of determining which of the numerous legal opinions had to be affirmatively published. That task would be even more onerous if our recommendation in Part IV.B for judicial enforcement of affirmative disclosure requirements were adopted. Moreover, it would be likely that the great majority of legal opinions nominally required to be published by the proposed expansion of the affirmative disclosure provision could be withheld under the three exemption 5 privileges, and thus the whole exercise would provide little additional transparency.[439]

Recognizing these concerns, we nonetheless believe it is important for Congress to clarify that, at a minimum, FOIA's affirmative disclosure requirements include formal written OLC opinions, other than those issued to the President or to agencies who subsequently abandon their proposals in light of OLC's advice. This requirement, like other affirmative disclosure requirements, would still be subject to existing exemptions (however they may, or may not, be refined by the courts or a future Congress). Furthermore, any records that are not affirmatively disclosed, even after statutory clarification, would still be subject to a traditional FOIA request process. We detail this proposal in our recommendations at the end of this Article, at Recommendation 4.

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438. Best Practices Memo, *supra* note 408, at 6. The memo does not reveal whether instances in which a private party requests that an agency take action should be treated the same as situations in which agency officials propose a new course of action at their own initiative (and without public knowledge). The private party may have an interest in learning why the agency is legally barred from doing what it requests, and the agency should have less of a need for confidentiality in considering a request made by a private person or entity. Such considerations should presumably play a role in a "foreseeable harm" analysis.

439. This same concern could apply to agency general counsel opinions, discussed *infra* Part II.C.4.

4. Agency General Counsel Opinions

Legal opinions generated by agency general counsels' offices may appear to resemble OLC opinions. But there are key differences. First, general counsel opinions are more numerous, more varied in terms of format and effect, and under-studied. Second, the closeness of the relationship between the agency counsel and the agency head (and other agency officials) can make distinguishing opinions that operate as "law" from those that merely constitute "advice" quite difficult. Third, agency lawyers more often render opinions as policy options are being weighed and crafted, and thus legal opinions often may not involve an "answer" so much as an assessment of "litigation risk." As such, much of what general counsels' offices produce may well not constitute agency legal materials for our purposes.[440]

In establishing offices of general counsel within departments and agencies, Congress rarely details these offices' responsibilities, largely leaving that task to the department or agency head.[441] Indeed, general counsels' offices perform a variety of functions. Some of these functions might best be addressed in the context of adjudications[442] or the issuance of guidance documents.[443] Agency lawyers might also draft all or part of various documents to be issued by the agency or subordinate program administrators either to guide their staff or for other purposes.[444] Importantly, none of these work products of agency general counsels are the focus of this section.

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440. However, at least one statute codifies a case that requires disclosure of counsel's legal opinions. I.R.C. § 6110.

441. *See, e.g.*, 20 U.S.C. § 3421 (establishing general counsel position for the Department of Education, who "shall provide legal assistance to the Secretary concerning the programs and policies of the Department"); 42 U.S.C. § 3504 (establishing general counsel for the Department of Health & Human Services and specifying no responsibilities); 38 U.S.C. § 311 (establishing and defining the duties of the general counsel of the Department of Veterans Affairs); 50 U.S.C. § 2407 (general counsel for the National Nuclear Security Administration within the Department of Energy); 31 U.S.C. § 301(f) (establishing offices of the general counsel for the Department of the Treasury and the Internal Revenue Service).

442. Thus, agency lawyers might possess decision-making authority with regard to some applications or requests from regulated entities or beneficiaries. In such a role they essentially function as "adjudicators."

443. See Herz, *supra* note 409, at 148. Lawyers may directly provide "advice" or "guidance" to regulated entities or beneficiaries in response to queries about their specific situation. Again, the availability of such advice or guidance should not turn on whether it is signed by an agency lawyer or a program official. Note that while most general counsel are generally tasked with providing legal assistance to the agency, another model of agency counsel is one in which the agency counsel serves as investigator and prosecutor of violations of the statutes and regulations within the agency's jurisdiction. *E.g.*, 5 U.S.C. § 7104 (Federal Labor Relations Authority); 22 U.S.C. § 4108 (Foreign Service Labor Relations Board); 31 U.S.C. § 752 (General Accounting Office Personnel Appeals Board). It was in this context, that the Supreme Court decided that the declinations to file unfair labor practices charged were a body of law to which the public must have access. *See, e.g.*, N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 155 (1975).

444. Agency lawyers may be called upon to do so, in part, because of their legal training, but their contribution will go beyond specifying the applicable legal constraints. For example, they might draft staff manuals, internal rules and procedures, policies for inspectors, penalty determinations, waiver determination, waivers, or settlements which may be issued by the agency head or program/operational officials. The Office of General Counsel drafts would likely fall under the deliberative process privilege.

Instead, this section focuses on the product of agency general counsels' offices that provide legal advice to agency officials, including heads of agencies, policymakers, and enforcement officials, inter alia.[445] Even in dealing with this subset of agency counsel communications, remaining cognizant of agency lawyers' dual roles is critical. General counsels' offices both advise agency officials on the most appropriate decision or course of conduct (including their potential legal ramifications) and render opinions on legal issues that serve to constrain or authorize certain agency decisions or courses of conduct.[446]

We have not undertaken a comprehensive review of agency heads' delegations of authority to their general counsel's office. But case law provides insights into the type of authority an agency general counsel's office might possess that can lead to the creation of records properly classified as non-exempt agency legal materials.

To pick one example: The head of the Maritime Administration (MARAD) has, in Maritime Administrative Order 22-1, delegated to MARAD's general counsel the authority under three statutes.[447] The Order specifies that agency officials must obtain "legal clearance" from the Chief Counsel before taking certain actions in the exercise of MARAD's authority under the relevant statutes.[448] This process results in Chief Counsel opinions (CCOs)[449] which are bound and, at least until 1950, were made available to the general public.[450] As of 1983, the year of the D.C. Circuit's *Schlefer* decision, the CCOs were not published. The Chief Counsel's office had developed an

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445. As two scholars have explained:

> These internal government policies do not have the imprimatur of law because they do not meet the APA criteria for rulemaking, and they are meant only to communicate an agency's policy views within government. They do, however, have the goal of creating uniformity across a wide range of geographically and professionally diverse agency actors in order to advance the agency's position more effectively.

Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463, 476 (2019).

446. *See* Herz, *supra* note 409, at 148 ("A general counsel's primary functions are to give legal advice to the head of the agency and to instruct program staff about what is permissible and what not."); *accord* AL GORE, STREAMLINING MANAGEMENT CONTROL: ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW, NATIONAL PERFORMANCE REVIEW at SMC04 (1993) (distinguishing agency attorney's "service function," i.e., "providing advice to managers" from their "control"/"regulatory clearance" functions, i.e., "vet[ing] policy proposals").

447. Office of Chief Counsel, MAO No. 22-1 (Oct. 28, 2005), https://www.maritime.dot.gov/ sites/marad.dot.gov/files/docs/about-us/foia/4456/mao022-001-0.pdf. The Order became effective October 28, 2005, and does not appear to have been amended since.

448. *Id.* §§ 4.08, 5.01, 5.05, 5.08.

449. Schlefer v. U.S., 702 F.2d 233, 235–36 (D.C. Cir. 1983).

450. *Id.* at 236 & n.4. Moreover, the Chief Counsel's staff maintained their own index system to allow them to more easily identify relevant CCOs previously issued. The staff summarized the facts and holding on index cards, which were filed according to substance. *Id.*

internal index system for these opinions that was not publicly available. In *Schlefer*, the court found that such opinions were not protected from disclosure by the exemption 5 privileges.

The D.C. Circuit offered two reasons. In practice the "Chief Counsel has authority effectively to give the legal advice furnished in CCOs the force of internal Agency law" because "requesting officials always follow the advice given."[451] Furthermore, because "[t]he Chief Counsel will not clear action that is inconsistent with a CCO issued earlier to a requesting official. . . . Agency action that depends on statutory interpretation does not occur without Chief Counsel approval."[452]

Similarly, cases involving the Internal Revenue Service (IRS) have concluded that agency general counsel opinions are properly classified as agency legal materials that cannot be withheld because they fall outside the purview of the attorney-client privilege. At the IRS, the Chief Counsel's Office produces a great deal of work product, including "Field Service Advice Memoranda" and General Counsel Memos, which have been the subject of D.C. Circuit opinions.[453]

As for Field Service Advice Memoranda (FSAs), these documents are prepared within Chief Counsel's national office in response to requests for legal guidance from field attorneys within the Chief Counsel's Office or the IRS field personnel (*i.e.,* field attorneys, revenue agents, and appeals officers). The requests usually seek guidance with respect to a specific taxpayer's situation. FSAs are used to ensure "that field personnel apply the law correctly and uniformly."[454] Puzzlingly, FSAs were not "formally binding on IRS field personnel who request[ed] them."[455] In fact, the *Tax Analysts* court could not determine *whether* FSAs bound field attorneys within the Chief Counsel's Office.[456] Nevertheless, the government acknowledged that FSAs were both "held in high regard" and "generally followed."[457] The *Tax Analysts* court concluded that FSAs represented a body of "law" given their function of promoting national uniformity within the IRS on "significant questions of tax law."[458] Indeed, "[t]he Office of Chief Counsel legal conclusions" constituted "agency law, even if . . .

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451. *Id.* at 237.

452. *Id.* at 238. The Department of Transportation makes the final nature of the authority quite clear, declaring that its General Counsel is the final authority on questions of law. 49 C.F.R. § 1.26 (2023) ("The General Counsel is the chief legal officer of the Department, legal advisor to the Secretary, and final authority within the Department on questions of law.") HHS's delegation to its General Counsel's Office, on the other hand, merely states that General Counsel may issue legal opinions as necessary. Off. of the Secretary, Statement of Organization, Functions, and Delegations of Authority, 86 Fed. Reg. 6349 (Jan. 21, 2021). This might suggest that the opinions are binding but it does not explicitly so provide.

453. Taxation With Representation Fund v. I.R.S., 646 F.2d 666 (D.C. Cir. 1981) (General Counsel Memos); Tax Analysts v. I.R.S., 117 F.3d 607 (1997) (Field Service Advice memoranda).

454. *Tax Analysts*, 117 F.3d at 609.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.* at 617.

not formally binding," "because FSAs are 'routinely used' and relied upon by field personnel." FSAs are "considered statements of the agency's legal position."[459]

As for General Counsel Memorandums (GCMs), these are memos from the Office of Chief Counsel prepared in response to a formal request for legal advice from the Assistant Commissioner of the IRS. The Assistant Commissioner typically seeks such advice in connection with the review of proposed private letter rulings, and although the Assistant Commissioner is the final decisionmaker, once that final decision is made, the Chief Counsel's Office modifies the GCM "to represent the position taken in the ruling."[460]

Once they are finalized, "GCMs are then copied and distributed to key officials within the [IRS], including [within] the Office of the Chief Counsel,"[461] and digested by personnel within the Chief Counsel's Office. "The Digest is distributed to key IRS and Office of Chief Counsel officials" and IRS field offices, among others.[462] The Chief Counsel's Office retains completed GCMs, and indexes and digests the memoranda "for the purpose of an in-house research tool."[463] According to the IRS, "[t]his is done to ensure that 'there (will) be some uniformity of positions taken.'"[464]

By concluding that the deliberative process privilege was inapplicable, the Court implicitly held that GCMs are agency "law." Completed GCMs are used as case precedent by staff attorneys preparing subsequent GCMs. As the *Taxation With Representation* court explained, "the interpretations of law contained in prior GCMs are knowingly applied, distinguished, or rejected of application, as the case may be, in subsequent GCMs to insure consistency of position in the Office of Chief Counsel."[465] In addition, "GCMs are used by IRS personnel to provide guidance 'as to the positions to take in negotiations' or conferences with taxpayers or taxpayer representatives. Thus,

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459. *Id.* ("Although FSAs may precede the field office's decision in a particular taxpayer's case, they do not precede the decision about the agency's legal position. Representing the considered view of the Chief Counsel's national office on significant tax law issues, FSAs do not reflect the 'give-and-take' that characterizes deliberative materials. The IRS tells us that FSAs may evaluate the strengths and weaknesses of alternative views. But that does not necessarily make them deliberative. The government's opinion about what is *not* the law and why it is *not* the law is as much a statement of government policy as is its opinion about what the law *is*." (emphasis added)).

460. Taxation With Representation Fund v. IRS, 646 F.2d 666, 669–70 (D.C. Cir. 1981).

461. *Id.* at 670.

462. *Id.*

463. *Id.*

464. *Id.* (quoting Affidavit of Jerome D. Sebastian, Dir., Interp. Div. Off. of Chief Counsel, IRS, Taxation With Representation Fund v. IRS, 646 F.2d 666 (D.C. Cir. 1981)). "Citations of GCMs in subsequent GCMs are noted on 'citator' index cards, along with the Code and Regulations sections cited in the GCM, 'just like Shepherd's.' These index cards are plugged into a 'RIRA system,' and placed on microfilm, which is available to IRS personnel in the field offices." *Id.* (citations and footnote omitted (quoting Affidavit of Jerome D. Sebastian).

465. "As discussed above, GCMs are retained by the Office of the Chief Counsel, and extensively cross-indexed and digested, as well as 'updated,' much like the service provided by Shepherd's." *Id.* at 682. And, it noted, "[i]t is also clear that [IRS personnel's] reliance [on GCMs] is facilitated and encouraged by the extensive indexing and digesting that the agency fosters with respect to these documents." *Id.* at 683.

it is clear that these documents are relied upon as accurate representations of agency policy 'not the ideas and theories which go into the making of the law, (but) the law itself.'"[466]

These examples are instructive. General counsel opinions that bind policymakers, enforcement officials, and others in the agency have clearly been considered agency legal materials by courts. They should be subject to affirmative disclosure requirements for the same reason that guidance documents and other material elaborating upon primary rules should be available. The constraints imposed by legal opinions will have an effect on members of the public, because such constraints will authorize or prohibit certain conduct by government officials toward the public. Constraints imposed by legal opinions may determine whether a private citizen is entitled to a permit or regulatory relief. Such constraints might also result in certain powerful incentives or disincentives to private citizens (e.g., by limiting the ability to award government contracts to individuals who comply with certain standards).[467] They may decide whether an individual can obtain benefits under a government program.

The *policy* that agency officials follow will often be outlined in some form of agency legal material. But members of the public will lack critical context if they do not know that a policy is a result of perceived *legal constraint*, not *policy discretion*.[468] And if the policy is shaped by a perceived legal constraint, members of the public can benefit from knowing the basis for the agency's conclusions that such a legal constraint exists. Members of the public may find it difficult to decide the scope of the constraint if unaware of the legal reasoning underlying the constraint.[469] They may also find it difficult to challenge the legal restraint before the agency or in court (without knowing the legal points that will need to be addressed). And should members of the public resort to the political arena and seek assistance from legislators (or if legislators take an interest on their own initiative), Congress will need to know the legal basis underlying the agency's policy choice before it can assess the propriety of the agency's action. In a real

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466. *Id.* at 682-83 (alteration in original) (citations omitted) (quoting Affidavit, *supra* note 464).

467. We will see the importance of this later when we discuss presidential directives, which often require agencies to impose conditions on federal contractors, *infra* Part II.E.

468. Courts often seek to make sure agencies distinguish between these two types of explanations for actions. They can require agencies to acknowledge that they have discretion and that their actions are not foreordained by the applicable law. *See, e.g.*, Hecker v. Chaney, 470 U.S. 821, 833 n.4 (1985) ("We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction."); FEC v. Akins, 524 U.S. 11, 26 (1998); Baltimore & Ohio R.R. v. ICC, 826 F.2d 1125, 1128-29 (D.C. Cir. 1987) (holding "that the Commission must explicitly assume the policy-making function that Congress delegated to it rather than assert a nonexistent congressional prohibition as a means to avoid responsibility for its own policy choice").

469. In *Marino v. National Oceanic & Atmospheric Administration*, 33 F.4th 593 (2022), the agency determined that it lacked authority to enforce certain provisions of its "permits" to take marine mammals for scientific or display purposes. The decision was based solely upon the legal analysis in a memo prepared by agency attorneys. The agency refused to disclose the document, apparently invoking the attorney-client privilege. The plaintiffs in *Marino* challenged the agency's failure to enforce certain provisions of the permits issued to take marine mammals, but the challenge was dismissed due to plaintiffs' lack of standing.

sense, some subset of agency legal opinions, just as with OLC opinions, set the bounds of the rules and practices agencies can adopt[470] and thus limit how government can affect individuals.

But lawyers play a dual role, as policy advisors and as expositors of the law.[471] At the margins, the distinctions between the two roles can be subtle or even non-existent. As has been noted, sometimes lawyers from an agency's general counsel's office will operate as counselors.[472] They may provide suggestions about how program officials can craft programs with an eye toward the legal implications of such choices. In general, agency lawyers can provide informed predictions about the legal consequences of particular agency actions or decisions. They might assess the potential legal consequences of actions that have already taken place, and the means to minimize the prospects of being successfully sued. Or agency lawyers' advice may be valued with respect to matters of procedural fairness, congressional intent, or the types of evidentiary support that certain agency actions need. Or agency lawyers' judgments may be valued simply because they have more distance from the issues facing program officials. In short, agency lawyers may be called upon in various ways to help guide agency officials in the choice between various options which all sufficiently pass legal muster. In such circumstances, policymakers or enforcement officials retain the ultimate say over the action the agency takes because the range of actions they are considering are all legally permissible. But much, if not all, of this type of pre-decisional advice would be appropriately exempt from disclosure under the exemption 5 privileges discussed earlier in this Article.

Two further points merit mention. First, some legal counsel opinions may not involve defining the substantive rights and obligations of private citizens, even indirectly by addressing agency officials. Instead, they may involve legal or other limits upon the agency's investigative, enforcement, or prosecutorial practices.[473] The special concerns with regard to such legal opinions will resemble the anti-circumvention concerns discussed previously in this Article.

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470. *See* Herz, *supra* note 409, at 148.

471. While sometimes a general counsel has formal authority to block a proposal by denying clearance, in other circumstances the impact of a negative opinion from the agency's general counsel may be less clear.

472. Often congressional statutes will emphasize the agency general counsel's role as "advisor." 20 U.S.C. § 3421 ("provide legal assistance"); 38 U.S.C. § 311 (same). Often, for example, lawyers within the general counsel's office will be involved early in the process of developing regulations, rather than merely providing an up or down opinion at the end. Herz, *supra* note 409, at 148. The general counsel will likely be an important advisor to the agency head on non-legal matters. *Id.* at 148–49. Most of time spent by the general counsel will be devoted to advising the agency head. *Id.*, at 158 (discussing perception of agency general counsel as an obstacle to policy and downsides of ignoring an agency general counsel's advice).

473. *E.g.*, Memorandum from Michael D. Granston, Dir., Dep't of Just. Com. Litig. Branch, Fraud Section, to Att'ys, Dep't of Just. Com. Litig. Branch (Jan. 10, 2018) (outlining how to "evaluat[e] a recommendation to decline intervention in a *qui tam* action" outside the viewing of individuals considering the bringing of false claims actions); U.S. DEP'T OF HOMELAND SEC., NATIONAL STANDARD OPERATING PROCEDURES: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2013), https://www.nilc.org/wp-content/uploads/2019/01/20c-DACA-FOIA-Redacted-FOIA-Response-USCIS-First-Production-set-2.pdf (describing "the procedures Service Centers are to follow when adjudicating DACA requests").

Second, agencies may also turn to outside lawyers for advice,[474] although it is not clear how frequently they do so. FOIA might not fully shield all communications between the agency and an outside lawyer from disclosure. Such protection may tenuously depend on the Supreme Court refraining from overruling the consultant's corollary to the deliberative process privilege.[475] We flag this issue as a theoretical matter but make no recommendation for reform as we did not uncover evidence of any widespread problems in practice.

In short, creating a government-wide legal standard for publishing agency counsel legal opinions is challenging given this array of differing roles and responsibilities of agency counsels across government. This task is made even more difficult by the lack of systematic study of agency counsels' responsibilities and power and the products that agency counsels' offices produce. In light of these concerns, we have decided to propose more focused requirements that either capture current practice or capture the current state of the law on exemptions. Granted that in doing so we have been selective. This area would benefit from further study. It is quite likely that there are other agency counsel opinions that are not disclosed but that still operate as law and fall within our definition of agency legal materials. Our recommendation in this regard, located in our conclusions section as Recommendation 5, should thus be seen as merely an initial step.

D. Agency Adjudication Materials

The term "adjudication" in administrative law can have a vast and sometimes slippery meaning. The APA defines adjudication by what it is not. An adjudication is any "agency process for the formulation of an order," and an

474. This was a suggestion from the Reinventing Government Task Force, reflecting a perceiving disinclination of agency lawyers to facilitate the agency's mission. *See* STREAMLINING MANAGEMENT CONTROL, *supra* note 446, at SMC04 ("[Agency heads] should allow line managers choice in selecting legal assistance from the 'service delivery' side. This choice could be via a franchising operation or other mechanism."); *see also* Suzanne Monyak, *Homeland Security Hires Outside Lawyers for Potential Impeachment*, ROLL CALL (Feb. 10, 2023) (referencing USAspending.gov contract summary), https://rollcall.com/2023/02/10/homeland-security-hires-outside-lawyers-for-potential-impeachment/.

A recent case illustrates the prospect of FOIA requesters seeking material provided to the agency by outside counsel it hires. In Microsoft v. I.R.S., 2023 WL 255801 (W.D. Wash. Jan. 18, 2023), Microsoft sought the work product of two consulting outside law firms working for the IRS. There, the agency was able to avoid producing many of the documents sought because it had not received them from the contractors. *Id.* at *5-*6.

475. *See* Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9 (2001). The consultant's corollary doctrine has been questioned by the Sixth Circuit in *Lucaj v. Federal Bureau of Investigation*, 852 F.3d 541 (6th Cir. 2017), as well as several members of the Ninth Circuit in Rojas v. FAA, 989 F.3d 666 (9th Cir. 2021) (en banc), *cert. denied*, 142 S. Ct. 753 (2022). *See* Rojas, 989 F.2d at 683-86 (Wardlaw, J., concurring and dissenting) (criticizing consultant's corollary as "atextual"); *id.* at 691 (Thomas, J., concurring and dissenting); *id.* at 693-94 (Bumatay, J., dissenting) (consultant's corollary is a subversion of FOIA's statutory text).

"order" is "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making.*"[476] Thus, any process other than rulemaking that produces a decision is an adjudication. As others have recognized, this capacious definition includes everything from adjudicatory decisions after trial-type hearings to advice letters sent to members of the public to a forest ranger's allocation of campsites.[477]

Indeed, there are a wide variety of agency proceedings that produce a resulting "order." The traditional typology divides agency proceedings into two categories. "Formal" agency adjudications, or APA adjudications, [478] are subject to the trial-type procedural formalities laid out in the APA including a requirement that the presiding administrative law judge issue a statement of "findings and conclusions, and reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record."[479] "Informal" agency adjudication—which is vastly more common than formal adjudication[480]—can range from proceedings that do seem comparatively informal to those that match (or even exceed) the formalities of formal adjudications, with administrative judges presiding over evidentiary hearings and producing written, reasoned decisions binding the parties.[481] That is to say, the processes of agency adjudication vary widely.[482]

In an effort to move away from these somewhat unhelpful or even misleading labels, ACUS and the ABA's Section on Administrative Law and

476. 5 U.S.C. § 551(6)-(7) (emphasis added).

477. *See* Michael Asimow, *Whither APA Adjudication*, 28 ADMIN. & REG. L. NEWS 7, 23 (Summer 2003) (noting that "adjudications" include "many employment, contracting, grantmaking, licensing, and land use decisions - everything down to the decision by a forest ranger about which camper gets a campsite"); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 114–17 (1998) (discussing informal orders).

478. APA formal adjudication procedures generally apply "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing." 5 U.S.C. § 554(a).

479. 5 U.S.C. § 557(c)(3)(A); *see also* 5 U.S.C. §§ 554, 556, 557 (laying out procedural requirements for formal proceedings).

480. Paul R Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739, 741 (1976) (highlighting that "'informal adjudication' describes about 90 percent of what the government does with respect to the individual"); *see also* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1656–57 (2016) (estimating the number of non-ALJ administrative judges at "more than double that of ALJs").

481. MICHAEL ASIMOW, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 18 (2016) (report to the Administrative Conference of the U.S.).

482. *Id.* ("The Type B [informal adjudication] evidentiary hearings [called for by statutes or regulations] vary enormously. Some are trial-type hearings that are at least as formal and private-party protective as those called for by the APA (except that the presiding officer is not an ALJ). Others are quite informal, and some are purely in writing. Some programs are in the mass justice category with heavy caseloads and rushed proceedings. Others have much lower caseloads and call for leisurely and thorough consideration. Some have huge backlogs and long delays; others seem current in their caseloads. Some proceedings are highly adversarial; others are inquisitorial. The structures for internal appeal also vary greatly.")

Regulatory Practice have more recently endorsed a three-part typology for agency adjudication. Type A encompasses adjudication governed by APA procedures and presided over by an administrative law judge; Type B are legally required evidentiary hearings that are not subject to the APA procedures but are presided over by adjudicators (typically styled as administrative judges); and Type C adjudications are not subject to a legally required evidentiary hearing.[483]

Type C adjudications themselves can cover a wide range of agency actions that reflect the agency's official position on a matter that affects the legal rights or obligations of a member of the public. Many of these records represent the memorialization of how the agency enforces, applies, and administers the law. They include various types of enforcement actions such as fines and penalties, waivers or variances, warning letters or stipulated settlements, letter rulings or advice letters, benefits grants and denials. These actions, as described below, can, in some programs, have a practical or legal effect on private parties or even conclusively determine the rights or obligations of a member of the public. As such, they constitute agency legal materials for the purposes of this Article.

The disclosure requirements for adjudicatory materials are not detailed. FOIA is the only generalized statute that requires the publication of agency adjudication materials. The relevant provision in FOIA states that all agencies must publish, in electronic format (i.e., on their website), "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."[484]

A plain reading of the statute, in conjunction with the statutory definition of "orders," might suggest all agency orders across these various categories must be made public. Indeed, Kenneth Culp Davis espoused this view in early academic commentary just after FOIA was enacted:

> The auditing of a single tax return may involve dozens of orders and dozens of adjudications, as defined. Each of the million licenses issued annually by the FCC is an adjudication, even if automatically issued. Every one of the Immigration Service's 700,000 dispositions of applications annually is clearly an order; when an officer checks one of thirty reasons on a printed card, the check-mark is an opinion. "Any matter other than rule making" includes no-action letters of the SEC and informal merger clearances by the FTC or the Antitrust Division; these materials, not heretofore available for public inspection, clearly should be and clearly will be under the [affirmative disclosure

483. *See* Adoption of Recommendations, 81 Fed. Reg. 94312, 94314 (Dec. 23, 2016); *see also* MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 5–6 (2019), https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf (describing the factors that help distinguish between the categories).

484. 5 U.S.C. § 552(a)(2)(A).

> provisions of the] Act, except to the extent that facts stated are within an exemption.[485]

One plausible interpretation of FOIA's affirmative disclosure provision is, therefore, that it includes orders made in all three types of adjudications.

The Attorney General, however, who is tasked with issuing interpretive FOIA guidance to federal agencies, originally advised that this provision only applies to those adjudicatory decisions with "precedential effect."[486] The Department of Justice continues to take this position today.[487] This position was based, at least in part, on the provision of FOIA that prohibited an agency from relying on any decision that was not so published, which the Attorney General read as informing the meaning of the disclosure requirement.[488] It also reflected the Attorney General's concern with the practical implications of requiring disclosure of all agency decisions.[489] Meanwhile, in a 1986 report concerning compliance with FOIA's affirmative disclosure requirements, the federal office now known as the U.S. Government Accountability Office (GAO) rejected that approach, explaining that "[i]n our view, subsection (a)(2) requires that final opinions be indexes and made available to the public whether or not the agency considers them to be precedential."[490] The GAO did not appear to consider the inclusion of Type C adjudications.

There is scant judicial elaboration on this requirement. In one early district court opinion, a judge concluded that "orders" included both precedential and non-precedential opinions issued after evidentiary hearings.[491] Courts have not

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485. Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 771-72 (1967).

486. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59.

487. DOJ, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 4 (explaining that "only records which have 'the force and effect of law' are required to be proactively disclosed").

487. 5 U.S.C. § 552(a)(2)(A).

488. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59; *see also* H. COMM. ON GOV'T OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, H.R. REP. NO. 1497, at 7 (1965) (describing the disclosure requirement as making available documents "having precedential significance").

489. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59 ("[K]eeping all such orders available in reading rooms, even when they have no precedential value, often would be impracticable and would serve no useful purpose.").

490. GEN. ACCT. OFF., GAO/GGD-86-68, FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS 25 (1986).

491. Nat'l Prison Project of the Am. C.L. Union Found., Inc. v. Sigler, 390 F. Supp. 789 (1975) (rejecting the government's argument to limit the provision to precedential opinions because "[t]he wording of this . . . provision is too straightforward and unambiguous" to limit its reach).

interpreted this requirement as a matter of affirmative disclosure obligations,[492] but they have used the existence of this obligation as an argument to construe the deliberative process privilege as inapplicable if the records at issue have been adopted as the agency's position or if they constitute agency working law.[493] Most notably, the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, declared:

> We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. Section 552(a)(2); and with respect at least to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final dispositions" of matters by an agency . . . we hold that Exemption 5 can never apply.[494]

Accordingly, this area is ripe for congressional clarification designed to ensure that agency legal materials that represent the agency's working law and are of value to the public are subject to mandatory affirmative disclosure, rather than requiring a member of the public to make a request. This section explores disclosure practices by subcategory of agency action.

1. Decisions After a Hearing

As described above, agency adjudications vary widely in their form. For the purposes of this subsection, rather than take on all agency "orders," we discuss a narrower category of "adjudication" as used by ACUS in a previous study, namely:

> [A] decision [a] by one or more federal officials made through an administrative process [b] to resolve a claim or dispute arising out of a federal program [c] between a private party and the government or two or more private parties and that is [d] based on a hearing—either

492. The few recent cases brought to enforce FOIA's affirmative provisions have not reached merits decisions that define the contours of 552(a)(2)(A). *See* Campaign for Accountability v. U.S. Dep't of Just., 486 F. Supp. 3d 424, 426, 444-45 (D.D.C. 2020) (denying in part a motion to dismiss a complaint based on findings that the plaintiff had "plausibly alleged that OLC opinions relating to inter-agency disputes are "final opinions . . . made in the adjudication of cases" (alteration in original) (quoting 5 U.S.C. § 552(a)(2)(A)); Animal Legal Def. Fund v. USDA, 935 F.3d 858, 874 (9th Cir. 2019) (not reaching the merits of the (a)(2) claim, holding only that such a claim was actionable under FOIA); N.Y. Legal Assistance Grp. v. BIA, 987 F.3d 207, 225-26 (2d Cir. 2021) (same).

493. *See, e.g.*, ACLU v. U.S. Dep't of Just., 210 F. Supp.3d 467, 477 (S.D.N.Y. 2016) ("The two long-recognized exceptions to Exemption 5 are: (1) adoption, *i.e.*, 'when the contents of the document have been adopted, formally or informally, as the agency position on an issue or are used by the agency in its dealings with the public'; and (2) working law, *i.e.,* 'when the document is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy'" (quoting Brennan Ctr. for Just. V. U.S. Dep't of Just., 697 F.3d 184, 195 (2d Cir. 2012)); Exxon Corp. v. F.T.C., 476 F. Supp. 713, 726 (D.D.C. 1979) (explaining how Exemption 5 can never cover final decisions, the disclosure of which is affirmatively required under FOIA).

494. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153–54 (1975).

> oral or written—in which one or more parties have an opportunity to introduce evidence or make arguments.[495]

In essence, this definition encompasses both Type A and Type B adjudications described above.

When discussing the affirmative disclosure of agency decisions after a hearing, one of the most important distinctions between agencies is the volume of agency adjudication. Some agencies engage in lengthy and often high-profile agency adjudication but for extremely small numbers of cases. The Federal Trade Commission, for example, filed three administrative complaints in the entirety of 2021.[496] According to the Adjudication Research Joint project of ACUS and Stanford Law School, only fourteen agencies adjudicate more than 1,000 cases per year, and only five agencies adjudicate more than 10,000 cases per year.[497] The high-end outliers, however, are extremely high-volume adjudication agencies. Most notably, in fiscal year 2021, Immigration Judges, housed at the Department of Justice, adjudicated 115,815 cases and Social Security Administration administrative law judges adjudicated 451,046 cases.[498] Others in the top five include the Office of Medicare Hearings and Appeals (117,127), the IRS Office of Appeals (66,522), and the Board of Veterans' Appeals (about 100,000).[499]

In agency adjudications, as with courts, the final order is generally accompanied by a written opinion.[500] Also akin to federal courts of appeals,[501] agencies often have a procedure to designate a subset of their adjudicatory decisions as

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495. *FAQ*, ADJUDICATION RSCH., http://acus.law.stanford.edu/content/user-guide.

496. *Adjudicative Proceedings*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse /cases-proceedings/adjudicative-proceedings (filter by "administrative complaints" and select the date range for calendar year 2021).

497. *Caseload Statistics*, ADJUDICATION RSCH., https://acus.law.stanford.edu/reports/case load-statistics. Notably, the data in this dataset is now nearly a decade old, reporting FY 2013 statistics.

498. DOJ, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS (Oct. 12, 2023), https://www.justice.gov/eoir/page/file/1530261/download; *Annual Statistical Supplement*, SOCIAL SECURITY ADMIN., https://www.ssa.gov/policy/docs/statcomps/supplemen t/2022/2f8-2f11.html.

499. DEP'T OF HEALTH AND HUMAN SERVS., MEDICARE APPEALS DASHBOARD, https://www.aha.org/system/files/media/file/2022/03/aha-v-becerra-march-2022-medicare-appeals-das hboard-3-30-22.pdf; *SOI Tax Stats - Appeals Workload, by Type of Case, IRS Data Book Table 27*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-appeals-workload-by-type-of-case-irs-data-book-table-27; ANNUAL REPORT FISCAL YEAR (FY) 2021, BD. OF VETERANS' APPEALS, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf.

500. *See* 5 U.S.C. § 555(e) (requiring a statement of the ground of denial of certain kinds of decisions); § 557(c) (describing the requirements for decisions in APA (Type A) adjudications). Agencies have their own statutory mandates to provide explanatory documents as well.

501. *See, e.g.*, 1ST CIR. R. 36.0(b) (publication of opinions); 4TH CIR. R. 36(a) (publication of decisions); 7TH CIR. R. 32.1 (publication of opinions)' 9TH CIR. R. 36.2 (criteria for publication).

precedential and thus binding on future decision-makers in the agency, and the remainder may be treated as non-precedential, and therefore binding only on the party to the proceeding itself.[502]

A recent ACUS project studied agencies' use of precedential and non-precedential designations in agency adjudications. The project's resulting report describes a wide variety of agency practices in this regard on account, at least in part, of the wide variety of agency adjudication and appellate structures.[503] The report's authors opined that ACUS cannot make concrete recommendations as to when agencies should use precedential decision-making systems, but that, among other matters, ACUS should recommend that such systems "comport with administrative law's norms of regularity, consistency, and transparency."[504]

Consistent with those findings, we conclude that both precedential and non-precedential decisions in agency adjudications serve as important agency legal materials of value to the public. While precedential opinions are the epitome of agency binding law, a non-precedential decision issued after an adjudicative hearing does bind the litigant in the individual case, having an operative legal effect on at least one member of the public. Indeed, that decision represents the agency's definitive position on the rights or obligations of that member of the public.

Even beyond the operative effect on the individual, however, non-precedential opinions have value to the public at large. To begin, patterns of agency decisions may well be revealed in these non-precedential decisions. These patterns would enable the public to evaluate an agency's performance of its statutory obligations and ensure important trends in agency decision-making are transparent to the public. One aspect of this import is enabling applicants for benefits to know the prospects for success and best frame their case before an agency adjudicator. Another aspect is that full data sets may be used for automated analysis or auditing systems. Patterns of decision-making may even have legal significance. The Supreme Court has noted that a settled course of agency adjudication might give rise to a claim of arbitrary action if the agency irrationally departs from its past practices.[505] As such, the public may have a strong interest in seeing the full corpus

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502. *See, e.g.*, *Precedential and Informative Decisions*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/ptab/precedential-informative-decisions (describing the rule on precedential agency decisions for the PTO, including a process for requesting such a designation); 38 C.F.R. 2.6(e)(8) (2023) (delegating to the General Counsel of the Veterans Administration the power to designate an opinion as precedential with respect to veterans' benefits laws); 8 C.F.R. 1003.1(g) (2023) (requiring a majority vote of the members of the BIA to designate an agency decision as precedential).

503. CHRISTOPHER WALKER, MELISSA WASSERMAN & MATTHEW LEE WIENER, PRECEDENTIAL DECISION MAKING IN AGENCY ADJUDICATION (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.).

504. *Id.* at 2-3.

505. *See* INS v. Yueh-Shaio Yang, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule *or by settled course of adjudication*—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as

of administrative orders, including their reasoning and analysis, not just the precedential ones.

Even more concretely, agencies may look to non-precedential decisions as guidance, even when they are not binding. Recent litigation highlights the public's need to access non-precedential decisions in this regard. In *New York Legal Assistance Group v. Board of Immigration Appeals*, the plaintiffs sought publication of all non-precedential immigration decisions issued by the BIA.[506] Although the Second Circuit was presented with a threshold question about the power of the district to issue the requested remedy, it also described the importance of the records:

> Here, the BIA asks us to acquiesce to just such a system of "secret agency law" that systematically limits the access to information of parties opposing the government in immigration proceedings. It may be that, in order to rely on an unpublished decision in advocating against an opponent in the immigration courts, § 552(a)(2) itself requires the government to provide a copy of *that decision* to the opposing party. But that "remedy" does not achieve parity between the parties. If that were the only available remedy for a failure to publish all non-precedential decisions, lawyers representing the government could review the range of unpublished decisions and select those most helpful to their position for presentation to the immigration courts, while their opponents are blocked from doing the same.
>
> Nor does the "non-precedential" nature of the "unpublished" opinions render them irrelevant. Every lawyer knows that the ability to cite non-binding authority can be helpful. Such decisions can illustrate concrete examples of a rule's application, show that impartial judges have adopted reasoning similar to that being advanced by the advocate, or demonstrate the continuing validity of an old case. It is one thing to cite a binding precedent for a general proposition and argue to the court that the logic of the general proposition applies to the

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'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act." (emphasis added) (quoting 5 U.S.C. § 706(2)(A)); *see also* Johnson v. Shulkin, No. 15-4621, 2017 WL 836256, at *7 (Vet. App. Mar. 3, 2017) ("There can be no doubt that consistent application of the law is part of a fundamentally fair adjudication. In other words, if VA adjudicators have different understandings of what it means for employment to be sedentary or semi-sedentary—as they well might, given that VA has never defined those terms (despite the ubiquity of their use in cases of requests for total disability ratings based on individual unemployability), and given that medical examiners rarely explain what they mean when they use these terms—then it is fair to conclude that whether a claimant is found to be capable of sedentary or semi-sedentary work is often dependent on the understanding of those terms held by the medical examiner and rating specialist to whom his or her case is assigned.").

506. N.Y. Legal Assistance Grp. v. BIA, 987 F.3d 207, 208 (2d Cir. 2021).

> specific case before the court; it is quite another, and more persuasive, to be able to cite specific instances in which courts have in fact applied the general principle to cases closely resembling the instant case. If that were not so, parties would never cite district court or out-of-circuit appellate authority to a court of appeals.[507]

The Second Circuit went on to cite numerous examples of agency use of non-precedential decisions. For example, it detailed a variety of BIA decisions that relied on or adopted the reasoning from an unpublished decision, sometimes one identified and submitted by a government lawyer.[508] It noted other times that the BIA described the submissions of unpublished decisions as persuasive authority by government attorneys,[509] and others in which the Immigration Judge had relied on unpublished BIA decisions in formulating the initial decision.[510]

The plaintiffs' Second Circuit victory led to a settlement under which, going forward, the government agreed to create and maintain an electronic reading room with all final BIA decisions, not just the precedential ones. Notably, the parties agreed to limited privacy redactions and withholdings and this agreement applies only to final decisions, not interlocutory orders, consistent with the language of the statutory disclosure requirement covering "final opinions . . . made in the adjudication of cases."[511]

These experiences demonstrate the value to the public of affirmative disclosure of all agency decisions made after an adjudicatory hearing, not just precedential decisions or those designated by the agency to be of particular

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507. *Id.* at 222-23 (footnote omitted).

508. *Id.* at 210 n.8 (quoting *In re* Razo, 2017 WL 7660432, at *1 n.1 (B.I.A. Oct. 16, 2017) ("We separately note that in an unpublished decision issued after the Immigration Judge's decision in these proceedings, the Board found that solicitation of prostitution under a Florida criminal statute is a CIMT."); *In re* Alvarez Fernandez, 2014 WL 4966372, at *2 (B.I.A. Sept. 23, 2014) ("[T]he respondent submitted an unpublished decision . . . . Although this decision is not precedential, we adopt a similar analysis . . ." (alterations in original)).

509. *Id.* at 210 n.7 (quoting *In re* Stewart, 2016 WL 4035746, at *1 (B.I.A. June 30, 2016) ("In its motion, the Government sought remand for the Board to determine the effect on the respondent's removability [of] . . . the Board's decision in an unpublished case[.]" (alterations in original)); *In re* Iqbal, 2007 WL 2074540, at *3 (B.I.A. June 19, 2007) ("[T]he Immigration Judge declined to find that the respondent had knowingly committed marriage fraud . . . . The DHS urges us to find otherwise based on an unpublished case.").

510. *Id.* quoting *In re* Perez-Herrera, 2018 WL 4611455, at *6 (B.I.A. Aug. 20, 2018) ("The Immigration Judge considered the relevant jury instructions, Pennsylvania state court cases, as well as unpublished Board decisions . . ." (alteration in original)); *In re* Bayoh, 2018 WL 4002292, at *1 n.1 (B.I.A. June 29, 2018) ("The Immigration Judge's decision specifically referenced and attached . . . two Board unpublished decisions . . ." (alterations in original)).

511. Stipulation of Settlement, N.Y. Legal Assistance Grp. v. Bd. of Immgr. Appeals, No. 18 Civ. 9495 (S.D.N.Y. Feb. 9, 2022) (setting forth an agreed upon publication schedule and limited set of bases for withholding to accommodate privacy and other concerns), https://www.citizen.org/litigation/new-york-legal-assistance-group-v-board-of-immigration-appeals/; *see also* 5 U.S.C. § 552(a)(2).

importance to the public. They also demonstrate the critical role of such access in terms of enabling the public "readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies."[512]

Despite their value to the public, the current legal requirements are falling short of ensuring that all adjudicatory decisions are affirmatively disclosed. Indeed, current agency practice varies with respect to the publication of non-precedential adjudicatory decisions. Agencies that disclose all final adjudicatory decisions include the Federal Trade Commission,[513] the National Labor Relations Board,[514] the Securities and Exchange Commission,[515] the Merit Systems Protection Board,[516] and the Nuclear Regulatory Commission.[517] In a discussion with the consultative group to this project, staff members from various agencies described processes for disclosure that did not differentiate between precedential decisions and non-precedential decisions.[518]

Those agencies, though, that only publish precedential decisions made after adjudicatory hearings appear to include some high-volume adjudication agencies, suggesting that practical barriers, such as the volume of decisions and the agency's information technology infrastructure, may be at least in part the reason that these agencies do not publish all decisions. The BIA is one example, at least until the recent settlement described above. The BIA issues more than 30,000 decisions per year, of which only about thirty are deemed precedential and thus published on the agency's website.[519] The recent settlement should change this practice going forward. The Social Security Administration is another example of an agency that publishes aggregate data but does not publish most individual decisions made after a hearing.[520]

Yet, some high-volume adjudication agencies do publish their full set of decisional documents, even when those documents require redaction for reasons of

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512. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59 (quoting (S. REP. NO. 813, at 3.); *accord*, S. REP. NO. 813, at 12. (noting that the basic purpose *of* subsection (b) is "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies").

513. *Legal Library: Adjudicative Proceedings*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/cases-proceedings/adjudicative-proceedings.

514. *Administrative Law Judge Decisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions.

515. *Commission Opinions and Adjudicatory Orders*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/litigation/opinions.

516. *Case Reports*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/decisions/casereports.htm.

517. *Adjudications (Hearings): Electronic Hearing Docket*, NUCLEAR REG. COMM'N (July 14, 2020), https://www.nrc.gov/about-nrc/regulatory/adjudicatory.html.

518. ADMIN. CONF. OF THE U.S., MINUTES FROM THE CONSULTATIVE GROUP MEETING FOR *DISCLOSURE OF AGENCY LEGAL MATERIALS* 2 (2022).

519. N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 209-10 (2d Cir. 2021).

520. *See Hearings and Appeals: Public Data Files*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/publicusefiles.html.

privacy. In one particularly notable example, the Board of Veterans' Appeals publishes all of its decisions, in redacted form, even though it adjudicates approximately 100,000 cases each year.[521] Those decisions appear in a searchable database on BVA's website.[522] BVA's publication practice demonstrates the feasibility of disclosure even at high-volume adjudication agencies.

Public access to adjudicatory decisions is consistent with open government. ACUS has adopted recommendations for public or open administrative proceedings to "facilitate public participation," "legitimate government processes," and "democratize justice."[523] Case law also heavily favors openness of adjudicatory proceedings. Some courts have found a constitutional right to access certain agency proceedings,[524] typically relying on Supreme Court precedent defining the contours of a constitutional right to access criminal judicial proceedings.[525] The Court has also recognized a qualified common law right of access to judicial records,[526] though it is unsettled whether such a right applies in the administrative context.[527] Overall, however, these sources support the idea of open access to agency proceedings, but typically concern access to watch the proceeding itself, rather than the documents it produces. Nonetheless, they espouse a deeply held policy preference for adjudication open to the public.

The results of agency adjudications are, if anything, even more critical to the public than the proceedings themselves, precisely because of the need to have access to the law. Legitimacy, public confidence, and public understanding are promoted when agency decisions on matters before them and the rationales for those decisions are disclosed to the public. Moreover, members of the public are better able to conform their actions to agency expectations when more information is known about how the agency enforces the law or adjudicates contested matters.

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521. *Board of Veterans Appeals: Decision Wait Times*, U.S. DEP'T OF VETERANS' AFFS., https://www.bva.va.gov/decision-wait-times.asp.

522. *Search Decisions*, U.S. DEP'T OF VETERANS' AFFS., https://search.usa.gov/search?affiliate=bvadecisions.

523. JEREMY GRABOYES & MARK THOMSON, PUBLIC ACCESS TO AGENCY ADJUDICATIVE PROCEEDINGS 8 (2021) (report to the Admin. Conf. of the U.S.).

524. *See, e.g.*, N.Y.C.L. Union v. N.Y.C. Transit Auth., 684 F.3d 286, 305 (2d Cir. 2012) ("[agency's] access policy violate[d] the public's First Amendment right of access to government proceedings."); Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002) ("[T]here is a First Amendment right of access to deportation proceedings."); Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 181 (3rd Cir. 1999) ("[T]he Planning Commission meetings are precisely the type of public proceeding to which the First Amendment guarantees a public right of access.").

525. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556-57 (1980) (explaining that, subject to a balancing test of competing interests, "[t]he right to attend criminal trials is implicit in the guarantees of the First Amendment").

526. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents," but noting that the right is not absolute and concluding it was overcoming in the particular instance (footnote omitted)).

527. GRABOYES & THOMPSON, *supra* note 523, at 12-13.

Citizens, and their attorneys, are also able to represent themselves better in future adjudicatory proceedings on an equal playing field with agency attorneys.

Finally, researchers, watchdog groups, and journalists may use the public databases to reveal patterns of under or over-enforcement; patterns of interpretations of law that are contrary to expectations; patterns of favoritism, capture, or bias; or patterns of low-quality or inconsistent decision-making.[528] Since these actions, by definition, have some legal effect on members of the public, they are among the more important agency records for public accountability purposes.

A previous ACUS study concluded that "it may be possible for agencies, no matter their size or policymaking preference or practice, to disclose all first line orders, appellate opinions, and supporting adjudication materials issued and filed in formal and semi-formal proceedings."[529] That the BIA recently entered into a settlement agreement in which it bound itself to prospectively publish more than 30,000 decisions a year in full indicates that publication is feasible.

We recommend that this requirement be enacted explicitly into law, a recommendation that is detailed in our conclusions at Recommendation 3.

We recognize, of course, that this recommendation may raise reasonable concerns. One concern would be whether agencies have the ability to protect legitimate privacy and confidential business interests. But we note that existing exemptions to disclosure (which our recommendations take no position on and therefore would not alter) seem adequate to protect privacy interests. No one with whom we consulted in the course of this study offered us any reason to think they could not be similarly protective if Congress followed our recommendation.

Another reasonable concern would be whether agencies have the resources required to conform to new requirements, particularly if the requirements are to adopt a certain platform or to backfill databases with a history of all unpublished decisions. We agree that a retroactive requirement could be exceedingly onerous for some agencies. But an affirmative obligation to disclose agency adjudicatory material might be made prospective only, or it might be made retroactive for only a limited time period. Yet, at the very least we believe prospective publication should not pose an undue challenge given that some agencies engage in full publication of their adjudicatory decisions, including mass adjudication agencies with decisions that include information that must

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528. *See, e.g.*, Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (empirically analyzing asylum claims and revealing "amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country"); Michael D. Frakes & Melissa F. Wasserman, *Is the Time Allocated to Review Patent Applications Inducing Examiners to Grant Invalid Patents?: Evidence from Micro-Level Application Data*, 99 REV. ECON. & STAT. 550, 560 (2017) (documenting poor quality decisionmaking at the Patent and Trademark Office); David Ames, Cassandra Handan-Nader, Daniel E. Ho, David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 5 (2020) (documenting a "crisis of decisional quality" in mass adjudication systems including at BVA, SSA, and immigration courts).

529. SHEFFNER, *supra* note 129, at 41.

at times be redacted.[530] As with budgetary and other practical considerations, we leave the details of those matters to others but do reiterate that Congress would do well to ensure that agencies will have adequate resources to meet any expanded disclosure obligations. Moreover, to the extent an agency should find itself faced with particularly burdensome circumstances with little public benefit in affirmative disclosure, our Recommendation 7 would provide alternative compliance options for agencies.[531]

Voluminous adjudicatory decisions also will pose a related problem of indexing and organizing the material to ensure its utility to the public. The mass of decisions may be of limited use if some form of digest or sophisticated search mechanism is not developed or is available only to those with the ability to pay a commercial database service that does such work privately. Here, our recommendation on affirmative disclosure plans, explained in detail in Part III.A and listed at Recommendation 11, would go a long distance in addressing these concerns.

2. Enforcement Actions Without a Hearing

Another category of operative documents can be loosely described as enforcement records. Some enforcement actions are the subject of adjudicatory hearings,[532] and the decisional documents resulting from those hearings would fall under the previous subsection's discussion. Other enforcement actions, however, memorialize the agency's finding of a violation of law, compliance with law, or release from legal obligation, but do not follow any sort of evidentiary hearing. These may include fines, penalties, stipulated settlements of an administrative complaint, warning letters, and inspection records, as well as letter rulings and waivers or dispensations from certain requirements.[533] Fines and penalties, as well as stipulated fines or penalties resulting from settlement of agency administrative charges against a private party, have a direct, binding effect on the private party at issue. Even less definitive enforcement actions, however, often represent the agency's official finding of a violation (or not) of the law and carry actual legal consequences such as elevating future penalties for subsequent violations, on the one hand, or safe harbor from consequences. Finally, letter rulings, waivers, or

530. The Board of Veterans' Appeals, discussed above, provides an instructive example in this regard. *See supra* notes 521-22 and accompanying text.

531. This alternative compliance mechanism is consistent with a recommendation ACUS recently made concerning settlement agreements of agency enforcement proceedings. *See* Adoption of Recommendations, 88 Fed. Reg. 2312, 2315-16 (Jan. 13, 2023) (Admin. Conf. of the U.S. Recommendation 2022-6) (detailing in enumerated recommendation 3 an alternative to full disclosure of all settlement agreements that involves a sample or summary).

532. *See* MICHAEL ASIMOW, GREENLIGHTING ADMINISTRATIVE PROSECUTION: CHECKS AND BALANCES ON CHARGING DECISIONS 3-12 (2022) (report to the Admin. Conf. of the U.S.) (describing the enforcement processes at five regulatory agencies).

533. Enforcement manuals would constitute a form of guidance material, which is addressed above in Part II.B.

dispensations, represent the agency's determination of compliance with the law, and what will be required of a regulated entity in a particular circumstance.

Take, for example, warning letters. FDA explains that its warning letters constitute "official" agency enforcement actions,[534] that FDA "may not approve pending drug or device applications" until violations are corrected,[535] and that all federal agencies will be notified through the government-wide Quality Assurance Program so that "they may take this information into account when considering the award of contracts."[536] FDA does not, however, consider warning letters to be a final agency action reviewable in court under the APA.[537]

Similarly, at USDA's APHIS, enforcement staff members may issue an official warning after investigation if they determine that "the evidence substantiates that an alleged violation has occurred."[538] APHIS advises that the purpose of any correspondence conveying a warning is to "provide notice . . . and promote compliance with the law.[539] Other regulatory enforcement options available to APHIS include engagement in pre-litigation settlement agreements (essentially, agreed-upon fines or penalties), or the referral of violations to a general counsel's office to file an administrative complaint before an ALJ.[540] Accordingly, these kinds of warning letters have real practical effect on the regulated entity that is targeted.[541]

There is a strong public interest in seeing warning letters, which often will represent the agencies' views on the meaning of various legal requirements. For example, FTC's warning letters "warn companies that their conduct is likely unlawful and that they can face serious legal consequences, such as a federal lawsuit, if they do not immediately stop."[542] Similarly, the Consumer Financial Protection

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534. FDA ENFORCEMENT MANUAL ¶ 410 (2006 & Supp. 2023) (Authority to Issue Warning Letters).

535. *Id.* ¶ 443 (How the FDA May React).

536. *Id.*

537. *Id.* ¶ 410 (Authority to Issue Warning Letters).

538. *Enforcement Summaries*, U.S. DEP'T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV. (Mar. 27, 2024), https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-panels/enforcement-summaries.

539. *Id.*

540. *Id.*

541. These documents might be quite helpful to private entities seeking to supplement the agencies' law enforcement efforts or seeking to assess how faithfully the agency is performing its enforcement functions. For example, animal welfare groups rely on APHIS records "to advocate for protection of animals used in research, exhibition, and the pet trade, and to petition the USDA to more diligently enforce the AWA, to promulgate standards for animal protection, and to formulate and institute policies and practices that will advance the protection of animals." Complaint ¶ 1, People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric., 2017 WL 586920 at *2 (D.D.C. filed Feb. 13, 2017).

542. *About FTC Warning Letters*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/topics/truth-advertising/about-ftc-warning-letters.

Bureau "will send a warning letter to advise recipients that certain actions may violate federal consumer law."[543] The public interest in knowing the agency's position on violations of law is clear.

Inspection reports often serve a similar purpose. Violations noted on inspection records can have real-world consequences for the private party. OSHA, for example, notes that "[w]hen an inspector finds violations of OSHA standards or serious hazards, OSHA may issue citations and fines."[544] Some agencies even allow private parties to appeal findings on inspection reports, illustrating the consequences of such findings.[545] The Federal Communications Commission, which issues Letters of Inquiry (LOI), notes that the letter "becomes part of the record" of the investigation and that "the failure to respond to an LOI . . . is a violation of an agency order."[546]

In addition, letter rulings, opinion letters, or advice letters can serve as important agency legal materials representing the agency's position on the application of the law.[547] This is particularly true when those letters have an operative legal effect. For example, the Department of Labor's Wage and Hour Division issues opinion letters to employers, and those letters can serve as the basis for a "good faith defense" to liability in a subsequent suit brought by an employee. That is true both for the recipients of the letter but also for employers with identical situations who relied on the letter, showing a broader effect of these letters.[548] Similarly, the IRS issues letter rulings that a "taxpayer ordinarily may rely on" to determine their tax liability, even though they may not be relied upon by another taxpayer.[549]

Finally, there are individual, case-by-case determinations that a private party will be given dispensation or waiver of an otherwise applicable regulatory requirement. These dispensations constitute one of the two main categories dubbed

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543. *Warning Letters*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/enforcement/warning-letters/.

544. *Inspections Fact Sheet*, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (Aug. 2016), https://www.osha.gov/sites/default/files/factsheet-inspections.pdf.

545. *See, e.g.*, *Appealing Inspection Decisions*, U.S. DEP'T OF AGRIC.: FOOD SAFETY AND INSPECTION SERV. (June 8, 2023), https://www.fsis.usda.gov/inspection/compliance-guidance/small-very-small-plant-guidance/appealing-inspection-decisions.

546. FED. COMMC'NS COMM'N, ENFORCEMENT OVERVIEW 8 (2020), https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf.

547. We also note that some such documents may even be written and signed by members of the agency's general counsel's office, but we do not believe such letters, directed to the public, should be treated differently based on their authorship.

548. FLSA EMPLOYEE EXEMPTION HANDBOOK, app. IV: ADMINISTRATIVE LETTER RULINGS: DOL, WAGE AND HOUR DIVISION (Supp. 2017), 2006 WL 3290802; *see also* 29 U.S.C. § 259 (setting forth the good faith defense to liability under the Fair Labor Standards Act).

549. *Internal Revenue Bulletin: 2023-1*, IRS (Jan. 3, 2023), https://www.irs.gov/irb/2023-01_IRB#REV-PROC-2023-1 (Section 11.01-0.2).

"unrules" in an authoritative academic treatment of the subject.[550] Waivers and dispensations—affirmative decisions not to enforce an otherwise applicable law—definitively alter the legal rights and obligations of the party and should be considered an agency legal material on par with the enforcement records described in this section. At least in part for those reasons, ACUS has previously recommended that agencies "should provide written explanations for individual waiver or exemption decisions and make them publicly available to the extent practicable and consistent with legal or policy concerns, such as privacy."[551] These are not to be confused with ordinary enforcement discretion not to prosecute a violation; rather, they are affirmatively issued decisions that the regulated party is made aware of that they will be granted some dispensation.

As described above, the APA definition of "order" may be broad enough to encompass enforcement actions taken even without an adjudicative hearing.[552] That said, the case law has not been developed on that point. This may be an instance in which the current practice has developed atextually, and Congress needs to clarify the scope of the text if it is to be given full effect.

There is an additional ambiguity about the word "final" that appears in the text of the affirmative disclosure provision. The full provision reads that agencies must publish "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."[553] "Final," however, has not been defined by the courts in this context, except in opposition to "predecisional" documents subject to the deliberative process privilege.[554] But of course the deliberative process privilege does not apply to enforcement records, which have (under our description) been provided to the affected private party and therefore are no longer internal.

The word "final" has, however, been the subject of extensive judicial interpretation in the context of APA Section 704, which permits judicial review only

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550. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 897–908 (2021).

551. Adoption of Recommendations, 82 Fed. Reg. 61728, 61742 ¶ 9 (Dec. 28, 2017) (Administrative Conference Recommendation 2017-7).

552. *See supra* notes 476-89 and accompanying text.

553. 5 U.S.C. § 552(a)(2)(A).

554. *See supra* notes 428-30 and accompanying text; *see also* Bristol-Meyers Co. v. FTC, 598 F.2d 18, 25 (D.C. Cir. 1978) ("It appears to us that the Court meant in *Sears* to establish as a general principle that action taken by the responsible decisionmaker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA."). Most recently, the Supreme Court decided *U.S. Fish and Wildlife Service v. Sierra Club*, in which the Court applied the deliberative process privilege to draft biological opinions issued by the Department of the Interior, explaining that "[t]o decide whether a document communicates the agency's settled position, courts must consider whether the agency treats the document as its final view on the matter." 141 S. Ct. 777, 786 (2021). Despite frequently using the word "final," as in contrast to predecisional deliberative documents, the Court did not refer to FOIA's affirmative provision or other provisions of the APA to elaborate on the meaning of final in this context. *See id.*

of "final agency action."[555] Yet, there is no reason to believe that the finality test used to determine when judicial review is available is, or should be, the same test used to determine the applicability of FOIA's provision requiring affirmative disclosure of "final opinions . . . and orders" made in the adjudication of cases. Indeed, there is at least an argument to be made that "final" in this provision applies only to "opinions" and not "orders," and thus is not a blanket requirement at all.[556]In short, ample need exists for Congress to clarify precisely what kinds of enforcement records should be considered "orders" required to be disclosed affirmatively under FOIA.

Many existing disclosure policies and practices do not apply only to agency orders of a character that are subject to judicial review. The advisability of disclosure of a broad range of enforcement materials has been recognized before. In 2011, President Obama issued a "Memorandum on Regulatory Compliance" which directed that:

> Agencies with broad regulatory compliance and administrative enforcement responsibilities . . . shall develop plans to make public information concerning their regulatory compliance and enforcement activities accessible, downloadable, and searchable online. In so doing, agencies should prioritize making accessible information that is most useful to the general public and should consider the use of new technologies to allow the public to have access to real-time data.[557]

Similarly, scholars have called for greater transparency concerning regulatory enforcement actions including the types of actions described in this section.[558]

Many agencies do publish their enforcement records, illustrating the feasibility of such a move. OSHA publishes enforcement actions and inspection records,[559] as does the Department of Labor.[560] EPA publishes extensive enforcement and compliance history data on its ECHO website.[561] APHIS, similarly, publishes a searchable database of Animal Welfare Act enforcement and

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555. 5 U.S.C. § 704. "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision making process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113 (1948)—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,' *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71, 91 S. Ct. 203, 209, 27 L.Ed.2d 203 (1970)." Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

556. *See* Davis, *supra* note 485, at 771-72.

557. Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825, 3825 (Jan. 18, 2011).

558. *See, e.g.*, Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 425 (2019) ("One policy response [to the increasing power of regulatory monitors] would be to require more comprehensive transparency.").

559. *Enforcement*, U.S. DEP'T OF LAB.: OSHA, https://www.osha.gov/enforcement.

560. *Data Enforcement*, U.S. DEP'T OF LAB., https://enforcedata.dol.gov/homePage.php.

561. *Enforcement and Compliance History Online* (ECHO), EPA, https://echo.epa.gov/.

inspection records.[562] The SEC, for its part, releases "comment letters" and companies' responses to those letters, on its EDGAR public filing system.[563] The Federal Communications Commission maintains a database of all enforcement actions, including warnings.[564]

Other agencies do not release these sorts of records categorically. FDA, for example, does not have any comprehensive way to locate its inspection reports, or Form 483s, which are instead requested by the thousands every year under FOIA, though it does select some inspections for publication.[565] FDA notes that these are not "a final Agency determination of whether any condition is in violation" of the law, but nonetheless these reports do constitute evidence for future actions and companies are permitted to respond.[566] By contrast, FDA does release its warning letters.[567]

As to letter rulings, some agencies have managed to maintain databases even of very high volumes of such decisions. For example, the U.S. Customs and Border Protection agency maintains a database of letter rulings now numbering more than 200,000.[568]

As to waivers and dispensations from otherwise applicable requirements, Coglianese, Scheffler, and Walters note that:

> Although we could find some information online about some of the dispensations authorized by these provisions, for more than half we could find no information about even their possible existence. For no more than 20% of the dispensations authorized did agencies provide lists indicating for whom they had waived an obligation.[569]

Yet, these authors note that some agencies do routinely disclose waivers and dispensation, citing the FCC as a prime example.[570]

ACUS has recognized that agencies' "[e]nforcement manuals can . . . be a

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562. *Welcome to the USDA Animal Care Public Search Tool*, U.S. DEP'T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV. (Apr. 23, 2024), https://aphis.my.site.com/PublicSearchTool/s/.

563. *About EDGAR*, SEC, https://www.sec.gov/edgar/about.

564. *Enforcement Actions*, FCC, https://www.fcc.gov/eb-enf-act.

565. *Inspection Classification Database*, FDA (Apr. 8, 2024), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/inspection-classification-database.

566. *FDA Form 483 Frequently Asked Questions*, FDA (Jan. 9, 2020), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/inspection-references/fda-form-483-frequently-asked-questions.

567. *Warning Letters*, FDA (May 18, 2024), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters.

568. *Customs Rulings Online Search System (CROSS)*, U.S. CUSTOMS & BORDER PROT. (May 20, 2024), https://rulings.cbp.gov/home.

569. Coglianese, Scheffler & Walters, *supra* note 550, at 949.

570. *Id.* at 948 n.264.

useful, practical resource for the public."[571] But it has not yet weighed in on the publication of agency legal materials that document specific enforcement decisions made by agencies. Yet, the utility to the public of information about the agency's enforcement actions is plain. Patterns of enforcement may reveal agency positions about what violations warrant what punishment or how the agency classifies certain actions as violations (or not). In this sense, even though any individual enforcement action may not set a precedent or come with detailed orders and reasoning, information on enforcement still very much counts as a form of the agency's common-law style working law. This information constitutes important agency legal material for which there is a clear public interest in disclosure as evidenced by frequent FOIA requests for these details.

Moreover, the numerous examples of comprehensive publication of enforcement records of all kinds—from fines to warning letters to inspection reports to letter rulings—suggest that publication is eminently feasible. As part of the consultations undertaken in the course of this study, various examples of agency publication of enforcement records were noted. Although sometimes redactions are necessary to protect privacy or confidential commercial information, we failed to discern any serious barriers to or concerns about publication of enforcement records.[572]

One challenge in legislating may arise from the wide variation in the types of enforcement records maintained by agencies and their components. Each agency has different enforcement practices and procedures. Yet, as the above-mentioned examples illustrate, there are common themes and methods that run across the federal government. Trans-substantive rules on disclosure can be made but should account for agency variability.

We therefore recommend that enforcement records be explicitly included in FOIA's affirmative disclosure plans, as detailed in Part IV.A of this Article at Recommendation 2. Moreover, we believe that, to account for the variability in types of agency records and respond to the concern that special circumstances of a given agency's enforcement practices might sometimes make publication of the full range of these materials either impracticable or inadvisable, we further recommend that Congress provide an alternative compliance mechanism, detailed at Recommendation 7.

3. Agency Settlements in Litigation

Like other litigants, agencies often settle litigation of judicial proceedings (rather than settlements of their own administrative proceedings, covered in the previous section). Settlement agreements represent a contractual obligation on the

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571. Adoption of Recommendations, 88 Fed. Reg. 2312, 2314 (Jan. 13, 2023) (Administrative Conference, Recommendation 2022-5).

572. ADMIN. CONF. OF THE U.S., MINUTES FROM THE SECOND CONSULTATIVE GROUP MEETING FOR *DISCLOSURE OF AGENCY LEGAL MATERIALS* 1-2 (2022).

part of both parties to perform duties. Agencies may promise to pay money damages or to commit to a certain course of conduct in the future. The settlements may be narrow and apply to only the opposing litigant, or they may settle class claims.[573] But when settlement agreements govern the obligations of the agency, they constitute agency legal materials.

Even more significant, when agencies are sued over policy matters alleged not to be in conformance with the law, settlements may involve an agency promise to perform its statutory duties differently going forward. To pick one example among many, the well-known 1997 *Flores* Settlement Agreement, concerning the detention of minors pending immigration case processing, resulted in several new agency rules to implement obligations set out in the settlement.[574]

Moreover, there have been documented instances of agencies entering into what appear to be collusive settlements, sometimes referred to as a "sue-and-settle" phenomenon,[575] under which an agency might agree to litigation and settlement as an end-run around normal regulatory procedures.[576] Agencies may be particularly inclined to avail themselves of this possibility toward the end of an administration, as a way to effectively bind a future administration through consent decrees and settlement agreements.[577] To state what might be obvious, transparency is the bare minimum of oversight one might hope for in the face of any end-run around a public and participatory process.

Settlement agreements in individual enforcement actions do not impose binding requirements on the agency itself but should still be disclosed.[578] In some respects, the case for disclosure is similar to that for enforcement manuals and other enforcement information, discussed along with other guidance above in Part II.B. Regulated entities can get a sense of agency priorities and of the sort and severity of sanctions or undertakings the agency may agree to in an enforcement action.

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573. *See, e.g.*, Herron v. Veneman, 305 F. Supp. 2d 64, 69 (D.D.C. 2004) (describing a settlement of a class-wide claim for employment discrimination).

574. *See* KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., IF11799, CHILD MIGRANTS AT THE BORDER: THE *FLORES* SETTLEMENT AGREEMENT AND OTHER LEGAL DEVELOPMENTS (Apr. 1, 2021), https://crsreports.congress.gov/product/pdf/IF/IF11799.

575. Katie L. Colton, The Sue-and-Settle Phenomenon: Its Impact on the Law, Agency, and Society (2018) (M.A. Thesis, Utah State University), https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=8531&context=etd; SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS (1984); W. KIP VISCUSI, REGULATION THROUGH LITIGATION (2002); ANDREW P. MORRISS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION (2008); Cary Coglianese, *Process Choice*, 5 REGUL. & GOVERNANCE 250, 250–61 (2011).

576. *See generally The Debate Over "Sue-and-Settle" Legislation*, REGUL. REV. (May 18, 2015), https://www.theregreview.org/2015/05/18/sue-and-settle/.

577. *See* Colton, *supra* note 575, at 41.

578. *See* Adoption of Recommendations, 88 Fed. Reg. 2312, 2315 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-6, Public Availability of Settlement Agreements in Agency Enforcement Proceedings) (encouraging agencies to "develop policies that recognize the benefits of proactively disclosing settlement agreements in administrative enforcement proceedings and account for countervailing interests").

Moreover, regulatory beneficiaries, members of the public, and legislators will be able to assess the scope and meaningfulness of agency enforcement efforts.

Some agencies have recognized that settlements bind the agency in a way that constrains future government behavior or defines government legal obligations and thus affects and concerns the public as a whole, rather than simply the litigants in the case.[579] EPA, for example, posts and takes public comment on important *proposed* settlements.[580] Some of the settlement agreements EPA has recently made available for public comment include an agreement that would require EPA to take certain air quality standards action and an agreement that EPA would respond to a petition for rulemaking related to the regulatory exemption of pesticide-treated seed.[581] More importantly, for purposes of this Article, EPA posts final settlement agreements and consent decrees on its website along with a description and summary of the underlying action.[582]

Currently, most federal settlement agreement information is issued through press releases and there is no uniform method to disclose or search settlements. The only routine way to access settlement agreements is either through PACER, when they are filed with the court, or through a FOIA request.

In 2020 ACUS adopted a recommendation on litigation materials, relying on a survey finding that:

> Several federal agencies already maintain agency litigation webpages . . . The survey suggests that most federal agencies do not maintain active agency litigation web pages. Among those that do, the quality . . . varies appreciably. Some contain vast troves of agency litigation materials; others contain much more limited collections. Some are updated regularly; others are updated only sporadically. Some are easy to locate and search; others are not. In short, there appears to be no standard practice for publishing and maintaining agency litigation webpages . . .[583]

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579. *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH L. REV. 321 (1988) (describing the unique nature of third-party interests in public litigation settlements and the various ways courts can protect those interests).

580. *Proposed Consent Decrees and Draft Settlement Agreements*, EPA (May 3, 2024), https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements.

581. *Id.*

582. *Civil and Cleanup Enforcement Cases and Settlements*, EPA (May 23, 2024), https://cfpub.epa.gov/enforcement/cases/ (settlements and consent decrees going back to 1998).

583. Adoption of Recommendations, 86 Fed. Reg. 6612, 6624 (Jan. 22, 2021) (Admin. Conf. of the U.S. Recommendation 2020–6); *see also* MARK THOMSON, REPORT ON AGENCY LITIGATION WEBPAGES (2020) (report for the Admin. Conf. of the U.S. stating that only nine of twenty-five agencies surveyed maintained active agency litigation web pages); Kristin E. Hickman & Mark Thomson, *Improving Agency Litigation Webpages*, REGUL. REV. (June 2, 2021), https://www.theregreview.org/2021/06/02/hickman-thomson-improving-agency-litigation-webpages/.

Moreover, the study found that settlements were among the category of records least likely to be published.[584]

Agency settlement agreements represent the agency's official position on its obligations with respect to the end of a particular dispute. Moreover, they are not always on PACER or another location, and they oftentimes have great public interest attached to them. Ad hoc publication through news releases or website updates is inadequate. Rather, agency settlements in litigation should be routinely published online.

ACUS has recommended that agencies consider maintaining litigation webpages that provide greater access to agency litigation materials, which it defined to include "publicly filed pleadings, briefs, and settlements, as well as court decisions about agencies' regulatory or enforcement activities."[585] We do not take up the question of other litigation-related documents, as the scope of this Article is limited to materials representing the working law of the agency. Other materials may have great interest and importance to the public, but they fall outside the scope of this project.

Notably, settlements have received attention in Congress as well with proposed legislation that would require mandatory publication of those records. Twenty years ago, Congress required the Attorney General to submit to it a regular report on any settlement for a sum over $2 million or "that provides injunctive or other nonmonetary relief that exceeds, or is likely to exceed, 3 years in duration."[586] Other individual statutes require public notice of proposed or final consent decrees.[587] In one prominent example, the Tunney Act requires publication of proposed consent decrees in antitrust actions.[588]

The proposed Settlement Agreement Information Database Act of 2023,[589] which passed the House on January 24, 2023, would require OMB or a designee agency to create a public database to which agencies would be required to upload their settlement agreements, subject to FOIA exemptions. The bill would require executive agencies to submit information on their settlement agreements to a public database. Specifically, an agency must submit information about any settlement agreement

584. THOMSON, *supra* note 583, at 19.

585. Adoption of Recommendations, 86 Fed. Reg. 6612, 6624 (Jan. 22, 2021) (Admin. Conf. of the U.S. Recommendation 2020–6).

586. 28 U.S.C. § 530D(a)(1)(C).

587. Superfund is a prominent example. *See* 42 U.S.C. § 9622. DOJ's Environment and Natural Resources Division publishes a notice of availability of proposed consent decrees (not limited to Superfund cases) in the *Federal Register*. *See, e.g.*, Notice of Lodging of Proposed Modification to Consent Decree Under the Clean Air Act and Other Statutes, 88 Fed. Reg. 2134 (2023) (Jan. 12, 2023); *Proposed Consent Decrees*, U.S. DEP'T OF JUST., https://www.justice.gov/enrd/consent-decrees (the proposed consent decrees on its website).

588. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 2(c), 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(b)-(h) and scattered sections of 15 U.S.C.).

589. Settlement Agreement Information Database Act of 2023, H.R. 300.,118th Congress, https://www.congress.gov/bill/118th-congress/house-bill/300/all-actions.

(including a consent decree) entered into by the agency related to an alleged violation of federal law. If an agency determines that information about an agreement must remain confidential to protect the public interest, the agency must publish an explanation of why the information is confidential.[590]

In December 2022, ACUS adopted Recommendation 2022-6, Public Availability of Settlement Agreements in Agency Enforcement Proceedings.[591] The Recommendation emphasizes the value of public disclosure of settlements and lays out a set of best practices to promote such disclosure but focuses on settlements of *administrative* enforcement actions. Many of the underlying justifications apply equally to judicial settlements.[592] It may even be that the case for disclosure of judicial settlements is stronger than that for settlements of administrative enforcement actions. After all, administrative settlements might not impose binding obligations on the agency—precisely the feature emphasized above and the essential reason for treating such settlements as agency legal materials. In addition, judicial settlements are fewer in number and thus their regular, affirmative disclosure would be less burdensome.

Finally, disclosure of judicial settlements is consistent with longstanding DOJ policy and internal regulations:

> It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of

590. *Id.*

591. Adoption of Recommendations, 88 Fed. Reg. 2312, 2315-16 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-6).

592. ACUS observes in its Recommendation the following:

> Unlike final orders and opinions issued in the adjudication of cases, settlement agreements ordinarily do not definitively resolve disputed factual and legal matters, authoritatively decide whether a violation has taken place, or establish binding precedent. Nevertheless, public access to settlement agreements can be desirable for several reasons. First, disclosure of settlement agreements can help regulated entities and the general public understand how the agency interprets the laws and regulations it enforces and exercises its enforcement authority. Second, public access to settlement agreements can help promote accountable and transparent government. The public has an interest in evaluating how agencies enforce the law and use public funds. By disclosing how agencies interact with different regulated entities, public access may also help guard against bias. Third, high-profile settlements, such as those that involve large dollar amounts or require changes in business practices, often attract significant public interest. Fourth, the terms of a settlement agreement may also affect the interests of third parties, such as consumers, employees, or local communities.

Id. at 2315 (preamble) (footnote omitted).

> openness in government and is consistent with the Department's policies regarding openness in judicial proceedings and the Freedom of Information Act.[593]

We therefore recommend that settlement agreements entered into in the course of litigation be expressly included in FOIA's affirmative disclosure provisions, as set out in the conclusions section at Recommendation 3.

E. Presidential Directives

Presidential directives in various forms and carrying various designations often compel action by an agency or agencies in a coordinated fashion.[594] In doing so, they constrain agency action in a manner that brings them within our definition of legal materials. [595]

Perhaps surprisingly, given varied contemporary sensibilities about separation-of-powers issues, the Federal Register Act explicitly includes the President within its definition of "federal agency," along with the other entities within the executive branch.[596] Section 1505 of the Act requires the President and his staff to submit two types of presidential directives—those designated as proclamations or executive orders—to the Office of the Federal Register (OFR) for publication.[597] That section, however, also exempts from publication directives that (1) govern only the conduct of federal agencies or personnel or (2) lack "general applicability and legal effect."[598]

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593. 28 C.F.R. § 50.23(a) (2023) (citations omitted); *see also* 28 C.F.R. § 50.9 (2023) (DOJ policy with regard to open judicial proceedings).

594. This discussion excludes oral directives either directly or indirectly from the President, and communications signed by officials heading offices within the Office of the President. Many of the President's oral directives may be issued privately, though there are exceptions. *See, e.g.*, Address to the Nation on Stem Cell Research, 2 Pub. Papers 953 (Aug. 9, 2001).

595. A leading commentator observed generally that most presidential directives "establish policy, and many have the force of law." HAROLD C. RELYEA, CONG. RSCH. SERV., 98-611 GOV, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 2 (Nov. 26, 2008). Unlike most "law" with which this report is concerned, presidential directives addressed to agencies are "enforced" only by the President's potential exercise of the removal power; they are not judicially enforceable. A fractured D.C. Circuit panel has held that an executive order can relieve the agency of a duty to respond to comments that conflict with a course of action required by an executive order. Sherley v. Sibelius, 689 F.3d 776, 785 (D.C. Cir. 2012); see Daphne Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2255 (2018).

596. 44 U.S.C. § 1501 (stating that, "Within the Federal Register Act, 'Federal Agency' or 'Agency' means the President of the United States").

597. 44 U.S.C. § 1505.

598. *Id.*

1. Taxonomy of Presidential Directives

The leading taxonomy of presidential directives appears in a 2008 Congressional Research Service report[599] that categorizes directives based on their official designations. But as one commentator has noted, sorting presidential directives into "separate and distinct 'types'" by document heading can be "misleading."[600] Indeed, the Department of Justice considers all presidential directives to have equal "legal" effectiveness, regardless of designation or form.[601] Moreover, all remain in effect until revoked, thus surviving the end of the issuing President's administration.[602]

Although all presidential directives may have the same legal effect, there are historical designations worth understanding. To begin, "executive orders" and "proclamations" are the most commonly used and discussed presidential directives.[603] The Federal Register Act expressly references these two types of presidential directives.[604] As between the two labels, the classic distinction between executive orders and proclamations appeared in a 1957 House Committee Report: executive orders are directed to and govern the conduct of Executive Branch officials, while proclamations affect primarily the activity of private individuals.[605]

Presidents appear to use executive orders to promote their policies and publicize their actions. Thus, they are regularly published in the *Federal Register* and made available on whitehouse.gov.[606] Executive orders sometimes order actions with some specificity.[607] At other times, the orders direct agencies to develop a plan of action for agencies or officials to pursue a general policy.[608] Often, the executive order will require implementation by one or more agencies.

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599. RELYEA, CONG. RSCH. SERV., *supra* note 595.

600. TODD GAZIANO, THE HERITAGE FOUND., THE USE AND ABUSE OF EXECUTIVE ORDERS AND OTHER PRESIDENTIAL DIRECTIVES 11 (2001). Moreover, several types of directives may be issued simultaneously in coordinated fashion to give effect to a single policy initiative. *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 132–35, 155–56, 163–64 (2d ed. 2014).

601. Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (Jan. 29, 2000). *See generally* Wolsey v. Chapman, 101 U.S. 755, 770 (1879); COOPER, *supra* note 600, at 172.

602. Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order, *supra* note 601.

603. COOPER, *supra* note 600, at 21.

604. 44 U.S.C. § 1505.

605. H. COMM. ON GOV'T OPERATIONS, 88TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF THE USES OF PRESIDENTIAL POWERS 1 (Comm. Print 1957); *see* COOPER, *supra* note 600, at 21.

606. Indeed, they are sometimes issued primarily to show President is taking some action or embracing a position his supporters or the general public desires. *See* COOPER, *supra* note 600, at 65–73.

607. *See, e.g.*, Exec. Order No. 12,954, 60 Fed. Reg. 13023 (Mar. 8, 1995).

608. *See, e.g.*, Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 13, 2022).

Most, if not virtually all, executive orders provide that they do not "create any right or benefit, substantive or procedural, enforceable at law or in equity by any party" against any governmental entity, personnel, or agents.[609] Similarly, courts have generally refused to recognize private rights of action to enforce agencies' obligations under executive orders.[610]

Among the many functions executive orders can serve,[611] Presidents use them as "mechanisms of regulation . . . of businesses or citizens, through the technical device of orders to government officials."[612] They also can serve as a means for Presidents to act when Congress fails to enact proposed legislation.[613] Thus, executive orders often have a consciously "regulatory" effect, even if directed at the manner in which agencies conduct their proprietary functions.[614]

Executive orders directed toward agency contracting or grant-making decisions will often have profound impacts on current or potential contractors' and grantees' activities.[615] Take for example, the executive order at issue in *Chamber of Commerce v. Reich,*[616] Executive Order No. 12,954.[617] The order mandated that agencies not contract with companies that "permanently replace lawfully striking employees."[618] The order, nominally directed at government entities, was intended to establish a "balance" between workers and employers in the private sector. As the D.C. Circuit noted in its invalidation of the order: "It does not seem to us possible to deny that the President's Executive Order seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers."[619]

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609. The quoted language in this sentence constitutes boilerplate terminology disclaiming judicial enforceability that can be found at the end of most executive orders. *See* Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 61 n.72 (2017).

610. *See, e.g.*, Zhang v. Slattery, 55 F.3d 732, 747–48 (2d Cir. 1995); Facchiano Constr. Co., v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993), *cert. denied*, 510 U.S. 822, (1993). *See generally* COOPER, *supra* note 600, at 110.

611. See COOPER, *supra* note 600, for such an enumeration.

612. *Id.* at 33.

613. *Id.* at 79-84; *see* Jeffrey A. Fine & Adam L. Warber, *Circumventing Adversity: Executive Orders and Divided Government*, 42 PRESIDENTIAL STUD. Q. 256, 258–61 (2012) (reviewing literature). For a comprehensive study of executive orders and how they come to be issued, see ANDREW RUDALEVIGE, BY EXECUTIVE ORDER: BUREAUCRATIC MANAGEMENT AND THE LIMITS OF PRESIDENTIAL POWER (2021).

614. COOPER, *supra* note 600, at 33–35.

615. *See, e.g.*, Chamber of Com. v. Reich, 74 F.3d 1322, 1332–33 (D.C. Cir. 1996).

616. *Id.* at 1322.

617. 60 Fed. Reg. 13023 (Mar. 8, 1995).

618. *Id.* at 13023.

619. *Chamber of Com.*, 74 F.3d at 1337. Of course, the most prominent rejection of an executive order was *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Some executive orders are "structural," seeking to change the manner in which a wide array of agencies consider issues over time and can sometimes be relatively stable.[620] Others direct specific actions or policy development that can be completed by means of agency action within a relatively short timeframe.

On the other hand, presidential proclamations are often commemorative and celebratory, and thus are usually viewed as trivial edicts.[621] However, proclamations are also the classic vehicle for direct presidential regulation of the conduct of private persons and entities. Indeed, proclamations can be the *required* vehicle for the President to take some action authorized by statute.[622] Increasingly, statutes require "presidential determinations," most often made by memoranda.[623] In certain instances, Congress has required the president to publish those determinations in the *Federal Register*.[624]

Beyond the two categories of directives named in the Federal Register Act—executive orders and presidential proclamations—Presidents will often sign less frequently discussed forms of commands, including national security directives, presidential memoranda, letters about tariffs and international trade, military orders, findings (statutorily required for covert operations), and administrative orders.

First, national security directives have their genesis in the formation of the National Security Council (NSC) in 1947. NSC "policy papers" eventually evolved into signed presidential policy mandates.[625] National security directives can be defined as "a formal notification" to relevant agency officials of "a presidential decision in the field of national security affairs" that requires follow-up action by those agency officials.[626] Decision directives are "definitive statements of presidential policy that supersede any agency interpretations of presidential policy,"

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620. *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (regulatory review); Exec. Order No. 13,132, 3 C.F.R. 206 (2000) (federalism); Exec. Order No. 13,526, 3 C.F.R. 298 (2010) (classified national security information); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (environmental justice) *amended by* Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Feb. 1, 1995).

621. COOPER, *supra* note 600, at 135-36, 142.

622. *See, e.g.*, 19 U.S.C. § 1338 (custom duties on countries that discriminate against American commerce); 22 U.S.C. § 445 (banning travel on vessels of states that become belligerent); 21 U.S.C. § 18 (suspending importation of adulterated articles); 22 U.S.C. § 441 (proclaiming a state of war between foreign states); 22 U.S.C. § 447 (banning financial transactions with designated foreign governments). Indeed, *U.S. v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936), involved a resolution making arms sales illegal upon a presidential proclamation declaring that "the prohibition of the sale of arms . . . to . . . [combatants] in the Chaco may contribute to the reestablishment of peace." *Id.* at 312.

623. COOPER, *supra* note 600, at 86; *see, e.g.*, 19 U.S.C. § 4082; 22 U.S.C. § 5604 (use of chemical weapons).

624. *See, e.g.*, 22 U.S.C. § 2414 (requiring publication of determination in the *Federal Register*).

625. RELYEA, CONG. RSCH. SERV., *supra* note 595, at CRS–8 to 9. NSDs are issued through the National Security Council (NSC). Vikki Gordon, *The Law: Unilaterally Shaping U.S. National Security Policy: The Role of National Security Directives*, 37 PRESIDENTIAL STUD. Q. 349, 350 (2007).

626. BROMLEY K. SMITH, ORGANIZATIONAL HISTORY OF THE NATIONAL SECURITY COUNCIL DURING THE KENNEDY AND JOHNSON ADMINISTRATIONS 23 (1988); COOPER, *supra* note 600, at 208.

and "enumerate steps to be taken . . . to implement the announced policy."[627] Study directives and the associated studies they prompt provide key information that leads to policy decisions.[628] In contrast to executive orders and proclamations, these various kinds of national security directives need not be, and rarely are, published in the *Federal Register*, as they are often classified at the highest level of protection. Many become available to the public after many years have elapsed, usually at the official library of the President who approved them in the first place.[629]

Second, "presidential memoranda" are presidential pronouncements nominally directed at executive-branch officials that have been labeled as "memoranda."[630] Memoranda are now the functional equivalent of executive orders,[631] but are not by that term expressly subject to the requirements governing the promulgation of executive orders set forth in Executive Order 11,030.[632]

No particular procedure is needed to issue a presidential memorandum.[633] Presidential memoranda are not routinely published in the *Federal Register,* nor are they indexed.[634] They are, however, included in the *Compilation of Presidential Documents.*[635] Moreover, presidential memoranda are sometimes issued in conjunction with executive orders. Public administration scholar Phillip Cooper has observed that

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627. *Digital National Security Archive (DNSA): Presidential Directives on National Security, Part II: From Truman to George W. Bush*, PROQUEST: LIBGUIDES (May 6, 2024, 10:51 AM), https://proquest.libguides.com/dnsa/presidential2.

628. *Id.* Across administrations, national security directives have been at varying times referred to by different names. *See* RELYEA, CONG. RSCH. SERV., *supra* note 595, at 8–12; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSIAD-92-72, NATIONAL SECURITY: THE USE OF PRESIDENTIAL DIRECTIVES TO MAKE AND IMPLEMENT U.S. POLICY 1–2 (1992); *Presidential Directives and Executive Orders*, FED'N OF AM. SCIENTISTS, https://fas.org/irp/offdocs/direct.htm; Gordon, *supra* note 625, at 349–67. In the wake of the September 11, 2001, attacks, for example, President George W. Bush created homeland security directives to serve purposes similar to national security directives. Elec. Priv. Info. Ctr. v. NSA, 988 F. Supp. 2d 1, 12–13 (D.D.C. Oct. 21, 2013).

629. RELYEA, CONG. RSCH. SERV., *supra* note 595, at 9. Sometimes agencies have provided them. *E.g.*, Elec. Priv. Info. Ctr., 988 F. Supp. 2d, at 13.

630. COOPER, *supra* note 600, at 120.

631. *Id.* One example is George W. Bush's memo on the implementation of the Vienna Convention, which the U.S. Supreme Court ultimately found to have no effect because the Convention was not self-enforcing and thus its implementation required congressional action. *See* COOPER, *supra* note 600, at 157–58; Medellin v. Texas, 552 U.S. 491 (2008). Another example is President Barack Obama's presidential memorandum dated January 21, 2009, adopting a presumption in favor of disclosure to FOIA Act requests. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009). That approach was ultimately codified in the Freedom of Information Act Improvement Act of 2016.

632. Exec. Order No. 11,030, 27 Fed. Reg. 5847 (June 19, 1962) *as amended by* Exec. Order No. 11,354, 32 Fed. Reg. 7695 (May 23, 1967); Exec. Order No. 12,080, 43 Fed. Reg. 42235 (Sept. 18, 1978); Exec. Order No. 12,608, 52 Fed. Reg. 34617 (Sept. 9, 1987); Exec. Order No. 13,403, 71 Fed. Reg. 28543 May 12, 2006); Exec. Order No. 13,683, 79 Fed. Reg. 75041 (Dec. 11, 2014).

633. COOPER, *supra* note 600, at 147.

634. *Id.* at 147–48.

635. *Id.* at 148.

the public can be misled when a simultaneously issued memorandum appears to trump an executive order "by significantly altering its nature and importance."[636]

One common feature among all presidential directives is that they continue to apply until revoked. Often Presidents will expressly revoke executive orders or terminate their effect. But in the Department of Justice's view, a president is not bound by a presidential directive, and thus the Department views any departure from an extant directive as a modification or waiver of that directive.[637]

Several commentators have argued that such tacit presidential departures from executive orders constitute a particularly pernicious form of "secret law."[638] The issue arose most prominently in 2007, when an Office of Legal Counsel opinion stated that a President could act contrary to an executive order without violating it, and that, instead, such an action would implicitly modify or waive the relevant executive order's requirements.[639] This revelation prompted at that time the introduction of legislation responsive to this situation, although this legislation did not pass.[640]

Even when there may be no conscious intent to keep tacit departures from presidential directives confidential, the informality of a rescission by departure—and, for that matter, the informality of the promulgation of some other forms of presidential directives—can cause confusion. In one well-known example, President Lyndon Johnson signed a presidential memorandum on polygraph testing of executive branch officials and staff. Yet despite being signed by the President, it was not clear whether the memorandum ever became effective because the document was not distributed. And even if it had become effective, the memoranda may later have been implicitly rescinded based on directions President Johnson delivered to his subordinates.[641]

In criticizing the potential implicit modification of executive orders by acting contrary to their terms, one commentator has observed, "[n]ot only are

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636. *Id.* at 163.

637. In 2007, Senator Sheldon Whitehouse gave a speech on the Senate floor disclosing three declassified conclusions from secret Office of Legal Counsel opinions on the nature of presidential power. The first conclusion read: "An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it." 153 CONG. REC. 33492, 33494 (daily ed. Dec. 7, 2007) (statement of Sen. Sheldon Whitehouse).

638. *See, e.g.*, GOITEIN, *supra* note 36; *Secret Law And The Threat To Democratic And Accountable Government Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 1-3 (2008) (Statement of Sen. Feingold); *id.* at 11-13 (Statement of J. William Leonard, Former Dir., Info. Sec. Oversight Off.); Manes, *supra* at 40, at 846 ("The President's discretion goes beyond issuing secret directives and extends even to secretly modifying *public* directives.").

639. GOITEIN, *supra* note 36, at 36.

640. *See* Executive Order Integrity Act of 2008, S. 3405, 110th Cong. (2008). A bill by that name was reintroduced in the 111th Congress without passing, but it does not appear to have been reintroduced since.

641. Status of Presidential Memorandum Addressing the Use of Polygraphs, 33 Op. O.L.C. 114 (2009). It is not clear how often such confusion occurs.

members of the public unaware of the true state of the law; they are actively misled, as the law that has been modified or waived remains, unaltered, on the books."[642] We have made no recommendation with regard to this potentially serious breach of the principle that "law" should be transparent because we cannot determine whether the two incidences discussed above are isolated circumstances.

2. Analysis of Publication Requirements

The Federal Register Act requires publication of all "Presidential proclamations and Executive orders."[643] An unpublished presidential directive is not "valid as against a person who has not had actual knowledge of it."[644] But the Act does provide three exceptions to its publication requirement. First, the requirement "does not apply to treaties, conventions, protocols, and other international agreements, or proclamations thereof by the President."[645] The other two exceptions, more notable for our purposes, work in tandem to exempt from the publication requirement any order or proclamation that lacks general applicability and legal effect *directly* upon members of the public. The second exception excludes those proclamations or orders "not having general applicability and legal effect."[646] The third exempts proclamations or orders that are "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof."[647] Together, these exceptions almost swallow the rule.

Proclamations and executive orders, by their very nature, certainly appear to have "general applicability" and they may well be intended to have "legal effect," albeit by way of agency implementation. But most, if not virtually all, executive orders are both (a) directed solely at federal officials and (b) contain language disavowing any judicial enforceability.[648] When orders are directed only at federal officials, they

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642. GOITEIN, *supra* note 36, at 36.

643. 44 U.S.C. Chapter 15. The Act came about largely as a result of difficulties caused by executive orders, COOPER, *supra* note 600, at 22. In *Panama Refining v. Ryan*, 293 U.S. 388 (1935), the Court noted that the government's position was based on a subsequently repealed executive order, due to the President's "failure to give appropriate public notice of the change." *Id.* at 412.

644. 44 U.S.C. § 1507.

645. 44 U.S.C. § 1511. Sources of international law have an increasing impact on domestic law and might well have implications for how the government treats private parties, even if the international agreement does not formally "bind" private persons. However, the mechanism for disseminating such materials to the public is quite different and is largely under control of the U.S. Department of State. For a critique of that process, see Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime For Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629 (2020).

646. 44 U.S.C. § 1505(a)(1).

647. *Id.*

648. A strict reading of 44 U.S.C. § 1505 would appear to exclude almost all executive orders because they almost invariably include boilerplate language, such as: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents,

are arguably not of "general applicability," but applicable only to government. (By contrast, the Act stipulates that any directive or order that "prescribes a penalty," presumably on those outside of government, does have "general applicability and legal effect."[649]) When an executive order expressly disavows the creation of any legal rights or privileges and precludes judicial review, it is less clear whether it can ever be said to have "legal effect." Finally, orders directed at federal agencies clearly fall into the exception for orders that are "effective only against Federal agencies."

Although these exemptions in the Federal Register Act could provide a plausible basis for refraining from publishing most if not all executive orders, presidents have rarely invoked the Act's exemptions to avoid *Federal Register* publication of their executive orders and proclamations.[650] This practice reflects both prevailing norms and incentives. Wide distribution of and attention to these presidential statements—many of which have primarily symbolic importance—advances a President's interests. Publication of this presidential material serves as a form of public relations.[651]

As a result, courts have had virtually no occasion to construe the Act in the context of presidential directives. Were this to change, two issues might arise: (1) whether a specific presidential directive is of general effect or merely has limited, particularized effects, and (2) whether a specific directive in question has "legal effect" or merely constitutes an internal management rule. Not many judicial decisions address these issues, and most arise in the context of legal materials created by agencies rather than from presidential directives themselves.[652] Yet these types of distinctions have given rise to difficulty in the APA and FOIA contexts.[653] Refusals to apply general rules to particular individuals might be important to increase public awareness about whether presidential directives mean what they appear to say.[654]

The Federal Register Act's provisions on presidential directives have not been updated in almost ninety years and thus they do not reflect the evolution of

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or any other person." *See supra* note 609 and accompanying text. Moreover, if they have any "legal" effect at all it would be only upon the government agencies and officials to whom the order is directed.

649. 44 U.S.C. § 1505(a)(3).

650. GOITEIN, *supra* note 36, at 35.

651. Executive orders also appear to be accessible at the whitehouse.gov website. However, with each change in administration, some of the content of the website from the prior administration is taken down.

652. This same issue is discussed in *Chamber of Commerce v. Reich*. 74 F.3d 1322 (D.C. Cir. 1996) (overturning executive order directing the Secretary of Labor to mandate that no federal contractor could employ strike-breakers, finding that the executive order was "regulatory" in nature); *see also* GAZIANO, *supra* note 600 (stating that some "directives may have a direct and predictable effect on the rights of parties outside the government" even though phrased as directives to agencies).

653. As Congress has concluded in the FOIA context, an order, etc. directed at one entity may well have general effect because it may control that entity's interaction with a large number of people who are thus affected by that order. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, *supra* note 59.

654. *See supra* notes 639-42 and accompanying text (discussing implied revocation of presidential directives).

presidential directive designations, most notably the increased use of the "presidential memorandum." As detailed in Recommendation 9 in Part IV.A of this Article, we urge Congress to create a content-based, rather than designation-based, publication requirement.[655] In addition, we recommend repealing the exemption from publication for executive orders effective only against government actors because, again, this exempts most or all executive orders from publication. Executive orders are, almost invariably by their terms, "effective against" only federal officials—even though these orders often call upon agency officials to consider imposing or implementing legal obligations on private persons or entities. When a statute has the same effect of requiring an agency to adopt regulations instead of regulating private entities directly, this does not exempt Congress from its affirmative duty to make the law public. Legislation must be published whether it has direct or indirect effects on the public. Executive orders function in the same manner and have much the same impact. The mere fact that they are directed at federal agencies should not exempt executive orders from the requirement of affirmative disclosure.

Even when executive orders are published in the *Federal Register*, finding a particular, relevant executive order can be difficult. These orders have been gathered in a topical codification only twice.[656] Without codification, executive orders are made available online in chronological order only. But "the mere chronological listing of executive decrees is of little help, since the sheer volume of information is overwhelming," making it "often quite difficult to find all the relevant authoritative announcements applicable to a particular agency or program."[657] It is ironic that the lack of up-to-date codification makes it difficult for government officials and the public to locate applicable presidential directives because this is a problem not entirely dissimilar to the government's problem in the *Panama Refining* litigation,[658] which prompted enactment of the Federal Register Act in the first place.[659] Today, the difficulty in accessing executive orders results from the lack of any up-to-date compilation, or even comprehensive indexing, of presidential directives. In Part IV.B of this Article on how materials should be disclosed, we offer Recommendation 14 on the organization of presidential directives, calling upon Congress to direct the Office of the Federal Register to study how directives could be arranged to facilitate improved public access to all provisions of presidential directives relevant to a particular issue.[660]

When it comes to FOIA, its provisions do not apply to the President, but they can apply to some components within the Office of the President. The APA's

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655. See *infra* Part IV.A.

656. COOPER, *supra* note 600, at 24-25.

657. *Id.* at 24; *see also id.* at 148 (discussing presidential memoranda).

658. 293 U.S. 388. *See supra* note 643.

659. *See supra* note 643 and accompanying text.

660. *See infra* Part IV.B.

definition of "agency,"[661] which FOIA incorporates and slightly expands,[662] does not specifically address the President or the Office of the President. Nevertheless, the Supreme Court has held that the definition excludes the President, fearing that a broader view would raise separation of power issues.[663]

However, in response to litigation over FOIA's applicability to various offices within the Office of the President, in particular *Soucie v. David*,[664] Congress amended FOIA to cover some offices within the Office of the President.[665] In particular, the revised definition of "agency" encompasses "any administrative unit with substantial independent authority in the exercise of specific functions," but it does not include "the President's personal staff" or "units whose sole function is to advise and assist the President."[666]

Notwithstanding FOIA's limited applicability to the President, it might nevertheless reach presidential documents transmitted to agencies (as presidential directives almost invariably are) and retained in the recipient agencies' files. Although documents received from the President do not appear to fall under the requirements for FOIA's proactive disclosure provisions,[667] these documents might be subject to release by the recipient agency under FOIA's reactive disclosure regime. In several cases involving national security directives, the courts have been called upon to determine whether such directives are publicly disclosable.[668] Interestingly, one court has found "appealing" the argument that such secret national security directives constituted "secret law" that must be disclosed, but nevertheless rejected the argument based on precedent.[669]

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661. 5 U.S.C. § 551.

662. 5 U.S.C. § 552(f).

663. Franklin v. Mass., 505 U.S. 788, 800-01 (1992). *But see* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63 (2020).

664. 448 F.2d 1067, 1073 (D.C. Cir. 1971).

665. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-5022, § 3, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552(f)). The Act revised the definition of "agency" to specifically include "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President) or any independent regulatory agency."

666. *Soucie*, 448 F.2d at 1073. A conference report for the FOIA Amendments of 1974 stated that "[w]ith respect to the meaning of the term "Executive Office of the President" [as part of the definition of 'agency'] the conferees intend[ed] the result reached in *Soucie v. David*." H.R. REP. NO. 93-1380, at 232 (1974) (Conf. Rep.).

667. Of course, this might not be so if they are documents that the agency expects multiple requesters to seek. 5 U.S.C. § 552(a)(2)(D)(ii).

668. Elec. Priv. Info. Ctr. v. NSA, 988 F. Supp. 2d 1, 8–12 (D.D.C. 2013), *vacated as moot*, (D.C. Cir. 2014); Ctr. for Effective Gov't v. U.S. Dep't of State, 7 F. Supp. 3d 16, 21 n.6 (2013); Ctr. for Nat'l Sec. Stud. v. Immigr. & Naturalization Serv., No. 87–2068, 1990 WL 236133 (D.D.C. Dec. 19, 1990); Halperin v. Nat'l Sec. Council, 452 F. Supp. 47, 48-49 (D.D.C. 1978).

669. GOITEIN, *supra* note 36, at 32–35.

Two doctrines complicate FOIA requesters' efforts to obtain documents that an agency receives from the President. Under FOIA, an agency need provide only documents within its control.[670] Some documents within the agency's possession may not be considered under its "control,"[671] as when it receives documents from FOIA-exempt entities, such as certain units within the Office of the President and congressional committees.[672]

Even if a FOIA requester surmounts that hurdle, the courts appear to have recognized a presidential communications privilege in the context of FOIA.[673] The privilege protects "'communications directly involving and documents actually viewed by the President,' as well as documents 'solicited and received' by the President or his 'immediate White House advisers.'"[674] It is "inextricably rooted in the separation of powers."[675] The communications privilege "'applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.'"[676]

Other FOIA exemptions may also prove important with respect to requiring disclosure of presidential directives in agency files, such as the exemption for classified documents. However, the "foreseeable harm" standard applies to agency decisions to withhold presidential directives.

The Presidential Records Act (PRA)[677] establishes a somewhat complex matrix of provisions governing public access to presidential documents after a

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670. U.S. Dep't of Just. v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

671. Kissinger v. Reps. Comm. for Freedom of Press, 445 U.S. 136, 157 (1980) (declining to hold that mere physical location of papers and materials could confer status as an "agency record").

672. In assessing the level of control exercised by a FOIA-exempt entity the D.C. Circuit has primarily looked to the intent of the entity manifested at the time of transfer and the clarity of that intent with respect to the documents subject to the FOIA request. *See, e.g.*, Goland v. CIA, 607 F.2d 339, 347-48 (D.C. Cir. 1978); United We Stand Am., Inc. v. IRS, 359 F.3d 595, 600-03 (D.C. Cir. 2004); Jud. Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 218-21 (D.C. Cir. 2013).

673. *See, e.g.*, Loving v. Dep't of Def., 550 F.3d 32, 37–38 (D.C. Cir. 2008) (holding, without specifically addressing threshold, that exemption 5 "incorporates" presidential communications privilege); Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108 (D.C. Cir. 2004) (applying the presidential communications privilege to protect Department of Justice records pertaining to the President's exercise of his constitutional power to grant pardons). The privilege has most often been discussed in the civil discovery context, with *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), being the seminal D.C. Circuit case. The Court also recognized "executive privilege" in *United States v. Nixon*, but it held that the privilege must give way in certain circumstances. 418 U.S. 683 (1974). More recently, however, in *Trump v. United States*, the Supreme Court has held that Presidents' discussions with Justice Department officials are effectively afforded absolute protection from their use in criminal prosecutions and that communications with other federal officials are at least to some degree presumptively protected from being used in prosecutions involving presidential conduct. 603 U.S. __ (2024) (slip opinion).

674. *Loving*, 550 F.3d at 37–38; *Jud. Watch*, 365 F.3d at 1114-15.

675. *Jud. Watch*, 365 F.3d at 1113 (quoting *Nixon*, 418 U.S. at 708).

676. *Jud. Watch*, 365 F.3d at 1113 (quoting *In re Sealed Case*, 121 F.3d at 745).

677. 44 U.S.C. §§ 2201–2209.

president leaves office.[678] The matrix includes both special PRA exemption provisions[679] (applicable for twelve years at the most) and FOIA exemptions.

During the first five years after records are turned over to the Archivist, presidential records are unavailable to the public. During years five through twelve, both the FOIA exemptions (except exemption 5) and the special PRA exemptions apply. The applicability of the latter depends on how long the President specifies such records should be withheld.[680] After twelve years, the special PRA exemption categories no longer apply, and requests for records are handled solely pursuant to FOIA and its exemptions (save Exemption 5).[681]

Section 2204(a) sets forth six PRA exemptions, four of which directly track a FOIA exemption. The first protects properly classified documents, paralleling FOIA Exemption 1.[682] The second protects records "relating to appointments to Federal office," which has no counterpart among the FOIA exemptions.[683] The third protects records specifically preempted from disclosure by another statute, as does FOIA Exemption 3.[684] However, Exemption 3 requires that a statute purporting to preclude disclosure must specifically reference FOIA if the statute post-dates the FOIA Amendments of 2008. The PRA exemption has no equivalent limitation. The fourth PRA exemption protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential," paralleling FOIA Exemption 4.[685] The fifth protects "confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers."[686] This closely tracks the judicially recognized privilege of presidential communications. The final PRA exemption authorizes the President to protect "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," paralleling FOIA exemption 6.[687]

Because FOIA's exemption 3 and the PRA's exemption 3 are not congruent—apparently unintentionally so—and given the risk of future

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678. The Act does not provide for access to presidential documents before the end of a President's term.

679. 44 U.S.C. § 2204(a).

680. For example, if a President specifies that a record covered by a PRA exemption should be embargoed for eight years, it becomes available after eight years if it does not fall into an applicable FOIA exemption.

681. For a helpful chart, see NAT'L ARCHIVES & RECS. ADMIN., GUIDANCE ON PRESIDENTIAL RECORDS, at attach., Presidential Records Act of 1978, 44 U.S.C. 2201–2209, https://www.archives.gov/files/presidential-records-guidance.pdf.

682. 44 U.S.C. § 2204(a)(1).

683. *Id.* § 2204(a)(2).

684. *Id.* § 2204(a)(3).

685. *Id.* § 2204(a)(4).

686. *Id.* § 2204(a)(5).

687. *Id.* § 2204(a)(6).

amendments creating greater inconsistency, we recommend technical revisions to the PRA to ensure those exemptions intended to carry over from FOIA to the PRA remain identical going forward.[688]

Once a president has been out of office for twelve years, access to presidential records is solely governed by FOIA,[689] including, presumably, its "foreseeable harm" requirement. However, the PRA specifies that FOIA exemption 5, which incorporates the deliberative process privilege and the attorney-client privilege, cannot be invoked to withhold presidential records. Note, however, that all of these provisions speak to reactive disclosure. The PRA does not appear to require any affirmative disclosure of documents, even though nothing in the text of the PRA specifically makes FOIA's affirmative disclosure provisions inapplicable.

Despite some concerns that wading into presidential records of any kind may present separation of powers considerations that would not apply to legislation addressing other types of agency legal materials, our recommendations fall squarely within the ambit of the disclosure requirements Congress has already legislated with respect to presidential directives. Given that these materials fall within our definition of agency legal materials, we are comfortable suggesting largely technical changes to give full effect to Congress's intent in requiring disclosure of some of these materials.

III. METHODS OF DISCLOSURE OF AGENCY LEGAL MATERIALS

The final core issue goes to *how*, not *whether*, legal materials should be made public and how those obligations are enforced. What is, in Blackstone's words, "the most public and perspicuous manner" of notification?[690] In the pre-internet era, the most public and perspicuous technique was printing. To "publish" was to print. Accordingly, the original Federal Register Act, in a provision that still exists, provided that as a statutory matter (though, conceivably, not as a constitutional one), publication of a document in the *Federal Register* is by definition adequate notice of that document's existence and contents.[691] And because printing is expensive, the general understanding was that the government could charge for copies of the printed laws. Copies might be available for inspection at the agency, and federal depository libraries housed much important material, although these

688. *See* Part IV.A (Recommendation 10).

689. 44 U.S.C. § 2204(a).

690. *See supra* note 30 and accompanying text.

691. Federal Register Act of 1935, Pub. L. No. 74-220, § 7, 49 Stat. 500, 502 (1935) (originally codified at 44 U.S.C. § 307, currently codified as amended at 44 U.S.C. § 1507) (providing that "unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby"); *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384–85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.") (citing 44 U.S.C. § 307).

were still not "free" for those who needed to travel or make copies. But an agency was not obliged to distribute legal materials at no charge to the citizenry at large.

As technology has changed, however, so have assumptions about what it means to provide information or materials to the public. The "most public and perspicuous"[692] manner of publication is now posting online. But given the volume of information on agency websites, merely posting materials on a website is not enough. That information needs to be truly accessible.[693] If members of the public cannot find the specific agency legal materials they need, then that information is effectively still secret. For these reasons, agencies need to manage their disclosure of legal material with true accessibility in mind. This means ensuring that websites are well-organized, clearly labeled, and kept up to date. They also need to be equipped with effective and user-friendly finding tools, and they must be compatible with digital technologies that allow access to those members of the public who require accommodation because of differences in ability. And beyond these vital matters of *how* agencies should disclose legal materials online, we address the need for effective enforcement to create incentives for agencies to comply with these robust disclosure obligations. This section takes on these essential components of any reform.

A. Indexing and Searchability

In our discussion of disclosure of agency guidance documents in Part II.B, we detailed how agencies face a primary challenge of ensuring comprehensiveness in release, organization in presentation, searchability, and usability by the public. We also described one of the more successful legislative efforts in this arena, the FDA Modernization Act.[694] Here, we take the lessons learned from the Act and describe how they could be implemented to apply to all agencies and to all agency legal materials required to be disclosed to the public affirmatively. In our view, the legislative provisions governing FDA guidance provide a model for the core requirements that Congress could include in legislation that would apply to all agencies and for all agency legal materials required to be made affirmatively available to the public. These requirements include the following four components:

- *Agency management and procedures*. Each agency must develop internal records management procedures and conduct periodic reviews of its legal materials to ensure that it maintains online access to a comprehensive and current collection of such material.
- *Labeling and numbering protocols*. Each agency must develop and apply clear, uniform protocols for managing, labeling,

692. BLACKSTONE, *supra* note 30.

693. *See* Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENV'T & ADMIN. L. 1 (2012).

694. 21 U.S.C. § 371(h).

numbering, and displaying its legal materials online on a webpage dedicated to legal materials (although the dedicated page could provide links to other agency webpages, as appropriate). Agencies should be directed to include at least the following in their protocols:

a. Consistent nomenclature for classifying and describing different types of legal materials;
b. An agency-wide numbering system akin to the "regulatory identifier numbers" used to track legislative rules;[695]
c. Labels indicating the nature of the material, such as whether binding, nonbinding, precedential, or nonprecedential (along with definitions of the categories used); and
d. Procedures for displaying inoperative guidance and labeling any material that is no longer in effect because it has expired or has been withdrawn or superseded.[696]

- *Effective appeals mechanism*. Each agency must develop an "effective appeals mechanism" to ensure compliance with its procedures and record management practices.[697]
- *Agency regulation and definitional clarity*. Each agency should publish a regulation addressing the above three components of its internal process for developing, managing, and disclosing agency legal material. Although the legislation imposing this requirement should itself specify what types of material should be addressed in an agency regulation on legal material disclosure, it may also direct each agency to provide further clarity on the material that is (and is not) covered by the agency's records management and disclosure procedures.

In this section, we elaborate on the rationale for each of the above four components of the necessary agency practice of indexing and searchability.

1. Agency Management and Procedures

Given the large volume of agency legal materials that agencies can produce, it is clear that, if they are to provide comprehensive, current, accessible,

695. ACUS Recommendation 2019-3 provides a discussion of the value of agencies adopting a "guidance identifier number" system. *See* Adoption of Recommendations, 84 Fed. Reg. 38927, 38931 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3, Public Availability of Agency Guidance).

696. ACUS Recommendation 2021-7 provides a detailed set of recommendations about the treatment and labeling of inoperative guidance. *See* Adoption of Recommendation, 87 Fed. Reg. 1715, 1718 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-7).

697. We borrow the terminology of an "effective appeals mechanism" from Congress, which has directed the FDA to "ensure that an effective appeals mechanism is in place to address complaints that the Food and Drug Administration is not developing and using guidance documents in accordance with this subsection." 21 U.S.C. § 371(h)(4).

and comprehensible public availability to these materials, they will need effective internal management systems and internal controls for tracking and disclosing such material. A statutory requirement that agencies develop and implement their own internal affirmative disclosure plans and procedures for their legal materials would be an appropriate approach to take in order to promote their availability.

A requirement for agencies to develop their own internal plans and procedures has been part of other efforts to improve governmental transparency.[698] In other contexts, this approach is known as management-based governance, according to which relevant entities are "expected to produce plans that comply with general criteria designed to promote the targeted social goal."[699] Management-based governance is appropriate to address "problems where it is difficult to prescribe a one-size-fits-all solution" and where it is difficult to define or measure outcomes in a manner that could facilitate requirements stated in terms of a level of performance.[700] The sheer variety of agencies and agency materials, combined with the difficulty—if not impossibility—of assessing performance when records have not in fact been disclosed, meet the conditions for the suitability of a management-based approach to the public availability of agency legal materials.

In addition, the problem of ensuring affirmative disclosure of agency legal materials is, in significant respects, a management problem—namely, one of records management.[701] Records management requires the development of processes that facilitate the ongoing tracking and disclosure of agency legal materials. The Organization of Economic Cooperation and Development (OECD), for example, has noted that "[e]ffective government information websites need to be conceived as dynamic tools if they are to provide value for citizens over time."[702] Building a government website and disclosing information on it "should not be conceived as 'one-off' activities, [but] rather as a dynamic project that is sustainable over time."[703] The OECD specifically recommends the establishment of "a management/ coordination structure for collecting information to populate the information

698. *See, e.g.*, Exec. Order No. 13,392, 3 C.F.R. 216-20 (2006) (directing agencies to "review, plan, and report" to improve the online disclosure of agency information); Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3, Public Availability of Agency Guidance)("Agencies should develop written procedures pertaining to their internal management of guidance documents.").

699. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 694 (2003).

700. CARY COGLIANESE, ORG. FOR ECON. CO-OP. & DEV., GOV/PGC/REG(2008)5, MANAGEMENT-BASED REGULATION: IMPLICATIONS FOR PUBLIC POLICY 12 (2008), https://www.oecd.org/gov/regulatory-policy/41628947.pdf.

701. Coglianese, *supra* note 7, at 243 (explaining that "guidance availability is ultimately a managerial challenge for agencies").

702. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, EFFECTIVE GOVERNMENT INFORMATION WEBSITES: TOOLKIT FOR IMPLEMENTATION 35 (2023), https://www.oecd-ilibrary.org/governance/effective-government-information-websites_ac325b03-en.

703. *Id.* at 11.

website."[704] It would clearly be appropriate for Congress to require all federal agencies to take the affirmative, documented management steps needed to maintain and keep up-to-date their online repositories of legal materials—just as Congress did in the FDA Modernization Act.

In fact, Congress has already required agencies to undertake efforts that are, in broad strokes at least, similar to what it has specifically required of the FDA. The E-Government Act's provisions about agency websites require all agencies to "develop priorities and schedules for making Government information available and accessible," take public comment thereon, and post such "determinations, priorities, and schedules" to the web and include them in their annual E-Government Status Reports.[705] In other words, Congress has required agencies to think systematically about when and how they will post materials to their websites. Our own review of agency websites suggests that in the wake of the passage of the E-Government Act, a number of agencies did develop such determinations, priorities, and schedules. Although the Act requires agencies to update these determinations, priorities, and schedules "as needed,"[706] it would seem that few have done so.

2. Labeling and Numbering Protocols

It is not enough for agencies simply to make legal materials available on their websites. The material must be organized and labeled in a way that makes it possible to find it and for members of the public to understand what exactly it is. In short, it needs to be meaningfully accessible and comprehensible to the public. This is why ACUS has recommended not merely that policy statements and interpretive rules be posted online but that they should be "made available electronically and indexed, *in a manner in which they may readily be found*."[707] ACUS has also noted that:

> [T]he primary goal of online publication is to facilitate access to guidance documents by regulated entities and the public. In deciding how to manage the availability of their guidance documents, agencies must be mindful of how members of the public will find the documents they need. Four principles for agencies to consider when developing and implementing plans to track and disclose their guidance documents to the public include: (a) Comprehensiveness (whether all relevant guidance documents are available), (b) currency (whether guidance documents are up to date), (c) accessibility (whether guidance

704. *Id.* at 17.

705. E-Government Act § 207(f)(2)(A), 44 U.S.C. § 3501 note; *see also id.* § 202(g), 44 U.S.C. § 3501 note (requiring each agency to submit an annual E-Government Status Report to OMB).

706. *Id.* § 207(f)(2)(B), 44 U.S.C. § 3501 note. The Department of the Interior continues to post its priorities. Notably, legal materials receive top priority. *See Schedule of Content*, DEP'T OF THE INTERIOR, https://www.doi.gov/notices/soc.

707. Adoption of Recommendations, 82 Fed. Reg. 61728, 61737 (Dec. 29, 2017) (emphasis added).

> documents can be easily located by website users), and (d) comprehensibility (whether website users are likely to be able to understand the information they have located).[708]

These same principles can and should apply to all types of agency legal materials.

The provisions in the FDA Modernization Act that call for uniform nomenclature and proper labeling of guidance materials are helpful guidance for legislation that could direct agencies to meet these objectives. Future legislation applicable to all agencies should follow the terms of the Act and require that all agencies adopt measures that will ensure that members of the public can readily search for and find relevant legal materials, such as through clear labeling, numbering, and indexing.

To facilitate the searchability of and meaningful access to agency legal materials, agencies should be required to adopt a system by which each record is assigned a "unique identification number[]."[709] In its online guidance database adopted following the passage of the FDA Modernization Act, the FDA followed such a practice for its guidance documents. In Recommendation 2019-3, ACUS recommended that all agencies assign identifier numbers to their guidance documents.[710] ACUS stated that "[o]nce a guidance identification number has been assigned to a guidance document, it should appear on that document and be used to refer to the document whenever it is listed or referenced on the agency's website, in public announcements, or in the *Federal Register* or the Code of Federal Regulations."[711]

This recommendation was put into effect with the now-revoked Executive Order 13,891.[712] The OMB guidance issued for implementing Executive Order 13,891 explained the use of such number as follows:

> The agency should develop a system that will allow a member of the public easily to search for and locate a specific guidance document by its unique identifier. This identifier can be a series of letters and numbers and should be preceded by a well-known acronym for the agency.[713]

A variety of agencies have now adopted these numbering practices for some of their guidance material. But to ensure that the public can track and find such material across the federal government, a similar requirement for unique identifiers should become part of any legislation directed at all agencies.

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708. Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3).

709. *Id.*

710. *Id.*

711. *Id.* (bold and italics fonts adjusted).

712. Exec. Order No. 13,891, 3 C.F.R. 371 (2020).

713. Mancini Memo, *supra* note 331, at 6.

An additional facet of labeling comes into play for any agency legal material that has become inoperative. For example, in Recommendation 2019-3, on the public availability of guidance documents, ACUS recommended that documents that have become no longer operative be labeled as such:

> To the extent a website contains obsolete or modified guidance documents, it should include notations indicating that such guidance documents have been revised or withdrawn. To the extent feasible, each guidance document should be clearly marked within the document to show whether it is current and identify its effective date, and, if appropriate, its rescission date. If a guidance document has been rescinded, agencies should provide a link to any successor guidance document.[714]

And if that recommendation were not itself enough, ACUS, in 2021, reinforced the value of having agencies provide access to and clarity about their inoperative guidance by adopting a recommendation dedicated specifically to public availability of inoperative guidance documents.[715] These same requirements should apply to all agency legal materials, as the principles of currency and comprehensiveness are relevant across the variety of kinds of materials we address in this Article.

3. Effective Appeals Mechanism

Any set of requirements directing agencies to ensure meaningful public access to agency legal materials will only be meaningful if agencies have an incentive to remain conscientious about tracking and disclosing what can be for many agencies rather voluminous material. In other contexts when consistent management must be sustained over time, research indicates a tendency of organizations to grow lax in their vigilance.[716] When it comes to information disclosure in particular, it has been acknowledged even by agency FOIA officials that "'[t]here really isn't an incentive' for agencies to proactively disclose records."[717]

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714. Adoption of Recommendations, 84 Fed. Reg. 38927, 38933 (Aug. 8, 2019 (Administrative Conference Recommendation 2019-3).

715. Adoption of Recommendation, 87 Fed. Reg. 1715, 1718 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-7).

716. *See, e.g.*, Cary Coglianese & Jennifer Nash, *Compliance Management Systems: Do They Make a Difference?*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE 571 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

717. KWOKA, *supra* note 6, at 179 (quoting Interview with Dr. James V.M.L. Holzer, Deputy Chief FOIA Officer, Jimmy Wolfrey, Senior Dir., FOIA Operations and Mgmt. & Amy Bennett, Public Liaison, U.S. Dep't of Homeland Sec., in Wash. D.C. (June 5, 2019) (alteration in original)); *see also* Herz, *supra* note 5 (arguing that "FOIA's fundamental limitation is its failure to impose affirmative responsibilities on agencies").

We deal further with the issue of agency incentives in Part III.B below, but we introduce the issue here because agencies' internal procedures for document management, indexing, and disclosure will ultimately depend on agencies' commitment to ongoing vigilance in maintaining a complete online catalog of their legal materials. As we note here, and elaborate further in Part III.B, such vigilance can be reinforced by externally imposed incentives, such as through judicial review. But agencies can and should also create their own internal "appeals" mechanisms that leverage public interest in agency legal material to help reinforce internal document management practices. Agencies can improve their document management and disclosure if they provide points of contact and procedures for members of the public to flag missing material and "appeal" to an agency to make such material available online. It is for this reason that we follow Congress's approach in the FDA Modernization Act and urge that agencies include an "effective appeals mechanism" as part of their overall framework for the management and disclosure of agency legal material.

Agencies are already required periodically to "index" their legal material.[718] This requirement, in principle, can help ensure that agencies do make all of their material available online, as well as provide the public with a benchmark against which to determine if all of an agency's legal material is available online.[719] But the requirement has not been taken to impose a requirement of an actual inventory of material that should be made available online. Instead, "[t]he index requirement is met by any organizational system which substantially enables a member of the public to locate desired materials in the Reading Room"—such as by creating links to the documents.[720] It is also clear that, even with this requirement, widespread concerns persist that agencies are not posting online all the material that they should.[721]

As discussed in greater detail below in Part III.B of this Article, agencies need incentives to maintain their systems of affirmative disclosure of information. When it comes to legislative rules, that incentive is built into the requirement for their publication in the *Federal Register*, as "a person may not in any manner be required to

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718. 5 U.S.C. § 552(a)(2)(E) ("Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published."); *see also* Church of Scientology v. IRS, 792 F.2d 153, 159 (D.C. Cir. 1986); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *82 (W.D. Pa. Feb. 7, 2001).

719. A publicly available inventory would be a way to address what is sometimes known as the "requester's paradox"—namely, the problem that the public cannot know what information an agency has failed to disclose if it fails to disclose it. *See, e.g.*, Herz, *supra* note 5, at 585 n.36. Of course, the requirement for an inventory is by no means a guarantee that the paradox has been overcome, as the public may often have no way to determine if the inventory is complete.

720. *Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements*, U.S. DEPT. OF JUST. (July 26, 2021), https://www.justice.gov/oip/blog/foia-post-2008-guidance-submitting-certification-agency-compliance-foias-reading-room.

721. *See supra* Part II.B.2.

resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."[722] In other words, if the agency wants a court to enforce a legislative rule against an individual or private entity, it must be published.

A provision within Section 552(a)(2) seeks to structure a similar incentive for non-legislative rules and other agency material. It states that an agency "statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if it . . . has been indexed and either made available or published as provided by this paragraph; or . . . the party has actual and timely notice of the terms thereof."[723]

In a similar vein, the now-revoked Executive Order 13,891 provided that guidance documents not made available online could no longer be deemed in effect: "No agency shall retain in effect any guidance document without including it in the relevant [online] database . . . ."[724] OMB guidance made clear that each agency "should send to the *Federal Register* a notice announcing the existence of the new guidance portal and explaining that all guidance documents remaining in effect are contained on the new guidance portal."[725] By this notice, the agency was effectively rescinding all non-published guidance. The Executive Order stated that "[n]o agency may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts."[726]

These efforts to create a self-reinforcing incentive for the affirmative disclosure of guidance material, MOUs, nonprecedential opinions, enforcement records, settlement agreements, and legal advice do not work in the same way as they do for legislative rules. These other kinds of materials, after all, are already by definition not binding on an individual or private entity—or if they are, they are released to that one individual, but they are not binding on the public at large. An agency will always need to rely on a statute or legislative rule if it seeks to impose a requirement or penalty on a third party. The inability to rely on guidance or other nonbinding material is, as a legal matter, not the same kind of institutional handicap to an agency as is the inability to rely on legislative rules. The same is true for an individual determination that cannot be relied upon for a different individual.

As a result, what is needed is a method by which those who are affected by or interested in agency legal materials beyond legislative rules and precedential opinions could take action to compel compliance with statutory requirements for the management and disclosure of such material—that is, there is need for some "effective

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722. *See* 5 U.S.C. § 552(a)(1)(E); *see also* 5 U.S.C. § 553(d) (requiring publication of "a substantive rule" prior to its "effective date").

723. 5 U.S.C. § 552(a)(2).

724. Exec. Order No. 13,891, 3 C.F.R. 371 (2020).

725. Mancini Memo, *supra* note 331, at 1.

726. Executive Order 13,891, 3 C.F.R. 371 § 3(b) (2020).

appeals mechanism," to use the language of the FDA Modernization Act. New legislation applicable to all agencies could require agencies to develop and make public through a *Federal Register* notice a procedure for affected interests to file a petition to put online materials that are found not to be already published or to carry out other statutorily required records management steps.[727] Following an agency's response to such a petition, or if an agency fails to respond within a specified period, the statute could then afford a petitioner a right of action to seek judicial review—a matter which we address in greater detail in Part III.B below.

4. Agency Regulation and Definitional Clarity

Each agency's appeals mechanism, internal management procedures, and other management protocols can be announced to the public through a rulemaking. This is the process that the FDA undertook in developing its guidance document management and disclosure system following the passage of the FDA Modernization Act.[728] The notice-and-comment process affords each agency an opportunity to benefit from public input about its system for managing the affirmative disclosure of legal materials.

One part of an agency's regulations should be devoted to defining with greater clarity the precise material that it makes available online as well as to defining any categories or distinctions that it makes in how such material is classified or indexed. The FDA, for example, distinguishes in its guidance policy between Level 1 and Level 2 guidance documents, the former which it develops following a notice-and-comment procedure.[729] The Securities and Exchange Commission, to use another example, distinguishes on its website between "interpretive releases" and "policy statements."[730] As just these examples show, different agencies will have different types of documents and ways of categorizing them. Although these differences should be accommodated by any new disclosure legislation, agencies can nevertheless be directed to articulate these differences with

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727. An entity could of course file a (b)(3) FOIA request for documents, which might then result in the documents being made available. And perhaps a pattern-and-practice lawsuit might lead to a somewhat systemic remedy to the failure to withhold documents. But this would be a much less efficient process than the process suggested above. Moreover, if petitions to disclose information are themselves required to be disclosed on agency websites, a wider range of interested persons might receive notice of the dispute early on and weigh in in a way that allows the agency to address the arguments about the obligation to provide access to a particular set of documents proactively in a more comprehensive manner. Perhaps once such an agency proceeding is complete, and certainly if judicial review is sought and the agency approach is upheld, that resolution should have some issue preclusion effect applicable to further reactive disclosure requests. Such an issue preclusive effect might add an additional incentive to establish and use an "effective appeal mechanism."

728. *See* Administrative Practices and Procedures; Good Guidance Practices, 65 Fed. Reg. 56468 (Sept. 19, 2000).

729. 21 C.F.R. § 10.115 (2023).

730. *Regulatory Actions*, SEC (Jan. 31, 2024), https://www.sec.gov/page/regulation.

specificity in their guidance disclosure regulations. It is in this vein that ACUS Recommendation 2019-3 recommends that agencies develop written procedures that include "a description of relevant categories or types of guidance documents subject to the procedures; and examples of specific materials not subject to the procedures, as appropriate."[731]

Although any new legislation should accommodate in this way differences in the types of legal materials that exist across agencies (while also demanding that agencies provide definitional clarity about these differences), it should be specific itself about the general type of material that should be covered by each agency's legal materials disclosure regulation. It should be crafted in a way that spells out clearly that agencies will include the full range of legal materials outlined at the beginning of this section: agency internal rules and procedures; staff manuals; policies related to inspections, enforcement, penalties, waivers, and settlements; interagency MOUs; general guidance documents, such as policy statements and interpretive rules; specific guidance, such as legal advisory letters; and substantive and procedural rules that bind the public.

It is in this respect that future legislation applicable to all agencies can and should be improved over the provisions of the FDA Modernization Act. Although that Act required the FDA to manage and make available to the public all guidance documents, it never actually provided a definition of a "guidance document."[732] Other sources of federal law also fail to provide a clear and comprehensive definition. In fact, "no uniform binding definition of guidance yet applies across the federal government."[733]

The lack of a definition of guidance in the FDA Modernization Act, as well as the absence of a definition in federal law more generally, has meant that the FDA has opted to treat some material as falling outside of its guidance disclosure system even though it might nevertheless pertain to the agency's interpretation and application of binding law and may have important practical effects for members of the public. In particular, the FDA has determined in its good guidance regulation that its disclosure procedures do not encompass, among other things, "[d]ocuments relating to internal FDA procedures" and "memoranda of understanding."[734]

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731. Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3).

732. The Act simply states that these documents are not binding on members of the public. Of course, at the very least, agencies could be required themselves to define the materials that fall within the category of guidance. The risk, of course, is always that any classification will shape future behavior in counterproductive ways, as certain communications will be pushed to exchanges that are not classified as guidance simply to avoid the need for disclosure.

733. Coglianese, *supra* note 7, at 254; *see also* Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975) (noting that the issue is "enshrouded in considerable smog"). The question has plagued courts and inspired numerous scholarly articles. *See* William Funk, *The Dilemma of Nonlegislative Rules*, JOTWELL (June 3, 2011), https://adlaw.jotwell.com/the-dilemma-of-nonlegislative-rules/ (listing scholarly articles).

734. 21 C.F.R. § 10.115(b)(3) (2023).

To be sure, certain types of internal procedures and even some MOUs might be purely internal in focus—such as procedures on how agency staff use agency computers, or MOUs for shared use of laboratory facilities by different agencies' staff. Nevertheless, internal procedures or MOUs that do hold implications for the public should be included in any agency's affirmative disclosure management system. For example, when inter-agency agreements or MOUs demarcate jurisdictional boundaries or allocation of responsibilities, the public deserves to know. Such agreements may also involve other matters that are important to the public, such as policies about enforcement or information-sharing. Some agencies already affirmatively disclose memoranda of understanding on their agency websites,[735] and any new legislation should be drafted to ensure that all agencies include such material as part of their overall disclosure of guidance material.

Although new legislation should allow agencies some flexibility as to how they define and describe their own guidance material, it should nevertheless start with a clear definition of the scope of material that should be included in each agency's system for tracking and disclosing its full range of guidance material. Such legislation should even be construed to direct agencies to err on the side of disclosure, for while agencies may think certain internal procedures, staff manuals, memoranda of understanding, and the like might not hold meaningful implications for members of the public, they very well could.

We therefore recommend that robust disclosure requirements be paired with a records management approach. Agencies should be directed to develop affirmative disclosure plans that will ensure the public can truly access their legal materials in a useful manner. We discuss these plans further in this Article's conclusion, at Recommendation 11.

B. Incentives and Judicial Review

One significant challenge faced by those seeking to access agency legal materials is ambiguity in the law as to whether courts can order compliance with affirmative disclosure obligations under FOIA. The affirmative disclosure obligations under FOIA largely concern legal materials, but the statutory language concerning judicial review of agencies' compliance with FOIA obligations has been interpreted differently in different circuits. Any legislation to improve access to agency legal materials should thus clarify the power of the courts to enforce disclosure obligations. To the extent that Congress accepts our recommendations and broadens current affirmative disclosure requirements of agency legal materials, clarity about the public's ability to seek judicial enforcement of these obligations will only become more important.

Underscoring the centrality of this issue to the project, the question of judicial enforceability was raised in four separate comments submitted in response to ACUS's

735. *See supra* notes 286-95 and accompanying text.

published request for information on this project.[736] The issue also received the attention of the consultative group organized to inform the contents of the report on which this Article is based. The Reporters Committee for Freedom of the Press noted that one of the principal obstacles in gaining access to agency legal materials is that agencies' programs are sometimes "so minimal" that reporters are forced to file FOIA requests for those materials.[737] Relatedly, that group's comment urged a recommendation to Congress to "make clear courts have authority to address violations of FOIA's reading room provision, including by ordering agencies to post agency legal materials online."[738] Citizens for Responsibility and Ethics in Washington and Public Citizen made similar calls in their comments.[739]

To be sure, extant enforcement of affirmative disclosure obligations is not limited to litigation. Some requirements are self-enforcing insofar as the failure to publish them renders them inoperable as binding agency law.[740] As to (a)(1) requirements under FOIA to publish certain materials in the *Federal Register*, including legislative rules and rules of procedure, FOIA provides that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."[741] Thus, agencies have a strong incentive to publish properly their binding, legislative rules in the *Federal Register*, or they are rendered unenforceable against a member of the public who has no actual notice of those rules.[742]

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736. Adina H. Rosenbaum (Public Citizen), Comment Letter on Disclosure of Agency Legal Materials (July 8, 2022) [hereinafter Public Citizen Comment], https://www.acus.gov/public-comment/response-rfi-adina-h-rosenbaum-public-citizen-7-11-2022; Reps. Comm. for Freedom of the Press, Comment Letter on Disclosure of Agency Legal Materials (July 18, 2022) [hereinafter Reps. Comm. Comment], https://www.acus.gov/public-comment/response-rfi-reporters-committee-freedom-press-7-18-2022; Citizens for Resp. & Ethics in Washington (CREW), Comment Letter on Disclosure of Agency Legal Materials (July 18, 2022) [hereinafter CREW Comment], https://www.acus.gov/public-comment/response-rfi-citizens-responsibility-and-ethics-washington-7-18-2022; *see also* Consultative Group Member Peter L. Strauss, Comment Letter on Disclosure of Agency Legal Materials (June 29, 2022), https://www.acus.gov/member-comment/comment-consultative-group-member-peter-l-strauss-5-19-2022 (raising a related comment concerning the importance of agencies obligations not just to respond to FOIA requests but to affirmatively publish records under subsections (a)(1) and (a)(2) of FOIA).

737. Reps. Comm. Comment, *supra* note 736, at 2 (noting also that the (a)(2) obligations under FOIA pertain to important legal materials not otherwise published in the *Federal Register*).

738. *Id.* at 6.

739. CREW Comment, *supra* note 736, at 7–8; Public Citizen Comment *supra* note 736, at 1–2.

740. *See* James T. O'Reilly, *Judicial Action Against Nonavailability*, 1 FED. INFO. DISCLOSURE § 6:9.

741. 5 U.S.C. § 552(a)(1). Notably, the provision exempts from this consequence material that is incorporated by reference with approval of the Director of the Federal Register. *Id.*

742. *See* Coglianese, *supra* note 7, at 271 ("Both Sections 552(a)(1) and (2) illustrate the kind of self-enforcing legal structure that helps ensure the publication of legislative rules, but which does not fit as well in the context of documents that are avowedly non-binding."); Coglianese, Scheffler & Walters, *supra* note 550, at 950 (noting that "agency officials know that if they ever wish to enforce a regulation,

Still, this self-enforcement mechanism will not be nearly as effectual for other types of materials required to be published in the *Federal Register*, such as "statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available."[743] Many of these records qualify as guidance documents, described in further detail above in Part II.B as a subcategory of agency legal materials, but since they are not binding on the public by definition, the failure to publish them as required will not have any consequence to the agency in any later dealing with a person who was not on notice of their existence.

A similar self-enforcement mechanism is built into FOIA's (a)(2) requirements, the so-called "reading room" provision, which mandates that agencies publish on their websites other categories of cases, including orders in the adjudication of cases and other categories of guidance documents not published in the *Federal Register*. In that provision, FOIA states that "[a] final order [or] opinion . . . may be relied on, used, or cited as precedent by an agency against a party other than an agency only if— (i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof."[744] This provision could never, however, provide any self-reinforcing incentive to the extent that the disclosure obligation extended to non-precedential agency orders. Nor would it speak to guidance documents, which are by definition not binding on anyone. It also does not provide any incentive to publish other categories of important legal materials addressed in this Article, such as enforcement actions, settlement agreements, and agency-granted waivers and dispensations from otherwise applicable legal requirements.

Under the current state of the law, many agency legal materials beyond binding regulations and precedential opinions are already required to be made proactively available by agencies.[745] This Article also recommends clarifying and, in some instances, expanding the types of agency legal materials subject to that requirement. But absent other changes, agencies' incentives for complying with these requirements will remain either weak or nonexistent. The self-enforcement provisions of FOIA will simply not provide any remedial mechanism for the failure to publish many agency legal materials as required by law.

When the law fails to provide self-reinforcing compliance incentives, it typically falls upon the courts to enforce legal rules.[746] In this regard, it is notable

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they must follow the proper procedural steps in developing it, including publishing the regulation in the *Federal Register*").

743. 5 U.S.C. § 552(a)(1)(B).

744. *Id.* § 552(a)(2)(E).

745. *See* Herz, *supra* note 5, at 587 (noting that (a)(1) and (a)(2) requirements "provide for disclosure of law," including policy and interpretive rules, proposed regulations, and other non-binding documents).

746. For a more general discussion of ways that laws can be structured to reinforce compliance almost as a default, see Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100

that FOIA provides a private right of action in circumstances where agencies are alleged to have failed to respond to a valid request for agency records: "On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."[747] It also specifies that the court shall review the matter de novo, and that a prevailing plaintiff may recover attorney's fees and costs.[748] This is, of course, the cause of action typically invoked when agencies fail to meet their reactive, rather than affirmative disclosure requirements.

A separate set of provisions explains the administrative process for requesting information and contesting a denial of the same. It begins by stating that "[e]ach agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection" shall respond within 20 business days, and then explains that in the case of an adverse determination, the person shall have a right to appeal to the head of the agency within 90 days of the denial.[749] A subsequent provision addresses administrative exhaustion: "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."[750]

The existence of these several separate statutory provisions concerning the ability of the courts to review *denials of requests* for agency records has led to some confusion in the courts with respect to the *affirmative disclosure obligations* under (a)(1) and (a)(2). While denials or failures to respond to traditional FOIA requests made under (a)(3) have long been litigated, agency failures to meet their affirmative disclosure obligations have been sparsely challenged.

As for (a)(1) obligations to publish certain legal materials in the *Federal Register,* including binding regulations, a 1996 D.C. Circuit decision, *Kennecott Utah Copper Corp. v. Department of Interior*, held that FOIA's jurisdictional provision, which authorizes district courts to order "production" of agency documents, did not authorize district courts to order "publication" of documents in the *Federal Register* in compliance with FOIA's (a)(1) provisions.[751] In so holding, the D.C. Circuit cited not only the language of the judicial review provision, but also the self-enforcement

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NW. U. L. REV. 655, 657 (2006) and Cary Coglianese, *Building Better Compliance*, 100 TEX. L. REV. 192, 211–12 (2022).

747. 5 U.S.C. § 552(a)(4)(B).

748. *Id.* § 552(a)(4)(B)-(E).

749. *Id.* § 552(a)(6)(A).

750. *Id.* § 552(a)(6)(C).

751. Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996).

mechanism provided in the statute that protects a person from being adversely affected by a regulation that was not published in the *Federal Register* but that should have been.[752] It further noted that "[p]roviding documents to the individual fully relieves whatever information injury may have been suffered by that particular complainant; ordering publication goes well beyond that need."[753] No other court has weighed in on the power of the district court to order an agency to comply with its affirmative obligations to publish material in the *Federal Register.*

As for (a)(2) reading room obligations, a recent circuit split has emerged over the availability of a judicial remedy. In 2017, the D.C. Circuit decided *Citizens for Responsibility and Ethics in Washington (CREW) v. DOJ* and held that FOIA's judicial review provision specified a court could only "order the production of any agency records improperly withheld *from the complainant*."[754] The Court reasoned that this language indicated that the court had no power to order an agency to publish records online, but rather only to order production to the particular plaintiff in a case.[755] As such, in the D.C. Circuit, plaintiffs cannot bring cases seeking an order for agencies to comply with (a)(1) or (a)(2) publication requirements.

Subsequently, the Ninth and Second Circuits held to the contrary in cases considering the enforcement of (a)(2) reading room obligations. In *Animal Legal Defense Fund (ALDF) v. USDA*, the Ninth Circuit found *CREW's* reasoning flawed and declined to follow its lead.[756] Instead, the Ninth Circuit concluded that FOIA authorizes district courts to order agencies to comply with the affirmative disclosure provisions in part based on the first clause of the judicial review provision, which gives district courts the power "to enjoin the agency from withholding agency records" more broadly, without limiting its language to the production of records to the plaintiff in the case.[757] The Second Circuit followed the Ninth Circuit's lead in *New York Legal Assistance Group v. BIA*.[758] There, the court similarly concluded that district courts had been conferred the power to issue broad equitable relief under the statute and to remedy any violation of FOIA's mandate, whether the reactive or proactive obligations.[759]

In addition to disagreement over the power of a district court to order agency compliance with affirmative disclosure provisions, there remains an open

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752. *Id.*

753. *Id.*

754. Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., 846 F.3d 1235, 1244 (D.C. Cir. 2017) (alteration in original) (quoting 5 U.S.C. § 552(a)(4)(B)).

755. *Id.*

756. Animal Legal Def. Fund v. USDA, 935 F.3d 858, 874-76 (9th Cir. 2019).

757. *Id.* at 869 (quoting 5 U.S.C. § 552(a)(4)(B)) ("[R]eading the words 'jurisdiction to enjoin [an] agency from withholding agency records,' to mean Congress *withheld* jurisdiction to enjoin agencies from withholding agency records would directly contradict the plain text." (alteration in original) (quoting 5 U.S.C. § 552(a)(4)(B)).

758. N.Y. Legal Assistance Grp. v. BIA, 987 F.3d 207 (2d Cir. 2021).

759. *Id.* at 224.

question about whether and how a member of the public must exhaust administrative remedies before filing a lawsuit in district court. Traditional FOIA requests are described in (a)(3) of the statute, where it specifies that

> *"Except with respect to the records made available under paragraphs (1) and (2) of this subsection* . . . each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."[760]

There is no corresponding provision describing the process for "requesting" publication of materials under (a)(1) or (a)(2). However, two separate provisions refer to "requests made under paragraphs (1), (2), or (3) of this subsection," one of which sets deadlines for agencies to respond to requests and another of which specifies that a failure by an agency to respond by the deadline will constitute exhaustion of administrative remedies.[761]

It thus appears that Congress contemplated the existence of some sort of request for compliance with (a)(1) and (a)(2) obligations, although it is not clear if such a request is required or what the request should consist of. The courts have not weighed in. In *CREW,* the D.C. Circuit had no occasion to consider exhaustion as it concluded that FOIA did not authorize the district court to order the relief sought as a categorical matter.[762] In *ALDF*, the government raised exhaustion as a defense, but the Ninth Circuit declined to address the issue, instead remanding to the district court to decide in the first instance.[763] And in *NYLAG*, the Second Circuit was not presented with the issue, as the plaintiffs filed a request for compliance in advance of litigation and thereby complied with any exhaustion requirement that might exist.[764]

This judicial silence about any exhaustion process or requirement, combined with confusion and disagreement in the courts concerning the power of the district courts to order compliance with FOIA's affirmative disclosure obligations, represents a significant source of ambiguity and confusion in the law. This confusion has potentially significant effects on the incentives that agencies have to fulfill their obligations to disclose agency legal materials fully and accessibly.[765] As the Ninth

760. 5 U.S.C. § 552(a)(3)(A) (emphasis added).

761. 5 U.S.C. § 552(a)(6)(A); § 552(a)(6)(C).

762. Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., 846 F.3d 1235, 1243 (D.C. Cir. 2017).

763. Animal Legal Def. Fund v. USDA, 935 F.3d 858, 876 (9th Cir. 2019).

764. N.Y. Legal Assistance Grp. v. BIA, 987 F.3d 207, 208 (2d Cir. 2021).

765. *See Freedom of Information Act — Office of Legal Counsel — D.C. Circuit Holds that OLC Is Not Required to Publish Its Formal Opinions.*, 133 HARV. L. REV. 1113, 1117 (2020) (describing the series of cases in the CREW litigation as dealing "a strong blow to efforts to ensure transparency and accountability in executive decisionmaking"); Emily Costantinou, Note, *FOIA's Got 99 Problems, and Circuit Court Disagreement About Authority to Compel Affirmative Disclosures Is Definitely One*, 82 U. PITT. L. REV.

Circuit noted, without a vehicle for enforcement, (a)(2) obligations are either "precatory" or even "a dead letter."[766]

Given that FOIA's "affirmative portion . . . represents a strong congressional aversion to 'secret [agency] law,' and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law,'"[767] some opportunity for judicial enforcement of those obligations is critically important if agencies are to have the full incentive to manage and disclose the voluminous legal material that they produce.

We recognize that legislation clarifying the availability of a private right of action under FOIA to enforce affirmative disclosure obligations might raise concerns if it were possible for any member of the public to sue any agency over non-compliance without the agency being made aware of the concern or any opportunity to come into compliance before litigation is initiated. Such a possibility would be of understandable concern to agencies, as they may not have reason to know that a member of the public believes they are not in compliance with the law. For this reason, we recommend that Congress not only clarify that district courts have the power to order compliance with FOIA's affirmative disclosure obligations, but that at the same time Congress also clarify that access to the judicial review will first require that a member of the public exhaust all administrative remedies. Each person seeking access to records under the affirmative portions of the Act must make a request for compliance to the agency and exhaust administrative remedies according to the Act prior to a lawsuit. This approach balances the need to provide full incentives for agencies to meet their affirmative disclosure obligations with the need for agencies to have ample opportunity to rectify any shortcomings that come to their attention prior to facing any litigation.

One set of written comments submitted in response to this project raised the question of the advantages of housing a cause of action to enforce affirmative disclosure requirements under a traditional APA review framework, rather than under FOIA.[768] One possible advantage of that approach would be to ensure that courts are empowered to issue orders that cover future documents in a disputed

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625, 643 (2021) ("Allowing judicial enforcement of FOIA's proactive disclosure requirements better aligns with the purpose of FOIA, better captures the intent of FOIA's drafters and recent presidential statements, and offers the best chance of achieving FOIA's goals efficiently."); Delcianna J. Winders, *Fulfilling the Promise of EFOIA's Affirmative Disclosure Mandate*, 95 DENV. L. REV. 909, 934 (2018) ("At bottom, refusing to grant relief in the form of publication renders virtually unenforceable an entire arm of FOIA—one that holds immense promise of reducing the burdens on the public and agencies alike caused by backlogs and delays.").

766. *Animal Legal Def. Fund*, 935 F.3d at 875.

767. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (alterations in original) (citation omitted) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967); H.R. REP. NO. 89-1497, at 7 (1966)).

768. Alan Morrison, Consultative Grp. Member, Comment Letter on Disclosure of Agency Legal Materials (Dec. 1, 2022), https://www.acus.gov/public-comment/comment-consultative-group-member-alan-morrison-disclosure-agency-legal-materials.

category, not only extant documents. We have concluded that FOIA nonetheless represents the better avenue for reform. First, two circuits have already found a cause of action exists under FOIA, and there is no reason to change emerging expectations in that regard. Indeed, we would not want Congress to imply that those courts were incorrect, but rather to confirm that they were. Second, FOIA authorizes de novo review of disclosure decisions, which is the appropriate standard both for reactive and proactive disclosures alike, as there would be no reason to defer to agencies' exemption claims, say, in the proactive disclosure realm but not as to reactive disclosure. Indeed, doing so would risk inconsistent outcomes in the courts on the very same types of questions. Third, FOIA's exhaustion framework is already set out and appears from the past litigation to be workable in the context of a proactive or affirmative disclosure case. And finally, courts have long found that FOIA's remedial reach includes prospective injunctive relief in appropriate cases.[769] Any ambiguity could be clarified by Congress to ensure district courts are empowered to fully enforce the affirmative disclosure requirements, including as to future records.

For these reasons, in Recommendation 16 in Part IV of this Article, we urge Congress to clarify in FOIA that agencies' affirmative disclosure obligations can be enforced through judicial review, provided administrative remedial action has been pursued first. We also suggest, in Recommendation 17 in that same Part, that Congress should confirm that, notwithstanding the obligations that FOIA imposes for the affirmative disclosure of agency legal materials, members of the public still retain the right to request such information if it has not been affirmatively disclosed. Because agencies should be affirmatively disclosing all non-exempt legal material, if they fail to do so and members of the public must request this under Section 552(a)(3) of FOIA, then agencies should process such requests on an expedited basis and should be precluded from collecting any search, review, and duplication fees, regardless of the requester's status.

We do recognize that some agencies could be reluctant to endorse an ACUS proposal to recommend that Congress make affirmative disclosure obligations enforceable through the possibility of judicial review—especially if the scope of material covered under these obligations would expand for some agencies if the other recommendations we have identified are adopted. Some agency officials will have reasonable concerns, for example, that some of their agency's

769. *See, e.g.*, Payne Enterprises, Inc. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988) ("The FOIA imposes no limits on courts' equitable powers in enforcing its terms."); Newport Aeronautical Sales v. Dep't of Air Force, 684 F.3d 160, 164 (D.C. Cir. 2012) ("We have also held, however, that 'even though a party may have obtained relief as to a *specific request* under the FOIA, this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future.'" (alteration in original) (quoting *Payne Enterprises*, 837 F.2d at 491)); Morley v. C.I.A., 508 F.3d 1108, 1120 (D.C. Cir. 2007) ("On remand the district court shall direct the CIA to search these documents.").

legal materials that would be covered by clarified or expanded legislation of the kind contemplated in this Article would be both exceedingly voluminous and insufficiently informative to justify developing burdensome document handling and publication practices. In other words, even though many agency officials might agree that it is eminently sensible that they should affirmatively disclose all non-exempt legal materials, they may fear that honoring this principle could be, at least in some cases, exceptionally costly and of limited public value. In their view, some materials may be duplicative or contain little information. Across several meetings, in the context of discussion of different kinds of agency legal materials, different members of the consultative group raised examples of specific types of documents from their agencies that would fall within the definition of agency legal materials used in this Article but for which their agencies do not post on their websites because the materials are so voluminous and yet routine and largely uninformative.

We have no reason to question the reasonableness of these practices. It will certainly be the case that some types of material covered by the recommendations in this Article could be exceedingly voluminous and yet of limited value—perhaps especially with respect to certain kinds of adjudicatory or enforcement actions. When these justifiable cases arise today, however, agencies simply make their own internal judgments about what legal material to withhold from publication on their website, with no input from or even notice to the public that the agency keeps from posting certain categories of materials online.

We propose that Congress require all agencies to formalize their disclosure policies and practices with respect to their legal materials. Part IV of this Article details Recommendation 7, which calls for a legislative amendment that would give agencies an opportunity to use the rulemaking process to create their own exceptions to the affirmative disclosure obligations created by the other legislative amendments reflected in this Article. When an agency finds that it would be costly to post online all of the material covered by amendments addressing the legal materials covered in this Article's recommendations, and yet doing so would provide at most de minimis value to the public (such as because of the duplicative nature of the material), the agency should be able to promulgate an exemption for itself using the full notice-and-comment rulemaking process. That rulemaking should explain what materials will not be published and why. It should also spell out what alternative information, if any, that the agency will provide instead. For example, if an agency should find it to be both impracticable and of minimal value to the public to post online each individual order following an adjudication or an inspection or enforcement action, it could instead commit by rulemaking to report aggregate data on these decisions or perhaps post illustrative versions of these documents.

Right now, agencies have no requirement to let anyone know about their actual document publication practices. While members of the public can obviously discover online what types of materials agencies have opted *to disclose*, they may have no way of knowing what types of materials agencies have decided *not to*

disclose. The rulemaking process outlined in this Article's Recommendation 7—as well as, we might add, the affirmative disclosure plan requirement outlined in Recommendation 11—will go a long way to making the public aware of what legal materials agencies are producing and which types they are, and are not, making affirmatively available to the public online.

IV. RECOMMENDED STATUTORY REFORMS

We summarize below our affirmative recommendations.[770] They can be organized into three categories, according to whether they: (A) clarify and supplement the categories of agency legal materials that must be affirmatively disclosed; (B) address how and where agency legal materials should be disclosed; or (C) strengthen enforcement of, and create incentives to comply with, affirmative disclosure requirements. In making these recommendations, we aim to articulate the key objectives of new legislation, not to draft statutory language.

Furthermore, we recognize that Congress would need to address several important issues beyond the ambit of our charge in crafting any implementing legislation. For example, to the extent that our recommendations would significantly increase the scope of existing affirmative disclosure obligations or practices, any such additional requirements would be virtually pointless without additional appropriations to fund new technologies and personnel to ensure the initiatives could be carried out. In addition, Congress would want to set a deadline for agencies to comply with new obligations and consider whether some obligations should apply only to newly generated legal materials. As these issues fall outside of our core mandate from ACUS, we simply note the importance of these issues in any resulting legislation and do not recommend a particular course of action.

A. Types of Agency Legal Materials

We formulated ten recommendations pertaining to the scope of agency legal materials that should be subject to affirmative disclosure requirements. As has been detailed in earlier sections of this Article, some agencies are already publishing these categories of legal materials proactively. We are aware, however, that some of these recommendations would considerably increase the scope of affirmative disclosure as currently practiced at other agencies. Congress should, in enacting new legislation, be sure to specify which new or clarified requirements apply only to newly created agency legal materials. We note only that different categories of agency legal materials addressed below may warrant differing treatment as to whether new legislation applies to existing or past legal materials. The following set of recommendations begins with seven recommendations that would amend FOIA's

770. For ease of reference, we also list the core of our eighteen recommendations in Appendix B.

affirmative disclosure obligations, followed by three recommendations that would amend other related statutory provisions.

> 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.

The law as it now stands has been interpreted inconsistently with respect to whether agencies must publish non-precedential opinions. This ambiguity deserves clarification. All agency decisions made in relation to an adjudicatory hearing have significant public import. ACUS has previously recognized that open adjudication processes increase legitimacy, public confidence, and public understanding of important agency functions. Moreover, even decisions designated as "unpublished" or "non-precedential" may have persuasive value or be relied upon by future litigants. Furthermore, patterns of agency decision-making may reveal issues of public interest that could be addressed through advocacy or law reform.

Finally, many agencies already publish or have promised to publish the full corpus of their adjudicatory decisions, indicating the feasibility of other agencies doing so. Concerns about privacy and confidential business interests can be addressed through targeted redactions or withholding materials under existing exemptions. For the rare cases where agencies with mass adjudication systems have repetitive, formulaic, or otherwise low-value decisional records, our subsequent recommendation concerning alternative disclosure (listed below at Recommendation 7) should be adequate to provide flexibility in meeting disclosure obligations.[771]

> 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.

Records that represent the agency's finding of a violation of law, compliance with the law, or release from a legal obligation take many forms, including fines, penalties, stipulated settlements of an administrative complaint, warning letters, agencies' records of their inspections, waivers, and dispensations

771. For background discussion, see *supra* Part II.D.1.

from requirements. These documents very often have legal or practical consequences, such as elevating future penalties for subsequent violations, on the one hand, or providing a safe harbor from consequences on the other. The public interest in seeing information about agency enforcement actions is plain. These actions represent the agency's determination of legal compliance. Individual decisions, as well as patterns of enforcement, reveal how the agency classifies certain actions as violations (or not). Many agencies do publish whole categories of enforcement records, suggesting that such publication is feasible for other agencies too. Moreover, for any sets of such records that are repetitive, formulaic, or otherwise low-value records, our subsequent recommendation concerning alternative disclosure (listed below at Recommendation 7) should be adequate to provide flexibility in meeting disclosure obligations.[772]

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.

When agencies settle litigation to which they are parties, those settlement agreements represent the agency's official position on its obligations with respect to the end of a particular dispute. Many times, these settlements bind agencies to a future course of conduct. As such, these agreements constitute part of the agency's working law. Unless they are judicially approved as consent decrees, those agreements may not make it into the judicial record. ACUS has previously recommended that agencies provide access to these agreements (along with other litigation documents we do not take up here), and Congress has considered legislation to require a centralized settlement agreement database.[773] Some agencies already publish comprehensive websites with their settlement agreements, indicating that such publication is feasible for other agencies, too, and the existing exemptions to disclosure under Section 552(b) are adequate to protect competing interests such as privacy or trade secrecy.[774]

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.

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772. For background discussion, see *supra* Part II.D.2.

773. A recent ACUS recommendation concerns agency settlement of administrative proceedings, not settlement of lawsuits filed in Article III courts. *See* Adoption of Recommendations, 88 Fed. Reg. 2312, 2315 (Jan. 13, 2023) (Administrative Conference Recommendation 2022-6).

774. For background discussion, see *supra* Part II.D.3.

The OLC produces a variety of opinions. The most well-known are formal opinions that have historically been published in bound volumes. Other opinions are more informal and much shorter treatments of legal issues. Examples of these can be found on the OLC website. While these are "binding" on agencies, it is not clear that OLC considers them strong precedent, and it does not appear that they are frequently cited for their precedential effect in formal opinions. Still other opinions must be provided in a short period of time, making OLC's advice provisional, in the sense that upon further consideration OLC might well change its position.

We fully recognize that this recommendation, if enacted into a legal requirement, may not, as a practical matter, change OLC's current publication practice much, if at all. Existing exemptions to disclosure—subject to ongoing judicial interpretation—may give OLC the discretion to withhold a majority of such opinions from the public. As they now stand, they appear amply broad to withhold categories of opinions OLC has noted are of particular concern and by matter of policy they do not publish: those opinions issued to the President about the President's contemplated actions and those opinions in which OLC finds a proposed agency action would be unlawful and the agency does not pursue its plan as a result.

Despite the fact that this legal change may not have great or immediate practical effect, we think it important to codify that these legal opinions are presumptively subject to affirmative disclosure whenever they would have to be released reactively upon request. In many ways, this change would codify OLC's own practice. OLC has long published many formal opinions, working for the last twelve years with a presumption of publication. Its criteria for withholding opinions resemble FOIA's exemptions to a significant degree. The recommendation above simply provides that this workable approach now be made law rather than left to the discretion of OLC. For now, this may have largely symbolic effect, itself of no small importance, but it might come to prevent a return to excessive secrecy with regard to these formal opinions.[775]

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
   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
   b. serve as the basis for either (i) the agency's conclusion that the law does permit the agency to take a certain

775. For background discussion, see *supra* Part II.C.3.

> action or (ii) the agency's refusal to take an action requested because it is contrary to law.
>
> With regard to the opinions described in (b), agencies can alternatively comply with their affirmative disclosure obligation by setting forth the agency's legal basis for action in a separate, publicly released decisional document.

As noted in Part II.C above, the status of certain types of opinions issued by agency chief legal officers is quite clear. Certain sets of legal opinions are not merely advice; they are forms of agency law. In *Schlefer v. United States*, the MARAD General Counsel's opinions were binding and enforceable, effectively given the authority the General Counsel possessed.[776] In the cases involving the IRS's Office of General Counsel, they were not formally binding but were so widely followed and respected and intended to ensure uniformity that they were also viewed as "law."[777] These were no isolated opinions, but a set of precedents whose coherence agency counsel sought to maintain. Indeed, in 1976, Congress mandated certain materials produced by the IRS general counsel to be affirmatively published.[778] It is safe to conclude that some of this legal material is not, in general, protected by exemption 5 privileges and that agencies should have little difficulty determining what material should be disclosed. In any event, litigation over whether a body of opinions qualifies as agency legal material should be relatively straightforward. The public should not have to be put to the burden of requesting individual opinions, requesting the whole corpus of opinions, or independently indexing opinions. The latter is particularly wasteful because the agency is likely to maintain for itself some form of indexing to navigate the case law in the corpus. And, to the extent some opinions of the corpus or some portions of opinions can be withheld under FOIA, nothing in this recommendation would prevent agencies from asserting the privilege upon a conclusion that the release of the opinion or portion thereof would cause foreseeable harm of the type that the exception was designed to prevent.

We also recommend that Congress adopt an affirmative disclosure requirement for agencies' general counsel opinions that serve as a legal basis for agency action, whether the action is pursuing an initiative or refusing to take an action requested by a private party. One recent controversy illustrates the need for affirmative disclosure of such legal opinions. In *Marino v. NOAA*, the agency determined that it lacked authority to enforce certain provisions of its "permits" to take marine mammals for scientific or display purposes.[779] The decision was

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776. 702 F.2d 233, 235–36.

777. *E.g.*, Taxation With Representation Fund v. IRS, 646 F.2d 666, 682-83 (D.C. Cir. 1981); Tax Analysts v. IRS, 117 F.3d 607, 617 (D.C. Cir. 1997).

778. *See* Tax Reform Act of 1976, Pub. L. No. 95-455, § 1201, 90 Stat. 1660 (codified as amended at 26 U.S.C § 6110).

779. Marino v. Nat'l Oceanic & Atmospheric Admin., 33 F.4th 593 (2022).

based solely upon the legal analysis in a memo prepared by agency attorneys. The agency refused to disclose the document, apparently invoking the attorney-client privilege. That action precluded members of the public from learning the legal basis for the agency's decision, and it forced them to initiate litigation to contest the agency's decision without knowing the basis for the agency's action.[780] Such a burden should not be imposed upon private citizens, and such an approach is certainly an inefficient means for an interested party to learn the legal basis underlying an agency's decision. Moreover, withholding such legal opinions precludes stakeholders from seeking to persuade the agency to reverse its decision.

Agencies should already be explaining the legal basis for their decisions for purposes of informing the public and to withstand judicial review. Thus, in many cases, the agency's decisional document or supporting data should be expected to provide sufficient insight into the agency's legal analysis of its authority to take such action or the prohibition against taking such action. The explanation in such a document, if sufficient for purposes of judicial review, should suffice in terms of affirmative obligations of the legal basis for the agency's action. When this does not occur, the legal opinion itself or an adequate summary of it should be available to the public if it is not otherwise subject to withholding under exemption 5 or some other FOIA exemption and its release will not cause "foreseeable harm" of the type that the exemption is designed to prevent.

There may be occasions when the need to withstand judicial review is insufficient to require an agency to spell out its resolution of critical legal questions related to its actions. In such cases, the recommendation allows the agency to protect the legal opinion, by ensuring public access to a decisional document that explains its resolution of critical legal issues to the public. Of course, the agency would not be required by the recommended legislation to produce such a document; it merely offers that avenue as a way to protect the unique means of expression of an agency counsel's legal opinion.[781]

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.

FOIA's affirmative disclosure provisions are designed to ensure that the public is informed of the agency's organization and procedures, inter alia. But often issues may be addressed in a coordinated fashion by multiple federal agencies, or by federal, state, and local authorities. Interagency MOUs and MOAs often memorialize these cooperative arrangements and thus may provide valuable information necessary for navigating "agency" procedure in such circumstances.

780. *Id.* at 595-96.

781. For background discussion, see *supra* Part II.C.4.

For example, such agreements may demarcate jurisdictional boundaries or allocate responsibilities between federal agencies or between federal and state agencies. MOUs and MOAs may also provide information on the extent of information-sharing among agencies with respect to personally identifiable information and confidential business information.

At least four agencies publish MOUs and MOAs, apparently without problems. Indeed, gathering all current MOUs and MOAs in one place on a website might be helpful to officials within the agency itself. For any sets of MOUs and MOAs that are repetitive, formulaic, or otherwise low-value records, our subsequent recommendation concerning alternative disclosure, listed below at Recommendation 7, should provide agencies adequate flexibility in meeting this disclosure obligation.[782]

> 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 (B) of de minimis value to the public due to records' repetitive nature. 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 its current disclosure practices.

In our first nine recommendations, we clarify categories of records subject to affirmative disclosure, but we recognize that some of these categories may be voluminous and may expand the responsibilities of agencies beyond current practices. One challenge in legislation in the area of affirmative disclosure is that the types of records that agencies use and hold vary widely between agencies. Each agency has different sets and systems of records with different volumes, designations, and uses. Trans-substantive disclosure rules can, of course, be made and should be strengthened as described above. However, to account for agency

782. For background discussion, see *supra* Part II.B.1.

variability, and the concern that special circumstances of an agency's practices would make the publication of the full range of the newly listed materials impracticable and without public value, we recommend including in any new legislative package a provision that would allow agencies, with the benefit of public input through a notice and comment process, to determine what to publish in lieu of the full set of a particular kind of record that would provide adequate public oversight benefits. If no data, sample, or other information about the unpublished records is to be provided, an agency would have to justify that choice. Moreover, such rules would be subject to review under 5 U.S.C. § 706, including review under the arbitrary and capricious standard, ensuring that agencies adopt reasonable disclosure alternatives when invoking this option.[783]

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

This proposal would simply address the duplicative and inoperative language and nonsensical scrivener's errors in the current law. As currently drafted, Section 206(b) of the E-Government Act provides:

> To the extent practicable as determined by the agency in consultation with the Director [of OMB], each agency . . . shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the *Federal Register* under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.[784]

This provision has several problems. First, Section 206(b)'s reference to materials that must be published in the *Federal Register* pursuant to Section 552(a)(2) is nonsensical; the latter does not require *Federal Register* publication, only electronic publication. Second, Section 206 only applies "to the extent practicable as determined by the agency,"[785] which suggests that agencies possess unreviewable, boundless discretion on this score and implies the existence of barriers to compliance that no longer exist (if they ever did). Third, the limitation to "information about the agency" is both confusing and unnecessary. To the extent any intended meaning can be divined, it would be to require all records already published in the *Federal Register* to be also published on agency websites, an objective achieved by our subsequent Recommendation 12 concerning a different provision of the E-Government Act.

Perhaps most fundamentally, the provision does no work. The "information about the agency required to be published in the *Federal Register*

783. For background discussion, see *supra* Part III.B.

784. E-Government Act, Pub. L. No. 107-347, § 206(b), 116 Stat. 2899, 2916 (2002) (codified at 44 U.S.C. § 3501 note).

785. *Id.*

under paragraph[] (1) . . . of section 552(a)," like everything published in the *Federal Register*, *is* published on "a publicly accessible Federal Government website." Two, in fact, the contents of the *Federal Register* are published on the *Federal Register's* own website and by GPO. And with regard to Section 552(a)(2) material, (a)(2) itself requires agencies to make that available in electronic format. Section 206(b) simply reiterates that existing obligation. As explained below with regard to Recommendation 12, agencies should list and post, or list and link to, all (a)(1) material. But that is not what 206(b) requires; it is what section 207(f) requires (or at least should require).[786]

> 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 Section 1505(a) disclosure requirements are subject to the exemptions set out in FOIA, including those found in Section 552(b)(1).

This recommendation primarily replaces the ninety-year-old document-designation-based publication requirement with a content-based publication requirement closely aligned with the definition of "legal materials" that has served as the basis for this Article. Presidential directives that impose obligations directly on individuals, and those that direct agencies to impose obligations on, or alter the rights of, private persons or entities, operate as "law," as we have explained above. Our proposal removes the exemption allowing non-publication of directives addressed only to federal agencies and officials. Interpreted literally, it would allow presidents to publish none of their executive orders, and possibly few of their proclamations. Removing this exemption will make the law consistent with current publication practices, which have proven perfectly workable over a long period of time.

The proposal also replaces the language imposing a publication obligation only if the directive has "general applicability and legal effect," with a rule that allows the President to withhold publication when the directive relates *solely* to the internal personnel rules and practices of the Executive

786. For background discussion, see *supra* Part II.A.1.

Branch or an agency. The courts have experience construing a roughly similar standard in the FOIA context. We include this exemption perhaps out of an excess of caution, and we presume that this will encompass only a quite small portion of presidential directives, if any.

In addition, as with the affirmative disclosure requirements imposed upon agencies under Section 552(a), we make clear that the FOIA exemptions apply to the revised affirmative disclosure obligations for presidential directives. We believe it particularly critical to note Exemption 1, which protects properly classified information. We take no position on whether *Sears, Roebuck's* prohibition on "secret law" applies to national security or homeland security directives, consistent with our position of not seeking to resolve issues about the scope of exemptions.[787]

> 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).

As noted above, the Presidential Records Act lists certain exceptions to public access to presidential records. As it currently stands, Section 2204 contains six such exceptions, four of which were apparently intended to directly track the language in existing FOIA exemptions. When FOIA exemptions are occasionally amended, though, the corresponding PRA exception may be overlooked. This occurred when a provision in the OPEN FOIA Act of 2009,[788] was crafted to address the considerable controversy over which statutes qualify for Exemption 3, the FOIA exemption that applies when other statutes call for nondisclosure. The OPEN FOIA Act added to FOIA's exemption the requirement that any future statute Congress intends to operate as a nondisclosure statute must specifically reference the FOIA exemption in its text. Yet the PRA has not been amended in a parallel fashion. Similar incongruences will arise anytime FOIA Exemptions 1, 3, 4, or 6 are amended in the future. Incorporating those exemptions by reference, rather than reproducing their text separately in the two separate statutes, resolves the inconsistency today and protects against inconsistencies going forward.[789]

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787. For background discussion, see *supra* Part II.A.

788. Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009),

789. For background discussion, see *supra* Part II.A.

B. Methods of Disclosure of Agency Legal Materials

We formulated five recommendations pertaining to the manner in which agencies disclose their legal materials that are or should be subject to affirmative disclosure requirements. They are presented, again, starting with a cornerstone amendment to FOIA and following with four recommendations for related statutory changes.

> 11. Congress should amend the FOIA 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 develops and implements 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.

Given the large volume of material that agencies produce which must be affirmatively disclosed, agencies will need effective internal management systems and internal controls for tracking and disclosing such materials if agencies are to provide comprehensive, current, accessible, and comprehensible public availability to these materials. In a number of recent recommendations, ACUS has urged agencies to develop their own plans for disclosure of varying types of legal materials.[790]

A legislative requirement for agencies to develop their own internal plans and procedures would aim to improve governmental transparency in much the same way that other social objectives have been addressed through forms of management-based governance. Under a management-based governance approach, relevant entities are "expected to produce plans that comply with general criteria designed to promote the targeted social goal."[791] Management-based governance is appropriate to address "problems where it is difficult to prescribe a one-size-fits-all solution" and difficult to define or measure outcomes in a manner that could facilitate requirements stated in terms of a

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790. Adoption of Recommendations, 87 Fed. Reg. 39798, 39800 (July 5, 2022) (Administrative Conference Recommendation 2022-2); Adoption of Recommendation, 87 Fed. Reg. 1715, 1718 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-7); Adoption of Recommendation, 87 Fed. Reg. 1715, 1715 (Jan. 12, 2022) (Administrative Conference Recommendation 2021-6); Adoption of Recommendations, 86 Fed. Reg. 6612, 6624 (Jan. 22, 2021) (Administrative Conference Recommendation 2020-6); Adoption of Recommendations, 84 Fed. Reg. 38927, 38932 (Aug. 8, 2019) (Administrative Conference Recommendation 2019-3).

791. Coglianese & Lazer, *supra* note 699, at 694.

level of performance.[792] The sheer variety of agencies and agency materials, combined with the difficulty—if not impossibility—of assessing performance when records have not in fact been disclosed, make a management-based approach particularly well-suited to the challenge of ensuring availability of agency legal materials. In addition, the problem of ensuring affirmative disclosure of agency legal materials is, in significant respects, intrinsically a management problem—namely, one of records management—which makes it appropriate to require agencies to take affirmative, documented management steps, much as Congress did with respect to guidance materials in the FDA Modernization Act. In essence, a management-based governance approach seeks to create both mechanisms and incentives for agency efforts to make their legal materials accessible to the public.

The existence of FOIA's exemptions provides an additional rationale for agencies to provide the public with a detailed disclosure plan that includes the criteria the agency uses for categorizing any material as exempt from affirmative disclosure. For example, as noted earlier, an agency general counsel's office produces opinions that serve as precedents for agency lawyers and policymakers, akin in some ways to the body of OLC opinions. We have recommended in Recommendation 5 that such opinions be expressly covered by FOIA's affirmative disclosure obligations, but we have also acknowledged that FOIA's exemption for attorney-client privileged material might permit withholding such a document in part or in full if its release would cause foreseeable harm. This holds implications for an agency's affirmative disclosure plan. If an agency's general counsel's office determines that it can only selectively disclose some decisions that are part of a larger defined corpus of opinions but will withhold those that (i) involve determinations of law that reference earlier opinions in that corpus and (ii) effectively bind agency officials, then the agency would set forth the criteria in the agency's affirmative disclosure plan by which it decides whether to release those opinions to the public.

In this way, an agency's affirmative disclosure plan could, with respect to agency legal opinions, follow the salutary practice adopted by OLC, which makes available on its website a document that describes the considerations that go into whether it releases to the public particular opinions. Indeed, an agency could go further and use its disclosure plan to outline how the agency's legal counsel office, or the agency more generally, will approach satisfying its obligation to conduct the statutorily required foreseeable harm analysis before deciding to withhold a document.

The content of affirmative disclosure plans will vary from agency to agency, but some common elements emerge from ACUS's several

792. Cary Coglianese, *Management-Based Regulation: Implications for Public Policy*, *in* GREGORY BOUNDS & NIKOLAI MALYSHEV EDS., RISK AND REGULATORY POLICY: IMPROVING THE GOVERNANCE OF RISK 159, 168-69 (2010).

recommendations calling for such disclosure plans in other contexts. Drawing on those recommendations, we suggest that agency plans should include the following categories of content:

a. Definitions and descriptions of categories or types of legal materials covered by the agency's affirmative disclosure plan;
b. Definitions and descriptions of categories or types of legal materials that are not covered by the agency's affirmative disclosure plan or that are exempt from affirmative disclosure;
c. The criteria used for identifying material to be disclosed online pursuant to the affirmative disclosure plan, including specific criteria that clearly specify what material, if any, is deemed exempt from affirmative disclosure;
d. A description of locations on the agency's website where material falling into different categories can be found;
e. A description of the agency's document labeling and numbering systems used to track agency legal materials that are made available online;
f. A description of how the agency will ensure the accuracy and currency of posted legal materials;
g. A description of how the agency will use online archiving or other means to maintain public access to amended, inoperative, superseded, or withdrawn agency legal materials, including:
    1. Any criteria for relocating to a portion of the agency's website dedicated to archiving materials that are inoperative or have been amended, superseded, or withdrawn; and
    2. Labels affixed to amended, inoperative, superseded, or withdrawn materials to indicate their current legal status.
h. The name of and contact information for the agency official responsible for ensuring that the agency develops and implements the affirmative disclosure plan;
i. Training practices used to ensure agency personnel will consistently carry out the agency's affirmative disclosure plan;
j. A stated commitment for periodic review of the affirmative disclosure plan and its implementation, including:
    1. Metrics and procedures that the agency will use to evaluate whether the agency is providing comprehensive and up-to-date public access to all legal material covered by the plan; and
    2. Specific time intervals when the agency will

periodically review its plan and its implementation; and

k. Opportunities for public feedback on the agency's affirmative disclosure plan and the agency's procedures for effective appeal of the plan and its implementation.

Including the above types of information in an agency affirmation disclosure plan would be consistent with ACUS's general best practices recommendations for related disclosure plans and Congress may decide to include some or all of these features in any new legislative requirement it adds.[793]

12. Congress should amend Section 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 Section 207(f)(1)(A)(ii) of the E-Government Act to eliminate its cross-reference to FOIA Section 552(b), and (B) amending Section 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.

Section 207(f)(1)(A)(ii) of the E-Government Act, concerning agency websites, provides that OMB must issue guidance that requires, among other things, that agency websites include "direct links to . . . information made available to the public under subsections (a)(1) and (b) of section 552 of title 5, United States Code."[794] This is nonsensical, as subsection (b) requires no information to be made available to the public; to the contrary, it is a list of *exemptions* to disclosure requirements. Presumably the intent was, as in Section 206(b), to refer to subsections (a)(1) and *(a)(2)*, not *(b)*. The cross-reference should be amended accordingly or simply deleted as duplicative with FOIA itself.

More broadly, this recommendation aims to improve the public's practical ability to find the regulatory information they seek. Merely posting regulations on a website—or linking to them from a website (as we read the statute, the "direct link" could be to a document on the agency's own website or on another website)—does not mean that those regulations can be easily found or

793. For background discussion, see *supra* Part III.A.

794. We note that while most or all agencies do provide links to their regulations, OMB's Policies do not actually require them to do so, in violation of this provision. *See* Memorandum from Joshua B. Bolten, Dir., OMB, to all Exec. Dep't and Agency Heads, M-03-18, (Aug. 1, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2003/m03-18.pdf.

accessed by members of the public. The existing statute shows awareness of this concern in requiring OMB to establish "minimum agency goals to assist public users to navigate agency websites." The statute should go further, however, specifying (or requiring OMB to specify) that each agency's regulations should be discoverable through a search of the agency's website, such as by clicking on a "regulations" tab on the homepage in addition to clicking links found elsewhere on portions of the website covering topics related to the regulation.

Along with a link to the current text of the regulation, each agency's website should also include links to other related material, such as the following: the *Federal Register* notice for the final rule and any amendments to it; the *Federal Register* notice for the initial proposed rule and any subsequent notices or proposals; the online rulemaking docket on either the agency's website or at Regulations.gov; posted summaries of the regulation or guidance documents related to the regulation; posted agency adjudicatory decisions applying or interpreting the regulation, including advisory opinions or declaratory orders; press releases about the regulation; and posted enforcement manuals pertaining to the regulation. Legislation should make clear that affirmative disclosure means much more than the mere possibility that documents can be found somewhere on an agency's website. Given the substantive importance of agency legal materials, agencies must do more to make it realistically feasible for the general public to find these materials online and see how they connect with other related agency materials.[795]

13. Congress should update Section 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 Section 207 should require, easily accessible, usable, and searchable.

Section 207 of the E-Government Act addresses, among other things, agency websites. Rather than directly imposing specific requirements for the electronic dissemination of information in general, or for the particulars of agency websites, Congress created an advisory committee. Section 207(c) requires the Director of OMB to establish an Interagency Committee on Government Information (the ICGI). While the Committee's work product was to be only advisory, the Act charges OMB with issuing policies "requiring that agencies use standards to enable organization and categorization of Government information" and, separately, promulgating "guidance for agency websites." Although referred to as "guidance," the Act also denominates them "standards for agency websites"

795. For background discussion, see *supra* Part II.A.2.

and states that they are to set out "requirements that websites" have certain features. OMB established the ICGI in 2002; it issued recommendations in 2004; OMB's initial set of guidelines followed. OMB issued updated Policies in 2016, which remain in place. The E-Government Act authorized OMB to terminate the ICGI once it had submitted its recommendations. OMB did not formally do so, but the ICGI no longer exists. It has evolved into the Federal Web Managers Council, often referred to as simply the Federal Web Council. The Council consists of two co-chairs, one from GSA and one from DHS, and about two-dozen federal web managers.

This recommendation proposes changes to Section 207 that would bring the E-Government Act up to date while maintaining its same basic, and sensible, structure: binding, though general, policies from OMB, informed by expert input from those in the government working on a daily basis on agency websites. It also would create a specific priority for ensuring that agencies make agency legal materials accessible on their websites in a meaningful way, in alignment with the amendments proposed in Recommendation 13. The Federal Web Council's recommendations should be incorporated by OMB into minimum guidelines for agencies about their websites and OMB should be directed to update its guidelines periodically.[796]

14. 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.

OFR provides an online archive of executive orders and other presidential proclamations and directives which is not as easily searchable as the content within that archive merits. As of May 2023, nearly 14,000 executive orders and 10,500 presidential proclamations had been published in the *Federal Register*. These are often quite important in their direct effects on the rights and obligations of private citizens, in structuring agency procedures, and in setting forth policies that agencies are obligated to pursue. OFR codified all executive orders and proclamations from April 13, 1945, through January 20, 1989. But the codification rapidly became outdated because more proclamations and executive orders were being issued. Although OFR continues to maintain disposition tables of executive orders, as well as a subject matter index within these tables, these tables and indices still make it more difficult to locate and more difficult to understand the current legal status or effect of particular executive orders than it should be. Congress could require OFR to identify strategies for keeping its codification of the corpus of presidential materials updated on a regular basis, much as electronic versions of the United States Code are maintained. Although

796. For background discussion, see *supra* Part II.A.1.c.iv.

we are not in a position to specify how to best organize presidential directives, the importance of these materials and the centrality of OFR to any open government endeavor justifies further study and adequate funding to find ways to improve OFR's contributions to the public accessibility of presidential directives.[797]

> 15. 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.

Consistent with the digital era which enables widespread online access to information, Congress should remove any requirement for a printed version of the *Federal Register.* This would eliminate the costs of printing, reprinting, wrapping, binding, and distribution. Ideally, such cost savings would be reflected in future publication fees charged to agencies. Congress should change any reference in the law that requires the "printing" of the *Federal Register* to "publishing," and should clarify that publishing includes making materials available online. This legislative amendment would be similar to the Federal Register Modernization Act, H.R. 1654, 116th Congress (2019-2020), which would have replaced the words "printing and distribution" in the Federal Register Act with "publishing." That legislation passed the House but died in the Senate.[798]

C. Incentives to Disclose Agency Legal Materials

We formulated two recommendations pertaining to the enforcement of agencies' affirmative disclosure requirements with respect to their legal materials.

> 16. 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.

797. For background discussion, see *supra* Part II.E.

798. For background discussion, see *supra* Part II.A.1.

There is a current circuit split interpreting language in FOIA's judicial review provision with respect to the power of the district court to order agencies to comply with affirmative disclosure provisions, indicating a lack of clarity in drafting and confusion in the law. Self-enforcement mechanisms, such as the inability of an agency to rely on a document not published as required, only work for binding legal instruments such as legislative rules. Many other categories of records do not have the kind of operative effect that would make self-enforcement mechanisms adequate as incentives for compliance.

The primary concern with clarifying the availability of a private right of action under FOIA to enforce affirmative disclosure obligations would arise if it were possible for any member of the public to sue any agency over non-compliance without the agency being made aware of the concern or any opportunity to come into compliance before litigation is initiated. This possibility would be of understandable concern for agencies, as they may have no reason to know that a member of the public believes they are out of compliance with the law. For this reason, we recommend clarifying that, while the district court has the power to order compliance, a member of the public seeking access to records under the affirmative portions of the Act must make a request for compliance to the agency and exhaust administrative remedies according to the Act prior to a lawsuit. This approach balances the need to promote compliance with the need for agencies to have ample opportunity to rectify any shortcomings their disclosure practices may have prior to litigation.[799]

17. 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 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.

Because members of the public are entitled to legal materials that must be affirmatively disclosed, they should be able to obtain them by a routine FOIA request if the agency has not met its affirmative disclosure obligation. A person needing a particular document in a "proceeding" or other process before the agency (or simply seeking to comply with legal requirements) should not be burdened with bringing a potentially complex and costly lawsuit to compel the

799. For background discussion, see *supra* Part III.B.

agency to produce all legal materials in a particular category and comply with the other affirmative disclosure requirements relating to that category of documents. Moreover, requests for agency legal materials that the agency unlawfully failed to publish should be accorded expedited status given their recognized importance to the public, and, for similar reasons, agencies should be prohibited from charging search, duplication, or review costs in response to a FOIA request for materials it should already have affirmatively published. We believe these changes will promote the basic government obligation to ensure that "the law" is publicly available and free.[800]

18. ACUS's Office of the Chairman should prepare and submit to Congress proposed statutory changes consistent with Recommendations 1 through 17.

The recommendations we have offered above will obviously only take effect if they can be translated into legislative language and adopted by Congress. For this reason, our final recommendation urged ACUS to submit proposed legislative reforms to Congress concerning the critical matter of disclosure of agency legal materials. The proposed legislative language offered by ACUS—and eventually adopted by Congress—should be consistent with our preceding recommendations.[801]

CONCLUSION

We recognize that an article that is long enough to be a book, and that contains eighteen recommendations for new legislation, risks having its readers lose the forest for the trees. In the end, then, we return to the simple proposition that has animated this entire Article: Each agency should make all its legal materials affirmatively available to the public on its website, with the exception of items that would be exempt from disclosure even if requested under FOIA.

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800. For background discussion, see *supra* Part III.B.

801. We can happily report that ACUS has already followed this final recommendation. Drawing upon the research contained in the report on which this Article is based, ACUS acted in June 2023 to adopt a formal suite of recommendations on behalf of the Conference that largely tracked the recommendations presented in this Article., 88 Fed. Reg. 42678, 42678 (July 3, 2023) (Administrative Conference Recommendation 2023-1); *see* Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Affirmatively Disclosing Agency Legal Materials*, REGUL. REV. (Sept. 11, 2023), https://www.theregreview.org/2023/09/11/bell-coglianese-herz-kwoka-lobel-affirmatively-disclosing-agency-legal-materials/. ACUS then established a working group—comprising, among others, several authors of this Article—to develop concrete a legislative proposal to submit to Congress for its consideration and, hopefully, adoption. The legislative proposal developed by the working group was transmitted to Congress by ACUS Chairman Andrew Fois in December 2023. Letter from Andrew Fois, Chair, to Committee Chairs and Ranking Members (Dec. 11, 2023), https://www.acus.gov/sites/default/files/documents/23-12-11_Office%20of%20the%20Chair%20Transmittal%20to%20Congress.pdf.

Agency legal material is of paramount importance to the public. Good government principles, as attested by numerous ACUS recommendations, impose on agencies an affirmative duty to disclose their legal materials. Congress now should step in to make those principles both legally binding and practically meaningful.

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APPENDIX B: EIGHTEEN RECOMMENDATIONS FOR IMPROVING THE AFFIRMATIVE DISCLOSURE OF AGENCY LEGAL MATERIALS

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.**

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.**

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.**

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**
    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**
    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 it is contrary to law.**

    With regard to the opinions described in (b), agencies can alternatively comply with their affirmative disclosure obligation by setting forth the agency's legal basis for action in a separate, publicly released decisional document.

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.**

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

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

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 Section 1505(a) disclosure requirements are subject to the exemptions set out in FOIA, including those found in Section 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 develops and implements 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.

12. **Congress should amend Section 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 Section 207(f)(1)(A)(ii) of the E-Government Act to eliminate its cross-reference to FOIA Section 552(b), and (B) amending Section 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.**

13. **Congress should update Section 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 Section 207 should require, easily accessible, usable, and searchable.**

14. **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.**

15. **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.**

Incentives to Disclose Agency Legal Materials

16. **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.**

17. **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 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.

18. **ACUS's Office of the Chairman should prepare and submit to Congress proposed statutory changes consistent with Recommendations 1 through 17.**