9-11-2023

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The Regulatory Review
A Publication of the Penn Program on Regulation

Opinion | Process | Sep 11, 2023

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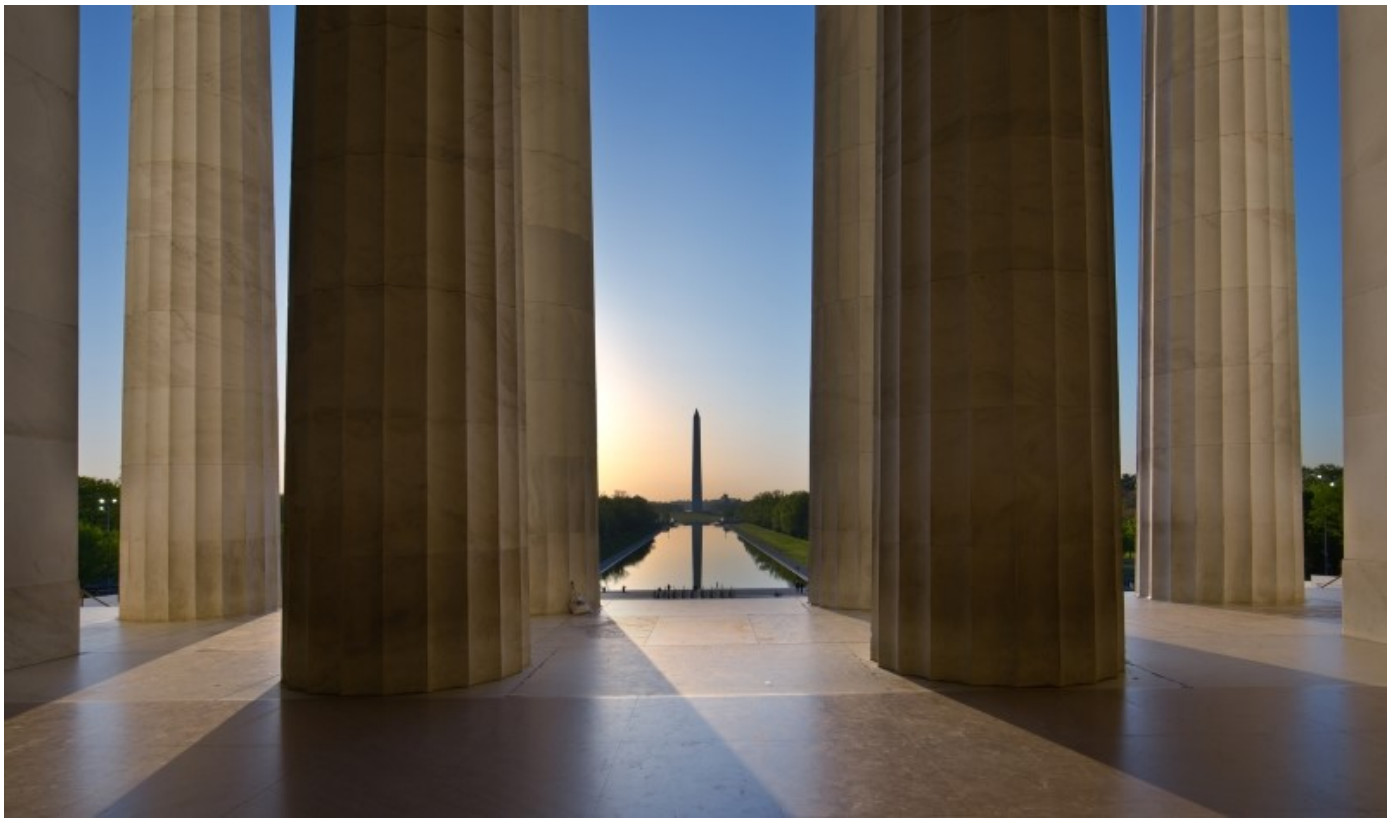

ACUS takes an important step forward toward improving agency disclosure of legal materials.

Administrative agencies' law-generating powers have long been recognized, as has the importance of making agency-generated law available to the public. In 1971, the Administrative Conference of the United States (ACUS) recommended that "agency policies which affect the public should be articulated and made known to the public to

the greatest extent feasible." Over the years, ACUS has adopted numerous recommendations to that end.

Congress has also embodied this publicity principle in the Administrative Procedure Act, which mandates that agencies affirmatively publicize certain categories of their legal materials. Those legislative provisions are reinforced by the Freedom of Information Act (FOIA), which aims to enable "the public readily to gain access to the information necessary to deal effectively and upon equal footing with the federal agencies."

FOIA imposes on agencies an obligation to disclose all agency records upon request, subject to exemptions and exclusions that enable agencies to withhold certain requested records if those disclosures would cause foreseeable harm. Some scholars have criticized this request-driven, reactive disclosure approach, especially when it is the public's only means for gaining access to agency legal materials not clearly covered by affirmative disclosure provisions in federal law.

Provisions requiring the affirmative disclosure of legal materials have also proven to be deficient. Agency legal materials comprise documents 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." Unfortunately, these materials are not always easily accessible to members of the public. This deficiency is striking in an internet era with digital technology that has vastly expanded agencies' capacity to provide affirmative access to their legal materials.

ACUS commissioned the five of us as a consultant team to craft potential statutory revisions that would ensure greater online accessibility of agency legal materials. As part of our work, we solicited formal input through a series of meetings with a 60-member group of ACUS members and affiliates, including representatives from 50 federal agencies. We also conducted our own research, reviewed more than 30 written comments submitted to us, and deliberated at length among ourselves in more than 20 team meetings held over an 11-month period. The resulting 157-page report thus reflects a well-deliberated consensus that is based on extensive analysis and broad input.

One simple principle animates our entire report: *All legal material that agencies must disclose upon request by a member of the public should be affirmatively made*

available on agency websites.

Building on this fundamental principle, we developed recommendations on *what* legal materials agencies should disclose affirmatively and *how* they should disclose such legal materials to make them more accessible—and on the manner in which Congress should strengthen agencies' *incentives* for disclosure, such as through judicial enforcement. We consciously avoided making any recommendations about the scope of FOIA's overarching exemptions and exclusions, which apply both to FOIA's affirmative and reactive disclosure requirements.

Our first set of recommendations propose that Congress more precisely define or expand agency obligations with respect to six specific types of agency legal materials that too often escape consistent affirmative disclosure:

1. Final opinions and orders;

2. Enforcement decisions, such as fines, penalties, inspection records, letter rulings, and dispensations;

3. Settlement agreements that resolve actual or pending litigation;

4. Formal legal opinions from the Department of Justice's Office of Legal Counsel (OLC);

5. Legal opinions issued by agency chief legal officers that function as law rather than merely advice; and

6. Guidance documents and inter-agency memoranda of understanding.

With respect to most if not all of these categories of materials, at least some federal agencies are currently doing a good job of disclosing such materials. But we found no agency to be disclosing materials in all six categories as fully as they could—and some agencies are failing to disclose any materials that fall into some of these categories. This is why congressional action is needed.

Of course, we recognize that for some agencies, affirmatively disclosing all these materials could be burdensome. For that reason, we also recommend that Congress adopt a novel statutory provision that would authorize agencies, under a defined set of conditions, to exempt themselves by notice-and-comment rulemaking from their affirmative obligation to disclose particular materials.

Specifically, agencies could exempt certain materials if affirmative disclosure would be both (a) impracticable for the agency, given the volume of content or the associated costs, and (b) of *de minimis* value to the public, due to the materials' repetitive nature. Even then, the agency would have to set forth in its rule a plan for providing alternative disclosure of aggregate data, representative samples, or other information about the body of documents it was exempting itself from disclosing.

Among other proposals in our report, we recommend amending or deleting provisions of the E-Government Act, the Federal Register Act, and the Presidential Records Act. Several of these recommendations would expand or clarify obligations to disclose legal materials originating in the Office of the President. We recognize that congressional imposition of disclosure obligations related to presidential materials might appear to raise serious separation of powers concerns. But various presidential directives to agencies are already subject to *reactive* disclosure by the very agencies to which they are directed. Moreover, because these agencies treat presidential directives as constraining their discretion, they fit within the definition of the kind of agency legal materials that the public is entitled to expect the government to affirmatively make accessible.

We also note that for almost 90 years the Federal Register Act has defined the President as an "agency" and imposed upon the President an affirmative obligation to publish certain presidential directives. We recommend that existing publication obligations imposed on the President be maintained but updated to better reflect the directives' function and substance.

In terms of *how* agencies should disclose their legal materials, we recommend that Congress direct agencies to develop affirmative disclosure plans, which would enable agencies to customize their procedures and practices for online disclosure. In support of this recommendation, which reflects a widely used management-based approach to governance, we identified fifteen essential elements of such plans, all of which find support in previous ACUS recommendations.

We also advance three more specific recommendations about *how* agencies should disclose their legal materials. First, we encourage agencies to provide links on their websites that cross-reference related legal materials. For example, the online text of, or link to, an agency regulation should be accompanied by links to the *Federal Register* notices from the rulemaking, related guidance documents, important adjudications applying the regulation, and the like. Such a practice would make it easier for members of the public to find relevant legal materials.

Second, we urge Congress to direct the Office of Management and Budget to update its guidance to agencies about how they should construct and organize their websites. Technology is changing rapidly and it is important for agencies to keep their websites containing legal materials well-maintained and up to date.

Third, we recommend that Congress direct the Office of Federal Register to study ways to make the corpus of presidential directives more readily searchable online. It is time to codify presidential records as clearly and accessibly as statutes and regulations have been organized for decades.

These various recommendations will only matter, of course, if agencies have appropriate incentives to implement them faithfully and consistently. To encourage agencies to maintain and enhance their disclosure practices, we recommend that Congress resolve a current circuit conflict and allow members of the public, after appropriate exhaustion of administrative remedies, to file lawsuits seeking to enforce agencies' affirmative disclosure obligations. But we also recommend, for those members of the public who wish to avoid initiating such broadscale litigation, that agencies be required to provide, upon request, specific unavailable legal materials that should have been made available—and to do so on an expedited basis and without charging fees.

We acknowledge, of course, that the kind of statutory clarifications and changes we recommend would create some new costs and burdens for agencies. Agencies might save some costs by reducing FOIA requests, but they are likely to be hard-pressed, especially in the short term, to divert significant resources from those used to provide reactive disclosure. Accordingly, it will be vital for Congress to provide adequate supplemental funding for agencies to expand and improve the availability of their legal materials.

Still, our recommendations are practical, feasible, and realistic. Almost all are reflected in some federal agency's current practice. Even our recommendation on the affirmative disclosure of OLC opinions merely calls for what is essentially the codification of the approach already contained in the Justice Department's own written policies. What we recommend Congress adopt by way of legislative changes would "level up" disclosure practices across all agencies. Overall, the package of recommendations in our report would ensure that all agencies engage in disclosure practices that some agencies have already proven feasible, while simultaneously providing flexibility for individual agencies to adjust to their unique circumstances.

After we submitted a draft of our consultant's report to ACUS, the Conference established an Ad Hoc Committee on Disclosure of Agency Legal Materials. This committee's membership was drawn from across ACUS's standing committees and from both public and government members of ACUS. Relying initially on our draft report, ACUS staff drafted a recommendation for discussion, which the Ad Hoc Committee debated and revised over the course of four sessions. The resulting Ad Hoc Committee's recommendation was considered in June by ACUS as a whole at its 79th plenary session.

What resulted was ACUS Recommendation 2023-1. This final ACUS recommendation largely tracks the proposals we put forward in our report.

For example, Recommendation 2023-1 clarifies that agencies have an affirmative disclosure obligation for five of the six categories of legal material addressed in our report; it omits OLC opinions. Furthermore, it added three additional categories to ensure that agencies proactively disclose who within an agency has authority to make administrative decisions: namely, by posting documents online that describe delegations of authority, orders of succession, and the identity of first assistants eligible to succeed to their superior's Senate-confirmed positions.

ACUS's final recommendation also endorsed our proposal that agencies be authorized to use rulemaking to exempt themselves from affirmative disclosure of specific bodies of material. By the end of the ACUS process, the language we proposed for determining which materials could qualify for such an exemption had been altered. The revised language would still allow agencies to declare that they would not be affirmatively disclosing materials, but only if either the materials "do not vary considerably in terms of their factual contexts or the legal issues they raise" or their disclosure "would be

misleading." And our proposal that an agency provide public notice and an opportunity for comment before exempting itself from disclosure requirements was, regrettably, excised from the ACUS recommendation on the floor of the Plenary session.

Our recommendations for how agencies should disclose their legal materials, though, were largely adopted, with the exception of our suggestions for improving public access to presidential directives. For example, ACUS adopted our recommendation calling for legislation to require agencies to establish written disclosure plans and provide cross-reference links to material related to agency rules. It also called for legislation that would ensure that the Office of Management and Budget periodically update its agency website guidance.

Finally, ACUS adopted our recommendation that Congress clarify that agencies' affirmative disclosure obligations are judicially enforceable. Although the final ACUS recommendation omitted our suggestion that legislation clarify that FOIA requests for agency legal materials be automatically entitled to expedited treatment and fee waivers, it did explicitly endorse legislation permitting individuals to use these requests, without having to initiate litigation, to find material that should have been affirmatively disclosed.

All in all, were Congress to adopt legislation that follows ACUS Recommendation 2023-1, it would be making important strides toward fulfilling the goal of making agency legal materials "known to the public to the greatest extent feasible." Perhaps, as with any policy or legislative issue, some critics might assert that the final product falls short of recommending everything that Congress should adopt in an ideal world. Nevertheless, the ACUS recommendation does put forward a series of important but practical and attainable steps that are not only grounded in widespread consensus but would also clearly improve public access to the agency-created legal materials.

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This essay is one of a four-part series on Using Technology to Improve Administration.

Tagged: ACUS, Affirmative Disclosure