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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Sixtieth Plenary Session. The appended recommendations address: Resolving FOIA Disputes Through Targeted ADR Strategies; Government in the Sunshine Act; Guidance in the Rulemaking Process; and "Ex Parte" Communications in Informal Rulemaking.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2014-1, David Pritzker; for Recommendation 2014-2, Reeve Bull; for Recommendation 2014-3, Funmi Olorunnipa; and for Recommendation 2014-4, Emily Bremer. For all four of these actions the address and phone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixtieth Plenary Session, held June 5-6, 2014, the Assembly of the Conference adopted four recommendations.

Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*, addresses more effective use of alternative dispute resolution (ADR) approaches to help resolve

disputes arising under the Freedom of Information Act (FOIA). The OPEN Government Act of 2007 created the Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, to assist in the resolution of FOIA disputes through use of mediation and other ADR techniques. The recommendation suggests ways that OGIS can maximize the effectiveness of its resources for this purpose. The recommendation also suggests steps agencies can take to prevent or resolve FOIA disputes, including cooperating with OGIS and making FOIA staff and requesters aware of OGIS services.

Recommendation 2014-2, *Government in the Sunshine Act*, highlights best practices designed to enhance transparency of decisionmaking at multi-member boards and commissions subject to the Government in the Sunshine Act. The recommendation urges covered agencies to provide a description of the primary mechanisms for conducting business, describe substantive business disposed of outside of open meetings subject to the Act (with appropriate protections for information made exempt from disclosure), and exploit new technologies to disseminate relevant information more broadly.

Recommendation 2014-3, *Guidance in the Rulemaking Process*, identifies best practices for agencies when providing guidance in preambles to final rules. It suggests ways that agencies can improve the drafting and presentation of these preambles, including making it easier to identify any guidance content. The recommendation also urges agencies to ensure that users of their websites can easily locate the required small entity compliance guides.

Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, provides guidance and best practices to agencies for managing "ex parte" communications between agency personnel and nongovernmental interested persons regarding the substance of informal rulemaking proceedings conducted under 5 U.S.C. 553.

The Appendix below sets forth the full texts of these four recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: www.acus.gov/60th. A video of the Plenary Session is available at the same Web address, and a transcript of the Plenary Session will be posted when it is available.

Dated: June 20, 2014.

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2014-1

Resolving FOIA Disputes Through Targeted ADR Strategies

Adopted June 5, 2014

The Freedom of Information Act (FOIA)[1] makes available to any person, upon request, any reasonably described agency record that is not exempt under nine specified categories.

[1] 5 U.S.C. § 552, as amended.

Congress has stated: "disclosure, not secrecy, is the dominant objective of the Act."[2] FOIA provides a two-level agency process for decisions on requests for access to agency records: (1) an initial determination that is ordinarily made by the component of the agency with primary responsibility for the subject matter of the request; and (2) an appeal to an authority under the head of the agency in the case of an adverse initial determination. A requester's formal recourse following an adverse determination on appeal (or the agency's failure to meet the statutory time limits for making a determination) is a suit in federal district court to challenge the agency action or inaction. Attaining the highest level of compliance at the agency level, without the need for resort to litigation, has long been recognized as a critical FOIA policy objective. A series of amendments to the Act over the years has provided for more detailed monitoring of agency compliance and established agency mechanisms to promote compliance. Despite these efforts, several hundred agency FOIA determinations adverse to requesters are challenged annually in federal courts,[3] and it is widely assumed that a substantial number of other non-compliant agency FOIA determinations are not taken to court by requesters, primarily for reasons of cost and delay that inhere in federal court litigation.

The Administrative Conference considered the potential value of "alternative dispute resolution" (ADR) in relation to FOIA disputes in 1987, at a time when federal agency use of

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[2] Openness Promotes Effectiveness in our National [OPEN] Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552), § 2(4). See also Presidential Memorandum of January 21, 2009, Freedom of Information Act, which stated, "The [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails." 74 Fed. Reg. 4683 (Jan. 26, 2009).

[3] The year 2012 saw the highest number of FOIA requests in the history of the law: a striking 650,000 requests were filed with agencies throughout the Executive Branch by individuals and organizations seeking government information. Data from the Administrative Office of the United States Courts indicate that the number of FOIA cases has varied within a range of 280 to 388 over fiscal years 2007 through 2013. Annual agency FOIA litigation costs hover around $23 million—a conservative estimate by some accounts.

ADR processes was not as common as today, and concluded that the data then available did not clearly establish the need for either an independent administrative tribunal to resolve FOIA disputes or the appointment of a FOIA ombudsman within the Department of Justice. However, the Conference noted that greater reliance on informal approaches to FOIA dispute resolution could result in more effective handling of some FOIA disputes without resort to court litigation.[4]

The OPEN Government Act of 2007 reflected concerns that some agencies, as a whole, were not implementing FOIA as Congress intended. Significantly, the 2007 legislation included, for the first time in FOIA's history, provisions that directed agency FOIA officers to "assist in the resolution of disputes" between the agency and a FOIA requester.[5] This legislation created in each agency the positions of a Chief FOIA Officer and FOIA Public Liaisons, and established the Office of Government Information Services (OGIS) in the National Archives and Records Administration, to perform a broad range of functions aimed at improving FOIA compliance and providing assistance to requesters. Those two developments are the only government-wide FOIA dispute resolution process changes subsequent to the earlier Administrative Conference study.

The Role of the Office of Government Information Services

OGIS has been in operation since September 2009. Acting, in effect, as a "FOIA ombudsman," OGIS has a hybrid mission that includes: identifying and resolving individual FOIA disputes between requesters and agencies through mediation services; reviewing agency

[4] *See* ACUS Statement #12, 52 Fed. Reg. 23,636 (June 24, 1987).

[5] OPEN Government Act of 2007, *supra* note 2, 5 U.S.C. § 552(a)(6)(B)(ii).

FOIA policies, procedures and compliance with FOIA; and making recommendations to Congress and the President to improve the administration of FOIA.

The Administrative Conference undertook a study in 2013 to examine the issues and other case characteristics that most commonly lead to litigated FOIA disputes, and to consider whether particular types of ADR approaches are likely to be especially effective in resolving identified types of FOIA cases or issues in an efficient and effective manner short of litigation. The current study reviewed FOIA cases closed in federal district courts in fiscal years 2010 through 2013 in order to categorize the bases for the most common types of FOIA lawsuits. Review of cases was supplemented by other case data and interviews with individuals whose experience with the FOIA process could give an understanding of the varying dimensions and perspectives of that process.

The Conference's study found wide variation in the form and substance of FOIA disputes between requesters and agencies, in the motivation, resources, and sophistication of requesters, and in the missions and the level of interest in agency records. The interplay of these variables has led to the conclusion that no simple formula for linking a particular set of case characteristics with particular ADR approaches is likely to be very fruitful. Instead, it appears that the most important targeting should be directed toward the dispute resolution mechanism itself. It is vital that OGIS, a mechanism external to the agencies that is open to all issues, all requesters, and all agencies, have appropriate FOIA dispute resolution authority, expertise, and resources.

In practice, OGIS's caseload is determined by whoever happens to contact OGIS, typically by telephone or e-mail inquiries, some of which come from individuals who have never filed a FOIA request. Often such individuals seek only modest help, such as where to file or

what form to use to obtain the desired records or information. Many of these inquiries are handled routinely on the day they are received. OGIS classifies such contacts as "Quick Hits." This service, along with the informational resources on the OGIS website, is frequently sufficient to assist the least sophisticated users of FOIA and should be continued. This is a low cost/high value function that has instant payoff for a broad constituency.

OGIS Caseload

Although many inquiries to OGIS are routine in nature, others are not. Also, the issues involved in an inquiry sometimes turn out to be more complicated than initially realized. In such cases, OGIS will gather information from the requester and make a preliminary assessment of the case, to decide whether it seems appropriate for an OGIS contact with the relevant agency to find out the status of the case and whether the agency has taken a position. Since the statute does not place any duty on the agency to participate in the OGIS mediation process, OGIS depends on agency cooperation. The relatively small fraction of agency denials that are appealed to the courts, together with agency success rates in FOIA litigation, may serve as a disincentive to agencies to participate meaningfully in a dispute resolution process at this point.

Although the Office of Information Policy (OIP) in the Department of Justice (DOJ) historically considered itself to have a role as "FOIA ombudsman," the legislation that created OGIS clearly assigned a mediation role to OGIS and, in effect, a "FOIA ombudsman" responsibility.[6] Underlying this policy decision was the fact that DOJ, including OIP, historically had both a FOIA compliance promotion function and a responsibility to represent

[6] However, the legislation (OPEN Government Act of 2007, *supra* note 2) does not use the term "FOIA ombudsman."

agencies in lawsuits arising under FOIA. Under the OPEN Government Act of 2007, OGIS has statutory responsibility to promote compliance but possesses no agency representation responsibilities.

OGIS has implemented its ombudsman responsibility through facilitating communications between a requester and the agency, helping the parties address factors contributing to delay, or actually engaging in a mediating process to achieve a resolution satisfactory to both sides. The recommendations addressed to OGIS that follow are intended to optimize the use of its resources. OGIS encourages requesters to complete the agency administrative appeal process prior to significant OGIS engagement, so as to give the agency an opportunity to reconsider its initial decision to deny a request. Whether or not a requester has exhausted the agency appeal process, if the unresolved portions of the request appear meritorious, OGIS assistance should focus on enabling the requester and the agency to engage in a discussion that resolves the dispute or deters litigation, either through reconsideration of the agency position or through the agency providing a fuller, more informative explanation for its position.

The OPEN Government Act of 2007, in addition to authorizing OGIS to provide mediation services to resolve FOIA disputes, provided that OGIS, at its discretion, may offer advisory opinions if mediation has not resolved the dispute.[7] However, OGIS has not yet chosen to exercise this authority.[8] The statutory linkage of OGIS advisory opinions to its mediation

[7] 5 U.S.C. § 552(h)(3).

[8] Although either the requester or the agency could ask OGIS for an advisory opinion, OGIS should have discretion to determine whether to initiate the advisory opinion process. An OGIS decision whether or not to issue an advisory opinion would likely not be subject to judicial review. *See* Heckler v. Chaney, 470 U.S. 821 (1985). The statute expressly uses the phrase, "at the discretion of the Office."

function is not ideal because a requester's or an agency's anticipation of OGIS's taking a public position in a particular case in which OGIS seeks to serve as a neutral mediator may discourage parties from participating in mediation. It therefore is important for OGIS to distinguish between expressing views on systemic issues or identifying broad trends or patterns and issuing advisory opinions that address the facts of individual cases it has sought to mediate. In appropriate cases, issuance of an advisory opinion may forestall potential litigation, and OGIS should make the parties aware of this authority.[9] Factors such as potential breadth of application and frequency of occurrence of an issue, along with consideration of caseload manageability, should be among the primary, though not the exclusive, determinants for OGIS in deciding whether or not to initiate the advisory opinion process. An OGIS advisory opinion might receive judicial consideration in a FOIA suit in which the advisory opinion is before a court, whether in the dispute which led to the opinion or another in which that issue is raised.[10]

Role of FOIA Public Liaisons

The FOIA Public Liaison role in each agency was created by the OPEN Government Act of 2007 specifically to foster assistance to FOIA requesters. Preventing or resolving FOIA disputes within agencies through the work of Public Liaisons advances the goals of the Act and can relieve the dispute resolution burden of both OGIS and the courts. These agency officials

[9] OGIS has described its advisory opinion authority as follows: "OGIS also is authorized to issue advisory opinions, formal or informal. By issuing advisory opinions, OGIS does not intend to undertake a policymaking or an adjudicative role within the FOIA process, but instead will illuminate novel issues and promote sound practices with regard to compliance with FOIA." *Available at* https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/the-ogis-mission.htm.

[10] *See* United States v. Mead Corp., 533 U.S. 218 (2001) (holding that a court may find persuasive, to some degree, the reasoning of an agency position that itself is not entitled to judicial deference under Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

should be given adequate authority and support from agency leadership for carrying out their statutory dispute resolution function, including appropriate training.

Agency FOIA Public Liaisons, under the direction of their Chief FOIA Officers, should be encouraged to seek OGIS mediation or facilitation services at any stage in the processing of a request when it appears to the agency that OGIS engagement may aid in the resolution of a request. In such cases, if the requester agrees to participate, OGIS should make its services available whether or not the appeals process has been exhausted or any applicable time limit has expired. This opportunity for agency engagement of OGIS recognizes that (a) once an agency has made a final determination on a request it is less likely than a requester to seek OGIS assistance, and (b) agency-sought OGIS engagement may provide one of the most fruitful settings in which to obtain an informal resolution.[11] Whether or not an agency chooses to seek OGIS assistance, each agency, in any appeal determination letter in which a request is denied in whole or in part, should notify the requester of the availability of OGIS mediation or facilitation services as a non-exclusive alternative to litigation.[12]

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[11] OGIS has described its relationship with agency FOIA Public Liaisons as follows:

> While the OPEN Government Act's definition of a [FOIA Public Liaison (FPL)] is simple and straightforward, we know that the reality of their positions is anything but. Some agencies have created new FPL positions that are completely dedicated to assisting requesters and resolving disputes. Other agencies — many of them smaller agencies — added the FPL tasks listed in the Act to the already-full plate of someone within the FOIA shop. We've also found that FPLs have a variety of approaches to their job, including everything from agitating for change within agencies to reiterating the party line.

http://blogs.archives.gov/foiablog/2011/06/09/whats-a-foia-public-liaison.

[12] OGIS itself has recommended such notice in the following form:

> As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

Congress and the Executive Branch should recognize the largely distinct dispute resolution and compliance promotion roles of OGIS, agency Chief FOIA Officers, and the Department of Justice, as a collective set of administrative mechanisms sharing the goal of avoiding unnecessary FOIA litigation.

Recommendation

Recommendations to the Office of Government Information Services (OGIS)

1. OGIS, a part of the National Archives and Records Administration, should continue to provide its "Quick Hit" service and the informational resources on its website, as principal means of assisting the least sophisticated users of the Freedom of Information Act (FOIA).

2. Requesters may appropriately seek assistance from OGIS at any stage of the FOIA process. However, because the opportunity for a FOIA appeal within the agency is an important component of the process, OGIS should continue to encourage requesters to complete that step prior to significant OGIS engagement.

3. OGIS should continue to provide both facilitation and mediation assistance to requesters and agencies, depending on the nature of the issues in dispute.

(a) For delay issues, OGIS assistance should focus on practical steps that, with agency cooperation, might facilitate processing of the request.

Available at https://ogis.archives.gov/about-ogis/working-with-ogis/Standard-OGIS-Language-for-Agencies.htm. OIP also has encouraged agencies to follow this practice. *Available at* http://www.justice.gov/oip/ foiapost/2010foiapost21.htm.

(b) For substantive issues, whether or not the requester has exhausted the agency appeal process, if the unresolved portions of the request appear meritorious, OGIS assistance should focus on enabling the requester and the agency to engage in a discussion that resolves the dispute without litigation, either through agency reconsideration of its position or through provision of a more informative explanation of the agency's decision.

4. In appropriate situations, OGIS should make use of its statutory, discretionary authority to issue advisory opinions. In implementing this authority, OGIS should distinguish between issuance of an advisory opinion in connection with (a) a systemic issue or identification of a broad trend or pattern, and (b) application of FOIA to the facts of an individual case, for which OGIS taking a position on an issue could be perceived to undercut its ability to act as a neutral mediator. Factors such as potential breadth of application, frequency of occurrence of an issue, and caseload manageability should be among the primary, though not the exclusive, determinants for OGIS's decision whether to initiate the advisory opinion process.

5. To the extent that agency and OGIS resources permit, OGIS should consider ways to acquire better data from both agencies and requesters on the kinds of issues that have led to recurring or protracted FOIA disputes. Such efforts may include working with agencies and others to create a database of consistent information on litigated issues. It may also be useful for OGIS to contact former litigants to gain a better understanding of their awareness and usage of OGIS or other sources of dispute resolution services.

Recommendations to Agencies

6. All agencies, acting in a spirit of cooperation, should affirmatively seek to prevent or resolve FOIA disputes to the greatest extent possible. In addition, all agencies, through their

FOIA Public Liaisons under the direction of their Chief FOIA Officers, should seek OGIS mediation or facilitation services at any stage in the processing of a request when it appears to the agency that OGIS engagement may aid in the resolution of that request. As early in the dispute resolution process as possible, the agency should provide the requester and OGIS with sufficient detail about its position to enable the requester to make a knowledgeable decision on whether to pursue the request further.

7. All agencies, in any appeal determination letter in which a request is denied in whole or in part, should notify the requester of the availability of OGIS mediation or facilitation services as a non-exclusive alternative to litigation. Agency websites and FOIA regulations should call attention to the dispute resolution services available from OGIS.

8. All agencies should take steps to maximize the effectiveness of their FOIA Public Liaisons in fulfilling the dispute resolution function that the Act assigns to Public Liaisons. Agency websites, as well as initial response letters to FOIA requests, should call attention to the problem resolution assistance available from Public Liaisons. In addition, agency leadership should provide adequate authority and support to Public Liaisons and should ensure they receive necessary training, including in dispute resolution, and are made aware of the services offered by OGIS.

9. Upon request by the Director of OGIS, all agencies should cooperate fully with OGIS efforts to mediate or otherwise facilitate the resolution of individual FOIA disputes. Similarly, agencies should cooperate with efforts by OGIS to obtain consistent and comparable data relating to FOIA litigation, to the extent permitted by law and agency resources.

Administrative Conference Recommendation 2014-2

Government in the Sunshine Act

Adopted June 5, 2014

In the late 1960s and 1970s, in the wake of increasing public vigilance concerning the activities of government sparked by the Vietnam War and Watergate, Congress passed and the President signed a series of transparency laws designed to promote greater accountability and transparency in government decisionmaking. The Government in the Sunshine Act, enacted in 1976, focused specifically on the transparency of meetings of multi-member agencies.[1] For any meeting involving a quorum of board or commission members, the agency must announce the event at least seven days in advance in the Federal Register and, with certain exceptions, permit attendance by interested members of the public.[2]

Notwithstanding its broad title, the Government in the Sunshine Act applies only to agencies that are headed by a group of board or commission members rather than an individual chairperson.[3] In addition to the Act's enumerated exceptions,[4] there are many ways of conducting business that fall outside its ambit. Specifically, any discussion among a group of

[1] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (5 U.S.C. § 552b (2006)).

[2] 5 U.S.C. § 552b.

[3] There are approximately 70 such agencies in the federal government. RICHARD K. BERG, STEPHEN H. KLITZMAN, & GARY J. EDLES, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 259–63 (2d ed. 2005); DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 127 (ACUS 1st ed., 2d printing 2013).

[4] 5 U.S.C. § 552b(c).

agency members smaller than a quorum does not trigger the Act.[5] The Act also does not apply when members communicate with one another and reach a decision via the exchange of written documents, a procedure known as "notational voting."[6]

The research conducted for the project shows that some boards and commissions dispose of a significant amount of business via means that are not subject to the Sunshine Act, relying especially heavily upon notational voting. For instance, of 32 agencies surveyed in connection with that research, 14 (approximately 40%) reported that they disposed of more than 75% of matters using that procedure, though the frequency with which it is used varies significantly from agency to agency.[7] As a consequence, many government transparency advocates have argued that some agencies undermine the spirit of the Sunshine Act by relying excessively on methods of conducting business that fall outside of its scope.[8] Many agencies, in turn, contend that they could not operate efficiently were they required to reach all substantive decisions in full agency meetings, especially those conducted in public.[9]

The Administrative Conference has addressed the Sunshine Act on two occasions, issuing recommendations designed to address concerns relating to the Act's negative effects on collegial interactions among board and commission members, on the one hand, and to agencies'

[5] *See id.* § 552b(a)(2) (defining "meeting" as any gathering featuring deliberations of "at least the number of individual agency members required to take action on behalf of the agency"); *see also* S. REP. NO. 94-354, at 19 (1975).

[6] Commc'ns Sys., Inc. v. Fed. Commc'ns Comm'n, 595 F.2d 797, 798–99, 801 (D.C. Cir. 1978).

[7] Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* 57 (Mar. 10, 2014) (citing research conducted by Professor Bernard Bell), *available at* http://acus.gov/report/final-Sunshine-Act-report.

[8] *Id.* at 25.

[9] *Id.* at 19–20.

overreliance upon means of conducting business that fall outside the Act's scope, on the other. In 1984, the Conference recommended that "agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities . . . in closed meetings, when the discussions are preliminary in nature or pertain to matters . . . which are to be considered in a public forum prior to final action."[10] In 1995, a special committee convened by the Conference recommended that Congress establish a pilot program (lasting from five to seven years) that would allow members to meet privately so long as they provide a detailed summary of the meeting no later than five days after it has occurred.[11] In exchange, pilot program participants would agree to refrain from using notational voting on "important substantive matters," instead addressing those issues in open meetings, and would "hold open public meetings, to the extent practicable, at regular intervals, at which it would be in order for members to address issues discussed in private sessions or items disposed of by notation."[12] Due to the temporary closure of the Administrative Conference shortly after the special committee issued its report, this recommendation was never forwarded to the full Assembly for consideration in Plenary

[10] Administrative Conference of the United States, Recommendation 84-3, ¶ 2, 49 Fed. Reg. 29,942 (July 25, 1984).

[11] Administrative Conference of the United States, *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 427 (1997) (the meeting summary "would indicate the date, time, participants, [and] subject matters discussed, and [would contain] a review of the nature of the discussion").

[12] *Id.* at 427–28. In 1984, the Administrative Conference similarly recommended that Congress "should consider whether the present restrictions on closing agency meetings are advisable" and examine statutory changes that might promote greater collegiality among board and commission members without materially undermining governmental transparency. Administrative Conference of the United States, Recommendation 84-3, *Improvements in the Administration of the Government in the Sunshine Act*, 49 Fed. Reg. 29,942 (July 25, 1984).

Session.[13]

In the surveys conducted for this project, although agency officials express many of the same frustrations with the operation of the Sunshine Act that they voiced in the prior Administrative Conference studies,[14] they indicated that they generally are able to conduct business under the existing regime.[15] Though governmental transparency advocates would prefer that agencies render more of their decisionmaking in open meetings, curtailing or eliminating the use of notational voting in all circumstances would prove disruptive to agencies' ability to function effectively.[16] At the same time, agencies can achieve greater transparency within the existing framework by apprising the public of their decisionmaking procedures and providing notice of business transacted outside of open meetings. In particular, agencies can exploit technological advances in order to disseminate information widely without incurring

[13] A pilot program along the lines of the 1995 recommendation permitting one or more agencies to hold private meetings would provide empirical evidence concerning whether such a policy change would promote collegiality without undermining the Act's overarching purpose of promoting transparency. The research for the instant recommendation in no way suggested that such a pilot program would be infeasible or undesirable, and, if some agencies are interested in participating, Congress may wish to authorize such a program and track the results to determine whether to expand it to all covered agencies. The Conference remains interested in revisiting the 1995 proposal, and, if adopted, the pilot program would ideally include multiple agencies, given that the dynamics vary from agency to agency.

[14] For instance, several agency officials expressed uncertainty concerning the ability of members to hold preliminary discussions or to conduct "brainstorming" sessions and voiced concern that the Act may impede collegiality. *See* Bull, *supra* note 7, at 52–55, 64–67. The obligations of the Sunshine Act present special challenges for agencies having three members, either from their structure or from vacancies, insofar as any substantive discussion amongst two members of the agency can trigger the Act.

[15] *Id.* at 17, 19–22. In light of the absence of applicable caselaw, this recommendation does not address the lawfulness of email and other electronic exchanges amongst board or commission members under the Sunshine Act.

[16] *Id.* at 19–20.

unreasonable costs.[17] This recommendation highlights a number of best practices undertaken by agencies covered by the Act and encourages other agencies to consider these innovations and implement them as appropriate, while preserving agency discretion to tailor the proposals to fit the needs of their individual programs.[18]

Recommendation

1. Each covered agency should develop and publicly release a succinct advisory document that discusses the mechanisms for attending and participating in open meetings and discloses the agency's procedures for closing meetings and the Sunshine Act exceptions upon which the agency typically relies. It should also describe the types of business the agency typically conducts outside of open meetings (including business conducted via notational voting) and how the results are revealed to the public. Each such agency should post a copy of this document on its website and in other places at which it can be accessed by interested members of the public.

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[17] Recommendation 4 urges agencies to consider providing webcasts or audiocasts of open meetings. In so doing, they should ensure that they achieve full compliance with the Section 508 Amendment to the Rehabilitation Act of 1973, which requires that electronically furnished information promote access to persons with disabilities. 29 U.S.C. § 794d. For example, the Department of Homeland Security has developed a webcasting forum, the Homeland Security Information Network, that allows agencies to webcast meetings and provides simultaneous captioning so as to ensure access for persons with hearing impairments. Bull, *supra* note 7, at 33–34. Agencies should explore the use of new technologies to provide ready access to meeting materials for individuals who otherwise might be geographically constrained from participating in the agencies' work.

[18] Recommendation 5 encourages agencies to post online any transcripts or meeting minutes prepared by or for the agencies. The Administrative Conference takes no position on whether agencies should reserve the right to post a transcript online whenever they contract with a private entity to prepare a transcript for an open meeting. In connection with Recommendation 6, the Conference notes that, consistent with the Freedom of Information Act and Government in the Sunshine Act, agencies need not disclose information protected by other statutes. 5 U.S.C. §§ 552(b)(3), 552b(c)(3).

2. For open meetings, covered agencies should post a meeting agenda on their websites as far in advance of the meeting as possible. Except for documents that may be exempt from disclosure under the Freedom of Information Act, agencies should also post in advance all documents to be considered during the meeting. When an agency cannot post non-exempt meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred.

3. Covered agencies should create email listservs, RSS feeds, or other electronic distribution mechanisms so as to provide timely notification for interested stakeholders and members of the public and an opportunity to receive meeting notices and other announcements relevant to upcoming meetings subject to the Sunshine Act.

4. Covered agencies should consider providing webcasts or audiocasts of open meetings. Such agencies should consider providing real-time streaming video of open meetings, if practicable, and in any event, should consider providing a webcast after the meeting has occurred that will be archived on the agency website for a reasonable period of time.

5. For all open meetings for which meeting minutes or transcripts are prepared by or for the covered agencies in the ordinary course of business, such agencies should endeavor to post these documents online in a timely manner after the meeting.

6. Except for information that may be exempt from disclosure under the Freedom of Information Act or the Government in the Sunshine Act, covered agencies should provide a summary description of business disposed of in closed meetings or via notational voting. The description should provide a brief summary of ultimate conclusions that the agency reached (e.g., the results of votes taken via notation procedure) but need not describe individual statements

made during such meetings or other predecisional elements of the preceding discussions.

Administrative Conference Recommendation 2014-3

Guidance in the Rulemaking Process

Adopted June 6, 2014

Over the past two decades, the use of guidance—nonbinding statements of interpretation, policy, and advice about implementation—by administrative agencies has prompted significant interest from Congress, executive branch officials, agency officials, and commentators. Most of this attention has been directed to "guidance documents," freestanding, nonbinding statements of policy and interpretation issued by agencies. While such guidance is often helpful to the public and is normally to be encouraged, commentators and the Administrative Conference have expressed concern that agencies too often rely on guidance in ways that circumvent the notice-and-comment rulemaking process.[1] The long-standing debate about guidance and its relationship to notice-and-comment rulemaking has, however, largely overlooked consideration of the function and varieties of *contemporaneous guidance*—that is, guidance that agencies provide about the meaning and purpose of their rules at the time those rules are issued.[2]

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[1] Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30101, 30103-04 (July 8, 1992).

[2] *See* KEVIN M. STACK, GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE at 2 (MAY 16, 2014) (Final Report to the Administrative Conference of the U.S.), available at http://www.acus.gov/sites/default/files/documents/Guidance%20in%20the%20Rulemaking%20Process%20Revised%20Draft%20Report%205_16_14%20ks%20final.pdf [hereinafter Stack Report].

Contemporaneous guidance appears in three main forms. First, agencies provide guidance about the meaning and application of their rules in explanatory "statement[s] of their basis and purpose,"[3] statements that constitute the bulk of the "preambles" issued with final rules. Second, agencies sometimes provide guidance in the regulatory text itself, in the form of notes and examples, and more general guidance in appendices that appear in the Code of Federal Regulations (CFR). Third, when agencies promulgate their regulations, they sometimes also issue freestanding guidance documents. Contemporaneous guidance furthers the legal value of notice; it furnishes the public and regulated entities with the agency's understanding of its regulations at the time of issuance, as opposed to later in time or in the context of an enforcement proceeding.

The Administrative Conference commissioned a study of agencies' current practices in providing contemporaneous guidance and the law applicable to this form of guidance.[4] This Recommendation and the underlying report identify a set of best practices for agencies in providing guidance in preambles to final rules,[5] as well as some problems in agencies' current practices in providing contemporaneous guidance. The report also describes the law applicable to guidance provided in preambles to final rules, regulatory text, and separate guidance documents.

This Recommendation builds upon two prior Conference recommendations with regard to the use of guidance by agencies. Administrative Conference Recommendation 76-5,

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[3] 5 U.S.C. § 553(c) (2012).

[4] *See* Stack Report, *supra* note 2.

[5] The underlying study and this Recommendation address preambles to final rules, not preambles to other documents such as a notice of proposed rulemaking (NPRM). However, some of the recommendations herein may nonetheless have some application to preambles to NPRMs.

Interpretive Rules of General Applicability and Statements of General Policy,[6] identified the benefits of providing notice and an opportunity to comment prior to the agency's adoption of guidance (sometimes called "non-legislative" rules) for both an agency and potentially affected parties. In Recommendation 92-2, *Agency Policy Statements*, the Conference advised agencies to impose binding standards or obligations only through use of the legislative rulemaking procedures of the Administrative Procedure Act (APA), typically the notice-and-comment process, and reiterated the importance of allowing parties an opportunity to challenge the wisdom of the policy statement prior to its application.[7] The Office of Management and Budget's *Final Bulletin for Agency Good Guidance Practices* (*OMB's Good Guidance Bulletin*),[8] adopted in 2007, reflects the concerns identified in these prior recommendations; the *Bulletin* obliges covered agencies to provide a means for public feedback on significant guidance documents and to undertake notice-and-comment procedures before issuing economically significant guidance, among other things. Neither of the Conference's prior recommendations nor *OMB's Good Guidance Bulletin* specifically addresses the guidance that agencies provide in preambles to final rules or in text that appears in the CFR.

This Recommendation addresses a number of issues regarding agencies' current practices by isolating ways in which agencies' presentation and drafting of preambles can be improved so that guidance contained therein is more helpful and more accessible. First, some preambles do

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[6] Administrative Conference of the United States, Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56767, 56769-70 (Dec. 30, 1976).

[7] Recommendation 92-2, *supra* note 1, at 30103-04.

[8] Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007), *available at* http://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf.

not include the issuing agency's statement of the purposes of the rules adopted in light of the statute's objectives. That absence reduces the usefulness of these statements in providing even the most basic guidance about the meaning and applicability of the rules. It also ignores the APA's requirement that agencies accompany a final rule with a statement of the rule's "basis and purpose." Second, the length of preambles to many major rules makes locating preambular guidance difficult, particularly where a preamble is written as narrative discussion without clear structure. Third, in their preambles to final rules, many agencies incorporate or rely upon discussions of the basis and purpose of the rule provided in the notice of proposed rulemaking or other prior notices. This practice can save time and costs for agencies in preparing preambles, but it also requires affected parties to integrate two or more agency treatments of the rule's basis and purpose. Fourth, many agencies do not mention preambles on their webpages and in other compilations of guidance, nor do they integrate the guidance content of preambles into their indices or topical treatments of guidance. This does not assist the public and regulated entities in integrating the guidance provided in preambles with other guidance documents. Fifth, displaying electronic versions of regulations with hyperlinks to relevant portions of their preambles and other guidance—a practice with which some agencies are experimenting[9]—could make it easier to find this content, and holds promise for future innovation.

A separate but equally important concern for preamble drafting is that some agencies include statements in preambles to final rules that appear to create binding standards or obligations as opposed to making those statements in the regulatory text. In this respect, this

[9] *See, e.g.*, http://www.consumerfinance.gov/eregulations/1005 (visited April 15, 2014) (providing a copy of 12 C.F.R. Part 1004 with hyperlinks to section-by-section analysis from regulatory preamble and other navigation tools and links).

Recommendation highlights that the prohibition against agencies making statements in guidance documents in forms that appear to be binding also applies to statements in preambles.[10]

Many agencies have policies on issuing guidance documents, but these policies do not generally address preambles and other forms of contemporaneous guidance. The Conference encourages agencies to include contemporaneous guidance within these policies as a step toward better integrating these forms of guidance with other guidance materials. This Recommendation also highlights that for agencies covered by *OMB's Good Guidance Bulletin*, the guidance content of their preambles should comply with the *Bulletin*.

Finally, the Small Business Regulatory Enforcement Fairness Act of 1996[11] requires that when agencies produce small business compliance guides, those guides be posted on the agency website in an "easily identified location."[12] Despite this requirement, these guides are often difficult to find on agency webpages. The Recommendation highlights this statutory requirement and urges greater agency attention to it with the assistance of the Small Business Administration.

Recommendation

Drafting of Preambles to Final Rules

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[10] *See OMB's Good Guidance Bulletin*, *supra* note 8, at 3440 (directing agencies not to use mandatory language in guidance documents); Recommendation 92-2, *supra* note 1, at 30103-04 (advising against making binding statements in policy statements).

[11] *See* Pub. L. No. 104-121, 110 Stat. 873, codified at 5 U.S.C. § 601 nt., § 212 (2012) (requiring the production of compliance guides whenever the agency must produce a regulatory flexibility analysis under 5 U.S.C. § 605(b), and quoting § 605(b)).

[12] *Id.* § 212(a)(2(A).

1. In the statement of basis and purpose accompanying a final rule, agencies should address how the rule advances statutory objectives. Such discussion should go beyond merely repeating the text or title of the statute.

2. Agencies should consider including, particularly for lengthy regulations, a section-by-section analysis in the preamble in which the organization of the preambular discussion corresponds to the organization of the final rules themselves. Such section-by-section analyses should go beyond merely repeating the regulatory text discussed.

3. When agencies incorporate or rely upon discussions of a rule's basis and purpose from prior notices, such as from the notice of proposed rulemaking, they should be mindful that such incorporation and reliance may make it more burdensome for readers to find all relevant information.

4. Agencies should not use the preamble as a substitute for regulatory language. Agencies should avoid use of mandatory language in the preambles to final rules, unless an agency is using these words to describe a statutory, regulatory, or constitutional requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected parties. Such language should be understood to include not only mandatory terms such as "shall," "must," "required," and "requirement," mentioned in the *OMB Final Bulletin for Agency Good Guidance Practices* (*OMB's Good Guidance Bulletin*), but also any other language that appears to impose substantive standards or obligations.

Policies on Guidance and Collections of Guidance

5. Agencies should mention preambles to their final rules as sources of guidance in their general compilations of guidance and on their webpages devoted to guidance. Agencies should also consider ways to integrate the guidance content of their preambles into their general compilations of guidance and on their webpages devoted to guidance.

6. To the extent agencies have policies on issuing guidance, those policies should assess and clearly state how they address the guidance content of preambles to their final rules. For agencies covered by *OMB's Good Guidance Bulletin*, their policies should address compliance with the *Bulletin* with respect to any significant and economically significant guidance included in preambles to final rules.

Electronic Presentation of Regulations

7. 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.

Small Entity Compliance Guides

8. Agencies should reassess how they are displaying the small entity compliance guides on their websites to ensure that these guides are in an "easily identified location," as required by Small Business Regulatory Enforcement Fairness Act of 1996.

9. The Small Business Administration should work with agencies to develop guidelines for posting small entity compliance guides on agency websites in ways that make them easily identifiable.

Administrative Conference Recommendation 2014-4

"Ex Parte" Communications in Informal Rulemaking

Adopted June 6, 2014

Informal communications between agency personnel and individual members of the public have traditionally been an important and valuable aspect of informal rulemaking proceedings conducted under section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Borrowing terminology from the judicial context, these communications are often referred to as "ex parte" contacts.[1] Although the APA prohibits ex parte contacts in formal adjudications and formal rulemakings conducted under the trial-like procedures of 5 U.S.C. §§ 556 and 557,[2] 5 U.S.C. § 553 imposes no comparable restriction in the context of informal rulemaking. The term "ex parte" does not entirely fit in this non-adversarial context, and some agencies do not use it. This recommendation uses the term because it is commonly used and widely understood in connection with informal rulemaking. As used in this recommendation, "ex parte communications" means: (i) written or oral communications; (ii) regarding the substance of an anticipated or ongoing rulemaking; (iii) between the agency personnel and interested persons;

[1] In the judicial context, "ex parte" contacts are those that are related to the subject of a lawsuit and occur between just one of the parties involved and the presiding judge, usually "without notice to or argument from the adverse party." BLACK'S LAW DICTIONARY (9th ed. 2009). Unless otherwise authorized by law, such contacts are generally viewed as highly unethical.

[2] *See* 5 U.S.C. § 557(d).

and (iv) that are not placed in the rulemaking docket at the time they occur. It bears emphasizing that such communications "are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."[3]

In Recommendation 77-3,[4] the Conference expressed the view that a general prohibition on ex parte communications in the context of informal rulemaking proceedings would be undesirable, as it would tend to undermine the flexible and non-adversarial procedural framework established by 5 U.S.C. § 553.[5] At the same time, the Conference concluded, it may be appropriate for agencies to impose certain restraints on ex parte communications to prevent potential or perceived harm to the integrity of informal rulemaking proceedings. Although the law has evolved since Recommendation 77-3 was adopted, these basic principles remain valid. Over the past several decades, agencies have implemented Recommendation 77-3 by experimenting with procedures designed to capture the benefits of ex parte communications while reducing or eliminating their potential harm. This recommendation draws on this substantial experience to identify best practices for managing ex parte communications received in connection with informal rulemakings.

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[3] Home Box Office, Inc. v. Federal Commc'ns Comm'n, 567 F.2d 9, 57 (D.C. Cir. 1977); *see also* Sierra Club v. Costle, 657 F.2d 298, 400-01 (D.C. Cir. 1981).

[4] Recommendation 77-3 emerged from a select committee the Conference convened in response to the D.C. Circuit's groundbreaking decision in *Home Box Office*. *See* Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 377 (1978). Following the recommendation's adoption, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), admonishing federal courts not to impose on administrative agencies procedural requirements beyond those contained in the APA. *See* Nathanson, 30 ADMIN L. REV. at 406-08.

[5] *See* Admin. Conf. of the United States, Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public. Although the rulemaking process has largely transitioned to electronic platforms in recent years, most ex parte contacts continue to take the form of oral communications during face-to-face meetings. These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates sensitive information, ex parte communications may be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies.[6]

On the other hand, ex parte communications can pose several different kinds of harm (both real and perceived) to the integrity of the rulemaking process. One difficulty is that certain people or groups may have, or be perceived to have, greater access to agency personnel than others. This unfairness, whether real or perceived, may be exacerbated if agency personnel do not have the time and resources to meet with everyone who requests a face-to-face meeting. Another concern is that agency decisionmakers may be influenced by information that is not in the public rulemaking docket. The mere possibility of non-public information affecting rulemaking creates problems of perception and undermines confidence in the rulemaking process. When it becomes reality, it creates different and more serious problems. Interested persons may be deprived of the opportunity to vet the information and reply to it effectively. And reviewing courts may be deprived of information that is necessary to fully and meaningfully evaluate the agency's final action.

[6] In such areas, interested persons may be willing to share essential information with the agency only through face-to-face, private conversations, and agency personnel may be subject to severe penalties for not keeping the information shared with them confidential. *See, e.g.*, 26 U.S.C. § 6103 (addressing confidentiality and disclosure of tax returns and tax return information). Of course, agencies may protect information from disclosure only to the extent permitted or required by law.

Best practices for preventing the potential harms of ex parte communications may vary depending on the stage of the rulemaking process during which the communications occur. Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex parte communications are desirable.[7] Communications during this early stage of the process are less likely to pose the harms described above and can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.[8] After an NPRM has been issued and during the comment period, there may be a heightened expectation that information submitted to the agency will be made available to the public. Indeed, during this time period, an agency's comment policy and its policy addressing ex parte communications may both apply.[9] Finally, once the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. Interested persons may be particularly keen to discuss with the agency information provided in comments by other persons filed at or near the close of the comment period. Agencies have in some circumstances disclosed significant new information received through such communications and reopened the comment period. This solution is not costless, however, and has the potential to significantly delay a proceeding.

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[7] Recognizing these principles, the Clinton Administration directed agencies "to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule," with the limited exception of "rules requiring the simple disclosure of the time, place, purpose, and participants of meetings." *See* Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), *available at* http://www.acus.gov/memorandum/regulatory-reinvention-initiative-memo-1995. This memorandum, which has never been revoked, continues to inform agency practice.

[8] *See id.*

[9] The Conference recently addressed agency comment policies. *See* Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

This recommendation focuses on how agencies can best manage ex parte communications in the context of informal rulemaking proceedings, including those that involve "quasi-adjudication among 'conflicting private claims to valuable privilege.'"[10] It does not address several related or peripheral issues. First, it does not evaluate formal or hybrid rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures to develop guidance documents. Second, it does not address ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA).[11] Third, it does not examine interagency communications outside the process of executive review. Fourth, it does not address intraagency interactions between an agency's staff and its decisionmakers.[12] Finally, it does not address unique issues that may arise in connection with communications between agencies and members of Congress, foreign governments, or state and local governments.

Recommendation

"Ex Parte" Policies

[10] *Sierra Club*, 657 F.2d at 400 (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959)). In such "quasi-adjudicatory" rulemakings, due process considerations may justify insulating the decisionmaker from ex parte contacts. *See id.*

[11] *See* Admin. Conf. of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989); Admin. Conf. of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).

[12] *See* 5 U.S.C. § 557(d).

1. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a written policy explaining how the agency handles what this recommendation refers to as nongovernmental "ex parte" communications, even if the agency does not use that term.

2. Agency ex parte policies should:

(a) Provide guidance to agency personnel on how to respond to requests for private meetings to discuss issues related to a rulemaking.

(b) Explain the scope of their coverage, which should be limited to communications on substantive matters and should exclude non-substantive inquiries, such as those regarding the status of a rulemaking or the agency's procedures.

(c) Establish procedures for ensuring that, after an NPRM has been issued, the occurrence and content of all substantive oral communications, whether planned or unplanned, are included in the appropriate rulemaking docket.

(d) Establish procedures for ensuring that, after an NPRM has been issued, all substantive written communications are included in the appropriate rulemaking docket.

(e) Explain how the agency will treat significant new information submitted to the agency after the comment period has closed.

(f) Identify deadlines for all required or requested disclosures of ex parte communications.

(g) Explain how the agency will treat sensitive information submitted in an ex parte communication.

(h) Explain how the agency's ex parte communications policy interacts with its comment policy.

3. In formulating policies governing ex parte communications in informal rulemaking proceedings, agencies should consider the following factors:

(a) The stage of the rulemaking proceeding during which oral or written communications may be received.

(b) The need to ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.

(c) Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings.

(d) The likelihood that protected information will be submitted to the agency through oral or written ex parte communications.

(e) The possibility that, even if an agency discourages ex parte communications during specified stages of the rulemaking process, such communications may nonetheless occur.

(f) The potential need to give agency personnel guidance about whether or to what extent to provide information to persons not employed by the agency during a face-to-face meeting.

Communications before an NPRM Is Issued

4. Agencies should not impose restrictions on ex parte communications before an NPRM is issued.

5. Agencies may, however, disclose, in accordance with ¶ 8 of this recommendation, the occurrence or content of ex parte communications received before an NPRM is issued, as follows:

(a) In the preamble of the later-issued NPRM or other rulemaking document; or

(b) In the appropriate rulemaking docket once it is opened.

Communications after an NPRM Has Been Issued

6. If an agency cannot accommodate all requests for in-person meetings after an NPRM has been issued, it should consider holding a public meeting (which may be informal) in lieu of or in addition to individual, private meetings.

7. After an NPRM has been issued, agencies should disclose to the public:

(a) The occurrence of all oral ex parte communications, including the identity of those involved in the discussion and the date and location of the meeting.

(b) The content of all oral ex parte communications through a written summary filed in the appropriate rulemaking docket. Agencies may either:

(i) Direct their own personnel to prepare and submit the necessary summary; or

(ii) Request or require private persons to prepare and submit the necessary summary of meetings in which they have participated, although it remains the agency's responsibility to ensure adequate disclosure.

(c) All written submissions, in the appropriate rulemaking docket.

Additional Considerations after the Comment Period Has Closed

8. Agencies should determine whether, and under what circumstances, ex parte communications made after the close of the comment period should be permitted and, if so, how they should be considered.

9. If an agency receives, through an ex parte communication, any significant new information that its decisionmakers choose to consider or rely upon, it should disclose the information and consider reopening the comment period, to provide the public with an opportunity to respond.

10. When an agency receives a large number of requests for ex parte meetings after the comment period has closed, it should consider using a reply comment period or offering other opportunities for receiving public input on submitted comments. *See* Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments* ¶ 6, 76 Fed. Reg. 48,791 (Aug. 9, 2011) (encouraging the use of reply comment periods and other methods of receiving public input on previously submitted comments).

Quasi-Adjudicatory Rulemakings

11. If an agency conducts "quasi-adjudicatory" rulemakings that involve conflicting private claims to a valuable privilege, its ex parte communications policy should clearly and distinctly articulate the principles and procedures applicable in those rulemakings.

12. Agencies should explain whether, how, and why they are prohibiting or restricting ex parte communications in quasi-adjudicatory rulemakings. Agencies may conclude that ex parte communications in this context require a different approach from the one otherwise recommended here.

13. Agencies should explain and provide a rationale for any additional procedures applicable to ex parte communications received in quasi-adjudicatory rulemakings.

Accommodating Digital Technology

14. Agencies should consider how digital technology may aid the management or disclosure of ex parte communications. For example, agencies may be able to use technological tools such as video teleconferencing as a cost effective way to engage with interested persons.

15. Agencies should avoid using language that will inadvertently exclude ex parte communications made via digital or other new technologies from their policies.

16. Agencies should state clearly whether they consider social media communications to be ex parte communications and how they plan to treat such communications. Agencies should ensure consistency between policies governing ex parte communications and the use of social media.

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