October 1, 2006

MEMORANDUM TO: Trip Rothschild
Assistant General Counsel

FROM: James Adler **/RA/**

SUBJECT: 5 U.S.D. 552(a)(1) and (a)(2)

Here is a rather extended summary of my recent thoughts that have grown out of my additional legislative history research. Most of the email is devoted to comparing the House and Senate reports and assessing them in light of the statute's text. There is also some discussion of the apparent DOJ position on the issue (based on a 1967 Attorney General's memo that, if I recall the Orange Guide correctly, finds its views reflected there even in 2004). Finally, I note some additional case law research I am attempting.

House and Senate Reports & the Text of 552(a)(2)

The materials in the book Cathy provided are definitely helpful, and reveal an interesting split between the House and Senate reports which I think suggests a cautious approach on our part. The emphasis on avoidance of "secret law" as the primary guiding force behind 552(a)(2) appears to be more a creature of the House report than of the statute itself, and the Senate report confirms this insofar as it doesn't dwell nearly as much on the "secret law" theory as the House report does.

The Senate report, as a law review commentary on the then-newly-enacted statute by Professor Kenneth Culp Davis points out, see p. 240 in the FOIA Source Book: Leg. Mat'ls, Cases, Articles, puts forward a much more consistently pro-disclosure slant on FOIA than the House report does. The House report, granted, does still make clear that FOIA was intended to foster a major increase in disclosure of federal materials to the public. However, regarding 552(a)(2), the House characterized the materials it reaches as being "the bureaucracy['s]...own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundresds of agencies." HR No. 1497, p. 2424. The House report then indicated--without any reference to supporting langauge in the actual legislation--that among materials not reached by 552(a)(2) were advisory opinions that pertain to specific fact scenarios and which are explicitly given no precedential significance by the agency, as well as "portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases." p. 2425 of HR No. 1497.

The only language in the Senate report that is at all comparable to these statements in the House report is included in the section explaining the indexing requirement regarding (a)(2) materials, as well as a brief description of the "sanction" imposed on agencies by (a)(2) (namely, that material that should have been made available under (a)(2), but was not, cannot be used against any non-agency party as precedent). The Senate report makes clear that the function of the indexing requirement is to ensure that persons who deal with an agency have a ready means to discover those agency materials that could

impact their dealings with the agency. In other words, the goal appears to be to prevent information asymmetries. The section of the Senate report describing the sanction provision simply restates the sanction provision in shortened fashion, and certainly does not emphasize it. Beyond what one might infer from these sections, though, the Senate report does not attempt to restrict the scope of the facially broad language in 552(a)(2) to materials resembling "case law" or "precedent."

In the statute itself, while "administrative staff manuals and instructions to staff" must "affect a member of the public" in order to fall within 552(a)(2), the only limiting langauge specifically pertaining to "statements of policy and interpretations" is that they must have been "adopted by the agency" and that they must not have been published already in the Federal Register. So, it is not clear from the statute itself that *statements of policy* need to "affect a member of the public" in order to fall within 552(a)(2)'s reach.

If one leaves aside House report's emphasis on "bureaucratic case law" and looks only at the statute's text and the Senate report, then one possible way to nevertheless reach a conclusion that "statements of policy" must affect members of the public in order to fall within 552(a)(2) would be to view (1) the indexing requirement and (2) the substantive provisions of (a)(2) (e.g. the requirement to disclose "statements of policy...adopted by the agency") as serving a single coherent purpose. As such, one could contend that the purposes behind the indexing requirement, as expressed in the Senate report, are likely the same purposes underlying the requirement that agencies provide access to statements of policy they have adopted.

Tending to support this conclusion is the fact that 552(a)(2) also prohibits agencies from relying on, using, or citing as precedent against a non-agency party any 552(a)(2)-covered materials that have not been indexed and made available or published as required (i.e. the "sanction" provision referred to above). While this provision could be viewed as merely a special protection, over and above the more general protections in 552(a)(2)(A)-(D), given to parties who legitimately would be "affected" by agency unpublished "statements of policy," etc., it can also be seen as confirming the House's view that 552(a)(2) as a whole is specifically aimed at the problem of "secret law" that "affects" members of the public who deal with agencies.

Another potential way to limit the scope of "statements of policy" would be via the requirement that such statements must have been "adopted by the agency." But the "adopted by the agency" language would not, seemingly, restrict (a)(2)(B) to covering only those statements of policy that affect the public. For example, it could be argued that an agency decision as to which criteria to use when conducting security assessments of research reactors is no less "adopted by the agency" than an agency decision as to what specific security requirements a research reactor would have to satisfy in order to obtain and maintain an operating license (or whatever research reactors need in order to operate). I have yet to look for case law interpreting the "adopted by the agency" language, however, so this is just speculation right now.

One important potential consequence of downplaying the House report's notion of bureaucratic case law and instead reading 552(a)(2) as serving broader public disclosure purposes, is that concepts like "secret law" and "affecting the public" could themselves be viewed very broadly. For instance, a decision by the agency on criteria to use when conducting security assessments of research reactors could, arguably, be said to "affect" those members of the public who might be at risk for latent harm — e.g. persons working next-door to the research reactor building. Such members of the public might never have occasion to "deal" with the NRC, and so they are never going to be in a position where the NRC relies on some undisclosed pseudo-precedential document when making some adverse ruling against them. But the fact that the NRC is not factoring in the risk of latent harm when considering how to proceed with security assessments would seem to "affect" them nonetheless, in so far as it would tend to reduce the amount of work the NRC will do to ensure they are protected. Moreover, viewed in light of the strong emphasis in

the Senate report (and even, though to a somewhat lesser extent, in the House report) that "For the great majority of different records, the public as a whole has a right to know what its Government is doing" (from S Rep. No. 813, under subheading "What S. 1160 Would Do"), as well as the drumbeat of similar statements I saw in reading through portions of the floor debate materials, it is not hard to construe 552(a)(2)(B) as establishing a simple, straightforward public right to know what official agency policies are. Under this reading, the potential that those policies can "affect" members of the public in a way that implicates the concept of "bureaucratic case law" might also be something that 552(a)(2) addresses--via the indexing requirements and the restrictions on agency reliance on, use, or citiation of undisclosed policy statements--but is not its sole focus.

In sum, the House report, the Senate report, and the statute's text do not combine to reveal a simple, straightforawrd purpose behind the 552(a)(2) that we could use to respond definitively to the OIG's concerns. One major goal animating 552(a)(2)'s drafting undoubtedly was Congressional concern about secret agency law that functions as precedent or authority--whether formally or informally--in guiding agency decisions. But whether that was the *only* goal in enacting 552(a)(2) is much less clear.

DOJ Memorandum vs. Statutory Text

Professor Davis noted in his 1967 article (see pp. 253-54 of the FOIA Source Book) that the DOJ memorandum summarizing FOIA--which I believe is often cited as a reference in the DOJ Orange Guide on FOIA, and may well serve as a foundation for many of the Orange Guide's conclusions--takes up the House report's notion of "case law" and runs with it. That DOJ memorandum (found at p. 194 of the FOIA Source Book) did not--at least to Professor Davis's satisfaction--explain how limiting 552(a)(2)'s reach to materials that could have significance in the future as precedent squared with the text of the statute. The DOJ memo's only apparent justification for restricting 552(a)(2)'s coverage to material of precedential value is that the enforcement provision at the end of (a)(2), in practice, will only reach such material (since it only prohibits governmental reliance on, use, or citation of...). As Professor Davis pointed out, Congress can choose whatever degree of enforcement it wants, and does not by any necessity need to make enforcement provisions coextensive with substantive requirements. In addition, the DOJ memo's reading of the statute would clearly narrow the range of FOIA-disclosable materials beyond that which the statute's text facially requires. The statute requires disclosure of "statements of policy...adopted by the agency." It does not refer to notions of "precedent" or "case law" except indirectly via the sanction provision. The DOJ interpretation, then, seems to run counter to the related general principle that FOIA exemptions must be narrowly construed. See, e.g., John Doe Agency v. John Doe Corp., 493 U.S. 146, 152-53 (1989).

To the extent, then, that the DOJ's Orange Book relies on the 1967 Atty General's memo (i.e. the DOJ memo discussed in the above paragraph), its suggestion that 552(a)(2) only gets at agency "case law" and "precedential" material is far from unchallengeable.

It was noted in our meeting earlier today that the DOJ is the federal government's point-person, so to speak, for interpreting FOIA. That issue could be relevant here, in so far as DOJ's interpretations of FOIA might vary from OIG's. I am pretty sure that the DOJ would not be given substantial special deference by courts regarding its FOIA interpretations. I recall that Chevron deference is given to an agency tasked with administering the statute in question if courts believe that agency expertise in the relevant area makes it likely a better judge of how to fulfill the statute's requirements than a judge would be. So, the NRC's interpretations of the Atomic Energy Act, as embodied in its regulations, etc., would be given much deference due to the NRC's superior technical expertise on nuclear energy matters. The DOJ, though, is the government's legal department, not an agency focused on some technical area. It's expertise is in the field of law. Unfortunately for DOJ, that just so happens to be the very same area of expertise that

judges would claim to have. As such, courts would not likely give DOJ any special deference in interpreting FOIA. That would also accord with courts' use of FOIA, as I mentioned earlier today, as a prototypical example of a statute that does not yield any Chevron deference. The usual rationale courts use in the latter instance is that FOIA is a statute that every agency in the government is charged with administering. DOJ may have interpretive authority to some extent, but I gather not to an extent that courts would defer to in the Chevron manner. See, e.g., Al-Fayed v. CIA, 254 F.3d 300, 306-07 (D.C. Cir 2001) (explaining justification for lack of deference to agency interpretations of FOIA, and citing, among others, a case that declined to extend Chevron deference to DOJ interpretation of FOIA – Reporters' Comm. for Freedom of Press v. United States Dep't of Justice, 816 F.2d 730, 734 (D.C.Cir.1987)).

Ultimately, then, while DOJ is an important authority on FOIA, it probably is not a trump card that can be used as such against OIG if OIG and DOJ interpret FOIA differently.

Case Law on "Secret Law"

I am currently digging through Westlaw to figure out whether courts have chosen sides with regard to the House/Senate split. Some courts definitely have referred to the notion of "secret law" as being one motivator of FOIA provisions. But I have not come across anything yet that affirmatively limits 552(a)(2)'s reach to materials that have some sort of precedential significance.