# M E M O R A N D U M

May 31, 1995

TO: T. Jeremy Gunn, Esq., Acting General Counsel

FROM: Laura Denk, Esq.

SUBJECT: Review Board Compliance with the Freedom of Information Act's Affirmative Disclosure and Reporting Requirements

I have reviewed selected sections of the Freedom of Information Act (FOIA) in an effort to determine the status of the ARRB's compliance with the statute. This memorandum primarily focuses upon the ARRB's affirmative disclosure and reporting obligations under sections (a)(1) and (2) of the FOIA. In addition, this memorandum covers the ARRB's obligation under the FOIA section (e) to submit a yearly report to Congress regarding FOIA compliance for the preceding year. For purposes of the instant memorandum, I will leave aside the issue of how the ARRB will need to deal with specific FOIA requests from individuals.

## PUBLICATION IN THE FEDERAL REGISTER

Section (a)(1) of the FOIA identifies five categories of information that federal agencies must publish in the Federal Register.

*(a)(1)(A): Descriptions of Agency Organization*
The ARRB must publish in the Federal Register "descriptions of its central...organization and the established places at which, the employees...from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions". 5 U.S.C. §552(a)(1)(A).

See Appendix A for an example of an organizational description.

*(a)(1)(B): Methods of Operation*
The ARRB must publish in the Federal Register "statements of the general course and method by which [the Board's] functions are channeled and determined, including the nature and requirements of all formal and informal procedures available". 5 U.S.C. §552(a)(1)(B).

In other words, the ARRB must create and publish a general description of the manner in which it discharges its functions, including a description of the nature and requirements of all formal and

informal ARRB procedures.[1] The purpose of (a)(1)(B) is "to make available useful information concerning agency functions which are of concern to the public."[2]

The Attorney General's Memorandum indicates that (a)(1)(B) requires agencies to publish a wide variety of agency practices. Many agency practices, with notable exceptions, such as matters of internal personnel administration and operating instructions to staff, will affect members of the public. Moreover, an agency must keep the public informed as to routines by which the agency conducts its business. Finally, an agency must publish material sufficient to "fully apprise members of the public of their rights and opportunities."[3] The Board, therefore, must publish any opportunity that it intends to make available to members of the public, such as the opportunity to attend public functions.[4]

*(a)(1)(C): Procedural Information*

The ARRB must publish in the Federal Register "rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations". 5 U.S.C. §552(a)(1)(C).

The purpose of section (a)(1)(C) is to prevent agencies from developing secret procedural requirements.[5] Thus, to the extent that the ARRB creates forms or instructions that are for the use of the public, it should publish a current list of such forms showing the heading, the number, and the date of the most recent version, along with a statement of where the public can obtain the forms.[6]

*(a)(1)(D): Substantive Rules, Policies, and Interpretations*

Section (a)(1)(D) of the FOIA requires the ARRB to publish in the Federal Register "substantive rules

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[1]Burt A. Braverman, Frances J. Chetwynd, Information Law, Volume I, §2-3.2 (1985) (hereinafter "Information Law").

[2]Attorney General's 1967 Memorandum on the Public Information Section of the Administrative Procedure Act, 7 (1967) (hereinafter "Attorney General's Memorandum"). As you know, the FOIA mirrors the Administrative Procedure Act and the Attorney General's 1967 Memorandum is a useful guide to interpreting provisions of the FOIA.

[3]Id. at 9.

[4]Id. at 9.

[5]Information Law at §2-3.3.

[6]Attorney General's Memorandum at 10.

of general applicability adopted [by the Board] as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the [Board]". 5 U.S.C. § 552(a)(1)(D).

Section (a)(1)(D) places two limitations on the substantive information that agencies must publish. The first is that, under (a)(1)(D), agencies only have to publish rules of "general applicability." In other words, the ARRB need not publish its substantive rules, statements, and interpretations unless the rule or statement of policy affects the rights of a substantial number of persons outside the agency.[7]

The second limitation in section (a)(1)(D) is that agencies only have to publish rules that are "adopted by the agency". If a rule, statement of policy, or interpretation has not been adopted, it need not be published, although it might be subject to individual FOIA requests pursuant to section (a)(3).[8]

*Section (a)(1)(E): Amendments, Revisions, and Repeals*
Finally, the ARRB must publish in the Federal Register amendments, revisions, and repeals in all material subject to the publishing requirements of section (a)(1). 5 U.S.C. §552(a)(1)(E).

## AVAILABILITY FOR PUBLIC INSPECTION AND COPYING

Section (a)(2) of the FOIA identifies three categories of information that federal agencies must make available for public inspection and copying.

*(a)(2)(A): Final Opinions and Orders Made in the Adjudication of Cases*
To the extent that the ARRB writes "final" opinions or orders in adjudicating cases, it must make those decisions available to the public. However, the FOIA does not require agencies to create opinions or orders. Nor does the language of section (a)(2)(A) intend to make available every final action of an agency.[9] Rather, "orders made in the adjudication of cases" limits the material to those orders "which are issued as part of the final disposition of an adjudicative proceeding."[10]

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[7] Information Law at §2-3.4.1.

[8] Id. at §2-3.4.2.

[9] Attorney General's Memorandum at 15.

[10] Id.

In enacting section (a)(2), Congress intended to prevent agencies from developing "secret law" and to require agencies to disclose those documents which have the 'force and effect of law.'"[11]

*(a)(2)(B): Statements of Policy and Interpretations Adopted by the Agency*
Section (a)(2)(B) complements section (a)(1)(D) above. Section (a)(1)(D) requires agencies to publish in the Federal Register substantive rules, interpretations and statements of policy that have "general applicability." Section (a)(2)(B) requires agencies to make available all other statements of policy and interpretations that are not general. In other words, an agency must make available specific policies and interpretations of unique applicability, but it need not publish such specific substantive rules[12]. As under section (a)(1)(D), the ARRB must make available only those substantive rules and interpretations that it has "adopted." 5 U.S.C. §552(a)(2)(B).

*(a)(2)(C): Administrative Staff Manuals and Instructions to Staff*
To the extent that the ARRB issues administrative (as opposed to law enforcement) staff manuals and instructions to staff, such materials must be made available to the public. 5 U.S.C. §552(a)(2)(C).

Although section (a)(2)(C) states that agencies only need to disclose manuals or instructions to staff if they "affect a member of the public," the Attorney General's Memorandum cautions that, "for all practical purposes," the information in agency staff instructions and manuals may be "as determinative of matters within the agency's responsibility as other subsection (b) materials which have the force and effect of law."[13]

Mere "housekeeping matters," such as "instructions on filling out forms, procedures for requisitioning cars from the car pool, etc." have been held not to affect members of the public and thus, not to be covered by (a)(2)(C).[14] In addition, manuals and instructions that focus upon terms of employment between agencies and their employees need not become part of an agency's public reading room collection.[15]

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[11] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1978).

[12] Information Law at §2-4.3.

[13] Attorney General's Memorandum at 16.

[14] Cox v. Department of Justice, 576 F.2d 1302, 1308-1309 (8th Cir. 1978).

[15] National Treasury Employees Union v. Department of the Treasury, 487 F. Supp. 1321 (D.D.C. 1980).

Materials that have been held to be disclosable as "administrative ... instructions to staff that affect a member of the public" include:[16]

- Directions by the FTC to its staff regarding preparations for a public hearing and the procedures to be followed at the hearing;[17]
- A direction by the FTC that a certain document be placed on the public record;[18]
- and, a statement listing reasons why an agency chose not to proceed by rulemaking.[19]

## INDICES OF (a)(2) "READING ROOM" MATERIAL

In order to assist the public in finding materials available to them under section (a)(2), the ARRB must maintain and make available for public inspection and copying current indices of all such material. The FOIA requires that such indexes reflect all material that would fall within the scope of section (a)(2) dating back to July 4, 1967. Thus, for the ARRB's purposes, the index must cover material from the Board's start date.

The indices must be kept current and the ARRB must publish and distribute the indices no less frequently than every three months.

## VOTING

Pursuant to section (a)(5) of the FOIA, the ARRB must maintain and make available for public inspection a record of the final votes of each member in every agency proceeding. 5 U.S.C. § 552(a)(5). Preliminary votes need not be placed in the public domain.[20]

## FOIA REPORT TO CONGRESS

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[16] Information Law at §2-4.4.

[17] United States v. J.B. Williams Co., 402 F. Supp. 796 (S.D.N.Y. 1975).

[18] Id.

[19] Bristol-Myers Co. v. FTC, 598 F.2d 18 (D.C. Cir. 1978).

[20] Attorney General's Memorandum at 29.

Section (e) of the FOIA requires the ARRB, on or before March 1 of each calendar year, to file a report to Congress regarding the Board's FOIA activities for the preceding year.[21] No law, regulation, or case law addresses the subject of whether an agency which has not been operating for a full year and has not denied any FOIA requests, is subject to the annual reporting requirement.

The report must include information regarding the number and disposition of FOIA requests received by the Board, along with specific information regarding any denials of FOIA requests. In addition, the report must include a copy of every rule made by the ARRB on the FOIA, a copy of the ARRB's FOIA fee information, an assessment of the total amount of fees that the ARRB collected for FOIA purposes, and any other information regarding the ARRB's efforts to fully administer the FOIA.

## FEE SCHEDULE

Pursuant to section (a)(4)(A)(i), the ARRB must promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to FOIA requests and establishing procedures and guidelines for determining when to waive or reduce fees. 5 U.S.C. § 552(a)(4)(A)(i).

The Office of Management and Budget issues a uniform schedule of fees to which all agencies must conform.[22]

Section (a)(4) establishes three categories of requesters of documents:

(a)(4)(A)(ii)(I) *Documents Requested for Commercial Use*

Fees may not exceed reasonable standard charges for document search, duplication, and review.

(a)(4)(A)(ii)(II) *Documents Requested for Non-Commercial Use and Requested by:*
*An Educational or Noncommercial Scientific Institution whose Purpose is Scholarly or Scientific Research,*
*OR a Representative of the News Media*

Fees may not exceed reasonable standard charges for document duplication.

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[21]The reference librarians at the Department of Justice Law Library indicated that DOJ does not have copies of other agencies' annual reports to Congress. If it would be useful to have examples of other agencies' reports, we could try to obtain them from Congress or the Legislative Archive at NARA.

[22]OMB published guidelines on March 27, 1987 (52 Fed. Reg. 10,012).

(a)(4)(A)(ii)(III) *All Other Requests*
Fees may not exceed reasonable standard charges for document search and duplication.

(a)(4)(A)(iii) *Public Interest Information*
To the extent that disclosure of the information will contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester, the ARRB must furnish the documents without charge or at a reduced charge. 5 U.S.C. § 552(a)(4)(A)(iii).

(a)(4)(A)(iv) and (v) *Limitations on Fees*

(1) If the cost of collecting and processing the fee are likely to equal or exceed the amount of the fee, no fee may be charged;
(2) agencies must provide two hours of search time and the first 100 pages of document duplication free to non-commercial requesters;
(3) agencies may not require advance payment of fees unless:
- the requester has previously failed to pay fees in a timely fashion,
- or, the agency determines that the fee will exceed $250;
(4) and, agencies may not charge review costs for review related to appeals or the resolution of issues of law or policy raised by the request.

I have reviewed Sheryl's draft regulations on FOIA fees. The regulation appears to comply with all of the statutory guidelines under 5 U.S.C. § 552(a)(4)(A)(i) through (vii).

## ENFORCEMENT OF AFFIRMATIVE DISCLOSURE AND REPORTING PROVISIONS OF THE FOIA

Unless a person has "actual and timely notice of the terms" of an unpublished rule or procedure, she "may not be required to resort to, or be adversely affected by a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1).

Agencies must publish material referenced in the FOIA as soon as possible, with no delay except the delay associated with the "normal process of printing and production."[23] The D.C. District Court has

[23] Merrill v. Federal Open Mkt. Comm., 413 F. Supp. 494, 505 (D.D.C. 1976), *aff'd,* 565 F.2d 778 (D.C. Cir. 1977), *rev'd and remanded on other grounds,* 443 U.S. 340 (1979).

held that even a 45 day delay before publication of policy is too long.[24]

Attached to this memorandum is a copy of the proposed FOIA regulations that Sheryl drafted along with my suggestions for changes to that document.

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[24] Id.

(a)(1) publishing requirements:

Purpose: The purpose of the publication requirements are to notify the public about how it can obtain information about the ARRB and about where to make submissions and requests. See, S. Rep. No. 813.

Minimum Standard: Publication will satisfy (a)(1) as long as the published materials notifies the public of actions necessary to comply with agency policies and all agency procedures that might apply to a particular case.

"Currently Published" Requirement : Publication must be made as soon as possible, with no delay other than that occasioned by the normal process of printing and production. Merrill v. Federal Open Mkt. Comm., 413 F. Supp. 494, 505 (D.D.C. 1976), *aff'd*, 565 F.2d 778 (D.C. Cir. 1977), *rev'd and remanded on other grounds,* 443 U.S. 340 (1979) (hereinafter cited as Merrill) (45 day delay before publication of policy was improper).

The courts have held that providing official notice and guidance to the general public is the fundamental purpose of the publication requirements of subsection (a)(1) and the availability requirement of subsection (a)(2). Failure to comply with the requirements of either subsection can result in invalidation of related agency action.