The Administrative Conference of the United States and Its Work on the Freedom of Information Act: A Look Back and a Look Forward

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TABLE OF CONTENTS

The Administrative Conference of the United States ("ACUS") celebrated its fiftieth anniversary in 2014 (disregarding a fifteen-year period of congressionally induced hibernation), and the Freedom of Information Act ("FOIA")[1] will celebrate a similar milestone either in 2016, fifty years after it was signed into law, or a year later, fifty years after it became effective. This Essay will consider the impact that ACUS has had on FOIA and what it might do going forward.

The connection is an important one that makes sense for several reasons. ACUS is a broadly representative body, including a majority of members who are federal officials, but also public members who are academics and practicing lawyers, both from private firms and nonprofits. Many of the public members have served in the federal government and vice-versa, thereby enriching their experiences and providing for greater balance on all of the issues that ACUS tackles. For FOIA in particular, many of the members have been on both sides of the issue—as the party receiving the information request and as the party making it—in the past and at present. In addition, some public members are interested in narrowing FOIA in certain areas to protect the interest of their clients, thereby bringing a third perspective to

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1 Freedom of Information Act, 5 U.S.C. § 552 (2012).

bear on the issue. There is also broad support for the underlying principles of FOIA—that people should generally have access to the records that their taxes pay to create and to know about much, but not all, of what the government is doing. And there is further agreement that there are some government records that should not be made public and that compliance with some requests would impose inordinate burdens on federal officials. The trick is to get the balance right, which is exactly the kind of matter that ACUS is suited to address through its careful research, its deliberative committee process, and its long history of full and candid debate on the floor of its plenary sessions.

There is another similarity between ACUS and FOIA: on their own, neither has any regulatory power as a matter of law, but both have the power to bring about change by their actions. ACUS makes specific recommendations to agencies generally, or in some cases to particular agencies. Whether those suggestions are adopted is beyond the control of ACUS. So too with FOIA: it is only a law, and it does not command anyone to release any records without a request and, even then and more often than it should be, without a court order or at least a lawsuit. Moreover, even releases of documents cannot force an agency to make any changes in what it does or does not do, but that does not mean disclosure has no impact. COINTELPRO (Counterintelligence Program) was a major FBI project until NBC reporter Carl Stern pried loose its sordid history, which brought it to an immediate end.[2] Together, ACUS and FOIA illustrate that the lack of formal power does not mean that an entity or a law is powerless.

One prominent limit on ACUS's work is that, generally, its primary focus has been on procedural rather than substantive issues. The theory is that Congress makes the policy choices that guide agencies, and that ACUS is most useful in suggesting improved procedures. Indeed, I recall a number of instances when, during a debate over a recommendation, a member who sensed that the tide was going in an unwanted direction would claim the recommendation was "substantive" and thus beyond ACUS's charge. As law students learn in their first year, the line between substance and procedure is very hazy, and perhaps even malleable, which may not be all bad. As applied to FOIA, as discussed below,[3] ACUS has moved the line a fair amount toward substance by offering its recommendations on two of the nine

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2 *See* Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973); *COINTELPRO*, FBI RECORDS: THE VAULT, http://vault.fbi.gov/cointel-pro (last visited May 13, 2015).

3 *See infra* Part 1.

specific FOIA exemptions and opining in another about the relation between FOIA exemptions and discovery in litigation against the federal government. One of my hopes for the future of ACUS and FOIA is for ACUS to examine another exemption—number 5—dealing with intra- and inter-agency records and all that it has come to include.[4] Before turning to the substantive recommendations, I want to revisit the first significant ACUS recommendation on FOIA (Recommendation 71-2)[5] and imagine the world in which its spirit is followed by all agencies responding to FOIA requests.[6]

I. Recommendation 71-2 and the Spirit of FOIA

FOIA became law because President Lyndon Johnson had the courage to sign it into law, despite the widespread objections to it in the Executive Branch.[7] The impetus for FOIA came from Congress, which was careful to exclude itself from the law.[8] Prior to FOIA, a person making a request had to show "good cause" for obtaining a record, and there was no specific right of judicial review. FOIA eliminated any requirement of need, it limited the reasons for denial to nine specific exemptions, and it created a right to judicial review, which was to be de novo, in contrast to the ordinary judicial review of agency decisions, in which the agency received considerable deference from the courts.[9] The message from the passage of FOIA was that this was to be a whole new world of disclosure, but there were still human beings who had to carry out the law, and all the inertia remained on the side of secrecy.

ACUS Recommendation 71-2 embraced the new law and urged agencies to do likewise, in many cases going beyond the letter of the law to suggest ways that its spirit could be realized.[10] In its General

4 *See* 5 U.S.C. § 552(b)(5).

5 ACUS Recommendation 71-2, Principles and Guidelines for Implementation of the Freedom of Information Act, 1 C.F.R. § 305.71-2 (1975).

6 There are a few additional recommendations (e.g., 68-2, 68-3, 76-2, and 89-8) that touch on FOIA, but in the interest of brevity and their lesser significance, this Essay will not discuss them. All ACUS recommendations can be located at *Recommendations*, Admin. Conf. U.S., http://www.acus.gov/recommendations (last visited May 12, 2015).

7 *See Freedom of Information at 40*, The Nat'l Security Archive (July 4, 2006), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm [hereinafter *Freedom of Information at 40*]. Johnson embraced the concepts behind FOIA, but had some concerns about whether the exemptions would be broad enough, as evidenced by his signing statement. *See* Statement by the President Upon Signing the "Freedom of Information Act," 2 Pub. Papers 699 (July 4, 1966), http://www2.gwu.edu/~nsarchiv/nsa/foia/FOIARelease66.pdf.

8 *See* 5 U.S.C. §§ 551(1)(A), 552(f)(1); *Freedom of Information at 40*, *supra* note 7.

9 *See* 5 U.S.C. § 552(a)–(b).

10 *See* ACUS Recommendation 71-2, § 305.71-2.

Principles it suggested that doubts should be resolved in favor of "providing the utmost information" and that "exemptions . . . should be interpreted restrictively."[11] It told agencies to "provide the fullest assistance to inquirers" and "the most timely possible action on requests for information."[12] When records had partially exempt portions, ACUS said that agencies should "supply that portion . . . which is not exempt"[13]—a principle later added by Congress.[14] Denials should be "promptly made and the agency should specify the reason for the denial."[15] It then urged that fees should be held to a minimum and provision made for waivers "when this is in the public interest,"[16] another idea that Congress later adopted.[17]

The next section proposed guidelines for handling FOIA requests, such as designating particular agency officials to whom requests should be sent, identifying others with "primary responsibility for assisting the public in framing requests," and creating a public directory containing that information,[18] something that would now be done on the agency's website.[19] It opposed use of standard request forms except "as an optional aid" so that "[a]ny written request that identifies a record sufficiently for the purpose of finding it should be acceptable."[20] It also noted that "categorical requests" should be considered to meet the requirement of "identifiable records" so long as "the agency would be reasonably able to determine which particular records come within the request" without undue burdens to the agency.[21] If an agency claimed undue burdens, it should do so by "specifying the reasons why and the extent to which compliance would burden or interfere with agency operations."[22] It also recommended that requesters be afforded "an opportunity to confer" with agency officials in order "to reduce the request to manageable propor-

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11 *Id.* pt. A(1).

12 *Id.* pt. A(2).

13 *Id.* pt. A(3).

14 5 U.S.C. § 552(b) (final paragraph).

15 ACUS Recommendation 71-2, § 305.71-2, pt. A(4).

16 *Id.* pt. A(5).

17 5 U.S.C. § 552(a)(4)(A)(iii).

18 ACUS Recommendation 71-2, § 305.71-2, pt. B(1).

19 Congress has recently mandated that agencies have a Chief FOIA Officer with substantial authority. *See* 5 U.S.C. § 552(j)–(k). Whether those provisions have made a difference may be worth studying by ACUS in the future.

20 ACUS Recommendation 71-2, § 305.71-2, pt. B(2)(a).

21 *Id.* pt. B(2)(b)(i).

22 *Id.* pt. B(2)(b)(ii).

tions by reformulation and by outlining an orderly procedure for the production of documents."[23]

Part 4 of this section dealt with time to reply and urged compliance with the ten-working-day rule then applicable, including keeping requesters informed as to the reason for any delays and when the decision is expected.[24] It gave examples of certain legitimate exceptions, but one is particularly significant because it is less about time than about how agency officials should respond on the merits. Subpart (e) would allow additional time so that "personnel having the necessary competence and discretion" could determine whether an exemption applies and also whether the records "should be withheld as a matter of sound policy, or revealed only with appropriate deletions."[25] Translation: just because an agency can withhold records does not mean it has to do so or should do so.

Part 5 dealt with the contents of denials: they should be in writing and include not just a reference to an exemption but also "a brief explanation of how the exemption applies to [each] record withheld."[26] Where the exemption is discretionary, subpart (ii) also urged agencies, if requested, to provide something that I have never seen: "a brief written statement of the reasons why the exempt record is being withheld as a matter of discretion."[27] Part B also recommended that a copy of all denial letters and explanations for exercising discretion not to release be collected in a central and publicly available file (unless a requester had a legitimate interest in personal privacy for his request).[28]

Other noteworthy recommendations included promptly deciding and explaining denials of appeals, with a public, indexed agency file containing all such denials, and a "fair and equitable fee schedule" that takes into account "the public interest in making the information freely and generally available."[29] Copying charges should be reasonable and should not exceed the commercial copying rate, even if that would not cover all incurred costs.[30] It also recommended not charging for routine searches and other incidental costs in connection with

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23 *Id.*

24 *Id.* pt. B(4).

25 *Id.* pt. B(4)(e).

26 *Id.* pt. B(5)(a)(i).

27 *Id.* pt. B(5)(a)(ii).

28 *Id.* pt. B(5)(b)–(c).

29 *Id.* pt. B(6) (denials of appeals); *id.* pt. C (fee schedule).

30 *Id.* pt. C(1).

routine requests,[31] perhaps in that way creating an incentive for agencies to do a better job of organizing and indexing their files. Finally, it recommended against fees for examining and evaluating records for possible exemptions, unless there was a "broad request [that] require[d] qualified agency personnel to devote a substantial amount of time to screening out exempt records."[32] But even then, ACUS urged agencies to consider "whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester."[33]

Although a number of the specific recommendations eventually became law, for those who have experienced FOIA from the perspective of requesters, agency responders, or judges in a FOIA lawsuit, it is plain that the ideal that ACUS presented is not the reality of how FOIA requests were handled when this recommendation was issued, or at any time after that, including today. Recommendation 71-2 did envision the problems that were likely to occur, and it urged agencies to take steps to avoid them. Courts often recited the broad purposes of FOIA, but did not always follow through when applying them to specific withholdings.[34] The fact that there are forces at work that make realization of those recommendations very difficult is not to fault ACUS for what it suggested, but that reality does make it clear that ACUS alone cannot compel agencies to take reasonable steps to carry out the letter and spirit of FOIA. In some cases, Congress stepped in to push agencies more in a disclosure direction, but Congress cannot be expected to be on top of the daily operation of FOIA or to devise solutions to every instance of agency recalcitrance. I turn now to some of the forces that prevented these recommendations from being operative and then make some suggestions for steps that might counteract them, including how ACUS might play a role.

II. The Real-World Barriers to FOIA Compliance

FOIA was and continues to be a good idea and, despite the many obstacles to full enforcement, it shines an important light on how government works, or doesn't work. But we need to be realistic and recognize that writing a law mandating disclosure, with limited exceptions, is only the first step; people who have control over requested records must cooperate or the system will not work as in-

31 *Id.* pt. C(2).

32 *Id.* pt. C(3).

33 *Id.* pt. C(3).

34 *See, e.g.*, Sinito v. U.S. Dep't of Justice, 176 F.3d 512, 513–15, 517 (D.C. Cir. 1999).

tended. There are, however, a few alternative realities that help make FOIA a more effective law.

Before FOIA became law, there was no law preventing the release of many, and some might say most, federal records.[35] Properly classified documents, income tax returns, trade secrets, and completed census forms could not be made public, and FOIA did not change that.[36] Even before 1966, if it was in the interest of a federal official to disclose a requested document, nothing stopped her. But it is precisely those documents whose disclosure is *not* in the interest of at least some officials that FOIA makes available as a matter of law. That, however, does not make them routinely and promptly available on request, which means that, in far too many cases, requesters must go to court to obtain access. Here are some ideas of how compliance with the spirit of FOIA might be increased, with the help of ACUS.

In the 1974 amendments to FOIA,[37] Congress added § 552(a)(4)(F), which was designed to hold accountable employees who withheld records without a legitimate basis for doing so, by requiring the Civil Service Commission (a function now handled by the Office of Special Counsel) to commence an investigation regarding the withholding.[38] However, the law included three conditions that essentially (but probably not intentionally) rendered this noble idea a nullity. First, it was applicable only if a court ordered disclosure and awarded attorneys' fees to the requester.[39] This meant that, if an agency "voluntarily" gave up the documents only after the parties had litigated for years, the remedy did not apply. Second, the court had to enter a finding that the "circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding"—a very high threshold and one that would require the judge to delve into matters beyond the record, including perhaps allowing the requester to take discovery on this issue.[40] Third, disciplinary action was available only against the "officer or employee who was primarily responsible for the withhold-

35 *See* Comment, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438, 1440 (1975) ("Until enactment of the FOIA, the public's right of access to government documents depended almost completely on the discretion of the executive branch.").

36 *See id.* at 1443–45.

37 Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552 (2012)).

38 *Id.* sec. (b)(2), 88 Stat. at 1562.

39 *Id.*

40 *Id.*

ing," a standard that raised knotty legal and factual questions.[41] Even if those conditions could be satisfied, it will be a rare requester indeed who will care enough to want to go through the effort to seek some form of discipline against an employee who did nothing evil and in most cases was not covering up something for which he was responsible.

The reality is that no federal employee ever received an award or a promotion for deciding to release documents pursuant to a FOIA request. All of the incentives run in the opposite direction. If a release is to the benefit of the agency, let a higher-up make that decision. The 1974 amendments created the possibility of discipline based on unjustified withholding and thereby sought to alter the existing incentives, without at the same time starting a disciplinary proceeding in every case in which a court orders disclosures, or counsel for an agency recognizes that either the defense is unlikely to be sustained or there is no sound policy reason for keeping the record secret. Perhaps simply requiring that some agency official take personal responsibility for each denial, including a statement both that one or more exemptions apply (and why), and that the official has read the records (or a representative sample) and has concluded that there are sound policy reasons for their withholding, would make denials less frequent or more limited. Or perhaps other ideas will come to mind, but they are surely worth exploration by ACUS.[42]

In defense of agencies that must decide whether to withhold information under an exemption, they must conduct thorough searches and reviews of requested documents for material that may cause harm of the kind that FOIA permits agencies to take into account, either to the agency or third parties. Agencies are chronically underfunded, and Congress rarely provides special appropriations to do FOIA work.[43] Responding to FOIA requests is not seen as central to the agency's mission, and so the most skilled and ambitious agency personnel generally do not flock to those positions. Initially, FOIA was

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41 *Id.*

42 Along the same lines, ACUS could examine whether the possibility of having to pay attorneys' fees to requesters who must go to court is sufficient to create incentives for agencies to make disclosures without having to be sued. A recent amendment to FOIA now requires agencies to pay those fees from their budgets, instead of having them come from the general judgment fund. Openness Promotes Effectiveness in Our National Government Act, Pub. L. No. 110-175, § 4(b), 121 Stat. 2524, 2525 (2007).

43 *See* Eric J. Sinrod, *Improving Access to Government Information in an Era of Budgetary Constraints*, 27 URB. LAW. 105, 109 (1995); Michael E. Tankersley, *How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age*, 50 ADMIN. L. REV. 421, 425 (1998).

used by the media and nonprofit groups or, along with the Privacy Act of 1974, by individuals who sought their own records, including those held by the FBI and the CIA. Around the time of the 1974 amendments, when my office—the Public Citizen Litigation Group—had the equivalent of fewer than two full-time lawyers doing FOIA cases, a quarter of all FOIA cases in the country were being handled by our office. It was also around that time when businesses began to recognize the value of FOIA to them, which significantly increased the number of FOIA requests made.[44] In addition, some agencies, in an effort to justify additional funding, insisted that routine press inquiries be denominated as FOIA requests to bolster their statistics. And the massive increase in the use of electronic records has made it feasible and reasonable for requesters to make far broader requests for electronic records. Where agencies have up-to-date record-keeping practices, the task of locating e-mails and other electronic records has been greatly simplified by the ability do the search electronically and then push a button to pull up whatever has been found, all of which must then be reviewed.

In the early years of FOIA, agencies would respond to some larger requests by reciting a list of exemptions, without describing in any detail the records being withheld or correlating claims of exemption with particular records or even categories of records. This practice was also followed in litigation until the D.C. Circuit found a creative solution in *Vaughn v. Rosen*.[45] Borrowing from the practice involving claims of privilege in discovery—which requires logs of documents being withheld—the court ruled that similar indices must be supplied by the defendant agency so that the requester and the district court could know which exemptions are claimed to apply to the various categories of records being withheld.[46] By and large, the practice has worked quite well once a case reaches the courts. Requesters and those who represent them have suggested that similar procedures be followed at the agency level for large requests with one quite sensible modification: the pre-litigation *Vaughn* showing could be oral if the agency preferred. The idea would be for the agency to describe generally what documents it had, the claimed exemptions, and the policy reason for which the records were being withheld. Agencies could also allow counsel to examine a sample, under an agreement that do-

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44 *See* Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1403–04 (2000).

45 Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

46 *Id.* at 826–28.

ing so did not create a waiver, a practice that is now recognized in litigation.[47] The goal would be to eliminate parts of requests for which the documents sought are of no real interest to the requester and to enable agencies to persuade requesters that there are legitimate bases for withholding some of the records sought, without having to litigate over every document covered by the request. The kinds of requests for which an oral *Vaughn* showing would be available, and under what conditions, are worthy of study and would be a natural subject for ACUS given its Recommendation 71-2, in which it urged agencies to discuss the basis for withholding as part of their review process. This approach could also lead requesters and agencies to mediate some of their larger disputes, an area in which ACUS has already made some recommendations applicable to FOIA.[48]

Finally, whether the time spent reviewing in detail every record sought for a possible exemption is justified by the benefit of keeping them secret is a question worth examining by ACUS and others. There may also be other approaches that ACUS could study that would speed up release of records and keep down agency costs, without revealing truly confidential information. The bureaucracy will never be enthusiastic about FOIA, but it is worth exploring alternatives that will overcome the inevitable resistance without harming significant interests that are protected by FOIA's legitimate exemptions, an issue to which I now turn.

III. ACUS AND FOIA'S EXEMPTIONS

The first of ACUS's recommendations dealing with a substantive exemption was 82-1, *Exemption (b)(4) of the Freedom of Information Act*, which applies to trade secrets and confidential commercial and financial information.[49] There were several problems covered, including both procedural issues and issues relating to the scope of Exemption 4.[50] On the procedural side, ACUS took on an issue that was

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47 FED. R. CIV. P. 26(f)(3)(D) (providing for discovery order to deal with claims of privilege, including, if the parties agree, "a procedure to assert these claims after production").

48 *See* 5 U.S.C. § 552(h)(1), (3) (2012) (creating the Office of Government Information Services, which includes mediation among its functions). The work of ACUS on the applicability of various alternative dispute resolution ("ADR") techniques to resolving disagreements regarding withholdings under FOIA is another reason to believe that the expertise of ACUS could be usefully applied to these problems. *See, e.g.*, ACUS Recommendation 2014-1, Resolving FOIA Disputes Through Targeted ADR Strategies, 79 Fed. Reg. 35,988 (June 25, 2014).

49 ACUS Recommendation 82-1, Exemption (b)(4) of the Freedom of Information Act, 47 Fed. Reg. 30,702, 30,792 (July 15, 1982); *see also* 5 U.S.C. § 552(b)(4).

50 *See* ACUS Recommendation 82-2, 47 Fed. Reg. at 30,792.

almost certainly not envisioned when the law was passed: if an agency wanted to disclose information that a third party—in these cases, a business that submitted the information to the agency—wished to keep from the public, what were the rights of the submitter?[51] Agencies had been working through this problem, which arose when an agency decided to honor a FOIA request, and ACUS provided a sensible solution including notice to the submitter, an opportunity to be heard, and an appropriate standard of review if the parties did not agree on what could be disclosed.[52] ACUS recommended de novo review as to the applicability of Exemption 4 and arbitrary and capricious review if the agency concluded that the exemption applied, but there was "an overriding public interest" in disclosure of the information.[53] It also suggested that Congress slightly expand the coverage of Exemption 4, and that the Trade Secrets Act be amended to clarify that it was not a basis for withholding under Exemption 3 and that it did not inhibit disclosure under Exemption 4. The willingness of ACUS to deal with the merits of Exemption 4 is significant because it eliminates the argument that its traditional reluctance to make recommendations on substantive law includes FOIA exemptions.

The second exemption-related recommendation was 83-4, which considered the interrelation between FOIA and discovery in civil cases involving the federal government.[54] ACUS recognized that, despite the potential overlap in discovery rules and FOIA, the two regimes served different purposes and both should continue to exist.[55] It noted the possibilities of surprise and duplication of effort by the agency, but concluded that the party opposing the agency should only have to notify the litigation counsel for the agency of any pending FOIA requests, declining to adopt a proposal that would have cut off FOIA rights during pending judicial or administrative litigation.[56] The solution was procedural, but ACUS considered substantive changes as well.[57]

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51 *See id.*

52 *Id.* at 30,704. These recommendations were largely adopted and expanded on in Exec. Order No. 12,600, 3 C.F.R. 235 (1988).

53 ACUS Recommendation 82-1, 47 Fed. Reg. at 30,704.

54 ACUS Recommendation 83-4, The Use of the Freedom of Information Act for Discovery Purposes, 1 C.F.R. § 305.83-4 (1993).

55 *See id.*

56 See *id.*

57 *See id.*

Third, in 1995, in Recommendation 95-1,[58] ACUS undertook a thorough examination of Exemption 8, dealing with banks and other financial institutions and their regulators,[59] and recommended certain modifications to the exemption, of which two are significant. First, for closed banks that have failed, and for which none of the traditional rationales for keeping their examinations by regulators secret still apply, ACUS recommended that the examinations be made public, with delays provided in certain limited circumstances.[60] Second, Exemption 8 had been read to cover agency records relating to financial institutions even where the agency whose records were being sought had no regulatory authority over such institutions.[61] ACUS recommended that Congress exclude the records of nonregulating agencies from the special protection of Exemption 8,[62] although Exemption 4 might still be available as it is for the records of all businesses.[63]

Based on this history, ACUS should have no reluctance to look into the other exemptions. Aside from Exemption 1, which applies to properly classified information and which can only be fixed by dealing with the problems of overclassification and failure to declassify decades-old materials,[64] the best candidate for a review for overuse is Exemption 5, the internal documents exception.[65] The theory behind the exemption is the need for candor in exchanges within the government and the fear that, if drafts and other tentative thoughts were made public, it would cause government personnel to hold back, denying others their ideas—good and bad.[66] The exemption also applies to attorney-client materials as well as attorney work product.[67] I do not suggest that the exemption be entirely eliminated, but only that ACUS study whether the exemption should be cut back substantially in four respects.

First, and most significant, the exemption applies forever. Candor is important, but the need wears off with the passage of time. That notion is not just my view, but is actually the law with respect to records that, if anything, would have a stronger case for the need for

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58 ACUS Recommendation 95-1, Application and Modification of Exemption 8 of the Freedom of Information Act, 60 Fed. Reg. 13,692 (Mar. 14, 1995).

59 5 U.S.C. § 552(b)(8) (2012).

60 ACUS Recommendation 95-1, 60 Fed. Reg. at 13,694–95.

61 *See id.* at 13,694.

62 *Id.*

63 *See* 5 U.S.C. § 552(b)(4).

64 *See id.* § 552(b)(1).

65 *See id.* § 552(b)(5).

66 *See* H.R. REP. NO. 104-156, at 13–14 (1995).

67 *See id.* at 14.

long-term secrecy. The Presidential Records Act has no Exemption 5 at all, but it does have a delay of twelve years from the end of a President's term before the records must be made public.[68] Aside from the details about how the time period for Exemption 5 should be measured in light of the fact that agency records exist before and after a President's term, the principle that the need for continued secrecy expires ten years or so after the document is created is one that everyone should accept. ACUS could usefully make a recommendation as to how to calculate the time period and to sort through the inevitable claims for exceptions.[69]

Second, Exemption 5 has been applied to preclude a former federal employee, who wrote a draft history of the Bay of Pigs failed invasion from the perspective of his agency, from obtaining a copy of his own draft for his own use.[70] If he is not worried about the chill from disclosure, why should the agency be permitted to claim that for him? Again, the scope of the "author" exception is worthy of further ACUS consideration.

Third, the Supreme Court in 1947 created the attorney work product privilege as an exception to the broad discovery rules that had been recently enacted, mainly to prevent one side from freeloading by giving the other side all the work that the other lawyer and his staff had done.[71] The current version is in Federal Rule of Civil Procedure 26(b)(3), where the protected documents are called "Trial Preparation Materials" and are subject to several exceptions based on a countervailing need.[72] As a rule of litigation fairness, protecting attorney work product makes sense, but once the need for fairness is over—i.e., the case is concluded—the rationale for the rule disappears, and so should the application of Exemption 5 to all work product materials prepared by or for government lawyers. Perhaps there are other justifications for keeping the public in the dark about how government lawyers represent their clients in civil cases, and, if there are, ACUS

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68 44 U.S.C. § 2204(a) (2012).

69 A recent example shows that all parties mentioned in sensitive internal comments can survive their disclosure years after the fact. A young White House lawyer described Judge (and potential and later actual Supreme Court nominee) Stephen Breyer as a "rather cold fish" who was unlikely to be "a great Supreme Court justice." To make matters worse, the lawyer, Ian Gershengorn, is now the Deputy Solicitor General and regularly argues cases before Justice Breyer, who has shrugged off the matter. *See* Al Kamen & Colby Itkowitz, *Issa-Holder Feud Remains Fast, Furious*, WASH. POST, Nov. 5, 2014, at A11.

70 Pfeiffer v. CIA, 721 F. Supp. 337, 338, 341 (D.D.C. 1989).

71 Hickman v. Taylor, 329 U.S. 495, 511 (1947).

72 FED. R. CIV. P. 26(b)(3)(a)(ii).

will discover them in the course of examining whether this prong of Exemption 5 should also be cut back.

Fourth, the exemption also covers all attorney-client advice and overlaps to some degree with the broader application of Exemption 5 to all internal communications, as well as with the narrower work product privilege. As noted above,[73] the Presidential Records Act has no Exemption 5, and so some of the most sensitive legal advice given to our presidents has been routinely made available, with a significant delay, but with no showing that the Republic has collapsed because of those disclosures. Not surprisingly, lawyers have a very high regard for the privilege, and there are many areas where it applies, such as the advice given to a person accused of a crime by his lawyer, that should remain sacrosanct. The real issue is not whether there should be such a privilege, but how it should apply to government lawyers doing the public's business.

A recent book by Jo Becker on the litigation seeking to overturn the California law forbidding same-sex marriages offers an interesting insight on the question.[74] Becker obtained permission from the lawyers and plaintiffs in that case to be the figurative fly on the wall almost from the start of the case, which included sitting in on all meetings and reading all relevant documents and e-mails.[75] The only limitation was that she could not publish anything until the case was over.[76] The book has many revelations about the strategic choices of plaintiffs' counsel, and it seems obvious that if there were more newsworthy exchanges among the lawyers or with their clients, Becker would have included them.[77] But so far as I could tell, there was nothing that she reported after the fact that was damaging to the case now, or that would have been damaging had it been revealed while the case was pending. I offer this observation not to establish the proposition that the attorney-client privilege should be repealed, but to suggest that its importance, supported mainly by lawyers, is overstated and, especially as applied to government lawyers, counterbalanced by the public's interest in learning what legal advice those lawyers are giving and on what basis they support their conclusions. Surely, the advice

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73 *See supra* note 68 and accompanying text.

74 *See* JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY 435–37 (2014). For a discussion of the book generally, and the privilege issue in particular, see Alan Morrison, *Lessons for Law Reform Litigators*, 18 GREEN BAG 2D 63, 72–74 (2014).

75 BECKER, *supra* note 74, at 435–37.

76 *Id.* at 436.

77 *See id.* ("It was agreed from the beginning that my access to the legal and war room team came with no prepublication review or veto rights.").

on torture, bombing Libya, or using drones against American citizens is of a different quality and public importance than the advice that a private lawyer gives an individual client about an issue of family law, property, or possible criminal responsibility.

There is another way of looking at the application of the attorney-client privilege to federal lawyers that suggests a further rationale for reducing its scope: who is the "client" in this relationship? Some would say it is the agency for which the lawyer works, or perhaps the President then in office. Others would say that the United States is the client, and that all of us have a stake in the advice that the lawyer gives. Even if every citizen were considered to be the "client" for these purposes, that would not require giving everyone immediate access to all legal advice, before agency officials who have the duty to act do so first. But at some point, the client is no longer the person in office when the advice was given. On that rationale, Congress may properly limit the application of the attorney-client privilege under FOIA such as it did in ending the historic presidential privilege under which all of the President's records were considered his property, to do with them as he pleased. The fact that, like presidential records, attorney-client records were created by government personnel, using government equipment, for government purposes, all paid for by the taxpayers, should weigh heavily in deciding the extent of that privilege as applied to government records. Again, at the very least, ACUS should take a fresh look at whether Exemption 5 provides more protection than is desirable for all attorney-client materials in agency files.

Final Thoughts

ACUS has played an important role in rendering advice about FOIA, and it should continue to do so. Most of its work has been on discrete projects, but it should at least consider undertaking a longer-term effort to examine FOIA as a whole. ACUS's independence, its balanced composition, and its history of careful analysis and thoughtful recommendations make it the ideal entity to take on such a project. Those same considerations would also strongly support discrete projects of the kind outlined above. FOIA is a good law, but could be made better. ACUS is the best federal body to see that beneficial changes to FOIA become a reality.