Committee on Judicial Review

Minutes

April 22, 2013

Committee Members Attending

Betty Jo Christian
Ron Levin, Chair
Peter Keisler
Jeffrey Minear, via telephone
Alan Morrison
David Shonka
Jonathan Siegel, via telephone
Judge Jay Plager, via telephone
Helgi Walker

ACUS Staff Attending

Paul Verkuil, Chairman
Gretchen Jacobs, Research Director
Jeffrey Lubbers, Special Counsel
Stephanie Tatham, Staff Counsel

Other Attendees

Leland Beck, Consultant
Carol Ann Siciliano, Government Member
Carrie Wehling, EPA
Danny Fischler, DHS
Keith Bradley, CFPB
James Tozzi, Public Member

The meeting commenced at 2:04 pm in the conference room of the Administrative Conference.

Committee Chair Mr. Levin opened the meeting and asked for introductions. The Committee approved minutes of the Apr. 3, 2013 meeting after noting one change to attendance.

Mr. Levin stated that the Committee's task was to polish up the resolution for the plenary session and that agreement was already reached on many major issues. He noted the circulation of a revised recommendation, which was used as the basis of the discussion.

Mr. Levin then moved conversation into "defining consideration" as listed on the agenda. Judge Plager noted the sentence on lines 54-57 was missing a verb and suggested inserting "should be included as." He then proposed that "considered" be used in place of "consideration" in the sentence on line 58. Mr. Beck agreed, noting "considered" is what is used in the recommendation proper. Judge Plager then suggested "agency official" in place of "agency lawyer" in the sentence on line 60. Judge Plager and Ms. Christian agreed that "generally not" should replace "probably not" in that same sentence.

Mr. Morrison inquired as to what "implies" meant in the sentences on lines 58-61. Mr. Levin suggested "entails" replace "implies" and Mr. Morrison agreed.

Mr. Shonka expressed concern that the sentence on lines 61-65 was too sweeping and addressed documents that decision makers never actually see. Mr. Levin pointed out that the decision maker might be using those documents indirectly because he or she could be brainstorming with an entire staff. Mr. Shonka responded that courts are primarily concerned

with what the decision maker says and does, not lower staff deliberation. After Committee discussion, Mr. Shonka suggested that "directly or indirectly reviewed by the decision maker" be used instead. The Committee discussed this view without coming to agreement regarding a change to the draft language. Mr. Keisler then suggested that "individual with substantive responsibilities" in the sentence on lines 58-61 should be repeated in the sentence on lines 61-65. The Committee agreed that this change would provide more guidance.

Mr. Bradley voiced concern that the "considered" definition includes too many documents that are not germane to the final rule. Mr. Levin asked if Mr. Bradley thought a more narrow definition or a change of compilation date would be more appropriate. Mr. Bradley responded that, for judicial review purposes, only what is germane to the final rule would be significant. Mr. Morrison suggested "proceeding" be replaced by "rulemaking" in the sentence on lines 61-65 in order to provide more flexibility.

Mr. Beck used the results of an agency survey to show structural distinctions in how decision makers view documents. He explained that many multi-member agencies give each member access to a wide variety of materials but that, in some single-executive agencies, many on-record documents never go higher than lower-level staff.

Mr. Lubbers suggested inserting "thus materials reviewed by an intern generally would not qualify" into the sentence on lines 58-60 because he felt the existing language was too fine-grained. Mr. Levin felt changing "intern" to "librarian" would be a better illustration. Mr. Shonka suggested that "it should be broadly interpreted" should be taken out of the sentence on lines 68-70. Mr. Levin proposed instead that "broadly" be taken out of the sentence on line 65 and the Committee agreed.

Mr. Levin moved the conversation into "confidential, protected, and privileged information" as listed on the agenda. He reviewed the discussion from the April 3, 2013 meeting, which recognized the difference in agency policies but called for each agency to clearly state its policy.

Judge Plager suggested that the recommendation's language should stay consistent with the terminology in the sentence on lines 12-13 because it would result in less confusion. He asked that "rulemaking record" be replaced with "internal agency rulemaking records in the sentence on lines 51-54. He suggested "administrative record" be replaced with "administrative record for judicial review" in the sentence on lines 81-82. The Committee agreed.

Mr. Levin discussed the specific categories set out in the sentence on lines 12-13 and the issues agencies might have with them. He stated that the "internal" in "internal agency rulemaking records" is meant to be descriptive and does not need to be there. Judge Plager suggested that, instead, the phrasing be changed to "records typically maintained internally." Mr. Morrison stated that the phrasing could be avoided if "those records" was inserted in that sentence and the committee agreed.

Mr. Lubbers proposed inserting "administrative record for judicial review" on lines 98-99 and the issue was generally committed to the committee on style. Regarding the same sentence, Mr. Morrison expressed concern that it did not accurately reflect agency practice of either submitting a public summary of redacted materials or, alternatively, filing the materials under seal. After discussion of this issue, local rules, and agency practices, the committee adopted the revised language "filing protected materials, or a summary thereof, under seal."

[Please note that 10 minutes of this meeting were not recorded due to technical difficulties. The time where the meeting coverage was interrupted begins 56:56 minutes into the webcast; notes from this discussion are omitted from the meeting. Our apologies.]

Mr. Lubbers asked if the term "privileged" was appropriate in this context and asked Ms. Siciliano if EPA uses a similar term. Ms. Siciliano stated that "privilege" in this context was not a recognized concept in the EPA. She and Ms. Jacobs debated on whether some materials are indeed privileged in the EPA. Mr. Beck explained that the facts in pre-decisional matters will go on record but the deliberative components will stay privileged. He went on to state that the EPA will create an additional document for those facts that do not otherwise appear except in privileged documents. He noted that this is a unique process to the EPA. Mr. Keisler stated that "pre-decisional" is just an element of "deliberative" and that "deliberative" was more appropriate in this context and in the sentence on lines 95-96. In the same sentence, Ms. Siciliano suggested replacing "never" with "do not." The committee agreed to the proposed changes.

Mr. Beck stated that the CFTC brought up an important point: certain managed information is kept from lower-level staff, including the recordkeeper, because the information is highly classified. He further explained that a separate process is necessary for that kind of information. Mr. Bradley suggested a conforming amendment to paragraph 3 of the recommendation. He stated that the paragraph seemed to suggest that there were only two ways to exclude information from the administrative record for judicial review.

Ms. Siciliano then suggested that "materials that the agency has determined are not part of the administrative record on review" be included in the paragraph. The committee did not adopt this suggestion. After extensive discussion, the Committee agreed to exclude qualifying language in the existing sentence. The sentence in paragraph 3 of the recommendation was revised to read "except that agency need not include: a) materials protected from disclosure by law, and b) materials that the agency has determined are subject to withholding on the basis of privilege."

Mr. Levin moved the conversation into commencement and termination of rulemaking record compilation. He proposed the addition of a sentence to paragraph 4 to specify that the record remain open while the rule is pending before the agency. Mr. Morrison suggested that "while" be changed to "as long as."

In reference to paragraph 4 of the recommendation, Mr. Lubbers asked if the NPRM is the appropriate commencement point. He explained that some relevant documents might not be included if agencies start compiling from that point. Mr. Levin stated that a related problem stems from the fact that NPRMs and ANPRMs are often broad and, as a result, agencies might be forced to compile too many materials. Mr. Morrison responded that the recommendation does not suggest agencies compile everything at the ANPRM stage but, instead, suggests that they begin compiling at the ANPRM stage. Mr. Morrison stated that the recommendation does not tell them what they should actually put in the record. Mr. Shonka proposed that a sentence be inserted that states "agencies should seriously consider beginning at the ANPRM stage."

Mr. Levin posed another problem: if there is no ANPRM, is the NPRM an appropriate start date? He explained that most of the work is done before the NPRM stage (not at the comment stage). Mr. Morrison agreed with the concern but suggested that all relevant material still must be included in the record. Discussion in the committee and conforming changes

indicated that the definition of record in the recommendation is separate from the suggestion of the commencement date.

Mr. Beck reiterated that, temporally, agencies should begin no later than the NPRM stage but the preamble states that they need to reach back for relevant documents. Mr. Morrison suggested the first sentence be a command to start compiling no later than the NPRM stage and the second sentence be a suggestion that agencies start earlier. Mr. Levin agreed with the structure but suggested that the second sentence offer alternatives: either compile retrospectively or have a procedure where you start earlier. The matter was left to the committee on style for implementation.

Mr. Levin then moved the conversation into general comments on the recommendation. Mr. Morrison suggested that "proceeding" be changed to "rulemaking" to conform to earlier changes. He then suggested that Section C of paragraph 1 of the recommendation is redundant. The committee agreed to remove this section, despite its inclusion in a prior recommendation.

Mr. Shonka pointed out an ambiguity in Section D of paragraph 1 of the recommendation: it does not specify to whom the "oral presentations" are being made. He suggested that Section D is too narrow (if it is intended to only cover meetings) because decision makers sometimes meet with people one-on-one. He used his agency as an example: all one-on-one meetings are summarized—according to this section as currently written, these summaries would not be included in the record.

Ms. Christian stated that Section D does not compel agencies to make a recording or transcript but, instead, asks them to include those that are made. Mr. Levin stated that the logic of including transcripts is straightforward (if an agency took the time to make one, it was probably important) but that many agencies might make a recording and never intend to use the recording for anything. He suggested that perhaps recordings do not belong in Section D. Ms. Tatham replied that "recordings" was meant to reflect technological evolution. ACUS, for example, videotapes its meetings. After further conversation the Committee agreed to leave the language and that summaries or ex parte contact were not specifically included in Section D though they might be captured by Section G of paragraph 1.

Mr. Shonka suggested that "required by law" be replaced with "by statute" in the sentence on lines 54-57. Mr. Beck replied that "by law" encompasses interpretations and external regulations (such as an executive order). Mr. Shonka suggested following up "prudential concerns" in the sentence on lines 76-79 with an illustration. The committee agreed.

Mr. Shonka suggested that the sentence on lines 79-80 should be struck because it looks as if it may be superseded by another part of the recommendation. Mr. Levin stated that perhaps the point is to tell agencies to continue to disclose required materials but that they have the option of including non-required materials as well. Ms. Christian stated that the sentence describes a best practice and that she agrees that it is a best practice. Mr. Levin stated that "best practice" can be an understatement because Courts will, in fact, require certain documents. It can also be an overstatement because some minor or supplementary materials need not be included. The committee agreed to refine the language to indicate that it is a best practice to include materials generated by the agency after the comment period in the public rulemaking docket and those that are considered in the record.

Mr. Tozzi congratulated the committee and stated that others are also sure to applaud the committee's work.

He brought footnote 11 to the attention of the committee. Mr. Morrison provided context: many agencies have electronic data that is not currently usable. Mr. Tozzi suggested that the recommendation be sent to the people at agencies overseeing management of electronic records. Mr. Beck stated that the recommendation can be used in conjunction with existing regulations on electronic recording. Ms. Tatham noted a prior suggestion that the committee recommend that, within each agency, the record custodians should coordinate with the individual managing the permanent record. She stated that the committee could not implement such a suggestion because it did not have the research to understand what it would entail. Mr. Tozzi again suggested immediate, targeted distribution to individuals involved in the process because it is a "hot issue."

Ms. Siciliano expressed concern over the phrase "ongoing basis" in paragraph 5 of the recommendation. She stated that agencies should index rulemaking records before permanent storage but that the recommendation should not tell agencies when to index. Mr. Morrison replied that the point of the recommendation is that agencies should not wait until the last minute (especially if there is a massive record). Ms. Siciliano suggested that the docket be maintained on an ongoing basis but not the indexing itself. Mr. Morrison expressed some agreement.

Mr. Beck stated that paragraph 5 shows the transition that agencies are going through now and that eventually agencies would have electronic indexes that would serve multiple purposes. However, he agreed with Ms. Siciliano because he found that paragraph 5 could impose a large burden for those agencies that manage paper records. Ms. Siciliano suggested taking out paragraph 5 or, at the very least, removing "ongoing basis" in the paragraph. Ms. Tatham replied that suggesting indexing as a best practice may make sense given that agencies will be expected to manage permanent records electronically anyway by 2019. Mr. Beck suggested and the committee agreed to insert "to the extent practicable" in paragraph 5.

Ms. Siciliano suggested that paragraph 10 of the recommendation should include "dockets" as well. She also suggested paragraph 10 be moved closer to the beginning of the recommendation for clarity purposes. The committee instead agreed to add an "Agency Record Policies" heading precede it.

Mr. Levin suggested that footnote 10 be dropped for the sake of conciseness. The committee expressed general agreement on that point.

The committee expressed general support for the recommendation in a straw vote with the understanding that any later objections to the version circulated with the edits from the committee on style would trigger a new vote.

Mr. Levin adjourned the meeting.