

LEGAL SERVICES CORPORATION  
BOARD OF DIRECTORS

OPERATIONS AND REGULATIONS COMMITTEE MEETING  
DISCUSSION (NO QUORUM)

Friday June 12, 1998

9:52 a.m.

750 First Street, N.E.  
Washington, DC 20002

BOARD MEMBERS PRESENT:

Ernestine P. Watlington, Chair  
F. William McCalpin  
Nancy H. Rogers  
Hulett H. Askew

STAFF AND PUBLIC PRESENT:

John McKay, President  
Suzanne Glasow, Senior Assistant General Counsel

**Diversified Reporting Services, Inc.**  
1025 VERMONT AVENUE, N.W. SUITE 1250  
WASHINGTON, D.C. 20005  
(202) 296-2929

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CHAIR WATLINGTON: Good morning. We will start our Ops and Regs Committee meeting. We don't have a quorum, so we'll start our discussion. The committee -- the welcome committee, members of the board is myself, Ernestine Watlington and Bill McCalpin. And we have the pleasure -- Nancy Rogers with us sitting in and our president. We'd like Suzanne to make a presentation to the committee to start a discussion.

MS. GLASOW: Thank you, Ernestine. For the record, I'm Suzanne Glasow. I'm with the Office of General Counsel. And we are presenting to the committee today for discussion: the results of public comment, our proposed rule, the innuendo procedures for the disclosure of information under the Freedom of Information Act. We only missed one comment dealing with one issue and I provided last week in the mail our analysis of the comment.

The comment was submitted by the Public Citizen Litigation Group and they disagree with the rules interpretation of the provision and our

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1 interpretation of FOIA, which requires agencies to make  
2 their public reading room records created after  
3 November 1st, 1996 available electronically. We  
4 limited that requirement to records created by the  
5 corporation. And a public citizen argued that we  
6 should apply that to any records obtained by the  
7 corporation.

8 We disagree with their comment and our  
9 interpretation is consistent with the Department of  
10 Justice. They have a -- mountains of information and  
11 privacy. And they deal exclusively with FOIA issues  
12 and they provide guidances to the federal government on  
13 the interpretation of FOIA and they do a lot of  
14 litigation in that area.

15 And we have, for a very long time, relied on  
16 their interpretations. And they just published their  
17 final rule last week and they are -- they maintain that  
18 this is an admin. proposed rule. That this requirement  
19 applies only to records created by an agency. It's  
20 partly interpretation, partly a technical issue.

21 Because many regulatory agencies are just  
22 inundated with records that they obtained in regulatory

1 process and are required to have those maintained  
2 electronically, it would just be in or outside their  
3 building -- So, we've been consistent with the Justice  
4 Department. It's consistent with case laws.

5 The Court has made it clear in case law that  
6 there are two type of records subject to FOIA: records  
7 created by agencies and records obtained by agencies.  
8 And Congress and the FOIA -- there's electronic FOIA  
9 recently created -- and so the Justice Department and  
10 our meeting of this and our ability, really, to promise  
11 the public that we can have records available  
12 electronically.

13 So we are recommending that we keep that  
14 notation to --

15 A PARTICIPANT: I'm sorry?

16 (Interruption to proceedings.)

17 MR. MCCALPIN: Suzanne, what -- may ask about  
18 is sort of an in-between situation. There are records  
19 created by the corporation and records created outside  
20 the corporation, of which are sent to us for one reason  
21 or another.

22 As I understand it, and I may not understand

1 this part of the statute accurately, if there is an  
2 externally created record that we think is apt to be  
3 the subject of numerous and repeated requests, we have  
4 to make that available. And are you saying we make it  
5 available, but not electronically?

6 MS. GLASOW: Well, this new electronic  
7 requirement only applies to public reading room  
8 records. And all of those records are records that are  
9 created by the corporation, with the one exception of  
10 what we call the subsequent request records. That is  
11 in the third category of FOIA records, which are the  
12 ones that can either be records we created or records  
13 we obtained.

14 But they're the type of records that can be  
15 requested and must go through the FOIA request process  
16 that we have in this rule. And there have been,  
17 historically, some records in agencies where there are  
18 repeat requests. As a matter of fact, I brought an  
19 article today that I have several copies here. The FBI  
20 listed their most frequently requested records and, you  
21 know, they had to do with J. Edgar Hoover and Elvis  
22 Presley and Lucille Ball, even Cardinal Spellman.

1           And because they have these repeat requests to  
2 save both the public the time of waiting and the agency  
3 the time of processing these over and over again, they  
4 now put these in their public reading room. Now this  
5 new electronic requirement applies only to public  
6 reading room records. The provision that says records  
7 created after that particular date must be provided  
8 electronically is a separate provision.

9           And it does use the word "created." And  
10 because now we have this new category records in the  
11 public reading room, public citizen has argued that  
12 that should apply to even the ones that are obtained by  
13 the agency and not those created. And we're  
14 interpreting that provision because it uses the word  
15 "created" as applying only to subsequent request  
16 records that are created by the agency.

17           MR. MCCALPIN: Let me ask you. Do I  
18 understand and if we have a frequently requested  
19 record, we have to -- even if it's externally created,  
20 we have to make that available in the reading room?

21           MS. GLASOW: That is correct. Now I will tell  
22 you historically, I'm having trouble thinking of a

1 record where we have had repeat requests and the  
2 corporation has some discretion to make that decision,  
3 "Is this a record where we anticipate we're going to  
4 have frequent subsequent requests?"

5 MR. MCCALPIN: Okay. But if that's the  
6 situation, that we have to put it in the reading room,  
7 is it a big deal to make it available electronically?

8 MS. GLASOW: Yes it is. If it is a record in  
9 huge numbers that we don't -- that was not given to us  
10 electronically. That means we have to have staff to  
11 sit down and put it on the system electronically, which  
12 is a huge job. And for many agencies, and including  
13 us, that could be quite a burdensome process.

14 We are starting to get records provided  
15 electronically, but we don't require all -- excuse me --  
16 - all our recordkeeping to be electronic, so it would  
17 be an extreme burden. And most of those records, I  
18 don't think we're going to get repeat requests for  
19 anyway. But we don't want to promise to the public  
20 something in this rule that we may not have the funds  
21 or the electronic capability to comply with.

22 MR. MCCALPIN: Okay.

1 CHAIR WATLINGTON: Are there any other  
2 comments, then? Board?

3 MS. GLASOW: I would like to point out we made  
4 a few technical changes which are -- they're really  
5 just clarifying changes. 1602C, we took out a comma.

6 MR. MCCALPIN: I looked at that on page 3 of  
7 your technical change 1602C. In the body of the  
8 regulation, there is no 1602C.

9 MS. GLASOW: It's on the bottom of page 5.  
10 It's the definition of educational institution.

11 MR. MCCALPIN: Oh, that's 1602.2C.

12 MS. GLASOW: Yes, I'm sorry. We just took out  
13 a comma because there was confusion about what that  
14 last clause applied to. That was where Joann Gretch  
15 helped me out.

16 MR. MCCALPIN: Can I raise another -- as long  
17 as we're at 1602.2C, let me raise another question.  
18 "Institution of professional or vocational education  
19 which operates a program or programs of scholarly  
20 research," I am familiar with a number of vocational,  
21 maybe you call them professional programs, which I  
22 don't think engage in programs of scholarly research.

1 We have something called Hadley Technical School in St.  
2 Louis which -- vocational training.

3 There are beauty colleges around. There is,  
4 not very far from where I live, an institution which  
5 trains paraprofessionals in the medical field. I have  
6 no reason to believe that any of them engage in what  
7 you might call scholarly research. Does that mean that  
8 they're excluded? They're not educational institutions  
9 which have the rights provided by this regulation?

10 MS. GLASOW: This really only has to do with  
11 whether or not we charge fees for requests, not whether  
12 they get the information or not. We are required,  
13 under the FOIA, to use the OMB guidances on  
14 definitions. And so this definition is the same as  
15 OMB's definition, and so we don't really have any  
16 discretion to come up with a new type of requirement  
17 for who or who does not -- who is charged fees or who  
18 isn't charged fees.

19 So OMB came up with this definition and we're  
20 required to go with it. But your interpretation is  
21 correct. They would be treated differently in terms of  
22 fees, but if they provided us with information or they

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1 requested information, they would still get the  
2 information if it's releasable.

3 CHAIR WATLINGTON: Are there any other  
4 exchanges or corrections?

5 MS. GLASOW: 13G, let me find that. Page 26,  
6 right at the top, paragraph G. That's just a  
7 clarifying change. So we recommend that it say "no fee  
8 will be charged under this section unless the cost of  
9 routine collection and processing of the fee payment is  
10 likely to exceed \$6.50."

11 And page 27, we made another clarifying  
12 change. Again, this came from our -- pursuant to a  
13 comment and that our current -- the language we have  
14 there was not clear. And I talked to our FOIA  
15 administrator and we put this language in to clarify  
16 it.

17 MR. MCCALPIN: Madam Chair, would you humor me  
18 by paging through this regulation and let me raise a  
19 number of comments and questions right here?

20 CHAIR WATLINGTON: Sure.

21 MS. GLASOW: What's your first question?

22 MR. MCCALPIN: Page 9, the first word. I

1 would suggested "issued" is a better word than "made."  
2 "Issues," -- I'm lost. "Made," it seems to me, just  
3 doesn't fit. In the next line, "statements of policy  
4 and interpretations adopted by the corporation."  
5 Interpretations of what?

6 MS. GLASOW: There is such a thing under the  
7 APA that are called interpretive rules or statements.  
8 And for instance, some guidances we give out, for  
9 instance, on certification of program integrity.  
10 There's a lot of guidance in there and we're  
11 interpreting our rule to the field. And we're saying  
12 if you have this kind of situation, you need to report  
13 that or fill in or give us --

14 That's an interpretive public statement. You  
15 can do interpretive rules, interpretive guidances, but  
16 it's sort of an extra step in providing guidance on  
17 what a regulation means.

18 MR. MCCALPIN: I'm merely suggesting that  
19 somebody looking at this, and to bare a word  
20 "interpretation," might wonder what you're talking  
21 about. Are you talking about the interpretations of  
22 the statute, are you talking about interpretations of

1 our regulations, are you talking about interpretations  
2 of program guidelines? Grant restrictions?

3 Maybe when you get around to a preamble, you  
4 may indicate it -- But it seems to me that to bare a  
5 word "interpretation" raises a lot of question in my  
6 mind what we're talking about.

7 MS. GLASOW: Well, it's a statement of  
8 interpretation and it can fall into all those  
9 categories you just mentioned. So, that's where we're  
10 using general language. It would be a final public  
11 statement. Either the board has adopted it or staff  
12 has sent it out as an interpretive guidance of some  
13 sort.

14 But it's not one that's published in the  
15 federal register. Because again, this is a public  
16 reading room record, the second category. The first  
17 category are those documents we must publish in the  
18 federal register.

19 MR. MCCALPIN: I gather from what you've said  
20 that "adopted by the corporation" doesn't necessarily  
21 mean board action.

22 MS. GLASOW: That is correct. Although I

1 would tend to use that more for board action, but it  
2 can be a public statement. I mean, Office of Program  
3 Operations sends out program letters that are  
4 interpretive.

5 MR. MCCALPIN: We've seen, as we came to the  
6 board a few years ago, a number of general counsel  
7 opinions, which -- some of which had been circulated  
8 and some not, that are -- I suppose those are  
9 interpretations.

10 MS. GLASOW: Yes.

11 MR. MCCALPIN: And there was some question, I  
12 think, about the status of those and what -- I suppose  
13 there's no doubt that the general counsel's got the  
14 right to issue interpretations with which the board may  
15 or may not agree.

16 MS. GLASOW: That is correct.

17 MR. MCCALPIN: Okay. Look at the bottom of  
18 page 12. It seems to me that the last line on 12 was  
19 just the type of record, such as application grant  
20 contractor report, is not consistent with the  
21 description of the kinds of records you're talking  
22 about in 1602.5B on page 8. The final opinions,

1       condescending opinions, orders issued, policy and  
2       interpreted administrative staff --

3               And yet here, you're talking about type of  
4       record, application, grant contractor report. Yet it  
5       doesn't seem to me that you're talking about the same  
6       things.

7               MS. GLASOW: This is a new type of record that  
8       we're talking about now. This is where it is not a --  
9       one publishing photoregister, it is not one in the  
10      public reading room. This is all other records that  
11      are considered to be corporation records and this is  
12      where the request process comes in, where you receive a  
13      FOIA request and we go through the process to determine  
14      whether it's discloseable.

15              And in that process, we ask the requestor to  
16      give us certain information so we can more easily find  
17      that document. And one of the things they can tell us  
18      is the type of record they're looking for. Is it an  
19      application? Is it a grant? Is it a contractor  
20      report? So we're in a new category of records here and  
21      it starts on page 11, section 8, "Request for records."

22              MR. MCCALPIN: So what you're saying is that

1 this doesn't apply if it's a record in the reading  
2 room?

3 MS. GLASOW: If it's a record in the reading  
4 room, it's already available to them. They can either  
5 walk in physically and sit down in our reading room and  
6 use it, or many of them will be available  
7 electronically. And most of the records in the reading  
8 room are ones that we often give out in the normal  
9 course of business anyway.

10 I mean, people often will call in and say "Can  
11 I have copies of your general -- OGC opinions on  
12 certain issues," or "Can I have a copy of your book of  
13 regulations." And we send those out as a matter of  
14 course, anyway. It's all these other records that may  
15 or may not have a lot of protections associated with  
16 them that go through this request process.

17 MR. MCCALPIN: So, if somebody wanted one of  
18 those frequently requested, externally produced  
19 documents that we talked about a while ago, it would  
20 have to -- I suppose it's not an application grant  
21 contractor report. I suppose it's something else.  
22 Well, I see what you're doing.

1 Well, let me say that up at the top, higher on  
2 page 12C, paragraph C, I think the article "an" is  
3 better than "a". "An F-O-I-A request." Just a matter  
4 of grammatical --

5 MS. GLASOW: "An F-O-I-A --"

6 MR. MCCALPIN: "An F-O-I-A request."

7 MS. GLASOW: I'll check that one out.

8 MS. PERLE: A FOIA --

9 MR. MCCALPIN: Pardon?

10 MS. PERLE: I heard you say "a FOIA request."

11 MR. MCCALPIN: Well further then, "an F-O-I-A  
12 request."

13 A PARTICIPANT: We'll check our grammatical  
14 database.

15 MS. GLASOW: When you're in Washington, it's  
16 FOIA, yeah.

17 (Laughter.)

18 A PARTICIPANT: Suzanne will be our --

19 MR. MCCALPIN: Okay, if you're --

20 MS. GLASOW: Yeah, I'll have my grammar  
21 technician person help me with that one.

22 MR. MCCALPIN: Okay. On page 14, the third

1 line from the bottom, I don't understand that we have  
2 any regional LSC offices anymore.

3 MS. GLASOW: We actually discussed that and  
4 decided that we would leave it in, in case we did  
5 create any. But we do not have any regional LSC  
6 offices. I know why we left it in. We do have some  
7 establishments. I believe we have some of our records  
8 over in the Justice Library.

9 MR. MCCALPIN: But that's not a regional LSC  
10 office.

11 MS. GLASOW: That is correct. That is  
12 correct.

13 MR. MCCALPIN: I think we closed the last one  
14 in California a few years ago.

15 MS. GLASOW: I mean, we could take the  
16 reference to the regional offices out.

17 MR. MCCALPIN: I think it's misleading to  
18 suggest that we have them.

19 MS. GLASOW: Okay. That's something we'll  
20 need to bring up tomorrow. So we'll just say from  
21 others --

22 MR. MCCALPIN: Two lines above that, consider

1 "necessary 'for' the proper processing" instead of  
2 "necessary 'to'." On page 16, four -- a little four in  
3 Roman numeral, "a matter of widespread and exceptional  
4 media interest." Why do we limit it to media? Why  
5 don't we talk about public interest?

6 MS. GLASOW: This, again, comes right out of  
7 the FOIA. And we're just taking that this is where the  
8 FOIA allows expedited treatment. Otherwise, everybody  
9 has to be treated the same, so we're really tied in to  
10 what the FOIA itself says here.

11 MR. MCCALPIN: On page 19, in B2, just below  
12 the middle of the page, I would suggest that the second  
13 sentence doesn't really belong in subparagraph two.  
14 Because it refers to both one and two.

15 MS. GLASOW: You want to put a three on it?

16 MR. MCCALPIN: Look, I would pull it out some.  
17 Either make it a three or pull it out or something.  
18 But, as I understand, the no-requestor applies to both  
19 one and two.

20 MS. GLASOW: Okay, I can work on that.

21 MR. MCCALPIN: 1602.10, at the top of page 20.  
22 Does that mean that the general counsel shall furnish

1 necessary advice also to the IG and the OIG?

2 MS. GLASOW: Yes. We basically -- the office  
3 of general counsel is the interpreter of what FOIA  
4 requires and we have worked very well on that since,  
5 and that's actually why we came to agreement on how to  
6 deal with OIG records. But when the corporation wants  
7 an official interpretation with FOIA, requires they  
8 would come to OTC.

9 MR. MCCALPIN: Let me see why I did this.  
10 1602.12 starts at the bottom of page 21 and the first  
11 line on page 22, I drew a circle around 1602.8B. And I  
12 don't think there is any address given in 1602.8B.

13 MS. GLASOW: There's an e-mail address.

14 MR. MCCALPIN: Pardon?

15 MS. GLASOW: There's an e-mail address. I  
16 mean a --

17 MR. MCCALPIN: 1602. -- oh, wait a minute.  
18 .8B, where is that? What page?

19 A PARTICIPANT: Page 11.

20 MR. MCCALPIN: I see. That just shows my  
21 reaction to things having to do with e-mail. I was  
22 looking for a street address. On page 23, B --