

**Comments of OpenTheGovernment.org, American Association of Law Libraries, Association of Research Libraries, and Government Accountability Project
on the 2015 Proposed Revision of Circular A-130**

Endorsed By: American Library Association, Bauman Foundation, Bill of Rights Defense Committee, Center for Media and Democracy, Defending Dissent Foundation, Project On Government Oversight, and Transactional Records Access Clearinghouse (TRAC)

All line and page numbers reference the [pdf](#).

Basic Considerations

- [Lines 211-16:](#)

Restore the following language from the November 28, 2000 Revision of the Circular: “The free flow of information between the government and the public is essential to a democratic society.”

Restore the language about “maximiz[ing] the usefulness of government information” – with the addition of “to the public.”

Restore: “Because the public disclosure of government information is essential to the operation of a democracy, the management of Federal information resources should protect the public's right of access to government information.”

- [After line 216:](#)

Restore the following language from the November 28, 2000 Revision of the Circular:

“n. Users of Federal information resources must have skills, knowledge, and training to manage information resources, enabling the Federal government to effectively serve the public through automated means.”

o. The application of up-to-date information technology presents opportunities to promote fundamental changes in agency structures, work processes, and ways of interacting with the public that improve the effectiveness and efficiency of Federal agencies.”

p. The availability of government information in diverse media, including electronic formats, permits agencies and the public greater flexibility in using the information.”

q. Federal managers with program delivery responsibilities should recognize the importance of information resources management to mission performance.”

r. The Chief Information Officers Council and the Information Technology Resources Board will help in the development and operation of interagency and interoperable shared information resources to support the performance of government missions.”

- [Lines 226-228](#): “Making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves the lives of Americans and contributes significantly to job creation.”

Add the following language: “and fosters public participation in government.”

- [Lines 235-36](#) and [Lines 240-43](#): Comment -- We support the emphasis placed on information quality. Agencies should be encouraged to strive for higher standards of information quality, both in their own records and in what is released to the public.

Policy

- [After Line 399](#): Add new language: 6) “Ensure that the CIO establishes and maintains a process to regularly engage with the public on agency information strategies and practices, which can include dissemination policies and practices.”

Records Management

- [Lines 620-21](#): “Ensure that records management programs provide adequate and proper documentation of agency activities.”

A specific definition needs to be given for “adequate and proper.” The current language is too vague and open-ended. We suggest language that reflects the roles that records management is required to serve, in line with “Records help us claim our rights and entitlements, hold our elected officials accountable for their actions, and document our history as a nation. In short, NARA ensures continuing access to the essential documentation of the rights of American citizens and the actions of their Government.”

<http://www.archives.gov/publications/general-info-leaflets/1-about-archives.html>

Information Management and Access

- [Lines 637-40](#): “Information is managed with the “presumption in favor of proactively making information accessible, discoverable and usable by the public to the extent permitted by statute and subject to existing terms and conditions, privacy, security, and other valid restrictions pertaining to access, use, and dissemination...”

The phrases “existing terms and conditions” and “other valid restrictions” need to be spelled out in more detail as to what they permissibly entail. Are these references to copyright and other non-governmental controls? The phrases as they stand are vague and open-ended and, thus, subject to abuse.

- [After line 640](#): New language should be added to elaborate on the minimum standards on proactive disclosure and to ensure that agencies follow the presumption of disclosure, in accordance with the President’s 2009 and the Attorney General [FOIA guidance](#).

“i. Agencies are required to proactively disclosure information when the agency official responsible for the information does not reasonably foresee that disclosure would harm an interest protected by an exemption described in subsection (b) of the Freedom of Information Act (5 U.S.C § 552).

ii. Information and documents that are frequently requested by the public should be proactively released, including documents relating to health, safety and environmental issues.

iii. Agencies are required to adopt a presumption of disclosure and openness, by evaluating records with a view towards what can be disclosed, rather than what can be withheld. Agencies shall not withhold information simply because existing statutes allow the withholding of such information.”

- After line 643: Restore the following language:

“Agencies have a responsibility to provide information to the public consistent with their missions. Agencies will discharge this responsibility by:

(a) Providing information, as required by law, describing agency organization, activities, programs, meetings, systems of records, and other information holdings, and how the public may gain access to agency information resources;

(b) Providing access to agency records under provisions of the Freedom of Information Act and the Privacy Act, subject to the protections and limitations provided for in these Acts;

(c) Providing such other information as is necessary or appropriate for the proper performance of agency functions.”

- Lines 659-62: “b) Ensure that the public has timely and equitable online access to the agency’s public information using a manner that is informed directly by public engagement and balanced against the costs of dissemination or accessibility improvements and demonstrate usefulness of the information.”

This language requires modification. Once federal information is digital, the costs of dissemination are minimal, and accessibility improvements should be taken into consideration as a system or application is procured or developed. Clarification is also needed as to whether “accessibility” here is intended to refer to Sec. 508 requirements. The language after ‘improvements’ should be struck; it is a remnant of arguments about whether the government should be in the role of providing information to the public – which has been settled.

- After line 669: “3) Agencies shall ensure that the public can appropriately discover, and provide feedback about disseminated information and unreleased information by...”

Add the following:

“c) Identifying plans for disseminating information that is collected in accordance with the OMB information collection clearance process, and providing explanation for information that is not publicly disseminated.”

- Lines 678-81: “In certain cases, it may be appropriate to engage in time-limited restrictions or exclusively in cases where the agency, due to resource constraints, would otherwise be unable to provide the information to the public on its own.”

Examples of permissible cases should be provided, as this is very open to interpretation as to what “resource constraints” are justified. It should additionally be modified to clarify that a) time-limited restrictions must be approved by a designee of the agency’s head; b) any such time-limited restrictions to information should be narrowly applied; and c) a written, publicly-accessible justification is required for the use of such restrictions, to include the beginning and end of the restriction period.

- Lines 690-94: “iii. Where the agency plans to establish user charges at less than cost of dissemination because of a determination that higher charges would constitute a significant barrier to properly performing the agency’s functions, including reaching members of the public whom the agency has a responsibility to inform;”

Clarity is needed on how such determinations would be made and justified. The determinations and justifications need to be made available for public comment, and should be reviewed at least annually.

- Lines 696-697: Add “regardless of format.” This would restore but update the language from the earlier circular which, in 6(h) required agencies to “provide electronic information dissemination products to the Government Printing Office for distribution to depository libraries.”

- Lines 704-5: “b) Providing adequate notice when initiating, substantially modifying, or terminating dissemination of significant information that the public may be using;”

Clarification and examples are needed on what types of notice will be considered “adequate.”

Definitions

- Lines 1028-32: “dd. ‘Major information system’ means a system that is part of an investment that requires special management attention as defined in OMB guidance and agency policies, a “major automated information system” as defined in 10 U.S.C. § 2445, or a system that is

part of a major acquisition as defined in the OMB Circular A-11 Capital Programming Guide consisting of information resources.”

Restore the following language at line 1028 -1029: “...an information system that requires special management attention because of its importance to an agency mission; its high development, operating, or maintenance costs; or its significant role in the administration of agency programs, finances, property, or other resources.”

- Lines 1068-73: “ II. ‘Records’ means all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them (44 U.S.C. § 3301)”

Informational clarification is needed as to why the following language from the Federal Records Act was omitted: “Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included”

Appendix III

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- After line 1715: Add the following:
“Consistent with Executive Order 13587, Section 7 (e), the activities directed by this section, including by not limited to the Insider Threat Program, shall not seek to deter, detect, or mitigate disclosures of information by Government employees or contractors that are lawful under and protected by the Intelligence Community Whistleblower Protection Act of 1998, Whistleblower Protection Act of 1989, Inspector General Act of 1978, or similar statutes, regulations, or policies, and shall contain the following addendum: These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

The suggested language is mandated by federal law, both in terms of the U.S. code and appropriations restrictions. There is no discretion about including it, or any associated

spending to implement or enforce the policy would be illegal. Inclusion of the addendum is required by Section 104 of the Whistleblower Protection Enhancement Act, Section 115 of the Whistleblower Protection Enhancement Act, and Section 743, Division E of the Consolidated Appropriations Act for FY 2015.