

Agency (FCC) reliance on data submitted to the agency by outside parties ("third-party" data)

The FCC Data Quality guidelines¹ do not specifically address the issue of reliance on non-agency data; nevertheless, the OMB guidance is controlling -- all agencies' guidance must comply with the OMB guidance.

The Data Quality Act ("DQA")² is a supplement to the Paperwork Reduction Act of 1995 ("PRA")³, mandating implementation of the PRA's information dissemination and quality provisions by OMB through the issuance of government-wide guidance. The DQA expressly incorporates the provisions of the PRA pertaining to OMB issuance of rules and regulations, and also the other provisions of the Act, requiring OMB to issue guidance "in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act." Sec. 3506(a)(1)(b) of the PRA states that "[t]he head of each agency shall be responsible for. . . complying with the requirements of this subchapter and related policies established by the Director."

The original OMB government-wide guidance defines "Dissemination" to mean "agency initiated or sponsored distribution of information to the public 67 FR 8460 2d & 3d cols (emphasis added). It is the term "sponsored" that is important with regard to agency reliance on outside data. In the guidelines, OMB provided the following preamble explanation:

"Dissemination" is defined to mean "agency initiated or sponsored distribution of information to the public." As used in paragraph V.8, "agency INITIATED * * * distribution of information to the public" refers to information that the agency disseminates, e.g., a risk assessment prepared by the agency to inform the agency's formulation of possible regulatory or other action. In addition, if an agency, as an institution, disseminates information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines. . . .

Similarly, as used in paragraph V.8., "agency * * * SPONSORED distribution of information to the public" refers to situations where an agency has directed a third-party to disseminate information, or where the agency has the authority to review and approve the information before release. Therefore, for example, if an agency through a procurement contract or a grant provides for a person to conduct research, and then the agency directs the person to disseminate the results (or the agency reviews and approves the results before they may be disseminated), then the agency has "sponsored" the dissemination of this information. By contrast, if the agency simply provides funding to support research, and it the researcher (not

¹ http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-02-277A1.pdf.

² 44 U.S.C. § 3516, note.

³ 44 U.S.C. § 3501 et seq.

the agency) who decides whether to disseminate the results and—if the results are to be released—who determines the content and presentation of the dissemination, then the agency has not “sponsored” the dissemination even though it has funded the research and even if the Federal agency retains ownership or other intellectual property rights because the Federal government paid for the research. To avoid confusion regarding whether the agency is sponsoring the dissemination, the researcher should include an appropriate disclaimer in the publication or speech to the effect that the “views are mine, and do not necessarily reflect the view” of the agency. On the other hand, subsequent agency dissemination of such information requires that the information adhere to the agency’s information quality guidelines. In sum, these guidelines govern an agency’s dissemination of information, but generally do not govern a third-party’s dissemination of information (the exception being where the agency is essentially using the third-party to disseminate information on the agency’s behalf). Agencies, particularly those that fund scientific research, are encouraged to clarify the applicability of these guidelines to the various types of information they and their employees and grantees disseminate.

67 FR at 8454 1st & 2d cols (emphasis added).

In a subsequent June 10, 2002 "Memorandum for President's Management Council"⁴, OMB's Administrator of its Office of Information and Regulatory Affairs provided further guidance on the meaning of "sponsored" to agencies developing their agency-specific guidelines in conformance with the OMB guidelines:

II. COVERAGE OF "THIRD-PARTY" INFORMATION UNDER THE GUIDELINES.

The preamble to the OMB guidelines states, "If an agency, as an institution, disseminates information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines." (67 FR 8454, February 22, 2002). Reinforcing this statement of policy, OMB also provided an example in its preamble concerning the applicability of the OMB and agency information quality standards to third-party studies relied upon by an agency as support for a proposed rulemaking, even if the third-party studies had been published before the agency's use of them (67 FR 8457, February 22, 2002).

DOT incorporated these principles from the OMB guidelines by stating that an agency disseminates information if it relies on information in support of a rulemaking. "If the Department is to rely on technical, scientific, or economic information submitted by, for example, a commenter to a proposed rule, that information would need to meet appropriate standards of objectivity and utility."

⁴ http://www.whitehouse.gov/omb/inforeg/iqg_comments.pdf.

(DOT, 3). "The standards of these guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely upon or disseminate this information or the Department decides to do so." (DOT, 8).

At 6-7 (emphasis added).

In summary, if an agency relies on non-agency ("third-party") information in one of its information disseminations, under the controlling OMB guidance that outside information is subject to the same quality standards as if the agency had developed the information itself.